Copyright as an Instrument of Information Flow and Dissemination: the case of *ICE TV Pty Ltd v Nine Network Australia Pty Ltd*

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Introduction

In October 2008, all seven justices of the High Court of Australia will hear an appeal against the Full Federal Court's ruling that Ice TV infringed the Nine Network's copyright in Nine's weekly (television) program schedule (a compilation) by reproducing a substantial part of the schedule in Ice TV's electronic program guide.[1]

The convening of all seven judges of the High Court is a rare occasion and reserved for cases of special significance. The court's decision in this case has the very real potential to influence the shape of innovation and productivity in Australia over the next decade. It will be asked to determine a legal issue that invites the court to provide guidance on the underlying purpose of copyright law and its role in promoting information dissemination and information flows: variables that (evolutionary) economists see as foundational to innovation.[2]

To this end we believe the outcome of this case may substantially determine the extent to which commercial information compilers control the use of non-expressive compilations. The underlying concern of many observers is that if substantial reproduction is said to result from appropriation of investment, and investment is said to be a legitimate simulacrum of expressive originality, most unauthorised copying of compiled information will constitute breach of copyright. The adverse social and economic consequences of so-called 'copyright in information' may be great.

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[1] [2008] HCATrans 308 http://www.austlii.edu.au/au/other/HCATrans/2008/308.html ; *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/71.html ; *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 http://www.austlii.edu.au/au/cases/cth/FCA/2007/1172.html

[2] See generally: JA Schumpeter, *Capitalism, Socialism and Democracy* (1943) Routledge London. See also JS Metcalf, The Broken Thread: Marshall, Schumpeter and Hayek on the Evolution of Capitalism, Ch 6 in Shinoya Y (Ed) *Marshall and Schumpeter on Evolution, Economic Sociology of Capitalist Development,* Edward Elgar, 2009, in which he discusses the idea that 'economy evolves because knowledge evolves' (p132). "[C]ulture, knowledge, choices and social networks *outside* of the economy – [need] to be taken into account, for it transpires that this is where growth innovation and dynamism originates in the evolution not only of the economy but also of knowledge": J Hartley (2009) 'From the Consciousness Industry to Creative Industries: Consumer-created content, social network markets and the growth of knowledge' in Jennifer Holt and Alisa Perren (eds) *Media Industries: History, Theory and Methods*. Oxford: Blackwell, 231-44.

Copyright law protects *compilations* of information.[3] In economic theory, compilation copyright safeguards information producers from rival producers who appropriate the information product – thus (in theory) the copyright simultaneously supplies productive incentive and encourages competition. The result is optimum dissemination.

In our opinion, the Full Federal Court, in considering the first appeal described the law on compilation copyright correctly. The Court's error stemmed from its failure, when considering 'the interest protected by copyright'[4], to apprehend the purpose for which the interest is protected. Interest protected and purpose of protection are not identical subjects. They are, however, logically related. Unless the law is devoid of reason, an interest is protected for a purpose. Determining substantial reproduction by reference to potential harm to the Nine Network's commercial interest in programming information, the Court erroneously conflated the welfare of the Nine Network with the purpose for which copyright subsists in television guides.

If the purpose of copyright subsistence is not discerned correctly, and instead is identified with protecting the copyright owner from competition, the result, as we discuss in this article, is that the legitimate flow of information, consistent with copyright principles, is constricted. The Federal Court, we believe, became lost in the fog of law.[5] If harm to the copyright owner's interest is the determinant of infringement, copyright becomes an instrument of oppression, since it enables the owner to elide legitimate competition, to public detriment. The Court, befogged by precedent, failed to realise that harm may be done to the copyright holder without causing injury to the copyright.[6]

The way out of the fog is to respond fully to the question only partly considered by the Court - why (or for what purpose) does copyright subsist in the weekly schedules – and to apply the logic of the answer to resolving the question of infringement. As we explain, our assumption, consistent with conventional public policy precepts adopted in Australia in the last 25 years, is that regulation is justified to the extent that it achieves agreed social goals and does not hinder competition. A court is not asked to predicate each judgment on fine analysis of social utility or competitive effect. But if a legal inquiry raises questions of regulatory purpose, the questions should not be avoided and cannot be answered by resort to legal doctrine alone.

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[3] A compilation is literary work and protects *original* literary works. To attract copyright protection a compilation must be original: *Nine v Ice* [9]-[10].

[4] *Nationwide News v Copyright Agency Limited* (1996) 65 FCR 399, 418 provided that substantiality is defined 'with reference to the interest protected by copyright.'

[5] Cf Carl von Clausewitz, originator of the phrase 'fog of war' in *On War* Bk 2 Ch 2 par 24: 'The great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently — like the effect of a fog or moonshine — gives to things exaggerated dimensions and unnatural appearance.'

[6] Cf Lyman Ray Patterson 'Free Speech, Copyright and Fair Use' 1989 *Vanderbilt Law Review* 40 1-66 (and see also *Copyright in Historical Perspective* Vanderbilt University Press 1968). Patterson distinguished between the limited function of copyright – to restrain piracy – and the licence implied by the US Constitution to use copyright works in ways that did not constitute piracy. '… copyright has both a purpose and function. The purpose is to promote learning; the function is to protect the author's economic interest. The function, however, must serve the purpose, not vice versa. To say that the copyright owner has a right to the profit and a right to deny public access is to fly in the face of the constitutional scheme of copyright. The purpose of copyright relates to the use of the work; the function of copyright relates to the use of the copyright. In order to protect the author against the use of the copyright, it is not necessary to deny the consumer the use of the work.' (At 46).

In neo-classical economic language, regulation creates distinct sovereignties: those of producer or consumer (including user).[7] Consumer sovereignty, achieved in theory by the elimination of market failure, is accepted, in Australia as elsewhere, as the goal of regulatory policy and the measure of regulatory efficiency.[8] If the producer is the market sovereign, the result is inefficiency and market failure. We argue below, that as a matter of public policy, it cannot be that, without more, copyright subsists in the weekly schedules in order to protect the Nine Network against appropriation in all circumstances. The goal of consumer sovereignty necessitates that copyright protects Nine against unauthorised copying in order that Nine continues to disseminate information by competing in the relevant market.

The novelty of our approach is to separate copyright holder and copyright, and show that, for reasons of public policy, copyright may subsist for a purpose different from the purpose the holder wishes to assert. By analysing subsistence and infringement by reference to public policy,[9] we supply a method of analysis that is consistent with both doctrine and policy. Our approach has some similarity to that of some courts and commentators in the United States, and the European Union legislature (see Part B under 'Constitutional and Purpose Considerations'), which have located analysis of copyright scope in the context of constitutional considerations (the US) and declared purposes (the EU).[10]

Our aim then is to clarify and examine the logic of the Full Court's decision. In Part A, we identify logical propositions underlying the court's reasoning, then articulate and discuss the legal policy implicit in that reasoning. In Part B, we discuss further policy considerations raised in Part A.

