

‘A BATTLE BETWEEN ENRAGED BULLS’: THE 2009 AUSTRALIAN SENATE INQUIRY INTO SPORTS NEWS AND DIGITAL MEDIA

DR BRETT HUTCHINS

(Refereed)

Monash University

PROFESSOR DAVID ROWE

University of Western Sydney

Abstract

On 14 May 2009, the Senate Standing Committee on Environment, Communications and the Arts handed down a Report after completing an Inquiry into ‘The Reporting of Sports News and the Emergence of Digital Media’. Called by the Federal Minister for Communications, Broadband and the Digital Economy, Stephen Conroy, the Inquiry sought, in the words of one Senator, ‘to shine a light on sometimes quite intractable disputes in this area’. The scale and intensity of these disputes, described in one submission as a ‘battle between enraged bulls’ (Davies, 2009), can be measured by the profile and power of many of the 44 organisations that made submissions and whose representatives appeared over the three-and-a-half days of hearings in Canberra, Sydney and Melbourne. These organisations included the Australian Football League (AFL), National Rugby League (NRL), the International Olympic Committee (IOC), News Limited, Hutchison Telecoms, Yahoo!7 and the World Association of Newspapers (WAN). The Inquiry’s hearings and Final Report have been the subject of close attention both in Australia and overseas, representing the first time that a national government has intervened in this area of commercial news and sporting activity.

Competing claims made during the Inquiry were, in the main, two-fold. First, sports organisations demanded guidance and/or legislation clarifying how the fair dealing exception for the reporting of news in the Copyright Act should operate online, particularly with regard to the placement of moving and still digital images on news websites. It was frequently asserted that existing news reporting arrangements online were infringing the intellectual property rights of sports organisations. In response, some major sports organisations had imposed highly restrictive accreditation and access terms on journalists and news organisations. Second, and in opposition to this position, news organisations demanded a right of access to ‘public sporting events’ under fair and reasonable terms, frequently claiming that such access was in the public interest. As might be expected, the Committee’s Recommendations satisfied neither side completely, although some demands made by a range of sports organisations were rejected outright. This paper concentrates on the first set of claims relating to fair dealing and the Copyright Act, highlighting the centrality of sport in the operation of the media and culture industries, as well as in broader contemporary culture.

Introduction: Digital media, sports news and an ‘appropriate balance’

The Parliament of Australia Senate Standing Committee on Environment, Communications and the Arts Inquiry into ‘The Reporting of Sports News and the Emergence of Digital Media’ and subsequent Report (2009) followed a series of intense and protracted disputes between national sports organisations, and news media companies and agencies. Such conflicts had, for example, affected the coverage of almost every major Test cricket series in Australia since the Ashes Tests of 2005, resulting on some occasions in journalist lock-outs from venues, and retaliatory boycotts by journalists and news organisations (Magnay, 2006; Linden, 2009; AIPS, 2009). Several news agencies, photographers and online journalists had experienced difficulties in accessing AFL grounds, while the AFL and Telstra had taken successful legal action against News Limited for

infringing their media rights online (Oakes, 2009). Telstra had also been involved in a similar court action against Premier Media Group (with which they also collaborate through the Foxtel subscription television service) and News Digital Media for alleged online infringements of National Rugby League (NRL) replays on the Fox Sports website (Webster, Murray and Jackson, 2007).

At the heart of these escalating disagreements is the ownership and control of the production, distribution and retransmission of news and sports media content on the internet and world wide web, including moving footage, text and still images. The legal and contractual skirmishes leading up to the Inquiry had, therefore, been occurring for at least five years both inside and outside the courts, with the acrimony exchanged between the interested parties reaching a point where, in the opinion of the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, Federal Government intervention was required in order to attempt a resolution, especially given the proposed introduction of the Government-initiated high-speed National Broadband Network (NBN). The Inquiry ultimately highlighted deep market uncertainty arising from the emergence of 'post-broadcast' arrangements and a convergent communications sector (Green, 2008; Tay and Turner, 2008; Hutchins and Rowe, 2009), with the previously firm boundaries between broadcast and online media, and the media sport industry frameworks attached to them, under clear challenge. These developments have led sports organisations to fear that previously stable broadcast arrangements and income sources are threatened, and so to respond with highly restrictive — and arguably excessive — news media and journalist access arrangements for major events.

