



***Nine Network v IceTV:
Legal & Policy Analysis***

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Objectives

- Application of Anglo-Australian copyright law to broadcast program schedules.
 - Legal analysis of full Federal Court decision in *Nine Network Pty Ltd v IceTV* [2008] FCAFC 71.
- Policy analysis of EPGs, PVRs/DVRs & the future of FTA broadcasting.
 - Is copyright the enemy of consumers & technological innovation?

Legal Analysis



- Material facts.
- First instance judgment.
- Precedents: Anglo-Australian law on copyright in compilations.
- Legal analysis of full Federal Court decision (Black CJ, Lindgren & Sackville JJ).
- Unresolved issues.

Material facts

- Nine prepared programming schedules in variety of formats.
- Weekly Schedule (WS) – schedule of program time & title information for each week, including synopses & additional information [in excel & text formats].
- About 17 days before broadcast week schedules distributed to Nine Network stations (& shortly after) to aggregators.
- WS – only version of Nine schedule sent to aggregators, & accessed by public (incl. IceTV).

Material facts

- Aggregators – Pagemasters Pty Ltd, HWW Ltd & eBroadcasters Pty Ltd.
- Publish aggregated schedules from all FTA broadcasters – *TV Week, Yahoo! 7 TV Guide.*
- ‘Late change notices’ (brief) – update aggregators on modifications (as late as date program broadcast).
- IceTV created ‘templates’ (mainly strip programming) from Nine broadcasts.
- IceTV updated information in IceGuide using aggregated guides.

First instance judgment

- The WS – the only compilation produced by Nine relevant for purpose of copyright infringement.
- Two sets of skill & labour exercised in creation of WS:
 - Preparatory skill & labour – selecting & arranging programs to be shown to attract viewers in different timeslots.
 - Skill & labour of drafting synopses, selecting & arranging additional information, into documentary form.

First instance judgment

- 'The detail of the underlying subject matter, the work in choosing the program for each timeslot is not relevant to the compilation once the 'timetable' is prepared, much in the same way that the history of the rolling stock of a rail carrier is not relevant to a train timetable'.

First instance judgment

- The preparatory skill & labour expended by Nine is not primarily expended for the purpose of producing the compilation, but for the purpose of broadcasting programs in an order so as to maximise viewers.
 - 'The skill & labour expended for the purposes of maximising the benefit of the broadcasting is not coextensive with that expended for the purposes of the creation of the copyright work'.

First instance judgment

- The time & title information is not qualitatively more important than the synopses.
 - 'Ice refers to the whole of the time & title information in the Aggregated Guides but only takes "slivers" of it. Those "slivers" do not bear substantial importance in relation to the originality of the WS as a whole'.

Precedents

- *BBC v Wireless Gazette* [1926] 1 Ch 433.
 - Copyright in listings of radio programs in Radio Times entitled to protection – product of considerable time, skill, labour & expense.
- *Independent TV Publications v Time Out* [1984] FSR 64.
 - Copyright in weekly schedules listing TV programs infringed by publishing selection of programs.
 - Whitford J – ‘... there is a great deal of skill & labour involved in arriving at the daily programme schedules’.

Purefoy Engineering v Sykes Boxall [1955]

- P issued trade catalogues with tables of standard parts & code numbers. SB went into competition, offering almost identical parts & almost identical catalogues (layout differed).
- ‘... the considerable skill & labour devoted by the Plaintiffs in making their selection was devoted to the selection of the range of goods in which the Plaintiffs were to trade & not for the purpose of bringing into existence the literary work, namely, the catalogue. No doubt skill & labour were employed for the latter purpose, but skill & labour of a different order’.

