No Free Kicks: Copyright in the Sporting Arena

The Senate Standing Committee on Environment, Communications and the Arts conducted an inquiry into the reporting of sports news and the emergence of digital media earlier this year. In this article, Victoria Wark considers the report of the Senate Inquiry and some of the arguments made for and against providing further protections for sporting events under the Copyright Act.

Despite being "indisputably part of modern life"[1] the common law does not recognise any property interest *per se* in a sporting event and event organisers do not 'own' the spectacle they produce. As a result, sporting bodies rely on various measures – including terms of entry, intellectual property actions[2] and special purpose legislation[3] – to protect against unauthorised commercial exploitation of 'their' major sporting event. This article discusses the copyright reforms raised at the Senate inquiry into the reporting of sports news and the emergence of digital media (**Senate Inquiry**).[4] The article concludes that sporting bodies who rely on copyright or call for its reform, need to appreciate the extent of, and basis for, its limited application to major sporting events. Copyright will not give sports a free kick in the digital environment.

The courts have resisted recognising copyright in a major event per se.

I Copyright and sporting events

Since the High Court decision in *Victoria Park Racing*, the law in Australia has been unambiguous; event organisers do not own a spectacle[5] and there is no general legal protection "around all intangible elements of value".[6]

The courts have resisted recognising copyright in a major event *per se*.[7] In particular, the courts are reluctant to protect the production of a sporting event as a 'dramatic work' under the *Copyright Act 1968* (Cth) (the **Act**).[8] In *Australian Olympic Committee v Big Fights Inc* Justice Lindgren said a film of a sporting event was not itself a dramatic work and more is required than recording real life events.[9] A 'dramatic work', he suggested, presupposes the action has been staged, contrived or directed and that the 'producer' has been responsible for the arrangement, form or combination of incidents which create an original end product.[10] He also said skill and labour in filming and editing would not transform "naturally occurring events", over which the producer had no control, into a dramatic work under the Act.[11]

Similarly in Canada, the Federal Court of Appeal found that "despite the high degree of planning" in the performance of team sports, there is no copyright in a sporting contest because "what transpires on the field is usually not what is planned...[n]o-one can forecast what will happen".[12] The court distinguished sport from choreographed works like ballet and found that while sporting teams may attempt to follow a game plan, a sporting event is largely a random series of events and the unpredictability is "so pervasive" it is not copyrightable.[13]

In the United States, copyright in an event *per se* has also had brief attention.[14] The National Basketball Association failed to establish that basketball games were original copyright works.[15] The court pointed to the opportunity for the legislature to include sporting events as a protected work[16] and the practical difficulties that would ensue if events were protected.[17] It was unclear who, in addition to the NBA – perhaps the teams, the stadium workers, referees or fans who all contributed to the event – would be a copyright owner and whose consent would have to be obtained before using copyrightable portions of the game.[18] The court observed that protecting an event would not accord with copyright's interest in furthering the arts, sciences and knowledge of society.[19] There was also a risk that protecting the event would negatively impact the longevity of

---

1 Justice Ian Callinan, 'Privacy, Confidence, Celebrity and Spectacle' (2007) 7 *Oxford University Commonwealth Law Journal* 1,1.
2 See eg, *Telstra Corporation Pty Limited v Premier Media Group* (2007) 72 IPR 89 ('*Telstra v Premier Media Group*') *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333 ('*Nine v ABC*').
3 See eg, *Commonwealth Games Arrangements Act 2001* (Vic); *World Swimming Championships Act 2004* (Vic).
4 See generally, Senate Standing Committee on Environment, Communications and the Arts ('*Committee*'), Parliament of Australia, *The Reporting of Sports News and the Emergence of Digital Media* (2009) ('*Report*').
5 (1937) 58 CLR 479, 496.
6 Ibid 509.
7 See eg, *Nine v ABC* (1999) 48 IPR 333, 337. Justice Hill thought copyright in the spectacle was Channel Nine's weakest claim.
8 The definition of dramatic work under the Act is not exhaustive and includes a choreographic show and a scenario or script for a show: s 10.
9 (1999) 46 IPR 53, 67.
10 Ibid
11 Ibid.
12 *FWS Joint Sports Claimants v The Copyright Board of Canada* [1992] 1 FC 487, 496.
13 Ibid.
14 See eg, *National Basketball Association v Sports Team Analysis and Tracking* 931 F Supp 1124 (SDNY, 1996) ('*NBA I*'); and on appeal *National Basketball Association v Motorola Inc*, 105 F 3d 841 (2nd Cir, 1997) ('*NBA II*'). Cf *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F 2d 663 (7th Cir, 1986) ('*the Baltimore decision*').
15 *NBA I* 931 F Supp 1124, 1140 (SDNY, 1996).
16 *NBA I* 931 F Supp 1124, 1141 and 1143 (SDNY, 1996).
17 *NBA II* 105 F 3d 841, 841 (2nd Cir, 1997).
18 *NBA I* 931 F Supp 1124, 1144 (SDNY, 1996).
19 Ibid 1141–42.

