

August 1, 2012

# This Sporting Life: Copyright Law and Consumer Rights

Matthew Rimmer, *Australian National University College of Law*

**This Sporting Life:**  
**Copyright Law and Consumer Rights**  
Matthew Rimmer  
ANU College of Law

When too much sport is not enough

H.G. Nelson and Roy Slaven

Sport occupies an anomalous position under Australian copyright law. A footballer like Gary Ablett Junior is not an author under copyright law. A sporting spectacle like the AFL Grand Final or the State of Origin is not a dramatic work. Sporting events are protected somewhat peripherally as television broadcasts under Australian copyright law. Nonetheless, sports organizations have engaged in special pleading in respect of intellectual property law. This has been particularly evident in the litigation between Optus, the National Rugby League, and the Australian Football League.

There are historical precedents for such special pleading by sporting organisations in intellectual property. First, sporting organisations have asked in vain for the High Court of Australia to recognize an action for misappropriation. In the 1937 case of *Victoria Park Racing and Recreation Grounds Company v. Taylor*, the owners of a racecourse sued a neighbor and broadcaster.<sup>1</sup> The majority of the High Court of Australia dismissed the lawsuit. Latham CJ observed: 'A "spectacle" cannot be "owned" in any ordinary sense of that word.' Evatt and Rich JJ dissented. The Australian Law Reform Commissioner, Jill McKeough, has noted: '*Victoria Park Racing* is still an important decision in the light of attempts to expand notions of property

---

<sup>1</sup> *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479 (26 August 1937).

and control of information.’<sup>2</sup> Second, there was an effort in the 1960s by sporting organisations to protect sporting spectacles as a distinct subject matter under copyright law in the United Kingdom and Australia. Benedict Atkinson writes that the Gregory Committee was hostile to such suggestions: ‘While sports promoters might claim that they wished to protect the products of their skill and investment, the Committee found a compelling reason, apart from the transient nature of performances, for rejecting copyright in sporting spectacles’.<sup>3</sup> In its view, it was preferable to protect television broadcasts – rather than sporting performances. Third, the Australian Government – and other hosts of the Olympics – have minted special sui generis laws to protect Olympic insignia and symbols against such threats as counterfeiting, ambush marketing, and branded venues.<sup>4</sup> There has often been much debate as to whether such laws have an adverse impact upon artistic expression and political speech.<sup>5</sup>

---

<sup>2</sup> Jill McKeough, “Horses and the Law: The Enduring Legacy of Victoria Park Racing”, Landmarks in Australian IP Law, Cambridge: Cambridge University Press, 2009, p. 53-72.

<sup>3</sup> Benedict Atkinson. *The True History of Copyright: The Australian Experience, 1905-2005*, Sydney: Sydney University Press, 2007, 274.

<sup>4</sup> See *S.F. Arts & Athletics, Inc. v. USOC* (‘the Gay Olympics case’) 483 U.S. 522 (1987); *The Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth); *Commonwealth Games Arrangements Act 2001* (Cth); *Olympic and Paralympic Marks Act 2007* (Canada); and *The Beijing Summer Olympics, The London Summer Olympics*.

<sup>5</sup> *Australian Olympic Committee Inc v. Baxter And Co Pty Ltd* (1997) 36 IPR 621; and *Sydney Organising Committee For The Olympic Games v. Pam Clark* [1998] 792 FCA *Australian Olympic Committee Inc and Sydney Organising Committee For The Olympic Games v. Alan Archibald Carter* [2000] ATMO 35.

The contemporary litigation between Optus, the National Rugby League, and the Australian Football League should be seen in this historical context of conflict over intellectual property and sport. In this case, the Optus group of companies devised a new subscription service – “TV Now” – which it offered, in the mainland State capitals, in Australia from mid-2011. This “time-shifting” service enabled subscribers to record free to air television programmes when broadcast and replay the programmes on a compatible Optus mobile device or personal computer at a time of their convenience.

The head of the Australian Football League, Andrew Demetriou, accused Optus of piracy: ‘They are not paying for it; they are lifting it. It is akin to stealing and all it will do is that if sports can't rely on that revenue, they will slug the consumers.’<sup>6</sup> The Australian Football League and the National Rugby League argued that the “TV Now” service infringed their copyright interests of free-to-air-broadcasts of AFL and NRL football games. Telstra was involved in the matter, because it had obtained an exclusive licence to communicate to the public, by means of the internet and mobile telephony enabled devices, free to air television broadcasts of both AFL and NRL matches.

