

JUSTIFIED HESITATION: CONSTRUCTIVE TRUSTS OVER COPYRIGHT IN AUSTRALIA AFTER *GAME MEATS V FARM TRANSPARENCY INTERNATIONAL*

JOSHUA YUVARAJ*

In August 2025, the Full Court of the Federal Court of Australia ruled that copyright in footage of a meat production company's premises and practices, surreptitiously obtained by animal rights activists, was held on constructive trust for that company. This meant that the activists could not legitimately publish or license that footage, even though the filmmaker is the 'author' under copyright law. It also meant the activists were required to transfer the copyright in the footage to the meat production company. This paper suggests four reasons why this finding may be premature: the tentative nature of previous High Court of Australia obiter dicta that 'opened the door' to a constructive trust being recognised over copyright, the distinct features and aims of copyright, the availability of other remedies, and the tension of the Court's approach with the moral rights authors have under copyright law. This analysis suggests there is good reason for courts to be hesitant to apply a constructive trust over copyright in the future.

I INTRODUCTION

Copyright law is designed to drive creativity and allow the public to access the products of that creativity.¹ Yet it has sometimes been used for reasons outside these ideals. *The Game Meats Co of Australia Pty Ltd v Farm Transparency International Ltd* ('*Game Meats*')² is a classic example. There, the Full Court of the Federal Court of Australia ruled that an animal rights organisation, Farm Transparency International ('FTI'), was prohibited from publishing surreptitiously obtained footage of the abattoir operations of Game Meats Co ('GMC'), and was required to

* Ph.D, BA/LLB (Hons). Senior Lecturer, Faculty of Law, University of Auckland; Co-Director, New Zealand Centre for Intellectual Property; Senior Fellow, Melbourne Law School, University of Melbourne; Academic Fellow, Centre for Technology, Robotics, Artificial Intelligence and the Law, National University of Singapore (NUS). Email: joshua.yuvaraj@auckland.ac.nz. Thanks to Ying Khai Liew, Andrew Fell and the anonymous reviewer for insightful comments on an earlier draft, and to the editorial team at the University of Queensland Law Journal for their meticulous work on this paper.

¹ Sabine Jacques, 'Platforms and Copyright in Creative Industries: A Tool for Inclusivity?' in Cristiana Sappa (ed), *Research Handbook on Intellectual Property Rights and Inclusivity* (Edward Elgar, 2024) 371.

² (2025) 312 FCR 272 ('*Game Meats Full Court*').

delete all such footage and assign the copyright in the footage to GMC, on the grounds that it held the copyright on constructive trust for GMC. FTI has been granted special leave to appeal to the High Court of Australia,³ suggesting that there is value not just in the footage itself, but also in the broader question of whether a court can impose a constructive trust over copyright and thereby restrict the rights provided to a copyright holder by copyright law.

To that end, this paper critically examines the approach of the Full Court in applying a constructive trust as a remedy for the actions of FTI in securing the footage. Part II outlines Snaden J's hesitation at first instance to recognise a constructive trust over the copyright in the footage. Part III demonstrates how Jackman J (Burley J agreeing) and Horan J, overruling Snaden J's judgment, were much more confident. Part IV highlights the deficiencies in Jackman J's approach in relation to prior case law and the nature, aims and features of copyright in Australia. Part V concludes.

II HESITATION AND RETICENCE: GAME MEATS AT FIRST INSTANCE

The copyrighted works at issue in this dispute were videos obtained by surreptitious installations of cameras in an abattoir run by GMC in Victoria in 2024.⁴ FTI sent footage to the Department of Agriculture, Fisheries and Forestry and subsequently to Channel Seven. When the footage was not published, FTI did so itself online.⁵ Following interlocutory non-publication orders, and in addition to other causes of action in tort, GMC sought a permanent injunction against FTI to preclude it from publishing the footage and a mandatory assignment of the copyright FTI held in the footage to GMC.⁶

GMC argued⁷ that its beneficial ownership of the copyright in the footage should be recognised, following the suggestion of Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),⁸ another case in which a company running an abattoir sought to restrain the publication of surreptitiously obtained footage. There, Gummow and Hayne JJ suggested that where a film was made 'in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff', the maker could be regarded as holding the footage on constructive trust for the plaintiff, it potentially being 'inequitable and against good conscience ... to assert ownership of the copyright against the plaintiff and to

³ *Farm Transparency International Ltd v The Game Meats Co of Australia Pty Ltd* [2025] HCASL 293.

