The Beautiful Restitutionary Heresy of a Larrikin

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Abstract

In *Larrikin Music Publishing v EMI Songs Australia (No 2)* (2010) 188 FCR 321, Jacobson J made an award of damages relating to copyright infringement under s 82 of the *Trade Practices Act 1974* (Cth). The liability was on the basis of the defendants' false and misleading conduct in claiming from third parties all of certain music copyright distributions. The damages award was calculated in terms of a notional royalty, determined by a hypothetical bargain between plaintiff and defendant on how those distributions should have been shared. Some restitution scholarship treats the distinction between harm-based (compensatory) awards and gain-based (restitutionary) awards as fundamental. The notional royalty award in *Larrikin* is considered by that scholarship to be a paradigm gain-based award. However damages under s 82 are strictly compensatory. This suggests either that: (i) the *Larrikin* award was a form of heresy, being gain-based relief granted under a harm-based provision; or (ii) the restitution scholarship that characterises notional royalty awards as being strictly gain-based is flawed. This article defends the award in *Larrikin* and argues that a notional copyright royalty award (or indeed any usage price award for a property right infringement) represents combined gain-based and harm-based elements.

Introduction

In 2010, an award of damages was made in litigation that received much publicity in Australia for reasons not entirely related to legal doctrine. The litigation *Larrikin Music Publishing v EMI Songs Australia and others* ('*Larrikin v EMI*') concerns an allegation of copyright infringement involving two iconic Australian musical works.[1] One is 'Kookaburra sits in the old gum tree' ('Kookaburra'), owned by the plaintiff. The other is 'Down Under', created and owned by the defendants, and alleged to comprise infringement of the plaintiff's copyright in 'Kookaburra'. However rather than the central contentions of this article being about the finding of copyright infringement—a finding that was

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1 The litigation at trial—which comprises three separate hearings—is reported at: *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169 ('*Larrikin Ownership*'); *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2010) 263 ALR 155 ('*Larrikin Liability*'); *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (No 2)* (2010) 188 FCR 321 ('*Larrikin Quantum*').

upheld on appeal[2]—they are about the award of compensatory damages which was made under trade practices law. The core argument of this article will be to examine the premise of the damages award in view of James Edelman's characterisation of notional usage price awards as non-compensatory and wholly gain-based.[3] It is hoped that the award in *Larrikin v EMI*—effectively a notional copyright usage price awarded as compensatory trade practices damages—will be seen to provide an excellent vehicle through which to consider the correctness of the award and Edelman's thesis.

The section that immediately follows will map out the litigious setting of the award in *Larrikin v EMI*. That award will then be situated within the two bodies of law that support it: the general law approach that justifies usage price awards for the violation of property rights; and Australian law relating to a type of compensatory trade practices damages. From this, the jurisprudential question of whether the award made in *Larrikin v EMI* should be regarded as compensatory will be explored and conclusions arrived at regarding the correctness of the award and Edelman's thesis.

II The *Larrikin v EMI* Damages Award

The cause of action established in *Larrikin v EMI* was for damages under s 82 of the *Trade Practices Act 1974* (Cth) ('TPA') for loss caused by contravention of s 52 of the TPA.[4] Section 52 proscribes misleading or deceptive conduct. Section 82 confers jurisdiction upon courts to compensate for loss caused by such conduct. The *Larrikin v EMI* award was complicated by the fact that a finding of misleading conduct required a finding of prior copyright infringement having been committed by the very same defendants. It is useful in setting out the context of the dispute to describe the way in which music copyright is collectively administered in Australia, and then how Larrikin and the defendants were placed within that setting.

Given the finding that the musical work 'Down Under' comprised infringement, infringing activity commenced in the early 1980s. Larrikin commenced its action in 2008.[5] Because a six year limitation period applies, damages could only be claimed from the period 2002 to 2008.[6] In that period it seems that the primary commercial exploitation in Australia of 'Down Under' occurred through licences administered by the conjoined music collecting societies APRA|AMCOS. APRA is the Australasian Performing Right Association and AMCOS is the Australasian Mechanical Copyright Owners Association.

2 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47 (31 March 2011) ('*Larrikin Appeal*').

3 James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 99–102 and 224.

4 *Trade Practices Act 1974* (Cth) ss 52 and 82 have since been replaced by analogues in the *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 18, 236. Authorisation liability in copyright law was also pleaded, and issues relating to that liability remain before the courts: *Larrikin Appeal* [2011] FCAFC 47, [238]–[250].

5 The infringement was publicly exposed by a television music quiz program—*Spicks and Specks*—broadcast in 2007: *Larrikin Liability* (2010) 263 ALR 155, 178 [203].

6 *Trade Practices Act 1974* (Cth) s 82(2).

APRA|AMCOS are two separate bodies that since 1997 have shared facilities, are jointly managed and are known by the composite moniker; they both are an important part of the Australian music industry. Each administers different types of licences on behalf of music rights holder members, who are most commonly composers, lyricists and their publishers.[7] APRA operates by taking an assignment of certain of the exclusive rights conferred upon the owner of copyright.[8] These rights include 'performance in public' and 'communication to the public'. In relation to those rights, APRA collects royalties (from dance clubs and broadcasters, for example) and distributes the royalties to the assignor/member. AMCOS licenses (in the shadow of a statutory licence)[9] the making of 'mechanical copies'—sound recordings—of published musical works, and similar to APRA, distributes royalties back to the relevant members responsible for the works.

In order for a member to receive a distribution from APRA|AMCOS of their collected royalties, that member must first warrant that they are entitled to those royalties by having (or having had) an entitlement in the relevant copyright. The defendants warranted to APRA|AMCOS that they held a complete entitlement to the relevant copyright in the 'Down Under' musical work, and consequently received all of the associated APRA|AMCOS distributed royalties.[10] The litigation primarily concerned whether 'Down Under' comprised an infringement of 'Kookaburra', which (as has been stated) is not the focus of this article. However that infringement, while closely linked to the cause of action established, was not the cause of action supporting the damages award. Rather it was, as mentioned above, an action for damages under s 82 of the TPA and during the hearing a consent order was made which linked the issues. The order provided that: (i) if a copyright infringement was found, then (ii) the complete entitlement warranties made by the defendant to APRA|AMCOS 'were misleading or deceptive' and therefore contrary to s 52, and, (iii) that Larrikin 'has suffered loss and damage'.[11] As will be discussed below, the issue of loss underlying the third part of the consent order is a critical aspect of the cause of action for damages under s 82 of the TPA.

