

# **In the Supreme Court sitting as the Court of Civil Appeals**

(unofficial translation by "Chever Metargamim")

**Civil Appeal 8485/08**

Before: His Honor Mr. Justice M. Naor  
His Honor Mr. Justice S. Jubran  
His Honor Mr. N. Hendel

The Appellants: 1. The FA Premier League Limited  
2. The Football League Limited  
3. The Scottish Premier League Limited  
4. The Scottish Football League  
5. Football DataCo Ltd

## **Versus**

The Respondent: The Israel Sports Betting Board

Appeal against the judgment of the Tel-Aviv District Court dated 2.7.08 in Civil Case 1022/04 given by Her Honor Ms. Justice Tziporah Brown

Date of sitting: 10<sup>th</sup> Shevat 5770 (25.1.2010)

On behalf of the Appellants: Advocate Meir Klinger  
On behalf of the Respondent: Advocate Asaf Posner; Advocate Tony Greenman;  
Advocate Avishai Feldman

## **Judgment**

His Honor Mr. Justice S. Jubran

1. The question which we are required to determine, is whether the fixtures schedules prepared by the British Football Leagues are protected in Israel by copyright law, or alternatively, whether the use of these schedules without the Leagues' permission constitutes unjust enrichment.

2. Since the Appellants are asking to be granted forward-looking declaratory relief, reference shall be made hereinafter to both the old statutory arrangement, as set out in the Copyright Act, 1911 (hereinafter: "the old Law") and the Copyright Ordinance, 1924 (hereinafter: "the Copyright Ordinance"), and the new statutory arrangement, to be found in the Copyright Law, 5768-2007 (hereinafter: "the new Law") which annulled the old Law.

### **Factual background**

3. Appellants 1-4 run the football leagues in Britain. Each year, the Appellants organize a multi-stage tournament within the framework of which all the teams in each league get to play against one another. Appellants 1-2 run the English leagues comprising of 92 teams, whereas Appellants 3-4 run the Scottish leagues in Britain comprising of 42 football teams. Appellant 5 is a limited company which was established with the aim of commercially exploiting the matches played in

these leagues; it makes profits from managing the leagues and in particular from selling tickets for the matches and licenses to broadcast them.

4. Organizing the numerous teams in each league so that each one is able to take part in the tournament requires the investment of resources and a great deal of effort and this fact is not in dispute. After completing the task of arranging the matches, each league annually publishes via the media and the various websites a fixtures schedule for the coming year setting out the order, dates and venues of football matches which are to take place in the leagues (hereinafter: "the fixtures schedules").

5. The Respondent is a lawfully established corporation and the only body in Israel authorized to arrange betting on the outcome of sports matches. Amongst other things, the Respondent also enables bets to be placed on the outcome of matches taking place in the British football leagues, making use of the fixtures schedules in order to do so. On the betting slips which set out the match results, are printed the names of the teams who are competing against one another and opposite them the date and time of the match.

6. The Appellants' action in the District Court was based primarily on the claim that the fixtures schedules were a protected literary work under Israeli law and therefore their use by the Respondent for gambling purposes constituted an infringement of copyright. Moreover, according to the Appellants, the fixtures schedules were not being used in good faith and therefore the profits generated from the gambling should be seen as unjust enrichment at their expense.

### **The District Court**

7. On 2.7.2008 the Tel-Aviv-Yaffo District Court (Her Honor Ms. Justice Tziporah Brown presiding) handed down a judgment in which it dismissed the Appellants' claim and gave its reasons for doing so. Firstly, the court rejected the notion that the fixtures schedules constituted a protected "literary work". In its view, originality was the principle consideration to be taken into account in deciding whether to grant copyright protection and this could not be established simply by proving the effort, time and skill involved in creating the work, however substantial these factors may have been. Since in the present case, there was nothing novel involved in choosing and arranging the final layout of the matches, the fixtures schedules failed to meet the standard of originality required.

8. The District Court went on to hold that the process of compiling the fixtures schedules also lacked the minimum level of creativity required, since the order in which these matches appeared was determined solely on the basis of functional considerations, and there was no interest in restricting the use of information concerning them.

9. It was also pointed out in the judgment, that the Respondent was not using the fixtures schedules themselves - their design and the order in which the matches appeared in them - but merely the data which was displayed in these schedules. It selected the data it wanted and then categorized it in accordance with its own criteria. Since there are no restrictions on using information about the matches, then even if the fixtures schedules did enjoy copyright protection, the Respondent's use of data concerning those matches did not involve any infringement of the Appellants' rights.

10. The Appellants' claims regarding the issue of unjust enrichment were also rejected, since the requirements for accepting this cause of action - such as the creation of unfair competition or breach of the laws of commerce - were absent in the present case. Since the Respondent was the

only body empowered to manage gambling in the field of sport, it was not in competition with the football leagues. Moreover, the interest which stimulates betting on the outcome of the leagues' matches in Britain enables the leagues to increase the fees they charge for broadcasting licenses and the prices of their accompanying products, thus indirectly enlarging the Respondent's profits.

### **The arguments pleaded by the parties**

11. According to the Appellants' attorneys, the fixtures schedules are a protected literary work and the ruling made by the District Court, according to which the degree of originality is the principle factor to be considered in deciding whether to grant copyright protection, cannot be accepted. They emphasize that the originality of the work is actually evaluated by examining the piecemeal manner in which it was formed and take the view that the process of creating and operating the fixtures schedules does in fact satisfy the necessary standard. Similarly, they claim that the enormous effort which was invested in fixing the matches is a relevant factor to be considered in determining whether to grant them copyright protection. Furthermore, if such a high standard of originality was allowed to stand it would prevent recognition of copyright in relation to other functional works, such as tables and various compilations which have already been recognized in Israel and in other countries as deserving protection. According to the Appellants, even if the sole purpose of the fixtures schedules is to transfer information about the tournaments their status should not be inferior to that of tourism guides, train timetables and schedules of television broadcasts which are recognized as protected works.

