

CA 8485/08

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

v.
The Israel Sports Betting Council

The Supreme Court sitting as the Court of Civil Appeals
[25 January 2010]

Before Justices M. Naor, S. Joubran, N. Hendel

Appeal of the judgment of the Tel-Aviv-Jaffa District Court (Judge Z. Brun)
on 2 July 2008 in CC 1022/04.

Facts: The appellants manage the professional football leagues in the United Kingdom, and regularly conduct an annual tournament among the teams in those leagues. As part of this activity, they organize and schedule matches, all of which are listed in schedules (fixture lists) that they publish. The respondent holds exclusive authority within Israel to arrange betting on sports events, and arranges such betting not only on matches played by Israeli teams, but also on matches that are a part of the appellants' tournaments. For this purpose, the respondent lists the appellants' matches on its betting forms, using the information about these matches that is included in the fixture lists.

The appellants filed an action against the respondent in the Tel Aviv District Court, claiming that its use of the information from the fixture lists constituted a copyright violation, or alternatively that the respondent's use of such information gave rise to a claim of unjust enrichment. The District Court denied the claim, and this appeal followed.

Held: Both the old and new Israeli copyright statutes provide for copyright protection only for works that express originality. The case law has interpreted the originality requirement — as it applies to compilation works such as the appellants' fixture lists — by establishing parallel tests, one referring to the level of the author's investment in the work, and the other referring to the degree that the work reflects the author's creativity. The latter test creates a requirement that not only is the author the

“source of the work” but that he has also left an imprint of his spirit on the work. In this case, the investment test had been met, at least at the minimal level which is required. However, neither the selection of the information included in the list (i.e., all the matches in the tournaments) nor the design of its presentation (reflecting nothing other than the most logical arrangement of the basic information) could establish that the required minimal level of creativity was involved in the appellants’ preparation of the lists.

Furthermore, even if the respondent’s use of the fixture lists had amounted to the use of a protected work, there was no violation of the copyright here. The respondent used only some of the matches included in the lists, and only the information required for the purpose of preparing its betting forms.

Regarding the claim for unjust enrichment, such claims are allowed in cases involving uses of intellectual property that do not constitute a copyright violation, but only where the party which is alleged to have unjustly enriched itself has engaged in improper business practices, which is not the case here.

Legislation Cited

Copyright Law, 5768-2007, ss. 1, 4(a)(1), 4(b), 11.

Copyright Act, 1911, ss. 1, 1(2), and 35.

Copyright Ordinance, 1924.

Regulation of Sports Betting Law, 5727-1967, ss. 1 and 11.

Israeli Supreme Court cases cited:

- [1] CA 528/73 *Ettinger v. Almagor* [1975] IsrSC 29(2) 116.
- [2] CA 513/89 *Interlego A/S v. Exin-Lines Bros. S.A.* [1994] IsrSC 48(4) 133.
- [3] CA 360/83 *Struski Ltd v. Whitman Ice Cream Ltd* [1985] IsrSC 40(3) 340.
- [4] CA 23/81 *Hershko v. Urbach* [1988] IsrSC 42(3) 749.
- [5] CA 3422/03 *Krone AG v. Inbar Reinforced Plastic* [2005] IsrSC 59(4) 365.
- [6] CA 2687/92 *Geva v. Walt Disney Co.* [1993] IsrSC 48(1) 251.
- [7] CA 2790/93 *Eisenman v. Quimron* [2000] IsrSC 54(3) 817.
- [8] CA 136/71 *State of Israel v. Ahiman* [1972] IsrSC 26(2) 259.
- [9] CA 559/69 *Almagor v. Gudik* [1970] IsrSC 24(1) 825.
- [10] CA 19/81 *Goldenberg v. Benet* [1982] IsrSC 36(2) 813.
- [11] CA 139/80 *Harpaz v. Ahituv* [1990] IsrSC 44(4) 16.
- [12] CA 8393/96 *Mifal Hapayis v. The Roy Export Establishment Company* [2000] IsrSC 44(1) 577.
- [13] LCA 5768/94 *A.S.I.R. Importing, Manufacturing and Distribution v. Forum Accessories and Consumer Products* [198] IsrSC 52(4) 289.
- [14] CA 2287/00 *Shoham Machines and Dies Ltd v. Harar* (2005) (unreported).
- [15] LCA 371/89 *Leibowitz v. E. and J. Eliahu Ltd* [1990] IsrSC 54(2) 309.

