

FEDERAL COURT OF AUSTRALIA

SUNDBERG, FINKELSTEIN & HELY JJ

SUNDBERG J:

1 For the reasons given by Hely J and the additional reasons given by Finkelstein J, with which I agree, the respondent has breached copyright in each of the broadcasts in suit.

2 Except as to *Simply the Best* (the Ray Martin rebroadcast) I agree with Hely J's conclusions on the fair dealing defences. I deal specifically with the three broadcasts upon which Hely J and Finkelstein J differ. They are sufficiently described in their Honours' judgments, and I do not need to repeat that exercise. My approach has been to uphold the primary judge's decision on the availability of the defences in relation to a broadcast unless convinced it is wrong. Fair dealing involves questions of degree and impression, on which different minds can reasonably come to different conclusions.

The Today Show -Boris Yeltsin rebroadcast

3 The primary judge observed, correctly, that there can be considerable difficulty in distinguishing news from entertainment, and concluded, as a matter of judgment and impression, that the purpose of this rebroadcast was to entertain rather than report news. Having watched the broadcast several times, on each occasion thinking it could reasonably be concluded either that the s 103B(1)(b) defence was made out or that it was not, I cannot bring myself to say that the primary judge was wrong in deciding it was not.

Simply the Best - Ray Martin rebroadcast

4 On each of my viewings of this broadcast I had the clear impression that what was involved was criticism of the set and of the fact that it was not possible to determine the basis on which the audience was being asked to vote. I am satisfied that the primary judge's decision that the s 103A defence was not made out because of the paucity of evidence which left no "viable basis for comprehending, much less resolving, what was the true nature of the alleged criticism and what was the purported basis therefor" was wrong.

Midday - John Howard singing rebroadcast

5 On each occasion on which I viewed the broadcast my impression was that the Panel was not engaged in criticism or review of the *Midday* presenter (s 103A), and that showing the Prime Minister singing Happy Birthday to Sir Donald Bradman was not for the purpose of reporting news (s 103B(1)(b)) but for its entertainment value. That was the primary judge's view.

6 I would make the orders appearing in pars 133 to 135 of Hely J's judgment, save that I would uphold the respondent's Notice of Contention as to *Simply the Best* and exclude it from the list of infringing broadcasts.

FINKELSTEIN J:

7 It is usually apparent whether a particular work may be the subject of copyright. The precise identification of that work will also cause no difficulty in most cases. Speaking generally, copyright subsists in a work of a particular kind, generally a literary, dramatic, musical or artistic work. But a work cannot be copyright unless it is fixed in some material form: *Tate v Fullbrook* [1908] 1 KB 821, 832-833. So the work can be seen and its character and scope identified. There are, however, some exceptions, and this case deals with one of those exceptions. This appeal is concerned with copyright in a television broadcast. The issue is whether Channel Ten has infringed copyright in a number of television broadcasts made by Channel Nine. To resolve this dispute it is necessary to identify the precise subject matter in which Channel Nine claims copyright. The reason why the subject matter must be identified with some precision is that copyright can be infringed if either the whole of the subject matter in which there is copyright or a substantial part of that subject matter has been copied: s 14 of the *Copyright Act 1968* (Cth). Thus the first step in a copyright infringement case is to identify the work or subject matter of copyright. The second step is to determine whether the whole or a substantial part of that work or subject matter has been copied without permission. In some cases there will be a third step. 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.

8

A television broadcast differs from most other subject matter in which there is copyright because it does not exist in any tangible form. According to s 91 of the Copyright Act, copyright subsists in a television broadcast made from a place in Australia. Section 99 provides that the maker of the broadcast is the owner of that copyright. But what is a “television broadcast”. The answer is to be found principally in two definitions in s 10. First there is the definition of “television broadcast” which means “visual images broadcast by way of television, together with any sounds broadcast for reception along with those images.” The second is the definition of “broadcast” which means “a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*.” Channel Nine is such a service.

9

I will return to these definitions in a moment, but before doing so I wish to draw attention to some other provisions in the Copyright Act. The first is s 101 which sets out what conduct will infringe copyright in a television broadcast. The section relevantly provides:

“(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.

...

(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.”

10

This takes us to s 87 where there is an explanation of the nature of copyright that subsists in a television broadcast. Section 87 provides that copyright in relation to television 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 or communicate it to the public otherwise than by*

broadcasting it.”

11 These provisions show that in so far as a television broadcast is concerned copyright subsists in visual images (and any accompanying sound). To understand what these images are, it is instructive to refer to another subject matter of copyright, namely a cinematograph film. Copyright in a cinematograph film is conferred by s 90. In s 10 a cinematograph film is defined to mean:

“[T]he 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.”

12 One can immediately see a distinction between what constitutes a television broadcast and what constitutes a cinematograph film. A television broadcast is defined by reference to the visual images that are broadcast, whereas a cinematograph film is more than a series of visual images. It is the aggregate of those images when they are embodied in an article or thing.

13 The distinction between, on the one hand, visual images and, on the other hand, an aggregate of visual images is important when one is attempting to identify precisely the visual images that constitute a television broadcast. It will be appreciated that what appears on a television screen is a sequence of still images of pictures which, when shown in rapid succession, give the appearance of a moving scene. Once it is seen that the visual images that constitute the broadcast need not be an aggregate of images it follows, in my opinion, that there is copyright either in each and every still image which is transmitted or in each and every visual image that is capable of being observed as a separate image on a television screen.

14 This position may be contrasted with that in the United States. There copyright is given to a television broadcast as an original work provided it be “fixed in any tangible medium of expression”: 17 USC § 102(a). Section 101 of the Act, containing definitions, provides “[a] work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’

for the purposes of this title if a fixation of the work is being made simultaneously with its transmission”. Accordingly, if the whole work is not taken, it is necessary to decide whether a substantial part has been. See eg *New Boston Television Inc v Entertainment Sports Programming Network Inc* 215 USPQ 755 (1981), where the court was required to consider whether highlights of a football game, although of a relatively short duration, were a taking of the substantial part of the game.

15 For these reasons, together with the reasons given by Hely J, with which I agree, I would hold that Channel Ten has breached copyright in each of the broadcasts in suit, unless Channel Ten can show that it made use of those broadcasts “for the purpose of criticism or review” (s 103A) or “for the purpose of, or [in association] with, the reporting of news” (s 103B). These are the “fair dealing” defences.

16 On this aspect of the appeal it is necessary to consider the tentative findings of the trial judge (he was not required to decide whether the defences applied as he found that there was no copyright infringement), to see whether any error is disclosed. In this regard, it needs to be acknowledged that we are in the realm of decision-making where there is room for legitimate differences of opinion as to the correct answer. In some instances it might be impossible to say whether one view is demonstrably right and another view is demonstrably wrong. It has been said of such a case that the appeal court should not interfere with the conclusion reached by the trial judge unless it is satisfied that the trial judge proceeded upon some erroneous principle or was plainly and obviously wrong: *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803, 815-816 per Lord Bridge. On the other hand where, as here, not only are the relevant facts not in dispute, but the appeal court is in precisely the same position as the trial judge to decide upon proper inferences to be drawn from the relevant evidence (which consists solely of the alleged infringing broadcasts), then cases such as *Warren v Coombes* (1979) 142 CLR 531 and *Taylor v Johnson* (1983) 151 CLR 422 suggest that there is no reason why findings made by the trial judge should be regarded as especially immune from appellate review: see *Antonovic v Volker* (1986) 7 NSWLR 151, 155. That is not to say that respect and weight should not be given to the conclusions which the trial judge has drawn from the evidence. However, once the appeal court has reached its own conclusions on the facts, it should not shrink from giving effect to those conclusions: *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207. This is not a case of the type referred to by Lord Hoffmann in *Biogen Inc v Medeva PLC* (1997)

RPC 1 at 45, which requires appellate caution in overturning a judge’s evaluation of the facts “because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.” It is not such a case because the primary evidence only consists of the alleged infringing broadcasts, and we are able to consider that evidence as well as the trial judge.

