

Sports Broadcasting in the Digital Era

We're not in the business of keeping media companies alive, we're in the business of connecting with consumers.

- Trevor Edwards, Nike (New York Times, 14 September 2007)

Sports is the battering ram of pay-TV

- Rupert Murdoch (1996 message to shareholders)

The amounts spent on broadcasting rights and sponsorship for the Beijing Olympic Games and the extent of the audience reach of the Games, was a compelling reminder of the importance placed on sport and sports marketing globally. Although the Sydney and Athens Olympics provided limited online offerings for audiences (mostly commentary and results), the Beijing Olympics were the first Games to truly harness the power of new media and to enable sports broadcasting to make its first confident step into the digital future.

This paper examines the changing landscape of sports broadcasting in the digital era and the implications for traditional models of sports advertising, content distribution and licensing. It uses the Beijing Olympics as a case study to explore how far sports broadcasting has come and to forecast where it might lead in the future.

The nature and importance of sports broadcasting

A lot of Australians watch a lot of sport. In 2008, 36 of the 50 highest rating free-TV programs in Australia involved sporting coverage.¹ The Games always attract massive audiences and the 2008 Beijing Olympics did not disappoint. According to Free TV Australia,

17.2 million people watched all or part of Seven's coverage – the largest in Australian television history - and an average of over 11.6 million tuned into the commercial television coverage every single day.²

However, whilst the Olympics contributed to the amount of sport Australians watched last year, the relative amount of sports viewing to the viewing of other programs in 2008 was not unusual. Even without the Olympics, sporting events occupied all top ten places of the highest rating programs in 2007.³

In Australia, as in many countries, televised sports provides 'a form of social cohesion'.⁴ However, the notion that sport

suggests 'some degree of unity in shared national values'⁵ highlights only part of what has become a complex matrix of often competing roles, players, interests and constraints. Above all, sports nowadays are a big business for the majority of stakeholders. Major sporting events are the most significant content draw-card – the "battering-ram" – for television broadcasters.

In addition to conferring prestige, differentiating among competing services and building a positive brand name for a network,⁶ for broadcasters, carrying sporting events ultimately mean more eyeballs. More eyeballs mean more advertisers and more pay-TV subscribers. High-rating events also tend to be a more successful platform for the promotion of prime time programs, so the process is self-generating.⁷

At the same time, sports themselves rely heavily on the support of television. Network television contracts provide both the largest source of revenue for sports franchises, as well as the most important exposure vehicle for professional sports leagues.⁸ Similarly, advertisers and sponsors are also the beneficiaries of wide exposure and the positive branding associated with major sporting events.

Despite the seeming commonality of interest amongst stakeholders, external constraints nonetheless affect and shape the framework for sports broadcasting. Consumer preferences, the tension between maximising revenue and maximising audience reach, the availability and quality of delivery platforms (quality sports broadcasts need high bandwidth) and the impact of government regulation, all heighten the importance of obtaining exclusive rights. Ironically, the expense of production and

dealing with these constraints limits rights fees on the one hand and informs exclusivity on the other.

The value of sporting rights as event television and ephemeral content is greater than most other types of premium content such as film because the value of sporting content derives from being delivered in real time. As such, there is less risk of digital piracy. However, while interest in live broadcasts may reduce (although not eliminate) the risk of piracy for sports broadcasts, it also increases the urgency of targeting digital piracy if and when it does occur. The ease with which content can be digitally distributed and the increase in the ways of delivering pirated content (for example by DVD, mobile and IPTV) means that considerable expense is also required to effectively combat the piracy of sporting broadcasts as close to the time of the relevant sporting event as possible.

The changing broadcasting model

Traditional model

Traditionally, sporting organisations owned all of the copyright in the broadcast and cinematograph film rights for a sporting event or competition and then licensed strictly defined rights to broadcasters to be exploited over various platforms. That is, free-TV and pay-TV rights were either licensed to the one 'host' broadcaster along with the right to sub-licence those rights, or were packaged and licensed separately from the outset. Generally, sporting organisations would hold back all other rights because of the pressure placed on them by broadcasters who feared that the proliferation of new media options would fragment audiences and undermine the value of their television rights. As a consequence, websites, when used, were merely informational and complementary.

