

PROTECTING "KILLER CROCS" AND "FANTASY FOOTBALL"

THE ETHICS OF COPYRIGHT LAW

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In this article Susy Frankel discusses the justifications for copyright law which form the ethical basis of copyright protection in New Zealand. It then considers how those justifications are reflected in the case law by examining two Court of Appeal judgments. The author concludes that at times the reasoning and results of individual cases lose sight of the justifications for copyright protection.

I INTRODUCTION

It is trite to state that the justifications for, and ethical bases of, legal rights are important. Paradoxically, however, this is often forgotten. Although the black letter law can easily be consulted and applied, the ethical decisions which are the basis of that law should not be forgotten and should be discernible from the body of case law which they have spawned.

The ethical bases of most intellectual property rights are difficult to pinpoint. The policy reasons for such rights are many and varied. They include justifications based on principles of reward for labour, skill or investment and the notion that such reward provides the incentive to create or invent. Most intellectual property texts include an introduction which discusses the history of such rights and their emergence rather than an analysis of justifications for their existence and scope from a political or economic viewpoint.¹ When viewed from an economic perspective there are many similarities between the different intellectual property rights, but this article is primarily concerned with copyright. The main

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¹ See for example Brown & Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989).

historical justification for copyright is that it provides an incentive for the creation of new copyright works. This can conveniently be described as the "incentive theory".

In addition to the incentive theory there are other justifications for providing copyright protection. These include the creation and maintenance of copyright producing industries. For example the film business, the music recording industry and computer software production. It is unrealistic to discuss the justifications for copyright and to ignore the huge benefits that some national economies have through copyright dependent industries.

Intellectual property rights are an integral part of New Zealand's and other countries' economic policy. The theme of this article is not to analyse whether the economic policy, or any of the other justifications, behind our copyright law are just, but to examine how the case law reflects them. This article outlines the justifications for copyright and the ethical bases from which those justifications have emerged. The article then examines how two New Zealand Court of Appeal judgments reflect those justifications. The writer respectfully concludes the Court of Appeal does not always give due consideration to the justifications for copyright protection.

I THE "ETHICS" OF COPYRIGHT PROTECTION

A *The Incentive Theory*

In this article the term "incentive theory" describes the concept that an author requires an incentive to create products of the intellect and that such an incentive takes the form of the rewards of copyright. "Incentive" in this context includes both the concepts of motivation and reward. The incentive theory relies on the concept that creators of copyright works require an incentive to initiate or continue their creations. Although some commentators argue that this is not so: "Throughout most of our human history there existed no concept of intellectual property rights. Nevertheless, humans still produced technological and cultural artefacts."²

The incentive theory provokes two questions. Who is in fact rewarded and who has been motivated? The term "author" refers to a creator of a work,³ but the beneficiaries of the reward are not only authors. Publishers, producers and the like also partake of any reward.⁴

² R V Bittig *Copyrighting Culture - The Political Economy of Intellectual Property* (Westview Press, Boulder Colorado, 1996) 25.

³ Copyright Act 1994, s 5(1).

⁴ In some cases the publisher or producer may be the first owner of copyright. For example see section 21(2) and section 5 (2) of the Copyright Act 1994.

Modern publishing practice requires an author of a book to assign copyright to the publisher. The publisher then has the obligation to publish the book and the exclusive right to authorise any subsequent use of the copyright. The publisher shares the incentive for the author to create another book. In a technological context this translates to the investment that companies make in research and development of computer software. Unless there is a reward mechanism which ensures a substantial return on such products no incentive exists for companies to invest in the development of computer programs. Thus, the rewards of copyright are hardly authors' exclusive domain. They belong to publishers, distributors and every business with a link to copyright industries.

