

## Looking for Creativity in Telephone Directories: *Global Yellow Pages*<sup>1</sup>

### I. Introduction

1. In *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* (“**Global Yellow Pages**”),<sup>2</sup> the Court of Appeal (“**CA**”) clarified the extent of copyright protection afforded to databases. In doing so, the CA considered issues of copyright subsistence and infringement for compilation of factual material, providing guidance on the nature of copyright protection in Singapore.

### II. Key Facts

2. The parties to the dispute were competing publishers of telephone directories. Global Yellow Pages Ltd (“**GYP**”) was the publisher of the Internet Yellow Pages (an online telephone directory) as well as several print directories (the “**GYP Directories**”).<sup>3</sup> These directories contained introductory material and telephone listings arranged by classification and/or in alphabetical order.<sup>4</sup> During the production of its own directories, Promedia Directories Pte Ltd (“**Promedia**”) relied on the GYP Directories as a source of information.<sup>5</sup> GYP thus commenced proceedings against Promedia, alleging that its copyright in the GYP Directories had been infringed.<sup>6</sup>
3. The High Court ruled in favour of Promedia, holding that the copyright in the GYP Directories was “thin”<sup>7</sup> and that this copyright had not been infringed.<sup>8</sup> On the issue of copyright subsistence in particular, the High Court (“**HC**”) held that the copyright was “thin” because it subsisted only in the telephone directories *as a whole*, but not the telephone listings themselves nor the selection and arrangement of the listings in alphabetical order.<sup>9</sup> In other words, unless Promedia had copied the GYP Directories in their entirety, the copying of the individual listings would not amount to copyright infringement.<sup>10</sup> The CA affirmed the High Court’s decision and dismissed the appeal.

### III. Discussion

4. When examining the GYP Directories for copyright protection, the CA agreed with the HC’s survey, assessment and opinion of the approaches to determining the subsistence of copyright.<sup>11</sup> The CA noted that there were two main approaches to determine

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<sup>2</sup> *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] SGCA 28 (“*Global Yellow Pages (CA)*”).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> “Thin” may be taken to mean that the GYP Directories attract a low degree of copyright protection as only few aspects of the Directories, such as the arrangement of the telephone listings, are the original effort of the author. In contrast, a fiction-based work would possess “thicker” copyright because the author has presumably conceived and created even the individual components that make up the entire work.

<sup>8</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [17].

<sup>9</sup> *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 (HC).

<sup>10</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [16].

<sup>11</sup> *Global Yellow Pages (CA)*, *supra* n 2.

whether copyright subsists in a database: the “creativity” approach and the “sweat of the brow” approach.<sup>12</sup>

5. Essentially, the approaches differ in the emphasis placed on the *quality* and the *object* of the effort in producing a work.<sup>13</sup> The “creativity” approach examines the eventual product of the work and traces efforts that have been directed specifically at reducing the work to its final form of expression.<sup>14</sup> On the other hand, the “sweat of the brow” approach places more emphasis on the industriousness and labour of the author, and also takes into account the preparatory efforts made towards the creation of the work, such as fact finding and fact collection.<sup>15</sup>
6. The CA held that the “creativity” approach should apply in Singapore.<sup>16</sup> The “sweat of the brow” approach which was adopted by the District Court in *Singapore Land Authority v Virtual Map (Singapore) Pte Ltd*<sup>17</sup> was expressly rejected by the CA.<sup>18</sup> Though creators of compilations and databases may not welcome this decision, this author submits that the “creativity” approach is the better approach for the following reasons.
7. First, the “creativity” approach is more congruent with the concept of originality. Originality is a requirement for copyright protection under the Copyright Act, as s 27(2)(a) provides that “where an *original* literary, dramatic, musical or artistic work has been published, copyright shall subsist in the work”(emphasis added).<sup>19</sup> Chao Hick Tin J said in *Re AUVI Trade Mark* that originality “does not mean novelty or uniqueness; nor does it necessarily involve inventiveness. All that needs to be shown is that *the author created it* and has not copied it from another”.<sup>20</sup> In *Global Yellow Pages*, amicus curiae Professor David Llewelyn commented that:

