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*Law and Public Policy: Taming the Unruly Horse?*

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**THE HANDMAIDEN AND THE WHIPPING BOY: THE COURTS' USE OF  
PUBLIC POLICY IN LIMITING COPYRIGHT PROTECTION**

ALEXANDRA SIMS\*

**I INTRODUCTION**

Public policy has always been likened to an unruly horse. On balance, unless courts are statutorily invited to ride it, it is more prudent for judges to steer clear of using it.<sup>1</sup>

Public policy has long been the law's whipping boy. One of its more colourful definitions is that of a '[w]ill-o'-the-wisp of the law which varies and changes with the interests, habits, needs, sentiments, and fashions of the day.'<sup>2</sup> Granted, the term public policy is vague<sup>3</sup> and it has different meanings in different contexts.<sup>4</sup> For the purposes of this paper I use public policy in the sense of the courts limiting or denying copyright protection because of the negative consequences of finding that copyright infringement has occurred.<sup>5</sup> Public policy in this sense can be split into two broad categories. The first relates to statutory interpretation: the courts on occasions have erred on the side of caution and held that copyright has not been infringed, even when this has meant reading

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<sup>1</sup> Gerald Dworkin, 'Judicial Control of Copyright on Public Policy Grounds' in Jan JC Kabel and Gerard Mom (eds) (1998) *Intellectual Property and Information Law* 137, 147.

<sup>2</sup> *Federal Deposit Insurance Corp v Fagan* 674 F 2d 302, 307, n 1 (4th Cir).

<sup>3</sup> Public policy vagueness is not unique to copyright law, for a discussion of vagueness in contract law see Sacha Judd, 'The Unruly Horse Put Out to Pasture: The Doctrine of Public Policy in the Modern Law of Contract' (1998) 8 *Auckland University Law Review* 686, 688.

<sup>4</sup> See, eg, *Butterworths Concise Australian Legal Dictionary* (3<sup>rd</sup> ed, 2004) 353.

<sup>5</sup> See Judd, above n 3, 705-706.

down legislation. The second is the courts' denial or cutting back of copyright protection through the use of the public interest defence and the public policy ground.<sup>6</sup>

The courts' use of public policy in limiting copyright protection has met with criticism: there is no authority for its use,<sup>7</sup> it leads to arbitrary decisions,<sup>8</sup> creativity will be stifled,<sup>9</sup> and it is a product of a 'copy-leftist philosophy'.<sup>10</sup> These criticisms are premised on the fiction that the law is neutral and objective<sup>11</sup> and the outdated notion that judges play no part in making the law.<sup>12</sup>

In this article I explore the vital and legitimate role that public policy plays and ought to play in regulating copyright law.

## II PUBLIC POLICY AND STATUTORY INTERPRETATION

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<sup>6</sup> Public policy in copyright law is, of course, not the sole preserve of these two categories, see, eg, the policy questions set out in Charlotte Waelde and Hector MacQueen, 'From Entertainment to Education: The Scope of Copyright' (2004) *Intellectual Property Quarterly* 259, 261.

<sup>7</sup> *Collier Constructions Pty Ltd v Foskett Pty Ltd* (1990) 97 ALR 460, 473 (Gummow J), '[t]here is no legislative or other warrant for the introduction of such a concept [the public interest defence] into the law of this country.'

<sup>8</sup> Dworkin, above n 1, 147 and see *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* (2007) 70 IPR 517, 554 (Finkelstein J).

<sup>9</sup> *Mitchell Brothers Film Group v Cinema Adult Theater* 604 F 2d 852, 856 (5th Cir 1979), cert denied, 445 US 917 (1980).

<sup>10</sup> David J Brennan, 'What can it Mean "to Prevent or Inhibit the Infringement of Copyright"?' – A Critique on *Stevens v Sony*' (2006) 17 *Australian Intellectual Property Journal* 81, 97.

<sup>11</sup> See Kathy Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 *Law and Critique* 75, 88 for a discussion about the purported neutrality and objectivity of the law.

<sup>12</sup> Cf *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 267 (Brennan J), 'nowadays nobody accepts that judges simply declare the law; everyone knows that, within their area of competence and subject to the legislature, judges make law.'

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Courts, when interpreting legislation, are required to take a purposive approach.<sup>13</sup> The purposive approach is not limited to occasions of ambiguity or inconsistency:

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy...if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.<sup>14</sup>

What then is copyright’s purpose? Is it, on the one hand, to protect copyright owners as widely as possible? On this view, copyright legislation would be read expansively for the benefit of copyright owners.<sup>15</sup> Or, on the other hand, should the rights of copyright owners be kept tightly within the bounds of the statute? Should a restrictive reading of the statutory wording be taken, lest the balance between copyright owners and users tip

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<sup>13</sup> *Acts Interpretation Act 1901* (Cth) s 15AA and *Interpretation Act 1999* (NZ) s 5(1).

<sup>14</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

<sup>15</sup> Thus those sections which limit copyright owners’ rights in some way, eg, the fair dealing provisions would be interpreted narrowly. For a relatively recent discussion on the courts’ tendency to construe fair dealing narrowly see Michael Handler and David Rolph, “A Real Pea Souper”: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 *Melbourne University Law Review* 381.

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too much in favour of copyright owners? Balance after all is a vital part of copyright law,<sup>16</sup> especially given copyright's monopoly.<sup>17</sup>

To be sure, legislatures in Australia and New Zealand (and elsewhere) have increasingly granted copyright owners broad rights (not to mention increasing the length of those rights); users by contrast are provided with narrow defences and exceptions.<sup>18</sup> Yet, authors have been granted their privileged position<sup>19</sup> because:

It is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright.<sup>20</sup>

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<sup>16</sup> See, eg, *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, 362 (McLachlin CJ), 'In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole [emphasis added].'