[16] CA 9568/05 *Shimoni v. "Moby" Birnbaum Ltd* (2007) (unreported).

American cases cited:

[17] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991).

[18] *Sony Corp. of America v. Universal City Studios, Inc.*, 417 U.S. 464 (1948).

English cases cited:

[19] *Football League Ltd v. Littlewoods Pools Ltd* [1959] 2 All E.R. 546.

Justice S. Joubran

1. The questions to be decided here are whether the fixture lists of the British football leagues are entitled to copyright protection in Israel, or alternatively, whether the use of these fixtures without the consent of the Leagues constitutes unjust enrichment.

2. Since the appellants are asking for future-oriented declaratory relief, the following discussion will relate both to the old legislative arrangement in the Copyright Act, 1911 (hereinafter: "the old Law") and in the Copyright Ordinance, 1924 (hereinafter: "the Copyright Ordinance"), and the new arrangement in the Copyright Law, 5768-2007 (hereinafter: "the new Law"), which repealed the old Law.

Factual background

3. Appellants 1–4 manage the British football leagues. Each year, the appellants conduct a multi-stage tournament, in the framework of which the teams in each league play against each other. Appellants 1–2 manage the English leagues, comprising 92 teams, and appellants 3–4 manage the Scottish leagues, comprising 42 teams. Appellant 5 — a company established for the purpose of exploiting the Leagues' matches commercially — generates profits from the management of the leagues, primarily from the sale of tickets to matches and from broadcast rights for those matches.

4. The organization of the tournament between the many teams in each league requires the investment of considerable resources and effort — a fact that is not disputed. Each year, after the task of scheduling the matches has been completed, each league publishes, in the media and on various internet sites, the annual fixture lists that include the order in which the football matches will be played, as well as the dates and venues of the matches (hereinafter: "the fixture lists").

5. The respondent is a statutory corporation, and it is the only entity authorized to arrange, in Israel, betting on sporting events. Among other things, the respondent arranges betting on British football matches, and for this purpose it makes use of the fixture lists. The names of the teams that are playing against each other appear alongside the date and time of each match on the forms used for betting on the match results.

6. The appellants' suit in the District Court focused primarily on the argument that the fixture lists constitute a protected literary work under Israeli law, and that the use made of these lists by the respondent for the purpose of betting therefore constitutes a copyright violation. Moreover, according to the appellants, this use was made in bad faith, and the profit generated by the betting therefore constitutes unjust enrichment at the expense of the appellants.

The District Court

7. On 2 July 2008, the Tel Aviv-Jaffa District Court (Judge Z. Brun) dismissed the appellants' suit in a reasoned judgment. The District Court began by answering, in the negative, the question of whether the fixture lists are a protected "literary work". The court noted that the element of originality is the main criterion among the considerations that are weighed with regard to the grant of copyright protection — in the sense that by themselves, effort, time or talent are not enough, no matter how substantial each of these are. Since in this case the selection of matches and their final arrangement in the fixture list lack any degree of originality, they do not meet the required threshold of originality.

8. The District Court further held that the process of the creation of the fixture lists also lacks any minimal degree of creativity, since the order of the matches is set in accordance with functional considerations only, and no interest is served in limiting the use of information about these matches.

9. The judgment also notes that the respondent does not make any use of the fixture lists themselves — including their design and the arrangement of the matches in these lists — but rather, uses only the data that appear in them. The respondent selects the details that it wants and classifies them according to its own criteria. Since there is no restriction on the use of the details of the matches, even were the fixture lists protected by copyright, the use that the respondent makes of the details of the matches would not constitute a violation of the appellants' rights.

