

COPYRIGHT IN TELEVISION BROADCASTS: *NETWORK TEN v TCN CHANNEL NINE*: ‘A CASE WHICH CAN EXCITE EMOTIONS’

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This is a case which can excite emotions and can excite a temptation to approach it from a point of view that this cannot be right.²

ABSTRACT

[277] *The Panel*’ decision has attracted considerable interest since the first hearing of the matter in the Federal Court before Conti J. It raises important questions regarding the legality of the fairly common practice of one broadcaster re-broadcasting images and extracts from a programme originally shown by another broadcaster. The answers to these questions have implications for copyright law and media law, generating issues regarding what use is permitted for the purposes of criticism, review and parody; the use of humour in the reporting of news and current events and the relationship between copyright law and freedom of expression. The key issues for decision in the case were how much of a television programme needed to be shown in order to constitute an infringement of the original broadcast and the operation of the fair dealing defences in this context. The fair dealing issues were dealt with by Conti J³ at first instance and, on appeal, by the Full Court [278] of the Federal Court.⁴ The appeal to the High Court related only to the question of the infringement of a television broadcast. This article will consider the implications of the High Court decision for copyright law.

Issues before the High Court

Can copyright in a television broadcast be infringed by the re-broadcast of a single image or is a more substantial appropriation required? Does copyright subsist in each minute of programming, in each programme that is broadcast or in the whole day of

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² Transcript of Proceedings, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2003] HCATrans 338 (High Court of Australia, Mr Bannon, Counsel for the Respondents, 5 September 2003) (‘High Court Transcript’).

³ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108; 50 IPR 335 (20 February 2001); [2001] FCA 841 (4 July 2001).

⁴ *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146; 55 IPR 112 (20 May 2002).

transmissions? The answer to these questions was recently considered by the High Court in *Network Ten Pty Limited v TCN Channel Nine Pty Limited*.⁵

This case concerned the nature of copyright in 'a television broadcast' under the *Copyright Act 1968* (Cth). For the first time, the High Court was required to articulate the scope of the rights granted to the owner of copyright in a television broadcast and how such rights may be infringed. The Court had to consider two questions:

First, what constitutes a 'television broadcast' for the purposes of the *Copyright Act*? In particular, does it consist of a single broadcast image (plus accompanying sounds), a series of images, a 'programme' or a day of broadcasting? This was an issue because of the lack of clarity of the definition of a 'television broadcast' in s 10(1) of the *Copyright Act*, combined with the expansion of this definition by s 25(4).

And then, what is a 'substantial part' of such a broadcast'?

The answer reached in relation to the first question will of course, have a significant impact on the answer to the second question, and ultimately on the decision in relation to infringement. The smaller the segment which is considered to qualify for protection as a broadcast, the smaller the portion that could be identified as a substantial part of that broadcast. The decision of the Full Court of the Federal Court in this case, that a single image would qualify as a broadcast, leaves very little room for the operation of the concept of substantial part and renders the re-broadcast of even short extracts an infringement of copyright (subject to the operation of the fair dealing defences).

The majority of the High Court (McHugh ACJ, Gummow and Hayne JJ) concluded that

[t]here can be no absolute precision as to what in any of an infinite variety of circumstances will constitute 'a television broadcast'. However, the programmes which had been identified by Channel Nine as the subject of the infringement action, would each qualify as they were put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title,

⁵ [2004] HCA 14 (11 March 2004).

such as *The Today Show*, *Nightline*, *Wide World of Sports*, and the like which would attract the attention of the public.’⁶

It remains to be determined if a ‘substantial part’ of each of these programmes was rebroadcast on *The Panel*.

Kirby and Callinan JJ, who each issued separate dissenting judgments, agreed with the decision of the Full Court of the Federal Court, and held that each visual image capable of being observed as a separate image on a television screen, and the accompanying sounds, is a ‘television broadcast’. Therefore, subject to the application of the fair dealing defences, the broadcast of a single image could infringe the rights of the owner of copyright in the broadcast.

The case raised some interesting problems of statutory interpretation, in particular, the interaction between the specific provisions outlining the nature of broadcast copyright and the general provision dealing with ‘substantial part’. However, the case is no dry recitation of the different approaches to statutory interpretation. It reflects a very real issue for Australian broadcasters. How much use may they make of material previously broadcast by a rival broadcaster? The problem confronting the Court was that, as had been concluded by the Full Federal Court, a straightforward reading of the relevant sections led to a conclusion that copyright subsisted in a broadcast of a single image. However, this conclusion conflicts with the traditional understanding that broadcasting, as a neighbouring right, attracts a lower level of protection [279] than other forms of copyright. Further, it reduces the concept of substantial part in relation to broadcasts, to a meaningless sliver of cropped images.⁷

Whilst the decision of the majority is the most satisfying in terms of promoting the overall objects of the Act, it is yet another example of the Court struggling to make sense of the technologically-challenged, and in many case outdated, provisions of the

⁶ Ibid [75].

⁷ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, 130 [89] (Hely J). See also Michael Handler, ‘*The Panel* Case and Television Broadcast Copyright’ (2003) 25 *Sydney Law Review* 391, 394.

Copyright Act.⁸ Intuitively, it seems wrong that television broadcasts should be granted the extensive protection articulated by the minority. However, as the dissenting judges conclude, this is precisely what the Act appears to do. The majority valiantly attempts to read some sense into the legislation but perhaps their efforts conceal the very real need for re-consideration and reform of the provisions dealing with television broadcasts, to bring them up to date with the 21st century.

This case, like so many others in the copyright sphere, also has implications for freedom of expression. Television footage of major events, such as the plane crashing into the World Trade Center or the explosion of the space shuttle, conveys a powerful message. A single still from such footage can convey almost as much meaning as the moving image. In many instances a verbal description is no substitute for the display of the actual image under consideration.⁹ To deny *The Panel* the right to display the footage they chose to discuss would significantly undermine the value of the programme as a piece of television. On the other hand, Channel Nine had invested substantial funds in the production of the broadcast material, so why should a competitor be entitled to make a free use of such footage? The tension between these principles was most clearly recognised by the dissenting judges, who concluded that Parliament intended to grant a unique set of rights to the owners of copyright in television broadcasts, and that intention should be respected. Any incursions into those rights could only be made pursuant to the fair dealing defences (not at issue before the High Court). If this outcome is regarded as undesirable and if any change is needed, that change must come from Parliament.

The matter has now been remitted back to the Full Court of the Federal Court for decision on the remaining issues.

⁸ Other recent examples include: *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 and *Data Access Corporation v Powerflex* (1999) 202 CLR 1, in which the High Court struggled with the concept of 'substantial part' with respect to computer programmes.