17 On the question of fair dealing, I agree in the reasons of Hely J except with regard to three broadcasts. To understand our differences, I need to say something about the program on which they were broadcast. The program is styled The Panel. The Panel is a late night television program, screened weekly on Channel Ten. The regular members of The Panel are Tom Gleisner, Rob Sitch, Kate Langbroek, Glenn Robbins (some viewers refer to him as “Uncle Arthur”) and Santo Cilauro. They are well known personalities. The program’s production company, Working Dog Pty Ltd, has also produced The Castle and The Dish, two highly successful comedy feature films. The Panel adopts an unusual format. Members of The Panel (not always all of them) sit around an oval desk, often with one or more invited guests, and discuss in a humorous way a variety of topics including, but not limited to, current affairs, sport, the arts and other items which they think are of interest. Although there is some serious discussion, the items are usually presented in an entertaining manner. The Channel Ten website invites people to “[t]une into The Panel for an irreverent look at the week’s events, featuring news, views and reviews.” The discussion is, or at least appears to be, largely unscripted, though the choice of topics must have been settled in advance. The show is punctuated by pre-recorded excerpts of other television programs. While there appears to be no evidence on this point, a casual observer of the show might conclude that Channel Nine programs are a favourite target.

18 Let me now deal with the broadcasts where I am in disagreement with Hely J.

The Today Show

19 The context is a discussion about Australia as a republic. The issue is whether the republican cause was doomed. Reference is made to the fact that a number of popular

personalities, Thomas Keneally (a well-known author), Billy Thorpe (an aging rock star) and Bryan Brown (an Australian actor), had climbed Mt Kosciuszko in aid of the republican cause. Then the discussion moves to the powers that could be conferred on the president of a republican Australia. In this context Boris Yeltsin is mentioned. Santo says that there should be some limitations on the powers of a president in case a person like Boris Yeltsin is appointed. There is then shown an excerpt of Boris Yeltsin shaking hands with three former Russian Prime Ministers. Glenn asks, by reference to Yeltsin, at what point a person would be too old to take on the office of president. The suggestion is made that regardless of Yeltsin's actual age, he is probably too old to be president because, as Santo put it, "he feels like your grandad". The Panel's consensus seems to be that it is necessary for a president to have experience, wisdom and memory, at least to "remember what you know". The discussion then moves to the age of other world leaders.

20 When the segment was broadcast, the question whether Australia should become a republic was a significant political issue. The referendum for constitutional amendments had been announced, and the segment must be considered in that context. The discussion whether there should be an age limit imposed on a president, while considered in a humorous way because of Yeltsin's known drinking and memory problems, was newsworthy. That is all that is required for fair dealing under s 103B(1)(b).

Midday

21 The Midday Show, as its title indicates, is a show Channel Nine formerly broadcast at midday each day. It had a studio audience and was, or purported to be, a live to air program catering for people who happen to be at home at that time of day. The presenter, Ms Kerri-Anne Kennerley, is a well-known television presenter. A feature of the Midday Show was that it dealt with topical events and often had invited guests. During the program in question, the Prime Minister was an invited guest and was interviewed by Ms Kennerley. She asked the Prime Minister to sing happy birthday for Sir Donald Bradman, Australia's greatest cricketer.

22 The Panel replayed the Prime Minister singing. Members of the Panel then made humorous, but disparaging, comments about the manner in which the Prime Minister performed. It was suggested that Ms Kennerley must be a Labor supporter because during a previous show she had also made the Treasurer "look like an idiot". Fair dealing is made out

in two respects. First the Panel is undertaking a review of sorts of the Midday Show. Indeed, after the excerpt was shown, there was a general discussion about Ms Kennerley's talents as the program's host. Second, and more obviously, an incident where the Prime Minister of a country has behaved in a way which some might call "silly" is certainly newsworthy. It is not only the political activities of a person such as a Prime Minister that make the news. His or her perceived indiscretions or other unusual actions warrant reporting. In a sense, all behaviour of a Prime Minister can be regarded as "political" because it may affect voters' perceptions and is newsworthy for that reason.

Simply the Best

23 Simply the Best was a evening television program hosted by Ray Martin, who is yet another well-known personality. The precise nature of the program is not apparent, but it seems that minor celebrities were invited to appear before a live audience. During the course of the show, the audience was asked to cast a vote on which is the "best" of a variety of things. In this particular program the Panel broadcast a segment showing Mr Martin walking on to the studio set and another segment where the audience was asked to vote on how much they liked "Bandstand" and "Countdown", each of which was a television program in which rock 'n roll music was performed.

24 The Panel introduced the first excerpt by commenting on the studio set. Tom said that it was a cross between that used on the television programs "Who Wants to be a Millionaire" and "The Footy Show", and "an inner city brothel". While the excerpt was being played, Tom commented "[t]hey've recycled a few sets there". Clearly this was criticism about the production side of the program. The second excerpt was introduced by Kate with the comment that it was not possible to understand the basis on which the audience was being asked to vote. It was said that the voting had no context. Immediately after the excerpt was broadcast, other members of The Panel said, in effect, that one could not tell what the voting was about. Various possibilities were discussed. From the segment of the show that I was able to see, the criticism, for that is what it was, about the show's format appears to be justified. The defence of fair dealing under s 103A is made out.

25 I agree in the orders proposed by Hely J save in respect to the three programs which in my view are not infringing broadcasts.

HELY J:

26 Part IV of the *Copyright Act 1968* (Cth) (“the Act”) provides for copyright in subject
matter other than works. Part IV extends copyright protection to sound recordings,
cinematograph films, television broadcasts and sound broadcasts and to published editions of
works.

27 This case is concerned with television broadcasts, and with the Act in the form which
it took prior to the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), which made some
alterations to some of the sections which will fall for consideration. Copyright in television
broadcasts is of relatively recent origin, having been created by the *Copyright Act 1956* (UK),
which was the model for the 1968 Australian legislation.

28 Section 87 of the Act provided 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.”*

29 The appellant (“Nine”) unsuccessfully contended at first instance that the re-
broadcasting by the respondent (“Ten”), as part of its programme “The Panel”, of excerpts
from other programmes previously broadcast by Nine, constituted an infringement of Nine’s
broadcast copyright conferred by s 87(c) of the Act. The excerpts from the Nine programmes
which were re-broadcast by Ten (the “Panel Segments”) were of various lengths, ranging
from eight seconds up to forty-two seconds in duration.

30 Nine also contended at first instance that the making by Ten of video tapes of the
Panel Segments for the purpose of re-broadcasting constituted an infringement of Nine’s
copyright conferred by s 87(a) of the Act. That claim also failed. The s 87(a) claim was

added to the Statement of Claim by amendment made during the hearing. Accordingly, it was agreed that the s 87(a) claim should be heard separately from and after the hearing of the s 87(c) claim. That was the course which was followed, and the primary judge decided the s 87(c) claim before determining the s 87(a) claim.

31 An Australian television broadcaster has the technical capacity to obtain material from another Australian broadcaster for re-broadcasting by either one of two ways:

- making a copy or video tape from the sending station's off-air or satellite signal; or
- redirecting or "pulling down" a signal from the sending station's off-air or satellite signal through the receiving station's transmitter.

Whilst the second activity is technically possible, the evidence was that this method of re-broadcasting was not followed in practice for programming reasons "as well as other reasons".

32 It was common ground that shortly prior to the broadcast of each of the Panel Segments Ten prepared a video tape, referred to in the primary judge's reasons as "the second BETA tape", so as to enable the particular Panel Segment to be re-broadcast as part of Ten's programme. Nine's alternative case was that the making by Ten of these video tapes constituted an infringement of Nine's s 87(a) copyright in the source broadcasts from which the Panel Segments were taken.

