



## **Supplementary submission to ALRC Issues Paper: Copyright and the Digital Economy**

### **Fair dealing exemption for news reporting – particularly regarding the reporting of sport**

**26 March 2013**

News Limited made a submission to the ARLC Issues Paper, *Copyright and the Digital Economy* in November 2012 (the Issues Paper). This submission is supplementary to that made in 2012.

This submission focuses on the fair dealing exception for the purpose of reporting news in the *Copyright Act 1968* (the Act), particularly associated with the topic of sport. As stated in our original submission, the current exceptions, including for the purpose of reporting news do not require amendment as they are functioning well.

The fair dealing exceptions for the purpose of news reporting ensure a free and open press. Attempts to define news and/or set limits on the amount material to be used to report news would pose significant threats to freedom of speech and freedom of the press. News Limited does not support attempts to restrict the press under any circumstance.

Further, the granting of exclusive rights for sports content must not prevent fair dealing for the purpose of news reporting – as per the exception of the Act – in relation to that content, regardless of platform, device or technology.

#### **The fair dealing exception for the purpose of news reporting ensures a free and open press**

The fair dealing exception for the purpose of news reporting ensures a free and open press.

Freedom of speech and freedom of the press in Australia continues to be subject to many threats. News Limited opposes attempts to limit the ability of the press to report, and does not support any suggestions that what constitutes news should be defined and/or limited in any way. To claim that the exception is imprecise and uncertain and to suggest that what constitutes news could be articulated by boundaries and limitations is dangerous to the Australian public's right to know.

It is important to note here that there are a growing number of sports administrations that are building their own media teams and reporting news – some of which are actively working to constrain other news gathering and reporting entities, including News Limited, from doing exactly what they are now doing: news reporting. Whatever the motivation for attempting to limit news reporting – including what is reported and how it is reported – it is likely to be to the detriment of society.

To illustrate with an example, the recent Essendon Football Club drugs scandal received extensive coverage, including text, graphics, blogs and video, in newspapers and associated digital properties.

It could be conceived that the result of defining what constitutes news, and/or the volume or amount of material can be used to report news could result – in this example – in the news reporting being stifled and limiting the Australian public’s right to know. In this example, the ‘person in the street’ may consider that the own sports administration’s media unit may be less inclined to apply the expected level of scrutiny, inquiry and reportage to the issue. This would undermine open reporting on a subject of great interest to many Australians.

*i. Defining what constitutes the reporting of news undermines freedom of speech and freedom of the press*

It should not be the case that legislation, including the Act, or any other statute or regulation defines what would or would not constitute news, and/or how it could or could not be reported including the use of audio-visual. Such attempts would be interventionist and would certainly undermine freedom of expression. Furthermore, recommendations for such impost would be opposed by publishers.

Such limitations would be detrimental to all news reporting, including success and triumph such as football grand finals – regardless of the code.

Importantly, the fair dealing exceptions for the purpose of news reporting applied to anything that could be news, not only sport.

*ii. Defining – by ‘guidance’ or other means – the amount of material which can be used under the fair dealing exception undermines freedom of speech and freedom of the press*

Again, it should not be the case that legislation, including the Act, or any other statute or regulation defines what volume of material would or would not constitute news, including the use of audio/visual.

It is the case as more sports administrations develop media arms, there are increasing attempts to restrict and limit the manner in which news can be reported. The Newspaper Publishers’ Association (now The Newspaper Works) made a submission to the Government’s Convergence Review<sup>1</sup>. That submission provides an overview of the situation which arose regarding the restrictions applied under the terms and conditions of accreditation for the International Rugby Board’s 2011 Rugby World Cup. That submission states:

*Newspaper publishers were told they had to restrict RWC video content; all video highlights has to be pulled down after 48hours from a website regardless of public interest or news value, highlights could be no more that 90 seconds, overseas visitors to this content had to be blocked, and there could be no advertising*

As the submission goes on to note:

*Newspaper publishers...were incredulous when the IRB itself posted video highlights of all matches that broke all the rules and restrictions that it wished to impose on newspaper publishers.*

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<sup>1</sup> [http://www.archive.dbcde.gov.au/\\_data/assets/pdf\\_file/0019/142840/Newspaper\\_Publishers\\_Association.pdf](http://www.archive.dbcde.gov.au/_data/assets/pdf_file/0019/142840/Newspaper_Publishers_Association.pdf)

Campbell Reid, News Limited's group editorial director said *'Our ability to cover the event is better if we don't sign the accreditation. It is about freedom of speech and our ability to make decisions on what is news.'*<sup>2</sup>

Restrictions such as these go to the heart of undermining freedom of the press, which resulted in News Limited covering the World Cup from outside of the ground. Such restrictions are an attempt to muzzle the media, and must not be incorporated into legislation or regulation.