⁹ See, for example, Professor Melville Nimmer's discussion of the photograph of the My Lai massacre: 'where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue': Melville Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 *UCLA Law Review* 1180. In such a case, Nimmer argued, there may be a justification for the taking of the whole work, even when the marketability of that work will be impaired, on the grounds of advancing the public interest in the freedom of expression. Of course, Nimmer was discussing the very different principles that apply pursuant to the First Amendment in US law. Australian law recognises only a very limited right of freedom of communication about

Broadcast Copyright

The difficulty faced by the High Court in this case was the interpretation and interaction of the sections that deal with broadcast copyright. These sections were recently amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). However this case concerned the relevant provisions as they existed prior to the commencement of those amendments on 4 March 2001.

Copyright protection was first granted to broadcasts in the *Copyright Act 1968*, following the recommendations made by the Spicer Committee. Sound and television broadcasts were granted protection as subject matter under Pt IV of the *Copyright Act*. The Spicer Committee had expressed some reservations regarding whether the protection of broadcasts could properly be located in the *Copyright Act*, which was concerned with protection against copying and public performance of [280] matter reduced to 'material form'. Broadcasts were, by their nature, transient. The Committee concluded:

However, there can be no doubt that broadcasting authorities are properly entitled to protection against the pirating of their broadcasts, whether by re-broadcasting 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.¹⁰

As noted by these concerns raised by the Spicer Committee, broadcasts reflect a unique form of copyright protection, because they do not involve fixation in permanent material form.¹¹

government or political matters, see: *Lange v Australian Broadcasting Commission* (1992) 189 CLR 520.

¹⁰ *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Canberra, 1965) [286] ('Spicer Committee Report'). Those recommendations were based in part on the considerations of the Gregory Committee in the UK, see: Sam Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (2nd ed, 2002) [8.70]–[8.74]. The Gregory Committee was prompted to recommend the introduction of protection for television broadcasts by evidence presented by the British Broadcasting Corporation (that that time, the only public broadcaster in the UK) that poor quality copies of its broadcast programmes had been made and sold to the public.

¹¹ Ricketson and Creswell, *ibid* [8.75]. The Spicer Committee Report noted that the absence of a material form requirement meant that protection of broadcasts may not be justified as falling under the Commonwealth's Constitutional power to legislate with respect to copyright (*Australian Constitution* s 51(xviii)). However, it could be achieved under the broadcasting power (*Australian Constitution* s 51(v)). See Spicer Committee Report [286]. See further Ricketson and Creswell, *ibid* [8.125]. Further,

The question arises regarding the nature and scope of the protection intended to be granted to such ephemeral creations. Ricketson and Creswell note that whilst 'it is possible that the broadcaster has applied considerable skill and judgment in its selection and compilation of what is broadcast, it does not seem that these elements are the object of Pt IV protection. It is simply the transmissions themselves.'¹² This means that, as many broadcasts will be the transmission of a live event such as a news-worthy occasion, game of football or a horse race, this grants the copyright owner a limited proprietary right in that event or spectacle: 'While this is not as extensive as the right contended for (unsuccessfully) in *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*, it still means that the broadcaster of a spectacle can prevent third parties recording and relaying their broadcast.'¹³ Of course, this does not prevent other broadcasters from broadcasting the same event using their own footage. In some instances, however, such as when that broadcaster is the only one present at the event, it does give the copyright owner something akin to a monopoly right in those images. This is the situation that may give rise to freedom of expression concerns.

Ricketson and Creswell distinguished broadcast copyright as essentially protecting the 'container' rather than the 'content' (being the material conveyed in that container). This conclusion gives rise to the question of the 'size' of that container i.e. the extent of the protection granted to a television broadcast, given that the extent of protection is not prescribed in the Act by reference to length or duration or even to familiar concepts such as 'programme' or 'episode'. This was the first issue confronted by the High Court in *The Panel* decision.

Section 10(1) of the *Copyright Act* defines a 'television broadcast' as 'visual images broadcast by way of [281] television, together with any sounds broadcast for reception along with those images.'¹⁴ This definition is qualified by s 25(4) which provides:

protection of broadcasts is not required pursuant to the Berne or Universal Copyright Conventions, but is the subject of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961) ('the Rome Convention').

¹² Ricketson and Creswell, *ibid* [8.100].

¹³ (1937) 58 CLR 479 (HC). Ricketson and Creswell, *Ibid*.

¹⁴ Note also the definitions of 'sound broadcast' which means 'sounds broadcast otherwise than as part of a television broadcast'; 'broadcast' which, at the relevant time, meant 'transmit by wireless

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.

The Act does not clarify the relationship between these two sections.

Section 101(1) of the *Copyright Act* provides:

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.

At the relevant time s 87 provided:

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.¹⁵

telegraphy to the public'; and 'wireless telegraphy' which meant the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy': *Copyright Act 1968* (Cth) s 10(1). These definitions were amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). 'Broadcast' now means 'a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*'.

¹⁵ Note that s 87(c) was amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). It now provides: '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'.

Having reached a decision of the relevant 'size' of the broadcast protected by the Act, the second question for the High Court was whether the infringement provisions set out in s 87 were subject to the general requirement that infringement occur in relation to a 'substantial part' of the original broadcast. The general requirement regarding 'substantial part' is set out in s 14(1) which provides:

In this Act, unless the contrary intention appears:

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

Procedural History

The case arose from the use of certain extracts from Channel Nine programs on *The Panel*, a weekly chat-style program, which discussed current events, sport, news and entertainment.¹⁶ Between 10 August [282] 1999 and 28 June 2000, Channel Ten broadcast extracts from twenty Channel Nine programmes as part of the discussion on *The Panel*.¹⁷ In order to show the extracts as part of *The Panel* programme, the extracts were first recorded on videotapes from which a further videotape was prepared containing the precise footage which was to be shown.¹⁸

At first instance, the matter was heard by Conti J in the Federal Court.¹⁹ Initially, Channel Nine claimed that Channel Ten had breached s 87(c) of the Act by re-broadcasting segments of television programmes which had originally been broadcast by Channel Nine. It later amended its statement of claim to include a claim that by making a recording of the relevant Channel Nine programmes for the purpose of re-broadcast, Ten had also infringed s 87(a) of the Act. Conti J delivered separate judgments in relation to each paragraph, concluding in each case that Channel Ten had not taken the whole or a substantial part of any of the Channel Nine broadcasts.

¹⁶ See Melissa de Zwart, 'Seriously Entertaining: *The Panel* and the Future of Fair Dealing' (2003) 8(1) *Media & Arts Law Review* 1, 8–12.

¹⁷ Excerpts from programmes originally broadcast by other Australian television stations, including free to air and pay television, were also shown during this period, but they were not considered as part of this action: *TCN Channel Nine Pty Limited v Network Ten* (2001) 50 IPR 335, 338 [2] (Conti J).

