



SUBMISSION TO SENATE INQUIRY INTO THE REPORTING OF SPORTS NEWS AND DIGITAL MEDIA

Australian and New Zealand Sports Law Association Inc. ("**ANZSLA**") is a non-profit organisation dedicated to providing education, advocacy and network opportunities on legal issues affecting sport within Australia and New Zealand. ANZSLA was formed in 1990 and its membership includes lawyers and barristers, sports administrators at all level, academics in legal and sporting disciplines and government representatives. Membership of ANZSLA is open to anyone with an interest in sport.

On 20 February 2009, ANZSLA received notification from Senator Anne McEwan, Chair of the Senate Standing Committee on Environment, Communications and the Arts ("**the Committee**") inviting ANZSLA to make a submission in relation to the Senate's Inquiry into the reporting of sports news and the emergence of digital media ("**the Inquiry**").

ANZSLA welcomes the opportunity to make a submission to the Committee.

Terms of Reference

The terms of reference of the Inquiry raise various legal and commercial issues.

Most of the issues in the terms of reference concern commercial matters, and ANZSLA does not propose to make direct submissions on those points. No doubt sporting organisations, media organisations and other stakeholders will make submissions to the Committee in that regard.

ANZSLA's submission is intended to provide the Committee with a brief background on relevant legal issues to assist the Committee in identifying and dealing with these

issues, and to make some general comments and observations about sports news reporting in the digital age to assist the Committee's deliberations.

To this end, the primary focus of this submission is the nature of the fair dealing exception to copyright infringement under the Copyright 1968 (Cth). Many digital media organisations rely on this provision to access and disseminate sports broadcasting content to which they do not otherwise have a direct contractual right. The submission also comments on "news access" arrangement.

Copyright in a Sporting Event

Copyright is a means of protecting intellectual property. Copyright protects various different types of works including literary, dramatic and cinematographic works. A sporting event in and of itself is not protected by copyright as it does not form part of one of the accepted categories or works or subject matter other than works ("Part IV works") recognised under the Australian *Copyright Act 1968* (Cth). This has been recognised since the 1937 decision of the High Court in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, which stands for the proposition that there is no property in a spectacle.¹

Copyright does however attach to the original cinematograph film recording of a sporting event and in the broadcast (television and sound broadcast) of a sporting event.²

Such copyright is vested in the maker or producer of the relevant cinematograph film or broadcast.³ In the case of sporting events, copyright in the film or broadcast of a sport is generally owned by the broadcaster or the relevant sporting organisation. Both cinematograph films and broadcasts are categorised as subject

¹ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

² Section 10(1) *Copyright Act 1968* (Cth). Also note that copyright in cinematograph films and broadcasts as well as other Part IV works subsists independently of the works which are embodied in them. For example, in relation to a film, copyright may subsist in the cinematograph film itself but it may also subsist in the screen play for the film (as a dramatic work), the music (as a musical work) and lyrics (as a literary work). See section 113 *Copyright Act 1968* (Cth).

³ Section 98 and 99 *Copyright Act 1968* (Cth).

matter other than works in Part IV of the *Copyright Act 1968* (Cth), which deals with other audio visual items.

Copyright in a cinematograph film gives the owner the exclusive right to (a) make a copy of it; (b) cause it to be shown or heard in public; and (c) communicate it to the public.⁴ The owner of copyright in a cinematograph film has the exclusive right to authorise the doing of any one the previously mentioned acts. For example, in instances where the sport owns the copyright in the cinematograph film, the sport can choose how it is broadcast to the public and who by. Sports, depending on the nature of the sporting event, generally contract with one or several broadcasters to broadcast the film in whole or in part through a variety of technological mediums including television, the web and mobile platforms.

Copyright in a television or sound broadcast gives the owner the exclusive right to (a) make a cinematograph film or copy of a cinematograph film of a television broadcast; (b) make a sound recording or copy of a sound recording of a sound broadcast or television broadcast; (c) re-broadcast a television or sound broadcast or (d) communicate it to the public otherwise than by broadcasting it.⁵

Copyright Infringement and Substantiality

The *Copyright Act 1968* (Cth) provides that copyright in Part IV works (including cinematograph films and broadcasts) is infringed if a person who is not the owner of the copyright does any act comprised in the copyright (the exclusive rights in the copyright) in Australia without the licence of the copyright owner.⁶ Infringement also occurs if a person who is not the owner of the copyright authorises a person to do any of the acts described above.

