

***TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)***  
**[2005] FCAFC 53**

**FEDERAL COURT OF AUSTRALIA**

SUNDBERG, FINKELSTEIN & HELY JJ

**SUNDBERG J:**

1           I have not viewed the Andy Warhol films referred to at [28] of Finkelstein J's judgment. I agree with his Honour's reasons, which do not turn on that paragraph, and with the orders proposed by him.

**FINKELSTEIN J:**

2           Section 91 of the *Copyright Act 1968* (Cth) provides that copyright subsists in a "television broadcast" made from a place in Australia by the holder of a licence under the *Broadcasting Services Act 1992* (Cth). In this case there was a dispute as to the meaning of "television broadcast". Was it each single image shown on a television set, or was it the programme constituted by an aggregation of those images? The dispute was resolved by the High Court: *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585. The High Court (by majority) pointed out (at 599) that the interest to be protected by this particular form of copyright (being copyright in non-original subject matter) is the cost and skill in assembling or preparing and transmitting the programme to the public. The nature of this interest, as well as the enacting history of s 91, led the High Court (at 593) to the conclusion that "broadcast" means "programme". In reaching this conclusion the High Court said (at 593) that the contrary view "fixed upon the medium of transmission, not the message conveyed by its use". Implicitly the High Court rejected the idea that the medium is the message, an idea popularised by Marshall McLuhan in *Understanding Media: The Existence of Man* (1<sup>st</sup> ed, McGraw-Hill, New York, 1964).

3           The High Court did not resolve the entire dispute between the appellants ("Nine") and the respondent ("Ten"). Ten's weekly television programme, *The Panel*, used 20 short extracts (between eight and 42 seconds) from programmes previously broadcast by Nine, extracts which had previously been recorded on video tapes. Nine alleges that those extracts infringe its copyright in the programmes. At trial ((2001) 108 FCR 235) and on appeal ((2002) 118 FCR 417) Ten made out a fair dealing defence in respect of nine extracts. The

dispute still to be resolved is whether the remaining 11 extracts that were copied and re-broadcast were “substantial” parts of the programmes from which they were taken. Only if they were “substantial” parts of those programmes will Nine’s copyright be infringed.

4           The first thing to be done is to resolve a different dispute. When deciding whether a part of a programme is a substantial part of that programme for copyright purposes it is necessary to compare what has been taken with the copyright work. In the case of broadcast copyright it is necessary to identify with precision the particular programme in which it is alleged the copyright has been infringed. This task is not as easy as it seems. Nine says that each programme identified in its statement of claim (the programmes ranged in duration from approximately 30 minutes to approximately five hours) is a separate television broadcast. Both Nine and Ten say that any advertisement shown during the course of a programme should be treated as a separate and discrete broadcast. According to the High Court those propositions are correct. On the other hand, and this is where a dispute has arisen, Nine claims that if a particular programme can be divided into separate and distinct parts in terms of theme, story and impact each segment should be treated as a separate broadcast. This is an important point. If a copyright owner is able to confine a programme in terms of length and subject matter, it will be easier for the owner to establish that the part that is taken is “substantial”. The parties are at odds as to whether the High Court has determined that the programmes in this case are those described in Nine’s statement of claim (where they are not broken into segments) or whether, for the purposes of determining infringement, the High Court left open the possibility that they may be segmented.

5           On this aspect the High Court first said ((2004) 78 ALJR 585, 600) that “a television broadcast” cannot be defined with “precision”. Nevertheless it said the programmes that Nine identified in its pleading do answer that description, subject to the qualification that advertisements should be treated as discrete and separate programmes. The High Court referred to the judge’s view that in an appropriate case it may be possible to treat a segment of a programme as the measure of a television broadcast. The majority (at 600) said as to this: “We would reserve consideration of that proposition for a particular case where the point arises.” They added, no doubt by way of caution, that even if the judge’s proposition is correct, a news broadcast made up of various segments, items or stories did not “necessarily render each of [them] a television broadcast in which copyright subsists”. For a similar view see *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 108.

6 It is, I think, clear that the High Court did not resolve whether any of Nine's programmes can be divided into segments where each segment is treated as a separate "television broadcast". First the judge himself did not make a final determination on this issue, it being unnecessary for him to do so. Second, the High Court was not specifically asked to rule on this point. Third, if the High Court had intended to determine the issue it would have analysed the programmes in question and there was no such analysis. So the position is still open, but for reasons that will soon become apparent the dispute need not be resolved on this appeal.

7 The principal issue that confronted the judge on the issue of substantiality was whether he should adopt the approach that applied to original works or whether a different test was required for non-original subject matter. Copyright in an original work will be infringed if there is an unauthorised reproduction of the work or if a person purports to be the author of the work by illegally appropriating the fruits of the author's labour by reproducing his work with colourable alterations. In *Dicks v Yates* (1881) 18 Ch D 76, 90, James LJ referred to the first kind of infringement as "open piracy" and to the second as "literary larceny".

8 Piracy is not committed only when the defendant has published the whole of the copyright work. If that happens it is immaterial in what form and for what purpose the work has been reproduced: *Scott v Stanford* (1867) LR 3 Eq 718, 723. There will also be piracy if the defendant reproduces a part of an original work because copyright protects the whole and all parts of the work: *White v Gerock* (1819) 2 Barn & Ald 298 [22 RR 786]; *Cary v Longman and Rees* (1801) 1 East 358. When part of the plaintiff's work is reproduced there will be an infringement of copyright if the part is an essential or material part of the original work. This was the position under the early Copyright Acts: *Sweet v Shaw* (1839) 3 Jur 217; *Sweet v Cater* (1841) 11 Sim 572, 573 [59 ER 994]; *Bohn v Bogue* (1846) 7 LT (OS) 277, 278; *Jarrold v Houlston* (1857) 3 K & J 708, 719 [69 ER 1294, 1299]; *Tinsley v Lacy* (1863) 1 H & M 747, 751 [711 ER 327, 329]. The rule had become so well entrenched that when s 2 of the *Dramatic Copyright Act 1833* (3 & 4 Will 4 c 15) for the first time enacted that there would be an infringement of copyright (in that case in a dramatic work) if there had been an unauthorised reproduction of "any part of the work", this was construed to mean a material or substantial part of the work: *Chatterton v Cave* (1878) 3 App Cas 483, 492. Section 2 of the *Copyright Act 1911* (UK), which was in force in Australia from 1912 until its repeal by the

*Copyright Act 1968* (Cth), made express provision for the reproduction of a substantial part of a copyright work to constitute an act of infringement. See now *Copyright Act 1968*, s 14.