The trial was split into three hearings. The first was to determine whether Larrikin had good title to the copyright in the musical work 'Kookaburra', which it was found to have.[12] The second determined whether the musical work 'Down Under' comprised a copyright infringement of 'Kookaburra'; controversially it was

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7 The distinction between the repertoire handled by APRA and AMCOS has been explained by the Australian Copyright Tribunal in the context of confirming a licensing scheme for digital downloads: *Australasian Performing Right Association Ltd v Australasian Mechanical Copyright Owners Society Ltd* (2009) 84 IPR 402.

8 A general description of APRA's operations has been given by the Australian Competition Tribunal in the context of an authorisation of APRA's activities for competition law: *Re Australasian Performing Right Association Ltd* (1999) 151 FLR 1.

9 *Copyright Act 1968* (Cth) pt 3 div 6; Luca Costanzo, 'Licensing the Manufacture of Records: the Current Statutory Licence and the Alternative of Collective Administration' (2009) 20 *Australian Intellectual Property Journal* 13.

10 *Larrikin Liability* (2010) 263 ALR 155, 182–3 [259]–[266].

11 Ibid [263]–[264]

12 *Larrikin Ownership* (2009) 179 FCR 169, 185–6 [170]–[172]

found to be an infringement.[13] The second hearing also determined the existence of liability under s 82 of the TPA; in particular, whether the 'complete entitlement' warranties had in fact been made by all the defendants to APRA|AMCOS, and whether those warranties—necessarily misleading in view of the infringement finding and consent order—caused Larrikin loss. The warranties were found to have been made by the defendants and to have caused Larrikin loss.[14] That loss was then assessed at the third hearing to be five per cent of the APRA|AMCOS royalty distributions made to the defendants in the 2002–8 period.[15] In this setting, a premise was accepted by the parties and therefore the court—the crux of this article—that the five per cent comprised loss and that a counterfactual bargain could be used to effect its quantification.

III The Counterfactual Bargain

To remedy in damages proprietary torts and intellectual property infringements, courts have long deployed a notional price that the defendant should have paid to the plaintiff for the exercise of the exclusive right trespassed or infringed upon. That price is referred to in this article as a 'usage price'. This can be seen in the early coal-taking cases by the award of notional rent for 'way leave'—a right of way under, across or over land. Quantification of notional way leave rent damages was explained in the 1896 case of *Whitwham v Westminster Brymbo Coal and Coke Company* on the following basis:

> [A] customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages; but the principle is that in some way or other, if you can do nothing better than by rule of thumb, the trespasser must be charged for the use of the land.[16]

Earlier still, the principle had been applied in English law for intellectual property infringement. In *Penn v Jack*, an 1867 decision, Page Wood V-C observed that to quantify damages in a patent infringement action, an appropriate methodology was to ask: 'What would have been the condition of the Plaintiff if the Defendants had acted properly, instead of acting improperly. That condition, if it can be ascertained, will, I apprehend, be the proper measure.'[17] The infringed patent related to an improvement to ship propellers. To have acted properly would have been to have bargained for the right to exploit the patent property, and to have paid the going rate of 2s 6d per horse power for each ship built incorporating the invention. That amount comprised the 'usage price damages'.[18]

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13 *Larrikin Liability* (2010) 263 ALR 155, 179–80 [218]–[229], upheld on appeal: *Larrikin Appeal* [2011] FCAFC 47 (31 March 2011).

14 *Larrikin Liability* (2010) 263 ALR 155, 186 [286]–[291]. The court also in the same hearing considered, and rejected, alternative theories of liability founded upon copyright authorisation and unjust enrichment: at 189–91 [318]–[336]. On appeal, the Full Court considered the rejection of authorisation liability to have occurred on an incorrect basis, and remitted that issue back to the trial judge for fresh determination: *Larrikin Appeal* [2011] FCAFC 47, [238]–[250].

15 *Larrikin Quantum* (2010) 188 FCR 321, 342–3 [214]–[224].

16 [1896] 2 Ch 538, 543–4.

17 (1867) LR 5 Eq 81, 84–85.

18 Ibid.

The principle has been judicially illustrated with imagined trespasses to an assortment of chattels: chairs, horses and concrete mixers. The chair example offered by the Earl of Halsbury in 1900 is possibly the most famous. Here a plaintiff had been deprived of a chair for twelve months by the commission of a chattel trespass. The quantum of general damages was not affected by what use the plaintiff would have made of the chair. Rather, such an award should be made on a fair market value basis by asking: 'Well if you wanted to hire a chair, what would you have to give for it for the period'.[19] In this way a 'rough sort of conclusion' can be made as to quantum.[20] Subsequently—and in a similar vein—Lord Shaw illustrated the point with a horse:

> If A, being a livery man, keeps his horse standing idle in a stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise'.[21]

Lord Shaw had before him not a case involving a horse, but one in involving the infringing use of patented technology, where no material loss in the sense of lost sales could be proven. In these circumstances, Lord Shaw applied the 'principle of price or hire' and considered the award of a notional royalty for the unauthorised sale of every one of the infringing machines to be an 'excellent key' to unlocking the appropriate remedy.[22] In 1995, the Privy Council emphasised the suitability of such damages in the absence of a material gain accruing to the wrongdoer:

> If a man hires a concrete mixer, he must pay the daily hire, even though he may not in the event have been able to use the mixer because of rain. So also must a trespasser who takes the mixer without the owner's consent.[23]

From these authorities emerge a principle that, as a bare minimum, a person who exercises a property right by taking—rather than bargaining—should pay to the property owner a usage price, as a minimum. This is so even if the horse owner, for example, suffers no material loss—in the sense of lost use—of the horse by the owner or demonstrated lost revenue from the owner being unable to hire out the horse to a third party. Likewise, this is so even if the trespasser who takes the concrete mixer, for example, makes no material gain in the sense of actual utilisation of the chattel.

The outcome that a usage price must be paid as a minimum, regardless of material gains or losses, is fundamentally tied to two related things: the nature of the underlying right being property and the normative characterisation of the transaction between the parties.

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19 *Owners of the Steamship "Mediana" v The Owners, Master and Crew of the Lightship "Comet"* [1900] AC 113, 117.
20 Ibid.
21 *Watson, Laidlaw & Co v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.
22 Ibid 120.
23 *Inverugie Investments v Hackett* [1995] 3 All ER 841, 846 (Lord Lloyd).

