Compilation Copyright: A matter calling for ‘a certain ... sobriety’

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**Justine Pila**\(^*\)

1. Introduction

Since the 19\(^{\text{th}}\) Century, the question of compilation copyright has influenced legal conceptions of works and the scope of copyright protection itself.\(^{1}\) In *Walter v Lane* [1900] AC 539, for example, copyright subsistence in street directories was cited by three majority Lords in support of sweat of the brow copyright in copies.\(^{2}\) More than a century later, the Full Federal Court of Australia in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 completed a circle with *Walter v Lane* by relying on their Lordships’ decision to support copyright subsistence in telephone directories produced by labour and money alone.\(^{3}\) According to the Court, copyright subsists in any compilation that supplies intelligible information and originates from its putative author, whether or not

\(^{\dagger}\) Greyhound Racing Association Ltd v Shallis [1923-1928] MCC 370 at 373 per Eve J.


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\(^{1}\) Unless otherwise indicated references to “works” throughout this article are references to literary, dramatic, musical and artistic works only, and do not include the other types of works in which copyright under UK law subsists.

\(^{2}\) See *Walter v Lane* [1900] AC 539 at 546 (Earl of Halsbury LC), 552 (Lord Davey), 554 (Lord James).

\(^{3}\) See *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 at [59]-[70], [90]-[95], [160] (Lindgren J); [352]-[355] (Sackville J); Black CJ agreeing with both.
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by investment of judgment or skill. For the resulting rights to be infringed, a substantial part of the work must be copied, where substantiality is assessed (said the Court) with reference to the interest which copyright protects. In Desktop, that interest was “the labour and expense of gathering together in the one place the details of all the members of a given universe - all the telephone subscribers in a region”.

As of 2008, Desktop remained the authoritative word on compilation copyright in Australian law, at least with respect to exhaustive collections of publicly accessible information. Further, the effect of the Full Court’s decision in that case has now been extended by the same Federal Bench – Black CJ, Lindgren and Sackville JJ – to a different type of compilation: selections and arrangements of information about free-to-air television broadcast weeks (“weekly schedules”). The extension occurred in Nine Network Australia Pty Ltd v IceTV Pty Ltd [2008] FCAFC 71, where the defendant conceded copyright subsistence, and in effect indirect copying as well, but denied that what it had copied from the works – program titles and broadcast times – were a substantial part of the weekly schedules.

At first instance Justice Bennett agreed with Ice: despite their undoubted value to Nine, the relevant slivers of information were


5 See Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd [2002] FCAFC 112 at [223] (Lindgren J, Black CJ agreeing: “As will appear below, in my opinion, at least in the case of a factual compilation intended to be a work of utility, infringement must be tested by reference to the interest which copyright is intended to protect in the particular case.”).


7 The members of the Desktop Bench wrote a joint judgment in IceTV in which they identified themselves expressly as the Desktop Bench; see Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [87].

8 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172.

9 This expression was used by Justice Bennett throughout her judgment, starting from Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [187]. It was the object of mild rebuke from the Full Court (see Nine
not sufficiently substantial to the schedules that copying them infringed the plaintiff’s rights. In reaching that decision her Honour suggested that the interest protected by copyright law derives not from the interests of the copyright owner, but rather the nature of the work when correctly perceived as a copyright work.\(^\text{10}\) Considering how to perceive the schedules, and what gave them their essence as copyright works, she noted their difference from the *Desktop* directories: whole-of-universe compilations,\(^\text{11}\) the form of which was predetermined and the essence of which lay in the coverage and accuracy of their information.\(^\text{12}\) By contrast, the schedules were regular compilations: selections and arrangements of information that derived their essence or substance as works from the relations between their component parts.\(^\text{13}\) This led to her conclusion in law, that the information copied by Ice was not substantial to the weekly schedules.

On appeal this conclusion was overturned. According to the *Desktop* Bench, the program titles and broadcast times were “the foundation” of the weekly schedules,\(^\text{14}\) and their systematic copying by Ice (in small amounts from different works) an infringement of the plaintiff’s rights.\(^\text{15}\) Central to the Court’s decision was its view of the schedules’ authorship as including the plaintiff’s considerable

\(^{10}\) See *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 at [175]-[176].

\(^{11}\) The phrase “whole-of-universe” is from *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 at [21] (Lindgren J) and [274] (Sackville J).

\(^{12}\) See *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 at [199].

\(^{13}\) See *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 at [43], [52], [199] (above n 10).

\(^{14}\) *Nine Network Australia Pty Limited v IceTV Pty Limited* [2008] FCAFC 71 at [113].

\(^{15}\) See *Nine Network Australia Pty Ltd v IceTV Pty Ltd* [2007] FCA 1172 at [125].
investment in deciding each of its broadcast weeks. It was the 
commercial importance of those decisions, and the value of the 
investment itself, that defined the plaintiff’s copyright interest, such 
that even slivers of information regarding the plaintiff’s broadcast 
weeks were a substantial part of the weekly schedules.16

In this article I offer a measured defence of Justice Bennett’s 
decision in IceTV. I suggest her decision is largely right, and reflects 
an important attempt by a Judge to reorient copyright around its 
works, and resist the past temptation of courts to read copyright as a 
law of unfair competition, or a law of natural property rights 
subsisting in products of labour and value. That temptation can be 
seen in a test of infringement that collapses questions of substantial 
part into assessments of the value of the part in the hands of the 
relevant copyright owner. It can also be seen in the Desktop support 
for sweat-of-the-brow copyright in compilations, and the expansive 
view in IceTV of the labour and skill invested by Nine in the 
authorship of its copyright works.17

2. Compilations and Copyright Subsistence: From Books to 
Original Literary Works

(a) Literary copyright in compilations as books: Compilation 
copyright under the Copyright Act 1842 (UK)

Before the introduction of the Copyright Act 1911 (Imp), literary 
copyright subsisted in “books”, including by legal (statutory) 
provision “every Volume, Part, or Division of a Volume, Pamphlet, 
Sheet of Letter-press, Sheet of Music, Map, Chart, or Plan separately 
published”.18 According to a line of equity cases, many by Wood or 
Giffard VC, one aim of copyright thus subsisting was to prevent the

16 Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [100]-[104], [114].
17 References to Nine as author should be read as references to Nine’s employees.
18 Copyright Act 1842 (UK) s 2.
taking of others’ labour by copying information contained in their books.\textsuperscript{19}

\textsuperscript{19} See, eg, \textit{Hotten v Arthur} (1863) 1 H & M 603 at 607-608; 71 ER 264 at 265-266 (Wood VC, affirming the eligibility for copyright of any catalogue not being “a mere dry list of names”, with reference among other things to the need to protect commissioned writers against the “unremunerated use of [their] labour”); \textit{Kelly v Morris} (1866) LR 1 Eq 697 at 702 (Wood VC, stating that a person “is not entitled to take one word of the information previously published [in a book] without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained”); \textit{Scott v Stanford} (1867) LR 3 Eq 718 (Wood VC, granting an injunction on the basis of the defendant’s “appropriation of the Plaintiff’s work” (at 721), and the principle that “[n]o man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information” (at 724)); \textit{Morris v Ashbee} (1868) LR 7 Eq 34 at 40 (Giffard VC, granting an injunction on the principle of \textit{Kelly v Morris}, and affirming that “no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at those results by some independent road”); \textit{Kelly v Byles} (1868) 13 Ch D 682 at 688 (Bacon VC, describing “[t]he spirit and the policy of the copyright Acts” as “clear and beyond all doubt. It is for the public benefit that the authors of all literary works should have the exclusive enjoyment and profit of their labours for the periods there mentioned”); \textit{Cox v Land & Water Journal Company} (1869) LR 9 Eq 324 at 332 (Sir R Malins VC, applying the principle of \textit{Kelly v Morris} and \textit{Morris v Ashbee} that people must get “information … at their own expense, as the result of their own labour, and they are not to be entitled to the results of the labours undergone by others”); \textit{Ager v Peninsular & Oriental Steam Navigation Company} (1882) 26 ChD 637 at 642-643 (Kay J, granting an injunction on “the usual test (\textit{Scott v Stanford}, \textit{Kelly v Morris}”), and satisfaction that “the Defendants are avail[ing] themselves very largely and unnecessarily of the labour and research of the Plaintiff without adequately recompensing him, that the use which the Defendants make of their book is calculated to interfere seriously with the sale of the Plaintiff’s book, that it is a multiplying of copies of the Plaintiff’s book, within the meaning of the Copyright Act”); \textit{Cate v Devon & Exeter Constitutional Newspaper Company} (1889) 40 Ch D 500 (see n 43); \textit{Collis v Cater} (1898) 78
The question remained, what kind of labour? What kind of labour was required for a book, and what kind of labour did copyright protect? From the lower court decisions of the 19th Century, the answer, it seems, was any kind of labour resulting in any meritorious book. From the Court of Appeal and the House of Lords, a different answer was suggested: for there to be a copyright
book there needed to be an author proper; a person exerting mental effort in creation of an expressive work.21

Many of the cases on book copyright involved compilations and words, titles or phrases. With respect to compilations see, eg, *Lamb v Evans* [1893] 1 Ch 218 (CA) (affirming copyright in detailed trade headings on the basis of their production by “literary labour” (Bowen LJ (at 227) and Kay LJ (at 232)) “both as regards the composition of the headings themselves and their collocation or concatenation in the book” (Bowen LJ (at 227))); *Leslie v Young* [1894] R (HL) 57 (describing copyright as restricted to original subject matter resulting from “independent labour” beyond the publication of material derived from common sources); *Chilton v Progress Printing & Publishing Company* [1895] 2 Ch 29 (CA) (denying copyright in individual names for lack of “literary composition”, with Lindley LJ saying (at 35) “I admit the difficulty of putting into language and defining expressly that which parliament has left intentionally undefined: I mean literary composition”). See also *Hotten v Arthur* (1863) 1 H & M 603 at 608; 71 ER 264 at 266 (Wood VC: “True, the principal value may be in the books themselves, but I cannot therefore refuse to recognise the property which this gentleman has in the product of his mental exertion; mental exertion used for this particular purpose, and in print. So soon as these notes are printed I consider them completely protected by the Copyright Acts.”); *Weatherby & Sons v International Horse Agency and Exchange Ltd* [1910] 2 Ch 297 at 304 (Parker J, affirming copyright in a list of names on the basis of its originality and literary value, and stating that “to support every copyright there must be an element of literary value”). With respect to words and titles/phrases see, eg, *Dicks v Yates* (1881) 18 Ch D 76 (CA) at 93 (denying copyright in the title “Splendid Misery” for lack of “intellectual effort”); *Walter v Lane* [1899] 2 Ch 749 (CA) at 772 (denying copyright in verbatim reports of speeches for lack of authorship in the sense of composition). See also *T M Hall & Co v Whittington & Co* (1892) 18 VLR 525 at 531-532 (Holroyd J, justifying a finding of copyright with reference to the existence of “room for thought”, and the “certain dexterity and expertness in the art of condensation” which were “called into play” by creation of the works); *Hollinrake v Trusswell* [1894] 3 Ch 420 (CA) at 427-428 (Davey LJ, describing the reference in the Preamble to the *Copyright Act 1842* (UK) to the expediency of the Law in affording “greater encouragement to the production of literary works of lasting benefit to the world” as useful in determining copyright subsistence).
This view of the book was wide enough to cover many compilations on the basis implied by the Berne commission, namely, that selecting and arranging information can involve sufficient mental effort to constitute a work of composition: an intentional expression of the compiler’s person.\textsuperscript{22} It did not cover, however, “mere lists of names” allowing no scope for independent thought.\textsuperscript{23}

\textsuperscript{22} See Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986 (1986) at 299 (explaining the reason for the inclusion of collective works in the Berne Convention with the following quote from the 1908 Actes of the Berne commission: “[I]t is the work which has been involved in bringing together diverse works following a determined plan, according to a more or less ingenious grouping. As the plan, as the combination, comprises a personal work, the protection given to it is independent of that given to the materials which have been employed. …”). A similar understanding of compilations can be seen in the cases, including Hotten v Arthur (1863) 1 H & M 603 at 609; 71 ER 264 at 266 (Wood VC, considering copyright in a catalogue compiled from common source information, and stating: “The only real question is as regards the quantity of copied matter, which in this case seems to be very considerable. Now the only fair use you can make of the work of another of this kind is where you take a number of such works; catalogues, dictionaries, digests, &c; and look over them all and then compile an original work of your own, founded on the information you have extracted from each and all of them; but is of vital importance that such new work should have no mere copying, no merely colourable alterations, no blind repetition of obvious errors.”); Maple & Co v Junior Army & Navy Stores (1882) 21 ChD 369 at 380 (Lindley LJ, affirming Hotten v Arthur as authority (with other cases) for the proposition “that a collection of illustrations put together into a book as distinguished from engravings intended to be sold separately is within the Copyright Act. They certainly form a book so as to come within the words of the Act”; Lamb v Evans [1893] 1 Ch 218 (CA) at 227, 228 (Lindley and Bowen LJJ, describing the collection of headings in which copyright subsisted as a “collocation or concatenation”), Leslie v Young [1894] R (HL) 57 (distinguishing a book comprising the mere publication in any particular order of timetables derived from common sources (not eligible for copyright) and a compilation or abstract involving sufficient independent labour to make the book an “original work” (eligible for copyright), and Walter v Lane [1900] AC 539 at 561 (Lord Robertson in dissent, describing a compilation as a presentation of information with “structure and arrangement”).

\textsuperscript{23} See Hotten v Arthur (1863) 1 H & M 603 at 607; 71 ER 264 (Wood VC) at 265-266 (see text accompanying n 42) and other cases discussed below. In the
Nor did it cover records of works, including records of spoken words, which were (it follows) not copyright books:

Some of the judicial decisions have, indeed, applied the words of the [Copyright Act 1842 (UK)] to very pedestrian efforts of the mind. But although timetables and furniture catalogues are not great things, there has been structure and arrangement on the part of the maker. I think that the recording by stenography of the words of another is in a different region from the making up a time-table. I do not say it is lower or higher, but in a different plane, because there is no construction. Upon this clear principle I reconcile those decisions with the judgment which I am now supporting. Nor do I consider it legitimate to justify a novel application of the Copyright Act by treating its most extreme applications as if they represented its normal scope. I do not think that a sound method of dealing with any statute. I prefer the tone and the words of my noble and learned friend Lord Davey in 1894, when, in Hollinrake v. Truswell, he thought that the preamble of the Act might be usefully referred to for the purpose of ascertaining the class of works it was intended to protect.24

US copyright would be denied to such lists by application of the merger doctrine.

24 Walter v Lane [1900] AC 539 at 561-562 (Lord Robertson). See also Walter v Lane [1899] 2 Ch 749 (CA) at 772 (reaching the same conclusion as Lord Robertson, and reasoning as follows: “The analogy [drawn by counsel and by North J at first instance] of directories, road-books, maps, &c., is, in our opinion, wholly misleading. There, each man who himself makes a directory, &c., and publishes it is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, &c., can be invoked by the plaintiffs. If the reporter of a speech gives the substance of it in his own language; if, although the ideas are not his, his expression of them is his own and not the speaker’s, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in court. But we have not to deal with speeches recast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing
This passage, I believe, was correct in law at the time it was written in *Walter v Lane*. It affirmed the decision of the Court of Appeal that reporting Lord Rosebery’s public speeches did not make the reporter an author of books. Despite this, the view it expressed was in dissent: the majority decided the reports were books as published “sheets of letterpress”, and that as they were originated by the reporter he was their “author” under the Act, and thus their eligible copyright owner. This, it was held, was the right result, for the reporter’s act in recording the speeches was one of considerable labour and skill.

with the most accurate report of the speaker’s words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports.”). *Walter v Lane* [1900] AC 539 at 545 (Lord Halsbury: “[I]t has not been and cannot be denied that [the reports] were originally, as in The Times, a sheet or sheets of letterpress, and came within the definition of the Act as a book”), 553 (Lord James: “It may be taken that the matter published in the columns of a newspaper is a ‘book’ within s.2 of [the 1842] Act”), 556 (Lord Brampton: “That the reports so published were ‘books’ within the meaning of the Copyright Act is undisputed”).

See Copyright Act 1842 (UK) s 3 (providing “[t]hat the Copyright in every Book which shall after the passing of this Act be published in the Lifetime of its Author … shall be the Property of such Author and his Assigns….”, without defining “author”); *Walter v Lane* [1900] AC 539, 549 (Lord Halsbury, describing copyright as a “right . . . given by the statute to the first producer of a book”), 551 (Lord Davey, describing the reporter as “the author of his own report. He it was who brought into existence in the form of a writing the piece of letterpress which the respondent has copied”), 555 (Lord James, deciding that “a reporter of a speech under the conditions existing in this case is the meritorious producer of the something necessary to constitute him an ‘author’ within the meaning of the Copyright Act of 1842”), 558 (Lord Brampton, describing the reporter as “the composer and author of the book. Without his brain and handiwork the book would never have had existence”).