9           There is no fixed rule for determining how much of a copyright work must be taken for it to be a substantial part of the work. The area of substantial similarity is at the heart of copyright law, yet it remains one of its most elusive aspects. The general rule is that substantiality depends on quality not quantity: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 293. Often it will be obvious whether or not a substantial part of the copyright work has been taken from a visual or, if appropriate, an oral comparison between the copyright work and the allegedly infringing work: see *Hanfstaengl v Empire Palace* [1894] 3 Ch 109, 129 per Lindley LJ: (“the degree of resemblance is all important”). In the United States the visual comparison that is required is referred to as the “ordinary observer test” and is derived from *Daly v Palmer* 6 Fed Cas 1132, 1138 (2nd Circ, 1868). Following the decision in *Arnstein v Porter* 154 F 2d 462, 473 (2nd Circ, 1946) the approach is sometimes referred to as the “audience test”. The test invites that a comparison be conducted between the two works for the purpose of deciding substantial similarity: see by way of example *Henry Holt & Co Inc v Liggett & Myers Tobacco Co* 23 F Supp 302, 304 (3rd Circ, 1938); *Concord Fabrics Inc v Marcus Brothers Textile Corp* 409 F 2d 1315, 1316-1317 (2nd Circ, 1969); *Miller Brewing Company v Carling O’Keefe Breweries of Canada, Ltd* 452 F Supp 429, 440 (2nd Circ, 1978); *American Greeting Corporation v Easter Unlimited, Inc* 579 F Supp 607, 615-616 (2nd Circ, 1983).

10           There will be cases where a visual or oral comparison will not enable the tribunal to decide whether the part taken is indeed substantial. This is especially so when the amount copied is small. There will be an infringement if the defendant has reproduced something that is of aesthetic significance. Sometimes, however, “[w]hen it comes down to a question of quantity [the answer] must be very vague”: *Bramwell v Halcomb* (1836) 3 My & Cr 732, 738 [40 ER 1110] per Lord Cottenham LC. In a doubtful case other factors must be considered.

11           One factor is the economic significance of that which has been taken. In *Bramwell v Halcomb* (1836) 3 My & Cr 732, 738 [40 ER 1110] Lord Cottenham said that it is the “value [to the plaintiff of what has been taken] that is always looked to.” See also *Bell v Whitehead* (1839) 8 LJ Ch 141, 142 per Lord Cottenham LJ: (“Here, the value of the extract is very

minute and trifling, and if there were nothing else in the case, the extreme minuteness of the value in the extract, and of the injury sustained by the plaintiff, would be sufficient to induce the Court not to interfere”); *Scott v Stanford* (1867) LR 3 Eq 718, 723 per Sir W Page Wood VC: (“But if, in effect, the great bulk of the Plaintiff’s publication – a large and vital portion of his work and labour – has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice as the Court can only look at the result, and not at the intention in the man’s mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects.”); *Bradbury v Hotten* (1872) 8 LR Ex 1, 6 per Kelly CB: (“The principle of [the authorities] is, that where one man for his own profit puts into his work an essential part of another man’s work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy upon which a jury should act”); *Weatherby & Sons v International Horse and Agency and Exchange Limited* [1910] 2 Ch 297, 305 per Parker J: (“[In utilising the plaintiff’s labour and industry] they have appropriated the result of [his] labour and expense to their own use, and even if they have injured the plaintiffs in no other way, they have at any rate deprived them of the advantage, which their copyright conferred on them, of being able to publish such a book as the defendant’s book at much less labour and expense than any one else.”). See also *Cambridge University Press v University Tutorial Press* (1928) 75 RPC 335, 343-344.

12           It should be noted, however, that if there is no damage to the plaintiff he will not necessarily fail in this action, for the right protected by the Copyright Act is not dependent upon proof of damage: see *Kipling v Genatosan Ltd* (1920) Mac Cop Cas 203, 205 per Peterson J: (“It was said that there was no competition or damage. But the judgment of Lord Parker in *Weatherby v International Horse Agency* ... showed that there might be infringement without either of these elements in the case”); *Hawkes and Son (London) Limited v Paramount Film Service, Limited* [1934] 1 Ch 593, 603 per Lord Hanworth: (“[T]he right of the owner of a copyright is not determined or measured by the amount of actual damage to him by reason of the infringement; copyright is a right of property, and he is entitled to come to the Court for the protection of that property even though he does not show or prove actual damage”).

13           Another factor is the use which the defendant makes of the copied portion of the plaintiff’s work. An unfair use, as when the defendant intends to go into competition with the

plaintiff, may be a determining factor: *Bradbury v Hotten* (1872) 8 LR Ex 1, 6 per Kelly CB: (“Is [the defendant] by so doing applying to his own use and for his own profit what otherwise the plaintiffs might have turned, and possibly may turn, to a ‘profitable account’? The pictures are of great merit, and no doubt were largely paid for, and by inserting these copies the defendant has unquestionably added to the value of his publication. Why should this not be an infringement?”); *Chatterton v Cave* (1878) 3 App Cas 483, 498 per Lord O’Hagan: (“In all, quantity and value are both the subjects of consideration, and in none of them has an infringement been established without satisfactory evidence of an appropriation, possibly involving a substantial loss to one person and a substantial gain to another; although as was observed by Lord Chief Justice Tindal in *Planche v Braham*, ‘the damage to the Plaintiff is not the test of the Defendant’s liability,’ and the penalty is to be paid ‘even if there is no actual damage’”); *Cooper v Stephens* [1895] 1 Ch 567, 572 per Romer J: (“But, in considering a question of infringement like this, it is important to consider the intent of the copyist and the nature of his work as was observed by Lord Chief Baron Kelly in *Bradbury v Hotten*. In the present case I observe that the Defendants are using the five drawings complained of for the very purpose for which the originals were made by the Plaintiffs, and so as to escape making any payment to the Plaintiffs in respect of their right in the drawings. And I cannot help seeing that, if the Defendants are allowed to do with impunity what they have done, the Plaintiff’s copyright will be rendered practically valueless, and, in fact, destroyed”). Once again, as several of these passages indicate, the defendant’s intention to profit from competition with the plaintiff is not necessarily decisive. See also *Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637, 656.