12. With regard to the District Court's observation that the main function of the Leagues is to fix the matches themselves rather than to prepare the schedule as an end in itself, the Appellants' attorneys contend that this is an irrelevant consideration which should have no bearing on the question of whether they should be granted copyright protection in relation to those schedules.

13. They even refer to English case law, which they claim recognizes similar fixtures schedules as literary works protected by copyright. In circumstances similar to those in the case before us, it was held that a private company which used the schedules in question to arrange for bets to be placed on the results of football matches, had in doing so infringed the League's copyright. Judgments handed down in England and in the United States within the framework of which protection was granted to works of a similar character, such as television program schedules and data bases providing golf match results, also support their argument, they claim, that the fixtures schedules are also covered by copyright protection.

14. Later on in their pleadings, the Appellants' attorneys go on to claim that the Respondent makes frequent use of an essential and central part of the fixtures schedules by integrating the Leagues' matches, some of which are particularly "attractive" fixtures, into their betting forms, and thus infringing, they argue, the Leagues' copyright.

15. The Appellants' attorneys plead in the alternative that a cause of action exists for unjust enrichment. According to them, the Respondent's profits from the sale of betting slips are being made in bad faith and the Appellants are therefore entitled to relief on the grounds of unjust enrichment, even without it being proved that they have sustained loss or have been detrimentally affected in some other way. Even if the Respondent does hold an exclusive license to organize gambling within sport in Israel this does not necessarily mean that it is exempt from having to pay any royalties to the Appellants for organizing the matches and the schedules.

16. The Respondent's attorneys for their part agree wholeheartedly with the judgment of the District Court. In their opinion, the fixtures schedules do not satisfy the originality requirement,

since they represent nothing more than a sequential and simple arrangement of football matches taking place in the Leagues. They refer to the Private Member's Bill currently being debated in the Knesset, which is designed to oblige commercial bodies to pay those associations and unions who organize the matches for using team names in order to promote gambling. This Bill, they argue, makes it clear that, until the legal situation changes the Respondent is not under any obligation to make payments of this kind, and certainly not under copyright law.

17. The Respondent's attorneys also stress the importance of the distinction made by the District Court between the effort and hard work which were invested in organizing the football matches on the one hand, and the effort which was involved in preparing the fixtures schedules as a "literary work" after the matches had already been organized, on the other. The Respondent agrees that the process of organizing the tournaments does indeed require a substantial investment; however, this has no connection to the procedure for preparing a fixtures schedule, which does not, since it merely involves producing a chronological printout of the matches taking place in each league.

18. The Respondent's attorneys further take the view, that in the circumstances of the case the American "merger doctrine" applies, according to which where an idea and its expression are inseparable, the courts will not grant copyright protection.

19. They similarly contend, that even if the fixtures schedules were to be recognized as a protected work, they were only partially used, since on the betting forms only a few of the Appellants' matches appear and in a different order to that in which they are listed in the fixtures schedules.

20. With regard to the claim for compensation on the grounds of unjust enrichment, the Respondent's attorneys maintain that this cause of action interferes with the balance contained in copyright law between the interest in encouraging creativity on the one hand and the right to freedom of expression and information on the other. Only in exceptional circumstances should the laws of unjust enrichment be applied to information which is not protected by copyright and these circumstances do not exist in the present case. No business competition exists between the Appellants and the Respondent and the use of the fixtures tables for gambling purposes has even created "cross-pollination" between them.

## **Adjudication**

21. The issue of the Appellants' moral rights in the fixtures schedules was not raised by the parties in their pleadings and therefore the discussion shall center on the "economic" copyright only (for the nature of the moral rights and the distinction between them and "economic" copyright refer to Chapter 7 of the New Law; Civil Appeal 528/73 Etinger v. Almagor, Supreme Court Cases 29(2) 116, 118 (1975); Civil Appeal 513/89 Exin Lines Bros S.A. v. Interlego A/S, Supreme Court Cases 48(4) 133, 160 (1994) (hereinafter: "**the Interlego case**"); Dr. Sarah Perezanti "Copyright Law" 1137-1197 (Third Edition, 2008)). The issues which need to be determined in the present case are firstly whether the fixtures schedules prepared by the Football Leagues are capable of constituting works protected by copyright according to the tests laid down by Israeli law, and secondly, if so, then what is the nature of the use made by the Respondent of those schedules and does it amount to an infringement of the Appellants' rights in them.

22. The coming into force of the new Law has not altered the rules concerning the matter before us. The new Law merely consolidates the body of case law which had been built up until now

and therefore the result of this adjudication shall be valid under both the old Law and the current legal arrangement.

### **Copyright in the fixtures schedules**

23. Copyright is granted under section 1 of the old Law to, amongst a variety of others, any "original literary work". Under section 35 a "literary work" is defined as including tables and compilations. Section 7B of the Copyright Ordinance limits copyright protection by declaring that no copyright shall subsist in "an idea, fact or datum, on their own" but it shall subsist in the manner in which any of these are expressed. Similar definitions reflecting this arrangement are to be found in the new Law. Section 4(a)(1) of the New Law states that copyright shall also subsist, amongst other things, in an original work which is a literary work. Section 1 of the Law includes in its definition of "literary work" tables and compilations of data. Finally, according to section 5, no copyright subsists in ideas, facts or data but it does subsist in their expression.

