RECONSIDERING THE NEED FOR DEFENCES TO PERMIT DISCLOSURES OF CONFIDENTIAL COPYRIGHT MATERIAL ON PUBLIC INTEREST GROUNDS

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Reconsidering the need for defences to permit disclosures of confidential copyright material on public interest grounds

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This article assesses the adequacy of the Australian legal framework governing unauthorised disclosures of confidential copyright material on public interest grounds. In Australia, in contrast with the United Kingdom (UK), courts are unlikely to recognise the existence of a non-statutory 'public interest defence' to copyright infringement or a 'public interest defence' to breach of confidence. Instead, it has been argued that a number of equitable doctrines and principles — the iniquity rule, clean hands, and the principles for the grant of injunctive relief — can do much the same work as the UK defences. This article critically analyses the role that the three abovementioned doctrines and principles have played and might play in facilitating 'public interest' disclosures, and seeks to revisit the case for defences to both breach of confidence and copyright infringement that would permit such disclosures. First, it shows that there are some types of disclosure that would be likely to be permitted by public interest defences in the UK but which would be restrained in Australia because of the limits of the three abovementioned equitable principles and doctrines and the current scope of the exceptions in the Copyright Act 1968 (Cth). Second, it makes a case that greater attention needs to be paid to the possibility of bringing Australian law into closer alignment with the position in the UK. It is argued that it would be problematic to expect the iniquity rule, clean hands and the principles governing injunctive relief to be stretched too far to deal with the full range of disclosures that might be caught by public interest defences, and that some of the concerns that have been expressed about the unstructured nature of public interest defences have not been borne out in practice in the UK over the past 40 years.

I The Australian legal framework governing public interest disclosures of confidential copyright material

In the 1990 Federal Court case of *Collier Constructions Pty Ltd v Foskett Pty Ltd*,[1] Gummow J held that Australian law does not provide for a non-statutory 'public interest' defence to copyright infringement,[2] contrary to the position that had been reached in a number of United Kingdom (UK) cases in the 1970s and 1980s.[3] Thus, in Australia, if a party wishes to reproduce and

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1 (1990) 97 ALR 460 (FC).

2 ibid 471–73.

3 *Beloff v Pressdram Ltd* [1973] 1 All ER 241 (Ch); *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA). Ten years before *Collier* (n 1), in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (HC) (which involved an application for an interlocutory injunction

disseminate copyright material on public interest grounds — for example, because that material reveals breaches of law or national security, or matters involving danger to the public, or the incompetence of regulatory authorities or the adequacy of work being undertaken for them[4] — it will avoid liability only if its conduct falls within the scope of one of the 'fair dealing' defences contained in the Copyright Act 1968 (Cth). These defences require the dealing to be for a narrowly-defined purpose, such as for the 'reporting' of news,[5] or for criticism of the material being copied, but not criticism at large.[6] What this means is that some disclosures of material such as documents, films and sound recordings can be suppressed through copyright law, even if these disclosures can be said to be in the public interest.

It might be thought that an obvious response to the inability of the fair dealing defences to permit disclosures on broad 'public interest' grounds would be to reform the Copyright Act to expand the scope of the existing defences or to add a new, bespoke defence. Indeed, both the Australian Law Reform Commission and Productivity Commission have recently made a compelling case for liberalisation of the Australian copyright exceptions regime, which would help ensure that a wider range of disclosures in the public interest would not infringe copyright.[7] However, there is a significant problem with viewing this issue solely through the lens of copyright law. In the vast majority of circumstances in which a defendant might wish to raise a 'public interest' defence to copyright infringement (in whatever form any such defence might take), the material in question will also be *confidential* in nature.[8] This raises a separate, equally important, question of whether the

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brought in the original jurisdiction of the High Court), Mason J drew on UK authorities, including *Beloff*, and assumed the existence of a public interest defence that would apply where the reproduction of copyright material was necessary 'to protect the community from destruction, damage or harm': at 52. Since *Collier*, however, the idea of the defence has been considered in only one Australian case (*Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* (1997) 144 ALR 528 (FC)) and Gummow J's reasoning has been strongly defended in scholarship: D F C Thomas, 'A Public Interest Defence to Copyright Infringement?' (2003) 14 AIPJ 225; see also Cheng Lim Saw, 'Is There a Defence of Public Interest in the Law of Copyright in Singapore?' [2003] SJLS 519, 539–40. cf Copyright Law Review Committee, *Copyright and Contract* (2002) para 5.93 (considering that the defence formed part of Australian law).

4 This conception of what might constitute a 'public interest' disclosure draws on the two key cases in which the defence has been considered (*Beloff* (n 3) and *Fairfax* (n 3)), and Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005) 83–85.

5 Copyright Act 1968 (Cth), ss 42 (for works), 103B (for audio-visual items).

6 ibid ss 41 (for works), 103A (for audio-visual items).

7 Eg, the Australian Law Reform Commission recommended the adoption of a 'fair use' defence to copyright infringement, not limited to specific purposes, or, as an alternative, a new 'fair dealing' defence for the purpose of 'criticism': see Australian Law Reform Commission, *Copyright and the Digital Economy* (Report No 122, November 2013) chs 4–6; see also Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, 23 September 2016) ch 6 (recommending 'fair use'). For recent developments, see Department of Communications and the Arts, *Copyright Modernisation Discussion Paper* (March 2018). It is worth noting, however, that in none of these inquiries was the idea of a bespoke, statutory 'public interest' defence to copyright infringement considered.

8 That is, it can be readily assumed that information disclosing breaches of law or national security, or matters involving public danger or the incompetence of regulatory authorities, is

disclosure of such copyright material can be restrained as being in breach of confidence.

Whether Australian law recognises a public interest defence to breach of confidence remains uncertain. In breach of confidence cases involving government information, the effect of Mason J's decision in *Commonwealth v John Fairfax & Sons Ltd* is that Australian courts are likely to apply an approach that involves balancing competing public interests. Recognising the importance of the public being able to 'to discuss, review and criticize government action',[9] the default position is that unless the disclosure would be detrimental to the public interest, it will be permitted. More specifically, unless the government can point to a countervailing public interest favouring non-disclosure of the information, for example, if 'national security, relations with foreign countries or the ordinary business of government will be prejudiced',[10] the public interest in disclosure will be prioritised.[11] However, in cases that do not involve government information, the law 'is by no means clear and settled'.[12] In the UK, it is well-established that there is a general public interest defence to breach of confidence. This involves courts undertaking an explicit balancing exercise in considering whether the importance of preserving confidence is outweighed by a public interest that favours the disclosure of the information contemplated by the defendant.[13] While there is judicial support for this approach in Australia,[14] there is also a line of authority, based on Gummow J's judgments in two Full Federal Court decisions — *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*[15] in 1987 and *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health*[16] in 1990 — that a public interest defence does not exist under Australian law.[17] In the latter case

highly likely to be material internal to an organisation (eg, file notes, memoranda and working reports, private sound recordings, or security footage), and for this reason confidential.

9 *Fairfax* (n 3) 52.

10 ibid. On the communication of official secrets, and the receipt of such communications by journalists, see Kieran Hardy and George Williams, 'Terrorist, Trader, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37 UNSWLJ 784, 803–07.

11 *Fairfax* (n 3) 52. See generally G E Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths 2015) ch 7. See also *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) 283 (Lord Goff) (supporting the approach taken in *Fairfax*). For a recent reconsideration of *Fairfax*, and how it might apply to online mass disclosures of government material, see Catherine Bond, 'Commonwealth v WikiLeaks: *Fairfax* Revisited' (2013) 18 MALR 310.

12 *Australian Football League v The Age Co Ltd* [2006] VSC 308, (2006) 15 VR 419 [75].

13 See generally Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, OUP 2012) paras 16.05–16.57.

14 For an overview, see *AG Australia Holdings Ltd v Burton* [2002] NSWSC 170, (2002) 58 NSWLR 464 [177]–[180]. The existence of the defence has also been accepted by the High Court of New Zealand: see *Earthquake Commission v Krieger* [2013] NZHC 3140, [2014] 2 NZLR 547 [40], [75]–[81]; *ANZ Bank New Zealand Ltd v Blum* [2014] NZHC 640 [70].

15 (1987) 14 FCR 434 (FC).

16 (1990) 22 FCR 73 (FC).

17 See *Bacich v Australian Broadcasting Corp* (1992) 29 NSWLR 1 (SC) 16; *Sullivan v Sclanders* [2000] SASC 273, (2000) 77 SASR 419 [2], [45]; *Australian Football League* (n 12) [83]; *British American Tobacco Australia Ltd v Gordon (No 3)* [2009] VSC 619 [115];

Gummow J offered the most trenchant critique of the defence to date, stating:

> the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence ... [E]quitable principles are best developed by reference to what conscionable behaviour demands of the defendant [and] not by 'balancing' and then overriding those demands by reference to matters of social or political opinion.[18]

For present purposes, the key point is that any attempt to put a public interest defence to copyright infringement on a statutory footing in Australia might well be futile, if the acts falling within the scope of such a defence would (at least in the context of non-government information) be able to be restrained as being in breach of confidence.

This is not, however, to suggest that no safeguards are available under Australian law for third parties wishing to reproduce and disclose confidential copyright material in the public interest.[19] Rather, a number of equitable doctrines and principles are likely to apply, with the effect of these being that injunctions to restrain such disclosures might not be granted. Three doctrines and principles are of particular significance. The first is the 'iniquity rule'. In Australia, this rule has been characterised as meaning that where information sought to be protected as confidential discloses an iniquity, no obligation of confidence will attach to the information. A second, closely related doctrine is 'clean hands'. Specifically, it has been recognised that where a party bringing an action for breach of confidence and/or copyright infringement has behaved in an improper or possibly misleading manner, as evidenced by the material the defendant wishes to disclose, a court may refuse injunctive relief. A third equitable principle takes an even more direct approach to public interest considerations: there are cases that indicate that a court, in determining whether to deny interlocutory or final injunctive relief, may take into account whether there is a 'public interest' that supports the reproduction and dissemination of the material. This combination of equitable doctrines and principles has been raised in Australian scholarship as indicating that public interest defences to both breach of confidence and copyright infringement are, in fact, unnecessary.[20]

This article assesses the adequacy of the Australian legal framework governing unauthorised disclosures of confidential copyright material on public interest grounds. Specifically, it provides a critical analysis of the role the three abovementioned equitable doctrines and principles have played and

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AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd [2010] NSWSC 1395 [20]. See further Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) paras 12.133–12.134; Christine Parker, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the *McCabe* Tobacco Litigation' (2017) 40 MULR 999, 1037–39.

18 *Smith Kline & French* (n 16) 111.

19 In addition to the equitable doctrines discussed in this paper, there is a public interest disclosure regime at federal and state/territory level, designed to protect public sector 'whistleblowers' from action, in limited circumstances, when they make 'public interest disclosures'. See generally Hardy and Williams (n 10) 809–16.