B The Role of Authors' Rights

This section considers whether authors' rights have played a role in the development of modern copyright law. New Zealand copyright law is now governed by the Copyright Act 1994. This Act is substantially based on the English Copyright, Designs and Patents Act 1988. The New Zealand predecessors to the 1994 Act⁵ are also based on the English equivalents.⁶ Therefore the history of English copyright law is relevant to a consideration of the justifications for New Zealand's copyright law. This history is riddled with conflict between the rights of authors as creators of copyright works and the rights of publishers as disseminators of those works.

One can trace English copyright legislation back to the 18th century and more particularly the Statute of Anne of 1709.⁷ The Statute of Anne's preamble records a lofty ethical basis for its existence:⁸

An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies.

The Statute of Anne was enacted after substantial lobbying by the Stationer's Company. Royal charter established the Stationer's Company in 1557. The charter gave the Stationer's Company a monopoly over printing in England. This monopoly lasted for the next 150 years.⁹ The Stationer's Company issued exclusive licences to its members to print and

⁵ New Zealand's previous copyright legislation was the Copyright Act 1962, Copyright Act 1913 and a number of English Acts. See Brown & Grant above n 1, 226-227.

⁶ See England's Copyright Act 1956 and Copyright Act 1911.

⁷ Prior to the enactment of the Statute of Anne a form of common law copyright protection which existed, but there were no decisions of common law courts upholding any form of copyright. See Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (2nd ed, Butterworths, London, 1995) 18-20.

⁸ British Statutes (1709) 8 Anne Chapter XIX.

⁹ A Star Chamber Declaration of 1586 limited the number of Master Printers in England to 25.

publish. This had an effect which resembles today's exclusive right of copyright owners to control the copying of their works, but was clearly a way of controlling competition. In addition, the motivation behind the existence of the Stationer's Company was equally, if not more so, that of censorship. A leading copyright text describes the Stationer's Company as "a cartel of booksellers, and mainly London booksellers at that".¹⁰ It was a form of guild which had a monopoly on printing. The focus was on the role of printers. There is no evidence that the concern to control printing was in any way a reflection of concern for authors' rights.¹¹

When the Stationer's Company lost its printing privileges in the late 17th century its members lobbied for control over the copying of printed works on its register and this led to the Statute of Anne. The statute provided a 14 year right for owners of books to control the publishing of those books.¹²

The right of printers was thus firmly established in English law. However, author's rights were not so firmly established. The emergence of printing as a means of income for authors coincided with the emergence of the theories of John Locke that people have property rights in the fruits of their labour.¹³ Exactly what role Locke played in developing authors' rights is a matter of some historical debate.¹⁴ However the concept of an author having a natural right to the fruits of his¹⁵ labour began to emerge as a leading argument on which the Stationer's Company lobbied for the Statute of Anne.

It is unnecessary for this article to examine either Locke or natural law theories in detail. The concept of labour playing a role in copyright protection has become integral when considering whether copyright exists in a particular work. Copyright only exists in

¹⁰ See Laddie et al, above n 7, 20.

¹¹ At this time authors relied on patronage as a means of income. It was not until the emergence of widespread printing that another means of income became a possibility for authors.

¹² Members of the Stationer's Company also claimed there was a common law copyright which existed after the statutory right expired. This argument over the vestiges of common law copyright lingered for some time. *Donaldson v Beckett* 4 Burr. 2048, (1774) 98 ER 257 held the statutory right replaced any common law rights. The English Copyright Act 1911 made it clear that common law copyright did not survive that statute.

¹³ See J Locke *Two Treatises of Civil Government* (Hafner Press, New York, 1947).

¹⁴ There are writings which allege that Locke stated that authors have a natural right to their work. It has been argued that an examination of Locke's treatises reveals no reference to intellectual creations and therefore "it can be doubted that Locke has intellectual creativity in mind when arriving at his labour theory of property". See R Bettig above n 2, 19-21.

