



Response of Australian Football League to Australian Law Reform Commission discussion paper – Copyright and the Digital Economy

1. Introduction

The Australian Football League (**AFL**) is grateful for the opportunity to make a submission in response to the Discussion Paper of the Australian Law Reform Commission (**ALRC**) in relation to Copyright and the Digital Economy.

The AFL has previously made a submission in response to the ALRC's Issues Paper dated August 2012. This submission is in addition to and complementary to the AFL's previous submission to the ALRC's inquiry.

2. General Comments

By way of background, the AFL makes the following general and introductory comments on the current ALRC inquiry and the importance to the AFL of protecting its valuable copyright.

2.1. Principles For Reform

The ALRC is considering whether reforms to copyright law exceptions are required, and if so what the options for reform are. It is fundamental to both of these issues that appropriate principles for any review and reforms be established.

The AFL did not agree with many of the principles, and the explanations of those principles, identified in the ALRC's earlier Issues Paper.

In its previous submission the AFL identified the following principles as central to any review and reform of copyright law exceptions:

- ◆ 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 copyright law exceptions must:
 - be confined to certain and special instances only;
 - not conflict with normal exploitation of the material;
 - not unreasonably prejudice the legitimate interests of the rights holders.

The AFL urges the ALRC to be guided by the above principles when considering whether any reform is required and if so, the options for reform.

The Discussion Paper sets out revised framing principles for the ALRC's current inquiry. The AFL continues to be concerned by some of the principles identified by the ALRC. In particular, the AFL disagrees with a broad interpretation of Principle 3, being 'the promotion of fair access to and wide dissemination of content'.

2.2. Need to Protect Copyright in the Digital Economy

The AFL is the owner and licensor of valuable content. The AFL's previous submission summarises the AFL's operations and the fundamental role of the sale of media rights and copyright in the AFL's not for profit business.

The exploitation of this content has a direct and immediate impact on AFL revenues. This revenue is used to support the AFL Competition and Australian Football generally, which in turn contributes significantly to the Australian economy and culture. It is fundamental the AFL exclusively control the licensing, use, access to and dissemination of this content, subject to a limited and certain set of justifiable copyright exceptions.

In that context the AFL raises the following matters for the ALRC's consideration:

- (a) The ALRC needs to protect copyright businesses. Existing and future business models of copyright owners should not be jeopardised or destabilised by any reforms. The AFL endorses the ALRC's comments that it 'does not intend in any way to undermine the property rights or a fair reward to copyright creators, owners and distributors'¹;
- (b) The media rights of the AFL are very valuable. The licensing and enforcement of copyright as part of the media rights arrangements has a direct and immediate impact on the AFL's current and future activities. The maintenance and growth of the AFL (and other Australian sports) is directly connected to their ability to continue to license broadcast and communication rights to their events, across multiple platforms. The AFL is opposed to any amendments to copyright law that may adversely impact the AFL's current and future exploitation of its content. In considering any reforms to copyright law that may adversely impact the ability to licence those rights, the ALRC needs to consider the unique position of the AFL (and other Australian sports) in the Australian economy and culture;
- (c) Copyright law needs to have certain, limited and enforceable boundaries on the unlicensed use of content;
- (d) Any reforms that may have the effect of reversing the onus of establishing whether a use falls within an exception to copyright should not be allowed. To require rights holders such as the AFL to demonstrate that a particular activity should not be allowed, rather than requiring a person seeking to rely upon an exception to have to identify a particular exception, is unreasonable. This problem is exacerbated in a digital age where unlawful third party copying and dissemination can be readily undertaken with little cost, with the associated costs and problems for copyright owners of identifying and prosecuting infringers;
- (e) Copyright owners and rights holders will inevitably bear the burden of considerable costs (such as legal advice and litigation) and delays to determine the boundaries of any new or amended copyright exceptions;
- (f) Copyright businesses such as the AFL are often at the forefront of innovation. This innovation needs to be recognised as a valuable part of the digital economy and needs to be able to occur in an environment where investments and copyright are protected. The ALRC should not seek to prefer new technologies or alternative distribution

¹ ALRC, Discussion Paper 3.45

models at the expense of existing property rights and the ability of rights holders to exploit, and control the exploitation of, those rights;

