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Give us a fair go! Legal obstacles to reporting sport on the Internet

By Rhonda Breit *

Abstract

As the Internet becomes a mainstream conduit for business and communication, it can no longer be referred to as a " lawless frontier" (De Zwart 1999, 112). The laws that regulate this environment, however, are not always obvious, particularly to reporters who have to collect stories for online newspapers, which are facing competition from their traditional sources of information. This article uses a case study of on-line sport to examine the legal pitfalls facing journalists reporting on-line.

Introduction

This article explores the legal obstacles journalists might face when reporting sport on the Internet. As event organisers and promoters see the commercial advantage of the Internet, they are producing their own news sites and competing for readership of the traditional news sources such as newspapers, television and radio. Confidential interviews with online newspaper sports editors have revealed commercial pressures are affecting the way in which sport is reported on-line, with event organisers/managers using contractual arrangements to exclude their competitors or stream on-line audiences through the official event website. The law is being used to obtain a competitive advantage, creating legal pitfalls for on-line sports reporters. This article analyses these pitfalls.

This study employed a variety of methods including a survey of on-line newspaper sports writers and editors. A poor response rate to the survey necessitated the author conducting in-depth interviews with some on-line sports editors. The author also obtained copies of contracts, outlining the entry conditions to sporting events for on-line reporters, described in a case study. The data collected from these sources has been used to identify the stakeholders in sporting events and analyse the legal principles that regulate the relationships between the various stakeholders. Using the case study, the author applies existing legal principles to predict how the law may obstruct on-line journalists seeking to report sporting events.

The stakeholders

Sport is big business, with various interested parties. The Internet provides another market for selling sport, creating new opportunities for interested parties. Before identifying legal problems arising from reporting sport online, it is important to identify the interests of the primary stakeholders in sporting spectacles.

Obviously, the public (or consumer) has an interest in attending spectacles or receiving accurate and contemporary information about sporting events. It also demands independent analysis and criticism of the event. These various interests of consumers of sport can be categorised as entertainment and news interests.

The government is a major stakeholder in sporting events. Its interest ranges from the laws that regulate the events to the taxes derived from them. But the government and the laws they implement must also protect the cultural aspects of the sporting spectacle, including access to the event and protection of the historical buildings in which events are staged such as Waverley Park in Victoria. These laws set the parameters for event management, reporting, analysis and consumption. State and federal governments also need to promote social harmony, which means promoting public access to events directly or indirectly through contemporaneous reports. This, in turn, means facilitating the media's access to events, which can be described as a free speech or public right to know interest. But the government must balance the public's right to know with the commercial interests of citizens who have invested in the event, including the event organisers, venue owners and managers, the competitors and the media.

The event organisers, venue managers and players want maximum exposure, maximum attendance and maximum profit. The competitors also seek sporting excellence, but in reality the degree of excellence relates strongly to commercial rewards (although it is possible to argue their physical appearance and presentation plays an important part in commercial reward).

The media also want maximum exposure and profit from reporting the event, but their interests go beyond commercial issues: idealistically (at least) they are seeking to facilitate the public's right to know, which means being able to independently review and criticise the event.

Event and media sponsors, who derive their interest by contracting with a primary stakeholder, are secondary stakeholders.

In summary:

- the public has an entertainment and news interest in sporting events;
- the governments' interests are legal, cultural and social;
- The event organisers, venue owners and managers and the competitors themselves have commercial interests in the event;
- The media have a commercial interest in maximising their audience and getting the exclusive or scoop. But commercial obligations must be balance against the public right to know.

The commercial interests of the event organisers, venue owners and managers, competitors and the media must be balanced against the public's interest in accessing the event directly or indirectly through media reports/commentary/criticism and review. The law attempts to balance these interests in various ways.

How these relationships are managed: A case study

How the law balances the various stakeholders' interests is best illustrated by a case study. The case study is constructed from data collected during interviews with on-line sports editors and inspection of contracts prepared by sporting event organisers, managers, and venue operators outlining conditions of entry to events. If these conditions are not accepted by media organisations then entry to the event is denied. Conditions imposed on online reporters have included:

- No moving picture video of match play or any other video permitted to be produced or posted on the Internet, including material from third party rights holders or material produced from previous years.
- No original audio material permitted to be produced in or transmitted from the grounds without a licence.
- No original photography by an online service is permitted and no photo credentials issued for online services. Photos from wire services can be posted.
- No live or direct transmissions from the grounds are permitted
- Sponsorship of online coverage is strictly prohibited.