Felix Cohen has famously described the defining attribute of private property to be 'the owner's entitlement to exclude the world from carrying out certain activities', and 'to secure the assistance of the law in carrying out a decision to exclude.'[24] Tony Honoré has described as an incident of ownership 'a general right to security, availing against others'.[25] Calabresi and Melamed have described an entitlement to be protected by a property rule as when 'a person wishing to acquire it from the owner must do so by voluntary transaction in which the value of the entitlement is mutually agreed'.[26] The policy of the law in imposing a usage price as a minimum is straightforward; a trespasser should never be in any better position that a person who bargained for the exercise of the property right. Anything less would undermine the coherence of private law in which property rights are highly situated. This very point was made explicitly by Lord Shaw in the context of his horse example: 'wherever an abstraction or invasion of property has occurred, then unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense'.[27]

However, the usage price has been described above as a 'bare minimum' because other potentially higher awards—such as that calculated under an account of profits—can apply in civil cases involving wrongful property use. The application of a profit award is a good example of the importance of the normative setting of the parties. Thus, in the early wrongful coal-taking cases, a 'taker' who is a conscious wrong-doer was met with a profit award; a 'taker' who exhibited mixed motives or acted in good faith was met with a usage price award.[28] The normative characterisation of the dealing between the parties will be expanded upon below on the question of loss.

As observed at the start of this section, infringement of intellectual property rights has long been subjected to usage price damages in the same way as the trespass to rights in the chair, horse and concrete mixer were considered able to be remedied.[29] Perhaps the most explicit statement of this principle, in an intellectual property context, occurred 100 years ago. Assessing patent damages in the 1911 case of *Meters v Metropolitan Gas Meters*, Fletcher Moulton LJ disparaged the notion that the only measure of damages was compensation for forensically proven loss, referring to it as a 'secondary rule'.[30] He stated that in the assessment of patent damages, the only applicable rule was 'the very idea and principle of damages—that is an equivalent for the wrong done to the plaintiff'.[31] Consistent with this

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24 Felix Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 359, 373.

25 Tony Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays In Jurisprudence: A Collaborative Work* (Oxford University Press, 1961), 107; this was also described as 'immunity from expropriation', 119.

26 Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1090.

27 *Watson, Laidlaw & Co v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.

28 *Powell v Aiken* (1858) 4 K & J 343; 70 ER 144 (bad faith coal taking, profit measure applied); *Jegon v Vivian* (1871) LR 6 Ch 742 (good faith coal taking, fair market value measure applied); *Hilton v Woods* (1867) LR 4 Eq 432 (good faith coal taking, fair market value measure applied); *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 (good faith coal taking, fair market value measure applied); *Phillips v Homfray* (1871) 6 Ch App 770 (bad faith coal taking, profit measure applied).

29 *Penn v Jack* (1867) LR 5 Eq 81, 84–85 and *Watson, Laidlaw & Co v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.

30 (1911) 28 RPC 157, 163.

31 Ibid.

statement, Fletcher Mouton LJ observed that damages in a patent infringement setting could be measured by applying the going licence fee that the patentee charges for use of the invention in respect of each infringement. Further, where no 'quoted figure for a licence existed', a court might estimate the damages in a way 'closely analogous' to this.[32]

In all cases where a usage price applies as damages—whether it be real, chattel or intellectual property—an issue arises as to what basis that should be determined. As indicated in the authorities if there is a going market rate, that rate could apply.[33] However when the exercise of a property right by the wrong-doer cannot be shown to equate readily with a market price—for example if the exercise or the property had unique attributes—the law has deployed a counterfactual hypothesis to arrive at usage price damages.[34] This is a notional transaction between the parties, which can be summarised as:

> (i) Restitution is effected by restoring the owner to the position it would have been in if the infringer had paid rather than taken;
>
> (ii) The quantum of that payment is assumed to have been arrived through a negotiated bargain between a hypothetical willing licensor (filling the shoes of the owner) and a hypothetical willing licensee (who takes the place of the infringer);
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> (iii) Those hypothetical negotiations occur on equal terms where each party adopts fair positions, including the acceptance by the licensee of the validity of the licensor's property rights, and the acceptance by the licensor of the licensee's legitimate interest in netting a profit from the licence.[35]

The intention underlying the use of this counterfactual hypothesis is to generate a fair price that should have been paid by the trespasser or infringer. Such a price could take a variety of forms: a lump sum, a rate per unit, or a royalty based on revenues earned. The *Larrikin v EMI* trial judge, upon finding infringement, was invited by the parties to resort to this methodology to determine the quantum of s 82 damages.[36]

It will be recalled that the defendants were found to have represented to APRA|AMCOS a complete entitlement to the distributed APRA|AMCOS 'Down Under' royalties, and that if 'Down Under' comprised copyright infringement, those representations were conceded to be misleading. The misleading nature of this can be explained as follows. Given that 'Down Under' comprised infringement, the defendants should have obtained a licence from the copyright owner of 'Kookaburra'. That licence would likely have involved a sharing of the APRA|AMCOS royalties. To the extent that the defendants represented a complete entitlement to the 'Down Under' royalties, they had misled APRA|AMCOS about the correct share that should have been paid to the copyright owner of

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32 Ibid.

33 House of Lords authority suggests that if such a market rate exists for a patent infringement then it should apply: *General Tire & Rubber v Firestone Tyre* [1975] FSR 273, 285–7.

34 A notable example is *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798.

35 See generally *General Tire & Rubber v Firestone Tyre* [1974] FSR 122, 147.

36 *Larrikin Quantum* (2010) 188 FCR 321, 323 [8].

'Kookaburra'. It will also be recalled that the parties, by consent, agreed that the plaintiff 'has suffered loss and damage'. But how was that loss and damage to be assessed? That was to be answered by essentially deploying the counterfactual bargain methodology to determine a usage price. In so doing, the trial judge drew upon a formulation of that methodology used by Pumfrey J, and described by that judge as having as its object 'compensation'.[37] In *Larrikin v EMI*, the infringement loosely equated to the defendants having 'sampled' from 'Kookaburra'—sampling is a type of copyright use usually licensed in the popular music industry—but for which each use is inherently unique. While there was no market rate that could be used, there was evidence of a variety of comparable bargains.[38] These bargains, together with the full context of the exercise of rights, led the trial judge to the conclusion that had a fair bargain been struck between the parties (whether in the early 1980s or in 2002) it would have been agreed that five per cent of the APRA|AMCOS royalties accrued to Larrikin.[39] That five per cent was the usage price that should have been paid, and was determined by the trial judge to comprise the loss caused by the contravention of s 52 and thus the s 82 damages. But should a failure to pay that five per cent usage price be considered loss or damage under s 82?