¹⁵ The author uses the word "his" in this context rather than "his or her" to reflect the notions of property ownership of the 17th and 18th centuries.

relation to original works.¹⁶ The amount of "skill, labour or judgement" expended in creating the work determines whether the work is original.¹⁷ Indeed, whether labour on its own is enough to give rise to a finding of originality is a topical issue of copyright law. It is typified by cases involving literary compilations like databases.¹⁸ Copyright captures databases because they fall within the definition of literary works which includes compilations.¹⁹ However, they are often the result of substantial labour rather than any creative originality. English authority tends toward the view that substantial labour expended in creating a work is enough to satisfy the originality requirement.²⁰ United States precedent suggests that in addition to labour there must be a "modicum of creativity" for a work to be original.²¹ According to a recent High Court case the position in New Zealand is unclear.²² Whatever position the New Zealand courts ultimately take on the database issue it is clear that conceptually labour can have a role in establishing the existence of copyright. Modern copyright law has provided a reward for investment whether that investment be substantial labour, skill or even financial input.

In 1769 the much heralded case *Millar v Taylor*²³ gave judicial backing to author's rights. Lord Mansfield stated "... it is just, that an author should reap the profits of his labour".²⁴ Accordingly, Lord Mansfield has taken a place in copyright history as a champion of authors.

The conflict between the rights of creators as authors and publishers as disseminators has remained central to our copyright law. An attempt to redress the balance has emerged in the recent enactment of moral rights in English²⁵ and New Zealand law. In New Zealand

¹⁶ Above n 3, s 14.

¹⁷ See *Ladbroke (Football) Ltd v William Hill* [1964] 1 All ER 465 and *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

¹⁸ See *Glougau v Land Transport Safety Authority of New Zealand and New Zealand Taxi Proprietors' Federation Inc* [1997] 3 NZLR 353.

¹⁹ Above n 3, s 2.

²⁰ For example see *Waterlow Directories v Reed Information* [1992] FSR 409. The European Union Directive on databases has meant England along with the rest of the Union has a sui generis regime in relation to databases. This provides the owner of the database with a right to prevent unfair extraction from the database.

²¹ *Feist Publications v Rural Telephone Service Co* (1991) 113 L.Ed 2d 358.

²² *Telecom Corporation of New Zealand v Colour Pages Limited* (Unreported, High Court, Wellington Registry, 14 August 1997, CP142/97).

²³ (1769) 4 Burr 2303, 98 ER 201.

²⁴ Above n 23, 203.

²⁵ Copyright Designs and Patents Act 1988, ss 77-84 (England).

moral rights include the right to be identified as the author of a work²⁶ and the right to object to derogatory treatment of a work.²⁷ These rights relate directly to the author's personality and reputation and therefore cannot be alienated by the author, but they may be waived.²⁸

Although authors and publishers may at times have conflicting interests this should not overshadow their common interests, which may in turn conflict with those of users of copyright works. These conflicts are broadly between the right to use the work and the copyright owner's right to control most uses of the work.²⁹

C Balancing the Protection of Copyright Owners and the Public Interest in Using Copyright Works

Another ethical factor enshrined in modern copyright law is the balancing of copyright protection against the interests of the public in the fair use of copyright works for purposes like education or to create even more works.

While Lord Mansfield is considered to be the 19th century champion of authors, Lord Macaulay regarded copyright as a necessary evil to encourage the creation and dissemination of socially useful works.³⁰ A necessary corollary of this view is that the rewards of copyright should be no greater than is necessary to achieve the goal of disseminating socially valuable works. That is, copyright protection should have limits. These limits are reflected in the fact that copyright is not perpetual³¹ and that certain uses of copyright works are allowed.³² This balancing approach is clear in our own legislation through the enactment of various permitted uses, but the policy behind the balance is more overt in the United States constitutional statement of copyright:³³

The Congress shall have the power ... to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.

²⁶ Above n 3, ss 94-97.

²⁷ Above n 3, ss 98-101.

²⁸ Above n 3, s 107.