The Senate Inquiry's terms of reference included the appropriate balance between commercial and public interest in sports news reporting, whether specific limitations on use are required to address new technologies and the practice of issuing accreditation terms.

the sport if competitors could prevent their rivals from copying their athletic feats.[20]

Judicial support for a legal interest in sporting events has been underwhelming.[21] One former member of the High Court of Australia, Justice Callinan, said that the time for recognising property in a spectacle may be overdue[22] and that copyright should protect sporting events in the same way as other original works of interest or utility.[23] Callinan also acknowledged that event organisers are left to rely on rigid causes of action to preserve legitimate commercial opportunities while undeserving exploiters flourish.[24] He adapted the copyright aphorism to suggest that what is worth copying or *exploiting* is worth protecting.[25] However, any such augmentation of copyright was recently rejected by the current High Court in connection with compilations, as a distraction from the focus on protecting expressions and not content or commercial value.[26] Without significant legislative or judicial action, the traditional reluctance and practical difficulties in recognising copyright in a sporting event, are likely to continue.

II The Inquiry

A. Background

Digital television and radio, internet protocol television, multi-channelling, and the proliferation of on-line and mobile telephony news services mean sports fans today can and do demand sporting news "anywhere, anytime, and on any platform".[27] Media organisations and sporting bodies have traditionally enjoyed a symbiotic relationship: news stimulates public interest in sport and drives up its commercial value[28] and access to sporting events enables the media to provide a breadth of coverage to the public and disseminate information, ideas and debate.[29] However, the unprecedented opportunities to gain the attention, interest and patronage of sports fans has created significant tension amongst some sporting bodies, their rights holders and media organisations.[30] The distinction between news and entertainment and the previously separate domains for sporting bodies and news organisations – to develop and invest in grass-roots and elite sport and to report sports news (respectively) – are becoming blurred.

The media claim the low barriers to entry to the on-line space mean sports are fast becoming competitors; providing their own up-to-date scores, reports, images and video.[31] They also claim sports use accreditation to control and sanitise news reporting and to unreasonably and unrealistically offer exclusivity arrangements to rights holders.[32] Sports, on the other hand, claim the media has pushed the boundaries of fair dealing too far in the type, frequency and duration of content used in the reporting of sports news.[33] They say the media is monetising their intellectual property under the guise of fair dealing by aggregating content (videos, interviews, archives and photo galleries) and exploiting the associated commercial opportunities.[34]

The Committee said parliament should not amend the fair dealing provisions in the Act

At their extreme these issues were manifest in high profile disputes over access to events and use of event content.[35] These incidents and the trajectory of the relationship between sport and the media in the digital environment led to the Senate Inquiry. The Senate Inquiry's terms of reference included the appropriate balance between commercial and public interest in sports news reporting, whether specific limitations on use are required to address new technologies and the practice of issuing accreditation terms.[36] The Committee recommended against any formal amendment to the Act. It said sporting bodies had not made a "strong case" for copyright reform and in particular was not convinced current news practices eroded broadcast rights or the value of online rights.[37] The Committee was also not satisfied of a public interest in ensuring a growing revenue stream to certain sports given that mass participation in a sport does not necessarily reflect its media profile and that increased availability of sporting information online can generate wider public interest in the sport.[38] The Committee's responses to the various arguments for and against copyright reform focus all stakeholders in major sporting events on the scope and adequacy of copyright in the digital environment.