<sup>17</sup> Hugh Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?' [1996] *European Intellectual Property Review* 253, '[w]e must always bear in mind that monopoly legislation is the end result of a balancing act: is the restraint of competition justified by the benefits which it gives to society at large?'

<sup>18</sup> *Ibid* 258 where the exceptions are described as being 'defined precisely and confined within high and immutable walls'. Space precludes a discussion over whether users have positive rights, see, eg, L Ray Patterson & Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (1991).

<sup>19</sup> It could be argued that the public has the privileged position: copyright in works eventually expires and when it does those works enter the public domain free for anyone to use. However, the duration of copyright protection for most works (that is literary, dramatic, musical and artistic works), lasts well beyond the author's life. Moreover, in the United States and Australia retrospective extensions of the copyright term have meant many works were granted an extra 20 years of copyright protection, and, more remarkably, in the United States, works have been plucked from the public domain: see the *Sonny Bono Copyright Term Extension Act* 1998 and Schedule 9 of the *US Free Trade Agreement Implementation Act* 2004.

<sup>20</sup> Trevelyan (ed), *8 Works* (1879) 195, 197 (Thomas Macaulay's 1841 speech in the House of Commons on Copyright) quoted by Zechariah Chafee, 'Reflections on the Law of Copyright: I' (1945) *XLV Columbia Law Review* 503, 507.

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Copyright, therefore, is the public's handmaiden. The recent insertion of a wide defence of parody and satire in the Copyright Act 1968 (Cth)<sup>21</sup> is testament to Parliament's attempt to return the balance to equilibrium.

*Telstra Corporation Ltd v Australasian Performing Right Association Ltd*<sup>22</sup> raised the spectre of the competing policy issues. One issue was whether Telstra was liable for copyright infringement if its customers played music to their clients when the clients were put on hold. Should Telstra as a telecommunications carrier be liable for the actions of another party, actions over which Telstra had no knowledge or control? Kirby J recognised the competing policy considerations: 'The law of copyright is concerned with balancing the public interest in economic and cultural development against the interests of individuals in securing a fair and equitable return for their intellectual efforts.'<sup>23</sup> Despite conceding the potential financial impact of the decision upon telecommunications carriers (and thus their customers) was considerable,<sup>24</sup> his Honour refused to exercise judicial constraint.

The competing interests of the public and copyright owners clashed again in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (hereinafter *The Panel*).<sup>25</sup> Network Ten in its irreverent programme, the Panel, had used snippets of footage taken from Channel Nine's programmes. Comedians and other personalities commented on the snippets (between eights and forty two seconds long). The Copyright Act 1964 could be read as treating broadcasts differently than other works. On this reading broadcasts were not subject to

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<sup>21</sup> *Copyright Act 1968* (Cth) s 41A, inserted by the *Copyright Amendment Act 2006* (Cth). For a discussion on the parody and satire defence, see Sally McCausland, 'Protecting "A Fine Tradition of Satire": The New Fair Dealing exception for Parody or Satire in the Australian Copyright Act' (2007) *European Intellectual Property Review* 287.

<sup>22</sup> (1997) 191 CLR 140 ('*Telstra*').

<sup>23</sup> *Ibid* 185.

<sup>24</sup> *Ibid*.

<sup>25</sup> (2004) 205 ALR 1 ('*The Panel*').

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the substantiality requirement. Despite the obvious disparity of treatment between broadcasts and other works, Kirby J found that the broadcast rights of rights holders were to be interpreted beneficially:

the Act afforded new and larger copyright entitlements in Australia, it would be contrary to basic principle and the ordinary canons of statutory construction to restrict those entitlements in a way that conflicted with the language of the Act or that unduly narrowed its operation. Normally, an amendment of an Act to provide new rights of such a kind will be given a beneficial construction so as to ensure that the purpose of the legislation is truly attained.<sup>26</sup>

Furthermore, it was ‘the statutory text, not generalities or *judicial policy judgments*, that ... is determinative [emphasis added].’<sup>27</sup>

The majority in *The Panel*, however, rejected Kirby J’s beneficial construction approach.<sup>28</sup> McHugh ACJ, Gummow and Hayne JJ were keenly aware of its consequences. They quoted Laddie J in *Autospin (Oil Seals) Ltd v Beehive Spinning*<sup>29</sup> who – in the course of noting that many copyright cases dealt with blatant stealing of the plaintiff’s labours – stated that:

This has led courts, sometimes with almost evangelical fervour, to apply the commandment “thou shalt not steal”. If that has necessitated pushing the boundaries of copyright protection further out, then that has been done. This has resulted in a body of case law on copyright which, in some of its further reaches,

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<sup>26</sup> Ibid 25. See also Kimberlee Weatherall, ‘On Technology Locks and the Proper Scope of Digital Copyright Laws – Sony in the High Court’ (2004) 26 *Sydney Law Review* 613, 633.

<sup>27</sup> *The Panel* (2004) 205 ALR 1, 25 (Kirby J).

<sup>28</sup> Ibid 5.

<sup>29</sup> [1995] RPC 683, 700.

