

3 September 2014

Commercial and Administrative Law Branch

Attorney-General's Department

3-5 National Circuit

BARTON ACT 2600

Via email: copyrightconsultation@ag.gov.au

Dear Attorney-General,

Online Copyright Infringement Discussion Paper

The Coalition of Major Professional and Participation Sports Inc (**COMPPS**) and its members appreciate the opportunity to make submissions regarding the above Discussion Paper.

Online copyright infringement is a major issue for each COMPPS member. The focus in the Discussion Paper on online infringement and enforcement issues is timely and is welcomed by COMPPS and its members.

1. COMPPS and COMPPS members

COMPPS consists of the following organisations:

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

Each of these organisations is the governing body and custodian of a major professional sport in Australia.

COMPPS members are not-for-profit bodies and are responsible for the long-term development and sustainability of their sport in Australia.



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

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

2. Copyright and COMPPS members

Strong and enforceable intellectual property laws are of fundamental importance to COMPPS members.

In particular, copyright is crucial to the exploitation and licensing by COMPPS members of media rights to the major sporting events and other content controlled by COMPPS members.

These media rights are exploited and/or licensed by COMPPS members across a range of platforms including free to air television, subscription television, radio, online (including IPTV) and mobile technology.

The revenue derived from the licensing of these rights is a very significant revenue stream for most COMPPS members. In particular, live broadcasts and communications of sports events are very popular and constitute valuable rights for COMPPS members.

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

The licensing of online and digital rights is an increasingly significant part of COMPPS members revenue. The proportion and importance of revenue from online and digital rights as part of overall media rights revenue is expected to increase in the coming years.

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

- (a) maintain and increase their distributions to members and clubs (and in turn to athletes), which have high levels of community support and interaction;

- (b) increase investment in the development of their respective sports, including at grassroots level;
- (c) maintain relatively low admission prices for attendees at matches, providing all Australians with the opportunity to participate in sports;¹
- (d) continue and increase support for important community relations programs;
- (e) continue to invest in facility development where appropriate and for the wider community benefit; and
- (f) continue to operate without significant reliance on Government funding.

The prevalence and scope of online copyright infringement and the limitations of traditional copyright law enforcement tools in dealing with online copyright infringement are significant concerns for COMPPS members.

In particular COMPPS members face major challenges due to unauthorised online distribution and communication of coverage of sporting events and other content controlled by COMPPS members, for example through unauthorised live streaming sites.

As evidenced by the submissions made to recent international copyright law reviews, online copyright infringement and enforcement issues are also a significant concern for international sporting bodies.²

One of the major concerns raised by COMPPS and COMPPS members in submissions to the Australian Law Reform Commission regarding the recent *Copyright and the Digital Economy* inquiry was the exclusion of enforcement issues from the terms of reference for that inquiry³.

COMPPS welcomes the focus in the Discussion Paper on online copyright infringement and enforcement issues.

3. Industry solutions and the role of Government

COMPPS notes the preference expressed in the Discussion Paper for industry and market solutions to online copyright infringement issues.

Given the significance of copyright for COMPPS members and the risks to COMPPS members posed by online copyright infringement, the key issue for COMPPS members is that copyright

¹ By way of example, COMPPS estimates that nearly half of all Australians attend at least one sporting event each year.

² See for example the submissions made by Premier League and the Sports Rights Owners Coalition to the Hargreaves review (UK)

³ See COMPPS' submissions to the ALRC *Copyright and the Digital Economy* inquiry dated 30 November 2012 and 31 July 2013. AFL, Cricket Australia and NRL also made separate submissions to the inquiry.

enforcement mechanisms are available that enable rights holders to take prompt and effective enforcement action at a reasonable cost.

If an industry or market based solution can achieve this, COMPPS and its members would support such a solution.

However, COMPPS also urges the Government to closely monitor the progress of negotiations for any industry solution and be prepared to step in if no real progress is made on an effective industry based solution or if it becomes clear that an industry or market based solution will not provide adequate protection for rights holders.