The word 'balance' is used in five of the nine Terms of Reference for the Inquiry (Parliament of Australia, 2009). Given the focus of this paper, the four most relevant items of the nine Terms of Reference were:

- a. the balance of commercial and public interests in the reporting and broadcasting of sports news;
- b. the nature of sports news reporting in the digital age, and the effect of new technologies (including video streaming on the Internet, archived photo galleries and mobile devices) on the nature of sports news reporting;
- d. the appropriate balance between sporting and media organisations' respective commercial interests in the issue;
- f. the appropriate balance between the public's right to access alternative sources of information using new types of digital media, and the rights of sporting organisations to control or limit access to ensure a fair commercial return or for other reasons.

The repeated reference to 'balance' implies that a perceived or real imbalance may exist, and certainly many sports organisations (see Table 1) believe this to be the case. The ability of sports to secure lucrative exclusive coverage deals with broadcasters and online media operators (Rowe, 2004) is purportedly undermined by news websites repackaging and presenting other parties' content by means of on-demand highlights packages and digital photographs. This practice, it was claimed in submissions by sports interests, is 'eroding' their ability both to 'protect traditional media rights' and to 'realise new opportunities from digital media' (COMPS, 2009: 1). Indeed, the Chief Operating Officer of the AFL, Gillon McLachlan, repeatedly insisted that news organisations are 'making money by exploiting our rights' (Proof Committee Hansard, 15 April 2009: 38) and monetising AFL match footage for entertainment purposes under the guise of reporting sports news. News organisations (see Table 1) such as Fairfax and News Limited, by contrast, claimed that no such imbalance exists, submitting that the moving image highlights packages and photographs appearing on their websites, be they archived or not, were legitimate news items catering to public interest. Witnesses representing news media companies often stressed that the fair dealing provisions of the Copyright Act were working well and that sports organisations were free to pursue legal action if they believed that their intellectual property rights were being infringed. In a sometimes amusing appearance, the Group Editorial Director for News Limited, Campbell Reid,

articulated a belief that sports organisations are seeking to 'restrict competition' because 'sporting bodies want to act as media providers themselves' via their own online portals (Proof Committee Hansard, 16 April 2009: 48). Acknowledging that both sides in this conflict 'may be testing the boundaries' of acceptable behaviour in an effort to position themselves advantageously in an evolving digital media marketplace (Senate Standing Committee, 2009: 27), the task of the Senators (see Table 2) was to grasp the evolving nature of a complex field of technological innovation, commercial activity and news reporting, and to recommend how to proceed in regulating the production and circulation of sports news.

Our analysis is based upon attendance, observation and note taking at the hearings, the Inquiry's written submissions, the Committee Proof Hansard, and the Senate Committee's final report, as well as some interviews with relevant parties. A component of a three-year Australian Research Council-funded project (2008–2010),¹ this paper draws on a range of contemporary socio-cultural theories concerned with the struggle for possession of media sport content, especially where it is a source of substantial economic value and national cultural significance. In this instance, however, we will concentrate on the empirical dimensions of the issue, with more extensive theoretical elaboration presented elsewhere (for example, Hutchins and Rowe, 2009; Hutchins, Rowe, and Ruddock, 2009).

Table 1: Submissions (Total: 44) to the Senate Standing Committee Inquiry into 'The Reporting of Sports News and the Emergence of Digital Media'

Submissions	
News Media Companies, Agencies and Corporations (12)	Agence France-Presse (AFP), Associated Press (AP), Australian Associated Press (AAP), Australian Broadcasting Corporation (ABC), Getty Images, Fairfax Media, News Limited, Premier Media Group (PMG), Reuters News, Special Broadcasting Service (SBS), Sports Media Publishing (SMP), West Australian Newspapers
Sports Organisations (11)	Australian Football League (AFL), Australian Racing Board, Cricket Australia, International Cricket Council (ICC), International Olympic Committee (IOC), National Rugby League (NRL), Softball Australia, Newcastle Knights Rugby League club, Racing Victoria, Tennis Australia, Victoria Racing Club (VRC)
News Media Associations and Representative Bodies (7)	Australian Press Council, Australian Subscription Television and Radio Association (ASTRA), Free TV Australia, News Media Coalition (NMC), Pacific Area Newspaper Publishers' Association (PANPA), South African National Editors' Forum (SANEF), World Association of Newspapers (WAN)
Telecommunications and Digital Media Companies (4)	Hutchison Telecoms, Optus, Yahoo!7, ninemsn
Sports Industry Bodies and Associations (4)	Coalition of Major Professional Sports (COMPS), Australian Athletes Alliance (AAA), Australian and New Zealand Sports Law Association (ANZLA), Australian Womensport and Recreation Association
Government Departments /Agencies (2)	Australian Sports Commission (ASC), Department of Health and Ageing
Individuals (2)	Dr Kayt Davies (Edith Cowan University), Mr David Smith (Edith Cowan University)
Other (2)	Confidential submission, Lander & Rogers Lawyers

¹ DP0877777: ARC Discovery Grant, 'Struggling for Possession: The Control and Use of Online Media Sport'.