10. The appellants' arguments regarding unjust enrichment were also dismissed, on the grounds that the criteria for accepting this cause of action,

such as the creation of unfair competition or a violation of the rules of commerce, are not fulfilled in this case. As the respondent is the only party in Israel that arranges betting on sporting events, there can be no competition between it and the football leagues. Moreover, the interest that betting on British football matches arouses allows the leagues to raise the prices of the broadcast rights and of league-related products, and in this way it indirectly helps to increase the appellants' profits.

The arguments of the parties

11. According to the appellants, the fixture lists are a protected literary work, and the District Court's holding that the degree of originality is the main test for granting copyright protection should be rejected. They emphasize that the work's originality is examined specifically at the stage of its formulation, and they believe that the process of creating and managing the fixture lists meets the required threshold. They also argue that the substantial effort that was invested in setting up the matches is a relevant criterion for determining whether the fixture lists enjoy copyright protection. Additionally, they argue that a high threshold for originality will not allow for the recognition of a copyright in functional works — such as tables and various compilations — that have already been recognized in Israel and in other states as being worthy of protection. According to the appellants, even if the only purpose of the fixture lists is the transmission of information regarding the tournaments, their status is not less than that of tourism guides, train schedules and television broadcast schedules, all of which have been recognized as protected works.

12. Regarding the District Court's determination that the main activity of the Leagues is directed at setting up the matches, and not at preparing the fixture lists as a goal *per se*, the appellants argue that this consideration is not relevant to the question of whether these lists should be protected by copyright.

13. They also refer to the case law from England, where, they argue, similar fixture lists have been recognized as copyright-protected literary works. In circumstances similar to those before us, it has been held that a private company that arranged betting on the results of football matches based on these lists had violated the League's copyright. They argue that various English and American decisions that have granted copyright protection to works of a similar nature, such as television broadcast schedules and a database of golf results, support the claim that the fixture lists are also covered by copyright protection.

14. Further to these claims, the appellants believe that the respondent makes frequent use of a substantial and key portion of the fixture lists, by integrating the league matches — some of them particularly “attractive” matches — into their betting forms. Consequently, they argue, the respondent is violating their copyright.

15. The appellants’ alternative argument deals with a claim of unjust enrichment. The respondent’s profits from the betting are, according to the appellants, produced in bad faith, and they are entitled to relief on the basis of an unjust enrichment claim, even if it has not been proven that any damage or injury has been caused to them. Even if the respondent holds an exclusive license in Israel for the arrangement of betting on sporting events, this would not necessarily signify that it is not required to pay any royalties whatsoever to the appellants as the organizers of the matches and of the lists.

16. Counsel for the respondent agree with the judgment of the District Court. They argue that the fixture lists do not satisfy the originality requirement, since they consist of nothing other than a simple and sequential arrangement of the Leagues’ football matches. They refer to the private member’s bill currently before the Knesset, according to which commercial entities that make use of the names of teams for the purposes of gambling would be required to pay for such use to the associations and corporations that organize the matches. They argue that this bill makes it clear that until the statutory situation is changed, the respondent is not required to make payments of this type, and certainly not pursuant to the laws of copyright.

17. Counsel for the respondent also note the importance of the distinction made by the District Court between the effort and labor invested in the organization of the football matches themselves, and the effort involved in preparing the fixture lists as a “literary creation”, after the matches have been organized. The respondent agrees that the process of organizing tournaments does involve a substantial investment; however, the same is not true with regard to the process of preparing the fixture lists, which requires nothing more than producing a chronological list of the matches in each league, without any significant investment of effort.

18. The respondent also argues that the “merger doctrine”, which originated in American law, applies to the circumstances of this case. According to the doctrine, when an idea can be expressed in only one way, that expression will not be granted copyright protection.