See *Walter v Lane* [1900] AC 539 at 545 (Lord Halsbury, describing the defendant as “seek[ing] to appropriate to himself the labour, skill, and capital of another”), 547 (Lord Halsbury, defining as the legal question as “whether this book … printed and published and existing as a book for the first time, can be copied by some one else than the producers of it (I avoid the use of the word ‘author’), by those who have not produced it themselves but have simply copied that which others have laboured to create by their
It also served the public interest, by ensuring access to Lord Rosebery’s speeches which otherwise might have been permanently lost.  

own skill and expenditure”), 551 (Lord Davey, describing the plaintiff as “seek[ing] only to prevent the respondent from multiplying copies of their own report of the speech and availing himself for his own profit of the skill, labour, and expense by means of which the report was produced and published”), 552 (Lord Davey, describing the relevant legal principle as “that a man shall not avail himself of another’s skill, labour, and expense by copying the written product thereof”), 556 (Lord Brampton, describing the reporter’s acts of transcription as involving “considerable intellectual skill and brain labour”), 554–5 (Lord James, distinguishing the art of different reporters according to their skill, and implying that the reporter in Walter invested sufficient skill to distinguish his act from “mere transcribing or writing from dictation”, so as to be an author in the statutory sense). See also Sands & McDougall Pty Ltd v Robinson [1917] HCA 14 (Isaacs J: “In Walter v Lane it certainly was held that originality in respect of the ideas expressed or in the composition recorded in the report which was the subject of their Lordships’ consideration was not necessary to constitute the reporter the ‘author’ of his report. But, on the other hand, the personal skill of the reporter as well as his labour and expense were considered to be material considerations, and, as these resulted in the production of a material and visible representation of what had been said, I think it can be collected from the case that that representation was regarded itself as an original production.”); Express Newspapers Plc v News (UK) Ltd [1990] 1 WLR 1320 at 1326 (Browne-Wilkinson VC, describing the High Court’s interpretation of Walter v Lane in Sands & McDougall as supporting the principle “that the word ‘original’ in the statute does not imply inventive originality; it is enough that the work is the production of something in a new form as a result of the skill, labour and judgment of the reporter”); Television New Zealand v Newsmonitor Services Ltd (1993) 27 IPR 441 (Blanchard J, reviewing Walter v Lane and its treatment in Sands & McDougall and Express Newspapers, and applying it to support a finding that television scripts were original as products of “a good deal of thought and skill and care” in choosing the questions and answers for incorporation into the scripts). Cf n 31.

See Walter v Lane [1900] AC 539 at 549 (Lord Halsbury, suggesting “those who preserve the memory of spoken words, which are assumed to be of value to the public” to be as deserving of intellectual property rights as “the
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Of particular interest in Walter v Lane are the decisions of Lords Halsbury, Davey and James, and the first instance decision of Justice North. According to each of those four Judges, the view of Lord Robertson quoted above, following the view of the Court of Appeal, undermined the position of earlier courts that producers of informational texts, including specifically street directories, had rights to prevent their unauthorised copying. Reasoning from this importer of foreign inventions”), 559 (Lord Brampton, describing the reporter as having ensured that ‘the thousands of the readers of [The Times] might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear”). See also 555 (Lord James, discussing the skill required for transcription, and stating as follows: “It may also be that the report has been obtained under circumstances of peculiar difficulty on the one hand or of advantageous conditions on the other. Thus if a reporter attended a meeting of Anarchists intended to be secret and made their speeches public, or if in former times a man had secreted himself in one of the Houses of Parliament and taken down the words of different speakers, may it not be contended that the reporter was doing something more than merely transcribing?”).

Walter v Lane [1899] 2 Ch 749.

See n 2; Walter v Lane [1899] 2 Ch 749 at 759 (North J, finding in favour of subsisting and reasoning (inter alia) as follows: “It is quite clear that one man may publish a directory, and another man may publish another, but he must not take it from the first. He must have recourse to the means which the first man adopted, and he may then make a second of his own. The point as to the directory is put very clearly by Lord Hatherley, when Vice-Chancellor, in Kelly v Morris...”). Counsel for the plaintiff had argued before North J as follows (at 751): “Reports are literary works giving a right of copyright; they are not mechanical copies. Reporters have to exercise a great deal of literary skill in taking down and editing what is said by a speaker, and making a report of a meeting. Such work requires much more skill than making a list of names and addresses for a directory, yet that was held in Kelly v Morris to enable the compiler to assert a copyright.” Similarly before the House of Lords, counsel argued as follows ([1900] AC 539 at 541): “Literary skill or originality are not necessary to authorship: protection has been given to the composer of a directory: Kelly v Morris...”. As this argument and the Court’s reasoning in Walter v Lane show, Kelly v Morris was regarded by some as synonymous with the principle of copyright in industriously created street directories, notwithstanding the suggestion of Wood VC in Hotten v Arthur to the contrary (see n 42. That principle has been widely accepted. See, eg, Report of the Committee to Consider the Law on
and the nature of books – and of authors themselves as producers of books – they suggested that labour alone would suffice for the vesting of copyright in a report.\textsuperscript{31}  Lord Halsbury explained the position as follows:

The sole ground, as I understand the judgment of the Court of Appeal, is, that in their judgment the producer of a written speech unless he is the original speaker cannot be an ‘author’ within the meaning of the Act. My Lords, it seems to me that this argument is based upon a too narrow and misleading use of the word ‘author.’ In my view the statute has not meant so to confine it, and I do not understand the explanation the Court of Appeal gives of the application of the word ‘author’ to such publications as directories, red books, maps, &c.

I observe the Court of Appeal uses the word ‘analogy’ as applicable to such questions. To my mind it is no analogy at all. If the maker of a

\begin{quote}
Copyright and Designs, Cmnd 6732 (1977) at [17]: “It is plainly not understood by a good many people that many of the words used in the Copyright Act have to be given a meaning, arising from definition and interpretation, rather different from that which would probably be given to them by most individuals. Few people, for example, would think of a mathematical table as being a ‘literary’ work, but it is one for the purposes of the Copyright Act. So too are street directories, football pool coupons and lists of Stock Exchange prices… What has been thought worth protecting is a man’s skill and/or labour. … Some works may involve much skill but little labour, with others the reverse is the case. …”
\end{quote}

\textsuperscript{31} See Walter v Lane [1900] AC 539 at 549 (Lord Halsbury: “if I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words, it is not because I think the less of those qualities, but because, as I have endeavoured to point out, neither the one nor the other are conditions precedent to the right created by the statute”), 551-552 (Lord Davey: “the question whether the composer has copyright in his report does not seem to me to vary inversely with or to depend on his skill in stenography [or composition]”), 553-554 (Lord James, affirming that “an ‘author’ may come into existence without producing any original matter of his own”, the producer of a “compilation of a street directory” being an example). Note that the relevant property was a limited right to reprint the speeches from the reporters’ own pages, without extending to rights in the speeches themselves, consistent with their Lordships’ conception of the book (n 22).
directory, red book, or a map is an ‘author,’ one has to analyze what in such cases is the distinction between the ‘author’ as thus referred to and the author of a spoken speech. The language of the Court of Appeal is: ‘Each man who himself makes a directory, &c., and publishes it, is the author of what he publishes. The reporter of a speech is not.’ With great respect to the Court of Appeal, this is allegation, not argument. The judgment goes on to say that ‘the distinction is all important,’ but it does not explain what the distinction is. For my own part, I am unable to discover it. A man goes along a street, collects the names, addresses, and occupations of each dweller therein. What is the original composition of which, according to the Court of Appeal, he is the author? The name of the street? The numbers of the street? The names of the dwellers in the several houses? What is the distinction which the Court of Appeal makes in giving copyright to the result of this labour and reducing it into writing? What is it that makes it an original composition?

But, further, where do the words ‘original composition’ come from? If the producer of such a book can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing or print and first publishing it as a book does not make the person who has so acted as much an author as the person who writes down the names and addresses of the persons who live in a particular street.32

Of note is his Lordship’s acknowledgement here that on his view of copyright law, and particularly his view of copyright books, the latter might exist without an author in the non-statutory sense of earlier courts, viz, someone who exerts mental effort in creation of an expressive work.33 Also of note is his Lordship’s failure to cite an authority for his premise that literary records of names and addresses were books in which copyright might subsist; not as compilations per se in the sense of the Berne Convention above,34 but rather as collections of a class of facts.35 On the other hand, it seems clear what authority he had in mind: the case cited in argument by the plaintiff’s

32 Walter v Lane [1900] AC 539 at 545-546.
33 Ibid. See also Walter v Lane [1899] 2 Ch 749 at 755 (North J, acknowledging the same).
34 Or Leslie v Young [1894] R (HL) 57 sense; see nn 21, 22.
35 See Walter v Lane [1900] AC 539 at 546 (text accompanying n 32).
counsel, as well as Lord Davey and Justice North.\textsuperscript{36} That case is \textit{Kelly v Morris} (1866) LR 1 Eq 697, where Wood VC stated as follows:

In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island ... he must go through the whole process of triangulation just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.\textsuperscript{37}

This passage is obviously not correct, and builds from the false legal premise that compilers of previously published material were obliged under the 1842 Act to create their compilations entirely from scratch, without “taking one word” from an earlier work.\textsuperscript{38} Compilers, of course, were not so obliged;\textsuperscript{39} they were only obliged to create their works without reprinting or multiplying copies of a book,\textsuperscript{40} raising the central question in law – all but ignored in \textit{Kelly v Morris} – what is the nature of a copyright book?\textsuperscript{41}

\begin{footnotesize}
\textsuperscript{36} See \textit{Walter v Lane} [1900] AC 539 at 541 (counsel), 552 (Lord Davey); \textit{Walter v Lane} [1899] 2 Ch 749 at 759 (n 19).
\textsuperscript{37} \textit{Kelly v Morris} (1866) LR 1 Eq 697 at 702.
\textsuperscript{38} \textit{Kelly v Morris} (1866) LR 1 Eq 697 at 702.
\textsuperscript{39} This part of \textit{Kelly v Morris} was described by Sackville J in \textit{Desktop} as “a famous but excessive admonition” (\textit{Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd} [2002] FCAFC 112 at [405]).
\textsuperscript{40} \textit{Copyright Act} 1842 (UK) s 2 (“the Word ‘Copyright’ shall be construed to mean the sole and exclusive Liberty of printing or otherwise multiplying Copies of any Subject to which the said Word is herein applied”).
\textsuperscript{41} The point is made implicitly with respect to \textit{Walter v Lane} by Isaacs J in \textit{Sands & McDougall Pty Ltd v Robinson} [1917] HCA 14; (1917) 23 CLR 49. For a detailed discussion of this issue as it arose in \textit{Walter v Lane} see \textit{Justine Pila},
\end{footnotesize}
It is tempting to interpret *Kelly v Morris* as supporting a view of the copyright book as including any printed text. That, however, would be inconsistent with the following view expressed by Wood VC in the earlier case of *Hotten v Arthur* (1863) 1 H & M 603; 71 ER 264:

[A] mere list of dry names, like a postal directory, Court guide, or anything of that sort, which must be substantially the same by whatever number of persons issued and however independently compiled [is not a copyright book].

Nonetheless, that the focus in *Kelly* on unauthorised copying eclipsed the need for a copyright book can be seen from the subsequent lower court cases. Consider for example *Cate v Devon & Exeter Constitutional Newspaper Company* (1889) 40 Ch D 500, where North J went beyond Wood VC by casting belief in one’s right to copy (and repeated copying in pursuit thereof) as itself suggesting a copyright wrong:

Then there is a further point raised by the Defendants that the amount that has been taken from the copyright publication is very small. In one paper I think out of the three weeks papers which have been put in evidence there was only one entry taken; ... but in considering these it must be borne in mind that all that is material for the Defendants for the purpose of their newspaper has been taken, and that it is taken entirely – copied exactly from the paper – taken regularly, systematically, every week, and published for the purpose of giving information to the very persons to whom the Plaintiffs intend their publications to give that information; and what is more important still, the Defendants now claim to do it as of right; and that of itself is quite sufficient to put them in the wrong in the action and get over any question as to the amount of matter actually taken from the particular publication which is in evidence.

The view that copying might itself be a wrong was also the


42 *Hotten v Arthur* (1863) 1 H & M 603 at 607; 71 ER 264 at 265-266.

43 *Cate v Devon & Exeter Constitutional Newspaper Company* (1889) 40 Ch D 500 at 507.
premise of *Collis v Cater* (1898) 78 LT(NS) 613. In that further decision of Justice North, his Lordship stated the law to be that people may not, “[f]or … their own profit,

…reap where they have not sown, and … take advantage of the labour and expenditure of [others] in procuring news for the purpose of saving labour and expense to themselves.”

This language can be traced to *Millar v Taylor* (1769) 4 Burr 2303, where Lockean (labour) theories of property were used to support common law rights in respect of authorial compositions. That those theories inform *Walter v Lane* (without the need for an authorial composition *per se*) is apparent from the reasoning of Justice North, and the majority Lords who followed his line with assistance from *Kelly, Cate and Collis*. They also inform *International News Service v Associated Press* 248 US 215 (1918), where Mr Justice Pitney for the US Supreme Court cited four decisions of Wood and Giffard VC, including *Kelly v Morris* itself, in argument for an equitable wrong of unfair copying of news reports independent of liability in copyright law.
This brings to the fore the effect of *Kelly*, and related 19th Century cases, in supporting a wrong of unfair copying in purported reliance on copyright law, but in terms reflecting a different law grounded not in the rights of authors *per se* but of people to prevent unauthorised copying of texts they have laboured howsoever to create. One proponent of that wrong was Justice North, whose first instance decision in *Walter v Lane* was rejected by the Court of Appeal, consistent with the view of appellate courts that the right to prevent unauthorised copying was an *authorial* right subsisting in *works* when appropriately fixed in material form. That the House of Lords followed Justice North is a fact of significant legal import, the effect of which is still being felt.

and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases, a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information...*). *International News Service* includes a strong dissent by Mr Justice Brandeis, described by Dixon J in *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479 as “substantially represent[ing] the English view”. Contrast the use made of Mr Justice Pitney’s judgment by Evatt J in dissent in *Victoria Park*: “If I may borrow some phrases from the majority decision [in *International News Service*], I would say that in the present case it is indisputable that the defendant broadcasting company has ‘endeavoured to reap where it has not sown,’ and that it has enabled all its listeners to appropriate to themselves ‘the harvest of those who have sown.’”

Further evidence of this grounding and the normative basis of these cases generally is provided by the suggestion of Sir Malins VC in *Cox v Land & Water Journal Company* (1869) LR 9 Eq 324 – also cited by Lord Davey in *Walter v Lane* [1900] AC 539 at 551 – that the right to prevent unauthorised copying might have a common law basis in terms reminiscent of *Millar v Taylor* (1769) 4 Burr 2303 (see n 44). See *Wilson v Lake* [1875] 1 VLR 127 (Molesworth J, discussing the basis of the decision in *Cox*).
(b) Literary copyright in compilations as original literary works: 
Compilation copyright under post-1911 Anglo-Australian legislation

**Compilation copyright under the 1911 Act**

In 1911 the Act was changed, and the category of original literary works replaced for the earlier category of books. A central reason for that change was the Berne Convention 1886, and the obligations it imposed on member states to grant copyright for literary and artistic works.

As defined in the 1911 Act, literary works included maps, charts, plans, tables and compilations; “compilations” by virtue of last minute amendment aimed at preserving earlier law, and ensuring compliance with the terms of Berne.

49 See Copyright Act 1911 (Imp) s 1(1).

50 In Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd [2002] FCAFC 112 at [72], Lindgren J cites the President of the Board of Trade, Mr Sydney Buxton, as having given three reasons for the introduction of the Copyright Act 1911 (UK) when introducing its Bill into the House of Commons: to “bring[] domestic law into line with the Berne Convention 1886[,] reform[,] the domestic law of copyright in the light of the recommendations of the Thirty-Sixth Report of the Copyright Commissioners, 1878[,] and[,] implement[] suggestions made at an Imperial conference ... of representatives of the self-governing Dominions, which had been assisted by the Report of a Departmental Committee called the ‘Law of Copyright Committee’ ... chaired by Lord Gorell.”

51 See Hansard, House of Lords, 16 November 1911 at 211. (Cf Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd [2002] FCAFC 112 at [77] (Lindgren J, suggesting a commitment to ensuring protection for compilations such as Bradshaw, which was expressly mentioned by Lord Gorell in moving the amendment to include a reference in the definition to “compilations”).) The same preservationist aim can be seen in the inclusion as “literary works” of maps, charts and plans, notwithstanding their graphic (artistic) nature. See further below.

52 As originally drafted, Article 2 of the Berne Convention for the Protection of Literary and Artistic Works defined literary and artistic works to include
Notwithstanding overlap in some of their categories, literary works differed from books in their lack of essential material form.\textsuperscript{54} That difference was important, for it underlined the nature of copyright works as authorial (expressive) compositions rather than reports or records of works. Hence the redefinition of copyright itself, from a right to reprint or multiply copies to a right to produce or reproduce a work, or any substantial part of a work, in any material form of fixation.\textsuperscript{55}

The result should have been a break with \textit{Walter v Lane} and the line of decisions on which it was based.\textsuperscript{56} The possibility for such break was threatened, however, by the statutory definition of “literary works” as including maps, charts and plans; and the (related) decision in \textit{University of London Press v University Tutorial Press ("ULP")} [1916] 2 Ch 601\textsuperscript{57} – following decisions of Bailhache J\textsuperscript{58}

“books, pamphlets, and all other writings; ... geographical charts; plans...” in fact, “every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction”. Following the Berlin revisions of 1908 it was extended to include “collections of works”.

This explains the omission from protection of material objects (such as sheets of music). On the materiality required of books under pre-1911 law, see E J Macgillivray, \textit{A Treatise Upon the Law of Copyright} (London: Murray, 1902) 11 (describing books for copyright purposes as requiring a certain physicality).

See Copyright Act 1911 (Imp) s 1(2) (defining “copyright” to mean among other things “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever," including the right to translate, novelize or dramatize it). For a pre-1911 example of copyright infringement by unauthorized reproduction of a substantial part of a copyright book, see \textit{Cate v Devon & Exeter Constitutional Newspaper Company} (1889) 40 Ch D 500.

