

## **COPYRIGHT AND THE DIGITAL ECONOMY**

### **SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION ISSUES PAPER**

**30 NOVEMBER 2012**



## 1 Executive Summary

The Australian Law Reform Commission's (**ALRC**) Issues Paper on Copyright and the Digital Economy raises important issues for the members of Coalition of Major Professional and Participation Sports (**COMPPS**).

The position of COMPPS and its members is:

- Copyright is fundamental to the commercialisation and exploitation of audio-visual coverage of major sporting events. Revenue received from the exploitation of their rights, including their online and digital rights, is vital for the development of COMPPS members' respective sports.
- When considering any recommendations for copyright reform, the ALRC must ensure that any adverse impact on the rights and activities of COMPPS members and their licensees is avoided.
- COMPPS does not believe there is sufficient reason for or evidence to justify many of the reforms to the *Copyright Act* raised by the ALRC.

## 2 Background

### 2.1 COMPPS

COMPPS consists of the following organisations:

- Australian Football League (**AFL**);
- Australian Rugby Union (**ARU**);
- Cricket Australia (**CA**);
- Football Federation Australia (**FFA**);
- National Rugby League (**NRL**);
- Netball Australia; and
- Tennis Australia.

Each of these organisations is the governing body and custodian of a major professional sport in Australia. They are not-for-profit bodies and are responsible for the long-term development and sustainability of their sport in Australia.

A profile summary of each COMPPS member and the sport it represents is provided in Annexure A.

In general, COMPPS members provide a wide range of public benefits through a self-funding business model. A large portion of their revenue is devoted to enhancing, promoting and developing sport for all Australians both at national and ‘grassroots’ level.

One of COMPPS’ roles is to provide a collective response on behalf of its member sports where their interests are aligned.

### 2.2 Media rights

The majority of COMPPS members revenue is generated from the licensing and exploitation of intellectual property rights, and in particular, copyright.

COMPPS members seek to commercialise their intellectual property rights as follows:

- (a) COMPPS members regulate access to venues in which events they organise are conducted.
- (b) COMPPS members grant licences to third party commercial organisations to produce and broadcast audio-visual and audio content of these events.
- (c) COMPPS members generally retain ownership of any copyright subsisting in the audio-visual and audio content produced. As copyright does not subsist in an event, the relevant copyright is generally in relation to the copyright subsisting in the broadcast and recordings of the events.<sup>1</sup>
- (d) COMPPS members seek to segment and separately licence media rights to their events, including:
  - (i) free-to-air television rights;
  - (ii) subscription television rights;
  - (iii) mobile, digital and online rights; and
  - (iv) radio rights.

The rights some of COMPPS members currently exploit, and their respective commercial partners are listed below:

| <b>COMPPS Member</b> | <b>Relevant rights</b>   |
|----------------------|--|
| AFL                  | Free-to-air television rights – Channel Seven<br><br>Subscription television rights – FOXTEL<br><br>Online and mobile rights - Telstra<br><br>Radio rights – Various radio stations across Australia |

<sup>1</sup> COMPPS has previously advocated extending copyright protection to key elements of the performance of major sporting events: see COMPPS' submission to Senate Committee *Inquiry into the reporting of sports news and the emergence of digital media*, May 2009. This issue appears outside the scope of the ALRC's terms of reference, but COMPPS can address this issue if it would assist the ALRC.

| <b>COMPPS Member</b>          | <b>Relevant rights</b>   |
|-------------------------------|--|
| Australian Rugby Union        | Free-to-air television rights – Channel Ten<br>Subscription television rights – Fox Sports<br>Digital rights – Fox Sports  |
| Cricket Australia             | Free-to-air television rights – Nine Network<br>Subscription television for domestic cricket and Big Bash League ( <b>BBL</b> ) broadband rights – Fox Sports<br>Wireless rights - Vodafone  |
| Football Federation Australia | Free-to-air television rights - SBS<br>Subscription television rights – Fox Sports<br>Digital and online rights – Fox Sports and SBS<br>Radio rights – ABC, SBS and various regional radio stations across Australia                     |
| National Rugby League         | Free-to-air television rights – Nine Network<br>Subscription television rights – Fox Sports<br>Digital rights – NRL is currently in the process of negotiating its digital rights and is unable to provide further details at this stage |
| Tennis Australia              | Free-to-air television rights – Channel Seven<br>Subscription television rights – Fox Sports<br>Digital and online rights – Channel Seven<br>Mobile rights - Optus   |

| <b>COMPPS Member</b> | <b>Relevant rights</b>  |
|----------------------|---|
| Netball Australia    | Netball Australia is currently renegotiating its media rights licences and is unable to provide further details at this stage |

The revenue derived from the licensing of these rights is a very significant revenue stream for most COMPPS members. For example, for one of COMPPS' members this revenue has recently accounted for more than 75% of total annual revenue.

### 2.3 The digital economy

The digital economy is the global network of economic and social activities that are enabled by platforms such as the internet, mobile and sensor networks.<sup>2</sup>

The economic and social success of the digital economy is highly dependent on the creation and dissemination of content. The dissemination of content is generally protected by copyright law. Rights holders, such as COMPPS members, require copyright law which is clear, effective and reflective of the way in which content is exploited.

COMPPS members are increasingly innovative in exploiting their online and digital rights. They have made, and continue to make, significant investments to enable them to exploit their rights as broadly as possible and to enable the Australian community access to their content via various mediums.