Notwithstanding (i) and (ii) the above, should it be the case that a party (such as a sports administration body) believes that there have been breaches of the Act, action can be taken via the courts.

### **Media rights agreements – increasing values and breadth**

It is claimed by some sports administrators that the value of media rights is susceptible to being undermined by the reporting of news. The evidence – media rights deals – suggests that this claim is unfounded.

In fact, a number of the major professional sports administrations in Australia have recently, or are on the cusp of, securing multi-year media rights agreements. Following is an overview of some media rights agreements:

i. Australian Football League (AFL)

The AFL announced broadcast rights in April 2011. News reports suggest Channel 7 and Fox Sports secured broadcast rights for \$1.253b over five years. That figure is up from \$749m for the previous five year period – an increase of close to 70%.

Digital rights were also announced in 2011. Telstra secured this for \$153m over five years.

Additionally, the AFL has agreements with various radio stations across Australia, and an agreement with News Limited for print media.

ii. National Rugby League (NRL)

The NRL announced broadcast rights in August 2012. News reports said Channel 9 and Fox Sports secured those rights for \$1.025b over five years – an increase over the previous period of almost 150%.

Digital rights were announced in December 2012. While exact sum was not disclosed, media reports<sup>3</sup> suggest that Telstra paid about \$150m over five years. Telstra was also required to enable Optus and Vodafone customers to watch NRL games on their wireless devices, for which Telstra would be paid a subscription fee.

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<sup>2</sup> <http://www.theaustralian.com.au/media/news-limited-wont-agree-to-restrictive-accreditation-demands-for-rugby-world-cup/story-e6frg996-1226073980091>

<sup>3</sup> <http://www.theaustralian.com.au/top50/2013/sports-rule-in-a-shifting-media-game/story-fnhac5yx-1226589510339>

iii. Australian Rugby Union (ARU)

The ARU announced broadcast rights in October 2012. Channel 10 and Fox Sports secured those rights for a three year period; however the value of the deal was not disclosed.

iv. Football Federation of Australia (FFA)

The FFA announced broadcast rights in November 2012. SBS and Fox Sports secured those rights for \$160m for a four year period – an increase on previous period of almost 100%.

v. Cricket Australia and Tennis Australia

Cricket Australia and Tennis Australia are currently negotiating their next media rights deals.

Cricket's Australia's broadcast rights are currently held by Channel 9 and Fox Sports; audio rights are held by the ABC; and mobile/wireless rights are held by Vodafone Hutchison Australia.

Tennis Australia's broadcast rights are currently held by Channel 7 and Fox Sports; and digital rights are held by Optus.

### **Senate Committee Inquiry and the resulting Code of Practice for Sports News Reporting**

It is the case that there has, and continues to be, restrictive conditions applied to the reporting of news as it relates to sport by some international sporting bodies. These restrictions are applied to publishers by making it a condition of the terms and conditions of media (photographers and journalists) accreditation – to access a ground and cover an event.

Such restrictions within the domestic sporting arena, and the threat that breakdown in communications between media and sporting organisation could adversely affect the Australian public's traditional access to news reporting about sporting events, prompted a Senate Committee Inquiry into the Reporting of Sports News in the Digital Media Environment<sup>4</sup>. The Committee recommended that:

*'stakeholders negotiate media access to sporting events based on the principle that all bona fide journalists, including photojournalists and news agencies, should be able to access sporting events regardless of their technological platform'<sup>5</sup>.*

As a result, the Code of Practice for Sports News Reporting (the Code)<sup>6</sup> was established on 30 March 2010 following negotiation by news organisations and sports administrators with the assistance of the Australian Competition and Consumer Commission.