These conditions mean that on-line media reporters are precluded from taking moving video pictures or photographs within the grounds of the event. The news organisation cannot produce live or direct online transmissions from the grounds. They cannot produce or transmit original audio of the event without a licence; and most alarmingly they cannot obtain a sponsor, independent of the event sponsor, for a non-official site. If these conditions are not accepted by a news organisation, their journalist will not be permitted to enter the grounds. Any site that wants live feed for commentary must go through the official web site, thus increasing its "hits" and maximising its marketability. Organisations, which refuse to accept this arrangement, can access the event via the official web-site, but they have no way of independently scrutinising the event.

Before analyzing the legal obstacles presented by these conditions, it is important to identify the different areas of law, which regulate these arrangements. Real property law determines the rights of an owner/occupier to impose conditions of entry to a property. Contracts legally define relationships between parties, and can be used to define the rights of entry to a property and assignment or licensing of intellectual property rights held by the creators of original works. The conditions of entry must not be anti-competitive in breach of the Trade practices Act and any arrangements entered into by the various stakeholders must not mislead or deceive readers. Finally, article 19.2 of the International Covenant on Civil and Political Rights guarantees "everyone has the right to freedom of expression (including) freedom to hold opinions without interference, and to seek and impart information and ideas through any media and regardless of frontier".

In light of these principles, the case study raises a number of specific questions:

- Does an event organiser/venue manager have the right to impose conditions on entry to the event?
- How does the Commonwealth Copyright Act protect works created from a sporting spectacle?
- Can media organizations link to the official site without permission?

- Can organisers limit on-line sports news sites from obtaining independent sponsorship?
- Are these restrictions a fetter on freedom of speech? If so, can any action be taken?

Does an event organiser/venue manager have the right to impose conditions on entry to the event?
There is no property in a spectacle (Victoria Park Racing and Recreation Grounds Company v Taylor and others 1937 58 CLR, 479). Profitability of events is determined by the conditions imposed on people entering the property to view the spectacle and from licensing the use of creative works derived from the event, which are protected by the Commonwealth Copyright Act 1968. The rights of property owners to impose conditions of entry to their property are derived from the law of real property. The rights to license original creative works derived from the event are regulated by intellectual property law, which will be discussed later in this article.

Occupiers of properties can impose conditions on entry to their property. Provided these conditions are not illegal, the occupiers and controllers of land can limit competitors' access to information or the spectacle itself. The rights of the owner/occupier are limited to the boundaries of the property, therefore the owner/occupier cannot stop a person observing events from some vantage-point outside the property, unless its constitutes a "nuisance". Gibson (1998, 164) explains the tort of nuisance is "the unreasonable interference with an occupier's enjoyment of land…the interference may…start outside the land occupied by the person complaining".

In *Victoria Park Racing and Recreation Grounds Company v Taylor* (1937), a narrow majority of the High Court of Australia (three out of five judges) found that erecting a tower, from which to view and broadcast a simultaneous commentary of racing meetings, did not cause a nuisance. This case hinged on the law of copyright, real property and the tort of nuisance and set out important principles of law, which are relevant to reporting sport on-line. These principles include

- There is no property in a spectacle (1937, 496-7)
- News is not property (1937, 498, 511, 518, 527).
- Mere competition cannot give rise to a cause of action in nuisance (1937, 493, 514)
- If an occupier of land wishes to prevent outsiders from viewing things taking place on the land occupied, it is the occupier's obligation to erect structures to prevent this occurring (1937, 494)
- To prove nuisance the occupier must prove detraction from his/her enjoyment of the natural rights of the occupation of land and occupation of land does not give an automatic right to broadcast any spectacle held on that land, which means property rights and intellectual property rights are independent (1937, 508)
- Erecting a vantage tower constitutes an interference with the occupier's profitable conduct of business and not his/her enjoyment of the land.

Dissenting, Rich, J observed "one of the prime purposes for occupation of land is the pursuit of profitable enterprises from which the exclusion of others is necessary either totally or except upon conditions which may include payment" (Victoria Park Racing and Recreation Grounds Company v Taylor 1937, 503). He stated the rights of a person to derive profit from his profit outweighed any rights of a neighbour to view or observe from adjacent land (Victoria Park 1937, 504).

Despite the narrow majority, the *Victoria Park Case* stands for the principle that occupiers of venues can impose conditions of entry, restricting the rights of online reporters entering the grounds. Where the event organiser is the ground occupier, these conditions can be imposed on entry to the property to maximise profitability of the spectacle. Where the venue occupier is not the event organiser, contractual arrangements must be made to protect the commercial interests of all parties.[1]

Legislation can extend property rights. This has occurred with special event legislation such as the Australian Grand Prix Act 1995, which was enacted by the Victorian Parliament. Section 35 states that:

(1) During the race period in respect of a year, a person must not, without the consent of the corporation, make, for profit or gain or for a purpose which includes profit or gain, at or from a place within or outside Albert Park any sound recording or television or other recording of moving pictures of a Formula One event or any part of a Formula One event.

