



Australian Government

Senate Committee on Environment, Communications and the Arts

Inquiry into the reporting of sports news and the emergence of digital media

Australian Government Response to the Committee's Report

January 2011

INTRODUCTION

On 12 February 2009, the Senate referred the matter of the reporting of sports news and the emergence of digital media to the Senate Standing Committee on Environment, Communications and the Arts for inquiry and report by 14 May 2009 (the Senate Inquiry).

The terms of reference for the Senate Inquiry covered:

- the balance of commercial and public interests in the reporting and broadcasting of sports news
- the nature of sports news reporting in the digital age, and the effect of new technologies (including video streaming on the internet, archived photo galleries and mobile devices) on the nature of sports news reporting
- whether and why sporting organisations want digital reporting of sports regulated, and what should be protected by such regulation
- the appropriate balance between sporting and media organisations' respective commercial interests in the issue
- the appropriate balance between regulation and commercial negotiation in ensuring that competing organisations get fair access to sporting events for reporting purposes
- the appropriate balance between the public's right to access alternative sources of information using new types of digital media, and the rights of sporting organisations to control or limit access to ensure a fair commercial return or for other reasons
- should sporting organisations be able to apply frequency limitations to news reports in the digital media
- the current accreditation processes for journalists and media representatives at sporting events, and the use of accreditation for controlling reporting on events
- options other than regulation or commercial negotiation (such as industry guidelines for sports and news agencies in sports reporting, dispute resolution mechanisms and codes of practice) to manage sports news to balance commercial interests and public interests.

The Senate Inquiry received 44 submissions, the majority of which were from either sporting or media organisations. On 14 May 2009, the Committee tabled its report to the President of the Senate. The report made five recommendations, which considered: the Independent Sport Panel's review and recommendations; copyright; media access to sporting events negotiations; and consideration of an industry code to aid in dispute resolution between media and sporting organisations.

BACKGROUND

Review of sport and sporting trends

The Independent Sport Panel (the Panel) was established on 28 August 2008 to investigate and report to the Minister for Sport, the Hon Kate Ellis MP, on measures needed to ensure Australia's sporting system remains prepared for future challenges, at the elite and grassroots levels. The Minister for Sport released the Panel's report on 17 November 2009.

The Panel was tasked with a number of priorities, one of which was to identify opportunities to increase and diversify the funding base for sport.

The Panel noted the need for a balance between the profitability of sport and reasonable access to sports media for news reporting. They stated that this balance would need to consider the public's right to alternative sources of information, and professional sport's need for control over material in order to ensure a fair commercial return.

The Panel did not believe there was a demonstrated need for government intervention. Instead, the Panel considered it appropriate for sporting and media organisations to reach mutually beneficial arrangements.

Separately, during the course of the Senate Inquiry, the Australian Sports Commission identified problems for smaller sporting organisations with engaging mixed media professionals and creating online content which can attract improved returns.

Copyright legislation and sport

Under the *Copyright Act 1968* (the Copyright Act), a sporting event *per se* is not protected by copyright. Copyright protects original expressions in certain material forms, including literary, dramatic, musical and artistic works and other subject matter (sound recordings, cinematograph films, television and sound broadcasts and published editions of works).

Examples of material relating to a sporting event that can be protected by copyright include a film of the event made for the purpose of a television broadcast, the broadcast transmission, photographs taken by a photographer or written text by a spectator to describe or analyse the event. In the latter case, copyright protects original expression in the written text and not the underlying facts or events.

Material recording a sporting event may embody several separate copyrights.

For example, film made of an event may have separate copyrights in the film, in a prepared script, in a sound recording used in the sound track, and in a background photograph included in the film.

The first owner of copyright is normally the author of a work but there are exceptions, including where the author is a journalist employed by a newspaper or magazine or where the author is an employee and the work is made pursuant to a contract of employment. In addition, a future copyright can be assigned by the author. The first owner of a film is the 'maker'. This means the first owner of copyright in film of a sporting event may be the television broadcaster who arranges for its making. Alternatively, the broadcaster may sell the copyright in film coverage or a broadcast transmission to another party such as a sporting organisation.