COMPPS members exploit their online and digital rights as follows:

| <b>Sport</b>               | <b>Exploitation of digital rights</b>  |
|----------------------------|--|
| Australian Football League | <p>AFL grants Telstra with an exclusive licence to communicate AFL matches and events online and to handheld devices.</p> <p>These include, amongst other things, the exclusive rights to:</p> |

<sup>2</sup> [http://www.dbcde.gov.au/digital\\_economy/what\\_is\\_the\\_digital\\_economy](http://www.dbcde.gov.au/digital_economy/what_is_the_digital_economy).

| Sport                         | Exploitation of digital rights   |
|-------------------------------|--|
|                               | <ul style="list-style-type: none"> <li>• communicate matches online after the conclusion of the match; and</li> <li>• communicate online non-live/replayed AFL content and archive such content.</li> </ul>  |
| Australian Rugby Union        | ARU grants Fox Sports with an exclusive licence to exploit the digital rights to ARU matches including the rights to sub-licence audio-visual signals to third parties for distribution via mobile and handheld devices.   |
| Cricket Australia             | <p>CA has granted an exclusive licence to communicate international, domestic and BBL matches to handheld devices to Vodafone.</p> <p>CA has also granted an exclusive licence to Fox Sports to communicate domestic cricket and BBL matches online on a subscription basis as well as on demand for a specified period of time from the conclusion of a match.</p> <p>Cricket Australia TV (<b>CATV</b>) live streams the Sheffield Shield on <a href="http://www.cricket.com.au">www.cricket.com.au</a> as well as provide clips, highlights and behind-the-scenes content from all competitions. CATV's YouTube channel also carries clips, highlights and behind-the-scenes content.</p> |
| Football Federation Australia | <p>FFA has granted the following licences:</p> <ul style="list-style-type: none"> <li>• Fox Sports with a licence to communicate and/or exploit certain A-League and Australian national team matches via the internet, IPTV and mobile devices.</li> <li>• SBS with a licence to communicate certain A-League and Australian men's senior national team matches via</li> </ul>  |

| Sport                 | Exploitation of digital rights  |
|-----------------------|---|
|                       | <p>the internet and mobile devices.</p> <p>The FFA retains the right to communicate and/or exploit certain A-League and Australian national team matches via the internet and mobile devices.</p>   |
| National Rugby League | <p>NRL is currently in the process of negotiating this grant of rights. It is anticipated that it will grant rights to:</p> <ul style="list-style-type: none"> <li>• communicate broadcasts of matches live or near to live to mobile devices; and</li> <li>• communicate replays of matches online.</li> </ul> |
| Tennis Australia      | Tennis Australia has, through Channel Seven, granted Optus mobile telephony rights.   |
| Netball Australia     | Netball Australia is currently renegotiating its media rights licences and is unable to provide further details at this stage.  |

The licensing of online and digital rights is an increasingly significant part of COMPPS members' revenue. For example, the proportion of media rights revenue derived from the licensing of online and digital rights of some of its members is approximately 15%. That proportion is expected to increase.

## 2.4 Importance and use of media rights revenue

COMPPS members reinvest their revenues into the development of their respective sports and the community as a whole. These include:

- Administration of elite leagues and talent – COMPPS members fund national leagues and tournaments, invest in stadiums, facilities and major events and distribute funds to state associations and member clubs;



- Administration of national teams and events – COMPPS members fund Australian national teams in their participation in competitions and stage and invest in major events;
- Development of talent – COMPPS members invest in coaches, umpires and referees, athlete development and promoting and maintaining community development programs; and
- Community investment – COMPPS members fund indigenous and multi-cultural outreach programs, invest in community facilities and fund junior leagues, clinics, tournaments and charities.

Maintaining and growing media rights revenue is critical to the survival and growth of COMPPS members and the sports they administer. In addition, the ability to develop new and valuable revenue sources by improving the ability of the COMPPS' members to deal in their existing rights and to develop new rights, will allow the COMPPS' members to:

- (a) maintain and increase their distributions to members and clubs, which have high levels of community support and interaction;
- (b) increase investment in the development of their respective sports, including at grassroots level;
- (c) maintain relatively low admission prices for attendees at matches, providing all Australians with the opportunity to participate in sports<sup>3</sup>;
- (d) continue and increase support for important community relations programs;
- (e) continue to invest in facility development where appropriate and for the wider community benefit; and
- (f) continue to operate without significant reliance on Government funding.

The Commonwealth Government has previously recognised the importance of digital revenue in sports. In May 2009, a Senate Standing Committee on Environment, Communications and the Arts urged the government to take into account the opportunities and challenges presented by digital media to sports organisations'

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<sup>3</sup> By way of example, COMPPS estimates that nearly half of all Australians attend at least one sporting event each year.

current and future revenue prospects and options.<sup>4</sup> The Senate Committee also shared the concerns of sporting bodies about prospects for future financial and commercial viability.<sup>5</sup>

## 2.5 Importance of copyright to COMPPS members

Copyright is fundamental to the way in which COMPPS' members commercialise and exploit audio-visual coverage of major sporting events.

Copyright law does not stop or stifle innovation by preventing others from creating original works. To the contrary, copyright encourages the creation of original works by protecting the investment of the creator in the original elements of new works.

COMPPS members rely on the clarity and robustness of the *Copyright Act* to ensure that:

- they are able to commercialise their valuable intellectual property rights;
- they are able to negotiate and obtain a fair value for the licences they grant;
- they are able to provide their licensees with certainty that third parties may not 'free-ride' on their investments; and
- they are able to continue investing in the development of their respective sport and supporting the Australian economy.

## 2.6 Importance of sport

Sport is entrenched in the Australian way of life and plays a major role in the economic and social health of the Australian community.

By way of example, it was recently estimated that sports and physical recreation organisations employ over 112,000<sup>6</sup> Australians and directly contributes over \$8.8

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<sup>4</sup> The Senate, Standing Committee on Environment, Communications and the Arts "*The reporting of sports news and the emergence of digital media*", May 2009, page 49.

<sup>5</sup> *Ibid.*

<sup>6</sup> Australian Bureau of Statistics, 'Sport and Recreation: A Statistical Overview' <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/E947E884D589DF99CA25796C00143810/\\$File/41560\\_2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/E947E884D589DF99CA25796C00143810/$File/41560_2011.pdf)> (2011) p 12, accessed 29 November 2012.

billion<sup>7</sup> annually to the Australian economy. It is likely that these estimates have since increased. The flow-on effect of this contribution is considerable.

Any amendments to the *Copyright Act* which adversely affects the exploitation of COMPPS' members rights will undoubtedly be detrimental to COMPPS members, their activities and investment into sport and the Australian population generally.

