‘A REAL PEA SOUPER’: THE PANEL CASE AND THE DEVELOPMENT OF THE FAIR DEALING DEFENCES TO COPYRIGHT INFRINGEMENT IN AUSTRALIA

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[The majority of commentary on the Federal Court decisions in The Panel Case has focused on the findings as to infringement of copyright in television broadcasts. By comparison, the judges’ consideration of the fair dealing defences to copyright infringement has been somewhat neglected. This article suggests that the Federal Court passed up a rare and valuable opportunity to clarify the operation of the fair dealing defences in Australian copyright law. It failed to articulate sound principles, which in turn led to anomalous and problematic outcomes in The Panel Case. The article provides a close analysis of the treatment of the fair dealing defences in The Panel Case as well as suggesting a basis for the future principled development of the fair dealing defences in Australian law.]

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I INTRODUCTION

Copyright cases in which fair dealing defences are raised are rare in Australia. The most recent Australian litigation in which such defences were raised was The Panel Case in the Federal Court, both at first instance and on appeal to the Full Court. TCN Channel Nine Pty Ltd (‘Nine’) sued rival television station Network Ten Pty Ltd (‘Ten’) for copyright infringement arising from the use of a number of excerpts from Nine’s programmes on Ten’s programme ‘The Panel’. Part of Ten’s defence was that its use of Nine’s programmes constituted fair dealing for the purposes of criticism or review and/or the reporting of news under sections 103A and 103B(1) of the Copyright Act 1968 (Cth) (‘the Act’). At first instance and on appeal, the outcomes for Ten in relation to its fair dealing defences were mixed. Given the infrequency with which fair dealing defences are raised in Australia, The Panel Case provided an important opportunity for the Federal Court to contribute to the principled development of the jurisprudence in this area. Unfortunately, the judges in The Panel Case did not adequately avail themselves of this opportunity.

1 TCN Channel Nine v Network Ten (2001) 108 FCR 235 (Conti J) (‘The Panel Trial’).

2 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 118 FCR 417 (Sundberg, Finkelstein and Hely JJ) (‘The Panel Appeal’).

3 Section 103A of the Act states:

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

Section 103B of the Act states:

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

(a) it is for the purpose of, or is associated with, the reporting of news by means of a communication in a cinematograph film.
At the most general level, we suggest that there are two overarching problems with *The Panel Case*. First, neither Conti J at first instance nor the Full Court on appeal clearly articulated the principles governing the defences of fair dealing for the purposes of criticism or review, and of news reporting. More specifically, they did not adequately consider: the proper standard by which the fairness of the dealing ought to be assessed; how crucial terms, such as ‘criticism’, ‘review’ and ‘reporting of news’, should be defined and applied; or how the substantial body of UK case law on fair dealing should be interpreted. Secondly, and as a consequence of the first problem, the judges applied the fair dealing defences in an ad hoc manner based primarily on personal ‘impression’, without clearly or consistently explaining, by reference to external principles, the bases for their findings. The judges largely overlooked the question of whether Ten’s dealings were ‘fair’, and the Full Court in particular failed to grasp the relationship between the assessment of the fairness of a dealing and the ‘substantial part’ test for copyright infringement. Instead, the judges focused on whether Ten’s dealings were for the purposes of ‘criticism’, ‘review’ and ‘reporting of news’, and in doing so implicitly encoded unduly restrictive notions of these statutory purposes in circumstances where a greater sensitivity to the practices of criticism and news reporting was needed. As a result of these two major problems, the Federal Court has both obfuscated the principles of fair dealing and reached outcomes that are neither clearly reasoned nor at times easy to reconcile with one another.

This article aims to provide a critique of the reasoning in *The Panel Case* and to suggest alternative ways that the fair dealing defences could be developed and applied. Part II of this article focuses on the judgments of Conti J and of the Full Court in *The Panel Case* and, in particular, on the way in which the judges dealt with the legal principles governing the fair dealing defences. Part III provides a critique of the judges’ articulation of legal principle in *The Panel Case*. Part IV focuses on the problematic application of principle in *The Panel Case* with particular reference to six excerpts of Nine’s programmes rebroadcast by Ten. Cumulatively, these criticisms demonstrate that the decisions in *The Panel Case* have left Australian copyright law in an unsatisfactory state. Part V offers a fresh examination of the fair dealing defences in light of this critique, indicating the need for a rigorous and principled reconsideration of the operation and effect of fair dealing defences under the Act.

II *THE PANEL CASE AND THE ARTICULATION OF THE PRINCIPLES OF FAIR DEALING*

A Background to the Litigation

‘The Panel’ is a weekly television programme that has been broadcast throughout Australia since 1998. Each hour-long episode features a regular team of three to five panellists, plus several invited guest panellists, who engage in largely unscripted discussion about items of topical interest and popular culture in a generally light-hearted manner. In doing so, the panellists frequently make reference to other television programmes, excerpts of which are sometimes
shown. Copies of these other programmes are made by Ten before each episode of ‘The Panel’ and Ten rebroadcasts excerpts from these copied programmes during each episode as prompted by the panellists. The panellists often use the excerpts to make reference to incongruous, sometimes unintentionally humorous, moments within rival broadcasters’ television programmes in order to poke fun at these programmes. As befits a live television show, on some occasions the ridicule is made more explicit than on others.

Between August 1999 and June 2000, Ten rebroadcast on ‘The Panel’ excerpts from 20 programmes originally broadcast by Nine.4 The excerpts were of between eight and 42 seconds in duration.5 Some examples of these excerpts, and the way in which the panellists dealt with them, are as follows:

- An excerpt from Nine’s morning news programme ‘The Today Show’ showed former Russian President Boris Yeltsin shaking hands with three former Russian Prime Ministers. The panellists, in the context of discussing the then pending Australian republic referendum, made humorous and derisive comments about the political performance of Yeltsin and other world leaders;6
- An excerpt from Nine’s variety programme ‘Midday’ showed the Prime Minister, John Howard, singing ‘Happy Birthday’ to retired Australian cricketer, Sir Donald Bradman, at the request of the programme’s host, Kerri-Anne Kennerley. The panellists made lengthy comments relating to the appearance of the Prime Minister in the excerpt and Kennerley’s performance as the host of ‘Midday’;7
- An excerpt from Nine’s long-running US soap opera ‘Days of Our Lives’ showed the character Marlena Evans standing on a balcony in a state of demonic possession. The panellists commented on the hackneyed plot devices being employed to prolong the life of Nine’s programme;8
- An excerpt from Nine’s flagship public affairs programme ‘Sunday’ showed a ‘sports performance consultant’ making allegations of drug-taking among elite athletes. The panellists generally agreed that the allegations were grossly exaggerated and inappropriate in the context of the then pending Olympic Games in Sydney;9
- An excerpt from the ‘72nd Academy Awards’ ceremony, which had been broadcast by Nine, showed American soul singer Isaac Hayes becoming enveloped in ‘a real pea souper’ of an artificial fog during his live performance at the ceremony, apparently due to overuse of artificial fog machines. The panellists made amusing comments about this over the footage of the excerpt;10

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6 Ibid 290–1.
7 Ibid 291.
8 Ibid 295.
9 Ibid 298.
10 Ibid.
A series of temporally separated excerpts from ‘The Today Show’, edited together by Ten, showed an interviewer, located in Nine’s studios, engaged in a serious interview of Mr Prasad, the manager of a Sydney hostel, who was located at the hostel. During the excerpts, hostel occupants intruded into the frame behind Prasad, and the panellists laughed at this.11

Following some inflammatory comments about Ten’s practices by the then director of news and current affairs at Nine,12 Nine brought proceedings against Ten, alleging that Ten had infringed Nine’s copyright in its television broadcasts.13 Ten argued that it had not infringed Nine’s copyright for two reasons. First, it had neither rebroadcast nor made cinematograph films of a substantial part of Nine’s television broadcasts. Secondly, and in the alternative, Ten argued that in respect of 19 of the 20 excerpts14 it had made fair dealings with Nine’s broadcasts for the purposes of criticism or review and/or the reporting of news.15

B Findings on Copyright Infringement

At first instance, Conti J held that Ten had neither rebroadcast a substantial part of Nine’s broadcasts16 nor made cinematograph films of a substantial part of Nine’s broadcasts preparatory to the rebroadcasting of excerpts of Nine’s programmes,17 and thus entered judgment for Ten.

On appeal, the Full Court held that Ten had, in rebroadcasting each of the 20 excerpts, availed itself of Nine’s exclusive rights under s 87 of the Act.18 It held that because a television broadcast is defined under section 10(1) of the Act merely as ‘visual images broadcast by way of television’, without reference to an aggregate of images or by reference to such notions as a ‘television programme’, the rebroadcasting of any of the actual images and sounds broadcast is an infringement of copyright.19 The length of the broadcast, and whether it could be characterised as a programme, a segment of a programme, an advertisement or a

12 Peter Meakin, then director of news and current affairs at Nine, stated (in relation to another Ten programme): ‘I’m reluctant to accuse [Ten] of theft, but in Saudi Arabia they’d have their hands chopped off’: see John Little, “Fair Dealing” Fuels Foul Calls’, Media, The Australian (Sydney), 3 February 2000, 3. These comments were criticised as being disingenuous in light of Nine’s own practices: see ABC Television, Media Watch, 7 February 2000 <http://www.abc.net.au/mediawatch/transcripts/s98367.htm> (but not, unfortunately, for their racial stereotyping).
13 Pursuant to s 101 of the Act (infringement), in relation to Nine’s exclusive rights under s 87(c) (rebroadcasting a substantial part of Nine’s television broadcasts) and s 87(a) (making cinematograph films of Nine’s television broadcasts).
15 In relation to the six excerpts considered above, Ten argued that its rebroadcasts of the ‘Days of Our Lives’, ’72nd Academy Awards’ and ‘The Today Show’ (Prasad interview) excerpts were fair dealings for the purpose of criticism or review, that its rebroadcasts of the ‘The Today Show’ (Boris Yeltsin) and ‘Sunday’ excerpts were fair dealings for the purpose of news reporting and that its rebroadcast of the ‘Midday’ excerpt was a fair dealing for the purposes of both criticism or review and of news reporting: ibid 290–9.
16 Ibid.
19 Ibid 422 (Finkelstein J), 436 (Hely J).
station break, were held to be immaterial. The Full Court held that ‘there may be many collocations of visual images and accompanying sounds broadcast during the space of a day, all of which would satisfy the definition of a “television broadcast”’. It held that the length of the television broadcast, for the purposes of defining the subject matter in which copyright subsists, is determined by the amount of material rebroadcast. This effectively meant that Ten had rebroadcast the entirety of each of Nine’s 20 broadcasts by rebroadcasting the excerpts of Nine’s programmes.

Whether or not Ten could rely on its pleaded fair dealing defences therefore became a live issue before the Full Court.

C Findings on Fair Dealing

1 Conti J

Although not required to do so (given his conclusions in relation to substantiability), Conti J considered whether Ten would have been able to make out its pleaded fair dealing defences. In doing so, his Honour referred to Beaumont J’s judgment in the leading Australian authority on fair dealing, *De Garis v Neville Jeffress Pidler Pty Ltd*. Conti J noted that Beaumont J had considered that the terms ‘criticism’ and ‘review’ as used in the Act were to be given their Macquarie Dictionary definitions, and had quoted from the UK Court of Appeal. The correctness of the Full Court’s decision on copyright infringement is beyond the scope of this article. However, although it has received some support in principle (see Staniforth Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (2nd revised ed, 2002) [8.100]), it has worrying implications. It is suggested that the Full Court failed properly to consider whether the definition of ‘television broadcast’ in the Act is intended to provide any quantitative standard or, because of the evanescent nature of a broadcast, whether it is merely meant to indicate the material in which the copyright exists (‘visual images’), leaving quantitative issues to be determined by other standards. As a result, the Full Court’s findings on subsistence and infringement make the notion of ‘substantial part’ in s 14(1)(a) of the Act redundant by glossing over the fact that the visual images extracted from a television broadcast only have real market value when viewed in relation to the complete programme, segment or advertisement from which the extracts are taken (see Sir Hugh Laddie et al, *The Modern Law of Copyright and Designs* (3rd ed, 2000) [8.37]) as well as glossing over the reasons for the defendant’s rebroadcast of the plaintiff’s material. In addition, the Full Court’s approach has implications for the use of sound broadcasts (such as radio programmes), which are defined in s 10(1) of the Act as ‘sounds broadcast otherwise than as part of a television broadcast’. On the reasoning of the Full Court, the rebroadcast of, or the making of a sound recording of, any ‘sounds’, no matter how brief and regardless of their qualitative significance, will be an infringement of copyright in the sound broadcast. The High Court has granted special leave to hear Ten’s appeal on the issue of infringement of copyright in a ‘television broadcast’; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2003) 24(8) Leg Rep SL5. See Michael Handler, ‘Before the High Court: The Panel Case and Television Broadcast Copyright’ (2003) 25 Sydney Law Review (forthcoming).