⁴ *The Game Meats Co of Australia Pty Ltd v Farm Transparency International Ltd* (2024) 186 IPR 261, 265 [6]–[7] (Snaden J) ('*Game Meats Trial*').

⁵ *Ibid* 265 [9].

⁶ *Ibid* 265 [10]–[11].

⁷ *Ibid* 291 [152].

⁸ (2001) 208 CLR 199 ('*Lenah*').

broadcast the film'.⁹ Gummow and Hayne JJ concluded that those circumstances would occasion orders declaring the existence of the trust and requiring the assignment of the copyright to the plaintiff.¹⁰

While Snaden J ordered FTI to pay damages of \$130,000 for the trespass (\$30,000 in general damages and \$100,000 in exemplary damages),¹¹ his Honour rejected the constructive trust argument. Justice Snaden was sympathetic to the view that equity should intervene in circumstances where 'the footage was the prize that FTI obtained as the intended result of the trespasses that were committed in its name [and] ... were committed so that FTI could obtain footage that it could, at its discretion, later use against GMC'.¹²

Nevertheless, Snaden J declined to apply the approach suggested by Gummow and Hayne JJ in *Lenah*. His Honour considered that the facts here were similar enough to *Windridge Farm Pty Ltd v Grassi* ('*Windridge*'),¹³ where Hall J of the Supreme Court of New South Wales rejected an argument for recognising a constructive trust over copyright in footage and images that the defendants had surreptitiously obtained by trespassing onto the premises of a piggery. In both cases, the wrongdoer 'intentionally infringed upon the plaintiff's rights with a view to obtaining information that they otherwise would not have been able to obtain; and did so intending that it should be used to the plaintiff's prejudice'.¹⁴

Justice Snaden also considered that there were factual similarities with *Smethurst v Commissioner of Police* ('*Smethurst*'),¹⁵ in which the High Court considered the seizure of property belonging to the journalist Annika Smethurst. In that case, 'the trespass ... was also deliberately (though not knowingly) committed with the intention of obtaining information for later use against ... its victim'.¹⁶ Yet, a constructive trust was only discussed tangentially and not applied.¹⁷

Justice Snaden suggested that the lack of any clear distinguishing facts in *Game Meats* should make the court 'slow to favour a result that deviates from what transpired in those cases'.¹⁸ Further, Snaden J gave weight to what he considered a lack of precedent for recognising a constructive trust over copyright, which, in his Honour's view, warranted 'caution' when a court is faced with the choice of 'recognis[ing] such circumstances for the first time'.¹⁹ The fact that Snaden J was dealing with the matter at first instance made his Honour more willing to 'leave

⁹ Ibid 246–7 [102].

¹⁰ Ibid.

¹¹ *Game Meats Trial* (n 4) 311 [264].

¹² Ibid 296 [176].

¹³ (2011) 254 FLR 87 ('*Windridge*').

¹⁴ *Game Meats Trial* (n 4) 297 [179].

¹⁵ (2020) 272 CLR 177 ('*Smethurst*').

¹⁶ *Game Meats Trial* (n 4) 297 [180].

¹⁷ See *Smethurst* (n 15) 216 [84] (Kiefel CJ, Bell and Keane JJ).

¹⁸ *Game Meats Trial* (n 4) 297 [180].

¹⁹ Ibid 297 [181].

[the matter] for higher consideration'.²⁰ As such, while FTI was liable to pay damages to GMC, no order was made as to the copyright in the footage.

III (OVER?) CONFIDENT APPLICATION: GAME MEATS IN THE FULL COURT

On appeal, the Full Federal Court found that a constructive trust over the copyright in the footage *did* exist and made the orders sought by GMC: a permanent injunction restraining FTI from publishing the footage, an order that FTI delete all footage of GMC's business, a mandatory assignment of the copyright in that footage to GMC, and damages of \$130,000.²¹ Justice Jackman (writing the main judgment, with which Burley J agreed) based his reasoning on (a) the fact that it was open to courts to find a constructive trust in copyright by reasoning from cases involving other types of property, and (b) Snaden J's undue hesitation in applying a clear principle proffered by the High Court in *Lenah* in very similar circumstances.