See Roberton v Lewis [1976] RPC 169 at 175 (doubting whether \textit{Walter v Lane} [1900] AC 539 remained good law after 1911, when originality became a requirement for copyright subsistence).

See, eg, \textit{Masson Seeley & Co Ltd v Embosotype Manufacturing Co} (1924) 41 RPC 160 at 163, 165 (Tomlin J, deciding that copyright subsisted in a catalogue as “a work of labour and expense”, and rejecting the argument of counsel that while the catalogue would have been a “book” within the meaning of pre-1911 law, it was not a “literary work” within the meaning of the 1911 Act, as inconsistent with the decision of Peterson J in \textit{ULP}).
– that a literary work under the Act was any “work ... expressed in print or writing,”59 and an original literary work itself any literary work originating from the author in the sense of not having been copied from another.60 With respect to the means of determining infringement, his Lordship advanced a “rough practical test that what is worth copying is prima facie worth protecting”.61

One result of the decision of Peterson J, confirmed in Sands & McDougall v Robinson (1917) 23 CLR 49, was to graft the requirement

58 See Byrne v Statist Co [1914] 1 KB 622 at 627 (Bailhache J, deciding a translation of an existing work to be an original literary work entitled to copyright, and stating as follows: “Was [the translation] original and was the plaintiff the author? These are, I think, in effect but one question. I think the words ‘original literary work’ mean a literary work of which the person in whom the copyright is laid, or through whom the title to the copyright is traced, is the author. A translator of a literary work has for many years been held to be the author of his translation, and the House of Lords, in Walter v Lane, went so far as to hold that a shorthand writer who reported a speech verbatim was the author of his report. I answer these questions, therefore, in the plaintiff’s favour.”); D P Anderson & Co Ltd v The Lieber Code Co [1917] 2 KB 469 at 471 (Bailhache J, deciding a compilation of meaningless words to be an original literary work entitled to copyright on the pre-1911 authority of Ager v Collingridge (1886) 2 TLR 291 at 292, in which a similar work was held to be a book entitled to copyright on the basis of its “enormous utility ... and of the service rendered to anybody desirous of forming a telegraphic code by an undertaking which once for all eliminated words liable to error, and supplied such a collection of the aptest words for telegraphic use” (2 TLR 291 at 292, quoted by Bailhache J)).

59 University of London Press v University Tutorial Press [1916] 2 Ch 601 at 608 (Peterson J): “In my view the words ‘literary work’ cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high.”

60 See University of London Press v University Tutorial Press [1916] 2 Ch 601 608-609 (Peterson J): “The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.”

for originality to the (ownership) requirement for an author. The question remained, who was an author? On the House of Lords authority of Walter v Lane it was a person responsible for producing a book, whether or not the book was an authorial work. Hence the effect of ULP, combined with the decision in Walter v Lane, which was to raise the spectre of judicial displacement of the statutory requirement for a literary work with a requirement for a material fixation of a work, namely, a book as conceived by the House of Lords. That effect was made stronger by the Act’s inclusion of artistic “books” as “literary works”. It was also made stronger by the “practical test”, which cast the fact of a defendant’s copying as proving the plaintiff’s property itself; treating the moral of reaping without sowing as the normative basis of the Copyright Act.

Had the courts fully embraced ULP they would have ignored originality, and focused entirely on unauthorised copying. That

62 See Sands & McDougall v Robinson (1917) 23 CLR 49 at 55-56 (Isaacs J, noting the effect of the ULP definition of originality in carrying Walter v Lane into the modern law, the reason being that as the reporter in Walter v Lane “was ... decided to be an ‘author’ as to the report; and, as no such thing existed previously, he created, that is ‘originated’, the report” with the result that the report was “in that sense ... necessarily ‘original’”).

63 See, eg, Masson Seeley & Co Ltd v Embosotype Manufacturing Co (1924) 41 RPC 160 (see n 57); Purefoy Engineering Co Ltd v Sykes Boxall & Co Ltd (1955) 72 RPC 89 at 95 (Sir Raymond Evershed MR, finding copyright to subsist in pages of a catalogue on the basis of North J’s judgment in Collis v Cater (1898) 78 LT(NS) 613 (see n 19), which judgment he described as having “never been doubted”). The moral is apparent even in the pre-ULP case of H Blacklock & Co Ltd v C Arthur Pearson Ltd [1915] 2 Ch 376 (Joyce J, supporting his finding of infringement of copyright in the Bradshaw compilation with reference to the commercial (cf personal) purpose of the defendant’s use). Note too the timing of ULP, two years before the decision in International News Service.

64 See Icos Computers Ltd v Barclays Mercantile Highland Finance Ltd [1994] FSR 275 at 289 (Jacob J: “[The aphorism “prima facie what is worth copying is worth protecting”], taken literally, would mean that all a plaintiff ever had to do was to prove copying. Originality, appropriate subject matter for copyright and a taking of a substantial part would all be proved in one go. One would not need the Act if the aphorism represented the law. It proves too much.”).
they did not can be seen from post-ULP cases, including those on compilations. For example, in *Greyhound Racing Association Ltd v Shallis* [1923-1928] MCC 370, Eve J denied injunctive relief to prevent the copying of compilations the production of which involved “neither literary ability, nor skill, nor labour, nor anything else … but a certain amount of sobriety”.65 In *Real Estate Institute of New South Wales v Wood* (1923) 23 SR NSW 349, Street CJ reasoned from copyright in compilations supplying “intelligible information” and requiring “mental effort and industry” to find literary copyright in a contract of sale.66 In *Smith’s Newspapers Ltd v The Labor Daily* (1925) SR NSW 593, Harvey CJ applied *Chilton v Progress Printing and Publishing Company* [1895] 2 Ch 2967 to deny copyright in a compilation of racing tips with reference to a view of literary works as requiring “more than mere penmanship”, and in particular, “literary composition”.68 In *British Broadcasting Co v Wireless League Gazette Publishing Co* (1926) 1 Ch 433, Astbury J supported copyright in compilations of radio broadcast information on the basis of the works’ “literary value” and creation by “literary authorship”.69 In *Mander v O’Brien* (1934) SASR 87, the Court affirmed copyright in compilations on the basis of the thought, careful consideration and accuracy in their preparation.70 In *Odham’s Press Ltd v London &

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65 *Greyhound Racing Association Ltd v Shallis* [1923-1928] MCC 370 at 373. The cards in issue contained a list of the names of dogs competing in the race in the order in which they were drawn from a hat, together with their owners’ names and colours.

66 *Real Estate Institute of New South Wales v Wood* (1923) 23 SR NSW 349 at 352.

67 See n 21.

68 See *Smith’s Newspapers Ltd v The Labor Daily* (1925) SR NSW 593 at 596-597.

69 *British Broadcasting Co v Wireless League Gazette Publishing Co* (1926) 1 Ch 433 at 442. According to the Court, the compilations were publications involving “considerable time, skill, labour and expense”, and the fact that the defendant’s publications would not compete with them was “no reason why the defendants should appropriate any part of the plaintiffs’ work by copying it”.

70 *Mander v O’Brien* (1934) SASR 87 at 92. The cards in issue contained a list of the names of horses competing in the race and associated (race-related)
Compilation Copyright: A matter calling for “a certain … sobriety”

Provincial Sporting News Agency (1929) Ltd [1936] Ch 357, the Court of Appeal distinguished “mere[] compilations of facts” (not original) from “compilations in which a selection has been made, and in which figures have been arrived at in certain cases which are not based on actual facts, but are matters of judgment and estimate” (original). In G A Cramp & Sons Ltd v Smythson Ltd [1944] AC 329, the House of Lords applied Leslie v Young [1894] R (HL) 5772 to support the denial of copyright subsistence in a compilation described as lacking “room for taste or judgment” (Viscount Simon LC),73 “meritorious information. The case was subsequently applied by MacDonald J in the Supreme Court of Canada to support a finding of literary copyright in a compilation on the basis of its originality, established with reference to its “originat[ion] by the plaintiffs, involving sufficient labour, knowledge and judgment to support copyright” (see Ascot Jockey Club Ltd v Simons [1968] 64 WWR 411 at 421).

71

Odham’s Press Ltd v London & Provincial Sporting News Agency (1929) Ltd [1936] Ch 357 at 364 (Lord Wright MR, others agreeing). At first instance in Odham’s, Eve J denied literary copyright in compilations of information regarding the entrants and place winners of horse races, the preparation of which involved “when the field is a large one … a great deal of work”. In the Judge’s view, while “a very hot job, and a very thirsty job, and a very tiring job for a certain period of time”, it was not one that resulted in “literary works in the nature of tables or compilations”, but rather “notes of what they see or hear as they pass round the ring”, “collection[s] of news”, the protection of which by copyright the Judge clearly regarded as contrary to the public interest. (See Odham’s Press Ltd v London & Provincial Sporting News Agency (1929) Ltd [1935] Ch 672 at 679-680: “The advantage which, if this case was proved up to the hilt, would accrue to the plaintiffs seems to be an advantage which is crowded into something like a matter of seconds. Their representative is entitled to know from these two men the result of their investigations before anybody else. Needless to say, there are plenty of persons who are eavesdropping and otherwise trying to obtain information as to what the news is, but the time which they are kept waiting is extraordinarily short, five seconds or ten seconds - not a minute. Indeed, before many minutes are over it is again published to the world at large by the exhibition in the paddock not only of the starting prices of the horses which have been placed, but the starting prices of the horses of which one may say that they ‘also ran.’”)

72

See n 21.

73

G A Cramp & Sons Ltd v Smythson Ltd [1944] AC 329 at 336. See further n 138.
distinctiveness” (Lord Macmillan),74 and the manifestation of sufficient valuable “work, labour and skill” (Lord Porter).75 And finally, in Winterbottom for the Western Australian Turf Club v Wintle (1947) 50 WALR 58, Wolff J held copyright to subsist in compilations of race-related information as products of their creators’ “skill and judgment”.76

The implication from these cases is that under the Act, copyright in a compilation required a certain authorial act: an intentional arrangement of different materials according to a non-predetermined plan. The position was explained by Ross J as follows:

A compilation is something derived from materials common to all. I do not propose to go through the numerous cases that have been cited, because I think the results are stated with great precision in two paragraphs of Copinger on Copyright, at p. 54: ‘Copyright may therefore be claimed by an author of a book, who has taken existing materials from sources common to all writers, and arranged and combined them in a new form and given them an application unknown before. For in making the selection, arrangement, and compilation he has exercised skill and discretion, and in producing something thereby that is new and useful, he is entitled to the exclusive enjoyment of his production. Books made and compiled in this manner are therefore the proper subjects of copyright; and the author of such a work has as much right in his plan, arrangement, and combination of the materials collected and presented as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old materials employed in such a combination for a different purpose. … Protection is not given to the component parts of a compilation independently of their arrangement and combination. Of the component parts the compiler is not the author, and he could not acquire an exclusive right to that which is common to all, neither can the arrangement and combination apart from the materials arranged and combined be the subject of protection. The copyright

74 G A Cramp & Sons Ltd v Smythson Ltd [1944] AC 329 at 338.
75 G A Cramp & Sons Ltd v Smythson Ltd [1944] AC 329 at 340.
76 Winterbottom for the Western Australian Turf Club v Wintle (1947) 50 WALR 58 at 67.
vests in the materials as arranged and combined not in the form and substance apart the one from the other, but in the union of the two.\textsuperscript{77}

In 1946, \textit{Whitaker \& Sons Ltd v Publishers Circulars Ltd} [1946] MCC 1 was decided, involving a whole-of-universe work in the form of a list of published books compiled from common source announcements.\textsuperscript{78} According to Henn Collins J hearing the case,

\ldots[w]hen a list is intended to be comprehensive and complete that kind of judgment which is necessary for selection plays no part in the compilation, but the very fact that it is intended to be comprehensive involves the greater labour in seeing that it is complete so far as research can make it so.\textsuperscript{79}

Considering the list as a copyright work, he reasoned as in \textit{Walter v Lane}; noting the presence of “skill and labour”, and the public interest in publishing the list:\textsuperscript{80}

It does not matter that the particular items in themselves are not the subject matter of copyright. What does matter, as it seemed to the learned Judge, is the skill and labour involved in collecting commonplace material – commonplace in the sense of being within common knowledge and accessible separately to anyone – into a convenient list by reason of which an interested section of the public get something which they want and which they would not get but for the labour and ingenuity of the plaintiffs and other compilers of the available material.\textsuperscript{81}

\textit{Compilation copyright since 1956}

\textbf{Compilations as literary works}

The 1911 Act was replaced in the UK by the \textit{Copyright Act 1956} (UK) and in Australia by the \textit{Copyright Act 1968} (Cth); the former of which

\begin{itemize}
  \item \textsuperscript{77} \textit{The Educational Company of Ireland Ltd v Fallon Bros Ltd} [1918] IR 62 at 68-70.
  
  \item \textsuperscript{78} See also cases cited n 203.
  
  \item \textsuperscript{79} \textit{Whitaker \& Sons Ltd v Publishers Circulars Ltd} [1946] MCC 10 at 12.
  
  \item \textsuperscript{80} See n 28.
  
  \item \textsuperscript{81} \textit{Whitaker \& Sons Ltd v Publishers Circulars Ltd} [1946] MCC 1 at 12.
\end{itemize}
has since been replaced by the Copyright, Designs and Patents Act 1988 (UK) ("CDPA").

In each of these Acts the definition of literary works has differed in ways of importance for compilations. For example, in the 1956 and 1968 Acts a literary work included “any written table or compilation”, see Copyright Act 1956 (UK) s 48(1); Copyright Act 1968 (Cth) s 10. In 1984 the definition in the 1968 Act was amended by the Copyright Act 1984 (Cth) s 3(f) to include “a table or compilation, expressed in words, figures or symbols (whether or not in a visible form)".

See Copyright Act 1956 (UK) s 48(1) (“writing” means “a mode of representing or reproducing words, figures or symbols in a visible form”); Copyright Act 1968 (Cth) s 10 (“writing” means “a mode of representing or reproducing words, figures or symbols in a visible form, and ‘written’ has a corresponding meaning”).

The implication for literary copyright was clear: works expressed as “literary works” were literary by dint of their nature itself, and not their statutory designation. It followed that only compilations having literary character were capable of being literary works. This view is supported by the cases, which reveal a contraction in the category’s boundaries to exclude compilations of non-literary content. It is also consistent with the High Court’s reading of the statutory definition of “computer program”, and in relation to UK law, with the terms of the CDPA definition itself:

82 Copyright Act 1956 (UK) s 48(1); Copyright Act 1968 (Cth) s 10. In 1984 the definition in the 1968 Act was amended by the Copyright Act 1984 (Cth) s 3(f) to include “a table or compilation, expressed in words, figures or symbols (whether or not in a visible form)”.  
83 See Copyright Act 1956 (UK) s 48(1) (“writing” means “a mode of representing or reproducing words, figures or symbols in a visible form”); Copyright Act 1968 (Cth) s 10 (“writing” means “a mode of representing or reproducing words, figures or symbols in a visible form, and ‘written’ has a corresponding meaning”).  
85 In Data Access v Powerflex Services [1999] HCA 49, the definition of “computer programs” contained in section 10(1) of the Copyright Act 1968 (Cth) – “an expression, in any language, code or notation, of a set of instructions ... intended ... to cause a device having digital information processing capabilities to perform a particular function” – was held to include only expressions in languages in which they possessed the required intent, and not the same expressions translated into languages in which they did not possess that intent.
'Literary work' means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes – (a) a table or compilation other than a database, (b) a computer program, (c) preparatory design material for a computer program, and (d) a database...86

The suggestion that compilations must possess the characteristics of a literary work in order to attract literary copyright raises the question what are those characteristics, and what is required for a literary work?87

The implication of the Act and some of the cases is that a literary work for copyright purposes is a work which possesses literary form, namely, a work presented in writing (notation).88 The same applies for non-literary works, with the exception of works of artistic craftsmanship, which have always been treated as special in law in requiring more than artistic form.89 According to the Courts, a work of artistic craftsmanship is a work of craftsmanship produced with artistic intent and judged by the Court on the basis of expert evidence not to be lacking in artistic quality.90 Thus defined, works...


88 See ibid.


90 See George Hensher Ltd v Restawile Upholstery (Lancs) Ltd [1976] AC 64 at 95 (Lord Simon: “It is probably enough that common experience tells us that artists have vocationally an aim and impact which differ from those of the ordinary run of humankind. Given the craftsmanship, it is the presence of such aim and impact – what Stewart J. called ‘the intent of the creator and its result’ – which will determine that the work is one of artistic craftsmanship.”). In Burge v Swarbrick [2007] HCA 17 the High Court accepted this view, replacing the emphasis on artistic intent with an
of artistic craftsmanship are constituted in part by their properties of form and in part by the history of their production, namely, the intent of their author and view of society with respect to their nature as artistic works.  

As noted, the orthodox view is that this definition is unique to works of artistic craftsmanship, and that all other types of copyright works are constituted by their properties of form. However, when asked to affirm copyright subsistence on the basis entirely of such form, the UK courts have often refused, suggesting that the history of a work’s production is equally important for other works. Consider for example the following reasons offered by Laddie J in *Metix (UK) Ltd v GH Maugham (Plastics) Ltd* [1997] FSR 718, for denying protection to cartridge moulds notwithstanding their possession of sculptural form:

I would say at the outset that I have difficulty in accepting that ... something which has a mere transient existence cannot be a work of sculpture. As Mr Meade readily accepted, a sculpture made from ice is no less a sculpture because it may melt as soon as the temperature rises. But, Mr Meade said, what one must look for and try to find is something which has an independent significance outside a commercial production process. He said that I should come to the conclusion that the sculptures allegedly existing here are no more than a stage, perhaps an inevitable stage, which exists between the creation of a drawing of a functional article and the article itself.

