

# FEDERAL COURT OF AUSTRALIA

NINE NETWORK AUSTRALIA PTY LTD V ICETV PTY LTD [2007] FCA 1172

## SUMMARY OF FINDINGS

1 For the reasons I have given, the application should be dismissed. For convenience only, a summary of my findings follows.

### **The Weekly Schedule is the copyright work**

2 The work produced by Nine that is relevant to these proceedings is the Weekly Schedule. The Weekly Schedule is a product of Nine's skill and labour in selecting and ordering programs for broadcast. It is also a product of Nine's skill and labour in presenting or arranging the information therein in the form chosen by Nine. That skill and labour includes the synopses drafted or edited by Nine. Ice accepts that copyright subsists in each Weekly Schedule as an original literary work (s 32 of the Act).

3 Each of the components of the Weekly Schedule, including the days of the week, program time and title, additional program information and the synopses, are an integral part of that compilation. Copyright subsists in the compilation as a whole. Nine cannot claim copyright in the time and title information for a single day or week as if that information were itself a separate compilation. Nor can Nine claim copyright in its Late Change Notices. The Late Changes Notices are neither accessed by Ice nor included in the Weekly Schedule.

### **The Aggregated Guides are separate compilations**

4 The Aggregators integrate the information in the Weekly Schedule with comparable information obtained from other free to air networks for publication in the Aggregated Guides. The aggregation of information does not "destroy" Nine's copyright in the Weekly Schedule. It does, however, result in the creation of the Aggregated Guides: compilations which are themselves separate and distinct from the Weekly Schedule. The Aggregated Guides are a product of the skill and labour of the

Aggregators and their clients (eg, Yahoo). They differ in form and content to the Weekly Schedule. It can, however, be said that the preparatory skill and labour protected by the copyright in the Weekly Schedule remains as Nine's preparatory skill and labour for that part of the Aggregated Guides.

### **Ice does not infringe copyright in the Weekly Schedule**

5           It is open at law to a person to ascertain the facts recorded in a compilation by independent inquiry and to compile his or her own compilation on the basis of that independent inquiry (*Desktop*). This is what Ice did during the "torture period" in 2004, when Mr Rilett developed the Templates for Sydney by watching television for three weeks and recording the details of the programs screened including name, channel and day of broadcast. Mr Rilett did not copy from the Aggregated Guides to create the Templates for Sydney.

6           The Templates for Sydney were entered into Ice's database and formed the basis for the IceGuide. Mr Rilett amended the time and title information in those templates prior to their entry into the Ice Database by reference to the Aggregated Guides. That means of amendment of information in the Ice Database continues today. Ice operators "predict over" a past IceGuide schedule from the same day of the week in a previous week to make a new IceGuide for that day. This involves use of Ice's software and the drawing of information in Ice's database. Ice checks each entry for the new IceGuide by reference to the Aggregated Guides and makes changes to the time and title information to reflect weekly variations in Nine's programming and late changes. The result is the creation of an IceGuide schedule which contains time and title information (but not additional information or synopses) that may be more than 99% similar to that part of the Aggregated Guides that reflects the Nine Programming.

7           Nine submits, as its primary case, that the making and updating of the IceGuide in this manner has resulted in the reproduction of a substantial part of its copyright work. This is a question of fact and degree to be tested by reference to the similarity between the works, the extent of actual copying, the quality and originality of what is taken and the interest which the copyright protects. Each case turns on its own facts.

8           Nine relies heavily on *Desktop*. *Desktop* was, however, a “whole of universe” case. A telephone directory permits no selection of the subscribers to be included and only one mode of arrangement and expression of the factual information therein. The interest that the copyright protected in *Desktop* was the skill and labour of gathering together in one place the details of all of the members of a given universe – the telephone subscribers in a region. By reason of the subject matter, the manner of alphabetical arrangement of the information was inevitable.

9           Different content and modes of expression and arrangement may be utilised for a television schedule. The Weekly Schedule, the Aggregated Guides and the IceGuide each differ in their manner of selection, expression and arrangement. It follows that form and content are each relevant to the question of infringement.

10          Ice does not engage in broadcasting. It does not take the skill and labour of placing programs in an order that appeals to viewers in that Ice plays no part in the placement of programs. It does not take the format of the Weekly Schedule. It does not take synopses from the Weekly Schedule. It conducts its own research and drafts its own synopses.

11          Ice does take slivers of time and title information each day from the Aggregated Guides. For the reasons I have set out in detail, Ice does not reproduce a substantial part of the Weekly Schedule in so doing.

12          It follows that Ice has not infringed Nine’s copyright in the course of making and updating the IceGuide. Nine accepts that, in these circumstances, the other infringement allegations must also fail.

13          Ice is not precluded from bringing a claim for unjustified threats of copyright infringement pursuant to s 202(1) of the Act because Nine commenced proceedings for infringement before such a claim was made. However, for the reasons I have given, leave to file the second cross-claim is refused.

14          I will hear from the parties before making orders as to costs.