20 Ibid 436 (Hely J).  
21 Ibid.  
22 Ibid.  
23 The correctness of the Full Court’s decision on copyright infringement is beyond the scope of this article. However, although it has received some support in principle (see Staniforth Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (2nd revised ed, 2002) [8.100]), it has worrying implications. It is suggested that the Full Court failed properly to consider whether the definition of ‘television broadcast’ in the Act is intended to provide any quantitative standard or, because of the evanescent nature of a broadcast, whether it is merely meant to indicate the material in which the copyright exists (‘visual images’), leaving quantitative issues to be determined by other standards. As a result, the Full Court’s findings on subsistence and infringement make the notion of ‘substantial part’ in s 14(1)(a) of the Act redundant by glossing over the fact that the visual images extracted from a television broadcast only have real market value when viewed in relation to the complete programme, segment or advertisement from which the extracts are taken (see Sir Hugh Laddie et al, *The Modern Law of Copyright and Designs* (3rd ed, 2000) [8.37]) as well as glossing over the reasons for the defendant’s rebroadcast of the plaintiff’s material. In addition, the Full Court’s approach has implications for the use of sound broadcasts (such as radio programmes), which are defined in s 10(1) of the Act as ‘sounds broadcast otherwise than as part of a television broadcast’. On the reasoning of the Full Court, the rebroadcast of, or the making of a sound recording of, any ‘sounds’, no matter how brief and regardless of their qualitative significance, will be an infringement of copyright in the sound broadcast. The High Court has granted special leave to hear Ten’s appeal on the issue of infringement of copyright in a ‘television broadcast’; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2003) 24(8) Leg Rep SL5. See Michael Handler, ‘Before the High Court: The Panel Case and Television Broadcast Copyright’ (2003) 25 Sydney Law Review (forthcoming).

24 (1990) 37 FCR 99 (‘De Garis’).  
26 De Garis (1990) 37 FCR 99, 107, Beaumont J defined the term ‘criticism’ thus: *The Macquarie Dictionary* definition of ‘criticism’ includes the following:

  1. the act or art of analysing and judging the quality of a literary or artistic work, etc: literary criticism.  
  2. the act of passing judgment as to the merits of something …  
  3. a critical comment, article or essay; a critique.’
case of *Hubbard v Vosper*\(^{28}\) as to what constituted ‘fair dealing’. Conti J also referred to other Australian authorities on the fair dealing provisions,\(^{29}\) including the Federal Court case of *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation*,\(^{30}\) in which Hill J suggested that the fact that a broadcaster intended to televise an event of national significance with a humorous commentary did not mean that its broadcast would not be for the purpose of news reporting.\(^{31}\) In addition, Conti J quoted without comment from a number of UK authorities on fair dealing, including *Beloff v Pressdram Ltd*\(^{32}\) and *British Broadcasting Corporation v British Satellite Broadcasting Ltd*,\(^{33}\) and the Court of Appeal decisions in *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc*,\(^{34}\) *Pro Sieben Media AG v Carlton UK Television Ltd*,\(^{35}\) and *Hyde Park Residence Ltd v Yelland*.\(^{36}\)

His Honour concluded that the following eight principles emerged from the authorities on fair dealing (‘Principles’):\(^{37}\)

(i) fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;\(^{38}\)

(ii) fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose [sic];\(^{39}\)

(iii) criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the

In my opinion, ‘criticism’ in the context of s 41 is used in these senses. Beaumont J defined the term ‘review’ thus (ellipsis in original):

The *Macquarie Dictionary* definition of ‘review’ includes the following:

‘1. a critical article or report, as in a periodical, on some literary work, commonly some work of recent appearance; a critique …’

In my opinion, ‘review’ is used in s 41 in this sense.

\(^{27}\) Ibid 109–10.

\(^{28}\) [1972] 2 QB 84.


\(^{30}\) (1999) 48 IPR 333 (‘Nine v ABC’).

\(^{31}\) Ibid 340.

\(^{32}\) [1973] 1 All ER 241.

\(^{33}\) [1992] Ch 141 (‘BBC v BS8’).

\(^{34}\) [1994] EMLR 1 (‘Time Warner’).

\(^{35}\) [1999] 1 WLR 605 (‘Pro Sieben’).

\(^{36}\) [2001] Ch 143 (‘Hyde Park’).


\(^{38}\) The first clause of this principle is derived from *Hubbard v Vosper* [1972] 2 QB 84, 94 (Lord Denning MR). The requirement that fair dealing is to be judged according to the standard of a ‘fair minded and honest person’ is based on *Hyde Park* [2001] Ch 143, 159 (Aldous LJ). The notion that fair dealing is an ‘abstract concept’ is based on a dictum of Gibbs J in the High Court case of *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 12.

\(^{39}\) This principle is based on a circumlocutory passage in *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 262 (Ungoed-Thomas J), quoted in its entirety by Conti J in *The Panel Trial* (2001) 108 FCR 235, 277. The requirement that fairness be judged ‘objectively’ is based on *Pro Sieben* [1999] 1 WLR 605, 614 (Robert Walker LJ) and *Hyde Park* [2001] Ch 143, 159 (Aldous LJ):

passing of judgment[;] criticism and review may be strongly expressed;\textsuperscript{40}

(iv) criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;\textsuperscript{41}

(v) an oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way[;] ‘the path of criticism is a public way’;\textsuperscript{42}

(vi) criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;\textsuperscript{43}

(vii) ‘news’ is not restricted to current events;\textsuperscript{44} and

(viii) ‘news’ may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.\textsuperscript{45}

Conti J then considered Ten’s use of each of the 19 excerpts of Nine’s broadcasts, finding that Ten could have established its pleaded fair dealing defences in relation to 11 of those excerpts. For example, in relation to the excerpts outlined in Part II(A) above, his Honour held that Ten would have been able to make out

\textsuperscript{40} The statements that ‘criticism and review are words of wide and indefinite scope which should be interpreted liberally’ and that ‘criticism and review may be strongly expressed’ are based on \textit{Pro Sieben} [1999] 1 WLR 605, 613–14 (Robert Walker LJ). The statement that ‘criticism and review involve the passing of judgment’ has its origin in \textit{De Garis} (1990) 37 FCR 99, 107 (Beaumont J).

\textsuperscript{41} The requirements that criticism and review be ‘genuine’ and ‘not a pretence for some other form of purpose’ are based on statements of Henry LJ in \textit{Time Warner} [1994] EMLR 1, 14–15 (quoted in \textit{Pro Sieben} [1999] 1 WLR 605, 613 (Robert Walker LJ)). The principle that genuine criticism or review may be ‘unbalanced’ was enunciated in both \textit{Time Warner} [1994] EMLR 1, 14 (Henry LJ) and \textit{Pro Sieben} [1999] 1 WLR 605, 613 (Robert Walker LJ).

\textsuperscript{42} The reference to an ‘oblique’ motive has its origins in the UK High Court case of \textit{Johnstone v Bernard Jones Publications Ltd} [1938] 1 Ch 599, 607 (Morton J), approved by Scott J in \textit{BBC v BSB} [1992] Ch 141, 157. The word ‘hidden’ comes from the Explanatory Memorandum, Copyright Amendment Bill 1986 (Cth), [25], which stated that ‘[t]he dealing must, however, be genuinely for the purpose permitted in the sections, and not for some other “hidden” purpose’: quoted by Conti J in \textit{The Panel Trial} (2001) 108 FCR 235, 280. There is no direct authority for the proposition that a hidden motive disqualifies reliance ‘particularly where the copyright infringer is a trade rival who uses the copyright subject material for its own benefit, particularly in a dissembling way’ (emphasis added). The proposition is loosely based on Lord Denning MR’s statement in \textit{Hubbard v Vosper} [1972] 2 QB 84, 93 that ‘[i]t is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit.’ Lord Adkin’s aphorism ‘[t]he path of criticism is a public way’ (\textit{Ambard v A-G for Trinidad and Tobago} [1956] AC 322, 335) was quoted with approval by Henry LJ in \textit{Time Warner} [1994] EMLR 1, 14 and referred to by Conti J in \textit{The Panel Trial} (2001) 108 FCR 235, 277.

\textsuperscript{43} This principle is based on statements of Lord Denning MR in \textit{Hubbard v Vosper} [1972] 2 QB 84, 94 and Ungoed-Thomas J in \textit{Beloff v Pressdram Ltd} [1973] 1 All ER 241, 262, both made in relation to literary works. Conti J’s extension of the principle to relate to subject matter other than original works is based on \textit{Pro Sieben} [1999] 1 WLR 605 where Robert Walker LJ held, in relation to a television broadcast, that criticism ‘may also extend to ideas to be found in a work and its social or moral implications’: at 614. In the UK, ‘works’ are defined to include materials (such as television broadcasts) that in Australia are described as subject matter other than works: \textit{Copyright, Designs and Patents Act 1988} (UK) c 48, s 1(1)(b).

\textsuperscript{44} This principle is taken from Mason J’s dictum in the High Court case of \textit{Commonwealth v John Fairfax & Sons Ltd} (1980) 147 CLR 39, 56, quoted by Conti J in \textit{The Panel Trial} (2001) 108 FCR 235, 276.

\textsuperscript{45} This principle is derived from statements of Hill J in \textit{Nine v ABC} (1999) 49 IPR 333, 340.
its pleaded defences in relation to the ‘Days of Our Lives’, ‘Sunday’, ‘72nd Academy Awards’ and ‘The Today Show’ (Prasad interview) excerpts. However, in relation to the ‘Midday’ excerpt, Conti J thought that Ten’s purpose in using the material was to satirise ‘certain supposed personality traits and political allegiances’ of Kennerley and to ‘satirise the Prime Minister’s already well-known admiration for Sir Donald Bradman’. Similarly, in relation to ‘The Today Show’ (Boris Yeltsin) excerpt, Conti J considered that the purpose of Ten’s rebroadcast was entertainment rather than news reporting.

2 The Full Court

In the Full Court, Hely J was the only judge to engage with Conti J’s approach to the law governing fair dealing. Hely J suggested that Conti J had ‘summarised the principles emerging from the authorities’, and then proceeded to quote Conti J’s Principles. Hely J neither explicitly adopted the Principles nor passed comment on them. His Honour did, however, state that although Ten’s purpose in broadcasting ‘The Panel’ might have been ‘to entertain and to achieve ratings’, this did not disentitle it from relying on its pleaded defences.

After considering the availability of the fair dealing defences in relation to the 10 excerpts that were the subject of Nine’s appeal and Ten’s Notice of Contention, the Full Court found that Ten had established its pleaded fair dealing defences in nine of the 19 excerpts. The Full Court agreed with Conti J’s conclusions in respect of ‘The Today Show’ (Boris Yeltsin), ‘Midday’, ‘Days of Our Lives’ and ‘Sunday’ excerpts, but held that Ten’s rebroadcast of ‘The Today Show’ (Prasad interview) excerpt was ‘made for its own sake’, or for the purpose of humour, rather than as an exercise in criticism or review.

The table in the Appendix provides a summary of the findings of Conti J and the Full Court in relation to all 19 excerpts.

D Reaction and Implications

The Full Federal Court’s decision in The Panel Case proved to be controversial. It was greeted with incredulity in the media, where it was suggested that the judges had failed to recognise that the panellists had engaged in obvious exam-
amples of criticism and news reporting. It was treated with concern amongst legal practitioners, who considered that it was now more difficult than ever to advise clients as to what would constitute a fair dealing with copyright material. Perhaps most tellingly, it appeared to create a climate of uncertainty within the broadcasting industry. Ten stopped rebroadcasting excerpts of Nine’s broadcasts on ‘The Panel’. Rival network Channel Seven, whose programme ‘Sportswatch’ included rebroadcasts of highlights of other networks’ sports events, was accused by Nine of infringing Nine’s broadcast copyright. ‘Sportswatch’ was cancelled in December 2002.

As we explain in the next two sections, the problems with The Panel Case both at first instance and on appeal are manifold and profound, leaving the law in relation to fair dealing defences in Australia obscure and unsettled.

III CRITIQUE OF THE PANEL CASE: UNCLEAR PRINCIPLES

The problems with Conti J’s articulation of the principles relating to the fair dealing defences were not due to any failure in collating relevant case law. Conti J did identify the relevant Australian and UK authorities from which the most important legal principles relating to fair dealing have been derived. The essential problem is, rather, that Conti J’s eight Principles are an untidy agglomeration of statements drawn from these authorities that have not been analysed or criticised. As such, Conti J provided little indication of the relative importance of each of the Principles or how they apply in practice. It is not clear, looking at the Principles as a whole, whether Conti J endorsed a liberal or restrictive interpretation of the fair dealing defences. There are also a number of specific problems with the Principles as articulated. Conti J’s isolation of statements from case law and elevation of them to the level of principle has the effect of distorting their meaning, making them inappropriate as guidelines for the operation of the fair dealing defences. Further, there are tensions within some of the Principles as to the definition and interpretation of key words in the fair dealing provisions. Conti J’s attempted restatement of the law on fair dealing defences has to some extent confused, rather than clarified, this aspect of the law.

It should also be emphasised that the Full Court bears equal responsibility for the lack of clarity in the principles governing fair dealing. In fairness to Conti J,
the fair dealing issue was not a live one at trial. The Full Court should therefore
have been more cautious than it was in accepting Conti J’s formulation of the
Principles and not addressing the relevant case law on which the Principles were
based in any depth. The Full Court’s failure to do so is all the more concerning
given that it was not bound to follow any of the authorities employed by Conti J
and, in particular, was in a position to review the approaches taken in the
Australian cases of De Garis and Nine v ABC.