B. A 'Sporting' Work

Several sporting bodies claimed that intellectual property is at the heart of their business and that because they 'put on the show' they should be protected under the Act.[39]

---

20 *NBA I* 931 F Supp 1124, 1141 and 1144 (SDNY, 1996) The better option, the court said was to confine the protection of athletic events to right of publicity, misappropriation, and other established legal doctrines outside the ambit of statutory copyright: *NBA I* 931 F Supp 1124, 1144 (SDNY, 1996).
21 See eg, the treatment of the *Baltimore decision* in *NBA I* 931 F Supp 1124, 1143 (SDNY, 1996) and comments in *NBA II* 105 F 3d 841, 846 (2nd Cir, 1997).
22 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, 321 (Callinan J).
23 Callinan, above n 1, 3.
24 Ibid.
25 Ibid.
26 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386, 394.
27 Valeska Bloch, 'Sports Broadcasting in the Digital Era' (2009) 27(4) *Communications Law Bulletin* 15,16.
28 Tennis Australia, *Submission to the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the Reporting of Sports News and the Emergence of Digital Media* ('*Inquiry*') (2009) 1, 2.
29 Report above n 4, [1.4 –1.9].
30 See generally, ibid [3.1 – 3.58]
31 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 54 ('*ninemsn*').
32 Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 75 ('*Fairfax*'). Fairfax queried what Telstra actually bought from the Australian Football League as online rights and said 'there is certainly no way [to insist] that Telstra now has football online so everyone else please stop'.
33 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 46 (David Smith) ('*Smith*').
34 Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 38 ('*AFL*').
35 For example, Cricket Australia's dispute with various media organisations during the 2007/2008 cricket season and the dispute between the AFL and news agencies including Australian Associated Press ('*AAP*'): see Report, above n 4, [3.1–3.58].
36 Ibid [1.1]
37 Ibid [5.15]
38 Ibid [5.16]

For the most part the media thought the current fair dealing provisions balanced the public interest in sports news and the commercial interest of sports

One proposal to provide further protection to event organisers was the inclusion in the Act of a 'sporting works' category and a description of the rights in the event which belong to the organiser.[40] The amendment was justified by sporting bodies on the basis that they should be able to exploit (and stop others from using) the commercial opportunities around an event in the same way as other forms of intellectual property.[41] The submission also contrasted the limited application of copyright and performers' rights in sporting events under the Act, with the rights granted to other choreographed productions, dramatic works and performances.[42] The proposed definition of 'sporting works' included the rules of the game, games played under, or recognised by, the peak body for that sport and the fact that the sporting body provides the officials and the venue and ensured that the event proceeds.[43] The specific rights comprising copyright in a 'sporting work' were not exhaustively discussed, but included the ability to enter exclusive arrangements in respect of sounds or images of the event, regulating access to an event, and supervising the reporting of events to the public.[44] While the new category would also be subject to statutory exceptions, including fair dealing for the news reporting,[45] proponents of the reform conceded there was still a risk sports could sanitise the news.[46]

This proposal was strictly outside the Senate Inquiry's terms of reference and received little attention from media organisations (although one said it was "laughable").[47] The Committee said vesting copyright in a sporting event was not relevant to the issue of the media using content for non-news purposes.[48] The proposal is, however, relevant to the bigger issues raised at the Senate Inquiry. Rather than copyright attaching only to discrete elements of an event, a sporting works category would bring the event and third party dealings with the event clearly within the copyright regime.[49] It may also more effectively protect the commercial opportunities arising from an event or deter unauthorised exploitation of event content. Further, any judicial determination of fair dealing with a sporting work may become a precedent for industry practice or create an impetus for sporting bodies and the media to agree what constitutes fair dealing in the sport event context.[50]

C. No enhanced fair dealing provisions

The Committee said unless and until future case law warrants legislative intervention, parliament should not amend the fair dealing provisions in the Act or otherwise legislate specific parameters for a fair dealing for news reporting in the digital environment.[51] In retaining the status quo, the Committee refused to act on the sports' concern that the media was using fair dealing and new technologies to unfairly deliver sporting event content to consumers.