... The law has been bedeviled by attempts to widen out the field covered by the copyright acts. It is not possible to say with precision what is and what is not sculpture, but I think Mr Meade was close to the heart of the issue. He suggested that a sculpture is a three-dimensional work made by an artist's hand. It appears to me that there is no reason why the word 'sculpture' in the 1988 Act should be extended far beyond the meaning which that word has to ordinary members of the public. There is nothing in the particulars in this case which suggests that the manufacturers of these moulds considered themselves,

emphasis on artistic quality instead, while adopting a method for determining such quality that revealed a conception more in keeping with that of Lord Simon (ie, emphasizing intent). See Pila, n 89.

91 See Pila, nn 87, 89.
92 See Pila, n 89 at note 69 and accompanying text.
or were considered by anybody else, to be artists when they designed the moulds or that they were concerned in any way with the shape or appearance of what they were making, save for the purpose of achieving a precise functional effect. Nothing in the particulars given here suggests that any consideration of appeal to anything other than functional criteria was in mind or achieved. In these circumstances, it appears to me that there is no arguable case pleaded for the existence of sculpture copyright in the moulds for these products.93

In July 2008 this statement was affirmed in LucasFilm Ltd v Ainsworth [2008] EWHC 1878,94 with reference to the following supporting example:

A pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for 2 weeks preparatory to a building project is equally plainly not. One asks why there is that difference, and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes. I appreciate that this example might be criticised for building in assumptions relating to what it seeks to demonstrate, and then extracting, or justifying, a test from that, but in the heavily subjective realms of definition in the artistic field one has to start somewhere.95

A similarly non-formalistic view has been offered in the context of literary works,96 including the context of compilations. Indeed, according to Justice Lindgren in the Desktop case,

...a totally random collection and listing of unrelated pieces of factual information would not be a compilation within the Act [unless apparently] the compilation included a statement that it was a random selection, since

94 See LucasFilm Ltd v Ainsworth [2008] EWHC 1878 at [115]-[116].
95 LucasFilm Ltd v Ainsworth [2008] EWHC 1878 at [118].
96 See, eg, Exxon v Exxon Insurance Corp [1981] 3 WLR 541 (deciding that a work might be presented in literary form but not be a literary work for copyright purposes), following Hollinrake v Truswell [1894] 3 Ch 420 at 428 (Davey LJ) (on which see further n 107)).
that very statement would give the whole a significance it would otherwise lack.  

In my view, the significance in law of including this statement is the same as the significance of moving bricks from a person’s driveway to a gallery space: it evinces an intent on the part of the author, if not an acceptance on the part of society, that the list is an expressive work of a particular (statutory) copyright type. This supports the suggestion made above that what constitutes a literary or other kind of work is not only its relevant properties of form, but the history of its specific production, including particularly its author’s intent and the view of society with respect to its nature as a literary or other kind of work.

In *Exxon v Exxon Insurance Corp* [1981] 3 WLR 541, the Court of Appeal rejected the argument that a literary work is any “work” in “literary” form. In its view, the word “literary” in the phrase “literary work” “colours and extends” the meaning of “work”. In this it agreed with Lord Simon in *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 and the High Court of

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97 *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 at [160] numbered point 4. According to his Honour, this was a function of the requirement that factual compilations supply “intelligible information” (see *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 at [160] numbered point 4, citing *Real Estate Institute of New South Wales v Wood* (1923) 23 SRNSW 349 (see n 66)).

98 See *Exxon v Exxon Insurance Corp* [1981] 3 WLR 541 at 548 (Stephenson LJ, others agreeing: “If you take the phrase ‘original literary work’ to pieces, this word ‘Exxon’ is original for the reason that I have given, it is literary and it is a work. Why, then, is it not an ‘original literary work’? ... [I]t is the expression as a whole in the context of the Act which has to be construed. ‘Literary’ is given a broader meaning in the Act of 1956 than it was given in the Act of 1842, and that broader meaning must colour and extend the meaning of ‘work.’”). See also at 552-523 (Oliver LJ, Sir David Cairns agreeing).

99 Ibid.

100 See *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64 at 91 (Lord Simon).
Australia in *Burge v Swarbrick* [2007] HCA 17, reaching a similarly non-formalistic end. It is submitted that while those courts are right, it does not follow that “work” adds nothing on its own to each of the relevant statutory phrases. In my view it does add something: the need for a bounded expressive artefact, an intentionally created object (artefact) having a bounded expressive form. It is this requirement that explains the denial of copyright for the dramatic elements in *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056, the artistic elements in *IPC Media v Highbury-Pleasure Publishing* [2005] FSR 20, and the performative elements in *Coffey v Warner/Chappell Music Ltd* [2006] EWHC 449.

101 See *Burge v Swarbrick* [2007] HCA 17 at [55]-[56].

102 By “artefact” here I mean an intentional product of authorship, consistent with the understanding of Risto Hilpinen, “Authors and Artefacts” (1993) 93 *Proceedings of the Aristotelian Society* 155-178. On Hilpinen’s understanding, an artefact is “an object o authored by A, in the sense that o satisfies some type-description included in I,A(o)”, where I,A(o) denotes the intentional content which guides A’s production of o.

103 See also *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 at [160] numbered point 3 (Lindgren J, stating: “The Act’s definition of ‘literary work’ as including a ‘compilation’ has made extended discussion of the meaning of ‘literary work’ unnecessary, but it is noteworthy that the noun ‘work’ has been defined to mean, in the word’s relevant general sense, ‘A thing, structure or result produced by the operation, action, or labour of ... a person or other agent’ (OED) and as ‘a product of exertion, labour, or activity’ (of which an artistic, literary or musical work is given as an example) (Macquarie).”).

104 Privy Council, deciding that copyright was not infringed by the reproduction of the format of a television show, on the ground that the format lacked the certainty and unity required of a dramatic work; see n 174.

105 Laddie J, rejecting a claim of copyright infringement involving the reproduction of a selection of design elements from different magazine articles and covers on the ground that such elements were not an artistic work.

106 Blackburne J, approving Laddie J’s comments in *IPC Media v Highbury-Pleasure Publishing* [2005] FSR 20 in the context of musical works, and relying on the same to reject an allegation of copyright infringement involving the reproduction of a combination of so-called performative
As these cases demonstrate, the boundaries of works are important in law, and determining exactly where they lie is a challenge for Anglo-Australian courts. That challenge is acute for compilations, on account of both their component parts (and the possibility created for multiple works) and the difference in their subsisting rights. See for example the following comments by Hill J in *Re Universal Press Pty Ltd v Provest Ltd* [1989] FCA 264:

> [T]here will be a question, be it one of fact only or be it a mixed question of fact and law is immaterial, which requires to be answered before the features (voice expression, pitch contour and syncopation of or around a lyrical phrase).

The issue of a work’s boundaries was also an issue for pre-modern (19th Century) courts; see, eg, *Maple & Co v Junior Army & Navy Stores* (1882) 21 ChD 369 at 380 (n 22); *Leslie v Young* [1894] R (HL) 57 (finding four pages of “excursion information” (in a 100-page two-part timetable) to be an independent work attracting its own independent copyright on the basis of its commercial importance to the book as a whole). See further the line of cases distinguishing between expressive and technical works on the authority of *Hollinrake v Truswell* [1894] 3 Ch 420, including *Libraco Ltd v Shaw Walker Ltd* (1913) 59 Sol Jo 48; 30 TLR 22 at 22 (Warrington J, applying *Hollinrake v Truswell* to deny copyright to boxed cards containing the personal details of clients on the ground that each card “was part of an outfit, and by itself useless and conveyed no meaning”); *Real Estate Institute of New South Wales v Wood* (1923) 23 SRNSW 349 at 350 (Street CJ, distinguishing *Hollinrake v Truswell* on the ground that the intention that the contract in issue “be put to practical use in connection with the transfer of land does not deprive it of its character as a literary work. It is separately published; it is complete in itself; and it conveys an intelligible idea.”); *Meccano Ltd v Anthony Hordern & Sons Ltd* (1918) 35 WN 185; 18 SRNSW 606 at 611 (Harvey J, distinguishing *Hollinrake v Truswell* and rejecting an argument that a manual of instructions had no literary or artistic quality that would justify its recognition as a copyright subject matter, on the basis that it was “really complete in itself”); See also *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213 (Thomas J, distinguishing *Hollinrake v Truswell* on the basis that the compilation of accounting forms in issue “have their own character, their own form of expression, and in a sense tell their story to the user”).
submission of the first respondent could be accepted: that is the identification of the original literary or artistic work in which the copyright infringed is said to subsist.

By way of example, a dictionary might be prepared chapter by chapter. Each chapter could in one sense be said to be complete in itself if it listed all the words in the language commencing with a particular alphabetical letter; yet no one would suggest that the relevant copyright in the event of infringement existed as such in each chapter. The relevant literary work in which copyright subsisted would be seen to be the dictionary itself. This does not necessarily preclude the possibility that copyright might also exist in the chapter. Another example, suggested by the facts of University of New South Wales v. Moorehouse [1975] HCA 26; (1974-75) 133 CLR 1, is a novel containing a series of chapters each of which is self contained although when read together those chapters can be seen as a complete novel. In such a case a question could well arise as to whether each chapter was to be seen as an original literary work with the edition being seen to confer only a compilation copyright or whether the original literary work was in fact the whole book. The problem is particularly acute if, as in the case of Mr Moorehouse’s book, the chapters had been independently published before the novel as a whole had been published.

Generally the question will be irrelevant, especially if the same author produces both the chapters and the book and if no chapter was published independently of the others. In the present case the question of identification of the work assumes a greater significance, both because the authors of individual maps may have differed over time and because individual maps appearing in the 53rd edition may be identical to maps appearing in the 52nd or earlier editions.

A book containing maps of the streets of Sydney may, as a matter of fact, be prepared from a large map or maps which for convenience of printing is or are broken down into smaller grids each occupying a page. The precise facts in the present case are not before me. The book may be intended by those preparing it to be an entirety with each page being seen to be a component part of that entirety, which entirety includes the indices which make the directory useful. If these were the facts it seems to me not unarguable that the book as a whole would be seen to be the original work and the question of infringement be tested by whether the infringing copy is a reproduction of a substantial part of the street directory as a whole.

If the issue be one of fact the appropriate question may well be whether the reasonable man upon seeing a reproduction of a particular page of the Gregory’s Street Directory would readily characterise what he saw as but a page of a street directory or whether he would more readily characterise it as a map standing on its own. So far as my researches have
shown there has, however, been no case which has yet considered the question how such a characterization should be undertaken.\textsuperscript{108}

This passage supports the suggestion above, that the boundaries of works are determined in law by their specific properties of expressive form and the history of their individual production. Thus, a work might include self-contained chapters but nonetheless be a single work\textsuperscript{109} on the basis of its author’s intent and society’s view with respect to its nature.\textsuperscript{110} The result is one of real import; being, as noted by Hill J above, the difference between protecting the work \textit{as a composition} and protecting it \textit{as a compilation per se}.

Related to the issue of the boundaries of a work is the issue of the boundaries of its authorial process: what acts are involved in creating a work?\textsuperscript{112} Any adequate answer to this question will reflect

\textsuperscript{108} Re Universal Press Pty Ltd v Provest Ltd [1989] FCA 264 at [13]-[17].
\textsuperscript{109} Re Universal Press Pty Ltd v Provest Ltd [1989] FCA 264 at [14].
\textsuperscript{110} Re Universal Press Pty Ltd v Provest Ltd [1989] FCA 264 at [16] (intent), [17] (society’s view). See further the cases at n 107.
\textsuperscript{111} Re Universal Press Pty Ltd v Provest Ltd [1989] FCA 264 at [14].
\textsuperscript{112} See, eg, Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 at 654 (Upjohn J: “The problem, therefore, at this stage resolves itself into the question whether, as Mr. Shelley submits, you must regard the activities of the League, its servants and agents (and that really means the activities of Sutcliffe) in producing the fundamental scheme for the following season’s football programme as being an activity directed to the production of non-copyright information to be made readily available to the public, or whether the League’s activities may properly be regarded as leading to the production of Sutcliffe’s documents, the clubs’ list or the chronological list, so that they may be regarded as compilations to which the entire energies of Sutcliffe may be attributed. If the latter be the true view, then let me say at once that I am satisfied, on the evidence, that the energies of Sutcliffe from start to finish are of a high order judged by any standard. His work represents much skill, labour, time, judgment and, above all, ingenuity, and on this view, therefore, is entitled to copyright.”); Elanco Products Ltd v Mandops Ltd [1980] RPC 213 (CA) (identifying as an issue for the Trial Judge “whether the literature was something in which there could be copyright, or whether it was merely something which gave news or information of which competitors could freely avail themselves, and in that connection whether
the nature of authorial acts as intentional acts of personal expression. Thus, while the formal question will be important (did the act affect the form of the work?), so will the further intentional question (was the act undertaken with a view to the work?). The same is supported by the UK courts, including \textit{Ladbroke v William Hill (Football) Ltd} [1964] 1 WLR 273:

I do not think it necessary in this type of case that the work done should have as its sole, or even as its main, object the preparation of a document such as a list or catalogue or race card. It is sufficient that the preparation of the document is an object of the work done. If that be so, the work cannot be split up and parts allotted to the several objects. The value of the work as a whole must be assessed when the claim to originality is being considered. If, when the work of selection is being done, there is no intention of listing results, the matter might well be different. A line could then be drawn between the work of selecting and the work of recording a selection independently made. No such line can be drawn in the present case which is, to my mind, much stronger than the ordinary case in which goods are being catalogued. The whole object of the work done was the production of the coupon.

As all of the speeches in \textit{Ladbroke} show, the emphasis on authorial intent in mapping the boundaries of authorial acts produces the important result in law that preparatory (“pre-expressive”) acts can be part of the authorship of a work. Further, the act and intent

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114 \textit{Ladbroke v William Hill (Football) Ltd} [1964] 1 WLR 273 at 290 (Lord Devlin).

115 See \textit{Ladbroke v William Hill (Football) Ltd} [1964] 1 WLR 273 at 290 (Lord Devlin); 287-288 (Lord Hodson); 293 (Lord Pearce); 278 (Lord Reid). On the impermissibility of distinguishing between expressive and pre-expressive stages of authorship, see further Winterbottom for the Western Australian Turf Club \textit{v} Wintle (1947) 50 WALR 58 at 67 (Wolff J), rejecting the distinction between expressive and pre-expressive stages of authoring a work, and

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might themselves be separate, such that intent to create a copyright work might follow the relevant creative act. (For example, arranging a photographic scene might be part of authoring a photograph, even where the decision to take the photograph proceeds arrangement of

noting “while at one stage, after the materials for the list and its form have been decided on, the setting up is more or less mechanical, that is a features which could be urged in respect of most literary works”); Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 at 655-656 (n 174): Mirror Newspapers Ltd v Queensland Newspapers Pty Ltd (1982) 59 FLR 71 (Connolly J, noting the illegitimacy of distinguishing between the work invested in an idea and its expression for copyright purposes); ITP v Time Out [1984] FSR 64 (Whitford J, finding compilations of daily broadcast information to be original on the basis of the labour and skill invested in both arriving at the schedule and describing it in the form of the literary compilations); British Columbia Jockey Club v Standen (Winbar Publications) (1985) 66 BCLR 245 (treating the pre-production work of determining race conditions, conducting the draw for racing post positions, etc, as part of the work directed to creation of the compilations of horse-racing information); Radio Telefis Eireann v Magill [1989] IR 554 at 563 (Lardner J, describing the process by which the weekly programme schedules were created, which process was a long one of planning, preparation and revision that began up to a year in advance of transmission); FWS Joint Sports Claimants v Canada [1992] 1 FC 487 (Federal Court of Canada – Court of Appeal) at [11]-[12] (affirming the decision of the Copyright Board that the expertise and creativity required to make compilations of programs might lead to copyright protection in the written schedule itself, as a compilation). Cf Elanco Products Ltd v Mandops Ltd [1980] RPC 213 at 226 (describing the compilation cases as “all go[ing] on there being skill and labour involved in making the compilation, as distinct from skill and labour in ascertaining information”, and identifying as an issue for the Trial Judge “whether the literature was something in which there could be copyright, or whether it was merely something which gave news or information of which competitors could freely avail themselves, and in that connection whether there was separate work and research which went into the preparation of the literature as distinct from the work designed to enable the applicants to see whether they had a marketable commodity [etc]). To the extent that the cases cited here in support of the “non-dissection” theory of Ladbroke support treating the authorship of a work as part of the authorship of a subsequent work, I believe they are wrong for the reasons that follow.
the scene.)