²⁹ The exclusive rights of the copyright owner are set out in section 16 of the Copyright Act 1994.

³⁰ Ginsberg J "A Tale of Two Copyrights" [1990] Tulane Law Review 991, 993.

³¹ Duration of copyright is for life of the author plus 50 years for literary artistic, musical or dramatic works and other periods, usually 50 years, for other works. See Copyright Act 1994, ss 22-25.

³² Above n 3, Part III.

³³ United States Constitution Article 1, Section 8, Clause 8.

The United States copyright law illustrates the public interest approach. The author centred approach lies at the heart of French copyright law, which in fact is entitled “droit d’auteur” which translates as authors’ rights rather than copyright. The Anglo (New Zealand) approach sits somewhere in between. There are many common themes between these different jurisdictions. For example, although the origins of the authors’ rights approach and the Anglo-American approach are generally regarded as different, a close analysis of their origins arguably reveals the difference is not in fact so great.³⁴

C *The New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Rights Act and particularly, section 14, which protects freedom of expression³⁵ ought to play a role in interpreting copyright law.³⁶ *TVNZ v Newsmonitor*³⁷ is the only New Zealand case to date where a court has considered the effect of the Bill of Rights Act on copyright. TVNZ claimed copyright in its news programmes. Newsmonitor video taped those programmes, provided its clients with summaries of the items and on request supplied clients with transcripts of those programmes for a fee. Newsmonitor argued that section 14 meant TVNZ’s claim to copyright could not be upheld. Counsel for Newsmonitor argued that:³⁸

the Copyright Act inhibits **the free flow of information** within the community by granting the originator of various works or products a statutory monopoly whereby that person may prevent others from doing certain acts in relation to them. [emphasis added]

Blanchard J did not accept this argument on the basis that copyright law takes account of notions of freedom of speech by its adherence to the idea/expression dichotomy.³⁹ In its broadest sense the idea/expression dichotomy means that copyright does not protect ideas but it protects the expression of those ideas. The difficulty with this dichotomy lies in drawing the line between what is an idea and what amounts to expression of that idea. Judge Learned Hand made one of the clearest statements of this difficulty:⁴⁰

³⁴ Above n 30.

³⁵ Section 14 provides: Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

³⁶ Section 6 of the New Zealand Bill of Rights Act 1990 requires a court to prefer a meaning of any enactment which is consistent with the Bill of Rights.

³⁷ [1994] 2 NZLR 91.

³⁸ Above n 37, 95.

³⁹ Above n 37, 95.

⁴⁰ *Nichols v Universal Pictures* (1930), 45 F2d 119 121.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist only of its title, but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas", to which, apart from their expression, his property is never extended ... Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work ... but the analogy is not a good one, because, though the skeleton is part of a body, it pervades and supports the whole. In such cases we are concerned with the line between expression and what is expressed.

The authors of a leading copyright text suggest that Judge Learned Hand's description does not in fact distinguish between what is an idea and what is expression. They describe the idea/expression dichotomy as the "idea/expression fallacy". In part because of this line drawing difficulty, but also because they argue that in some circumstances it can be disproved.⁴¹ One of the examples given is that a translation of a literary work can amount to an infringement but clearly the expression has been completely changed.

In *Newsmonitor* Blanchard J stated:⁴²

Provided the Copyright Act is interpreted in a manner consistent with this fundamental rule of copyright law there can be no conflict with section 14, for what is protected there is the right to express and receive ideas and opinions. Section 14 does not provide a guarantee of a right to appropriate someone else's form of expression. "Freedom of expression" does not mean freedom to copy the form in which authors have expressed themselves....

With respect this statement assumes it is possible to apply consistently the idea/expression principle. As suggested above this is not necessarily so. Therefore the idea/expression dichotomy is not of its own as capable of rigorously protecting freedom of expression as Blanchard J suggested.⁴³

Accordingly, it is submitted the principle of freedom of expression should become, if it is not already, part of the ethical basis of copyright law.