¹⁸ *Ibid* 340 [4].

¹⁹ *TCN Channel Nine Pty Ltd v Network Ten* (2001) 50 IPR 335.

Channel Nine argued that ‘each and every visual image of a television broadcast’ was the subject of copyright, whereas Channel Ten asserted that the copyright vested in the continuous broadcast, for example, over a twenty four hour period. The length of the actual extracts used on *The Panel* ranged between eight and 42 seconds duration, taken from programmes with an advertised length of 30 minutes to one hour. Conti J rejected the definition of the scope of a television programme put forward by both Channels Nine and Ten and concluded that ‘the only feasible candidate must be a television broadcaster’s programme, or respective segments of a programme, if a programme is susceptible to subdivision by reason of the existence of self-contained themes.’ He also recognised that in some instances an advertisement, station break or logo may constitute a programme as each has separate themes, production and ownership of underlying intellectual property.²⁰

As Conti J concluded that Channel Ten had not copied or re-broadcast a substantial part of any of the Channel Nine broadcasts it was not necessary to consider the matter of fair dealing. However, he reached a number of conclusions regarding the nature of fair dealing and applied those principles to the various extracts. He concluded that the use of the extracts was justified on the basis of fair dealing in relation to eleven out of the twenty programmes.²¹

In relation to s 87(a) Nine argued that s 25(4) qualified the operation of that section to confer copyright on each visual image contained within the relevant excerpts from the Channel Nine programmes.²²

In keeping with his decision in relation to s 87(c), and the application of s 14(1)(a), Conti J concluded that the relevant portion against which to assess any question of infringement was ‘a television programme or an identifiable segment thereof’.²³ What

²⁰ Justice Conti states: ‘For convenience, I will include hereafter in the expression “programme” any segment thereof, unless otherwise explicitly stated, and as earlier indicated, what may amount to a television programme or alternatively any segment thereof will require an assessment to be made in each case, based upon fair and reasonable judgment in the light of what the law may be taken to sensibly protect as a question of fact and degree. Thus in the case of a television programme containing successive themes or stories, particularly when segregated by advertisements, fairness and reasonableness may stand in the way of an artificial or unrealistic quantification spanning an entire and more lengthy programme presented with a single title’: *ibid* 369 [43].

²¹ *Ibid* 396–7 [73]. See de Zwart, above n 16, 8–10.

²² [2001] FCA 841.

²³ *Ibid* [18].

amounts to a television programme (or a substantial part thereof) would be an issue to be decided on a case by case basis.

[283] On appeal, the Full Court of the Federal Court held that each visual image capable of being observed as a separate image on a television screen and the accompanying sounds is a 'television broadcast' in which copyright subsists.²⁴ Therefore, subject to the operation of the fair dealing defences, Channel Ten had infringed copyright in relation to the making of the excerpt video tapes and the re-broadcasting of those excerpts.²⁵

The High Court Decision

The majority of the High Court, McHugh ACJ, Gummow and Hayne JJ, delivered a joint judgment in which they agreed with the submission made on behalf of Channel Ten that the definition given to the term 'television broadcast' by the Full Court was 'so reduced that questions of substantiality have no practical operation and the ambit of the copyright monopoly is expanded beyond the interest the legislation seeks to protect.'²⁶ They observed:

The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of the various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed.²⁷

Kirby J and Callinan J dissented from the conclusions of the majority, each issuing a separate judgment.

²⁴ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112 (Sundberg, Finkelstein and Hely JJ). For a further analysis of the Full Court decision in relation to the broadcast copyright issue, see Handler, above n 7. For further discussion of the fair dealing issues, see de Zwart, above n 16; Michael Handler and David Rolph, "'A Real Pea Souper": *The Panel* Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381; David Brennan, 'Copyright and Parody in Australia: Some Thoughts on *Suntrust Bank v Houghton Mifflin Company*' (2002) 13 *Australian Intellectual Property Journal* 161, 163–4.

²⁵ There was some disagreement between the three judges regarding the applicability of the fair dealing defences, ultimately concluding that it was available in relation to nine of the excerpts, see further, de Zwart, *ibid* 10–12.

²⁶ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14 [8].

²⁷ *Ibid* [12].

The Court, and counsel, clearly struggled with the technical language of the Act; language that, it has been accepted on many occasions, attempts to convey outmoded concepts which in many cases are inapplicable to today's technology. A similar struggle was undertaken by the High Court in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations*²⁸ in relation to cinematograph films and sound recordings, and *Telstra Corporation Ltd v Australasian Performing Rights Association*²⁹ in relation to broadcast and diffusion rights.

The Majority View

What is worth copying is worth protecting

The joint judgment considered first the submission made by Nine, that 'what is worth copying is prima facie worth protecting'.³⁰ However, the majority warns, this conclusion can be taken too far, distorting the intention of the legislature. In this context the Court refers to the writing of Professor Waddams, citing his argument that the use of terms such as 'piracy', 'robbery' and 'theft' successfully stigmatises [284] the conduct of alleged infringers and demonstrates the persuasive power of using proprietary concepts to describe the rights of the owner of intellectual property.³¹ Certainly, there has been an increased reliance on proprietary concepts by copyright owners in recent years to strengthen their rights.³² In particular, the Recording Industry Association of America and Motion Picture Association of America have used the argument that copyright is property and that all uses without the permission of the copyright owner amount to theft in their fight against peer to peer systems.³³

²⁸ (1998) 40 IPR 225.

²⁹ (1997) 38 IPR 294.

³⁰ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 610; *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [14].

³¹ 'Analogous cases include the taking of unauthorized photographs, unauthorized rebroadcasting of television signals, use of confidential information, or the copying of a design where there is no copyright or registration protection. When such an issue arises, the claimant is always eager to categorize the claim as proprietary. Thus the conduct of the defendant is apt to be described by claimants as piracy, highway robbery, and brazen theft. This is the rhetoric: the taking of a photograph, the rebroadcasting of television signals, the use of confidential information, or the copying of a design cannot, in fact or in law, be piracy, robbery (on or off the highway), or theft, and if it were any of these things the rhetoric would be unnecessary.': Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003) 175 (citations omitted).

³² See Jessica Litman, *Digital Copyright* (2001); Siva Vaidyanathan, *Copyrights and Copywrongs* (2001). See also Carys Craig, 'Locke, Labour and Limiting the Author's Right: A Warning Against A Lockean Approach to Copyright Law' (2002) 28 *Queen's Law Journal* 1.