The definition of a "television broadcast"

33 **Television broadcast** means "visual images broadcast by way of television, together with any sounds broadcast for reception along with those images": s 10. It is impermissible to construe a definition by reference to the term defined: *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 419. "Television broadcast" is given a particular meaning by the Act, whether or not it accords with its ordinary meaning. There is no reference in this definition to any notion of a television programme. Nor does the definition follow the form of the definitions of "cinematograph film" or "sound recording" which are expressed in terms of the **aggregate** of visual images embodied in an article or thing or the **aggregate** of the sounds involved in a record. Television broadcasts and sound broadcasts differ from works and from the other subject matter protected under Part IV, in

that there is no requirement that the subject matter of the broadcast be reduced into a material form or fixed, in order that copyright protection may be attracted. “Broadcast” means transmit by wireless telegraphy to the public: s 10. “Wireless telegraphy” means the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy: s 10. It is the transmission of images and sounds over non-material paths of electromagnetic energy to the public which attracts copyright protection: cf Ricketson *The Law of Intellectual Property: Copyright, Designs and Confidential Information* at par [5.50]. A television broadcast is essentially of an ephemeral nature.

34 Copyright will subsist in a television broadcast once the subject matter of the broadcast is **made**, provided the connecting factors referred to in s 91 of the Act are satisfied. The requirement of originality which is imposed by s 32 of the Act in the case of works does not apply in relation to a television broadcast. Copyright continues to subsist in a television broadcast until the expiration of 50 years after the calendar year in which the broadcast is **made**. Section 99 of the Act specifies the owner of copyright subsisting in a television broadcast, depending on the circumstances in which it was **made**. Regarding the **making** of a work or other subject matter (including a television broadcast), s 22(5) of the Act provides:

“... a television broadcast or sound broadcast shall ... be deemed to have 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, or both, as the case may be, were broadcast.”

History of broadcast copyright

35 The *Copyright Act 1956* (UK) (“the 1956 UK Act”) implemented many of the recommendations of the report of the Copyright Committee (the “Gregory Committee”), which was presented by the President of the Board of Trade to Parliament in October 1952. The Gregory Committee favoured copyright protection being granted to a broadcasting authority in relation to its own programmes which it assembles and transmits at considerable cost and skill. Recommendation 31 was as follows:

*“31. 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.”*
(emphasis added)

36 Section 14 of the 1956 UK Act was a new section which dealt with copyright in television broadcasts and sound broadcasts. Section 14(10) defined “television broadcast” so as to mean “visual images broadcast by way of television, together with any sounds broadcast for reception along with those images”. Section 14(10)(a) provided that for the purpose of the Act a television broadcast shall be taken to be made by the body by whom, at the time when, and from the place from which the visual images or sounds in question, or both, as the case may be, are broadcast.

37 Section 14(1) provided for subsistence of copyright in every television broadcast made by specified authorities in specified circumstances. Subsections (4) and (6) were as follows:

- “(4) *The acts restricted by the copyright in a television broadcast or sound broadcast are –*
- (a) *in the case of a television broadcast in so far as it consists of visual images, making, otherwise than for private purposes, a cinematograph film of it 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, making, otherwise than for private purposes, a sound recording of it or a record embodying such a recording;*
 - (c) *in the case of a television broadcast, causing it, 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, if it is seen or heard by a paying audience;*
 - (d) *in the case either of a television broadcast or of a sound broadcast, re-broadcasting it [or including it in a cable programme].*
- (6) *In relation to copyright in television broadcasts, in so far as they consist of visual images, the restrictions imposed by virtue of subsection (4) of this section shall apply to any sequence of images sufficient to be seen as a moving picture; and accordingly, for the purpose of establishing an infringement of such copyright, it shall not be necessary to prove that the act in question extended to more than such a sequence of images.”*

38 Thus although the Gregory Committee recommended in favour of copyright protection for a broadcaster’s programmes, the subsequent legislation was couched in terms of copyright subsisting in the visual images broadcast by way of television, together with any sounds broadcast for reception along with those images, it being sufficient to constitute

infringement for there to be the making of a cinematograph film of, or a re-broadcasting of, any sequence of images sufficient to be seen as a moving picture.

39 In Australia, the Copyright Law Review Committee (“CLRC”) was appointed to consider whether and to what extent the amendments recently made to the law of copyright in the United Kingdom should be incorporated into Australian copyright law. The CLRC produced its report in 1959 (the “Spicer Report”). The following provisions of the Spicer Report were set out by the primary judge as being of potential relevance:

“286 ... However, there can be no doubt that broadcasting authorities are properly entitled to protection against the pirating of their broadcasts, whether by rebroadcasting or recording, and there seems to us, at least in the case of television, to be a case for protection against the display in public to a paying audience of the programme received....

287 In the absence of express provisions giving copyright in broadcasts, the broadcasting authority could obtain protection by recording or filming its broadcast and rely upon the copyright thus arising in the record or film. In most cases this would doubtless be done. However, the protection should not be dependent upon this course being followed.

288 The conclusion we reach, therefore, is that provision should be made, either in the copyright law or in some other appropriate legislation, for the protection of sound and television broadcasts against the kind of pirating envisaged by section 14 of the 1956 Act.

295 It seems to us, having regard to the provisions of section 14(6), that under the 1956 Act a person may, without committing an infringement of the broadcasting copyright, take as many photographs of a television broadcast as he wishes provided no two photographs constitute ‘a sequence of images’. We can see no good reason for limiting the protection to this extent and recommend that the taking of a photograph of any part of a television broadcast should be a restricted act if it is done otherwise than for the private use of the person taking the photograph.”

Section 25(4)(a) of the Act gives effect to par 295.

40 The Second Reading Speech of the Attorney-General, Sir Nigel Bowen, relating to the introduction of the Australian legislation to the House of Representatives, included the following:

“There is no copyright under the existing law in a sound or television broadcast. There are provisions in the Broadcasting and Television Act

*which prohibit the broadcasting by one person of **programmes** transmitted by another without the permission both of the original broadcaster and of the Broadcasting Control Board. The Bill establishes a new category of protection for sound and television broadcasts. It provides that copyright, in relation to a broadcast is the exclusive right to make a cinematograph film of the broadcast in the case of a television broadcast, to make a sound recording of the broadcast and to re-broadcast the broadcast. These provisions are contained in clause 87 of the Bill.”*

(emphasis added). Clause 87 of the Bill became s 87 of the Act.

The subject matter of the broadcast

41 To establish infringement of s 87(c) of the Act, Nine needed to show that Ten re-broadcast a “television broadcast” the copyright in which was owned by Nine. Alternatively, Nine needed to show that s 14(1)(a) of the Act applied, and that Ten re-broadcast a substantial part of a “television broadcast”. The resolution of either of these questions required identification of the subject matter which constituted the relevant television broadcast.

42 Nine’s primary contention at first instance was that each visual image which is broadcast constitutes a television broadcast; and that the definition of **television broadcast** is couched in terms of “visual images broadcast by way of television” and accompanying sounds, without identifying any number of images, or a cut-off point, or a requirement that the visual images constitute a discrete or complete story or programme. If that submission had been upheld, considerations of substantiality would not arise on the facts of this case, as the Panel Segments were visual images which had been previously broadcast by Nine by way of television.

43 Alternatively, Nine contended that a television broadcast relates to the whole of each programme, or else to the whole of each segment of a programme where the programme breaks down into segments. Whether a programme breaks down into segments is a factual question. On this construction, considerations of substantiality would arise, as in no case did Ten re-broadcast the whole of one of Nine’s programmes, or the whole of a segment of such a programme. It would therefore be necessary to determine whether each Panel Segment was a substantial part of the programme, or a substantial part of a segment of the programme of which it was an excerpt.

