

Compilations under Australian Law – Nine Network Australia Pty Ltd v IceTV Pty Ltd [2008] FCAFC

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Introduction

For those that compile information derived by them from original sources, if too little industry is employed in creating a database that database may not be regarded as an original work capable of protection by the laws of copyright. For those who obtain information from secondary sources, it is possible that in taking too much of another's compilation one infringes copyright. The Full Court of the Federal Court of Australia has examined, once more, the issues that typically arise in relation to using information gleaned from another source.

On 8 May 2008 the Full Federal Court of Australia (Black CJ, Lindgren and Sackville JJ) overturned the decision of Bennett J in *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 holding that an electronic program guide developed by IceTV Pty Ltd ("Ice") did infringe the copyright of Nine Network Australia Pty Ltd's ("Nine") in television program schedules: *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2008] FCAFC 71. The same Full Court previously held, in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491 ("*Desktop Marketing*"), that the use of an original compilation of data was infringed where a substantial part of the data was copied although it had been differently presented.

This most recent decision concerns compilations in which quantitatively less had been copied but that information which was copied was critical.

Facts

Nine broadcast between 168 and 210 programs per week. The selection, arrangement and ordering of programs required the investment of considerable skill and labour. Nine's programming decisions were reduced to material form in Weekly Schedules. The Weekly Schedules were not issued to the public. They were sent to television program aggregators ("Aggregators") who combined the information with comparable information received from other television broadcasters to produce further programs ("Aggregated Guides"). Aggregated Guides were available to the public online and in print. Not all of Nine's programming information was disclosed to the Aggregators in the Weekly Schedules; late change notices were sometimes issued.

Ice provided a subscription-based interactive electronic television program guide (EPG) called "IceGuide". The IceGuide allowed television program schedules to be viewed on television or computer screens. The Full Court accepted the primary judge's finding that the IceGuide was not copied from the

Aggregated Guides. Instead, an Ice employee watched television and recorded program details in a notebook.¹ Those details were transferred into templates, compared against the Aggregated Guide and modifications made as may have been required. Programming for each day of the week was then predicted over to the corresponding day of the following week. Ice referred to the Aggregated Guides on a daily basis to ensure that late changes were taken up.

The primary judgment

It was common ground that Nine had copyright in the relevant Weekly Schedules. The question was whether Ice had infringed Nine's copyright by indirectly copying time and title information from the Weekly Schedules via the Aggregated Guides.

Three key reasons were given by Bennett J for holding that there had not been an infringement.

First, there were two sets of skill and labour involved in producing the Weekly Schedule. The first was Nine's skill and labour expended in selecting and arranging its programs; the second was the skill and labour involved in drafting the synopses, selecting and arranging additional program information and reducing all the information into documentary form. Bennett J considered the first set of skill and labour to be

“antecedent” or “preparatory” to the exercise of skill and labour in preparing the Weekly Schedules.² That skill and labour could be viewed separately from the skill and labour involved in reducing it to material form.

Secondly, Nine’s main purpose in selecting and arranging its programs was not to create a literary work but rather to create a programming schedule that would maximise viewers.³ As a result, although Ice had copied “slivers” of time and title information it had not relevantly appropriated that skill and labour.

Thirdly, Nine failed to establish that the time and title information in the Weekly Schedules was qualitatively more important than the synopses of the programs which were not reproduced.⁴

Full Court

On appeal from the decision of Bennett J, a single set of reasons was delivered.

The Full Court referred to *Desktop Marketing*, where the question was whether copyright could subsist in a compilation of factual information absent the application of skill or significant labour. In that case an identically-constituted Full Court had held that the concept of originality in copyright accommodated a factual compilation which was the product of industrious collection involving substantial labour and expense. It emphasised that the compilation attracted copyright, not the information contained in it.

The present case was different to *Desktop Marketing*. No person outside Nine could have ascertained the precise programming schedule recorded in the Weekly Schedules in advance of their creation and dissemination.⁵

Originality was held to have derived largely from Nine’s creativity in the selection and arrangement of programs for broadcast.⁶ The

originality of that information lay in the skill and labour expended in selecting and arranging the programs as opposed to the form in which Nine presented it.

To the extent that the trial judge found that the skill and labour expended by Nine in selecting and arranging its programs was “antecedent” or “preparatory” to the exercise of skill and labour in preparing the Weekly Schedules, the Full Court emphasised that originality in a compilation may well lie first and foremost in the skill and labour expended by the compiler in selecting and arranging the items in the compilation,⁷ which should not be disregarded when determining the originality in a compilation.

There was no need for the sole or main purpose in the preparation phase to be the preparation of a compilation, an object being sufficient.⁸ Once that is established, the work cannot then be split up and parts allotted to the several objects.⁹ Here, one of the objects – but not the primary object – was the creation of the Weekly Schedules.

Substantiality required the part taken to be essential or material.¹⁰ Asking whether the time and title information was qualitatively more important in terms of originality than the synopses was the wrong line of inquiry. Even had the synopses been more important a finding that Ice had taken a substantial part of the work was not precluded.¹¹

The time and title information was a crucial aspect of the compilation. Everything else in the Weekly Schedules, such as synopses and program classifications, was subsidiary.¹² The time and title information reflected the expenditure of a great deal of skill and labour. That skill and labour was not separate and discrete from the skill and labour involved in setting those decisions down in the form of Weekly Schedules. It was part of a single process leading to the creation of the copyright work, being the written

record of Nine’s programming decisions and the associated program information.¹³

Ice’s use of many pieces of time and title information, indirectly copied from the Weekly Schedules on a weekly basis, involved the reproduction of more than slight or immaterial portions of Nine’s work.¹⁴ Authorities holding that the taking of a small quantity or proportion of a copyright work can constitute the reproduction of a substantial part of the work, especially where the infringer has acted systematically on a regular basis, were cited with apparent approval.¹⁵ For the Full Court, given the quality of the material taken, namely the most creative elements of the skill and labour exercised by Nine in creating the Weekly Schedules, the substantiality of the material taken was apparent.¹⁶

Comment

Ice has lodged an application for special leave to appeal to the High Court of Australia. The implications which will flow from the outcome of that application and from any appeal are obvious.

While it is unlikely that the High Court would draw a bright line between permissible and impermissible uses more generally, a review of the principles pertaining to substantiality would assist those information providers who obtain their data otherwise than by direct collection and provide guidance on the form in which it may then be presented.

¹ *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2008] FCAFC 71 at [84] – [86].

² *Ibid* at [95].

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid* at [92].

⁶ *Ibid* at [94].

⁷ Ibid at [100].

⁸ Ibid at [101] citing *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 479 per Lord Devlin.

⁹ Ibid.

¹⁰ Ibid at [105] citing *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

¹¹ Ibid at [106].

¹² Ibid at [109].

¹³ Ibid at [111].

¹⁴ Ibid at [113].

¹⁵ Ibid at [114] referring to *Football League Ltd v Littlewoods Pools Ltd* [1959] 1 Ch 637; *Cate v Devon and Exeter Constitutional Newspaper Co* (1889) 40 Ch D 500.

¹⁶ Ibid at [115].

Student Prize

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