Sporting bodies claimed the current fair dealing provisions do not accommodate the digital, mobile and online platforms and should be updated.[52] The AFL, for example, said that without clear guidelines around fair dealing with digital technologies, the media can use these new platforms to communicate football content, purportedly as 'news', and directly compete with the on-line rights it sold to Telstra.[53] It follows, according to these sports organisations, that the scope and ambiguity of fair dealing in the digital space erodes the value of exclusivity offered to rights-holders and jeopardises sports' ability to reinvest in grass-roots participation or elite sport.[54]

1. Flexibility or certainty

Sporting bodies urged the Committee to recommend replacing the "wide and indefinite" concepts of news and fair dealing, with exhaustive definitions, and quantifiable limits. In particular, the sports wanted guidance on what constitutes 'news' (as opposed to monetising content) and pre-determined benchmarks of the volume, frequency and duration of the media's use of sporting event content.[55] The mechanisms sporting bodies proposed to achieve these reforms were, however, diverse and included non-binding advice from government, amendment of the Act or regulations to prescribe limits on fair dealing in certain circumstances and legislative protection of accreditation terms which prohibit certain use of event content.[56] In response to questions from the Committee about the form and content of any proposed amendment to the fair dealing provisions, sporting bodies conceded that it was a "difficult" issue and that the specific details of "frequency, duration and dissemination" would require "consultation between media and sport".[57] One submitter even acknowledged that while uniform guidelines would ensure that "the media are not driven crazy", they should still reflect the very diverse nature of each sport.[58]

---

39 AFL, *Evidence to the Committee*, above n34, 38 and Lander & Rogers Lawyers, *Submission to the Inquiry* (April 2009) 1, 5. See also, Coalition of Major Professional Sports ('*COMPS*') *Submission to the Inquiry* (May, 2009) 1, 5.
40 Report, above n 4, [4.44]. See also, Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 50–6 ('*Lander & Rogers Lawyers*'); COMPS, above n 39, 21.
41 See eg, Lander & Rogers Lawyers, *Submission*, above n 39, 5.
42 *Copyright Act 1968* (Cth) s 248A(2)(c). While not conferring copyright in the performance, the Act entitles the performer to bring an action for 'unauthorised use' of the performance including the making, selling, copying or communication of the performance to the public without permission. For a contravention of these provisions a court may impose an injunction and damages (including any additional damages the court considers appropriate in the circumstances) or criminal penalties: see eg, ss 248J(2),(3) and 248PA–248PA.
43 Report, above n 4, [4.45].
44 See eg, Lander & Rogers Lawyers, *Submission*, above n 39, 5.
45 Ibid. See also, COMPS, above n 39, 21.
46 Lander & Rogers Lawyers, *Evidence to the Committee*, above n 40, 55.
47 Fairfax, above n 32, 77.
48 Report, above n 4, [4.48].
49 Cf the status quo where sports try to predetermine fair dealing or use accreditation terms to contract out of the operation of the Act. See generally, Evidence to the Committee, Parliament of Australia, Canberra, 5 May 2009, 21 (Senator Lundy and representatives of the Attorney General's Copyright Branch ('*Copyright Branch*').
50 See eg, *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1992] Ch 141 ('*BBC*') which became a basis for determining fair dealing for television broadcasters.
51 Report, above n 4, vii. The fair dealing provisions in the Act for the purpose of reporting news are: ss 42 and 103B.
52 Cricket Australia, *Submission to the Inquiry* (April 2009) 1, 9. See also, Evidence to the Committee, Parliament of Australia, Canberra, 15 April 2009, 30 ('*Cricket Australia*'); AFL; *Submission to the Inquiry* (2009) 1, 10–11.
53 AFL, above n 52, *Submission* 8.
54 Cricket Australia, *Evidence to the Committee*, above n 52, 20. See also, COMPS, above n 39, 1 and Report, above n 4, [3.53].
55 AFL, *Submission*, above n 52, 8– 10. See also Cricket Australia, *Submission*, above n 52, 9; Report, above n 4, [4.18].
56 COMPS, above n 39, 20.
57 Lander & Rogers, *Evidence to the Committee*, above n 40, 53.
58 Ibid 54.