It does not follow, however, that any act affecting the properties of a work and undertaken with a view to creating that work will be part of the work’s authorial process. For example, it does not follow from the fact that a poem is written for inclusion in an anthology of poems that authorship of the single poem is part of the authorship of the anthology. The reason lies in the nature of the works, as well as the specific legal principle that the investment in creating a work – even if not a copyright work – is not also investment in a later work. That principle was expressed in *Bookmakers’ Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723:

A person who takes a work, whether it be a formula, a book, or a poem, and uses it to produce another work, will only obtain copyright in that other work if the skill, labour and judgment used to produce that other work are sufficient.116

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116 *Bookmakers’ Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723 at 735. The quoted passage begins as follows: “The formula [for calculating forecast dividends] was an original literary work, and the question arises whether the individual dividends produced applying the formula were each original literary works on the basis of the skill, labour and judgment invested in deriving the formula itself. If they were, the labour, skill and judgment used in deriving the formula would continue to support copyright after copyright in the formula itself had expired. This is an untenable position.” While the formula in question was a copyright work, the result ought to have been the same had it been a work not entitled to copyright, for the formal and historical relations between the works and acts (in issue) would not have been affected by that fact. The Court’s reasoning seems to confirm that this was its understanding. A related issue concerns new editions of works, and the requirements for their recognition as new works entitled to new copyright. This was the issue in *Sawkins v Hyperion Records* [2005] EWCA Civ 56, considered below. Considering the question in 1893, Copinger suggested that for a new edition of a literary work to be a new work entitled to a new copyright, it would need to be “substantially different” from the existing work, in the sense of having “a true and real value” over and above that the existing work itself. Further, one test of such difference it was said would be whether the new edition would “procure purchasers in the market on special account of” its variations; the implication being that the question
The importance of identifying the boundaries of works and the authorial process by which they are made derives from the role of each of the same in defining the rights of copyright owners, and identifying owners (and authors) themselves.\textsuperscript{117} This raises the requirement of originality, as the conceptual interface in modern law between the subsistence and ownership of copyright in works.

**Compilations as original (literary) works**

As seen above, the originality requirement was introduced in 1911 with the vesting of copyright in categories of works, and interpreted soon after (in ULP) as requiring no more than origination, in the sense of creation in contrast to copying.\textsuperscript{118} That interpretation continues today,\textsuperscript{119} with the important caveat (from Walter v Lane) that where a work is or incorporates a copy of a work,\textsuperscript{120} the

\[117\] Note however the courts’ practice on occasion of straining (in either direction) their conception of the boundaries of a work or category of work to support a particular finding on originality; an example being Interlego v Tyco Industries [1989] AC 217, discussed at length in Pila, n 41 at 550-553.

\[118\] The interpretation has been consistently affirmed and applied, including by the House of Lords in Ladbroke v William Hill (Football) Ltd [1964] 1 WLR 273.

\[119\] In Walter v Lane neither North J nor the majority of the House of Lords believed the transcripts to be copies, but rather new books. With respect to North J see Walter v Lane [1899] 2 Ch 749 at 755 (“It was said that a reporter cannot have any copyright because he is not an author of any original published matter; and it is said that a publisher of a work which has been previously published is not himself the author of that which had been previously published. That seems to me to be rather a confusion of terms. No doubt the reporter is not the author of the speech; but the reporter is the author of the public report of the speech, and of the writing containing the speech, and that is the only thing with respect to which copyright can
creation/copying distinction will fail and subsistence of copyright in the work be established (not precluded) by acts of copying.\footnote{121}

In the UK, this caveat was affirmed in Sawkins v Hyperion Records [2005] EWCA Civ 56, along with Walter v Lane itself.\footnote{122} According to Mummery LJ in that case, writing the opinion for the Court, performing editions of musical works were original on account of the “substantial effort, skill and time”\footnote{123} invested by the plaintiff in creating the same, including in copying the works themselves.\footnote{124}

Although I agree that some aspects of Dr Sawkins’ exertions, such as time and labour spent on the discovery or retrieval of the original scores and in their layout on the page, are irrelevant to the subsistence of copyright in a musical work, I do not accept the narrow approach advocated by Hyperion as to the type and nature of the work required to attract musical copyright.

\footnote{121}This provides a possible justification for the principle expressed by Joyce J in H Blacklock & Co Ltd v C Arthur Pearson Ltd [1915] 2 Ch 376 at 384 that “[a] book which consists of a specification of the conditions at the present moment of a constantly changing subject-matter is a new work even though some of the particulars may not have altered from what they were, and were stated to be, at some prior date, perhaps years before”.

\footnote{122}See Sawkins v Hyperion Records [2005] EWCA Civ 56 (Mummery LJ) at [33] (describing the House of Lords in Walter v Lane as having expounded the essential elements of originality, and as remaining good law), [36] (describing the finding of originality as involving “the application of Walter v Lane”).

\footnote{123}Sawkins v Hyperion Records [2005] EWCA Civ 56 at [16]. The Trial Judge’s language – approved by Mummery LJ (at [23]) – was “considerable skill and labour”.

\footnote{124}Creation of the performing editions involved “transposing the source material into conventional modern notation, correct[ing] it where necessary and mak[ing] certain other additions”: see Sawkins v Hyperion Records [2005] EWCA Civ 56 at [25]. Of course, and consistent with the principles above, the investment of the original composer (Lalande) himself in creating the works new editions of which Dr Sawkins created was not and could not have been included in the Court’s account of the authorship of those editions.
Hyperion’s emphasis is on the necessity for composition or re-composition of new notes of music, as in a musical adaptation or arrangement, in order to produce an original combination of sounds appreciated by the ear, rather than on the exacting scholarly exertions of Dr Sawkins on the notation of the scores and the inclusion of performing indications and directions.\footnote{Sawkins v Hyperion Records [2005] EWCA Civ 56 at [43]-[44].}

In Sawkins, Jacob LJ gave a separate opinion of current importance for two main reasons. The first is its emphasis on the personal judgment required to create the performing edition;\footnote{Sawkins v Hyperion Records [2005] EWCA Civ 56 at [86] (Dr Sawkins “re-created Lalande’s work using a considerable amount of personal judgment. His re-creative work was such as to create something really new using his own original (not merely copied) work.”).} and the second its suggestion that public policy might displace the need for originality.\footnote{Sawkins v Hyperion Records [2005] EWCA Civ 56 at [81] (quoting with approval a passage from The Modern Law of Copyright ending with the statement “it is submitted that the Interlego proposition [that copying cannot confer originality and that copies cannot be the subject of artistic copyright] is anyway distinguishable where the replicator succeeds in preserving for posterity an original to which access is difficult.”), [87] (describing the solution in the appeal as “accord[ing] with a reasonable view of public policy – that the sort of work done by Dr Sawkins should be encouraged. It saves others the time and trouble of re-creation of near-lost works, but in no sense creates monopoly in them. If someone wants to use Dr Sawkins’ short cut, they need his permission.”).}

The result was an opinion that well reflects the tendency of Anglo-Australian courts to look for evidence of skill and judgment in the creation of a statutory work.\footnote{See, eg, Portway Press Ltd v Hague [1957] RPC 426 at 428 (Vaisey J, finding compilations of racing information to be original as products of a “great deal of ingenuity, skill and labour, and much investigation in various quarters, and a large expenditure of trouble, care and time”); Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 at 654 (Upjohn J, finding compilations of information regarding football matches to be original as products of “much skill, labour, time, judgment and, above all, ingenuity”); Cuisenaire v Reed [1963] VR 719 at 733 (Pape J, assuming a compilation of
information regarding the colours and lengths of mathematical rods to be original by reason of the skill and labour involved in its preparation, including particularly in the selection of the colours; Ladbroke v William Hill (Football) Ltd [1964] 1 WLR 273 (finding compilations of football coupons to be original as products of a “vast amount of skill, judgment, experience and work” (Lord Reid at 275), “the requisite degree of skill, judgment and labour” (Lord Evershed at 282), a “highly skilled” process of selection (Lord Hodson at 287), “great deal of industry and skill” (Lord Devlin at 289), and the devotion of “much work and money and ingenuity” (Lord Pearce at 292); Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales [1977] RPC 137 (NSW SC) at 149 (Bowen CJ, finding compilations (in the form of questionnaires and surveys) to be original as products of “skill, judgment and labour”); Elanco Products Ltd v Mandops Ltd [1980] RPC 213 at 226 (Goff LJ (others agreeing), describing the compilation cases as “all go[ing] on there being skill and labour involved in making the compilation”); Mirror Newspapers Ltd v Queensland Newspapers Pty Ltd (1982) 59 FLR 71 at 75-76 (Connolly J, finding compilations of numbers on bingo cards to be original as products of “sufficient skill and ingenuity”, and the application of “thought”, applying Real Estate Institute of New South Wales v Wood (1923) 23 SRNSW 349 (see n 66), D P Anderson & Co Ltd v The Lieber Code Co [1917] 2 KB 469 (see n 58), and Ager v Collingridge (1886) 2 TLR 291 (see n 58)); British Columbia Jockey Club v Standen (Winbar Publications) (1985) 66 BCLR 245 (Legg J, describing compilations of horse-racing information as manifesting “work, skill, judgment and knowledge” (which the defendants had appropriated); ITP v Time Out [1984] FSR 64 at 66 (Whitford J, describing compilations of daily broadcast information as the product of “a good deal of hard work and skill”, and noting the defendant’s acceptance of the same); Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd (1985) 5 IPR 213 (Thomas J, finding a compilation of accounting forms to be original as products of “intellectual input … in as much as [the forms] are designed and presented in a way which will produce meaningful results for the user”); Spiro-Flex Industries Ltd v Progressive Sealing Inc (1985) 8 IPR 449 (Gibbs J, finding copyright to subsist in compilations of drawings, directions and specifications for a pump coupler on the basis of the “work, taste and discretion” invested in its composition); Express Newspapers Plc v News (UK) Ltd [1990] 1 WLR 1320 at 1326 (Browne-Wilkinson VC, finding a report of another’s words to be original on the authority of Walter v Lane, but interpreting that authority as requiring “skill, labour and judgment [in] the reporting of Miss Ogilvy’s words”; see n further n 27); Radio Telefis Eireann v Magill [1989] IR 554 at 563 (finding compilations of weekly radio broadcast information to be original as “the product of a long process of planning, preparation, compilation and revision” including “a great deal of
preparedness, where no such evidence can be found, to consider subsistence nonetheless on alternative public policy grounds.\textsuperscript{129}

preliminary consideration and work and of the exercise of skill and judgment”); CCOM Pty Ltd v Jiejing Pty Ltd [1993] FCA 653 at [194] (Cooper J, finding a compilation of Chinese characters to be original as the product of “substantial skill, time, effort and original thought”); Bookmakers’ Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd [1994] FSR 723 (Aldous J, finding: i. advance programmes of greyhound races (showing for each of 12 races the time, length and type of race, the prize money, the runners, the name of the trainers and three sets of reserves) to be original works entitled to literary copyright on the basis of the “considerable skill, labour and judgment” involved in their preparation (at 732); ii. race cards incorporating the advance programmes and other information to be original works entitled to a separate literary copyright on the basis of “the work needed to produce that card”, his Lordship having earlier stated the test of the cards’ originality as “whether sufficient labour, judgment and skill were used so as to render [the cards] original literary works” (at 731); iii. a formula for deriving forecast dividends to be an original work entitled to literary copyright on the basis of the “thought, skill and labour” invested in its initial derivation, and its refinement since then “with the application of further skill and labour” (at 734); iv. dividends calculated using the formula not to involve “sufficient skill, labour and judgment” to be original literary works; and v. the compilation of the 12 dividends for the 12 races not to be an original work on the ground that there was “no skill or judgment and minimal labour in writing [the dividends] down 12 times”, with the result that they amounted “to a mere collocation to which copyright does not attach” (at 736); Data Access v Powerflex Services [1999] HCA 49 at [122]-[123] (n 211).

\textsuperscript{129} See, eg, Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637, where Upjohn J emphasised the presence of judgment in the author’s act of creating the programme (stating at 654 that the “work represents much skill, labour, time, judgment and, above all, ingenuity, and on this view, therefore, is entitled to copyright”), and was also prepared to support copyright in the chronological list itself, despite it being the product of “a great deal of painstaking hard work with complete accuracy as the keynote” only, on the basis of the following public policy consideration (at 656): “I think that the matter may be tested in this way. Suppose the League did no more than issue the clubs’ list. Suppose an enterprising publisher conceived the idea of publishing a complete chronological list, which he thought might
In the UK, judicial understandings of originality have had limited relevance for compilations since the Copyright and Rights in Databases Regulations 1997 (UK). Those Regulations introduced section 3A(2) of the CDPA, incorporating the rule of 96/9/EC Directive on the Legal Protection of Databases [1996] OJ L077, that for a database to be an original work it must be “the author’s own intellectual creation” by reason specifically of its selection or arrangement. The effect is to give statutory force to the requirement for an authorial work of the type described by Ross J above, specifically, an intentional arrangement of different materials according to a non-predetermined plan. Further, as most compilations are databases, they will also be subject to section 3A(2).

prove useful to football patrons, and puts one on the market. That work proving successful, suppose it is pirated, that is, deliberately copied by another. In my judgment the enterprising publisher (though perhaps by the narrowest of margins) would be entitled to claim that the work involved sufficient work and labour to justify the existence of copyright therein. True there would be in that suppositional case the argument that there was competition between infringer and infringed, and there is none here, but that is not decisive: see Weatherby & Sons v International Horse Agency and Exchange Ltd. Had it been necessary to do so, I should have been prepared to find in the League’s favour on this ground also.” Cf Bevis v Lyons (1986) (Williams J, emphasizing that copyright as a property right is not proved merely by showing that loss will be suffered unless the defendant is restrained from carrying on his proposed activity; that what is required, rather, is the establishment of a property right and its infringement).

N 77 and accompanying text. See also Interlego v Tyco Industries [1989] AC 217 (PC) at 232-233 (deciding that what matters about an artistic work for copyright purposes is “what can be seen”, with the result that assessments of originality in the context of such works must focus on those aspects of the works having visual significance).

See CDPA s 3A(1) (defining “database” to mean “a collection of independent works, data or other materials which – (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means”). It is possible that even the small number of compilations not satisfying this definition would be assessed against the section 3A(2) standard of originality, unless their lack of sui generis protection is deemed to make such assessment inappropriate on policy grounds. The absence of such protection was noted by Lindren and Sackville JJ in their consideration of section 3A(2) in Desktop as a point of
In conclusion, the UK law of originality is a long way from the Australian law, particularly since the decisions in Desktop, and not only with respect to compilations. Given this, it is surprising to read the Desktop judgments and see the construction of UK cases, and their influence on the Courts’ decision that copyright subsists in telephone directories as industrious collections of a class of facts. Consider for example the following passage from arguably the most important judgment, the first instance decision of Finkelstein J:

I take the effect of the English authorities to be as follows. The author of a book that records facts, whether it be an encyclopedia, a map, a directory or some other factual compilation, does not acquire copyright in the facts that have been published. So much is trite. But the author may have copyright in the form in which he has published the facts. Copyright will subsist if there has been sufficient intellectual effort in the selection or arrangement of the facts. It will also subsist if the author has engaged in sufficient work or incurred sufficient expense in gathering the facts. The cases have not defined with any precision what amount of intellectual effort, labour, etc., is required to justify copyright. ‘In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree’: Macmillan & Co Ltd v Cooper (1923) 40 TLR 186, 190. What is not clear is whether the intellectual effort, labour, etc, must be more than negligible or whether it must be substantial: see Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd (1985) 84 FLR 101, 120-121 where the cases expressing the competing views are collected. When copyright does subsist in a compilation of facts, any person who wishes to publish the same facts is free to do so. But he must collect the facts himself. He cannot copy them from the first work.

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132 I say this on account of the judgment’s depth of legal analysis, and the Full Court judgments’ essential support of it.

133 Relevant distinction between Australian and UK law in this area; see Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd [2002] FCAFC 112 at [162] (Lindren J), [408], [424] (Sackville J).

See Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd [2001] FCA 612 at [74]. For a discussion of his Honour’s quandary see further Pila, n 41 at 550.
It is submitted that this is not correct; that as I have tried to show above, the English cases do not support, and indeed have never decisively supported, copyright on the basis (as is said) of “work or ... expense in gathering facts”. Indeed, even the author of Kelly v Morris writing in 1863, recognised limits to copyright subsistence by excluding lists from the category of books. In Desktop the Courts rejected such limits. According to Justice Finkelstein, with whom the Full Court clearly agreed, such is the nature of certain works that function and commercial considerations will limit the scope for independent thought (not to mention creative effort). Thus, in the case of regional telephone directories – and presumably postal directories too – there can be no selection of facts, and no feasible method of arranging facts, other than those commonplace methods of alphabetical, chronological or sequential grouping. This created the quandary for the Courts that that which makes a work of value – costly to produce and of benefit to the public – may also threaten its status as a work entitled to legal (copyright) protection.

It is difficult to accept the Desktop view that there exists a type of compilation not involving any selection at all, for even including all possible facts entails a selection of those facts. Rather, the better view is the one above: that possessing the expressive form of a work – paint on a surface, three dimensions, or a collection of different notational marks – does not make a thing a copyright work. The reason is the nature of works, which require a history of production consistent with them being authorial works of a particular (statutory) copyright type. Applying that understanding here, we might say that a regional telephone directory is neither intended by

134 Indeed, the only modern cases which support compilation copyright on the basis of labour and expenditure alone would seem to be Waterlow Publishers Ltd v Rose [1995] FSR 207 and Waterlow Directories Ltd v Reed Information Services Ltd [1993] ECC 174, though in neither case was the question of subsistence in issue (on account of having been conceded by the defendant).

135 For example postal directories; see n 42.

136 See Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd [2001] FCA 612 at [64].
its producer, nor understood by society, to exist as an authorial work in the form of a literary compilation.\textsuperscript{137}

This leaves the quandary perceived by the Courts regarding the denial of copyright protection for certain valuable informational works. It is submitted, however, that this is misplaced; for as the House of Lords\textsuperscript{138} and High Court support,\textsuperscript{139} value itself cannot

\textsuperscript{137} See further Pila, n 87.