19. Counsel for the respondent also argue that even if the fixture lists are recognized as a protected work, the use made of them is only partial, such

that only a few of the league matches appear on the betting forms, and the order in which they appear on the fixture lists is not taken into account.

20. Regarding the demand for compensation based on the unjust enrichment claim, counsel for the respondent argue that this claim violates the balance established in the law of copyright between the public interest in providing incentives for creativity and the right to freedom of expression and of information. Any application of unjust enrichment law to the use of information that is not protected by copyright must be very limited, and it is not justified in the circumstances of this case. There is no business competition between the appellants and the respondent, and the use of the fixture lists for the purpose of the betting even gives rise to a certain “cross-fertilization” of each side’s interests.

Deliberations

21. The issue of the appellants’ moral rights in the fixture lists was not raised in the parties’ pleadings, and the deliberations will therefore focus on their “economic” rights only. (On the nature of moral rights, and the distinction between these rights and “economic” copyright, see chapter G of the new Law; CA 528/73 *Ettinger v. Almagor* [1], at p. 118; CA 513/89 *Interlego A/S v. Exin-Lines Bros. S.A* [2], at p. 160; S. Portnezy, *Copyright Law* (3rd ed., 2008), at pp. 1137 – 1197.) The issues to be decided in this case relate first of all to the question of whether the Football Leagues’ fixture lists should be included within the category of copyright-protected works, according to the criteria established for this purpose under Israeli law. A positive answer will necessitate an examination of the nature of the use that the respondent makes of these lists, and whether it reaches the level of a violation of the appellants’ copyright.

22. The entry into force of the new Law did not change the Israeli law relating to this matter. The new Law anchors the rules that have been developed in the case law to date, and the outcome of this discussion is therefore applicable to both the previous statute and the current legal arrangement.

Copyright in the fixture lists

23. Among the various works to which the old Law refers, copyright protection is granted, by virtue of s. 1 of that Law, to an “original literary work”. Section 35 provides that the term “literary work” includes tables and compilations. Section 7B of the Copyright Ordinance qualifies this protection and establishes that there can be no copyright in an “idea, fact or data, by themselves”, and that only the manner in which these are expressed may be

the subject of copyright. There are similar definitions in the equivalent to this arrangement in the new Law. Section 4(a)(1) of the new Law provides that there will be copyright protection for, *inter alia*, an original creation that is a literary work. Section 1 of the new Law includes a table or a compilation of data within its definition of a “literary work”. Finally, s. 5 provides that copyright will not apply to an idea, fact or data, but only to the manner in which these are expressed.

24. The case law development of the arrangements in the old Law and in the Copyright Ordinance fashioned the criteria to be applied in determining whether copyright should be granted to a variety of works, including tables and compilations. In light of the nature of the work which is the subject of the appeal before us — a compilation of the details of the British League matches, in tables — it is more appropriate for it to be judged as a work in the compilation category, although in the circumstances before us, the possible differences between a compilation and a table would be of no consequence.

25. Among the conditions for the recognition of copyright, the criteria relevant to our case are those relating to the “creativity” of a work and to the “investment” therein — meaning that we must determine the proper interpretation of these criteria and the relative weight that each should be given, in dealing with a work that consists of a compilation of data, even if the data themselves are not protected by copyright.

26. These criteria developed against the background of the interpretation of the “originality” requirement, which had already been established in the old Law (after it was amended due to the accidental omission of this requirement from the original translation of the English law into Hebrew, see CA 360/83 *Struski Ltd v. Whitman Ice Cream Ltd* [3], at p. 347), and was included in the new Law as well, as a key condition for copyright protection. The first approach to its interpretation — dubbed the “investment approach” in *Interlego A/S v. Exin-Lines Bros. S.A.* [2] (and called the “sweat theory” in the United States) — is based on the application to intellectual property of the rationales that underlie the protection of “tangible” property. According to this view, since it would be unfair to allow a person to enjoy the fruits of another person’s labor without permission or the payment of consideration, the level of the creator’s investment in the work should be emphasized as a condition of fulfillment of the originality requirement.