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would come as a surprise to the draughtsmen of the legislation to which it is supposed to give effect.<sup>30</sup>

Thus, it comes as no surprise that the majority in *The Panel* upheld the gist of the defendant's complaint: the Full Court's finding of copyright infringement expanded 'the ambit of the copyright monopoly ... beyond the interests the legislation seeks to protect.'<sup>31</sup>

Matters came to a head in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (hereinafter *Sony*).<sup>32</sup> Sony's PlayStation console had been designed so that it would not play unauthorised games. Stevens had installed mod chips in PlayStation consoles before selling the altered consoles. The mod chips allowed unauthorised games to be play on those consoles. Sony alleged that a breach of s 116A of the Copyright Act, that Mr Stevens without permission had knowingly sold or distributed a "circumvention device" which was capable of circumventing or facilitating the circumvention of a "technological protection measure" which protected Sony's copyright in literary works (computer programs) and cinematograph films. The majority, took a very narrow reading of the Act, and in finding no infringement,<sup>33</sup> repeated its sentiment in *The Panel* that: 'it is important to avoid an overbroad construction [of the *Copyright Act 1968*] which would extend the copyright monopoly rather than match it.'<sup>34</sup> In both *The Panel* and *Sony*, it is difficult to come to a conclusion other than the High Court read down the relevant provisions of the Copyright Act 1968 (Cth) to find that copyright infringement had not occurred.<sup>35</sup>

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<sup>30</sup> *The Panel* (2004) 205 ALR 1, 5.

<sup>31</sup> *Ibid* 3.

<sup>32</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448 ('*Sony*').

<sup>33</sup> The majority found that Sony's technological protection measure did not prevent or inhibit copyright infringement; it merely prevented the playing of an unauthorised game on the console.

<sup>34</sup> *Sony* (2005) 221 ALR 448, 459 (Glesson CJ, Gummow, Hayne and Heydon JJ).

<sup>35</sup> See, eg, Brennan, above n 10.

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Have things really changed since *Telstra* was decided? Are the courts prepared to use public policy to ensure that the balance between copyright owners and the public is maintained? It has been argued that the provisions in question in *Sony*, the anti-circumvention law<sup>36</sup> were ‘para-copyright laws’.<sup>37</sup> Normal or proper copyright law is ‘aimed at encouraging and rewarding creativity and innovation’.<sup>38</sup> Anti-circumvention laws, in contrast, were ‘deliberately designed to “prevent or inhibit” certain technological innovations.’<sup>39</sup> However, a close reading of *Sony*, combined with the High Court’s decision in *The Panel* demonstrates the High Court was not limiting itself to the anti-circumvention laws. On the minorities’ (and Full Court’s) view, any copying of a broadcast constituted infringement, whereas other categories of works required a substantial part to be copied before infringement could arise.<sup>40</sup> The majority in *The Panel* were concerned, however, about granting greater rights to one sector of copyright owners (owners of the rights in broadcasts) than more traditional copyright owners.<sup>41</sup>

While the High Court has been criticised for its reading down of the anti-circumvention laws in *Sony*,<sup>42</sup> it is not out of step with other Commonwealth jurisdictions. The public policy of not extending copyright too far can be seen in New Zealand and Canada. In *Henkel KGaA v Holdfast New Zealand Ltd*,<sup>43</sup> New Zealand’s Supreme Court reaffirmed, albeit obiter, that a low level of originality (in that case packaging for products) gives rise to a lower level of protection.<sup>44</sup> *CCH Canadian Ltd v Law Society of Upper Canada*<sup>45</sup>

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<sup>36</sup> *Copyright Act 1968* (Cth) Pt V, Div 2A.

<sup>37</sup> Weatherall, above n 28, 635.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> See, eg, *The Panel* (2004) 205 ALR 1, 25 (Kirby J).

<sup>41</sup> For a discussion of this point prior to the appeal to the High Court see Michael Handler, ‘*The Panel* Case and Television Broadcast Copyright’ (2003) 25 *Sydney Law Review* 391, 396-397.

<sup>42</sup> Brennan, above n 10.

<sup>43</sup> (2007) 1 NZLR 577.

<sup>44</sup> This observation was obiter as the plaintiff failed to produce a work in which copyright subsisted.

<sup>45</sup> [2004] 1 SCR 339.

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was another case where a Supreme Court took a restrictive reading of copyright legislation and rejected the sweat of the brow test in Canada.<sup>46</sup> To be sure, *Henkel* and *CCH* involve the common law doctrine of originality.<sup>47</sup> Be that as it may, there is no doubt that the High Court in *The Panel* and *Sony* did read down the legislation to afford a result that better fitted with its perceived purpose of copyright.

*A Recent (non) Application of Public Policy*

How are the lower courts handling the clear public policy (as demonstrated by the High Court in *The Panel* and *Sony*) of not extending copyright law? The answer is not too well. The Full Court in the recent case of *Cooper v Universal Music Pty Ltd*<sup>48</sup> dealt with one of copyright law's most pressing issues: whether hyperlinking to infringing content constitutes copyright infringement. More importantly it looked at the liability not just of the ISP's customer, but the ISP itself. The case therefore has serious implications for the internet.

Mr Cooper ran a website which featured links to MP3 music files held on other websites unconnected to Cooper. When a user clicked on a hyperlink, it was taken to a remote server where it could download the MP3 file. Many, if not all, the MP3 files were popular sound recordings and still in copyright. Cooper's website carried advertising, and with the number of views of his website<sup>49</sup> there is no doubt that he derived reasonable advertising revenue. Comcen, an internet service provider (ISP), hosted Cooper's website

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<sup>46</sup> Originality has always been a requirement of copyright protection (even if it was not expressly mentioned in copyright legislation), yet the courts traditionally set the originality standard at a very low level. One device employed was the creation of the "sweat of the brow test": if a person spent sufficient amount of skill, judgment and labour in creating the work, copyright protection would be given, even if this conferred a proprietary interest in facts to the copyright owner.

<sup>47</sup> See, eg, *Henkel KGaA v Holdfast New Zealand Ltd* (2007) 1 NZLR 577, 590 ('*Henkel*').

<sup>48</sup> (2007) 71 IPR 1 ('*Cooper*').