IV The Importance of Loss or Damage to the Section 82 Cause of Action

Section 82(1) of the TPA relevantly provides that: 'a person who suffers loss or damage by conduct of another person that was done in contravention of [provisions of the TPA, including s 52] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention'.[40] It therefore identifies certain legal norms (such as the s 52 prohibition upon misleading or deceptive conduct) the contravention of which creates a cause of action for (seemingly) as-of-right damages.[41] The section has been traditionally confined in Australian law to compensation for harm caused by a TPA contravention.[42] As a cause of action, Gummow J has described s 82 in terms of 'at least five discrete elements':

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37 *Ludlow Music Inc v Williams (No 2)* [2002] FSR 868, 882–90 [38]–[48] in which Pumfrey J particularly relies upon *General Tire & Rubber v Firestone Tyre* [1975] FSR 273.

38 *Larrikin Quantum* (2010) 188 FCR 321, 340–1 [179]–[191].

39 Given the effect of the six-year limitation period, a subsidiary issue was when that hypothetical bargain would have been struck. The trial judge elected 1982 in preference to 2002, but considered that the same rate would have been arrived at in either year: ibid 341–3 [192]–[220].

40 The successor provision is similarly expressed: *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 236.

41 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 117 [19] (Gleeson CJ).

42 See for example statements such as those in *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251, 261 (French J): 'for the purposes of s 82 of the *Trade Practices Act 1974*, the loss suffered by the applicants is to be assessed by comparing the positions they were in as a result of the misleading conduct with that in which they would have been had the conduct not occurred' and a unanimous High Court in *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 290: 'Actions based on section 52 are analogous to actions for torts. It follows that, in assessing damages under section 82 of the Act, the rules for assessing damages in tort, and not the rules for assessing damages in contract, are the appropriate guide in most, if not all, cases'. Subsequent authorities have, however,

> First, it identifies the legal norms for contravention of which the action under the section is given. Secondly, it identifies those by and against whom that action lies. Thirdly, the section specifies the injury for which the action lies as the suffering of loss or damage. Fourthly, it stipulates a causal requirement that the plaintiff's injury must be sustained 'by' the contravention. Finally, the measure of compensation is 'the amount of' the loss or damage sustained.[43]

It is possible to consider the *Larrikin v EMI* action by reference to these 'five discrete elements' identified by Gummow J:

1. Contravention of section 52 creates a possible cause of action under section 82, and in view of the finding of infringement such contravention had been conceded by the defendants.[44]
2. That contravention arose by making representations to an intermediate commercialisation agency that the defendants had a complete entitlement to a resource in circumstances where they did not, and a partial entitlement existed in the plaintiff.[45]
3. The gist of section 82 is compensation for loss or damage conceived of in a restricted way. While the existence of loss or damage (albeit not its quantum) was accepted by the defendants upon the finding of infringement, this is a central point that will be explored in greater depth below.[46]
4. The defendants put in issue whether their representations caused Larrikin's loss or damage. On this element the trial judge found against the defendants by finding 'a sufficient causal nexus between the loss and damage suffered by Larrikin and the misrepresentation made by the respondents'.[47]
5. The quantum of damages is the amount necessary to compensate in money for the loss or damage assessed at element three. This was assessed under a counterfactual bargain methodology to comprise five per cent of the APRA|AMCOS distributions paid in respect of 'Down Under'.[48]

The interconnected third and fifth elements of the action, and how the counterfactual bargain applied in that regard, requires consideration. In particular, was the failure by the respondents to pay the five per cent usage price share of APRA|AMCOS distributions truly a 'loss' or a 'damage' to Larrikin recognisable under s 82?

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sought to sever the explicit analogy with tort damages and to suggest instead that s 82 damages for 'loss or damage' are sui generis: *Murphy v Overton Investments* (2004) 216 CLR 388, 407 and the cases there cited at note 64.

43 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 526–7 [95] adopted in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 126 [50].

44 *Larrikin Liability* (2010) 263 ALR 155, 183 [263]–[264].

45 Ibid.

46 Ibid.

47 *Larrikin Liability* (2010) 263 ALR 155, 186 [291].

48 *Larrikin Quantum* (2010) 188 FCR 321, 342–3 [214]–[224].

The limited nature of 'loss or damage' able to be compensated by s 82 damages has been frequently explained by a comparison with contract damages. *Marks v GIO Australia Holdings Ltd* supplies a vivid illustration.[49] GIO had represented to prospective borrowers that interest on a loan type was 'fixed at 1.25 per cent above bank bill rate' for the life of the loan. The loan contract, contrary to that representation, gave GIO the discretion to vary that margin at any time on 90 days notice. Another term of the loan contract required borrowers to pay GIO $4 600 if a loan was paid out before it was 10 years old. One year after the representation GIO notified borrowers that the margin would increase to 2.25 per cent, and gave them an opportunity pay out the loan without the $4 600 payment. A trial judge awarded the borrowers damages under s 82 based on the difference between the two rates of margin.[50] A High Court majority considered that such damages were unavailable because the borrower had suffered no relevant loss.[51] Relevant loss did not arise simply because a thing of value that has been represented is not delivered. Such expectation-based damages were relevant for contract damages. Rather, what needed to be established was some form of loss caused by the misrepresentation which is distinct from the loss of expectations created by that misrepresentation. While the $4 600 payment might have comprised such distinct loss had it not been waived, in light of its waiver by GIO the misleading conduct caused no relevant loss for s 82 purposes.[52]

However relevant loss or damage for s 82 purposes could—and often does—arise in cases involving representations to third parties that are a cause of loss or damage to the plaintiff. Since the 1970s, it has been accepted that liability for contravention of s 52 can be pleaded in the alternative in passing-off actions in Australia.[53] When a trader deceives consumers, and that deception can be shown to have led to consumers buying more of that trader's product and less of a rival's product, the actual lost sales or damage to the goodwill of the rival is relevant loss or damage for s 82.[54] Similarly, the misleading and deceptive conduct of the defendants in *Larrikin v EMI* was directed at third parties, APRA|AMCOS. However for that conduct to give rise to s 82 damages, it must have caused Larrikin the type of loss or damage recognisable under s 82.