### **3 Response to Issues Paper**

#### **3.1 The Inquiry**

The inquiry requires the ALRC to consider whether the exceptions and statutory licences in the *Copyright Act* are adequate and appropriate in the digital age.

COMPPS believes the Issues Paper does not address some important issues which are relevant to copyright in the digital age.

##### **(a) Enforcement of copyright**

The enforcement of copyright in the digital age is not expressly within the terms of reference of the current review.

In the face of no cost copying and piracy, COMPPS considers the rights of rights holders in the digital economy are hamstrung by ineffective or unrealistic enforcement options. As rights owners, COMPPS members are concerned that traditional enforcement tools are less effective in the digital age. COMPPS believes that stronger deterrents are necessary to prevent copyright infringement.

The difficulty in enforcing copyright law has resulted in fewer enforcement actions being taken despite an increase in the prevalence of conduct constituting copyright infringement. COMPPS is extremely concerned that because copyright infringement has become widespread, there is a growing perception that many acts, which in fact infringe copyright, have become acceptable practices. COMPPS would be opposed to any ex-post amendments to the *Copyright Act* to legitimise these acts.

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<sup>7</sup> Australian Bureau of Statistics, '\$8.8 billion income for Australia's sports and physical recreation services' 29 August 2006 <  
<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/8FD09A511684A4D3CA2571D80021CC86?>>  
accessed 29 November 2012.

### (b) Safe harbour provisions

While the ALRC is considering existing copyright exceptions, COMPPS believes it is also appropriate that the 'safe harbour' provisions be examined. The safe harbour provisions and the exception provisions are effectively 'defences' to copyright infringement, and COMPPS believes it would be sensible and efficient to consider both matters at the one time.

COMPPS would welcome the opportunity to address these significant issues in further detail, if requested.

## 3.2 Guiding principles for reform

The ALRC has published eight draft guiding principles to assist with its approach in the inquiry.

COMPPS is strongly supportive of the development and growth of the digital economy and encouraging innovation and competition, however COMPPS believes it would be misguided if the ALRC's consideration of the matters in the Issues Paper was to emphasise innovation of end users at the expense of continued protection for rights holders and the innovation of authors and content producers.

COMPPS is also concerned with the suggestions in the Issues Paper that changed consumer attitudes to copyright, such as 'less willingness to recognise that copyright is a form of property'<sup>8</sup>, or that an exemption should be created where there is widespread infringement, should be taken as guiding principles in reforming copyright laws to legitimise such conduct. To the contrary, any copyright law reform should recognise that these matters give rise to the need to address the way in which rights holders may enforce their rights.

In COMPPS' view, the ALRC must take into account the following issues when considering matters arising in the current inquiry:

- There must be sufficient evidence to justify any reform of the *Copyright Act* and any reform proposal must be carefully considered from a legal, economic and socio-economic perspective.

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<sup>8</sup> Paragraph 38 of the Issues Paper.

- Copyright plays a critical role for rights holders such as COMPPS' members. Any reform of the *Copyright Act* which may undermine the ability of rights holders to control and derive revenue from the exploitation of their rights must be avoided.
- Innovation by existing rights holders in the way they and their licensees currently exploit their online and digital rights must also be acknowledged and respected.
- Any amendments to the current 'exceptions' regime in the *Copyright Act* should be made only if the amendment satisfies the 'three-step test' under Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works (Three-Step Test)*. In particular, any new exceptions must:
  - be confined to certain and special instances only;
  - not conflict with normal exploitations of material; and
  - not unreasonably prejudice the legitimate interests of the rights holder.

### 3.3 Cloud computing

Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of computing resources that can be rapidly provisioned and released with minimal management effort or service provider interaction.<sup>9</sup>

The Issues Paper has queried whether:

- Australian copyright law is impeding the development or delivery of cloud computing services; and
- whether new exceptions should be created to account for new cloud computing services.

Cloud computing services have been in existence for some time. For example, the provision of web-based email services and digital storage lockers have been available and used for a number of years. These services do not raise any novel issues, and have developed under the current legal system.

There is no evidence that current Australian copyright law is impeding the development or delivery of legitimate cloud computing services in Australia.

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<sup>9</sup> US National Institute of Standards and Technology definition, referred to in the Issues Paper.

COMPPS is also unaware of any legal restrictions in Australia which have prevented the development and progress of legitimate cloud computing services.

The Issues Paper refers to the recent *Optus TV Now* litigation as an example of how Australian copyright law may be inhibiting the development of 'new and emerging cloud computing services'.<sup>10</sup> COMPPS emphatically rejects this suggestion. In *Optus TV Now*, the Full Court of the Federal Court of Australia held that Optus had infringed copyright by making, or jointly making, recordings of particular free-to-air television broadcasts. The Court's judgment also held that Optus could not avail itself of the 'time shifting' exception in section 111 of the *Copyright Act*. The case did not turn on the fact that the technology used by Optus was cloud computing nor does it inhibit the development of cloud computing technology.

The High Court of Australia has recently refused to grant Optus special leave to appeal. The case law in Australia in this area is now settled law. COMPPS sees no reason to revisit this issue.

There is no reason why parties which wish to offer services such as *Optus TV Now* cannot seek to obtain licences from rights holders.

COMPPS does not believe that any new 'cloud computing' based exception should be created or existing exceptions be amended.

There already exist numerous provisions within the *Copyright Act* which provide cloud computing service providers with protection for certain activities. These provisions were introduced by the *Copyright Amendment Act 2006 (Cth)* and the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*. That legislation was drafted on the principle of 'technology neutrality'. There is no reason why the existing provisions should now be considered to be insufficient. In COMPPS' view, if any cloud computing service is not protected by the existing provisions, then they should not be permitted by Australian copyright law.

Any changes to the existing copyright exceptions are likely to prejudice the legitimate interests of COMPPS' members and the value of the rights currently exploited by rights holders such as COMPPS' members. This would in turn impact on existing licensing arrangements. To the extent any changes may impact on current or future licensing regimes, such changes must be avoided.