The new media market

A series of both technical and legislative developments over the past decade has meant that the traditional framework for sports broadcasting has undergone a radical transformation.

The introduction of digital television, HDTV and the multi-channelling of free-to-air channels over the past few years, has increased the capacity for sports content to be broadcast and has also had

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implications for some of the traditional distinctions between free-to-air and pay-TV. In the lead up to the review of the anti-siphoning regime,⁹ the government has controversially suggested, despite strong opposition from pay-TV and sporting lobby groups, that it is considering removing anti-siphoning restrictions on free-to-air multi-channels¹⁰ in order to drive the uptake of digital television.¹¹ This has the potential to reduce the amount of sport available to pay-TV channels which have traditionally used sporting events as a primary driver for subscriptions. It also threatens to impact sporting organisations that rely on subscriptions to drive up the amount that they can charge for broadcast rights.

In addition to developments in digital television, a 'new media' market for sports broadcasting has emerged as a viable platform. The increased penetration of high bandwidth internet connection (both wired and wireless) has caused both a shift in the way content is created, distributed and accessed, as well as an increase in the type and amount of content that is now available. Remote, wireless and mobile applications are now making it possible for people to access online content anywhere, anytime and on any platform.

Not only do these new technologies offer greater interactivity, personalisation and customisation of content,¹² they also offer the opportunity for rights holders to distribute their content to a far larger audience than was previously possible via free-to-air or pay-TV broadcasting. At time of writing, there are approximately 3.3 billion mobile phone subscribers and 1.3 billion internet users worldwide and market penetration is increasing exponentially.¹³ The technical convergence of platforms (as demonstrated by the advent of the iPhone, the 3 Skype Phone, the Nokia N95 and the Google Android) has therefore given content service providers the opportunity to leverage the market share enjoyed by mobile carriers. At the same time, mobile

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carriers are now increasingly using content services (including more recently, killer apps like social networking, Presence and video) to sell connectivity.¹⁴

The unique characteristics of the internet – specifically, the growth in internet eyeballs, the availability of significant revenue through targeted advertising, the opportunities for viral marketing particularly through social networking sites and the ability to collect precise real-time user metrics – have meant that internet advertising is experiencing the fastest growth of all advertising platforms.¹⁵ In fact, the fastest growing portion of online advertising is advertising on mobile phones.¹⁶ As advertising is the primary driver for free-to-air broadcasters, the internet is now a platform that can no longer be ignored or

successfully resisted by broadcasters and sporting organisations. The adoption of a 3-screen approach enabling consumers to view sports on television, internet (via a PC) and mobile has become increasingly attractive to consumers, broadcasters and advertisers alike.

Licensing new media rights

The recognition of new media as a viable and competitive market has presented both legal and commercial challenges for content management and distribution. There is a complex interaction between contractual frameworks, new technologies and legislation. As a result, rights owners, legislators and courts are increasingly grappling with whether licensing within the new media market should operate differently to licensing within traditional markets. Contractual definitions of new media, technical attempts to counter jurisdictional challenges through geo-blocking, and interpretations of the legislated fair dealing exception, are all examples of

measures emerging from the new media context that are having a direct and significant impact on the value of purchasing and exploiting online rights.

Definitional issues – future-proofing

Defining 'new media' rights for the purpose of licensing them, poses a challenge in itself. Traditionally sports broadcasting rights are licensed several years in advance of the actual event to be broadcast. The rapid development of new media technologies makes it difficult to license rights in relation to a platform that is by its very nature dynamic and that may therefore have changed by the time the event takes place, or even over the duration of that licence period. Rights-holders therefore need to future-proof definitions and possibly reduce the duration of new media licences. To date, rights packages have tended to articulate rights in terms of 'the internet', 'interactive TV' or 'mobile' rights.