- (g) Any suggestion that community attitudes towards the unlawful copying and misuse of copyright material has changed is misguided. There is no general expectation of the Australian community that third parties, including individual consumers, can use content, such as AFL audio-visual content, in any way they want. Perceptions of consumer attitude should not drive policy in this area;
- (h) The AFL competes with other sports and entertainment products, both in Australia and overseas. To inhibit the AFL's ability to exploit its valuable copyright in Australia will undermine the AFL's ability to continue to do this, particularly if international competitors are not so inhibited;
- (i) The current inquiry has been asked to consider the connection between the digital economy and copyright reform. However, many of the proposed reforms identified by the ALRC do not have any obvious connection with the digital economy, such as the proposed generalised fair use and private and domestic use exceptions²;
- (j) Any commercial exploitation of copyright must be controlled by the copyright owner subject only to certain and limited exceptions;
- (k) Copyright law, and in particular the exceptions to copyright, is one part of a number of laws that relate to the AFL's media rights. Other relevant laws relate to communication and broadcasting including the *Broadcasting Services Act*. To undertake reforms to copyright law without considering the inter-related impacts on communications, media and broadcasting industries and policy is dangerous. To the extent that any of the reforms identified by the ALRC raise other policy issues, the ALRC should not recommend amendments in the absence of full consideration of those other important policy considerations and consultation with all relevant stakeholders.

² For example, ALRC proposals 4-1, 9-1 and 9-2

3. Fair Use

3.1. A fair use exception should not be introduced

The AFL does not support the radical proposal to introduce a new, broad exception for 'fair use' into Australian copyright law³.

The introduction of this new concept into Australian copyright law will increase uncertainty, effectively reverse the onus for establishing copyright infringement, unacceptably undermine the AFL's valuable property rights and potentially adversely impact the value of those rights.

It is concerning to the AFL that none of the ALRC's reasoning in support of a fair use exception references or recognises the rights of copyright owners to control, licence and disseminate their content or grow their businesses.

3.2. Fair use is uncertain

A broad fair use exception is not certain, coherent or predictable.

Fair use is a standard. It is the AFL's view that rules promote greater certainty than standards and that if general exceptions to copyright are to exist, then they should be based on rules rather than standards. It is noted that some of the current fair dealing exceptions may be considered a general standard rather than a rule, however the parameters of these exceptions have been established over many years and at substantial costs through various legal proceedings. The AFL has grave concerns that time consuming legal proceedings and litigation costs will be substantial if there is a move to more standard based exceptions rather than rules.

A broad fair use exception will blur the line between infringement and fair use, and make property rights harder to licence and enforce. Outcomes in fair use disputes will be arbitrary and hard to predict, given the wide range of subjective views on the fundamental issue of 'what is fair?'. Non rights holders will inevitably seek to push the uncertain boundaries of any new fair use exception. The use of the open ended fair use standard is not an appropriate way to regulate the boundaries of important and exclusive property rights.

³ The AFL has previously opposed the introduction of 'fair use' in submissions to the review by the Attorney-General Department in 2005 and the AFL's previous submissions to this inquiry.

3.3. No evidence

Many stakeholders, including the AFL, have submitted to the ALRC that any changes to copyright exceptions should be based on evidence. The AFL does not believe that there is any, or at least sufficient, evidence to support the introduction of a broad fair use exception into Australian law. Indeed, the introduction of fair use is not consistent with the findings of past Australian copyright reviews, and the copyright law and reviews in many other jurisdictions.

The suggestion that the need for a broad fair use exception is connected with a digital economy is overstated. There is no inherent link between the emergence of the digital economy and the need to do away with established, rules based copyright exceptions that have evolved over time, in place of a 'one size fits all' exception. To suggest that a fair use exception would promote innovation has not been proven. Further, any reform proposal that fails to recognise, or minimises the significance of, the innovation and the product development that occurs by right holders operating in a protected and predictable copyright framework, is inappropriate.

3.4. Increased transaction costs

The introduction of a new fair use exception, and the associated uncertainty, will inevitably lead to increased transaction costs, such as advice and litigation costs. The AFL and other copyright owners will bear the onus and financial burden of prosecuting any such litigation, as they attempt to get courts to ascertain the parameters of what is an entirely new concept to Australian law. This advice and litigation will be costly and time consuming.

