



DEVELOPMENTS IN SINGAPORE COPYRIGHT LAW

Compilations, Fair Dealing and Originality in Derivative Works

I. INTRODUCTION

1. Two recent decisions, one each from the High Court and Court of Appeal saw the Singapore Courts clarify / affirm certain principles in copyright law. This article explores these two cases in relation to the copyright doctrines of compilations, fair use and originality.

II. COMPILATIONS AND FAIR DEALING

2. Both the plaintiff and defendant in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd*¹ ("**Global Yellow Pages**") are publishers of telephone directories. The plaintiff alleged that the defendant infringed its copyright in its directories by copying material owned by the plaintiff.
3. The first issue that arose for determination is whether copyright subsists in the plaintiff's telephone directories. A telephone directory is essentially a compilation of facts / data and whether this was sufficient to cross the threshold of originality had to be determined by the Court of Appeal. The Court of Appeal held that:

For copyright to subsist in any literary work, there must be an authorial creation that is causally connected with the engagement of the human intellect ... A compiler must exercise sufficient creativity in selecting or arranging the material within the compilation; and if the compiler does so, the resulting copyright will only protect the original expression in the form of the selection or arrangement of the material.²

4. The plaintiff alleged that copyright subsists in the following three aspects of its directories:

- (a) Listings arranged within each classification

The Court of Appeal found that this was merely a "*fact-discovery exercise*"³ and no creativity was exercised.

¹ [2017] SGCA 28

² *Global Yellow Pages* at [24]

³ *Global Yellow Pages* at [38]



(b) Listings in the Business Listings

Whilst the selection of the Business Listings lacked creativity, the arrangement of the Business Listings was found to have exhibited sufficient creativity, but only on a small scale with the resulting copyright being “*extremely thin*”⁴, with the result that “*infringement would only be established by nothing less than near-wholesale taking of the [Business Listings], arranged exactly as they were in the [Business Listings]*”⁵.

(c) Seeds (i.e. fictitious listings designed to detect and prove copying)

The plaintiff’s assertions that the seeds attracted copyright failed as it is not a literary work to begin with and the “*creation of a fictitious name and telephone number falls well short of the requisite standard of creativity*”⁶.

5. Having found that only the arrangement of the Business Listings attracted copyright (albeit a “thin” one), there was nevertheless no copyright infringement as all that the defendant took was the data in the plaintiff’s directories. The plaintiff sought to mount the argument during the appeal that the defendant’s temporary database was an infringing work. The Court of Appeal dismissed this argument on the basis that this was not sufficiently pleaded at the outset.⁷ Nonetheless, even if the plaintiff could rely on the defendant’s temporary database, its claim for copyright infringement would have likewise failed on the basis that the defence of fair dealing would have succeeded.

6. In assessing whether a defence of fair dealing can succeed, section 35(2) of the Copyright Act⁸ lists five factors that can be taken into account, namely:

- (a) The purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the work or adaptation;

⁴ *Global Yellow Pages* at [49]

⁵ *Global Yellow Pages* at [49]

⁶ *Global Yellow Pages* at [52]

⁷ *Global Yellow Pages* at [54] to [58]

⁸ Cap 63, 2006 Rev Ed



- (c) The amount and substantiality of the part copied taken in relation to the whole work or adaptation;
 - (d) The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (e) The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.
7. Each of these factors were further elaborated upon by the Court of Appeal.
- (a) *Purpose of character of the dealing* – this factor would require a Court to compare “the purposes of the infringing work and the original work and assess whether the dealing was fair”⁹. The Court of Appeal held that “the fact that the original and infringing works share the same purpose will tend to weigh against a finding of fair dealing”¹⁰. Also, the fact that commercial exploitation drives the dealing would generally (being simply one of the many factors to be considered) weigh against a finding of fair dealing.¹¹
 - (b) *Nature of the work* – the inquiry here is targeted at whether the type of work in question results in it being “closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”¹². The Court of Appeal gave the example whereby fair dealing is less likely to be applicable to fiction-based (as opposed to fact-based) works because copyright protection is not as “thin”.
 - (c) *Amount and substantiality of the portion used in relation to the copyrighted work* – the focus is on the quantity and value (i.e. qualitative importance) of the material taken and whether they are reasonable for the purposes of copying.¹³
 - (d) *Effect of the use on the potential market for the value of the copyrighted work* – the Court will not only focus on the harm caused by the alleged infringing act but also whether such unchecked acts would result in a