In a recent case in the US District Court in New York,¹⁷ the Court used the 'new use' principle to interpret a pre-existing licence and determine whether it covered digital

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downloads. The Court held that language of a licence should be construed to include new technologies if they could reasonably be said to fall within the medium as described in the licence. In this case, the use of the language 'now or hereafter known' in the clause authorising Ramones Productions 'to manufacture, advertise, sell, distribute, lease, license or otherwise use or dispose of the Masters and phonograph records...by any method *now or hereafter known*', indicated that an expansive definition was intended. Although there have been no similar cases in Australia, this is an example of both the benefits for rights-holders of future-proofing definitions, as well as the practical approach that courts may take in relation to such definitions.

Jurisdictional issues – geo-blocking

In 2005, Dick Pound, a former IOC Vice-President was reported to have said the following:

Until the technology changes to allow the video to be restricted, we have a problem...Historically, we have sold rights in a particular territory. Unless and until you can guarantee that the signal will be restricted to your territory, then you cannot put real time video or real time audio on the Internet.¹⁸

Licensing content based on geography makes sense (and has been commonplace for years¹⁹) for television broadcasters because broadcast licences are usually granted in relation to a particular geographical location. What seems unusual, is that the licensing of content rights to online content service providers has often also been granted in relation to a geographical location, even though the internet has traditionally been regarded as a 'borderless' communications medium.²⁰ This raises both jurisdictional and practical issues.

However, internet-based geographic access control systems (**Geo-location technologies**), which have been available since 1999, are increasingly providing a technical solution to the difficulties associated with acquiring geographically restricted online rights packages. Enabling website operators to restrict access to websites based on the geographic location of the access-seeker, these technologies have alleviated some of the fears

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articulated by Dick Pound and in doing so, helped to cement the role of the internet as a vital platform for sports broadcasting. However while geo-location technologies have quickly become an essential part of content rights management, they are not fool-proof. It is still difficult technically to simultaneously minimise the incidence of false positives (erroneous permission of access) and false negatives (erroneous denial of access).²¹ Furthermore, as Edelman notes, 'the commercial incentives of an advertising driven business model strongly disfavour false negatives, causing still greater impediments to attempts to minimise false positives'.²² There are also numerous ways of circumventing geo-location technologies.²³ The effectiveness of geo-location technologies can have a significant effect of the success of online sports broadcasting because an inability to prevent false positives undermines the value of exclusivity, whilst an inability to prevent false negatives can result in a loss of consumer confidence.

Fair Dealing

The operation of the fair dealing exception relating to the reporting of news online illustrates the tension between rights holders and the broadcast of sports online. Further, the scope of the fair dealing

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exception can have a direct impact on the rights-holders perception of exclusivity and the consequent value of online rights. The exception provides that a fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or a work or other audio-visual item included in the item, if it is for the purpose of, or is associated with, the reporting of news *by means of a communication or in a cinematograph film*.²⁴ The technology neutral concept of 'communication' covers film and broadcast copyright subject matter available (whether by streaming or downloading) over the internet, as well as wireless internet applications such as 3G mobile phone content services.

Although conventions exist which provide guidance as to the accepted duration and

3G mobile phones.²⁸ Telstra applied for an interlocutory injunction on the basis that the reports of NRL matches (sourced from highlights packages broadcast on the Fox Sports news channel) made available from the Fox Sports website and provided by Premier Media Group (PMG) to Hutchison and Vodafone for their 3G telephony services,²⁹ were an infringement of its copyright.³⁰ The respondents (PMG and the publisher of the Fox Sports website, www.fox.sports.com.au) argued that the reports constituted fair dealing. Telstra contended that 'old world accommodations about the use of copyright material by rival television broadcasters do not constitute an appropriate approach to the question of fair dealing in the so-called digital age'.³¹

In the circumstances and on the balance of convenience, the Court was not prepared to conclude that there was a case that injunctive relief would be granted.³² Although it was not persuaded that there was a case to distinguish delivery of relevant content on 'new media' (internet and mobile) and 'old media' (free-to-air and pay-TV),³³ the Court did concede that this was a real and arguable issue. Similarly, although it was unpersuaded by the argument for interlocutory purposes, the Court also noted that whether the provision of reports by Fox Sports News to Hutchison and Vodafone, precluded a fair dealing defence because the respondents were simply broking or selling content, not delivering news, was 'also a point that may be made good on a final hearing'.³⁴