In keeping with the chattel analogies, it is perhaps fitting to offer another analogy to map the setting of *Larrikin v EMI*. B might represent to its letting agent C that B is the owner of an office space, and that office has on title an entitlement to use a car parking space. The office with the car parking space is let by C to D on a long-term commercial lease, and C remits net rental payments to B. A learns of the letting, and brings a s 82 action against B, but not C nor D. The action is on the basis that A has the true entitlement to the car parking space, and in view of that entitlement, B has breached s 52 by falsely representing to C that B controlled the entitlement to the car space. A's entitlement is established by a court. The issue is

49 (1998) 196 CLR 494.
50 *Marks v GIO Australia Holdings Ltd (*1996) 63 FCR 304.
51 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, McHugh, Hayne and Callinan JJ reasoning at 514–6 that where the difference between what was represented and what was given cannot be proven to have caused actual loss, s 82 damages are unavailable.
52 The borrowers remained in the loans as a matter of choice: ibid 504 (Gaudron J), 532 (Gummow J).
53 A point established in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216.
54 *Janssen-Gilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

then what loss or damage (if any) has A suffered by B's false representation to both satisfy the s 82 cause of action and to assess the quantum of compensatory damages. One way of considering the loss or damage caused by the false representation to C, and the compensation for that loss or damage, is that it is similar to the trespass to the chair, the horse, and the concrete mixer; an abstraction of A's property rights in the car space. Ways to quantify damages are to apply a going market rate if there is one, or if there is no such rate, to apply the counterfactual methodology to determine the price that would have arisen had B bargained with A for the right to let out the car space. If (say) recourse to the notional bargain is required, it might yield a usage price of five per cent of the net rental payments. The five per cent usage price that should have been paid provides a 'loss or damage' basis for the s 82 damages calculation.

But the question remains, can the five per cent of the APRA|AMCOS distributions, or indeed five per cent of the net rental payments in the above hypothetical, comprise relevant loss to support a s 82 action and damages?

V The Meaning of 'Loss or Damage' in Cases of Property Violation

James Edelman's 2002 book, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property*, strongly contends that intellectual property damages assessed by a counterfactual bargain—and other similarly-assessed damages awards for proprietary torts such as those illustrated by the chair, the horse and the concrete mixer—are non-compensatory in nature.[55] These are said to be purely 'gain-based' damages. This is a central idea of the book. On the argument there advanced, rather than compensatory, such damages should be conceived of as wholly based upon reversing the gain received by the wrongdoer. The Edelman argument proceeds on two footings: a negative case deriding the classification of such damages as compensatory; and a positive case arguing that they are wholly gain-based in nature.

The negative case was mounted by explaining past classification of such damages as 'compensatory' for a particular type of harm: lost opportunity to bargain. Having explained this compensatory characterisation, Edelman asserted it was overreaching because any lost opportunity to bargain 'can be shown to be fictitious in three ways':

> This is because the market value is used as the measure of damages where the claimant would clearly have sought and obtained more than market value; where the claimant would have obtained less than market value; and where the claimant would never have bargained at all.[56]

Having rejected compensation as fictitious, Edelman offered an alternative basis for all such damages. They are 'restitutionary damages' and entirely explained as gain-based insofar as they 'give back value transferred from a

55 Edelman, above n 3, 99–102, 224.
56 Ibid 99.

claimant to a defendant as a result of a defendant's wrong and is almost always measured by the objective gain received by the defendant'.[57]

Applied in *Larrikin v EMI* the Edelman view would offer this somewhat idiosyncratic characterisation of the five per cent. The trial judge concluded that had a fair bargain been struck between the parties, they would have agreed to a usage price comprising five per cent of the APRA|AMCOS royalties for exploitations of 'Down Under'. The counterfactual (or to use Edelman's language, 'fictitious') nature of this particular usage price award was highlighted in the judgment where reference was made to the evidence of one of the musician defendants responsible for the infringement. That evidence made plain that he would, in fact, have strongly resisted the payment of any of the income from 'Down Under' to the copyright owner of 'Kookaburra'.[58] Therefore, this award was not on Edelman's analysis compensatory damages for any actual lost opportunity to bargain. There would never have been any bargain. Rather, they were non-compensatory and gain-based, because they were damages best explained by (i) objectively valuing as five per cent of the APRA|AMCOS royalties to be the gain received by the defendants from infringing Larrikin's copyright by incorporating part of the 'Kookaburra' music into 'Down Under', and, (ii) requiring that value to be given back to Larrikin in the form of five per cent of those APRA|AMCOS royalties.

On Edelman's view the failure to agree to pay that five per cent could not comprise relevant loss or damage to Larrikin, and therefore a misrepresentation consistent with that failure could also not logically be said to be a cause of any relevant loss. Likewise, in the car parking space analogy, assume that similar to *Larrikin v EMI*, the evidence revealed that under no circumstances would an agreement between A and B have been struck in relation to the car space. It is difficult to conceive of how—under Edelman's view—usage price damages (calculated by notional bargain) of five per cent of the net rental payments could comprise relevant loss. Thus, it is difficult to accommodate both the Edelman gain-based analysis of these settings and the adoption of a usage price generated under an entirely notional bargain as compensatory damages award under s 82. On Edelman's view damages calculated on such counterfactual ('fictitious') bases implicate no loss and seemingly would not provide the relevant fundament to a s 82 damages award which is wholly compensation for loss caused by a relevant contravention. If Edelman's view is correct, the s 82 damages in *Larrikin v EMI* were awarded in error; but is Edelman's view correct?

Since the publication of *Gain-Based Damages*, an ongoing debate surrounding the importance of a 'corresponding loss' in unjust enrichment scholarship (of which discussion about usage price damages for proprietary torts and intellectual property infringements is but an aspect) has intensified. Peter Birks's *Unjust Enrichment* made the argument that English law does not require

57 Ibid 66. The 'almost always' relates to the issue of 'subjective devaluation' where the objective benefit is said to be discounted because it has a lesser value to that particular wrongdoer: at 71. The twin authorities that gave rise to the issue in restitution scholarship (*Ministry of Defence v Ashman* [1993] 2 EGLR 102 and *Ministry of Defence v Thompson* [1993] 2 EGLR 107) are not of relevance to Larrikin v EMI and have been explained in normative terms: David J Brennan, *Retransmission and US Compliance with TRIPS* (2003, Kluwer Law International) 180–2.