<sup>49</sup> The primary judge had described Cooper's web site as being very successful and attracting significant traffic from Australian users: *Cooper* (2007) 71 IPR 1, 19.

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and Cooper was given free hosting in return for carrying Comcen's logo and a hyperlink to Comcen's website on his website.<sup>50</sup> Comcen in turn was run by E-Talk Communications Pty Ltd and Com-Cen Pty Ltd. When Mr Bal, the director of E-Talk and Com-Cen, became aware of Cooper's website he asked Cooper to take it down, but when Cooper refused Bal took no further action.<sup>51</sup> Moreover, The trial judge found all the defendants liable for copyright infringement: they had authorised the infringement of copyright in the sound recordings.

Had Cooper infringed copyright? He merely provided links to other websites which held the sound records. But if he had authorised the doing in Australia of any act comprised in the copyright, he had infringed the respondents' copyrights.<sup>52</sup> Authorisation was therefore at the heart of the issue.<sup>53</sup>

Section s 101(1A) defines authorisation. The factors the courts are required to take into account in determining whether authorisation has incurred include:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

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<sup>50</sup> Ibid 12.

<sup>51</sup> Ibid 34.

<sup>52</sup> *Copyright Act 1968* (Cth) s 101.

<sup>53</sup> *Cooper* (2007) 71 IPR 1, 20 (Kenny J).

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The definition is premised on the common law doctrine of authorisation.<sup>54</sup> Branson J found the legislature was presumed to have been aware of the relevant Australian authorities on authorisation at that date.<sup>55</sup> Kenny J went further: s101(1A) was expressly premised on the concept of authorisation as developed in *University of New South Wales v Moorehouse*.<sup>56</sup> In addition to this common law gloss, the use of 'include' makes it clear that the three factors are not the only ones to be taken into account. In relation to Cooper's liability, Branson J focused solely on these factors.<sup>57</sup> Kenny J took a slightly wider view,<sup>58</sup> but did not look at the larger picture of hyperlinking to infringing material on the internet.

In assessing the statutory factors, the trial judge and the Full Court used a small sleight of hand. In looking at the factor under s 101(1A)(b) of 'the nature of any relationship existing between the person and the person who did the act concerned', the trial judge found there was a commercial aspect in the relationship between Cooper and the users of his web site: more users meant more advertising and sponsorship for Cooper.<sup>59</sup> Branson and Kenny JJ agreed with this.<sup>60</sup>

It is naïve to suggest that financial advantage is irrelevant. But, financial advantage should not have come under the 'nature of the relationship' factor. Kenny J demonstrates the artificial interpretation through her Honour's choice of title: 'The nature of the relationship between Mr Cooper and the internet user and operators of remote

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<sup>54</sup> See, eg, the Explanatory Memorandum for the *Copyright Amendment (Digital Agenda) Bill 1999* (Cth) [56] <<http://scaleplus.law.gov.au/html/ems/0/1999/0/0642408165.htm>> at 10 July 2007.

<sup>55</sup> *Cooper* (2007) 71 IPR 1, 8.

<sup>56</sup> (1975) 133 CLR 1; *Cooper* (2007) 71 IPR 1, 28 (Kenny J).

<sup>57</sup> *Cooper* (2007) 71 IPR 1, 7–11.

<sup>58</sup> *Ibid* 30–31.

<sup>59</sup> *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 [90].

<sup>60</sup> *Cooper* (2007) 71 IPR 1, 11 (Branson J), and 32 (Kenny J).

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websites.<sup>61</sup> By hiding the factor in the statutory requirement the Court attempted to appear neutral in its application of the statute.<sup>62</sup> A better approach would have been to state that financial advantage was a relevant factor that lay outside the statutory definition even though it would have made the statutory test harder to satisfy.

The financial benefit factor is troubling, however. While many would agree that a large financial benefit is a strong factor in favour of finding that authorisation has occurred, the question remains as to where to draw the line. Is the test: a significant financial benefit; a reasonable amount; or any, no matter how small? If the test is any benefit, websites carrying a modicum of advertising will be caught: company or institution's names or logos would presumably suffice. Indeed, Branson J found ComCen's logo and a link to ComCen's web site constituted a commercial advantage,<sup>63</sup> and this was a significant factor in finding E-Talk liable for authorisation.<sup>64</sup> One advertisement therefore was sufficient to attract liability.<sup>65</sup>

Given the importance of the decision for ISPs, it is curious that the remaining parties' liability was dealt with in a few cursory paragraphs. Section 101(1A)(a) was met as E-Talk had the ability to withdraw the hosting of Cooper's website.<sup>66</sup> Branson J placed no weight on 'at best, [of] remote factors between E-Talk ... the users of Mr Cooper's website and the remote providers of music files...'.<sup>67</sup> Kenny J, due to the financial advantage in the form of E-Talk's opportunity to advertise, did put a small amount of

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<sup>61</sup> Ibid 32. See Branson J (at page 10) who used the Act's terms, 'Nature of relationship: s 101(1A)(b)'.

<sup>62</sup> See Bowrey, above n 11 and accompanying text.

<sup>63</sup> Albeit that this time the factor was included under s 101(1A)(c): *Cooper* (2007) 71 IPR 1, 13.

<sup>64</sup> *Cooper* (2007) 71 IPR 1, 13 (Branson J).

<sup>65</sup> ComCen's advertisement was not really a 'free advertisement' as ComCen hosted Cooper's website, along with its attendant heavy traffic

<sup>66</sup> *Cooper* (2007) 71 IPR 1, 13 (Branson J) and 33 (Kenny J).

<sup>67</sup> Ibid 13.