\textsuperscript{138} See \textit{G A Cramp & Sons Ltd v Smythson Ltd} [1944] AC 329 at 335-336 (Viscount Simon LC, “There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the postal guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment. There remains, I agree, the element of choice as to what information should be given, and the respondents contend that the test of originality is satisfied by the choice of the tables inserted, but the bundle of information furnished in the respondents’ diary is commonplace information which is ordinarily useful and is, at any rate to a large extent, commonly found prefixed to diaries, and, looking through the respondents’ collection of tables, I have difficulty in seeing how such tables, in the combination in which they appear in the respondents’ 1933 diary, can reasonably claim to be ‘original work.’ There was no evidence that any of these tables was composed specially for the respondents’ diary. There was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged. My own conclusion is that the selection did not constitute an original literary work.”)

\textsuperscript{139} See \textit{Burge v Swarbrick} [2007] HCA 17 at [51] (denying copyright to a prototype boat as a work of artistic craftsmanship, and expressing the following view: “[A]s the facts of this case demonstrate, encouragement of ‘real artistic effort’ to industrial design may be constrained by the nature of the functional purposes to be served by the object to which industrial design is applied and by the marketing imperatives for mass production. The evidence of the marketing of the JS 9000 class of racing yacht, described in the first part of these reasons, is illustrative of these constraints. It is these
override the need for a statutory category of work. The same point was made by the US Supreme Court in denying protection to telephone directories:

Originality is a constitutional requirement. ... It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations. ‘No one may claim originality as to facts’ ... because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery.... Factual compilations, on the other hand, may possess the requisite originality [if they involve choices as to the facts’ selection and arrangement that are] made independently by the compiler and entail a minimal degree of creativity.... This inevitably means that the copyright in a compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement... It main seem unfair that the fruit of the compiler’s labour may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not ‘some unforeseen byproduct of a statutory scheme’ [but] rather, ‘the essence of copyright’ [which] assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. ... The result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.140

A similar position in respect of directories has been taken in EC and Canadian law. In the EC, as seen above, databases must be their “author’s own intellectual creation” in order to attract copyright protection. In Canada a similar understanding exists grace of Tele-Direct Publications Inc v American Business Information Inc (1998) 76 CPR (3d) 296; 154 DLR (4th) 328 and CCH Canadian v Law Society of Upper Canada [2004] 1 SCR 339.141 Despite their different constraints which make it difficult to support the Plug as a ‘work of artistic craftsmanship’.”). For a discussion see Pila, n 89.


141 In Tele-Direct Publications Inc v American Business Information Inc (1998) 76 CPR (3d) 296; 154 DLR (4th) 328 the Canadian Federal Court, including particularly Décary J, applied something close to the EC conception of
formulations, each of these (US, EC and Canadian) tests reflects a restriction, at least, of literary copyright to authorial works in the sense above.\textsuperscript{142} To the extent that Desktop differs from this, it casts Australia as a lone outlier on the spectrum of international copyright standards. To the extent that it supports Walter v Lane and the Kelly v Morris line of cases, it is especially unfortunate, for those cases cast copyright law as an equitable wrong of unfair copying, thereby obscuring its primary statutory aim of defining the rights of individual authors in respect of certain categories of works.

3. Compilations and Copyright Protection: From a Right to Reprint to a Right (entirely or substantially) to Reproduce

Anglo-Australian copyright law is oriented around works: copyright subsists in works and protects against their unauthorized use in whole or substantial part.\textsuperscript{143} It follows that the questions what is a work, and what gives a subject matter its substance as a work, are central to modern copyright law.

The same has been recognized by the courts, particularly in discussions of copyright infringement, which reflect a concern to understand works and what gives them their essence as copyright works.\textsuperscript{144} For example, in Norowzian v Arks Ltd (No 2) [2000] FSR 363, an allegation of substantial copying inferred from the objective originality in support of the finding that telephone directories did not qualify as an original intellectual creation and were thus not entitled to copyright protection. That conception was later developed and refined by the Supreme Court of Canada in the non-compilation case of CCH Canadian v Law Society of Upper Canada [2004] 1 SCR 339 at 352, where it was held that for a work to be original under Canadian law it must be more than a mere copy of another work and involve “an exercise of skill and judgment”, but need not be creative in the sense of being novel or unique.

\textsuperscript{142} Compare the position with respect to copyright subject matter other than (literary, dramatic, musical and artistic) works.
\textsuperscript{143} CDPA s 16(3)(a), Copyright Act 1968 (Cth) s 14(1).
\textsuperscript{144} For a fuller discussion of this thesis and its supporting cases see Pila, n 41.
similarity of the works was “destroyed by the evidence of an expert choreographer” that when perceived specifically as works of dance, they lost their objective similarity.\textsuperscript{145} Similarly in \textit{Pearce v Ove Arup} [2000] Ch 403, Jacob J suggested that while a side-by-side comparison of the works as plans might reveal similarities suggestive of copying, when the works were perceived as architectural works a different impression and conclusion resulted.\textsuperscript{146} And finally in \textit{Designers Guild Ltd v Russell Williams (Textiles) Ltd} [2000] 1 WLR 2416, the House of Lords’ understanding of the copyright work was strongly informed by the \textit{gestalt} of painting, and perceptions of the same in the design of the fabric.\textsuperscript{147}

More difficult for the courts have been functional works, as seen in the context of computer programs. In \textit{Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd} [1994] FSR 275, for example, Jacob J emphasized the need for strict application of the statutory principles to avoid aphorisms such as the ULP “rough practical test”, before proceeding to suggest “the notion of an over-borrowing of the author’s skill, labour and judgment” as “a good guide” to determining copyright infringement.\textsuperscript{148} The same emphasis on “over-borrowing” from others’ investment can be seen in respect of computer programs generally; a further example being \textit{John Richardson Computers v Flanders} [1993] FSR 497, where Ferris J referred to copyright infringers as “plagiarsists”, before declaring the defendant to have infringed the plaintiff’s work by reproducing a substantial part of the product of its “protected labour and skill”.\textsuperscript{149}

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145 \textit{Norowzian v Arks Ltd (No 2)} [2000] FSR 363 at 370. \\
146 \textit{Pearce v Ove Arup} [2000] Ch 403 at 413-415. \\
147 \textit{Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd} [1994] FSR 275. \\
148 \textit{John Richardson Computers v Flanders} [1993] FSR 497. \textit{Compare Cantor Fitzgerald v Tradition} [2000] RPC 95, where Pumfrey J rejected Jacob J’s “good guide” from \textit{Ibcos} as an unhelpful distraction form the statutory test of substantiality, and went on to formulate a test of substantial part focused
\end{tabular}
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Interpretations of copyright as protecting investment in the creation of works (by preventing appropriation of the same) are consistent with the role of originality as the central requirement for copyright protection. However, the investment required for originality is not commensurate with the work itself, being the thing in which copyright strictly subsists. Put differently, that which gives a work its substance is not the investment in its creation, much less the investment on the basis of which title to its copyright is conferred. For this reason alone, assessments of infringement ought not to focus on authorial or other investments in a work, but rather (and as the Act requires) on the substantiality of the relevant part to the work when correctly perceived as a copyright work.

As seen above, this view finds support among UK courts in cases involving the paradigm types of creative (artistic and other) works. However, difficulties arise when applying the test in the context of functional and technical works. This was recognized in Autodesk Inc v Dyason (No 2) [1993] HCA 6, where Mason CJ suggested in dissent that if programs are perceived as technical works, then any part of them will be substantial on account of its importance to the program’s function. The point was made in Data Access v Powerflex Services [1999] HCA 49, and the implication taken in that case that when considering issues of substantial part, programs must be perceived as copyright works, namely, works that derive their essence or substance from the gestalt of the category in which the originality of what was taken. In the event the Judge largely acquitted the defendant of infringement, though in terms reminiscent of International News Service v Associated Press 248 US 215 (1918) in their emphasis on the distinction between fair and unfair copying, and in particular between a person who reproduces a substantial part of another’s skill and labour on one hand, and a person who intends and works very hard to produce a new program, albeit using the author’s work to help if needed.

150 Autodesk Inc v Dyason (No 2) [1993] HCA 6 at [11]; Data Access v Powerflex Services [1999] HCA 49 at [80]-[84].
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which they fall.\footnote{151} In the case of the category of programs itself, that gestalt lay in the combination of expressive features standard to the category of computer programs,\footnote{152} which features included, on the Court’s analysis, “the structure, choice of commands and combination and sequencing of the commands in source code”.\footnote{153}


\footnote{152}See Roman Ingarden, “The General Question of the Essence of Form and Content” (1960) 57 The Journal of Philosophy 222 at 230, 233 (defining “gestalt” to mean the interior form of a work; the “certain special regularity that ... appears in certain objects” so as to create by their occurrence “a mutual affinity (belonging)” among the same); cf Walton, ibid at 340-341 (describing the gestalt of a category as perceived in a work when we perceive (without necessarily being aware of) features standard relative to that category “combined into a single gestalt quality”).

\footnote{153}Data Access v Powerflex Services [1999] HCA 49 at [88]. When the substantiality of the Reserved Words to the copyright program in Data Access was considered in the light of this understanding of the source of the program’s essence, it was determined in the defendant’s favour. According to the Court (at [88]): “As they appear in the source code of the Dataflex system, the Reserved Words are irrelevant to the structure, choice of commands and combination and sequencing of the commands in source code. They are merely literal strings which, from the computer's perspective, could be replaced by any other literal string. Accordingly, they are not a substantial part of the Dataflex program as it appears in source code unless they have their own inherent originality.” Compare [1999] HCA 49 at [84], where the Court (following Mason CJ’s decision in Autodesk Inc v Dyason (No 2) [1993] HCA 6) supported a test of substantiality that required “considering the originality of the part allegedly taken”. See also Bevis v Lyons (1986) (Williams J, finding copyright to subsist in the rules of a game, while emphasizing that what is protected is the literary work and not the invention or idea of the game itself, citing Hollinrake v Truswell [1894] 3 Ch 420 (see n 107)). This is not to suggest that the technical or functional nature of a work must be excluded for copyright purposes, which the High Court has made clear it need not be. Rather, it is to admit the possibility of perceiving subject matter in different ways, and to require that they be perceived in a particular way for copyright purposes, namely, as expressive works falling within a particular statutory category. See further on this issue Kalamzoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd (1985) 5 IPR 213 (Thomas J, noting the difficulties presented by technical artefacts (such as the compilation of accounting forms in issue, as “an apparatus designed
Artistic works create further difficulties, including particularly photographs and maps, which are often raised in compilation cases despite being artistic (not literary) works.\(^{154}\) Consider for example photographs. Here the work’s properties of form are a statutory given; a photograph being “a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film”,\(^{155}\) and in Australia, “a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied”.\(^{156}\) It follows from this, and \textit{ULP}, that the mere act of pressing a shutter-button will suffice to confer the originality required for artistic copyright subsistence.\(^{157}\) The same was confirmed in \textit{Creation Records for the use of customers”) for copyright law, including particularly for the need to identify that which is suitable for protection by copyright as distinct from patent or design, while also making it clear that functionality does not per se preclude copyright protection, and that the functional or technical aspects of works do not “need[] to be severed or disregarded when evaluating their literary and original qualities”).

See, eg, \textit{Walter v Lane} [1900] AC 539 at 542 (counsel for the plaintiff, analogising the reports to photographs, which analogy was rejected by counsel for the defendant at 544); \textit{Nine Network Australia Pty Ltd v IceTV Pty Ltd} [2007] FCA 1172 at [120] (quoting \textit{Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd} [2002] FCAFC 112 at [26]); David B Wolf, “Is there any Copyright Protection for Maps after \textit{Feist}” (1992) 39 Journal of the Copyright Society of the USA 224. On the dangers of analogizing between categories and even sub-categories of works in discussions of copyright see \textit{Baigent & Leigh v Random House Group} [2007] EWCA Civ 24 at [142] (regarding the categories of literary works). As seen above, maps were the subject of literary copyright until the 1956 and 1968 Acts, explaining perhaps the frequency with which they were considered in judicial discussions of compilation copyright, including in \textit{Kelly v Morris} itself (see n 37 and accompanying text).

\(^{154}\) CDPA s 4(2).
\(^{155}\) Copyright Act 1968 (Cth) s 10.
\(^{156}\) Copinger & Skone James have famously suggested that for the purpose of determining whether copyright subsists in a photograph, the requirement of originality is low, and may be satisfied by little more than the
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_Ltd v News Group Newspapers Ltd_ [1997] EMLR 444; the implication of that judgment being – as _Antiquesportfolio Plc v Rodney Fitch & Co Ltd_ [2001] FSR 345 makes clear – that any intentionally taken photograph of a single, static non-spherical three-dimensional object, and possibly of a single, static, two-dimensional object as well, will be an original artistic work in the form of an original photograph. This is consistent with the understanding of works above, for a subject matter such as this will have the constituent (formal and historical) properties of a photograph. This similarly explains why maps produced by investment of labour and skill are properly regarded as copyright works, and why the frequently drawn analogy between photographs and maps on one hand, and records of words and facts on the other, are problematic; namely, they take insufficient account of the need for a statutory work. Put differently, records of others’ words and lists of facts are not _per se_ literary works, however much skill has been invested in their creation, whereas photographs and maps are artistic works.

The question remains of substantial part, and how one determines whether part of an image is a substantial part for infringement purposes? That issue arose in _Bauman v Fussell_ [1978] RPC 485, where copyright in a photograph of two birds fighting was alleged to have been infringed by the defendant’s copying of the opportunistic pointing of the camera and the pressing of the shutter button. An exception will however arise where the photograph is taken under direction, in which case the photographer will be (in the language of _Walter v Lane_ [1900] AC 539 at 554 (Lord James)) “a mere scribe”.

The result is consistent with the definition of originality for photographs contained in the 93/98/EEC Directive of 29 October 1993 harmonising the term of protection of copyright and certain related rights, which is the same as that contained in the 96/9/EC Directive on the Legal Protection of Databases [1996] OJ L077 discussed above but which, unlike the latter, has not been expressly incorporated into UK legislation.

The reason a collection of facts is not a literary work is either (on the whole-of-universe reasoning) that it involves no selection or (on the reasoning supported above) that the history of its production will not be consistent with it being a literary work (in the form of a compilation). For a discussion of the treatment of records of others’ literary works as literary works, see Pila, n 41.

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position of the birds in his painting. The plaintiff argued that “[d]esign is a substantial part of an artistic work”, and that as the position of the birds was “the main part of the design of the photograph”, reproducing that position infringed its copyright.\footnote{160} This argument was rejected. According to Lord Somerville, while the relative position of objects depicted in an artistic work could be described as substantial where the work was a painting, the same could not always be said where the work was a photograph. What would count as substantial to a photograph, he suggested, varies according to the category of photograph, and the essence or \textit{gestalt} of that category itself. For example, while the \textit{gestalt} of the category of photojournalism derives from the objective depiction of a scene or event with a view to telling a story, the \textit{gestalt} of the category of fine art photography derives from the arrangement of objects to create by photographic means a harmonious design representing an idea and having a “feeling and artistic character”.\footnote{161}

In so suggesting, his Lordship supported the view above that in

\begin{itemize}
  \item \textit{Bauman v Fussell} [1978] RPC 485 at 487.
  \item \textit{Bauman v Fussell} [1978] RPC 485 at 487 (Lord Somerville: “A man takes a photograph of a procession or the laying of a foundation stone. He, of course, has chosen when and from where the photograph should be taken. The relative position of those in the procession, or their taking part in the ceremony is not, however, his work, or his design, in the sense in which the relative position of the figures on the ceiling of the Sistine chapel was the work and design of Michelangelo. The order and arrangement of the procession has been, no doubt, carefully planned and designed by someone else. It is an individual’s work that the Act is intended to protect. I do not think that a painter who was minded to make a picture of the procession, in his own style, would be committing a breach of copyright if he used the photograph to enable him to get accurately the relative positions of those taking part. What he would be taking would not be a substantial portion of the plaintiff’s work. At the other end of the photographic scale one can imagine a case where the photographer has made an original arrangement of the objects animate and inanimate which he photographs in order to create a harmonious design representing, for example, Spring. Here the design would be his work. The position of the birds here is betwixt and between. It is, I think, nearer to the former than the latter category.”).
\end{itemize}
determining issues of substantial part, one must correctly perceive the protected work, meaning perceive it with reference to its appropriate category by perceiving the category’s gestalt in the work. The result, as Bauman v Fussell makes clear, is to restrict the scope of the plaintiff’s rights with reference not to the generic form of the work, but that which gives the work its essence as a copyright work. In relation to the categories of works themselves: as the examples of photographs and programs reflect, their boundaries will shift over time, consistent with the nature of authorship as an evolving practice of intentional expression existing in a particular social context.\footnote{162} Once again, the validity of this understanding has been affirmed by the courts for works of artistic craftsmanship.\footnote{163}

4. Compilation Copyright in Australia: The Federal Court Judgments in IceTV

(a) Literary copyright in the IceTV weekly schedules

In IceTV, the parties conceded that the weekly schedules – the compilations of program titles and broadcast times, program synopses and reviews, and other program-related information – were original compilations entitled to copyright. At first instance the plaintiff also argued that the record of time and title information for the plaintiff’s broadcast days and weeks contained in the Master Paper Grid were separate works having separate copyright. That argument was accepted by the Judge but held to be of no consequence for Nine, as the process by which the schedules were made and the manner of their presentation evinced an intent on the part of their authors that they alone exist as published works.\footnote{164}

\footnote{162} See Pila, n 87 at note 97 and accompanying text.
\footnote{163} Ibid.
\footnote{164} See Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [20], [33] (“There is no suggestion that Ice or the Aggregators has or had access to or have reproduced the Master Paper Grid or the First and Final Schedules. These schedules may attract copyright protection from, for example, unauthorised copying by a person within the Nine Network or its affiliates. That is not, however, relevant to these proceedings.”); Nine Network
Each of the sets of information contained in the Weekly Schedule, including the days in the broadcast week, the additional program information and the synopses, are a part of that compilation. The purpose of the Weekly Schedule is to impart the totality of that information to the Aggregators and, in turn, the public. Nine’s operational activities are, as Ms Wieland agreed, ‘geared to [a] week to week basis’. The Weekly Schedule, built up each week by Mr Healy and Ms Wieland, inevitably includes the synopses and the additional program information. These, in turn, are an integral part of the relationship between the information in and the design of the Weekly Schedule. The Weekly Schedule is the only relevant work to leave Nine. It is the work sent to the Aggregators. It is, with all of the information it includes, the way in which Nine, for good commercial reasons, presents the collocation of information. The totality of the information there included is necessary because it is required by the Aggregators and is also provided to the Aggregators by Nine’s competitors for the purposes of the Aggregated Guides that are made available to the public.165

In reaching this conclusion her Honour rejected the argument advanced for the plaintiff that the boundaries of works depend in part on the form in which they are expected to be received by the public. Nine’s submission that it intended “the Weekly Schedules [to] ‘be published … with primary emphasis on the time and title information, and on a daily basis, especially in the digital environment’,“166 was rejected:

[T]he fact that a reader may make use of a part of the compilation does not of itself change the nature of the copyright which subsists in the Weekly Schedule as an original literary work. That compilation, as supplied to the Aggregators, is not limited to time and title. Nor is it limited to just one day of the relevant broadcast week.167

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165 Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [56] (“It was …
common ground that Nine had copyright in the Weekly Schedules and in the other formats of the schedules, such as the Master Paper Grid.”).