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<sup>10</sup> Paragraph 65 of the Issues Paper.

Further, COMPPS believes that any general exception for cloud computing services would be contrary to the Three Step Test.

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

The Issues Paper requests for submissions on whether online uses of copyright materials for social, private or domestic purposes should be more freely permitted and if specific exceptions for such use should be created.

COMPPS does not believe that the *Copyright Act* should be amended to more freely permit online uses of copyright materials for social, private or domestic purposes. COMPPS believes that existing exceptions are sufficient.

Copyright law is intended to, amongst other things, provide rights holders with the right to stop copying by other persons, to control the way material is disseminated and to enable rights holders to profit from their work. It would be contrary to the rationale and basic principles of copyright law to more freely permit online uses of copyright material.

Content owned or controlled by COMPPS' members is frequently uploaded to social networking websites. This is valuable content and includes, for example, whole or substantial parts of recordings of sporting event broadcasts or highlight clips.

COMPPS does not believe it is appropriate to characterise the uploading of this material as being for 'private or domestic' use. The content is often made available to many people through social networking sites. Once uploaded, the content is unlikely to remain 'private' and will, in some cases, be available for viewing or download to all users of the internet. Use of this content is not tracked.

Many social networking websites (such as YouTube) provide contributors with a way to monetise content. In such cases, any use of copyright materials cannot be considered to be 'private or domestic'.

Significantly for COMPPS members and their licensees, the (unauthorised) availability of such content on social networking websites, for free or otherwise, undermines the exclusivity in that content and therefore is detrimental to the rights holders or their exclusive licensees.

COMPPS does not believe there is any evidence that further exceptions are required or are justified for this type of conduct. In fact, existing fair dealing provisions and the

requirement that a 'substantial part' of copyright material be reproduced before copyright infringement may be found already provide users with sufficient protection to create (non-substantial) user generated content.

It is suggested in the Issues Paper that a new exception may distinguish between 'social, private or domestic use', 'non-commercial use' and 'commercial use'. These concepts are ambiguous and difficult to define. Given the many ways content may be disseminated over the internet, it may be impossible to ascertain whether the use is commercial or not. It is also likely that introducing such concepts and terms would only lead to further complexity and uncertainty within the *Copyright Act*, both for rights holders and users who intend to take advantage of any such exceptions.

The Issues Paper has specifically suggested that a specific exception may be introduced to allow individuals to make user-generated content, where this use does not unjustifiably harm copyright owners.

COMPPS submits that the existing copyright law and exceptions enable the creation of user-generated content without impinging on the rights of rights holders. For example, the fair dealing exception allows the creation of user-generated content for criticism, review, parody or satire.

COMPPS' members are concerned that creating a general exception for social, private or domestic use of copyright materials would be excessively broad and would be contrary to the Three-Step Test:

- Exemptions must be limited to special cases only. The breadth of a requirement that (online) use is for social, private or domestic use is so wide that it cannot constitute a special case.
- Creating a new exemption would also unreasonably prejudice the ability of rights holders to exploit their content online. Any such right would undermine the exclusivity of rights granted by rights holders to licensees and permitted third parties (such as video sharing sites). Any threat to exclusivity of the rights would adversely and significantly impact on the financial value of the rights of copyright owners.

It is an axiom of copyright law that a copyright owner has discretion regarding when and how content will be licenced. Introducing an exception that allows third party users rights to modify and adapt copyright work without the owner's permission for



vague and uncertain grounds is inappropriate. For example, COMPPS' members cannot allow their content to be transmitted in a way that may connote any sort of sponsorship, approval or affiliation with an unauthorised third party, such as a person seeking to ambush official sponsors. In addition to commercial considerations, COMPPS' members also control the use of content for the 'good of the game' (for example, imposing restrictions on rough conduct footage or other content that may damage the image of the sport). Further, even if content is uploaded on the internet for a social purpose, it may be able to be easily copied and distributed by others, for all sorts of other purposes.

### 3.5 Copying for private use (time shifting and format shifting)

The Issues Paper queries if the exceptions for private copying are appropriate and whether they may be simplified. The Issues Paper raises the Canadian *Copyright Modernization Act 2012* (Can), which contains one general exception for reproductions for private purposes, as a suggested model for reform.

COMPPS appreciates the need for exceptions for copying for private use and accepts that Australians should be permitted to 'time shift' and 'format shift'. This issue has already been extensively considered as part of the enactment of the *Copyright Amendment Act 2006*. Those amendments provide Australians with the right to 'time shift' and 'format shift'. The *Copyright Amendment Act 2006* is technology neutral.

The Attorney-General's Department has also conducted a review on the format shifting exceptions in *Copyright Exceptions for Private Copying of Photographs and Films* in 2008 (**2008 AG Review**), and did not recommend any change to the law.

COMPPS believes the existing exceptions are clear and appropriate. Consequently, COMPPS sees no reason for the ALRC to revisit this issue: the existing law maintains an appropriate balance between the rights of owners and users in the digital environment.

#### ***Format shifting***

COMPPS opposes any amendments to the *Copyright Act* which would allow third party 'copying services' to reproduce copyright material for an individual's private use. COMPPS strongly believes that the format shifting exceptions should only allow the owner or user of copyright material to make copies for themselves.

COMPPS does not believe that the format shifting exceptions for film should cover digital to digital copying. COMPPS is particularly concerned that permitting such copying would simply encourage piracy, particularly via peer-to-peer networks.

COMPPS notes and agrees that the position in the 2008 AG Review was clear that there is no evidence that section 110AA of the *Copyright Act* may be 'stifling innovation'.<sup>11</sup>

COMPPS does not believe the creation of a single more general exemption to 'format shifting' is either warranted or practicable. The 2008 AG Review had considered this issue and did not recommend any such reforms.<sup>12</sup>

Even if the public does not recognise that many common practices are in fact prohibited, COMPPS does not believe this is a reason to amend the laws – rather, public confusion is best addressed by a public awareness campaign.

### ***Time shifting***

COMPPS believes there is a fundamental distinction between recordings made by consumers but later stored on a remote server and recordings made by companies, for commercial gain, and stored on remote servers for their subscribers to access.