3.5. Use of protocols and guidelines

The ALRC suggests one way of dealing with the uncertainty arising from the introduction of a new broad fair use exception is through the use of protocols and industry guidelines.

The AFL does not support this suggestion for a number of reasons.

Firstly, many likely infringers of AFL copyright are not now, and are unlikely in the future to be, subject to, or take any notice of, any such protocols and guidelines.

Secondly, it is the AFL's experience that the introduction and implementation of industry guidelines to negotiate the use of content is a difficult process and the results can be unsatisfactory. Stakeholders will inevitably pursue their own, differing interests. The 'compromises' reached as part of industry arrangements are often a function of bargaining

power, timing and political pressure, rather than an appropriate balancing of rights. Experience shows there is little appetite by media companies to agree to restrictions in this area. Industry guidelines can also be hard to adapt and update over time. Further, the AFL has real concerns regarding the enforceability of industry guidelines, particularly if the guidelines are not supported by rules based law.

3.6. Fair use cannot involve commercial benefit

To the extent that a new fair use exception is introduced (which is opposed by the AFL) such an exception needs to explicitly acknowledge that a commercial / profit making purpose or use by third parties cannot be a 'fair use'.

3.7. Third parties

The AFL is concerned by a number of comments in chapter 5 of the ALRC's Discussion Paper, which suggest that third party use of copyright material can be regulated by a fair use exception and the associated 'fairness factors'. In particular, the AFL specifically rejects the inaccurate assertion that the conduct considered in the *Optus TV Now* simply involved Optus 'facilitating private and domestic uses'. The facts of that matter are clear: Optus made copies of the relevant broadcast for commercial gain without licence from the copyright owner and that conduct was found to infringe copyright. The current inquiry should not seek to overturn or amend the settled law.

The maker of any copies, and the purpose of the maker, must be relevant in any copyright exceptions. Third parties should not be able to make commercial gain from unlicensed copying, reproduction or communication of copyright material. The AFL urges the ALRC to expressly confirm that any commercial or profit making use or third party use would not fall within a new fair use exception.

Also, the AFL rejects the broad assertion that the prohibition of unlicensed copying may inhibit the development of the digital economy.⁴ This is a gross overstatement, unsupported by any examples or evidence. This suggestion ignores the fundamental right of copyright owners to determine how their content may be used and to whom it may be licensed. As previously noted, the AFL has both financial and qualitative concerns when licensing its rights. Any reform that allows unlicensed use outside of the clearly defined, existing fair dealing exceptions is unacceptable.

⁴ ALRC Discussion Paper paragraph 5.49

3.8. *International standards*

The AFL does not believe that a broad fair use exception falls within the international standard for copyright exceptions known as the ‘three step’ test.

3.9. *Fairness factors and illustrative purposes*

The ALRC has identified a number of non-exhaustive fairness factors and illustrative purposes. The non-exhaustive nature of these lists is illustrative of the inherent uncertainty of the proposed fair use exception.

3.9.1. *Fairness factors*

Factor (b) of the fairness factors proposed by the ALRC in its Discussion Paper relates to the nature of copyright material used. The ALRC refers to a similar fairness factor in United States law, and points out that this factor considers ‘was the plaintiff’s work creative?’ and ‘was that work published?’⁵ The AFL would be concerned if content that is not seen as ‘creative’ and/or ‘published’ is afforded any less protection under the fairness factors.

Factor (d) of the fairness factors proposed by the ALRC in its Discussion Paper refers to concepts of ‘market’ and ‘value’. These factors are clearly relevant, however they are not straightforward. Establishing the ‘market’ and ‘value’ in order to establish copyright infringement will be a complicated and costly process, and goes far beyond the current law. This is perverse, given the ALRC’s stated desire to make the copyright exceptions more straightforward.

Also, it is not clear what is meant by ‘*potential*’ market of the copyright material.

3.9.2. *Illustrative purposes*

The AFL specifically rejects the need for illustrative purposes relating to:

- ◆ non-consumptive use;
- ◆ private and domestic use; and
- ◆ quotation.