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weight on it.<sup>68</sup> Thus the second factor cannot be said to be clearly made out. E-Talk could have taken down the website but the fact that it chose not to, even after it had instructed Cooper to take it down, meant it had fallen foul of the third factor.<sup>69</sup> The Full Court found that s 112E<sup>70</sup> afforded no defence to E-Talk and Bal because of their knowledge of the copyright problems and the advertisement on Cooper's website.<sup>71</sup>

Given Cooper's actions it was not surprising that he was found to have authorised copyright infringement. What was surprising, however, was the Full Court's failure to take account of any policy considerations concerning the internet. Indeed, Branson J brushed aside Cooper's argument that an analogy could be drawn between his website and Google: the 'assumption that Google's activities in Australia do not result in infringements of the Act is untested.'<sup>72</sup> To be sure, Google's activities in Australia have yet to be tested, but without search engines the internet would resemble the greatest library in the world with its books strewn on the floor and no hint of a classification system. Furthermore, with a library you can at least see the books, but with the internet nothing is visible. Instead, domain names would have to be guessed at with the hope that a website is lying in wait. Branson J did, however, draw a distinction between Cooper's website and Google. 'Google is a general purpose web engine rather than a website designed to facilitate the downloading of music files.'<sup>73</sup> Kenny J's decision did not repeat Branson J's assertion over Google's potential liability.<sup>74</sup>

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<sup>68</sup> Ibid 33.

<sup>69</sup> Ibid 13 (Branson J) and 33 (Kenny J).

<sup>70</sup> *Copyright Act 1968* (Cth) s 112E 'A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.' Section 100A defines an 'audio-visual item' as including a sound recording.

<sup>71</sup> *Cooper* (2007) 71 IPR 1, 12 (Branson J); 35-36 (Kenny J).

<sup>72</sup> Ibid 10.

<sup>73</sup> Ibid.

<sup>74</sup> French J agreed with the reasons given by both Branson and Kenny JJ. Ibid 3.

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No doubt concerns over possible effects for search engines will be downplayed and *Cooper* will be limited to its facts: in particular E-Talk knew what was going on and even offered free web hosting to Cooper. However, Kenny J, who gave the most balanced decision, noted that: ‘concepts of linking and downloading from remote computers to an internet user are central to the appeals.’<sup>75</sup> Indeed, *Cooper* was greeted with delight by the music industry. An agent of the major record companies and the music publishers stated that a person could be sued for ‘embedd[ing] a copyright-infringing YouTube clip in their blog or MySpace page’ and that no distinctions were made ‘between big websites or small websites’.<sup>76</sup> ‘If you are linking to copyrighted material in an unauthorised fashion, then you can be held liable for copyright infringement.’<sup>77</sup> And finally, while Cooper’s web site and Google were different, ‘There is, however, action that is being taken against Google in other jurisdictions, and we’re awaiting that eagerly.’<sup>78</sup> Given the importance of hyperlinking to the health of the Internet and the Full Court’s expansionist stance in copyright law it is desirable for the High Court to provide some guidance on hyperlinking.

The High Court in its two most recent copyright cases, *The Panel* and *Sony*, has demonstrated a clear preference to use public policy to regulate copyright law. Indeed, following the High Court’s refusal to use public policy in *Telstra*, Parliament amended the Copyright Act 1968 so that telecommunication carriers in Telstra’s position were afforded a defence under the Act.<sup>79</sup> Moreover, after *The Panel* was decided, Parliament

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<sup>75</sup> Ibid 18.

<sup>76</sup> Asher Moses, *The Age* (Melbourne), 19 December, 2006 <<http://www.theage.com.au/news/web/ruling-puts-hyperlinking-on-notice/2006/12/19/1166290520771.html>> at 8 July 2007 quoting Ms Sabiene Heindl, general manager of Music Industry Piracy Investigations (MIPI).

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> As Wilcox J in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, 384 noted, s 112E of the *Copyright Act 1968* (Cth) which was inserted by the Copyright Amendment

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saw fit to enact a specific defence for parody and satire.<sup>80</sup> The value of the parody and satire defence became apparent immediately. In response to the actions of copyright owners who were attempting to prevent the use of amusing cricket themed songs set to well known music, the Attorney-General stated:

I have a bill before the Senate which will ensure Australia's fine tradition of satire is safe. There will be a parody and satire exception for what the law calls 'fair dealing'. In circumstances that are fair, it will mean that groups like the Fanatics will be able to parody popular songs in response to the Barmy Army ... patriotic Australians will be free to mock the British team without the fear of lawsuits ... To retain the law in its current form just wouldn't be cricket.<sup>81</sup>

### **III PUBLIC POLICY BEYOND THE COPYRIGHT ACT 1968**

The courts' use of public policy can be seen clearly in their development of the public interest defence and the public policy ground. Both are similar, lying as they do on the two sides of 'the moral coin'.<sup>82</sup>

#### *A The Public Interest Defence*

The public interest defence enables the publication of a substantial amount of a work because it contains information that is in the public interest for the public or the relevant

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(Digital Agenda) Amendment Act 2000 (Cth), 'operates as a legislative reversal of the High Court's decision in *Telstra...*'.

<sup>80</sup> *Copyright Act 1968* (Cth) s 41A. This section was introduced by the *Copyright Amendment Act 2006* (Cth). For a brief discussion see McCausland, above n 21, 289.

<sup>81</sup> Attorney-General Philip Ruddock, 'Protecting Precious Parody', *Daily Telegraph*, 30 November, 2006, quoted by McCausland, above n 21, 291 See also Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney General).

<sup>82</sup> *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* 70 IPR 517, 538 (French and Kiefel JJ). See, also Dworkin, above n 1, 142 who describes the two as being 'slightly separate, albeit related'.