(2) The corporation may charge a fee for giving its consent under subsection 1

(3) If a person makes a sound recording referred to in subsection 1 without the consent of the Corporation, the corporation may recover, as a debt due to the Corporation, by proceedings in a court of competent jurisdiction, the fee that would have been payable for the Corporation's consent under subsection 2.

Section 42B enacts similar rights regarding the Motor Cycle Grand Prix. State governments are permitted to expand property rights in the course of enacting laws for the peace order and good government of the state. However, state governments cannot regulate areas of Commonwealth jurisdiction. The Grand Prix Act extends the Corporation's right to control original material derived from the event beyond the perimeters of Albert Park (the property boundaries). In effect, the expanded property rights are expanding the corporation's intellectual property rights, granting it exclusive filming and broadcasting rights, which it can assign or licence upon certain conditions. Under section 52 (v) Commonwealth Constitution Act, the Federal Parliament has exclusive rights to make laws with respect to radio and television broadcasting. This empowers the Federal Parliament to:

- Establish and authorise a body to prepare and transmit programs
- Lay down criteria defining who may be licensed to conduct radio and television services
- To impose conditions upon those licenses and prohibit conduct in relation to them (Walker 2000, 978).

[1] Given the changes in technology and the commercial value of filming and broadcasting rights of sporting spectacles, it is possible this authority could be overturned

If the High Court accepted the granting of filming rights was a de facto regulation of broadcasting rights, then sections 35 and 42B would be beyond the state's power and severable from the Act. However, the Federal Government could easily rectify this problem by enacting provisions granting the Grand Prix organisers broadcasting rights.

This analysis reveals that while the law does not recognise any special rights in spectacles, it does recognise the rights of organisers of spectacles to “create” rights as conditions of entry to maximise profitability of those events. In fact, the law has been interpreted to give property occupiers/owners wide powers to impose conditions on entry, which can be expanded by legislation.

The public interest requires that any contractual conditions imposed on entering the spectacle must be legal and therefore cannot be anti-competitive, illegal restrictions on speech or otherwise illegally interfere with the commercial practices of a competitor. The party imposing the restrictions must also have the rights to the intellectual property to which they are restricting access.

Consumer rights also receive limited protected because the law refuses to recognise intellectual property rights in news, information or facts (Victoria Park 1937, 498, 518, 511, 527), therefore the public can receive factual reports of the event. (The question remains whether the consumers' interest is satisfied by these reports). However, if conditions of entry preclude online sporting reporters from entering the event, then the only way in which the excluded journalist can report the event is by providing text based reports from the official web-site. Real property law provides no avenue by which the online journalist can enter the venue unless his/her employer agrees to the conditions of entry. The Copyright Act (Cth) 1968 prevents the reporter from unfairly using any material placed on the official web-site.

How does Copyright Act (Cth) protect works created from sporting spectacle?
Copyright is a form of intellectual property law, which purportedly balances the interest of the creator of original works to profit from their endeavour and the public interest in receiving information. (Walker 2000, 902). The Commonwealth Copyright Act (1968) grants exclusive rights to deal with original material, which includes works and subject matter other than works (Parts III, IV). The act sets out who owns the copyright, what constitutes an infringement of these exclusive rights and identifies exemptions to these infringements, commonly known as fair or permitted uses of copyright material.

Works include literary, dramatic, artistic and musical works. Subject matter other than works includes films, sound recordings, broadcasts and published editions. As a general rule, the person who creates a literary, dramatic, musical or artistic work or their employer is the copyright owner. The person who makes a sound recording or cinematographic film or the person that contracts the maker to do the work and pays for it is the copyright owner (Copyright Act 1968, s35, 97,22, 98). Prior to amendment by the Copyright Amendment (Digital Amendment) Act (CADA), the Copyright Act gave the copyright owner exclusive rights to reproduce work in material form, publish the work,

perform the work in public, broadcast the work, adapt the work, transmit the work to subscriber or diffusion services, commercially rent sound recordings and computer programs (Copyright Act 1968, sections 31, 85, 86, 87, 88; Commonwealth of Australia 2000, 6). Copyright is infringed when a person does or authorizes any act to which the owner has exclusive rights (Copyright Act 1968, sections 36, 101).