A Justifying the Possibility of a Constructive Trust in Copyright

Justice Jackman considered that there were multiple lines of authority that could be used to justify the application of a constructive trust in a situation like this, where the parties had no pre-existing fiduciary relationship. The first was the application of constructive trusts to property acquired by way of theft or fraud.²² His Honour considered that FTI's behaviour was similar to fraud in that FTI 'engaged in a surreptitious intrusion onto and within GMC's property to gain an advantage which was not lawfully available to it, and to cause detriment to GMC'.²³ Ultimately, 'the ends do ... not justify the means', however 'noble' the cause.²⁴

The second was the application of constructive trusts to payments made to one party by another by mistake, the trust arising 'once the recipient knows of the mistake'.²⁵ Justice Jackman regarded this as 'a weaker case for constructive trust than the circumstances of the present case' given the passivity of the recipient of mistaken funds²⁶ — the implication being that if a constructive trust is applied in the mistaken payment case, it follows *a fortiori* that one should also be imposed in the present case.

²⁰ Ibid.

²¹ Interest was awarded on the \$30,000 component of the damages award that constituted compensatory damages: see *Game Meats Full Court* (n 2) [52] (Jackman J).

²² Ibid 278 [17].

²³ Ibid 278 [18].

²⁴ Ibid.

²⁵ Ibid 278–9 [19].

²⁶ Ibid 279 [20].

These two lines of enquiry dealt with *pre-existing* property held by the plaintiff, rather than property *created* by the defendant.²⁷ A cinematograph film is a work in respect of which copyright subsists, and subsists in the maker in the first instance, whatever the circumstances of its creation (save for limited exceptions for works made in the course of employment or subject to a commission).²⁸ In making the film, FTI therefore created new rights of which it became the owner.

Nevertheless, Jackman J considered that the lack of pre-existing property was no barrier to the application of a constructive trust. His Honour referred to *Pallant v Morgan*²⁹ and later cases discussing it, including *Banner Homes v Luff*³⁰ and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* ('*John Alexander's Clubs*').³¹ In *Pallant v Morgan*, a pre-auction agreement between two potential bidders as to how ownership of the property would be distributed if one party won was held to give rise to a constructive trust despite not being contractually binding at law, even though at the time of the agreement, neither party had a pre-existing interest in the property in question.

The FTI-GMC situation was 'fundamentally different' given that FTI did not voluntarily create 'an expectation ... that it would confer a benefit' on GMC by its conduct, namely the copyright in the footage in question.³² Justice Jackman used this line of cases, however, to illustrate that the lack of a pre-existing fiduciary relationship or proprietary interest — neither of which was present in *Game Meats* — is no barrier to the application of a constructive trust. Further, Jackman J noted that the moral quality of FTI's behaviour in securing the footage was analogous to that of a thief or fraudster, in respect of whom courts have traditionally imposed a constructive trust so that they do not profit from their misbehaviour.³³

B Why the Full Court Imposed a Constructive Trust over Copyright

A constructive trust being potentially available in these circumstances, then, Jackman J considered Snaden J's reasoning for refusing to recognise one. Jackman J was critical of Snaden J's reliance on a lack of precedential authority for his decision not to impose a constructive trust over copyright. There was no reason for a primary judge to be reticent about applying this remedy. In *Lenah*, Gaudron J and Callinan J both agreed with Gummow and Hayne JJ on this point, and in doing so 'were not expressing merely theoretical possibilities but a realistic outcome in an appropriate

²⁷ Ibid 279 [21].

²⁸ *Copyright Act 1968* (Cth) s 98.

²⁹ [1953] Ch 43.

³⁰ [2000] Ch 372.

³¹ (2010) 241 CLR 1 ('*John Alexander's Clubs*').

³² *Game Meats Full Court* (n 2) 280–1 [28].

³³ Ibid. See further at 284 [41] for a dismissal of other arguments by FTI, which are less relevant to this paper.

case'.³⁴ Justice Jackman considered that the situation in *Game Meats* was one of the clearest examples of the potential application of this rule.³⁵

Justice Horan also considered that a constructive trust should apply, noting that the copyright 'was created in circumstances involving an invasion of the legal or equitable rights of [GMC], including [GMC's] right to exclusive possession of its premises', making it 'inequitable and against good conscience for FTI to assert ownership of the copyright against GMC'.³⁶

IV UNRESOLVED TENSIONS BETWEEN COPYRIGHT LAW AND EQUITY WHEN RECOGNISING CONSTRUCTIVE TRUSTS

The readiness with which Jackman J and Horan J recognised a constructive trust over the copyright in the footage in favour of GMC can be challenged. Their Honours proceeded on the basis that a constructive trust was available in circumstances like the present under the majority's reasoning in *Lenah*, and because there was a documented, unauthorised invasion of GMC's proprietary rights by way of trespass, the constructive trust automatically meets those criteria.