Under the Copyright Act, the rights holders are free to decide whether and how to licence copies of the material in which they own the copyright. However, sporting organisations are able to use contracts to place restrictions on a copyright owner on the use of material made at an event through conditions placed on entry to the event. These conditions are usually agreed through accreditation contracts signed between a journalist or editor on behalf of a media organisation and the sporting organisation. As well as dealing with the exploitation of

material made at an event, accreditation agreements also commonly cover such matters as liability in the event of injury, security, and operational health and safety matters.

A media organisation that wishes to use copyright material relating to a sporting event may seek authorisation from the copyright owner. In the absence of authorisation, a media organisation may rely on one of the copyright exceptions in the Copyright Act.

Two particularly relevant exceptions are sections 42 and 103B, which allow 'fair dealings' for the purpose of reporting the news. Section 42 states:

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:
 - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
 - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

Section 103B is a parallel provision which provides for a fair dealing with 'an audiovisual item' (meaning a sound recording, a cinematograph film, a sound broadcast or a television broadcast) for the purpose of reporting the news.

In order for either of the above exceptions to apply, the particular dealing with copyright material must be both 'fair' and for the purpose of reporting the news.

Some sporting organisations have raised concerns about the use of video highlight packages, and more particularly the availability of online archives of video highlights. While print media in particular has a long history of freely available archival material, sporting organisations have argued that the greater accessibility of online media is problematic.

Legal action is an available remedy for rights holders and exclusive licensees who think their copyright has been infringed. Guidance on whether a particular dealing is likely to be fair or for the purpose of reporting the news can be obtained from legal authority and by examining similar provisions. In addition, industry conventions have been developed to reduce the potential for legal disputes. In its submission, the Special Broadcasting Service (SBS) referred to the 'three by three by three' rule, which has evolved to suit the needs of television:

[N]on-rights holders will use no more than three minutes of footage, spaced at intervals of longer than three hours, no more than three times a day ... [T]his convention may be flexible in particular circumstances—such as where an extraordinarily newsworthy sporting event demands more regular reporting.¹

¹ SBS submission to the Senate Inquiry on the reporting of sports news and the emergence of digital media, 2009, page 6.

Amendments to Copyright Legislation

In 2002, the Copyright Law Review Committee provided a report titled *Copyright and Contract* to the then Attorney-General. The report examined the way contracts were being used in the digital environment to set the terms and conditions of access to, and use of, copyright material, and included recommendations suggesting amendments to the Copyright Act. A recommendation was to protect certain exceptions, including sections 42 and 103B, from being modified or excluded by contractual agreements.

A number of submissions to the Senate Inquiry, including those from the Australian Associated Press and Optus, recommended adopting the Copyright Law Review Committee's recommendation.

Industry codes

A prescribed industry code of conduct was raised as a possible mechanism to reduce conflict between media and sporting organisations over copyright and fair dealing. A prescribed industry code is a code which regulates the conduct of participants in an industry, both in their dealings with each other and towards their consumers. These codes can be either mandatory or voluntary.

Section 51AE of the *Trade Practices Act 1974* (the Trade Practices Act) provides for regulations relating to prescribed industry codes. The regulations may:

- prescribe an industry code, or specified provisions of an industry code; and
- declare the industry code to be a mandatory industry code or voluntary industry code; and
- for a voluntary industry code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be bound (by reference to provisions of the code or otherwise).