A The Undifferentiated Reading of the Case Law on Fair Dealing

1 Conti J’s Methodology

The first, and overarching, problem with Conti J’s formulation of the Princi-
ples relates to his Honour’s uncritical treatment of the case law from which the
Principles were derived. This treatment failed to differentiate between the
divergent approaches taken to the interpretation of the fair dealing defences
according to the circumstances of individual cases. As a consequence, many of
the Principles have limitations as guidelines for future fair dealing cases.

Conti J appears to have assumed that a coherent and uncontroversial body of
case law on fair dealing defences had developed prior to The Panel Case, such
that statements extracted from any particular case could be seen as consistent
with other fair dealing cases and representative of general statements of princi-
ple. This assumption is, however, highly problematic. The following exposition
of the UK case law on fair dealing referred to by Conti J reveals that his Hon-
our’s undifferentiated reading of the existing case law was in error. This in turn
demonstrates the fundamental problems with his Honour’s articulation of the
Principles.

2 An Engagement with the UK Case Law

It has been suggested that, despite different outcomes reached in UK cases on
fair dealing, there has been little dispute about the applicable general prin-
ципes.63 However, the fact that similar principles have been consistently referred
to across a number of cases does not necessarily indicate that those principles
have been consistently interpreted. It is possible to discern two approaches to the
fair dealing defences from the UK case law to which Conti J referred. The first is
an expansive approach, as seen in cases such as Hubbard v Vosper, BBC v BSB,
Time Warner and Pro Sieben, where not only were the fair dealing defences
made out, but the courts also interpreted the language of the fair dealing defences
and applied such defences liberally.64 The second is a more restrictive approach,
as revealed in cases such as Beloff v Pressdram Ltd, Hyde Park and Ash-
down v Telegraph Group Ltd,65 where the fair dealing defences were interpreted
and applied strictly.

63 Pro Sieben [1999] 1 WLR 605, 613 (Robert Walker LJ). See also Jeremy Phillips, ‘When Is a
64 See Jonathan Griffiths, ‘Preserving Judicial Freedom of Movement — Interpreting Fair Dealing
65 [2001] Ch 685; aff’d [2002] Ch 149 (‘Ashdown’). Sir Andrew Morriss V-C’s decision at first
instance was handed down before Conti J’s judgment in The Panel Case, and the Court of Ap-
(a) The Expansive Approach

In the first group of cases, each case involved the reproduction of material already published or placed in the public domain. There was no real question of the defendants’ dealings supplanting the plaintiffs’ markets for their copyright material and the defendants’ uses of the plaintiffs’ copyright material were ‘transformative’. This is the factual matrix in which the UK courts have interpreted the scope of the fair dealing defences most broadly.

For instance, in *Hubbard v Vosper*, Lord Denning MR held that ‘criticism’ of a literary work included criticism of the thoughts, doctrines or philosophy expounded in the work. His Lordship thus found that it was permissible to quote from religious tracts in order to criticise the religion itself. In *Time Warner*, which involved the defendant using extracts of the film ‘A Clockwork Orange’ (comprising approximately eight per cent of the entire film) in the course of a documentary criticising the decision to withdraw the film from circulation, the Court of Appeal interpreted the requirements of the fair dealing defences expansively. It held that the dealing was fair despite the length of the extracts used and the fact that the defendant had chosen extracts that were arguably not representative of the film. It also held that, even if the purpose of the documentary was to criticise the decision to withdraw the film, it was ‘highly relevant to that criticism to illustrate by excerpts relevant qualities, whether positive or negative, of the film, so that the public may form a view of the decision criticised’.

The Court of Appeal in *Pro Sieben* interpreted ‘criticism’ even more broadly still. In this case, the plaintiff had broadcast a nine minute segment on a German current affairs programme which included a paid interview with a woman pregnant with eight embryos, an interview arranged by her publicist. The defendant, in the course of its programme criticising chequebook journalism, broadcast a 30 second extract of the plaintiff’s programme which showed the pregnant woman and her partner shopping for eight teddy bears. The Court of Appeal held that the defendant’s dealing was for a permissible purpose, because Conti J’s decision in *Ashdown* was handed down after Conti J’s judgment but before the Full Court’s judgment in *The Panel Case*.

66 Although in *Hubbard v Vosper* [1972] 2 QB 84 some of the copyright works reproduced had only been published with a limited circulation (namely to those who took certain courses in Scientology): at 94; and in *Time Warner* [1994] EMLR 1, the copyright work (Stanley Kubrick’s film ‘A Clockwork Orange’) had been withdrawn from circulation in the UK approximately 20 years before the defendants’ dealing with the work: at 5.

67 In *BBC v BSB* [1992] Ch 141, Scott J rejected the BBC’s argument that BSB’s showing of brief highlights of World Cup football matches after the BBC’s broadcast of the entire matches, but before the BBC’s own highlights programme, affected the BBC’s market in its broadcasts: at 155.

68 See Pierre Leval, ‘Toward a Fair Use Standard’ (1990) 103 *Harvard Law Review* 1105, 1111; *Campbell v Acuff Rose Music Inc*, 510 US 569, 579 (1994) (Souter J). However, it is acknowledged that in Anglo-Australian law ‘transformative use’ does not determine whether a use is for a permitted statutory purpose or even if it is a ‘fair dealing’.

69 [1972] 2 QB 84, 94. See also at 98 (Megaw LJ).


72 Ibid 13 (Neill LJ), 15–16 (Henry LJ).

73 Ibid 16 (Henry LJ).
it was criticising the genre of works representing the fruits of chequebook journalism and media exploitation, of which the plaintiff’s programme was an example.74 It was in this context that the Court of Appeal proclaimed that criticism or review may extend to the ‘ideas to be found in a work and its social or moral implications’.75

(b) The Restrictive Approach

In contrast, in *Beloff v Pressdram Ltd, Hyde Park* and *Ashdown*, the copyright material in question was both unpublished and confidential and had been ‘leaked’ to the defendant. In each case, the Courts’ disapprobation of the defendants’ conduct in dealing with the unpublished material was palpable.76 It is arguable that the unpublished nature of the copyright material was perhaps the most important factor in the Courts’ determination that the defendants’ dealings were not ‘fair’. However, in each of these cases, the Courts considered other factors going to ‘fairness’, as well as whether the defendants’ dealings were for a permitted purpose. Perhaps unsurprisingly, given the fact that the outcome of the case had effectively been decided on the basis of the unpublished nature of the material, the Courts interpreted these other elements narrowly.77

Thus, on the question of ‘fairness’ in *Hyde Park* and *Ashdown*, a relevant consideration was held to be whether the defendants’ use of the copyright material was ‘necessary’ for the statutory purposes78 a term that is not synonymous with ‘fair’. In particular, Aldous LJ in *Hyde Park* considered that the defendant newspaper editor’s use of stills from a security camera video — merely to show the timing of the arrival and departure of Diana, Princess of Wales and Dodi Al Fayed at a house in Paris, in order to refute comments made by Al Fayed’s father in another newspaper — was excessive because that

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74 Pro Sieben [1999] 1 WLR 605, 617 (Robert Walker LJ). The Court of Appeal’s approach has been rightly criticised for having stretched the language of the UK legislation to breaking point: see Robert Burrell, “Reining in Copyright Law: Is Fair Use the Answer?” [2001] Intellectual Property Quarterly 361, 369 fn 43. Yet, on the facts of the case, it is arguable that the defendant was in fact criticising the extract of the plaintiff’s programme directly, rather than merely as an example of the genre of which it formed a part. The defendant’s comments which prefaced the showing of the excerpt clearly indicated that the scene in the excerpt was a misrepresentation, that its ‘ordinariness’ was contrived and the result of a publicist’s manipulation. Further, the defendant’s reference to the amount of money the plaintiff paid to make its programme was clearly intended as an implied criticism of the quality of the outcome, as evidenced by the balmorality of the excerpt chosen: at 609–10.


76 *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 263 (Ungood-Thomas J): the reproduction of an unpublished work ‘is a much more substantial breach of copyright than publication of a published work’; *Hyde Park* [2001] Ch 143, 158, 159 (Aldous LJ): ‘it was difficult to imagine that it could be fair dealing to use a work that had not been published … for the purposes of criticism, review or newspaper reporting … [and] [t]o describe what “The Sun” did as fair dealing is to give honour to dishonour’; *Ashdown v Telegraph Group Ltd* [2001] Ch 685, 698–700 (Sir Andrew Morritt V-C); *Ashdown* [2002] Ch 149, 174–5 (Lord Phillips MR).

77 This is not to suggest that this is always the case: see, eg, *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, 625 (Talbot J).

information could have been conveyed in writing. This test of ‘necessity’ has not been employed in cases where the fair dealing defences were made out.

The UK courts also seem to have taken a darker view of the fact that a defendant and plaintiff are competitors in cases where the copyright material is unpublished. Thus, in *Ashdown*, which involved a national UK newspaper, the *Sunday Telegraph*, publishing a confidential minute of a meeting between two politicians, the Court of Appeal considered that the defendant’s publication was not a fair dealing because it had ‘destroyed a part of the value of the [plaintiff’s] memoirs which it had been Mr Ashdown’s intention to sell’. The Court of Appeal also thought the defendant’s quotation of the plaintiff’s work unfair because it

added a flavour to the description of the events covered which made the article more attractive to read and will have been of significant commercial value in enabling the ‘Sunday Telegraph’ to maintain, if not to enhance, the loyalty of its readership.

This conflicts with the earlier approach taken in *BBC v BSB*, where Scott J held that the fact that the defendant broadcaster wished to make its television programme more attractive to viewers and to build up audience loyalty by taking the best parts of a competitor’s previously broadcast World Cup football matches was not an ‘oblique motive’ that disqualified reliance on the defence of fair dealing.

Further, the approaches to the question of fairness taken in cases involving unpublished material seem, in turn, to have influenced the courts’ interpretation of the relevant statutory purposes. Thus in *Hyde Park*, Aldous LJ considered that the defendant’s use of the stills was not for reporting the events shown in the footage, as the trial judge had held, but that the ‘clear purpose and context were to expose the false statements of Mr Al Fayed and to vilify him’. Aldous LJ only reluctantly accepted that the stills were shown to report the recent coverage of Mr Al Fayed’s falsehoods about the events shown in the stills. There was no recognition of the fact that a defendant might have a number of purposes in

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79 [2001] Ch 143, 159 (Aldous LJ), 171 (Mance LJ). Cf at first instance, where Jacob J held that ‘it was close to necessary to publish the photographs to refute what Mr Al Fayed said’ and that for the newspaper merely to state that it had seen the photographs ‘would not have had anything like the same impact and force as actual publication of the stills’, which would demonstrate that ‘it had convincing evidence’ of its claims: *Hyde Park Residence Ltd v Yelland* [1999] RPC 655, 662.

80 [2002] Ch 149, 174 (Lord Phillips MR). This was despite the fact that at first instance it was held that it may have been the disclosure of the information in the minute rather than its copying that had reduced its value: *Ashdown v Telegraph Group Ltd* [2001] Ch 685, 699 (Sir Andrew Morritt V-C).


85 Ibid.
dealing with copyright material, one of which was the relevant statutory purpose, which perhaps indicates that Aldous LJ classified the defendant’s conduct in terms of a ‘dominant’ purpose. Such an approach runs counter to that taken in, for example, Pro Sieben Media AG v Carlton UK Television Ltd. This narrow approach to the statutory purpose of ‘reporting current events’ is at odds with the prevailing liberal interpretation, where even the concept of ‘reporting’ has been construed very broadly.

It therefore appears that where the plaintiff’s copyright material is unpublished, this has influenced the courts’ determination of other elements of the concept of fairness and has even influenced the interpretation of the statutory purposes.

3 The Problems with Conti J’s Methodology

This survey of the UK fair dealing case law indicates that the fair dealing defences have been interpreted and applied in significantly different ways, depending on the subject matter of the copyright material in question as well as other factual circumstances. There is a tension between the liberal approach taken in Hubbard v Vosper, BBC v BSB, Time Warner and Pro Sieben and the more restrictive approach taken in Beloff v Pressdram Ltd, Hyde Park and Ashdown. In particular, certain statements made in cases where a restrictive approach was taken, such as those relating to the necessity of the defendant’s dealing, the importance of the parties being commercial rivals, and the search for a dominant purpose, tend to conflict with statements made in cases where an expansive approach was taken.