20 See, eg, Thomas (n 3) 234–37. See also P D Finn, 'Confidentiality and the "Public Interest"' (1984) 58 ALJ 497, 506–07.

might play in facilitating 'public interest' disclosures, and seeks to revisit the case for defences to both breach of confidence and copyright infringement that would permit such disclosures. In Part II, the primary goal is to identify what differences exist as between Australian and UK law on point: that is, to show that there are some types of disclosure that would be likely to be permitted by public interest defences in the UK but which would be restrained in Australia because of the limits of the three abovementioned equitable doctrines and principles and the current scope of the exceptions in the Copyright Act. In Part III, it is argued that greater attention needs to be paid to the possibility of bringing Australian law into closer alignment with the position in the UK. In doing so, it is argued that it would be problematic to expect the iniquity rule, clean hands and the principles governing injunctive relief to be stretched too far to deal with the problems identified in Part II, and that more thought should be given to the value of embracing public interest defences for such a purpose. While this might be relatively straightforward in the copyright context (given that a strong case has already been made for liberalising the exceptions regime), any reforms to the Copyright Act would need to be coupled with a change in judicial attitudes to ensure that if the material in question is also confidential it can be disclosed if a sufficiently compelling public interest can be demonstrated. It will be suggested that, notwithstanding the compelling criticisms that have been levelled against the development of a public interest defence to breach of confidence, such as those in *Smith Kline & French*, such a change can be justified. This is not only because some of the concerns historically expressed about the unstructured nature of the public interest defence to breach of confidence have not been borne out in practice in the UK. It is also because a more positive case can be made for adopting a forward-looking, balancing doctrine that allows for certain interests (most notably, freedom of expression) to be prioritised and valued more explicitly than at present.

II An analysis of the equitable doctrines that facilitate disclosure of information on public interest grounds

Any assessment of the role that established equitable doctrines might perform in ensuring that confidential copyright material can be reproduced in the public interest first requires an engagement with the extent to which such doctrines might justify the disclosure of material as not involving a breach of confidence. Thus, Part II starts with an analysis of the 'iniquity rule' in the law of breach of confidence, focusing on how this rule has been interpreted in Australia and its scope compared with the UK's public interest defence to breach of confidence. Part II then turns to consider issues relating to the disclosure of copyright material more specifically, addressing the operation of the 'clean hands' maxim, and the ability of courts to deny injunctive relief for infringement by reference to general 'public interest' considerations.

A The 'iniquity rule' compared with the public interest defence to breach of confidence

1 An overview of the Australian position

The most useful starting point in assessing the extent to which unauthorised disclosures of confidential, non-government material[21] might be permitted under Australian law is Gummow J's influential judgment in *Corrs Pavey*.[22] His Honour rejected the line of authority that had developed in the UK from the late 1960s recognising a defence to breach of confidence based on 'just cause' or 'excuse', which had transformed into a broader defence permitting disclosure in the 'public interest'. It was considered that the case cited as the foundation for this line of authority, *Gartside v Outram*,[23] did not support the existence of any such 'defence'. Despite references in some reports of *Gartside* to 'exceptions' to the obligation of confidence, including the statement that there is 'no confidence in the disclosure of an iniquity',[24] Gummow J considered that the case was authority only for the limited proposition that no court would be likely to imply into an employment contract an obligation requiring the employee to keep secret the details of his or her employer's gross bad faith.[25] To the extent that a more general principle could be taken from the case, his Honour thought that it was:

> no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[26]

Although it is possible to point to a number of Australian decisions before *Corrs Pavey*,[27] and at least two afterwards,[28] indicating acceptance of the

21 See nn 9–11 and accompanying text for the approach likely to be taken in Australia in an action for breach of confidence involving government material.

22 *Corrs Pavey* (n 15).

23 (1856) 26 LJ Ch 113.

24 ibid 114.

25 *Corrs Pavey* (n 15) 454–55.

26 ibid 456. To the extent the recipient of information is under an express contractual obligation of confidence, such a provision might not be enforced on the grounds of 'public policy' if it covers 'iniquitous' subject matter. In *AG Australia* (n 14) [196], Campbell J held that 'there is a public policy which makes void an express contract to keep secret the committing of a widespread and serious fraud'.

27 *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 (CA) 309–10 (Samuels JA, approving the balancing approach undertaken in the UK) (cf Street CJ at 297–98, who was equivocal about the existence of the defence, and Hutley AP at 306, who rejected the balancing approach); *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 (SC) 379–83 (where Powell J recognised the relationship between the 'iniquity' defence as it had come to develop in the UK and the potentially broader public interest defence).

28 *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (CA) 166–71 (Kirby P); *Westpac Banking Corp v John Fairfax Group* (1991) 19 IPR 513 (SC) 525–26. See also *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 [34]–[35] (Gleeson CJ, in obiter dicta, agreeing with the statement in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 (QB) that a public interest defence to breach of confidence exists).

existence of a public interest defence based on UK authority, the more widely held position in Australia is that no such defence exists.[29] Instead, the orthodox view is that an obligation of confidence will not attach to information revealing 'an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance'.[30]

The above formulation of the rule appears to contemplate a narrow idea of 'iniquity'. Even the broadest illustration of what this might involve — a 'serious misdeed of public importance' — suggests wrongdoing analogous to a crime or civil wrong. This is reflected in the limited Australian case law to have considered the scope of iniquitous conduct. In *AG Australia Holdings Ltd v Burton*, Campbell J considered that while iniquity might include 'serious anti-social activities',[31] conduct that contravenes the statutory prohibition on engaging in misleading or deceptive conduct in trade or commerce, now found in s 18 of the Australian Consumer Law, might not inevitably amount to an iniquity.[32] And in *A v Hayden*, three members of the High Court doubted whether 'trivial' breaches of the criminal law contained in confidential material might be justifiably disclosed.[33] In addition, even where the material discloses an iniquity, only limited disclosure is said to be justified: that is, the disclosure can only be 'to a third party with a real and direct interest in *redressing* such crime, wrong or misdeed'.[34] The iniquity rule thus offers only an attenuated form of protection for disclosures on public interest grounds.

2 An overview of the public interest defence to breach of confidence in the UK

In contrast, in the UK from the late 1960s the iniquity rule was reinterpreted as providing a foundation for, and subsequently a mere illustration of, a more expansive 'exception' that overrode obligations of confidence. First, in *Initial Services Ltd v Putterill*, Lord Denning MR considered the statement that there is 'no confidence in the disclosure of an iniquity' to be an expression of a 'just cause' defence that could excuse disclosures of 'crimes, frauds and misdeeds, both those actually committed as well as those in contemplation', provided these were 'justified in the public interest'.[35] These disclosures generally needed to be to the appropriate investigatory authorities but, depending on the nature of the misdeed, could be to the wider public.[36] Subsequently, in *Fraser v Evans*, his Lordship offered the even more expansive view that 'iniquity' was 'merely an *instance* of just cause or excuse for breaking confidence', and that '[t]here are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep

29 See *Smith Kline & French* (n 16) and the cases cited at n 17.
30 *Corrs Pavey* (n 15) 456 (Gummow J).
31 *AG Australia* (n 14) [204].
32 ibid [191] (doubting *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 55 FLR 125 (FC) 167). It is worth noting that Campbell J was not directly considering the 'iniquity rule', as the obligation of confidentiality in question was contractual: ibid [174], [176].
33 (1984) 156 CLR 532 (HC) 545–46 (Gibbs CJ), 574 (Wilson and Dawson JJ).
34 *Corrs Pavey* (n 15) 456 (Gummow J) (emphasis added).
35 [1968] 1 QB 396 (CA) 405.
36 ibid.

them secret'.[37] By 1972, in *Beloff v Pressdram Ltd*, the exception had come to be conceptualised as a 'public interest defence' to breach of confidence (and, more surprisingly, to copyright infringement).[38] At this point, it was thought not to extend beyond 'misdeeds of a serious nature and importance to the country' with examples being matters 'in breach of the country's security, or in breach of the law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public'.[39] Over time, however, the defence came to expand beyond these categories, in part due to an explicit recognition that applying the defence involved 'balancing' the public interest in maintaining confidentiality against a countervailing public interest in disclosure.[40]

3 The extent of the differences between UK and Australian law

From the substantial body of law that has developed since *Initial Services*,[41] it is possible to identify at least two broad situations in which the UK public interest defence has come to permit the disclosure of otherwise confidential material in circumstances where this would be unlikely under Australian law, given the scope of the iniquity rule as formulated in *Corrs Pavey*.[42] In both situations, the difference can be said to be the result of the UK courts downplaying, or even jettisoning, the element of 'wrongdoing' on the part of the plaintiff, and focusing more on the value of making the information publicly available.[43]

In the first situation, the plaintiff has misled the public, with such misleading conduct falling short of being a civil wrong or a 'serious misdeed', and the defendant sought to disclose confidential material as a corrective. The best known but most problematic illustration is the English Court of Appeal's

37 [1969] 1 QB 349 (CA) 362 (emphasis added). As Gurry noted, this created the difficulty of giving content to the words 'some things': Francis Gurry, *Breach of Confidence* (Clarendon Press 1984) 335.

38 *Beloff* (n 3). On the complex background to this litigation, see Jose Bellido, 'The Failure of a Copyright Action: Confidences in the Papers of Nora Beloff' (2013) 18 MALR 249.

39 *Beloff* (n 3) 260.

40 See *Woodward v Hutchins* [1977] 1 WLR 760 (CA) 764 (Lord Denning MR); *A-G v Guardian (No 2)* (n 11) 268–69 (Lord Griffiths), 282 (Lord Goff). This concept of 'balancing' competing public interests had already been established in the law of contempt: see, eg, *A-G v Times Newspapers Ltd* [1974] AC 273 (HL).

41 For an older overview of the factors that have been taken into account in determining whether a public interest defence to breach of confidence is available, see Yvonne Cripps, *The Legal Implications of Disclosure in the Public Interest: An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees* (2nd edn, Sweet & Maxwell 1994) 84–135.

42 A third situation, which will not be considered in detail, involves disclosures of 'matters medically dangerous to the public', even if these cannot be said to be the result of a specific 'misdeed': see generally *Hubbard v Vosper* [1972] 2 QB 84 (CA) and *Church of Scientology of California v Kaufman* [1973] RPC 635 (Ch). It is, however, important to note that these decisions did not involve the more careful balancing exercise that has come to characterise later UK decisions, as to which, see *X v Y* [1988] 2 All ER 648 (QB) 661; *H (A Healthcare Worker) v Associated Newspapers Ltd* [2002] EWCA Civ 195, [2002] All ER (D) 371 (Feb).

43 See Finn (n 20) 507. Some of these cases were decided after the coming into force of the Human Rights Act 1998 (UK), s 12(4) of which requires the court to have particular regard to the importance of the right to freedom of expression protected by European Convention on Human Rights, art 10. The impact of this will be discussed in Part III(B).