The CADA, which came into effect on 4 March 2001, amends the exclusive rights of copyright owners, creating a new "right to communicate material to the public" (Copyright Act 1968, sections 31,85, 86, 87). This right is defined as making available online or electronically transmitting a work or subject matter (Copyright Act 1968, section 10(1)). The new right is conferred on all owners of copyright in literary, musical, dramatic and artistic works, sound recordings, films and broadcasts (Copyright Act 1968, ss 31,85, 86, 87). It incorporates the existing broadcasting and cable diffusion rights and covers on-line transmission and uses. These reforms ensure that the original material published on the Internet attracts copyright protection and any copyright works created before the introduction of this legislation will see the creator retain first digitisation rights, regardless of any licensing arrangement, unless there is an express or implied contrary intention communicated. Work practices are a factor taken into account in determining whether there is a contrary intention, according to acting principal legal officer, intellectual property branch, Carolyn Hough (2000).

Broadcasts are a subject matter that attracts a general communication right. The CADA relies on the Broadcasting Services Act 1992 definition of “broadcast”. Section 6 BSA defines broadcast to include all television and radio programs delivered to people with equipment to receive that service regardless of the technology used to deliver the service. The definition specifically excludes:

- Services which provide no more than data or text
- Services that make programs available on demand on a point-to-point basis, including a dial up service
- A service, or class of services that the Minister determines, by notice in the Gazette, not to fall within this definition.

Costelloe (2000b, 71) explains this definition "expands the protection for broadcasts in which copyright separately subsists” resulting in owners of copyright in broadcast having “exclusive right to transmit or make their broadcasts available over the Internet".

However, the Minister for Communication, Information Technology and the Arts, Senator Richard Alston, has qualified the definition of broadcast. In a gazetted Determination, the Minister has declared that "a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands" does not fall within that definition (Government Gazette, 27 September). This determination means (Alston 2000, 1) "Internet streaming provided outside the broadcasting services bands - through home computers or on mobile phones - will not be regarded as a broadcasting service" for the purposes of the Broadcasting Services Act and the Copyright Act.

Costelloe (2000a, 59) explains Internet streaming "is a method of transferring content so that it can be processed as a steady and continuous stream allowing the end user's browser to start displaying data before an entire file has been transmitted from its source". Streamed audio and video content can be sent from prerecorded files or distributed as a live feed (Costelloe 2000, 60).

Nicholls and Lidgerwood (2000, 96) explain that, as a result of this determination, television and radio programs must comply with restrictions set out in the Broadcasting Services Act when transmitted through conventional technology "but will not be subject to the restrictions…when delivered to audiences through the Internet". The Determination also has Copyright implications. Research fellow the University of Melbourne Law School David Brennan (2000) claims it means a person responsible for streaming real-time (live) audio and video online does not have an exclusive right to communicate that material. The streaming is specifically excluded from the definition of broadcast and live feeds do not fit within the definition of a cinematographic film, which is defined in Section 10 (1) Copyright Act.

> *"Cinematographic film means the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing*
>
> *(a) of being shown as a moving picture; or*
>
> *(b) of being embodied in another article or thing by the use of which it can be shown;*
>
> *and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.*
>
> *"Sound recording means the aggregate of sound embodied in a record.*

For streamed video and audio to fall within this definition they must be stored, making it an aggregate of visual images and embodied sound. If the video and audio is stored and then streamed online, the creator (or his/her employer/conractor or licensee) has the exclusive right to transmit the material online. If it is fed live then the audio and video does not come within this definition until it is stored. Therefore the creator or person contracting the video and audio will have an exclusive right to communicate the material to the public. If the copyright owner of the audio and video and the online broadcaster differ, then the online transmission rights will need to be assigned or licensed contractually.

This argument means there is no exclusive right to communicate live-streamed audio and video. Any "rights" over the live-streamed material must be created independently of the Copyright Act. Effectively, the Determination is creating a virtual spectacle environment, where rights to the real-time event are created contractually as conditions to entering the event, both real and virtual, and accessing other intellectual property rights derived from the event. Web traffic can be excluded from the real time video and audio by linking or access agreements and through exclusive sponsorship deals. Technology can be used to quarantine the audio and video and prevent unauthorized links. Tags warning that links

are not permitted without consent will preclude any arguments about implied licenses to link to the streamed audio and video.

By using contractual conditions, live streaming on the Internet can be protected, thus bridging any possible gap in Copyright protection.