Their Honours' reasoning raises four issues which suggest that courts should be cautious about whether to recognise a constructive trust over copyright: (a) the questionable nature of the *Lenah* 'precedent'; (b) the specific features and aims of copyright arising from its statutory framework; (c) the availability of other remedies; and (d) the difficulties in application caused by copyright's moral rights regime.

A The Questionable Nature of the Lenah 'Precedent'

Justice Jackman dismissed Snaden J's hesitation about the precedential value of Gummow and Hayne JJ's statements in *Lenah* because *Lenah* 'recognised the principled nature of the constructive trust over copyright which is sought in the present case'.³⁷ This statement is questionable. While other recent Federal Court authority also appears to have acknowledged this avenue as a valid remedial pathway,³⁸ the High Court in *Smethurst* appeared to consider that Gummow and Hayne JJ were suggesting it as a *possibility* only: '[t]heir Honours considered that a basis in principle *might* be found in the imposition of a constructive trust'.³⁹ Academic commentary also suggests that Gummow and Hayne JJ's statements in

³⁴ Ibid 283 [37].

³⁵ Ibid.

³⁶ Ibid 287 [54].

³⁷ Ibid 282–3 [35]–[36].

³⁸ *Watson Webb Pty Ltd v Comino* [2025] FCA 871, [423] (Halley J).

³⁹ *Smethurst* (n 15) 216 [84] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

Lenah should be regarded as obiter and tentative, rather than authoritative statements of law.⁴⁰

At best, then, it was potentially *open* for a constructive trust over copyright to be recognised in *Game Meats*. However, Jackman J appears to have unduly rushed from that point to the conclusion that it *must* be applied if the facts were similar to *Lenah*.

B Copyright's Distinct Features and Aims

However, even assuming *Lenah* is binding authority for the application of a constructive trust over copyright, neither the purported moral equivalence between FTI's behaviour and theft/fraud, nor the factual similarities between *Lenah* and *Game Meats* necessarily justify the imposition of a constructive trust over copyright. Gummow and Hayne JJ's reasoning suggests a constructive trust may be imposed where it would be 'inequitable and against good conscience' to allow copyright to be asserted. It is not clear whether this is intended to be a separate element after an 'invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff' are made out, or that this would be automatically shown *if* such an invasion/breach was made out.⁴¹ However, given Jackman J considered that it is a threshold test,⁴² the rest of the analysis proceeds on that basis.

How then should a court determine whether this test is met? *Game Meats* and prior cases dealing with the constructive trust–copyright angle tend to emphasise inequity and unconscionability in relation to the *behaviour of the alleged wrongdoer*. Whether the facts in *Lenah* would have met these criteria and therefore given rise to a constructive trust over copyright in the abattoir footage was not pleaded and therefore not decided. In *Windridge*, Hall J, expanding on Gummow and Hayne JJ's comments, indicated that the circumstances supporting a constructive trust would 'include matters which constitute either an invasion of

⁴⁰ Jani McCutcheon and Jordan Leahy, 'Illegal Copyright Works and the Remedial Discretion of the Court' (2019) 9(3) *Queen Mary Journal of Intellectual Property* 326, 340 ('Illegal Works and Remedial Discretion'); Jordan Leahy and Jani McCutcheon, 'Do Wrongs Make a (Copy)right? Illegal Works and Copyright Subsistence under Australian Law' (2019) 30(2) *Australian Intellectual Property Journal* 78, 87 ('Illegal Works and Copyright Subsistence'); William M Heath, 'Possum Processing, Picture Pilfering, Publication and Privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*' (2002) 28(1) *Monash University Law Review* 162, 175 n 88; Daniel Stewart, 'Protecting Privacy, Property, and Possums: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*' (2002) 30(1) *Federal Law Review* 177, 198.

⁴¹ By analogy consider how the High Court considers the description of 'unconscionable' as one that refers to the overall result, rather than as a separate element: see eg, *Kramer v Stone* (2024) 281 CLR 484, 503 [41] (Gageler CJ, Gordon, Edelman and Beech–Jones JJ).