The Committee may have too easily dismissed the difference between the traditional and new media or overstated the acceptance of the conventions.

The Committee's recommendation against legislative amendment or government intervention in respect of fair dealing effectively endorsed the media's submissions to the Senate Inquiry. Some media organisations were prepared to accept an explicit exclusion from fair dealing of live streaming or semi-streaming to protect rights-holders in the digital environment.[59] For the most part, however, the media thought the current fair dealing provisions balanced the public interest in sports news and the commercial interest of sports.[60] They also said the commercial or entertainment value of sporting events does not make those events any less newsworthy and that there is no sound basis for scaling back fair dealing or differentiating between technological platforms.[61]

Premier Media Group said that while fair dealing may appear to erode an exclusive right, in its experience as a rights holder, the news reporting regime was very limited and did not enable a third party to establish a valuable association with a sport or event.[62] By contrast, it said, sports, rights-holders and their sponsors can create an 'official' and superior association with the event across multiple platforms and seek remedies under the Act where the fair dealing regime is misused.[63] According to Premier Media Group, the fact that there are very few, if any cases, or actions by sporting bodies who feel so aggrieved suggests that prohibited conduct operates at the edges and not in the mainstream.[64]

The Committee emphasised the flexibility of the status quo and seemed particularly reluctant to recommend legislating today, for technology which may be superseded tomorrow.[65] While it acknowledged that the proposed reforms may provide greater certainty about the scope of fair dealing, the Committee thought the absence of any prescriptive limits on frequency, duration or use was in the public interest. This approach resonates with the submissions of various media organisations including SBS and the ABC. These organisations spoke of the virtue of courts having the flexibility to determine fair dealing in the context of the particular use. They also wanted to allow the current system to evolve with the new technology without prescriptive regulation, particularly while new platforms or new modes of consumer behaviour are difficult to predict.[66] The Committee's preference for flexibility also accords with Justice Allsop's comments, in the only reported case on fair dealing in the digital environment, that notions of fair dealing are not easy to govern by rules laid down in advance.[67]

2. Gentlemen's agreements and news access rules

One reason the Committee gave for not recommending enhanced fair dealing provisions was that it expected conventions like the 3x3x3 'gentlemen's' agreement in the free-to-air television industry to emerge in the on-line and mobile telephony space.[68] This expectation may, however, be optimistic. It ignores the fact that many sporting organisations and their rights-holders have been "very slow" to come to terms with fair dealing in the digital and on-line environment and that any developments will need to reflect the different ways these new media outlets operate.[69] It also down plays the incidents which led to the Senate Inquiry and other examples of tension – including media lockouts, refusal to cover events, increased use of photo galleries, archival content, on-demand services and accreditation terms which claim copyright in media content, pre-determine future use, vet customer lists, and are subject to withdrawal at the discretion of a sporting body – which make amicable or mutually satisfactory arrangements, unlikely.[70]

The ABC insisted that rules limiting online news to three bulletins per day, three hours apart, have no practical application and are meaningless on-line where news is not a one-off broadcast.

The Committee may have also too easily dismissed the difference between the traditional and new media or overstated the acceptance of the conventions. The 3x3x3 convention grew out of an environment where today's rights holder is tomorrow's non-rights holder and a common interest and dependency for news content. Television broadcasters had an incentive to share news feeds with other news broadcasters and knew that technological and commercial pressures restricted their rivals' use of the content. The footage would be a small part of a larger program which had to fit within an existing broadcast schedule and the commercial imperatives of the other broadcaster. In the current environment the issues are more complex. Television broadcasters have no incentive to share real-time feeds with internet or mobile telephone content providers. These organisations convert television footage to internet files to stream or provide as part of on-demand or interactive services to consumers who would otherwise be watching the broadcast or paying another rights-holder for these services.