The latter can significantly impact on the ability of content owners to exploit their rights and should not be allowed without the consent of the rights holder.

Time shifting is essentially an individual recording a program so that that individual can watch that program at a more suitable time. It must be the individual which records the program, rather than a third party. This was recognised in the *Optus TV Now* judgment.

At the time the 2006 amendments were introduced, the Commonwealth Government made clear the time shifting amendments must, amongst other things, not:

- significantly harm or unreasonably affect the interests of copyright owners; and
- unreasonably harm or discourage the development of new digital markets by copyright owners.

<sup>11</sup> 2008 AG Review, paragraph 3.11.

<sup>12</sup> 2008 AG Review, paragraph 5.19.

COMPPS supports these two principles, and believes that those principles should also apply when considering any further changes to the law.

Given the adverse economic consequences that would arise to existing and future licensing arrangements if third parties were permitted to time shift on behalf of others, it is COMPPS' position that any such amendment would unreasonably affect the interests of copyright owners and is not appropriate.

The *Optus TV Now* case has not changed the law in this area. Indeed that decision confirms that a user who engages in time shifting for the prescribed purpose is protected. However, a commercial enterprise is not. Commercial enterprises who wish to provide such services can always seek to obtain a licence from the relevant copyright owner.

COMPPS notes that recent reviews of copyright laws in Canada and Ireland did not propose amendments allowing third parties to time shift or format shift on behalf of users.

### ***Back-up and data recovery***

The Issues Paper queries if the *Copyright Act* currently permits Australians to copy and store copyright material for the purposes of back-up and data recovery.

COMPPS' members have not considered this matter in detail, save to note that any provisions allowing copying for back-ups and data recovery should only protect legally obtained material and not permit unauthorised commercial exploitation.

Should the ALRC propose any amendments to the current law, COMPPS will consider the matter further.

## **3.6 Transformative use**

The Issues Paper raises the question of whether the use of copyright materials in a transformative way should be more freely permitted, and whether an exception should be created specifically permitting the use of copyright materials in a transformative manner.

The right to use or 'transform' copyright material is the exclusive right of the copyright owner or its licensee. It is a standard term of a digital rights licence to allow the

licensee the (exclusive) right to adapt or modify audio-visual feeds (subject to certain conditions). This is a valuable right for copyright owners and their licensees.

A broad exception permitting the use of copyright materials in transformative use is inconsistent with traditional principles of copyright law.

COMPPS does not believe it is proper, from a legal and policy perspective, that copyright law permits the use of copyright material for the creation of transformative works.

In addition to the likelihood that such a change would undermine the rights of COMPPS members and licensees, there is also a significant risk that the creation of certain transformative works may also impact on the reputation of the rights holders as users may erroneously believe that the transformative works were created by or with the endorsement of the rights owner. There is a similar risk for any moral rights owner.<sup>13</sup>

### ***Defining ‘transformative works’***

The terms ‘transformative works’ and ‘transformative use’ are uncertain.

Given COMPPS’ position that there is no need for an exception for transformative works, it does not believe that the term ‘transformative use’ needs to be defined in the *Copyright Act*.

If the ALRC was considering defining that term, COMPPS’ view is that the question of whether or not use of copyright material is ‘transformative’ ought to be appropriately considered on a case-by-case basis, taking into account all relevant facts.

Further COMPPS is skeptical that a distinction between ‘commercial’ and ‘non-commercial’ uses of material can be made that would not result in further confusion and uncertainty. As noted above, the nature of many social networking websites has commercial aspects. For example, the uploading of content onto the internet would inevitably have commercial aspects. Even if the person uploading the content does not have a commercial motivation, the third party platform operators, such as YouTube, are commercial enterprises and commercialise the content.

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<sup>13</sup> Including, for example, the right to attribution and the right against derogatory treatment.

COMPPS is alarmed at the ALRC's questioning whether 'any use of a publicly available work in the creation of a new work' should be considered transformative. Such a definition would extend to parasitic use of copyright material and would significantly undermine the basic rights of a copyright owner.

### ***Creation of 'transformative works'***

Any suggestion the current law blocks innovation in respect of transformative works is disputed. The position of COMPPS is that there is not a sufficient policy justification for the creation of a new transformative works/use exception.

The value in the underlying work should be realised by the original creator, not a subsequent user who does not pay a price for using valuable content.

Simply creating a clip that uses audio-visual content of a COMPPS' members sporting event and adding an audio recording should not create any unique rights.

The existing provisions of the *Copyright Act*, including the 'fair dealing' provisions and the requirement that a 'substantial part' of copyright material must be reproduced for infringement purposes, already provide users with sufficient protection to use copyright material for legitimate 'transformative' purposes.

COMPPS believes amending the *Copyright Act* to provide a general exception to use (valuable) material which appropriates, without permission or compensation, the original works of others is inconsistent with, amongst others, Principle 2 and Principle 3 of the Issues Paper's Guiding Principles for Reform. In particular, it would discourage rights holders from innovating in exploiting their rights and fail to recognise the rights of rights holders.

COMPPS also believes such an exception is inconsistent and possibly in breach of Australia's obligations under the Three-Step Test, which prohibits:

- The creation of an exception which would conflict with a normal exploitation of the work. The exploitation of rights online by rights owners or their licensees is a 'normal' exploitation of sporting event rights.
- Creating an exception which would unreasonably prejudice the ability of rights holders such as COMPPS' members to exploit their content and allow third parties to 'free ride' on the content of rights holders. This could cause significant

financial harm to COMPPS' members and negatively impact on the funding and activities of COMPPS' members.

Any exception to allow for transformative uses of the kind foreshadowed in the Issues Paper is open ended and lacks certainty. This would, in turn result in further complexity in the *Copyright Act* and inevitably result in litigation.

COMPPS does not support the introduction of an exception to copyright infringement for transformative works.

### **3.7 Retransmission of free-to-air broadcasts**

Free-to-air television broadcasts of COMPPS' members sporting events may be retransmitted pursuant to the existing retransmission regime in the *Broadcasting Services Act* and the *Copyright Act*. The existing retransmission regime specifically excludes retransmission over the internet.