In relation to what the fair dealing exception actually means in terms of the duration and timing of news broadcasts, the Court noted that what commercial participants in any given industry think is fair is unlikely to be necessarily determinative of the issue of fair dealing. However, a general view about the legitimacy of a certain length of use of audio-visual footage will certainly be a relevant consideration to fairness.³⁵ It is possible therefore that a UK-type Code or an internet industry equivalent of the Convention, might serve this purpose.³⁶ The issue as to whether parties can legislate out fair dealing exception altogether was also left for another time.³⁷

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As the case was settled before a final hearing, the scope and operation of the fair dealing exception in the context of the internet remains unresolved.³⁸ Nevertheless, it seems that copyright owners or licensees who want to argue that fair dealing in the context of the internet should be treated differently from traditional media, should be prepared to prove why different considerations should apply.³⁹

A Case Study – the Beijing Olympics

Introduction

Paradoxically, although broadcast and sponsorship rights to the Olympic Games are amongst the most highly valued in the world,⁴⁰ the primary aim for the IOC is not to maximise revenue. Rather, the Olympic Charter compels the IOC to 'ensure the fullest coverage by the different media and the widest possible audience in the world.'⁴¹ However, notwithstanding the IOC's global imperative, Olympics broadcasters, sponsors and the IOC fiercely protect their property and in doing so, the value of their deals.

IOC restrictions

Although limited online coverage (mainly competition statistics and results) was available prior to the Beijing Olympics, Beijing was the first time new media coverage was made widely available. This was due to increased technical capabilities, a growing recognition by both broadcasters and sponsors of the potential to leverage a far larger internet audience, and, perhaps most significantly, the IOC's liberalisation of the licensing of digital and new media rights for Beijing.

In guidelines released in the lead-up to Beijing, the IOC acknowledged that 'the Internet can enhance the quality, presentation, immediacy and comprehension of Olympic broadcasts' and it encouraged rights-holders to 'use the internet for cross-promotion'.⁴² However non-licence holders were explicitly prohibited from disseminating moving images or play-by-play audio coverage of any Olympic events at the Games, including over the internet.⁴³ The guidelines noted that should any fair dealing or similar provisions in applicable national law permit the use of such content for news purposes on the internet,

then any such broadcast must be restricted to the territory in which the law applies; that is, it had to be geo-blocked.⁴⁴

Rights structure

Despite the increased role to be played by new media in Beijing, the structure of rights packages remained largely unchanged. Typically, to broadcast the Olympics, a three-way deal is arranged between the IOC, the host broadcaster and other broadcasters. For the Beijing Olympics, in major markets like the US, Western Europe, China and Australia, digital rights (that is, online and mobile rights) were packaged with television deals. For example, in the US, the Olympic broadcaster (the NBC) retained its online rights and provided footage via its NBCOlympics.com site. In Australia, the Seven Network was awarded all rights (free, pay, internet and mobile). Whilst it hoarded the pay-TV rights, it granted internet and mobile rights to Yahoo7. Yahoo7 sub-licensed the mobile rights to Telstra Big Pond.

However, there were exceptions to the packaging of digital rights with television rights. The IOC awarded a few web-only licences, including to the internet arm of China's state broadcaster CCTV (cctv.com).⁴⁵ The IOC also entered into an agreement with YouTube (the video sharing service owned by Google) to offer online video in 77 countries where digital rights had not been sold or had been acquired only on a non-exclusive basis.⁴⁶

Online viewing

The success of the new media offerings during Beijing was largely dependent on how well the rights holders utilised the new media platform. NBC was particularly successful. Spurred on by geo-blocking capabilities and cost-efficient technologies which enabled editors in the US to extract high resolution material from low resolution files of Olympic footage, the NBC broadcast a record 3,600 hours of linear TV coverage and 2,200 hours of live-streaming on its website. This was more than all of the previous summer Olympics combined. Online coverage also included live streams, podcasts, video-on-demand, email alerts, mobile phone content and RSS feeds. Although the viewing experience on