The policy guidelines for developing a prescribed industry code require that proposals for such a code only proceed if:

- The code would remedy an identified market failure or promote a social policy objective; and
- The code would be the most effective means for remedying that market failure or promoting that policy objective; and
- The benefits of the code to the community as a whole would outweigh any costs; and
- There are significant and irremediable deficiencies in any existing self-regulatory regime—for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems; and
- A systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and

- A range of self-regulatory options and ‘light-handed’ quasi-regulatory options has been examined and demonstrated to be ineffective.²

There are four mandatory prescribed industry codes declared by regulation under Part IVB of the Trade Practices Act: the *Franchising Code of Conduct*, the *Oil Code*, the *Horticulture Code of Conduct* and the *Unit Pricing Code of Conduct*. No voluntary prescribed industry codes have been declared under Part IVB of the Trade Practices Act.

Industry codes—enforceability

The enforceability of prescribed industry codes is governed by Part IVB of the Trade Practices Act. Section 51AD of that Act provides that a corporation must not, in trade or commerce, contravene an ‘applicable industry code’. An applicable industry code is one which has been declared by regulations under section 51AE to be either a mandatory or a voluntary prescribed industry code.

Voluntary prescribed industry codes are applicable only to those corporations which have consented to be bound by the code. The code can specify how and to what extent corporations agree to be bound.

A breach of a prescribed industry code is a breach of the Trade Practices Act, which can be prosecuted either privately by affected parties or by the Australian Competition and Consumer Commission, which has responsibility for the enforcement of prescribed industry codes. The Trade Practices Act provides for civil remedies for breaches, including damages (section 82), remedial orders (section 87), and injunctions (section 80). There are no criminal sanctions or civil penalties for breaches of a code.

Developments since the Inquiry

Following the release of the Committee report’s in May 2009, the Government noted a continuation of disputes over access to sporting venues between some media agencies and sporting organisations. To assist in the resolution of these disputes, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, asked the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel, to chair a series of roundtables between sporting and media organisations.

The roundtables focused on issues surrounding the use of text, photography and data and led to the development of a new voluntary code of practice for the sports news reporting industry.

The *Code of Practice for Sports News Reporting* (the Code) sets out the rights and responsibilities of sporting and media organisations with regards to text, photography and

² *Prescribed Codes of Conduct: Policy guidelines on making industry codes of conduct enforceable under the Trade Practices Act 1974*, Treasury, 1999, pages 7–8. Available online from www.treasury.gov.au.

data. The objective of the Code is to ensure that media organisations are able to access sporting events for the purpose of sports news reporting.

The Code was signed into being from 30 March 2010. A Code Administration Committee was established on that day to manage any issues that may develop, with Mr Kevan Gosper and Mr Mark Hollands appointed as the independent chair and secretary of the Committee respectively.

It is understood that discussions about the Code played an important part in the return of AAP agency photographers to AFL matches for the 2010 season, the first time since 2007.

Recommendations and Australian Government Response#

The Australian Government has considered the Committee's report and provides the following response to the recommendations. The Senate Committee's recommendations are addressed in turn below.

Recommendation 1

The committee urges the Government to take into account the opportunities and challenges presented by digital media to sports organisations' current and future revenue prospects and options, and recommends that the current Crawford review of sports pay particular attention to the capacity of sports to invest in digital innovation.

Australian Government Response

The Government notes this recommendation.

In its report, the Independent Sport Panel (the Panel) addressed the impact the digital media was having on the broadcasting of sport in Australia.

The Panel reported:

- A balance is needed between the ability of sports to protect their commercial rights and generate funds to promote their sport, and reasonable access to content for news reporting for media outlets.
- There needs to be an appropriate balance between the public's right to access alternative sources of information using new types of digital media, and the rights of sporting organisations to control or limit access to ensure a fair commercial return.
- The Panel believes that at this time there is not a demonstrated need for government intervention; it is appropriate for sporting organisations to deal with the various media outlets to attain mutually beneficial arrangements.

The Panel did not make any specific recommendations on the issue.

The Government also notes the Australian Sports Commission's work in assisting sporting organisations to take full advantage of the digital era's opportunities. The Australian Sports Commission provides direct support to national sporting organisations by helping them identify commercial opportunities to improve capacity and sustainability, and identify and develop initiatives to increase non-government funding sources.