27. The second approach — the “creativity approach” — focuses on the public interest in encouraging the creation of public goods, through the

expansion and compensation of the world of expression. The level of effort invested in a work does not guarantee that the output makes any contribution whatsoever to society, and therefore, this approach focuses on the nature and character of the investment, and not on its quantity. (Regarding these two approaches, see the extensive discussion in *Interlego A/S v. Exin-Lines Bros. S.A.* [2], at pp. 161–164, 167–168, and the sources cited there.) It should be noted that in the case law, the “creativity” test is also called the “originality” test; however, in accordance with the conceptual division outlined in *Interlego A/S v. Exin-Lines Bros. S.A.* [2], and for the purpose of avoiding confusion with the “originality” requirement established in the statutes, this test will be referred to hereinafter as the “creativity test”.

28. Israeli case law recognizes the two tests — both the creativity test and the investment test — as conditions for the fulfillment of the statute’s creativity requirement (see *Interlego A/S v. Exin-Lines Bros. S.A.* [2], at p. 173), and they are therefore important in this case as well.

Creativity and investment — the nature of the tests

29. It should be noted that as a rule, these two tests do not establish a particularly high threshold for those seeking to acquire copyright protection for their works (*ibid.* [2], at p. 170), and compilations are not an exception to the rule. In CA 23/81 *Hershko v. Urbach* [4], at p. 759, the Court went further, noting that:

‘The degree of originality that is required for the work to be protected pursuant to the copyright laws will differ from case to case, and in some cases could be minimal and even valueless.’

30. Although this approach was not adopted in the same words in later case law, it certainly reflects the understanding that it is not necessary to be overly strict regarding the grant of copyright protection. Thus, it has been held that the creativity condition does not include a requirement of innovation in relation to existing works, and that the meaning of the term “originality” in the statute, with regard to this condition, does not refer to the work itself but rather to the author or compiler, in the sense that the author or compiler must be the “origin” of the work:

‘[It is] not [necessary] for the work [to be] the expression of a novel or innovative idea or invention, but that the work must not be copied from another work, and its source must be its creator or author’ (*Struski v. Whitman Ice Cream* [3], at p. 346).

Or, as my colleague Justice Rubinstein has written: “original — meaning, independent” (CA 360/83 *Krone AG v. Inbar Reinforced Plastic* [5], at p. 378).

31. Nevertheless, it is obvious that the positive aspect of this creativity-independence requirement should not be utterly dismissed. The case law clearly indicates that the fact that a work was independently produced and has not been copied will not necessarily signify that it is protected, and that even if the author or compiler is the source of the work, the creativity requirement may not have been fulfilled. A work that makes use of only general elements and is not based on an earlier work will indeed pass the originality bar of the law relatively easily (see *Interlego A/S v. Exin-Lines Bros. S.A.* [2], at p. 173). On the other hand, the work must contain some form of the author’s or compiler’s own imprint — even if at times this may be only minimal. It must be the “fruit of the creator’s intellectual labor” (*ibid.* [2], at p. 378), and it must, at the least, reflect “a very minimal level of personal expression” (CA 2687/92 *Geva v. Walt Disney Co.* [6], at p. 257. See also CA 2790/93 *Eisenman v. Quimron* [7], at p. 830.)

32. As noted above, one of the clear purposes of copyright is to provide incentives to potential authors to publish their works, in order to enrich the world of expression based on the existing facts, data, and ideas. The recognition of copyright protection for works that include no expansion of the existing forms of expression would contradict this said purpose. Therefore, copyright protection will not be granted even to works that are not copied, when —

‘The final work makes use of things that are simple, obvious and known, which are in the public domain, such as a circle, or a simple line’ (*Interlego A/S v. Exin-Lines Bros. S.A.* [2], at p. 171).