The objective of the Code – regardless of publishing platform – is:

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<sup>4</sup>[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=eca\\_ctte/completed\\_inquiries/2008-10/sports\\_news/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eca_ctte/completed_inquiries/2008-10/sports_news/index.htm)

<sup>5</sup>[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=eca\\_ctte/completed\\_inquiries/2008-10/sports\\_news/report/b01.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eca_ctte/completed_inquiries/2008-10/sports_news/report/b01.htm)

<sup>6</sup>[http://www.archive.dbcde.gov.au/data/assets/pdf\\_file/0019/127324/Code\\_of\\_Practice\\_Sports\\_News\\_Reporting\\_MAR\\_CH\\_2010.pdf](http://www.archive.dbcde.gov.au/data/assets/pdf_file/0019/127324/Code_of_Practice_Sports_News_Reporting_MAR_CH_2010.pdf)

*...to ensure that media organisations are able to access sporting events for the purposes of gathering news content for news reporting<sup>7</sup>.*

In practice, this means that no restrictions should be placed – regardless of publishing platform – on the text/photography reportage of sports events as a condition of accreditation. While being world-leading, the Code does not apply to international sports events, for example the Australian cricket tour of India (whereby the BCCI sets the accreditation terms and conditions); and the Rugby Union World Cup.

Signatories to the Code include sports administrations – Australian Football League (AFL), Australian Rugby Union (ARU), Cricket Australia, National Rugby League (NRL) and Tennis Australia; and news organisations – Agence France-Presse (AFP), Australian Associated Press (AAP), Getty Images, Fairfax Media and News Limited. These organisations are founding members of the Code and members of the Code Committee. The chair of the Code Committee is Mr Kevan Gosper AC of the International Olympic Committee.

It should also be noted here that the Senate Committee also recommended *‘that the parliament should not amend copyright law to clarify the application of the news ‘fair dealing’ exception, unless future specific case law outcomes appear to warrant it’*. This has not been required.

### **Media accreditation**

As referenced above, the media – journalists and photographers – are required to be accredited with sports administrators to enable them to attend and cover the sporting event to which the accreditation applies. Media outlets are required to apply for accreditation and agree with terms and conditions, consistent with the Code above and set by the sporting body, to access events. It should be noted that accreditation is not guaranteed – it is in fact discretionary.

To that end the ALRC may be aware of recent events in India whereby the Board of Control for Cricket in India (BCCI) did not accept the application for accreditation by international photographic news agency Getty Images. This was the case for the England and Pakistan cricket tours of India in late 2012, and also for the current Australian cricket tour of India (February – March 2013). The BCCI’s decision to deny access to grounds by reputable photo-agencies has resulted in other international news organisations – which had been granted access – suspending their photographic coverage in protest.

It is notable that on the eve of the England tour, Kevan Gosper, Chairman, IOC Press Commission, said of the BCCI:

*‘The IOC strongly disagrees with these moves by the BCCI, which we believe are a direct attack on the freedom of the media to report from sporting events, and shows contempt for the sporting public around the world who would otherwise like to follow these important matches.’*

As a result of the approach taken by the BCCI, News Limited and other Australian publishers, independently, are not providing photographic coverage of the current Cricket Australia tour of India.

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<sup>7</sup> [http://codeofpracticeforsportsnewsreporting.com.au/pdfs/FINAL\\_CODE\\_30\\_March.pdf](http://codeofpracticeforsportsnewsreporting.com.au/pdfs/FINAL_CODE_30_March.pdf)

Prior to this, the International Rugby Board's media accreditation for the 2011 World Cup included accreditation terms that would restrict newspaper websites to running only 90 seconds of highlight videos, require them to be taken down after 48 hours and have geographical blocks in place to stop people outside Australia accessing them.

As articulated previously in this submission, such restrictions go to the heart of undermining freedom of the press, which resulted in News Limited covering the World Cup from outside of the ground.

Campbell Reid, News Limited's group editorial director said:

*'Our ability to cover the event is better if we don't sign the accreditation. It is about freedom of speech and our ability to make decisions on what is news.'*<sup>8</sup>

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<sup>8</sup> <http://www.theaustralian.com.au/media/news-limited-wont-agree-to-restrictive-accreditation-demands-for-rugby-world-cup/story-e6frg996-1226073980091>