166 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [42].

167 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [42].
On appeal the Full Court accepted the Trial Judge’s analysis, namely, that while the Master Paper Grid was a copyright work, the only relevant copyright works were the weekly schedules. In the Court’s analysis, Nine intended the weekly schedules to exist as the sole published records of its broadcast weeks, and created those schedules with that aim in mind.\textsuperscript{168} Nonetheless, such was the importance of the time and title information that it eclipsed the schedules in the Full Court’s reasoning.\textsuperscript{169} This reflects, I think, the truth of the case; that Nine’s intent that the weekly schedules be the only vehicle for the advertisement and promotion of its broadcast weeks did not affect the existence as part of those schedules of the records of time and title information per se. The Courts’ extrapolation from that intent to find that once published the records were subsumed by the weekly schedules was ill-conceived, and involved a conflation of the records with their forms of fixation.\textsuperscript{170}

In my view, there were three types of works in IceTV:

i. The broadcast week, being the temporal arrangement of a selection of programs for broadcast (the broadcast compilation);

\textsuperscript{168} See Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [109] (suggesting that Nine intended that the weekly schedules would be the only record of its broadcast week, and that providing such a record would be those schedules’ primary function). Cf ibid.

\textsuperscript{169} See, eg, Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [109] (“The time and title information incorporated by Nine in its Weekly Schedules was a crucial element of the compilation, and was plainly of particular interest to potential viewers. The Weekly Schedules were the compilations by which Nine recorded its programming decisions, both for its own purposes and for the purposes of dissemination to Aggregators and, through them, to the potential viewing audience. While there were other elements of the Weekly Schedules that doubtless were also of interest for internal and external audiences, such as the synopses and the so-called additional information, it was the time and title information that formed the centrepiece of the Weekly Schedules. Everything else in the compilation was subsidiary to that information.”).

\textsuperscript{170} The Courts seemed to regard the broadcast timetables as existing in the fixed form of the Master Paper Grid solely.
ii. The literary record of the broadcast compilation, being the description of the pre-determined broadcast timetable (the broadcast timetable);\(^\text{171}\) and

iii. The weekly schedules, being the arrangement of a selection of information relating to the broadcast week, including the broadcast timetable itself and certain other information selected (and in some cases prepared) by the plaintiff for publication with it.

The main uncertainty in this context concerns i., and whether the broadcast compilations are properly regarded as expressive works existing from the point of final conception (meaning here, approval by Nine) even before their actual transmission. My reason for believing they are works is that they possess the essential characteristics of one, albeit not the characteristics of a copyright work. Specifically, they are bounded expressive artefacts: collocations of a selection of programs equivalent in fact to an anthology of poems.\(^\text{172}\) Importantly, they do not have the ephemerality or uncertainty of the dramatic format in *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056,\(^\text{173}\) nor the

\(^{171}\) This was referred to in the first instance judgment as the “Master Paper Grid”; see n 164.

\(^{172}\) The argument was made in *FWS Joint Sports Claimants v Canada* [1992] 1 FC 487 (Federal Court of Canada – Court of Appeal) at [11]; for the result see n 176.

\(^{173}\) In *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056, the television format was held to be too abstract to be a proper subject of copyright, and in particular to be “a work”. (See at 1058: “The alternative formulation of the appellant’s claim relies on the ‘dramatic format’ of ‘Opportunity Knocks’, by which their Lordships understand is meant those characteristic features of the show which were repeated in each performance. … It is stretching the original use of the word ‘format’ a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were ‘structure’ or ‘package’. This difficulty in finding an appropriate term to describe the nature of the ‘work’ in which the copyright
abstract or non-expressive content of the Ladbroke and Football League compilations. While they lack the properties of any of the

subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show etc) and identified as an ‘original dramatic work’. No case was cited to their Lordships in which copyright of the kind claimed had been established. The protection which copyright gives creates a monopoly and ‘there must be certainty in the subject-matter of such monopoly in order to avoid injustice to the rest of the world’: see Tate v Fullbrook [1908] 1 KB 821 per Farwell LJ at 832–833. The subject matter of the copyright claimed for the ‘dramatic format’ of ‘Opportunity Knocks’ is conspicuously lacking in certainty. Moreover, it seems to their Lordships that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the ‘format’ of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic.”

In contrast to the broadcast week, the football schedule in Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 was a schedule of spectacles (football matches) to occur in the future, and the betting coupons in Ladbroke a list of bets offered to the public, neither of which (the spectacles nor bets) were themselves expressive works in the sense here understood. For this reason, it is submitted that the Courts’ decisions in those cases – that the scheduling of the spectacles and calculation of the betting odds was part of the authorship of the compilations – were right, consistent with the distinction above between compilations of works and compilations of information and other materials not amounting to works as such. See, eg, Football League, see [1959] Ch 637 at 655-656 (Upjohn J: “Every case must depend on its own facts. It is perfectly true that Sutcliffe was not employed to produce a work of art per se nor even a work primarily as a book of reference, such as a directory or a railway guide, but he was employed to produce the best possible programme of fixtures. Of necessity, however, that programme had to be reduced to writing. The League’s duty is to arrange the best possible programme of games to please the football public in general and the clubs’ finances in particular, and they can only do that by producing a list or lists of those games. If, as a result of prolonged cogitations, Sutcliffe reaches the conclusion that it will be best if, for example, Arsenal plays Manchester City at Highbury on September 20, 1958 (as the programme provided), he is doing so no doubt primarily because that is best from the point of view of league football, but if, as the result of the whole of his prolonged and skilled cogitations, he produces in a particular form the season’s list consisting of
statutory categories of (literary, dramatic, musical or artistic) works, as well as the material fixation required for literary, musical and dramatic copyright, this precludes only their entitlement to copyright, and does not prejudice their existence as works per se, which existence ought consequently to have been recognized by the Courts.

2,028 matches or thereabouts, in my judgment he or the League (who have, by direct assignment, any copyright which might otherwise vest in him) are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the League, their servants and agents. In my judgment, on the facts of this case, it is not open to the defendants to try and dissect and break down the efforts of Sutcliffe in the way suggested. Accordingly, in my judgment, the plaintiffs are entitled to copyright in the chronological list.

It seems clear that describing in literary form a broadcast week is not a material fixation of that week, any more than a recipe is a material fixation of a cake. The nature of the broadcast compilation – as a temporal arrangement of programs – is such that it could not be fixed materially as such, being only capable of realisation by being broadcast at the scheduled time.

See FWS Joint Sports Claimants v Canada [1992] 1 FC 487 (Federal Court of Canada – Court of Appeal) at [11]-[12]. In that case the Court decided that a broadcast day was neither a literary or dramatic work specifically (so as to be eligible for copyright protection), nor “a new work” separate from “the actual shows being broadcast, which have already been copyrighted by their owners”. The basis for this decision however is problematic, and reflects the focus of the Court on the question whether the broadcast day was a copyright work – and in particular a literary compilation – rather than a work itself. This is apparent from its statement (at [12]) that “[t]here is no editing or creative input added to the shows themselves. The written compilation may be a collection of literary or dramatic works, but that does not make the broadcast day a literary or dramatic work itself. Nor is the broadcast day a cinematographic production.”

See on this point Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [56] (noting that the plaintiff’s “programming decisions could not attract copyright protection unless and until they were reduced to a material form”).
This view of the broadcast compilations as works finds some support in the decision in *Network Ten v TCN Channel Nine* [2004] HCA 14. In that case, the High Court responded to the ephemerality of television broadcasts in general by emphasising the need for a non-formalistic conception of the same, and an awareness of the inability to define with “absolute precision ... what in any of an infinite possibility of circumstances will constitute ‘a television broadcast’”.\(^{178}\) By requiring flexibility in the conception of broadcasts, this statement supports (if only by not precluding) the treatment of the broadcast compilations in IceTV as works independent of the weekly schedules.

If the artefactual nature of the broadcast compilations is accepted, then on the principles above their authorship ought to be excluded from accounts of the authorship of the broadcast timetables and weekly schedules. In that situation, the broadcast timetables – as mere descriptions in literary form of the broadcast compilations – were not original works in which literary copyright could subsist.\(^{179}\) This is in contrast to the weekly schedules themselves, which were such works on the basis of the substantial labour, skill and judgment invested in their creation, even excluding the labour, skill and

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178 *Network Ten v TCN Channel Nine* [2004] HCA 14 at [75].
179 Cf *British Broadcasting Co v Wireless League Gazette Publishing Co* (1926) 1 Ch 433, where Astbury J implied that the authorship of the record of broadcast time and title information there at issue did not include the labour, skill and judgment in deciding the broadcast weeks themselves. See (at 436): “The compilations ‘gave the day and hour of each performance, the name of the artist, appropriate headings for items or groups of items, such as ‘Old Memories,’ ‘Children’s Corner,’ ‘Humour and Request,’ ‘Scottish Hour,’ and translations of unfamiliar foreign titles of songs or music, with occasional misprints such as ‘Schetterling’, ‘The Butterfly’, ‘Voglein’, ‘The Little Bird,’ and ‘Lungi dal cero hena’, ‘When two that love are parted.’ The preparation, arrangement, and editing of the actual programmes involved considerable time, skill, labour and expense, although of course the preliminary work of fixing the days and hours, engaging the artists and choosing the items had all been done some time beforehand.”; *ITP v Time Out* [1984] FSR 64 (Whitford J, suggesting that the skill and labour involved in reducing the daily broadcast schedules to literary form would have been sufficient to make them original).
judgment invested in creating each of the broadcast compilations and timetables.

If the broadcast compilations’ artefactual nature is not accepted, then their authorship ought to be included in accounts of the authorship of the broadcast timetables. In this situation, the broadcast timetables were original works attracting literary copyright on the basis of the substantial labour, skill and judgment invested in deciding and describing in literary form the broadcast weeks. This was the decision reached on similar facts in *Radio Telefis Eireann v Magill* [1989] IR 554, as follows:

Each programme [in the broadcast week] is chosen and may have been produced or purchased by R.T.E. The pattern and order in which the various programmes in each week are to be broadcast is determined by R.T.E. — a determination which I am satisfied involves the exercise of skill and judgment. From these materials and decisions the programme schedules are created by R.T.E.

Central to the analysis here is the question of the works’ boundaries, as well as the related question of the boundaries of the authorial process by which they came to exist. These questions were also central to the Courts’ analyses in *IceTV*, not only in identifying the protected works, but also in relation to substantial part. At issue there was whether conceiving the broadcast weeks was part of authoring the weekly schedules so as to be (in the Courts’ analyses) part of the plaintiff’s copyright interest. Justice Bennett held it was not: “the work in choosing the program for each timeslot is not

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180 See n 115.
181 *Radio Telefis Eireann v Magill* [1989] IR 554 at 564-565 (Lardner J). According to Lardner J (at 564), the argument of counsel that the schedules in question — broadcast timetables for radio broadcasts — were not original compilations but rather “lists of information” was misconceived, for it “rests on the assumption that the … times and titles … is information in the public domain at the time when reproduced by Magill in T.V.Guide. Rather, the evidence establishes that the list of times and titles of programmes originated from and was created by R.T.E.”
relevant to the compilation … much in the same way that the history of the rolling stock of a rail carrier is not relevant to a train timetable”. The Full Court decided this was wrong, relying on the decisions in ITP v Time Out [1984] FSR 64, Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 and Ladbroke. Accepting the relevance of authorial intent on the authority of Ladbroke, the Court pointed to the Trial Judge’s own finding that one aim in conceiving the broadcast weeks was to produce the individual weekly schedules:

It is not to the point that (as her Honour found) the skill and labour expended by Nine on making programming decisions were not primarily expended for the purpose of producing a compilation. 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… Nine’s time and title information may have had less value if published separately, but it had great value as an essential component in a larger compilation.

This passage seems problematic. If the broadcast weeks were not themselves works (as compilations of programs), it must be because they lacked the formal or historical properties of an expressive artefact, and existed merely as steps in the production of the broadcast timetables, analogous to the betting odds in Ladbroke, the fixtures in Football League, and the cartridge moulds in Metix. In this situation the labour, skill and judgment in their conception were part of the labour, skill and judgment in creation of the timetables, though still not part of the labour, skill and judgment in creating the weekly schedules. The same is implicit in Justice Bennett’s view of the broadcast timetables as literary records of the broadcast compilations selected for inclusion in the weekly schedules and

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182 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [52].
183 Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [102].
184 Nine Network Australia Pty Limited v IceTV Pty Limited [2008] FCAFC 71 at [102] (emphasis in the original).
185 See n 93 and accompanying text.
arranged therein with other information; the premise of that treatment being her Honour’s understanding of the timetables as literary works existing separate from the weekly schedules, even in their published form.

[The weekly schedules are original by virtue of] the skill and labour of drafting the synopses, selecting and arranging the additional program information such as classifications and consumer advice and recording, weekly, all of the information into documentary form, the Weekly Schedules.

In conclusion, the Trial Judge’s decisions regarding the boundaries of the weekly schedules and the authorial processes leading to their creation were correct, in that the schedules were, as her Honour said, compilations of information regarding the plaintiff’s broadcast week created by an authorial process that involved selecting and arranging the information for inclusion in the schedules, and preparing such of that information as needed to be prepared for such inclusion, but not conceiving the broadcast week itself. Where she was wrong, it is submitted, is in her decision that

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186 As noted above (n 174), it does not follow that Ladbroke and similar cases are wrong.

187 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [46]. See further at [55]: “Nine submits that the preparatory skill of the thinking and the planning and the skill of setting down the program time and title in material form as a compilation are not to be separated. That may be the case where, as in Desktop, the skill and labour was in the collection of the data and the form of the compilation followed from that collection and the nature of the work. It does not follow where the skill and labour of collection of information was preparatory to the further exercise of skill and labour of creation of the arrangement of that information in the Weekly Schedule. Nine’s submission also ignores the correct characterisation of the skill and labour employed in the creation of the Weekly Schedule, as the arranging in a single document of not only the order of the programs and their time and title which followed from the creation of the Nine Programming, but also the additional program information and the synopses and the arrangement of the different sets of data.”
the weekly schedules were the only relevant works created by Nine. For the reasons above, I believe that both the broadcast compilations and the literary descriptions of those compilations, the broadcast timetables, were works – albeit in neither case copyright works – that existed and were intended to exist independent of the process of creating the schedules.

(c) Infringement of the literary copyright in the IceTV weekly schedules

When considering infringement, Justice Bennett emphasised the inadequacy of substantial copying per se, and the need clearly to identify an infringing use of a specific copyright work.

It can be said that Ice copies ‘slivers’ of information. Over an extended period of time, the impact of the constant updating may have both a quantitative and qualitative effect on the accuracy of the IceGuide. However, for any given day or week the information taken is not of sufficient quantitative nor qualitative significance to be characterised as a substantial part of the whole of the Nine compilation, the Weekly Schedule.188

By contrast, the Full Court was concerned less with individual works and infringing acts than substantial unauthorised copying. In this respect its analysis recalls that of North J in Cate v Devon above.189

It is true that the Weekly Schedule recorded more than simply the time and title information. But that information was the foundation of the Weekly Schedules. 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.

There are many authorities which have held a taking of a small quantity or proportion of a copyright work to be the reproduction of a substantial part of the work. Courts appear to be especially willing to make such a finding where the alleged infringer has systematically taken material, albeit in small quantities, on a regular basis. An example is Littlewoods Pools

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188 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [93].
189 N 43 and accompanying text.
Justice Bennett’s starting position has the support of the statute and English courts. The latter in particular emphasise the importance of identifying a single work copyright in which has been infringed, and of rejecting claims of infringement involving allegations of “systematic[] tak[ing] of material, albeit in small quantities, on a regular basis”. In the event however this was not critical to the Full Court’s decision, for its view was clearly that the copied information was in any case substantial to each weekly schedule.