58 *Larrikin Quantum* (2010) 188 FCR 321, 333 [98].

any plaintiff loss for an unjust enrichment award to be made in the plaintiff's favour.[59] In *Hambly v Trott*, which was an action against an estate relating to a chattel-trespass by the testator, Lord Mansfield observed:

> So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.[60]

This dictum was relied upon by Birks to answer an assertion by Mitchell McInnes—a Canadian scholar—that unjust enrichment should confine itself to settings in which the plaintiff has suffered a loss corresponding to the defendant's gain.[61] In *Hambly v Trott*, Birks claims to 'compel the adoption of the proposition that English law does not insist on loss to the claimant'.[62] In advancing his view that usage price damages calculated by reference to a notional bargain are wholly gain-based, Edelman's analysis is manifestly consistent with Birks's view of English law.

In the years since the publication of *Gain-Based Damages* and *Unjust Enrichment*, McInnes has contested the position adopted by Edelman and Birks. McInnes takes Lord Shaw's horse example, and explains that the Edelman view of damages in that setting is that they are non-compensatory, gain-based, and entirely intended to reverse the wrongful transfer of value accruing to the chattel trespasser. McInnes goes on to observe:

> An immediate objection to that analysis is that, as normally conceived, a 'transfer' entails the movement of the same thing from one place to another. And if that is true, then the defendant's acquisition of value must be matched by the plaintiff's loss of value, in which case there is scope for a compensatory award.[63]

For Birks, McInnes refines and develops his counterpoint. In a book chapter, under the heading 'non-consensual interference with property and loss', McInnes states two propositions intended to answer Birks's use of Lord Mansfield's horse example:

> 1. Compensation may be available even in the absence of a financial injury. Regardless of direct economic consequences, an unauthorised interference with property violates the owner's right of *dominium* and thereby creates a *loss* that is susceptible to reparation.

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59 Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 79–82.

60 *Hambly v Trott* (1776) 1 Cowp 371, 375; 98 ER 1136, 1138.

61 Mitchell McInnes, 'Interceptive Subtraction, Unjust Enrichment and Wrongs—A Reply to Professor Birks' (2003) 62 *Cambridge Law Journal* 697.

62 Birks, above n 59, 81–2.

63 Mitchell McInnes, 'Gain-Based Damages: Contract, Tort, Equity and Intellectual Property, by James Edelman' (2004) 40 *Canadian Business Law Journal* 146, 158. See to similar effect Craig Rotherham, 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 *Cambridge Law Journal* 172, 182 who observes: 'Edelman's account of "restitutionary damages" is founded on the premise that, while value is transferred from the claimant in these cases, the claimant has not necessarily suffered any loss. This is curious.'

> 2. A loss of *dominium* that is sufficient to support compensatory damages in tort equally constitutes an expense for the purposes of unjust enrichment. In the restitutionary context … that expense is mirrored by the benefit that the interfering party enjoys, regardless of financial benefit, as a result of his unilateral appropriation of property.[64]

This conception of gains and losses has at its core a sensitivity to the exclusive nature of rights associated with property—a matter flagged above. If the consistent views of Cohen, Honoré, Calabresi and Melamed are correct, it implies that de jure and per se harm arises from the violation of a property right. McInnes terms this violation of a 'right of dominium' which 'thereby creates a loss'.[65] In so doing, McInnes is not saying anything controversial. Rather he is invoking (under the term 'right of *dominium*') a long-understood core attribute nature of property earlier described: the owner's entitlement to exclude the world from carrying out certain activities, and to secure the assistance of the law in carrying out a decision to exclude.[66]

By the reference in his second proposition to the mirroring of benefit and loss, and its rider 'regardless of financial benefit', McInnes invokes Aristotle's notion of corrective justice, popularised in modern unjust enrichment literature by another Canadian scholar Ernest Weinrib.[67] Under this notion where two parties are bound together in a transaction by virtue of one owning property and the other infringing it, the infringer's gain and the owner's loss can always be said to equate. That is to say the infringer has received more than he or she deserves by exploiting the right without prior owner consent and the owner has received less than he or she deserves by being denied the opportunity to exclude or grant consent. The role of the law or the judge is to intervene so as to correct this imbalance. The objective is to restore the parties to the equality that would have prevailed had the norm been observed. Thus a just outcome is one where both parties are taken to the 'mean'; an outcome where neither has more or less than he or she ought from the transaction. The correlation between gains and losses occurs on a normative rather than material level. Aristotle's notion of corrective justice explains why a restitutionary award of a usage price as a bare minimum will apply in a case where the defendant makes a material gain without the plaintiff making a material loss—such as in Lord Shaw's horse example. Likewise, corrective justice also explains why in the case of the Privy Council's concrete mixer example a restitutionary award of a usage price will also be apt. There the absence of material gain in the defendant will not preclude a usage price award as a bare minimum to correct the normative

64 Mitchell McInnes, '*Hambly v Trott* and the Claimant's Expense: Professor Birks' Challenge' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 105, 115. Likewise Steve Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28 *Melbourne University Law Review* 759, 777 when critiquing Birks succinctly observes: 'where the defendant trespasses on the plaintiff's property for a period ... if we are prepared to say that the defendant has gained the use of the land, it is hard to see what stops us saying that the plaintiff has lost it'.

65 McInnes, above n 64, 115.

66 Cohen, above n 24, 373. See *Plenty v Dillon* (1991) 171 CLR 635 at 645 (Mason CJ, Brennan and Toohey JJ) and 654–5 (Gaudron and McHugh JJ).