These concepts are discussed in further detail below.

⁵ ALRC Discussion Paper paragraph 4.153

Also, any purposes relevant to copyright exceptions cannot extend to include the involvement of a third party. For example, a third party should not be able to rely upon a copyright exception on the basis they or it is facilitating or assisting an illustrative purpose.

The AFL does not believe that any further illustrative purposes of what may constitute fair use should be included. Rather, if a list of illustrative purposes is inserted, then a list of purposes that do *not* constitute fair use, such as 'social use' (as that term is used in the Discussion Paper), commercial use and any other use in return for a fee or other consideration should be included. This would provide some assistance in clarifying the notion of fair use.

4. Fair dealing

4.1. Fair Use Should Not Replace Existing Fair Dealing Exceptions

As discussed above, the AFL does not agree with the ALRC's proposal to introduce a new, broad fair use exception that would replace the fair dealing exceptions currently found in the *Copyright Act*. Any fair dealing exceptions should be limited to specific, purpose based exceptions to the rights of copyright owners.

The 'research or study', 'criticism or review', 'parody or satire', 'reporting news' and 'professional advice' fair dealings exceptions (**existing fair dealing exceptions**) continue to be appropriate, subject to the comments below on the reporting of news exception. The AFL does not believe there is any evidence to suggest the existing fair dealing arrangements are inappropriate in the digital environment, and notes the existing fair dealing exceptions are already technology neutral.

The existing fair dealing exceptions should not be removed from the *Copyright Act* and inserted as illustrative purposes in a new, broad fair use exception.

Introduction of fair use is opposed, but if it is to be introduced then the existing fair dealing provisions referred to in ALRC's proposal 7-2 need to be repealed to avoid any overlap and suggestion that the new, broad fair use exception is materially greater than the existing fair dealing exceptions. The AFL makes the same point in relation to other similar proposals of the ALRC.

4.2. Reporting of news fair dealing

For the reasons identified in its previous submission, the AFL maintains the fair dealing reporting of news exception needs to be clarified to provide greater certainty as to the application and scope of the exception.

The AFL rejects News Limited's assertion in its supplementary submissions to the first stage of the ALRC inquiry that clarifying the reporting of news fair dealing exception would compromise 'freedom of speech'. That suggestion is unfounded and is an unnecessary distraction to the real issue, being the creation of entertainment products under the guise of the reporting of news exception. This type of use undermines the rights granted by the AFL, including highlights and clip rights. This problem persists. For example, as at 31 July 2013, Fairfax's *'The Age'* website features an almost 7 minute segment relating to the top 5 matches of the 2012 season.⁶ The segment includes extensive use of AFL copyright material and is displayed over 10 months after the conclusion of the 2012 season.

In addition to the AFL's suggestions to clarify this exception set out in the AFL's previous submission, the AFL proposes the reporting of news fair dealing exception be clarified by inserting a definition of the meaning of 'news' that requires a temporal or contextual currency to any content used. For example, it should not be permissible for an unlicensed third party to make available online a highlights package of footage of spectacular marks from the AFL Competition in past years on the basis that a great mark has recently been taken in an AFL match and the highlights package is a 'news' story regarding great marks in the AFL.

Further, the AFL does not agree with News' suggestions in its supplementary submissions to the first stage of the ALRC inquiry that the use of industry guidelines addresses the AFL's concerns. The AFL accepts the existing Code of Practice for Sports News Reporting, however the creation of that Code was a good example of a difficult process where the results were not necessarily satisfactory to all parties – in particular, the sports rights owners, and the Code has at times proved difficult to use, very difficult to seek amendments to and issues with compliance with the Code by particular media organisations are ongoing. Further, the Code does extend to audio visual content. The AFL does not believe a compromise could be reached between the numerous sports rights holders and the media in relation to appropriate parameters for fair dealing for the reporting of news for audio-visual content, and in any event, as a matter of policy, the AFL would not support the Code being extended to cover audio-visual content.