At the Beijing Olympics, the International Olympic Committee (**IOC**) introduced news access rules for the online space to complement the existing news access rules for traditional media and to deal with the "aggressive media environment" in Australia. The on-line rules specified that a maximum of 180 seconds of Olympic material per day could be used to report news on-line. The use was, however, subject to certain conditions including that the content only appear in a highlights package, as a news update bulletin and in no more than three bulletins per day, with each bulletin being three hours apart and removed after 24 hours.[71] While the IOC referred to the significant differences between the new and old media platforms,

---

59 See eg, Australian Broadcasting Corporation ('*ABC*') *Submission to the Inquiry*, (April 2009) 1, 5.
60 See eg, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 31 (Special Broadcasting Services ('*SBS*'). See also, Agence France-Presse, *Submission to the Inquiry* (2009) 1, 8. Several media organisations, did, however, seek, an amendment to the Act to make provisions in contracts which exclude or modify the application of the fair dealing provisions unenforceable: see below Part II (D).
61 See eg, ninemsn, *Submission to the Inquiry* (April 2009) 1, 6–7.
62 Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 21 ('*Premier Media Group*').
63 Ibid.
64 Ibid 28.
65 Report, above n 4, [4.22].
66 ABC, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 29. See also SBS, above n 60, 31 and 36.
67 *Telstra v Premier Media Group* (2007) 72 IPR 89, 96.
68 The 3x3x3 rule allows media organisations to use three minutes of content, three times a day, at least three hours apart.
69 ABC, *Evidence to the Committee*, above n 66, 22.
70 Smith, above n 33, 47–50.
71 IOC, *Evidence to the Committee*, Parliament of Australia, Melbourne, 29 April 2009, 7.

The Committee accepted that in some instances accreditation was being used to override the ordinary operation of copyright

the on-line news access rules were, the IOC admitted, "based on the terrestrial television rules".[72] In fact they seemed to effectively neutralise the technological advantages of the new medium and take it closer to the traditional television broadcast environment.

The IOC told the Committee the rules were "taken very well by the Australian media" and "were not abused"[73] and the Committee thought the rules were the best example of an agreement where on-line rights are associated with broadcast rights.[74] However, the IOC also admitted that this 'agreement' was "very quietly" negotiated with its broadcast partners and was not discussed with the media.[75] The IOC also has a reputation for requiring and strongly enforcing an undertaking from non-rightsholding media organisations to abide by the terms of any news access rules.[76]

Several media entities at the Senate Inquiry noted their concern with the IOC's news access rules and the role of the 3x3x3 conventions in the new environment. The ABC insisted that rules limiting online news to three bulletins per day, three hours apart, have no practical application and are meaningless on-line where news is not a one-off broadcast.[77] It said the rules needed to further adapt to the on-line environment.[78]

D. Contracting out of fair dealing?

One reform which did receive some tentative support from the Committee was a proposal in the 2002 Copyright Law Review Committee Report.[79] The Committee recommended that the government consider and respond to the 2002 Report and specifically a proposal that the Act include a provision that any agreement or provision in an agreement which excluded, or modified fair dealing (or had these effects), is unenforceable.[80] The 2002 Report described how fair dealing exceptions were fundamental to the scope of copyright in Australia and that exclusions or modifications via contract created an imbalance by extending the ambit of copyright under the Act.[81]

It is not clear what, if anything, will flow from this recommendation. The Report was provided to a previous government, did not receive a response and, although still lying around, is not under active consideration.[82] The original recommendation was directed to a power imbalance where big corporations pre-determine contractual and intellectual property rights of consumers. While smaller media entities may be vulnerable consumers presented with accreditation terms "on a take it or leave it basis",[83] the reform may be unjustified and ill-suited where two equal or powerful parties negotiate agreements.[84] During the Senate Inquiry several media organisations referred to their considerable power in negotiating accreditation agreements. News Limited said it did not want legislative help and will negotiate with sports until they lose sleep.[85] AAP also noted that sports' dependency on the media to ensure exposure for their sponsors often meant the media ultimately gained access to an event, even if it was pressure from the sponsors which cleared the way.[86]

These submissions also pointed to the media's main concern with the practice of sporting bodies issuing accreditation terms, namely that they can restrict, compromise or threaten the freedom of the press and access to information.[87]