4. Extended authorisation liability

COMPPS agrees with the position of the Government expressed in the Discussion Paper that the extension and clarification of liability for authorising copyright infringement is essential to ensure an effective legal framework that:

- functions as intended;
- encourages industry co-operation; and
- is consistent with Australia's international obligations.

COMPPS is broadly supportive of the amendments referred to in the Discussion Paper to clarify the application of liability for authorising copyright infringement under sections 36 and 101 of the *Copyright Act 1968*. COMPPS believes liability for authorisation must be established where an ISP fails to take reasonable steps to act to prevent infringing activity, with those reasonable steps set out in an industry code.

COMPPS is concerned the suggested drafting changes do not achieve the intent expressed in the discussion paper. The legislative amendments giving effect to the extension of authorisation liability can and should be more clearly drafted.

The terms of any proposed industry schemes or commercial arrangements referred to in paragraph (b) of Proposal 1 and any prescribed measures in the *Copyright Regulations 1969* referred to in paragraph (c) of Proposal 1 will also need to be reviewed before COMPPS can comment conclusively on Proposal 1.

In relation to the specific questions in the Discussion Paper regarding the extension of authorisation liability:

QUESTION 1: What could constitute 'reasonable steps' for ISPs to prevent or avoid copyright infringement?

COMPPS is generally supportive of determining what constitutes 'reasonable steps' for ISP's to prevent or avoid copyright infringement by reference to relevant industry schemes or commercial arrangements.

In relation to any such industry schemes or commercial arrangements, COMPPS submits that:

- COMPPS members are the holders of important and highly valuable copyright and are significantly impacted by online copyright infringement. Therefore, it is important that:
 - consideration be given to how COMPPS members would be covered by any proposed industry schemes or commercial arrangements;
 - COMPPS and COMPPS members are consulted in a meaningful way regarding any proposed industry schemes or commercial arrangements impacting on them or their rights; and
 - COMPPS and COMPPS members are provided with the opportunity to participate in negotiations regarding the terms of such industry schemes or commercial arrangements.
- A graduated response scheme that combines notices with agreed mitigation or preventative measures is distinctly preferable to a scheme that only includes notices or a scheme that requires rights holders to take legal proceedings against individual infringers as their only remedy. Given the significance of their media rights and the live manner in which this content is often disseminated and licensed, COMPPS members need to have a range of effective and efficient remedies available to them to ensure ISP prevent or avoid copyright infringement.
- It is important that any relevant industry scheme or commercial arrangement is binding on all relevant parties and covers all relevant infringing conduct. COMPPS members have experience with the practical limitations of industry schemes or agreements which are not binding or which fail to extend to all of the relevant conduct⁴. In this regard, COMPPS supports the comments of the Government in the Discussion Paper regarding the need for any relevant industry scheme to have a broad application.
- COMPPS expects there will be a significant role for the Government in respect of any such industry schemes or commercial arrangements. This may include the Government facilitating the discussions between industry participants to seek to reach agreement on any such industry scheme or commercial arrangement.

⁴ See the submissions to the ALRC *Copyright and the digital economy* inquiry dated 31 July 2013 made by AFL and Cricket Australia regarding the Code of Practice for Sports News Reporting.

- COMPPS members are not opposed to the Government imposing the relevant 'reasonable steps' regime if industry stakeholders are not able to reach agreement. However before doing so, COMPPS suggests that:
 - COMPPS members should be consulted regarding any reasonable steps regime proposed by the Government; and
 - any 'reasonable steps' regime imposed by the Government should proceed on the basis that it provides 'best practice' protections for rights holders, otherwise there is limited incentive for ISP's to engage regarding a voluntary industry scheme or commercial arrangement or enforce any such voluntary industry scheme or commercial arrangement.

QUESTION 2: How should the costs of any 'reasonable steps' be shared between industry participants?