Ladbroke v Wm. Hill [1964]

- Fixed odds football betting coupons – selection of wagers.
- WH copied 15 of the 16 lists in the Ladbroke coupons. Types of wagers copied (& to some extent, arrangement & headings of coupon).
- Contention: coupon produced in two stages:
 - selection of wagers (idea);&
 - production (arrangement) of coupon (expression).
- Only skill & labour in production of coupon can be taken into account.
- Trader's catalogue analogy – skill & labour in deciding goods to stock not taken into account – *Purefoy Eng.*

Lord Reid

- ‘... the respondents did not proceed in that way. Their business was to devise a coupon which would appeal to the betting public..’
- ‘... even in the case of a catalogue there may be a question whether the work, in deciding what to sell, & the work, in deciding how to sell it, are not so inter-connected as to be inseparable’.

Lord Evershed

- 'True it is that a great amount of work is devoted to calculating the odds; but this is not a case in which, in my opinion, the resulting document, that is the coupon, has involved no further skill, labour or judgment'.
- 'There can, in my judgment, be no doubt upon the evidence in the present case that, when all the hard work has been done in deciding upon the wagers to be offered, there still remains the further distinct task, requiring considerable skill, labour & judgment (though of a different kind) in the way in which the chosen wagers are expressed & presented to the eye of the customer'.

Lord Hodson

- ‘... it is clearly established that a claim to copyright may subsist by virtue of selection alone’: *Macmillan v Cooper*.
- ‘this selection was a highly skilled matter involving ... selections from an infinity of choice & much expenditure of time, money & effort’.

Lord Hodson

- *Purefoy Engineering* – ‘It may well be that there are cases in which expenditure of time & money has been laid out which cannot properly be taken into account as skill & labour involved in bringing into existence the literary work, be it catalogue or other compilation’.
- ‘This, however, is not ... such a case, & I cannot accept that preparatory work must be excluded in this case so as to draw a line between the effort involved in developing ideas & that minimal effort required in setting those ideas down on paper’.

Lord Devlin

- 'Any selection, for an example an anthology, requires a process of decision between alternatives & I cannot see that it matters whether the decision is made on literary or business grounds'.
- 'It is pointed out, quite rightly, that an anthology is different from a list that is descriptive of articles for sale, since the anthology is itself the thing that is offered for sale. But if this distinction was a good one, there could never be a copyright in a catalogue of goods'.

Lord Devlin

- 'I do not think it necessary in this type of case that the work done should have as its sole, or even as its main, object the preparation of a document such as a list or catalogue or race card. It is sufficient that the preparation of the document is an object of the work done'.
- 'If, when the work of selection is being done, there is no intention of listing results, the matter might well be different'.

Lord Pearce

- 'Out of the vast number of bets that can be offered, they select & devise those which, while being profitable to them, will fill up the coupon in preference to rival coupons'.
- 'There may be cases where such a dichotomy might be justified between some preliminary work & the actual transcription of a compilation, if the work was done with no ultimate intention of a compilation. But on the facts of the present case such an argument cannot succeed'.

Autocaps v Pro-Kit (1999)

- Trading catalogue of radiator caps & fuel tank caps.
- Finkelstein J
 - 'the preparatory work involved in the identification of which cap suited a particular vehicle was undertaken for the principal purpose of offering those caps for sale. Nevertheless it was a subsidiary but important object of the work that the information obtained would be recorded in a catalogue, being the principal means by which CPC advertised its products. That this was a significant subsidiary purpose ... is sufficient, in my opinion, to enable the work to be taken into account in determining the originality of the catalogue'.

Lahore & Rothnie

- [10,105] – It may ... be misleading if it is suggested that, because a process of selection may be necessary in the preparation of a compilation, the selection should be protected by copyright on the same basis as, for example, the selection of poems in Palgrave's Golden Treasury.
- In the latter case, the labour & skill in preparing the selection may justify subsistence of copyright in the selection as an aggregate work by virtue of the selection alone. On the other hand, the catalogue or the football coupon is a compilation in which copyright may subsist by virtue of labour & skill expended in preparation, arrangement or lay-out.