33. A further distinction which can be of use in implementing the creativity test is that the test does not focus on the final product, but rather on the process of its preparation, and examines the degree of creativity with which the author or compiler endowed the creation during the stages of its formation. Pursuant to this rule, even if the work in its final format is absolutely identical to a different protected work or does not indicate any creativity or investment, it could be entitled to protection due to the creator’s contribution in the process of its formation (*ibid.* [2], at pp. 170-171, 173; *Eisenman v. Quimron* [7], at p. 830. See also the discussion below).

34. As for the investment test — its interpretation is not disputed and its implementation is simple. According to this test, “an expression regarding

which copyright protection is sought ... must be the product of a minimal investment of some type of human resource” — time, labor, ability, knowledge, etc. (See *Interlego A/S v. Exin-Lines Bros. S.A.* [2], at p. 173.)

Originality and investment — the relationship between the two and the importance of each

35. The question of the importance of these two tests and of the relationship between them has already been elucidated in Israeli case law. In *Interlego A/S v. Exin-Lines Bros. S.A.* [2], President (ret.) M. Shamgar discussed the various trends that have developed over the years in English and American case law regarding the relationship between the two tests and their weighting in the protection of various works. The decision in that case refers to rules that placed the level of investment, specifically, at the center of the originality requirement, allowing for the erosion of the creativity requirement. Thus, one approach tended towards invoking the level of the investment in the work as an indicator of the presence of creativity, and another held that significant efforts would compensate for a lack of creativity and would, by themselves, satisfy the originality requirement (*ibid.* [2], at p. 168, 169-170, and the sources cited there). Indeed, the discussion in CA 136/71 *State of Israel v. Ahiman* [8] indicates that this Court has been willing to implement this latter conception, by using the investment test only. In that case, the Court examined the possibility of granting copyright protection to income tax withholding tables, and held as follows:

‘Although, as is known, there is no copyright in an idea only, there can be a copyright in a special manner of preparation or design chosen by the compiler of the tables in order to make the use thereof easier, *if special thought, labor or skill were invested in inventing the plaintiff’s method*’ (*ibid.* [8], at p. 261, emphasis added, S.J.)

36. Nevertheless, Israeli law has, in the end, accepted a different approach, which conditions copyright protection on the presence of a minimal degree of creativity, and rejects protection of a work based purely on investment. This approach is based on the leading rule established in the United States in *Feist Publications Inc. v. Rural Telephone Service Company* [17] (hereinafter: “the *Feist* rule”). (See also the expanded discussion of the rule, below.) The *Feist* rule was expressly adopted in *Interlego A/S v. Exin-Lines Bros. S.A.* [2], and has since then been followed in our case law. President Shamgar justified the adoption of the rule as follows:

‘In light of the purpose of the copyright laws, as presented above, *clearly the conclusion is that investment alone is not sufficient to*

justify the grant of copyright protection to an expression. This conclusion relies both on the fact that the copyright laws constitute a balance of competing societal needs, and on the scope of the protection granted to the holder of copyright. *The balancing function of the law stems from the fact that the grant of copyright protection to a particular expression limits possible future expressions. An approach that views the right as stemming from the investment per se is not sufficiently sensitive to this important balance, which forms the basis of the copyright law.* The “investment” approach is, indeed, a standard approach for the justification of tangible property law, and there are those who see it as appropriate for intellectual property law as well (T. Black, *Intellectual Property in Industry* (London, 1989) at p. 70). But it appears that the difference between the two areas does not allow for its adoption in the intellectual property field. Expansion of the world of expression is important not only in terms of the self-expression of the creator of the expression, but also with regard to the world of expression of the entire public and all of society. Ownership of the fruit of the tree is not the same as ownership of seeds from which, in the future, other trees will grow. In both cases, the grant of ownership limits the ability of the rest of the world to exploit it in the present; when we speak of ownership of the seeds, however, there will also be ramifications with respect to the variety and quantity of the trees in the future; and in the case of ownership of an expression, there are far-ranging ramifications for the future world of expression. With regard to these matters, not only the aspirations of individuals must be balanced: the good of society as a whole must be considered (*Sony Corp. of America v. Universal City Studios*, [18], at p. 429). The subject matter of intellectual property is a cushion for the realization of human aspirations, but this is also an area in which humanity’s future aspirations and horizons are developed. *Great importance therefore attaches not only to providing compensation for investment but also to the degree of restriction on future development that the grant of copyright is likely to cause’* (*ibid.* [8], at p. 165 (emphasis added, S.J.)). See also, *ibid.* [8], at p. 169; T. Grinman, *Copyright* (2nd ed., 2003), at p. 121.)