1977 decision in *Woodward v Hutchins*,[44] in which three celebrities who had sought to present a particular image of themselves to the public were denied injunctive relief to restrain the publication of allegedly confidential and defamatory material that undercut that image. Some care is needed in considering the import of this decision.[45] Lord Denning MR's judgment has been rightly criticised as seeming to reduce the question of whether a public interest defence applies to a balancing exercise between maintaining confidentiality on the one hand and 'knowing the truth' on the other[46] and, in so doing, privileging the disclosure of true states of affairs that, at most, might satisfy the public's idle curiosity.[47] However, in more recent cases with similar facts, courts have looked more to whether the plaintiff has made unambiguous, direct public statements as to his or her moral propriety in assessing whether the public interest might justify disclosure of confidential material that undermines and corrects such statements.[48]

Outside the realm of personal information, it is possible to point to examples of cases where courts would have been prepared to permit the disclosure by a media organisation of confidential material to correct misleading statements on matters of far greater public significance. In *Hyde Park Residence Ltd v Yelland*,[49] the defendant newspaper had obtained and published still photos from a security camera at Mohamed Al-Fayed's residence, in order to refute public statements made by Mr Al-Fayed about the whereabouts of his son and Diana, Princess of Wales on the day of their deaths, about their plans to marry, and about an alleged secret service plot to kill them. Mance LJ suggested that the plaintiff had run the case as a copyright infringement action because the defendant would have been able to make out a public interest defence to any breach of confidence action.[50] A near-identical statement was made by the Court of Appeal in *Ashdown v Telegraph Group Ltd*,[51] where the defendant newspaper sought to reproduce extracts of a confidential minute of a meeting in which the Labour Prime Minister had indicated a willingness to form a Cabinet with Liberal Democrats, thus contradicting public statements made by the Prime Minister. Both of these examples are noteworthy because the 'corrective' material itself did not disclose wrongdoing, but rather revealed that prior statements made by parties outside the litigation were misleading.

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44 *Woodward* (n 40).

45 An overlooked aspect of the case is that Lawton LJ, with whom Bridge LJ agreed, held that interim injunctive relief should be refused on the basis that the plaintiff's primary argument was that the material was defamatory: ibid 765.

46 See, eg, *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 33 ALR 31 (SC) 56; J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) para 42–160.

47 See Andrew Stewart and Michael Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 Adel L Rev 1, 17.

48 See, eg, *Campbell v Frisbee* [2002] EWCA Civ 1374, [2002] All ER (D) 178 (Oct) [26]. See also the discussion of the concessions made by the plaintiff to this effect in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [24] (Lord Nicholls), [58] (Lord Hoffmann), [82] (Lord Hope), [151]–[152] (Baroness Hale).

49 [2000] EWCA Civ 37, [2001] Ch 143.

50 ibid [73].

51 [2001] EWCA Civ 1142, [2002] Ch 149 [82].

The second situation is similar to, but involves an extension of, the first. It involves cases where the defendant sought to disclose confidential material to shed light on a matter of serious public importance, in circumstances where the plaintiff had not engaged in any wrongdoing or sought to mislead the public. The most striking example remains the Court of Appeal's 1985 decision in *Lion Laboratories Ltd v Evans*[52] — a decision significant not only because it extended the scope of the public interest defence, but also because it set up the more structured 'balancing exercise' which has informed subsequent UK decision-making on point. The plaintiff was the manufacturer of a breathalyser, approved by the Home Office for use by the police, and it sought to restrain a newspaper from disclosing verbatim details of internal memoranda that indicated problems with the breathalyser's accuracy. All three judges held that although this was not a case involving misconduct by the plaintiff, the public interest defence should not be limited to such circumstances,[53] and might apply in 'exceptional cases'.[54] Stephenson LJ considered that courts should be guided by a number of factors in considering the defence, including whether there is in fact an iniquity or misdeed involved; whether the matter is genuinely in the public interest or is merely interesting to the public; the relevance of a media defendant's private commercial interests; and the importance of ensuring whether the nature of the disclosure contemplated (that is, to an investigatory body or to the public at large) is appropriate.[55] Both Stephenson and Griffiths LJJ undertook detailed analyses of the plaintiff's internal memoranda, finding them to contain credible material that cast doubt on the trustworthiness of the breathalysers, which in turn raised serious questions about whether the police might have obtained drink driving convictions based on unreliable evidence. This public interest in exposing matters going to the administration of justice and potentially impacting on people's livelihoods, in circumstances where the Home Office had indicated its support for the breathalysers, was thought sufficient to deny interlocutory relief to restrain the reproduction and dissemination of the memoranda by the newspaper.[56]

That the public interest defence applies beyond cases of wrongdoing was confirmed by Lord Griffiths and Lord Goff in *A-G v Guardian Newspapers Ltd (No 2)*.[57] Two more recent cases show how the defence might apply in such situations.

In *London Regional Transport v Mayor of London*[58] the claimants were the statutory authorities responsible for operating the London Underground, and were at the time conducting a tendering process as part of the establishment of a proposed public-private partnership for the management of the network. The claimants commissioned a confidential report from a private consulting firm, which was critical of the claimants' handling of the PPP process. The defendants sought to publish this report, with commercially sensitive material

52 *Lion Laboratories* (n 3).
53 ibid 538 (Stephenson LJ), 548 (O'Connor LJ), 550–51 (Griffiths LJ).
54 ibid 551 (Griffiths LJ).
55 ibid 537–38.
56 ibid 540–44 (Stephenson LJ), 547, 549 (O'Connor LJ), 551–53 (Griffiths LJ).
57 *A-G v Guardian (No 2)* (n 11) 268 (Lord Griffiths), 282 (Lord Goff).
58 [2001] EWCA Civ 1491, [2001] All ER (D) 80 (Aug).

redacted. Both the trial judge and the Court of Appeal held that this was an exceptional case where publication in the public interest was justified, taking into account that the report contained 'serious criticism, from a responsible source, of the value for money evaluation which is a crucial part of the PPP for the London Underground',[59] such a matter being of 'very considerable public importance'.[60] This approach was endorsed in *The Jockey Club v Buffham*,[61] in which the BBC sought to disclose confidential material provided to it by a former security officer at the Jockey Club indicating widespread corruption in horseracing and the Club's failure to address this. Gray J outlined in detail the factors favouring the maintenance of confidentiality,[62] but concluded that other public interest factors outweighed this. These factors included that the corruption was ongoing, that drawing attention to such corruption and the Club's inadequate response would be of 'legitimate concern to a large section of the public', and that the disclosure was to be made on a serious public affairs programme.[63]

4 Summation

The UK's public interest defence is likely to permit the disclosure of confidential material in a narrow, but significant, range of circumstances extending beyond what would be possible in Australia. Given that UK law no longer requires the existence of a 'misdeed' by the plaintiff, and contemplates the possibility of disclosure being to the world at large, it is difficult to see how the iniquity rule, as formulated in Australia, could reach the same results in fact scenarios such as those in *Lion Laboratories*, *Hyde Park* and *Ashdown*.[64] Whether an Australian court could reach the same outcomes as in *London Regional Transport* and *Jockey Club* might depend on the extent to which it would be prepared to stretch Mason J's approach to 'government information' in *Fairfax* to cover regulatory authorities.[65] At the same time, it is important to appreciate that there are numerous cases in the UK since *Woodward* where the balancing exercise has come down *in favour* of maintaining confidentiality, or where the exercise resulted in findings that only limited disclosure to regulatory authorities was justified.[66] In most instances, the UK approach is likely to lead to outcomes no broader than those that would be reached in Australia.

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59 ibid [50] (Robert Walker LJ).
60 ibid [40].
61 [2002] EWHC 1866 (QB), [2003] QB 462.
62 ibid [53].
63 ibid [57].
64 Even though it might be said that in some of these cases the information was relevant to the potential disclosure of an iniquity (eg, in *Lion Laboratories*, that the information revealed the possibility of wrongful criminal convictions), this would not be enough to bring it within the narrow iniquity rule. As Campbell J said of the Australian position in *AG Australia* (n 14) [208], 'it would, in my view, be extending the law to decide that ... the protection of confidence did not extend to information which was relevant to an allegation of iniquity, though not itself disclosing that iniquity'.
65 cf *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (HC) 31 (Mason CJ suggesting, in obiter dicta, that the *Fairfax* approach 'should be adopted when the information relates to statutory authorities or public utilities').
66 See further Part III(B).

B 'Clean hands' as a means of facilitating public interest disclosures of copyright material

1 Copyright exceptions and public interest disclosures

Under Australian law, even if a defendant can establish that its intended use of information does not constitute a breach of confidence, this does not provide an answer to the question of whether the defendant's conduct might constitute copyright infringement. For example, if a satirical public affairs television programme were to obtain documentary evidence (such as an internal memorandum) from a government department indicating internal corruption, in light of *Fairfax* it is likely that the public interest in being able 'to discuss, review and criticize government action' would ensure that the disclosure of such information on the programme could not be restrained on the grounds of breach of confidence.[67] However, if the broadcaster sought to reproduce and publish extracts of the document (being a copyright work) as evidence of the corruption, there is no guarantee that a fair dealing defence to copyright infringement would be available. Even if a court were minded to find a dealing with an unpublished government document to be 'fair',[68] the defendant's use might not constitute 'criticism or review ... *of that work or of another work*',[69] or be 'for the purpose of, or ... associated with, the *reporting* of news'.[70] Much the same can be said in cases involving non-government documentary material. Even if the material discloses serious misconduct and the iniquity rule were to apply, such that the defendant would be free to disclose the information to an investigatory body, any reproduction of the material, even for that limited purpose, might not be caught by an exception to infringement in the Copyright Act.[71]

As indicated at the outset of Part I, in the UK such reproductions might be permitted by way of the non-statutory public interest defence to copyright infringement that came to be developed in cases in the 1970s and 1980s.[72] The current scope of the defence is, admittedly, unsettled following Aldous LJ's evisceration of it in *Hyde Park* and the Court of Appeal's subsequent retreat from this position a year later in *Ashdown*.[73] In the latter case the Court went only as far as saying that 'the circumstances in which the public interest may

67 *Fairfax* (n 3) 52.

68 ibid 55 (considering that to do so 'would be to adopt a new approach' to the construction of 'fairness'). The orthodox view is that such dealings are unlikely to be fair: *British Oxygen Co Ltd v Liquid Air Ltd* [1925] 1 Ch 383 (Ch); *Hyde Park* (Appeal) (n 49).

69 Copyright Act 1968 (Cth), s 41. See also s 103A (fair dealing with an audio-visual item only if there is criticism or review 'of the ... audio-visual item, another audio-visual item or a work'). The requirement of a 'sufficient acknowledgement' of the work or audio-visual item is also likely to be problematic.

70 ibid s 42(1)(b) See also s 103B (fair dealing with an audio-visual item for the purpose of or associated with the reporting of news). The same language is used in Copyright Act 1994 (NZ), s 42, and in *Copyright Licensing Ltd v University of Auckland* (2002) 53 IPR 618 (HC) 626, Salmon J considered that the effect of this drafting is that the exception could only be relied on by 'some section of the news media'.

71 See Burrell and Coleman (n 4) 87–88 (discussing this issue in the context of *Woolgar v Chief Constable of the Sussex Police* [1999] EWCA Civ 1497, [2000] 1 WLR 25).