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[7] Neo-classicists did not actually coin the term. William Hutt invented the phrase 'consumer sovereignty' and Ludwig von Mises developed the concept. John Kenneth Galbraith popularised the notion of producer sovereignty arising as the result of subversion of the market by producers, through marketing and other means, directing the preferences of consumers. Neo-classical economists (including those of the Chicago School) agree, however, that consumer sovereignty is the goal of market economics, though they see its realisation as an ideal because of the difficulty in removing anti-competitive distortions from the market. Von Mises and Hayek considered removal of distortions possible if government took appropriate action. They, together with some members of the Chicago School, took the view that consumer sovereignty may be realisable. But neo-classicists (including the Chicago School) and the Austrian School all agree that market distortions created by the collusions and restrictive practices of producers and governments shrink the choices available to consumers. The goal of governments ought to be the removal of such distortions, and the correction of market failure – induced by, for example, laws encouraging monopoly – to allow consumer sovereignty to become a reality. Public policy in the Western world universally accepts the goal of achieving consumer sovereignty as an object of regulatory policy.

[8] See, eg, references below to National Competition Policy.

[9] The Federal Court did not analyse the purpose of subsistence or the reason why the Nine Network's copyright interest required protection. It assumed that copyright conferred on Nine a right to protection against appropriation of relevant information in the weekly schedules.

[10] Directive 96/9/EC (of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases) contains a preamble of 60 articles, many of which concern the need, by harmonisation of database laws, to foster competition and the free flow of goods and services in the EC.

PART A – FULL FEDERAL COURT'S JUDGMENT

Logic of Full Federal Court's judgment

In our view, the Court asserted, implicitly or explicitly, three major logical propositions.

PROPOSITION 1

Copyright subsists in the weekly schedules to protect the Nine Network's position in a competitive market.

What the Full Federal Court said:[11]

> [102] … Contrary to Her Honour's implicit finding, Nine and Ice were competitors in the sense that each was seeking to derive profit from the dissemination of the time and title information
> [104] Viewed more broadly, the creation by Nine of a compilation based on its programming (time and title) decisions, was a central element of its business as a television broadcaster for the reason that the compilation was an essential step in informing its potential viewing public of what it had on offer. Within the competitive environment of television broadcasting it can be assumed that Nine had no business option but to create the compilation.
> [113] Ice appropriated many pieces of the time and title information, apparently on a weekly basis. It did so in order to create something commercially valuable out of templates that otherwise would have had no commercial value to it.

Policy

Subsistence was not in issue in the case before the Full Court, but its discussion of substantiality focused on Ice's alleged appropriation of the results of the Nine Network's investment, and discussion of the policy for compilation copyright. Questions of appropriation are inevitably tied to considerations of subsistence policy because appropriation is a purposive act: the act of reproducing compiled information constitutes substantial reproduction if the purpose of the act conflicts with the purpose for which copyright subsists in the compilation.[12]

Although it emphasised the Nine Network's expenditure of skill and labour, the Federal Court did not explain the policy for protecting the results of that investment. But its reasoning, from paragraph [72] onwards makes evident that, in the court's opinion, the originality of the time and titles compilations derived from the commercial value of those compilations. Paragraphs [102] [104] and [113] (excerpts

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[11] *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/71.html

[12] See [94] of the Federal Court judgment: 'These principles strongly suggest that, although the quantity of any material copied by Ice from the Weekly Schedules (directly or indirectly) is relevant to the issue of substantiality, it is more important to take into account the originality of the material that has been copied …'

above) suggest that, in the court's opinion, the policy at large for compilation copyright lies in protecting the investor from commercial injury.

Critique

The question of substantial reproduction cannot be decided without defining the purpose of the alleged reproduction and the purpose for which copyright subsists in the subject matter reproduced. The Federal Court explained its approach to the question of substantiality more loosely: 'The quality of what is taken must be assessed by reference to the interest protected by the copyright.'[13] The court assumed the copyright interest to be indivisible from the interest asserted by the copyright holder. However, copyright and copyright holder are distinct: the copyright holder does not determine the scope of the copyright.

The court explained that the Nine Network invested labour and skill to produce the time and title compilations, and that Ice's putative reproduction of information in the compilations could damage the Nine Network's competitive position.[14] It can be assumed by inference that the court assumed that copyright inhered in the time and title compilations to protect the Nine Network's position in a competitive market. But the judgment did not give any reasons that adequately support such an assumption. Nothing in the court's reasoning explains explicitly the purpose for which copyright subsists in the Nine Network's compilations or why copyright should protect Nine's competitive position.

The court, as far as can be ascertained, considered that copyright in the weekly schedules subsists to protect the Nine Network from a competitor taking, without warrant, the fruits of its investment.[15] While the court asserted that the parties were competitors in the supply of programming information, and that competitive necessity compelled the Nine Network to produce the weekly schedules, the judgment did not define the market in which the parties supposedly competed, or the competitive intentions of Ice, or the harm that might be caused to Nine by Ice's alleged copying.

Having imputed to the weekly schedules a commercial purpose, and declared Ice and the Nine Network to be competitors – presumably in the supply of programming information – the court neglected to explore the fundamental questions that pertained to whether Ice's actions could or would cause competitive harm to the Nine Network. The absence from the judgment of market analysis undermines the credibility of the court's conclusions.

From a public policy perspective, copyright cannot subsist to protect the Nine Network. Its purpose is to prevent free-riding that, by making supply of the weekly schedules uneconomic, could drive Nine from the market, leading to consumer welfare deficit. Yet the Federal Court's judgment in no respect showed that the alleged copying by Ice involved appropriation intended, or likely, to cause market

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[13] At [93] (per *Nationwide News Pty Ltd v Copyright Agency Limited* (1996) 65 FCR 399).
[14] As noted, see the discussion, beginning at [72] of the impact of the alleged copying., esp [102]-[104].
[15] Eg at [116]: 'As we have explained, the existence of Strip Programs does not negate the fact that Nine expended substantial skill and labour in compiling the Weekly Schedules. Nor does it detract from the conclusion that Ice, by reproducing time and title information via the Aggregator Guides, took the fruits of Nine's skill and labour.'

harm to the Nine Network, or likely to cause reduction or cessation of Nine's production of programming information.[16]

As discussed, public policy suggests that the fact of substantial reproduction be determined by reference to the purpose of subsistence. If purpose is tied to the object of protecting investment from free-riding (to secure optimum dissemination), it can be seen that substantial reproduction occurs when a market exists for the supply of goods or services, and A's appropriation of the product of B's investment:

- is intended to secure competitive advantage in the market
- may cause market harm to B
- may cause B to reduce supply or leave the market.

The purpose of compilation copyright, according to this analysis, is to secure continued production and supply, for the benefit of the public. Market analysis, applied to the facts of the case, would make unlikely a finding of infringement by Ice. Market analysis is proposed for two reasons. First, public policy locates the conduct of corporate entities within the boundaries of markets. It is not possible to analyse the conduct of companies outside the relevant market. Whether or not Ice has acted as a free-rider must be determined by reference to a market. Second, the Full Court's judgment invites market analysis. The court declared the parties to be competitors and observed that 'within the competitive environment of television broadcasting' Nine 'had no business option but to create' the weekly schedules (at [104]). Clearly, their Honours understood the putative harm caused by Ice's appropriation to competitive harm, in other words, harm caused by Ice to Nine *in a market.*

PROPOSITION 2

A person who appropriates the results of skill and labour without the copyright owner's consent, infringes the copyright.