Lahore & Rothnie

- In the case of Palgrave's Golden Treasury it is the selection which must not be copied. One must not copy the catalogue or the football coupon, but there may be no protection against copying the selection of goods in the trader's shop or using the same wages offered by the football pool operator.
- *Ladbroke* – Lord Evershed considered that there was the requisite degree of skill, judgment & labour in putting together the coupon itself, in the way the selection was presented to the customer ... It seems more logical to consider the matter from this point of view, rather than to see subsistence of copyright in the coupon as being based upon the same principles as subsistence of copyright in a selection such as an anthology of poems, as did Lord Hodson, Lord Devlin & Lord Pearce.

DMS v Telstra (2002)

- Lindgren J on substantiality:
- ‘... in my opinion, at least in the case of a factual compilation intended to be a work of utility, infringement must be tested by reference to the interest which copyright is intended to protect in the particular case. In the present case, that interest was the labour & expense of gathering together in the one place the details of all the members of a given universe – all the telephone subscribers in a region’.

IceTV on appeal

- Substantiality – 3 important issues:
- Separation of preparatory skill & labour in selecting program time & title information.
- Main purpose of selecting information was deciding what to broadcast & not production of WS.
- Time & title information qualitatively less important than synopses.

Preparatory skill & labour

- [100] The decisions in *Time Out, Littlewood Pools & Ladbroke ...* plainly recognise that the originality in a compilation, such as a listing of programs to be broadcast in a future period, may well lie primarily in the skill & labour expended by the compiler in selecting & ordering the programs.
- The decisions reject the notion that that kind of skill & labour should be disregarded when assessing the originality of a compilation.

Object of skill & labour

- Lord Devlin
 - It is sufficient that the preparation of the document is an object of the work done.
- Lord Pearce
 - dichotomy might be justified between preliminary work & the actual transcription of a compilation if the work was done with no ultimate intention of a compilation.
- It is not to the point that (as her Honour found) the skill & labour expended by Nine on making programming decisions were not primarily expended for the purpose of producing a compilation.

Object of skill & labour

- [103] In saying that each case must depend on its own facts ... we recognise that there can be circumstances where work engaged in at an earlier point of time without the thought of the making of a compilation does not 'count' in the identification of originality or of substantial part.
- That, however, is not this case. When settling upon the times & titles, Mr H & Ms W had in mind that a purpose of the exercise was the use of the result to create the WS.

Time & title information

- Substantial part – *Blackie v Lothian*
 - ‘... one person should not be allowed to take away the results of another’s labour unless the court is satisfied that the part taken is so slight & the effect on the total composition so small as to render the taking immaterial’.
- ... the question is not whether the time & title information was or was not ‘qualitatively more important’ in terms of originality than the synopses.
- A particular element of a copyright work may be an essential or material part of that work, even if other aspects of the work demonstrate or reflect greater originality.

Substantiality

- 'The time & title information incorporated by Nine in its WS was a crucial element of the compilation, & was plainly of particular interest to potential viewers'.
- '... it was the time & title information that formed the centrepiece of the WSs.
- Ice's templates – 'lacked the crucial time & title information that would make the templates useful'.

Substantiality

- Courts appear to be especially willing to make such a finding [of infringement] where the alleged infringer has systematically taken material, albeit in small quantities, on a regular basis.
- Ice's use of material derived from the time & title information – we would not use the expression '*slivers of information*' – appropriated the most creative elements of the skill & labour utilised by Nine in creating the WS.

Conclusions

- IceTV indirectly reproduced a substantial part of Nine's WS by copying time & title information from the aggregated guides.
- Provided production of compilation is an object, preliminary labour, skill & judgment may be taken into account in determining originality of compilation.
- Full FC decision is entirely in accord with authority & appeal would need to overturn Anglo-Australian law.
- Anglo-Australian protection of compilations more like unfair competition law than protection of incentives for producing copyright material.