72 See n 3.

73 Any argument that the defence is incompatible with the EU Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation

override copyright are not capable of precise categorisation or definition',[74] but that it would be 'very rare for the public interest to justify the copying of the form of a work to which copyright attaches',[75] suggesting the defence is likely to apply in a narrower range of circumstances than in cases of breach of confidence.[76] Nonetheless, a case can still be made that the UK defence might well apply in cases where the copyright material sought to be reproduced reveals breaches of national security or the law; matters that involve danger to the public; potential wrongdoing, corruption or mismanagement by regulatory authorities; or information that counteracts prior misleading statements on matters of public importance.[77] Successful defences were thought to be available in *Lion Laboratories* and at first instance in *Hyde Park*,[78] and a strong case can be made that such a defence should have been made out on the facts of *Ashdown*,[79] given the public interest in disclosing not only the event recorded in the minute, but also in reproducing the contents of the minute to guarantee its accuracy. The current authors of *Laddie, Prescott & Vitoria* have suggested that in considering whether the defence applies courts should take into account a set of factors drawn from the first instance decision in *Hyde Park*,[80] which themselves drew on Stephenson LJ's factors in *Lion Laboratories*. These include the need for a genuine 'public interest' as distinct from a matter of interest to the public, and that the extent of the disclosure must be 'proportionate to the public interest'.[81]

In Australia, however, the effect of *Collier* is that there is next to no likelihood that a court will seek to apply a non-statutory public interest defence to copyright infringement,[82] leaving defendants without the sort of

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of certain aspects of copyright and related rights in the information society [2001] OJ L167/10) has been refuted: Phillip Johnson, 'The Public Interest: Is It Still a Defence to Copyright Infringement?' (2005) 16 Ent LR 1, 5–6.

74 *Ashdown* (n 51) [58].

75 ibid [59].

76 *Hyde Park* (Appeal) (n 49) [76] (Mance LJ).

77 See Burrell and Coleman (n 4) 83–85 (on possible scenarios when the defence might apply) and 104 (criticising the idea that the defence to copyright infringement should be narrower than the defence to breach of confidence).

78 *Hyde Park Residence Ltd v Yelland* [1998] EWHC 247 (Pat), [1999] RPC 655.

79 See, eg, Jonathan Griffiths, 'Copyright Law after *Ashdown* — Time to Deal Fairly with the Public' [2002] IPQ 240, 253 (noting that 'where there is a public interest in the subject matter of a copyright work, the public interest in disclosure of that work is likely to be greater where the work is unpublished than where the work has previously been published').

80 *Hyde Park* (Trial) (n 78) 671.

81 See Mary Vitoria and others, *Laddie Prescott & Vitoria: The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011) para 21.30. See also Jonathan Griffiths, 'Pre-empting Conflict — A Re-examination of the Public Interest Defence in UK Copyright Law' (2014) 34 LS 76 (on situations where the public interest defence to breach of confidence might 'pre-empt' a related copyright claim).

82 The most compelling reason for this relates to the different statutory frameworks in the UK and Australia. In *Collier* (n 1), Gummow J recognised that Copyright, Designs and Patents Act 1988 (UK), s 171(3) preserved the effect of the non-statutory public interest defence that had developed in UK case law from the 1970s, and reasoned that in the absence of such a provision in the Copyright Act 1968 (Cth) a non-statutory defence could not exist in Australia.

protection they might receive under UK law.[83] This raises the question of the extent to which equitable doctrines and principles on the denial of discretionary relief might have a role to play. Specifically, it needs to be considered whether there are particular doctrines and principles that might be able to do the same work in Australia as a public interest defence to copyright infringement (and, to the extent the material sought to be disclosed is confidential, the same work as a public interest defence to breach of confidence). The doctrine that is most likely to be relevant is 'clean hands'.

2 The role and scope of the clean hands doctrine in intellectual property cases

A court is free to deny equitable relief for copyright infringement (most relevantly, injunctive relief under section 115(2) of the Copyright Act) on the basis of certain types of past improper conduct by the plaintiff. The most important element of the clean hands doctrine for present purposes is that it requires more than 'general depravity' by the plaintiff. Instead, the plaintiff's improper conduct 'must have an immediate and necessary relation to the equity sued for'.[84] What this means, and how this requirement might apply in the sort of circumstances in which a public interest defence to copyright infringement might otherwise be available, need to be carefully unpacked. This is because courts and commentators have occasionally made far-reaching statements that an application of the clean hands doctrine helps to avert injuries to the public generally, raising difficult questions about the reach of the doctrine and its ability to give effect to broader public interest considerations.

In the copyright infringement context, the most obvious situation in which clean hands might have work to do is if the plaintiff has made a direct misrepresentation to the defendant about the scope of its copyright,[85] or has obtained its copyright fraudulently, such as through a sham assignment. Cases involving other forms of intellectual property provide useful illustrations of how clean hands might apply in such situations. In *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co*, the US Supreme Court held that because the plaintiff secured its patent on the basis of fraud (by relying on dishonest statements made as part of the prosecution of the patent application), its unclean hands prevented it from obtaining injunctive relief against an infringer.[86] In the field of passing off, a local example is *Kettles and*

83 This leaves aside the question of whether the restrictive drafting of the 'criticism and review' and 'reporting of news' exceptions in the Copyright Act 1968 (Cth) might impermissibly burden the implied constitutional freedom of political communication, as most recently considered in *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328. See generally Robert Burrell and James Stellios, 'Copyright and Freedom of Political Communication in Australia' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP 2005).

84 See *Dering v Earl of Winchelsea* (1787) 1 Cox 317, 319, (1787) 29 ER 1184, 1185. See also *Meyers v Casey* (1917) 17 CLR 90 (HC) 123 (Isaacs J).

85 See, eg, *Testa v Janssen*, 492 F Supp 198, 201 (WD Pa, 1980).

86 324 US 806 (1945). In Australia, a patent can be revoked on such grounds: Patents Act 1990 (Cth), s 138(3)(d)–(e).

Gas Appliances Ltd v Anthony Hordern & Sons Ltd,[87] in which the plaintiff sold over 30 000 kettles marked with the word 'Patented' on them, this statement being false, and sought an injunction to restrain the defendant from selling its similarly-shaped kettles. Even though the plaintiff established sufficient distinctiveness in its product shape, the injunction was denied. Long Innes J pointed to the false statement as being 'intended to deceive the public and to deter others from manufacturing and vending a similar article', and that 'the acquisition of that degree of distinctiveness without which the plaintiff could not have established its right to succeed in this suit was in part at least due to such action'.[88] Although *Kettles and Gas* has at times been read broadly, as a case that shows that conduct that misleads the public as a whole might amount to unclean hands,[89] a more circumspect reading is that the decisive factor was that the plaintiff's fraudulent conduct was instrumental in giving the plaintiff the ability (by allowing it to establish a sufficient reputation in its product shape) to bring the action against the defendant.[90] Based on this interpretation, a case like *Kettles and Gas* would be of relatively little assistance in situations that might otherwise be covered by a public interest defence to copyright infringement.

A more promising line of clean hands cases involves what might be described as 'inherent problems' with the intellectual property right. In numerous passing off cases, courts have been prepared to deny injunctive relief where the plaintiff's trade name or device is 'inherently deceptive,[91] for example by containing a false reference to the composition of the plaintiff's goods,[92] their geographical origin,[93] or who manufactures them.[94] In such cases the plaintiff's 'misconduct' can be said to be aimed at the general public, rather than just the defendant or trade competitors. These cases share similarities with those involving 'inherently problematic' copyright material,

87 (1934) 35 SR (NSW) 108 (SC).

88 ibid 127.

89 See Thomas (n 3) 234–35.

90 See Burrell and Coleman (n 4) 96 n 54; *Black Uhlans Inc v New South Wales Crime Commission* [2002] NSWSC 1060, (2002) 12 BPR 22,421 [177]. See also *Angelides v James Stedman Henderson Sweets Ltd* (1927) 40 CLR 43 (HC), in which the plaintiff had marketed its mint confectioneries under the name 'Minties' (a word thought to be descriptive) with the word 'Reg' on the label, despite not owning a trade mark registration for 'Minties' alone, and had been able to prevent other traders from using 'Minties' on the basis of this representation. Isaacs ACJ would have denied the plaintiff an injunction to restrain the defendant's sale of 'Minties' on the basis of the plaintiff's unclean hands, accepting that any injury to the public was 'indirect' on the deception involved in acquiring exclusivity over the term ('[t]o mislead the trade, frighten would-be manufacturers and retailers of an article with an accessible trade mark, injures the whole public. It falsely creates a monopoly'): at 70–71.

91 If such signs are registered as trade marks, these registrations can be cancelled under Trade Marks Act 1995 (Cth), s 88(2)(a) (by reference to ss 57 and 43) or s 88(2)(c), depending on the circumstances.

92 *Fetridge v Well*s, 13 How Pr 385 (NY Sup Ct, 1857).

93 *Newman v Pinto* (1887) 4 RPC 508 (CA). See also the discussion in *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1998] RPC 117 (Ch) 144–49.

94 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1865) 11 HL Cas 523, (1865) 11 ER 1435. An odd feature of the application of the clean hands doctrine in such cases is that both the plaintiff's and defendant's misleadingly marked goods remain free to circulate: see Zechariah Chafee Jr, 'Coming into Equity with Clean Hands [Part II]' (1949) 47 Mich L Rev 1065, 1078.

such as grossly immoral works. United Kingdom courts have long held that copyright can be denied on public policy grounds in cases involving obscene, blasphemous, libellous or immoral works.[95] The better position, and one that reflects the current law in Australia, is that copyright will subsist in every work or subject matter that meets the requirements for subsistence set out in the Copyright Act,[96] but that a court may deny equitable relief to the copyright owner on the basis of its unclean hands, for example if the owner were unable legally to exploit the work.[97] The 'inherent problems' with the copyright work might extend to the fact that it contains material that is in breach of the law, even if this falls short of 'iniquity'. For example, in *Slingsby v Bradford Patent Truck and Trolley Co*,[98] a copyright owner was denied relief in an action to restrain infringement of its trade catalogue because the catalogue contained false statements that the copyright owner was the maker of the listed goods and that the goods were patented. More recently, in the Federal Court case of *A-One Accessory Imports Ltd v Off Road Imports Pty Ltd (No 2)*, Drummond J denied injunctive relief to a copyright owner that had established infringement by the defendant, on the basis that the copyright owner's catalogue itself infringed copyright in two earlier catalogues.[99]

The above cases indicate that there is likely to be overlap between the application of the clean hands doctrine and the work that might be done by a public interest defence to copyright infringement. If the copyright material sought to be reproduced unambiguously and on its face reveals that the owner has engaged in a breach of the law or national security, or has encouraged others to do so, there is a strong likelihood that equitable relief will be denied on the basis of the owner's unclean hands.[100] In other words, if the owner's impropriety is contained *within* the subject matter it is seeking to enforce — for example, if an admission of a company's fraudulent conduct is recorded in an internal company memorandum, or in a sound recording of a conversation[101] — the clean hands doctrine is likely to apply.

A further line of cases might seem to provide support for an even broader role for the clean hands doctrine. In *Morton Salt Co v GS Suppiger Co*,[102] the US Supreme Court held that the patentee was to be denied an injunction to restrain the infringement of its patent on the basis that it was in breach of antitrust law (by engaging in third line forcing). This decision represents an extension of the law, in the sense that the plaintiff's wrongdoing related to the *exploitation* of its intellectual property right in a manner that was detrimental

95 For recent consideration, see Alexandra Sims, 'The Denial of Copyright Protection on Public Policy Grounds' [2008] EIPR 189.