COMPPS members who own copyright in the free-to-air television broadcasts that are retransmitted receive compensation from Screenrights under the statutory licensing scheme.

COMPPS does not believe the existing retransmission regime should allow for retransmission of free-to-air television broadcasts beyond the existing practices of free-to-air television and subscription television licensees. To allow retransmissions by other services is unnecessary to satisfy the public policy basis for the retransmission regime and has the real potential to adversely impact the commercial value of digital rights of COMPPS' members.

In particular, COMPPS does not consider the retransmission regime should extend to allow retransmissions of free-to-air television broadcasts over the internet.

COMPPS opposes any such changes for the following reasons:

- The enactment of a statutory licensing scheme for retransmission over the internet would significantly impede the ability of COMPPS' members to exploit online and digital rights. Many COMPPS members already have exclusive internet licensing deals in place. Amendments to the retransmission scheme would adversely effect these agreements.

- A statutory licensing scheme would provide insufficient compensation from internet retransmitters. Those persons would not be paying a market rate for the rights.
- Given that content may be recorded and disseminated easily and without trace over the internet, it would be impossible for rights holders to monitor and collect royalties for the use of its content.
- Many of COMPPS' members licence their rights under 'holdback' arrangements which prevent licensees from communicating content during an event and for a prescribed period after the event. Should retransmission via the internet be permitted, these holdback restrictions would be severely compromised. Such a scheme may also affect COMPPS' members exploitation of their rights overseas.
- As the Issues Paper notes, extending the statutory licensing scheme to apply to retransmission over the internet raises issues of compliance with Australia's obligations under its Free Trade Agreement with the United States.

The retransmission scheme should not apply to internet or IPTV communications.

To the extent there is any ambiguity under the current law, the *Copyright Act* and the *Broadcasting Services Act* should be clarified to make it clear the statutory scheme for retransmission of free-to-air broadcasts does not apply to IPTV.

### 3.8 Fair Dealing & Fair Use

The ALRC has requested comments on the fair dealing exceptions in the *Copyright Act*.

#### ***Reporting of news***

The most relevant fair dealing exception for COMPPS members is the exception relating to the reporting of news.

COMPPS is concerned that the exception for the reporting of news is being exploited and relied on by media organisations to use an excessive amount of highly valuable content for a purpose other than the reporting of news.

COMPPS has previously raised concerns with this exception in the Attorney-General's *Review of Fair Use and Other Copyright Exceptions* in 2005 (**Fair Use Review**). These concerns continue to exist:

- The value of media rights to a sporting event is particularly susceptible to being damaged by the broadcast of relatively small proportions of the event. For example, in some sports, there may only be a small number of scoring movements or highlights. If a third party is able to communicate footage of the entirety of those highlights, this means that a significant proportion of the potential viewers of a broadcast of a match would no longer be interested in watching the broadcast.
- The elements of the fair dealing for reporting of news exception are imprecise and uncertain. Media organisations which compile and broadcast unlicensed highlight packages of matches are directly exploiting copyright material for commercial gain. Additionally, sporting bodies are unable to control the manner in which this content is communicated.
- COMPPS believes the reporting of news exception should be amended to expressly provide that a dealing with copyright material will not be a fair dealing if the dealing has a material impact on the value of copyright material. Such an amendment is intended to prevent a person dealing in sports content under the guise of reporting news where to do so would decrease the value of any rights that the sports content owner licences or wishes to licence.

COMPPS calls for amendments to the fair dealing for reporting of news exception which:

- provides guidance to rights holders and news organisations as to the amount of material which may be used under this exception (similar to the exception for the purpose of research and study);
- defines the boundaries of what would constitute 'the reporting of the news' and prevents what is in reality an entertainment, rather than a news offering; and
- addresses the abuse of the reporting of news exception by third parties without a licence and the impact that this has on rights holders and their licensees.



### ***Fair Use***

COMPPS believes that the importation of a 'fair use' concept, or the amendment of the fair dealing exceptions to a broader exception based in principles found in the US 'fair use' concept, is inappropriate.

COMPPS believes that a broad 'fair use' exception introduces unnecessary uncertainty.

This issue was also considered in the Fair Use Review. As part of that review, some of COMPPS' members (AFL, Cricket Australia and NRL) made submissions opposing the introduction of such an exception.

That review identified a number of significant drawbacks with a fair use style exception, including that any attempt to list the uses that qualify as a fair use is extremely difficult as the distinction between fair use and infringement can be unclear and not easily defined, outcomes in fair use disputes may appear arbitrary and hard to predict and that defending a fair use claim can be expensive. Those criticisms remain.

Recent reviews of copyright law in Canada, Ireland and the United Kingdom have considered in detail the implications of introducing a 'fair use' exception. In each of these reviews, significant concerns were raised regarding the difficulties and uncertainties which would arise from such an amendment. None of those reviews supported the introduction of a 'fair use' style exception.

As such, COMPPS sees no reason to amend the substantive law to introduce a fair use exception.

### **3.9 Contracting Out**

The ALRC is considering whether to include a prohibition on contracting out of the operation of any existing or proposed copyright exceptions.

The media organisations that contract with COMPPS' members to acquire media rights are sophisticated commercial organisations. 'Contracting out' is something that would be done by these parties with full knowledge of their rights.

COMPPS does not believe there is any reason to change the current legal position.

COMPPS and its members are available to participate in any further discussions the ALRC may wish to have in relation to the matters identified in the Issue Paper and in these submissions.

For further queries, please contact:

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Executive Director  
The Coalition of Major Professional and Participating Sports  
Life Lab Building, Suite 101  
198 Harbour Esplanade  
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## Annexure A – Profiles of COMPPS Members

### Australian Football League

The AFL is the administrator, operator, promoter and ultimately the custodian of the elite national league of Australian Football. Australian Football is one of the most popular sports in Australia in terms of match attendances, broadcast audiences and participation rates. In 2011, 7.14 million people attended AFL matches, the national weekly television audience was around 4.7 million and there were nearly 800,000 registered participants in Australia and 45,000 overseas.