This demonstrates two fundamental problems with Conti J’s approach. First, the assumption on which Conti J’s methodology was based is unfounded. It is simply not the case that the body of UK case law can be treated as coherent, governed by unifying, consistently interpreted principles. Conti J should therefore have done much more than locate and quote from relevant UK case law without an appreciation of the context in which those statements were made. Rather, his Honour should have considered how the approaches taken in those cases were contingent on their factual circumstances, and commented on the relationships between the cases considered. Had either Conti J or the Full Court taken this approach, the judges might have considered whether the similarity between the facts of The Panel Case and those UK cases where an expansive

86 See Kevin Garnett, Jonathan Rayner James and Gillian Davies (eds), Copinger and Skone James on Copyright (14th ed, 1999) vol 1, [9-16].
87 [1998] FSR 43, 52 (Laddie J): ‘At one stage [counsel for the plaintiff] seemed to suggest that criticism of the work or performance must be the dominant purpose. I do not think it is necessary to go that far’. This finding was not disturbed on appeal.
approach had been taken justified a particular interpretation of the fair dealing
defences.90

The second problem is that once it is established that Conti J’s methodology
was unfounded, doubt is then cast over the way in which Conti J chose to
articulate the Principles. For example, the fifth Principle emphasises the impor-
tance of the parties being trade rivals, without any recognition of the different
opinions expressed in the UK as to the weight to be accorded to this factor. A
further example may be found in the first Principle, that fair dealing is to be
judged by the criterion of a ‘fair minded and honest person’; a statement made in
a particular context involving dishonest actions by the defendant.91

These problems mean that the Principles are not a complete set of guidelines.
While they do contain some useful statements of law, they are essentially an
agglomeration of unanalysed statements. A proper understanding of the princi-
ples of fair dealing requires a nuanced and critical analysis of the existing case
law, one which focuses on how the crucial elements of ‘fairness’, ‘criticism’,
‘review’ and ‘news reporting’ have been interpreted in various factual scenarios
in respect of different types of copyright material.

B Statements Taken Out of Context and Improperly Elevated to the Level of
Principle

The second problem with the Principles is that Conti J’s act of isolating certain
statements from case law and elevating them to the level of ‘principle’ signifi-
cantly changed both the meaning and force of such statements.

The problem is most pronounced in relation to the first Principle. The initial
part of the first Principle, that ‘fair dealing involves questions of degree and
impression’,92 takes on a very different meaning when divorced from the context
in which it was made in Hubbard v Vosper. In that case, Lord Denning MR held
as follows:

It is impossible to define what is ‘fair dealing.’ It must be a question of degree.
You must consider first the number and extent of the quotations and extracts.
Are they altogether too many and too long to be fair? Then you must consider
the use made of them. If they are used as a basis for comment, criticism or re-
view, that may be fair dealing. If they are used to convey the same information
as the author, for a rival purpose, that may be unfair. Next, you must consider
the proportions. To take long extracts and attach short comments may be unfair.
But, short extracts and long comments may be fair. Other considerations may
come to mind also. But, after all is said and done, it must be a matter of impres-
sion.93

90 Nine’s broadcasts had already taken place at the time of Ten’s dealings with them, and the
information they conveyed was in the public domain. It was not seriously argued that Ten’s uses
of Nine’s broadcasts were intended as substitutes for Nine’s original programmes: see The Panel
91 See below Part III(B).
93 [1972] 2 QB 84, 94.
2003]  
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Thus, for Lord Denning MR, the judge’s impression was the conclusion, not the starting point, of the inquiry into whether a dealing was fair, and various factors needed to be taken into account to structure this ‘impression’. In later cases, other factors, such as whether the copyright work was unpublished, how it was obtained, or whether the use of the copyright work was necessary for the relevant purpose, have been considered in determining whether a dealing was fair. The Act itself provides a list of factors that, although stated to apply only in respect of dealings with copyright material for the purposes of research and study, may well be relevant in determining whether a dealing for the purposes of ‘criticism’, ‘review’ or ‘news reporting’ is fair. Thus, simply to state that ‘fair dealing involves questions of degree and impression’ is problematic. It gives no indication of the essential part of Lord Denning MR’s inquiry: what are the factors that need to be taken into account to structure this ‘impression’? To suggest that this bare phrase represents a legal principle is even more concerning because it appears to advocate a test of fairness based on idiosyncratic judicial impression alone.

This problem is exacerbated by the remainder of Conti J’s first Principle. The statement that fair dealing is an ‘abstract concept’ was made by Gibbs J in *University of New South Wales v Moorhouse* merely to indicate the uncontroversial proposition that what will be a ‘fair dealing’ cannot be determined in advance but will depend on the circumstances of particular cases. However, to say without elaboration that fair dealing is an ‘abstract concept’ tends to reinforce the notion that fair dealing can be determined according to personal ‘impression’, rather than on the basis of relevant factors. Conti J’s only indication of the basis on which fair dealing is to be determined is equally problematic. The statement that fair dealing is to be judged according to the standard of a ‘fair minded and honest person’ was made by Aldous LJ in *Hyde Park* in the context of a national UK newspaper’s publication of previously unpublished stills from a security video tape that had been dishonestly obtained and then purchased by the newspaper. In no other case has this criterion of a ‘fair minded and honest person’ been used or referred to. Indeed, it appears at odds with the other factors that the courts have taken into account in determining fairness, by importing moral considerations into an otherwise largely commercial

96 Ibid 158–9 (Aldous LJ), referring to *British Oxygen Co Ltd v Liquid Air Ltd* [1925] Ch 383, 393 (Romer J).
98 Copyright Act 1968 (Cth) ss 40(2), 103C(2).
100 (1975) 133 CLR 1, 12.
101 [2001] Ch 143, 159.
context. In Time Warner, Neill LJ held that ‘criticism and review of a work already in the public domain which would otherwise constitute fair dealing … would seldom if ever be rendered unfair because of the method by which the copyright material had been obtained’. Divorced from its context in Hyde Park, it is difficult to see how Aldous LJ’s statement is meant to operate at the level of general principle. At worst, it seems to require courts to focus inordinately on the propriety of the conduct of defendants, rather than the utility of their dealings. This may unfairly prejudice those defendants engaged in socially subversive criticism or investigative journalism, which may itself involve socially contestable conduct.

This problem of treating trite statements from case law as statements of principle permeates a number of Conti J’s other Principles. For example, the second Principle merely states that the defendant’s dealing must be ‘fair’ for one of the statutory purposes, which is self-evident from the terms of the Act and does not give any indication as to the basis on which ‘fairness’ is to be judged. Similarly, in relation to the eighth Principle, it is axiomatic to state that ‘the distinction between news and entertainment may be difficult to determine in particular situations’, and such a statement gives no guidance as to what constitutes ‘news’. Further, the eighth Principle raises to the level of principle the idea that courts must differentiate between ‘news’ and ‘entertainment’ in determining whether a defendant’s dealing is for the relevant statutory purpose, an idea which relies on a false dichotomy between the two. These examples show that some of the Principles cannot operate as workable guidelines for the future application of the fair dealing defences.

C The Problems with Defining ‘Criticism’ and ‘Review’

A third problem with Conti J’s articulation of the Principles is his Honour’s lack of engagement with definitions of the terms ‘criticism’ and ‘review’. Conti J adopted, as the first part of the third Principle, Robert Walker LJ’s statement in Pro Sieben that ‘criticism’ and ‘review’ are words of ‘wide and indefinite scope and should be interpreted liberally’. Yet earlier in his Honour’s judgment, Conti J referred to the selected Macquarie Dictionary definitions of ‘criticism’ and ‘review’ given by Beaumont J in De Garis, noting that such definitions had not changed since De Garis was decided. This is reflected

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103 [1994] EMLR 1, 10. See also Hyde Park Residence Ltd v Ireland [1999] RPC 655, where the fact that the newspaper had paid for the photographs was held not to derogate from the pleaded fair dealing defence: at 663 (Jacob J).


105 See below Part IV(D).


in the third Principle in Conti J’s qualification that ‘criticism and review involve
the passing of judgment’.109

As a result, there is an unacknowledged tension in Conti J’s treatment of these
key terms. On the one hand, Conti J’s reliance on selected dictionary definitions
involves an assumption that the meanings of these terms are immutable. On the
other hand, Conti J was prepared to acknowledge that, in the context of the fair
dealing defences, other judges have seen fit to interpret these terms very broadly.
These two approaches cannot be easily reconciled.110 Accordingly, it is difficult
to see how the third Principle operates as a useful guideline in the interpretation
of the terms ‘criticism’ and ‘review’.

There are two significant problems with De Garis, such that Conti J’s, and by
implication the Full Court’s, reliance on the case as establishing general princi-
ples is itself questionable. The first relates to Beaumont J’s selective definitions
of the terms ‘criticism’ and ‘review’. The second relates to the focus on the
definition of the terms at the expense of any recognition of how criticism and
review operate in practice.

1 Limitations of the Definitions of ‘Criticism’ and ‘Review’ in De Garis

The first difficulty with De Garis relates to the way in which Beaumont J
chose to define ‘criticism’ and ‘review’. His Honour did not explain why he
selected only certain Macquarie Dictionary definitions and excised others, such
as ‘censure’ and ‘fault-finding’ for ‘criticism’,111 or ‘a general survey of some-
thing’ for ‘review’.112 Further, Beaumont J did not consider whether other
dictionaries defined these terms more expansively.113 Most importantly,
Beaumont J did not provide any authority to justify limiting the meanings of
‘criticism’ and ‘review’ in the way that he did. Neither Conti J nor the Full Court
should have accepted Beaumont J’s definitions as uncritically as they did.114

Further, the judges in The Panel Case overlooked the circumstances in which
Beaumont J’s definitions were made. In De Garis, the defendant’s press clipping
service merely located and scanned relevant newspaper articles at the request of
subscribers. The defendant provided no commentary or additional input, leading
to Beaumont J’s conclusion that the defendant had not dealt with the plaintiff’s
copyright works for the purposes of criticism or review within the meaning of
the Act.115 Beaumont J did not need to define the terms ‘criticism’ and ‘review’

112 Ibid 1479.
113 See, eg, John Simpson and Edmund Weiner (eds), Oxford English Dictionary (2nd ed, 1989) vol
4, 31 (‘criticism’ defined to include ‘fault-finding; censure’), vol 13, 830–1 (‘review’ defined to
include ‘a general survey … of some subject or thing’ and ‘a general account or criticism of a
literary work’).
114 For example, neither Conti J nor the Full Court referred to the approach taken in Schott Musik
International GMBH & Co v Colossal Records of Australia Pty Ltd (1996) 71 FCR 37, 43 (Tamb-
berlin J); aff’d (1997) 75 FCR 321, 332 (Hill J), where the judges used a number of dictionaries
to define the word ‘debase’, used in (the now repealed) s 55(2) of the Act. The Full Court did
not refer to Copyright Licensing Ltd v University of Auckland [2002] 3 NZLR 76 (High Court),
where Salmon J used the New Shorter Oxford English Dictionary to define ‘criticism’: at 83.
to come to this conclusion: under any interpretation of these terms, the defendant’s activities were clearly not for the prescribed statutory purpose.

In contrast, Ten did much more than merely locate interesting excerpts from Nine’s broadcasts. The essence of each of its dealings was that the panellists commented upon, or otherwise engaged with, each of the excerpts. The judges in The Panel Case were thus required squarely to consider whether Ten’s dealings were for the purposes of criticism or review. Given this crucial difference between De Garis and The Panel Case, both Conti J and the Full Court’s lack of engagement with Beaumont J’s definitions is deeply concerning.

2 The Improper Focus on Definitions at the Expense of Interpretation

A second, more fundamental, problem with De Garis is the way in which it privileges traditional or obvious forms or styles of criticism and review at the expense of more subtle forms or styles — itself a consequence of Beaumont J’s selective use of dictionary definitions. Yet nothing in the Act or its history suggests that a focus on particular forms is appropriate. Rather, the Act recognises that criticism and review are beneficial forms of social discourse that may require the use of others’ copyright material. Therefore, it is incumbent on judges to ensure, in interpreting the Act, that criticism and review (however they are practised) are not impeded or marginalised.116

This ultimately requires judges to recognise and be sensitive to the variety of forms that criticism and review can take. An act of criticism may involve the explicit passing of judgment as to the merits of something, taking the form of a ‘comment, article or essay’,117 as defined by Beaumont J. Equally, however, criticism may involve something more subtle, such as an analysis or contestation of assumptions on which taken-for-granted practices rest,118 whose form and style are dependent on various factors, such as the medium of communication of the criticism, its target and its audience.119 Such criticism may not be identifiable simply by asking whether a dictionary definition is satisfied. In fairness to the judges whose task it is to determine whether dealings are for the purpose of criticism, it may well be difficult to identify or classify certain forms of criticism. But this difficulty does not justify enclosing the concepts of ‘criticism’ and ‘review’ so that the court’s task is made more manageable. This is not to suggest that a recognition of more subtle forms of criticism requires the courts to redefine the terms ‘criticism’ and ‘review’ periodically to align them with the meanings they are given under a particular contemporary theory or practice. Rather, it is to suggest that courts should treat these concepts as fluid and indeterminate and be prepared to interpret them in light of the circumstances of

117 See above n 26.
119 See ‘Freedom of Speech at Risk’, above n 58.
particular cases. In the same way that the courts have been prepared to recognise new forms of creative or industrious expression, provided that they can be categorised as ‘literary works’ or ‘artistic works’, by analogy the courts should also be sensitive to the range of practices that may constitute ‘criticism’ and ‘review’.

IV CRITIQUE OF THE PANEL CASE: AD HOC DECISION MAKING

The defects inherent in the Principles as articulated in The Panel Case were manifest in the outcomes reached by the judges in considering whether Ten had established its pleaded fair dealing defences. There are a number of fundamental problems with both Conti J’s and the Full Court’s consideration of Ten’s dealings with each of the excerpts, which it is argued are a function of the poorly formulated Principles. This part of the article seeks to analyse the failure of principle in its application to the excerpts in question in The Panel Case, with particular reference to the six excerpts mentioned in Part III(A). In particular, this part focuses on three problems with Conti J and the Full Court’s decisions. First, it criticises the judges’ almost complete abnegation of their responsibility to consider the ‘fairness’ of Ten’s dealings. Secondly, it addresses the consequences of the judges’ belief that the availability of the defence of fair dealing is simply a matter of judicial impression. Thirdly, it considers the reductive manner in which the judges interpreted the key purposes of ‘criticism’, ‘review’ and ‘reporting news’ and suggests alternative ways in which these purposes could have been interpreted.

