Network Ten Pty Limited v TCN Channel Nine Pty Limited [2004] HCA 14

HIGH COURT OF AUSTRALIA

McHUGH ACJ, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

McHUGH ACJ, GUMMOW AND HAYNE JJ:

1 This appeal is brought from the decision of the Full Court of the Federal Court of Australia (Sundberg, Finkelstein and Hely JJ)[1] which allowed in part an appeal by the respondents against judgments at the trial before Conti J[2]. The issues which arise turn upon the provisions of the *Copyright Act* 1968 (Cth) ("the Act") as they stood before the commencement on 4 March 2001 of the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) ("the Amendment Act")[3].

2 The appellant ("Ten") is the holding company of the Ten Network, and each of the respondents ("Nine") is part of the Nine Network. The relevant corporate actors in the events giving rise to the litigation held the appropriate commercial television broadcasting licences under the *Broadcasting Services Act* 1992 (Cth) ("the Broadcasting Act").

3 The litigation concerned alleged infringement by Ten of the copyrights of Nine in certain television broadcasts. The Ten Network broadcast a weekly television programme entitled *The Panel*, which included 20 extracts from programmes previously broadcast by the Nine Network. These were used in 15 different episodes of *The Panel* broadcast in 1999 and 2000. Before that use, each extract (referred to in the judgments in the Federal Court as the "Panel Segments") was placed on an individual video tape.

4 The Panel Segments ranged in duration from eight to 42 seconds. They were taken from programmes of the usual advertised length of 30 minutes to one hour.

5 The programmes of *The Panel* were produced for Ten by a contracted production company, Working Dog Pty Ltd ("Working Dog"). It appears that Working Dog retained ownership of the master tapes and its copyrights therein and for reward granted to Ten the rights to one free-to-air live broadcast on Ten and its affiliates. The litigation instituted by Nine was against Ten, not Working Dog.

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1 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

2 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235; *TCN Channel Nine v Network Ten (No 2)* (2001) AIPC ¶91-732.

3 The Act sufficiently appears for the purposes of these reasons in Reprint 8.

6 The injunctive relief sought by Nine was to restrain the re-broadcasting "on the television program 'The Panel' ... of a substantial parts [sic] of any television broadcasts by [Nine] without [its] consent". Nine also claimed a declaration of infringement of the "broadcast copyright" of Nine in each of the episodes of what were identified as "the television programs known as [for example, *The Today Show*, *A Current Affair*, *Australia's Most Wanted*]". The Full Court granted declaratory relief and remitted to the primary judge any questions of further relief consequential upon the declaratory relief.

7 At trial, Conti J held that Ten had not taken the whole or a substantial part of any of Nine's broadcasts. Those findings were reversed in the Full Court. Hely J delivered the leading judgment. Sundberg J agreed with Hely J and with additional reasons given by Finkelstein J for the conclusion that Ten had infringed the copyright of Nine in its television broadcasts. There were fair dealing defences under ss 103A and 103B of the Act. These partly succeeded, but do not arise for consideration in this Court.

8 Nine seeks to uphold the Full Court decision in its favour that each visual image capable of being observed as a separate image on a television screen and accompanying sounds is "a television broadcast" in which copyright subsists. The gist of Ten's complaint is that the term "a television broadcast" as it appears in the Act was misread by the Full Court, with the result that the content of that expression is so reduced that questions of substantiality have no practical operation and the ambit of the copyright monopoly is expanded beyond the interests the legislation seeks to protect.

9 Ten's submissions should be accepted and the appeal allowed.

Statutory interpretation

10 The submissions for Nine initially eschewed any detailed consideration of the anterior legal and historical context in the United Kingdom; this was despite the significance of the British legislation which then followed, upon the later Australian legislation. Nine also stressed the significance of what were said to be the plain words of the provisions of the Act immediately in issue and sought to discount any reaction to the decision of the Full Court which emphasised that the construction favoured by the Full Court appeared to be at odds with the overall scheme of the Act. Accordingly, it is convenient now to restate several of the relevant principles or precepts of statutory interpretation.

11 In *Newcastle City Council v GIO General Ltd*[4], McHugh J observed:

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4 (1997) 191 CLR 85 at 112. See also the observations of Windeyer J in *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 283.

> "[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context."

His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*[5]. There, Brennan CJ, Dawson, Toohey and Gummow JJ said[6]:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act* 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure[7]. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy[8]. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*[9], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent[10]."

12 The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability

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5 (1997) 187 CLR 384.

6 (1997) 187 CLR 384 at 408.

7 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft* [1975] AC 591 at 614, 629, 638; *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-26; *Pepper v Hart* [1993] AC 593 at 630.

8 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315.

9 (1986) 6 NSWLR 363 at 388.

10 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321.

of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed.

13 Reference first will be made to two well-established principles, those concerned with the significance of copying, and with the taking of a substantial part of the protected material. Attention then will be given to the legislative context in which the broadcasting right first appeared, and thereafter to the particular issues of statutory construction involved in the appeal.

Copyright and copying

14 Counsel for Nine invoked a well-known statement made in *University of London Press Ltd v University Tutorial Press Ltd*[11]. This was a case of infringement of copyright in an original literary work and Peterson J applied "the rough practical test that what is worth copying is prima facie worth protecting". But later authorities correctly emphasise that, whilst copying is an essential element in infringement to provide a causal connection between the plaintiff's intellectual property and the alleged infringement[12], it does not follow that any copying will infringe. The point was stressed by Laddie J when he said[13]:

> "Furthermore many copyright cases involve defendants who have blatantly stolen the result of the plaintiff's labours. This has led courts, sometimes with almost evangelical fervour, to apply the commandment 'thou shalt not steal'. If that has necessitated pushing the boundaries of copyright protection further out, then that has been done. This has resulted in a body of case law on copyright which, in some of its further reaches, would come as a surprise to the draughtsmen of the legislation to which it is supposed to give effect."

15 Professor Waddams, speaking of the use of terms such as "piracy", "robbery" and "theft" to stigmatise the conduct of alleged infringers of intellectual

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11 [1916] 2 Ch 601 at 610.

12 *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §7.08.

13 *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700. See also *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §7.31.

property rights, describes "the choice of rhetoric" as "significant, showing the persuasive power of proprietary concepts"[14]. He also remarks[15]:

> "Against the merits of enlarging the property rights of one person or class of persons must always be set the loss of freedom of action that such enlargement inevitably causes to others."

16 In another English decision, Jacob J[16] identified Peterson J's aphorism in *University of London Press* as an indication of the dangers in departing too far from the text and structure of the legislation; his Lordship said that the aphorism "proves too much" because if "taken literally [it] would mean that all a plaintiff ever had to do was to prove copying" so that "appropriate subject matter for copyright and a taking of a substantial part would all be proved in one go".

17 In Australia, the dangers in the use of the remarks in *University of London Press* were explained by Sackville J in *Nationwide News Pty Ltd v Copyright Agency Ltd* as follows[17]:

> "[T]he test has a certain 'bootstraps' quality about it. The issue of substantiality, in relation to a literary work, arises only where the work has been reproduced or published, at least in part. If applied literally, the test would mean that all cases of copying would be characterised as reproducing a substantial part of the work. It is therefore unlikely to be of great assistance in determining whether a particular reproduction involves a substantial part of a work or subject matter of copyright."

"Substantial part"

18 All the species of copyright enjoy a protection which is not limited to infringement by the taking of the whole of the protected subject-matter. The taking of something less will do. That lesser degree of exploitation is identified in s 14(1) by the phrase "a substantial part". The decision in *Data Access Corporation v Powerflex Services Pty Ltd*[18] with respect to infringement of the literary works in

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14 *Dimensions of Private Law: Categories and concepts in Anglo-American legal reasoning*, (2003) at 175-176.

15 *Dimensions of Private Law: Categories and concepts in Anglo-American legal reasoning*, (2003) at 174.

16 *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] Fleet Street Reports 275 at 289. See also the decision of Pumfrey J in *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95 at 133.

17 (1996) 65 FCR 399 at 417-418.

18 (1999) 202 CLR 1.

computer programs provides a recent example of the operation of s 14(1). The sub-section states:

> "In this Act, unless the contrary intention appears:
>
> (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and
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> (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be."

19 The effect of the interpretation given by the Full Court to the term "television broadcast" and related expressions in the Act is to go beyond s 14(1) and provide that, with respect to any given period of broadcasting, however brief, the copyright owner has the exclusive right to re-broadcast *any* of the images and accompanying sounds broadcast.

20 The term "substantial part" has a legislative pedigree. It appeared in s 1(2) of the *Copyright Act* 1911 (Imp) ("the 1911 Act"). The 1911 Act was repealed in 1956 by the *Copyright Act* 1956 (UK) ("the UK Act") and later excluded from further operation in Australia by s 5(1) of the Act. The inclusion of the term in the 1911 Act had reflected judicial interpretation of earlier copyright legislation[19].

21 The scheme of the 1911 Act, as with the UK Act and the Australian legislation which succeeded it, keeps separate the concepts of substantial part and fair dealing. Accordingly[20]:

> "acts done in relation to insubstantial parts do not constitute an infringement of copyright and the defences of fair dealing only come into operation in relation to substantial parts or more".

It would be quite wrong to approach an infringement claim on the footing that the question of the taking of a substantial part may be by-passed by going directly to the fair dealing defences.

The legislative context

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19 *Bramwell v Halcomb* (1836) 3 My & Cr 737 at 738 [40 ER 1110 at 1110]; *Chatterton v Cave* (1878) 3 App Cas 483 at 492; cf *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593 at 605-606.

20 Ricketson, *The Law of Intellectual Property*, (1984), §10.3.

22 In 1968, at the time of the enactment of the Act, the predecessor of the Broadcasting Act, the *Broadcasting and Television Act* 1942 (Cth) ("the 1942 Act"), was in force. As it stood in 1968, s 99(1) of the 1942 Act required the holder of a commercial television station licence to "provide programmes ... in accordance with standards determined by the [Australian Broadcasting Control] Board". With respect to what was then the Australian Broadcasting Commission[21], s 59 of the 1942 Act required the Commission to "provide, and ... broadcast or televise from transmitting stations made available by the Postmaster-General, adequate and comprehensive programmes". Section 121 of the 1942 Act prohibited the broadcasting of programmes of other stations, and s 132 rendered an offence the contravention of any provision of the 1942 Act[22].

23 The Act was preceded by the Report ("the Spicer Report") delivered in 1959 of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations were desirable in the copyright law of the Commonwealth ("the Spicer Committee"). The Spicer Report had said it was significant that neither the Brussels Convention nor the Universal Copyright Convention recognised a copyright in sound broadcasts or television broadcasts (par 285)[23]. In the end, the Spicer Report concluded (pars 288, 289) that protection for broadcasters could properly be included in the copyright law with an adaptation of the provision then recently made by s 14 of the UK Act.

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21 Constituted by s 30 of the 1942 Act.

22 Section 121 (later repealed by s 86 of the *Broadcasting and Television Amendment Act* 1985 (Cth)) stated:

> "(1) Except with the consent of the owner or licensee of the broadcasting station whose programme it is desired to broadcast and, in the case of a broadcast which is a re-broadcast, with the approval of the Board –
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> (a) the Commission shall not broadcast the whole or any part of the programme of a broadcasting station (whether situated in Australia or elsewhere) other than a national broadcasting station; and
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> (b) the licensee of a commercial broadcasting station shall not broadcast the whole or any part of the programme of any other broadcasting station (whether situated in Australia or elsewhere).
>
> (2) In this section, 're-broadcast' means the reception and re-transmission of a broadcast."