However, if there are no communication rights arising from live-streamed audio and video, there will be no exceptions to their use. The Copyright Act (1968) permits the fair use of copyright material without consent of the copyright owner. Fair dealing exceptions give effect to the public's interest in accessing information. These exceptions include the use of copyright material for the purposes of research or study (sections 40 & 103C), criticism and review (sections 41 & 103A) reporting the news (section 42). The CADA extends these fair use exemptions to the general communication right and their application in the online environment has been clarified to some extent. Macmillan (2000, 12) notes “one area of fair dealing law, in which an important change has been made…is in relation to the quantitative test, which forms part of the exception for fair dealing with literary, dramatic or musical works for purposes of research and study”. The CADAl amends the Copyright Act to define what constitutes a reasonable portion for purposes of research and study if the work has been published in electronic form. Without limiting the meaning of ‘reasonable portion’… a reasonable portion will be up to 10 percent in aggregate of the number of works in the work or, if the work is divided into chapters, up to one chapter”.

But there is no similar clarification of what constitutes a fair dealing for the purposes of criticism and review or reporting the news, either on-line or through a licensed broadcaster. The courts take a liberal view on what constitutes news, but the use of the copyright material must be limited to the extent that it has news value. Copyright material, such as audio and video, cannot be used merely to obtain a commercial advantage. A similar uncertainty surrounds the criticism and review provisions. The fair use of copyright works for the purposes of criticism and review is a question of degree.

Notwithstanding these attempts to clarify the application of these exceptions, they will not be available to people using portions of a live-streamed audio and video. Any contractually created rights associated with live-streamed audio and video will not be subject to these exemptions, unless these exemptions are recognized in the contract. Parties not privy to the contract will be excluded from relying on the recognized fair use exceptions.

The ambiguity surrounding real-time video and audio streamed online should not be treated as an invitation to link to or use this material without consent of the owner. In addition to any contractual restrictions on linking, unauthorised links to streamed live audio and video can give rise to other legal problems such as passing off or misleading and deceptive conduct in breach of section 52 Trade Practices Act. If the real-time video is framed by images, then copyright problems may arise because the framed images are protected by copyright.

Notwithstanding the ambiguities surrounding the exclusive rights of a person streaming video online, the laws of copyright, contract and real property can be used to control competition. These laws aid the direction of web traffic through the official site or the site, with the Internet publishing rights. The public's interest in accessing information is being framed through the fair dealing defences (where they apply), which hinge on what the courts or legislature determine is an unfair use. Where competing news services are excluded completely (as in the case study), their criticism and review and their decision on what is news is framed by the organiser's self-promotional material. The public's interest and the media's news interest are giving way to the commercial interests of the other stakeholders.

Can media organizations link to the official site without permission?
Unauthorised links could give rise to false inferences for readers. For example, an unauthorized link between a news organisation and the official website could suggest some co-operation or arrangement between the news site and the event organisers and their sponsors. If the linking site is framed by an independent sponsor's logo and advertising, a significant number of readers could reasonably infer that the news organisation's sponsor is an official sponsor of the site. This could give rise to an action under section 52 Trade Practice Act (Cth) 1974, which outlaws conduct that misleads or deceives or is likely to mislead or deceive, or section 53 which deals with "false representations". Walker (2000, 375) notes that "where material is published to the general public, it is enough that any meaning that is reasonably open to a significant number of those to whom the material is published is mislead or deceptive". The crucial question is whether the conduct of the media organisation conveys a misrepresentation (Walker 2000, 275). The act of linking without authority and the inclusion of frames suggest that the news organisation's conduct would be seen to have conveyed the misrepresentation, therefore such actions would likely constitute a breach of Section 52, 53.

Section 65A however, exempts prescribed information providers from liability under section 52 unless the deception occurs in advertisements or material promoting the providers' commercial interests. News organizations fall within the definition of a prescribed information provider but "the instant news material is sponsored, or run in return for compensation in cash or kind, or used to promote the news organisation's own operations (such as in a promo), it falls within the Act and leaves any content that is misleading open to prosecution (Pearson 2000, 62).

The deception does not arise from the act of publication (or provision of information), but the act of linking and therefore it is questionable whether the section 65A exemption would apply. If the exemption did apply, then any sponsorship of the news organisation's site could render the exemption ineffective.

Alternatively, unauthorised linking could be actionable under the tort of passing off, which prevents a trader from exploiting the reputation of a competitor. Walker (2000, 944) identifies the elements of passing off to be goodwill or a good reputation, a misrepresentation, which gives rise to harm or likely harm. Proving these threshold

elements can be problematic in the online environment. What evidence can be provided to prove good will or reputation? How do you trace the link which gives rise to the misrepresentation? How do you prove harm?

News organizations should not be tempted to get in the back door to events, by using unauthorized links to the official website. Despite the uncertainty surrounding the exclusive rights to deal with live-streamed audio and video, unauthorised links can give rise to embarrassing litigation.