COMPPS is of the view that it will generally be appropriate for industry participants to bear their own costs of participating in any industry scheme, commercial arrangement or other reasonable steps regime.

If any cost sharing arrangements are proposed as part of any industry scheme, commercial arrangement or other reasonable steps regime, COMPPS submits there should not be any significant or unreasonable cost impost on COMPPS members under such cost sharing arrangements.

It would be an undesirable outcome if not-for-profit bodies such as COMPPS members were discouraged from accessing any industry scheme, commercial arrangement or other reasonable steps regime due to a significant cost burden being imposed.

QUESTION 3: Should the legislation provide further guidance on what would constitute 'reasonable steps'?

COMPPS is supportive of further guidance on and clarification of the 'reasonable steps' requirements in relation to authorisation of copyright infringement being provided.

Such guidance and clarification could be provided under relevant industry schemes or commercial arrangements or, failing agreement on such industry schemes or commercial arrangements, by Commonwealth legislation.

QUESTION 4: Should different ISPs be able to adopt different 'reasonable steps' and, if so, what would be required within a legislative framework to accommodate this?

COMPPS considers that any relevant framework (whether legislative, industry scheme or commercial arrangement) should establish a base level of 'reasonable steps' required to be taken by ISP's, so that all participants have certainty regarding the minimum level of actions required to be taken.

In addition COMPPS members would also support an appropriate framework which provided flexibility regarding the different 'reasonable steps' required or able to be adopted by different ISP's within that framework.

QUESTION 5: What rights should consumers have in response to any scheme or 'reasonable steps' taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?

COMPPS believes that the interests of rights owners should be the primary consideration when determining any scheme to prevent the unauthorised online distribution and communication of their content.

5. Extended injunctive relief to block infringing overseas sites

Copyright infringement by overseas operated websites or services is a major issue for COMPPS members.

COMPPS members have significant experience of overseas operated websites or services undertaking unauthorised and infringing communications of the sporting events and other content controlled by the COMPPS members. Infringement can take many forms, such as the unauthorised live streaming of matches and events and the unauthorised communication of highlights packages of sporting content.

Seeking to enforce copyright against the operators of such websites or services is a major challenge for COMPPS members, particularly as:

- the overseas operators of such websites or services are frequently difficult, if not impossible, to identify (for example due to the use of fictitious entity names and addresses and the lack of any need for the operator of the website or service to have a physical presence or operation); and
- frequently such websites or services are (intentionally) hosted in and operated from jurisdictions which provide limited legal or practical recourse for rights holders.

The nature of the sporting content exploited and licensed by COMPPS members makes it particularly important that efficient and timely injunctive relief or other similar remedies are available to block the operation of such overseas sites or services.

This is because the commercial value of sporting content is increasingly associated with the live communication of the sporting content. Accordingly the ability to block overseas based live streaming or other similar websites that infringe copyright is critical to the ability of COMPPS members to protect and preserve the value of this content, for the ultimate benefit of their respective sports.

Accordingly COMPPS is supportive of the Government's proposal to amend the *Copyright Act 1968* to enable rights holders to take action to block access to a website offering infringing material without the need to establish that a particular ISP has authorised an infringement.

COMPPS is aware of a similar regime allowing for such injunctions being used in the United Kingdom to require ISP's to block websites which were providing unauthorised live streams of premier league football matches⁵.

As a result, COMPPS is broadly supportive of Proposal 2 in the Discussion Paper.

COMPPS does however consider that the requirement in Proposal 2 that an overseas website or service have the 'dominant purpose' of infringing copyright is an unnecessary requirement and may create an unreasonable evidentiary burden on rights holders.

COMPPS submits the relevant injunctive relief should be available if it is demonstrated that the relevant overseas operated website or service infringes the copyright of the relevant rights holder or there is a real risk that the overseas operated website has or will infringe the copyright of the rights holder.

