



Copyright and the Digital Economy

NRL submission to the Australian Law Reform Commission - Discussion Paper

2 August 2013

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 31 July 2013.
- 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 conducting professional competitions the Telstra Premiership and the Holden State of Origin Series, 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 grass roots levels and 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 Telstra Premiership, Holden 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) the Nine Network 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 has also entered into an agreement with Telstra for the licensing of its broadcast rights over the internet and to mobile devices. In this agreement it grants Telstra inter alia the rights 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. This requires significant investment by the NRL and 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 need to be effectively protected by copyright laws as embodied in the *Copyright Act 1968*.

ALRC Discussion paper

General

- 15 It is apparent from a review of the ALRC discussion paper that a number of the proposals put forward will impact significantly on the financial interests of the NRL in the exploitation and commercialisation of its copyright broadcast content.
- 16 Given that one of the proposed guiding principles of the reform is that it will not materially prejudice or harm the financial interests of rights holders, it is surprising that there has not been any detailed economic analysis of the extent of the detrimental financial impact of particular reform proposals.
- 17 While there are many anecdotal statements in submissions that the ALRC received that suggest that such impact will be minimal, this is not an evidence based process on which to form conclusions. Given the financial interests that a number of the parties who have made submissions will have in the outcome of the reform process an objective detailed financial analysis of the consequences of the various reform proposals is required.
- 18 This need is illustrated by the submission made by one telecommunications provider in support of an extension of the retransmission scheme to all rebroadcasting, irrespective of delivery platform or device - see paragraph 15.101 of the discussion paper. It dismissed the financial impact on the rights holders by asserting that the rights holders were seeking to be paid twice for the same content. Putting to one side the fallacy in this argument, the

submission made is one in direct support of a reform that the telecommunications provider plainly intends to use to generate revenue from consumers from a business activity in which it is currently prohibited at law from engaging.

- 19 If there truly are to be reforms proposed that cause financial detriment to rights holders then there should be a detailed consideration of the extent of that detriment so that the interests of rights holders such as the NRL can properly be taken into account in determining whether the reform is justified. It may be by doing this that exemptions for specific copyright content are required in reform proposals to ensure that the financial interests of specific copyright owners who are particularly prejudiced are protected.
- 20 There is in the view of the NRL a strong case for such an exemption in relation to broadcast sporting content. The NRL has recently been involved in a market process for the sale of its broadcast content across digital platforms. Its experience in those negotiations is that there would be a significant reduction in the value it would achieve in the exploitation of its digital content if the reforms made lawful services similar to the Optus TV Now service.

Fair use

- 21 The principal submission of the NRL on the proposed fair use defence is that set out in the COMPPS submission.
- 22 The NRL does however want to emphasise the lack of certainty that such a defence would cause if it extended to the purposes of private and domestic use.
- 23 The discussion paper in support of the principle of using broad standards seeks to rely on the successful use of the prohibition against 'misleading or deceptive conduct' in what is now s 18 of the Australian Consumer Law. This broad standard is however entirely different as conduct that is misleading or deceptive is much more capable of objective determination than conduct that it is to be judged by a broad standard of fairness.
- 24 The consequence of this is that there is likely to be a broad range of views amongst judicial officers as to what would constitute fair use in any given situation. The inherent imprecision in a term such as fair, which involves the balancing of competing interests, will tend to lead to what in many cases will be little more than arbitrary decision making.

- 25 This will result in significant uncertainty in the minds of rights holders and users. This will inevitably lead to increased transaction costs. It will also likely reduce the value of digital rights for sporting bodies such as the NRL as uncertainty as to the extent of exclusive rights that a licensee has will be reflected in the prices that licensees will be willing to pay for those rights.
- 26 The same difficulty will arise if the fair dealing defence is extended to include a permissible purpose of private and domestic use. While this uncertainty has always existed within the current fair dealing defence, this to date has been within the relatively contained list of permissible purposes.