The most difficult (and interesting) part of the IceTV judgments generally, and of Justice Bennett’s judgment specifically, concerns the treatment of substantial part. The starting point for that treatment was her Honour’s categorisation of the weekly schedules and differentiation of their category from that of the Desktop works. In Desktop, she noted, the works were whole-of-universe compilations, the originality of which lay “in the skill and labour in collecting, extracting and verifying the data compiled”. As a result, the unauthorised copying by the defendant in that case of “the great bulk” of information contained in the directories, even without the form of its presentation, was an infringement, for it involved a reproduction of a substantial part of the protected work. That which earned the plaintiff copyright in Desktop – skill and labour in collecting – was that which the defendants had saved themselves from having to expend; ie, that which they had “taken” from the plaintiff. In IceTV, by contrast, that which earned the plaintiff copyright was its skill and labour in selection and arrangement, with

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190 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [114].
192 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [53].
193 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [175].
the result that that which gave the works their essence was not the exhaustiveness and accuracy of their facts (as in Desktop), but the relationship between their form and content. For infringement purposes this meant that “the form and content of the presentation of the data are not pre-determined by the nature of the compilation and are not irrelevant to infringement”:194

Where the manner of presentation is the basis for the attraction of copyright, it may be that a presentation of the same information in different form would not infringe... In such circumstances there may not have been a taking of a ‘substantial part’, which is assessed by reference to the quantity and the quality of what is taken and the inter-relationship between them...195

It is submitted that Justice Bennett’s analysis here reflects her Honour’s attempt to reconcile Desktop with past compilation authorities in a way that is consistent also with the Act. While it seems to produce the perverse result of greater protection for laboriously-produced than creatively-produced compilations, on closer analysis it does not, for implicit in her judgment is the view that copyright in whole-of-universe compilations will only be infringed by (substantially) whole-of-universe copying. On this view, the protection conferred by copyright maps to the investment rewarded by copyright in a way that also maps to the protected subject when perceived as a work of relevant type (eg, as a whole-of-universe compilation). In this her Honour’s approach recalls that of Lord Somerville in Bauman v Fussell above. It also enabled her Honour to define “the question” of infringement as “whether the skill and labour in the production of the Weekly Schedules has been appropriated”,196 while maintaining that “the reference point [for determining what copyright protects] is the original work for which protection is claimed”.197

194 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [176].
195 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [182].
196 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [219].
197 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [199] (“In determining whether a defendant has taken a substantial part in quality of a work, the impact of the copying on the interest protected by the copyright is
Justine Pila

It is submitted that Justice Bennett walks a fine line here. By emphasising the need to perceive works as original works, she presents an understanding that is consistent with the Desktop Courts’ view of copyright as protecting investment. However, in her own description of the schedules she focuses less on the investment of its creators than the schedules themselves as expressive artefacts, similar again to Lord Somerville (and others198). This can be seen in the following statement:

[T]he reference point [for determining infringement] is the original work for which protection is claimed. A compilation is the collection, assembly and arrangement of chosen information into a single entity. Cases addressing the taking of a part of an artistic work, for example a line in a poem or a refrain in a musical work, may address substantial part and the quality and quantity taken differently.199

Her Honour’s difficulty lies in reconciling this with the focus of past courts on the protection by copyright of labour and skill, and her response to that difficulty a test of infringement that starts with the relevant. This, in turn, may take account of the commercial interests of the copyright owner and whether the parties are in competition, as well as whether there has been a taking of skill and labour. However, the reference point is the original work for which protection is claimed. A compilation is the collection, assembly and arrangement of chosen information into a single entity. Cases addressing the taking of a part of an artistic work, for example a line in a poem or a refrain in a musical work, may address substantial part and the quality and quantity taken differently.”).

198 See for example the decision of Lord Hoffmann in Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416.

199 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [199]. See also at [52]: “The skill and labour involved in making a factual compilation is likely to vary in each case. As described by Ice, pieces of information are brought together, the selection of that information to the exclusion of other items and the association of pieces of information, one with the other in a line or table creates an intelligible relationship between the pieces of information. The usefulness of the pattern created by the compiler is achieved by the choices that were made and judgment exercised about the individual pieces of information and the relationship between them.”
question of substantial part (determined with reference to the work), and then considers the originality of the part that was taken. The result is a restriction of copyright to the unauthorised copying of parts of a work that are both substantial to the work and original to its authors.

Recognising that copyright in this compilation is defined by the attributes of selection, expression or arrangement, Ice contends that the copyright subsists in the Weekly Schedule by virtue of each of those attributes. In the circumstances of this case it then follows, according to Ice, that infringement is assessed against each of the attributes of selection, expression and arrangement and, if one of these is missing or not preserved in the Aggregated Guides to which Ice has recourse, there can be no reproduction of the Weekly Schedule by Ice. If, by that submission, Ice submits as a general proposition that there is no infringement of a compilation unless each of the selection, expression and arrangement are reproduced, then that is inconsistent with Lindgren J in Desktop. While the attributes of selection, expression and arrangement have all been exercised in the creation of the Weekly Schedule, a taking of any one of those attributes may be sufficient to constitute the taking of a substantial part of the work as a whole, if the requisite skill and labour have been appropriated.

Further, it is not a question of saying whether the expression ‘skill, judgment and labour’ is conjunctive or disjunctive. It is the correlation between what is being taken by the alleged infringer and what is original and thereby attracts protection under section 32 of the Act. If a work is sufficiently original so as to attract protection but skill and labour is only expended in one of those attributes, it is against that attribute that infringement is measured.  

As I have elsewhere argued, the restriction by courts of copyright protection to the unauthorised use of original parts of a work is a natural response to a legislative scheme in which title to copyright derives from an individual author and the investment s/he makes in creating a work. Despite this, it represents an inappropriate conflation of the tests of subsistence and infringement, and is arguably also a misstatement of the Powerflex test. The better approach (and reading of that test) is the one Justice Bennett

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200 Nine Network Australia Pty Ltd v IceTV Pty Ltd [2007] FCA 1172 at [206]-[207].
201 Pila, n 41 at 554.
202 See n 153 and accompanying text.
starts with. That approach involves perceiving the schedules as compilations, and assessing the substantiality of that which has been copied from them accordingly. This allows the possibility that copying one of a work’s three aspects of selection, expression and arrangement will not involve an unauthorised use of a substantial part of the work as a compilation, on the ground that the gestalt of the category of compilations lies in the “the interrelationship of its component [informational and presentational] parts”.

203 See n 204 and accompanying text (emphasis added). See, eg, The Educational Company of Ireland Ltd v Fallon Bros Ltd [1918] IR 6 (n 77); Cambridge University Press v University Tutorial Press (1923-1928) MCC 549; (1928) 45 RPC 335 at 343-344 (Maugham J, deciding that the unauthorised reproduction in a different arrangement of 13 essays from an anthology of 20 essays did not infringe copyright in the anthology as a compilation, on the ground among others that when robbed of their particular arrangement the 13 essays were not a substantial part of the protected compilation); Cuisenaire v Reed [1963] VR 719 (deciding that copyright in a table or compilation could not be infringed by the production of another other than a table or compilation); Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 at 657 (Upjohn J: “If the defendants like to use the information contained in the chronological list and prepare their own lists by ‘scrambling’ the order of matches so that the divisions were all mixed up and so that there was no alphabetical order, it is possible that it could be successfully argued that they were using only the information and were not reproducing the compilation, but that is not a question I decide…”); Baigent & Leigh v Random House Group [2007] EWCA Civ 24 at [142] (describing the “[t]he relevant form of expression of [an anthology of poetry] for deciding whether there has been an infringement of copyright” as “the selection and arrangement of the poetry, not the text of the individual poems themselves”). Cf Demarara v Phang (1963) 6 WIR 177 (finding copyright in a compilation of racing-related information to have been infringed by the unauthorized copying of the information without the form of its presentation); British Columbia Jockey Club v Standen (Winbar Publications) (1985) 66 BCLR 245 (disapproving the passage from Football League above and finding copyright in a compilation of racing-related information to have been infringed by the unauthorized copying of the information without the form of its presentation, on the basis that such copying represented an
iceTV, this approach clearly supports the Trial Judge’s conclusion, namely, that the time and title information was not a qualitatively substantial part of the weekly schedules when correctly perceived as compilations. Whether it was a substantial part of the broadcast timetables themselves is more difficult. In my view, the reasoning above supports the conclusion that it was not, with the result that even if the timetables were themselves original works protected by copyright, the defendant’s unauthorised copying still was not an infringement of the plaintiff’s rights.

One final aspect of Justice Bennett’s decision worth noting here is its presentation of the defendant’s use of the information as an instance of transformative use, as follows:

Nine submits that adding information, albeit complex information and in quantity, does not avoid infringement. For the mere adding of information, that may be so. However, the submission does not take into account the fact that the adding of information may affect the compilation as a whole and the interrelationship of its component parts, so as to affect not only the quantity but also the quality of what it conveys. It is a question of fact and degree.\(^204\)

This presentation recalls the statement of Younger J in *Glyn v Weston Feature Film Co* \[1916\] 1 Ch 261 – itself echoing an earlier judgment of Wood VC \(^205\) – that

...[n]o infringement of the plaintiff’s rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.\(^206\)

\(^{204}\) Nine Network Australia Pty Ltd v IceTV Pty Ltd \[2007\] FCA 1172 at \[205\].

\(^{205}\) See *Spiers v Brown* (1858) 6 WR 352; *Scott v Stanford* (1867) LR 3 Eq 718 (n 19) at 722.

\(^{206}\) *Glyn v Weston Feature Film Co* \[1916\] 1 Ch 261 at 268 (Younger J). Interestingly his Honour makes no reference to the decisions of Wood VC above, despite the obvious derivation of this passage from *Scott v Stanford* (1867) LR 3 Eq 718, where the Vice Chancellor said (at 722) as follows: ‘While I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.’ I applied that
The question arises whether this is right. Assuming that what has been taken is itself a substantial part of the protected work, then copyright in that work will be infringed, in theory at least, at the point of reproduction. However, if the effect of the subsequent revision and alteration is to transform that part, the question arises whether the infringement is thereby reversed. It seems clear it is not, for copyright is infringed by the unauthorised copying of a substantial part of a protected work, and no amount of transformation can undo the fact of that copying, and thus the fact of the infringement itself, however different (transformative) the final result.207

It seems clear however that in *IceTV* Justice Bennett did not regard the defendant’s initial act of reproduction as an infringing one, and that the point of her comments above was not (as the Full Court reasonably suggested) to cast the defendant’s additional work as absolving it from liability for infringing Nine’s copyright, as much as to underline the importance of correctly perceiving the plaintiff’s works as (different types of) compilations for the purpose of determining copyright infringement.

207 In the UK, this result was confirmed by the House of Lords in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 when it confirmed that the issue of substantial part, and thus the issue of infringement itself, does not depend on the object similarity between the parties’ works; but rather proof of copying and then the determination of whether what was copied represents a substantial part of the protected work. Of course, this is to say nothing of the exceptions that might exist under Anglo-Australian law in respect of transformative uses of a copyright work.
5. Conclusion

My purpose above has been to review the state of Anglo-Australian compilation copyright in the light particularly of the Australian Full Federal Court’s decision in *IceTV*. That decision is important in two respects. The first is its affirmation of the principles of compilation copyright and originality expressed in the *Desktop* decisions. And the second is its articulation of the natural extension of those decisions from the spheres of originality and copyright subsistence to the spheres of substantial part and copyright infringement.

It is submitted that both aspects of the *IceTV* decision are unfortunate. With respect to subsistence: so-called “sweat-of-the-brow” copyright has no firm basis in Anglo-Australian law, other than, perhaps, as a judicial exception to the requirement for an original (authorial) work on specific public interest grounds. The decisions supporting such an exception however are in the minority, with the more authoritative view being that originality is an immovable criterion that requires more than labour and expense in the creation of a work. A recent example is *ITP Pty Ltd v United Capital Pty Ltd* (1985) 5 IPR 315, where Carter J denied copyright to an income tax manual (as a compilation) on the basis that its arrangement was “for all practical purposes” predetermined by taxpayers’ statutory obligations, with the result that there was not “that degree of labour, skill and ingenuity such as to warrant a claim of originality”. Another is *Data Access*, where the High Court doubted that an alphabetical arrangement of words involving “very little skill or labour” in their compilation “over and above the sum of the skill and labour involved in devising each individual [word]” would be an original work entitled to copyright, “[e]ven if the skill and labour involved in devising each individual [word] is combined and consideration given to the total skill and labour”. In that case,
the Court also found a compression table to be original on the basis of its emanation from the person claiming to be its author, in the sense of having been originated or brought into existence by him and not having been copied from another, as a result of “substantial skill and judgment”.211) And finally, there is the non-compilation case of Rose v Information Services Ltd [1987] FSR 254, where Hoffmann J denied literary copyright in the title “The Lawyer’s Diary 1986” due to the absence of “skill, knowledge and creative labour in its creation”.212

In specific cases there will be compelling reasons for protecting an unoriginal work; an example of present relevance being telephone directories in remote indigenous communities. However, whether it would be appropriate even in such a case as this for courts to abandon the statutory requirement for an original work and declare copyright to subsist on public interest grounds is doubtful. If they were to do so, they ought at least to make clear the basis for their decisions, including the public interest being served. They ought also to allow for the possibility of denying subsistence on equivalent (public interest) grounds.213 Were they to do that, and were the

212 Rose v Information Services Ltd [1987] FSR 254 at 255.
213 Cases in which policy has supported a denial of copyright include Odham’s Press Ltd v London & Provincial Sporting News Agency (1929) Ltd [1935] Ch 672 at 679-680: “The advantage which, if this case was proved up to the hilt, would accrue to the plaintiffs seems to be an advantage which is crowded into something like a matter of seconds. Their representative is entitled to know from these two men the result of their investigations before anybody else. Needless to say, there are plenty of persons who are eavesdropping and otherwise trying to obtain information as to what the news is, but the time which they are kept waiting is extraordinarily short, five seconds or ten seconds - not a minute. Indeed, before many minutes are over it is again published to the world at large by the exhibition in the paddock not only of the starting prices of the horses which have been placed, but the starting prices of the horses of which one may say that they ‘also ran.’”; Rose v Information Services Ltd [1987] FSR 254 (Hoffman J, supporting a denial of copyright in a title on the ground of originality with reference to the monopoly which the plaintiff would acquire in part of the English language
courts’ conception of “public interest” to bear any relation to the UK conception, it would be surprising if they supported literary copyright in literary records of free-to-air television broadcast compilations, even assuming such records to be original literary works.  

Notwithstanding the attention given in the *IceTV* judgments to originality, the case was ultimately about copyright infringement, and whether the copyright conceded to subsist and in law subsisting in compilations of broadcast-related information was infringed by copying certain time and title information contained in the same. Implicit in the Trial Judge’s finding that it was not infringed was her Honour’s location of that information in a separate literary work – namely, the literary record of the broadcast week – which work, it seems clear, she regarded as one of the compilation’s component parts, analogous to a poem in an anthology. In that context, copying the time and title information was akin to copying a small number of important lines from a single anthologised poem, which, given the nature of compilations, could not have infringed the plaintiff’s rights.

By contrast, central to the Full Court’s finding that copyright was infringed was its conflation of the weekly schedules with the same literary records of the broadcast compilations. As a result of that conflation, copyright in the schedules was treated by the Court as akin to copyright in the records, transforming the works from *compilations* to *literary compositions*. Given this, the assessment of

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214 For a judicial discussion of the public interest in the wide dissemination of and easy access to programme information in the UK, see *News Group Newspapers Ltd v ITP Ltd* [1993] RPC 173 at 188-189, where the Copyright Tribunal expressed the view that such public interest “is more important than the general principle in our law that there should be no use or expropriation of private property without fair compensation”. See further Robyn Durie & Margot Watts, “A comparative study of TV listings with reference to the United Kingdom, Australia, New Zealand and Europe” [1992] *Entertainment Law Review* 133.

215 See n 111 and accompanying text.
substantial part necessarily proceeded in a different way, such that
the finding of infringement was all but inevitable.

As this demonstrates, the disagreement between the Courts
ultimately resolves to a disagreement over their definition of the
relevant works’ boundaries. In order to resolve that disagreement it
is necessary to engage with the nature of works and what constitutes
them specifically as copyright works. Here and elsewhere I have
argued that what constitutes a work as such is its properties of form
and the history of its individual production. If this is accepted, then
the boundaries of a work ought to be determined with reference to
the same formal and historical considerations, with the result for
IceTV that the weekly schedules ought to have been treated as one of
three types of works, even if the only type of copyright work.

If this were in fact the Courts’ finding, the question would
have arisen whether copying small but important pieces of
information from one of the component parts of the weekly schedules
– the broadcast timetables – infringed the plaintiff’s copyright. In my
view it did not, for in analyses of infringement the work must be
perceived with reference to its statutory category, which in the case of
the weekly schedules was the category of compilations. The essence
or gestalt of that category lies in the interrelationships between its
component parts, which interrelationships, as Justice Bennett
suggested, are therefore the appropriate “reference point” for
determining the essence of the individual schedules themselves, and
what gave them their substance as copyright works.

It is submitted that her Honour’s conclusion in law was right.
At a normative level, too, that conclusion is to be welcomed, for it
represents an approach to the issue of copyright infringement
generally, and substantial part specifically, characterised by a
sensitivity to the works in which copyright subsists; not as products
of time and money, nor as useful market commodities, but as works,
namely, intentional expressions of certain ideas (in the form of a
bounded expressive artefact) constituted by both its properties of
form and the history of its individual creation.