⁹ *Global Yellow Pages* at [77]

¹⁰ *Global Yellow Pages* at [78]

¹¹ *Global Yellow Pages* at [80] and [81]

¹² *Global Yellow Pages* at [82]

¹³ *Global Yellow Pages* at [83]



substantially adverse impact on the potential market, including the harm caused to the market for derivative works.¹⁴

- (e) *Possibility of obtaining the work within a reasonable time at an ordinary commercial price* – a finding of fair dealing is less likely where the defendant could have obtained the work on reasonable commercial terms.¹⁵

8. The above factors were applied to the facts and the findings are summarised as follows:

Factor	Finding
(a) <i>Purpose of character of the dealing</i>	<ul style="list-style-type: none">• Meant to assist the defendant's employees to compare listings• Purpose of the dealing was to access the data and had nothing to do with the arrangement of the data which attracted copyright in the first place
(b) <i>Nature of the work</i>	<ul style="list-style-type: none">• Work in question is largely fact-based and lies at the very edge of copyright protection
(c) <i>Amount and substantiality of the portion used in relation to the copyrighted work</i>	<ul style="list-style-type: none">• As copyright protection in this case was "thin", the Court of Appeal did not find it appropriate to place too much weight on the substantiality of the taking in relation to the whole work
(d) <i>Effect of the use on the potential market for the value of the copyrighted work</i>	<ul style="list-style-type: none">• The Court of Appeal did not consider that the potential market for the plaintiff's works would be usurped by such a dealing and noted that had the defendant used multiple hard copies of the plaintiff's works, the defendant would not have <i>prima facie</i> infringed any copyright

¹⁴ *Global Yellow Pages* at [84]

¹⁵ *Global Yellow Pages* at [85]



- (e) *Possibility of obtaining the work within a reasonable time at an ordinary commercial price*
- As the plaintiff's works were distributed freely, there was no point in the defendant seeking a licence from the plaintiff, particularly where what the defendant was after was the factual content which was not protected by copyright

III. ORIGINALITY IN DERIVATIVE WORKS

9. In *PropertyGuru Pte Ltd v 99 Pte Ltd*¹⁶ ("**PropertyGuru**"), both the plaintiff and the defendant were in the business of providing online property classifieds. The plaintiff sued the defendant for reproducing photographs found on the plaintiff's website.
10. It was not in dispute that photographs are artistic works in which copyright could subsist and thus found a claim in copyright infringement. However, these photographs were originally taken by the end users of the plaintiff's service to which the plaintiff altered them before posting the same on its website. The alterations included resizing the photographs, tweaking the light balance and softening the edges of the photographs.¹⁷ The question in this case is whether (and to what extent) the plaintiff owns the copyright in the photographs.
11. The High Court approved the seminal case of *Interlego AG v Tyco Industries Inc*¹⁸ that copying per se does not result in an original work and there must be an element of material alteration or embellishment which suffices to make the totality of the work an original work.¹⁹ By way of example, the High Court cited *The Reject Shop Plc v Robert Manners*²⁰ to explain that no copyright would subsist in photocopied and enlarged versions of copyrighted drawings.²¹

¹⁶ [2018] SGHC 52

¹⁷ *PropertyGuru* at [103]

¹⁸ [1989] AC 217

¹⁹ *PropertyGuru* at [99]

²⁰ [1995] FSR 870

²¹ *PropertyGuru* at [100]



12. Upon comparing the original photographs against the altered photographs, the High Court held that:²²

Apart from the change in size, there is barely any discernible difference between each original photograph and its image. Absent the watermark, one would find it difficult to tell which is the original photograph and which is the modified photograph. I do not mean to say that digital editing of a photograph can never result in an altered image which is an original work in its own right. The technical possibilities for editing an image are now fairly advanced. Conceivably, a photograph might be so substantially altered, in a manner which obviously required much skill and labour of an artistic nature as to qualify for copyright protection. On the facts of this particular case, however, the original and watermarked photographs are, if not for the watermark, virtually indistinguishable

13. As such, the plaintiff's claim against the defendant for copyright infringement was dismissed.

IV. CONCLUSION

14. These two cases have shed light on important issues of copyright law and have helpfully clarified the issues relating to compilations, fair use and originality in derivative works.

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²² *PropertyGuru* at [103]