In order for an act to constitute copyright infringement there must however be a taking of a “substantial part” of the relevant Part IV works.⁷ The corollary of the

⁴ Section 86 Copyright Act 1968 (Cth).

⁵ Section 87 Copyright Act 1968 (Cth).

⁶ Section 101 *Copyright Act 1968* (Cth).

⁷ Section 14 *Copyright Act 1968* (Cth).

substantiality requirement is that copyright is not infringed by an unauthorised dealing with an insubstantial part of a work or other subject matter.

In determining substantiality the classic starting point is the statement by Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*: "The question whether (an author) has copied a substantial part depends much more on the quality than on the quantity of what has been taken. One test may be whether the part which he has taken is novel or striking, or merely a common-place arrangement of ordinary words or well-known data."⁸

Substantiality does not always depend on establishing originality in the sense of being striking or novel. Rather, originality can depend on the labour, skill and expertise involved in the relevant copyright work.⁹

The latter approach has been adopted more widely with respect to Part IV works, as Part IV subject matter do not require originality – where the quantity rather than the quality of the part taken has been emphasised in determining substantiality.

Substantiality was one of the issues in the recent case of *Nine Network Australia v IceTV Pty Ltd* [2008] FCA FC 71 (8 May 2008). The case involved a claim by Nine that Ice TV had infringed Nine's copyright in its television program schedules. The Full Court of the Federal Court of Australia considered whether Ice TV had reproduced a substantial part of Nine's weekly schedule by incorporating the time and title information in its electronic program guide, thereby infringing Nine's copyright.

The Court held that substantiality depends much more on quality rather than quantity of what is taken and this must be assessed by reference to the interest protected by the copyright. In determining that Ice TV had taken an essential and material part of Nine's copyright work, the Court looked at the quality of what was

⁸ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465, 469.

⁹ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465, 481.

taken. The Court found that the small quantity of the material that had been reproduced in fact constituted an appropriation of the most creative elements of the skill and labour used by Nine when creating the weekly schedules. The Full Court also found that the necessarily causal relationship existed between the product of the alleged infringement and the copyright work. This case is currently on appeal to the High Court.

The audio-visual reporting of sports news does not involve communication of the entirety of a cinematograph film or broadcast of a sporting event, but rather the communication of highlights on key occasions only. For example, only a few minutes of a cricket Test Match or the goals in a soccer match are likely to be deemed "newsworthy" for a media organisation's nightly television news service.

In order for a copyright owner to make a case for copyright infringement – and subject to the fair dealing defences – the owner must show that a substantial part of the protected copyright has been taken.

The Fair Dealing Exception to Copyright Infringement

The defence of fair dealing dates back to case law in the 19th century in the United Kingdom, where the defence first existed at common law. The *Copyright Act 1905* (Cth) was the first federal copyright statute to be enacted in Australia by the Commonwealth parliament. That Act did not contain any specific fair dealing provisions, but did contain a provision relating to the abridgment or translation of a book for a private purpose in section 28 which provided that: "Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making ***fair extracts*** (emphasis added) from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information."

The Act (and this sole provision referencing fair dealing) was short lived and was replaced in 1912 by the *Copyright Act 1912* (Cth), where the federal parliament declared that the British *Copyright Act 1911* (UK) was in force throughout Australia.¹⁰

As a consequence, the *Copyright Act 1911* (UK) and the provisions relating to fair dealing were incorporated into Australian copyright law, marking the first origins of a true fair dealing defence in Australian copyright law.

The *Copyright Act 1912* (Cth) was eventually repealed in 1968 and replaced by the *Copyright Act 1968* (Cth), which included more comprehensive fair dealing provisions with respect to literary, dramatic, musical or artistic works for the purpose of (a) research or private study;¹¹ (b) criticism or review;¹² (c) associated with reporting of news in a newspaper, magazine or similar periodical or in a cinematograph film.¹³

Subsequent amendments to the Copyright Act 1968 (Cth) have extended the fair dealings provisions to Part IV works, including cinematograph films and broadcasts with respect to fair dealings for the purposes of research or private study; criticism or review; or purposes associated with reporting of news in sections 103C; 103A and 103B of the *Copyright Act 1968* (Cth) respectively.