14            This whole area is neatly summed up by Storey J in *Folsom v Marsh* 9 Fed Cas 342, 348 (Mass, 1841):

*“It is certainly not necessary, to constitute an invasion of copyright, that the whole of the work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. ... Neither does it necessarily depend upon the quantity taken ... [i]t is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work. ... In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”*

15           The effect of the authorities seems to be this. The test of substantiality – that is the notion of quality – is not confined to an examination of the intrinsic elements of the plaintiff’s work. The test of substantiality may involve a broader enquiry, an enquiry which encompasses the context of the taking. The key ideas here are first that copyright is granted to protect the owner’s financial interest in his property. The second idea links financial harm to the rationale of unfair use or the injurious appropriation of the plaintiff’s skill and labour. The level of financial harm may indicate that the use of that labour is unfair. In *Blackie & Sons Limited v The Lothian Book Publishing Company Proprietary Limited* (1921) 29 CLR 396 Starke J (at 402-403) said that the question was “[whether] the defendant, to use the words of the statute, reproduced a substantial part of the plaintiff’s book...or...has an unfair or undue use been made of the work protected by copyright?” One of the factors upon which Starke J relied to conclude (at 403) that the defendant “[appropriated] a substantial and valuable portion” of the plaintiff’s work was that the defendant’s books were intended to be, and were, in direct competition with the plaintiff’s. The third idea draws on the paradigm of piracy. The “clear case” of copyright infringement is where the defendant sells a cheaper version of the plaintiff’s work, causing the plaintiff financial harm. The fourth idea is the concept of “value”, which denotes more fully than the word “quality” a financial dimension as well as the notion of originality or artistic merit.

16           Evidence of the harm caused by the defendant’s conduct is potentially relevant in a number of ways. First, and most importantly, it might indicate that the financial interest protected by copyright has been interfered with. Its absence might indicate the contrary. Second, it may indicate that the extent of the taking has been unfair, for example when it causes the plaintiff injury by reducing his profits. Third, it may be evidence of a straightforward piracy, being an intentional “stealing” for profit of the author’s skill or labour. Last, it might highlight that the part taken is important, vital or material in the sense that the part gives the work its financial value. As Lord Herschell LC said in *Leslie v J Young & Sons* [1894] AC 335, 342: “[i]t may be the very thing that the presence or absence of which would most largely promote or retard the sale of the work.”

17           When the judge came to decide the issue of substantiality it was by no means clear how the principles applicable to original works should be applied to broadcast copyright. There were only two decisions that had considered substantiality in the case of copyright in non-original subject matter, *Nationwide News Pty Ltd v Copyright Agency Limited* (1996) 65

FCR 399, a decision of the Full Federal Court, and *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] Ch 257, a decision of the English Court of Appeal. Each case concerned copyright in a published edition. In *Nationwide News Pty Ltd v Copyright Agency Limited* it was held that published edition copyright was in the typographical arrangement or composition of the whole published edition. The leading judgment was delivered by Sackville J. On the question of substantiality he said that it was necessary to apply the test derived from cases on infringement of original works, where substantiality refers to the quality of what is taken. Applying that test to published edition copyright he said (at 418): “In relation to a published edition, the quality of what is taken must be assessed by reference to the interest protected by the copyright. That interest ... is in protecting the presentation and layout of the edition, as distinct from the particular words or images published in the edition.” He further went on to say (at 419) that “since [the key issue is to determine] the quality of the material taken ... the quantity is not the only nor necessarily the principal criterion”. He then referred with obvious approval to a passage in *Copinger and Skone James on Copyright* (13th ed, 1991) where the authors said (at 8-27) that “[i]n deciding [the quality or importance of the part taken] regard must be had to the nature and objects of the selection made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the object of the original work.”

18           A different view of substantiality in relation to published edition copyright was taken in *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] Ch 257. The Court of Appeal decided that substantiality could be determined quantitatively. This was in line with the views of Laddie, Prescott and Vitoria in *The Modern Law of Copyright and Designs* (2nd ed, 1995) at para 8.18, where the authors said that “‘substantial part’ simply means any part of the work so long as it is not so small as to be trivial”. This view was repeated in the 3rd edition (2000) at para 8.37: (“It may be that anything which is not de minimis will be regarded as ‘substantial’”). I adopted this view in relation to cinematograph film copyright in *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31, 91-92.

19           The quantitative test has not, however, survived. It was rejected when *Newspaper Licensing Agency Ltd v Marks & Spencer plc* [2003] 1 AC 551 was taken to the House of Lords. The leading speech was given by Lord Hoffman. He said (at 560) that, as with original works, substantiality is to be tested by quality rather than quantity. “But”, asked



Lord Hoffman (at 559), “what quality is one looking for?” In the case of original works it is in the originality of the skill or labour in producing the work. In the case of a published edition it is in the skill of designing the arrangement and the labour and cost of setting it up and keeping it running. As regards quantity, Lord Hoffman said (at 561) that “[t]he test is quantitative in the sense that as there can be infringement only by making a facsimile copy, the question will always be whether one has made a facsimile copy of enough of the published edition to amount to a substantial part. But the question of what counts as enough seems to be qualitative, depending not upon the proportion which the parts taken bears to the whole but on whether the copy can be said to have appropriated the presentation and layout of the edition.” In *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585 the High Court decided that this approach is to be followed in Australia. The court said (at 595) that: “Questions of quality ... as well as quantity arise both in respect of [non-original subject matter copyrights] and ... copyrights in original works”.

20           A number of things must be borne in mind when applying the traditional test to broadcast copyright. The first is that the exclusive right of the owner of a television broadcast is, broadly speaking, to make a cinematograph film of the broadcast, to re-broadcast it or to communicate (that is make available online or to electronically transmit) the broadcast to the public otherwise than by broadcasting it: see Copyright Act, s 87 and the definition of “communicate” in s 10. Thus there will only be an infringement if the actual broadcast or a substantial part of the broadcast is faithfully copied or rebroadcast. It will not suffice to show that the defendant has broadcast a colourable copy of the plaintiff’s work as it would in the case of, say, artistic copyright. The second thing to be borne in mind is that “the quality of what is taken must be assessed by reference to the interest protected by the copyright”: *Nationwide News Pty Ltd v Copyright Agency Limited* (1996) 65 FCR 399, 418 per Sackville J. The High Court (at 599) identified this interest as “the cost and skill in assembling or preparing and transmitting programmes to the public”. The interest covers the different kinds of programmes that are broadcast. They range from live broadcasts (such as news and sports programmes) to programmes recorded in the studio and the transmission of cinematographic film, such as a motion pictures or a television series.

21           The judge did not have the benefit of the decisions of the House of Lords and High Court. He formulated a test which sought to bridge the gap between *Nationwide News Pty Ltd v Copyright Agency Limited* and the Court of Appeal decision in *Newspaper Licensing*

*Agency Ltd v Marks and Spencer plc* accepting, so it seem to me, that aspects of each decision could be made to apply to broadcast copyright. Ten had submitted to the judge that “(a) a primarily quantitative approach should be taken; (b) the commercial purpose of the utilisation of the excerpts in the [sic] question should be looked at; and (c) matters of technical significance in the excerpt with respect to the broadcast may also be relevant.” The judge accepted this submission with “minor qualification”.