Table 2: Committee Membership, Senate Inquiry into ‘The Reporting of Sports News and the Emergence of Digital Media’

Member	Party	Attendance at the Inquiry
Anne McEwen (Chair)	Australian Labor Party (ALP)	Yes. All 3.5 days.
Simon Birmingham (Deputy Chair)	Liberal Party (LP)	Yes. 3 days.
Kate Lundy	ALP	Yes. All 3.5 days
Dana Wortley	ALP	Yes. All 3.5 days.
Judith Troeth	LP	Yes. 1.5 days.
Louise Pratt	ALP	Yes. 0.5 day.
Ron Boswell	National Party (Nats)	No.
Scott Ludlam	Australian Greens (AG)	No.

Contesting the future of media sport

The actual structure of the markets, technologies, and social practices that have been destabilized by the introduction of computer-communications networks is now the subject of a large-scale and diffuse institutional battle (Benkler, 2006: 468–69).

The Senate Inquiry was another front in the battle described above by Yochai Benkler, with parallel contests over the control of digital content occurring in the global music, publishing and film industries. Whilst the Inquiry reflected the specificity of the Australian sporting market and culture, matters relating to the right to reproduce digital images on news websites have also been fiercely contested internationally at tournaments such as the Football, Cricket and Rugby World Cups (Sparre, 2007; Associated Press, 2009). Thus, Inquiry participants included the IOC, the World Association of Newspapers (WAN), Agence France-Presse (AFP), and Reuters News, with extensive media coverage of the Inquiry both in Australia and overseas. According to a sports media analyst quoted in *The Australian*, ‘All sporting bodies from FIFA to the English Premier League, PGA [Professional Golfers Association] and LPGA [Ladies Professional Golf Association] are going to be analysing this [Inquiry] very carefully’ (Canning, 2009). Although the Australian media sport market is relatively small, it is globally interconnected (Miller, Lawrence, McKay and Rowe, 2001), and so decisions within its jurisdiction resonate well beyond the nation’s borders.

The Inquiry displayed an emergent conflict between two sets of incumbent market operators — major news companies and sports organisations — who had largely co-existed for many decades given the mutually agreeable profits that followed from a compact between media companies and sports associations, leagues and clubs (Rowe, 2009). The broader context and significance of the Inquiry lay in the strategic preparations by both interest groups as broadcast and print have given way to networked online distribution, representing a fundamental shift in the production, distribution and reception of media content (Bruns, 2005, 2008). From the perspective of sports organisations, these changes threaten previously reliable income streams and undermine the considerable value of exclusive contractual arrangements that have long governed the relationship between sports competitions and media organisations (Hutchins and Rowe, 2009). Diminished exclusivity and control are an acute source of anxiety for professional sports and, in asking for the intervention and guidance of Government, Cricket Australia (2009: 11) listed the conditions that it felt threatens its once secure ‘intellectual property’:

- Digital media are available 24 hours, seven days per week
- Platforms and applications are constantly evolving

- New technologies are being developed every day
- Time offers no bounds
- Unlimited geographical reach and unlimited storage capacity
- The public can access with ease
- Updating of material is possible at any time and as often as desired
- Aggregation of material is easy and possible by anyone, not just ‘news’ organisations
- New revenue opportunities for both media and other industries

Another member of the Confederation of Major Professional Sports (COMPS),² Tennis Australia (2009: 9), also addressed the growing problem of online piracy, having detected ‘59 sites offering unauthorised streams or sites linking to these streams’ during the 2008 Australian Open.

A curious feature of proceedings was how sports organisations complained about the likelihood, rather than the actuality, of reduced income streams. This point was recorded in the Committee’s report, with ‘no specific evidence’ of ‘erosion in revenue-raising capacity’ presented by the sports (Parliament of Australia, 2009: 27). In explaining the ‘future focussed’ character of the Inquiry, sports organisations expressed fear of the disruptive impact of digital communications upon established business practices and models; a point confirmed by 17 in-depth interviews conducted with representatives of national sporting bodies and clubs over 2008–09 in which the themes of uncertainty and transformation clearly emerge.³ According to Michael Latzer (2009: 605–07), a common feature of disruptive communications innovations for incumbent operators is the realisation of ‘lower profits until a new business model is found’, which is offset by ‘first mover advantages’ for those organisations that re-educate personnel and develop new organisational skills. Sports are seeking to avoid the first and struggling to understand how the second can be achieved. Many issues were raised during the Inquiry emphasising these challenges, including confusion over the distinctions between mobile and internet content and platforms, difficulties in monetising websites, and uncertainty concerning whether any intellectual property is embedded in a live sporting event that can then be used to exercise control over online content. In terms of lowering profits, a fear expressed here is that broadband or IPTV operators will begin acquiring exclusive rights to premium sports content, thereby circumventing anti-siphoning legislation and damaging the market for free-to-air and pay television (Free TV Australia, 2009; Murray, 2006).

