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What does the IceTV Decision Mean for the Racing Sector?

Australia - Copyright in race fields/sports fixtures lists.

Does copyright subsist? Will bookmakers use of race fields/sports fixtures constitute infringement of copyright held by racing/sports bodies?

The racing industry¹ has viewed copyright as the means to source an appropriate financial return from bookmakers and other parties who use racing product without the industry's consent. Indeed, in a frequently quoted statement from an interview in July 2008, Peter V'Landys, the Chief Executive of Racing NSW stated:

“The other situation is that Racing New South Wales, if this [race fields] legislation is challenged, will also enforce immediately its copyright on our racing information and our price may then change. Instead of being one and a half percent, it could be substantially more if we need to go through the process of protecting our copyright.

There has been a decided court case only weeks ago between Channel Nine and Ice, which shows that you take any part of the copyright of racing information, either be the numbers or be a name, you are still in breach of the copyright.”

But is this now the case after the High Court's decision in IceTV²?

The result is clear. In an unanimous judgement, the High Court ruled that IceTV, even though it had utilised extracts from Nine's TV schedule, a compilation in which Nine held copyright, did not infringe that copyright.

Certain commentators have suggested that this means that copyright does not exist in race fields.

This conclusion should be viewed with caution. In certain cases, copyright will subsist in race fields, just as it may in schedules of racing (or betting) information or results, and the owners

¹ The comments set out in this focus paper relate directly to the racing sector – they are equally relevant to the sports industry when considering copyright in sports fixtures lists.

² See Case Note in Addisons Focus Paper no 100 at <http://www.addisonslawyers.com.au/focuspaper/100>

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of that copyright will consider that infringement has taken place where unauthorised use occurs.

The tests that will be applied are well established:

- Does copyright subsist?
- Has the copyright been infringed?

The High Court clarified the legal principles that would be applied when considering whether copyright in race fields has been infringed. For these purposes, let's assume that the race field comprises various items of information, such as time, the name of the race, the horse, their trainer and jockey and their starting prices.

In order for copyright in the race field to be established:

- it must be original; and
- there must be an author or authors.

In considering these points, the Court would have regard to the following principles that were restated by the High Court:

- copyright will subsist in a form of expression; and
- copyright does not protect facts/information.

Similarly, for infringement to be established, there must be reproduction of a substantial part of the relevant copyright work. Again, the High Court reiterated the principles that would be applied in assessing whether copyright in a compilation, like a race field, has been infringed. These include:

- in considering whether a substantial part is reproduced, it is necessary to consider both the quantity and quality of what is copied;
- in assessing the quality, it is necessary to consider the originality of the part copied;
- the commercial value of the information taken is not a relevant factor as this focuses on the information, rather than the particular form of expression;
- when considering infringement of copyright in a compilation, a distinction should be drawn between those parts that constitute information and those parts that constitute creative material;
- use of the information, not being an original work of the relevant authors, will not constitute infringement;
- where the relevant work is simple or lacking originality, a greater proportion of the relevant work will need to be taken for infringement to be established;

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- where the expression is of limited originality (e.g. expression of time and title information), particularly if taken from another source, it is likely to lack the requisite originality to constitute a substantial part;
- a chronological arrangement of times is obvious – this lacks the requisite originality;
- the fact that extensive skill and labour may have been expended in the development of the copyright work is not enough in itself – the tests relating to substantial part must still be applied; and
- the objective of the skill and labour must still be considered – it must be directed at the particular form of expression to be relevant. Of particular importance is the following statement:

“the critical question is whether skill and labour was directed to the particular form of expression of the time and title information, including this chronological arrangement. The skill and labour devoted by Nine’s employees to programming decisions was not directed to the originality of the particular form of expression of the time and title information. The level of skill and labour required to express the time and title information was minimal. That is not surprising, given that, as explained above, the particular form of expression of the time and title information is essentially dictated by the nature of that information.”

In the context of race fields, each of these issues will be of great relevance. At the end of the day, the facts in issue will be viewed closely by the Court. Additional factors such as the following will be assessed:

- What independent enquiries/developments have been conducted by the “infringer” in creating the “infringing” race field;
- The extent that parts of the race field are reproduced, are they:
 - a material part;
 - original;
 - obvious; or
 - mere information?
- What is the objective of the skill and labour expended by the authors of the race field? Is it:
 - the form of expression; or
 - some other objective?



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In the aftermath of the IceTV decision, these principles will be analysed closely by the racing industry, bookmakers and their advisers, particularly if the race field legislation does not withstand the current constitutional challenges³

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³ Betfair and Sportsbet are separately challenging the enforceability of the NSW race fields provisions in the Federal Court of Australia. For further information concerning the NSW race fields provision, see Addisons' Focus Paper no. 73 at <http://www.addisonslawyers.com.au/focuspaper/73>