24. Case law development of the statutory arrangements found in the old Law and the Copyright Ordinance produced tests which were then applied in determining whether to grant copyright protection to a variety of different works, including tables and compilations. Bearing in mind the nature of the work being considered in this appeal - a compilation of data in table form relating to matches being played in the British Leagues - it would be more suitable for it to be adjudicated as a work falling within the compilation category, even though, due to the circumstances of the case, any possible differences between "compilation" and "table" are irrelevant.

25. Amongst the plethora of tests which must be satisfied in order to recognize the existence of copyright, the important ones for present purposes are the "creativity" of the work and "the investment" involved in producing it, that is, the proper interpretation and relative weight to be given to each of these tests must be decided upon, the creativity in question being a compilation of data which by itself is not protected.

26. These tests were developed against a background of the interpretation given to the "originality" requirement which was already anchored in the old Law (after it had been amended due to the accidental omission of that requirement from the Hebrew translation of the original English statute, see Civil Appeal 360/83 Strosky Ltd v. Whiteman Ice-Cream Ltd, Supreme Court Cases 40(3) 340, 347 (1985) (hereinafter: "**the Strosky case**")), and which was also adopted in the new Law, as a fundamental condition which had to be satisfied before copyright would be recognized. One interpretation approach - which was nicknamed in the Interlego case "the investment approach" (and which in the United States is known as "the sweat theory") - is based on applying the same rationales used to justify the protection of rights in "corporeal" property, to intellectual property law as well. According to this approach, since it would be inequitable to allow a person to enjoy the fruits of another man's labor without permission or payment, the extent of the investment made by the author of the work must be extolled as a precondition to satisfying the originality requirement.

27. The second approach, known as the "creativity" approach, centers on the interest in encouraging the creation of social capital through the expansion and distribution of the literary works. The degree of effort invested in the work does not guarantee that the product will make any contribution to society and therefore this approach focuses on the quality and character of the investment rather than on its size (for an analysis of both approaches refer to pages 161-164 and 167-168 of the Interlego case and the further reading referred to therein). It should be pointed out, that the "creativity" test is also described in case law and in professional literature as the "originality" test, however, in accordance with the conceptual dichotomy outlined in the

Interlego case and to avoid confusion with the statutory "originality" requirement this test shall hereinafter be referred to as "the creativity test".

28. According to Israeli case law, both the creativity and the investment tests must be satisfied as a precondition to fulfilling the originality requirement laid down by statute (see the Interlego case, p. 173), which is why they are important in the present context as well.

### **Creativity and investment - the nature of the two tests**

29. It is important to point out that generally speaking, neither of these tests demand that the Applicants meet a high standard before their works can enjoy copyright protection (the Interlego case, p. 170), and compilations are no exception to this rule. In Civil Appeal 23/81 Hershko v. Aurboch, Supreme Court Cases 42(3) 749, 759 (1988), the Court went even further, stating that:

"The degree of originality required to protect a work under copyright law also varies from case to case and may be diminutive or even worthless".

30. While this approach has not been fully adopted in the later precedents, it is certainly indicative of an attitude that says that obtaining copyright protection should not be made too difficult. Thus it has been held that showing innovation in relation to existing works is not required in order to fulfill the creativity condition and that the meaning of the term "originality" as it appears in the Law does not refer to the work itself but rather to the author or the compiler, in the sense that they have to be the "source" of the work:

"The work does not have to embody an original thought or a novel concept. All that is required is that the work was not copied from another work, but that it originated with its creator, its author"  
(the Strosky case, p.346)

or, as my colleague Mr. Justice A. Rubinstein has put it: "Original, in other words, independent" (Civil Appeal 3422/03 Krone AG v. Inber Reinforced Plastic, Supreme Court Cases 69(4) 365, 378 (2005) (hereinafter: "**the Inber case**")).

31. On the other hand, it's clear that the positive aspect of this creativity-independence requirement cannot be overlooked completely. The precedents show unequivocally that despite the fact that the work is independent and not copied does not mean that protection for it will automatically be forthcoming, and even when the work can be traced to its author or compiler the creativity requirement may not have been satisfied. Thus, while a work which has nothing unique about it but which at the same time is not based on an earlier work will indeed pass the originality hurdle in the Law with relative ease (see the Interlego case, at p. 173), the author or compiler must on the other hand have stamped his mark on it in some way - however faint that stamp may sometimes be. The work must be "the fruit of the creator's intellectual endeavor" (see the Interlego case, at p. 378) and at least reflect "the lowest level of personal expression" (Civil Leave to Appeal 2687/92 Geva v. Walt Disney Corporation, Supreme Court Cases 48(1) 251, 257 (1993) (hereinafter: "**the Geva case**"). See also Civil Appeal 2790/93 Eisenman v. Kimron, Supreme Court Cases 54(3) 817, 830 (2000) (hereinafter: "**the Kimron case**").

32. As aforesaid, one of the clear objectives of copyright law is to provide incentives to potential authors to publish their works in order to enrich the world of literature through the utilization of existing facts, data and ideas. Recognition of copyright in works which add nothing to existing literary expression contradicts the aforementioned objective. Therefore, copyright protection will not be granted even to original works if:

"the end result makes use of obvious, recognized and uncomplicated things which already exist in the public domain such as a circle or simple line" (the Interlego case, at p. 171).

33. A further distinction which may contribute to passing the creativity test is that while the author or compiler has not made progress in the finished product, he has actually done so in the process of preparing it, so that what is being examined in this case is the level of creativity shown while the author or compiler was on route to producing the work. According to this assertion, even if the work in its final format is completely identical to another protected work or does not display any creativity or investment, it's nevertheless possible that the work will merit protection because of the maker's contribution during the process of its creation (see the Interlego case, at p.170-171, 173; the Kimron case, at p. 830, and see what is stated hereinafter).