22 The “minor qualification[s]” were as follows. First the judge said (at 274) that Ten’s adoption of the “primarily quantitative approach” was sound, but the approach did not “wholly encapsulate” the test enunciated in *Nationwide News Pty Ltd v Copyright Agency Limited* (1996) 65 FCR 399. He explained (at 274) that “the notion of substantiality falls to be determined as a matter of degree by reference to the quality of presentation and screen appearance of the program which has been taken, as well as the quantity of the program in terms of viewing time which has also been taken”. Then (at 274), seemingly by way of summary and, according to the judge, to put the matter “in more practical terms”, the judge said the question was this: “[Has] harm ... been caused to Nine’s commercial interest in the whole of its particular program”? The second “minor qualification” was to the “commercial purpose” limb of the test. As to this the judge said (at 274) that “care must be taken to avoid the application of that [limb] in a mutually exclusive way from the tests concerning quantity and quality.”

23 Later in his reasons the judge provided what he described as a summary of the principles applicable to substantiality. It is necessary to set out the relevant parts of that summary because it differs in some respects from the judge’s earlier statement of the test. He said (at 285-286):

- “(iii) ...a primarily quantitative approach will usually be the most practical starting point of any inquiry.
- (iv) quality is concerned with the considerations associated with infrastructure of production, and in consequence with the technicalities of presentation and appearance of the visual images rather than what may be involved in terms of program theme, story, information or other program content.
- (v) one simple and practical test is to ask the question whether there has in truth taken place a ‘pirating’ by the alleged infringer from the program or program segment, that is to say, a significant interference

*with the television broadcaster's commercial interest in terms of the nature, value and degree of what has been taken; in short, has harm been inflicted on the television broadcaster's commercial interest in the ... program. ...*

(vi) *... a further guide ... may be the object or purpose of the re-broadcaster ... ; an object or purpose of satire, comedy or light entertainment, will not normally involve infringement because it will not involve imitation and thus copying, whereas the same cannot be said in relation to the contrasting notions of parody and burlesque, the essence of which is imitation and thus copying."*

24 The judge then applied the test he had formulated to the facts of the case. The result was a finding that there had been no infringement of Nine's copyright. The judge explained (at 287-288) that if quantity alone was the sole factor for the measurement of Ten's liability, Nine was bound to fail. He went on (at 288) to say, however, that it was also necessary to assess "the factor of quality in the relevant sense of technical presentation, arrangement and appearance, and the further factor of Ten's object or purpose of copying". As regards those factors the judge said (at 288):

*"These critical factors of quantity, quality and object or purpose do not operate in a mutually exclusive way ... [They] must be resolved as to whether harm has been inflicted on Nine's commercial interest in the whole of the program or program segment and whether Nine's commercial interest has been interfered with in terms of the nature, value and degree of what has been taken."*

25 He also said (at 288) that he could not identify "any instance where in terms of appearance or presentation it can reasonably be postulated that harm has been occasioned to Nine's commercial interest". To the contrary, the judge said that what had been taken was de minimis and for the most part trivial and was used by Ten for different purposes "than those targeted by Nine". When regard was had to each relevant factor "it [could] not be reasonably postulated that any use by Ten of the footage or excerpts taken occasioned harm to the scope of Nine's legitimate entitlement to television broadcast copyright protection."

26 It is evident from this summary that the judge's approach was to focus upon one single issue, namely whether Nine suffered any economic harm as a result of the use made of its programmes by Ten. Because Nine suffered no harm its copyright had not been infringed.

27 It is now clear that the starting point for any enquiry into substantiality is not, as the judge would have it, "primarily quantitative". Nor is the principal enquiry whether harm has

been caused to the plaintiff's commercial interests. The first thing that must be done is to look at the part taken, compare it with the copyright work and ask whether it is possible to conclude from that comparison whether that part is a "substantial part" of the plaintiff's programme. The question will often boil down to one of the following (dependent on the type of programme): Does what has been taken amount to "essentially the heart" of the copyrighted work?: *New Era Publications International, ApS Carol Publishing Group* 904 F 2d 152, 158 (2nd Circ, 1987). Is what has been taken "the essential part of the copyright work?": *Cable / Home Communications Corporation v Network Productions, Inc* (902) F 2d 829, 844 (11th Circ, 1990). Is what has been taken "at least an important ingredient" of the copyright work?: *Salinger v Random House* 881 F 2d 90, 99 (2nd Circ, 1987). Have the best scenes been taken from the programme?: *Hi-Tech Video Productions Inc v Capitol Cities / ABC* 804 F Supp 950, 956 (W. D. Mich, 1992). Are the excerpts "highlights" from the programme?: *New Boston Television Inc v Entertainment Sports Programming Network Inc* 215 US PQ 755, 757 (D. Mass, 1981). Are the excerpts central to the programme in which it appeared?: *Roy Expert Company Establishment of Vaduz Liechtenstein, Black Inc v Columbia Broadcasting System Inc* 503 F Supp 1137, 1145 (2nd Circ, 1980). Does the portion used "constitute the 'heart' – the most valuable and pertinent portion – of the copyright material?": *Los Angeles News Service v CBS Broadcasting, Inc* 305 F 3d 924, 940 (9th Circ, 2002).

28           If what has been taken does not meet any of those descriptions that will often be the end of the enquiry. There will, however, be borderline cases where an enquiry based on a visual comparison will not yield a result. Take as an example a programme that has no "core" or "heart". Here I have in mind two cinematograph films by the 1960s icon Andy Warhol. The films are "Sleep" and "Empire", films that few people have seen. "Sleep" has been described as "one of the most famous of unseen films": F Camper, "The Lover's Gaze", *Chicago Reader Movie Review*, section 1, 28 April, 2000. It is a six-hour (some say longer) film taken by a stationary 16 mm camera of a man sleeping. The reviewer Jonas Mekas writing in the *Village Voice* (September, 1963) queried whether the film was: "An exercise in hypnosis? Test of patience? A Zen joke?" *Empire* is a single shot from late dusk to early morning of the Empire State Building taken from the 44th floor of the Time-Life Building. Mr Koch described *Empire* as "the most profoundly mute motion picture ever filmed": S Koch, *Stargazer: Andy Warhol's World and His Films* (2nd ed, M Boyars, New York, 1985) at 60. The film has no plot and only two things happen. The sun moves through the sky and, at dusk, floodlights are turned on to illuminate the upper floors of the Empire State Building.

