

**THE COALITION OF MAJOR PROFESSIONAL AND PARTICIPATION SPORTS
INCORPORATED**

SUBMISSION TO THE DEPARTMENT OF COMMUNICATIONS AND THE ARTS

COPYRIGHT MODERNISATION CONSULTATION PAPER

4 JUNE 2018



1 INTRODUCTION

COMPPS consists of the following organisations:

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

These sports play a large role in developing, promoting and presenting sport in Australia from the grass roots through to the international level. They are not-for-profit bodies and are responsible for the long-term development and sustainability of their sports.

Each of these organisations is the governing body and custodian of a major professional sport in Australia. They are mass participation sports - between them, they have over 9 million participants and 16,000 clubs.

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 the national and 'grassroots' level.

One of COMPPS' roles is to facilitate a response to public inquiries on behalf of its member sports.

This document comprises COMPPS' written response to the Department of Communications and the Arts' (**Department**) '*Copyright Modernisation Consultation Paper*' (**Consultation Paper**).

2 INTELLECTUAL PROPERTY IS FUNDAMENTAL TO 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 competitions and 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 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 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) increase investment in the development of their respective sports, including at the grassroots level;
- (b) maintain relatively low admission prices for attendees at matches, providing all Australians with the opportunity to participate in sports;¹
- (c) continue and increase support for important community relations programs;
- (d) maintain and increase their distributions to members and clubs (and in turn to athletes), which have high levels of community support and interaction;
- (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.

Copyright has an essential role in the licensing and exploitation of media rights to the major sporting competitions and events and other content owned or controlled by COMPPS members. As part of their licensing arrangements COMPPS members own copyright in the broadcasts and recording of their content. Ownership of copyright is important as it allows COMPPS members to license or exploit content across multiple platforms and, where necessary, take enforcement action against unauthorised use.

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

3 GENERAL COMMENTS IN RELATION TO THE CONSULTATION PAPER

COMPPS and its members wish to engage with the current consultation in relation to:

- flexible exceptions (question 1 in the Consultation Paper); and
- contracting out of exceptions (questions 3 and 4 in the Consultation Paper).

COMPPS' submissions in relation to those matters are set out in Parts 4 and 5 below.

As noted in the Consultation Paper, these areas have been well traversed in recent years in reviews by the Copyright Law Committee, Australian Law Reform Commission and Productivity Commission. COMPPS has participated in these reviews and maintains its previously stated position on these important areas.

Given COMPPS' involvement in previous submissions and the significance of copyright to COMPPS members, COMPPS was surprised and disappointed that neither it nor any of its members were contacted to be involved in the roundtable discussions in relation to the current consultation.

Prior to commenting on the exceptions to copyright and contracting out, it is important to note COMPPS' position in relation to the context and scope of the current consultation.

COMPPS is concerned that the adoption of additional or new copyright exceptions and the imposition of any restrictions on 'contracting out' will have a significant adverse effect on COMPPS members and, by implication, their sports, athletes, supporters, communities and other stakeholders.

COMPPS and its members appreciate that copyright law involves a balancing of various interests, but copyright law must always give proper protection to persons or organisations who take the time and effort to create and develop the content and material that is subject to copyright protection. In the case of COMPPS members, this means that the film and broadcast copyright of their sporting and related activities must be adequately and appropriately protected. Failure to do so will unnecessarily and unfairly put at risk existing and future authorised exploitation of their protected rights.

COMPPS members are very familiar with persons seeking to exploit their content without authorisation. "Modernisation" of copyright law should not be used as a cloak for allowing the infringement of important and valuable rights, nor should it be to the detriment of existing protections. For example, COMPPS opposes any changes to the law that would allow practices of the kind that were held to be unlawful in the *Optus TV Now* case² and the *Fanatix* case in the United Kingdom³.