34. With regard to the investment test - it seems that its interpretation is not a matter of dispute and that its realization is a straightforward matter. According to this test "the product for which copyright protection is being sought ... must have resulted from a minimum investment of some form of human resource" - whether it be time, work, natural talent, knowledge, etc. (see the Interlego case, at p. 173).

### **Originality and investment - Their relationship to one another and importance**

35. The question of the importance of the two tests and the relationship between them was resolved long ago in Israeli case law. In the Interlego case, retired President M. Shamgar described the various directions in which the English and American case law had moved in over the years with regard to the reciprocal relationship between these tests and their importance in the protection of works of art and literature. The judgment contains an analysis of those rulings which actually place the size of the investment made at the center of the originality requirement which the law imposes, the price being a corresponding erosion of the creativity requirement. Thus one approach favors using the amount invested in the work as an indicator of the existence of creativity. Another sees the magnitude of the efforts made as compensating for the absence of creativity, with those efforts being sufficient in themselves to satisfy the originality requirement (see *ibid*, at p. 168, 169-170 and the references quoted there). Indeed, the impression one gets from Civil Case 136/71 State of Israel v. Achiman, Supreme Court Cases 26(2) 259 (1972) (hereinafter: "**the Achiman case**"), is that this Court was prepared to implement the approach in question by applying the investment test only. In that case, the Court was called upon to decide whether it was possible to protect income tax deduction tables under copyright law, and it held as follows:

**"While, as is known, there is no copyright in an idea only, copyright can attach to the form in which it is arranged or a special design for the tables component which was chosen in order to make them easier to use, if an intellectual effort, hard work or special skill was invested in developing the Plaintiff's method"** (the Achiman case, at p. 261, I have added the highlighting, S J).

36. Nevertheless, Israeli law at the end of the day took the opposite approach, by making copyright protection conditional on the existence of a minimal degree of creativity and rejecting the notion that protection of a work could be justified solely on the basis of the effort invested. This approach was based on the common law rule established in the leading U.S. case of *Feist Publications, Inc v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991) (hereinafter: "**the Feist rule**", which shall be referred to in detail later on). The Feist rule was explicitly

adopted in the Interlego case, which was decided after the Court had reached its verdict in the Achiman case and which has remained the defining judgment in this area of Israeli common law ever since. This is how in the Interlego case President Shamgar explained his reasons for adopting the American approach:

"In the light of the objectives of copyright law, as set out above, it's obvious that the conclusion to be reached is that investment alone is insufficient to justify granting the expression copyright protection. This conclusion is supported by the purpose of copyright law, which is to strike a balance between competing social needs, as well as by the degree of protection which the owner of the right is entitled to. The balancing role played by the law results from the fact that by granting copyright in a particular expression, the future use of other possible expressions becomes restricted. An approach which sees the right as stemming simply from the fact of the investment is not sufficiently sensitive to this important balance which goes to the very foundation of copyright law. While "the investment" approach can be used to justify corporeal property laws, and, as a result, there are those who feel it should properly be applied to intellectual property law as well (T Black, *Intellectual property in industry*, 70, London 1989), it seems that the difference between these two areas prevents it from being adopted in the field of intellectual property. Expanding the world of expression is not only important for the self-expression of the person creating the literary work in question but also for the world of expression of the general public and society as a whole. Owning the fruit of the tree is not the same as owning the future seeds which will bring forth the trees of the future. Even though in both cases the granting of ownership restricts the exploitation ability of everyone else in the present, when ownership of the seeds is at stake, this also has implications for the complexions and amounts of trees that will be available in the future and granting proprietary rights to an expression has far reaching implications for the use of language in the future. In these matters it is not sufficient to simply strike a balance between the aspirations of individuals but the welfare of the whole of society must be taken into account as well (*Sony Corp. of America v. Universal city studios, inc* (1948) US 464 417 at 429). Intellectual property deals with material designed to assist in the realization of man's current ambitions, but it is also an area which envisions the development of his future aspirations and horizons as well. Therefore, it is extremely important not only to reward the investment which was made but also to understand the restriction on future development which granting the right is likely to bring with it" (ibid, at p.165. All highlighting has been added by me, S J. See also ibid, at p. 169; Tony Greenman "Copyright" 121 (Second Edition, 2003)).

37 In the Kimron case, the Supreme Court confirmed this rule when it held that:

"The originality is the main thing, and the investment of effort, time or natural skill is not enough to justify the granting of copyright protection" (ibid, at p. 829. See also p.830, where an investment testifying to the existence of creativity approach is mentioned, although it's not suggested in the judgment that it be applied in practice).

38. This being the case, the unequivocal legal position today is that both the creativity and investment tests must be satisfied as an essential precondition for copyright protection to be granted - satisfying one of them alone is not sufficient. Even though, as we have seen above, Israeli law has interpreted these tests in a liberal fashion, they are overlapping and apply in conjunction with one another, so that a person seeking to protect his creation must be able to demonstrate that he has satisfied both of them. The amount of effort invested in producing the work, however impressive, cannot compensate for the absence of the creativity element and vice versa. In the final analysis, however, since satisfying the investment test is usually a straightforward matter, the creativity test is the one which determines whether the work meets the standard of originality required by law. The precedents quoted by the Appellants' attorneys in order to support their arguments - amongst others an English judgment dating back to 1959 (*Football League Ltd v. Littlewoods Pools Ltd*, [1959] 2 All E.R. 546) - which recognize the existence of copyright in football match schedules, have not been accepted by Israeli case law.

