

TRINIDAD AND TOBAGOIN THE HIGH COURT OF JUSTICE

H.C.A. No. 2520 of 1990

BETWEEN

THE JOCKEY CLUB
(a body corporate, incorporated by Royal
TRINIDAD RACE CLUB LTD.

THE BETTING LEVY BOARD
(a body corporate, established under the Betting Levy
Board No. 75/89)

PLAINTIFFS

AND

MERRICK ABRAHAM
(Executor & Trustee under the Will of Stephen Abraham,
deceased, trading as Abe's Racing Service)

ERNESTO ABRAHAM
(trading as Goodwill Racing Service)

PETER GEORGE
(trading as Grand National Racing Service)

GOWREE RAMPERSAD
(trading as King's Racing Service)

PATRICIA JOY CHAN
(trading as Tote Investments)

CYRIL SANCHEZ
(trading as Track Investors)

MC DONALD WARD & ERNESTO ABRAHAM
(Legal Personal Representatives of Carl Lopez,
deceased, trading as Winners Pool)

DEFENDANTS

Mr. H. C. de Bastide S.C. and C. Hamel-Smith for Plaintiffs
and Mr. Gacelan S.C. and S. Belzin for Defendants

BEFORE THE HONOURABLE MR. JUSTICE
CARLTON BEST

J U D G M E N T

The Copyright Act 1985, which was assented to on 3rd June 1985, provides inter alia by Section 6:

- "(1) Subject to this section, the categories of works in which copyright under this Act may subsist are:
- (i) literary works...
- (2) Copyright shall not subsist in a work unless
- (a) it is original, and
 - (b) it has been written down, recorded or otherwise expressed in some material form".

Section 24 provides inter alia that:

"The copyright... in a protected work... is infringed by a person who, not being the owner of the copyright... and without the licence of the owner thereof...

- (c) in Trinidad & Tobago...
 - (i) sells, lets for hire, or by way of trade offers or exposes for sale or hire any article... if the making of this article constituted an infringement of that copyright..."

These are the provisions of the Act that I kept in mind as I considered the plaintiffs' claim for an inter parties interlocutory injunction to restrain the defendants:

- (a) "From infringing the first plaintiff's copyright in the information contained in and/or derived from the lists of horses entered and declared to run in races at any race meeting in England, Scotland and Wales... whether by way of reproducing the same or any part thereof on race cards or programmes or by distributing or selling race cards or programmes containing information derived from the first plaintiff's lists and/or by displaying on video screens, information derived from the first plaintiff's lists or making any other use of information derived from the first plaintiff's lists and/or

- (b) from infringing the second plaintiff's copyright in the information contained and/or derived from the lists of horses entered and declared to run in races at any race meeting promoted and/or managed by the second plaintiff and/or the Trinidad Race Club and/or Union Park Turf Club and/or the Trinidad Turf Club and/or the Arima Turf Club ... whether by way of reproducing the same or any part thereof on race cards or programmes or by distributing or selling race cards or programmes containing information derived from the second plaintiff's list or by making any other use of information derived from the second plaintiff's list and/or
- (c) from further infringing the third plaintiff's copyright in the race cards or programmes published by the third plaintiff whether by way of reproducing and/or copying the same or any part thereof and/or distributing and/or selling race cards or programmes published by the third plaintiff or copies thereof".

FIRST ISSUE:

Can a Race Programme be considered a literary work within the ambit of the Copyright Act?

In the case of Ascot Jockey Club Ltd. v Simons (1962) 66 W.R. 411 the High Court of British Columbia had to consider whether an information sheet for horse races constituted an "original literary work" under the Copyright Act which existed in British Columbia. A quotation from the headnote, in sum of the view, adequately sums up the law:

"...it matters not the plaintiff's publication had no pretensions to literary or artistic merits as those words were generally understood, nor was their essential character affected by the fact that the infringement complained of might not be said to be an infringement of original material, but of the mere arrangement of material, the evidence showed that plaintiff's publication called for labour skill and judgment in their production, and the result was novel; the publication met the test of "original literary works".

There is little doubt in my mind that the disputed arrangement of information, of which copyright is claimed by the plaintiffs,

could be classified under the head "Literary Works" under section 6(1) of our Copyright Act, and I so hold.

SECOND ISSUE:

Can an original idea be subject to the Copyright, and if not, how can it be so made?