What the Full Federal Court said:[17]

> [111] The time and title information incorporated into the Weekly Schedules reflected a great deal of skill and labour on the part of Mr Healy and Ms Wieland. As we have explained, Ice, to the extent it reproduced time and title information from the Weekly Schedules, appropriated the skill and labour used by Nine to create the Weekly Schedules.
>
> [112] … That information [time and title data], which Ice either obtained from or checked against the updated Aggregated Guides (which in turn incorporated time and title information provided by Nine), was essential to Ice's project. Without it, IceGuide would have been commercially useless.
>
> [115] When the quality of the material taken by Ice is considered, the substantiality of the part taken becomes even clearer. Ice took, via the

[16] The High Court has rejected a tort of unfair competition: *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414. Conduct alleged to be unfair competition must be restrained by a known cause of action.

[17] *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/71.html

> Aggregated Guides, precisely the pieces of information that reflected the exercise of skill and labour by Nine in determining the program for a particular day or other period.

Policy

As noted earlier, the Full Federal Court explained ad hoc the policy for compilation copyright by reference to competition, its judgment suggesting that copyright subsisted in the Nine Networks weekly schedules to protect Nine's competitive interest in the supply of programming information. The originality in the time and titles compilations derived from the labour and skill invested in their production, and that labour and skill was directed towards a commercial purpose (see [104] of the judgment). In the case of the Nine Network, copyright protected the commercially valuable results of labour and skill.

If this summary is correct, the court's single rationale for finding substantial reproduction by Ice is that reproduction of time and title information could harm the Nine Network's competitive position as a supplier of programming information. It cannot be proposed as policy that reproduction of the information in a compilation infringes copyright simply because the compilation is the result of skill and effort. Policy cannot support copyright in the investment of skill and effort *in themselves*. Legal policy does not operate in a vacuum. This much is implicitly recognised in those parts of the court's judgment that discuss the commercial value of the time and title compilations to the Nine Network and Ice.

Critique

The court did not directly articulate policy for compilation copyright. However, its reasoning draws implicitly, in a mixed and incomplete way, on two philosophical rationales for copyright subsistence in compilations. Each bears upon determination of substantial reproduction.

The first rationale posits that copyright protection is the Nine Network's just *desert*.[18] Arguing from models of either corrective or distributive justice, proponents of desert

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[18] The Full Federal Court did not make this point explicitly but its reasoning, similar to that of the authority it quoted, rested in part on the premise that the simple fact of investment or compilation by 'sweat of the brow' invites protection. See its discussion of *Desktop Marketing Systems v Telstra Corporation Limited* [2002] FCAFC 112 at [90]: 'The Court concluded that, as a matter of authority and policy, the concept of originality in copyright should be understood as embracing a compilation that is the product of substantial labour and expense, provided it is not merely copied from other works'.

Advocates of intellectual property typically justify rights by arguing axiomatically from John Locke's *labour-desert* theory of property. Their axiom is that property is a legitimate reward for labour. Locke said: '[e]very man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature has provided, and left it in, he has mixed his labour with, and joined it to something that his own, and thereby makes it his property. It being by him removed from the common state nature hath place it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at leastwhere there is enough, and as good, left in common for others.' (John Locke, *Two Treatises of Government* – Treatise Two, Chapter 5, Section 27).

theory make the case for protection on the basis that those who sow deserve to reap (corrective justice), or that those who expend labour are entitled to possess what they produce (distributive justice).[19]

The second rationale asserts that, in specific circumstances, copyright protection supplies incentive. If, in these circumstances, the Nine Network, or others, cannot rely on proprietary rights to protect their investment in the production of information, they will cease production, leading to undersupply of information products.[20]

We consider that only the incentive rationale – if necessary conditions are met - provides an appropriate justification for copyright subsistence in the present case. More relevantly, since subsistence is not at issue, we consider, as discussed below, that a finding of substantial reproduction by Ice is only reconcilable with public policy if the facts show that Ice's conduct may cause Nine to cease supplying programming information, or restrict supply of that information.

Justification from desert

Why do those who sow deserve to reap? And why does labour and skill (investment) entitle the investor to property in the thing produced? From the perspective of public policy, informed by allocative welfare economics, the answer is that labour or investment, *in themselves*, supply no entitlement.

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[19] Stewart E Sterk, 'Rhetoric and Reality in Copyright Law', 94 *Michigan Law Review*, 1995-1996, 1197-1249. Sterk identifies the inadequacies of both the corrective and distributive justice claims for copyright protection. The corrective justice model posits that copyright regulation corrects real or potential injustices to authors or producers. It asserts that copyright holders are entitled to legal protection because of the utility of their labour. Without protection, they may withhold labour, and no one is affirmatively entitled to benefit from their labour. A third proposition is that copyright owners are entitled to rely on the legal system to claim remuneration for labour. Sterk points out that this mishmash of propositions says nothing about the justification for copyright. The distributive justice model, by contrast, implies that the copyright system distributes the rewards of property to the industrious. It relies principally on Locke's labour theory to assert, in Locke's words, that 'God gave the World … to the use of the Industrious and Rational, and Labour was to be his Title to it'. Sterk points out the intuitive appeal of the idea that labour is rewarded with property. The economic consequences of encouraging people to work more to own more are greater production and more wealth. Seen in this light the distributionist model posits incentive as a consequence of copyright protection. Sterk casts doubt on the idea that copyright protection is necessary to create incentive. A more relevant question, in the present context, is whether the argument that property rights result in productive incentive is sufficient in itself to justify copyright protection. Our argument is that incentive is meaningless unless related to purpose – ie, what is the purpose of encouraging production?

[20] The Full Federal Court made indirect reference to the purpose of protecting the Nine Network's investment in its discussion of competition between Ice and Nine. The Court implied that Ice's reproduction of time and titles information injured Nine because it gave Ice a competitive advantage: see [78] [102] and [104]. At [102]: 'Nine and Ice were competitors in the sense that each was seeking to derive profit from the dissemination of the time and title information.' At [104]: 'Viewed more broadly, the creation by Nine of a compilation based on its programming (time and title) decisions, was a central element of its business as a television broadcaster for the reason that the compilation was an essential step in informing its potential viewing public of what it had on offer. Within the competitive environment of television broadcasting it can be assumed that Nine had no business option but to create the compilation. However attractive its programs and their scheduling might be, they would be of very limited value if viewers had no programme guide and had to chance upon the programs that they wanted to see.'

The case for regulatory intervention to protect investment depends on the social utility of the investment, because the object of regulation is to optimise public welfare.[21] In public policy terms, property in information is justified only as a solution to market failure caused by piracy driving the information producer from the market. If the information producer is deterred from production by pirates or free-riders, then property rights may supply an incentive to continue production, thus ensuring the continuing dissemination of information to the public – the goal of regulatory intervention (see discussion below on incentive theory).