### **Creativity and investment where the literary work is a compilation**

39. We shall now move on to examine how these tests are applied where the literary works are compilations. First of all, it is important to point out that even where the content of the compilation is not protected by copyright - because it comprises of ideas, facts, news items, etc - information which in itself may be used by all and sundry, this does not mean that such a work such can never be protected:

"The fact that "the bricks and mortar" used to create the work are common property has no bearing on the issue of whether copyright exists in that work" (Civil Appeal 2790/93 *Eisenman v. Kimron*, Supreme Court Cases 54(3) 817, 828 (2000)).

40. While data, facts or ideas themselves clearly cannot be protected by copyright even after being included in a compilation (cf. the *Kimron* case, at p.828), copyright protection is granted in such cases for the way in which the compiled information has been processed and presented. It naturally follows, that fulfillment of the statutory originality requirement also expresses itself in terms of the external characteristics of the compilation's contents:

"Although as everyone knows there is no copyright in an idea itself, copyright protection can apply to the form in which information is presented or to a special design... regardless of whether the "raw material" used in preparing the tables is common knowledge" (the *Achiman* case, at p. 261)

"We have seen that compilations and arrangements may constitute "literary works" as defined in the law, and that the issue of whether copyright exists in a work is determined by the degree of originality which it contains" (the *Kimron* case, at p. 831).

41. These rules have since been expressly anchored in statute by section 4(b) of the new Law, which states that: "The originality of a compilation is the innovation shown in selecting the information and in the manner in which the work or the data contained therein is arranged". Even though the "selection" of data is not expressly mentioned in the case law which preceded the new Law, it nevertheless seems that the new Law does not make changes to but merely clarifies the existing position and that the courts had already decided before it was enacted that the manner in which information is selected can in itself amount to creativity. In any event, section 4(b) of the

new Law does not make the originality requirement any more stringent than it was previously. The degree of creativity shown in selecting the data and not just the manner in which that data is organized can in itself be sufficient to satisfy the originality requirement (see in this context the explanatory notes to the Copyright Bill, 5765-2005, Official Gazette (Proposed Laws) 196, 1120, and the referral made there to section 10(2) of the TRIPS Agreement in which selection and arrangement are expressly given as alternatives: "...selection *or* arrangement of their content" (the emphasis has been added by me, SJ. To see the full text of the Agreement, go to the WTO's website at: [http://www.wto.org/english/docs-e/legal-e/27-trips\\_04\\_e.htm#1](http://www.wto.org/english/docs-e/legal-e/27-trips_04_e.htm#1)).

42. In the light of the foregoing, it seems that where the literary work in question is a compilation, two main characteristics of the work must be evaluated in determining whether the twin requirements of investment and creativity have been satisfied: the manner in which the data used to create the work was selected, or alternatively the way in which it was arranged and designed therein. In the past, this Court has examined two types of compilations and decided that both of them were deserving of copyright protection. The first time it did so - in the Achiman case - it was the originality of income tax deduction tables which had to be examined. However, as we have already seen above, the decision to grant the tables protection was based solely on the investment test, and therefore that ruling is of no help in the present context. The second occasion on which the Court had to give its ruling was in the Kimron case, in which the issue was whether the deciphering of an ancient scroll through assembling, locating and arranging its approximately one hundred torn pieces, completing its missing sections and breaking the puzzle of what was written in it entitled the person who had engaged in such a project to copyright in the entire text. The judgment concentrated in that case on the originality shown in the process of deciphering the scroll (see above regarding the importance of evaluating the process of preparing the work) and emphasized that while the text could have been reconstructed in various ways, completion of the missing sections of the scroll was the result of the investigator's intellectual efforts and could not have been logically inferred from those portions of the text which were already in place. The criteria used in the judgment in order to determine whether the work satisfied the creativity test were the knowledge, expertise and imagination of the investigator who had compiled it:

"The ingredients of the work cannot be separated from one another and should be seen as a single creative act. Examining the work in all its aspects as one complete creation reveals an unquestionable degree of originality and creativity. Kimron's work was therefore not of a technical and "mechanical" nature, "the sweat of man's brows", a simple manual task the results of which were known in advance, but rather the sensitivity and additional spiritual input with which he imbued the torn sections of the scroll produced a living text. The end result can be attributed to a process in which Kimron relied upon his knowledge, expertise and imagination, exercised discretion and chose between various alternatives" (ibid, at p. 833).

43. In American case law we find many references to copyright in compilations, however, we should first and foremost make a comparison with the Feist rule as discussed above because of the adoption by Israeli law of the conclusions reached in that case, and especially because those conclusions were based on a set of facts which were similar to those in the present case.

44. In the Feist case, the U. S. Supreme Court adjudicated the claim by a company which supplied telephone services in a number of regions that it was entitled to copyright protection for the telephone directory which it published for the benefit of its customers. The telephone directory (or rather those sections of it which the dispute revolved around) contained a list of

customers arranged in alphabetical order, together with the names of the cities in which they resided and their telephone numbers. The Court based its deliberations in the Feist case on the presumption, which exists in Israeli law too, that the names of the company's customers and their contact details were not in themselves protected by copyright since they were simple facts, however the way in which the compilation of the customers' details had been designed could in principle merit protection. In this context the rule adopted in the Interlego case was emphasized, that is, that the originality of the work cannot be established without the presence of some degree of creativity:

[Quote in English] (ibid, at p. 362. The emphasis has been added by me, SJ).

45. After considering whether arranging a telephone directory could involve a sufficient degree of creativity, the Supreme Court concluded that the compilation of the company's customers' details in this case did not merit copyright protection since choosing, arranging and designing the data which appeared in the phone book lacked even the most basic level of creativity.