In the case of *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd*, Rares J held ‘that the user made each recording of a broadcast by clicking on the “record” button on his or her

---

<sup>6</sup> Optus unsuccessfully sued the AFL for misleading and deceptive conduct over the statements: *SingTel Optus Pty Limited v Australian Football League* [2012] FCA 138.

compatible device’.<sup>7</sup> The judge noted: ‘I considered that this result was substantially similar to the position where a person used a video cassette recorder (VCR), digital video recorder (DVR) or similar device to copy a television broadcast’.<sup>8</sup> Rares J observed: ‘Even though Optus provided all the significant technology for making, keeping and playing the recording, I considered that in substance this was no different to a person using equipment or technology in his or her home or elsewhere to copy or record a broadcast’.<sup>9</sup> The judge noted that this result was consistent with precedents in the United States and Singapore - *Cartoon Network LP, LLLP v CSC Holdings Inc*;<sup>10</sup> and *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd*.<sup>11</sup>

On appeal, in the matter of *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd*, Finn, Emmett, and Bennett J came to a different conclusion. First, the judges held that Optus was responsible for the copying: ‘Optus could be said to be the maker in that the service it offered to, and did, supply a subscriber was to make and to make available to that person a recording of the football match he or she selected’.<sup>12</sup> The judges noted: ‘Alternatively Optus and the subscriber could be said to be the maker for Copyright Act purposes as they acted in concert

---

<sup>7</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34.

<sup>8</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34.

<sup>9</sup> *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34.

<sup>10</sup> *Cartoon Network LP, LLLP v CSC Holdings Inc* 536 F 3d 121 (2<sup>nd</sup> Cir 2008).

<sup>11</sup> *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

<sup>12</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

for the purpose of making a recording of the particular broadcast which the subscriber required to be made and of which he or she initiated the automated process by which copies were produced.’<sup>13</sup> Second, the judges held that Optus could not invoke the “private and domestic use” defence of s 111 of the *Copyright Act* 1968 (Cth).<sup>14</sup> Third, the judges noted that it was open to parliament to amend or reform the defence: ‘In the present matter such are the conflicting interests and values, such are the possible consequential considerations of which account might need to be taken that, if a choice is to be made to extend or otherwise modify an exception such as s 111, this requires a legislative choice to be made, not a judicial one.’<sup>15</sup> Finally, the judges observed that the ruling was particular to the factual matrix surrounding Optus and TV Now: ‘We should emphasise that our concerns here have been limited to the particular service provider-subscriber relationship of Optus and its subscribers to the TV Now Service and to the nature and operation of the particular technology used to provide the service in question’.<sup>16</sup> The judges commented: ‘We accept that different relationships and differing technologies may well yield different conclusions to the “who makes the copy” question.’<sup>17</sup>

---

<sup>13</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>14</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>15</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>16</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

<sup>17</sup> *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

In response to the ruling, AFL chief executive Andrew Demetriou maintained that ‘common-sense prevailed’.<sup>18</sup> He accused Optus, in perjorative language, of engaging in immoral and unethical behaviour:

It [what Optus was offering] was clearly an inferior product. I've been saying all along it was something that we believe was unethical. It was improper. And we're certainly appreciative of the judges' decision.<sup>19</sup>

The Chief executive of rugby league, David Gallop, argued: ‘We have always believed there was a clear principle in play here: that the sports are entitled to control who shows their events and who profits from those events.’<sup>20</sup> He maintained: ‘Companies should not be able to profit from our content without investing in the sport itself.’<sup>21</sup>

Telstra spokesman Craig Middleton observed:

The judgment is vindication for the sporting bodies and the content providers. This provides certainty for the content providers, players, fans and sport in general. What was at stake was the future of content rights for sport. We've invested millions of dollars in online sporting rights. If that investment was devalued, that would have affected sports fans from the grassroots right through to elite sport.<sup>22</sup>

---

<sup>18</sup> Paul Bibby and Lucy Battersby, ‘Telstra, AFL, NRL win live footy court battle’, *The Sydney Morning Herald*, 27 April 2012, <http://m.smh.com.au/business/telstra-afl-nrl-win-live-footy-court-battle-20120427-1xoth.html>

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.