⁶ <http://media.theage.com.au/sport/afl-real-footy/the-top-five-afl-games-of-2012-3647671.html>

4.3. Fairness factors and fair dealing

If fair use is not enacted, the AFL is not opposed to the existing fair dealing exceptions being amended to expressly include fairness factors as a guide to matters to be taken into account in determining whether copyright is infringed. In addition to the matters identified by the ALRC, these fairness factors need to be framed to expressly take into account the purpose and character of the dealing (with an express prohibition on commercial or profit making dealings), any impact on the commercial interests of rights holders, the availability of similar content within a reasonable time through authorised means and qualitative matters (eg - brand, reputation and non-derogation).

5. Non consumptive use

As stated above, the AFL opposes the introduction of a broad, fair use exception. It follows that the AFL does not support an open ended right for 'non consumptive use' to be part of a fair use exception.

In any event, the AFL does not believe the ALRC Discussion Paper discloses cogent evidence that the *Copyright Act* is unfairly or unreasonably impeding internet caching, indexing and/or data and text mining.

If it is thought that any exception is required for particular caching, indexing or data and text mining activities, then this should be dealt with by way of a specific exception in the *Copyright Act*, rather than as part of a broad, open ended and uncertain fair use exception.

Any specific exception should not allow unfair data and text mining use by third parties, such as the unlicensed use of valuable data of sports bodies to the commercial disadvantage of any copyright owner. Also, any specific exception should apply to specific and defined activities, such as for the purposes of research and study.

Further, the AFL is concerned that the proposed definition of 'non consumptive use' would allow for wider use rights than intended (i.e. – caching and indexing). In particular, linking the proposed test to '*not directly trading on the underlying creative and expressive purpose of the material*' does not adequately restrict the use of all valuable copyright material of the AFL. Some AFL copyright material may not be used to trade on a creative and expressive purpose, but still needs to be protected and not fall within the proposed exception.

6. Private and domestic use

6.1. No general exception for private and domestic use

The creation of any new exception allowing 'private and domestic use' is strongly opposed by the AFL.

As discussed above, the AFL does not agree with the creation of a new fair use exception or the inclusion of 'private and domestic use' as one of a number of 'illustrative purposes' as part of that new exception.

Further, the AFL opposes the introduction of a new fair dealing exception for private and domestic purposes. Such an exception would be open ended, create unnecessary uncertainty and potentially adversely impact the control of the AFL over, and the value of, its copyright material.

Exceptions in the *Copyright Act* already allow private and domestic use of copyright material in certain, limited circumstances, such as time shifting and format shifting. These provisions are linked to private and domestic use by individuals and, in some warranted instances, are already technology neutral.

6.2. 'Private and domestic use'

The expression 'private and domestic use' is very broad. As raised in the AFL's previous submission, the line between private and domestic use and other use (including commercial use) is not easily drawn. One person's private and domestic use may be commercial use by another; use may change over time. Further, the use of content on social media such as Facebook cannot be said to be 'private and domestic use' because it is inherently not 'private' and there is often commercial gain from the use, such as by the provider of the service.

Under cover of the AFL's objection to any extension of the law to include a broad private and domestic use exception, if any such amendment is proposed the law must clearly define what is meant by 'private and domestic use'. The definition must exclude so called 'social use' (eg – use on Facebook and You Tube), use involving or facilitated by third parties or use in any way connected with a commercial or profit making purpose.

6.3. *Format shifting and time shifting*

At the time the existing format shifting and time shifting exceptions⁷ were introduced into the *Copyright Act* it was noted the exceptions:

- would not significantly harm or unreasonably affect the interests of copyright owners;
- would only have a negligible impact on the market ; and
- should not unreasonably harm or discourage the development of new digital markets by copyright owners.

These objectives remain relevant and desirable.

The AFL is concerned that any private and domestic use exception introduced to replace the existing format shifting and time shifting exceptions goes much further than the existing exceptions. A new private and domestic use exception would be open ended and unclear, may not prevent activities that are currently and appropriately prohibited by law and/or is likely to adversely impact the market and market value of AFL's copyright. For example, the AFL is opposed to any change to the law that may allow conduct of the kind found to be an infringement of copyright by the Full Court of the Federal Court of Australia in the recent *Optus TV Now* litigation.

Further, any exceptions that allow time or format shifting should be linked to the purpose of the maker of any copy.