120 See Brad Sherman, ‘Appropriating the Postmodern: Copyright and the Challenge of the New’ in Daniel McClean and Karsten Schubert (eds), Dear Images: Art, Copyright and Culture (2002) 405, who argues that while copyright law should not necessarily modify its structures according to contemporary (and possibly fleeting) movements, the law has sufficient flexibility to accommodate a wide range of artistic and cultural practices.

121 In the context of literary works, see University of London Press v University Tutorial Press [1916] 2 Ch 601, where Peterson J held that the term ‘literary work’ covers ‘work which is expressed in print or writing, irrespective of the question whether the quality or style is high’: at 608, meaning that works such as a grid of numbers for a betting game (Express Newspapers plc v Liverpool Daily Post & Echo plc [1985] 1 WLR 1089) and blank accounting forms (Kalamazoo (Australia) Pty Ltd v Compact Business Systems Pty Ltd [1985] 5 IPR 213) have been protected as ‘literary works’. Following amendments to the Act in 1984, a table of data stored in a computer, even though invisible, will constitute a literary work: see Data Access Corporation v Powerflex Services Pty Ltd [1999] 202 CLR 1, 41–2 (Gleeson CJ, McHugh, Gummow and Hayne JJ). The situation is more complex in respect of artistic works. With the exception of ‘works of artistic craftsmanship’, there is no requirement of artistic quality: Copyright Act 1968 (Cth) s 10. Thus the stylised letters ‘R’ and ‘B’ have been protected as ‘drawings’ (Roland Corporation v Lorenzo & Sons Pty Ltd [1991] 33 FCR 111), a plastic frisbee has been held to be an ‘engraving’ (Wham-O MFG Co v Lincoln Industries [1984] 1 NZLR 641) and a half-court tennis court and a swimming pool have been held to be ‘buildings’ (Half Court Tennis Pty Ltd v Seymour (1980) 53 FLR 240; Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd (1998) 41 IPR 649). Even in respect of ‘works of artistic craftsmanship’, where some element of artistic quality is required, courts have not set this test at a high threshold and have been prepared to accept works with utilitarian features: see Coogi Australia Pty Ltd v Hysport International Pty Ltd [1998] 86 FCR 154, 164 (Drummond J). However, courts have at times narrowly interpreted ‘paintings’ (Merchandising Corporation of America Inc v Harphond Ltd [1983] FSR 32) and ‘sculptures’ (Metix (UK) Ltd v G H Maughan (Plastics) Ltd [1997] FSR 718; Creation Records Ltd v News Group Newspapers Ltd [1997] EMLR 444).
A. The Failure Properly to Consider the Issue of Fairness

In determining whether Ten’s pleaded fair dealing defences were established, both Conti J and the Full Court made a fundamental omission. The judges failed to give any real consideration to the fairness of Ten’s dealings with Nine’s broadcasts. Instead they focused almost entirely on the purpose of the dealings in determining whether Ten’s pleaded defences were established. Even in relation to those few excerpts where the judges did refer to the issue of fairness, they did so in a problematic manner.

1 ‘Fairness’ Overlooked

Conti J raised the question of the fairness of Ten’s dealings in relation to only two of the 19 excerpts and in those instances merely asserted that Ten’s dealings were fair for its pleaded statutory purposes. In relation to one other excerpt Conti J alluded to factors that have in other cases been held relevant to the question of fairness but did not make explicit the relevance of those factors. The Full Court’s treatment of fairness was equally cursory, the issue being raised in relation to only two of the 10 excerpts considered and directly addressed in relation to only one of these.

Yet in respect of none of the other excerpts did either Conti J or the Full Court consider whether Ten’s dealings were fair. This was so even where the judges held that Ten’s fair dealing defences would have been or were established. Instead, the judges concentrated exclusively on whether Ten’s dealings were for the permitted statutory purposes. For example, in relation to ‘The Today Show’ excerpt showing Boris Yeltsin shaking hands with three former Russian Prime Ministers, Finkelstein J considered that Ten’s dealing was for the purpose of news reporting and then, without turning to the question of fairness, stated: ‘[t]hat is all that is required for fair dealing under s 103B(1)(b).’

The judges’ almost complete failure to consider the issue of fairness was an extraordinary oversight. While the purpose of the dealing is important, it is not determinative of whether a defendant can rely on a pleaded fair dealing defence. The governing provisions of the Act require an independent consideration of fairness in relation to defences of fair dealing. The relevant UK case law has provided a menu of factors to be taken into account in determining whether a dealing is fair. In short, fairness is not a mere nicety which can be trivialised or overlooked.

This neglect of fairness is the clearest example of the defects inherent in Conti J’s Principles, particularly the first Principle, being exacerbated in application. The Principles concentrate heavily on the claimed purpose of the dealings

122 The Panel Trial (2001) 108 FCR 235, 295 (‘Days of Our Lives’ (Marlena standing)), 298 (‘Sunday’ (Drugs at Olympics)).
123 Ibid.
124 Ibid 293 (‘A Current Affair’ (Masquerade of introduction agency)).
125 The Panel Appeal (2002) 118 FCR 417, 444 (‘Sunday’ (Drugs at Olympics)), 445 (‘The Today Show’ (Prasad interview)) (Hely J).
126 Ibid 444 (‘Sunday’ (Drugs at Olympics)) (Hely J).
127 Ibid 424.
to the exclusion of any rigorous, independent assessment of the fairness of such dealings. Indeed, even those principles which seem to deal more readily with the question of fairness rather than purpose, such as the fifth Principle, are nonetheless couched by Conti J in terms of purpose rather than fairness.\textsuperscript{128} The perfunctory manner in which fairness was treated in the Principles is reflected in the judges’ consideration of most of Ten’s dealings.

2 \textit{Failure to Consider the Relationship between ‘Substantial Part’ and Fair Dealing}

As has been noted,\textsuperscript{129} Conti J’s consideration of the availability of the fair dealing defences came after his Honour had found that Ten had not rebroadcast a substantial part of any of Nine’s 20 broadcasts. Thus it is implicit in Conti J’s approach to fair dealing that none of Ten’s dealings with Nine’s broadcasts were quantitatively or qualitatively substantial. There is admittedly a degree of artificiality in asking whether a dealing is fair in circumstances where prima facie infringement has not been established. It is, however, suggested that since Conti J chose to address the issue of whether Ten’s pleaded defences would have been established, his Honour should have acknowledged the variety of factors to be taken into account in determining the fairness of Ten’s dealing and considered how these factors would have applied had he found that Ten had in fact dealt with a substantial part of each of Nine’s broadcasts.

This is a minor problem compared to the Full Court’s approach. The Full Court interpreted the term ‘television broadcast’ in such a way that each of Ten’s dealings involved a rebroadcast of the \textit{entirety} of the copyright subject matter.\textsuperscript{130} The Full Court did not acknowledge the implications of its finding on substantiability for the interpretation of ‘fairness’ in relation to the rebroadcast of audiovisual material. This is demonstrated in the Full Court’s approach to Ten’s use of Nine’s ‘Sunday’ report on drugs at the Olympics, where Hely J considered that ‘[w]ether excessive use was made of the material in which copyright subsists so as to negative the fair dealing defence is very much a matter of impression’.\textsuperscript{131} Such an approach makes no sense given the Full Court’s finding that the length of the defendant’s rebroadcast \textit{determines} the length of the ‘material in which copyright subsists’ for the purposes of the Act. Given that every rebroadcast will always be of 100 per cent of the original broadcast and never any lesser proportion, there is simply no scope for the relative concept of ‘excessive use’ to apply in order to determine which uses are not fair.

Conti J correctly noted that the factors set out by Lord Denning MR in \textit{Hubbard v Vosper} to determine the fairness of a dealing overlap with those going to

\textsuperscript{128} In \textit{Johnstone v Bernard Jones Publications Ltd} [1938] 1 Ch 599, Morton J suggested, in obiter dicta, ‘that any oblique motive … would render the publication of the letter in question an unfair dealing’: at 607. Similarly, in \textit{Hubbard v Vosper} [1972] 2 QB 74, Lord Denning MR stated that ‘[i]t is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit’: at 83. Conti J however misconstrued both cases in suggesting in the fifth Principle that improper motives or whether the defendant is a trade rival of the plaintiff ‘may disqualify reliance upon criticism and review’: \textit{The Panel Trial} (2001) 108 FCR 235, 285.

\textsuperscript{129} See above Part II(C).

\textsuperscript{130} See above Part II(B).

\textsuperscript{131} \textit{The Panel Appeal} (2002) 118 FCR 417, 444 (emphasis added).
substantiality. The question the Full Court should therefore have addressed was whether the taking of the whole of an audiovisual work could ever be fair and, if so, under what circumstances. Hely J thought that it was ‘uncontroversial that, depending on the circumstances, a fair dealing can reproduce the whole of the work in which copyright subsists’, referring to Megaw LJ’s judgment in *Hubbard v Vosper* in support. However, Megaw LJ only suggested that this may be possible in respect of a very short literary work. Indeed, there is conflicting authority suggesting that it would not be fair to reproduce an entire literary work consisting of several hundred words. More importantly, the Full Court has left no basis for determining whether a rebroadcast can ever be described in relative quantitative terms such as ‘short’ or ‘long’. The fact that this issue was overlooked by the Full Court suggests that it did not fully grasp the relationship between the question of substantiality and the application of the requirement of fairness in the fair dealing defences.

3 Commercial Rivalry Given Undue Importance

Even in those rare instances where Conti J and the Full Court in *The Panel Case* did allude to factors going to the issue of fairness, they focused inordinately on the relationship between Ten and Nine rather than the nature of Ten’s dealings. It appears that, in applying the fifth Principle, the judges focused more on the fact that the parties were ‘trade rivals’ rather than whether Ten dealt with the excerpts ‘for its own benefit’.

Thus, in relation to the ‘Days of Our Lives’ excerpt showing the character Marlena Evans ‘possessed’, Conti J held that Ten’s use was fair, even though the excerpt was taken from, and the criticism necessarily directed towards, Ten’s commercial rival, Nine. To similar effect was Conti J’s comment in relation to the excerpt from the ‘A Current Affair’ report on introduction agencies. His Honour suggested that the panellists’ criticism of the poor disguises used by Nine’s undercover agents prevailed over Ten’s ‘purported derogation of its business rival’s practices’. Conti J’s reasoning appears to suggest that the mere fact that Ten was criticising the practices of a commercial rival was a relevant consideration going to the question of fairness. On appeal, Finkelstein J made the unsubstantiated assertion that ‘a casual observer of the show might conclude that Channel Nine programmes are a favourite target’ of the panelists.

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134 [1972] 2 QB 84.
135 His Lordship gave the example of an epitaph on a tombstone ‘consisting of a dozen or of 20 words’: ibid 98. It is perhaps doubtful that such a short piece could even constitute a literary work, given Mummery J’s finding in *Noah v Shuba* [1991] FSR 14 that two sentences totalling 17 words were insufficiently substantial to constitute a literary work: at 33.
137 See also Burrell, ‘Reining in Copyright Law’, above n 74, 365–73 as to the history of the relationship between the concepts of substantiality and the fair dealing exceptions.
139 Ibid 293.
The judges’ unqualified focus on commercial rivalry is particularly problematic given that the copyright material in question consisted of television broadcasts which Ten had rebroadcast. This is because the only organisations in Australia physically capable of rebroadcasting television broadcasts are themselves television broadcasters. Such broadcasters will be, by definition, rivals of the owners of copyright in the original broadcasts. By enacting ss 103A and 103B of the Act, the legislature has already indicated that broadcasters may deal with their commercial rivals’ broadcasts, provided that they do so fairly for permitted purposes. Thus, in assessing the fairness of a broadcaster’s dealings with another’s broadcasts, the mere fact that the parties are commercial rivals should be of little importance. The more pertinent issue is the way in which the defendant broadcaster deals with its rival’s copyright material, including whether the defendant’s use competes with or supplants the market for the plaintiff’s broadcast. The nature of the comments made by the judges as to the commercial rivalry between the parties indicates that the judges did not grasp this issue.

It is also worth noting that, within the Australian broadcasting industry, a convention called the ‘three-by-three-by-three rule’ had apparently developed, whereby commercial rivals considered it fair to rebroadcast three minutes of another broadcaster’s footage, three times a day, three hours apart. This convention was not considered by the judges in The Panel Case, despite the fact that, in other cases, courts have taken industry standards into account when determining what constitutes a ‘fair’ dealing. It would have been helpful if the judges in The Panel Case had commented on the relevance of, and weight to be given to, industry standards generally, and in particular whether the ‘three-by-three-by-three rule’ provides a useful legal standard of ‘fairness’ in the broadcast context. Moreover, given that the convention has its origins in the 1960 Rome Olympics, a sporting event consisting of many hours of competition held daily over a fortnight, it would have been useful if the judges had commented on whether the convention is an appropriate guideline in the context of shorter broadcasts of different types of subject matter. Even though the judges would not have been able to provide broadcasters with absolute certainty as to whether their dealings with rivals’ broadcasts were fair at law, the failure to address the issue means that the relevance of such guidelines agreed among commercial competitors remains entirely unclear.