23 See Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (1987), §6.77.

24 The introduction by s 14 of the UK Act of the new species of copyright protection followed Recommendation 31 in the *Report of the Copyright Committee*[24] ("the Gregory Report") which had been presented in 1952. Recommendation 31 had been:

> "That a broadcasting authority should have the right to prevent the copying of its programmes either by re-broadcasting, or by the making of records for sale and subsequent performance. (Paragraph 117)"

Paragraphs 116 and 117 of the Gregory Report state the policy and objectives which were subsequently to find expression in the provisions of the Australian legislation upon which this appeal turns. Accordingly, pars 116 and 117 should be set out in full[25]:

> "116. We now turn to the question whether a new right should be given to the broadcasting organisations in their own programme, additional to any copyright there may be in the individual items which go to make up those programmes, and we deal at this stage solely with a right to prevent other persons from copying the programme either by way of again broadcasting a programme (in the event of there being more than one broadcasting authority in the future) or by way of recording such programmes for subsequent performance in some other way.
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> 117. On the question of copyright in the ordinary sense, *the position of* the [British Broadcasting Corporation ('*the BBC*')], as we see it, *is not, in principle, very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill. When using copyright material it pays the copyright owner, and it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.* It has been represented to us that the absence of such a right has already caused considerable embarrassment to the BBC. Apparently, indifferent reproductions both of sound and television programmes have been made, and sold to the public, to the detriment alike of the [BBC] and of those taking part. We consider that a right should be given to the BBC or any other broadcasting organisation to prevent this happening again. Any right so conferred would be additional to the right of the author or composer to prevent mechanical recording where copyright material is broadcast. It would also extend to prevent the mechanical recording of a broadcast of material which is either non-copyright, or of a nature in which a right to prevent recording may not, under the present law, subsist at all, eg news, talks, music-hall 'gags'." (emphasis added)

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24 Great Britain, (1952), Cmd 8662 at 120.

25 Great Britain, *Report of the Copyright Committee*, (1952), Cmd 8662 at 41.

25 In Australia, the Spicer Committee stressed the significance of the new head of copyright protection, saying (par 282):

> "The conception of copyright which has hitherto been accepted is one which extends protection against copying and performing in public any work insofar as it is reduced to a permanent form. Copyright has not been extended to confer such protection in relation to a mere spectacle or performance which is transitory of its very nature."

In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[26], the High Court had rejected the submission that by the expenditure of money the plaintiff had created a spectacle at its racecourse so that it had "a quasi-property in the spectacle which the law would protect"[27] by enjoining the broadcast of a race-meeting there. The issue before the Spicer Committee was a different one, namely the protection of broadcasts themselves.

26 The Spicer Committee added (par 284):

> "It is true that in many cases the broadcast will be recorded on tape or film, in which case the record or film will enjoy its own copyright protection, but the copyright here being considered is one which attaches to the broadcast itself."

27 In the second reading speech on the Bill for the Act, the Attorney-General, Mr N H Bowen QC, said that the matters of records and broadcasts were dealt with in the UK Act and that it was appropriate to deal with them in the Bill[28]. He also referred to the provisions of the Rome Convention[29] which had postdated the UK Act but to which Australia was yet to accede. The Rome Convention also provided for the grant of "neighbouring rights" to various persons including broadcasters. Article 13 of the Rome Convention provided that "[b]roadcasting organisations

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26 (1937) 58 CLR 479. See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 444-445; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 54-55 [4]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 248-250 [106]-[111], 320-322 [313]-[317].

27 (1937) 58 CLR 479 at 496.

28 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1528.

29 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 26 October 1961. This, with some reservations, was acceded to by Australia with effect from 30 September 1992: [1992] *Australian Treaty Series* No 29.

[were to] enjoy the right to authorise or prohibit", among other things, "the rebroadcasting of their broadcasts", "the fixation of their broadcasts" and "the reproduction ... of fixations, made without their consent, of their broadcasts".

28 Conti J noted[30] that the Gregory Report had spoken of the right to prevent the copying of the "programmes" of broadcasting authorities, and the broadcasting systems established by the 1942 Act spoke of the provision of "programmes" broadcast or televised from transmitting stations, and the Spicer Report spoke both of the protection of "broadcasts" and (in par 286) of "the programme received". The Rome Convention, like the Act, used the term "broadcast". There was no significant step taken with this shift in language. At this time, the use of "broadcast" as a noun indicated[31]:

> "**a** Broadcasting as a medium of transmission.
>
> **b** The material, music, or pictures broadcast; also, a single program of such material".

29 The policy and objective in the recommendations of both Committees was to protect the cost to, and the skill of, broadcasters in producing and transmitting their programmes, in addition to what copyrights may have subsisted in underlying works used in those programmes. There is no indication, as Nine would have it, that, with respect to television broadcasting, the interest for which legislative protection was to be provided was that in each and every image discernible by the viewer of such programmes, so as to place broadcasters in a position of advantage over that of other stakeholders in copyright law, such as the owners of cinematograph films or the owners of the copyrights in underlying original works.

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30 (2001) 108 FCR 235 at 267.

31 *Webster's New International Dictionary*, 2nd ed (1958), vol 1 at 339. *The Australian Oxford Dictionary*, (1999) at 170 distinguishes between uses of "broadcast" as a verb, noun, adjective and past participle; it gives for its meaning as a noun "a radio or television programme or transmission" and as a verb "transmit (programmes or information) by radio or television". *The Macquarie Dictionary*, 3rd ed (1997) for "broadcast", and beside the sub-classification "*Radio*", states at 274:

> "**a** the broadcasting of radio messages, speeches, etc. **b** a radio program. **c** a single period of broadcasting".

The Oxford English Dictionary, 2nd ed (1989), vol 2 at 568 cites the statement in the *Westminster Gazette*, 19 October 1922:

> "The British Broadcasting Company will broadcast news, information, concerts, lectures, educational matter, speeches, weather reports, and theatrical entertainments."

The television broadcasting right

30 Part III (ss 31-83) of the Act provides for copyright in original literary, dramatic, musical and artistic works. Part IV (ss 84-113) provides for copyright in subject-matter other than works, namely sound recordings, cinematograph films, television broadcasts and sound broadcasts, and published editions of works. Of Pt IV copyrights, it is accurately observed[32]:

> "In general, these subject matters receive a lower level of protection than works, with shorter terms and more restricted exclusive rights."

As indicated above, this case concerns copyright in television broadcasts.

31 Copyright subsisting by virtue of Pt IV is in addition to and, with an immaterial qualification[33], is independent of copyright subsisting by virtue of Pt III (s 113(1)). Further, as to Pt IV copyrights, the subsistence of copyright under one provision of Pt IV does not affect the operation of any other provision of Pt IV under which copyright can subsist (s 113(2)). For example, there may be copyrights under Pt IV in a cinematograph film which is the subject of a television broadcast, and the film may utilise the copyrights under Pt III in, for example, original dramatic and musical works.

32 There are various points of contact made in the Act between the copyrights conferred by Pt III in respect of original works and the newer forms of copyright provided for in Pt IV. These contacts were described in the judgment of the majority in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* ("*PPCA*")[34]. What is significant for present purposes is that the exclusive rights with respect to original literary, dramatic and musical works include the right to broadcast the works (s 31(1)(a)(iv)) whether by way of sound broadcasting or television (s 25(1)), and the exclusive rights with respect to original artistic works include the right to include the works in television broadcasts (s 31(1)(b)(iii))[35]. The result is that a

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32 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, 2nd ed (rev) (2002), §8.0.

33 Any copyright otherwise still subsisting under Pt III is not infringed by the public viewing of a cinematograph film, the copyright in which has expired (s 110(2)).

34 (1998) 195 CLR 158 at 162-163 [3]-[6].

35 The Amendment Act substituted in pars (b)(iii) and (a)(iv) the right "to communicate the work to the public" and introduced in s 10 a definition of "communicate" as meaning:

> "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter".

television broadcast may be more than a broadcast of some event or spectacle; it also in some cases may reproduce one or more works in which copyright subsists under Pt III and is vested in a different ownership to that of the broadcast.

33 Copyright subsisted in "a television broadcast" made by Nine from a place in Australia (s 91) and was vested in Nine (s 99), and subsisted for 50 years thereafter (s 95(1)).

34 Section 101 is the primary provision dealing with infringement of Pt IV copyrights. Sub-section (1) states:

> "Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright."

The reference to "any act comprised in the copyright" is to be read as a reference to any act that, under the Act, the copyright owner has the exclusive right to do; this includes the exclusive right to authorise a person to do that act (s 13). Sub-sections (3) and (4) of s 101 provide:

> "(3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.
>
> (4) Subsection (1) applies in relation to an act done in relation to a television broadcast or a sound broadcast whether the act is done by the reception of the broadcast or by making use of any article or thing in which the visual images and sounds comprised in the broadcast have been embodied."

35 The reference in s 101(4) to "reception" is to reception from the transmission by which the broadcast is made or from a simultaneous transmission made by other means (s 25(2)). The distinction drawn in s 101(4) between infringement by reception and by fixation, using embodiments of the broadcast, reflects the mischief perceived in par 116 of the Gregory Report, and Recommendation 31, which have been set out above at [24].

36 The acts comprised in the broadcasting copyright are specified in s 87, the text of which will be set out below. Two particular paragraphs of s 87 were in issue in this litigation. The first, s 87(a), specifies as a violation of the exclusive right in the case of the visual images in a television broadcast, the making of a cinematograph film or a copy thereof. The second, s 87(c), specifies the re-broadcasting of a television broadcast. The Full Court held that Ten was guilty of each species of infringing activity.

37 However, for this appeal there is a necessarily anterior question. It is what is comprehended by the "subject-matter" of the protection under Pt IV given to "a

television broadcast". That is the phrase used in ss 91, 95, 99 and 101(4). It should be observed that s 101(4) uses the phrase "the visual images and sounds comprised in the broadcast". Likewise, for the purposes, for example, of fixing the commencement of the 50 year period specified in s 95(1), the television broadcast is treated by s 22(5) as having been made "by the person by whom, at the time when, and from the place from which, the visual images or sounds constituting the broadcast ... were broadcast"[36]. The decision which Ten challenges appears to discount the force of that phrase, redolent of plurality and interconnection of images and sounds, by treating as "a television broadcast" that which is capable of being observed as a separate image and (in an unexplained fashion) that capable of being heard and distinguished as the accompanying sounds (if any).

The medium of communication

38 Where the "subject-matter" of copyright protection is of an incorporeal and transient nature, such as that involved in the technology of broadcasting, it is to be expected that the legislative identification of the monopoly (eg, by s 87) and its infringement (eg, by s 101) of necessity will involve reference to that technology. But that does not mean that the phrase "a television broadcast" comprehends no more than any use, however fleeting, of a medium of communication. Rather, as the Gregory Report indicated, protection was given to that which had the attribute of commercial significance to the broadcaster, identified by the use of the term "a broadcast" in its sense of "a programme". In the same way, the words, figures and symbols which constitute a "literary work", such as a novel, are protected not for their intrinsic character as the means of communication to readers but because of what, taken together, they convey to the comprehension of the reader.

39 In fixing upon that which was capable of perception as a separate image upon a television screen and what were said to be accompanying sounds as the subject-matter comprehended by the phrase "a television broadcast", the Full Court appears to have fixed upon the medium of transmission, not the message conveyed by its use.

40 Because the medium is ephemeral, it is necessary to capture what a television broadcaster transmits if any practical use is to be made of the signal that is broadcast. For many purposes, it is necessary not only to capture the signal, but also to translate it so that the images and sounds which the signal conveys can be seen and heard. The most common method of doing that is, of course, the television set, but other devices, such as various forms of video recorder, may be used. According to the device that is used, what is captured and translated may be only so much of a signal broadcast as has previously been, or can at the time of transmission of the signal be, translated into a single image or moment of sound. But in the ordinary course, what is captured and translated can, and will, be a faithful reproduction of all, or substantially all, that the broadcaster's signal permits.

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36 See also s 25(5).

41 Section 87 of the Act, in pars (a) and (b), identifies the nature of copyright in a television broadcast by reference to two methods by which what is transmitted can be captured and recorded in permanent or semi-permanent form. One method (s 87(a)) is to take a still visual image of what otherwise appears on a television set as part of a continuous visual transmission. In that context it may be sensible to speak of a single visual image that is broadcast. However, it by no means follows that it is sensible to confine the understanding of "a television broadcast" by basing the meaning that is given to the expression upon the capacity to capture and record singular visual images. Especially is that so when it makes little sense to speak of a single "moment" of sound accompanying that image. The instantaneous fixing of single visual images is familiar, but the instantaneous fixing of single sounds is not. When it is further observed that s 87(c), with its reference to re-broadcasting, at least encompasses the capture and simultaneous retransmission of a television broadcaster's signal, it is apparent that to understand "a television broadcast" as a singular and very small portion of the signal which a broadcaster transmits virtually continuously, and a person receiving is intended to receive continuously, is to give the expression a very artificial meaning. Yet that is what the Full Court did.