In can be seen that in public policy terms, the welfare of the Nine Network is relevant to the regulator to the extent that legal protection prevents market failure by ensuring dissemination. The *desert* of the Nine Network, the scale of its investment, the amount of labour or skill it has expended, the fact that it has sown and expects to reap, each of these considerations is relevant to the regulator only to the extent that they cause the Nine Network to decide it cannot continue to participate in the market for supplying programming information. Considered in detachment from the market, which functions to deliver information to the public, none of these considerations – from the public policy perspective - entitles the Nine Network to proprietary rights.

Arguments founded on concepts of corrective or distributive justice usually emphasise the author's unique contribution but originality need not be their cornerstone. Desert theory is an accommodating doctrine which justifies protection for just about any human product. Output thus matters more than the nature of input. If you produce something you *deserve* to own it.[22]

Explained in this way, desert theory fails because it asserts rather than justifies. Claims for monopoly rights *because they are deserved* in no way supply a policy for copyright regulation. Policy is determined by articulating social objectives. For what purpose is regulation needed?[23] In the case of compilation copyright, it might be argued that justification is beside the point. Since information is an infinite resource, the possible negative consequences of copyright in information can only be negligible

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[21] The guarantor of regulation's efficiency in achieving agreed objectives is competition policy. National Competition Policy states that regulation must not restrict competition unless regulatory authorities can show that a. the benefits of the restriction to the community as a whole outweigh the costs and b. the objectives of the legislation can only be achieved by restricting competition (see the National Competition Council's *Compendium of National Competition Policy Agreements*, 2nd edition, consisting of the *Competition Principles Agreement*, *Conduct Code Agreement* and *Agreement to Implement the National Competition Policy and Related Reforms*).

[22] Numerous commentators have argued that Locke did not intend his labour-desert theory to apply to intangibles. He considered the Stationers' Company's monopoly on printing an 'invasion of the trade, liberty, and property of the subject.' See Tom W Bell *Intellectual Privilege: Copyright, Common Law and the Common Good,* Tom G Palmer, forthcoming book (www.intellectualprivilege.com), 'Are Patents and Copyrights Morally Justified?' 13 *Harvard Journal of Law and Public Policy* (1990) 817, Richard Epstein, 'Liberty versus Property? Cracks in the Foundation of Copyright Law' 42 *San Diego Law Review* (2005) 1,20, Ronan Deazley, *Rethinking Copyright*, Edward Elgar (2008).

[23] This question exposes the speciousness of entitlement arguments. What purpose is served by granting monopoly rights in the output? This question must be asked, and answered satisfactorily, before protection can be said to be justified. If the proposed purpose of awarding rights is private reward and that reward is not linked to public benefit the purpose is not sufficient to justify protection. Reward of producers is not (in itself) a valid justification for policy.

in effect. But even an argument of this generality can be rebutted, on the grounds that privatising information is a step towards privatising infinity.[24]

Justification from incentive

Incentive theory posits that proprietary rights prevent undersupply by protecting producers from economic attack by free-riders. Protected against appropriation of investment output, producers retain the incentive to continue production and to increase output to satisfy demand. Proprietary rights protect against the flight of investment.

Incentive theory, however, also assumes a competitive market and consumer sovereignty. Thus proprietary rights supply incentive to continue competitive production – for the purpose of increasing consumer welfare. The welfare of consumers – not producers - is the object of awarding rights. The Full Court mistakenly assumed the reverse, making the welfare of a particular producer, in this case, the Nine Network, the object of legal intervention. However, incentive theory supports copyright in the weekly schedules only to the extent that copyright guarantees continued production that the Nine Network would otherwise withdraw or reduce.

If the Nine Network's copyright in the weekly schedules is justified as an incentive to continued production, determination of the question of substantial reproduction must consider whether Ice's alleged appropriation threatens Nine's production. This determination would involve analysis of competitive effect by consideration of questions such as:

- what is the market?
- are the Nine Network and Ice competitors in the market?
- what is the purpose of the alleged appropriation?
- does the alleged appropriation cause under-supply of information?

PROPOSITION 3

Indirect reproduction of a copyright compilation infringes the copyright if the reproduction uses a substantial amount of information disclosed by the compilation.

What the Full Federal Court said:[25]

> [124] The test of whether the necessary causal relationship exists between a copyright work and an infringing work is whether the infringing work was produced by use of the copyright work: [cit] That test ordinarily involves

[24] Defenders of the principle that investment warrants protection would no doubt rely on Locke's labour-desert theory to assert that privatisation of information, like privatisation of common land, encourages more production and diffusion. Locke's theory, however, applied to finite resources and marches in step with the argument that private ownership of land prevents exhaustion by common use. According to this view, ownership is a social necessity. Exhaustion by use does not threaten the supply of information.

[25] *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/71.html.

> assessing whether the alleged infringer has produced a result substantially similar to the copyright work by independent skill or labour, without copying [cit]. All that is required is '*some causal connection*' [cit].
>
> [128] It is correct, as Ice submits and her Honour found, that the Aggregated Guides as a whole were significantly different in look, feel and content to the Weekly Schedules. Nonetheless, the Aggregated Guides reproduced, with permission, the totality of Nine's time and title information. If it matters, the form of the reproduction of that information bore significant similarities to that used by Nine. Ice used the time and title information reproduced in the Aggregated Guides as an important resource for producing IceGuide. In consequence Ice reproduced a substantial part of Nine's copyright work. The required causal connection was present. This was a case of indirect copying of a substantial part of a copyright work.

Policy

In finding that Ice's indirect reproduction amounted to substantial reproduction, the court appeared to focus on the purpose and effect of reproduction. Ice wished to reproduce Nine's programming information in its own program guide, and the effect, in the Full Federal Court's view, was likely to be detrimental to the Nine Network. That Ice obtained the information from a source independent of the Nine Network – the aggregated guides – did not alter the fact of appropriation potentially harmful to Nine.

The Full Court therefore seemed to reaffirm its belief that the policy of compilation copyright is to protect the compiler, but its judgment is indefinite about why protection is afforded. Faced with lacunae in the judgment concerning the nature of harm or the reason for protection, the reader is forced to search for rationales. The court seemed to accept implicitly that appropriation, because it offended Nine, constituted infringement. In the absence of evidence to show harm, an advocate would be hard pressed to show why mere appropriation is substantial reproduction. The court's reasoning suggests a view that infringement occurs if indirect copying might lead to unspecified disadvantage to the compiler.

Critique

In its discussion of indirect reproduction, the court, as elsewhere in the judgment, failed to explain the logic of its reasoning. If Ice, by indirect copying, appropriates Nine's information product, why does the indirect copying *of itself* constitute substantial reproduction? The court did not say. The court explained, by reference to authority, the mechanics or protection and infringement, but did not explain why the law protects compilations.