² *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59

³ *England & Wales Cricket Board Ltd v Tixdaq* [2016] EWHC 575 (Ch)

COMPPS maintains that right holders must have clarity and certainty as to their rights and a robust system to enforce those rights. COMPPS does not support a recalibration of the well-established property rights of its members and is very concerned that the adoption of additional exceptions or an open ended and uncertain 'fair use' concept will immediately and significantly adversely impact its members' rights. COMPPS considers there is strong public recognition of, and support for, the need for the copyright content of COMPPS members to be protected and respected.

4 FAIR USE

The comments below comprise COMPPS' response to question 1 in the Consultation Paper.

4.1 COMPPS does not support any additional fair dealing exceptions

COMPPS does not support the introduction of any additional fair dealing exceptions. In particular COMPPS does not support any additional exceptions relating to non-commercial private use or incidental or technical uses.

COMPPS believes that the existing fair dealing exceptions are well understood and that no proper case has been made in the Consultation Paper or elsewhere, for introducing new exceptions.

If the Government is minded to introduce any additional fair dealing exceptions (which is not supported by COMPPS) COMPPS does not support allowing the Minister to add or amend fair dealing exceptions as part of the Copyright Regulations, rather than through amendments to the Copyright Act itself. COMPPS believes that any changes to important property rights are a matter for Parliament, not a ministerial instrument.

Further, COMPPS believes that the Department should consider amending the existing fair dealing exception for the reporting of news. This exception has been inappropriately relied upon by various persons, including non-rights holders, to provide entertainment offerings under the guise of the reporting of news. These unauthorised offerings can have an impact on the market for or value of non-live highlights content rights provided by or licensed by COMPPS members. COMPPS maintains that the news reporting exception should be clarified to provide greater certainty as to the application and scope of the exception. These amendments should involve introducing certain criteria to be considered when assessing whether the reporting of news exception should apply. This approach is already utilised with some of the other existing fair dealing exceptions.

4.2 COMPPS opposes the introduction of a 'fair use' exception

COMPPS continues to oppose the replacement of the current fair dealing exceptions in Australian law with a broad, US-style exception of 'fair use'.

COMPPS does not believe a case has been made out for the introduction of a new fair use exception. Further and significantly, COMPPS and its members believe a new fair use exception will undermine and adversely impact the licensing and value of the media rights and other content rights of COMPPS members.

The replacement of the existing fair dealing exceptions with a fair use exception has been considered in past Australian reviews and inquiries. COMPPS and its members have consistently argued against the introduction of a new fair use exception, including in response to the recent Australian Law Reform Commission and Productivity Commission reports.

COMPPS remains of the view that a broad fair use exception is not appropriate for Australian law. In COMPPS' view:

- (a) fair use is not certain or predictable;
- (b) a single, general standard is not required;
- (c) fair use is not required to assist innovation or required for the digital economy; and
- (d) fair use will result in greater transaction costs, for example, fair use will require COMPPS' members to incur significantly greater costs in monitoring use of their copyright.

COMPPS' criticisms of a fair use exception are expanded upon below.

(a) Fair use is not certain or predictable

Exceptions to copyright impact the rights of copyright owners and licensees. Given these impacts, to the extent that any exceptions to copyright are justified, the exceptions need to be limited, clear in scope and able to be consistently applied. COMPPS is concerned the scope and application of any new fair use exception will be difficult to predict and this will result in inconsistent and arbitrary decisions. It will be difficult for parties to understand the boundaries of the relevant rights and difficult to predict outcomes when they seek to enforce their rights.

Further, COMPPS is concerned that fair use will be seen as a standalone, 'user right' rather than an exception to the exclusive rights of copyright owners, and this will lead to an increased culture of infringement in Australia. This is not in the interests of content rights holders or other stakeholders.

These outcomes need to be avoided in Australian copyright law.

Certainty is the cornerstone for encouraging business investment and innovation, and the protection of valuable rights. The uncertainty and unpredictability arising from a new copyright exception will create serious difficulties and costs for copyright owners, especially COMPPS members, when licensing their rights, determining whether a particular use falls within the exception and in enforcing rights. The speed and transaction costs of enforcement will be particularly impacted to the detriment of COMPPS members. The lack of Australian case law in relation to any new fair use exception adds to the unpredictability and uncertainty of the exception.