⁴² *Game Meats Full Court* (n 2) 276 [10]: '[T]he passage [in *Lenah*] indicates that there is no objection in legal principle to the imposition of a constructive trust over the relevant copyright which was created by means of unlawful conduct if the circumstances show that it is inequitable and against good conscience for the maker of the film to assert the copyright conferred by statute.'

the legal or equitable rights (such as the right to confidentiality) of the owner or occupier of premises or facts that establish a breach of any equitable obligation operating between [the parties] ... at the time the film and the photographs were made or taken'.⁴³ In *Game Meats*, Jackman J considered that FTI's behaviour was analogous to theft/fraud, and to a lesser extent, the receipt of a mistaken payment, to be sufficient to ground the application of a constructive trust.

The thread running through all of these cases is ultimately whether the legal owner of the copyright (here, FTI) should 'in good conscience retain the beneficial interest',⁴⁴ by reference to the other party's behaviour. Yet such a broad-brush approach neglects a *copyright-oriented* approach taking into account its distinct features as a type of property. Copyright is personal property; it is, however, a creature of statute.⁴⁵ The scope and extent of proprietary protection is governed by the *Copyright Act 1968* (Cth) ('*Copyright Act*'), and that protection has several distinct features.

For example, unlike other personal and real property, copyright is necessarily limited in duration. Rights are granted over original literary, dramatic and musical works for 70 years following the author's death,⁴⁶ while, for films and sound recordings, the period is 70 years after making or publication.⁴⁷ Copyright will not subsist unless the work is 'reduced to writing or to some other material form'.⁴⁸ Copyright is *limited*: outside what is specified (eg the right to make a copy of the film, to publish the film or communicate it to the public) the author has no enforceable rights.⁴⁹ Copyright is also fundamentally a right to *prevent* others from exercising certain statutory rights.⁵⁰ Last, copyright is subject to numerous exceptions which allow others to behave in ways that would otherwise infringe copyright — for example, by fairly using material for criticism or review, or for parody and satire.⁵¹ These distinctions are material when compared to the ownership of other real or personal property, in respect of which the owner often has far broader rights which can be enforced in perpetuity.

Accordingly, it is not coherent to adopt a broad-brush approach to what is inequitable or against good conscience when it comes to the application of constructive trusts to copyright. What may have been inequitable in the case of

⁴³ *Windridge* (n 13) 104–5 [129] (Hall J); *Lenah* (n 8) [102].

⁴⁴ *Beatty v Guggenheim Exploration Co*, 122 NE 378, 380 (NY, 1919) (Cardozo CJ), quoted in RP Meagher and WMC Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 6th ed, 1997) 306 [1301], in turn quoted in *Lenah* (n 8) 315 [297] (Callinan J).

⁴⁵ *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154, 158–9 (Barwick CJ).

⁴⁶ *Copyright Act 1968* (Cth) s 33.

⁴⁷ *Ibid* s 93.

⁴⁸ *Ibid* s 22(1).

⁴⁹ *Ibid* s 87.

⁵⁰ Cathay YN Smith, 'Weaponizing Copyright' (2021) 35(1) *Harvard Journal of Law and Technology* 193, 228.

⁵¹ *Copyright Act 1968* (Cth) ss 103A–AA.

the theft of money (which, save for illegal purposes, has very few restrictions on what the owner can use it for) should not *automatically* be regarded as inequitable or against good conscience so as to automatically justify the imposition of a constructive trust over *copyright*, as Jackman J and Horan J appeared so ready to do in *Game Meats*.

Further, even if the behaviour may *in isolation* be considered inequitable or against good conscience, that alone should not *mandate* the imposition of a constructive trust over copyright, influential though it may be in the determination. The fact that copyright is a creature of statute — and therefore a manifestation of parliamentary intention — means the question should be whether the behaviour *so justifies the effective removal of copyright protections specifically*.⁵² That determination should take into account the aims of copyright law in granting that limited bundle of property rights.

The High Court has acknowledged that copyright law has at least two public policy goals: ‘encouraging creativity and ... permitting certain uses on some reasonable basis’.⁵³ Justice Kirby has also noted that

[c]opyright law aims to promote innovation and creativity by protecting new works, according temporary exclusive rights in respect of them, particularly against deliberate uncompensated invasions for the profit of strangers, who have made no arrangement for compensation to the copyright owner, but instead seek financial gain of their own from facilitating deliberate copying of the original works of others.⁵⁴

In light of copyright’s goals, then, whether to apply a constructive trust over copyright is about whether the behaviour occasioning the creation of that work is inequitable or against good conscience in a way that justifies overriding the goals of promoting creativity or permitting uses of copyright-protected works on a reasonable basis.