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authority to know.<sup>83</sup> The defence is attributed to Ungood-Thomas J's obiter comments in *Beloff v Pressdram Ltd*:<sup>84</sup> the 'public interest is a defence outside and independent of statutes, is not limited to copyright cases and is based upon a general principle of common law.'<sup>85</sup> To make the defence out there:

must be disclosure justified in the public interest, of matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity. Public interest, as a defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect.

The future of the defence in Australia looked promising when Mason J tentatively acknowledged its existence in Australian copyright law.<sup>86</sup>

The United Kingdom's Court of Appeal breathed life into the defence in *Lion Laboratories v Evans* (hereinafter *Lion*),<sup>87</sup> and it was soon after codified.<sup>88</sup> In *Lion* the

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<sup>83</sup> The public interest defence, therefore, is very similar to the public interest defence in breach of confidence. For a brief history of the public interest defence see Alexandra Sims, 'The Public Interest Defence in Copyright Law: Myth or Reality' (2006) 28 *European Intellectual Property Review* 335.

<sup>84</sup> [1973] 1 All ER 241.

<sup>85</sup> *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260.

<sup>86</sup> *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 57. '[M]akes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public.'

<sup>87</sup> [1985] QB 526 (CA).

<sup>88</sup> *Copyright, Designs and Patents Act 1988* (UK) s 171(3), 'Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.'

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plaintiff sought to prevent the publication of information about the unreliability of its breathalyser machines. There was the distinct possibility of people having been and continuing to be wrongly convicted and imprisoned for drunk driving. Had the defence not operated the defendant newspaper would have infringed copyright in informing the public of the potential miscarriages of justice.<sup>89</sup>

New Zealand's Parliament followed the United Kingdom's lead.<sup>90</sup> The defence was not codified in Australia, however. Things look a turn for the worse when Gummow J single-handedly argued that no such defence existed in Australia in either breach of confidence or copyright.<sup>91</sup> His Honour dismissed the defence as being constructed from 'inadequate historical and doctrinal materials.'<sup>92</sup> Fortunately Gummow J's attack on the public interest defence in breach of confidence does not appear to have been accepted by subsequent courts in Australia.<sup>93</sup> Notwithstanding this, it has been argued that Gummow J's position is correct in relation to copyright law.<sup>94</sup> The combination of the idea/expression dichotomy and the statutory fair use defences are said to be sufficient to combat any deleterious effects of copyright.<sup>95</sup> Moreover, the putative infringer is seen as

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<sup>89</sup> The Court of Appeal found that the normally proper authority, in this situation, the Home Office, could not be trusted to carry out an investigation properly. It was the Home Office that had, through the police, purchased the machines in the first place.

<sup>90</sup> *Copyright Act 1994* (NZ) s 225(3).

<sup>91</sup> *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545, 583; *Collier Constructions Pty Ltd v Foskett* (1990) 19 IPR 44, 54 – 57

<sup>92</sup> *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 17 IPR 545, 583.

<sup>93</sup> See, eg, Megan Richardson, 'Wither Breach of Confidence: A Right of Privacy for Australia' (2002) *Melbourne University Law Review* 381, 392-393 who argues that the High Court expressed some approval of the defence in *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 208 CLR 199, 328 (Callinan J). See also *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525 where Powell J was clear that the public interest defence in breach of confidence existed in Australia.

<sup>94</sup> See generally, DFC Thomas, 'A Public Interest Defence to Copyright Infringement' (2003) 14 *Australia Intellectual Property Journal* 225.

<sup>95</sup> *Ibid* 231.

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too lazy to 'create his own independently evolved expression'.<sup>96</sup> However, the idea/expression dichotomy is now more honoured in the breach than in the observance.<sup>97</sup> The sweat of the brow doctrine means that facts cannot be lifted from the plaintiff's work; those facts must be found elsewhere. On the occasions that the public interest will apply, the plaintiff will be the sole source of the facts. Copyright's width means that it impinges directly on free speech; the public interest defence simply ensures that copyright is not used as a tool to cover wrongdoing.

*B The Denial of Copyright Protection on Public Policy Grounds*<sup>98</sup>

The courts in the United Kingdom, and elsewhere,<sup>99</sup> have used public policy to deny or limit copyright protection to works that were fraudulent or deceptive,<sup>100</sup> obscene,<sup>101</sup> indecent,<sup>102</sup> immoral,<sup>103</sup> blasphemous and irreligious,<sup>104</sup> or 'reek[ing] of turpitude'.<sup>105</sup>

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<sup>96</sup> Ibid.

<sup>97</sup> See generally, Alexandra Sims, 'Copyright's Protection of Facts and Information' (2006) 12 *New Zealand Business Law Quarterly* 360.

<sup>98</sup> There is no settled name for the public policy ground, see, eg, Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (3<sup>rd</sup> ed, 2000), vol 1, [20.3] where no name is ascribed to it, rather it is contained in the part 'The rights of the public: permitted acts', under the heading 'At Common Law'. Dworkin, above n 1, 138 uses the title 'Reprehensible Copyright Works and/or Reprehensible Authors or Owners'. Cf Owen Morgan, 'Copyright, The Public Interest and Content Restriction' (2003) 8 *Media & Arts Law Review* 213 where it is called a public interest defence.

<sup>99</sup> See, eg, *Martinetti v Maguire* 16 F Cas 920 (CC Cal 1867) (No 9,173) and *Broder v Zeno Mauvais Music Co* 88 F 74 (CCND Cal 1898).

<sup>100</sup> *Wright v Tallis* (1845) 1 CB 893; 135 ER 794 and *Slingsby v Bradford Patent Truck and Trolley Co* [1905] WN 122; [1906] WN 51.