The reasoning of the Full Court

42 The conclusion of the Full Court with respect to s 87(a) rested largely upon a view taken of the significance of s 25(4). That sub-section treats the reference in s 87(a) to the making of "a cinematograph film" of "a television broadcast" as "including a reference to a cinematograph film ... of any of the visual images comprised in the broadcast". In that regard, Hely J held[37] that "the expression 'any of the visual images' encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast". His Honour concluded[38]:

> "As the videotapes of the Panel Segments made by Ten are cinematograph films of the visual images comprised in the source television broadcasts in terms of s 25(4), it follows that, subject to the fair dealing defences, Nine has established contravention of its s 87(a) copyright in the source broadcasts. *That conclusion follows from the application of s 25(4) to the facts, without the need to determine what constitutes a television broadcast*. However, that issue has to be confronted in relation to s 87(c)." (emphasis added)

However, the primary task had been to identify that television broadcast in which copyright subsisted in Nine under s 91. This was a matter of visual images and

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37 (2002) 118 FCR 417 at 433.

38 (2002) 118 FCR 417 at 435.

sounds and the primary task was not performed, and could not properly be avoided, by reasoning from a provision concerned with fixation in a cinematograph film.

43 As to s 87(c), Hely J observed that in the Act there was no definition of "re-broadcast"[39]. However, it should be noted that Art 3(g) of the Rome Convention states:

> "'[R]ebroadcasting' means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation."

If s 87(c) of the Act be read in the same way, the use by Ten of its previous "fixations" of the Nine programmes would not have contravened s 87(c)[40]. However, neither side has submitted to this Court that s 87(c) is to be read in the same way as the re-broadcasting right given by the Rome Convention. It might be added that it would be difficult to read Art 3(g) as applying to a simultaneous re-broadcast of one image and accompanying sound.

44 Hely J concluded the consideration of s 87(c) by saying[41]:

> "When is a television broadcast made? A television broadcast is made when the transmission of visual images and any accompanying sounds begins. A television broadcast continues to be made as the transmission of visual images and any accompanying sounds continues. Visual images and accompanying sounds as they are broadcast, themselves satisfy the definition of 'television broadcast'[42]. *One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made.*
>
> ...
>
> I conclude that a television broadcast in which copyright may subsist is made whenever visual images and accompanying sounds are broadcast by way of television. Re-broadcasting of any of the actual images and sounds so broadcast is an infringement of copyright under s 87(c), whether or not the subject matter of the re-broadcast is characterised as a

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39 (2002) 118 FCR 417 at 435.

40 See Stewart, *International Copyright and Neighbouring Rights*, 2nd ed (1989), §8.32.

41 (2002) 118 FCR 417 at 435-436.

42 cf the observations of Buckley LJ in *Spelling Goldberg* [*Productions Inc v BPC Publishing Ltd* [1981] RPC 283] at 296.

programme, a segment of a programme, an advertisement, a station break or a station logo, or as a substantial part of any of those things.

Accordingly, I do not agree, with respect, with the primary judge's conclusion that whether or not there has been 're-broadcasting' of a television broadcast is to be measured against those benchmarks." (emphasis added)

45 The critical step in this reasoning was to identify "a television broadcast" as the broadcast of a singular visual image with accompanying sound. In essence, the reasoning depended upon giving controlling force to s 25(4) in construing and applying the meaning of "a television broadcast". It is not right to give s 25(4) that place. As these reasons seek to show, s 25(4) is explanatory or epexegetical of an aspect of one of the three species of rights with which s 87 is concerned. The expression "a television broadcast" must be understood in a way which is consistent with all of the rights mentioned in s 87.

46 Conti J had favoured the "television broadcaster's program, or respective segments of a program, if a program is susceptible to subdivision by reason of the existence of self-contained themes" and added that "in the case of commercial television, an advertisement should logically be treated in the same way as a separate program"[43]. However, in the Full Court, Hely J took a contrary view, saying[44]:

> "It may be that in the mid-1950s a television broadcast would be seen as consisting of a series of discrete programmes of comparatively short duration. But today there is a continuous television broadcast, although the subject matter of that broadcast may be so arranged as to be of interest to different sections of the public at different times in the day. There may be some spectacles or events, for example, the Gulf War, which might be the subject of a television broadcast continuing for more than a day."

Hely J explained the role for principles of substantiality upon his construction of the phrase "a television broadcast" by saying[45]:

> "If a broadcast consists of visual images and sounds, but the re-broadcast is of one, rather than the other, or if the re-broadcast is of images which have been cropped, then issues of substantiality may arise."

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43 (2001) 108 FCR 235 at 272.

44 (2002) 118 FCR 417 at 436.

45 (2002) 118 FCR 417 at 436-437.

47 As already emphasised in these reasons, the requirement that an infringer who takes less than the whole of the protected subject-matter must take at least a substantial part thereof plays a well-established and central part in copyright law. Questions of quality (which could include the potency of particular images or sounds, or both, in a broadcast) as well as quantity arise both in respect of Pt IV copyrights and those copyrights in original works to which Pt III applies[46].

48 The outcome of the decision of the Full Court now under appeal is that the interests of broadcasters are placed by the Act in a privileged position above that of the owners of copyright in the literary, dramatic, musical and artistic works which may have been utilised in providing the subject of the images and sounds broadcast. This is because the diminished requirements in respect of infringement of television broadcasts for the taking of a substantial part of the subject-matter facilitate the proof of infringement there while leaving the owners of copyrights under Pt III with a heavier burden. Ten points to this apparent incongruity as favouring a construction of the Act contrary to that adopted by the Full Court.

Section 87(a) and s 25(4)

49 The construction given by Hely J to s 87(c), the re-broadcasting right, appears to have proceeded from the construction given to the visual "fixation" right conferred by s 87(a). That, in turn, depended upon the construction and significance of s 25(4). Ten emphasises in its submissions on the appeal that the limitation of s 25(4) and s 87(a) to the fixation of the visual element in "a television broadcast" provided no necessary or sufficient support for an interpretation of the re-broadcasting right where no fixation is involved but both image and sound are received and broadcast in infringement of the copyright. Nor, Ten submitted, was the process of construction whereby s 87(a) drove the construction of s 87(c) indicated by his Honour. Those submissions should be accepted.

50 It is convenient then to make further reference to s 25(4). That requires that there first be some examination of the building blocks which the Act supplies in a complex set of definitions and explanatory provisions.

51 The category in Pt IV of copyright in subject-matter other than works falls into four divisions: sound recordings; cinematograph films; television broadcasts and sound broadcasts; and published editions of works. The first three are related. Each is the subject of definitions in s 10 of the Act, as follows:

(i) A "***sound recording*** means the aggregate of the sounds embodied in a record" and "***record*** means a disc, tape, paper or other device in which sounds are embodied". The term "embodied" reflects the introduction into some of the Pt IV subject-matter of the "fixation" principle of copyright law

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46 See *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 at 418-419; *Newspaper Licensing Agency Ltd v Marks & Spencer plc* [2003] 1 AC 551 at 561.

that copyright does not subsist in a work unless and until the work takes some material form, so that protection does not extend to the ideas or information contained in the work and a balance is struck between the interests of authors and those of society in free and open communication[47]. This notion of "fixation" receives further explanation in s 24. This states:

> "For the purposes of this Act, sounds or visual images shall be taken to have been embodied in an article or thing if the article or thing has been so treated in relation to those sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing."

Further, s 23(1) marks off the definition of sound recording from that of "cinematograph film" by providing:

> "For the purposes of this Act, sounds embodied in a sound-track associated with visual images forming part of [a] cinematograph film shall be deemed not to be a sound recording."

This Court held in *PPCA*[48] that (i) the operation of s 23(1) was to deny any separate copyright as a sound recording to the sounds embodied in the soundtrack which forms part of a cinematograph film, but (ii) it did not follow that, when a film, with its soundtrack, was broadcast, there was no infringement of copyright in earlier sound recordings (in *PPCA*, of various songs) which had been reproduced in that soundtrack.

(ii) A "***cinematograph 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 so shown;

and includes the aggregate of the sounds embodied in a sound-track with such visual images".

Again, s 24 operates to explain the use of "embodied". It will be observed that what is protected is not merely an aggregation of visual images, but an

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47 *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §3.74. See also *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 67 [45]-[46]; *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336 at 353-354, 397-398; Loughlan, "Copyright Law, Free Speech and Self-Fulfilment", (2002) 24 *Sydney Law Review* 427 at 428-431.

48 (1998) 195 CLR 158.

aggregation capable of "being shown as a moving picture"; that expression is not defined.

(iii) References to "broadcasting", subject to the appearance of a contrary intention, are to be read as references to "broadcasting whether by way of sound broadcasting or of television" (s 25(1)); and "***broadcast*** means transmit by wireless telegraphy to the public". In turn, "***wireless telegraphy*** means the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy".

(iv) The phrase "***sound broadcast*** means sounds broadcast otherwise than as part of a television broadcast"; the phrase "***television broadcast*** means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images", so that the phrase "television broadcast" has visual and auditory elements but only the former need be present for the definition to apply.

52 The definitions of "sound recording" and "cinematograph film" are drafted so as to avoid overlapping. But both definitions differ in a significant respect from those of "television broadcast" and "sound broadcast". The former turn upon the notion of "fixation" and the existence of a material embodiment, as explained by s 24. The latter do not. Rather, as foreshadowed in par 284 of the Spicer Report, set out in these reasons at [26], they turn upon the activity of broadcasting to the public by wireless telegraphy and by way of television. Further, television broadcasting involves the two elements of visual images and sound. These distinctions between the incorporeal and the corporeal, and between the sound and visual elements of television broadcasting, are vital to an understanding of the relationship between ss 85 and 86 on the one hand and s 87 on the other.

53 Sections 85 and 86 identify the exclusive rights conferred by copyrights in sound recordings (s 85) and cinematograph films (s 86). One of the former is "to make a copy of the sound recording" (s 85(1)(a)); one of the latter is "to make a copy of the film" (s 86(a)). Each category of infringing act in these categories will involve copying to produce a material embodiment where there was an anterior material embodiment.

54 Television and sound broadcasts do not have that character. The reception of a broadcast by "pulling it down" may itself be sufficient (as s 101(4) recognises) for infringement by re-broadcasting (s 87(c)). However, in drafting the Act, some care was needed in identifying the translation of the incorporeal into a fixed form if that translation were to be treated as an infringing act. That was done by pars (a) and (b) of s 87. Section 87 states:

> "For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

(a) in the case of a television broadcast in so far as it consists of visual images – to make a cinematograph film of the broadcast, or a copy of such a film;

(b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds – to make a sound recording of the broadcast, or a copy of such a sound recording; and

(c) in the case of a television broadcast or of a sound broadcast – to re-broadcast it."

55 Section 25(4) is epexegetical or explanatory of par (a) of s 87, providing the following detail:

"In this Act:

(a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast; and

(b) a reference to a copy of a cinematograph film of a television broadcast shall be read as including a reference to a copy of a cinematograph film, or a reproduction of a photograph, of any of those images."

56 Where, as in the present case, both visual images and the sounds of a television broadcast are captured on video tape, s 87 identifies the exclusive right of the broadcaster in a striking fashion. It distinguishes between the capture of the visual images (s 87(a)) and the recording of the sounds (s 87(b)). In each case, the exclusive right in respect of the ephemeral activity of broadcasting is identified by reference to fixed embodiments.