If part of “Sleep” or “Empire” is taken, no amount of visual comparison would enable a tribunal to determine whether that part is a substantial part of the film. It would be necessary to consider factors such as the plaintiff’s financial interest as well as the defendant’s purpose to resolve the issue.

29           There is one other aspect of the judge’s test for substantiality which, with respect, I think is wrong. It is the judge’s acceptance of Ten’s submission that “matters of technical significance ... to the broadcast may also be relevant”. According to the judge (at 273) those matters encompass the “technical considerations associated with the infrastructure of production”. If by accepting Ten’s submission the judge meant that it is either necessary or permissible to enquire into the means by which a programme is created and broadcast then in my view he is in error. It cannot make any difference to the test of substantiality if, say, there is a live broadcast of a sporting event using several television cameras and microphones near the scene that send their signals to a control room where they are combined and then transmitted to television sets or whether the broadcast is of a video recording of the event. At any rate “matters of technical significance” is not the interest protected by the copyright.

30           The final thing that remains to be done is to apply the correct test to the extracts taken from Nine’s programmes. Here I will not repeat the description of the programmes; the programmes have been sufficiently described in previous judgments. I will provide enough of a description so that the reasons for reaching my conclusions will be understood. For that purpose I will in large measure paraphrase Nine’s description of the programmes for it appears to be accepted by Ten that those descriptions are reasonably accurate.

31           Ten infringed Nine’s copyright in the television broadcast when it broadcast the following extracts.

32           The Inaugural Allan Border Medal Dinner: Ten copied 10 seconds of the programme. The programme centred upon the dinner and presentation of the inaugural Allan Border Medal for the Australian cricket player of the year. The extract was of Glen McGrath’s reaction to the announcement that he was the winner of the award, his displayed emotion and the congratulations from his surrounding team mates. The cameras were trained on the winner to capture that moment. The cameras then followed Mr McGrath as he moved towards the stage. The excerpt was plainly a material and important part of the programme.

The evidence of Mr Burns was that the announcement of Glen McGrath as the Australian cricketer of the year was “the highlight of the dinner”.

33 Midday (Prime Minister singing Happy Birthday): Ten copied 17 seconds of the programme. The presence of the Prime Minister on the Midday show was a key part of that day’s programme. The footage of the Prime Minister singing Happy Birthday to Australian cricketing legend, Sir Donald Bradman, was a key and memorable feature. One of the panellists, Mr Gleisner, said the footage should be included in the Midday’s shows “best of” special.

34 Wide World of Sports (Grand Final Celebration/Glen Lazarus cartwheel): Ten copied eight seconds of the programme. The footage of the Glen Lazarus cartwheel was, on any view, a “highlight”. Mr Lazarus was a prop (affectionately known as “the brick with eyes”). He was playing his very last game of rugby league and was able to celebrate it with a win in the 1999 grand final.

35 Australia’s Most Wanted (re-enactment of stabbing by party gatecrashers): Ten copied 26 seconds of the programme. “Australia’s Most Wanted” is a programme directed at unsolved crimes and seeking public assistance in relation to particular crimes that are the subject of re-enactments on the programme. The re-enactment was of a gang of youths who gatecrashed a party. The gatecrashers intimidate the innocent partygoers. The gatecrashers then force entry into the house and one of them stabs a young man. The intimidation and break-in sequence coupled with the climactic stabbing scene is very dramatic and clearly central to the programme in which it appeared.

36 Pick Your Face (Keri-Anne Kennerley): Ten copied 20 seconds of the programme. This programme is a game show for children. The identification by contestants of the faces they have assembled is an important part of the show. One of the Panel members, Mr Gleisner described the excerpt of the child who wrongly identified Keri-Anne Kennerley (from faces shown on a board) as a “little highlight”.

37 The Today Show (child yawning): Ten copied nine seconds of the programme. The footage rebroadcast involved part of an interview by Richard Wilkins with Alex Breden, and his mother. Alex was a child celebrity who featured on the HBA health insurance

advertisements. The extract showed Alex yawning while being interviewed. It is a memorable part of the interview.

38           There has been no infringement by taking extracts from the following programmes: A Current Affair (brothel masquerading as introduction agency); The Today Show (Boris Yeltsin); The Crocodile Hunter (scuba diving); The Today Show (Prasad interview); and Nightline (Kevin Gosper interview). In each case the extracts were very short, but as I have previously said quantity does not dictate the answer. I have found that these extracts have not infringed Nine's copyright because the extracts were insignificant (de minimis is another description) in the context of Nine's programme (or, if it be relevant, the segment of the programme from which they were taken). Moreover, as the judge pointed out, the taking of these extracts caused absolutely no injury to Nine's interests.

39           This leaves the question of costs both of this part of the appeal and the earlier appeal which, according to the High Court requires reconsideration by us. In my view the proper orders to make are that Nine should recover two thirds of its costs on the basis that defences were made out on approximately 70 per cent of the disputed extracts.

**HELY J:**

40           This case concerns the broadcast by the respondent ('Ten') of portions of television programmes first broadcast by the appellants ('Nine'). The portions were broadcast by Ten during a television production called 'The Panel' ('the Panel Segments'). At first instance, Conti J dismissed claims by Nine for infringement based on s 87(c) of the *Copyright Act 1968* (Cth): *TCN Channel Nine v Network Ten* (2000) 108 FCR 235. Later his Honour dismissed claims by Nine based on s 87(a) of the Act: [2001] FCA 841.

41           This Court upheld an appeal from the decision of Conti J: (2002) 118 FCR 417. A further appeal to the High Court of Australia by Ten was successful: (2004) 78 ALJR 585 (McHugh ACJ, Gummow and Hayne JJ, Kirby and Callinan JJ dissenting). At the conclusion of the judgment of the majority, the following appears:

*'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 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.'*

42 There was thus remitted for determination whether each of the Panel Segments is a substantial part of the source television broadcast from which the particular panel segment was taken. Eleven discrete items remain in dispute, as indicated in the following table (which, apart from the last column, is derived from the judgment of Conti J):