96 *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* [2006] FCAFC 188, (2006) 157 FCR 442 [77]–[84] (French and Kiefel JJ).

97 ibid [137] (Finkelstein J).

98 [1905] WN 122 (Ch), affd [1906] WN 51 (CA).

99 (1996) 66 FCR 199 (FC) 201.

100 In *Hubbard* (n 42) 99–101, Megaw LJ would have denied relief to the Church of Scientology to restrain the publication of confidential documents on the basis of unclean hands, since those documents contained material advocating that church members enforce an extra-legal penal code.

101 Assuming, of course, that the company owns copyright in the memorandum or sound recording.

102 314 US 488 (1942).

to the public interest.[103] United States courts have drawn on *Morton Salt* in denying relief on the basis of unclean hands in cases where the plaintiff was exploiting its copyright in breach of antitrust law,[104] an idea that found favour with Murphy J, in obiter dicta, in the High Court of Australia's decision in *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV*.[105]

However, even these cases cannot deal with some of the situations in which a public interest defence to copyright infringement might be available. As seen in Part II(A), such situations might involve *no* misconduct by the copyright owner, but instead might arise where the material sought to be used by the defendant exposes a serious matter of public importance. A defendant might wish to reproduce an organisation's documents that do not record any breach of law or wrongdoing by the organisation, but instead give rise to concerns of mismanagement within the organisation[106] or corruption in an industry regulated by the organisation,[107] or that the organisation's oversights have themselves given rise to miscarriages of justice elsewhere.[108] Alternatively, the document the defendant might wish to reproduce could on its face be entirely innocuous — such as a still from a security camera, or a diary entry — but in fact be a 'corrective' that establishes that past statements by an organisation or public figure on matters of public importance were grossly misleading.[109] In these cases, where the 'misconduct' is extrinsic to the copyright material, it seems impossible to argue that the copyright owner's hands are unclean when all that it is doing is exercising its statutory right to restrain the circulation of material without its permission. The clean hands doctrine can clearly serve the public interest, but the fact it cannot apply where the plaintiff's conduct amounts only to 'general depravity' means that it cannot do the same work as a public interest defence to either copyright infringement or, to the extent such material remains confidential, to breach of confidence.[110]

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103 ibid 492 (courts of equity 'may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest').

104 See Timothy H Fine, 'Misuse and Antitrust Defenses to Copyright Infringement Actions' (1965) 17 Hastings LJ 315, 330–34.

105 (1977) 138 CLR 534 (HC) 560–61.

106 cf *London Regional Transport* (n 58) (changing the facts to assume that LRT took an assignment of copyright in the consultant's report).

107 cf *Jockey Club* (n 61) (assuming that the BBC wished to reproduce substantial extracts of the internal memoranda).

108 cf *Lion Laboratories* (n 3).

109 cf *Hyde Park* (Trial) (n 78) and *Ashdown* (n 51).

110 A useful illustration is *Windridge Farm Pty Ltd v Grassi* [2010] NSWSC 335, (2010) 238 FLR 289. The defendant had trespassed on the plaintiff's piggery and taken film footage, which the defendant alleged showed evidence of animal cruelty. The plaintiff argued that it was entitled to a constructive trust over the copyright in the footage. The defendant argued that such relief should be denied on the basis of the plaintiff's unclean hands. Latham J disagreed, holding that the 'depravity' alleged by the defendant (the animal cruelty) did not have a sufficiently close nexus with the plaintiff's claimed equity (the constructive trust arising from the defendant's trespass).

C 'Public interest' as a free-standing factor in determining injunctive relief

Even if the plaintiff has come to equity with clean hands, there are other circumstances in which injunctive relief may be denied that might be said to do the work of a public interest defence to copyright infringement. Whether the plaintiff is seeking interlocutory or final relief, it is trite to note that the grant of such relief is always discretionary. It might therefore be the case that a court will take into account whether the disclosure of the material, to the extent contemplated by the defendant, is in the broader public interest as a factor that supports the denial of injunctive relief. It has been suggested that taking public interest considerations into account in this manner has the potential to facilitate disclosures of copyright material in much the same circumstances as would be covered by a public interest defence, but with the important advantage that the court remains free to award damages for the infringement of copyright.[111]

1 Public interest and final injunctions

Looking first at final injunctions, the Australian case that most strongly supports the idea that injunctive relief to restrain copyright infringement can be denied on public interest grounds is *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd*.[112] One of the respondents was assumed to own copyright in material safety data sheets (MSDSs) containing information about hazardous substances. These MSDSs were provided to importers and suppliers of such substances. The applicant operated a database that gave access to MSDSs, which were provided to the applicant by the importers or suppliers, and was alleged to have infringed the respondent's copyright in a number of MSDSs. Merkel J held that the applicant had an implied licence from the respondent to reproduce its MSDSs,[113] but went on to consider in obiter dicta whether relief would have been available if the applicant had infringed. His Honour considered whether a public interest defence to copyright infringement formed part of Australian law, concluding that '[t]he true underlying principle ... for refusing relief on grounds of public interest might lie in the discretion conferred as to the appropriate form of relief, rather than whether a defence disentitles the copyright owner to any relief'.[114] With this in mind, Merkel J would have denied the respondent an injunction on the basis that:

> it would be contrary to the public interest for the Court to make orders preventing or impeding the disclosure of MSDSs for safety related purposes. Such disclosures are obviously in the public interest and should not be prevented or impeded by court order whenever the need arises for such disclosure.[115]

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111 See, eg, Thomas (n 3) 235–36.

112 *Acohs* (n 3).

113 ibid 547–51.

114 ibid 553. In support, Merkel J referred to *Lord and Lady Perceval v Phipps* (1813) 2 V & B 19, 35 ER 225, saying that in this case 'injunctive relief was withheld in respect of a copyright claim on the grounds of public interest'. As to why this reading of *Perceval* is inaccurate, see Aplin and others (n 13) paras 2.51–2.53.

115 *Acohs* (n 3) 555.

What is striking about this reasoning is that there was no wrongdoing on the part of the respondent. That is, the Court was prepared to take into account the desirability of the reproduction of the material being in the 'public interest' in circumstances going well beyond those in which the iniquity rule would permit the disclosure of otherwise confidential material, or where clean hands would have any role to play.

A much more circumspect approach has been taken to this issue in the UK.[116] This can be seen not only in nuisance cases, where there is 'highly inconsistent and perhaps irreconcilable'[117] case law on the extent to which the public interest in allowing sporting activities to take place near people's homes can justify the denial of injunctive relief.[118] It can also be seen in a number of copyright and patent infringement cases in which defendants have attempted to argue that 'Lord Cairns' Act damages' should be awarded in lieu of a final injunction, pursuant to section 50 of the Senior Courts Act 1981 (UK).[119] In those cases, the courts assessed the issue by reference to the 'working rule' formulated by the Court of Appeal in the nuisance case of *Shelfer v City of London Electric Lighting Co*,[120] which looks to factors such as whether the injury to the plaintiff's legal rights is small, is capable of being estimated in money and can be adequately compensated by a small payment, as well as whether it would be oppressive to the defendant to grant the injunction.[121] These factors are likely to be of relatively little assistance for defendants seeking to raise broader 'public interest' arguments.[122] The most significant decision in this context is *Chiron Corp v Organon Teknika Ltd (No 10)*,[123] where Aldous J considered that although broader public interest considerations might be relevant to the exercise of the court's discretion, it was not enough for an infringer of a patent to point to the potential benefit to the public of an injunction being denied so that a pharmaceutical product could circulate freely.[124]

The approach taken in *Chiron (No 10)* to the availability of Lord Cairns' Act

116 See generally Burrell and Coleman (n 4) 98–99.

117 Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (CUP 2014) 271.

118 cf *Miller v Jackson* [1977] 1 QB 966 (CA) with *Kennaway v Thompson* [1981] QB 88 (CA).

119 *Chiron Corp v Organon Teknika Ltd (No 10)* [1995] FSR 325 (Ch) (patent); *Ludlow Music Inc v Williams (No 2)* [2002] EWHC 638 (Ch), [2002] FSR 57 (copyright). In Australia, the only copyright case in which Lord Cairns' Act damages have been considered appears to be *Matthews v ACP Publishing Pty Ltd* [1998] FCA 1122, (1998) 87 FCR 152 (considering the remedies available for conduct that contravened Copyright Act, s 35(5) and finding (i) that Federal Court of Australia Act 1976 (Cth), ss 5 and 22–23 gave the court the power to award Lord Cairns' Act damages in lieu of an injunction, and (ii) that such damages could be awarded for breach of a provision of the Copyright Act that manifested an intention to create a private cause of action). See further Heydon, Leeming and Turner (n 46) para 24–150; Barnett and Harder (n 117) 281.

120 [1895] 1 Ch 287 (CA).

121 ibid 332–33 (AL Smith LJ). In relation to the final factor, it has been held in Australia that the test is not one of 'balance of convenience', but rather looks to the hardship that would be caused to the defendant if the injunction were granted: *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] VSCA 311, (2007) 20 VR 311 [81].

122 See Gwilym Harbottle, 'Permanent Injunctions in Copyright Cases: When Will They Be Refused?' [2001] EIPR 154.

123 *Chiron (No 10)* (n 119).

124 This case was not referred to in *Acohs* (n 3). Instead, Merkel J relied on *Roussel-Uclaf v GD Searle & Co Ltd* [1977] FSR 125 (Ch), as to which, see nn 133–35 and accompanying text.

damages is broadly consistent with that recently adopted by the UK Supreme Court in *Lawrence v Fen Tigers Ltd*,[125] another nuisance case. All members of the Court cautioned against a mechanical application of the *Shelfer* working rule, and indicated that courts may take into account public interest considerations in exercising their discretion to deny final injunctive relief.[126] However, this reasoning should not be taken too far: as Michael Bryan has argued, 'outside the specialised area of planning law ... the suggestion that the public interest is a discrete ground for awarding or denying injunctive relief should be treated with caution'.[127] In summary, the UK experience in considering the circumstances in which final injunctive relief might be refused suggests that to the extent that public interest considerations are relevant, they are to be given relatively little weight, and that a UK court is perhaps unlikely to reach the same result as Merkel J did in *Acohs*.

