

Compilations, television program schedules and the question of copyright – implications of the decision in *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172

On 9 August 2007, the Federal Court handed down its decision in the case of *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172. Justice Bennett considered whether copyright subsisted in television program schedules as compilation literary works within the meaning of s 10 of the *Copyright Act 1968* (Cth) (“the Act”). The decision of Justice Bennett provides some indication of the scope of copyright as it subsists in different types of compilations as well as guidance in determining whether a substantial part of a compilation has been reproduced.

Nine’s program schedules and the question of copyright

Nine prepares a schedule of programming that includes information regarding time and title information for one broadcast week, in addition to program information and synopses (“Nine Schedule”). The Schedule is produced in various formats, one of which is provided to third party aggregators who combine it with similar information from other broadcasters into an aggregated guide. The aggregated guide is then made publicly available.

Ice provides a weekly, subscription based “electronic program guide” which displays details of all programs scheduled for broadcast by free to air networks. Ice does not receive information from Nine or from the Aggregated Guide about the time, date and title of programs proposed to be broadcast by Nine. Ice said that it “predicts” the information for inclusion in its guide based on its observations of Nine’s past programming behaviour and knowledge of the industry. Ice then checks its predictions against the Aggregated Guide.

Nine argued that the reproduction of the time and title information in the Nine Schedule by Ice, as well as the act of producing and disseminating the guide involved an act of infringement in that Ice appropriated the “skill labour and authorship” of Nine in compiling the Nine Schedule.

Ice accepted that the creation of the Nine Schedule gave rise to a literary work in which copyright subsisted under the Act.

Nine asserted the subsistence of copyright in three literary works:

1. A compilation of program time and title information only
2. A compilation of program time, title and additional program information and
3. A compilation of program title and additional program information, together with the synopses issued by Nine.

Referring to the decision in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491 amongst others, Bennett J found that Nine could claim copyright in its weekly schedule. However, given that a proper identification of the copyright work takes account of the way in which the copyright owner presents or packages that work, Nine could not claim copyright in the individual components of that schedule. As Bennett J noted, the Act “provides for the subsistence of copyright in compilations of information, not mere information per se”.

Her Honour went on to consider the question of skill and labour in terms of copyright relevant to factual compilations. After considering the relevant authorities, her Honour held:

1. Where sufficient skill and labour is expended in gathering the material for inclusion in the compilation, but not in the form of presentation or arrangement of the material because the form is dictated by the nature of the material, that skill and labour is protected.
2. Where the form of presentation or arrangement of a compilation is a product of the skill and labour of the author, it is that form that is protected.

The activities of IceTV

After finding that Nine had no copyright in the Aggregated Guide beyond its own “preparatory skill and labour”, Bennett J went on to examine the conduct of IceTV.

IceTV’s evidence was that it:

1. Created a seven day television template independently of any guide. This involved an employee of IceTV watching television for approximately three weeks, a process the employee described as “torture”.
2. Entered the template into its database, which then formed the basis for the IceGuide. Each template was amended prior to entry into the Ice database by reference to the Aggregated Guide. Using specialised software, Ice employees then “predict over” any further changes based on information contained in the database and past programming patterns to create a new IceGuide.
3. Checked each entry for the new IceGuide by reference to the Aggregated Guide and made changes to the time and title information to reflect weekly variations in Nine’s programming and late changes.

Although Bennett J noted that the expenditure of Ice’s skill and labour “may provide the basis for a claim to compilation copyright in the IceGuide”, that did not, of itself, answer Nine’s claim of infringement. Her Honour also noted that although the IceGuide and Nine’s schedule were similar in time and title content, they were not similar in the *totality* of the information included, nor in the *form* of presentation of the data. As such, the present case could be distinguished from the decision in *Desktop v Tesltra* where the interest that the copyright protected was the skill and labour of gathering together in one place the details of all of the members of a “given universe”.

Ultimately, her Honour held that as Ice did not take the skill and labour of placing programs in an order that appeals to viewers, but did conduct its own research and draft its own synopses, it had not infringed Nine’s copyright. Although Ice was found to take slivers of time and title information each day from the Aggregated Guide, it did not reproduce a substantial part of Nine’s own guide.

Implications

The decision is important for a number of reasons:

1. A compilation, which has involved the use of labour and skill, will attract copyright.
2. Individual components of a compilation are unlikely to be protected.
3. Use of labour and skill in preparing a compilation – whether based on an existing factual compilation or otherwise – will determine whether there has been any infringement.

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