Australian Football has a long, proud history. In 1857, Tom Wills returned to Australia after schooling in England where he was football captain of Rugby School and an accomplished cricketer. Initially, he advocated the winter game of football as a way of keeping cricketers fit during the off-season. The new game was devised by Wills, his cousin H.C.A. Harrison, W.J. Hammersley and J.B. Thompson.

The Melbourne Football Club was formed on August 7, 1858—the year of the code's first recorded match between Scotch College and Melbourne Grammar School. The game quickly blossomed with new clubs being formed and in 1866 an updated set of rules was put in place and competition started.

The Victorian Football League (VFL) was established in 1896 and the following year the League's first games were played among the foundation clubs—Carlton, Collingwood, Essendon, Fitzroy, Geelong, Melbourne, St Kilda and South Melbourne.

In 1989, in parallel with the commencement of a new governance structure under an independent Commission, the VFL evolved into the AFL as the league expanded into a national competition.

The AFL now has 18 clubs located in five States and holds matches across Australia. The AFL generates significant revenue for participating clubs and to develop the code through licensing media and broadcasting rights, club memberships, match attendance, corporate sponsorships and hospitality events and merchandising. The AFL reached revenue in 2011 of \$234 million and achieved a broadcasting rights agreement for the 2012-2016 period for an Australian record \$1.253 million.

Australian Football is a major sport in Australia and is among the largest individual business sectors within the sports and recreation industry. It is an industry sector which supports more than 4,400 full time equivalent jobs (excluding players and umpires) and which is estimated to have generated \$4.200 billion in financial contribution to the Australian economy in 2011.

Andrew Demetriou, Chief Executive Officer

[www.afl.com.au](http://www.afl.com.au)

### Australian Rugby Union

#### *Rugby first kicks off in Australia*

As early as the 1820s, there are reports of Rugby games being played at Barrack Square in the city between the army and the crews of visiting ships. Rugby Union formally began in

Australia with the formation of the first clubs, the oldest of which is the Sydney University Club, formed in 1864.

By 1874 there were enough clubs to form a Sydney Metropolitan competition and in that year the Southern Rugby Union was established. In 1892 the Southern Rugby Union of New South Wales and the Northern Rugby Union of Queensland (formed in 1883) became New South Wales and Queensland Rugby Unions respectively.

### *The First Tests*

Representatives from these two unions combined in 1899 when an Australian team played its first Test series - against a visiting team from the British Isles. Four tests were played, Australia winning the first test at the Sydney Cricket Ground 13-3. The second test in Brisbane and the third and fourth Sydney were won by the British Isles who took out the series.

Without a national jersey, the Test matches in New South Wales were played in blue jerseys and in Queensland in maroon - both with the Australian Coat of Arms on their chests. In 1903 Australia and New Zealand played a single test at the Sydney Cricket Ground in front of a crowd of 30,000.

This was the beginning of intense rugby rivalry between the two nations. The crowd had grown to almost 50,000 at the same venue when Australia played New Zealand in 1907. As popular as Rugby had become, it would soon feel the impact of the breakaway professional game of Rugby League, which was formed in 1908.

### *The First Wallabies*

That same year the first Australian representative team, the first Wallabies, went on tour. Sailing on the steamship 'Omrah', the team spent 9 months touring the United Kingdom, Ireland and North America. Of the players, their ages ranged from 20 to 27 years old, height from 5'5" to 6'1" (only 1 player was over 6") and weight from 10 stone to 14 stone.

Following on the heels of a tour by the New Zealand All Blacks, the Australian team was pressured to produce a war cry similar to the Maori Haka. The team were ordered to perform an Aboriginal war cry, but were embarrassed by it. The Australian Captain Herbert 'Paddy' Moran called it the first Wallabies gravest affliction.

The 1908 tour coincided with the London Olympic Games in which Rugby Union was a sport. Invited to play, the Australian team won the gold medal by defeating Cornwall, the Champion English team representing England. When the team returned home, eleven of its members were enticed by the money offered to join the newly formed Rugby League.

From amateur beginnings to today's highly professional organisation, The Australian Rugby Union provides the launching pad for the highly successful Wallabies to make rugby union one of the biggest crowd drawers of any sport in Australia.

John O'Neill, AO, Managing Director & Chief Executive Officer

[www.rugby.com.au](http://www.rugby.com.au)

## **Cricket Australia**

Cricket Australia (CA) is the custodian of cricket in Australia. CA's vision is to develop the game of cricket in Australia with the aim of cricket being Australia's number one sport for viewership, fan passion, participation and team success. Central to our vision to be Australia's favourite sport, we must also be a sport for all Australians.

CA is closing in on its vision with more than 880,000 registered participants in the game of cricket making cricket Australia's number one sport for organised participation. Further reiterating our position as a truly national sport is the 1.4 million people who attended a cricket match in 2011-12 and a highest television audience reach a cricket match in 2011-12 exceeding 18.4 million.

The Australian men's and women's cricket teams continue to excel at international level most recently with the women's team, the Southern Stars, retaining their crown as the World T20 champions for the second tournament in a row.

In 2015, Australia will host the world's 4<sup>th</sup> biggest sporting event when the ICC Cricket World Cup is held in venues across Australia and New Zealand.

### *Member associations*

Cricket Australia is made up of six member associations:

- Cricket New South Wales
- Queensland Cricket
- South Australian Cricket Association
- Cricket Tasmania
- Cricket Victoria
- Western Australian Cricket Association

The Australian Capital Territory Cricket Association and the Northern Territory Cricket Association are non-member associations.

Australian Cricket employs more than 600 staff across the country (excluding players, coaching staff and umpires) and supports an extensive volunteer base at the local and club level.

### *Board of Directors*

Following a recent governance restructure, the Cricket Australia Board comprises six State-appointed Directors and three independent Directors. The Board currently comprises five independent Directors and four Directors who also sit on their respective State Cricket Association Boards.