On the whole, the judges’ treatment of fairness in relation to Ten’s dealings was little more than perfunctory and a direct result of the inadequately conceived Principles which do not clearly explain the importance of the requirement of fairness.

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141 See, eg, Laddie et al, above n 23, [20.16].
142 Little, above n 12; McLeod, Hore and Polites, above n 59, 6.
144 See Little, above n 12.
B  ‘Matter of Impression’ Misapplied as the Central Inquiry

Another major concern in *The Panel Case* is the way both Conti J and the Full Court treated the issue of whether Ten’s pleaded fair dealing defences were made out as a ‘matter of impression’. While it is acknowledged that a judge’s determination of the availability of a fair dealing defence is ultimately subjective, and that invariably different judges will come to different conclusions on the same set of facts, this does not absolve judges from justifying their impressions by reference to legal principle. The approach to the fair dealing defences sanctioned in *The Panel Case* is not only based on a problematic reading of the case law, but is ultimately one of ad hoc decision-making where it is unclear what factors will be taken into account and how key concepts will be interpreted.

The judges’ approach in assessing whether Ten’s fair dealing defences were established was to view and re-view the excerpts and to form impressions as to whether the panellists’ treatment of them was for the prescribed statutory purposes. Conti J justified a number of his findings solely on the basis of his personal impressions of the nature of Ten’s dealings with Nine’s broadcasts. For example, in relation to the ‘72nd Academy Awards’ excerpt, Conti J stated that his ‘initial reaction’ was that Ten had rebroadcast the footage for the purpose of light entertainment. However, his Honour then held: ‘[a]s was said in *Vosper*, “But after all is said and done, it must be a matter of impression” … and my impression on a somewhat precarious balance is in favour of a justifiable Ten purpose here involved of criticism and review’. On appeal, Sundberg J was explicit that his methodology was to view Ten’s rebroadcasts and form an impression as to whether each of Ten’s fair dealing defences were made out. Hely J’s approach was to watch the excerpts to determine whether his impressions aligned with those of Conti J.

There is a significant problem with the judges’ approach in treating their impressions as the justifications for their findings as to the availability of the fair dealing defences. In part it relates to the judges’ misinterpretation of *Hubbard v Vosper* in their literal application of the first part of Conti J’s first Principle, namely ‘fair dealing involves questions of degree and impression’. As indicated above, Lord Denning MR made this statement in a particular context: in discussing how the *fairness* of a dealing was to be determined, and after

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146 See *The Panel Appeal* (2002) 118 FCR 417, 419 (Sundberg J), 422 (Finkelstein J). Finkelstein J commented that ‘it needs to be acknowledged that we are in the realm of decision-making where there is room for legitimate differences of opinion as to the correct answer. In some instances it might be impossible to say whether one view is demonstrably right and another view is demonstrably wrong’: at 422.
147 See *The Panel Trial* (2001) 108 FCR 235, 291 (‘The Today Show’ (Boris Yeltsin)), 295 (‘Days of Our Lives’ (Marlena standing)), 298 (‘72nd Academy Awards’ (Artificial fog)).
148 Ibid 298.
150 Ibid 442, 444.
having stated what factors must be taken into account in making this determination.

The judges in The Panel Case overlooked the context in which Lord Denning MR’s statement was made. They did not address the factors going to fairness as outlined by Lord Denning MR, or indeed any factors going to the question of fairness. Moreover, they applied the test of ‘impression’ to ascertain whether a permitted purpose was present, in doing so overlooking authority that suggests that the purpose of the dealing is to be determined objectively, that is, by focusing on the likely impact of the dealing on its audience. As such, the judges used Lord Denning MR’s statement as a justification for ad hoc decision-making, referable only to idiosyncratic and unexplained notions of what does and does not constitute fair dealing. It is thus impossible to determine the bases on which any of the judges came to their conclusions. Again, this is a direct consequence of the inadequacies of the Principles.

The judges’ failure to consider adequately the fairness of Ten’s dealings, and their assessment of Ten’s purposes solely by reference to ‘impression’, has left the law in an unsatisfactory state. This is not because the judges necessarily arrived at ‘wrong’ outcomes, as distinct from ‘right’ outcomes that would have been reached by a more methodical approach: the fair dealing provisions cannot guarantee certainty of outcomes. Rather, it is because the judges have removed almost any degree of certainty from this already inherently unpredictable area of the law. Parties seeking to use others’ copyright material, or legal practitioners advising them, now have almost no basis on which to attempt to assess in advance whether such parties’ dealings will be permissible. While prior to The Panel Case, it was at least clear that certain factors would be considered in determining ‘fairness’, and that the relevant purposes would be assessed objectively, it is now uncertain what judges in future cases will take into account.

This uncertainty will result in one of three outcomes. One is that such parties will have to hope that, if they deal with another’s copyright material and are sued, the presiding judge forms a favourable ‘impression’ of their dealings. Given the time and cost involved in defending copyright infringement proceedings, this is a significant risk to take. A second outcome is that copyright owners may apply pressure to potential users of copyright material, using the lack of clarity in the fair dealing defences as leverage to impose more onerous licensing conditions, such as higher licensing fees. This may be the case particularly in the broadcasting context, where virtually every act of rebroadcasting

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151 See above Part IV(A)(1).
will be a prima facie infringement of copyright, and where rebroadcasters may not wish to risk court proceedings and may thus accept unfavourable licences. Perhaps the third outcome is most likely: that as a defensive measure, people and organisations will simply not use others’ copyright material in the first place, which may have a deleterious effect on the standard of socially beneficial acts of criticism, review and news reporting.

As a consequence of their determination of the availability of fair dealing defences on the basis of ad hoc impression, the judges in The Panel Case have fostered a climate where users of copyright material cannot avail themselves of their legitimate statutory rights with any degree of certainty.

C Problems with the Interpretation of ‘Criticism’ and ‘Review’

Paradoxically, for all their misplaced emphasis on the purpose of Ten’s dealings to the exclusion of ‘fairness’, the judges in The Panel Case provided only a superficial interpretation of the prescribed statutory purposes. This is especially evident in their incoherent treatment of the key terms ‘criticism’ and ‘review’. At times, the judges accepted that drawing attention to a technical or production fault in a broadcast was an act of criticism,\(^\text{157}\) while at others they did not.\(^\text{158}\) Comments about tired plot devices on a soap opera were held to constitute criticism of the programme,\(^\text{159}\) but comments on the performance of the host of a variety show were not.\(^\text{160}\) Conti J suggested that criticism may be implicit,\(^\text{161}\) but Hely J considered that criticism must be ‘recognisable’ as such.\(^\text{162}\) At times, the judges focused on the merits of Ten’s actions in considering whether the criticism was ‘legitimate’\(^\text{163}\) or whether it was ‘justified’.\(^\text{164}\) At others they adhered strictly to the third and fourth Principles in holding that criticism and review may be ‘unbalanced or strongly expressed’.\(^\text{165}\) Unsurprisingly, no clear rationale emerges from the case as to why certain acts constituted criticism and why others did not.

There are two overarching problems with the judges’ consideration of Ten’s dealings where fair dealing for the purposes of criticism or review was pleaded. Both of these are manifestations of the inherent tension in Conti J’s Principles as to how the terms ‘criticism’ and ‘review’ are to be defined and interpreted. The first problem relates to the judges’ inconsistent application of the concepts of criticism, satire, humour and entertainment in determining whether Ten’s

\(^{157}\) The Panel Trial (2001) 108 FCR 235, 298 (‘72nd Academy Awards’ (Artificial fog)), 299 (‘Sale of the New Century’ (Lighting switched off)), 300 (‘Newsbreak’ (Technical glitch)).

\(^{158}\) The Panel Appeal (2002) 118 FCR 417, 445 (Hely J) (‘The Today Show’ (Prasad interview)).


\(^{160}\) The Panel Appeal (2002) 118 FCR 417, 443 (Sundberg J), 442 (Hely J) (‘Midday’ (Prime Minister singing)).

\(^{161}\) The Panel Trial (2001) 108 FCR 235, 296 (‘Crocodile Hunter’ (Scuba diving)).

\(^{162}\) The Panel Appeal (2002) 118 FCR 417, 444 (‘Simply the Best’ (Ray Martin)).

\(^{163}\) The Panel Trial (2001) 108 FCR 235, 293 (‘A Current Affair’ (Masquerade of introduction agency)).

\(^{164}\) The Panel Appeal (2002) 118 FCR 417, 425 (Finkelstein J) (‘Simply the Best’ (Ray Martin)).

\(^{165}\) Ibid 444 (Hely J) (‘Simply the Best’ (Ray Martin)).
dealings were for the permitted statutory purposes. The second problem is that
the judges’ ‘impressions’ of Ten’s purposes implicitly revealed a lack of sensi-
tivity to the way in which excerpts were used on ‘The Panel’ and, more gener-
ally, a lack of appreciation of the role of the television viewer in structuring an
act of criticism. As a result, the judgments ultimately encode narrow construc-
tions of the terms ‘criticism’ and ‘review’, providing inadequate guidance as to
how the terms are to be interpreted in future cases.

1 Criticism, Satire, Humour or Entertainment?

The first problem is in the judges’ lack of conceptual clarity in determining
whether Ten’s dealings were in fact for the purposes of ‘criticism’. At times, the
judges acknowledged that criticism and review could be undertaken in a humor-
ous, entertaining, light-hearted or satirical manner.\footnote{Ibid 439 (Hely J). See also The Panel Trial (2001) 108 FCR 235, 293 (‘A Current Affair’ (Masquerade of introduction agency)), 299 (‘Sale of the New Century’ (Lighting switched off)), 299 (‘The Today Show’ (Prasad interview)), 300 (‘Newsbreak’ (Technical glitch)), 301 (‘Who Wants To Be a Millionaire’ (Ingredients of Xmas pudding)), The Panel Appeal (2002) 118 FCR 417, 445 (Hely J) (‘Newsbreak’ (Technical glitch)).} This is evident in Conti J’s
treatment of the ‘72nd Academy Awards’\footnote{The Panel Trial (2001) 108 FCR 235, 298.} and ‘Days of Our Lives’ excerpts,\footnote{Ibid 295.} the latter of which was upheld on appeal.\footnote{The Panel Appeal (2002) 118 FCR 417, 443 (Hely J).} Yet in relation to other excerpts, the
judges balanced criticism and review against humour, entertainment and satire to
determine the real or prevailing purpose.\footnote{Ibid 445.} The presence of these other factors
was used to justify findings that Ten’s dealings were not for the permitted
statutory purpose of criticism. For instance, in relation to the ‘Midday’ excerpt,
in which the Prime Minister sang ‘Happy Birthday’ to Sir Donald Bradman on
the prompting of the programme’s host, Kerri-Anne Kennerley, Conti J consid-
ered that the purpose of the dealing was ‘to satirise aspects of Ms Kennerley’s
performance as presenter of “Midday”, and certain supposed personality traits
and political allegiances’.\footnote{The Panel Trial (2001) 108 FCR 235, 292.} Conti J considered that as a consequence Ten’s
dealings was not for the purpose of criticism or review. His Honour did not
explicitly consider whether the panellists’ satirical comments, although intended
to be humorous and entertaining, involved criticism. This approach was upheld
on appeal, where both Sundberg and Hely JJ held that the excerpt was shown for
its entertainment value.\footnote{The Panel Appeal (2002) 118 FCR 235, 292.} Similarly, in relation to ‘The Today Show’ excerpt of
the Prasad interview, Hely J stated without elaboration that the excerpt was
rebroadcast ‘for fun’ rather than for the purpose of ‘criticism or review’.\footnote{Ibid 445.} This
demarcation of criticism from satire, humour and entertainment can be seen in
relation to other excerpts where the judges considered whether Ten’s dealing
approached the ‘true notion of criticism’,\textsuperscript{174} or whether the ‘essence’ of Ten’s dealing was one of criticism.\textsuperscript{175}

As a consequence, the decisions in The Panel Case provide little guidance as to when a dealing will in fact be for the purpose of ‘criticism’, and in particular when a satirical use of material constitutes criticism and when it does not. The judges failed to appreciate that if criticism extends to thoughts and ideas underlying copyright material, then satirical comments about any aspect of an audio-visual work should be accommodated within the statutory purpose. Although Conti J quoted a passage from Copinger and Skone James on Copyright\textsuperscript{176} in which this point was made,\textsuperscript{177} his Honour neither referred to it nor applied it in determining whether some of the panellists’ satirical comments were for the purposes of criticism. Had the judges recognised the breadth of the concept of criticism and applied such a notion accordingly, the outcomes for Ten may have been substantially different.

2 The Unduly Narrow Understanding of What Constitutes ‘Criticism’

The second, related problem with the judges’ treatment of ‘criticism’ is that in spite of the broadly articulated first part of the third Principle, the judges ultimately encoded and applied an essentialist and reductive notion of ‘criticism’. Moreover, this notion was applied without a detailed understanding of the way in which excerpts were used on ‘The Panel’. As a result, the judges found that some of Ten’s dealings were not for the purposes of criticism or review, where a more sensitive interpretation of these concepts may have yielded different results.