57 At first blush, it may have been more straightforward for the statute to have settled in s 87(a) solely upon the making of "a cinematograph film" of the television broadcast as the relevant exclusive entitlement of the broadcaster. But to do so would have given rise to textual difficulty. If s 87(a) had referred, in its closing phrases and without more, to the making of a cinematograph film of the broadcast, that would have made a nonsense of the opening words of s 87(a). These take as the subject-matter of the cinematograph film only so much of the broadcast as consisted of visual images. But the definition in s 10 of "cinematograph film", set out above, takes two aggregates, that of the visual images and that of the sounds, each as found in a distinct fixed embodiment.

58 That definition of "cinematograph film" is subjected by s 10 to the presence of a contrary intention. That is found in s 25(4) which takes the composite expression "a cinematograph film of a television broadcast" and permits its limitation to a peculiar cinematograph film, one limited to visual images comprised

in the television broadcast. In this way, there is effectuated the drafting method adopted in s 87 to deal with sound broadcasts and the sound element of television broadcasts together (in par (b)), and separately (in par (a)), with the visual element of television broadcasts. But it should be noted that there is not removed from the necessary character of the "cinematograph film" spoken of in par (a) the definitional requirement that the aggregate of visual images be capable, by use of the material embodiment, "of being shown as a moving picture".

Section 25(4) and "substantial part"

59 Section 25(4) does not answer the next question which may arise, namely, whether this cinematograph film represents a substantial part of the images comprising the television broadcast in question. Paragraph (a) of s 14(1) requires references to the doing of infringing acts to be read as including references to infringing acts in relation to a "substantial part" of Pt IV subject-matter, in this case, television broadcasts.

60 Section 14, like s 25, is contained in Pt II (ss 10-30A), which is headed "Interpretation". Section 14 does not affect the references in other provisions of the Act (ss 32, 177, 180, 187 and 198) to the publication of a work or to the absence of publication of a work. Sub-section (2) of s 14 so states. It should be noted here that, to a significant degree, questions of the subsistence and duration of copyright turn upon the classification of works as published or unpublished. Section 14(1) is expressed to be subject to the appearance of a contrary intention. The immediately following s 14(2) is a detailed instance of this. Another is s 29(2). This states that s 14 does not apply in determining whether reproductions of a work or an edition of a work have been supplied to the public and are therefore to be classified as published works.

61 Section 25(4) does not display a contrary intention to displace the operation of s 14. In particular, s 25(4) does not further favour the interests of broadcasters by decreasing the burden they carry in establishing infringement of television broadcasting copyright below the requirement of a taking of a substantial part of the subject-matter. Rather, s 25(4) gives a special meaning to the term "a cinematograph film of the broadcast" in s 87(a), but leaves outstanding the issue whether there has been taken at least a substantial part of the images aggregated in the television broadcast in question. In this way, effect is given to each provision, while maintaining the unity of the statute in the sense discussed in *Project Blue Sky Inc v Australian Broadcasting Authority*[49].

Additional matters of construction of s 25(4)

62 Four points should be made here in support of the above reading of s 25(4). First, as observed earlier in these reasons, it would be a curious method of construction of the Act to take s 25(4) as flowing upstream and as dictating the

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49 (1998) 194 CLR 355 at 381-382 [69]-[70].

content of the phrase "a television broadcast". Secondly, s 25(4) is not addressed to that part of the "fixation" right in s 87 which is concerned with sound. In so far as "a television broadcast" consists of sounds, the relevant provision is in par (b) not par (a). It would make little sense and not meet the definition of "sound recording" to speak of a recording of that minimal auditory experience which could be treated as accompanying that single image to provide what Nine contends together constitutes "a television broadcast". Thirdly, s 25(4) can have no application, given its terms, to that exclusive right conferred by s 87(c), ie, that to re-broadcast the television broadcast in question. It would be an odd result if the requirement of at least a substantial taking applied to s 87(c) but not to s 87(a). That suggests s 25(4) operates in the fashion explained in these reasons. Fourthly, there is the significance of the presence in the infringement provision in s 101(4) of the phrase "the visual images and sounds comprised in the broadcast" and the reference in s 135B to the making of a copy of the whole or a part of a "transmission" (being a sound broadcast or a television broadcast).

63 Part VA (ss 135A-135ZA) deals with the copying of "transmissions" by educational and other institutions. The term "transmission" is defined in s 135A so as to include "a sound broadcast or a television broadcast". Section 135B then states:

> "In this Part:
>
> (a) a reference to a copy of a transmission is a reference to a record embodying a sound recording of the transmission or a copy of a cinematograph film of the transmission; and
>
> (b) a reference to the making of a copy of a transmission is a reference to the making of a copy of *the whole or a part of* the transmission." (emphasis added)

64 No contrary view of the operation of s 25(4) is required by the treatment of photography as the making of "a cinematograph film of a television broadcast". The Act otherwise distinguishes between photography and cinematography. A photograph is an artistic work by reason of its inclusion in par (a) of the definition of "artistic work" in s 10. Thus, a photograph may be an original artistic work to which Pt III of the Act applies.

65 But "photograph" is so defined in s 10 as to place cinematography elsewhere, namely in Pt IV, with other original works of authorship. In that regard, Judge Learned Hand observed[50]:

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50 *Jeweler's Circular Pub Co v Keystone Pub Co* 274 F 932 at 934 (1921); affd 281 F 83 (1922).

"no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike".

The definition states:

"***photograph*** means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and ***photographic*** has a corresponding meaning".

The effect of s 25(4) is to qualify that disjunction between photography and cinematography. This is achieved in s 25(4) by treating the photographing of visual images in a television broadcast as the making of a cinematograph film of the broadcast, for the purposes of s 87(a). Whether one or more photographs infringe the television broadcast copyright will depend upon the operation of the substantiality provision in par (a) of s 14(1) of the Act.

66 There remains the question of identifying that to which par (a) of s 14(1) speaks in its application to "a television broadcast" spoken of in pars (a) and (c) of s 87. What does that phrase identify in the present case?

What is "a television broadcast"?

67 The definition given in s 10 is "television broadcast", which is drawn in terms of the technology of broadcasting which is to be utilised. But the phrase in the exclusive right provisions of s 87 (as also in ss 91, 95, 99 and 101(4)) is "*a* television broadcast" (emphasis added).

68 In the present case, Hely J focused attention not upon the statutory phrase "a television broadcast", but upon the use of technical language in the definition of "television broadcast". His Honour concluded[51]:

"Here the interest protected by the copyright is the visual images broadcast by way of television and any accompanying sounds. It is the actual images and sounds broadcast which constitute the interest protected. The interest protected is not defined in terms of some larger 'whole' of which the visual images and sounds broadcast are but a part. The ephemeral nature of a broadcast, and the fact that copyright protection is conferred by reference to a broadcaster's output, rather than by reference to the originality of what is broadcast, may also help to explain why the interest protected is defined in this way."

69 That identification of the interest sought to be protected by the broadcast copyright should not be accepted.

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51 (2002) 118 FCR 417 at 436.

70 The interest sought to be protected by the conferral of the television broadcast copyright was identified by the Spicer Committee with reference to the experience of the BBC and the Independent Television Authority. The latter was established by the *Television Act* 1954 (UK) and charged by s 3 to "broadcast ... programmes" of a certain standard. This interest was identified as that in the cost and skill in assembling or preparing and transmitting programmes to the public. That activity of public broadcasting occurred in exercise of statutory authority which required the transmission of programmes of a certain standard or quality identified by their content. The Spicer Committee decided against leaving it to broadcasters to record or film their broadcasts and so depend upon the protection given to sound recordings and cinematograph films (par 287).

71 Further reference should be made to s 91. This limits the identity of those in whom there may subsist copyright in television broadcasts and sound broadcasts. It is sufficient for present purposes to set out pars (a) and (b) of s 91. These state:

> "Subject to this Act, copyright subsists:
>
> (a) in a television broadcast made from a place in Australia by:
>
> (i) the Australian Broadcasting Corporation;
>
> (ii) the Special Broadcasting Service Corporation; or
>
> (iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a licence issued under the *Radiocommunications Act 1992*; and
>
> (b) in a television broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:
>
> (i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or
>
> (ii) a class licence determined by that Authority under that Act".

The result is to render the subsistence of copyright dependent upon the making of "a television broadcast" by the Australian Broadcasting Corporation ("the Corporation"), the Special Broadcasting Service Corporation ("the SBS") and those such as Nine and Ten holding the requisite licences or permits under the

Broadcasting Act[52]. What then is contemplated is the exercise by those identified broadcasters of the performance of their statutory powers or duties under their constituent legislation or the exercise of the authority given by their licences under the Broadcasting Act.

72 Under the present legislation, s 14 of the Broadcasting Act defines as "commercial broadcasting services"[53] those:

> "broadcasting services:
>
> (a) that *provide programs* that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and
>
> (b) that *provide programs* that:
>
> (i) are able to be received by commonly available equipment; and
>
> (ii) are made available free to the general public; and
>
> (c) that are usually funded by advertising revenue; and
>
> (d) that are operated for profit or as part of a profit-making enterprise; and
>
> (e) that comply with any determinations or clarifications under section 19 in relation to commercial broadcasting services". (emphasis added)

The term "program" means (s 6(1)):

> "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
>
> (b) advertising or sponsorship matter, whether or not of a commercial kind".

The inclusion of par (b) should be noted.

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52 The only prescriptions under s 91(a)(iii) were of Satellite Leisure Services Pty Ltd and Sky Channel Pty Ltd by Reg 17A of the Copyright Regulations, now repealed by the Copyright Amendment Regulations 2001 (No 2), Sched 1, Item 3.

53 The Broadcasting Act also provides for and defines "community broadcasting services" (s 15), "subscription broadcasting services" (s 16), "subscription narrowcasting services" (s 17) and "open narrowcasting services" (s 18), but in terms which in each case provide for the provision of "programs".

73 The *Australian Broadcasting Corporation Act* 1983 (Cth) specifies the functions of the Corporation in s 6. In particular, par (a) of s 6(1) states as a function of the Corporation:

> "to provide within Australia innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system consisting of national, commercial and public sectors and, without limiting the generality of the foregoing, to provide:
>
> (i) *broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community*; and
>
> (ii) *broadcasting programs of an educational nature*". (emphasis added)

The phrase "broadcasting service" is defined in s 3 as meaning a service that delivers "programs" to persons having certain reception equipment, and "program" means "a radio program or a television program".

74 The *Special Broadcasting Service Act* 1991 (Cth) states in s 6(1):

> "The principal function of the SBS is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society."

The SBS is also empowered by s 44(1)(a):

> "to produce, promote or present programs or arrange, or provide facilities, for the production, promotion or presentation of programs".

75 There can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute "a television broadcast". However, the programmes which Nine identified in pars 5.1-5.11 of its pleading as the Nine Programs, and which are listed with their dates of broadcast in the reasons of Conti J[54], answer that description. These broadcasts were put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title, such as *The Today Show*, *Nightline*, *Wide World of Sports*, and the like, which would attract the attention of the public.

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54 (2001) 108 FCR 235 at 240.

76 However, Conti J was, with respect, correct in adding, with reference to *Copinger and Skone James on Copyright*[55], that[56]:

> "Television advertisements should be treated as discrete television broadcasts, particularly since 'A television or cinema commercial is typically the product of the creative and administrative work of many separate individuals' ... I would reject Ten's submission that because advertising is the 'life blood' of commercial television broadcasting, it is 'impossible for [Nine] to avoid the conclusion that these advertisements are part of that program'."

His Honour added[57]:

> "Moreover, where a given program divides into segments, it may be legitimate in the facts of a given case to use a segment of a program for measurement of the television broadcast, rather than the whole of the program."

77 We would reserve consideration of that proposition for a particular case where the point arises. However, the circumstance that a prime time news broadcast includes various segments, items or "stories" does not necessarily render each of these "a television broadcast" in which copyright subsists under s 91 of the Act.

The United States law

78 Reference was made in argument to the position under *The Copyright Act of 1976* ("the US Act") and something should be said to indicate that this system is at odds with the "single image" interpretation of the Australian legislation. Under the US Act, copyright protection subsists in original works of authorship including "audiovisual works" which are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (s 102(a)). The situation is said to be[58]:

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55 14th ed (1999), vol 1, §27.341.

56 (2001) 108 FCR 235 at 270.