⁴¹ See Laddie et al above n 7, 61.

⁴² Above n 37, 95.

⁴³ For an argument that Blanchard J's analysis is incorrect see Oliver J "Copyright and Freedom of Expression" (Unpublished paper submitted for Laws 353 Intellectual Property, Victoria University of Wellington, 1997), held at the Victoria University of Wellington Library.

D *Economic Policy and Copyright*

There is a huge investment in intellectual property industries. New Zealand has the status of being a net user of copyright (ie it imports more copyright works than it exports) but nonetheless the value of New Zealand's copyright related industries is significant. Copyright now covers a greater diversity of subject matter than ever before. It is no longer confined to works like books and paintings, but has developed to cover modern arts like film and technologies such as computer programs, broadcasts, and cable programmes. It also protects industrial type works.⁴⁴

Intellectual property rights are now recognised as a sizeable part of international trade law. They are regarded as a necessary corollary to the principles of open markets and fair competition, which the World Trade Organisation embodies.⁴⁵ The World Trade Organisation includes the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This international agreement has placed an unheralded emphasis on the significance of intellectual property to the world's leading trade powers. TRIPS deals with a number of aspects of intellectual property. In relation to copyright it provides that countries must recognise the minimum levels of copyright protection enshrined in Articles 1-21 of the Berne Convention.⁴⁶ In addition TRIPS prescribes addition protections. For example, rental rights in relation to films and computer programs.⁴⁷ The economic value of copyright is a central justification for its modern form and structure.

Intellectual property rights are part of New Zealand's overall competition policy.⁴⁸ The structure of copyright law embodies features which in combination can protect against the creation of undesirable monopolies. Whether in practice it operates like this is a matter of some debate which is beyond the scope of this article.⁴⁹ Those features include :

- only original works are protected⁵⁰;

⁴⁴ For example, plastic kiwifruit trays: *Plix Products v Frank M Winstone (Merchants) Limited* (1984) 3 IPR 390 and plastic components for drawers: *LB (Plastics) Ltd v Swish Products Limited* [1979] RPC 623.

⁴⁵ See Jackson J, Davey W & Sykes *Legal Problems of International Economic Relations* (West Publishing, Minnesota, 1995). The World Trade Organisation Charter and Agreements are available online at [<http://www.wto.org/>].

⁴⁶ Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971).

⁴⁷ Article 11.

⁴⁸ Intellectual property policy advice is given to government from the Competition and Enterprise Branch of the Ministry of Commerce.

⁴⁹ See Bettig above n 2.

⁵⁰ Above n 16. Although the standard of originality is not a high threshold the law is clear that a

- copyright does not protect ideas or information but the expression thereof;
- copyright is of limited duration⁵¹; and
- certain uses of copyright works which would otherwise amount to an infringement are permitted. For example, fair dealing for research or private study.⁵²

In summary, competition law policy is part of the ethical basis of copyright law.

III CASE LAW AND THE ETHICS OF COPYRIGHT

Whether the justifications for copyright protection are politically or ethically acceptable is a matter for debate. Regardless of what opinion is held in that debate the case law should reflect the justifications for copyright law. It is difficult to measure a legal justification by looking at individual cases. It is unusual in New Zealand copyright cases for courts to discuss copyright justifications at length. However, justifications should be reflected in and recognisable from the reasoning and outcome of a judgment. Individual cases should not run counter to the overall justifications for copyright's existence. Many cases are finely balanced when a black letter law analysis is applied to the facts of an alleged copyright infringement. In such a situation the justifications for copyright should be the factors which tip the balance in favour of one or other party. This article argues that in New Zealand this is not always the case.

The remainder of this article considers two cases which have proceeded to the New Zealand Court of Appeal in recent years: *Beckmann v Mayceys Confectionery*⁵³ and *Bleiman v News Media (Auckland) Ltd*⁵⁴. It argues that only one of the decisions reflects the justifications which form the ethical basis of copyright.