E. Beyond copyright?

The Committee regarded the use of accreditation terms and its actual and potential consequences for the free flow of news as the most significant matter raised at the Senate Inquiry and provided several recommendations for government involvement and intervention. The Committee went to some effort to understand, from all parties, the way accreditation terms are currently issued, negotiated, and accepted or rejected.[88] It also investigated a number of proposals to address the public interest in receiving news, including voluntary industry guidelines, codes of practice under the *Trade Practices Act 1974* (Cth) (**TPA**) and legislative rights of access to sporting events. [89]

The Committee accepted that in some instances accreditation was being used to override the ordinary operation of copyright by modifying the media's use of its own content without going through the process of formal assignments or asserting a legal right over the images.[90] However, the Committee insisted that accreditation issues are not a matter for copyright law.[91]

It also rejected the proposal to address the accreditation issue by including in the Act a right of access to sporting events for the media.[92]

The Committee recommended that future negotiation of entry conditions be conducted on the premise that all journalists (including photojournalists and news agencies), regardless of their platform, can access sporting events.[93] It also suggested that if these negotiations are unsuccessful, the government should introduce a process for consideration of a code of practice under the TPA.[94]

---

72 Ibid 6.
73 Ibid.
74 Ibid 9.
75 Ibid 6.
76 See eg, IOC *Submission to the Inquiry – Annexure 5* (April 2009) 1, 4.
77 ABC, *Submission*, above n 59, 7.
78 Ibid.
79 Copyright Law Review Committee, *Copyright and Contract* (2002) ('*2002 Report*').
80 Report, above n 4, [7.49].
81 Report above n 4, [7.16].
82 Evidence to the Committee, Parliament of Australia, Sydney, 5 May 2009, (Copyright Branch), 23.
83 Georgina Waite, 'Sport Broadcasting and News Reporting – The Current Legal Landscape and the Senate Committee Report into Sports News' (Paper presented at the 2009 Copyright Symposium, Sydney, 15 and 16 October 2009) 1,5 (copy of paper available with author).
84 Copyright Branch, above n 82, 24.
85 Evidence to the Committee, Parliament of Australia, Sydney, 15 April 2009, 52 (News Limited).
86 Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 91 ('*AAP*').
87 Ibid 93. See also, Evidence to the Committee, Parliament of Australia, Sydney, 16 April 2009, 100 ('*AFP*'). AFP told the Senate Inquiry that accreditation terms made it impossible for international news agencies to cover sporting events including the 2008-09 Australian cricket season and deprived fans of a source of interest: See also, PANPA, *Submission to the Inquiry* (April 2009) 1, 9; Getty Images, *Submission to the Inquiry* (April 2009), 1, 3.
88 See eg, Report, above n 4, [3.10 –3.46]. See also, Cricket Australia, *Evidence to the Committee*, above n 52, 17–20.
89 See Report, above n 4, [4.1–4.50].
90 Evidence to the Committee, Parliament of Australia, Melbourne, 29 April 2009, 42, (SMP Images)
91 Report, above n 4, [5.26].
92 AAP, *Submission to the Inquiry* (2009) 1, 18. See also, Smith, above n 33, 47.
93 Report, above n 4, vii.
94 Ibid.

The Committee's proposals in response to the accreditation issue stopped just short of escalating the issue. A prescribed voluntary or mandatory code would be a significant form of government intervention and a regulatory burden, a breach of which could be pursued by either an aggrieved party or the Australian Competition and Consumer Commission.[95] The Committee's reluctance to recommend the immediate introduction of a code of practice may reflect the diverse submissions in respect of industry regulation it received from the media *and* sporting organisations. Some entities rejected any need for further regulation.[96] Others proposed alternatives which lie somewhere between voluntary guidelines and mandatory codes of practice and cover either or all of the process for negotiation, the method and content of fair dealing and the conditions for dispute resolution or withdrawal of accreditation.[97]