46. An examination of the process involved in compiling the directory, showed that the data which appeared in it had not been selected. The lists in the telephone book simply included the names all the company's customers and the most rudimentary information about them:

[Quotation in English] (ibid, at pp. 362-363)

47. The arrangement of the lists could also not have been more trivial - The names of the customers were simply set out in alphabetical order, a standard format for which there was no real alternative:

[Quotation in English] [the telephone company which prepared the directory] [Quotation in English] (ibid, at p. 363, I have added the words in parentheses and the italics, SJ)

48. After having examined the nature of the originality requirement in Israeli law and demonstrated the level of creativity and investment needed in relation to works entitled to protection in general and compilations in particular - we shall now go on to apply these principles in the case before us and examine whether the fixtures schedules should be granted copyright protection.

### **Copyright in the fixtures schedules - Applying the general principles to the specific facts in this case**

49. The British Leagues' fixtures schedules list all the football matches being played in the annual tournament and those matches only. The information about each fixture appearing in the schedule includes the names of the teams playing and time and venue of the match. The matches are arranged in chronological order according to the date and time when they are to take place. Next to the times there appears a list in alphabetical order of the names of the home teams. After the name of each home team there appears a letter "v" ("versus") followed by the name of the guest team in that match, and then finally, in brackets, the venue. The lists in the schedules are organized into lines and are not accompanied by any other special design or arrangement.

50. It ought to be emphasized, that in examining the existence of relevant originality here, only the process of creating the compilation itself is being taken into account, but not in any circumstances the preparations involved in arranging the tournament or fixing the order of play

in accordance with the constraints on the teams, the suitability of the stadiums and other practical considerations. The information included in the fixtures schedules is selected from existing data about the matches. That data is created at the preliminary stage when the teams and match venues are first selected in coordination with all those involved, thus enabling the football tournament to eventually get underway. Therefore, all the creativity and investment involved in organizing the tournament have nothing whatsoever to do with the originality requirement in this case. Taking them into account would be tantamount to claiming that in assessing the creativity and efforts which the company invested in preparing the telephone book for its customers in the Feist case, not only the preparation of the directory itself should have been taken into account but also the effort involved in installing the telephone infrastructure and connecting the customers to it!

51. The investment test does not constitute an obstacle in the present case. It seems that even if no effort was involved in selecting the matches to be included in the schedules, then at least by preparing the lists the Appellants can be seen as having invested the minimum amount of effort needed in order to satisfy this requirement. On the other hand, in my opinion, the degree of creativity required to justify copyright protection is absent in the present case; it cannot be seen in the selection of the data included in the schedules - a point which anyway was never argued before the lower court - and nor in the manner in which that data is arranged in them. Thus, not only is the data appearing in these schedules itself not protected by copyright, but even the list of fixtures looked at as a whole and the format in which those fixtures are presented are not eligible for protection.

52. While the fixtures schedules do not list all football matches due to take place during the year, nor even all the matches being played in Britain, but only those fixtures arranged within the framework of the tournament, it does seem, prima facie, that there has been a "selection" of the information appearing in the schedules, however, this "selection" does not involve any intellectual process of filtering data. Even though the "source" of the selection is the author-compiler as stipulated in the Inber case, it lacks any real expression, even the most diminutive one, of his spirit and personality, a requirement emphasized by the rulings given in the Interlego and Geva cases, and this conclusion is unavoidable even if one takes into account the fact that we are not dealing here with the creation of a "classic" literary work, but a table of data which is being provided for a specific purpose. It also need hardly be pointed out, that in making this selection no expertise or imagination (see the test in the Kimron case) were needed, and even the information presented regarding each fixture is quite trivial. Therefore, in similar vein to the Feist case, even if drawing up the Leagues' football matches for inclusion in the schedules did involve a process of "selection", it cannot be described as a "creative selection" and so it lacks any originality.

53. The identical conclusion must also be reached regarding the format, arrangement and design of the information given about the Leagues' fixtures. It seems that the most logical way (if not the only logical way) to present all the fixtures taking place within the football tournament, is to adopt the format used in the schedules, that is, setting out the date on which the match is to take place, while also indicating of course the names of the teams and the stadium in which they are to play in. The way in which the information is presented - showing the home team and then the guest team separated by a "v", as well as placing the venue where the fixture is to take place in brackets - lacks even a scrap of uniqueness or individual expression, and, according to the tests specified above, even the arrangement of the information lacks the measure of creativity needed in order to satisfy the originality requirement.

54. The conclusion demanded from all that has been stated above, is that according to Israeli law it's perfectly legitimate to make any use of the details given about each individual match

separately (since they are facts which are not protected) and all the matches taken in conjunction with one another as a single block of information (since the method by which the matches were chosen is not protected), as well as the format used to present these fixtures in the schedules (since even the design of the schedules is not protected), and all without having to obtain permission from or pay any fee to the Appellants.

55. Having arrived at this conclusion, there is no need for me to address the question of copyright infringement. I would, however, briefly add in passing, that even if I had postulated that the compilation in question fulfills the originality requirement, both from the point of view of the investment made in preparing it and the creativity it shows, this would not have been enough to accept the Appellants' claim. Even if the selection of the matches and design of the schedules did carry with them copyright protection, the fact is that the Respondent did not copy or publish them but merely used the facts presented in a compilation, and these, as explained above, cannot be protected under copyright law.