Anti-competitive practices

Competition practices are regulated by a variety of laws, but this article focuses on whether the contractual restrictions imposed on competing online news services, outlined in the case study, breach section 46 Trade Practices Act (Cth) 1974, which outlaws a corporation with "a substantial degree of power in a market" from taking advantage of the power for the purposes of

- eliminating or substantially damaging a competitor in that or any other market
- preventing the entry of a person into that or any other market
- deterring or preventing a person from engaging in competitive conduct in that or any other market?

Any condition imposed on the entry into sporting events must not contravene section 46 Trade Practices Act (Cth) 1974 because these conditions would be unenforceable. A breach of Section 46 hinges on three issues:

- What is the market?
- Whether the corporation alleged to be anti-competitive has a substantial degree of power in that market
- Whether there has been any misuse of this power?

Arguably the conditions of entry imposed in the case study are anti-competitive, but this issue is far from clear-cut given the court's approach to defining a market. Section 4E TPA defines market to be an Australian market "for goods or services that are substitutable for, or otherwise competitive with" other goods and services. Clarke and Sweeney (2000, 419) explain that markets include product, geographic, functional dimensions (including the stages of production), and time components, with demand and supply substitution being used to determine the extent of the product and geographic elements of the market.

Cornones (1999, 91) notes that defining the market depends on the "substitutability" of the product, either goods or services. "One needs to identify the goods or services at issue and any other goods or services that are substitutable for them on the demand side and the supply side…substitutability is gauged by reference to the ..price incentive test." (Corones 1999, 91).

> *"The basis for identifying substitutability is to consider the likely responsiveness of both buyers and sellers to a price increase of 5 to 10 percent…if users would shift to other products or if other producers could quickly and easily alter their*

product mix to provide an alternative supply, then these products and these suppliers should be included in the same market as the products of the producer under investigation" (Steinwall et al 2000, 119).

Corones (1999, 89) suggests the test involves asking these questions:

- What happens if the party whose conduct is at issue raises its price?
- Is there much of a reaction on the part of buyers
- How do they respond?
- Do they switch to a rival seller?

While an important consideration, demand and supply substitution must be considered in context. Deciding what constitutes the market involves making "value judgements" and cannot be decided in isolation: the question of what is the market is linked to the question of market power (Corones 1999, 116-117). Therefore it is crucial that “the relevant fact-finding tribunal gives appropriate weight to the constraints on decision making by the firm under consideration and the competitive process" (Corones 1999, 117). This means the anti-competitive action complained of can influence the way adjudicators define the market. The need for flexibility in defining a market has seen a mixed approach to its interpretation by the administrators of the Trade Practice Act. In *News Ltd v Australian Rugby League*, Burchett J interpreted the market of competition to go beyond rugby league to include all forms of football and basketball. The Trade Practices Tribunal adopted a similar approach in *Re Media Council* (No 4). The market in this case included the national market for advertising space and time in Australia, including television and radio, newspaper and magazine space, outdoor and cinema advertising, direct marketing and the Internet (1996, 41-497, Corones 1999, 116). However, when assessing the merger between Foxtel and Australis Media, pay-TV and free-to-air were construed to be separate markets (Corones 1999, 116).

Based on this analysis the production and reporting of sporting spectacles, gives rise to many markets, including a labour market covering the contracts with competitors, a stadium market being the venues and seating allocations and a media market, which includes the reporting and promotion of the event. The conditions of entry may affect all of these markets, but this paper is concerned only with online publications arising from sporting spectacles and whether this could be construed as a separate market for the purposes of section 46 TPA.

If construed widely the market would include all Australian newspapers, broadcast and online news/media services. Construed narrowly the market would be limited to online sporting publications or the market for sponsorship for online sporting agencies. Corones (1999, 116-17) notes that the Trade Practices Tribunal tends to construed markets broadly, while the courts have adopted a mixed approach to defining markets, therefore it is impossible to say with any certainty how the market in the case study will be defined. Given however, that the act of defining the market is influenced by the anti-competitive conduct complained of, it is arguable that the market should be construed narrowly because the case study entry conditions are directed only to online reporters and not the

general media. It is possible the market could be construed as narrowly as the market for sponsorship of on-line sporting publications.

The next question to consider is whether the sporting event organisers have a 'substantial degree of power' in the market. This question involves two issues: market share and the barriers to entering the market.

> *"A large market share may be evidence of market power…but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power….Barriers to entry may be legal barriers - patent rights, exclusive government licences and tariffs for example. Barriers to entry may also be a result of large economies of scale. Where the economies of scale in are market are such that the minimum size for an efficient firm is very large relative to the size of the market, it may be that potential competitors will be dissuaded from entering the market by apprehension that only one firm would survive." (Queensland Wire Industries Case* 1989, 189-190).