³³ The recent imposition of a custodial sentence by the Brisbane Magistrates Court for trading in counterfeit DVDs, gives strength to the argument that copyright infringement is piracy and theft, see:

The majority concludes that applying the logic of the statement from *University of London Press* literally would lead to a finding of infringement in all cases of copying.³⁴

The Broadcast Right

The majority outlined the legislative history concerning the inclusion of the broadcast right in the *Copyright Act*. As noted above, such a right was not included until the introduction of the *Copyright Act 1968* following the recommendation of the Spicer Committee in Australia and the Gregory Committee in the UK.

Reviewing the findings of the Gregory and Spicer Committees and the circumstances surrounding the introduction of the protection of broadcasting into the *Copyright Act*, the majority notes:

The policy and objective in the recommendations of both Committees was to protect the cost to, and the skill of, broadcasters in producing and transmitting their programmes, in addition to what copyrights may have subsisted in underlying works used in those programmes. There is no indication, as *Nine* would have it, that, with respect to television broadcasting, the interest for which legislative protection was to be provided was that in each and every image discernable by the viewer of such programmes, so as to place broadcasters in a position of advantage over that of other stakeholders in copyright law, such as the owners of cinematograph films or the owners of the copyrights in underlying original works.³⁵

Indeed, this would be out of keeping with the general principle that Pt IV copyrights generally 'receive a lower level of protection than works, with shorter terms and more restricted exclusive rights.'³⁶ The majority acknowledges that the lack of any requirement to prove infringement in relation to a [285] substantial part of the broadcast by the Full Court grants owners a right that is stronger in some sense than

Senator Chris Ellison, Minister for Justice and Customs, 'Brisbane man sentenced over fake DVD imports' (Press Release, 2 June 2004) <<http://www.law.gov.au/www/justiceministerHome.nsf/Alldocs/RWP77F3DD6760DB3318CA256EA700264452?OpenDocument>> at 11 June 2004.

³⁴ See *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) FCR 399, 417–18 (Sackville J); *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [17].

³⁵ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [29].

³⁶ Ricketson and Creswell, above n 9, [8.00], cited by the majority: *ibid* [30].

that granted to owners of copyright in literary, dramatic, musical and artistic works.³⁷ Clearly, the majority does not favour the elevation of the rights of the owners of copyright in a television broadcast in this manner. This being so, the Court still had to determine the precise scope of those rights and, for this purpose, sought to establish what was intended to be encompassed within the ‘subject-matter’ of the protection granted to a television broadcast by Pt IV.³⁸

The majority notes:

Where the ‘subject-matter’ of copyright protection is of an incorporeal and transient nature, such as that involved in the technology of broadcasting, it is to be expected that the legislative identification of the monopoly (eg, by s 87) and its infringement (eg, by s 101) of necessity will involve reference to that technology.³⁹

However, the majority notes that this should not be interpreted to mean any use, however fleeting, of that technology. Rather, protection was granted to that identifiable unit which was of commercial significance to the broadcaster:

In the same way, the words, figures and symbols which constitute a ‘literary work’, such as a novel, are protected not for their intrinsic character as the means of communication to readers but because of what, taken together, they convey to the comprehension of the reader.⁴⁰

In focusing on the separate images, the Full Court was said to have ‘fixed upon the medium of transmission, not the message conveyed by its use.’⁴¹

In order to derive any practical benefit from the broadcast, the signal must be captured and transformed into sounds and images. Therefore, the acts that are described in s 87 as belonging to the copyright owner, are acts that relate to the capture of that signal.

³⁷ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [48].

³⁸ The term ‘a television broadcast’ is used in ss 87, 91, 95, 99 and 101(4). Section 101(4) also refers to ‘the visual images and sounds comprised in the broadcast’ and s 22(5) refers to a television broadcast having ‘been made by the person who provided the broadcasting service by which the broadcast was delivered’.

³⁹ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [38].

⁴⁰ *Ibid.*

⁴¹ *Ibid* [39].

Section 87(a) encompasses the recording of a still visual image from what appears to the viewer as a continuous transmission. However, that did not require the reading down of the definition of 'a television broadcast' to constitute a single image. The majority rejected the approach adopted to this section by the Full Court, stating that the interpretation of what constitutes a television broadcast for the purposes of s 87(a) should not be decided solely by reference to s 25(4) which is concerned with the making of a cinematograph film of a television broadcast:

[T]he primary task had been to identify that television broadcast in which copyright subsisted in Nine in s 91. This was a matter of visual images and sounds and the primary task was not performed, and could not properly be avoided, by reasoning from a provision concerned with fixation in a cinematograph film.⁴²

Similarly, the majority rejects the Full Court's conclusions with respect to s 87(c) that re-broadcasting of any of the images and sounds broadcast is an infringement. Section 25(4) should not be treated as the key to defining the scope of the term 'a television broadcast'. The majority states that s 25(4) 'is [286] explanatory or expegetical of an aspect of one of the three species of rights with which s 87 is concerned. The expression "a television broadcast" must be understood in a way which is consistent with all of the rights mentioned in s 87.'⁴³ With respect to s 25(4), the majority states that its purpose is to clarify the operation of s 87(a). As the broadcasting right deals with an incorporeal subject matter some care was necessary in defining how it could be infringed by reference to fixation of that matter in material form. Section 87(a) refers to the capture of the visual images and s 87(b) relates to capture of the sounds. Section 25(4) is necessary to clarify that the taking of visual images is sufficient to constitute an infringement, given that the definition of cinematograph film in s 10(1) refers to the 'aggregate of the visual images embodied in an article or thing' capable of being shown as a moving picture and includes the aggregate of sounds embodied in the sound-track associated with those visual images.

Therefore the majority concludes that the role of s 25(4) is to give a 'special meaning' to the term 'a cinematograph film of the broadcast' in s 87(a) in relation to visual

⁴² Ibid [42].

⁴³ Ibid [45].

images alone, but there is no indication that it is intended to displace the operation of s 14(1) which imposes the requirement of a substantial part.⁴⁴

This interpretation is further strengthened by the following four points: first, it would be ‘a curious method of construction’ to read s 25(4) as ‘flowing upstream’ and dictating the meaning of ‘a television broadcast’. Second, s 25(4) does not address that part of s 87 which deals with sound, that is s 87(b). The meaning of ‘sound recording’ would not extend to the sounds which would accompany a single image, sufficient to constitute a television broadcast as such a segment of sound would be meaningless. Third, s 25(4) cannot apply to s 87(c) and it would be an odd result if the substantial part requirement applies with respect to s 87(c) and not s 87(a). Fourth, s 101(4) refers to the ‘visual images and sounds comprised in the broadcast’ and s 135B refers to the making of a copy of the whole or a part of a ‘transmission’ (being a sound broadcast or a television broadcast’).⁴⁵

The majority concludes that although it could not identify in advance in all circumstances what would be sufficient to constitute a television broadcast, at least in the present case the programmes identified by Channel Nine in the pleadings would satisfy this definition.⁴⁶

The majority also accepted Conti J’s conclusions that advertisements should be treated as discrete broadcasts but reserved its opinion on whether discrete segments of a programme, such as news items or segments could be treated as a separate ‘television broadcast’ in which copyright subsists.⁴⁷

Substantial Part

Having reached this conclusion, the majority did not go on and consider the question of what constituted a substantial part of such broadcasts. Generally, in relation to the issues of the relevance of the concept of ‘a substantial part’, the majority noted that the approach adopted by the Full Court of the Federal Court had been to deny any

⁴⁴ *Ibid* [61].