44 Ten's primary contention at first instance was that a television broadcast commences when the transmitter is switched on such that visual images and sound are transmitted by the broadcast waves. The television broadcast continues until the transmitter is switched off, such that visual images and sounds are no longer broadcast. The visual content of the broadcast changes throughout the day as different programmes, news items, station identifications and other subject matter are broadcast.

45 In 1968 television broadcasters in Australia did not transmit continuously. They began each morning and closed each night. In due course broadcasters extended their hours and now generally broadcast twenty-four hours per day, seven days per week. Television broadcasters issue their programming in roughly 6.00 am to 6.00 am days in seven day bundles. This is the form in which the programming is reprinted in newspapers and TV guides. Accordingly, Ten submitted that the best definition of the copyright subject matter is what is transmitted in the twenty-four hour period of broadcasting during the period chosen by Nine itself in the formulation of its programming, namely from 6.00 am one day to 6.00 am the next. On this construction, the benchmark against which the issue of substantiality is to be tested is a television broadcast which continues from 6.00 am one day to 6.00 am the next.

46 The primary judge rejected the primary contention advanced by each party. His Honour rejected Nine's submission that Nine's broadcast copyright relates to each and every single visual image as a discrete subject matter. His Honour also rejected Ten's submission that the broadcast relates to the aggregate of all visual images broadcast by Nine over a period of not less than one day, irrespective of the number of programmes thereby involved. His Honour said that it followed that "the only feasible candidate" for the subject matter of a television broadcast must be a television broadcaster's programme, or segments of a programme, if a programme is susceptible to subdivision by reason of the existence of self-contained themes.

47 His Honour found that an advertisement should be treated as a separate programme; and that "station breaks" and "station logos" should also be excluded from programmes or segments of programmes for the purposes of copyright protection, as they do not bear in any relevant sense an essential relationship to the programmes or segments of programmes any more than advertisements.

48 His Honour held that none of the Panel Segments amounted to a substantial part of the programmes or segments of programmes which had been broadcast by Nine. His Honour also held that in the case of some (but not all) of the Panel Segments, Ten would have made out a defence of fair dealing under either s 103A or s 103B of the Act if breach of copyright had otherwise been found to have occurred.

Cinematograph films

49 Nine sought support for its primary contention in the decision of the United Kingdom Court of Appeal in *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 283. The Court there found that a photograph of a single frame of a cinematograph film was an infringement of the copyright in the film because a single frame is part of a film within s 13(10) of the 1956 UK Act, even though it does not itself possess the characteristics of a film.

50 The definition of “cinematograph film” in s 13(10) of the 1956 UK Act was as follows:

“Cinematograph film” means any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by use of that material –

- (a) of being shown as a moving picture, or*
- (b) ...”*

The acts restricted by the copyright in a cinematograph film were specified in s 13(5) of the 1956 UK Act, and included (s 13(5)(a)) making a copy of the film. “Copy” was defined in s 13(10) in relation to a cinematograph film as meaning:

*“any print, negative, tape or other article on which the film **or part of it** is recorded.”*

(emphasis added). The definition refers to any part of a film, rather than a substantial part.

51 The substantiality provisions of the 1956 UK Act, equivalent to s 14(1) of the Australian Act, were contained in s 49 of the 1956 UK Act. Section 49(1) provided that except insofar as the context otherwise requires, any reference in the Act to the doing of an act in relation to a work or other subject matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof.

52 In *Spelling Goldberg* (supra), Buckley LJ said that it did not make very much difference whether one eliminates s 49(1) from application in relation to s 13(5)(a) on the ground that there is a context which “otherwise requires”; or whether s 49(1) applies, not so as to impose a requirement that a copy of a part of a film has to be a copy of a substantial part of the film, but so as to render it an infringement of copyright to reproduce a substantial part of a part of a film, ie a substantial part of a frame from a film. Templeman LJ and Donaldson LJ agreed with Buckley LJ, but were inclined to the view that s 49(1) had no relevant application as the context “otherwise requires”.

53 The provisions of the 1956 UK Act in relation to cinematographic films may be contrasted with the provisions of s 14 of that Act in relation to television broadcasts. “Television broadcast” was defined so as to mean “visual images broadcast by way of television, together with any sounds broadcast for reception along with those images”. The acts restricted by the copyright in a television broadcast were as set out in s 14(4), and, as earlier noted, s 14(6) provided that the s 14(4) restrictions apply to “any sequence of images sufficient to be seen as a moving picture”, and for the purpose of establishing infringement of copyright in a television broadcast, it shall not be necessary to prove that the act in question extended to more than such a sequence of images.

54 Thus doing one of the acts restricted by the copyright in a television broadcast in relation to a single image would not ordinarily constitute an infringement of copyright created by the 1956 UK Act, which defines infringement in terms of a sequence of images sufficient to be seen as a moving picture.

55 I should record, if only for the sake of completeness, that the provisions of the Australian Act in relation to cinematograph films are different from those contained in the 1956 UK Act. Under the Australian Act “copy”, in relation to a cinematograph film, means any article or thing in which the visual images or sounds comprising the film are embodied. “Cinematograph film” means (*inter alia*) 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 of being shown as a “moving picture”. These definitions suggest that in the context of the Australian Act, a copy must itself have the characteristics of a cinematograph film and could not comprise a single frame.

56 As noted above, *Spelling Goldberg* is a decision on the operation of s 13(5) of the 1956 UK Act in relation to films. There is no comparable provision in the 1956 UK Act or the Australian Act in relation to television broadcasts. Thus the decision cannot and does not establish any principle which support Nine’s primary contention. The contrast between the terms of s 13 and s 14 of the 1956 UK Act make it clear that under s 14 a single image could not itself constitute a television broadcast in which copyright might subsist, as a single image is not a sequence of images sufficient to be seen as a moving picture. Nonetheless, some assistance may be derived from *Spelling Goldberg*, particularly from the observations of Buckley LJ at 296, as discussed hereafter.

The operation of s 25(4) of the Act

57 The making of a cinematograph film of a television broadcast, insofar as it consists of visual images, or a copy of such a film, is an infringement of copyright in the television broadcast by virtue of s 87(a) and s 101. Section 25(4) of the Act provides as follows:

“(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.”*

58 The catalyst for the enactment of s 25(4) was par 295 of the Spicer Report, quoted above. Paragraph 295 of that report explicitly recommended that the taking of a photograph “of any part of a television broadcast” should constitute an infringement of copyright, unless done for the private use of the photographer. Section 111(1) of the Act provides that the copyright in a television broadcast insofar as it consists of visual images is not infringed by the making of a cinematograph film of the broadcast, or a copy of such a film, for the private and domestic use of the person by whom it is made.

59 Section 25(4)(a) does not directly play a part in the definition of the subject matter of a television broadcast. The subsection is in the nature of a deeming provision, which gives an expanded meaning to the notion of a cinematograph film of a television broadcast beyond

that which would otherwise flow from the s 10 definition of cinematograph film. This has the indirect effect of defining one of the exclusive rights in relation to a television broadcast.

60 Thus s 25(4) of the Act deems a photograph of any of the visual images comprised in a television broadcast to be a cinematograph film of that broadcast. Consistently with par 295 of the Spicer Report, the provisions of s 14(6) of the 1956 UK Act as to any “sequence of images sufficient to be seen as a moving picture” have not been taken up in s 25(4).

61 The effect of s 25(4) is thus 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 such as s 111.

Section 87(a) – making a cinematograph film of a television broadcast

62 Lahore *Copyright & Designs* 1996 at [8030] and Ricketson (supra) at [8.50] suggest that there may be some room for argument as to whether a video tape consists of visual images, and thus some room for argument as to whether a video tape is a cinematograph film as defined in s 10 of the Act. It was common ground at first instance that the video tapes made by Ten of the Panel Segments are cinematograph films as defined, hence it is not necessary to pursue this question. However, I note that *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1996-1997) 37 IPR 462 and *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* (2001) 50 IPR 29 at 44 suggest that the approach adopted by the parties in this respect accords with the law. Both Lahore and Ricketson conclude in the paragraphs noted above, that a video tape does come within the definition of cinematograph film.