Table 1 above demonstrates that the organisations and groups contributing to the Inquiry fall into eight main categories. For the purposes of our analysis, these were further condensed into (i) sport organisations and associations; (ii) news media companies and associations; and (iii) telecommunications and digital media companies. Given the limitations of a single paper, we have selected (i) for particular attention in this context. While it is not possible to attribute uniformity to the positions and arguments of each submission and speaker, the following discussion offers an analytical framing of the overall position of the groups involved and the issues being discussed, including points of disagreement.

² Members of COMPS regard themselves as ‘the custodians of the nation’s major professional sports’ (COMPS, 2009: 1). Formed in 2005, members of this coalition are the AFL, NRL, the Australian Rugby League (ARL), Cricket Australia, the Australian Rugby Union (ARU), Football Federation Australia (FFA), the Professional Golfers Association (PGA) and Tennis Australia. Despite keeping a relatively low public and media profile, COMPS is arguably Australia’s most powerful and (collectively) wealthy sports lobby group.

³ Interviewees quoted in this paper are de-identified in accordance with Human Research Ethics Protocols.

Contrasting claims: Sports organisations and associations

The existing fair dealing provisions of the *Copyright Act* do not hold up in the digital era. (Cricket Australia, 2009: 14)

It is about copyright legislation that originated in an analogue linear world and which is now exploited in a digital world in a way that was never contemplated. I guess it is essentially legislation that has not kept up, allowing the key driver of sports business models protection of their IP to be undermined ... Succinctly, our issue is about the extent of the use of our copyrighted material and the breadth of it, and how we find the balance ... It plays directly into the question of an entertainment offering versus a news offering, and goes to the heart of the protection of our IP. As I said earlier, in the end, this is all we have. It is critical to the survival of the sporting bodies represented here today that we find the right balance. (Gillon McLachlan, Chief Operating Officer, AFL, Proof Committee Hansard, 15 April 2009: 33)

These statements form part of a plea by sports bodies for 'legislative leadership' (Proof Committee Hansard, 15 April 2009: 33) in clarifying and/or reforming Section 42 — fair dealing for the purpose of reporting news — of the *Australian Copyright Act 1968* (as amended). They are also part of a contentious set of claims put forward by major sports organisations that, despite making healthy annual profits and exercising considerable power in the sports market via media rights deals, stressed repeatedly that many operate on a not-for-profit basis, thereby problematising the status of sport as a 'public good'. Observing the hearings gave the impression that not all sports organisations were genuinely expecting alterations to the Copyright Act to protect sports broadcasts. Such amendments would require additional changes to those legislated in 2000 under the *Copyright Amendment (Digital Agenda) Act*, which adopted a platform-neutral policy orientation towards copyright and the fair dealings provisions. Any sport-specific changes would also have unpredictable flow-on effects for other areas of the cultural and media industries. However, by asking for such remarkable Government intervention, the extent of sports' dissatisfaction with existing arrangements was communicated effectively to the Committee. This line of argument also served to make the less interventionist idea of a codified industry agreement, or recommendations governing the reproduction of digital sports images on news websites, appear more reasonable and realistic. Whether this tactic by several sports organisations was an intentional, coordinated strategy, or a coincidental commonality is, though, not crucial, as it was given partial effect in the Committee's final Report.

The efforts of the leading sports organisations (or, more accurately, a legal firm representing them) to control online communications, also led to an unusual but notable assertion — that intellectual property protection should extend beyond the broadcast of a sports event to the event itself:

The athletes, clubs and sporting organisations put on the 'show'. It is our submission that they should be rewarded by ensuring the Copyright Act protects their performance. That is, there should be copyright in the performance of sport. (Lander & Rogers Lawyers, 2009: 5)

COMPS (2009: 5) similarly argued that:

... sporting organisations should be granted ownership of copyright in key elements of performance of the major events promoted by those sports organisations. This requires an enhancement of their intellectual property rights at law.

