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Australia: Copyright in Race Fields and Sporting Fixture Lists

What does the Telstra Telephone Directories case mean for the Racing Sector?

When will copyright subsist? Will bookmakers' use of race fields and sports fixtures infringe copyright held by racing and sports bodies? Don't bet on it!

For some time now, elements of the racing industry have considered copyright as a legitimate means to obtain a financial contribution from bookmakers who utilise race information without the racing industry's permission. This continues to be the case despite the High Court's 2009 unanimous decision in the IceTV Case where the High Court ruled that IceTV did not infringe copyright in Nine's television program schedule.¹ The High Court found that there was no substantial reproduction of Nine's program titles and times in IceTV's electronic program television guide.

A recent case, involving Telstra Directories, has concluded that copyright did not subsist in Telstra's white and yellow directories. This raises significant obstacles to any party seeking to establish copyright in databases compiled from factual information. Racing and sporting bodies will have to address these issues if they wish to pursue unauthorised users of their racing and sports fixture information (including wagering operators) on the basis of copyright infringement.

IceTV Case

In order for copyright to be established in the program schedule, the schedule was required to be original and the work of an author or authors. In considering this, the High Court restated the principle that, while copyright does not protect facts or information, it will protect the form or expression of the facts or information, if the form or expression is original.

The High Court also stated that, in considering whether copyright in a compilation has been infringed, some of the principles to be applied include:

¹ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

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- when determining whether a substantial part of a compilation has been reproduced, the quantity and quality of what was copied must be considered; and
- in assessing the quality, the originality of what was copied must be considered.

A person will not have infringed copyright if they have used skill and creativity in producing a new work, even if the new work incorporates part of someone else's compilation, provided what is copied is not original (that is, simply facts or information).²

For a detailed analysis of this case and its ramifications for the racing and sports betting industry, see <http://www.addisonslawyers.com.au/focuspaper/101>.

Telstra Directories Case

The February 2010 decision of the Federal Court in *Telstra Corporation Limited & Anor v Phone Directories Company Pty Ltd & Ors* [2010] FCA 44 (**Telstra Directories Case**) may be an additional nail in the coffin for any argument that race fields are protected by copyright. Race fields are compilations of factual information, such as the time and name of the race, the names of the horses and the names of the trainers and jockeys.

In the Telstra Directories Case, her Honour Justice Gordon was required to consider whether copyright subsisted in various White and Yellow Pages telephone directories (which comprised listings, headings and arrangements of listings under headings). In deciding that copyright did not subsist in the telephone directories, which were produced by Sensis Pty Ltd (**Sensis**) for Telstra Corporation Limited (**Telstra**), Justice Gordon considered the issues of authorship and originality to be closely tied.

Authorship

- If copyright were to subsist in the directories, it was considered essential that Telstra be able to identify the joint authors of the directories.
- Telstra's evidence on this issue, which consisted of affidavits from 91 individuals involved in the production of the directories, did not cover the entire range of people who would have contributed to the production of the White and Yellow Pages.
- Of the 91 individuals, some did not contribute "independent intellectual effort" or "sufficient effort of a literary nature". From this evidence, it appeared that the authors of substantial parts of the directories could not be ascertained or were not human.
- Many who could be considered joint authors were contractors of Sensis, rather than employees. Telstra and Sensis failed to tender copyright assignments from all contributing contractors.
- Therefore, Telstra failed to establish sufficiently the identity of all of the authors.

² For a more detailed general consideration of this case, see Addisons' Focus Paper no 100 at <http://www.addisonslawyers.com.au/focuspaper/100>.

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- The process of creating the directories was "heavily automated". Human contribution was regulated by the parameters of the computer systems used in production and "the Rules". The Rules were very strict guidelines that controlled and dictated content and presentation and left next to no scope for creative input.

Originality

- Given the lack of independent intellectual effort or sufficient effort of a literary nature, the directories were not original works and therefore could not be protected by copyright (even if all the authors could have been identified).
- There was no "creative spark" or exercise of the required level of skill and judgment.
- Whilst the production of the directories required significant expense and labour, these two factors, on their own, will not result in the directories being considered "original".
- Therefore, each of the telephone directories was not an original literary work.

Implications for Race Fields and Sporting Fixture Lists

The decision in the Telstra Directories Case has significant implications in considering whether copyright in race fields and sporting fixture lists subsists, and is capable of enforcement. In light of Justice Gordon's decision, it is clear that serious questions exist as to whether authorship and originality can be established.

Authorship

Any entity asserting copyright in race fields or fixture lists must be able to establish that they own the relevant copyright. This requires all relevant authors to be identified. Also, all parties involved in the creation of the relevant works must be identified and all rights must be held by the claimant (generally the copyright owner).

If they are unable to do this, they should carefully consider whether any assertion that copyright subsists in these compilations is misleading or incorrect.

Originality

The IceTV and Telstra Directories Cases indicate that there is a serious question as to whether copyright can subsist in a list comprising factual information. An entity asserting the subsistence of copyright in race fields / sports fixtures must consider the following:

- Whilst effort and expense may have gone into creating such lists, has the compilation of these lists required independent intellectual effort or sufficient effort of a literary nature? If not, then these types of lists may not be protected by copyright.
- Does the way in which the lists are produced limit any form of creativity? These types of factual lists, due to their very functional nature, leave little or no scope for any creative input in the way in which the information they contain is presented.



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This creates considerable uncertainty as to whether those cases which suggest that copyright can subsist in race fields/sporting fixtures lists³ will be applied by the Australian courts.

Conclusion

We expect that Telstra will appeal this decision to the Full Federal Court. In the meantime, we await the Federal Court's decision in respect of the current constitutional challenges to the race fields legislation in New South Wales to determine whether copyright is the last legal ground remaining upon which racing bodies can rely to require payment of race fields fees. But, if this occurs, the Telstra Directories Case indicates that it will not be an easy task, leading to the possibility that the legal challenges will continue for some time.

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³ *Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637 and *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273