IV BECKMANN V MAYCEYS CONFECTIONERY

A *The Facts and the Reasoning of the Court*

Mayceys manufactured and sold in New Zealand jelly confectionery in the shape of crocodiles and known as "killer crocs". Beckmann imported to New Zealand confectionery made by another manufacturer but also in the shape of crocodiles. Killer crocs were made from moulds based on a plaster model or sculpture.⁵⁵ There was no dispute that Mayceys

work is not original if it is copied from another work.

⁵¹ Above n 31.

⁵² Above n 3, s 43.

⁵³ Unreported, 13 October 1995, Court of Appeal, CA 187/94.

⁵⁴ [1994] 3 NZLR 673.

⁵⁵ A model or sculpture qualifies as an artistic work under section 2 of the Copyright Act 1994.

owned the relevant copyright. The focus of the case was whether there had been an infringement. The High Court held that Mayceys' copyright had been infringed. Mr Beckmann appealed that judgment.

This was not the first time the parties had a dispute over consumable crocodiles. Mr Beckmann previously had imported to New Zealand jelly crocodiles which had been directly copied from the killer crocs. That earlier dispute had been settled. The crocodile confectionery now in dispute had been made under Beckmann's clear instructions not to copy Mayceys' product. He instructed his supplier to create a crocodile sweet using a different mould maker and without reference to the killer crocs.

On appeal, Gault J referred to two elements which "support the presumption that in making the alleged infringement the skill and effort that went into the creation of the original copyright work has been appropriated".⁵⁶ Those two elements being the resemblance and the direct or indirect causal link.⁵⁷ The Court notes that "[j]ust what degree of similarity there must be before it amounts to reproduction is never an easy matter to determine".⁵⁸ The Court considered the level of originality of Mayceys' crocodiles was relevant to the issue of infringement. What is barely original will be scantily protected, or in the words of Gault J:⁵⁹

If there is borne in mind the purpose for which the resemblance is assessed it is apparent that whether or not it is sufficient will depend in part on the originality and distinctiveness of the copyright work. If two artists sketch the same common object there will necessarily be close resemblance. Similarly in product design two designers will embody features dictated by known manufacturing constraints which will necessarily be similar.

The Court acknowledged:⁶⁰

Anyone else is free to make a model of a crocodile and to use it to make moulds for jube production so long as they do not directly or indirectly copy [Mayceys] model or a substantial part of it.

Gault J then compared the features of the Beckmann's and Mayceys' crocodiles and concluded there was no infringement. There were "no features of striking similarity and

⁵⁶ Above n 53, 5.

⁵⁷ Similar elements were identified by Tipping J in *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 91. He called them "objective similarity" and "causal connection". In addition he refers to substantiality of the part copied.

⁵⁸ Above n 53, 5.

⁵⁹ Above n 53, 5.

⁶⁰ Above n 53, 6.

[they] convey quite different overall impressions".⁶¹ Gault J deduced that the trial judge may have come to the opposite conclusion because:⁶²

His comparison was perhaps made without giving sufficient consideration to the fact that both articles are representations of a common animal the features of which are distinctive but not because of any creativity on the part of the copyright owner.

This view of the trial judge's findings is very interesting. It appears to acknowledge that copyright should not be used to create a monopoly in the use of a common animal or object. Such a misuse of copyright law would defeat the justifications which form the ethical basis of copyright law.

B How are the Ethics of Copyright Reflected in Mayceys?

1 The Incentive Theory

The decision in no way impairs any incentive to make confectionery. The incentive for manufacturers to produce sweets in crocodile and other animal shapes remains intact. Both parties and others still have an incentive to create these sorts of copyright works. There is sufficient reward for Mayceys' creative investment. Killer crocs may not be copied, they are protected.