James Sutherland, Chief Executive Officer

[www.cricket.com.au](http://www.cricket.com.au) and [www.bigbash.com.au](http://www.bigbash.com.au)

## **Football Federation Australia**

Football Federation Australia (FFA) is the governing body of football in Australia and is a member of Fédération Internationale de Football Association (FIFA), the international governing body for football.

While FIFA has the FFA and 207 other national associations as its members, it also recognises six confederations largely grouped along continental lines. Each FIFA member is also a member of a confederation. FFA is a member of the Asian Football Confederation, having joined that body on 1 January 2006.

FFA was established in 2004 and is a member-based organisation. FFA's membership is loosely based on Australia's federated system of government and is comprised of New South Wales, Northern New South Wales, Victoria, Queensland, Western Australia, South Australia, Australian Capital Territory, Tasmania and Northern Territory. Each of these governing bodies has a commitment to comply with the FFA constitution, applicable statutes, by-laws and regulations and is responsible for the game within their respective geographic regions.

The sport of football in Australia has 1.7 million participants and FFA has over 450,000 registered participants in its online national registration database.

In 2005, FFA established Australia's first ever fully professional national football league – the Hyundai A-League. Today, the Hyundai A-League consists of the following football clubs: Adelaide United, Brisbane Roar, Central Coast Mariners, Melbourne Heart, Melbourne Victory, Newcastle Jets, Perth Glory, Sydney FC, the new Sydney Club representing Western Sydney and Wellington Phoenix. FFA's membership also includes a representative of the clubs participating in the Hyundai A-League.

FFA's long-term vision is to establish Australia as a truly world-class football nation.

In order to achieve this vision, FFA's business operations are structured across three core strategic pillars:

- National Teams & Elite Player Development,
- A-League & Competitions, and
- Football Community.

In 2011, FFA was awarded the right to host the AFC Asian Cup in 2015. The AFC Asian Cup 2015 will be the first ever senior men's football tournament staged in Australia and is expected to attract a cumulative global television audience of over 1 billion people.

David Gallop, Chief Executive Officer

[www.footballaustralia.com.au](http://www.footballaustralia.com.au)

## **National Rugby League**

The National Rugby League is the product of a century of Australian sporting evolution.

Since its bold inception in 1908 as a professional competition keen to embrace innovation in the name of opportunity and excitement for players and fans, Rugby League has captivated generations of Australian crowds.

Sixteen teams spread across Australia's eastern seaboard and New Zealand ensure a breathtaking mix of speed and skill in a competition where every team is a genuine contender.

The NRL is the flagship competition of the Australian Rugby League Commission which was formed in 2012 to streamline and strengthen Rugby League's governance structure by providing a single point for all strategic direction.

As a result the Telstra Premiership, the 104-year history of the Kangaroos, the unrivalled spectacle of State of Origin, the grass-roots enthusiasm of more than 480,000 regular competition participants and the unbridled fun and opportunity that comes to one million more children each year through school clinics, Backyard League and One Community activities are all for the first time coordinated through the one independent body.

Chaired by former Kangaroo, Mr John Grant, the ARL Commission brings together a uniquely qualified array of business and sporting leaders who will act as trustees of the game.

The move to a single independent Commission is the biggest structural change to Rugby League's administration since 1908 and is the result of a game-wide decision involving clubs, leagues and the previous NRL Partners News Limited and the ARL to position Rugby League for the future.

While the Australian Rugby League Commission retains an historic name in Australian sport, it represents a new era for Rugby League and for the millions who live and breathe the exhilaration of the Greatest Game of All.

Shane Mattiske, Interim Chief Executive Officer

[www.nrl.com](http://www.nrl.com)

## **Netball Australia**

Netball is more than a game – Australia's leading female sport leads social change, strengthens and builds capacity in communities and empowers women and girls.

Formed in 1927, Netball Australia (originally known as All Australia Women's Basket Ball Association), is the preeminent sporting body for netball in Australia.

Netball is ranked as the leading women's participation team sport and the top team-based sport in Australia for 15 to 24 year olds. Over 1.2 million participants enjoy the game nationally and Australia has been dominant on the international stage since 1963.

Netball Australia has more than 330,000 registered members; 5,000 clubs nationally; 570 Associations; and eight member organisations.

Netball has enjoyed numerous periods of sustained on-court success, having won 10 out of 13 World Netball Championship titles and, combined with netball's off-court community programs, plays a pivotal role in grass roots sport and the local community, impacting on the social, political, economic, education and health status of women and girls.

Netball Australia has an important role in promoting and delivering best practice strategy, planning and decision making; providing a clear national perspective; improving the linkages between Member Organisation jurisdictions; and providing improved community programs and services.

### *Member Organisations*

Netball Australia is made up of eight Member Organisations:

- ACT Netball Association
- Netball New South Wales
- Netball NT
- Netball Queensland
- Netball South Australia
- Netball Tasmania
- Netball Victoria
- Netball WA

The Chief Executive Officer carries out the role of Public Officer for the Company.

Kate Palmer, Chief Executive Officer

[www.netball.asn.au](http://www.netball.asn.au)

### **Tennis Australia**

Tennis Australia is the governing body of tennis within Australia, linking to member associations throughout the country.

Tennis Australia promote and facilitate participation in tennis at all levels, and also conduct national and international tournaments. The most widely recognised of these include:

- The Davis Cup
- The Fed Cup
- Australian Open
- Tennis Pro Tour
- Australian Open Series

The Lawn Tennis Association of Australia - trading as Tennis Australia (TA) - was established by the existing Member Associations (MAs) and New Zealand in late 1904. In 2004/05 TA celebrated the centenary of the organisation and its marquee event - the Australian Open. Today TA is a AUS\$150-million turn-over business and stages one of the world's four Grand Slam tournaments.

Tennis Australia's mission is to grow, manage, promote and showcase the sport of tennis throughout Australia, recognising the health, social, economic and entertainment benefits of sport, and tennis in particular, for people of both sexes, all ages and abilities.

Steve Wood, Chief Executive Officer

[www.tennis.com.au](http://www.tennis.com.au)