In Arnotts Limited v TPC, the Full Court of the Federal Court of Australia stated there is "no inflexible rule" to determining whether a corporation has a dominant market position. Factors taken into account in deciding market power include:

- The number and size distribution of independent sellers, especially the degree of market concentration
- The height of barriers to entry to the market
- Product differentiation and sales promotion
- Character and extent of vertical integration with customers and suppliers
- The nature of relationships between firms (Queensland Co-op Milling Association and Defiance Holdings 1976, 189)

Based on this analysis, it is unlikely the courts would find the sporting event organisers as holding a substantial degree of power in the general media market, given the dedicated readership of traditional sporting bodies and the percentage transition to online publications. Traditional news organisations like News Limited and Publishing and Broadcasting Limited would be seen to hold similar, if not greater competitive advantage to sporting event organisers. However, in recent times the global sporting events have emerged, with events like the Grand Prix motor racing and the grand slam tennis. Here the question of market power becomes blurred. In the case of the Grand Prix, statutory rights like those created under the Grand Prix Act suggest that these global sporting event organisers hold a substantial degree of market power because they control the information and can preclude use of that information for profit or gain. The courts note that the power of organisations accused of anti-competitive activity should not be viewed in isolation, but must be measured in light of any arrangements it has with others (*Dowling v Dalgety Australia Limited and Others* 1992, 140). Given the common practice of sporting event organizers forming alliances with major sponsors and a major media partner or partners, this combined force may be seen to give the sporting event organizers substantial power in the traditional media market.

The question then arises whether the conditions of entry are a misuse of market power, as specified by the act?

This question does not hinge on the consequences of the action, but rather the subjective intention or motivation for the conduct. The corporation's intention may be inferred from conduct. Instead of looking at the effect of the conditions of entry to decide whether the sporting event organisers are misusing market power, the question is what was the intended purpose of those conditions? Here, it is important to distinguish between use and misuse of competitive power.

Clarke and Corones (2000, 362) note that refusing to grant access to property or infrastructure can constitute misuse of power under section 46. However, the courts have distinguished between a refusal to supply goods or services and a refusal to grant access to property and infrastructure. In Dowling v Dalgety Australia Limited and Others (1992, 144; Clarke & Corones 2000, 364) Lockhart J distinguished between the exercise of rights that would be exercisable only in non-competitive conditions and the exercise of rights, "which come into existence and would be exercisable in competitive conditions but which may establish a framework…that may lead to the establishment of a substantial degree of power". The court found the right to bring actions for breach of copyright and property rights arising from ownership of land fall into this latter category, and are not misuse of market power (1992, 144-145; Clarke & Corones 2000, 364-365). They are simply a competitive act, which by its very nature is deliberate and ruthless" (1992, 144).

Clarke and Corones (2000, 365) also note imposing restrictive conditions on customers or suppliers may infringe section 46, but not all restrictive conditions constitute a misuse of market power. In deciding whether there has been a misuse of market power, the courts look behind the effect on competition to the intended purpose of the action. Therefore, in assessing whether the conditions of entry to sporting events outlined in the case study, are anti-competitive, the courts will look at their intended purpose. It could be suggested the purpose is to exclude mainstream media organisers from the online sporting publication market. Alternatively it could be argued that imposing the conditions of entry simply maximise the competitive position of the official website in the online publication market. Given that these events are usually held on an annual basis, it is likely that the courts will interpret this action as ruthlessly competitive but not a misuse of market power. This approach may change if the conditions were imposed on events held regularly because of the long-term effect on the online publication market. If the market were construed narrowly as the market for sponsorship of online publications, then the question arises whether the exclusion of independent sponsorship was the primary intention of the conditions or a mere consequence of the transaction. Given the explicit nature of the condition, it would be hard to maintain this provision was a mere consequence of the transaction.

In summary, it is unlikely the conditions of entry would be perceived as anti-competitive in breach of section 46 TPA because:

- The market is likely to be construed widely to include all media

- If construed widely, then sporting event organisers are unlikely to be seen as holding substantial power in that market. Only the global event organiser would share the market power of major news groups and then the court would need to look at any arrangements the sporting event organisers had with other media organisations
- To decide whether the conditions are a misuse of market power, the court will look at the subjective intention and not the objective effect of the conditions. In this case, it is likely the courts would interpret the intended purpose of the conditions to be merely competitive.

If the conditions are not anti-competitive, they could still be seen as illegal constraints on freedom of speech.