Unresolved issues

- Should selection of material for compilations be based on same principles as selection of material for other copyright works (eg. anthologies)?
- Was Ice's creation of the IceGuide template an indirect reproduction of Nine's compilation by means of Nine's broadcasts?

Selection of information

- Full FC impliedly supports views of Hodson, Devlin & Pearce LJ in *Ladbroke*:
 - ‘... originality in a compilation ... may well lie primarily in the skill & labour expended by the compiler in selecting & ordering the programs’.
- But the SLJ in selecting must not be separate from SLJ in presentation:
 - ‘... the skill & labour in selecting & arranging programming should not be regarded as separate & discrete from the extremely modest skill & labour involved in setting down on paper the programs already selected & presenting them in the form of the WS’.
- Is there a difference b/w ‘producing’ information (facts) & selecting from pre-existing facts?

Indirect reproduction

- *Purefoy Engineering*
 - Contended that copyright in trader's catalogue could be indirectly reproduced by copying parts offered for sale.
 - Held – parts offered for sale were not a copy or reproduction of pl's catalogue.
- Ricketson (1st ed) – there should be a 'generic limitation' on indirect reproduction via medium other than the original.
- Superseded by case law: *Winstone v Plix*; *LED Builders v Eagle Homes*; *Autodesk v Dyason*.

Indirect reproduction

- Lahore [1992] EIPR 428: ‘... the question is whether it would be an infringement of copyright in a railway timetable to stand on a station & observe & write down the times of train arrivals & departures, assuming that those times were the same as those printed in the timetable...’
- Case law – provided intermediary medium conveys form of expression (not ideas or facts), then indirect reproduction.
- Is there a distinction between trader’s goods/train stations (physical reality) & broadcast (medium, like text, that conveys information)?

Policy analysis

- Welfare effects of exclusivity in 'sole source' compilations/databases.
- Future of advertising-supported FTA broadcasting.

Copyright vs technological nirvana

- 'Australia is back in the technology dark ages after the Federal Court ruled in favour of Channel Nine in their appeal against Ice TV who for the last two years have produced an electronic TV program guide for media centre and set top box manufacturers which Nine said breached their copyright': David Richards, <www.smarthouse.com>, 9/5/08.

Copyright vs technological nirvana

- Kathy Bowrey, 'What Are You Missing Out On?' in A. Kenyon (ed) *TV Futures* (2007).
 - 'We are provided with glimpses of what could eventuate ...- where technology, industry, govt. policy, legislation & the public interest work together to support a competitive marketplace rich in new, innovative media services & experiences. But contemporary copyright plays a spoiler role. Copyright law, in alliance with Big Media, frustrates access to IceTV, TiVo & the next generation of PVRs & ad-skipping tools ... The impression given is that the law will continue to be out of step with delivering the potential of the new technologies & confound consumer expectations of easy access to content on demand well into the future'.

'Sole source' compilations

- 'Sole source' database – where compilation only source of information – railway schedules, telephone directories, broadcast schedules – competitors must deal with copyright owner.
- *RTE & ITP (Magill)* [1995] ECR I-743, [1995] 4 CMLR 718:
 - RTE & ITP successful in action for breach of copyright in broadcast program listings.
 - Magill appealed to Eur Commission alleging abuse of dominant position (Art 86).
 - ECJ held breach of Art 86 by refusing access to 'the basic information which is the raw material indispensable for the compilation of such a guide'. This 'prevented the appearance of a new product, a comprehensive guide to TV programmes...'

Refusals to deal

- Gilbert & Shapiro, 'An economic analysis of unilateral refusals to licence IP', 93 Proc. Nat'l Acad of Sci 12749 (1996).
- Compulsory licensing can have two negative effects: reduce welfare in short run by compelling inefficient licensing; & reduce welfare in long run by reducing incentives for innovation.
- 'The analysis in this paper is unlikely to support the argument that economic welfare ... is enhanced by an obligation to license IP ... whenever such property is necessary for the production & marketing of a new product for which there is potential consumer demand'.
- 'A more productive channel of inquiry appears to us to focus on the types of products that justify IP protection & the appropriate scope of that protection'.