It is arguable that in most cases, this calculation will lead to a conclusion that a constructive trust should not be imposed. This is because a constructive trust interferes with copyright ownership in a way Parliament arguably never intended. Under the *Copyright Act*, copyright subsists in works, and authorship and ownership are attributed, with no regard for ethical considerations. This reflects an implicit recognition that the *substance* of creative works is regulated in other areas of law (consumer protection, human rights law, constitutional law), but that such regulation does not affect whether and in whom copyright subsists. The market may also contribute to regulation by refusing to publish material that offends public sensibilities. But none of those areas of regulation interfere with the *ownership* of the copyright in the way that the Full Federal Court did via the constructive trust doctrine in *Game Meats*: namely, to introduce a normative ‘qualifier’ between the

⁵² McCutcheon and Leahy, ‘Illegal Works and Remedial Discretion’ (n 40) 339.

⁵³ *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, 296–7 [48] (The Court).

⁵⁴ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 250 [199] (Kirby J).

creation of a work and the contemporaneous attribution of ownership in that work based on an ethical assessment of how that work was created.

Consider a book glorifying racial discrimination, for example. Content in the book may well contravene laws regulating hate speech and defamation. It may so offend public sensibilities as to be quickly removed from shelves upon public outrage. Those outcomes are reasonable. Yet what is not generally considered is removing the author's copyright or ordering the author to assign it as in *Game Meats*. Ultimately, the author will retain the bundle of rights provided under copyright law, assuming the requirements for copyright to subsist are satisfied (the work is original, it is fixed in a material form, etc).⁵⁵ The author is then entitled to enforce those rights if, for example, the book is adapted or reproduced without authorisation. Further, they are entitled to license or sell those rights, subject to court orders directing the proceeds of works created to exploit their criminal behaviour.⁵⁶ While they may incur penalties under other areas of the law (eg fines under criminal law) for their behaviour, copyright law imposes no normative qualifications for the enforcement of their rights. As McCutcheon and Leahy note in relation to copyright in what they define as 'illegal' works:

[D]enying [works that are illegal by content or process] copyright subsistence would be problematic. It would invariably be based on subjective decisions dependent on the decision-maker's personal values concerning illegality, and thus the copyright status of many works would be inherently uncertain. It would also require continuous alteration to copyright statutes to specify exclude[d] works and capture changing social attitudes.⁵⁷

In the same way, opening the constructive trust door in the copyright context risks allowing parties to whom creators owe no contractual or fiduciary obligations to restrain the expression of creativity in ways that the *Copyright Act* is not intended to support. The application of constructive trusts over copyright may also have a chilling effect on creativity, particularly in a society where there is at least theoretical freedom to challenge norms, institutions, corporations and other large organisations through art. Copyright is a property right given to incentivise the production of creative works for the public good. Allowing corporations to effectively lock away works due to purported 'inequitable' behaviour leading to the creation of those works patently undermines this aim. It also has an impact on the broader public by reducing access to creative works for consumption, innovation and the development of knowledge and culture.

Further, imposing a constructive trust over copyright arguably contravenes the principle, articulated by a unanimous five-Justice bench of the High Court in *John Alexander's Clubs*, that 'a constructive trust [should not] ... be declared in a

⁵⁵ McCutcheon and Leahy, 'Illegal Works and Remedial Discretion' (n 40) 330.

⁵⁶ *Proceeds of Crime Act 2002* (Cth) ss 152–79.

⁵⁷ McCutcheon and Leahy, 'Illegal Works and Remedial Discretion' (n 40) 331 (citations omitted). See also Leahy and McCutcheon, 'Illegal Works and Copyright Subsistence' (n 40) 89–91.

manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant'.⁵⁸ There is a strong argument that the public would be deprived of access to knowledge and culture in this instance given GMC's interest in suppressing the footage and FTI's corresponding interest in publishing it. Accordingly, it is at least arguable that the trust mooted would be 'injurious' to third parties, even excluding the public interest considerations arising from the subject matter at hand.⁵⁹

None of the above suggests that a constructive trust should *never* be imposed over copyright. However, it does suggest that when situations arise in which that option is mooted, a copyright-centred approach should be taken. In light of copyright's features and aims, it is likely that in many cases a constructive trust will not be justified.