The Halsbury's Law of England (4th Ed.) at page 527, paragraph 829 states:

"Ideas and opinions are not the subject matter of copyright but only the form in which ideas and opinions are expressed and then only to the extent that a substantial part of the form must be plagiarised".

The learned authors of the Modern Law of Copyright (Butterworth) (1980) at page 33 paragraph 2.55 had this to say:

"Ideas thoughts and facts merely existing in a man's brain are not 'works' and in that form are not within the Copyright Act; but once reduced to writing, or other material form, the result may be a work susceptible of protection. Given that there exists a good copyright in a work, the law does not protect a general idea or concept which underlies the work, nor any one piece of fact or piece of information contained therein. However, a more detailed collection of ideas or patterns of incidents or compilation of information may amount to such a substantial part of the work that to take it would be an infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed".

This Court is of the view that for the purposes of this application an original idea or bit of information is not protected under the Act unless the said idea/information is expressed as literary work within the meaning of the Act. Further, when thus expressed the author does not have an intellectual monopoly over his said idea/information, other can have access to same within

"even though a work contains a substantial part derived from earlier material, the work can be the subject of copyright provided sufficient further independent skill, useful labour, knowledge, taste or judgment have been bestowed on it".

(The Modern Law of Copyright) (supra) page 23 Paragraph 2.37).

The same learned authors of Halsbury's Laws of England at paragraph 831 page 529 in discussing the originality of work that could be protected by the Act states:

"The originality which is required relates to the expression of thought. It is not required that the expression should be in an original or novel form but that the work should not be copied from another work, it should originate from the authors".

The same learned authors promulgated a test of originality at paragraph 836 page 533:

"The skill and labour necessary in order to fulfil the list of originality may consist ...in the mere preparation of lists, though there will be no copyright if the list conveys no useful information... the labour of compiling a programme where time, skill and money have been expended upon the form and arrangement is sufficient to enable the compiler to restrain the copying of his work".

In this regard the learned authors of the Modern Law of Copyright are of the opinion that a work must be regarded as a whole. In their view little would be achieved by dissecting the work into segments as that:

"...robs each fragment of its Colocation. The correct approach is to determine whether the work as a whole is original and only then to decide whether any part taken by the defendant is substantial".

In arriving at the undermentioned, reference was made to Copinger and Skene James on Copyright (11th Ed.) Sweet and Maxwell and The Demerara Turf Club Ltd. v J. Pang (1963) 6 W.L.R. 177 in addition to those authorities mentioned previously. This Court is of the

view that a compiler of information, although he may have expended skill, labour and finance upon the compilation of a Race Programme, cannot complain, in law, if someone makes use of the component parts of the information found in the said Race Programme. There can be no copyright in information per se. However, the new document complained of, must be viewed as a whole, and it is a question of fact and degree if such a substantial use is made of the information found in the said Race Programme so as to reconstitute the compiler's original work. Such plagiarism can and will be restrained.

In determining the respective rights of the parties at this interlocutory stage, I have had recourse to the hallowed guideline laid down by Lord Diplock in American Cyanamid Co. v Ethicon Ltd. (1975) A.C. 396

(A) Is there a serious question to be tried?

I am of the view that in an attempt to hold the balance between these parties as evenly as possible until this matter is resolved at a trial, I must not make findings of fact, but that I am entitled to draw reasonable inferences of fact from the evidence presented. Further, I do not believe that I should, at this stage, attempt to resolve conflict of evidence, apparent on the affidavits, but that such an exercise should be left to a Judge at the trial. I have read all the affidavits and meticulously poured over all the exhibits thereto. Keeping in the forefront of my mind what I have stated earlier, I am of the view that I should not embark upon an exercise of dissecting the evidence in any detail so as to avoid becoming embroiled in a trial by affidavits, save that I draw the following inference that from the evidence, that the attempted partial copying of race programmes by a servant/agent of the first defendant at a certain business establishment and the...

information emanating from first plaintiff's television monitors at the business places of the defendants, to be an indication that the copyright of the plaintiffs may have been infringed and in paraphrase Lord Diplock in the Cyanamid Case (supra) such evidence suggests, I am of the view, a real prospect of the plaintiffs succeeding in their claim for a permanent injunction at the trial of this matter. The submission of Learned Senior Counsel for the defendants, that there was no comparison evidence before the Court so that it can determine whether there had been an infringement of the plaintiffs' alleged copyright, and which submission found favour with C.J. Douglas in Federal Bookmakers Ltd. v Joseph (1978) 31 W.L.R. at page 44C, I do not propose to accept in this interlocutory application as I am of the view that such a submission can be resolved for the trial of this matter, if the occasion presents itself. The question I posed at the beginning of this section, I think, can be answered in the affirmative.