63 Nine contends that the effect of s 25(4)(a) of the Act is that the making of a cinematograph film of **any** of the visual images of a broadcast (in the sense of any one or more of those images) is taken to be a cinematograph film of a television broadcast, thus giving rise to an infringement of copyright by virtue of s 87(a) and s 101 of the Act.

64 Nine relied upon par 295 of the Spicer Report in support of the construction which it placed on s 25(4)(a). In his second judgment, the primary judge dealt with par 295 of the Spicer Report as follows (at par 5):

“... I record in particular however the expressions in such paragraph 295 ‘provided no two photographs constitute a sequence of images’, and ‘the taking of a photograph of any part of a television broadcast’. The former cited expression seems to me to more likely reflect Spicer’s concern, as I think Ten rightly points out, for copyright protection against lengthy but disjointed taking, whilst the latter refers imprecisely to ‘a television broadcast’ and in any event does not express or reflect the infringement conduct the subject of Nine’s s 87(a) case ...”.

65 The primary judge rejected Nine’s contentions as to the effect of s 25(4). His Honour upheld Ten’s submission that the impact of s 25(4) upon s 87(a) is to ensure that single images are capable of leading to infringement, but without detracting from the need for there to be a sufficiency of them to amount to a substantial part of an identifiable television broadcast. His Honour noted that s 25(4)(a) of the Act does not use the words “any one” or “any one or more” as do ss 79, 83(b), 184(1) and 248U(1) of the Act, albeit those sections are concerned with a different subject matter.

66 I do not agree, with respect, with the conclusion reached by the primary judge on this issue. In my view, s 25(4) should not be regarded as being subject to an unexpressed qualification that 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, but only if the visual images constitute a substantial part of the broadcast.

67 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.

68 Ten’s response, as noted by his Honour in par [36] of his first judgment, was that whilst s 25(4)(a) makes it clear that photographs can infringe, “there would need to be sufficient photographs to amount to a substantial part of an identified broadcast”. This response, which was repeated in Ten’s written submissions in this Court is, to my mind, unconvincing. It assumes that par 295 of the Spicer Report was only concerned with eliminating any requirement that photographs must constitute a sequence before they could

amount to photographs of a substantial part of the broadcast. Par 295 is not expressed in those terms. Ten's submission pays insufficient regard to the terms in which the recommendation was couched, namely a recommendation that the "taking of a photograph of any part" of a television broadcast should be an infringement. Both Ricketson at [9,520] and Lahore at [34,075] express the view that the taking of a single photograph of any image contained in a television broadcast will fall within the control of the copyright owner of the broadcast.

69 If what is involved is a cinematograph film of any of the visual images contained in a television broadcast, rather than a photograph of any of those images, the definition of cinematograph film in s 10 may indicate that s 25(4) would not be enlivened unless sufficient visual images of the broadcast are embodied in the film, such that it can be shown as a moving picture.

70 On that basis s 25(4) would apply to a film capable of being shown as a moving picture of any of the visual images comprised in a television broadcast and to a photograph of any one or more of the visual images comprised in the broadcast. A conclusion to that effect would be consistent with the recommendation of the Spicer Report that provision should be made for the protection of television broadcasts against the kind of pirating envisaged by s 14 of the 1956 UK Act, but with a provision more favourable to the broadcaster in relation to photographs of a television broadcast.

71 The construction of s 25(4) for which Ten contends is not supported by the Spicer Report. Section 14(6) of the 1956 UK Act contained its own prescription of the quantum of the "taking" of a television broadcast which would constitute infringement, namely any sequence of images sufficient to be seen as a moving picture. If what was taken was sufficient to be so seen, then infringement was established whether or not the sequence of images constituted a substantial part of the source broadcast or not. In *Spelling Goldberg* (supra) Buckley LJ said at p 296 in relation to a cinematograph film:

"... every part of a complete film which is itself of sufficient duration to amount to a showing as a moving picture must itself answer to the definition of a cinematograph film."

These observations are equally applicable to a television broadcast under s 14.

72 Paragraph 295 of the Spicer Report makes it clear that s 25(4) was intended to provide a greater protection to broadcasters than that contained in s 14(6). That objective would be frustrated, rather than furthered, by the adoption of the construction of s 25(4) for which Ten contends.

73 In par [7] of his second judgment, the primary judge made the following observation:

“... if s 87(a) applies to a single visual image the subject of a television broadcast, it would follow that s 87(b) would apply to a single sound the subject of a sound broadcast, an equally unlikely matter of legislative intention. Moreover, how the statutory scheme concerning fair dealing defences could accommodate a single visual image has never been explained on behalf of Nine.”

74 Acceptance of Nine’s argument based on s 25(4) does not impact upon the proper construction of s 87(b). So far as fair dealing is concerned, it is uncontroversial that, depending on the circumstances, a fair dealing can reproduce the whole of the work in which copyright subsists: *Hubbard v Vosper* [1972] 2 QB 84 at 98. The fair dealing provisions do not assist in the construction of s 87.

75 Nine submits that its construction of s 25(4) can accommodate s 14(1) of the Act insofar as reproduction of a substantial part of one of the images comprised in a broadcast may give rise to an infringement. It is not necessary to decide this question in order to resolve the present appeal. However, my view is that s 25(4) is in the nature of a self-contained definitional provision, the terms of which are not subject to further modification by reference to s 14.

76 As the video tapes 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).

Section 87(c): re-broadcast a television broadcast

77 The definitions of “television broadcast” and “broadcast” are set out earlier in these reasons. There is no definition of “re-broadcast”. I agree with the primary judge that in the context of Division 2 of Part IV of the Act, “re-broadcast” simply means broadcasting what another television broadcaster has already broadcast on television.

78 Section 101(1) of the Act provides that a person infringes another’s copyright by doing acts “comprised in the copyright”. Section 101(4) of the Act provides:

“(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.”

It follows from s 101(4) that the notion of “re-broadcasting” is not confined to the re-direction or “pulling down” by one station of another’s signal. Ten’s transmission of the Panel Segments which it had captured on video tape involved a “re-broadcasting” of the Panel Segments. Section 95(2) of the Act accepts that a television broadcast may be a repetition of a previous broadcast, made by broadcasting visual images or sounds embodied in any article or thing.

79 Copyright subsisting in a television broadcast arises when the broadcast is made (s 91). A television broadcast is made when the visual images and sounds constituting the broadcast, or both (as the case may be), are broadcast. The definition of “television broadcast” and other sections of the Act dealing with copyright in a television broadcast consistently refer to the visual images and sounds (plural) comprised in the broadcast (eg s 25(4)) or constituting the broadcast (eg s 25(5)).

80 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”: cf the observations of Buckley LJ in *Spelling Goldberg* at 296. 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.

81 The issue of infringement of copyright is necessarily bound up with the way in which the interest protected is defined. Thus if the interest protected is a work, the doing of one of the acts comprised in the copyright in relation to that work, or a substantial part of the work, will result in infringement. Similarly, if the interest protected is the aggregate of the visual images embodied in a cinematograph film, the doing of one of the acts comprised in the copyright in relation to the aggregate of those images, or a substantial part thereof, will result in infringement.

82 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.

83 In *Aristocrat Leisure Industries* (supra) at [65], Tamberlin J quoted the following observations of Burchett J in *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 69 FCR 268 at 273-274 (which concerned “video” games) with approval:

“... it is appropriate to adopt a ‘liberal interpretation’ to intellectual property legislation, including the present Act, and to avoid a narrow, literal approach specific to a particular technology or unduly limited to the state of the art as at the date when the relevant provisions were passed.”

84 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, eg the Gulf War, which might be the subject of a television broadcast continuing for more than a day.

