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IceTV

The demise of sweat of the brow

by Mark Davison, Professor of Law, Monash University and Special Counsel, Knightsbridge Lawyers.

The Facts

- IceTV generated its own schedule of Channel Nine's program and broadcast times together with its own synopses.
- It did so by watching Channel Nine for some weeks, writing down the schedule as broadcast and 'predicting' future schedules
- Fine tuning of the 'predicted' schedule was done by cross-checking against Nine's published schedule
- It took this approach due to the prior case law

Prior Case Law

- Desktop Marketing v Telstra clearly accepted 'sweat of the brow' or 'industrious compilation' as the test of subsistence of copyright.
- Sackville J :
 - 'Australian law recognises copyright in so called industrious compilations, even in the case of whole of universe compilations prepared by monopolies.'
 - Ice was attempting to prove that it used its own 'sweat' to independently create its own schedule of Nine's broadcasts

Issues for the High Court

- Ice conceded that copyright subsisted in Nine's schedule, a literary work
- The narrow issue was whether the information it took from Nine's published schedule constituted a substantial part of the literary work.
- First instance decn, these 'slivers' of information did not constitute a substantial part of the work as the investment in determining what to show when was not relevant to originality of the work
- Full Court decn – preliminary work of deciding what to watch an important part of the work of creating the compilation

High Court decn -the narrow issue

French CJ, Kiefel, Crennan JJ

■ Para 42

■ Expression of the time and title information is not a form of expression which requires particular mental effort or exertion.

■ Way in which time and title can be expressed very limited and so 'the expression lacks the requisite originality ... for the part to constitute a substantial part'.

■ **Para 49** Only skill and labour directed to the originality of the particular form of expression is relevant for infringement

Gummow, Hayne and Heydon JJ

- The legislation requires that the part taken be substantial which in turn means that some measure of legitimate appropriation is allowed – **para 157**
- Commercial value of the time and title information not relevant to issue of substantiality – **para 162**
- Difficult to discern expression of thought in time and title information – **para 170**
- First instance judge reached the correct outcome on issue of substantiality

Broader issues

- Test of originality for subsistence of copyright
- French et al– origination correlates with authorship. If the work originates from the author it is an original work. – **para 33**
- Either sweat or intellectual effort are sufficient for subsistence – **para 47- 48**
- Substantial part requires a reproduction of an original part. Originality for infringement is a different issue from originality for subsistence- **paras 38, 49**
- Only effort directed towards originality of expression is relevant. And the skill and labour to express time and title was minimal **Para 54**
- Correctness of Desktop Marketing for another day

Broader Issues

- Gummow et al- Desktop Marketing wrong on :
- Authorship – **para 130**
- Relevant investment and appropriation – **para 133-4 : 160-1**
- Substantial part – **para 157**
 - Subsistence of copyright may well require a spark of creativity (Feist) or skill and judgment (Canadian CCH decision) – **para 188**
 - Open invitation to challenge Desktop Marketing