NBCOlympics.com was different to that on TV – users saw the standard world feed sent to broadcasters and without commentary or slick production – almost 10 million viewers watched more than 6 million hours or more than 56 million online videos of the NBC Olympics coverage.⁴⁷

Yet even with the abundance of live streams, prime time on NBC was protected. Live gymnastics, track and field, swimming, diving, volleyball and beach volleyball were reserved for prime time television and could only be downloaded from the site on demand, after the event.⁴⁸ Despite this, or maybe because of it, figures suggest that viewers used online video primarily to supplement rather than replace their television viewing. According to Nielsen, on August 9, a Sunday, there were 858,000 unique visitors to the video section of NBC's Olympic site. The next day, when people were back at work, the total surged to two million. Meanwhile, the average US television audience for the first 5 days of the Games was above 30 million on every evening except Saturday, typically a slow night.⁴⁹

Web 2.0

The role of the internet in exploiting the value of the Olympics was not limited to the broadcast of events. The Beijing Games were the first Olympics since the term Web 2.0 entered the marketing vernacular and sites like MySpace, Facebook and YouTube have become household names.⁵⁰ Sponsors accordingly harnessed the power of social media services by using these platforms for user-generated content and viral marketing tactics to engage consumers and leverage Olympic rights.⁵¹ However, the relatively unregulated online environment also opened up further opportunities for ambush marketing. Pepsi's online campaign 'Everyone can be on the can for China' encouraged users to upload pictures, poems and articles about their love for China without ever mentioning the Olympics. According to research by CMR Group conducted in 10 Chinese cities, 60% of respondents thought that Pepsi was the official drink of the Olympics, with only 40% naming the actual sponsor, Coca-Cola.⁵²

Looking forward to London

Digital rights for the Beijing Olympics accounted for only a tiny proportion of the \$1.7 billion the IOC estimated it would make from broadcast rights in Beijing. Nonetheless, the recognition that digital media is increasingly important in enabling the IOC to realise its goal of ensuring the widest possible audience, means that the IOC is likely to award rights in different ways in the future.⁵³ As consumers demand more from broadcasters and business

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models for sports broadcasting change, the prospect of emerging new media titans (such as Google and Apple) bidding for future Olympic Games against international broadcasts, is becoming increasingly real.⁵⁴ The greatest challenge for the IOC will be attempting to forecast how people might be watching the Olympics in 2014 or 2016 as it attempts to negotiate those rights agreements today.

Conclusion

The modern context for sport can be characterised as a professional and intensely commercial network of activity, regulated by an ever-expanding web of sporting federations, governments, and agencies. Further contributing to this network are lucrative sponsorship contracts, broadcasting rights and national pride, all of which assert their own priorities. However the one factor underlying these competing interests is the need to maintain the interest and (financial) support of the public.

Advertisers and sponsors are increasingly recognising that in order to connect with the public, they need to respond to their demands. This has had a flow-on effect for broadcasters, who are now beginning to find ways to monetise online eyeballs and embrace the strong growth in the digital media market. However the value of digital rights is still unclear. Further, the shift in business models from traditional content distribution to online distribution, requires significant investments. As a result, digital rights continue, for the most part, to be bundled with traditional media rights and sold to the incumbent media broadcasters.

However, according to the Accenture Consumer Broadcast Survey 2008, 'Television is shifting from its origins as a clearly identifiable stand-alone medium towards a future in which it is just one of an expanding array of devices through which people will choose to consume the content they want.'⁵⁵ It is likely therefore that the future will see both a change in the ways in which rights are awarded to account for increased importance of digital and new media, as well as the emergence of new partnerships to leverage various platforms and enable cost-sharing. The winners for sports broadcasting in this environment will be those that are willing to exploit change and the opportunities that new media brings. Whilst it is impossible to predict how the digital world will transform sports broadcasting in years to come, what is certain is that the classic broadcasting model has changed irreversibly.

Valeska Bloch is a Lawyer in the Communications, Media and Technology Group at Allens Arthur Robison in Sydney.

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2 'Olympic Games Coverage Proves a Winner with Australian TV Audiences', *FreeTV Australia Media Release*, 29 August 2008, accessed at http://www.savemysport.com.au/Media/Media/2008-0014_MED_Anti-siphoning_and_Olympic_coverage_290808.pdf on 2/10/08.