2 The Public Interest in Using Copyright Works and the Bill of Rights Act

In *Mayceys* there was no argument that Beckmann's use of the Killer Crocs was fair dealing with the copyright work. It could not sensibly be argued that there was any fair dealing of the sort permitted by the Copyright Act 1994, such as research or private study,⁶³ criticism or review,⁶⁴ or any sort of educational or public administration related use.⁶⁵ In that sense the case raised no public interest issue.

In a broad sense it could be argued that the case raised a freedom of expression issue. That is, it is arguably an unfair fetter on the right of freedom of expression for the use of a common animal to be restricted. However, this argument is more concisely justified by an examination of economic policy behind copyright protection.

⁶¹ Above n 53, 10.

⁶² Above n 53, 10.

⁶³ Above n 3, s 43.

⁶⁴ Above n 3, s 42.

⁶⁵ Above n 3, ss 44-66.

3 *Economic Policy and Copyright*

Mayceys represents the balance between protecting copyright works but limiting that protection so that the justifications for copyright are not undermined. The decision acknowledges that anyone may create a copyright work based on a crocodile and copyright should not be used to create a form of monopoly in a common object. The case recognises that because the original features of a crocodile are not what copyright protects, in relation to the killer crocs, *Mayceys* should not obtain a right to prevent others from using crocodiles in making confectionery. Although the court does not rely on “idea/expression” terminology it recognised the concept of the idea/expression dichotomy in its broadest sense. The “idea” of crocodile confectionery is not protected, but the particular expression is. The Court’s actual reasoning was that a substantial part of *Mayceys*’ actual expression of a crocodile had not be appropriated.

V *BLEIMAN V NEWS MEDIA (AUCKLAND) LTD*

A *The Facts and the Reasoning of the Court*

In 1994 the Court of Appeal considered an appeal from Blanchard J’s refusal to grant an interlocutory injunction to restrain News Media from publishing “any competition game having features said to have been copied from games devised initially by the first appellant and developed and published pursuant to an arrangement with him by the second appellant”.⁶⁶

Mr Bleiman, the first appellant, had created a competition game which he called “Fantasy League”. The game first appeared in *Rugby League Week* under that title. As the competition game progressed it also appeared under the heading “follow your progress”. The judgment describes the rules of the game which essentially involve participants selecting a team of players in scoring positions. Each scoring player is selected from a group of possible players for that position. The selection of these players creates a “fantasy team”. A competition participant obtains points if the real players represented in the fantasy team score points in real matches. Mr Bleiman’s own affidavit described how he based the game on similar games in the United States.⁶⁷ Shortly after the appellants’ game appeared the respondents published a similar game under the heading “Fantasy Footy”. The appellants applied to the High Court for an interlocutory injunction to prevent the respondents from publishing their game. The respondents undertook to change the look of their game by not using the words “fantasy” or “fantastic”, not using the heading “follow you progress” and not adopting a layout with boxes containing the names and positions of players on the right

⁶⁶ Above n 54.

⁶⁷ Above n 54, 675.

hand side of the page. The respondent's changed the look of their game accordingly - the altered game had the boxes containing the names and positions on the left hand side.

The statutory presumptions of subsistence and ownership were relied on because the existence of copyright was not disputed. The focus of the case was whether there was an infringement of copyright. At first instance Blanchard J did not consider there was a serious issue to be tried. The respondents had made sufficient alterations to the presentation of their game. He held there was "no copying of the plaintiff's text - the means of expression - which is what literary copyright protects".⁶⁸ On appeal Gault J held there was a serious question to be tried.⁶⁹

In the present case we consider that it is arguable that even in the modified version of the game ... there is sufficient objective similarity to the appellants' works and ample basis for the inference it was derived from those works. The whole essence of the game was taken and retained. The features taken arguably go beyond mere ideas or concepts. It is not unarguable that the respondent did much more than copy general ideas embodied in the game and undertake its own independent work in devising the game. If the respondent had sought to design a game to be played through its newspaper based on the achievements of individual players in the national rugby competition the likelihood of a result incorporating all the features of the appellants' game would be remote indeed.