QUESTION 6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

COMPPS submits that in determining whether to grant an injunction to block access to a particular website, the Court should consider:

- whether the website or service or the use of the website or service infringes the copyright of the relevant rights holder;
- whether there is a real risk of the website or service or the use of the website or service infringing copyright of the relevant rights holder; and
- the special damage that may be suffered by the relevant rights holder if the injunction is not granted. For example, in the case of sports rights holders such as COMPPS members, the damages that may be suffered by COMPPS members if overseas websites or services make unauthorised live communications of their sporting events should be

⁵ *The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch) (16 July 2013)

taken into account. Further, COMPPS members often grant rights to third parties on an exclusive or protected basis, and the extent to which those licences may be or are impacted by infringement on a particular website may be a relevant consideration.

COMPPS also does not believe that it should be necessary for rights holders to demonstrate that an ISP has 'actual knowledge' that the relevant overseas website or service is infringing copyright.

COMPPS submits that the focus of any amendments should be on whether the relevant overseas website or service infringes copyright of the relevant rights holder (or there is a real risk that it will do so) rather than on the state of knowledge of the particular ISP.

6. Extended safe harbour scheme

COMPPS is not necessarily opposed to extending the operation of the safe harbour scheme to apply beyond 'carriage service providers' (as defined in the *Telecommunications Act 1997*).

However, COMPPS considers that any such extension should only be introduced if:

- (a) liability for authorisation of copyright infringement is appropriately expanded and clarified; and
- (b) the parties to whom the extended safe harbour scheme would apply are subject to an appropriate industry agreement, commercial arrangement or other 'reasonable steps' regime.

COMPPS also suggests that consideration should be given to whether further legislative guidance can be provided regarding when an organisation adopts and reasonably implements a policy for dealing with repeat infringement.

7. Building the evidence base

QUESTION 8: How can the impact of any measures to address online copyright infringement best be measured?

COMPPS supports efforts to build the evidence base regarding the volume and impact of online copyright infringement.

Where possible COMPPS and COMPPS members are willing to share relevant information with Government regarding the volume and impact of online copyright infringement of its content on a confidential basis.

COMPPS can also facilitate appropriate introductions to relevant international sporting and sports governance bodies to discuss this issue.

8. Other approaches

QUESTION 9: Are there alternative measures to reduce online copyright infringement that may be more effective?

COMPPS does not have any specific further proposals regarding alternative measures to reduce online copyright infringement.

As a general proposition, COMPPS would support alternative measures that allowed rights holders to obtain prompt and effective enforcement of copyright at a reasonable cost.

Given the significance of copyright to COMPPS members and the impacts of online copyright infringement on COMPPS members, their respective sports and the broader community, COMPPS submits that in considering alternative measures to reduce online copyright infringement, the focus should always be on ensuring that best practice protections are available in Australia for rights holders.

9. Regulation Impact Statement

QUESTION 10: What regulatory impacts will the proposals have on you or your organisation?

QUESTION 11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

COMPPS will need to review the final form of any proposed reforms to the *Copyright Act 1968* as well as the terms of any proposed industry schemes or similar arrangements before COMPPS is able to comment on the regulatory impacts, costs or other burdens that may be imposed by the proposals in the Discussion Paper.

10. Concluding comments

Copyright is very important to the current and future activities, success and sustainability of COMPPS members. Online copyright infringement is a major issue for COMPPS members, and

presents a current and significant threat to the activities and revenue streams of all COMPPS members.

COMPPS welcomes and supports the focus in the Discussion Paper on online copyright infringement enforcement issues, and in particular the extension of liability for the authorisation of copyright infringement and the introduction of a regime for injunctive relief to block infringing overseas websites.

In addressing the matters raised in the Discussion Paper COMPPS and its members urge the Government to introduce legislative amendments or support industry based arrangements where such amendments or arrangements bolster the rights of copyright owners and allow for prompt, clear and cost effective means to prevent the unauthorised use of the valuable copyright and content of COMPPS' members.

Representatives of COMPPS and its members are available to consult with Government or other stakeholders regarding these matters.

For further information please contact:

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Yours sincerely



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