

From the editors...

Welcome to this edition of the Computers and Law Journal.

The IceTV litigation has finally been determined by the High Court. In our first article, Andrew Steward and Ryan Grant review the IceTV litigation including the much-anticipated recent High Court decision which examines the subsistence of copyright in compilations and whether taking slivers of those compilations infringes copyright.

The New South Wales parliament has recently granted new powers to the New South Wales police to seize and examine computers and data, including by removing computers from premises named in a search warrant and by operating equipment at the premises named in the search warrant to access data. At the same time, New South Wales police have been granted new powers to obtain covert search warrants. Christopher Palmer provides an overview and analysis of those significant new powers.

In the final article, Colin Bosnic considers why so few IT project disputes are decided in final hearings.

After that article was written, the Supreme Court of Victoria announced the introduction of a Technology, Engineering and Construction List ("TEC List"), which commenced on 19 June 2009. Paragraph 16 of Practice Note 2 of 2009 states that "a TEC case should be approached like any technical, engineering or construction project, with time and cost budgeting". It will be interesting to see whether any significant differences emerge in the operation of the Victorian TEC List, when compared to the Technology & Construction List in the Supreme Court of New South Wales.

Contributions are welcomed

We are always very excited to receive contributions for the Computers and Law Journal. If you would like to contribute an article, case note, book review, or any other material relevant to computers and the law, please contact us at editors@nswscl.org.au. Please refer to the notice on page 11 for more information and some ideas for topics that could form the basis of an article.

Essay competitions

Please see page 18 of this issue for details of a competition being conducted by the NSW Society for Computers and the Law, for which there is a prize of \$1000. That competition closes on 10 December 2009. The Australian Copyright Council is also offering a prize in a separate competition, the details of which are available at www.copyright.org.au/essayprize.

Jeanette Richards, Vinod Sharma and Martin Squires

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Federal Court – First Instance

Justice Bennett at first instance³ found that IceTV had not infringed Nine's copyright in the course of making and updating the IceGuide.

Justice Bennett accepted the submission that IceTV used a predictive method to produce a first draft of each weekly IceGuide. The process commenced with an IceTV employee watching television for a three-week period in 2003 while taking notes of the relevant programme information. On that basis, IceTV created templates showing the time and title (and other) information for each programme. These templates were then used to "predict" the programming of those channels for the future on the assumption that *"the structure of television broadcasting is such that the daily content of the commercial*

*broadcasters for a particular day in this week is likely to be substantially replicated on the same day next week or on the same day in two weeks time"*⁴.

These "predicted-over" schedules were entered into a database and compared to the programme times and titles contained in the aggregated guides. Where the IceTV database differed from the aggregated guides, it was amended accordingly. IceTV then added its own synopses and other information to form the IceGuide.

In coming to her decision, her Honour held that there had been between two types of skill and labour involved in the making of the Weekly Schedule by Nine:

the skill and labour in selecting and arranging the programmes; and

the skill and labour involved in drafting the synopses and preparing the guides.

Justice Bennett was of the opinion that copyright in a television schedule did not extend to protect

the antecedent skill and labour in making programming selection decisions. Copyright protection was therefore confined to the arrangement, form and content of the schedule. Her Honour considered, however, that IceTV had not taken the form of the Weekly Schedule and that the time and title information copied from the aggregate guides were mere "slivers" of information. Thus, IceTV had not infringed Nine's copyright and could not be held to have taken a substantial part of the Weekly Schedule.

Full Federal Court

On 8 May 2008, the Full Federal Court (Black CJ, Lindgren and Sackville JJ) in *Nine Network Australia Pty Limited v IceTV Pty Limited*⁵ reversed Justice Bennett's decision.

In regards to the scope of copyright protection which may exist in factual compilations, the Full Court held that the preparatory work of programme selection should not be ignored for the purpose of assessing the