(B) Having answered the above in the affirmative, I turn now to consider whether damages would be an adequate remedy and the defendants' ability to pay same.

I guide myself, at this stage of this investigation, by the views of Lord Diplock at page 408 B-C of the American Cyanamid Case (supra).

The inference which I draw from the evidence presented on this issue suggests that if the defendants are not restrained in their alleged activities, their continuation may encourage other Pool Operators to withdraw their patronage from the Betting and Levy Board, thereby leading to a potential loss of profit. This alleged loss of profit, I am of the view, can easily be quantified, and there has been no evidence to show that the defendants could make

good damages arising thereof. However, there is a further loss which I infer from the evidence, that of goodwill. This loss, from of the opinion, is not easily provable and for which compensation may not be easily quantifiable. For this trend in thinking I am grateful to Mr. Justice Oliver in Slick Brands (Clothing) Ltd. v Jelly Bire Ltd. (1975) Ch.D 470.

On the other hand commonsense tells me that if I impose the requested injunction on the Pool Operators there is every likelihood of an imprecise assessment of damages in financial terms to their goodwill, also.

What does a Court do in a situation where there is a possibility of unquantifiable damages on both sides?

This situation arose in The Quaker Oats Company v All Trades Distributors Ltd. (1961) Flood Street Reports 09. Burklely Ltd. at page 14 states:

"...in the circumstances of the case, this was a case in which it was legitimate for the judge to take into account the probable outcome of the action..."

Elsewhere I have concluded that based upon the evidence presented I am of the opinion, that the plaintiffs could possibly succeed in obtaining a permanent injunction at the trial of this matter. I now reiterate the position.

(C) I now consider the balance of convenience.

I am of the view that there has been no challenge to the allegation by the plaintiffs that there was copying of their works, both by use of a photocopying machine and via television monitors. The submission that such an activity could ultimately lead to unquantifiable financial loss to the plaintiffs' goodwill, I readily accept, but I decline to accept the submission as well stated

Radley Gowns Ltd. v Costas Spryons (1975) Fleet Street Patent Law Reports 455 that I should factor into account, the allegation that the non-payment for the services of the plaintiffs by the defendants may encourage other Pool Operators so to do. Lord Diplock has sounded the warning that in a situation where the factors seem to be evenly balanced, measures should be taken to preserve the status quo (American Cyanamid Case at page 408F).

Agonising upon the real possibility that whichever way this matter is determined, there will be some measure of injustice to either party, I think at this time that the evidence, authorities, justice of the situation and the balance of convenience lie with the plaintiffs. Accordingly I hereby grant to the plaintiffs an interlocutory injunction, terms as set out hereunder:

An order that the defendants and each of them by themselves their servants or agents be restrained from copying or causing to be copied, or selling unauthorised copies of, race cards or programmes prepared and published by the third-named plaintiff with respect to horse-racing in Trinidad & Tobago or in the United Kingdom and from displaying or causing or permitting to be displayed on video screens in their betting shops with respect to horse-races to be run in the United Kingdom, the name of the track, the time of the race, the distance of the race, the names of the horses entered and declared to run and the saddle-cloth numbers of such horses without the permission of the third-named plaintiff.

Further, I order as follows:

- (1) That the matter be set down for trial with expedition.
- (2) An amended Statement of Claim to be delivered within three (3) weeks from date hereof.
- (3) A Defence be served within three (3) weeks of delivery of the amended Statement of Claim.
- (4) A Reply, if any, be served within two (2) weeks of delivery of the Defence.
- (5) That parties are to exchange a list of documents within four (4) weeks of close of pleadings.
- (6) The estimated length of trial is two (2) weeks.
- (7) That the matter be set down for trial 1st July 1992.
- (8) That the costs of this application be costs in the cause certified fit for two Counsels.

Dated this 18th day of March 1992.

Carlton Best
Judge