⁴⁵ *Ibid* [62]. Section 135B is one of the provisions contained in Part VA which deals with the copying of ‘transmissions’ by educational and other institutions. ‘Transmission’ is defined in s 135A to include ‘a sound broadcast or a television broadcast’.

⁴⁶ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [75].

need to consider the concept of 'substantial part' with respect to infringement of a television broadcast, with the result that the re-broadcasting of any of the images would constitute an infringement.⁴⁸ The majority considered the legislative history of the concept of substantial part, first included in the *Copyright Act 1911*, but reflecting earlier judicial approaches to infringement. In particular, the majority noted that the 1911 Act carefully separated the concepts of [287] substantial part and fair dealing.⁴⁹ Consequently, application of the concept of infringement could not be short-circuited by avoiding the consideration of whether a substantial part had been copied and moving directly to the question of whether there is a defence on the basis of fair dealing.

However, rather than apply this law to the facts before the Court, the orders of the Full Court were set aside and the matter remitted to the Full Court for determination of the remaining grounds of appeal to that court.

Given that all the excerpts the subject of the appeal were taken from clearly identifiable programmes, with a minimum running time of 22 minutes and 51 seconds ('*A Current Affair*') and that the extracts were between 8 and 28 seconds duration, on a quantitative test alone it is likely that the Full Court will find that they do not constitute a substantial part of the original broadcasts.⁵⁰ Applying a qualitative approach, it is also likely that they would not qualify as a substantial part of the original broadcasts, as *The Panel* chose to extract quirky, trivial, amusing and often

⁴⁷ Ibid [75].

⁴⁸ Ibid [18]–[23].

⁴⁹ 'Fair dealing' was first introduced in the *Copyright Act 1911* (Cth). However, the concept had been articulated in cases dating back to the introduction of copyright in the Statute of Anne, see: de Zwart, above n 16, 3–4.

⁵⁰ The broadcasts which were the subject of appeal to the High Court were:

- 'The Today Show' (Boris Yeltsin);
- 'A Current Affair' (Masquerade of Introduction Agency);
- 'The Inaugural Allan Border Medal' (Prime Minister being ignored by Glenn McGrath);
- 'The Today Show' (Prasad interview);
- 'Midday' (Prime Minister singing);
- 'Wide World of Sports' (Grand Final celebrations);
- 'Australia's Most Wanted' (ARIA award);
- 'Pick Your Face' (Kerrie-Anne Kennerley);
- 'Crocodile Hunter' (Scuba Diving);
- 'The Today Show' (Child Yawning);
- 'Nightline' (Kevan Gosper).

These are the excerpts use of which the Full Court considered was not justified by the defence of fair dealing.

background aspects of the footage as the subject of their discussion.⁵¹ For example, the footage of Steve Irwin ('The Crocodile Hunter') was shown to demonstrate that he looked and sounded like 'Uncle Arthur', a character portrayed by a member of *The Panel*, Glenn Robbins. This extract could not be considered substantial on either a quantitative or qualitative test.

This conclusion is supported by the decision of Conti J at first instance, who held that

the notion of substantiality falls to be determined as a matter of degree by reference to the quality of the presentation and screen appearance of the programme which has been taken, as well as the quantity of the programme in terms of viewing time which has also been taken, with sometimes more emphasis to be placed on the former than the latter or vice versa, depending on the circumstances of the case.⁵²

Conti J also placed significant weight upon the question of whether the use has caused any harm to the commercial value of the original broadcast. If the extract is used for a different purpose than the original broadcast, for example, 'for the object or purpose for instance of satire, comedy or light entertainment' that may count in favour of permitting such use.⁵³ Conti J concluded that, applying all three tests to the twenty extracts before the Court, 'what was taken could be characterised as relatively *de minimus*' and therefore not a substantial part.⁵⁴

[288] The approach of the majority avoids providing any clear guidelines regarding the identification of what constitutes a television broadcast and even less clear is how a substantial part of such broadcast should be calculated. The practical implications of this outcome are discussed below.

⁵¹ See *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593 for the meaning of substantial part.

⁵² *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 370–1.

⁵³ *Ibid* 371.

The Minority View

The dissenting judges highlight the fact that they feel bound to reach the same decision as the Full Court by the clear language of the *Copyright Act*.⁵⁵

Whilst acknowledging the correctness of the purposive approach to statutory interpretation adopted by the majority, Kirby J states that it does not justify ignoring the wording of the statute:

I accept that in the context of the law of copyright, indeed intellectual property law generally, other considerations compete with the protection of private rights. But in the end, it is the statutory text, not generalities or judicial policy judgments, that governs the task in hand and is determinative.⁵⁶

Kirby J notes that he has reached his conclusions regarding the scope of protection granted to television broadcasts 'without quite the same enthusiasm as Callinan J appears to feel for it.'⁵⁷ He acknowledges that this interpretation grants television broadcasters an immensely powerful form of copyright. In particular, Kirby J notes the criticisms of the Full Court decision, that it makes television broadcast copyright 'an extraordinarily strong right, easily the strongest of all copyrights in Australia, able to be infringed by taking less than a substantial part of the broadcast.'⁵⁸ However, he feels constrained by the wording of the Act to reach the conclusion that the taking of a single image from a television broadcast constitutes an infringement.

Kirby J undertakes an extensive textual analysis of the provisions of the Act which prescribe the nature of copyright in a television broadcast. He notes: 'The Act contemplated a form of copyright apt to the particular technology involved in television broadcasting.'⁵⁹ He stresses the importance of the visual images that comprise the broadcast:

⁵⁴ Ibid 384. See also Michael Handler's discussion of substantial part: Handler, above n 7, 404–7.

⁵⁵ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [84] (Kirby J), [128] (Callinan J).

⁵⁶ Ibid [89] (citations omitted).

⁵⁷ Ibid [90].

⁵⁸ Handler, above n 7, 395, cited by Justice Kirby: ibid [90].

⁵⁹ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [93].