<b>Nine Programme Title</b>	<b>Duration of Nine Programme</b>	<b>Duration of Nine Segment (if applicable)</b>	<b>Duration of Ten Re-Broadcast (ie, Panel Segments)</b>	<b>Percentage of Nine Programme Re-Broadcast in Panel Segment</b>
'A Current Affair' (Masquerade of Introduction Agency)	22 mins & 51 secs	6 mins & 39 secs	9 secs	0.66%
'The Inaugural Allan Border Medal Dinner' (Prime Minister embarrassed)	2 hrs 11 mins & 44 secs	42 mins & 17 secs (or at best 5 mins & 50 secs)	10 secs	0.13%
'The Today Show' (Boris Yeltsin)	90 mins & 2 secs	1 min & 24 secs	13 secs	0.24%
'Midday' (Prime Minister singing)	67 mins & 34 secs	15 mins & 5 secs	17 secs	0.42%
'Wide World of Sports' (Grand Final celebrations)	4 hrs 57 mins & 30 secs	8 mins & 16 secs	8 secs	0.04%
'Australia's Most Wanted' (Aria Award)	43 mins & 2 secs	8 mins & 55 secs	20 secs	0.77%
'Pick Your Face' (Kerri-Anne Kennerley)	22 mins & 32 secs	5 mins & 25 secs	20 secs	1.48%
'Crocodile Hunter' (Scuba diving)	42 mins & 50 secs	7 mins & 23 secs	28 secs	1.09%
'The Today Show' (Prasad interview)	1 hr 29 mins & 56 secs	5 mins & 9 secs	42 secs	0.78%



'The Today Show' (Child yawning)	1 hr 30 mins & 30 secs	4 mins & 33 secs	9 secs	0.17%
'Nightline' (Gosper interview)	25 mins & 50 secs	3 mins	10 secs	0.65%

### Programme Segments

43 The resolution of the question remitted to this Court necessarily begins with the identification of the source television broadcast, particularly as Nine claims that if a television programme (such as, for example, the 'Today Show') can be divided into separate and distinct parts in terms of theme, story or impact, then each segment should be treated as a separate television broadcast. Ten submits that the High Court has determined this question adversely to Nine, and it is not now open to Nine to contend that some smaller unit of subject matter than the television programme, such as 'programme segment', is the appropriate television broadcast.

44 The majority of the High Court posed the following question (at [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?'*

Their Honours answered that question (at [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, 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.'*

And their Honours (at [76] and [77]) reserved consideration of whether, on the facts of a given case, to use a segment of a programme rather than the whole of the programme for measurement of the television broadcast 'for a particular case when the point arises', it being implicit in their Honours' observation that the point does not arise in the present case.

45 Ten's submission that the High Court has authoritatively determined this question should be accepted.

## Substantiality

46           The term ‘substantial’ is imprecise and ambiguous. It takes its meaning from the context. Ten submits that in the present context, ‘substantial’ is a reference to taking ‘the substance of’ the source television broadcast. That submission pays insufficient regard to the statutory language, which is expressed in terms of ‘a substantial **part**’ of a television broadcast, which is a different thing. There may be many parts of a television broadcast which qualify as a substantial part of that broadcast.

47           Both parties accepted that in determining whether a substantial part of a copyright work or other subject matter is taken, the relevant comparison is between the part taken and the copyright work or subject matter: see *Auto Desk Inc v Dyson (No 2)* (1993) 176 CLR 300 (*‘Auto Desk (No 2)’* at 305. The issue is not the importance of the part taken to the defendant’s product: *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at 709.

48           At first instance, Conti J accepted Ten’s submission that a primarily quantitative approach should be taken to the issue of substantiality. His Honour said (at [67]):

*‘... ascertainment of what constitutes a substantial part of a program or a segment of a program will require consideration of both the quantity and quality of what has been taken from a television broadcaster’s commercial interest in relation to its program or program segment, with the ultimate emphasis to be placed, whether on quantity or quality, depending on the particular circumstances of the particular case; a primarily quantitative approach will usually be the most practical starting point of any enquiry ...’*

Ten’s submission was based upon the decision of the Court of Appeal in *Newspaper Licensing Agency Ltd v Marks & Spencer plc* [2001] Ch 257. That approach did not meet with approval when the matter went to the House of Lords: [2003] 1 AC 551 at 561.

49           The High Court has also confirmed that an approach to the assessment of substantiality in the case of Part IV subject matter involves taking into account questions of quality (which could include the potency of particular images or sounds, or both, in a broadcast) as well as the quantity of the material taken: 78 ALJR 585 at [47] (McHugh ACJ, Gummow and Hayne JJ). A small portion in quantitative terms may constitute a substantial part having regard to its materiality in relation to the work as a whole: 78 ALJR 585 at [100] (Kirby J).

In *Tamawood Limited v Henley Arch Pty Ltd* [2004] FCAFC 78 (a case concerned with copyright in architectural plans) the Full Court said at [50]:

*'It has often been said that the expression "substantial part" in copyright legislation refers to quality, rather than quantity: cf Ladbroke per Lord Reid at 276, per Lord Pearce at 293; S W Hart per Gibbs CJ at 474, Wilson J at 481, Deane J at 503; Autodesk at 305; Data Access at [83]–[87]; Dixon Investments Pty Ltd v Hall (1990) 18 IPR 481 ("Dixon Investments 1") per Pincus J at 483 and on appeal in that case ('Dixon Investments 2') at 494–495; Collier Constructions Pty Ltd v Foskett Pty Ltd (1990) 19 IPR 44 ("Collier 1") per Gummow J at 49, and on appeal in that case (Collier Constructions Pty Ltd v Foskett Pty Ltd (1991) 20 IPR 666 ("Collier Constructions 2")) at 669. See, too, the recent discussion by Kirby J of the notion of a "substantial part" of a television broadcast in Network Ten Pty Ltd v TCN Channel Nine Pty Ltd [2004] HCA 14 at [100] – [102]. Accordingly, a quantitatively small part can be a substantial part for infringement purposes: Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd (1921) 29 CLR 396 at 403 per Starke J; Ricordi; Hawkes at 606–607 per Slessor LJ. But quantity may be relevant. Where the same degree of labour, skill and judgment contribute uniformly to all parts of the work, so that no part is distinguishable from any other part in this respect, it will apparently be necessary to demonstrate reproduction of a quantitatively substantial proportion of the work in order to establish reproduction of a substantial part: cf Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd (1993) 42 FCR 470 (reproduction of 25 per cent of computer program).'*

Whether the part taken is a substantial part of the source broadcast thus involves an assessment of the importance of the part taken to the source broadcast. In some cases the issue has been expressed in terms of whether what is taken is an 'essential' or 'material' part of the total work: *Autodesk (No 2)* at 305; *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 ('*Nationwide News*') at 418. In other cases the issue has been expressed in terms of whether the part taken is recognisable as part of the original work (see *Hawkes & Son (London) Ltd v Paramount Film Services Ltd* [1934] Ch 593 at 604), or distinctive of it (see *Nationwide News* at 420). In *The Modern Law of Copyright* (H Laddie, P Prescott et al, 3<sup>rd</sup> ed, Butterworths, London, 2000 at [7.59]) the matter is put in the context of substantial part and films, as follows:

*'... The Act does not attempt to define what it means by a "substantial part", so Parliament must be taken to have left it to the courts to apply a commonsense value judgment, having regard to the facts of each individual case. An approach which is frequently useful for the traditional subjects of copyright law (ie original literary, dramatic, musical and artistic works) is to enquire whether the aspect of the work which has been taken required a*

*substantial amount of skill and labour for its origination. It is submitted that this approach is not satisfactory in the case of films. Films can be made which are copyright even though no skill and labour at all were expended in their making: they do not have to be “original”. Nor would it be correct to approach the question on the basis of some crude mathematical apportionment: the Act says “a substantial part” not “a substantial percentage”. It is suggested that a better approach is to enquire whether the taking amounts to something real and consequential, as opposed to that which is trifling or insignificant.’*

(emphasis added)

52 Whether a substantial part has been taken of subject matter in which copyright subsists is to be assessed by reference to the interest protected by the copyright: *Nationwide News* at 418. It is settled in the case of Part III works, that the quality or importance of what has been taken must be understood in terms of the features of the work which made it an original work: *Copinger & Skone James on Copyright* (K Garnett, J James et al, 14<sup>th</sup> ed, Sweet & Maxwell, London, 1999 at [7-30]). Originality goes to the heart of the interest that the copyright protects, namely authorship. Thus, in the case of Part III copyright, reproduction of non-original matter will not ordinarily involve a reproduction of a substantial part of the work in which copyright subsists: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 481.

53 Broadcast copyright protects the sounds and images embodied in a television broadcast or programme. It protects the cost to, and the skill of, broadcasters in transmitting their programmes: 78 ALJR 585 at [29]. There is no requirement for originality in the case of Part IV copyright, a fact which leads Ten to submit that it is wrong to look to the originality of content as a touchstone for assessing substantiality in relation to Part IV subject matter. Nine’s focus on whether the Panel Segments were ‘distinctive’ of, or were ‘recognisable’ as having come from Nine’s broadcasts is, in Ten’s submission, to do just that.

54 In the case of Part IV copyright, ‘originality’ is not a touchstone for the assessment of substantiality as originality forms no part of the identification of the interest protected by the copyright. For that reason, the notion that reproduction of non-original matter will not ordinarily involve a reproduction of a substantial part of a copyright work can have no application in the case of Part IV copyright. Nonetheless, the High Court’s observation that the element of ‘quality’ bears on the substantiality question, and may involve consideration of the ‘potency of particular images or sounds, or both’, invites an assessment of the relative

significance in terms of story, impact and theme conveyed by the taken sounds and images relative to the source broadcast as a whole. Whether the part taken represents one of the highlights of the source broadcast has a bearing on that assessment as does whether the Panel Segments were ‘distinctive of’ or were ‘recognisable’ as having come from Nine’s broadcast. Ten’s submission to the contrary should be rejected.

55 At first instance, Justice Conti appears to have taken a narrower view of what is involved in a qualitative comparison, as his Honour said, at [67]:

*‘... quality is concerned with the considerations associated with infrastructure of production, and in consequence with the technicalities of presentation and appearance of the visual images rather than what may be involved in terms of program theme, story, information or other program content ...’*

Consistently with that view, his Honour’s judgment does not embark upon a consideration of the significance or materiality in terms of visual and sound content of the images of the Panel Segments compared to the Nine programmes from which they derived. His Honour does not identify how it is that ‘technicalities of presentation and appearance of the visual images’ are evident other than in the form of visual images and sounds broadcast. However, it is the message conveyed by use of the medium of transmission which is protected: 78 ALJR 585 at [38] – [39], rather than the techniques deployed in the production of the images and sounds in question. I do not agree, with respect, that ‘quality’ is confined in the manner which his Honour suggests.

56 The third of the factors (ie, in addition to quantity and quality) which influenced his Honour in coming to the conclusion that the Panel Segments were not a substantial part of Nine’s source broadcasts was the factor of Ten’s object or purpose of copying. His Honour said, at [17]:

*‘... apart from quantity and quality considerations per se, a further guide as to whether a substantial part of the program or segment of the program has been taken may be the object or purpose of the re-broadcaster in so taking; an object or purpose of satire, comedy or light entertainment, will not normally involve infringement because it will not involve imitation and thus copying, whereas the same cannot be said in relation to the contrasting notions of parody and burlesque, the essence of which is imitation and thus copying ...’*

57 His Honour found that the Panel Segments were used by Ten for different objects or purposes than those targeted by Nine, being in Ten’s case purposes essentially of satire, light

humour or light entertainment. Ten's object or purpose in taking by way of re-broadcasting has not been to create anything resembling the Nine programmes from which Ten has taken footage or excerpts.

58 Whether the part taken is a substantial part of the source work is to be determined objectively. Infringement of copyright does not have a mental element of purpose or intention. However, there are statements in the cases (see, for example, *Nationwide News* at 419) which indicate that in deciding the quality or importance of the part taken, regard must be had (inter alia) to the nature and objects of the selection made. In some cases and in some circumstances evidentiary assistance favourable to the copyright owner may be gained from a consideration of the alleged infringer's conduct. One of the considerations sometimes put forward as helping to decide whether a substantial part has been taken was described by the authors of *Copinger & Skone James* (supra), at [7.31], as follows:

*'Are the two works in competition? Has the value of the plaintiff's work been diminished? Is the market for the plaintiff's work likely, or unlikely to be affected? Tests of these kind are sometimes applied but it is suggested that today they need to be used with caution. Obviously, if it can be seen that the market for lawful reproductions of the plaintiff's work has been adversely affected, this may be because a substantial part has been taken, particularly if the reason for this is that the public regard the defendant's work as an adequate substitute for the plaintiff's. Care needs to be taken, however, since this decline may simply be the result of lawful (i.e. non-infringing) competition. Conversely, it is possible to imagine many cases where the businesses of the plaintiff and the defendant do not compete but unfair advantage of the plaintiff's skill and labour may yet have been taken. In such a case it is difficult to see why the absence of competition should help answer the question in favour of the defendant. Where, however, the two works are clearly in the same market and compete, and the plaintiff's work would be expected to suffer if a substantial part had been taken, the absence of any injury may be a helpful indication.'*

59 In the present case, Ten submitted that the evaluation of what constitutes a material part of a television broadcast is a classic jury question. One takes into account all the circumstances. Accepting that to be so, the fact that the Panel Segments were used by Ten for the purpose of satire or light entertainment strikes me, with respect, as throwing little, if any, light on whether the parts taken were a substantial part of the source broadcasts.