Freedom of speech

The conditions of entry to the sporting venue are a restriction on the movement and speech of media organisations. But the question is whether they are an illegal restriction on freedom of speech and movement in Australia. Unlike the United States of America, Australia has no general constitutional right to freedom of speech. In 1992, a majority of the High Court of Australia recognised that Australians have an implied freedom of political and government communications (Nationwide News Pty Ltd v Wills 1992, 1; Australian Capital Television Pty Ltd v Commonwealth 1992, 106), arising from the Commonwealth Constitution, particularly the provisions guaranteeing representative government. This implied freedom is not a positive right. It is a negative immunity, which means local, state and federal governments cannot enact laws constraining political or government speech. The right vests in the public's need to have information about political and government matters, which have been construed widely by latter courts (Lange v ABC 1997, 12). Non-binding statements by a majority of the High Court in *Kruger v Commonwealth* suggest the implied freedom arising from the notion of representative government extends to freedom of movement and association as well as communication (146 ALR, 196-7, 218, 175-177; Kennett 1997, 14).

To decide whether laws infringe the implied constitutional freedom the courts asks two questions. Walker (2000, 66) identifies these questions as:

- "Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?"
- "If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative government?"

In light of this analysis, the implied freedom of political communication could not give the media a positive right to access sporting events. At its best it could be used to restrict the application of some of the legal principles outlined in this article if the law "effectively burdened freedom of political communication in (their) terms, operation or effect". It could be argued that the extension of the Grand Prix Corporation's property rights to control filming of the event from inside and outside Albert Part may effectively curtail the freedom of Grand Prix protesters. The ambiguity of the term "outside" could

suggest that the provisions are not "reasonably appropriate and adapted". There are two problems with this argument:

- the subject matter of the Grand Prix Act is unlikely to fall into the ambit of political and government speech.
- The Act is not restricting the right to protest but rather the filming of such protest and is therefore likely to be construed as “reasonably appropriate and adapted”.

Therefore domestic law is unlikely to provide a venue for challenging the censoring nature of the entry conditions.

However in 1991, Australia acceded to the Optional Protocol to the International Covenant on Civil and Political Rights. Article 19.2 of this covenant states the "everyone has the right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

Walker (2000, 70) notes however that accession to the Optional Protocol "has not affected the legal status of the covenant in domestic law". It does not provide a positive right for people to enforce in the domestic courts of Australia. When making decisions, judges in domestic courts may refer to Australia's obligations under the Optional Protocol and make reference to the decisions of the Human Rights Committee. But any action to enforce an individual's right to freedom of speech must be taken through Human Rights Committee. Walker (2000 70) identifies a number of weaknesses with the enforcement procedures of this body, particularly its lack of real authority because it is not a judicial body and the committee's views are not binding. It asserts only "moral authority" which may or may not influence public opinion.

The freedom of expression outlined in the Optional Protocol is not absolute, recognising "that it may be necessary to restrict freedom of expression to protect the rights or reputations of others or to protect national security, public health or morals" (Walker 2000, 71). In the case study discussed, the commercial interests of the sporting event, organisers, venue owners and the players have to be balanced against the public/consumers interest in accessing events and information about events.

Given the increasing power of sporting event organisers such as national football leagues and global special event organisers, calls have been made for legislative intervention to protect the consumers’ interests because none of the existing domestic laws can guarantee access to events and information about events (see Ross 1999, 145-139). However, the only recourse open to aggrieved news organizations in the case study would be to complain to the Human Rights Committee where the conduct of the news organization would come under scrutiny. The primary reason for gaining access to the event would need to be facilitation of the public right to know and not being competitive or promoting the sport, as some of the editors/journalists interviewed suggested.

Conclusion

This article has identified some legal pitfalls for online sports reporters. Contract law, property law, the tort of nuisance, copyright, consumer protection laws, the tort of passing off, anti-competition laws all regulate the relationships between the parties who have primary interests in sporting events. This article does not identify legal problems arising from the laws, which regulate the relationships between primary and secondary stakeholders. Some areas of law, such as the registration of domain names, have not been addressed because they did not arise from the case study.

The article illustrates that the Internet is not a lawless frontier. In fact, the commercial pressures to make the Internet pay are presenting many obstacles for the unwary journalist. The traditional pitfalls of defamation, contempt of court and copyright are still a constant concern to journalists. However, a new era of communication is heralding a new era of legal headaches, suggesting that journalism educators will need to factor these legal problems into journalism training programs. However, journalism programs should also be equipping journalists with the skills to address the form of competition from a product basis. The emphasis on the "scoop" and the exclusive rights as the measure of journalistic success may need to shift to the more thoughtful and analytical approach, where short grabs of vision supplement the criticism and review.

As a starting point however, journalists need an understanding of the legal issues associated with the competitive aspects of new technology to prepare them for the pitfalls they face when doing their job as reporters.

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* Rhonda Breit lectures in journalism at Deakin University.