In reaching its conclusion Gault J relied on *Elanco v Mandops*⁷⁰ a case involving a leaflet containing instructions regarding a herbicide and incorporating publicly available scientific information. In that case the defendants had copied the plaintiffs leaflet and then altered it. The court held that there was an arguable case of infringement as the defendants did not sufficiently cure the infringement by altering the original work. The court held the defendants should have used the public information to produce their own leaflet from scratch. Gault J considered *Bleiman* was analogous to *Elanco*. He regarded the respondent's altered version of its game as no more than modifications of the earlier version which did not cure the infringement.⁷¹

With respect, it is submitted that there is a substantial difference between the copying at issue in the *Elanco* and *Bleiman* cases. The actual text was copied in *Elanco*. In *Bleiman* the text was not copied, any similarity was in the layout. The features which were similar in the *Bleiman* case were arguably commonplace layout features. This was certainly the view

⁶⁸ Above n 54, 676.

⁶⁹ Above n 54, 678.

⁷⁰ [1980] RPC 213.

⁷¹ Above n 54, 679.

at first instance. In the words of Blanchard J in the High Court "the use of boxes is a trite feature... a very obvious and common presentation".⁷² Furthermore, the final sentence of Gault J's quote above is debatable. The similarities between the final two games are so commonplace that it is hard to see why any similar sort of competition would not necessitate a similar look. The function of the competition involved picking individual players from several different groups of players. This inevitably required the listing of those groups so that they can easily be differentiated from each other. This aspect of the expression is dictated by function not by the originality of the plaintiff's work.⁷³

B How are the Ethics of Copyright Reflected in Bleiman?

1 The Incentive Theory

The result in *Bleiman* has the superficial appeal of protecting the authorial labour and effort expended in creating the appellants' game. However, it is submitted that the Court of Appeal did not achieve an even balance between the necessary reward and the appellants' creative investment. The outcome was skewed in favour of the reward. Arguably, there is now no incentive for the appellants to develop their existing competition, or to create new competitions, because of the substantial copyright protection received for its existing competition. Such a reward does not only not fulfil the aim of encouraging creativity, but it looks like a form of unacceptable monopoly.

2 The Public Interest in Using Copyright Works

The court's reasons for finding that the respondent's game infringed the appellants' copyright makes it difficult to see how any one could create this sort of sports competition without infringing the appellants' copyright.

The Court of Appeal's reasoning, as quoted above, appears to leave open the possibility that a third party could independently create such a competition game and end up with a different looking game from the appellants. It is submitted that this is doubtful because of the significance placed on the use of features which are arguably commonplace. This decision virtually gives a monopoly to the appellants to create games of this sort in the field of rugby, and possibly other sports, in New Zealand.

⁷² It is also arguable that the originality of the work in *Bleiman* should have been challenged. The literary work in *Elanco* was the result of substantial research and piecing together of relevant information. Bleiman's own affidavit stated the fantasy football game was adapted from similar games for other sports in the United States. While this no doubt involved some labour, that labour is arguably minimal.

⁷³ This is analogous to the "features dictated by known manufacturing constraints" referred to in *Mayceys*. See above n 54.

3 *Economic Policy and Copyright*

Bleiman results in a limitation on the creation of similar competition games which is contrary to an economic policy which discourages that sort of restriction.

VI CONCLUSION

The judgment of *Mayceys v Beckmann* accurately applied a number of aspects of the justifications for copyright law. With respect, the *Bleiman* reasoning did not. The justifications for copyright protection form the ethical bases of copyright law. It is important that the justifications for protection are remembered so that copyright protection is applied consistently and, in as far as is possible, predictably.