56. Moreover, as can be seen from the volumes of exhibits submitted by the Appellants, there is absolutely no similarity between the design of the tables in which the Respondent publishes the details of the matches and the order in which the information is presented in the Appellants' schedules. The Respondent does not even publish the details of all the British Leagues' fixtures, but only some of them, and they appear next to details of football matches being played in Israel and in other countries. In such circumstances, even if it could be postulated that some of the compilation's characteristics are protected by copyright, it certainly cannot be said that all of these have been replicated or even a material part of them (with regard to the "material part" requirement, see section 11 of the Copyright Law, section 1(2) of the old Law (where the term "substantial part" is used), and also Civil Appeal 559/69 Almagor v. Gudik, Supreme Court Cases 24(1) 825, 830-831 (1970); Civil Appeal 19/81 Goldenberg v. Bennet, Supreme Court Cases 36(2) 813, 823 (1982); Civil Appeal 139/80 Harpaz v. Achitov, Supreme Court Cases 44(4) 16, 21 (1990); Civil Appeal 8393/96 Mifal Hapayis v. The Roy Export Establishment Company, Supreme Court Cases, 54(1) 577, 591-593 (2000); the Inber case, at p.p. 381-382).

### **Unjust Enrichment**

57. Similarly, in my opinion the Appellants' claims regarding the issue of unjust enrichment should also be dismissed. The judgments handed down by this Court have established the fundamental premise that the laws of unjust enrichment may also be applied, under certain circumstances, to areas which by their natural definition should be dealt with by intellectual property law. This principle was established in a majority decision (His Honor Mr. Justice Y. Engelhard dissenting) in Civil Leave to Appeal 5768/94 ASYR Import Export and Distribution v. Forum Accessories and Commodities Ltd, Supreme Court Cases 52(4) 289 (1998) (hereinafter: "**the ASYR case**"):

"The different opinions expressed in the ASYR case, even if not producing a uniform rule, show clearly that it is possible, in certain circumstances, by applying the laws of unjust enrichment to protect ideas which are not protected within the framework of intellectual property law " (Civil Appeal 2287/00 Shoham Machines and Dies Ltd v. Harar (unpublished, 5.12.2005), at paragraph 10 (hereinafter: "**the Shoham case**"). Even the opinion of Mr. Justice Y. Englehard, that the absence of a cause of action under intellectual property law automatically cancels the possibility of a claim based on the laws of unjust enrichment, leaves the door open for a claim based on the law of obligations, see the ASYR case, at pp. 445-446 and see also Ofer

Grosskopf "New horizons in law - Protecting the rules of competition through the laws of unjust enrichment" 309-312 (5762)).

58. The cause of action known as unjust enrichment is to be found in section 1(a) of the Unjust Enrichment Law, 5739-1979 (hereinafter: "**the Enrichment Law**"):

**"Duty of restitution** 1(a) Where a person (hereinafter: "the beneficiary") has obtained any property, service or other benefit from another person (hereinafter: "the benefactor") which came to him without him having had any right in law to do so, then he shall be obliged to make restitution to the benefactor, and if restitution in kind is impossible or unreasonable, then he shall pay him the value of the benefit."

59. The section provides that this cause of action comes into being if three conditions are met: The existence of enrichment - the beneficiary "obtained" some "property, service or other benefit..."; the said enrichment "came" to the beneficiary from the benefactor and "at his expense"; and so too the enrichment of the beneficiary at the benefactor's expense took place "without him having had any right in law". Case law has supplemented the third condition with an "additional element" which must exist in order to establish the cause of action:

"The third element, according to which the issue of whether the enrichment took place "without any right in law" must be examined, shows that merely establishing the fact of enrichment is not sufficient to give rise to an enrichment action. It is also not enough to prove that the benefactor was the source of the enrichment and that it came about at his expense. In order for an enrichment claim to be made another element must be present. This additional element centers on the nature of the enrichment" (Civil Leave to Appeal 371/89 Leibovitch v. A and Y Eliyahu Ltd, Supreme Court Cases 44(2) 309, 321-322 (1990)).

60. In the ASYR case, there was unanimous agreement amongst the judges that "imitation or replication of a product "alone" - in the absence of intellectual property in the product according to the statutory rules...does not give rise to a right of restitution under the Unjust Enrichment Law". Similarly, it was agreed that "in order for a right of restitution to exist, the imitation or replication had to be supplemented by an "additional element" (ibid, at p.449). However, the nature of that "additional element" and the proper way to use it in those instances where intellectual property laws would have ordinarily applied or where a cause of action under those laws had been ruled out, gave rise to much debate and a number of different interpretations in the ASYR case.

61. In delivering her judgment in that case, it was suggested by Her Honor Ms. Justice T. Strasbourg-Cohen that this element would be satisfied if the beneficiary had acted in bad faith (ibid, at pp. 431-432). Retired President of the Court A. Barak, while accepting her interpretation, proposed a more focused test, according to which the "additional element" would be satisfied if it could be established that the beneficiary had engaged in unfair competition which violated the laws of trade (ibid, at pp. 474-477). Retired Deputy President S. Levine and Mr. Justice T. Or also adopted the unfair competition test (for other suggestions which were rejected by the majority view see: the "unusual gravity" test proposed by Mr. Justice Y. Zamir, ibid, at p. 492 and the "quasi-tort" test of Mr. Justice M. Heshin, as he was then known, ibid at pp. 371-373. For a detailed analysis of the various approaches and the extent to which the unjust

enrichment laws apply in these types of cases, see Civil Appeal 2287/00 Shoham Machines and Dies Ltd v. Harar (unpublished, 5.12.2005), at paragraph 11 (hereinafter: "**the Shoham case**").

62. In the course of the judgment, President of the Court Barak enumerated a number of considerations which in the circumstances had to be taken into account in order to decide whether this test had been satisfied and whether a cause of action for unjust enrichment existed: the importance, inventiveness and uniqueness of the work from which the beneficiary had enriched himself; the effort invested in its preparation; the number and frequency of the occasions on which the work had been copied; if the product in question had been designed with a specific function in mind - the availability of reasonable options for manufacturing similar products; the consequences of the replication and its impact on the benefactor. (ibid, at pp. 477-479. See also the judgment of Mr. Justice Hashin, ibid, at pp. 431-432, where progress is made in two of the tests, and so too the Shoham case, at paragraph 12).