67 J A K Thomson, *The Ethics of Aristotle – the Nicomachean Ethics Translated* (Penguin, 1953) (book 5) and Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277.

imbalance that occurs when property is taken rather than bargained for. Finally, and as noted above, the normative (as opposed to material) character of the imbalance can be seen in the remedial difference in the earlier coal taking cases: wilful takings are met with a profit-stripping award; less offensive takings are met with a usage price.[68]

In his 2007 book, *Torts and Rights*, Robert Stevens makes an attack upon Edelman's position which is similar to McInnes's critique.[69] Stevens's framework involves recognition of a two-tiered structure of obligations relating to tort damages: a primary right that the tort not be committed, and (if that primary right is violated) a secondary right to damages 'as a *next best* substitute for the primary right'.[70] Under this view, tort damages sit within one of two alternative categories: 'substitutive' as opposed to 'consequential'.[71] Stevens's view is that usage price awards exemplify substitutive damages, awarded as a substitute for the objective value of the right infringed. Alternatively, compensatory or restitutionary awards can be made upon proven plaintiff economic loss or proven defendant economic gain arising as a consequence of the commission of the tort.[72] In an important passage, Stevens explains the conceptual difference between substitutive and consequential damages:

> The distinction between damages which are awarded as a substitute for the right and those awarded to compensate for consequential loss can be obscured because in most cases the value attached to the right is precisely the same as the loss suffered, usually financial, by the claimant. If you smash someone else's car the value of the right infringed is the economic cost of fixing it. Where substitutive damages are available, and result in full compensation of loss, no further award should be made. The claimant cannot recover twice, although consequential losses over and above the value of the right infringed are recoverable, for example a taxi driver's loss of earnings while his damaged car is being repaired.[73]

Thus on Stevens's view, a plaintiff seeking copyright damages could most obviously make a claim for a notional usage price as a substitute for the value of the exclusive right, and if greater loss can be established, it can also seek to prove that loss to support a claim for consequential damages—for example, particularly significant lost sales as a consequence of the infringement. Stevens's view is that 'the popularity of a restitutionary analysis has caused sight to be lost of the substitutive award' that usage price damages represent.[74]

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[68] The authorities listed above n 28.
[69] Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 59–68, 79–84.
[70] Ibid 60.
[71] Ibid.
[72] Ibid 61. The authority Stevens offers in support of gain-based awards in this context is the famous US case of *Edwards v Lee's Administrators* 96 SW 2d 1028 (Ky, 1936).
[73] Ibid. Compare the similar sentiments of Fletcher Moulton LJ in *Meters v Metropolitan Gas Meters* (1911) 28 RPC 157, 163 discussed above. Later Stevens explains 'over and above' restitutionary consequential damages: 'If correct, the analysis suggested here renders otiose the category of restitutionary damages save where the gain made is greater both than the value of the right infringed and the consequential loss suffered', again referencing *Edwards v Lee's Administrators* 96 SW 2d 1028 (Ky, 1936): Stevens, above n 69, 83.
[74] Ibid 81.

While Stevens's framework is a powerful one, it begs questions. If by the novel term 'substitutive damages' Stevens is describing awards neither solely harm-based nor solely gain-based, but rather a hybrid, he is putting forward a view largely consistent with that offered by McInnes and Weinrib. But this hybrid nature is not well-conveyed by the word 'substitutive', which itself suggests compensation purely for harm. More fundamentally, the insistence that substitutive damages reflect the objective value of the right infringed, leads Stevens to have difficulty in clearly accounting for the underlying normative factors that explain the different calibration of damages awards for knowing and innocent infringers.[75] As such, Stevens's counterpoint to Edelman is one which might be less persuasive in explaining usage price damages than that offered by McInnes and Weinrib. Notwithstanding these difficulties, assuming that Stevens's substitutive damages have the hybrid nature here described, McInnes, Weinrib and Stevens seem to share a similar core view of usage price damages, a view which is an attractive one. It is one that reflects a realistic appraisal of societal expectations: amounts awarded as usage price damages are both compensation for harm and restitution of gain.

The interesting thing about the award in *Larrikin v EMI* is that it was not copyright damages. Rather, it was s 82 damages arising from a misrepresentation to third parties about entitlements. Such a damages award requires loss or damage to be caused by the misrepresentation. The parties in *Larrikin v EMI* accepted that if there was copyright infringement, there was misrepresentation by the defendants to APRA|AMCOS, 'and [Larrikin] has suffered loss and damage'.[76] That loss and damage can only be understood to be the revenues that Larrikin otherwise would have earned by licensing the defendants, had the defendants bargained rather than infringed.[77] That loss was quantified by the court to be five per cent of the APRA|AMCOS distributions utilising, at the behest of the parties, the counterfactual bargain.[78] To be sure, that five per cent can also be said to be a gain that the defendants wrongfully retained. However, whether viewed as the defendants' gain or the plaintiff's loss, or indeed an amount in substitution for the

75 Ibid 82. The Stevens framework does not fully explain the differing outcomes in the coal-taking cases referenced above at n 28, nor the modern treatment of deliberate intent as a factor colouring the nature of trespass: *Plenty v Dillon* (1991) 171 CLR 635 at 654–5 (Gaudron and McHugh JJ). My research has identified five compounding and overlapping indicia (from American, UK and Australian authorities) to help distinguish between cases where an account of profits award is applicable, as opposed to a notional usage price: Brennan, above n 57, 199–203. The indicia are: whether strict owner control over the resource is an underlying policy of the law (a property or liability rule); normative considerations (good faith and bad faith infringers); whether ascertainable, proximate profit arises from violation (problems of proof); the physical nature of the violation (actual consumption or mere use); and whether the owner has regarded the right in the resource as a right to payment for use (hired goods/rented properties).

76 *Larrikin Liability* (2010) 263 ALR 155, 183 [263]–[264].

77 In copyright law, debates have arisen occasionally about whether usage price damages are gain-based or loss-based. Goldstein, a leading copyright treatise writer in the US, clearly regards usage price awards as loss-based. He argues that every measure of actual damages, whether reasonable royalty or lost sales, requires the copyright owner to show only that it has lost revenues that it otherwise should have earned had the infringer obtained a licence, and not that it has suffered losses from other prospective licensees. Goldstein contends that a notional usage price for the exercises of the property right, while by definition is based on a counterfactual setting, nonetheless comprises legally recognisable loss for copyright damages: Paul Goldstein, *Copyright: Principles, Law, and Practice*, vol 2 (Little, Brown & Co, 1989) 316–9 and Brennan, above n 57, 196–8.

78 *Larrikin Quantum* (2010) 188 FCR 321, 323 [8].

plaintiff's primary exclusive rights which have been violated, it is the same five per cent.