It is clear, however, that questions of subsistence and infringement are related. It seems obvious from its reasoning that court did not consider that the mere fact of Ice reproducing information in the aggregated schedules amounted to infringement. The court evidently considered that Ice's action would only amount to infringement if the copying could materially injure Nine's interests. But it did not say so explicitly, leaving the reader to deduce its logic. However, that logic seems clear. Ice infringed

because it appropriated, for a competitive purpose, information compiled for a competitive purpose. Ice's purpose, and the potential effect of its action on Nine, the owner of the compilation, were, for the Federal Court the fundamental considerations leading to its finding of infringement.

This being so, the question arises – why? The answer reveals that the court has failed to reconcile policy with mechanics. It has mechanistically followed authority to determine questions of substantial reproduction while failing to grasp the policy that makes its application of authority problematic. An answer to the question posed earlier leads back to the earlier discussions of policy. It would be contrary to policy to argue that copyright subsists in compilations merely to protect the interests of the compiler.

Copyright would then be merely a device for restrictive trade practice. Conventional economic theory requires that regulation increase public welfare. Policy therefore demands that copyright subsist in compilations to ensure the continued dissemination of information for the public good. Copyright is thus a device to provide the compiler with the necessary legal protection to continue production. If this is so, the Federal Court's discussion of indirect reproduction is primarily deficient because it failed to examine the harm intended and potentially caused by Ice's indirect reproduction. It failed to determine whether Ice, by its action, appropriated information from a competitor, and it failed to consider whether the appropriation was likely to cause harm to Nine that could cause it to cease production of information.

PART B – POLICY CONSIDERATIONS

Having highlighted the key issues arising from the Full Court's judgment it is pertinent to further examine the policy considerations at play.

Compilation copyright

To restate the underlying premise: Copyright law protects *compilations* of information. In theory, compilation copyright safeguards information producers from free-riders who appropriate the information product – thus (in theory) the copyright simultaneously supplies productive incentive and encourages competition. The result is optimum dissemination.

Purpose

Although judges usually determine the subsistence of compilation copyright hermeneutically by reference to legal principle (eg, the expenditure of skill and effort in the compilation of information predicts originality), the economic rationale stated above supplies the logical justification for compilation copyright, and informs, to varying degrees, the logic of judgments.[26] No other rationale for compilation copyright is, in public policy terms, tenable, a fact explicitly recognised in some

[26] *Desktop Marketing Systems v Telstra Corporation Limited* [2002] FCAFC 112, para 8.

judgments and indirectly by US merger doctrine.[27] We propose that judges determining the originality of a compilation, or whether substantial reproduction has occurred, should ensure that their findings are consistent with the *purpose* of compilation copyright. Divorced from consideration of purpose, legal exegesis to discover originality or substantial reproduction is likely to result in findings that defy logic or commonsense.

The same can be said about any common law exercise in determining the scope of copyrights.[28] The difference is that while the rationale of compilation copyright is unequivocal the purpose of copyright law generally is much more difficult to adduce. Copyright law is not governed by ineluctable logic and policy discernible from the record is inconsistent. [29] The interpreter is forced to consider hypotheses about why copyright laws were made and discovers that theory about copyright's function does not match reality.[30]

The most constructive way to resolve these difficulties is to accept as a principle guiding interpretation that to the extent that policy consensus exists about the function of copyright, interpreters should interpret legislation to give effect to that policy. For example, it is probably uncontroversial that a function of copyright law is to encourage information dissemination.[31] Adopting the suggested approach, the object of dissemination is a relevant consideration in interpreting the scope of a right.

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[27] In *Feist Publications Inc v Rural Telephone Service Co*, 499 US 340 (1991), the Supreme Court held that the originality in a compilation required more than 'sweat of the brow': some element of creativity must be evident in the compilation. The creativity requirement leads directly to a purposive inquiry – why should a finding of originality be conditional on a finding of creativity? The theoretical answer leads back to the theoretical rationale for compilation copyright – protection delivers incentive. Merger doctrine upholds the principle that copyright applies to the expression of ideas not the ideas themselves. If expression is inseparable from idea, expression merges with idea and copyright does not subsist, since copyright cannot apply to ideas. Once again, the rationale for the doctrine is theoretical: if the threshold for originality is set too low, ideas, or, more accurately, mere data, become copyright protected, resulting in information foreclosure. Foreclosure reduces incentive in rival producers undermining competition and dissemination. The theoretical justification for merger doctrine is the obverse of that for compilation copyright. The first precludes investment that ultimately reduces dissemination, the second protects investment that ultimately increases dissemination.

[28] See, eg, *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 http://www.austlii.edu.au/au/cases/cth/HCA/2008/35.html. In that case, the Court found that surveyors did not grant government an implied licence to reproduce or communicate survey plans. The Court did not look to the purpose of Crown copyright in plans. Had it done so, it might have considered whether the legislature intended the logic of statutory copyright exceptions to apply to copyright uses not specifically referred to in the exceptions provisions.

[29] An error committed by judges, academics and policymakers is to attribute to legislators policy that they did not formulate. A second, related, error is to attribute to copyright legislation functions that it does not perform. Interpreters make false assumptions about the policy of the law and falsely assume that the law implements that policy. Thus the idea, invented by the Spicer Committee in 1959, that copyright law creates a 'balance' between the rights of copyright owners and users. Or the idea that the copyright law creates an incentive to production. See B. Atkinson, *The True History of Copyright: The Australian Experience,* Sydney University Press, 2007.

[30] For example, the theory that copyright law functions to increase producer incentive, thereby optimising dissemination cannot be demonstrated empirically. Politicians passed legislation to allow producers to control production, not to stimulate competition and dissemination: see B. Atkinson, *The True History of Copyright*, id.

[31] In theory, dissemination is the primary purpose of copyright law but many copyright law advocates are willing to acknowledge only that it is one of many equal objects of the law.

The greatest problem in adopting this suggestion lies in determining an agreed rationale for copyright law that could be used universally by judges interpreting the law. As noted, the policy of copyright law, so far as the parliamentary and government record is concerned, is an incoherent jumble. Judicial policy elucidation is mostly based on speculation and hypothesis drawn from academic writings and government reports. Copyright policy is a moveable feast, and the most sane way to resolve conflicts and confusions is to eschew attempts to discover a historical policy, and instead rely on a clear statement of what the law *should* achieve.[32] The judiciary's responsibility for identifying and giving effect to the public purpose of copyright regulation can hardly be overstated.[33]

Fulfilling the rationale of compilation copyright

Compilation copyright cases turn on questions of subsistence (originality) and infringement (substantial reproduction) and though judges rarely elucidate the rationale for this category of copyright protection, their reasoning about the elements of originality and reproduction points to that rationale. Protection for a compilation may be granted because the compilation involves skill and effort (*Desktop*) or refused because it manifests nil creative input (*Feist*). In these cases, the courts stipulated 'skill and effort' and 'creativity' as conditions of subsistence because they considered that copyright law protects investment and creativity. Why? The judges did not say. The answer lies in economic theory. Protecting investment in compilations prevents free-riding, thus increasing dissemination. Protecting creativity also prevents free-riding, stimulating the creator (producer) to further production.