It is the very power of particular, and often quite limited (even fragmentary) portions of 'visual images' on television that makes it such a potent and commercially valuable means of expressing thoughts and ideas: noble and banal, serious and humorous, uplifting and discouraging.⁶⁰

Kirby J acknowledges the practical realities of the television medium: the fact that a single image or short series of images may be extremely powerful. A single still taken from moving video footage can still convey a message more potent than any written or oral description of that image.

Kirby J is willing to accept that television broadcast copyright may be very different from copyright in other subject matter. Kirby J again demonstrates his practical approach to copyright by acknowledging the specific nature of the medium. In the oral argument before the High Court, Kirby J had observed that it was not altogether surprising that television broadcasts should have such a strong form of copyright protection given that television 'is the most potent form of communication that now exists in the world, save perhaps for the Internet'.⁶¹ In his judgment, he reinforced the conclusion that even very brief segments of a television broadcast can represent a valuable commodity.⁶² Akin to the notion that what [289] is worth copying is worth protecting, Kirby J recognises that the extracts used by *The Panel* are interesting because of their ability to convey a message, even over a duration of less than thirty seconds, hence their value and inclusion in the programme.

Kirby J concludes that Parliament did not seek to impose a balance between public and private interests in the use of extracts from a broadcast through the notion of a substantial part. Rather, he concludes, the balance should be sought through the application of the fair dealing defences.

The fact that the parties to the proceedings are commercial competitors was also considered to be relevant by both Kirby J and Callinan J.⁶³ Callinan J stated:

⁶⁰ *Ibid.*

⁶¹ High Court Transcript, above n 2.

⁶² *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [94].

⁶³ *Ibid* [94] (Kirby J).

The production of any programme, indeed each and every frame and segment of it, comes at a cost. It is produced in order to make money by inducing advertisers to pay to have their activities advertised in association with its broadcast one or more times. Further value may arise from the isolation, reproduction and broadcasting of an image or images, with or without sound, from it, and the licensing of it or an isolated image or images from it, whether by and in a photograph, a film or a video film. What is clear in this case is that value did lie in the copying, reproduction and rebroadcasting of segments, albeit generally fairly brief segments, of the respondents' programmes. That value had two aspects: it enabled the appellant to gain revenue from advertising associated with *The Panel*; and it relieved the appellant of the cost of buying or producing other matter to occupy the time taken by the rebroadcasting, during *The Panel*, of the copied and reproduced segments.⁶⁴

Returning to the discussion of the concept of what is worth copying is worth protecting Callinan J makes a related but distinct point:

After all, in recognising the validity of the respondents' copyright in excerpts from their programmes, the Court would not be denying access to the general public of the golden words of a new Shakespeare. This is a case of blatant commercial exploitation, neither more nor less.⁶⁵

With respect, this blurs the issues of infringement and fair dealing, and appears to impose a high degree of personal taste to the subject matter of the broadcast. Certainly the extracts presented on *The Panel* did not represent matters of significant public debate such as the images of the 9/11 crash or the Kennedy assassination but many of the extracts did raise valid questions, such as the quality of television journalism (poor efforts to disguise people being interviewed on *A Current Affair*), the activities of the Prime Minister (singing on the *Midday Show* and at the Allan Border Medal) and the banal nature of television itself (*Days of Our Lives* and *Who Wants to be a Millionaire*). Channel Ten was keen to establish that although *The Panel* presented these issues in a lighthearted and humorous manner, it did make a contribution to the critical review of the television medium itself. The extracts did more than illustrate the discussion; they form the subject matter of that discussion. *The Panel*, though

⁶⁴ Ibid [142].

⁶⁵ Ibid [143].

humorous, makes an important contribution to media debate, perhaps not with the same level of insight and seriousness as ABC's *Media Watch*, but it reaches a large audience and hopefully prompts them to think a little deeper about some of the programmes they are watching, their quality, their message and production values.

Callinan J concludes that by its own admission, Channel Ten had copied the Channel Nine programmes by taping them in full. This clearly constitutes a breach of s 87(a). In relation to the argument that Channel Ten did not re-broadcast a 'substantial part' of the Channel Nine programmes, he concludes that the concept of programme is irrelevant because it is not used anywhere in the Act. This concurs with the conclusions of the Full Court and with Ricketson and Creswell who state: [290]

As a matter of principle, the approach of the Full Court seems correct: it is consistent with the definition of 'television broadcast' in s 10(1) ('visual images broadcast') and does not seek to introduce artificial limitations not contained in that definition, such as 'programme', 'segment' and the like.⁶⁶

Callinan J concludes that the drafters of the Act were fully cognisant of the actualities of the broadcast medium. The use of even a few seconds worth of visual images (even if the accompanying sounds are unintelligible) is sufficient to amount to a re-broadcast. The mere fact it is being shown demonstrates its worth.⁶⁷ Section 14 must be read as being subject to the specific provisions dealing with television broadcasts. Its relevance may lie in determining whether the rebroadcast of cropped or reduced images still constitutes a substantial part.⁶⁸ It does not lead to the conclusion that the re-broadcast of a brief segment of a broadcast is not an infringement. Section 25(4) must be read as leading to the conclusion that the copying of any image of a broadcast is an infringement under s 87(a) and the broadcast of such an image is an infringement of s 87(c).⁶⁹

⁶⁶ Ricketson and Creswell, above n 9, [8.100].

⁶⁷ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [148].

⁶⁸ *Ibid* [151].

⁶⁹ *Ibid* [153].

Fair Dealing

Channel Ten had successfully relied upon the fair dealing defences in relation to at least some of the broadcasts at first instance and on appeal. The fair dealing issues were not raised before the High Court although they were raised in the oral submissions to the Court and certainly were in the mind of Kirby J in reaching his decision:

It is mainly by the operation of the fair dealing defence, and not by the artificial, uncertain and untextual proposition propounded by the appellant, that the battleground of the present dispute was to be fought in the manner contemplated by the Act.⁷⁰

Kirby J expresses some sympathy with the views expressed previously by this author with respect to the decision of the Full Court regarding fair dealing:

There are...many circumstances in which the public interest lies in permitting the use of a work without the permission of the owner of copyright, with or without payment. *The Panel* decision provides a good example of circumstances in which a licence would not be granted (between competitors)...

It is vital to recognize the public interest element of copyright... Copyright is not solely concerned with economic returns for the owner. Neither was copyright intended to enable owners to exploit all possible uses and derivations of the work. The public domain is an important legacy of copyright law and its existence should also be protected in the face of the growth of digital capture and licensing of works.

...*The Panel* serves as a vehicle for social comment and criticism, albeit in a relaxed humorous fashion...Copyright is a social as well as a commercial construct and its role in facilitating new creations as well as protecting existing creations should not be forgotten.⁷¹

However, he concludes that these issues should not be resolved at the level of determining infringement. The nature of broadcast copyright and how it may be infringed is set out in the Act. Matters of public policy and interest could only be

⁷⁰ Ibid [103].