60 No doubt Ten used the Panel segments because it considered that the Panel Segments would contribute to Ten's programme, even though the contribution made to that programme

may be quite different from the contribution made by the Panel Segments to the source broadcast. But that says little, if anything, about whether those segments are a material part of the source broadcast.

### **Individual consideration of the Panel Segments**

61 It remains for me to consider whether individual Panel Segments represent a substantial part of the source programmes. Subject to the foregoing discussion, this is largely a matter of impression as the text of ‘substantial part’ under the Act imparts criteria of ‘fact and degree’: 78 ALJR 585 at [100] (Kirby J). As is apparent from the table set out above, quantitatively each of the Panel Segments is but a small proportion of the source programme.

62 Nonetheless, in my opinion, three of the Panel Segments are a substantial part of the television broadcast from which they have been taken. The first is ‘Midday’ (Prime Minister singing). Programmes such as ‘Midday’ which extend over a significant period of time are often punctuated by highlights. The footage of the Prime Minister singing Happy Birthday to Australia’s cricketing legend, Sir Donald Bradman, is one such highlight. The re-broadcast of this potent footage provided entertainment in its own right, apart altogether from any additional contribution made by members of the panel.

63 The second is ‘Australia’s Most Wanted’ (Aria Award). The footage taken is part of a re-enactment of an unsolved stabbing that had taken place at a residential home. The crux of the re-enactment is the intimidation of the innocent partygoers and the forcible entry into the home culminating in the stabbing, all of which are shown on the footage taken. The footage shown is highly dramatic, and reproduces the essence of the original story, rather than something which is merely incidental to the originating broadcast. The fact that the Panel used the footage as the foundation for a humorous assertion that the boys dancing in another piece of footage shown were the same gang that stabbed the partygoer does not negate substantiality.

64 The third is ‘Pick Your Face’ (Kerri-Anne Kennerley). Pick Your Face is a game show for children, in which child contestants are asked to identify a celebrity from a partial picture. The particular portion shown in the Panel Segment is a child mistakenly identifying a partial picture as depicting Ms Kerri-Anne Kennerley. In my opinion, the Panel Segment provided a substantial part of the entertainment value of the programme from which it is

taken, and the footage re-broadcast is funny in its own right. The member of the Panel who introduced the footage, Mr Gleisner, described the excerpt as a ‘little highlight’ from the programme.

65 In my opinion, the following Panel Segments are not a substantial part of the source programme:

- ‘A Current Affair’ (Masquerade of Introduction Agency): the original programme is an exposé of questionable business practices conducted by an introduction agency. The Panel Segment relates to disguises worn by alleged victims of the introduction agency who were interviewed during the programme. The Panel Segment strings together disconnected parts of the source broadcast, without conveying anything of significance in relation to the original story. The extracts are trivial, inconsequential or insignificant in the context of the source broadcast.
- ‘The Inaugural Allan Border Medal Dinner’ (Prime Minister embarrassed): this Panel Segment takes a portion of a live Nine broadcast during which a number of awards are presented. The particular segment re-broadcast shows the passage of the winner of the inaugural Allan Border medal, Mr Glen McGrath, from his seat to the stage. The Panel re-broadcast 10 seconds of a source work that was 2 hours 11 minutes 44 seconds in length. The portion taken does not include any critical moments or highlights of the original broadcast such as Mr McGrath receiving the award or giving his acceptance speech. The material used by the Panel is only incidental to the source broadcast, and the part taken is trivial, inconsequential or insignificant in terms of the source broadcast.
- ‘The Today Show’ (Boris Yeltsin): this Panel Segment takes a portion of the Today Show, a Nine program that presents a series of magazine-style segments. The particular portion taken is footage of successive Russian Prime Ministers who had been dismissed by President Boris Yeltsin. The footage taken is incidental to the source broadcast and is trivial, inconsequential or insignificant in terms of that broadcast.
- ‘Wide World of Sports’ (Grand Final celebrations): this Panel Segment takes a portion of Nine’s live broadcast of the National Rugby League grand final.



The particular portion taken features one of the players, Mr Glen Lazarus, performing a cartwheel as part of the post-match celebrations. He was not the only player to do so, and the footage taken does not show that there were other players following suit doing cartwheels of their own. The part taken is fleeting in character, and is not in any sense a highlight of the broadcast. Even if it be accepted that the original broadcast had as its subject matter both the grand final itself as well as the post-match presentations, the footage taken was only incidental to the source broadcast, and was trivial, inconsequential or insignificant in terms of that broadcast.

- ‘The Today Show’ (Child yawning): this Panel Segment takes another portion of the Today Show. The particular part taken is nine seconds in length during which a child is shown yawning in an interview with the presenter, Mr Richard Wilkins. The part taken is fleeting in nature and on the periphery of the original broadcast, making little, if any, contribution to the subject matter of that broadcast. The footage taken is only incidental to the source broadcast, and is trivial, inconsequential or insignificant in terms of that broadcast.
- ‘Crocodile Hunter’ (Scuba diving): this Panel Segment takes a portion of a show featuring Mr Steve Irwin, who is promoted by Nine as the ‘Crocodile Hunter’. During the programme Mr Irwin is filmed in various marine environments, and the show climaxes with him swimming in the open ocean with sharks. The particular portion shown in the Panel Segment depicts Mr Irwin in a large tank in which various marine creatures are swimming. The dialogue during the footage is Mr Irwin’s description of a wobbegong shark that is also in the picture. The Panel Segment is humorous, but there was nothing funny about the original broadcast. The footage taken is used in an entirely different context from the original broadcast, and in that broadcast it is trivial, inconsequential or insignificant.
- ‘The Today Show’ (Prasad interview): the part taken is from an interview with the manager of a hostel for homeless people, in which a number of homeless people can be seen gesticulating in the background. The source broadcast is a human interest story. The Panel’s focus is on matters which are no more than background in the source broadcast, and barely noticeable.

Again, the footage taken is trivial, inconsequential or insignificant in terms of the source broadcast.

- ‘Nightline’ (Kevin Gosper interview): Nightline is a late night news and current affairs programme broadcast by Nine. The particular part taken shows Mr Kevin Gosper, an Australian Vice President of the International Olympic Committee, expressing relief at being cleared of all corruption allegations. The part taken is fleeting in nature, and so taken out of context that it does not give the impression of a reproduction of a material part of the original story. Again, the footage taken is trivial, inconsequential or insignificant in terms of the source broadcast.

### **Conclusion**

66           Nine’s appeal should be allowed in part, with declarations being made that Nine’s broadcast copyright was infringed in relation to the three segments referred to above. The notice of appeal does not include in the orders sought any claim for damages or other pecuniary relief. I agree with the order for costs proffered by the other members of the Court.