The Committee accepted that there was "a bargaining imbalance, or a perceived bargaining imbalance" in the negotiation and implementation of accreditation regimes and was concerned that the "burden" falls disproportionately to news agencies like AAP and Getty Images.[98] It also accepted that a code of practice under the TPA could resolve this and other disputes between major sporting event stakeholders.[99] However, the Committee believed it had seen sufficient evidence to suggest that accreditation and other issues could still be resolved by the parties without such intrusive measures.[100] It also noted that any movement toward a code of practice in the future would involve costs to the industry, require compliance with best practice regulation, (including dispute resolution alternatives and as co-regulation), and need to be developed by government in conjunction with industry.[101]

Even if the remarkable step of prescribing a code of practice is taken, none of the reforms contemplated, including a mandatory code of practice, will completely remove the need for stakeholders to work, at some level, co-operatively. Sporting and media organisations should, therefore, continue to direct their energies to adapting to and exploiting (either together or alone) new technologies to retain or attract fans, advertisers or rights-holders and litigating or otherwise determining what constitutes fair dealing in the digital and on-line context.

Conclusion

Despite its limitations, sporting bodies may continue to rely on copyright or seek legislative reform of the Act to preserve and increase opportunities to generate revenue. Copyright should, however, only be part of a broader strategy. Legislation like the new *Major Sporting Events Act 2009* (Vic) in Victoria, aimed specifically to protect the commercial arrangements supporting major sporting events, is another option. In addition to consolidating provisions in respect of crowd management, ticketing and aerial ambush marketing, the Victorian Act offers additional commercial protections and practical benefits. It also creates a recognised and sound basis from which sports can launch future calls for reform to better protect their interests.

While it is not seriously doubted that fair dealing for news reporting applies to the online and mobile platforms, judicial determination of fair dealing in the new technological environment is overdue. Even though it is hard, grubby and expensive[102] litigation on the scope of fair dealing with new media may create a precedent or framework for future industry practice. Legal proceedings may also establish a mandate for legislative intervention if they show that the current fair dealing provisions do not work as effectively as they did for the traditional media.[103]

Despite its potential to erode the value of exclusivity, proliferation of sporting content on new platforms may also serve sports' long-term interest. It facilitates wide-spread access and exposure of the sport and its commercial partners and offers additional opportunities to generate revenue.[104] The traditional distinction between the functions of the media and sporting bodies is a "bit messed up".[105] Sports should take advantage of the low barriers to enter the on-line media world and capitalise on the lack of rules in this space. Sports should also attack the digital environment and compete with organisations monetising their content by generating premium content or services.[106] As facilitators of some of the most popular events in Australia, sports do not need a free kick to stay in the game.

Victoria Wark is a lawyer in the Communications, Media and Technology group at Allens Arthur Robinson and a keen sports person. The views expressed in this paper are those of the author and do not represent the views of the Firm. A version of this paper was submitted for assessment as part of a Graduate Diploma in Sports Law at the University of Melbourne.

95 See generally, *Trade Practices Act 1974* (Cth) ss 51AD, 51AE.
96 See comments above in Part II (C) that no further regulation is needed.
97 See eg, COMPS, above n 39, 18–20; Cricket Australia, *Submission*, above n 52, 14; Reuters Thomson, *Submission to the Inquiry* (April 2009) 1, 6–7; News Media Coalition *Submission to the Inquiry* (April 2009), 1, 7.
98 Report above n 4, [5.28].
99 See AAP, *Supplementary Submission to the Inquiry* (2009) 1, 4–6.
100 Report, above n 4, [4.42]
101 Ibid [4.41]
102 AFL, *Submission* above n 52, 8; AFL *Evidence to the Committee*, above n 49, 33.
103 News Limited, above n 85, 47.
104 See generally, SBS, above n 60, 39.
105 Evidence to the Committee, Parliament of Australia, Melbourne 29 April 2009, 35 (Kayte Davies, Lecturer in Journalism, Edith Cowan University).
106 Sports with exclusive or superior access to players and officials could arrange those persons to regularly appear on-line to talk to fans, and create a further forum for on-line advertising: IOC, *Evidence to the Committee*, above n 71, 57. Both sport and the media already benefit from the inclusion on each other's websites of links to the 'official' sport website 'or official' news provider: Fairfax, above n 32, 76.