⁷¹ de Zwart, above n 16, 16–17, cited by Justice Kirby: ibid [91].

accommodated by the determination of whether [291] Channel Ten had a defence in fair dealing.⁷² Further, if fair dealing did not prove to be broad or flexible enough to protect such public interest then that was a matter for Parliamentary reform. The High Court was not at liberty to distort the wording of the *Copyright Act* to suit that interest.⁷³

It is interesting to note that the issue of whether there existed an implied licence to copy and re-broadcast portions of a competitor's broadcasts was raised before Conti J at first instance. Channel Ten claimed: 'the making of the video tapes of parts of the Nine Programs for subsequent rebroadcast by [Ten] in the course of The Panel program was carried out with the implied licence of [Nine] based upon trade practice and usage in Australia.'⁷⁴ This argument was rejected by Conti J.⁷⁵

If such a licence did exist, this would remove much of the need for fair dealing in the context of news reporting.

Criticisms of the Decision

This decision reaffirms the conclusion that each category of copyright attracts a distinct form of protection. Certainly, Pt IV creates rights and interests very different from those granted to works, and, at a general level, this seems appropriate. The question is, has the High Court interpreted the rights granted by statute appropriately?

The majority had to perform a contortionist's act to reach what they considered to be the appropriate outcome in the case, to ensure the definition of television broadcast applied to more than a single image and that the concept of substantial part applied to the broadcast right. The minority view, on the other hand, appears to more naturally

⁷² *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [98].

⁷³ *Ibid* [103]–[104].

⁷⁴ *Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 841, [21].

⁷⁵ *Ibid* [27]: 'There does not exist in Australia, at least among the major television broadcasters, such as those the subject of the present proceedings, any established trade practice or custom constituting a mutually implied license to the effect that a television broadcaster is entitled to make a video tape of a programme, or an excerpt of a programme, previously broadcast by another television broadcaster, for any purpose, and that the second-mentioned television broadcaster would consider itself uninhibited from making complaint or seeking redress, unconstrained by any supposed existence of any custom or usage to the contrary, by such processes as it may judge to be appropriate in the circumstances of the case, where the infringement of copyright has occurred in circumstances outside what it may consider

reflect the wording of the *Copyright Act*. The contentious issue in this case was that the Full Court of the Federal Court and the minority view appears to 'place a higher value on the investment involved in the communication of images and sounds than on the investment or creativity involved in bringing those images and sounds into being, for example, as films or sound recordings, in the first place.'⁷⁶

As noted above, Kirby J and Callinan J are quite comfortable with this conclusion, believing that it accurately reflects the intention of the legislature as embodied in the wording of the Act. Callinan J concluded:

Nothing turns, in my opinion, upon any perceived differences between the quality or nature of the copyright afforded by the Act to television broadcasts and other copyright holders. It was and was intended to be a new and unique right. The medium is very different from others. To exploit it, different and perhaps more expansive infrastructures, fees, techniques and resources are required. The industry is, and has always been in this country, a highly competitive, and, as this case shows, a highly commercialised one. There may have been good reason for [292] the legislature to single it out for special treatment. It is for the Court to give effect to the language of the Act and not to speculate about that.⁷⁷

In any event, the case highlights, yet again, the difficulty the legislature encounters in attempting to define the scope of the rights granted to owners of copyright in new technologies. It does seem absurd that the most commonly referenced unit of television viewing, that is, the programme, is not recognised in the wording of the Act. For this reason it is not altogether evident that the legislature had as clear an understanding of the technology as is claimed. Broadcasting is a highly artificial concept that does not sit easily with other copyright rights.

In his article on the Full Federal Court decision, Michael Handler anticipates the deficiencies of the approaches ultimately adopted by both the majority and minority of the High Court. Handler concluded that there were 'significant errors in the Full

to be the perceptibly justifiable protection of applicable fair dealing defences.' See also *British Broadcasting Corporation v British Sky Broadcasting Ltd* (1991) 21 IPR 503 (HC(UK)).

⁷⁶ Handler, above n 7, 396 (citation omitted).

⁷⁷ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [155].

Court's judgment'⁷⁸ and that the approach of Conti J at first instance, which emphasised the importance of the concept of substantial part to the question of infringement, was to be preferred. Handler questioned whether the highly literal approach to interpretation of the relevant sections adopted by the Full Court ultimately promoted the purpose of the *Copyright Act*. In particular, he emphasised the fact that the Full Court's approach appeared to grant 'extraordinarily strong'⁷⁹ rights to broadcasters; stronger than those granted to cinematograph films or sound recordings which require a much higher level of creative effort and probably investment.⁸⁰ Handler therefore argues for a purposive approach to interpretation of these sections. He also acknowledges that there may be some problems with this approach, noting that it is not certain that the relevant sections are sufficiently unclear to support such an approach and further that material supporting his favoured approach was scarce.

Handler's preferred purposive analysis was ultimately adopted by the majority in the High Court, yet the hope he outlined in his conclusion, that the decision would also provide guidance on 'how copyright subject matter is to be defined and how a "substantial part" of that subject matter is to be determined' remains unfulfilled.⁸¹

Practical Implications of the Decision

The decision of the majority still leaves a great deal of uncertainty. First, on the issue of what constitutes a television broadcast. Then, once this is decided, what constitutes a substantial part of such a broadcast? The majority decision provides no absolute rule as to what constitutes 'a television broadcast', although a discrete programme with a separate title appears to satisfy that test. This will create particular problems with respect to less clearly delineated programmes or segments than the programmes identified as the subject matter of *The Panel* decision. For example, consider the following three scenarios:

The *Six O'Clock News*: is each story or segment a 'television broadcast' if it is given a separate title and introduction and has been produced by a separate production team?

⁷⁸ Handler, above n 7, 392.

⁷⁹ *Ibid* 396.

⁸⁰ Cf Callinan J in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14, cited above n 77.

The same segments may be shown independently and reshuffled on later news programmes, indicating that they are complete in themselves. Some are clearly licensed from overseas or independent broadcasters. If the answer is yes, then a thirty second extract from a two minute news story may constitute a substantial part of that broadcast. If the answer is no, then it is harder to argue that a 30 second extract from a single news item is a substantial part of a half-hour news bulletin.⁸² Of course, this will require the application of the test of substantiality from both a quantity and quality point of view.

[293] *Rage* (or any 'video hits' show): *Rage* runs from midnight to 10 am on the ABC on Friday and Saturday nights. Is each video clip, separately produced, often at great expense, a separate broadcast?⁸³ Are the links by the hosts, a separate broadcast? Again, if the *Rage* programme is considered as a whole, a thirty second extract could not be considered a substantial part. On the other hand, a thirty second extract from a four minute video-clip could be substantial.