<sup>101</sup> *Stockdale v Onwhyn* (1826) 5 B & C 174; 108 ER 65 and *Fores v Johnes* (1801, 1803, 1804) 4 Esp 97; 170 ER 654.

<sup>102</sup> *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73.

<sup>103</sup> *Glyn v Weston Feature Film Co* [1916] 1 Ch 261.

<sup>104</sup> *Lawrence v Smith* (1822) Jac 471; 37 ER 928.

<sup>105</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 294 (Lord Jauncey).

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While these cases are ‘of some antiquity’<sup>106</sup> and doubt has been expressed over the public policy ground in the United States<sup>107</sup> and Canada,<sup>108</sup> the English Court of Appeal has approved of it in relatively recent times.<sup>109</sup> The question of whether the ground existed in Australia was untested until *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* (hereinafter *Venus*).<sup>110</sup>

The Venus shops were a chain of retail shops selling pornographic films. Venus had been purchasing adult films from one of the plaintiffs, but when the arrangement broke down, Venus began sourcing its films elsewhere. The plaintiffs’ claim of copyright infringement against Venus was successful in the Federal Magistrates Court and damages were awarded against Venus.<sup>111</sup>

Given the nature of the DVDs – ‘hard-core’<sup>112</sup> pornographic films – the question of the public policy ground arose. The majority, French and Kiefel JJ, under the heading ‘Public policy, immorality and the denial of copyright protection’, quoted *Copinger and Skone James on Copyright*:

Such readiness on the part of judges in the past to apply their own views in deciding what works should be refused protection gave rise to criticism.... In the present day, in which the public perception of such matters is different, the courts

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<sup>106</sup> *Hyde Park Residence Ltd v Yelland* [1999] RPC 655, 664.

<sup>107</sup> See, eg, *Mitchell Brothers Film Group v Cinema Adult Theater* 604 F 2d 852, 856 (5th Cir 1979), cert denied, 445 US 917 (1980).

<sup>108</sup> See, eg, *Aldrich v One Stop Shop Ltd* (1987) 17 CPR (3d) 27.

<sup>109</sup> *Hyde Park Residence Ltd v Yelland* [2001] Ch 143, 161 (Aldous LJ) (CA).

<sup>110</sup> (2007) 70 IPR 517 (*Venus*).

<sup>111</sup> \$150,000 (additional damages of \$85,000 and conversion damages of \$65,000).

<sup>112</sup> *Venus* (2007) 70 IPR 517, 549: ‘A list of the more than 200 titles of the works in suit indicates that they are all hard-core pornography: they are usually referred to as “adult films”. We were not asked to view any of the DVDs. Nonetheless I have proceeded on the basis that the films depict explicit details of sexual activity, have little by way of plot and not much dialogue’ (Finkelstein J).

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can be expected to reflect this difference and to take an attitude which is far less protective of the public... at least in relation to sexual conduct protection is only likely to be refused to a work considered as having a grossly immoral tendency by present-day standards [footnotes omitted].<sup>113</sup>

It is hard to defend an argument that copyright should be stripped from offending works, yet this is a side issue.<sup>114</sup> The question is whether the public policy ground applied in Australia.

The majority accepted the view in *Lahore's Copyright and Design* that the Act did not deny copyright protection to a work based on its contents.<sup>115</sup> Moreover, the majority endorsed the proposition that 'copyright can subsist in a seditious, libellous, immoral, blasphemous or fraudulent work, but that the court may not grant a remedy as a matter of public policy'.<sup>116</sup> Thus, for the majority, the work's content did not affect existence of copyright in the work, but it could affect the remedy, albeit the 'scope of such an exercise of discretion would seem to be narrow.'<sup>117</sup> The adult films in question fell outside the scope of the court's discretion and were thus entitled to protection as copyright works.

Encouragingly the majority therefore recognised that the public policy ground existed in Australia, albeit it was limited to the remedy afforded to affected works. However, the majority's endorsement of Gummow J's statement in relation to his Honour's rejection of

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<sup>113</sup> Kevin Garnett, Gillian Davies, Gwilyn Harbottle, *Copinger and Skone James on Copyright* (15<sup>th</sup> ed, 2005) vol 1, 183. *Venus* (2007) 70 IPR 517, 537.

<sup>114</sup> It is certainly not clear on the authorities whether copyright should be stripped from a work, copyright recognised by no remedy will be forthcoming, See, eg, *Venus*, (2007) 70 IPR 517, 552 (Finkelstein J). See also Sims, 'The Denial of Copyright Protection on Public Policy Grounds' (forthcoming *European Intellectual Property Review*).

<sup>115</sup> Butterworths, *Lahore, Copyright and Designs*, Sydney, 6150. 'There is nothing in the 1968 Act which denies copyright protection to obscene or blasphemous works.' *Venus* (2007) 70 IPR 517, 538.

<sup>116</sup> *Lahore's Copyright and Design* Butterworths, Sydney, 6150: *Venus* (2007) 70 IPR 517, 538.

<sup>117</sup> *Venus* (2007) 70 IPR 517, 538-539.

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the public interest defence in Australia tempers the partial recognition of the public policy ground in Australia.<sup>118</sup>

Venus' next challenge was on the purported illegality of the DVDs. The magistrate had accepted the sale of certain of the films in New South Wales and Queensland would have breached the relevant state classification enforcement Acts. But the magistrate observed that:

from the evidence which I have received in this case and from articles in the press including one in the *Sydney Morning Herald* ... there is very little will to enforce the relevant provisions of the Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW).<sup>119</sup>

While the police and others often use their discretion not to pursue a matter and take it to court, once it does go to court, the court is expected to apply the law.<sup>120</sup> Moreover, the comment privileges one law (copyright) over another (criminal).