C The Availability of Other Remedies

The nature and aims of copyright may well be of less relevance if a constructive trust over copyright was the only effective remedy against plainly tortious, and in some cases, criminal behaviour leading to the creation of works like the footage in *Game Meats*. Yet other remedies are clearly available to GMC; the sufficiency of those other remedies is a relevant factor in determining whether to recognise a constructive trust. As Liew notes, the High Court has 'repeatedly ... said that the constructive trust is to be imposed only as a last resort, that is, after other "lesser" — personal — remedies have been considered and found to be wanting in a particular case'.⁶⁰ Justices Jackman and Horan were noticeably less reticent than Snaden J to apply the remedial constructive trust, but did not appear to consider other remedies *not* arising from the constructive trust that could potentially have addressed any perceived loss suffered by GMC.

For instance, surreptitiously placing cameras in a private enterprise to collect footage without authorisation, with the knowledge and/or intention that the release of that footage would harm the business, would potentially have justified findings of trespass and breach of confidence, though the latter would require showing the information was 'private'.⁶¹ Injunctions against publication of media

⁵⁸ *John Alexander's Clubs* (n 31) 46 [129] (The Court).

⁵⁹ For more on the argument for a public interest defence, see eg, Michael Handler, 'Reconsidering the Need for Defences to Permit Disclosures of Confidential Copyright Material on Public Interest Grounds' (2018) 12(2) *Journal of Equity* 195, 211.

⁶⁰ Ying Khai Liew, *Rationalising Constructive Trusts* (Bloomsbury, 2017) 245 [11.2.2.2.1]. But see Ying Khai Liew, 'Constructive Trusts and Discretion in Australia: Taking Stock' (2021) 44(3) *Melbourne University Law Review* 963.

⁶¹ *Lenah* (n 8) 221 [25]–[26], 225–30 [39]–[52] (Gleeson CJ).

in the context of breach of confidence can achieve much the same effect.⁶² Damages may also be adequate. As mentioned, the Full Court in *Game Meats* upheld an award of \$130,000, including an exemplary damages award of \$100,000, to reflect the brazen, flagrant nature of the trespass. The new statutory tort of privacy provides another potential cause of action to vindicate individuals who may or will suffer loss due to the exposure of private information.⁶³ The availability of remedies like these designed to achieve similar, or identical impacts as a constructive trust (as a remedy for illegitimately procured footage) suggests that Snaden J's cautious approach to recognising such a trust over copyright is justified.

D *The Challenge of Moral Rights*

Lastly, if a court still considers that a constructive trust should be recognised over copyright (taking all the issues above into account), it must deal with the ramifications of such an order posed by Australia's moral rights regime. The moral rights provisions in the *Copyright Act* suggest that constructive trusts over copyright are, at best, an inelegant tool against inequitable behaviour.

In addition to the 'economic rights' mentioned above, the *Copyright Act* also gives individuals⁶⁴ moral rights in works they create. In Australia, these are: (a) the right to be attributed as the author; (b) the right against false attribution of someone else as the author; and (c) the right for their work not to be treated in a derogatory fashion.⁶⁵ For films, moral rights are provided to the director and screenwriter rather than any company they are employed by.⁶⁶ Moral rights are designed to reflect the link between the work and the personality of the author rather than to provide any economic benefit. As such, they cannot be assigned at law, with the only agreement permitted by the *Copyright Act* being an agreement between co-authors not to exercise the right against derogatory treatment in respect of a film or an underlying original work without the agreement of all authors.⁶⁷ Thus, even if FTI complied with the Full Court's orders, the director or screenwriter would retain their moral rights for the duration of copyright in the footage.

Accordingly, recognising a constructive trust over copyright (as a precursor to a mandatory assignment) could unreasonably fragment the protection of copyright in works like the footage at issue. GMC would own the economic rights,

⁶² See, eg, *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15; Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41(2) *University of New South Wales Law Journal* 490. See also *Smethurst* (n 15) 239 [150] as to the potential for injunctive relief in the case of unlawful seizure of intangible property to encompass the delivery up or destruction of copies.

⁶³ *Privacy Act 1988* (Cth) sch 2 s 7.

⁶⁴ *Copyright Act 1968* (Cth) s 190.

⁶⁵ *Ibid* ss 189–195AZR.

⁶⁶ *Ibid* s 191(3).