The proposal to create a 'new right' with regard to intellectual property (Proof Committee Hansard, 29 April 2009: 49) was made most forcefully in a submission supplied by Lander & Rogers Lawyers and reasserted during the hearing process. This firm represents between 50 and 100 national and state sporting organisations in Australia, including the AFL (Proof Committee Hansard, 29 April 2009: 52, 55). For the purposes of the Senate Inquiry, however, it was stated that they were

speaking on behalf of only five lower tier sports.⁴ The proposal led to a series of awkward exchanges between Senator Kate Lundy and Ian Fullagar, a partner at Lander & Rogers, as she interrogated him about the full implications of his argument. Fullagar appeared to be poorly prepared for this line of questioning, contributing to further confusion around the issue. The logic of the ambit claim was that if sports have blanket copyright control over their events, they could then exercise a higher-level of control over media accreditation and the subsequent reporting of the event. More pertinently, this arrangement would eliminate any suggestion that journalists should have an automatic right of access to take news photographs, record and/or replay digital footage because sports fixtures would no longer be considered a ‘public event’. News companies, as might be expected, noted frequently in their submissions that substantial public funding is provided for many sports. Sport, they contended, could not be treated as the private property of the recipients of public subvention.

The principal problem with the advocacy of Lander & Rogers is two-fold. First, as Senator Lundy pinpointed, for Fullagar’s case to have effect, he would have to identify what form of intellectual property is embedded within a sports event, leading to the possible conclusion that it is the athletes or ‘performers’ — not the sports organisations — who actually ‘own’ the event. This scenario would create tensions and possible conflicts between sports and athletes over the organisation of competitions and distribution of income arising out of them (difficulties currently evident in the area of athlete image rights). Second, even if intellectual property were found to be embedded in a sports event and its control to be the domain of the event organiser, it would not solve the main problem that prompted the Inquiry. News organisations would still expect to report on sport and attempt to use fair dealing provisions to present sports content on their websites (Parliament of Australia, 2009: 44), and the argument that all that could be considered to be ‘news’ concerning the event could be determined by the producer would be legally and politically unsustainable. The difficulty of altering the fair dealing provisions of the Copyright Act for online sports news highlights the uncertainty surrounding executive and judicial interpretations of Section 42, and the elusive character of what constitutes a significant portion of a sports broadcast. In her investigation of the frequently discussed case (implicating, but not centring, on sports footage) of *The Panel (TCN Channel Nine Pty. Ltd. V Network Ten Pty. Ltd.)*, Melissa De Zwart demonstrates that the test of fair dealing for the purposes of criticism or review (Section 41) or in the reporting of news (Section 42), is difficult to establish, expensive, and time consuming to contest in court. Such proceedings produce ‘highly subjective and unpredictable results, subject to personal issues of taste and interpretation’ (De Zwart, 2009: 251), which was reflected in the findings of the presiding judges in this case. Indeed, we would add, the status of a sport event as a ‘work’ would need to be explored in ways that go far beyond the orthodox arts-cultural concerns implied in the Copyright Act.

Reaching the Full Bench of the Federal Court, the case pivoted on the issue of what constitutes a ‘substantial part’ of a television broadcast, a notoriously difficult matter to define. Channel Ten and *The Panel* program’s producers were accused by Channel Nine of exploiting or ‘free-riding’ on content that they produced and broadcast, with 20 separate segments put forward in support of this claim. The case also related to Channel Nine’s frustrations with Ten’s *Sports Tonight* program on which Ten regularly exceeded the unwritten ‘3 x 3 x 3’ industry convention of showing three minutes of another broadcaster’s footage, three times a day, three hours apart (De Zwart, 2009: 254). The difficulty for Channels Nine, Ten and television producers in general was that the proceedings provided no clarity on what is legitimate or illegitimate when replaying segments of other networks’ programs. Little consensus emerged between the three judges on the Federal Court when applying the fair dealing test. The court eventually found that several segments did represent a substantial part of various Channel Nine shows, but they disagreed about which ones. One judge

⁴ Surf Life Saving Australia, Badminton Australia, Bowls Australia, Softball Australia and Australian International Shooting Limited.

used ‘economic significance’ as a key criterion in making his judgment, while another assessed whether the program excerpt was ‘trivial, inconsequential or insignificant’ within the overall broadcast (De Zwart, 2009: 262). The confusion evident in this legal case is exacerbated when considering the retransmission of footage on internet and mobile platforms in which ‘the most valuable part’ of the program becomes more uncertain, especially in terms of length, content, the ability to be replayed continuously, and online archiving (cf. *The Sports Factor*, 2007). During the Senate Committee hearings, it was tellingly conceded by James Sutherland (Chief Executive of Cricket Australia), speaking during a collective appearance by COMPS, that even sports organisations do not necessarily agree on what constitutes a ‘significant part’ of a sports broadcast:

Senator Lundy. We are still yet to hear of or understand what a definition of a news video clip is that would be acceptable or defined by sports for the purposes of being news reported. Could you respond to that?