The AFL supports clarification of the existing format shifting and time shifting exceptions in the *Copyright Act* to expressly, but not exhaustively, prohibit any use of the exceptions where the maker of any copy of copyright material has a commercial purpose.

7. Transformative Use and Quotation

7.1. Transformative Use

The AFL supports the ALRC's recommendation that the *Copyright Act* should not provide for a new 'transformative use' exception.

⁷ sections 43C, to 47J, 109A, 110AA and 111 of the *Copyright Act*

The AFL does not support the introduction of a new, broad fair use exception, nor the suggestion that such an exception should be applied when determining whether or not a 'transformative use' infringes copyright.

The AFL's previous submissions identify why it opposes amendments to copyright law to extend to transformative use, including the material adverse impact transformative use may have on the value and branding of AFL content. The AFL continues to oppose the extension of copyright law to allow unauthorised transformative use.

7.2. Quotation

Any extension of copyright law to expressly provide for a quotation right is not warranted and is not supported by the AFL.

The AFL and other sporting bodies grant highlights and clip rights across different media platforms, including free to air television, pay television and internet and mobile transmissions. The AFL also has a business that licenses the use of photographs of AFL matches, players and events, for which the AFL owns copyright. A new platform neutral quotation exception could cut across or undermine those valuable and industry accepted rights, which would be inappropriate.

The AFL understands the ALRC's consideration of any new quotation right does not extend to the use of audio or audio visual material. To allow use of that material as part of a 'quotation' right would impact the AFL's control over the material, impact the ability of the AFL to licence its rights (including valuable highlights and clip rights) and reduce the qualitative control of rights holders such as the AFL over content. Similarly, the use of photographs under the guise of an extended 'quotation' right has the real potential to adversely impact the rights of copyright owners, and, in some instances, the athletes who feature in the photographs.

8. Libraries, archives and digitisation

The AFL and its licensees maintain and exploit libraries and archives of AFL copyright material, primarily film and images of AFL matches.

The AFL understands the ALRC's review regarding copyright exceptions and libraries, archives and digitisation is limited to the undertaking of those activities by 'cultural institutions' for preservation and for research and study only.

The AFL has no issue with an exception for genuine activities in those areas provided that the exception does not undermine the ability of AFL to continue to exclusively exploit and licence its own archives.

9. Retransmission of free to air broadcasts

9.1 Reform to existing retransmission regime?

The regime allowing retransmission of free to air television broadcasts is very important to the AFL.

The AFL understands the existing retransmission regime is generally accepted by the television industry, notwithstanding the remuneration received by the AFL from the statutory licensing scheme is not at market rates.

The AFL does not support any amendments to the existing retransmission regime, and does not believe the existing retransmission scheme unduly or unreasonably prejudices any particular platform.

The ALRC's Discussion Paper identifies two options for further reform. If the ALRC was inclined to recommend either option (which AFL does not support, as it does not believe reform is required), the AFL's preference is for Option 1, being a market based solution which allows retransmission to occur only by way of negotiation between the parties. This is consistent with the principle that owners of copyright should determine where and how copyright material is disseminated.

The regime for retransmission of free to air broadcasts is complicated and raises issues other than copyright, such as broadcasting, competition and communications policy and the potential impact on existing licensing arrangements. The AFL believes that any review of the retransmission arrangements must involve consideration of those issues as well, and not simply occur as part of a review of copyright exceptions. Any such review will involve additional issues and stakeholders.

9.2 Retransmission 'over the internet'

The ALRC report proposes that retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free to air broadcasts.

The AFL strongly opposes this proposal.

As described in detail in the AFL's previous submission, the AFL sells segmented rights across various platforms. The sale of segmented rights across multiple platforms is an established and important method for rights holders to increase value in the sale of their important and valuable media rights, and address qualitative requirements. The ALRC's proposal to remove the differentiation between free to air television and internet platforms may significantly adversely impact existing and future media rights arrangements of the AFL and the value of the rights granted there under.

The AFL also strongly disagrees with the comments attributed to Optus in its submissions to the ALRC inquiry to the effect that rights holders, such as the AFL, should be prevented from obtaining '*separate royalties for the same content for different delivery methods or means of viewing the contents*.'⁸ This comment should be seen for what it is: a self-interested comment by a commercial enterprise that is a non-rights holder.