57 (2001) 108 FCR 235 at 270.

58 *Nimmer on Copyright*, (2003), §2.03[B][2]. See further §1.08[C][2] and *Production Contractors Inc v WGN Confidential Broadcasting Co* 622 F Supp 1500 at 1503 (1985).

> "Because it is common practice for radio and television broadcasters to simultaneously record live broadcasts, this extension of the concept of fixation would seem to effectively protect virtually all broadcasts."

However, "audiovisual works" are defined in s 101 as:

> "works that consist of *a series of related images* which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied". (emphasis added)

Conclusions

79 The appeal should be allowed with costs. However, there remains for consideration by the Full Court the determination of so much of Nine's appeal to that Court as turns upon the challenge to the treatment by the primary judge of the issues of substantiality under s 14(1)(a) of the Act. There also remains the question of what orders the Full Court should make in place of those entered on 19 July 2002 in the light both of the reasons of this Court and of the Full Court's consideration of the appeal to that Court.

80 The orders entered on 19 July 2002 should be set aside and the matter be remitted to the Full Court for determination of the remaining grounds of appeal to that Court and for the making of appropriate orders to dispose of that appeal. The costs of all the proceedings in the Full Court should be for that Court.

KIRBY J:

81 In this appeal, there is a division of opinion in the Court concerning the extent of copyright protection of a television broadcast within Pt IV of the *Copyright Act* 1968 (Cth) ("the Act"). As explained elsewhere, the case concerns the Act in the form in which it appeared before amendments introduced by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth). The enactment of copyright protection in a television broadcast is a relatively recent development. It was provided in the United Kingdom in 1956[59] following a 1952 report of the Gregory Committee[60]. In Australia, legislation to introduce such protection, substantially copying the United Kingdom Act, was first enacted in 1968[61].

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59 *Copyright Act* 1956 (UK).

60 United Kingdom, *Report of the Copyright Committee*, (1952), Cmd 8662.

61 The Act, s 87 ("Nature of copyright in television broadcasts and sound broadcasts").

A difference over copyright infringement

82 The point over which this Court has divided concerns a question of statutory construction. That point was first exposed in a difference of opinion between the primary judge in the Federal Court of Australia (Conti J)[62] and the Full Court of that Court[63]. The latter reversed the primary judge's orders.

83 Upon the matter in issue, I agree in the conclusion reached by Callinan J. In my view, the approach adopted by the Full Court was correct. The reasoning of Hely J in the Full Court is compelling. Sundberg J agreed with it[64]. So, substantially, did Finkelstein J[65]. So do I.

84 The foundation for the difference between the competing judicial opinions is a conclusion, expressed by the Full Court, and repeated by Callinan J, that the contrary result involves distorting, if not ignoring, the language of the Act. That language must be given effect because it has the special legitimacy of the written law endorsed by the Parliament within a head of power granted by the Constitution[66]. The judicial function demands obedience to the provisions of valid enacted law[67].

85 Upon the clear language of s 87(a) of the Act, the appellant (which never denied copying the respondents' television broadcasts) infringed that provision. It was common ground that the videotapes made by the appellant, including the segments used in *The Panel* programme later broadcast by the appellant, were cinematograph films, as defined[68]. Similarly, upon the clear language of s 87(c) of the Act, the appellant infringed copyright under that provision. It would require an artificially narrow construction of the phrase "a television broadcast" in par (c) of s 87 of the Act to hold that the appellant's undoubted broadcast of excerpts, extracted from the copies it had made of the respondents' broadcasts, did not

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62 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235.

63 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

64 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 419 [1].

65 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 422 [15].

66 Constitution, s 51(xviii).

67 See *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

68 cf *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8; *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* (2000) 105 FCR 153 at 167-168 [63]-[67].

constitute a "re-broadcast[ing]" of "a television broadcast". Given the terms of the Act, and the purpose of the Parliament in introducing copyright protection in the case of "a television broadcast", it would be surprising indeed if the only infringement for which the Act provided was constituted by a rebroadcast of an entire television "programme" or of some particular segment of such a programme to an extent yet to be specified with acceptable precision. The language of the Act, set out and explained in the reasons of Callinan J, indicates why this interpretation is wrong. It should not be accepted.

Purposive construction within textual limits

86 In some respects, this appeal presents, in a different context, a problem about the meaning of the Act similar to that which this Court faced in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations*[69]. There, the issue was whether the incorporation of sounds, from a sound recording, in the sound-track of a cinematograph film, resulted in a broadcast of the sound recording when the film was subsequently broadcast. There too this Court divided. The majority[70] held that there was a broadcast of the sound recordings when the cinematograph film, including the sound recordings incorporated in the sound-track, was broadcast. McHugh J and I dissented upon the view that we took of the provisions of s 23(1) of the Act expressly deeming "sounds embodied in a sound-track associated with visual images … not to be a sound recording"[71]. On the point in issue in that appeal, the decision of the majority states the law. However, the same problem of interpretation, and many of the same considerations, arise for the interpretation of the provisions of the Act in issue in this appeal.

87 I accept wholeheartedly that the contemporary approach of this Court to the interpretation of contested statutory language is the purposive approach[72]. However, adopting that approach does not justify judicial neglect of the language of the statute, whether in preference for historical or other materials, perceived

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69 (1998) 195 CLR 158.

70 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 172 [34] per Gaudron, Gummow and Hayne JJ.

71 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 174-175 [42], reasons of McHugh J and myself; cf *Kelly v The Queen* [2004] HCA 12, reasons of McHugh J and myself.

72 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424. See eg *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 130 [143]; 202 ALR 233 at 267.

legal policy or any other reason[73]. A purposive construction is supported by s 15AA of the *Acts Interpretation Act* 1901 (Cth). But that section also does not permit a court to ignore the words of the Act. Ultimately, in every case, statutory construction is a text-based activity[74]. It cannot be otherwise.

88 In the present case, in the terms of the Act, I find it impossible to construe "a television broadcast" as mentioned in ss 25 and 87 of the Act to exclude those "visual images broadcast by way of television, together with any sounds broadcast for reception along with those images"[75] of the kind described in the evidence, being the segments from the respondents' earlier television broadcasts recorded by the appellant and rebroadcast as part of its own programme, *The Panel*. Similarly, I find it impossible to read the plain language of s 101(1) and (4) of the Act somehow to confine the meaning of "a television broadcast", so that it does not include segments of the type recorded and then rebroadcast by the appellant.

89 If one is truly looking for the "purpose" of the Act, that purpose must be found not in some *a priori* view about the merits, or desirability, of the copyright in their television broadcasts which the respondents assert. Ultimately, that purpose must be found in the command of the Parliament, expressed in the Act. Moreover, because, following detailed official inquiries[76] and the development of an international Convention[77], the Act afforded new and larger copyright entitlements in Australia, it would be contrary to basic principle and the ordinary canons of statutory construction to restrict those entitlements in a way that conflicted with the language of the Act or that unduly narrowed its operation. Normally, an amendment of an Act to provide new rights of such a kind will be given a beneficial construction so as to ensure that the purpose of the legislature is

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73 See eg *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

74 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

75 The Act, s 10(1).

76 United Kingdom, *Report of the Copyright Committee*, (1952), Cmd 8662.

77 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961, 1992 *Australia Treaty Series* 29, entered into force for Australia on 30 September 1992. See *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 178-179 [48]-[50].

truly attained[78]. I accept that in the context of the law of copyright, indeed intellectual property law generally, other considerations compete with the protection of private rights[79]. But in the end, it is the statutory text, not generalities or judicial policy judgments, that governs the task in hand and is determinative[80].

Criticisms of the ambit of copyright protection

90 I reach my conclusion without quite the same enthusiasm as Callinan J appears to feel for it. The opinion of the Full Court has been described as "highly literal"[81]. Perhaps it is; but the language of the Act leaves no scope for another approach. The most telling criticism voiced of the Full Court's interpretation is that it makes television broadcast copyright "an extraordinarily strong right, easily the strongest of all copyrights in Australia, able to be infringed by taking less than a substantial part of the broadcast"[82]. This, it is said, is counterintuitive given the ephemeral nature of television broadcasts and the original reasons for granting copyright in them.

91 If I were free of the constraints of the language of the Act, I would be happy to agree in the conclusion reached in this Court by McHugh ACJ, Gummow and Hayne JJ, whilst feeling anxiety about the lack of precision as to what, in any of an infinite range of circumstances, will constitute "a television broadcast" on that view[83]. I also have some sympathy for the opinion expressed by Ms de Zwart in a comment upon the Full Court's opinion in these proceedings[84]:

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78 cf *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 69 FCR 268 at 273-274. The need also to adapt the Act to changing technology was emphasised in that decision.

79 cf *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 530-532 [130]-[134].

80 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 172 [34].

81 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 394.

82 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 395.

83 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 394-395.

84 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 16-17.

> "There are … many circumstances in which the public interest lies in permitting the use of a work without the permission of the owner of copyright, with or without payment. *The Panel* decision provides a good example of circumstances in which a licence would not be granted (between competitors). …
>
> It is vital to recognise the public interest element of copyright … Copyright is not solely concerned with economic returns for the owner. Neither was copyright intended to enable owners to exploit all possible uses and derivations of the work. The public domain is an important legacy of copyright law and its existence should also be protected in the face of the growth of digital capture and licensing of works.
>
> … *The Panel* serves as a vehicle for social comment and criticism, albeit in a relaxed, humorous fashion. … Copyright is a social as well as a commercial construct and its role in facilitating new creations as well as protecting existing creations should not be forgotten."

92 A further comment of this author appears consonant with the evidence and with my own impression, based on that evidence[85]:

> "*The Panel* is an irreverent program that seeks to critique the foibles of the television medium. It provides an important forum to review the broadcast programs of the preceding week. It may not itself be free of the constraints of commercialism, but if the right of fair dealing is not available to permit it to demonstrate the points it is making the message is weakened."

Textual difficulties with the propounded limitation

93 It is in this final observation by Ms de Zwart that the clue is provided as to the correct application of the Act in respect of television broadcasts, in the terms in which the Parliament gave expression to its purpose. The Act contemplated a form of copyright apt to the particular technology involved in television broadcasting. It therefore provided that copyright would attach to "the visual images comprised in the broadcast"[86]. Those who conceive the Parliament as confining the scope of the new copyright protection for television broadcasts to entire programmes (or defined and undefined sections and segments of a continuous day's broadcasting) must not watch much television. It is the very power of particular, and often quite limited (even fragmentary) portions of "visual images" on television that makes it such a potent and commercially valuable means of expressing thoughts and ideas: noble and banal, serious and humorous, uplifting and discouraging.

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85 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 17.

86 The Act, s 25(4)(a).

94 Everyone knows that still images or very brief segments in television broadcasts can constitute commercially valuable commodities, standing alone. The acquisition by a broadcaster of comparatively short filmed sequences will sometimes represent very important and commercially valuable rights that exist without the need of a surrounding context, let alone an extended programme or particular segment of a day's broadcast. The parties to the present appeal were in commercial competition with each other. That fact is itself also a consideration that generally favours the claim of a copyright owner[87].

95 The appellant relied on s 25(4)(a) of the Act in construing s 87(a). It said that the interpretation of that paragraph that it favoured conformed to the purpose of the Parliament as illustrated by the Spicer Report[88]. In my view, the Full Court was right to reject the notion that the "visual images" protected by s 25(4)(a) were only so protected if they constituted a "substantial" part of "a television broadcast". Where does this gloss on the Act come from? Such an approach is inconsistent with the terms of the Act. The Act refers to "any of the visual images"[89], making it clear that any one or more of those images is in the sights of the statute. There is thus no textual foundation for the importation of the notion of "a substantial part". Moreover, as Hely J pointed out in the Full Court[90], the very fact that, by s 25(4), the Act provides for copyright protection for a photograph of any visual images comprised in a television broadcast, contradicts any threshold requirement of substantiality, inherent in nothing more than the word "broadcast". The suggested limitation upon the notion of infringement provided by the Act is therefore unsustained by a conventional analysis of the statutory language.