Furthermore, the fair dealing provisions for both works and Part IV works have been extended in the *Copyright Act 1968* (Cth) to other fair dealings including for the purpose of parody or satire¹⁴ and acts done for the purpose of judicial proceedings.¹⁵

¹⁰ Section 8 *Copyright Act 1912* (Cth) states that "(t)he British Copyright Act, a copy of which is set out in the Schedule to this Act, shall, subject to any modifications provided by this Act, be in force in the Commonwealth, and shall be deemed to have been in force therein as from the first day of July, One thousand nine hundred twelve."

¹¹ Section 40 *Copyright Act 1968* (Cth)

¹² Section 41 *Copyright Act 1968* (Cth).

¹³ Section 42 *Copyright Act 1968* (Cth).

¹⁴ With respect to works see section 41A and with respect to Part IV works see section 103AA of the *Copyright Act 1968* (Cth).

¹⁵ With respect to works see section 43 and with respect to Part IV works see section 104 of the *Copyright Act 1968* (Cth).

Fair Dealing for the Purpose of Reporting the News (Part IV Subject Matter)

Section 103B of the Copyright Act relates to “fair dealing for purpose of reporting news” and provides:

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item 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 first-mentioned audio-visual item 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.

The **first limb** is concerned with reporting in a newspaper, magazine or similar periodical, while the **second limb** is concerned with reporting the news in the electronic media by way of cinematograph film or other means of communication.

Historically, the **first limb** was directed to print media, but given technological developments and the digital age, there is no reason why this provision should not be interpreted to include electronic versions of newspapers or magazines that are delivered electronically on-line or on CD-ROM. This is consistent with the legislature’s policy behind recent reforms to the *Copyright Act 1968* (Cth) that the legislation is to be read and interpreted as technology neutral.

The **first limb** of this fair dealing provision is conditional upon giving a sufficient acknowledgement of the copyright material. Generally, cursory reference to the

source of a work which is reproduced will not suffice, if no mention is made of the author.¹⁶

The **second limb** applies to the reporting of news by electronic media – that is by way of cinematograph film or other communication. The term “communication” applies to both television and sound broadcasts (wired and wireless), as well as other online transmissions to the public and making works available online, such as where news reports are posted on a website.¹⁷

What Constitutes Reporting the News?

The ordinary definition of “news” is applied by the courts when considering the fair dealing exception. In *De Garis v Neville Jeffress Pidler Pty Ltd*, Beaumont J relied on and cited the *Macquarie Dictionary* as to the definition of news: “1. A report of any recent event, situation etc; 2. A report of events published in a newspaper, journal, radio, television, or any other medium; 3. Information, events etc considered as suitable for reporting: *it's very interesting but not news*; 4. Information not previously known: *that's news to me*.”¹⁸

“News” for the purposes of fair dealing is not restricted to current events. For example, old material or footage may be relevant to current news events. Conversely, copyright material may relate to past events which constitute news.

Drawing a distinction between what is news and what is entertainment may be elusive.¹⁹ In determining whether the use of copyright material constitutes fair dealing, the courts are likely to require more than simply a connection with a newsworthy topic. The crucial element is whether the primary purpose of the use is to report or comment on news. Thus, where the court considers the purpose of

¹⁶ *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359.

¹⁷ See section 10(1) *Copyright Act 1968* (Cth).

¹⁸ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 at 301-302.

¹⁹ *TCN Channel Nine Pty Ltd v Newtwok Ten Pty Ltd* (2001) 108 FCR 235; 50 IPR 335 at 381 (Conti J).

using the copyright material is primarily to entertain, the presence of newsworthy issues may not be sufficient to make the use a fair dealing.

What Constitutes Fair Dealing?

If it can be established that the relevant dealing is for the purpose of reporting the news, attention then turns to the question of whether that dealing is “fair”.

The *Copyright Act 1968* (Cth) does not define the term “fair dealing,” for the purposes of reporting the news with respect to Part IV matter. There are very few reported authorities on what constitutes fair dealing for the purposes of reporting the news. Ultimately the question of whether or not a particular dealing is a fair dealing for the purpose of reporting the news is an objective question for the court to decide.

This lack of guidance as to what constitutes a fair dealing is in contradiction to the fair dealing exception for the purpose of research and study, where section 103C relating to Part IV works sets out the following matters which a court shall have regard to in determining whether a dealing is fair:

- a) The purpose and character of the dealing;
- b) The nature of the audio-visual item;
- c) The possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price;
- d) The effect of the dealing upon the potential market for, or value of, the audio-visual item; and
- e) In a case where part only of the audio-visual item is copied – the amount and substantiality of the part copied taken in relation to the whole item.

Industry Guidelines – News Access

There are two understandings as to the definition of “news access” in the broadcasting industry.