85 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 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.

86 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. For the same reasons I would also reject Ten's submission that the benchmark is a day's television, with the added comment that where broadcasting is continuous, there is no more logic in adopting a day's output than, for example, a week's.

87 On this view there 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.

88 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.

89 This conclusion allows for a limited role for s 14(1). 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. In any event, s 14(1) applies "unless the contrary intention appears". One should therefore not approach the problem of identifying the interest protected by the copyright on the basis that resolution of that problem should necessarily accommodate s 14(1).

90 The outcome of this case does not depend upon whether a broadcast of a single image can itself be a television broadcast, or whether a plurality of visual images is required. Each of the Panel Segments consisted of a plurality of visual images. The Act is consistently expressed in terms of the plural. This may be because the provisions of the 1956 UK Act applied to any sequence of images sufficient to be seen as a moving picture. Copyright will not usually be held to subsist in works which are "insubstantial" in purely quantitative terms

(see Ricketson at [7.215]). A transmission which lasts for a fraction of a second only may be of too insubstantial a nature to be regarded as a television broadcast in its own right. Even if that is so, the Panel Segments were not too insubstantial to qualify for copyright protection, having regard to their duration.

91 In his second judgment, the primary judge appears to have accepted Ten's submission that the s 87(a) protection (and presumably the s 87(c) protection) should not comprise or extend to a single visual image (or presumably to a plurality of images), because "... to hold otherwise would be to grant to television broadcast copyright, a copyright which is attracted by the mere act of switching on a transmitter, [being] a status (in the sense that it would be easy to infringe) far above that granted to other copyrights which are, in general, the outcome of greater creativity, skill, labour and involvement: for example, works under s 31, sound recordings under s 85 and films under s 86".

92 Ten's submission overlooks, or pays insufficient regard to, the fact that the interest protected by the copyright is differently defined in the case of a television broadcast. It also overlooks, or pays insufficient regard to, the fact that there is no infringement of copyright in a television broadcast unless the actual sounds or images which were broadcast by the broadcaster are taken. A re-creation of those sounds or images may infringe copyright in some underlying work, but would not constitute an infringement of the copyright arising under Part IV of the Act. It is the actual visual images or sounds which comprise the television broadcast which are protected and not some imitation or reproduction thereof produced by collateral means: Laddie et al, *The Modern Law of Copyright and Designs* 2nd Ed. 1995 at par 7.32.

93 It follows that subject to "fair dealing" defences, the re-broadcast of the Panel Segments were an infringement of copyright under ss 87(c) and 101.

Fair dealing

94 Section 103A of the Act provides:

"A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of criticism or review, whether of the first-mentioned audio-visual item, another audio-visual item or a work, and a sufficient acknowledgment of the first-mentioned audio-visual item is made."

An audio-visual item is defined in s 100A as meaning a sound recording, a cinematograph film, a sound broadcast or a television broadcast.

95 Section 103B provides:

“(1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if:

- (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgment of the first-mentioned audio-visual item is made; or*
- (b) it is for the purpose of, or is associated with, the reporting of news by means of broadcasting or in a cinematograph film.”*

96 At first instance both parties professed reliance on the decision of the United Kingdom Court of Appeal in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605. The Court there held that the test of whether an extract from a copyright work had been used for one of the purposes laid down in the corresponding provisions of the *Copyright, Designs and Patents Act 1988* (UK) is an objective one:

“The words ‘in the context of’ or ‘as part of an exercise in’ could be substituted for ‘for the purpose of’ without any significant alteration of meaning.”

(at 614)

97 That decision was followed by the UK Court of Appeal in the subsequent case of *Hyde Park Residence Ltd v Yelland* (2001) Ch 143. In that case, whether a work was used “for the purpose of reporting current events” was a matter to be ascertained by a reading of the relevant parts of the work in question. However, both cases make it clear that the intentions and motives of the user of the copyright material are highly relevant in relation to the issue of fair dealing.

98 After reviewing the authorities, and the submissions of the parties, the primary judge summarised the principles emerging from the authorities involving fair dealing defences as follows:

“(i) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;

- (ii) *Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose (sic);*
- (iii) *Criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment. Criticism and review may be strongly expressed;*
- (iv) *Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;*
- (v) *An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; ‘the path of criticism is a public way’;*
- (vi) *Criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;*
- (vii) *‘News’ is not restricted to current events; and*
- (viii) *‘News’ may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.”*

99 Nine submitted on the hearing of the appeal that the criticism or review must be of the work itself, but this may include the doctrine or philosophy underlying the work. However, s 103A expressly provides that the criticism or review may relate to “the first-mentioned audio-visual item, another audio-visual item or a work”.

100 Nine’s written submissions on the appeal also challenged principle (ii) in the summary of the trial judge quoted above. It was submitted that the requisite purpose must be that of the respondent rather than some third party, and there was no evidence before the trial judge that Ten itself (as distinct from Working Dog Pty Ltd and its Executive Producer, Mr Hirsh) had a relevant purpose of criticism or review or of news reporting. Contrary to the position which it had adopted at first instance, Nine’s submission then proceed upon the basis that it was incumbent upon Ten to call evidence as to the actual purposes, intentions and motives of those who produced the programmes.

101 Ten engaged Working Dog Pty Ltd (“Working Dog”), referred to by the primary judge as “its contracted production team”, to produce for it a television programme which would, amongst other things, involve criticism and review and the reporting of news events. The purpose of Working Dog in the production of these programmes was the purpose of Ten. Consistently with the decisions of the UK Court of Appeal earlier referred to, the “purpose” referred to in s 103A and s 103B is to be ascertained objectively, and it was neither necessary nor appropriate for officers of Ten or of Working Dog to give evidence that they had a sincere belief that he or she was criticising a work or an audio-visual item or reporting news.

102 Nine also submits that to the extent that it is discernible, Ten’s purpose in re-broadcasting the Nine material was to entertain, provide programme content and achieve ratings. This purpose is the same purpose that Nine, its trade rival, had in broadcasting the material originally. It does not ground a fair dealing defence.

103 Ten accepted the proposition that if it had used the Panel Segments as a “potted” substitute for entertainment, so that a television viewer could obtain ready and easy access to the same in a shorter time, such kind of activity on its part would constitute an unfair dealing. Ten denied that it had used any of the Panel Segments in that way, and the primary judge found that its denial was justified.

104 Ten’s purpose in broadcasting its programme “The Panel” may have been, as Nine asserts, to entertain and to achieve ratings. If it does so by means of a programme involving or including criticism, review or reporting of news in which there is fair dealing with material in which copyright would otherwise subsist, then Ten is not disentitled from relying on the s 103A and s 103B defences by reason only of the commercial nature of its activities. Criticism may involve an element of humour, or “poking fun at” the object of the criticism. The fact that news coverage is interesting or even to some people entertaining, does not negate the fact that it could be news: *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333 at 340 pars [34] – [37]. News may be reported with humour and still fall within the ambit of s 103B.

105 The primary judge would have upheld the fair dealing defence in relation to the following Panel Segments:

- “The 72nd Academy Awards”

- “The Sale of the Century” (lighting switched off)
- “The Today Show” (Opera House)
- “Who Wants to be a Millionaire” (ingredients of Xmas pudding)

Nine has not appealed from any of those findings. That tends to confirm that the availability of the fair dealing defence needs to be considered in relation to individual Panel Segments on a case by case basis, rather than by reference to some *a priori* thesis that Ten is not entitled to rely upon the defence because its purpose was to entertain and to achieve ratings. The issue is whether the means which Ten adopted in order to achieve those objectives included a fair dealing with copyright material for the purpose of criticism or review or of reporting news.