Mr Sutherland. If we went along the line here, we would probably all have some sort of a different version. Every one of our sports is different in its own way. Some of them are high scoring, some of them are low scoring, some of them go for five days, and some of them go for a couple of hours. All of those things make it difficult to be quite specific about that, and that is where we encourage this committee in its findings to consider a further step where this can be discussed and considered in terms of an appropriate measure or guideline for what is news in the context of various major sports that are of public interest. (Proof Committee Hansard, 15 April 2009: 25)

Neither the courts nor the aggrieved sports can currently find consistent agreement on how Section 42 of the Copyright Act should be applied in the context of television and the internet, and are unlikely to do so. Thus, entreating a Senate Committee to resolve the matter is a highly optimistic strategy. It is little surprise, then, that Recommendation 2 of the Committee’s report stated that no amendments to ‘copyright law to clarify the application of the news ‘fair dealing’ exception’ should be made (Parliament of Australia, 2009: 50). It was also emphasised during the hearings and in the Report that, instead of asking for Government intervention, sports should pursue litigation if they believed that their rights are being infringed, which would help copyright law ‘keep pace with technological developments’ (Parliament of Australia, 2009: 49). In other words, responsibility for making such determinations was diverted by the legislature to the judiciary — hardly a promising prescription for creating and expediting certainty in the provision of sports news in digital media environments.

Conclusion: Turf wars and opening windows

When consideration is given to how news (especially broadcast) media companies are dealing with technological developments online in the wake of a concerted challenge to their historical dominance of sports news and information distribution, the ‘turf war’ is replicated in reverse, with accusations that sports organisations are trying to become media companies. A third ‘front’ was also evident in the shifting boundaries between media companies (again, especially broadcasters) and telecommunications providers. In broad terms, the findings of the Senate Standing Committee Inquiry into ‘The Reporting of Sports News and the Emergence of Digital Media’ are consistent with Benkler’s (2006: 393) case that market incumbents should not be protected from the risks posed by networked information environments. If Australia’s most powerful sports had been successful in their demands for regulatory intervention to help guarantee their viability on the digital frontier, it would, for example, be equally valid for print news companies to call upon Federal Government intervention to combat the mounting challenges posed by online news distribution and content aggregation.

The difference here, sports would argue, is that many of them are run on a not-for-profit basis (in spite of their evident profitability), a position that was undermined by the Department of Treasury’s James Chisholm when he explained that, under the Trade Practices Act, commercial activity

involves ‘continuous or repetitious commercial or income-generating’ activities irrespective of the status of the operating body (Proof Committee Hansard, 5 May 2009: 34). Sporting bodies are, therefore, necessarily commercial entities and actors — it rather stretches credibility to treat a major component of the ‘sportsbiz’ as if it has quasi-charitable status. This is not to argue, of course, that the lucrative broadcast rights that sports sell (increasingly separately across digital and mobile platforms) should be infringed without restraint by media and telecommunications companies, nor that the latter should simply breach each others’ copyright. It is, rather, to highlight that the previous arrangements of corralling and selling premium media sports content are becoming demonstrably outmoded.

The Committee’s overall position rejected the more ambitious proprietorial claims of the various parties, so renouncing the tendency of legal and political systems to act as inhibitors of digital innovation and to side with regulatory regimes based upon enclosure and control (Benkler, 2006: 393–94). It is for this reason that a light regulatory touch is preferable when unique socio-technical conditions emerge that force new ways of thinking and operating among long-dominant sports and media operators. The shift from broadcast to online represents the opening of a window where new players, content production and distribution mechanisms, and user practices have an opportunity to gain a commercial and cultural foothold (Bruns, 2008; Jenkins, 2006a, 2006b; Jenkins and Deuze, 2008). Historically, though, it can be assumed that a new, more stable regime will take hold after the current period of uncertainty and boundary testing — until the next ‘paradigm crisis’ in communication.