Retransmission of free-to-air broadcasts

- 27 The proposal that the free-to-air television re-transmission scheme should be extended to include delivery across all platforms and devices would have a significant impact on both the exploitation and value of the NRL broadcast content.
- 28 The NRL broadcast content on free-to-air television is currently licensed on the basis that two matches are played simultaneously on Friday evenings. Different matches are shown live in New South Wales and Queensland, with the alternate match played on a delayed basis immediately after the live broadcast.
- 29 If the re-transmission scheme was extended to permit the re-transmission of the New South Wales this would lead to the New South Wales broadcast being transmitted live into Queensland. This would significantly diminish the value of the NRL free-to-air rights as it would split the potential television audience in each state and inevitably lead to a significant reduction in the viewing audience for the second match in both states.
- 30 It would also prevent a free-to-air broadcaster from effectively holding back a delayed broadcast of a match into prime time slots into South Australia and Western Australia. A viewer would be able to watch a live re-transmission of an eastern state broadcast. This would be destructive of value of the NRL broadcast rights in South Australia and Western Australia and may lead to the loss of free-to-air coverage in these states as it would no longer be exclusive. For a sport such as the NRL that is seeking to expand its audience in these states by the use of free-to-air television broadcasts, this would be a significant detriment.
- 31 These plainly destructive consequences of extending the free-to-air television re-transmission scheme to all platforms makes clear the fallacy in the submission made by the telecommunications provider that rights holders are

seeking to be paid twice for essentially the same right - see paragraph 15.101. While the content may be the same, the rights to deliver across different platforms, such as legislatively mandated free-to-air and point to point internet delivery, are as fundamentally different as the right to licence a film for viewing by the public in a cinema and the right of digital delivery of the same content via the internet when the movie is on DVD release.

- 32 The significance of the impact of the anti-siphoning legislation scheme cannot be over emphasised. Unlike nearly all other copyright owners, the NRL is compelled by legislative requirement to make available nearly 50% of its copyright broadcast content on free-to-air television. If the re-transmission scheme is extended as proposed then the NRL will as a consequence be required to make available this content across all platforms, irrespective of its wishes or the commercial consequences.
- 33 In this latter respect, the anti-siphoning legislation scheme already negatively impacts on the value of the NRL broadcast rights by reducing competition between free-to-air and subscription broadcasters. Any extension of the effect of the scheme through changes to the re-transmission scheme will further erode the market value of the NRL's broadcast rights.

Contracting Out

- 34 The proposal that the Copyright Act should prohibit a sporting body limiting by contract the right of one of its content licensees to exploit a fair use or fair dealing defence is entirely unnecessary. It is also a significant fetter on its ability to control the use of its licensed content.
- 35 Putting to one side the fact that its licensees as sophisticated commercial entities are perfectly capable of negotiating their respective contractual rights, there is no evidence that there is any need for this constraint.
- 36 Further, the control of the broader dissemination of its copyright content is an important method by which a sporting body may seek to promote its sport. If a sporting body wishes to licence broadcast content on the basis that a particular form of highlights package is to be used or disseminated by the broadcaster, there is no public interest in this being prohibited.
- 37 A prohibition against contracting out even if limited to private and domestic use is problematic as it would prevent a sporting body from licensing digital downloads on a once only or limited use basis. These are currently legitimate methods for a rights holder to exploit its exclusive copyright content. There is no persuasive public interest justification set out in the discussion paper for

preventing a rights holder imposing a contractual prohibition for this purpose on the consumer copying the content for his or her subsequent private use.

Enforcement of Copyright

- 38 The ability of copyright owners and licensees to enforce their rights against infringement in a cost effective and timely manner remains problematic.
- 39 Although this is an issue that is outside the scope of the current inquiry this is an area which the NRL believes needs reform. The potential for infringement given technological advances is such that a full review of the enforcement rights of copyright owners is required.

Conclusion

- 40 The NRL welcomes the opportunity to submit on this important project and would like the opportunity to meet with representatives of the Australian Law Reform Commission to discuss these issues.

Contact details

Ms Nicky Seaby
Strategy & Government Relations Manager
02 9359 8725
nseaby@nrl.com.au
National Rugby League
Driver Avenue, Moore Park 2021