2 Public interest and interlocutory injunctions

Turning to interlocutory injunctions, assuming that the copyright owner will be able to demonstrate a prima facie case of infringement,[128] the second issue involves considering where the balance of convenience lies, in which context a key factor is that it will be likely that damages will be an inadequate remedy.[129] The question is then whether public interest considerations can be taken into account as factors that tip the scales in favour of denying injunctive relief. It is clear from the joint judgment of Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[130] that the public interest can be taken into account at this stage. Approving a statement by Spry,[131] their Honours held that 'the interests of the public ... are relevant and have more or less weight according to other material circumstances', but noted that while the court should 'weigh the disadvantage or hardship [the plaintiff] would suffer if relief were refused against any hardship or disadvantage that might be caused to ... the public generally if relief were granted', these latter considerations 'are only rarely found to be decisive'.[132] Such statements do not provide especially strong support for the idea that 'public interest' considerations are likely to play a pivotal role at the interlocutory stage in copyright infringement cases. It is possible to point to one UK decision from 1976 in which an interlocutory injunction to restrain infringement of a pharmaceutical patent was denied, where the court noted the 'life-saving' nature of the defendant's drug.[133]

125 [2014] UKSC 13, [2014] AC 822.
126 See especially ibid [118], [124] (Lord Neuberger PSC).
127 Michael Bryan, 'Taking *Shelfer* Off the Shelf' (2016) 28 SAcLJ 921, 944.
128 That is, in the sense described in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 (HC). See *Australian Broadcasting Corp v O'Neill* [2006] HCA 46, (2006) 227 CLR 57 [65] (Gummow and Hayne JJ), whose reasoning was supported by Gleeson CJ and Crennan J at [19].
129 The reason is that the work will likely be unpublished, such that the plaintiff will likely suffer little financial harm.
130 [1998] HCA 30, (1998) 195 CLR 1.
131 I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (5th edn, Lawbook Co 1997) 402–03.
132 *Patrick Stevedores* (n 130) [65].
133 *Roussel-Uclaf* (n 124) 131.

However, relief was in fact denied on the basis that damages were an adequate remedy,[134] and the court's reasoning on the public interest is hard to square with the subsequent approach taken in *Chiron (No 10)*.[135] In any event, it is hard to see such reasoning applying with the same force in cases involving copyright infringement, where disclosures will rarely be of a 'life-saving' nature.

A final point to note is that even if Australian courts were prepared to treat public interest considerations as decisive in denying final or interlocutory injunctive relief in the same circumstances that a public interest defence to copyright infringement could be made out, the problem remains that the dissemination of such copyright material would, in many cases, still be likely to constitute a breach of confidence. Given the scope of the iniquity rule, and the *Fairfax* rule applying to public interest disclosures of government material, there is a low likelihood that a court would exercise its discretion in considering whether to refuse an injunction to restrain a breach of confidence on grounds that are any broader than those contemplated by such rules.[136]

III Reassessing the equitable doctrines, and reconsidering public interest defences

The analysis in Part II has shown that there is a significant difference between UK and Australian law as to whether disclosures of confidential, copyright material can be made on public interest grounds. Although the three equitable doctrines and principles considered in Part II can go a long way to ensuring that such material can be freely disclosed, they cannot (either individually or collectively) cover the same territory as public interest defences to breach of confidence and infringement of copyright. Put simply, it is very difficult to see how an Australian court could reach the same outcomes as *Lion Laboratories*, *London Regional Transport*, *Jockey Club* or *Hyde Park* at first instance, or *Ashdown* if the public interest defence had been made out. This raises the question of whether Australian law should be brought more closely into alignment with the position in the UK and, if so, how this might occur.

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134 ibid 130.

135 For comment, see Rosa Castro Bernieri, '*Ex Post* Liability Rules: A Solution for the Biomedical Anti-commons?' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law: Economic and Social Justice Perspectives* (Edward Elgar 2010) 109–10.

136 See ALRC, *Serious Invasions of Privacy* (n 17) para 12.132 ('courts considering injunctions to restrain a breach of confidence do not exercise any special caution in the interests of free speech or other broadly defined public interests'). See further Dal Pont (n 11) para 15.4 (noting the limited bases on which courts are likely to refuse injunctive relief to restrain a breach of confidence). But cf *National Roads and Motorists' Association Ltd v Geeson* [2001] NSWSC 832, (2001) 39 ACSR 401 where the applicant sought to restrain the potential disclosure of information about conflicts at an NRMA board meeting. Bryson J refused the injunction on the basis that some respondents had not threatened to disclose any information, and that another respondent would be entitled to disclose information within the directors' Code of Conduct. In obiter dicta, his Honour considered that had it been otherwise appropriate to grant the injunction, the fact that the interests of NRMA members would have been positively served by making the information known would have favoured denying injunctive relief: at [35]. This approach was supported on appeal: *NRMA v Geeson* [2001] NSWCA 343, (2001) 40 ACSR 1 [47].

An important point to note about the UK cases mentioned in the previous paragraph is how closely analogous they are to those in which a plaintiff's 'misconduct' would result in the iniquity rule or the clean hands maxim applying to justify a defendant's disclosure. These UK cases represent limited extensions of the law, involving disclosures that shed light on wrongdoing or misleading conduct on matters of genuine public concern. Importantly, they can be said to help safeguard the important value of freedom of expression, but in a more nuanced manner than simply prioritising 'truth-telling' over confidentiality. Instead, they have allowed for disclosures of information to help promote accountability and transparency among regulatory authorities or government contractors, and to improve the quality of public discourse on the workings of government, public affairs and matters of genuine community concern.[137] To the extent that the cases involved the reproduction and publication of copyright material, they lay bare the deficiencies of the 'fair dealing' model of exceptions, showing it to be an inadequate mechanism to safeguard the public interest and freedom of expression. In most of the cases, copyright subsisted in the material in circumstances bearing no relation to the incentive-based rationale for affording copyright protection; the defendants' uses would have had little to no impact on any market for the exploitation of the material; and the material was used for critical, newsworthy purposes — these being strong justifications for permitting the reproduction of such material on broader 'fairness' grounds.[138]

There is, therefore, a serious issue as to whether something is being lost in Australia, where the law as it currently stands would be likely to suppress the sort of expression outlined above. And it is vital to appreciate that this would continue even if the Copyright Act were to be amended to adopt a 'fair use' defence, or expanded 'fair dealing' defences, to infringement, for which a strong independent case has already been made in recent law reform inquiries. This Part commences with an examination of whether the equitable doctrines and principles considered in Part II can, in fact, be stretched so that Australian law more closely aligns with UK law. It then considers whether more thought needs to be given to developing a public interest defence to breach of confidence in Australia. This involves engaging with the criticisms of such defences as involving ad hoc, unstructured decision-making, and examining the potential benefits of embracing a doctrine that seeks to identify and balance competing public interests.

A Can the equitable doctrines be stretched to achieve the same outcomes as public interest defences?

It should be recalled that Gummow J's articulation of the iniquity rule in *Corrs Pavey*[139] did not seek to define the outer boundaries of what might constitute an 'iniquity'. This has led some commentators to note that the concept of

137 cf *Fairfax* (n 3) 52. See further Part III(B)(2) as to whether the interests recognised by Mason J should justify disclosure of only government information.

138 cf the factors that a court would consider in determining whether a defendant has made a 'fair use' of a copyright work under Copyright Act 1976 (US), s 107.

139 See n 26.

iniquity 'is hardly inflexible'[140] and may be expanded in a way that more explicitly embraces public interest considerations. Some support for this view is contained in *A-G (UK) v Heinemann Publishers Australia Pty Ltd* at first instance, where Powell J considered that the iniquity rule could apply where 'there is shown to have been some impropriety which is of such a nature that it ought, in the public interest, be exposed'.[141] This is a clear reference to Lord Denning MR's statement in *Initial Services* that an obligation of confidence would not be implied in an employment contract to prevent the disclosure of 'any misconduct of such a nature that it ought in the public interest to be disclosed to others'.[142] Other commentators have seemed to go even further, suggesting that the UK courts' approach of weighing competing public interests in publication and confidentiality 'is really only taking the present conception of "iniquity" (that is, misconduct and/or public danger) to its logical conclusion'.[143]

Even though the iniquity rule can clearly accommodate some public interest considerations, the difficulty with the above arguments is that the language of 'iniquity' can only be stretched so far. While in *Initial Services* the Court of Appeal was prepared to consider that 'iniquity' could encompass less serious misconduct than crimes and fraud, the Court did not go so far as to suggest that disclosures could be justified in the absence of any iniquity. That separation came in *Fraser v Evans*, which enabled the subsequent development of a public interest defence that, in time, did not require any wrongdoing on the part of the plaintiff. An approach that seeks to stretch the iniquity rule while still retaining the core requirement of an 'iniquity' faces a definitional problem: an 'iniquity' necessarily involves wrongdoing, and the concept is simply not coterminous with 'conduct that it is in the public interest to disclose'. Where misconduct is not disclosed in the information sought to be divulged, or where there is no misconduct at all, even an expanded 'iniquity rule' would have no work to do. A further difficulty is the requirement in the iniquity rule as formulated in *Corrs Pavey* that the defendant's disclosure be to a party 'with a real and direct interest in redressing' the iniquity. Unless the idea of 'redress' is interpreted very broadly, to encompass shedding light on a state of affairs in anticipation of bringing about productive change, this aspect of the rule would seem to prevent it from expanding much beyond its current limits.

There are similar problems with the idea that the 'clean hands' maxim can be stretched to deal with situations where the misconduct is extrinsic to the confidential copyright material that is sought to be reproduced. As it stands, the American 'misuse' cases discussed in Part II(B) involve an already broad reading of what constitutes unclean hands in the context of an infringement of an intellectual property right. Indeed, while the outcomes in these cases might be justifiable in policy terms, it is debatable whether all antitrust violations committed by patentees or copyright owners will necessarily have a sufficiently close nexus with the equities being sued for (namely, injunctions

140 Dal Pont (n 11) para 11.25.
141 *Heinemann* (Trial) (n 27) 382. See also *Westpac* (n 28) 525.
142 *Initial Services* (n 35) 405.
143 Stewart and Chesterman (n 47) 16. But see n 193.

to restrain acts of infringement of those patents or copyrights).[144] To attempt to expand the clean hands doctrine even further runs contrary to cases where 'collateral' misconduct by plaintiff copyright owners, such as unrelated acts of copyright infringement[145] or contravention of consumer protection statutes,[146] has been held not to constitute unclean hands. It would also damage the integrity of the doctrine more generally, at a time when, in non-intellectual property contexts, the New South Wales Supreme Court of Appeal has reiterated the importance of identifying an 'immediate and necessary relation to the equity sued for'.[147] Indeed, as Paul Stanley has warned, seeking to expand the scope of clean hands runs into the same criticisms that have been raised against some of the public interest defence cases, namely that the doctrine might 'become a vehicle for arbitrary ad hoc decisions based on broad sympathy for one party or the other'.[148]

A stronger argument for stretching existing equitable principles is that courts could potentially give more weight than at present to public interest considerations in considering whether to deny injunctive relief for copyright infringement and breach of confidence. In the context of copyright infringement, future courts might be guided by the approach taken in *Acohs* (rather than the UK cases on point) and deny injunctive relief in circumstances where the clean hands doctrine would not apply, if a sufficiently strong public interest were to support the reproduction and disclosure of the copyright material. And a court could, without going so far as recognising a public interest defence that justifies the use of confidential information, treat public interest considerations as decisive in denying final or interlocutory relief to restrain a breach of confidence. The key effect of these approaches would be to ensure that, while the information in question could be reproduced and disclosed, other remedies would remain available for the plaintiff: for example, damages for infringement of the copyright and/or equitable compensation for the breach of confidence.[149]

Two things can be said in response. First, it needs to be asked why a defendant should remain liable for damages or other equitable compensation in these circumstances. As Robert Burrell and Allison Coleman have argued, this is likely to create a 'significant chilling effect', in that it would provide a disincentive to parties wishing to disclose information on public interest grounds.[150] It is not a concern that can be addressed by stating that only

144 For critique of the breadth of US law, see Chafee (n 94) 1071–72.

145 *British Leyland Motor Corp v Armstrong Patents Co* [1982] FSR 481 (Ch) 501–02.