The suggestion that fairness factors and illustrative exceptions will assist in defining the scope of the new fair use exception is also not helpful or determinative, given those concepts are not clear or exhaustive.

(b) A single, general ‘flexible’ standard is not required

COMPPS believes that the use of an open-ended general, ‘one size fits all’ ‘fair use’ standard is problematic. The concept of ‘fair’ is subjective and open to different interpretations. ‘Fair’ use will invariably mean different things to different people.

COMPPS believes the attraction of a single fair use exception to copyright based on a standard is illusory. A fair use exception increases the complexity of copyright law and has inherent uncertainty.

(c) Fair use will not assist innovation and is not required

Any suggestion that ‘fair use’ is required to develop innovative copyright-dependent industries is not supported by evidence. Major technology companies have successfully established their presence in Australia within the boundaries of the existing copyright laws. Existing copyright laws have not prohibited the development of technology like cloud computing, provided that technology is used in a lawful manner.

COMPPS members are consistently innovating to provide their content to consumers in a format and through platforms that suit modern consumption patterns, within the existing copyright framework. Any reforms that undermine the protections granted by the existing copyright framework will reduce the incentive for rights holders to continue to invest in these innovative products and services and will likely lead to a reduction in innovation and dissemination of quality content.

Further, there is no evidence that the existing fair dealing exceptions are inflexible or otherwise inappropriate. The existing fair dealing exceptions are technology neutral and importantly focus on the use of the copyright material by the user.

(d) Fair use will result in greater transaction costs

It is clear that significant resources will need to be expended by rights holders and non-rights holders in navigating the broad and uncertain legal boundaries of any new 'fair use' exception.

The copyright material of COMPPS members is popular and valuable. COMPPS members need to be protected against unauthorised use of this material. COMPPS members have had to take legal action in the past to prevent unauthorised use of copyright material purportedly under exceptions in the Copyright Act.

The novelty, uncertainty and unpredictability of a new broad fair use exception will inevitably result in increased transaction costs, such as the expenditure of significant costs by rights owners and users on legal costs and litigation to protect rights under the new exception.

The burden of the transaction costs associated with defining the parameters of the new exception will fall to rights holders, such as COMPPS members, to incur. It is unfair that COMPPS members be required to obtain advice and pursue litigation to obtain certainty concerning the scope and possible infringement of their rights.

4.3 The proposed fairness factors

The Consultation Paper refers to various 'fairness factors' and specific illustrative purposes to be used in determining whether a use constitutes fair use under the proposed new exception.

The proposed fairness factors are uncertain, complex and involve consideration of multiple issues. There can be no certainty and predictability in a law based on a standard if the only guidance given for its application is a list of fairness factors to be considered as part of any determination as to whether a use of copyright material constitutes fair use.

COMPPS notes the following about the proposed fairness factors:

(a) The purpose and character of the use

There is no evidence that the existing provisions of the Copyright Act are unreasonably preventing individuals from using copyright materials for private and domestic purposes or that any broader exceptions in respect of private and domestic use are required.

At the same time, there is significant evidence that the instance of improper and unfair use by individuals and third party publishers across digital platforms such as Facebook and Google have grown considerably (as have efforts from COMPPS members to monitor and take down offending content).

COMPPS believes there are already sufficient exceptions in the Copyright Act providing for use of copyright material for private and domestic use, such as the existing time shifting and format shifting exceptions. COMPPS considers the format shifting and time shifting provisions of the Copyright Act adopt the appropriate approach to exceptions for private and domestic use, and notes that any such exceptions should apply to the use of copyright material for private and domestic purposes in certain limited and specific circumstances only. There is no evidence to suggest that these exceptions are too prescriptive or inflexible.