The majority in *Venus* recognised that illegality posed a problem for the plaintiffs: '[a]s a matter of first principle, it is difficult to see how an owner of copyright could invoke the conversion remedy if the infringing copies are such that their possession is contrary to law.'<sup>121</sup> But it went on to find that the party claiming illegality was required to 'establish

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<sup>118</sup> *Ibid* 538.

<sup>119</sup> [2005] FMCA 997 [41].

<sup>120</sup> *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 6, in the case of a film classified RC or X 18+ or an unclassified film that is subsequently classified RC or X 18+ the maximum penalty is 100 penalty units or imprisonment for 12 months for an individual, 250 penalty units for a corporation.

<sup>121</sup> *Venus* (2007) 70 IPR 517, 543.

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the necessary factual basis for that contention.<sup>122</sup> Venus failed under this head as it had not produced evidence of which DVDs had fallen foul of the relevant state law.

While it was heartening to see the majority accept that illegality was a relevant factor in assessing conversion damages under s 116,<sup>123</sup> the majority divorced illegality from the public policy ground: the magistrate was criticised for ‘conflat[ing] the public policy and illegality issues.’<sup>124</sup> Yet, illegality is one aspect of the public policy ground.<sup>125</sup> Indeed, the majority discussed *Stockdale v Onwhyn*<sup>126</sup> in its discussion of illegality, one of the very cases which it had already referred to in relation to the public policy ground. The divorcing of illegality from the public policy ground is important, as the majority only found illegality relevant when conversion damages were calculated, not when additional damages were being assessed.

Another issue of concern, and one that was related to the question of illegality was the majority’s apparent decision to go against one of the tenants of copyright law: the plaintiff bears the onus of proof in copyright actions.<sup>127</sup> In response to Venus’ challenge that the sale of some of the films in the relevant states was not lawful and this was relevant to the calculation of damages, the majority found, ‘[t]his would have required, for each film copied, evidence of its classification or lack thereof and submissions about the application of each state and territory law to its sale, offering for sale or possession for sale.’<sup>128</sup> Yet, despite the Full Court not having this information, it upheld conversion

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<sup>122</sup> Ibid 544-545.

<sup>123</sup> Ibid 541-542.

<sup>124</sup> Ibid 545.

<sup>125</sup> See, eg, Sims, ‘The Denial of Copyright Protection on Public Policy Grounds’, above n 119.

<sup>126</sup> (1826) 5 B&C 173; 108 ER 65.

<sup>127</sup> *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1991) 171 CLR 88 and see *Copyright Act 1968* (Cth) ss 37, 38.

<sup>128</sup> *Venus* (2007) 70 IPR 517, 533.

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damages.<sup>129</sup> Finkelstein J, on the other hand, found that as the measure for damages was the value of the work converted,<sup>130</sup> the magistrate was required to determine a number of issues including the market value of the DVDs.<sup>131</sup> Finkelstein J's view on this point is to be preferred over the majority's.<sup>132</sup>

The majority also upheld the award for additional damages under s115(4). Finkelstein J was concerned over this:

Additional damages should only be awarded if, to summarise the effect of s 115(4)(b), the defendants' conduct deserves punishment or there is a need for deterrence. A defendant will deserve punishment if his conduct was vindictive, reprehensible, malicious or something of that sort.<sup>133</sup>

His Honour found Venus' actions were not vindictive, reprehensible or malicious.<sup>134</sup> While Finkelstein J did not address separately all of the factors set out in s 115(4)(b), it is hard to come to any other conclusion that his Honour's determination was correct: for example, Venus had no warning it was infringing copyright, and Venus acceded to the injunctions once they were granted.

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<sup>129</sup> Albeit, the magistrate's award was reduced from \$68,000 to \$54,400, for the procedural reasons for this see, *ibid* 548-549.

<sup>130</sup> *Ibid* 555.

<sup>131</sup> For a list of these issues see *ibid* 556-557.

<sup>132</sup> Indeed, in *Henkel* (2007) 1 NZLR 577 the plaintiff failed in its action due to its failure to plead the underlying drawings in which the copyright lay, producing the packaging instead. Notwithstanding this basic mistake, the High Court at first instance had found copyright infringement as it, along with other courts, had repeatedly let slide the plaintiff's requirement to produce or at least provide sufficient evidence to the court of the existence of a work in which copyright existed.

<sup>133</sup> *Venus* (2007) 70 IPR 517, 557.

<sup>134</sup> *Ibid*.

Finkelstein J was acutely aware of the public policy concerns. ‘This conclusion [that s115(4)(b) had not been made] makes it unnecessary to decide whether as a matter of policy a court should grant a windfall profit to a pornographer.’<sup>135</sup>

#### IV CONCLUSION

It is arguable that the public interest defence and the public policy ground fall foul of what Chafee has described as the sixth ideal of copyright law, that ‘[t]he legal rules should be convenient to handle’.<sup>136</sup> Lawyers should be able to ‘ascertain the rights of the parties and protect those rights with assurance.’<sup>137</sup> But as Chafee recognised this ideal must be tempered by his fourth ideal that ‘[p]rotection should not go substantially beyond the purposes of protection’.<sup>138</sup> It is here where the competing interests between the copyright owner and the public are weighed. If a blind application of copyright would see wrongdoing covered up, justice denied or windfall profits for pornographers from products that could not be sold, then protection has gone substantially beyond the purposes of copyright protection. In isolated situations courts must be allowed to use their toolkit to ensure that the public is not harmed by copyright law. So too should the courts continue to use public policy when interpreting legislation to ensure that the balance between copyright owners and users does not tip too far in favour of the former.

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<sup>135</sup> Ibid.

<sup>136</sup> Chafee, above n 20, 514.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.