146 *Collier* (n 1) 474.

147 See, eg, *Kation Pty Ltd v Lamru Pty Ltd* [2009] NSWCA 145, (2009) 257 ALR 336 [8] (Allsop P), [28] (Hodgson JA), [158] (Basten JA, who went on to hold at [160] that the statement in *Carantinos v Magafas* [2008] NSWCA 304 [58] that the disentitling conduct have 'a sufficiently close relationship to the equity sued for' should not be taken to have represented a liberalisation of the orthodox position). See also *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269, (2017) 95 NSWLR 458 [37] (Macfarlan JA).

148 Paul Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing 2008) 57.

149 Noting that if the plaintiff makes out both copyright infringement and breach of confidence, it will be awarded a single sum in compensation for both: *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* (1975) 6 ALR 445 (SC).

150 Burrell and Coleman (n 4) 97.

nominal damages for the copyright infringement are likely to be available under section 115(2) of the Copyright Act.[151] For example, in a case such as *Ashdown*, the plaintiff would have had a strong argument that the newspaper's disclosure of the diary entry would have lessened the value of the work when published as part of the plaintiff's memoirs.[152] In any event, a defendant liable for only nominal damages still faces the prospect of substantial additional damages under section 115(4),[153] which might be granted in recognition of the plaintiff's hurt feelings and non-pecuniary interests.[154] In addition, even if the legislature were to act on the recommendations of recent law reform inquiries and expand the scope of the defences to copyright infringement, there would still be a problem. This could potentially create an situation where a defendant would not be liable *at all* for the reproduction of copyright material on public interest grounds, and where, if the material is also confidential, a court might be prepared to deny injunctive relief so that the material could be disclosed, but where the threat of the court awarding equitable compensation would still hang over the defendant.

A second response is simply to note the lack of transparency that would be involved in expecting that public interest considerations should play a more decisive role in the determination of whether injunctive relief should be refused. Until a line of cases emerged where it was clear that such considerations were being given more weight than at present, it would not be possible to know if such a shift had in fact occurred. And it is not clear *how* a court would go about this task — in particular, what criteria it would use to weigh public interest considerations against other factors that might support the grant of injunctive relief (for example, the inadequacy of damages). Such indeterminacy as to how a court might exercise its discretion when considering the public interest would be likely to create a further chilling effect for would-be disclosers of confidential, copyright material.

B Are public interest defences appropriate?

The final criticism outlined above — that giving more weight to the public interest in determining whether injunctive relief ought to be refused would result in unstructured, subjective decision-making — can, of course, be levelled at public interest defences. This was the thrust of Gummow J's critique of the public interest defence to breach of confidence in *Smith Kline & French*: that such a defence is 'an invitation to judicial idiosyncrasy' that enables judges to decide 'each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence', by '"balancing" and then overriding [what conscionable behaviour] demands by reference to matters of social or political opinion'.[155] Any suggestion that Australia should consider embracing public interest defences needs to confront these criticisms directly.

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151 cf Thomas (n 3) 236.

152 See generally Staniforth Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Deigns and Confidential Information* (R September 2018) para 13.710.

153 *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)* [2007] FCAFC 40, (2007) 157 FCR 564 [54].

154 *Polygram Pty Ltd v Golden Editions Pty Ltd* (1997) 76 FCR 565 (FC) 576.

155 *Smith Kline & French* (n 16) 111.

This final section takes as a starting point that a compelling case for legislative reform to expand the scope of the exceptions to copyright infringement has already been made by the Australian Law Reform Commission, and that a 'fair use' defence, or a new defence of 'fair dealing' for the broad, unqualified purpose of 'criticism',[156] would be sufficient to permit the sort of use of copyright material that would only be allowed under the UK's public interest defence. Therefore, the remaining issue that needs to be addressed relates to the desirability of Australian courts embracing a public interest defence to breach of confidence.

1 An invitation to judicial idiosyncrasy?

Is it the case that the public interest defence to breach of confidence in fact involves an exercise of unstructured, subjective judicial discretion? This is best assessed as an empirical matter, by reference to how the defence has come to operate in the UK.

It is certainly possible to point to problematic UK decisions. For example, *Woodward* can rightly be said to have strayed too far in allowing the disclosure of material that was merely of prurient interest, and that it improperly privileged 'truth in publicity' over the maintenance of confidentiality.[157] And it is also possible to criticise a case such as *W v Egdell*[158] where the Court of Appeal sought to balance competing public interests in a convoluted manner, when the application of something closer to the iniquity rule would have been sufficient.[159] However, singling out such cases for criticism avoids the question of how representative they are.

What can be seen in the UK public interest defence cases since the late 1970s, particularly after *Woodward*, is an attempt to give as much structure as possible to the balancing exercise. The cases involve far more comprehensive explanations than in *Woodward* of the nature of the competing public interests that need to be weighed against each other. Courts have heeded Griffiths LJ's call in *Lion Laboratories* that in the absence of misconduct, disclosure in the public interest should be possible only in 'exceptional' cases.[160] They have continued to emphasise the vital public interest in the maintenance of confidentiality.[161] In considering 'whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached',[162] they have routinely taken into account Stephenson LJ's factors outlined in *Lion Laboratories* — in particular, whether the information reveals misconduct; whether it relates to a matter of genuine public importance; and whether the

156 See n 7.
157 See, eg, Heydon, Leeming and Turner (n 46) para 42–165.
158 [1990] Ch 359 (CA).
159 Heydon, Leeming and Turner (n 46) para 42–165.
160 *Lion Laboratories* (n 3) 551 (Griffiths LJ).
161 See, eg, *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 (CA) 27 (Shaw LJ); *X v Y* (n 42); *Imutran Ltd v Uncaged Campaigns Ltd* [2001] EWHC 31 (Ch), [2002] FSR 2 [23]–[26]; *H (A Healthcare Worker)* (n 42); *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 [67]; *Northern Rock plc v The Financial Times Ltd* [2007] EWHC 2677 (QB) [20]; *Brevan Howard Asset Management LLP v Reuters Ltd* [2017] EWHC 644 (QB) [43].
162 *Prince of Wales* (n 161) [68].

extent of the contemplated disclosure is appropriate in the circumstances.[163] In considering the second issue, they have been at pains to ensure that more is needed than the identification of matter that might be of interest to the public, and that the public interest being served by the disclosure must go further than mere 'truth-telling'.[164]

Even if courts have come to recognise a more specific set of factors that give structure to the balancing exercise, it might still be possible to criticise the entire body of case law on the basis that it is inherently subjective. That is, it can be argued that it remains impossible to know in advance if a disclosure of confidential material will be considered to be justifiable on public interest grounds until a court decides.[165] Such concerns have much in common with those raised by opponents to a 'fair use' defence to copyright infringement. In that context, the existing 'fair dealing' regime has been defended as promoting ex ante 'certainty' for would-be users of copyright material, with an open-ended 'fair use' model presented as prioritising 'flexibility' over certainty and predictability.[166] Responding to that critique, the Australian Law Reform Commission recognised that empirical work conducted in the US has revealed that fair use outcomes are much in fact more predictable than commonly appreciated.[167] The Commission was also sceptical about the argument that 'certainty' was a valuable end if it meant the law was overly restrictive, quoting a submission that 'Australia's current system of exceptions only provides "certainty" in the sense that we can be confident that a whole raft of socially desirable re-uses of copyright material are prohibited'.[168]

These points have resonance when considering the UK public interest

163 cf *Re A Company's Application* [1989] Ch 477 (Ch) (disclosure to financial regulators of breach of financial regulations justified), *W v Egdell* (n 158) (disclosure of potential criminal behaviour to doctors and Secretary of State justified) and *Woolgar* (n 71) (disclosure of potential misconduct to nursing regulatory body justified) on the one hand with *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 (CA) 899 (no public interest in the media publishing tapes alleging misconduct in racing, but if the misconduct amounted to crimes or breaches of racing rules, limited disclosure to the police and Jockey Club might have been justified) and *Imutran* (n 161) [24] (online disclosure of the highly technical material alleging animal cruelty not justified, but more limited disclosure to a Select Committee investigating the matter might have been) on the other hand.

164 See, eg, the Court of Appeal's formulation of the test in *Prince of Wales* (n 161) [67].

165 For a critique of the uncertainty of the defence, see Kaaren Koomen, 'Breach of Confidence and the Public Interest Defence: Is It in the Public Interest? A Review of the English Public Interest Defence and Options for Australia' (1994) 10 QUTLJ 56. See also Ricketson and Creswell (n 152) para 26.5.

166 See generally Michael Handler and Emily Hudson, 'Fair Use as an Advance on Fair Dealing? Depolarising the Debate' in Shyam Balganesh, Haochen Sun and Ng-Loy Wee Loon (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions in Comparative Perspective* (CUP forthcoming 2019).

167 ALRC, *Copyright and the Digital Economy* (n 7) paras 4.123–4.124 (citing Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham L Rev 2537; Matthew Sag, 'Predicting Fair Use' (2012) 73 Ohio St LJ 47). For further discussion, see Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (2nd edn, U Chicago Press 2018).

168 ALRC, *Copyright and the Digital Economy* (n 7) para 6.22 (quoting Robert Burrell and others, Submission 716 to the Australian Law Reform Commission, *Copyright and the Digital Economy* (Discussion Paper 79, 2013)).

defence cases. The case law has now developed to a point where it can be argued that there is a reasonable degree of predictability in the judicial approach to the defence and in outcomes. When the post-*Woodward* cases are put in three groups — those in which the public interest justified only limited disclosure; those in which the public interest justified disclosure to the general public; and those in which no public interest in disclosure was found — some patterns start to emerge.

In the first group, the information sought to be disclosed revealed serious misconduct that was capable of being redressed by an investigatory body.[169] In the second group, no misconduct was involved, but the disclosure was made 'to expose hypocrisy or ... some improper practice or concealment, or to demonstrate incompetence'[170] on matters of genuine public significance. These cases, representing cautious, incremental expansions of the law beyond those in the first group, have helped set the current limits of the defence.[171] The third, and largest, group consists of cases where no misconduct was involved and the interest in publicising the information was substantially outweighed by the importance of preserving confidentiality,[172] or where the information did disclose misconduct or some degree of public danger, but the defendant's desire to publish the information to the public at large was unjustified.[173] Seen in this way, the outcomes of the cases, and the results of the balancing exercise, are far more predictable than critics have acknowledged.[174]

A final point that needs to be made in considering how the defence has applied in the UK concerns the relevance of the Human Rights Act 1998 (UK) (HRA). Specifically, since 2 October 2000, UK courts in considering whether to grant relief have been required to have 'particular regard to the importance of the [European Convention on Human Rights] right of freedom of expression', and where the proceedings relate to 'journalistic, literary or artistic material', the extent to which 'it is, or would be, in the public interest for the material to be published'.[175] From this, it could be said that UK courts are obliged to give weight to particular considerations in a manner that would not be open to an Australian court, and that little is to be learned by studying post-HRA UK case law.