Such statements are a curious spin on the case – given that the role of copyright is to encourage learning and the creative arts. The Full Court of the Federal Court certainly do not express a view in their judgment that the role of copyright law is to promote sporting entertainments.

Optus has sought special leave to appeal to the High Court of Australia. The chief executive, Andrew Demetriou, has said that he was ‘disgusted’ that Optus had appealed the matter to the High Court of Australia.<sup>23</sup>

In any case, sporting organisations have demanded legislative changes to protect their broadcast rights. In February 2012, the chief executives of the AFL, Cricket Australia, NRL and Tennis Australia met the Prime Minister, Julie Gillard, the Communications Minister, Senator Stephen Conroy, the then Sports Minister, Mark Arbib, and Attorney-General Roxon, to propose amendments to the copyright act. Julia Gillard observed: ‘We have said to them [sporting bodies] . . . that we will urgently consider options here. I think we are all concerned what this can mean for our great sporting codes and it was an unexpected development.’<sup>24</sup> As Kimberlee Weatherall has observed, it is difficult, though, to conceive of a simple amendment in this particular area – which would have flow-on consequences for consumers, innovators, and technology developers.

---

<sup>23</sup> Jon Pierek, ‘Optus Appeal Disgusts The AFL’, *The Age*, 12 May 2012, <http://www.theage.com.au/business/optus-appeal-disgusts-afl-20120511-1yi9l.html>

<sup>24</sup> Dan Harrison and Richard Willingham, ‘Digital Copyright Law Under Review After Optus Court Win’, *The Sydney Morning Herald*, 8 February 2012, <http://www.smh.com.au/opinion/political-news/digital-copyright-law-under-review-after-optus-court-win-20120207-1r5bn.html#ixzz1vI7lmuJv>

Such a position represents a backflip for the Australian Labor Party. The late Senator Peter Cook supported a 'time-shifting' exception in copyright law during the *Australia-United States Free Trade Agreement* 2004. He was shocked that video recording matches of his beloved West Coast Eagles – while he was away on parliamentary duties - constituted an infringement of copyright law. The Australian Labor Party recommended: 'Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the 'fair use' doctrine that exists in the United States and to address the anomalies of 'time shifting' and 'space shifting' in Australia'.<sup>25</sup> It would appear that, in the case of sporting television broadcasts, the Gillard Government is willing to wind back such copyright exceptions. Such a decision reflects the close relationship that exists between the Gillard Government and the elite sporting codes.

Sadly, the over-protection of sporting organisations under Australian copyright law may well have inadvertent impacts upon consumers, cloud computing, and technology developers.<sup>26</sup> Unfortunately, the interests of consumers have been forgotten in this corporatist clash over

---

<sup>25</sup> Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, Canberra: Australian Parliament, 5 August 2004, [http://www.apph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=freetrade\\_ctte/report/final/alp.htm](http://www.apph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/report/final/alp.htm)

<sup>26</sup> Rebecca Giblin, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's decision in *NRL v Optus*' (2012) 34 (9) *European Intellectual Property Review*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2086396](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2086396)

copyright law. It is striking Australian consumers do not enjoy the same freedoms and liberties as their counterparts in the United States and Singapore. A number of cloud computing companies – including Beem and MyTVR - have closed down their operations because of concerns about the precedent of the Full Court of the Federal Court of Australia.<sup>27</sup> Technology developers – with products and services related to time-shifting, space-shifting, and place-shifting – will be anxious about liability for authorizing copyright infringement in Australia.

Hopefully, the High Court of Australia will hear the appeal mounted by Optus. The legal dispute promises to be a spectacle to rival to the AFL Grand Final or the State of Origin – with elite sporting clubs and broadcasters pitted against telecommunications companies and sporting fans. My hope is that the balance of Australian copyright law is not distorted by the special pleading of sporting organisations.

**Dr Matthew Rimmer is an Australian Research Council Future Fellow; an Associate Professor at the ANU College of Law; and an Associate Director of the Australian Centre for Intellectual Property in Agriculture. He is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod*. Dr Matthew Rimmer is an avid supporter of the Sydney Swans. He has a keen interest in intellectual property, and sport.**

---

<sup>27</sup> Josh Taylor, 'Cloud TVRs Stop in Wake of TV Now Ruling', ZDNet, 24 March 2012, <http://www.zdnet.com.au/cloud-tvrs-stop-in-wake-of-tv-now-ruling-339338503.htm>