Sole source databases

- Is there a need for an incentive to produce databases such as telephone directories & broadcast schedules?
- Should Australian law be more in line with US law – *Feist Inc v Rural Telephone*, 111 S Ct 1282 (1991)?
- A matter for the legislature & not the courts.

Future of FTA broadcasting?

- PVRs/DVRs facilitate ad-skipping.
- 'No commercial television w/out commercials'.
- Media moving from mass market stage to 'specialised' stage – old media struggling to stay viable in face of competition from new media: A M Noll, *The evolution of media* (2006).
- Matthew Ricketson, *The Age* (23/6/08): stagnant growth in TV advertising revenues:
 - 'Is the slowdown in growth linked to the slowdown of some parts of the economy or to the gradual dissolving of the mass audience for commercial television? Or to something else?'
- Chris Anderson, *The Long Tail* (2006) – with internet distribution, products in low demand with low sales volumes can effectively compete with bestsellers/blockbusters.
- FTA broadcasters vs YouTube.

Economics of FTA b/casting

- Productivity Commission, *Broadcasting*, Inquiry Report No. 11 (2000).
- FTA broadcasting has characteristics of public good – non-excludability, non-rivalry in consumption.
- In absence of exclusion mechanism, FTA broadcasters must be financed by advertising (commercial) or govt (ABC, SBS).
- FTA broadcasting – consumers unable to signal preferences directly through market.

Commercial b/casting

- FTA b/casters sell audience to advertisers.
- B/casters seek to maximise revenue by maximising audience share.
- But b/casters have no means of determining intensity of preferences.
- Therefore FTAs will b/cast programs large audiences marginally prefer over programs smaller audiences strongly prefer.

Commercial vs subscription

- 'If viewers can choose to delete commercials, free TV – regardless of the programming choice model – becomes unaffordable, thus leading to subscription-based TV with some programming restructuring': Loebbecke & Radtke, 'Business Models & Programming Choices' (2005).
- Strategies for dealing with ad-skipping:
 - Increased product placement – shifts advertising revenue to content providers.
 - Pop-up ads – may shift advertising revenue to PVR/DVR service providers.

Commercial vs subscription

- Subscription TV – viewers express preferences directly & may cater for small groups.
 - ‘The direct contractual link between viewers (subscribers) and broadcasters provides an incentive for the operators to cater for the diversity of viewers’ tastes and preferences’. (PC, p 292).
- Erosion of commercial FTA b/casting raises social equity concerns:
 - ‘To the extent that b/casting services take on more of the characteristics of normal private goods, the public goods ‘problem’ becomes less of an issue; however, access & equity issues then arise. A TV industry, for example, based on subscription services alone may offer greater choice to subscribers, but at a significant cost to lower income consumers’. (PC, p 94).

Conclusions

- In *Nine v IceTV* – Nine has used copyright to protect the commercial FTA business model.
- It is hard to justify copyright protection of 'sole source' databases where they would be produced anyway.
- But there may be a public interest in restricting ad-skipping technologies.
- Simply because PVR/DVR ad-skipping is convenient for consumers, does not mean it is in the broader public interest.
- The debate about the future of Australian commercial FTA b/casting is properly a matter for b/casting policy, not copyright law.
- Therefore, if restrictions on functionality of PVRs desirable – to support commercial FTAs – should ideally be imposed under broadcasting law.
- But politically unpalatable to impose restrictions on consumer electronics (& Aust. b/casting policy is broken).

Conclusions

- Commercial FTAs have been forced to rely on copyright law.
- Australian developments will always be peripheral secondary to US developments in:
 - FTA strategies for dealing with ad-skipping; &
 - development of PVR/DVR technologies.
- The onus lies on commercial FTAs to devise creative strategies to survive in increasingly challenging media landscape.