“for copyright to subsist in any literary work, there must be an authorial creation that is *causally connected* with the *engagement of the human intellect*. By the human intellect, we mean the application of intellectual effort, creativity, or the exercise of mental labour, skill or judgment [emphasis added]”.<sup>21</sup>

It is clear from the foregoing statements that in order to establish originality in a work, the author must be able to prove that he has applied a certain degree of creativity to the work.
8. In addition, it is trite law that copyright protects original *expressions*, and not ideas, facts or information.<sup>22</sup> A compilation may be new or even the first of its kind; however, if it is presented in a mechanical fashion, it has no originality to speak of even if the author expended a substantial amount of effort arranging the factual material. The

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<sup>12</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [23].

<sup>13</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [23].

<sup>14</sup> *Global Yellow Pages (CA)*, *ibid*.

<sup>15</sup> *Global Yellow Pages (CA)*, *ibid*.

<sup>16</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [24].

<sup>17</sup> *Singapore Land Authority v Virtual Map (Singapore) Pte Ltd* [2007] SGDC 216.

<sup>18</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [26].

<sup>19</sup> Copyright Act (Cap 63, 2006 Rev Ed) s 27(2)(a).

<sup>20</sup> *Re AUVI Trade Mark* [1992] 1 SLR 639 at [32].

<sup>21</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [24].

<sup>22</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [18] and [30].

“sweat of the brow” approach, which rewards diligence rather than creativity, is therefore not wholly consistent with the concept of originality.

9. Secondly, the “creativity” approach is in line with the international development of copyright law. The CA observed that there has been a “noticeable retreat” from the “sweat of the brow” approach among foreign jurisdictions,<sup>23</sup> such as the Australia<sup>24</sup> and the UK, and a greater utilisation of the “creativity” approach.<sup>25</sup>
10. It may be argued that the CA should not have ruled out the “sweat of the brow” approach entirely. This approach may be utilised to protect certain works that society finds useful, or where the copying of the work would be frowned upon as free riding. In today’s information age, compilations and databases are becoming increasingly important and valuable.<sup>26</sup> Applying only the “creativity” approach will tend to afford a low degree of copyright protection to compilations as such works are usually arranged in a commonplace, “uncreative” fashion. The minimal or absence of copyright protection might in turn discourage the creation of databases that are beneficial to society.
11. However, while the value of compilations and databases are undeniable, this author submits that copyright law should stay true to its purpose of encouraging creativity<sup>27</sup> by affording protection to only original works. Affording extensive protection to compilations and databases through the application of the “sweat of the brow” approach would, as the CA rightly pointed out, invariably confer “impermissible monopoly”<sup>28</sup> over the composite parts of the compilations, which are but bare facts that should remain as freely available information.

#### IV. Conclusion

12. Although *Global Yellow Pages* puts an end to the debate of whether and to what extent copyright law should protect compilations in Singapore, the discussion is likely to surface again when the works in dispute are of a different nature. In any event, the “creativity” approach ought to prevail and prevent the alteration of the fundamental concept of originality.

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<sup>23</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [26].

<sup>24</sup> See *IceTV Pty Limited v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, which marked a shift away from the decision of the Federal Court in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*. The latter case has been described as the “high watermark of the “sweat of the brow” approach.

<sup>25</sup> See *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275 and *Autospin (Oil Seals) Ltd v Beehive Spinning (A Firm)* [1995] RPC 683.

<sup>26</sup> Wei, Sze Shun & George, *Some Thoughts on Intellectual Property Rights in Singapore: A Monograph for Gerald Dworkin* (Research Collection School of Law, Singapore Management University, 2009) at p 175.

<sup>27</sup> David Llewelyn, *Invisible Gold in Asia: Creating Wealth through Intellectual Property* (Marshall Cavendish, 2010) at p 24.

<sup>28</sup> *Global Yellow Pages (CA)*, *supra* n 2, at [18].