If the rationale for compilation copyright is defeating free-riding to encourage dissemination, to what extent is this policy relevant to analysis in the *Ice TV* case? Primarily as a conceptual tool. If copyright in the weekly schedules subsists because Nine invested skill and effort in their compilation, on what basis does Nine's investment justify protection? The investment in skill and effort may be the determinant of subsistence, but it is not, of itself, the *justification* for protection. Justification comes from policy: investment deserves protection only if it prevents free-riding, thus encouraging further investment and dissemination of information. Thus, the fundamental policy question is whether, in compiling its program guide, Ice free-rides on Nine's investment. An answer to this question is obtained by ascertaining whether Nine and Ice compete in a market for the supply of program

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[32] Logically, such a statement would replicate the principles of government policy on regulation and make consumer (user) sovereignty its foundation principle. Its analysis would be informed by orthodox economic principles. In short, an optimum copyright legislative policy would state that copyright regulation is justified to the extent that it secures public welfare through the dissemination of information. Rights are granted for a limited term to prevent free riders from appropriating the product of the producer's investment. Rights are limited to prevent producers from engaging in anti-competitive practices and determining price monopolistically or by cartel.

[33] See Lyman Ray Patterson, *Copyright in Historical Perspective,* supra, 229: 'Copyright is too complex a matter, too delicate a subject, to be dealt with by statutes alone. Copyright statutes have provided rules, not principles, and if the principles necessary to a sound body of copyright law are to be formulated, the judges must accomplish the task. History shows the consequences to be expected if they fail. More important, however, history gives them an adequate basis upon which to proceed, to recognize the limited function of copyright, to protect the author's creative interest, and to give due regard to the rights of the individual's use of a copyrighted work.'

guides and, if they do, whether Ice obtains an unfair competitive advantage over Nine through publication of its program guide.

It can be seen that reference to policy – the theoretical rationale for compilation copyright – allows for clarification of the subjective elements involved in determining subsistence and substantiality. Adopting policy-based analysis, deficiencies in the Full Federal Court's analysis of the case become obvious. The court found that Nine's investment warranted protection, and that Ice's program guide reproduced a substantial portion of the weekly schedules. It failed to explain, however, why protection of Nine's investment was of itself justified. In other words, its conclusions applied legal principle but did not comprehend the policy that underlies principle. When the *purpose* of compilation copyright is considered, it becomes obvious that findings of subsistence or substantial reproduction should wait on determination, by reference to competition principles, of the question whether protection of investment will prevent free-riding and encourage dissemination. If the answer is no, if the supply of program guides does not constitute a market, or if Ice TV does not use information about Nine's programming to secure competitive advantage over Nine, any grounds for protecting Nine's investment evaporate.

Dissemination

Compilations consist of *information*. As discussed, the reason for allowing copyright in compilations of information, given the historical consensus that copyright protects expression and not ideas, and common law ambiguity over whether originality demands any element of creativity, is utilitarian. The law protects investment against free-riders. But why does it do so? Cases such as *Ice TV v Nine Network*, like the recent High Court case of *Copyright Agency Limited v State of NSW,*[34] encourage the Court to consider fundamental questions about the dissemination of information and the purpose of copyright law in encouraging dissemination.

Dissemination is a social good, justifiable in economic, social and political theory. It enables individuals in society to understand, learn and express. The flow of information helps individuals to exercise their creative and productive faculties, to organise themselves, and to create and nurture the processes and institutions that produce material welfare and political freedom. In short, information dissemination is fundamental to both individual and social growth. The more a society disseminates information, the more critically informed its citizens become about the choices it offers, the more free they are to exercise choices about living – an observation that distils Sir Francis Bacon's aphorism 'knowledge is power' (which could be paraphrased as 'knowledge is freedom'). If political, economic and social freedom are agreed to be socially desirable in themselves, as well as predictors of economic growth, then information dissemination is crucial to social welfare.

Dissemination the goal of copyright policy

This much is recognised in conventional economic analysis of regulation. The *Review of intellectual property under the Competition Principles Agreement'* (the Ergas Report) stated in 2000 that, '[b]alancing between providing incentives to invest in

[34] [2008] HCA 35.

innovation on one hand, and for efficient diffusion of innovation on the other, is a central, and perhaps the crucial, element in the design of intellectual property laws.'[35]

Regulation's function is social: the object of regulation in democratic society must be to fulfil agreed goals pertaining to that society.[36] In the case of intellectual property regulation, the goal is dissemination. An orthodox *legal* analysis might disagree with this assertion, but the validation of intellectual property laws is not the preserve of lawyers.[37]

It can be seen that if regulation is interrogated for purpose consistent with social objectives, and the exercise uncovers laws without social utility, those laws are contrary to policy. The moral and material self-justifications advanced by copyright owners tend to obscure this point. To be valid, regulation must define social objectives, and, consistent with competition policy, establish the machinery to achieve them. Desert arguments for copyright protection are justified only to the extent that they are consistent with social purposes. Applying this premise to analysis of the corrective/distributive justice models, it can be seen that protecting output on the simple grounds that output deserves protection is offensive to public policy. To postulate, however, that protection supplies incentive to further output suggests the beginning of a policy for regulation. But the incentive theory raises another question: why is more output desirable? The answer to this query supplies the only defensible policy rationale for copyright regulation, if regulatory policy is agreed to be a device to secure public welfare. It is that output, and the incentive to produce more, results in the dissemination of information, which is a social good.

All defensible rationales for copyright regulatory policy lead to one object: the dissemination of information to benefit society in the ways enumerated above. If copyright law-making is not tied to purpose, if its overriding hypothesis is that private interests deserve protection, then copyright laws undermine rather than enhance

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[35] AGPS 2000,p 5.

[36] The guarantor of regulation's efficiency in achieving agreed objectives is competition policy. National Competition Policy requires stipulates that regulation must not restrict competition unless regulatory authorities can show that a. the benefits of the restriction to the community as a whole outweigh the costs and b. the objectives of the legislation can only be achieved by restricting competition (see the National Competition Council's *Compendium of National Competition Policy Agreements*, 2nd edition, consisting of the *Competition Principles Agreement*, *Conduct Code Agreement* and *Agreement to Implement the National Competition Policy and Related Reforms*).

[37] See Review of the National Innovation Committee *Venturous Australia* (2008) (Cutler Report) at 85: 'As Moir points out, one of the major problems here is that intellectual property policy is being managed as a legal issue, whereas although this area like any other must operate through the legal system, intellectual property policy is most fundamentally an aspect of economic policy. Before the economic reforms of the last two decades what we now know as competition policy – which was then known as 'trade practices' policy fell within the portfolio of the Attorney General's Department. Given its economic significance it is now located within the Treasury portfolio. Today copyright policy is handled within the Attorney General's Department whilst patents are handled within the Innovation portfolio. Nevertheless the consideration of policy with regard to both is dominated by IP practitioners and by the beneficiaries of the IP system. We need the expertise of lawyers in this as in many other areas of policy but it is imperative that IP policy make the transition that competition policy made over a decade ago now, from a specialist policy area dominated by lawyers, to an important front of micro-economic reform.'

consumer sovereignty. Producer sovereignty results in restricted access and inefficient pricing,[38] and discourages competitive innovation.