63. In the case before us, the existence of the "additional element" according to the unfair competition test can be automatically discounted due to the status of the Respondent as the only body authorized to organize and arrange betting on the results of sports matches and competitions in Israel (see sections 1 and 11 of the Law for the Arrangement of Betting in Sport, 5727-1967). The question of the existence of illegitimate commercial competition is not relevant in the present case because the Respondent and the Appellants have never from the outset been in competition with one another. The arranging of bets does not then damage in any way the Appellants' existing or potential business or profits, even if the details of the British Leagues' matches are taken from the data shown in the fixtures schedules.

64. Although it is unnecessary to do so, I would point out that even if the Respondent did not, as a statutory body, have the sole concession to organize betting, the Respondent's use of information concerning the British Leagues' matches would not have amounted to unfair competition. Preparation and publication of the fixtures schedules is certainly very important if the public is to be informed about the football tournaments' itinerary, however, the act of copying it for the purpose of arranging the betting can only assist in that publication. As we have already seen, the existence of inventiveness and uniqueness are in serious doubt in the present case, and the efforts and investment which were put in to their preparation - in contrast to the enormous investment which was unquestionably made in actually preparing the tournament and arranging the fixture - was relatively insignificant. On the assumption that the Appellants are also able to arrange bets on the outcome of the Leagues' matches, it seems that if the Respondent was ordered to pay royalties to them for using data concerning the fixtures, then this would actually be likely create unfair competition on the part of the Appellants, who would in such circumstances have a monopoly on the information.

65. There was no impropriety in the Respondent's behavior, even if the extent of that impropriety were to be judged in accordance with the broad test of good faith as defined in the ASYR case, and therefore the payment of royalties to the Appellants cannot be justified on this basis either. The Respondent is not abusing its authority or stopping the Appellants from making other indirect profits by licensing broadcasting rights for the matches and selling the paraphernalia associated with football teams. It's also not inconceivable that the existence of the betting might even raise public awareness within Israel about the British Leagues' matches. In the light of this, unjust enrichment cannot be relied upon as a cause of action in the present case. Moreover, if the Respondent was ordered to pay royalties it would actually be the Appellants who would be unjustly enriched. Bearing in mind the nature of the Respondent's business activities and its monopoly on arranging the bets, the other tests put forward in the ASYR case as a way of implementing "the additional element" requirement have not been satisfied here either, and this being so, the arguments pleaded by the Appellants in this context should also be dismissed.

66. In passing, I would point out that in the ASYR case the debate focused on a number of products which had to be processed either under the industrial design or patent laws (bathroom accessories; aluminum processing and cutting tools; and a special method for sealing together pages in photo albums), and not on works the protection of which was a copyright issue. The laws of intellectual property were not applied in the circumstances of that case because the plaintiffs had not registered the products as required by law. It is for this reason that Greenman suggests in his book that a line should be drawn between those situations in which protection under intellectual property law was ruled out as a result of technical irregularities and those cases in which the product or work itself is the reason why protection was denied - because of certain interests, appropriate policy considerations, etc - and in particular when the enrichment resulted from exploitation of information or data which were already in the public domain. He takes the view that the application of the unjust enrichment laws should be more circumscribed in the latter cases:

"Since these laws have already undergone internal modification in order to strike a balance between opposing public interests, and especially between the encouragement of creativity on the one hand and freedom of speech and information on the other, it would not be appropriate to disrupt these balances by applying the laws of unjust enrichment in this area" (ibid, at p.65)

67. This suggestion is consistent with the approach, recently reinforced by case law, which rejects as undesirable the excessive use of the enrichment laws as a cause of action in areas overlapping with intellectual property law:

"Indeed, only in exceptional cases are the fundamental features of the invention - as characterized by the product, its uniqueness, innovativeness, and the time, human resources and money invested in its development - of such dimensions as to justify tipping the scales in favor of granting relief by virtue of the unjust enrichment laws rather than by relying on the natural and customary application of intellectual property and tort law (Civil Appeal 9568/05 Shimoni v. "Moby" Birnbaum Ltd (unpublished, 25.6.2007 and see the referrals mentioned therein).

68. Nevertheless, since in the present case a cause of action for unjust enrichment also doesn't exist according to the criteria stipulated in the ASYR case, a definitive answer on this question of adapting "the additional element" tests as expressed therein to circumstances in which an idea or information constitute the foundation for a claim based on unjust enrichment, shall have to be put off pending further consideration.

69. In conclusion, it is my opinion that since the fixtures schedules are not protected by copyright and no cause of action exists under the Enrichment Law, the Appellants are not entitled to any relief for the use being made by the Respondent of the information given in those schedules. Therefore, if my opinion is accepted by my colleagues, the entire appeal will be dismissed.

70. The Appellants shall pay the costs of the appeal and the Respondent's legal fees in the sum of NIS 30,000.

Judge

His Honor Mr. Justice N. Hendel:

I agree.

Judge

Her Honor Ms. Justice M. Naor:

The Respondent is making use, as my colleague Mr. Justice Jubran has indicated, of data appearing in the fixtures schedules. I concur in my colleague's assessment that the Appellants are not protected against such use and that they are to pay the costs of the appeal in the amount proposed by my colleague.

Judge

Therefore the Court's decision is as set out in the judgment of Mr. Justice S. Jubran.

Given today, 28<sup>th</sup> Adar 5770 (14.3.2010)

Judge

Judge

Judge

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