As has been seen, in many instances the judges determined whether the purpose of criticism was established by reference to their ‘impressions’.\textsuperscript{178} In relation to some excerpts, the judges explicitly considered whether Ten’s dealings involved the passing of judgment.\textsuperscript{179} It appears that the judges watched the excerpts and the panellists’ commentary, then formed an opinion as to whether such use conformed with their understanding of ‘criticism’. What is almost entirely absent from the judgments is any attempt to place the panellists’ use of the copyright material in any broader context or any consideration of how this context may itself determine the panellists’ critical purpose.

\textsuperscript{174} The Panel Trial (2001) 108 FCR 235, 293 (‘Wide World of Sports’ (Grand Final celebrations)). See also at 296 (‘Simply the Best’ (Ray Martin)).
\textsuperscript{175} Ibid 293 (‘A Current Affair’ (Masquerade of introduction agency)).
\textsuperscript{176} Garnett, Rayner James and Davies, above n 86, vol 1, [9-18] fn 92.
\textsuperscript{177} The Panel Trial (2001) 108 FCR 235, 250.
\textsuperscript{178} Ibid 295 (‘Days of Our Lives’ (Marlena standing)), 298–9 (‘72nd Academy Awards’ (Artificial fog)); The Panel Appeal (2002) 118 FCR 417, 420 (Sundberg J) (‘Simply the Best’ (Ray Martin)), (‘Miday’ (Prime Minister singing)).
\textsuperscript{179} The Panel Trial (2001) 108 FCR 235, 293 (‘Wide World of Sports’ (Grand Final celebrations)), 294 (‘Pick Your Face’ (Kerri-Anne Kennerley)), 295 (‘Days of Our Lives’ (Marlena standing)), 298–9 (‘72nd Academy Awards’ (Artificial fog)), 301 (‘The Today Show’ (Child yawning)). Each of these findings was either not appealed by Nine, not part of Ten’s Notice of Contention or was upheld on appeal.
An objective analysis of purpose (that is, determining the likely impact of the dealing on its audience)\textsuperscript{180} requires the court to ascertain the audience for the dealing, and consider how the form of the dealing, such as its style, tone and content, may itself be structured by the relationship between the defendant and its audience. In this regard, describing ‘The Panel’ merely as an irreverent ‘light entertainment’ comedy programme is perhaps insufficient.\textsuperscript{181} An important element of the programme is that the panellists consciously avoid presenting themselves as ‘experts’ about their topics of discussion. Indeed, they wear their dilettantism as a ‘badge of honour’.\textsuperscript{182} The tone adopted on ‘The Panel’ is one of egalitarianism and accessibility, with a lack of hierarchy between the panellists and the viewer, as if the viewer is intended to be included in the panellists’ conversation rather than merely observing an expert discussion.\textsuperscript{183} Further, the audience for ‘The Panel’ is assumed to be television-literate and aware both of the nature of the programmes discussed by the panellists and the ethos of the original broadcaster of those programmes. These factors are fundamental to an understanding of the way in which Nine’s excerpts were used on ‘The Panel’ in those circumstances where Ten argued that its rebroadcasts were for the purposes of criticism. In turn, the judges should have recognised their importance in assessing the purpose of Ten’s dealings.

Generally speaking, the panellists excised and rebroadcast incongruous or farcical moments of Nine’s programmes.\textsuperscript{184} Taking into account the tone of ‘The Panel’ and the relationship between the panellists and their viewing audience, it can be argued that the excerpts were cast in such a way that viewers were invited to draw comparisons between the excerpt and the programme from which it came. It can further be argued that this in turn was intended to draw attention to the disparity between the ethos of the programme and its actual content. Such challenges to normative notions of what is accepted on television may in this context be interpreted as ‘criticism’.\textsuperscript{185} The problem is that the judges did not display an awareness of the context of the practices of ‘The Panel’. In looking for evidence of the explicit passing of judgment, the judges may well have overlooked the different form of criticism being practised by the panellists.

The panellists’ treatment of the ‘Midday’ and ‘The Today Show’ (Prasad interview) excerpts is illustrative of the panellists’ techniques, and the judges’ consideration of these dealings is indicative both of their failure to consider the broader context of the practices of ‘The Panel’ and their ultimately reductive interpretation of ‘criticism’.

\textsuperscript{180} Pro Sieben [1999] 1 WLR 605, 613–14, 616 (Robert Walker LJ). See also above nn 152–3 and accompanying text.


\textsuperscript{182} Regular panellist Tom Gleisner, quoted in Peter Wilmoth, ‘Once Bitten …’, Agenda, The Sunday Age (Melbourne), 19 August 2001, 1, 4.

\textsuperscript{183} See also John Docker, Postmodernism and Popular Culture: A Cultural History (1994) 275, who describes the idea of a passive spectator of cultural production as a ‘modernist myth’.

\textsuperscript{184} This is at the very least true for those dealings considered in Part II(A) above.

In relation to ‘Midday’, Hely J concluded that Ten failed to establish a ‘real connection’ between the excerpt and the panellists’ discussion. Sundberg J agreed that “The Panel was not engaged in criticism or review of the ‘Midday Show’ presenter”. Such reasoning demonstrates a narrow conception of criticism, which appears to require explicit passing of judgment on the content of the excerpt. Rather, it is arguable that the excerpt was shown as an illustration and a stimulus to discussion, to challenge and contest the performance and practices of the host of ‘Midday’ and, by extension, the programme itself. Some panellists made implicit and derogatory references to Kennerley’s apparently domineering personality and her placement of guests in humiliating situations. Other panellists disagreed with such inferences, suggesting that Kennerley was an effective host given the circumstances. These comments, when considered in light of the extract, invited viewers to consider whether Kennerley was an appropriate host of one of Nine’s high profile programmes. Thus, while the panellists may not have explicitly passed judgment on Kennerley’s performance as reflected in the excerpt, the rebroadcast of the excerpt can nevertheless be seen to be for the purpose of criticism, when interpreted broadly and with sensitivity to the panellists’ practices.

A further example of this misunderstanding is provided by the judges’ treatment of the Prasad interview on ‘The Today Show’, where Ten edited together images from the original interview in order to catalogue the instances of hostel residents intruding into frame behind the interviewee. At first instance, Conti J found that the purpose of the dealing was to criticise, albeit lightly and humorously, “the perils of live interviews on television”. On appeal, the Full Court unanimously disagreed. Hely J held that the panellists had rebroadcast the edited collection “for its own sake”, noting that some of the panellists giggled at the excerpt and that Ten’s editing had increased the humour in the excerpt.

Again, the Full Court failed to appreciate the context of the panellists’ use. The excerpt was of a serious interview taken from Nine’s popular and high profile morning news and current affairs programme. The excerpt showed an incon-

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187 Ibid 420.
188 For example, the comments: ‘Well I reckon if he didn’t sing it, she would have put her hand up his a…’ and ‘Kerri-Anne will not take no for an answer’: cited in The Panel Trial (2001) 108 FCR 235, 291.
189 For example, the comment: ‘She is essentially a Labor voter [because she got [conservative politician] Costello to do the macarena … and made him look like an idiot and now she’s done it with John Howard’: cited in The Panel Trial (2001) 108 FCR 235, 291.
190 For example, the comments:

‘Leave Kerri-Anne alone. She does a good job I reckon.’
‘She resurrected [the programme].’
‘You think about that though, what is it five hours.’
‘Five days a week.’
‘She is an ideal Midday host’.

191 Ibid 299.
gruous series of moments, whose effect was to highlight flaws in the production values of ‘The Today Show’. Thus, the mere act of excising and rebroadcasting such footage was used by ‘The Panel’ to invite its viewers to draw a comparison between the purported ethos of ‘The Today Show’ and its actual content in order to contest Nine’s representation of ‘The Today Show’. In this regard, Ten arguably rebroadcast the footage for the purposes of criticism. The criticism may have been weakly made and not explicit, but if the judges were prepared to recognise in principle that strongly expressed criticism should be protected, the corollary must equally apply and weakly expressed criticism must also be protected. To hold otherwise would mean that the availability of the fair dealing defences would be determined on the basis of the quality of the defendant’s dealing, rather than on its purpose.

Ultimately, by misguidedly allowing themselves to form an impression of the purpose of Ten’s dealings, by never clearly defining ‘criticism’ and ‘review’ or considering the various ways in which they can operate in practice, and by interpreting these terms based on an anterior, but unarticulated, understanding of what constituted real or proper ‘criticism’ and ‘review’, the judges’ application of principle yielded questionable outcomes.

D Problems with the Treatment of News and Entertainment

There are also inconsistencies in the judges’ treatment of news reporting, both at first instance and on appeal. While the judges appeared to indicate that news reporting should be interpreted broadly, what they ultimately considered to be ‘newsworthy’, and the approach they took to determine this, proved to be unduly and unjustifiably restrictive.

In principle, the judges recognised that there can be no rigid demarcation between news and entertainment and that the overlap between news and entertainment allowed for the fact that reporting news could involve the use of humour. In doing so, the judges reiterated Hill J’s observations in *Nine v ABC*. However, there are some who would go further than the tentative comments on the relationship between news and entertainment made in *Nine v ABC*. Media studies academics, for instance, have argued that ‘the lines between entertainment and information, between quality news and tabloid journalism, between objectivity and subjectivity are hopelessly blurred’. Indeed, a television programme such as ‘The Panel’ is an example of precisely

195 See *Pro Sieben* [1999] 1 WLR 606, where Robert Walker LJ noted that the defendant’s ‘relatively mild’ criticism was a consequence of the ‘bland’ nature of the copyright material being criticised: at 617.
this blurring of genres. ‘The Panel’ contains elements of comedy, music and variety. It also includes interviews with the serious and the famous (groups not mutually exclusive). The discussion regularly turns to, and blends, news, entertainment, gossip and sport.

Yet while the judges in *The Panel Case* were prepared to recognise that ‘The Panel’ adopts an ‘unusual format’, in determining whether Ten’s rebroadcasts of Nine’s excerpts were for the purposes of news reporting, the judges applied restrictive notions of what constituted ‘legitimate’ news reporting as distinct from ‘entertainment’. This undermined their stated view that news and entertainment could overlap. Further, they demonstrated little awareness of contemporary news practices and the importance of the social and political context of the use of television broadcast material in news reporting.

1 *The False Dichotomy between News and Entertainment*

In practice, if not in principle, the judges in *The Panel Case* implicitly encoded notions of ‘hard’ news and ‘quality’ reporting as legitimate, at the expense of ‘soft’ news, ‘tabloid’ journalism and non-traditional or new forms of ‘infotainment’. This is most evident in Conti J’s treatment of the ‘Sunday’ excerpt concerning drugs at the Olympics, which was endorsed on appeal. His Honour described this as ‘the clearest exemplification’ of the reporting of news. Conti J characterised the discussion among the panellists as ‘essentially serious’ but noted that, ‘[d]espite the serious nature on this occasion … one member of The Panel introduced a measure of satire to the discussion’. This comment suggests that such levity was inappropriate in the context of news reporting.

Such a narrow construction of ‘news’ led to problematic outcomes where the panellists treated the excerpts irreverently. In relation to the ‘The Today Show’ excerpt of Boris Yeltsin, where the panellistsmocked Yeltsin’s age and drinking problems, Conti J noted that ‘there can … be considerable difficulty in distinguishing news from entertainment’. His Honour then stated that, based on his ‘judgment and impression’, Ten’s use of the excerpt was for the purpose of entertainment and not news reporting. On appeal, both Sundberg and Hely JJ stated that Conti J did not err in coming to this conclusion. In relation to the ‘Midday’ excerpt showing the Prime Minister singing ‘Happy Birthday’ to Sir Donald Bradman, Sundberg J asserted that his ‘impression’ was that the excerpt was rebroadcast ‘not for the purpose of reporting news … but for its entertainment value’.

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201 See also *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76, where Salmon J held that the reporting of current events would only occur in ‘some section of the news media’: at 84.
203 Ibid.
204 Ibid 291.
205 Ibid.
207 Ibid 420. See also at 442–3 (Hely J).
The problem here is that the judges relied on a distinction between ‘news’ and ‘entertainment’ to reach their conclusions, without providing any reasons as to how that distinction was drawn or why it needed to be drawn. The judges appeared to interpret Hill J’s comments in *Nine v ABC*208 as an invitation to undertake the task of distinguishing news from entertainment in order to determine whether Ten’s dealings were for the purposes of news reporting. However, such a task is not required under the Act. ‘Entertainment’ is not an impermissible purpose, provided that a purpose of news reporting can also be established. News reporting does not even need to be the dominant purpose of the dealing.209 Yet in relation to ‘The Today Show’ and ‘Midday’ excerpts, the judges provided no reasons as to why Ten’s dealings were not for the purpose of news reporting. Indeed, by asserting that Ten’s dealings were for the purpose of entertainment as a justification for finding that Ten’s dealings were not for the purpose of news reporting, the judges implicitly relied on a false dichotomy between news and entertainment. This approach may be contrasted with Finkelstein J’s dissenting approach in relation to ‘The Today Show’ excerpt. After considering the panellists’ discussion of the excerpt, his Honour held that it was newsworthy, even though it was humorous.210 This latter approach correctly recognises that what is newsworthy must be determined by other objective factors and not defined against concepts such as humour or entertainment.