VI Conclusion

The premise of the damages award in *Larrikin v EMI*, when assessed against the gain-based thesis put forward by Edelman, is restitutionary heresy. That is because the parties and the court both accepted, contrary to Edelman's view, that an unpaid usage price assessed by a counterfactual bargain comprised loss which was able to form the basis of a compensatory damages award. This amounts, on Edelman's argument, to overreaching by compensatory damages; an overreach resting on the 'fiction' of a lost opportunity to bargain. The argument put forward here—without touching upon the specific issues of infringement in the case—is that the general premise adopted by the parties and the court is correct, and indeed that the heresy is a beautiful one. That is to say, whenever a notional usage price is awarded as damages for a proprietary tort or intellectual property infringement, that award is best thought of as representing both the plaintiff's loss and the defendant's gain.

Edelman's book has as a central idea that a notional usage price award in such a setting is wholly gain-based and not compensatory. When applied to the uncontested premise which underlies the *Larrikin v EMI* award, that idea can be seen to be deficient in three related ways.

First, it underplays the principle that violations of an exclusive right in real, chattel or intellectual property comprises de jure and per se harm to the owner.[79] It implies that where no material harm has been occasioned by the violation, the sole philosophical justification for financial relief is gain-based. In so doing it incorrectly demotes the importance of property rights in private law.[80] The Edelman view rejects that it is implicit in the creation of a property right that violation necessarily comprises harm to its owner, and rather only recognises as loss 'de facto' or 'forensic' harm which arises from the violation. *Larrikin v EMI* suggests that—at least for s 82 purposes—the Edelman view is not widely accepted.

Second, the Edelman view derides as 'fiction' the assessment of that harm by means of a counterfactual bargain.[81] Man-made law is artifice. For example, the

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79 *Plenty v Dillon* (1991) 171 CLR 635, 645 (Mason CJ, Brennan and Toohey JJ); 654–5 (Gaudron and McHugh JJ).

80 In a 2006 book chapter, Edelman describes McInnes's position as 'rights-based compensation' which is 'controversial', and in what appears as a partial retreat from ideas in his 2002 book suggests that it could be accepted as applying only 'in cases involving interference with rights held for non-commercial purposes': James Edelman, 'Gain-Based Damages and Compensation' in Andrew Burrows (ed) *Mapping the Law—Essays in Memory of Peter Birks* (Oxford University Press, 2006) 141, 154, 159. The scope of 'non-commercial purposes' is obscure but clearly Larrikin's purposes are commercial in acquiring the copyright and enforcing it: *Larrikin Ownership* (2009) 179 FCR 169, 177–80 [84]–[107].

81 In a 2009 book chapter, Edelman seems to recant some of his earlier ideas. His 2002 book identified the case of *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798 ('*Wrotham Park Estate*') as

bundle of exclusive rights recognised as 'property' is itself a human construct devised for instrumental reasons. As such, all law is 'fiction' and seeking to critique it by use of that term is ill-suited to the discipline. The notional usage price is a means to assess at a minimum damages for property trespass or infringement. The law does the best it can. In intellectual property, the notional usage price will often be an applicable going-rate, or if there is none, what a hypothetical fair bargain would have yielded. A sum or rate so generated is a measure of the plaintiff's harm and the defendant's gain, each estimated at the minimum end of a normative scale. This legal rule is no more or less fiction than any other legal rule.

Third—and bringing together the preceding two points—Edelman's argument that lost opportunity to bargain is fiction being used to camouflage the gain-based nature of certain awards, is itself camouflage. The owner of real, chattel or intellectual property has an entitlement that a third party first obtains the owner's consent prior to that third party exercising the property rights. The right to require that any third party prospective user bargains with the owner is an intrinsic aspect of property.[82] If it is accepted that after infringement the owner's lost opportunity to bargain is fictitious loss, then the non-consensual exercise by the infringer of the exclusive right must also be a fictitious loss to the owner. But whether viewed as fiction or fact, property rights create special norms.[83] One of those is that if there is a non-consensual exercise of a property right its owner must have that right vindicated. Courts have long recognised this as a necessity and because of that necessity, have approximated as bare minimum damages the price that should have been paid had the defendant chosen to bargain rather than infringe. This necessity arises because if the law were to award less than usage price damages it would in effect be providing an incentive to infringe rather than to bargain.

In an important article that speaks to the setting in *Larrikin v EMI*, Weinrib has observed—consistent with McInnes—that:

> Because property rights give proprietors the exclusive right to deal with the thing owned, including the right to profit from such dealings, any

a 'fine example' of the fiction of lost opportunity to bargain being used to disguise a gain-based award as compensation. 'The award cannot be compensatory for two reasons. First, the claimants' land had suffered no loss of amenity. Secondly, there was an express finding that the claimants would never have consented to such relaxation.': Edelman, above n 3, 101. In a footnote to the 2009 chapter Edelman there says about *Wrotham Park Estate*: 'But a loss-based analysis must also be possible.' This was because the consequence of the 'contrary position (and one which I had also previously adopted) is that the claimant who would be prepared to bargain for the release of the right would have suffered a loss, but the claimant for whom the consequence of the release is so undesirable that it would never release the right would be said to suffer no loss.': James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 211, 214 nn 9. Edelman accepts here that in such a case the 'undesired consequence' of infringement (the erection of buildings on parkland in breach of a restrictive covenant) was a non-pecuniary loss: ibid 214. The precise scope of this 'undesired consequence' qualification is unclear. However it does not appear to apply to Larrikin's position insofar as the defendants' conduct has not caused Larrikin any similar 'undesired consequence', such as the type of reputational damage found in *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2009) 81 IPR 378, 384–5 [31]–[34].

82 Calabresi and Melamed, above n 26, 1090.

83 One commentator has offered an account in which the primary justification of restitution for wrongs is the protection of certain private legal facilities ('facilitative institutions') most notably private property: IM Jackman, 'Restitution for Wrongs' (1989) 48 *Cambridge Law Journal* 302.

> gains resulting from the misappropriation of property are necessarily subject to restitution. Gains from dealings in property are as much within the entitlement of the proprietor as the property itself.[84]

Weinrib goes on to state in relation to usage price damages: 'Through an award of damages ... the defendant gives the plaintiff the equivalent of what was taken. ... By awarding the value of the use, the court reverses the wrong that consists in the use.'[85] The sentiment of Weinrib echoes those of the authorities that have awarded notional usage price damages for property infringements since the 1867 decision of *Penn v Jack*. All these cases involve defendant gain and plaintiff loss. The gain and loss correlate on a normative level; the defendant's gain is the plaintiff's loss. The usage price award is one of the ways that private law attempts to effect a just correction so that the loss is remedied by the gain being relinquished.

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[84] Ernest J Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1, 11–2.

[85] Ibid 17.