106 As I indicated earlier, the fair dealing defence would have been upheld by the primary judge in some cases but not in others. Not all of the findings of the primary judge in this respect were the subject of challenge on appeal. The programme segments which were the subject of challenge on the appeal are as shown in the following table:

Programme Title of original Nine broadcast	Segment description	Position on appeal regarding fair dealing defences
1. The Today Show (Boris Yeltsin)	Boris Yeltsin shaking hand with three former Russian Prime Ministers	Ten pressing Notice of Contention re trial judge’s rejection of news reporting defence
2. Midday	Prime Minister John Howard singing Happy Birthday for Sir Donald Bradman	Ten pressing Notice of Contention re trial judge’s rejection of criticism/review and news reporting defences
3. A Current Affair	Patrons in a brothel masquerading as an introduction agency	Nine appealing trial judge’s upholding of defence of criticism/review
4. Days of Our Lives	Marlena standing on balcony	Nine appealing trial judge’s upholding of defence of criticism/review
5. Days of Our Lives	Marlena levitating above bed	Nine appealing trial judge’s upholding of defence of criticism/review
6. Simply the Best	(i) Ray Martin walking	Ten pressing Notice of

	on to set (ii) Audience votes for “Countdown”	Contention re trial judge’s rejection of criticism/review defence
7. The Inaugural Allan Border Medal Dinner	Prime Minister John Howard approaches cricketer Glenn McGrath	Nine appealing trial judge’s upholding of defence of reporting news
8. The Sunday Program	Interview with Grant Ellison about drugs in sport in Australia	Nine appealing trial judge’s upholding of defence of reporting news
9. The Today Show (Prasad interview)	Steve Liebmann interview with Mr Prasad, manager of the Matthew Talbot Hostel	Nine appealing trial judge’s upholding of defence of criticism/review
10. Newsbreak	Technical glitch	Nine appealing trial judge’s upholding of defence of criticism/review

The role of an appellate court

107 In *Pro Sieben Media* (supra) the UK Court of Appeal said that a trial judge’s conclusions on fair dealing should not be disturbed unless “they proceeded from some error of principle or are clearly unsustainable”. That view was endorsed by Conti J, sitting as a member of a Full Federal Court, in *Aldi Stores Ltd Partnership v Frito-Lay Trading Co GmbH* [2001] FCA 1874 at [198]. The position that an appellate court will not interfere with a finding of the primary judge in an area such as the present, unless it is “clearly unsustainable”, may be a slight overstatement of the Australian approach: *Australian Capital Territory v Badcock* (1999-2000) 169 ALR 585 at pars [37], [48] and [51].

108 In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 Allsop J (with whose reasons Drummond and Mansfield JJ agreed) extracted the following propositions from a review of decisions of the High Court:

“28. ... First, the appeal court must make up its own mind on the facts. Secondly, that task can only be done in the light of, and taking into account and weighing, the judgment appealed from. In this process, the advantages of the trial judge may reside in the credibility of witnesses, in which case departure is only justified in circumstances described in *Abalos v Australian Postal Commission* (1988) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 and *SRA v Earthline, supra*. The advantages of the trial

judge may be more subtle and imprecise, yet real, not giving rise to a protection of the nature accorded credibility findings, but, nevertheless, being highly relevant to the assessment of the weight to be accorded the views of the trial judge. Thirdly, while the appeal court has a duty to make up its own mind, it does not deal with the case as if trying it at first instance. Rather, in its examination of the material, it accords proper weight to the trial judge's views. Fourthly, in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.

29. *The degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge. Sometimes, where matters of impression and judgment are concerned, giving 'full weight' or 'particular weight' to the views of the trial judge might be seen to shade into a degree of tolerance of divergence of views: compare S W Hart & Co Pty Ltd v Edwards Hot Water Systems (1985) 159 CLR 466, 478 and 491; Turbo Tek Enterprises Inc v Sperling Enterprises Pty Ltd (1989) 23 FCR 331; Pacific Dunlop Ltd v Hogan (1989) 23 FCR 553; Allsop Inc v Bintang Ltd (1989) 15 IPR 686; Dart Industries v Decor Corporation Pty Ltd (1989) 15 IPR 403, 412; and Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd (2000) 100 FCR 90 at [27]. In such cases the personal impression or conception of the trial judge may be one not fully able to be expressed or reasoned: see for example In Re Wolanski's Registered Design (1953) 88 CLR 278, 281 and Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co [1901] AC 363, 391. However, as Hill J said in Commissioner of Taxation v Chubb Australia (1995) 56 FCR 557, 573 'giving full weight' to the view appealed from should not be taken too far. The appeal court must come to the view that the trial judge was wrong in order to interfere. Even if the question is one of impression or judgment, a sufficiently clear difference of opinion may necessitate that conclusion."*

See also *Windsor Smith Pty Ltd v Dr Martens Australia Pty Ltd* (2001) 49 IPR 286 at pars [15] and [16], a decision of a Full Federal Court in the context of misleading and deceptive conduct, to similar effect.

109 I turn, then, to the particular Panel Segments that were the subject of submissions on the appeal whether on the part of Nine as the appellant, or on the part of Ten pursuant to its Notice of Contention.

1. The Today Show (Boris Yeltsin)

110 At par 72(i), the primary judge said:

“... news may involve the use of humour, but ... there can nevertheless be considerable difficulty in distinguishing news from entertainment (see [58] above). As a matter of judgment and impression, I prefer the conclusion that the purpose of this re-broadcast, evident from The Panel discussion, was that of entertainment rather than the reporting of news ...”

Ten submits that the primary judge reached this conclusion upon the erroneous basis that there could be no overlap between news and entertainment. His Honour specifically acknowledged that there could be such an overlap, but came to the conclusion, as a matter of judgment and impression, that this Panel Segment fell upon one side of the line rather than upon the other. This is a matter on which different persons might legitimately hold different conclusions. I am not persuaded that his Honour erred in coming to the conclusion which he did.

2. Midday

111 At par 72(ii), the primary judge found that:

“... the purpose of Nine’s dealing with the subject footage of ‘Midday’ was to satirise aspects of Ms Kennerley’s performance as presenter of ‘Midday’, and certain supposed personality traits and political allegiances. I do not think that on balance, and as an issue of fact and degree, it can rightly be postulated that The Panel here engaged in criticism or review of ‘Midday’, and that such was its purpose.”

112 In context, the issue is whether the purpose for which the Panel Segment was shown was criticism or review of the broadcast of which the Panel Segment formed part, or criticism or review of some other broadcast of the Midday programme. An appraisal of Ms Kennerley’s role as the presenter of the Midday show could amount to criticism or review of the television broadcast constituted by the “Midday” programme, but there was no real connection between the Panel Segment and such discussion as there was of Ms Kennerley’s role. The Panel Segment was shown for its own sake, either as something worth seeing again, or for the benefit of those who had missed it when it was originally broadcast by Nine. I agree with the primary judge’s conclusions.

113 The primary judge also rejected Ten's claimed entitlement to a defence under s 103B(1)(b) on the purported basis that the Prime Minister's singing of "Happy Birthday" to Sir Donald Bradman was "newsworthy". It may be accepted that unusual or incongruous moments in the life of a world leader may be "news", and elsewhere in his reasons, the primary judge accepted that "news" for the purposes of s 103B(1) was not restricted to current events. But a contention that The Panel was reporting an item of news, namely that the Prime Minister had sung Happy Birthday to Sir Donald Bradman on the Midday show some fourteen days earlier, and that the Panel Segment was shown for the purpose of or in association with the reporting of that news is, to my mind, an exaggeration or distortion of the facts. The Panel Segment was simply shown for its entertainment value. No error has been shown in the primary judge's conclusion in this respect.

3. A Current Affair

114 The primary judge found that there was a fair dealing for the purpose of criticism or review of the programme from which the Panel Segment was taken, on the basis that Ten was criticising Nine's broadcast for inadequately protecting by means of ineffective disguises the anonymity of interviewees who wished to keep their identity secret. That was sufficient to "marginally weigh" the balance in favour of Ten's establishment of the s 103A defence.