96 Both Professor Ricketson and Mr Lahore in their texts[91] express the opinion that the taking of a single photograph of any image contained in a television

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87 Bently, "Sampling and Copyright: is the Law on the Right Track? – II", (1989) *Journal of Business Law* 405 at 406.

88 Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, (1959), par 295. The history is explained in *EMI Music Australia Pty Ltd v Federation of Australian Commercial Television Stations* (1997) 74 FCR 485 at 491-494 per Lockhart J.

89 The Act, s 25(4)(a).

90 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 432 [60].

91 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2002) at [8.100], [9.520]; Lahore and Rothnie, *Copyright and Designs*, (2003) at [34,075].

broadcast will fall within the protection provided by the Act to the copyright owner of the broadcast. Their opinions confirm my own approach.

97 I agree with the view expressed by Hely J[92]:

> "[T]here may be many collocations of visual images and accompanying sounds broadcast during the space of a day all of which satisfy the definition of a 'television broadcast'. Thus, for example, the first minute of transmission may be a television broadcast as much as the first five minutes. If there is a re-broadcasting of the first minute by one competitor and of the first five minutes by another, then each has infringed the initial broadcaster's copyright in a television broadcast which is of one minute's duration in the first case, and of five minutes duration in the second.
>
> The fact that there may be thousands of transmissions in any day which are a television broadcast as defined does not lead to any inconvenience or absurdity given that copyright protection is confined to the actual images and accompanying sounds broadcast."

The proper approach to the meaning of the Act

98 It follows that the Parliament did not envisage the striking of a balance between public and private interests in the Act by the adoption of an unspecified and ultimately undefinable notion of "a television broadcast" in the sense of a "unit of programming". The Act does not refer to that notion of a "programme" or unit thereof[93]. It might have done so. But it did not. Instead, the Act provides for copyright to attach to "a television broadcast" that necessarily contains, of its nature, parts of such a programme, including therefore long as well as very short extracts. To strike an acceptable balance between public and private interests, the Parliament looked elsewhere. By s 14(1) it provided, in effect, for a permissible degree of exploitation by introducing the notion that the proscribed act must be in relation to "a substantial part" of the work or subject matter. And if that barrier is passed the defence of fair dealing may be invoked, precisely as the appellant claimed in this case.

99 I would endorse what Finkelstein J said on this point[94]:

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92 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 436 [87]-[88].

93 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 400 citing *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1 at 27.

94 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 420 [7].

"There are exceptions to the monopoly rights given to copyright owners. Fair dealing is one of those exceptions. The *Copyright Act* confers a privilege on third parties to use copyright material without the consent of the owner in certain circumstances. The doctrine developed to resolve the tension between, on the one hand, the monopoly granted to the owner and, on the other hand, the public interest."

100 The text of "substantial part" under the Act imports criteria of "fact and degree"[95]. Commonly, it is bound up with notions of originality. It has been applied restrictively as little more than a *de minimis* threshold. What is a "substantial part" of a television broadcast will not necessarily represent a segment of long duration. The image of a winning ball or a goal in a sporting final; the sight of a catastrophe captured on film by a television crew that arrived there first; the image of events of global significance akin to the collapse of the World Trade Center in New York in 2001 or the crash of the *Concorde* airliner, all illustrate the impossibility of thinking in such purely quantitative terms in the context of this medium.

101 The proposition that the excerpts broadcast by the appellant were of comparatively brief duration and that this indicates somehow that the parts copied by the appellant were "not substantial"[96] overlooks the terms of the Act and the basic nature of television broadcasting in which minutes or seconds, visually captured, especially with sound and images, may tell a thousand stories which the print media or other forms of human communication cannot precisely match.

102 Copyright will not usually subsist in works that are "insubstantial" in quantitative terms[97]. A transmission lasting for a fraction of a second might indeed, in some circumstances, be too insubstantial to be regarded as "a television broadcast" within the Act[98]. In this appeal it is unnecessary to decide what would be the case in such an extreme instance. None of the subject segments broadcast in *The Panel* was of such an insubstantial duration. Accordingly, any such qualification to the notion of "a television broadcast" in the Act can be ignored in this appeal. It is irrelevant to this Court's present task.

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95 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 283, 287-288; [1964] 1 All ER 465 at 473-474, 477.

96 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 407.

97 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2002) at [7.215]. See also the reasons of Callinan J at [151].

98 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 437 [90].

103 It is mainly by the operation of the fair dealing defence, and not by the artificial, uncertain and untextual proposition propounded by the appellant, that the battleground of the present dispute was to be fought in the manner contemplated by the Act.

104 Having regard to the grounds of appeal before it, this Court is not concerned to review the decisions which the Full Court made on the fair dealing defence. To the extent that it is suggested that the fair dealing defence under the Act is unduly narrow[99], that submission should be addressed to the Parliament. It would be an impermissible mode of reasoning for this Court to narrow the ambit of the infringement provided by the Act so as to enlarge the scope of free and unlicensed use of "a television broadcast", contrary to the terms of the Act. In any case, if the broad view of fair dealing adopted by Finkelstein J is correct, much of the sting is taken out of the criticisms of the Act voiced by the appellant in support of its submissions about the ambit of infringement. The correction of any remaining defects is a matter for the Parliament. It is not for this Court.

Conclusion and order

105 I have repeatedly obeyed the rule of the purposive construction of legislation. However, its application is always subject to textual limits. Sometimes the propounded construction would exceed those limits. This is such a case. The appellant's construction must be rejected. The respondents' construction should be preferred.

106 The appeal should be dismissed with costs.

CALLINAN J:

107 The question in this appeal is whether the recording and broadcasting, not by way of fair dealing, by one telecaster of excerpts from the broadcasts of a commercial competing telecaster were infringements by the former of the latter's copyright. As to that the Full Court of the Federal Court was unanimously of the view that they were. In my opinion that view is the correct one.

The facts

108 The interests of the respondents are relevantly the same and they may therefore be treated as one party. The appellant and the first respondent are major commercial telecasters in competition with each other. Each holds a licence under the *Broadcasting Services Act* 1992 (Cth).

109 Between August 1999 and June 2000, the first respondent broadcast a variety of television programmes which were recorded on video tape by the

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99 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 17.

appellant. Excerpts from them ("the appropriations") were rebroadcast by the appellant during a programme called *The Panel*. That the appropriations were of real value to the appellant appears, among other things, from their frequency, and in some instances their length, a table of which I reproduce.

Respondents' programme	**Date of broadcast by the first respondent**	**Date of rebroadcast of excerpts by the appellant**
The Today Show	10 August 1999	11 August 1999
Midday	26 August 1999	9 September 1999
Wide World of Sports	26 September 1999	29 September 1999
A Current Affair	19 October 1999	20 October 1999
Australia's Most Wanted	11 October 1999	13 October 1999
Pick Your Face	20 August 1999	1 September 1999
Crocodile Hunter	21 August 1999	25 August 1999
Days of Our Lives	19 August 1999	26 August 1999
Days of Our Lives	20 August 1999	26 August 1999
Simply the Best	19 October 1999	20 October 1999
The Inaugural Allan Border Medal Dinner	31 January 2000	8 March 2000
Sunday	19 March 2000	29 March 2000
The 72nd Academy Awards	27 March 2000	29 March 2000
Sale of the New Century	4 April 2000	5 April 2000
The Today Show	4 April 2000	5 April 2000
The Today Show	5 May 2000	10 May 2000
Nightline	15 May 2000	24 May 2000
Newsbreak	22 May 2000	24 May 2000
Who Wants to be a Millionaire	29 May 2000	7 June 2000
The Today Show	28 June 2000	28 June 2000

110 The appellant promoted *The Panel*, which was produced by a production group calling itself "Working Dog", by advertising it as:

> "'our light entertainment stable', 'chuckle and jibe over the week's events', 'the best homegrown laugh all week', 'produces the best one-liners', 'though once deemed pretentious by some reviewers, it is impossible to imagine anyone else being able to make a round table chat equally successful', and 'musing irreverently over the topical issues of the week'."

111 *The Panel* was first broadcast in early 1998. During each of that and the next year, 42 weekly episodes were produced and broadcast. By November 2000, the month of the trial, a further 36 weekly episodes had been produced. From mid-1998, the appellant claimed that *The Panel* had been the highest rated programme for viewers aged 16 to 39. Its programmes were said to be concerned with current affairs, news, comedy and "chat". The format was of a panel of four people,

engaging in what was presented to viewers as unrehearsed conversation in the presence of a studio audience. One or two guests of prominence in, for instance, sport or entertainment, were usually invited to participate in the conversation each evening. Designers and regular panelists met weekly to select recent events and "breaking stories", and to identify prospective guests. The participants also then discussed the use of recent television footage of utility for the next programme. Television footage and material from other media selected for use on *The Panel* included footage of recent television programmes broadcast by each of the major television channels and satellite channels and not merely the respondents' Channel 9.

112 Some other factual matters need mention. Although a broadcast by telecasting usually involves the transmission of a multiplicity of changing images and sounds, a broadcast may be of a still picture or moving images, with or without accompanying sounds. So too a part only, a moment or less of a television broadcast may be isolated, recorded, and reproduced either wholly or in part, whether by cropping or otherwise. "Cropping" was explained, non-controversially during the appeal as, for example, eliminating part of an image or picture and then perhaps magnifying the remainder to give a greater dramatic impact than the whole or the excluded parts might have given.

The proceedings in the Federal Court

113 The respondents brought proceedings in the Federal Court for an injunction against the appellant and damages for infringement of copyright. The appellant denied that it required any licence from the respondents to broadcast the excerpts that it did, and contended that they did not constitute a substantial part of matter in which the respondents held copyright. Further or alternatively, the appellant asserted, its conduct in relation to 10 episodes of *The Panel* was by way of fair dealing for the purpose of criticism or review, and that a sufficient acknowledgment of any relevant broadcast was made; and, in the further alternative, as to those 10 episodes, the excerpts were broadcast for the purpose of, or associated with, the reporting of news by means of broadcasting. At the trial the appellant introduced evidence that *The Panel* was, if not wholly, certainly to some extent at least, a humorous programme. Whatever relevance if any that might have to a defence of fair dealing, it has nothing to say about the entitlement to copyright of the creator of humorous matter.

114 Issues were singled out by Conti J for separate argument. One of these was whether the appellant had rebroadcast the whole or a substantial part of any of the respondents' programmes. In the event, his Honour held that there was no infringement of copyright under s 87(a) of the *Copyright Act* 1968 (Cth) ("the Act") because the appellant had not made a cinematograph film of the whole or a substantial part of any of the broadcasts. His Honour also dealt with the defences of fair dealing, rejecting some and upholding others. Fair dealing is not an issue in this Court which is concerned only with the excerpts not so designated.

The appeal to the Full Court of the Federal Court

115 The Full Court of the Federal Court (Sundberg, Finkelstein and Hely JJ), to which the respondents appealed, unanimously took a different view from the primary judge. The effect of s 25(4) of the Act, the Full Court held, is that a cinematograph film *or photograph of any* of the visual images comprised in a television broadcast, is an exclusive right of the copyright owner, subject to specific statutory exceptions. It is not necessary that an image or images amount to a substantial part of the broadcast. One of the judges, Finkelstein J, said that there is copyright either in each and every still image transmitted, or in each visual image capable of being observed as a separate image on television. The excerpts rebroadcast by the appellant were cinematograph films of the visual images comprised in various of the respondents' broadcasts in terms of s 25(4) of the Act. The appellant therefore infringed the respondents' copyright under s 87(a) subject of course to any defences of fair dealing available to the appellant.

116 In the context of Pt IV Div 2 of the Act, Hely J who wrote the principal judgment, said, and in my view, correctly, "rebroadcast" simply meant the broadcasting of what had already been broadcast by another broadcaster on television[100]:

> "Section 25(4) applies to both a photograph of any of the visual images comprised in a television broadcast, as well as to a cinematograph film of any of those images. It is true that the present case is not concerned with photographs. But the fact that s 25(4) applies to a photograph of any of the visual images comprised in the broadcast supports the view that the expression 'any of the visual images' encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast.
>
> ...
>
> When is a television broadcast made? A television broadcast is made when the transmission of visual images and any accompanying sounds begins. A television broadcast continues to be made as the transmission of visual images and any accompanying sounds continues. Visual images and accompanying sounds as they are broadcast, themselves satisfy the definition of 'television broadcast' ... One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made."