The first understanding of news access relates to the physical access to a particular event – so that other broadcasters, although not entitled to broadcast the event live in view of the official broadcaster’s exclusive rights, can report an item of news about the event. This is not a matter for copyright law. Whether or not the other broadcasters are entitled to have television cameras at an event in order to record that event to enable them to report that event, or whether the exclusive rights of the broadcaster restricts such access, is not a question of copyright but is properly a matter for contract law – that is, a question of the nature and extent of separate contractual agreements (if any) between the relevant sporting body and/or venue owner, the official broadcaster, and the other broadcasters.

The second understanding of news access relates to whether broadcasters can use part of the actual broadcast transmitted by another broadcaster of an event, for the purposes of reporting the news. Examples of such news access guidelines are the News Access Rules issued by the International Olympic Committee prior to every summer and winter Olympic games or the Media Accreditation terms and conditions of which the Fédération Internationale de Football Association (FIFA) has in place for each of its football (soccer) tournaments around the World. Many Australian sports organisations also have media accreditation regimes.

It is ANZSLA’s understanding that in the broadcasting industry in the United Kingdom at least, there is a recognised set of guidelines as to the terms of which “news access” will be allowed to other broadcasters by a broadcaster with exclusive rights to particular events.

While failure to adhere to those guidelines may still amount to fair dealing, the adherence to the guidelines provides “a solid foundation for a fair dealing defence”.²⁰

Observations and Comments by ANZSLA

ANZSLA wishes to make the following observations and comments about sports news reporting in the digital age:

1. Media rights revenue is a key revenue source for high profile sports organisations.
2. In considering the commercial and public interests associated with the reporting and broadcast of sports news the Committee needs to consider more than just the commercial interests of sporting and media organisations, and whether, how and when the public gets access to media reporting of sports events. The Committee also needs to consider the interests of the players in the relevant competitions and the “non-commercial” interests of the sports stakeholders in general (including participation at the low / no profile “grassroots” level of the sports) and the indirect benefits of the sporting organisations maximising its revenue, such as facility development and other sporting / community initiatives.
3. The nature of sports reporting means that the “best” or “quality” parts of a sporting event can be “cherry picked” for highlights based news reports.
4. Digital delivery of sports news reporting allows for the non-linear, on demand provision of sports reports: consumers can now access more news reports, more often and in more ways.

²⁰ Scott J in *British Broadcasting Corporation v British Satellite Broadcasting Ltd*

Copyright and Fair Dealing

5. Copyright in cinematographic films and broadcasts of high profile sporting events is usually owned by the sporting organisation and/or the broadcaster.
6. Media organisations usually preserve, and guard ferociously, their right to engage in conduct they say constitutes fair dealing for the reporting of news under the fair dealing exemption in the Copyright Act.
7. Where content is delivered under the fair dealing for reporting of news provisions, sports organisations controlling rights do not receive any revenue from such use.
8. Fair dealing in the digital age raises new questions and issues, particularly in relation to the purpose for which the dealing is occurring. Determining whether the purpose of the communication is actually the reporting of news or entertainment is not straight forward, and the concept is imprecise and capable of abuse in this digital era where emerging news and communications mediums are rapidly evolving – that is, the line between news and entertainment is not as readily discernible as it may have been in the pre-digital age. In submissions made to the Commonwealth Attorney-General's Department as part of a review of the fair use copyright exceptions the AFL, NRL, Cricket Australia and Australian Rugby Union identified the potential threat to their revenue for fair dealing exception for the reporting of news in the digital age.
9. There is a legitimate need for further clarity of the reporting of news fair dealing exemption through statutory reform, such as guidelines which involve frequency (both number and time limit) restrictions.

Media Access to Sporting Events

10. There is no absolute right for media to attend or report on a sporting event, and media organisations are, like the general public, subject to conditions of entry imposed by third party venue owners and the relevant sporting body.
11. Accreditation arrangements between media and sports organisations allow sporting organisations to control, via contractual arrangements, accreditation of media to sporting events. The imposition of contractual rights and obligations via accreditation is standard worldwide practice.
12. Associated with paragraph 11 above, the imposition of a frequency limitation to news reports in media, via contractual arrangements, appears reasonable, particularly given the distribution and means of accessing digital content.

As noted above, a number of items in the Committee's terms of reference raise commercial matters that are not within the domain of ANZSLA's expertise. These matters are best responded to by sporting and media organisations.

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