Intellectual infrastructure

Recent scholarship in the United States has characterised the aggregate of what might be described as useful data in the public domain as an 'intellectual infrastructure'.[39] The use of a noun that suggests an enabling system is deliberate: the intellectual infrastructure is not a purposeless, disconnected mass of information swirling at large in a fathomless galaxy of scientific, technical and literary output. Rather it is a useful and accessible body of knowledge that grows or shrinks depending on the principles adopted by intellectual property regulators.

Merger doctrine accommodates the central idea of scholars writing about the intellectual infrastructure, which is that innovation, and human progress via the application of knowledge, increase if laws nurture the infrastructure of knowledge by enabling people to contribute to, and freely draw from, that infrastructure. The idea that copyright cannot subsist if idea and expression are inseparable forces the regulator to face squarely the question of copyright's purpose. Is it to protect the production of information (in the present case by the Nine Network's compilation of program information) or to facilitate the dissemination of information?

The concept of an intellectual infrastructure shows that the way in which regulators answer the question will significantly influence the welfare of both country and citizens. Just as the physical infrastructure degrades in the absence of renewal, and expands after the application of resources, so the intellectual infrastructure calcifies if regulation constricts the inflow, or dissemination, of information. If copyright protects the production of information, such as compilations that merger doctrine might characterise as void of expression, then increasingly inflow of information that develops the intellectual infrastructure will shrink.

According to US theorists, copyright law should dynamically transfer proprietary data items to the intellectual infrastructure as they '*become* stock and standard' – in other words, as soon as they can no longer be said to manifest a unique expressive character.[40] Merger doctrine prevents private enclosure of publicly useful information: '[u]underpinning the idea-expression dichotomy, as well as the merger doctrine, is the objective of keeping productivity-enabling ideas in the public domain.'[41]

A concept inimical to the intellectual infrastructure is the idea that all copyright uses are remunerable. Lawmakers usually take for granted that outside the exceptions stated in legislation, use of copyright material demands compensation. We have

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[38] Sometimes a fundamental access issue for the consumers of copyright products in less developed countries. Pricing intended to maximise revenue imposes very real opportunity costs on developed world consumers and carried over to those in poorer countries they can result in large number of people having little or no access to educational and other material.

[39] Brett M Frischmann *An Economic Theory of Economic and Commons Management* 89 Minn LR 917 (2005), Peter Lee, 'The Evolution of Intellectual Infrastructure' 83 Washington Law Review 39 (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1042261>

[40] Id p 22.

[41] Id 23.

argued in another article that the logic of the statutory exceptions is not confined by statute, and permits gratuitous use of copyright material if the use does not offend the Berne three-step test.[42] The user-pays principle, if applied wholesale to the use of copyright material, prevents knowledge flowing to the intellectual infrastructure. If lawmakers protect the production of information, rather than encouraging its dissemination, they create the conditions for access to elementary knowledge to become conditional upon payment.

Constitutional and purpose considerations

In the United States, scholars and courts have, over time, asserted that the Constitution intends copyright laws to facilitate free speech,[43] to 'be the engine of free expression,'[44] and to encourage (via incentive)[45] dissemination of information.[46] Copyright should not impose 'improper restraints' on free expression.[47] The 'ultimate aim' of copyright law is to encourage production of useful works 'for the general public good.'[48] The Supreme Court has, however, ruled that free speech is protected by the maxim that copyright protects expression not ideas – according to this reasoning, copyright intrinsically safeguards free speech.[49]

In Australia, consideration of copyright purpose in light of constitutional objects is much more unlikely:[50] the Australian Constitution, unlike its US counterpart, is not

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[42] BF Fitzgerald and BA Atkinson *Third Party Copyright and Public Information Infrastructure/Registries: How much copyright tax must the public pay?* in Fitzgerald B and Perry M, eds, *Knowledge Policy for the 21st Century* (forthcoming 2008) Irwin Law. http://eprints.qut.edu.au/archive/00013627/

[43] See Hannibal Travis *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment* 2000 Berkeley Technology Law Journal 1-65 and Lyman Ray Patterson 'Free Speech, Copyright and Fair Use' and *Copyright in Historical Perspective*, supra. Travis and Patterson discuss how judges in the nineteenth century were called upon to consider the relevance to copyright law-making of Article I, section 8, clause 8 of the Constitution – which grants Congress power to 'make laws to 'promote the Progress of Sciences and the useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective Writings and Discoveries' – and the First Amendment, which guarantees freedom of speech and the press. Both concluded that while Art I 8(8) and the First Amendment read together invite a narrow reading of copyright scope, the judiciary gradually narrowed the field of permissible copyright uses. According to Patterson, the fair use doctrine, codified in 1909 in the US Copyright Act, 'brought consumer conduct within the realm of infringement' and began 'a termitic infestation of the constitutional right of free speech.'

[44] *Harper & Row v Nation Enterprises* 471 US 539 1985: '… it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'

[45] See preceding quote and *Mazer v Stein* 347 US 201, 209 (1954): 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "science and the useful Arts."'

[46] *Harper v Row* supra 471, quoting Second Circuit decision (citation omitted): 'The public interest in the free flow of information is assured by the law's refusal to recognise a valid copyright in facts.'

[47] *Estate of Hemingway v Random House Inc* 23 NY 2d 341, 348 1968: 'The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression ideas'.

[48] *Twentieth Century Music Corp v Aiken* 422 US 156: 'The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor But the ultimate aim is, by this incentive, to stimulate [production] for the general public good.'

[49] *Harper & Row* supra and see also *Eldred v Aschcroft* 239 F 3d (ultimately 537 US 186).

[50] Brian F Fitzgerald *Digital Property: the Ultimate Boundary?* 2001 Roger Williams University Law Journal 9. <http://eprints.qut.edu.au/archive/00007406>

usually regarded by lawyers as an oracular document. However, 'the existence of competing constitutional objectives [in relation to regulation of intellectual property], express and implied, is undoubted.'[51] Scholars surveying the US scene have argued that anti-trust law, with its prohibition on monopoly created by anti-competitive conduct, provides judges with the tools to give effect to the intent of the constitutional copyright power and the First Amendment.[52]

That intent is that copyright law encourage information dissemination, a goal consistent with that of competition policy. Whether competition is understood to create market diversity or market efficiency, it is seen to result in consumer (user) choice.[53] Choice is impossible without dissemination. Laws that restrict access to information constrict choice and the way to prise open clamps on access is to understand the competitive (or anti-competitive) purpose for which access to information is granted or denied.