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7 *Ibid* at 385.

8 Fortunato, J. 'The NBA Strategy of Broadcast Television Exposure: A legal application' (2001-2002) 12 *Fordham Intellectual Property Media & Entertainment Law Journal* 133 at 135.

9 A review of the anti-siphoning regime must be conducted before 31 December 2009 and is timed to occur before the current anti-siphoning list expires on 31 December 2010.

10 Under the *Broadcasting Services Act 1992* (Cth) (BSA), subscription television broadcasting licensees are subject to a licence condition that the licensee cannot acquire rights to events on the anti-siphoning list unless a national broadcaster has the right to televise the event, or a commercial television broadcasting licensee (other than a licensee operating under a licence issued under subsection 40(1) of the BSA) covering more than 50 per cent of the population has the right to televise the event. Similarly, during the

simulcast period, a commercial television broadcaster must not televise the whole or part of an anti-siphoning event on a multi-channelled commercial broadcasting service, unless the whole or part of the event has been previously televised on the core service, the event is televised simultaneously on the core service and the multi-channel, or the broadcaster televises the part of the anti-siphoning event in a news or current affairs program; BSA, Sch 4, cl 41A.

11 Just as sporting events were a driver for the uptake of pay-TV, so too does the government hope that it will be a driver for the uptake of digital television.

12 For example, in the area of mobile alone, there are numerous options for content distribution available, including mobile web, mobile TV, mobile alerts and mobile video.

13 Morgan Stanley, *Internet Trends*, March 18 2008, Accessed at: http://www.morganstanley.com/institutional/techresearch/internet_trends.html on 1 July 2008. Mobile penetration rate is set to increase to 95% by 2013 from 46% in 2008, according to a new survey of 34 emerging markets by pricing and tariffs research firm Tariff Consultancy; Wanjiku, R. 'Mobile penetration to hit 95% by 2013, firm claims' *Computerworld*, 20 October 2008, accessed at <http://computerworld.co.nz/news.nsf/mgmt/FBC69286AC4FE940CC2574E400758A35> on 21/10/08.

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18 Svantesson, D. 'The Impact of Geo-location Technologies on Internet Licensing - Let the Cat and Mouse Game Begin' (2005) 63 *Intellectual Property Forum* 24.

- 19 Ibid.
- 20 Svantesson, n18.
- 21 Edelman, B. 'Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users', accessed at http://cyber.law.harvard.edu/archived_content/people/edelman/pubs/jump-091701.pdf on 21/10/08, at 7.
- 22 Ibid.
- 23 For example, through anonymisers and proxy servers; Svantesson, n18 at 25-26.
- 24 *Copyright Act 1968* (Cth) s103B(1)(b).
- 25 The Australian TV Access Convention (the **Convention**) is an undocumented 'gentleman's agreement' between broadcasters. It is specific to the television industry and it arose within the context of broadcasters providing each other with feeds for the purpose of compiling news bulletins, which form a small part of larger programs and programming schedules. The Convention contrasts with the UK which has a formal code of practice signed by participating television broadcasters (the **Code**). Neither the Convention nor the Code would have direct application to the internet.
- 26 The UK Code was developed following the decision in *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1991] All ER 833.
- 27 Whereas there is a need for reciprocity and the sharing of feeds to compile news bulletins on the basis of agreed rules in the television industry, in the internet industry there is not the same incentive amongst broadcasters to share footage.
- 28 *Telstra v Premier Media Group* [2007] FCA 568 at 4.
- 29 Ibid at 12, 13. The reports were placed on the internet or were available on the telephony for about 48 hours after being put up, which was about 48 hours after the matches on the highlights. Although the length of the footage varied, the parties argued on the basis of two-minute footages; [2007] FCA 568 at 26, 27.
- 30 n28 at 14.
- 31 Ibid at 17.
- 32 Ibid at 43.
- 33 Ibid at 36.
- 34 Ibid at 51.
- 35 Ibid at 48.
- 36 Ibid.
- 37 Ibid at 24.
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- 53 Prodhan, n45.
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