The 2009 Senate Inquiry — the first but probably not the last of its type in the world — demonstrates that we are living through an *interregnum* out of which will emerge a new media sport order. The rapidly changing media and sport environment is demonstrated by the Federal Government’s announcement on the 15th September 2009 (that is, well after the Inquiry had reported) that it would force the structural separation of the retail and wholesale divisions of Australia’s oligopolistic telecommunications company, Telstra, and would ‘encourage’ the company to sell its 50 per cent stake in the key pay TV operator and major subscription sport platform, Foxtel (Department of Broadband, Communications and the Digital Economy, 2009). The present response from many sports — and, indeed, several of their counterparts in the news media — is inadequate to the challenge at hand. Their problem involves a dissonance between how online media *are* functioning and how they believe they *ought* to function (cf. Beniger, 1986: 88), and their inability to reconcile the two in a digital media setting characterised by a profusion of options.

Both the hearings and submissions indicated that popular elite sports and some of their media partners are attempting to replicate online the existing broadcast model of rights control and content management. This mindset is consistent with operational norms, business structures and organisational cultures established over many years. The architecture and functionality of the internet, web and mobile do not fit or operate smoothly within these structures and cultures, with the shift from broadcast to online characterised by a movement from broadcast content scarcity to digital plenitude (Hutchins and Rowe, 2009), irrevocably changing the production, distribution and consumption of sports content.

REFERENCES

- AIPS (International Sports Press Association) (2009) ‘Australian Senate Inquiry Looks Into Media Rights and the Internet’, 15 April.
<http://www.aipsmedia.com/index.php?page=news&cod=3330&tp=n> (last accessed 1 October, 2009).
- Associated Press (2009) ‘Online Rights in the Spotlight at Senate Inquiry’, *NZ Herald*, 16 April.
- Beniger, J.R. (1986) *The Control Revolution: Technological and Economic Origins of the Information Society*. Cambridge, MA and London: Harvard University Press.

- Benkler, Y. (2006) *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven and London: Yale University Press.
- Bruns, A. (2005) *Gatewatching: Collaborative Online News Production*. New York: Peter Lang.
- Bruns, A. (2008) *Blogs, Wikipedia, Second Life, and Beyond: From Production to Produsage*. New York: Peter Lang.
- Canning, S. (2009) 'Senate Inquiry to Decide Who Owns Sports Match Footage', *The Australian*, 16 March, <http://www.theaustralian.news.com.au/business/story/0,28124,25190559-36418,00.html> (last accessed 1 October, 2009).
- COMPS (Coalition of Major Professional Sports) (2009) Submission to 'Inquiry into the Reporting of Sports News and the Emergence of Digital Media', *Senate Standing Committee on Environment, Communications and the Arts*. Canberra: Parliament of Australia.
- Cricket Australia (2009) Submission to 'Inquiry into the Reporting of Sports News and the Emergence of Digital Media', *Senate Standing Committee on Environment, Communications and the Arts*. Canberra: Parliament of Australia.
- Cricket Australia, Australian Football League (AFL) and National Rugby League (NRL) (2005) Submission to 'Attorney General's Review of the Fair Use and Other Copyright Exceptions', *Australian Government Attorney-General's Department*. Canberra: Parliament of Australia.
- Davies, K. (2009) Submission to 'Inquiry into the Reporting of Sports News and the Emergence of Digital Media', *Senate Standing Committee on Environment, Communications and the Arts*. Canberra: Parliament of Australia.
- DeZwart, M. (2009) 'The Panel Case', in A. Kenyon, M. Richardson and S. Ricketson (eds) *Landmarks in Australian Property Law*. Melbourne: Cambridge University Press, pp. 251–63.
- Department of Broadband, Communications and the Digital Economy (2009) *Telecommunications Regulatory Reform*, http://www.dbcde.gov.au/communications/telecommunications_regulatory_reform (last accessed 26 September, 2009).
- Free TV Australia (2009) *National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper*. Submission by Free TV Australia Limited to the Department of Broadband, Communications and the Digital Economy. Canberra: Parliament of Australia.
- Green, J. (2008) 'Why Do They Call It TV When It's Not on the Box? "New" Television Services and Old Television Functions', *Media International Australia* 126: 95–104.
- Hutchins, B. and Rowe, D. (2009) 'From Broadcast Rationing to Digital Plenitude: The Changing Dynamics of the Media Sport Content Economy', *Television & New Media* 10 (4): 354–70.
- Hutchins, B., Rowe, D. and Ruddock, A. (2009) "'It's Fantasy Football Made Real": Networked Media Sport, the Internet and the Hybrid Reality of MyFootballClub', *Sociology of Sport Journal* 26 (1): 89–106.
- Jenkins, H. (2006a) *Convergence Culture: Where Old and New Media Collide*. New York: New York University Press.
- Jenkins, H. (2006b) *Fans, Bloggers, and Gamers: Exploring Participatory Culture*. New York: New York University Press.
- Jenkins, H. and Deuze, M. (2008) 'Editorial: Convergence Culture', *Convergence* 14 (1): 5–12.
- Lander & Rogers Lawyers (2009) Submission to 'Inquiry into the Reporting of Sports News and the Emergence of Digital Media', *Senate Standing Committee on Environment, Communications and the Arts*. Canberra: Parliament of Australia.
- Latzer, M. (2009) 'Information and Communication Technology Innovations: Radical and Disruptive?' *New Media & Society* 11 (4): 599–619.