The appeal to this Court

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100 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 433-435 [67], [80].

117 Copyright in sound recordings, cinematograph films and television broadcasts is dealt with in Pt IV Div 2 of the Act, the presently relevant provisions of which have existed in the Act in substantially the same form since 1968.

118 The sections of the Act with which the Court is concerned that were in force at the relevant time[101] should first be noted, including some of the definitions in s 10(1):

> "***broadcast*** means transmit by wireless telegraphy to the public.
>
> ...
>
> ***cinematograph 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 so shown;
>
> and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.
>
> ...
>
> ***photograph*** means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and ***photographic*** has a corresponding meaning.
>
> ...
>
> ***sound broadcast*** means sounds broadcast otherwise than as part of a television broadcast.
>
> ...
>
> ***television broadcast*** means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images."

119 Section 13 provides as follows:

> "**13 Acts comprised in copyright**

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101 The Act has subsequently been amended, most significantly by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth), which commenced on 4 March 2001.

(1) A reference in this Act to an act comprised in the copyright in a work or other subject-matter shall be read as a reference to any act that, under this Act, the owner of the copyright has the exclusive right to do.

(2) For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work, adaptation or other subject-matter."

120 Section 14 is in the following form:

"**14 Acts done in relation to substantial part of work or other subject-matter deemed to be done in relation to the whole**

(1) In this Act, unless the contrary intention appears:

(a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and

(b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.

(2) This section does not affect the interpretation of any reference in sections 32, 177, 180, 187 and 198 to the publication, or absence of publication, of a work."

121 Section 25 should also be set out in full:

"**25 Provisions relating to broadcasting**

(1) A reference in this Act to broadcasting shall, unless the contrary intention appears, be read as a reference to broadcasting whether by way of sound broadcasting or of television.

(2) A reference in this Act to the doing of an act by the reception of a television broadcast or sound broadcast shall be read as a reference to the doing of that act by means of receiving a broadcast:

(a) from the transmission by which the broadcast is made; or

(b) from a transmission made otherwise than by way of broadcasting, but simultaneously with the transmission referred to in the last preceding paragraph;

whether the reception of the broadcast is directly from the transmission concerned or from a re-transmission made by any person from any place.

(3) Where a record embodying a sound recording or a copy of a cinematograph film is used for the purpose of making a broadcast (in this subsection referred to as ***the primary broadcast***), a person who makes a broadcast (in this subsection referred to as ***the secondary broadcast***) by receiving and simultaneously making a further transmission of:

(a) the transmission by which the primary broadcast was made; or

(b) a transmission made otherwise than by way of broadcasting but simultaneously with the transmission referred to in the last preceding paragraph;

shall, for the purposes of this Act, be deemed not to have used the record or copy for the purpose of making the secondary broadcast.

(4) In this Act:

(a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast; and

(b) a reference to a copy of a cinematograph film of a television broadcast shall be read as including a reference to a copy of a cinematograph film, or a reproduction of a photograph, of any of those images.

(5) In this section, ***re-transmission*** means any re-transmission, whether over paths provided by a material substance or not, and includes a re-transmission made by making use of any article or thing in which the visual images or sounds constituting the broadcast, or both, as the case may be, have been embodied."

122 Section 86 is concerned with the nature of copyright in cinematograph films:

"**86 Nature of copyright in cinematograph films**

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:

(a) to make a copy of the film;

(b) to cause the film, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;

(c) to broadcast the film;

(d) to cause the film to be transmitted to subscribers to a diffusion service."

123 Section 87 provides as follows:

"**87 Nature of copyright in television broadcasts and sound broadcasts**

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

(a) in the case of a television broadcast in so far as it consists of visual images – to make a cinematograph film of the broadcast, or a copy of such a film;

(b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds – to make a sound recording of the broadcast, or a copy of such a sound recording; and

(c) in the case of a television broadcast or of a sound broadcast – to re-broadcast it."

124 Section 91 should next be noticed:

"**91 Television broadcasts and sound broadcasts in which copyright subsists**

Subject to this Act, copyright subsists:

(a) in a television broadcast made from a place in Australia by:

(i) the Australian Broadcasting Corporation;

(ii) the Special Broadcasting Service Corporation; or

(iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a licence issued under the *Radiocommunications Act 1992*; and

(b) in a television broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:

(i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or

(ii) a class licence determined by that Authority under that Act; and

(c) in a sound broadcast made from a place in Australia by:

(i) the Australian Broadcasting Corporation;

(ii) the Special Broadcasting Service Corporation; or

(iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a licence issued under the *Radiocommunications Act 1992*; and

(d) in a sound broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:

(i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or

(ii) a class licence determined by that Authority under that Act."

125 Section 95 prescribes the duration of copyright in television and sound broadcasts and s 99 provides as follows:

"**99 Ownership of copyright in television broadcasts and sound broadcasts**

Subject to Parts VII and X:

(a) the Australian Broadcasting Corporation is the owner of any copyright subsisting in a television broadcast or sound broadcast made by it; and

(aa) the Special Broadcasting Service Corporation is the owner of any copyright subsisting in a television broadcast or sound broadcast made by it; and

(b) a person who is or has been a holder of a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992* or a prescribed person for the purposes of subparagraph 91(a)(iii) or 91(c)(iii) is the owner of any copyright subsisting in a television broadcast or sound broadcast, as the case may be, made by that person; and

(c) a person who makes a television broadcast or sound broadcast under the authority of a class licence determined by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992* is the owner of any copyright subsisting in the broadcast."

126 Section 101 defines infringement in this way:

"**101 Infringement by doing acts comprised in copyright**

(1) Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

(2) The next two succeeding sections do not affect the generality of the last preceding subsection.

(3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.

(4) Subsection (1) applies in relation to an act done in relation to a television broadcast or a sound broadcast whether the act is done by the reception of the broadcast or by making use of any article or thing in which the visual images and sounds comprised in the broadcast have been embodied."

127 One other provision should be noted. It is s 135B:

"**135B Copies of transmissions**

In this part:

(a) a reference to a copy of a transmission is a reference to a record embodying a sound recording of the transmission or a copy of a cinematograph film of the transmission; and

(b) a reference to the making of a copy of a transmission is a reference to the making of a copy of the whole or a part of the transmission."

128 In construing the Act, the text, if not of all importance, is certainly of primary importance. I would, in this connexion, repeat what was said in *Rural Press Ltd v Australian Competition and Consumer Commission*[102]:

> "In the past, judges have sought to elucidate the meaning of this concept by examining the legislative history. That process of construction is legitimate, provided it is not taken too far. ... It [resort to parliamentary statements] has also driven courts to the unproductive and inappropriate task of seeking to construe the parliamentary materials and speeches rather than the statute."

129 Although a court is entitled to have regard to the legal and historical context of legislation, and in particular the mischief that it is enacted to cure, care must always be exercised in using all extrinsic material, including in particular assumed historical facts, to ensure that those facts are accurately and relevantly completely stated. Facts of the latter kind are that broadcasting of both radio and television in the United Kingdom was, from the beginning (in 1922) and for a long time afterwards undertaken exclusively by one broadcaster, latterly called the British Broadcasting Corporation ("the BBC")[103]. Although that broadcaster was financed at the outset by a consortium of manufacturers of domestic wireless receiving sets, it was conducted on entirely non-commercial lines. Advertising was not permitted. Emphasis was placed upon the objective dissemination of news, culture, education and entertainment[104]. By 1927 control of the broadcaster was in the hands of its governors, who although appointed by the Executive, were expected to be independent of it[105]. There was, in consequence, until 1955[106] no commercial competition in broadcasting of any kind except for unlawful broadcasting by "pirate" broadcasters operating from vessels moored or steaming beyond the territorial waters of the United Kingdom[107]. In short, for many years, infringement by commercial competitors of the BBC's broadcast matter was non-existent, and not something for which any special or express provision was necessary.

130 Although provision was made for public television by the *Television Act* 1953 (Cth) and by amendments to the *Broadcasting Act* 1942 (Cth) in 1956[108],

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102 (2003) 203 ALR 217 at 221 [7] per Gleeson CJ and Callinan J.

103 See Briggs, *The Birth of Broadcasting*, (1961).

104 Briggs, *The Birth of Broadcasting*, (1961) at 357-359.

105 Briggs, *The Birth of Broadcasting*, (1961) at 357-359.

106 Briggs, *The BBC: The First Fifty Years*, (1985) at 288.

107 Briggs, *The BBC: The First Fifty Years*, (1985) at 329.

108 *Broadcasting and Television Act* 1956 (Cth).

from the outset of actual telecasting in Australia in that year, there was, unlike in the United Kingdom, commercial competition.

131 The *Broadcasting Act* is of relevance to this discussion, but in these respects only. It, rather than the Act or its precursor[109], was the enactment which, by s 121, prohibited the broadcasting of matter emanating from other stations, and it was programmes of the latter that it thereby protected. "Program" was defined in that Act as including an "advertisement and any other matter"[110]. Similarly, "program" is defined in s 6 of the *Broadcasting Services Act* as:

> "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
>
> (b) advertising or sponsorship matter, whether or not of a commercial kind."

132 The word "programme" nowhere appears in the Act, and this is so despite that the reports to which other members of the Court have referred did use the term[111]. A concept of a programme, as to the nature, content and duration of which there is much room for debate, has in my opinion, no part to play in the resolution of the issues here.

133 In enacting the Act, the Parliament must have been conscious of the different histories of broadcasting in Australia and the United Kingdom, as well as the earlier different provisions of the *Broadcasting Act*. The Act, especially those sections of it with which this appeal is concerned, was avowedly designed to deal with *new* rights, as the Attorney-General in his second reading speech expressly acknowledged[112]:

> "[T]he Bill confers a number of new rights, particularly in respect of broadcasts, cinematograph films and printed editions of books."

134 The statements made by the Attorney-General also acknowledged that the 1968 Bill represented a significant change from the position that had been adopted on these matters in 1967[113]. The Attorney-General was well aware of the different

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109 *Copyright Act* 1912 (Cth).

110 *Broadcasting Act*, s 4.

111 See reasons of McHugh ACJ, Gummow and Hayne JJ at [23]-[24].

112 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1528.

113 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1527-1528.

and ephemeral nature of a television broadcast as a medium of communication unless and until it was recorded, and its value once it was, to other broadcasters. In the same speech he said[114]:

> "Both the Australian Broadcasting Commission and the commercial broadcasting and television organisations had asked for a more extensive right of making what are known as 'ephemeral' records than is given by clause 47 of the Bill. In my opinion, however, the Berne Convention permits only the making of ephemeral records by a broadcaster for the purpose of his own transmissions without any obligation to the copyright owner. But since the Convention also permits the recording of musical works under compulsory licence, on payment of compensation to the copyright owner, it has been thought reasonable to include in the Bill what is in effect a statutory licence for the making of *ephemeral* records by a broadcasting organisation for use by other broadcasting organisations." (emphasis added)

135 And later he said[115]:

> "I turn now to those provisions of the Bill which provide for copyright to subsist in broadcasts, cinematograph films, sound recordings and published editions. These provisions are to be found in clauses 84 to 113 of the Bill. These clauses involve *substantial changes* in the existing law and, in respect of the rights given in sound recordings, substantial differences from the provisions of the 1967 Bill. Broadcasts are not protected at all under the existing copyright law. Some protection against the use of broadcast material is given by the Broadcasting and Television Act. Sub-clause (2) of clause 9 of this Bill specifically preserves the operation of the relevant provisions of that Act. Under the Bill the owner of the copyright in a radio or television broadcast is given the right to control rebroadcasting of that broadcast. In the case of a television broadcast he is given the exclusive right to make a cinematograph film of the broadcast or a copy of such a film. In the case of a sound broadcast, or the sounds accompanying a television broadcast, the rights include the exclusive right to make a record of that broadcast or reproductions of that record. These provisions are contained in clause 87 of the Bill.
>
> A cinematograph film is protected under the existing law in two ways. Inasmuch as an ordinary cinematograph film consists of a series of individual photographs, each frame is protected as an artistic work. But if the arrangement or acting form or the combination of incidents represented

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114 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1532.