This approach does not undermine the doctrinal approach usually adopted by the judiciary. It does, however, refine that approach by supplying analytic tools that cut to the heart of questions of access. As discussed, in the *Nine v Ice* appeal, the Full Federal Court seemed unable to conceive that substantiality should not determined by reference to the particular commercial interest of Nine[54] rather than the purpose for which the copyright subsists. That purpose is to enable Nine to disseminate programming information to the public safeguarded from information pirates. Infringement thus becomes an act of piracy – one that cannot take place unless Nine and the alleged infringer compete in a market.

The European Union has dealt partially with the question of information compilation by issuing a directive on sui generis database protection.[55] Legislation implementing the directive protects database compilers from unauthorised use and makes investment, rather than expressive originality, a condition for protection. The EU did, however, to some extent resolve interpretive difficulties by beginning its directive with a preamble of 60 articles. These make explicit the intent of the directive is to protect the investment of the compiler and to ensure consistency of law to facilitate the functioning of an internal market. The preamble also declares that the purpose of the directive is pro-competitive.[56]

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[51] *Id,* quoting Kirby J in *Grain Pool of WA v The Commonwealth* 2000.

[52] *Id.* See *Associated Press v United States* (1945) 326 US 1, 20: 'The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public'. More generally: Herbert Hovenkamp *Federal Antitrust Policy* 47-76 (2d ed 1999), Phillip Areda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and their Application* (2d ed 2000) David McGowan *Innovation Uncertainty and Stability in Antitrust Law* 16 Berkeley Tech LJ 729 (2001).

[53] Fitzgerald 35-46.

[54] Which the Court defined as the results of Nine's labour and skill but which could be said to be to prevent the production of electronic program guides that encourage viewers to watch less live free-to-air television.

[55] Directive 96/9/EC of European Parliament and Council 11 March 1996.

[56] Article (6) Whereas, nevertheless, in the absence of a harmonised system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction an/or re-utilization of the contents of a database.

A year before the directive passed, the European Court of Justice ruled that broadcasters who prevented (by refusing to license) the respondent from publishing a weekly television guide containing their program schedules, engaged in anti-competitive behaviour (abused their dominant market position).[57] The Court found that the appellants' actions were anti-competitive (frustrated the creation of a market to satisfy consumer demand for weekly guides); were not expressions of legitimate competition (there was 'no justification' for prohibition) and were unfair (the appellants abused their market power by excluding a competitor from the secondary market for supply of television guides). The ECJ's analysis, on competition policy grounds, thus had the effect of encouraging dissemination since it prevented copyright holders from withholding consumer information.

Conclusion

Ice TV v Nine Network is a seminal copyright case because of its potential to restrict information flow. Access to information is a human right,[58] and while it might be thought that the public is not much harmed if prevented from extracting data from unexpressive information compilations, over time the oppressive exercise of proprietary rights in information could radically undermine our freedom to inform ourselves without cost or restriction.

We have not written this article as advocates, however. We have no wish to persuade by partial argument. It seemed clear to us that the Full Court's judgment failed to apply doctrine consistent with unmistakable policy principles. For that reason, analysing the judgment involved an objective exercise in identifying logical deficiencies in the court's reasoning, and analysing infringement in accord with related principles of law and policy.

We believe, as we explained, that the court erred because it failed to separate the interest of the copyright holder, the Nine Network, and the copyright held by Nine. The copyright protects Nine against unfair competition (free riding for competitive advantage) in order to encourage Nine to continue production (dissemination). The proper focus of analysis is the copyright held by Nine: if the copyright is intended secure the goal of dissemination by preventing unfair competition, analysis must discover the relevant market and whether Ice and Nine compete in that market.

Competition principles supply *tools* of analysis. It is important to reaffirm that we propose analysis of competitive conduct within a market as the most precise way to determine substantial reproduction. Such analysis would tell us whether – in the present case – Ice's copying is done for the purpose of using, without consent, and for competitive advantage, Nine's investment *and* whether the effect of appropriation will

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[57] *Radio Telefis Eireann v European Commission* 1995 ECR I-743; 4 C.M.L.R. 718 (1995) (*Magill).*

[58] Article 19 of the United Nations' International Covenant on Civil and Political Rights (Universal Declaration of Human Rights) states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' See further B Fitzgerald et al *Creating a legal framework for copyright management of open access within the Australian academic and research sector* (2007) <http://eprints.qut.edu.au/archive/00006099> Chapter 4; B Fitzgerald (ed.) *Legal Framework for e-Research* (2008) Sydney University Press, Sydney, 274-277

affect Nine's production. It short, it enables us to determine precisely the effect of reproduction on the interest affected.

As we discussed in the second part of this article, the overriding consideration that should inform any assessment of compilation copyright is the policy for allowing copyright to subsist in compilations of information. The reason for subsistence is not protection of the copyright owner, which is a necessary part of achieving the policy goal, but dissemination of information, a public good. Copyright allows the owner to restrict the flow of information, and for that reason courts, in resolving questions about subsistence and substantiality, need to pay heed to considerations of purpose: for what purpose does copyright subsist? for what purpose does the alleged infringer appropriate? Does the alleged infringement frustrate the purpose of the copyright?

Responding to these questions will usually elucidate whether the parties compete in a market and the alleged infringement constitutes unfair competition. It is lamentable that the Full Court, having decided that infringement occurred if appropriation harmed the fruit of Nine's investment, failed to consider the precise nature of the harm to Nine. Market analysis of the type we advocate would have revealed that the judge at first instance correctly determined that Nine and Ice were not competitors,[59] and that Ice's copying of program information had no effect on Nine's continued supply of information to aggregators.

Ice's publication of its electronic guides has no noticeable effect on the aggregators' demand for supply of the weekly schedules and certainly does not affect Nine's production of the weekly schedules. In short, the electronic guide appears to have nil effect on Nine's willingness to continue supply of programming information to the public. Why then does Nine wish to restrain Ice? To a certain extent, the question is academic, if the court is satisfied that that Ice did not take compiled information – the fruit of Nine's investment - in order to secure advantage, to Nine's detriment, in a competitive market.

At the same time, consideration of why Nine seeks restraint results in a likely answer suggesting itself. Ice's television guide facilitates recording of free-to-air programs by viewers, and the widespread practice of recording programs potentially harms advertising revenue, the lifeblood of commercial television stations. Non-publication of Nine's programming information in Ice's electronic television guide, which greatly reduces the utility of the guide to viewers, may help to protect the Nine Network against the loss of advertising revenues, since the viewer cannot refer to the Ice program guide in making recording decisions.

Assuming this reasoning to be correct, the ulterior purpose of Nine's attempted restraint of Ice underlines the critical importance of courts undertaking the task that the Full Court neglected: to define, in the most precise terms possible, the actual harm caused by an alleged substantial reproduction of copyright compilations.

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[59] The Full Court said at [102] that 'Nine and Ice were competitors in the sense that each was seeking to derive profit from the dissemination of the time and title information'. The Court's reasoning is, to say the least, doubtful. Nine and Ice both use the information to produce information products but the products are supplied to different audiences, or more accurately, in different markets. If, as the Full Court suggests, persons who seek profit from use of the same data are competitors, the number and variety of markets across Australia could be countless.