The *9/11* documentary: The only footage of the jet crashing into the World Trade Center was shot by two French brothers, who happened to be making a documentary about a probationary New York firefighter and his company.⁸⁴ In the weeks leading up to the dreadful tragedy of 9/11 they had spent many quiet hours at the fire station, filming the firefighters becoming increasingly bored with their lack of business. The footage of the plane crash was a small part of their larger documentary in terms of seconds but was overwhelmingly the most valuable piece of footage. A related question would be how you characterise the CNN coverage of such an event. Is the broadcast the whole day, which focused on various aspects of the tragedy as events unfolded across the US and the World, or was it each separately produced segment,

⁸¹ Handler, above n 7, 407.

⁸² The majority reserved consideration of Conti J's proposition that 'where a given program divides into segments, it may be legitimate in the facts of a given case to use a segment of a program for measurement of the television broadcast, rather than the whole of the program': *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 367 [41]. They concluded that 'the circumstance that a prime time news broadcast includes various segments, items or "stories" does not necessarily render each of these a "a television broadcast" in which copyright subsists under s 91 of the Act': *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [77].

⁸³ This scenario ignores the separate issue of the underlying copyright in the clip as a cinematograph film, musical work, etc.

⁸⁴ Jules and Gedeon Naudet, *9/11*. See <<http://www.frenchculture.org/tv/programs/naudet911.html>> at 23 June 2004.

filed by CNN's team of correspondents, both employee and freelance, around the World?

The answers to these questions will have to await further relevant litigation.

Of course, if that threshold is reached in a particular case, the fair dealing defences may be applied if the circumstances are relevant. The surprising strength of copyright in broadcasts, acknowledged by both the minority and majority judgments, highlights the importance of the balancing role played by fair dealing, which incorporates the protection of the public interest within the boundaries of copyright law. All of the High Court judges acknowledge the need to be careful to avoid rolling issues of substantiality and issues of fair dealing in together. Kirby J, in particular, stresses the fact that fair dealing is the appropriate avenue for consideration of issues of public policy. The news item example discussed above, may serve to illustrate this point. A small extract from a short news broadcast may constitute a substantial part in terms of length and content. However, the use may be protected as a fair dealing, on the basis that it is used as part of the reporting of news or for purposes of criticism or review.

The majority view, which recognises a narrower form of copyright protection for broadcasts, with the application of the test of substantial part, (more akin to other subject matter protected by copyright) creates a more extensive scope for re-broadcasting. The minority view, recognising a much stronger form of broadcast copyright, increases the need for a strong defence of fair dealing in leaving some scope for public uses of a broadcast.

Clearly the outcome of this decision has an impact on the issue of freedom of expression, as discussed above. If certain images of a major event are captured by only one broadcaster, for example, the launch of the private space rocket, Space Ship One, the crash of Ralf Schumacher at the United States Grand Prix or the discovery of Saddam Hussein in his hiding hole, that fact grants the broadcaster substantial control over a series of images which may be of vital significance to public debate. Care must be taken to ensure that the public interest in freedom of expression is protected within copyright, whether that is through the application of the test of substantial part, or more appropriately, through the application of fair dealing.

[294] **Conclusions**

The concerns expressed by the Spicer Committee in 1965 regarding the appropriateness of granting protection to broadcasts in the *Copyright Act* appear to be justified by this decision. Television broadcasts do raise unique issues due to the power of the visual image, the cost of production, and the lack of creativity associated with other subject matter of copyright. However, none of this appears sufficient to justify the departure from the concept of substantial part, so fundamental to the copyright balance and which is applicable to all other aspects of copyright. If it is not intended to apply to broadcasts, the Act should explicitly state this. The decision demonstrates the need for legislative reform of this aspect of the *Copyright Act*. If broadcasts are to be protected as part of the copyright regime that protection should conform to the fundamental principles of copyright, balancing the interests of owners and users. As Handler notes: 'The outcome of the case will have important implications for the Australian broadcasting industry, in particular as regards the way in which television broadcasters use other broadcasters' material.'⁸⁵ As discussed above, this is relevant to freedom of expression as well as copyright concerns.

The conclusions of the majority are to be preferred from a practical point of view, allowing broadcasters to continue to make use of material broadcast by a rival broadcaster, provided it does not reach the threshold of a substantial part of the relevant segment. However, it is the conclusions of the minority which appear most accurately to interpret and apply the literal wording of the legislation.

The difficulties faced by the High Court in this case clearly demonstrate the problems with the drafting of the *Copyright Act*. Although s 87 was subject to minor amendments as part of the Digital Agenda reforms, this did nothing to remove the issues raised in the case. The relationship between ss 14(1), 87, 101 and 25(4) in particular needs to be clarified. Although it appears that s 25(4) is intended to be a clarifying provision that is, to confirm that reproduction by way of a photograph of any of the visual images comprised in a broadcast would be an infringement, it has the reverse effect. As noted by the majority, an apparently subordinate provision could be interpreted (as the Full Court and the minority in the High Court did) as dictating the

⁸⁵ Handler, above n 7, 391.

meaning of infringement with respect to television broadcasts, upsetting the operation of more dominant provisions.⁸⁶ A valid question is why was s 25(4) included in the Act?

These provisions should be redrafted so that their meaning and intended interrelationship is clear. 'Television broadcast' should be defined to clarify the unit to which it applies, this may require the inclusion in the *Copyright Act* of a reference to the concept of 'programme' or 'segment' which has separate production credits. The application of the concept of substantial part to such a unit should also be confirmed and the relevance of s 25(4) clarified.

The concept of substantial part is essential in maintaining the copyright balance ensuring that users retain the ability to make use of small portions of copyright material without needing the permission of the copyright owner. If all and any use of copyright material were an infringement a very heavy burden indeed would fall upon the fair dealing defences, being the only generally available defences under the *Copyright Act*.

By confining its consideration of the issues very closely to the facts of this case, the High Court ultimately gives very little guidance on the two questions identified at the beginning of this article. The majority held only that the programmes identified in the Channel Nine statement of claim would satisfy the definition of a television broadcast. The majority confirms that the concept of substantial part is relevant to the determination of infringement of copyright in a television broadcast but leaves unclear how that substantial part is to be calculated. This still leaves room for significant uncertainty regarding how much one broadcaster may 're-broadcast' from another and, as with the uncertainty regarding the application of the fair dealing defences, any uncertainty will operate as a deterrent to freedom of communication.

⁸⁶ Given the introductory words of s 14(1) 'unless the contrary intention appears', this is of course, open to argument.