115 In assessing whether a defence of fair dealing exists, it is necessary to have regard to the true purpose of the critical work. As Henry LJ said in *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation PLC* (1993) 28 IPR 459 at 468, the question to be answered is as follows:

"is the program incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism, and so profit unfairly from another's work? As Lord Denning said in Hubbard v Vosper [1972] 2 QB 84 at 93, 'it is not fair dealing for a rival in the trade to take copyright material and use it for its own benefit'."

What is required in order to enliven the defence is that the copying take place as part of and for the purpose of criticising or reviewing the broadcast in question: *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 at par 61.

116 The Panel discussion did not involve a criticism of Nine's selection of disguises for the interviewees; the discussion proceeded upon the basis that the interviewees chose their

own disguises. Thereafter The Panel attempted to poke fun at the disguises which the interviewees wore. I agree with the submission of Mr Bannon SC that The Panel were not criticising Channel Nine's failure to protect people who wished to remain anonymous, which might have amounted to a criticism of the television broadcast. Rather, The Panel were simply poking fun at the disguises which the people had chosen, and using the Panel Segment for the purposes of entertainment.

117 For these reasons, in my opinion, Nine has established that the primary judge fell into error in upholding the fair dealing defence in relation to this Panel Segment.

4. & 5. Days of Our Lives

118 The primary judge found that these Panel Segments would have attracted the defence of fair dealing for the purposes of criticism or review on the footing of an innuendo of loss of originality and novelty of theme. I agree with that conclusion. The fact that humour was also involved is beside the point. I do not agree with Nine's submission that Ten re-broadcast melodramatic aspects in order to entertain persons who did not see the material as originally broadcast.

6. Simply the Best

119 The primary judge held that the s 103A defence of criticism or review was not made out. He did so on the basis of a "paucity of evidence" which left no "viable basis for comprehending, much less resolving, what was the true nature of the alleged criticism, and what was the purported basis therefor".

120 Ten contends that the comments by The Panel members clearly reveal the purpose of criticism or review in relation to the set (and underlying artistic work) used in Nine's programmes; and that once this is accepted, there is no need to enquire further as to the nature or basis for the criticisms made.

121 Criticism or review may be unbalanced or strongly expressed and nevertheless fall within s 103A. Nonetheless, it has to be recognisable as criticism or review. As I read his Honour's decision the defence failed because the so-called criticism or review in relation to the set was not recognisable as such. I agree with his Honour's conclusions in this regard.

7. The Inaugural Allan Border Medal Dinner

122 The primary judge would have upheld a fair dealing defence of reporting of news in respect of this re-broadcast. However, was it news that Glenn McGrath did not notice the Prime Minister's attempt to congratulate him at the dinner? There is no suggestion that Mr McGrath deliberately ignored the Prime Minister, or that on the actual night anyone thought that the Prime Minister had been publicly embarrassed. The only public embarrassment was created by The Panel's publicising of a background and unnoticed incident. It was done by showing the footage in slow motion (unlike the original). Section 103B proceeds upon the basis that the news exists independently of the Panel Segment, and the defence is attracted if the Panel Segment is broadcast for the purpose of or in association with the reporting of that news. Yet here, if there is any news, it arises by reason of the slowing down of the footage so as to display a hitherto unnoticed incident which, had it been noticed, might have been a source of embarrassment for the Prime Minister. I agree with Nine's submission that it is not a fair dealing for the purpose of reporting news to use footage in a particular way so as to create the appearance of a public embarrassment and then to assert that the re-broadcast of the footage was merely the report of a public embarrassment.

123 Nine's appeal in relation to this Panel Segment should be upheld.

8. The Sunday Program

124 The primary judge held that this was "perhaps the clearest exemplification" of the s 103B(1)(b) defence. The theme of The Panel commentary on this re-broadcast was that the allegations of drug-taking made on the Nine footage by a so-called Sports Performance Consultant constituted gross exaggeration, yet had been inappositely made in the context of the pending Olympic Games in Sydney.

125 Nine submits that it was not **necessary** for Ten to re-broadcast Nine's copyright in the expansive manner in which it did for the purpose of reporting the news that 70-80 per cent of elite athletes take drugs. Whether excessive use was made of the material in which copyright subsists so as to negative the fair dealing defence is very much a matter of impression. I agree with the impression formed by the primary judge. Nine has not established that the conclusion reached by the primary judge in this respect was erroneous.

9. The Today Show (Prasad interview)

126 The primary judge held that this Ten re-broadcast encaptures the perils of live interviews on television, and on balance, found that the purpose of using the Panel Segment was to lightly and humorously criticise the Nine broadcast.

127 Ten's re-broadcast involved the "splicing" or "merging", in a compressed fashion, of elements of the original broadcast that were temporally separated. Nine submits that the splicing distorted the impact of the background interference in the interview in order to achieve a humorous result. Ten contends that the editing did not affect the fairness of the dealing, but rather more plainly conveyed the criticism being made, although the nature and content of the so-called criticism was never clearly identified.

128 The primary judge's conclusion was one which he reached "not without some difficulty". With respect, I do not agree with that conclusion. The broadcast of the Panel Segment was made for its own sake, or, as Nine put it, "watch this for fun" rather than as something shown as part of an exercise of criticism or review. The Panel members giggled about homeless men coming into the background of the interview. Any humour that existed in that respect was accentuated by the splicing. In my view, the fair dealing defence was not made out.

10. Newsbreak

129 The primary judge would have upheld a defence of fair dealing for the purpose of criticism or review. There was a technical glitch in the source programme which involved the appearance of the presenter of "Newsbreak" being accidentally shrunk or abbreviated to a very small size. The Panel commentator showed the Panel Segment in association with the commentary that live television is fraught with peril.

130 Nine submits that the "content of the re-broadcast (a technical glitch suffered in the Newsbreak programme) may be humorous. But while criticism or review may be humorous, humour without criticism or review does not ground a fair dealing defence".

131 Whilst there is force in Nine's submissions, what Ten has done is to draw attention, in a humorous way, to a fault appearing in the original television broadcast by Nine. The primary judge characterised that as an exercise in criticism or review. I agree with that

characterisation. It has not been shown that his Honour was in error in coming to the conclusion which he did.

Sufficient acknowledgment

132 This issue was not pursued on appeal.

Conclusion

133 Nine's appeal should be upheld in relation to the following Panel Segments:

- "A Current Affair"
- "The Inaugural Allan Border Medal Dinner"
- "The Today Show" (Prasad interview)

but should otherwise be dismissed. Ten's Notice of Contention should be dismissed.

134 In order to give effect to these conclusions:

- the orders made by the primary judge on 20 February 2001, 4 July 2001 and 10 September 2001 should be set aside.
- In lieu thereof it should be declared that the making by Ten of a cinematograph film of the undermentioned Panel Segments, and the re-broadcasting by Ten of those Panel Segments is an infringement of Nine's copyright in the television broadcasts from which the Panel Segments were extracted:
 - "The Today Show" (Boris Yeltsin)
 - "A Current Affair"
 - "The Inaugural Allan Border Medal Dinner"
 - "The Today Show" (Prasad interview)
 - "Midday" (Prime Minister singing)
 - "Wide World of Sports" (Grand Final celebration)
 - "Australia's Most Wanted" (ARIA Award)
 - "Pick Your Face" (Kerrie-Anne Kennerley)
 - "Crocodile Hunter" (Scuba Diving)
 - "Simply the Best" (Ray Martin)
 - "The Today Show" (Child yawning)

- “Nightline” (Kevan Gosper)
- The matter should be remitted to the primary judge for consideration of any further or other relief consequential upon these declarations.

135 Ten should pay Nine’s costs of the appeal. The costs of the proceedings at first instance should be remitted to the primary judge for reconsideration in the light of the result of the appeal.