(b) The nature of the copyrighted work

COMPPS members' valuable copyright includes, but is not limited to, rights in sound and film recordings and broadcasts.

It is not clear how the nature of copyright material is a relevant consideration to whether the copyright owners' property rights have been infringed.

Simply because the copyright subsists in a recording or a broadcast or a digital format, or is accessed by a large number of Australians, this should not make it easier for any unauthorised use to be characterised as 'fair use'.

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole

This factor involves considering the degree of use in determining whether the use is fair.

The effect of the proposed use on the reputation of the copyright owner must also be taken into account. For example, COMPPS members must maintain the right to control the use of footage showing rough conduct in their sport or other content that may damage the image of the sport. Such footage, if communicated in an unauthorised manner, has the potential to detrimentally affect the reputation of COMPPS members, their content and their sports.

(d) The effect of the use on the potential market for or value of the copyrighted work

This is a very important factor: use that has an adverse impact on current or future copyright owners' rights should not be capable of being a 'fair' use.

This factor places the onus on the copyright owner to establish the effect on the potential market for, or value of, the copyright material. It is unreasonable and inappropriate to place the burden of proof on to the owner of copyright to show that an unauthorised use of their copyright content is unlawful. No such onus exists under the current fair dealing exceptions.

Further, it is also not clear how the market effect of an infringer's conduct is to be determined and demonstrated. Ascertaining the market effect of the use of copyright material may entail complex economic considerations and raise cost and evidentiary issues.

The proposed fairness factors fail to acknowledge that there may be other reasons why the use of content is unfair or unreasonable and should not occur without the authorisation of the copyright owner. It is inappropriate and unfair that third parties be able to use this content outside the scope of existing, understood fair dealing exceptions.

The illustrative exceptions

The Consultation Paper refers to a list of illustrative exceptions be included in a new fair use exception. Again, COMPPS is concerned that these illustrative exceptions will not provide clarity or certainty.

5 CONTRACTING OUT

The comments below comprise COMPPS' response to questions 3 and 4 in the Consultation Paper.

COMPPS members contract out of the fair dealing exceptions from time to time, including as part of the media rights arrangements referred to in part 2 above.

COMPPS and its members do not support the introduction of any limitations on corporations and individuals agreeing to exclude or limit the operation of the copyright exceptions (other than in respect of the exceptions for libraries and archives).

The media rights licensing arrangements of COMPPS members are detailed, negotiated agreements entered into by sophisticated commercial parties. 'Contracting out' is something that is undertaken by these commercial parties with knowledge of their rights. COMPPS does not see any reason why these parties should be restricted from contracting out of the fair dealing exceptions.

This is particularly the case given that COMPPS members may seek to contract out of these exceptions to protect the reputation and/or integrity of their sports. For example, COMPPS members may insist on restricting use of sporting event footage to minimise or avoid harm to the reputation of a sport and/or to avoid an unsavoury incident being broadcast or replayed.

There are also legitimate reasons why COMPPS members or their licensees may wish to contract out of fair dealing exceptions in agreements with consumers. For example, COMPPS members or their licensees may licence consumers to 'rent' audio visual content of sporting events for a limited duration (similar to the time limited content arrangements available using services such as Apple TV). Such arrangements require the parties to be able to contract out of fair dealing exceptions, including to prevent users being able to contravene the time limited arrangements under cover of a fair dealing exception.

Further, COMPPS does not believe that the existing restrictions on contracting out in the Australian Consumer Law, National Employment Standards and residential tenancy conditions referenced in the Consultation Paper are helpful precedents for, or fair comparisons in relation to, contracting out of the fair dealing exceptions under copyright law.

6 CONTACT DETAILS

Should the Productivity Commission have any questions in relation to this submission or require any further information from COMPPS or its members please contact Malcom Speed at mspeed@compps.com.au or at:

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Yours sincerely

A handwritten signature in black ink, appearing to read 'MS', written in a cursive style.

Malcolm Speed AO
Executive Director