115 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1533-1534.

in a cinematograph film give the work an original character, the film is protected as a dramatic work. The present Bill establishes a *separate protection* for cinematograph films. The rights given to the owner of the copyright in a cinematograph film are set out in clause 86 of the Bill. The copyright in a cinematograph film continues until the expiration of 50 years from the end of the calendar year in which the film was first published. For many purposes, ordinary cinematograph film and videotape are interchangeable. Thus a scene may be recorded by a television camera on videotape and the videotape later copied on to an ordinary cinematograph film. The incidents recorded may be seen either by viewing the videotape on a television screen or by viewing the cinematograph film on a cinema screen. The Bill therefore assimilates videotape to ordinary cinematograph film for the purposes of copyright protection and the term 'cinematograph film' appearing in the Bill is defined as including videotape." (emphasis added)

136 What is also of significance is that the Rome Convention[116], to which the Attorney-General referred, by Art 13 sought to protect not "programmes", however they might be defined, but broadcasts and to prohibit fixation or the rebroadcasting of fixations of them.

137 There are other matters which suggest that recourse to the United Kingdom experience and learning is unlikely to assist in the resolution of the problem here. The statutory provisions there are quite different, in particular that no separate and special provision is made for copyright in television broadcasts. Section 6(1) of the *Copyright, Designs and Patents Act* 1988 (UK) ("the United Kingdom Act") defines "broadcast" only slightly differently from the Australian Act, to mean a transmission by wireless telegraphy of visual images, sounds or other information which:

"(a) is capable of being lawfully received by members of the public, or

(b) is transmitted for presentation to members of the public".

138 But of significance is the fact that there is in the United Kingdom no analogue to s 87 of the Australian Act. Rather, s 16 of the United Kingdom Act is a general provision (applying indiscriminately to all forms of copyright works) that refers to "[t]he acts restricted by copyright in a work". Section 16(1)(a) provides that "to copy the work" is such an act. Infringement of copyright in a work occurs pursuant to s 16(2) of the United Kingdom Act when a person, without licence, does any of the acts protected by the copyright. Copying relevantly for the purposes of the United Kingdom Act is governed by s 17(4) of it:

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116 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome 1961.

"Copying in relation to a film, television broadcast or cable programme includes making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme."

139 The United Kingdom Act therefore is quite differently structured and worded from the Australian Act.

140 For this reason and the others to which I have referred, statements in English texts are not capable of automatic application in this country. In Laddie's *The Modern Law of Copyright and Designs*, it is suggested that in relation to s 17(4), "the taking of even a single frame of a film (or the equivalent amount of a TV broadcast) may be an infringement."[117] Other English text writers take a different view. For example, Garnett, James and Davies write[118]:

"No further definition of 'copying' in relation to a broadcast is given in the 1988 Act other than that it includes making a photograph of the whole or any substantial part of any image forming part of the broadcast … *In the usual way it will also be an infringement to copy the whole or any substantial part of the broadcast*, whether directly or indirectly or transiently or incidentally to some other use." (emphasis added)

141 Similarly, Cornish and Llewelyn observe[119]:

"The 1988 Act is not so specific as its predecessor about what acts of 'copying' infringe sound recording, film, broadcasting and cable-casting copyright. Presumably, as before, this includes making recordings or films *that are substantial copies of those things*." (emphasis added)

142 The Act falls to be read therefore against the background of these indisputable facts. The parties compete with each other. The production of any programme, indeed each and every frame and segment of it, comes at a cost. It is produced in order to make money by inducing advertisers to pay to have their activities advertised in association with its broadcast one or more times. Further value may arise from the isolation, reproduction and broadcasting of an image or images, with or without sound, from it, and the licensing of it or an isolated image or images from it, whether by and in a photograph, a film or a video film. What is clear in this case is that value did lie in the copying, reproduction and

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117 Laddie et al, *The Modern Law of Copyright and Designs*, 3rd ed (2000), vol 1 at 429. The authors add later that "anything which is not *de minimis* will be regarded as 'substantial'."

118 Garnett, James and Davies, *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1 at 446 (footnotes omitted).

119 Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 5th ed (2003) at 434.

rebroadcasting of segments, albeit generally fairly brief segments, of the respondents' programmes. That value had two aspects: it enabled the appellant to gain revenue from advertising associated with *The Panel*; and it relieved the appellant of the cost of buying or producing other matter to occupy the time taken by the rebroadcasting, during *The Panel*, of the copied and reproduced segments. The intention of Pt IV Div 2 of the Act was, as the Attorney-General said, broadly not only to place television footage on at least the same basis as other original work, particularly moving films, protected by the Act, but as appears from the language used in it, with necessary adaptations to suit the medium and the means available to competitors to exploit it, and in consequence to create new rights. Why should, it is reasonable to ask, the appellant, save to the extent that it deals fairly with any of the respondents' valuable broadcasted matter, get it and rebroadcast it for its own commercial benefit, for nothing? The question in this case is whether the Act prevents it from doing that.

143 The use by the appellant of excerpts from the respondents' broadcasts was blatant. And although blatant appropriation of the kind which has occurred here might not be such as to warrant an evangelical fervour[120] in responding to it, in the nakedly commercial context of television broadcasting in Australia, the test of "what is worth copying is prima facie worth protecting" posed by Peterson J in *University of London Press Ltd v University Tutorial Press Ltd*[121] has much to commend it, and provides at least a reasonable starting point. After all, in recognising the validity of the respondents' copyright in excerpts from their programmes, the Court would not be denying access to the general public of the golden words of a new Shakespeare. This is a case of blatant commercial exploitation, neither more nor less.

144 It has always been the respondents' case that the appellant has infringed both ss 87(a) and 87(c) of the Act. The appellant has never denied that it copied by reproducing in full the respondents' programmes. It has therefore infringed, on any view, s 87(a) of the Act.

145 As to s 87(c) however, the appellant argues that because it did not rebroadcast other than an excerpt from, that is to say, less, indeed much less than, the whole of any of the programmes of the respondents, it did not rebroadcast "a television broadcast" of the respondents. In short the appellant submits that a television broadcast within s 87 of the Act cannot be less than the whole or a substantial part of a television programme, notwithstanding that the relevant sections do not anywhere use that term, and the Act attempts no definition of it. The appellant's proposition, it further argues, is correct because otherwise there is no, or little work for s 14 of the Act to do.

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120 See *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700 per Laddie J.

121 [1916] 2 Ch 601 at 610.

146 I am unable to agree. The definition of cinematograph film does not assist the appellant. The aggregate of a few seconds of visual images is, as occurred in this case, capable of being embodied in a video tape, or electronically otherwise, by the use of which it can be shown. In those few seconds, there were, and there always will be, except perhaps when a "still" is shown, certainly more than one, and almost certainly a multiplicity of images and sounds. The test cannot be simply whether the images and sounds captured and fixated last a millisecond or half an hour. In aggregate they still constitute a "broadcast".

147 Nor can the existence of a broadcast be denied because it is not possible to speak of a single moment of sound. Perceptions of visual images and sound are different. It is no more correct to say that a single television image is not a broadcast because its accompanying sounds are unintelligible, than it is to say that a silent film shown on television is not a broadcast because it has no accompanying sounds at all.

148 That the appellant thought a few seconds of the respondents' broadcast worth rebroadcasting provides some indication of the understanding in the industry of what is sufficient to constitute a broadcast. Hely J was right to hold that "any of the visual images", the expression used in s 25(4) of the Act, means a visual image, that is something that can be isolated and fixated. The Act was not enacted in a vacuum of awareness as to how the industry operated, or without regard to practicalities. Those practicalities include the certain knowledge that one television licensee would only seek to use what would be of real value to it: it would have no interest, commercial or otherwise, in anything less than something complete enough in itself to be viewed, in short, a broadcast. In that sense the term "broadcast" is almost self-defining.

149 To regard a broadcast differently, as for example, a "programme", is not only to introduce a concept not reduced to concrete language or even implied anywhere in the Act, but is also to create a deal of uncertainty about its operation. The view adopted at first instance by Conti J is, with respect, incapable of any certain application. On his Honour's view the programme can be the whole programme "or respective segments ... if [it] is susceptible to subdivision by reason of the existence of self-contained themes."[122] To say that is not to say of what a programme consists. Is it the "menu" of the channel or programme for the next twenty-four hours, or the forthcoming week, or for a month, or a year, or however long it schedules its broadcasts? What is a self-contained theme? There may be many threads and indeed themes to a television story, coming together only at the end to make a self-contained theme, but before that point providing valuable snippets of utility to competitors. In any event, none of these, "programme", "segments of a programme", or "self-contained theme" is the language of the Act.

150 The Act can be read harmoniously with the conclusion that the Full Court reached. I have already referred to the definition of a cinematograph film and need

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122 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235 at 272 [43].

only make the further point that its emphasis is upon use, in particular, capability of use, and not duration of the matter used. The further relevant concept which the legislators have chosen to define is the concept of "television broadcast" and not a television programme. The legislature having eschewed such a definition and therefore the relevance of a concept of it for the purposes of the Act, I would not regard it as appropriate to import either a definition of it from another Act, for example the *Broadcasting Services Act*, or an understanding, assuming a common one could be identified, of it by participants in the industry. In any event an importation from the former would not assist the appellant. Unlike in *Newspaper Licensing Agency Ltd v Marks & Spencer plc*[123] where it was demonstrated that a particular undefined term "published edition" had a clear and well-established meaning in the publishing trade, "broadcast" is defined by the Act, and programme, its suggested synonym, was not shown to have any accepted meaning in the television industry.

151 The presence of s 14 of the Act compels no different conclusion. Its opening words make it clear that it must be read subject to the appearance elsewhere in the Act of any contrary intention. The combination of ss 25, 86, 87, 91 and 101 manifest such an intention. Even if they did not, s 14 can stand alone to perform useful work. One type of such work is the ultimate prevention of rebroadcasting of reduced, blended, adapted, altered or otherwise cropped images or an aggregation of images previously broadcast by a television channel. I would accept that a question of substantiality may in some circumstances require consideration of the quality, importance, relevance and duration of part of a work in an appropriate case, but that it may, does not mean that the recording and rebroadcasting of a very brief segment of a broadcast is not an infringement of the broadcaster's copyright.

152 It is noteworthy that s 25(2) speaks of the reception of a television broadcast. Indeed the Act speaks of three different processes: broadcast, transmission and reception. Each is different. The copyright arises at the first point, of broadcast, and does not depend upon its reception.

153 Section 25(4) is also important. The words "of any of the visual images", whether by reference to other sections of the Act or otherwise, admit of no meaning other than either a singularity *or* multiplicity of images. To make a copy therefore of *any* image comprised in a broadcast is to make a copy of a cinematograph film within s 86(a) of the Act just as to broadcast the image is to broadcast a film of it within s 86(c) of the Act. So too, s 87 affords the protection of copyright to the image because the reference there to a cinematograph film must be read, pursuant to s 25(4) as a reference to any of the images comprised in the broadcast.

154 Section 91 makes no reference to a programme. It refers not to "television broadcasting" or to "television broadcasts". It relevantly throughout uses the words "a television broadcast" as does s 99. And finally, s 135B, not only uses the

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123 [2003] 1 AC 551 at 558 per Lord Hoffmann.

words "cinematograph film" but also, in par (b) refers to a copy of the whole or "*a part of the transmission*".

155 Nothing turns, in my opinion, upon any perceived differences between the quality or nature of the copyright afforded by the Act to television broadcasts and other copyright holders. It was and was intended to be a new and unique right. The medium is very different from others. To exploit it, different and perhaps more expansive infrastructures, fees, techniques and resources are required. The industry is, and has always been in this country, a highly competitive, and, as this case shows, a highly commercialised one. There may have been good reason for the legislature to single it out for special treatment. It is for the Court to give effect to the language of the Act and not to speculate about that.

156 I would dismiss the appeal with costs.