⁶⁷ *Ibid* s 195AN(3)–(4).

but the director/screenwriter, or any other person to whom the *Copyright Act* applies authorship under the moral rights regime, would still have enforceable moral rights over that footage. Of course, this would be the same for anyone who assigned or licensed their economic rights, which is likely to be most creators seeking to disseminate or monetise their works. However, such situations, at least initially, involve a general coalescence between the economic and moral rights regimes; that is, the publisher or other exploiter disseminates the work in keeping with the moral rights (eg publishing the book with the author's name) so that both parties can benefit from that dissemination. In *Game Meats*, however, there was a fundamental conflict between what the holder of the economic rights via constructive trust wanted to do (suppress the work) and what the holder of the moral rights wanted to do (publish the work).

This conflict could lead to an unplanned outcome where GMC becomes liable for a moral rights infringement by virtue of non-publication (even though that is the point of seeking a constructive trust declaration). The claim would be that keeping that footage hidden constitutes 'doing' something that is 'prejudicial to [FTI's] ... honour or reputation'.⁶⁸ 'Doing' is 'an open and inclusive provision that does not appear to have any restrictions'.⁶⁹ Meanwhile, 'honour' imports both subjective and objective considerations.⁷⁰ The Federal Court suggests that the use of a musician's work 'without permission to promote political values which they find repellent' could impinge on their honour.⁷¹

In the same vein, it remains possible that suppressing footage which the public knows exists could be deemed to prejudice the honour of the filmmaker, particularly if there is widespread public support for the relevant cause (in this case, drawing attention to alleged animal cruelty in meat production facilities) and the author has been required by the court to delete all other copies of the work. This is of course an open question on which reasonable minds may disagree. The point, however, is that the *Copyright Act* and case law are ambiguous enough to leave the scope of the moral rights regime unclear on potential claims like this.

A court could seek to overcome the disjuncture between a constructive trust over copyright and moral rights by ordering an author to 'consent' to derogatory treatment as a way of pre-empting interference with the property.⁷² However, the fact the moral rights framework exists to protect authors suggests that it will be a rare situation where the court could justify forcing them to effectively waive these rights.

In any case, the presence of the moral rights issue highlights the unintended consequences that can arise from recognising a constructive trust over copyright in particular, given its particularities and statutory regime —

⁶⁸ Ibid s 195AL.

⁶⁹ Rita Matulionyte, 'Can AI Infringe Moral Rights of Authors and Should We Do Anything About It? An Australian Perspective' (2023) 15(1) *Law, Innovation and Technology* 124, 134.

⁷⁰ *Boomerang Investments Pty Ltd v Padgett* (2020) 383 ALR 202, 286 [401] (Perram J).

⁷¹ Ibid 287 [403].

⁷² *Copyright Act 1968* (Cth) ss 195AW, 195AWA.

consequences that arguably do not affect other types of real or personal property to anywhere near the same degree. This is not to say a constructive trust over copyright will never be an appropriate remedy. However, courts should consider the practical implications of such an order, including the impact of the moral rights regime on its purported efficacy.

V CONCLUSION

Game Meats raises an important question: should a constructive trust over copyright be available as a remedy for tortious or criminal behaviour that leads to the creation of original literary, dramatic, musical or artistic works? At first instance, Snaden J was noticeably hesitant to take such a step, while the Full Court took the opposite approach. Jackman J suggested that it was only logical to recognise such a trust because, in *Lenah*, four justices of the High Court had already set out, or agreed with, the principles for doing so, and the cases had critical factual similarities.

This article suggests that Jackman J's reasoning should be scrutinised for a number of reasons. Justices Gummow and Hayne's suggestion in *Lenah* that a constructive trust might be available over copyright remains just that; it does not *mandate* the application of a constructive trust, even in factually similar circumstances. Copyright has distinct features as a creature of statute with particular aims, which arguably conflict with the application of a constructive trust in most cases. Of course, a constructive trust may be applicable if it is the only viable remedy, but that is far from certain given the availability of other remedies (eg injunctions and damages). And even if a constructive trust is issued, the presence of statutory moral rights may impact its efficacy.

Nothing in the analysis above precludes courts from applying Gummow and Hayne JJ's reasoning in *Lenah* and finding a constructive trust exists over copyright due to the author's behaviour. There may well be situations in which such a remedy is justified. However, this article highlights the importance of adopting a posture of justified hesitation when considering whether to recognise a constructive trust over copyright, ultimately grounded in an understanding of what copyright is, how it is intended to be used, and what impacts it is intended to have on authors, publishers, and the public at large. Proceeding with such hesitation is likelier to preserve the utility of constructive trusts as a remedy on the one hand, and the role of copyright in encouraging creativity for public benefit on the other.