The coming into force of the HRA did have a major impact on UK breach of confidence law, but primarily in the context of *private* information. Courts

169 *Re A Company's Application* (n 163); *W v Egdell* (n 158); *Woolgar* (n 71).

170 *Brevan Howard* (Trial) (n 161) [44].

171 *Lion Laboratories* (n 3); *London Regional Transport* (n 58); *Jockey Club* (n 61). This category might also include *Hyde Park* (Trial) (n 78) and *Ashdown* (n 51).

172 *X v Y* (n 42); *H (A Healthcare Worker)* (n 42); *Prince of Wales* (n 161); *Northern Rock* (n 161); *Brevan Howard Asset Management LLP v Reuters Ltd* [2017] EWCA Civ 950, [2017] All ER (D) 75 (Jul).

173 *Schering* (n 161); *Imutran* (n 161).

174 Even if it is accepted that the 'public interest' remains such a vague notion that it is impossible to predict how far the defence *might* expand, it needs to be considered whether the degree of uncertainty generated by the defence is in fact preferable to the available alternatives. The iniquity rule and clean hands might well have a more 'certain' sphere of operation, but the limited scope of these doctrines means that some forms of beneficial disclosure will, inevitably, be suppressed.

175 Human Rights Act 1998 (UK), s 12(4).

are required to balance the right to privacy contained in Article 8 of the European Convention on Human Rights against the Article 10 right to freedom of expression, leading to a significant body of case law in which privacy interests have been safeguarded through the breach of confidence action.[176] However, where no privacy interest is involved, the impact of the HRA has been more muted. At a formal level, the courts now apply a test of 'proportionality' in considering when the right to freedom of expression is subject to restrictions 'necessary in a democratic society', such as obligations of confidentiality.[177] However, the 'balancing' exercise undertaken by the courts in applying this test has remained largely unchanged from the pre-HRA position. In its 2017 decision in *Brevan Howard Asset Management LLP v Reuters Ltd*[178] the Court of Appeal quoted from *A-G v Guardian Newspapers (No 2)*, where Lord Goff suggested that there was no inconsistency between the balancing exercise being applied by UK courts in public interest defence cases as at 1988 and what would be required in giving effect to Article 10 of the Convention,[179] a view recently endorsed by three members of the UK Supreme Court.[180] On this basis, the Court of Appeal in *Brevan Howard* considered that the balancing exercise undertaken in *Lion Laboratories*, and Griffiths LJ's recognition in that case that an exceptional case needed to be made for a disclosure of confidential information not involving any iniquity, was entirely consistent with post-HRA case law.[181]

2 The advantages of 'balancing'

The second criticism that has been levelled against the public interest defence to breach of confidence is that it is inappropriate to treat the obligation of confidence as something that can be 'outweighed', through a balancing exercise, by a competing public interest that justifies disclosure of the information. The assertion being made here is that unless the information discloses an iniquity (such that it will lack the necessary quality of confidence) the recipient of the information in circumstances importing an obligation of confidence should be bound by that obligation — effectively meaning that the maintenance of confidentiality is the only relevant public interest that should be recognised.

An immediate response to the above criticism is to point to two closely related situations in which Australian courts *have* recognised the appropriateness of balancing competing interests in determining whether the confidentiality of information should be protected. The first involves attempts to restrain the disclosure of confidential government information. It was accepted in *Fairfax* that an actionable breach of confidence in this context

176 See generally Aplin and others (n 13) paras 16.58–16.129; Lionel Bently and others, *Intellectual Property Law* (5th edn, OUP 2018) ch 47.

177 See *Prince of Wales* (n 161) [67] (reflecting the relationship between ECHR, arts 10.1 and 10.2).

178 *Brevan Howard* (Appeal) (n 172) [67].

179 *A-G v Guardian (No 2)* (n 11) 283–84.

180 *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [46] (Lord Mance JSC, with whom Lord Neuberger PSC and Lord Clarke JSC agreed).

181 *Brevan Howard* (Appeal) (n 172) [69]–[70].

requires use that is 'detrimental' to the government.[182] In assessing this, courts will be required to balance competing public interests: on the one hand, that disclosure 'will serve the public interest in keeping the community informed and promoting discussion of public affairs'; on the other hand, that disclosure might also 'be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be compromised'.[183] If the latter interest 'outweighs' the former, disclosure will be restrained.[184] The second situation involves considering whether a contractual obligation of confidence should be held unenforceable or void as being contrary to public policy by interfering with the administration of justice. In *Richards v Kadian* the New South Wales Supreme Court of Appeal held that this may require the court to 'weigh up or balance competing interests',[185] depending on 'the nature of the confidential information, the public interest said to be affected and whether there is any other public interest consideration'.[186] In commenting on this case, Dal Pont has argued that 'parallel reasoning should translate to the recognition of a balancing of relevant interests outside the contractual environment'.[187]

Both cases not only show that Australian courts have been prepared to engage in the sort of balancing exercise required by the UK public interest defence. They also illustrate a key benefit of undertaking such an exercise: that it 'forces the judiciary to examine why confidentiality should be protected'.[188] This is something courts have been comfortable doing in the context of government information. A number of judges have emphasised that because a functioning democracy requires the executive government to act in the public interest, it should be judged by this standard when seeking to enforce confidentiality.[189] What this does is shift the focus of the inquiry away from what would be expected of the recipient of the information, and more towards the nature of the information and the value of the public being made aware of it. Outside the realm of government information, however, courts have been disinclined to engage with the question of why confidentiality should be protected in the face of potentially countervailing public interests. Instead, if information is received in circumstances importing an obligation of confidence, that obligation is treated as inviolable.[190] What is marginalised here is any engagement with the question of why respecting the obligation of the confidence must necessarily prevail over any countervailing interests. This is especially the case when the nature of the confidential information is such that, if disclosed, it would serve near-identical public interests to those that have been prioritised in related contexts, such as keeping the public informed

182 *Fairfax* (n 3) 52. 'Detriment' is not an essential element of the action in other circumstances: *Optus Networks Pty Ltd v Telstra Corp Ltd* [2010] FCAFC 21, (2010) 265 ALR 281 [39].
183 *Fairfax* (n 3) 52.
184 ibid.
185 [2005] NSWCA 328, (2005) 64 NSWLR 204 [46] (Beazley JA, with whom Stein AJA agreed). See also at [160] (Hodgson JA).
186 ibid [87] (Beazley JA).
187 Dal Pont (n 11) para 11.38.
188 Jason Pizer, 'The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?' (1994) 20 Mon LR 67, 87.
189 See, eg, *Fairfax* (n 3) 51; *Heinemann* (Appeal) (n 28) 191 (McHugh JA).
190 See Heydon, Leeming and Turner (n 46) para 42–080.

on matters of serious public significance involving the workings of government and its agencies (as in *London Regional Transport* or *Ashdown*) or assisting in the administration of justice (as in *Lion Laboratories*).

The worth of a 'balancing' approach is that it is more transparent about the range of interests and values that might be at stake in circumstances when obligations of confidence are sought to be enforced than any existing equitable doctrines. The balancing approach continues to recognise the fundamental importance of respecting obligations of confidence. But it also recognises that the imposition of those obligations might — in a limited, increasingly well-defined set of circumstances — impose restrictions on freedom of expression, denying the public access to valuable information on matters of significance. The UK experience over the last 40 years demonstrates how these competing considerations can be identified, particularised and prioritised within the scope of a public interest defence. This is not to suggest that 'public interest' considerations find no expression in existing equitable doctrines, but rather that the extent to which they do (for example, through the scope of the iniquity rule, or the circumstances in which injunctive relief might be denied) is opaque. As a final point, a legal technique based on identifying competing public interests seems better able to accommodate developing notions of when it might in fact be in the public interest for confidential information to be disclosed than current doctrines. For example, a decade ago it would have been unthinkable to suggest that it would have been in the public interest to disclose confidential details of the inner workings of a social media platform to show how it organised and presented third party content to its users. Now, the degree of control such companies exert over the way that news, material passing itself off as news, and related advertising content is generated, presented and disseminated, and the impact of such control on citizens' understanding of and engagement with political affairs and matters of public significance, raises quite different questions.

IV Conclusion

The iniquity rule, the clean hands doctrine, and the discretionary factors informing the denial of injunctive relief can all go a long way to ensuring that the disclosure of non-government information revealing serious misconduct or which is necessary to safeguard public safety will not be suppressed on the grounds of breach of confidence and/or copyright infringement in Australia. However, a close analysis of the body of case law that has developed in the UK, in particular over the last 40 years, shows that there is a small but significant range of circumstances in which disclosures of confidential, copyright material on public interest grounds would be permitted in the UK, but not in Australia. The suggestion that this more expansive body of UK case law has inappropriately prioritised the disclosure of matters that are only arguably in the public interest over respecting obligations of confidence, for the sale of promoting 'truth-telling', does not accurately reflect how this body of law has come to develop since the late 1970s. Through careful identification of competing public interests, the UK cases have come to allow for disclosures of information for the same reasons as those that underpin the abovementioned equitable doctrines (to ensure that crimes, civil wrongs and misconduct can be disclosed, in particular to investigatory authorities) and for

reasons closely analogous to those that have justified the disclosure of government information in Australia (to promote accountability among regulatory authorities or government contractors, and to improve the quality of public discourse on public affairs).

Attempting to address the difference between UK and Australian law by stretching the iniquity rule or expanding the application of the clean hands doctrine would seriously damage the integrity of both doctrines. And expecting that courts might give more weight than at present to 'public interest' factors in denying final or injunctive relief for copyright infringement and breach of confidence lacks transparency. A more direct approach, involving embracing defences that permit disclosures on public interest grounds, instead ought to be taken. To ensure disclosures in the public interest do not infringe copyright in circumstances not covered by any existing defences, legislative reform is needed, and the case has already been made for expansion of the existing exceptions regime that would guarantee this. However, it is important that any such reforms be accompanied by a change in judicial attitude to the circumstances in which confidential information can be disclosed on public interest grounds. On this issue, it is worth reiterating that whether a public interest defence to breach of confidence currently exists under Australian law 'is by no means clear and settled',[191] with judges in a number of cases suggesting that the defence does or might form part of our law.[192] It is a concept that has gained the strong support of key scholars, most notably Andrew Stewart and Michael Chesterman, who described the defence as an 'obvious and logical extension' of the iniquity rule.[193] Most significantly, the UK experience demonstrates that the defence can be applied with predictability and kept within well-defined limits, ensuring that obligations of confidence are respected, but recognising that in exceptional cases such obligations ought to give way to a more compelling public interest.

191 *Australian Football League* (n 12) [75].

192 See nn 27–28 and accompanying text.

193 Stewart and Chesterman (n 47) 16. The same statement is repeated in Andrew Stewart and others, *Intellectual Property in Australia* (6th edn, LexisNexis Butterworths 2018) 107. See also Dal Pont (n 11) para 11.38.