The ALRC's proposal conflates the concepts of internet transmission and broadcasting. The differentiation of these concepts is entrenched in Australian law and recognised world wide. This issue raises myriad broadcasting, competition and communications policy issues. For example, the so called anti-siphoning provisions under the *Broadcasting Services Act* effectively compel the AFL to license certain AFL content on free to air television. In light of this, it is incongruous, extremely unfair, and materially damaging to the AFL, if the law then allowed this free to air television content to be available on internet platforms outside of the AFL's control, particularly where the content can be licensed to subscribers or users on that platform under a statutory retransmission scheme.

The AFL sells media rights in separate Australian markets and outside of Australia. The AFL is concerned that an internet retransmission right raises problems of restricting broadcasts within licensed areas in Australia and also the prevention of internet transmissions outside Australia. If internet retransmission was allowed, then restrictions that the AFL lawfully and appropriately imposes on free to air television broadcasts (for example, any holdback / delay arrangements into particular markets) will be undermined. Technical measures such as "geoblocking" do not provide a solution to these concerns, as there may still be issues with effectiveness and circumvention of those measures.

To the extent the ALRC is considering recommending extending retransmission arrangements to cover over internet transmissions (which is opposed by the AFL), then sports rights, such as the AFL should specifically be excluded from any such an amended retransmission right. The basis for this is that any adverse impact on sports rights holders

⁸ ALRC Discussion Paper 15.101

needs to be avoided; sports rights holders derive significant revenue from separately licensing internet transmissions and there is a direct link between revenue obtained from separate licensing of internet rights and the revenues to the rights holder and the flowing back to benefit the Australian community.

If the ALRC is proposing any amendments to the retransmission arrangements, then no alterations at all should be permitted as part of any retransmission. Any alteration that impacts on the content could adversely impact on sponsorship and advertising revenues, and must be prohibited.

9.3 Clarification of section 135ZZJA of Copyright Act.

The AFL maintains that any internet related delivery, including IPTV howsoever defined, should be captured by the internet exclusion contained in section 135ZZJA of the *Copyright Act*. The AFL welcomes clarification of that section to confirm that the retransmission provisions do not apply to transmission over IPTV.

10. Broadcasting exceptions

The AFL does not believe the issues raised in the ALRC's Discussion Paper regarding the current operation of broadcasting exceptions constitute sufficient grounds for any reform in this area.

The AFL opposes the extension of the broadcasting exceptions to internet transmissions. The extension of broadcast exceptions to internet transmissions would broaden the scope of the exceptions. The broadcast exceptions were never intended to apply to non-broadcast platforms. The AFL opposes any change to the broadcasting exceptions that could in any way impact the current and future licensing of the AFL's media rights, which are licensed by reference to differentiated platform delivery.

As with the retransmission regime discussed above, this issue raises significant broadcasting, media and communications policy issues. Care must be taken before making any piecemeal changes to copyright legislation that would have unintended or adverse impacts on broadcasting and communications policy.

If the ALRC was inclined to extend broadcasting exceptions to transmissions of television and radio programs using the internet (which is opposed by the AFL), then those broadcasting exceptions should be limited to only allow internet transmissions by broadcasting services licensed under the *Broadcasting Services Act* and only then on a linear basis.

11. Contracting out

The AFL does not support the introduction of provisions into the *Copyright Act* that restricts companies and individuals agreeing to exclude or limit operation of copyright exceptions.

The AFL's licensing arrangements with media companies are undertaken on an arm's length basis and the AFL's media licensees are large corporations. These commercial parties should be free to contract on whatever terms they see fit in relation to copyright exceptions.

Further, to the extent the AFL and its licensees contract with consumers for the provision of content, the parties should be free to impose restrictions on the use of content. For example, if the AFL's licensee provides a time limited download right to a particular person in relation to highlights of an AFL match, that party should not be able to provide that material to another party for use or use the content for a different time period than was contemplated under the licensing terms.

If the ALRC has any questions in relation to the AFL's submissions or other aspects of the inquiry that may affect the AFL, please contact Simon Lethlean, General Manager - Broadcasting, Scheduling and Major Projects and Deputy General Counsel.

Australian Football League

31 July 2013