Recommendation 2

The committee recommends 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.

Australian Government Response

The Government supports this recommendation.

The Government agrees that there is no compelling evidence at present to indicate that the 'fair dealing' exceptions for reporting the news (sections 42 and 103B of the Copyright Act) are inadequate in their present form.

The exceptions are flexible and technology neutral. If made too prescriptive, they may fail to maintain the necessary balance between the rights of copyright owners and the larger public interest in encouraging innovation and access to information. This is particularly important for responding to new forms of digital media.

Recommendation 3

The committee recommends that the government consider and respond to the Copyright Law Review Committee report and its recommendations.

Australian Government Response

The Government does not support this recommendation in the present context.

The report of the Copyright Law Review Committee, *Copyright and Contracts*, examined the extent to which electronic trade in copyright works and other subject matter was subject to agreements which purported to exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act, especially online consumer licences. The report is of limited relevance to the matters considered by the Committee, such as accreditation contracts. The Committee noted that it became aware of the report late in its inquiry and did not consider the issues in detail.

Recommendation 4

The committee recommends 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.

Australian Government Response

The Government supports this recommendation.

In order to expedite agreement on access arrangements for all bona fide journalists (including photographers and news agencies), the Government convened a series of roundtables between major news agencies, print media and sporting organisations that made submissions to the Inquiry. These meetings were chaired by the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel.

The roundtables facilitated agreement between media and sporting organisations, and led to the development of the *Code of Practice for Sports News Reporting* (the Code). The Code took effect from 30 March 2010. The initial signatories and members of the Code Committee are:

Independent members

Mr Kevan Gosper (independent chair)
Mr Mark Hollands (independent secretary)

Code signatories

Agence France-Presse—Mr Marc Lavine
Australian Associated Press—Ms Emma Cowdroy
Australian Football League—Mr Simon Lethlean
Australian Rugby Union—Mr Peter Friend
Cricket Australia—Mr Dean Kino
Fairfax Media—Ms Gail Hambly
Getty Images—Mr Stuart Hannagan
National Rugby League—Mr John Brady
News Limited—Ms Creina Chapman
Tennis Australia—Ms Kate Roffey

As recommended by the Senate Committee, the Code specifically protects the right of bona fide media organisations to be present at sporting matches regardless of the eventual platform on which their photography, text and data would be reported. Additionally, the Code prohibits limits on the quantity or timing of news updates.

The Government considers the Code to be a good-faith response from sporting and media organisations that is in accordance with the Recommendation.

Recommendation 5

In the event that these negotiations are unsuccessful, the committee recommends that the Minister consider initiating the process for consideration of a code under Section 51AE of the Trade Practices Act.

Australian Government Response

The Government notes this recommendation and will monitor the performance of the Code of Practice for Sports News Reporting (the Code).

The Code Administration Committee will provide an annual report on the performance of the Code to the Minister for Broadband, Communications and the Digital Economy, the Chair of the Australian Competition and Consumer Commission, and the Minister for Sport. This report will include:

- (a) A statement on the success or otherwise of the Code in managing complaints and any recommended changes to the Code;
- (b) The nature of any disputes/breaches of the Code that occurred during the period;
- (c) The number of disputes/breaches;

- (d) An outline of how disputes were resolved;
- (e) The progress of any disputes which were heard by the mediator but which were not able to be resolved; and
- (f) Any opinion recorded by a mediator in connection with the mediation of a dispute that a party was not acting in good faith.

In addition, in the event that 70 per cent of the Code Administration Committee agree that a signatory has committed a significant and blatant breach of the Code, or a number of breaches of the Code, and mediation has not been able to resolve these breaches, the Committee can choose to inform the Department of Broadband, Communications and the Digital Economy about their concerns, for referral to the Government and possible further action.