- Linden, J. (2009) ‘Aussie Sports Inquiry Kicks Goal for Media Freedom’, *Reuters*, 14 May. <http://www.reuters.com/article/technology-media-telco-SP/idUSSP41556920090514> (last accessed 1 October, 2009)
- Magnay, J. (2006) ‘Pitch Battle Between Sports and Media Over Images’, *Sydney Morning Herald*, 16 December.
- Miller, T., Lawrence, G., McKay, J. and Rowe, D. (2001) *Globalization and Sport: Playing the World*. London: Sage.
- Murray, L. (2006) ‘Foxtel Wants Rules for the Internet’, *The Age*, 10 March.
- Oakes, D. (2009) ‘Telstra and AFL Win Case Against News Ltd’, *The Age*, Business Day, 6 February. <http://business.theage.com.au/business/telstra-and-afl-win-case-against-news-ltd-20090205-7z0q.html> (last accessed 1 October, 2009).
- Parliament of Australia Senate Standing Committee (2009) *The Reporting of Sports News and the Emergence of Digital Media*. The Senate Standing Committee on Environment, Communications and the Arts, Commonwealth of Australia, May, http://www.aph.gov.au/SEnate/committee/eca_ctte/sports_news/report/index.htm (last accessed 27 September, 2009).
- Proof Committee Hansard (2009) ‘Reference: Reporting of Sports News and the Emergence of Digital Media’, *Senate Standing Committee on Environment, Communications and the Arts*. Commonwealth of Australia, Wednesday, 15 April.
- Proof Committee Hansard (2009) ‘Reference: Reporting of Sports News and the Emergence of Digital Media’, *Senate Standing Committee on Environment, Communications and the Arts*. Commonwealth of Australia, Thursday, 16 April.
- Proof Committee Hansard (2009) ‘Reference: Reporting of Sports News and the Emergence of Digital Media’, *Senate Standing Committee on Environment, Communications and the Arts*. Commonwealth of Australia, Wednesday, 29 April.
- Proof Committee Hansard (2009) ‘Reference: Reporting of Sports News and the Emergence of Digital Media’, *Senate Standing Committee on Environment, Communications and the Arts*. Commonwealth of Australia, Tuesday, 5 May.
- Rowe, D. (2004) *Sport, Culture and the Media: The Unruly Trinity* (2nd edition). Maidenhead, UK: Open University Press.
- Rowe, D. (2009) ‘Media and Sport: The Cultural Dynamics of Global Games’, *Sociology Compass* 3/4: 10.1111/j.1751-9020.2009.00225.x: 543–558.
- Sparre, K. (2007) ‘Newspaper Organisations Continue Fight Against Sports Federations’, *Play the Game*, 19 January. <http://www.playthegame.org/news/detailed/newspaper-organisations-continue-fight-against-sports-federations-1373.html> (last accessed 1 October, 2009).
- Tay, J. and Turner, G. (2008) ‘What is Television? Comparing Media Systems in the Post-Broadcast Era’, *Media International Australia* 126: 71–81.
- Tennis Australia (2009) Submission to ‘Inquiry into the Reporting of Sports News and the Emergence of Digital Media’, *Senate Standing Committee on Environment, Communications and the Arts*. Canberra: Parliament of Australia.
- The Sports Factor* (2007) ‘Playing Hard Ball: New Media and Sport’, *ABC Radio National*. <http://www.abc.net.au/rn/sportsfactor/stories/2007/1917322.htm> (last accessed 1 October, 2009).
- Webster, A., Murray, L. and Jackson, G. (2007) ‘NRL in Middle of Rights Fight’, *The Age*, 5 April. <http://www.theage.com.au/news/news/nrl-in-middle-of-rights-fight/2007/04/04/1175366328612.html?page=fullpage#contentSwap1> (last accessed 1 October, 2009).