2. The Importance of Context in News Reporting

An additional problem with Conti J and the majority of the Full Court’s treatment of ‘The Today Show’ and ‘Midday’ excerpts is that their assessment of the purpose of Ten’s dealings was wholly divorced from the context in which the excerpts were rebroadcast and the discussion about them occurred. This is problematic because the context of the dealing is perhaps the major factor in determining whether the excerpt was rebroadcast for the purpose of news reporting. The narrow judicial approach to the excerpts is in sharp contrast to the more integrated, television-literate approach displayed by ‘The Panel’ and demanded of its audience.

In relation to the ‘The Today Show’ excerpt, neither Conti J, nor Sundberg and Hely JJ on appeal, explained the relevance of the context of the panellists’ use of the excerpt in coming to their conclusions that Ten’s purpose was one of entertainment. In contrast, Finkelstein J observed that the excerpt was rebroadcast when a referendum as to whether Australia should become a republic had been announced.211 His Honour noted that the footage of Yeltsin was shown in the context of the panellists discussing the ‘powers that could be conferred on the president of a republican Australia’.212 It was in this context that the panellists irreverently discussed Yeltsin’s age, drinking habits and mental acuity,213 as

211 Ibid.
212 Ibid 423.
well as shortcomings with other world leaders. Finkelstein J held that this context was fundamental, because it meant that the panellists’ use of the footage, combined with their discussion about the qualifications and limitations of potential presidential candidates, meant that the dealing was for the purpose of news reporting.

Further, implicit in Finkelstein J’s finding is an understanding that the news being reported does not have to inhere wholly in the audiovisual material shown. Here, the footage of Yeltsin was shown as an illustration of a newsworthy point and as a stimulus to discussion. Such an approach shows an awareness of contemporary television news practices, where images are frequently shown to provide a visual complement to what is being said rather than because of any particular event or scene depicted in the footage. Finkelstein J’s approach is thus preferable to that of the majority judges, whose reliance on subjective impression as to what constitutes ‘entertainment’ as distinct from ‘news’, and whose neglect of the context of the rebroadcasts means that little guidance can be gained as to the interpretation of the statutory purpose of news reporting.

Conti J’s and the majority of the Full Court’s consideration of the ‘Midday’ excerpt is even more concerning in its failure to consider the context in which the excerpt was rebroadcast on ‘The Panel’. At first instance, Conti J found that it was ‘unrealistic and inapposite’ to characterise Ten’s use of the excerpt as reporting news, principally because there was no suggestion that the event had been treated as newsworthy. On appeal, Hely J stated, without elaboration, that any description of Ten’s treatment of the excerpt as newsworthy was ‘an exaggeration or distortion of the facts’. Neither judge referred to the context in which the excerpt was rebroadcast.

This approach is flawed for two reasons. Firstly, it involves a misguided attempt to second-guess what is newsworthy. Despite Conti J and Hely J’s characterisation of the excerpt, the Prime Minister’s appearance on ‘Midday’ had in fact been reported and commented upon in the ‘quality’ press at the time of the rebroadcast. What constitutes ‘news’ is not a matter for subjective judicial impression. It is a construct of what is objectively considered to be information or events worth reporting, even though the events may appear trivial or banal. This must be recognised by judges in interpreting the statutory purpose of news reporting.

Secondly, the judges’ approach ignores the social and political context in which the excerpt was rebroadcast and the panellists’ treatment of the excerpt. The Prime Minister singing ‘Happy Birthday’ to Bradman may appear insignificant as an event in isolation if, like the Full Court majority’s reasoning, the incident is decontextualised. Yet, as the panellists themselves recognised, and as

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the panellists assumed their audience would understand, the Prime Minister’s birthday greetings to Bradman occurred in a much larger context in which they needed to be interpreted. Finkelstein J recognised this by holding that the panellists’ dealing was for the purpose of reporting news on the basis that ‘all behaviour of a prime minister can be regarded as “political” because it may affect voters’ perceptions and is newsworthy for that reason’. The Prime Minister was appearing on a television programme which targeted a particular demographic. He was thereby seeking to enhance his image and thus his political appeal with that group. In the political context of the time, where an early election was predicted but not yet announced and where the Prime Minister was seeking re-election on the controversial platform of large-scale taxation reform, there was a heightened interest in all of the Prime Minister’s media appearances. Thus the way in which a Prime Minister presents him or herself in the media to the electorate at large or to a particular constituency is inherently newsworthy. Further, the fact that the Prime Minister chose to sing to Sir Donald Bradman on national television was also newsworthy. The Prime Minister was attempting to align himself with not only a successful and popular sportsperson, but also with someone perceived as embodying quintessentially Australian values. This act was itself political in its deployment of essentialist ideas about Australian national identity for the purposes of appealing to voters who shared these ideals. The panellists’ reporting of this incident, in which they appeared to suggest that the Prime Minister’s attempts had backfired, was a reporting of a news event.

Ultimately, in considering Ten’s dealings with the excerpts, Conti J and the majority of the Full Court interpreted ‘news reporting’ narrowly, overlooking the complexities of the media production and consumption of ‘news’.

V A RE-READING OF THE FAIR DEALING DEFENCES

Having analysed the decisions of Conti J and the Full Court in The Panel Case and identified their shortcomings, it is now possible to offer a re-reading of the principles that underpin the fair dealing defences. It is hoped that this will offer guidance for future fair dealing cases.

221 Ibid; Seccombe, above n 218.
222 Meade, above n 218; ‘The Don: Both Hero and Metaphor’, above n 218.
223 Meade, above n 218; Seccombe, above n 218.
225 For example, one panellist’s sarcastic comment that Kennerley’s actions would ‘get him back’ on the show, and another’s comment that the Prime Minister looked like a ventriloquist’s dummy when he sang: cited in The Panel Trial (2001) 108 FCR 235, 291.
A Fairness

The fundamental issue to be determined where a defence of fair dealing is raised should be the fairness of the dealing. In assessing whether or not there has been a fair dealing with copyright material, Lord Denning MR’s observation in *Hubbard v Vosper*,\(^\text{226}\) properly understood and applied, provides a sound starting point. It is necessary to form an impression as to the fairness of a dealing, not an impression as to the purpose of the dealing. The notion of fairness is not personal or idiosyncratic, but rather is to be assessed objectively, with sound reasons for judgment given in support. The formation of an impression as to the fairness of a dealing with copyright material needs to be informed by factors such as, but not limited to, the following:

- the amount of the copyright material used in comparison with the length of the copyright material;
- the extent of the use made of the copyright material by the defendant;
- the motives of the defendant;
- whether the copyright material is confidential or has not been disclosed to the public;
- whether the parties are in commercial competition with each other in respect of the use of the copyright material in question and the way in which it has been used;
- whether the use of the material is reasonably appropriate, rather than necessary, for the permitted purpose; and
- the relevance of, and weight to be given to, any industry practices or agreements between commercial rivals as to what constitutes a ‘fair’ dealing.

Not all of these factors will be relevant in any given case. It will be necessary to address such factors as are relevant to the dealing in question. Past fair dealing cases may provide guidance as to how these factors are to be interpreted, but such cases must be used with sensitivity to their particular factual circumstances.

B Purpose

Copyright material may be used for a number of purposes. The Act allows copyright material to be used for the purposes of criticism, review and reporting news but does not require that one of these permitted purposes be the sole or even the dominant purpose of the dealing in order for the defence of fair dealing to be established. In order to establish a defence of fair dealing, an alleged infringer should only need to prove that he or she used the copyright material for a permitted purpose. The fact that the copyright user may have been motivated by other purposes, for example humour or entertainment, should not itself disentitle him or her from relying upon a defence of fair dealing, although those other purposes may be relevant to the inquiry into the overall fairness of the dealing.

\(^{226}\) [1972] 2 QB 84, 94.
C Criticism and Review

The concepts of criticism and review must be interpreted broadly and extend to the thoughts and ideas underlying the copyright material. The interpretation of these concepts must not be limited to dictionary definitions. The effective interpretation of these terms requires an awareness of the diverse practices of criticism and review. It is inappropriate for judges to impose a preconceived, unstated notion of what constitutes ‘criticism’ or ‘review’. The effective interpretation of these terms also requires sensitivity to different modes of criticism and review and the relevance of different forms of media. Challenging popular culture is no less critical than passing judgment on a work of high culture. It is incumbent upon judges to appreciate this in determining whether a copyright user’s dealing is for the purpose of criticism. Equally, simply because criticism or review is conveyed in a humorous or entertaining manner does not mean that it cannot be recognised as criticism or review. Further, criticism and review must be interpreted so that poorly expressed or weakly presented criticism, as well as clear and effective criticism, are protected.

D News Reporting

News reporting also needs to be interpreted broadly. Again, this requires an awareness of the practices of news reporting. There are a number of implications of such an awareness. There must be an understanding that the distinction between news and entertainment has been steadily eroded to the extent that not only is there an overlap between the two concepts, but there are also formats in which news and entertainment are integrated. There must be an awareness of the social and political context in which use of copyright material takes place to determine whether such material is used for news reporting. Further, the news that is being reported does not have to inhere wholly within the copyright material used. Often, reporting news, particularly on television, requires images related to the subject matter to be used by way of illustration to illuminate broader discussion. As with criticism and review, reporting news need only be identifiable for it to be protected by a defence of fair dealing.

VI Conclusion

The decision of the Full Federal Court in The Panel Case represents the highest appellate consideration of fair dealing defences in Australian copyright law. Prior to this case, the leading Australian authorities were the single-instance decisions of Beaumont J in De Garis and Hill J in Nine v ABC. It has been demonstrated that both Conti J and the Full Court’s judgments in The Panel Case fail to provide any real guidance as to the relevant principles governing the fair dealing defences and their proper application to future cases. Indeed, the articulation of principles and their subsequent application to the facts in The Panel Case have been shown to be highly problematic.

Fair dealing defences play an important role in copyright law, given that they purport to allow non-copyright owners to use copyright material for socially useful purposes. The consequence of The Panel Case is that the scope and
operation of these defences in Australia are more uncertain than ever. Non-copyright owners are now less likely to use copyright material, even if they consider that the use is for legally sanctioned purposes. It is hoped that our suggestions go some way to restoring the vitality of the fair dealing provisions diminished by The Panel Case. It is further hoped, given Ten’s decision not to appeal the Full Court’s findings on fair dealing, that an appellate court will, sooner rather than later, attempt to introduce some clarity and certainty into this important but neglected area of Australian copyright law.
## VII Appendix: Summary of The Panel Case

<table>
<thead>
<tr>
<th>Nine programme (Excerpt)</th>
<th>Fair Dealing Defence(s) Raised by Ten</th>
<th>Defence(s) Made Out?</th>
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<tr>
<td></td>
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<td>Conti J</td>
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<tr>
<td>‘Days of Our Lives’ (Marlena levitating)</td>
<td>Criticism or review</td>
<td>Yes</td>
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<tr>
<td>‘Days of Our Lives’ (Marlena standing)</td>
<td>Criticism or review</td>
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<tr>
<td>‘Sunday’ (Drugs at Olympics)</td>
<td>Reporting news</td>
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<td>‘Newsbreak’ (Technical glitch)</td>
<td>Criticism or review</td>
<td>Yes</td>
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<td>‘The 72nd Academy Awards’ (Artificial fog)</td>
<td>Criticism or review</td>
<td>Yes</td>
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<tr>
<td>‘Sale of the New Century’ (Lighting switched off)</td>
<td>Criticism or review</td>
<td>Yes</td>
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<tr>
<td>‘The Today Show’ (Opera House)</td>
<td>Reporting news</td>
<td>Yes</td>
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<tr>
<td>‘Who Wants To Be a Millionaire’ (Ingredients of Xmas pudding)</td>
<td>Criticism or review</td>
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<td>‘Simply the Best’ (Ray Martin)</td>
<td>Criticism or review</td>
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<td>‘A Current Affair’ (Masquerade of introduction agency)</td>
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<tr>
<td>‘The Today Show’ (Prasad interview)</td>
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<tr>
<td>‘The Inaugural Allan Border Medal Dinner’ (Prime Minister embarrassed)</td>
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<td>‘The Today Show’ (Boris Yeltsin)</td>
<td>Reporting news</td>
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<td>‘Midday’ (Prime Minister singing)</td>
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<sup>227</sup> Hely J dissented.
<sup>228</sup> Finkelstein J dissented.
<sup>229</sup> Finkelstein J dissented.
<sup>230</sup> Finkelstein J dissented.
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<td>Criticism or review</td>
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<td>(Grand Final celebrations)</td>
<td>Reporting news</td>
<td>No</td>
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<td>‘Australia’s Most Wanted’ (ARIA award)</td>
<td>Criticism or review</td>
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<td>Not part of Ten’s Notice of Contention</td>
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<td></td>
<td>Reporting news</td>
<td>No</td>
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<tr>
<td>‘Pick Your Face’ (Kerri-Anne Kennerley)</td>
<td>Criticism or review</td>
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<td>‘Crocodile Hunter’ (Scuba diving)</td>
<td>Criticism or review</td>
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<td>‘The Today Show’ (Child yawning)</td>
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