37. In *Eisenman v. Quimron* [7], this Court approved this ruling, holding as follows:

‘Originality is the main thing, and the investment of effort, time or skill is not sufficient to justify copyright protection’ (*ibid.* [7], at p. 829; see also p. 830, which mentions the approach whereby investment alone may indicate the existence of creativity, although that approach is not actually applied in the decision).

38. Thus, we are now faced with a clear rule, according to which both the creativity and the investment tests are necessary conditions for granting copyright protection, but each of them by itself is not sufficient. While Israeli law construes both tests rather narrowly — as we saw above — they are cumulative and parallel tests, and a party claiming that a work is subject to copyright protection must show that both tests have been met. A high level of investment in the creation cannot compensate for the absence of creativity, and vice versa. Since the investment test is generally easily met, the creativity test is the one that will, ultimately, determine the question of whether the work satisfies the originality test in the statute. The rules on which the appellants’ counsel rely, including the rule in the British judgment in *Football League Ltd v. Littlewoods Pools Ltd* [19]), which recognize copyright for football fixture lists, have not been adopted in Israeli case law.

Creativity and investment in a compilation-type literary work

39. We will now examine how these tests are applied with respect to a compilation-type literary work. First, it is important to note that even when the content of the compilation is not protected by copyright — in that it is composed of ideas, facts, news, etc. — and the general public is therefore permitted to make use of such content, this does not signify that the compilation work cannot enjoy any protection at all:

‘The fact that the “building blocks” that served as the material used by the creator were in the public domain has nothing to do with the question of whether the creator can benefit from copyright protection for his work’ (*Eisenman v. Quimron* [7], at p. 828).

40. It is understood that data, facts or ideas will not become protected even after they are included in any type of compilation (compare, *Eisenman v. Quimron*, *ibid.* [7]). Copyright protection is granted in these cases to the manner in which the compiled details are processed and the manner in which they are presented, and not to the details themselves. Naturally, the fulfillment of the statutory requirement of originality, too, is expressed in the examination of the external characteristics of the compilation’s contents:

‘Although, as is known, there is no copyright protection for an idea by itself, such protection can be given to a unique manner of

preparation or design . . . and it makes no difference that the “raw material” for the composition of the tables was in the public domain’ (*State of Israel v. Ahiman* [8], at p. 261).

‘We have seen that compilation and preparation can fall within the definition of a “literary work” as defined in the statute, and that the question of whether a work is entitled to copyright protection is determined according to the degree of originality that it contains’ (*Eisenman v. Quimron* [7], at p. 831).

41. In the new Law, these rules were expressly anchored in s. 4(b), according to which the “originality of a compilation is the originality in the selection and arrangement of the works or of the data embodied therein.” Although “selection” of the data was not expressly mentioned in the case law that preceded the new Law, it appears that the new Law does not contain any legal innovation and provides a clarification only, and, even prior to its enactment, the Court would have looked for the required creativity on the basis of the manner in which the information was selected. Creativity in the selection of the data is an alternative, not cumulative, condition for the requirement of originality in the arrangement of the data. (See, on this matter, the explanatory notes to the Copyright Bill, 5765-2005, Draft Laws 196, 1120, and the reference to s. 10(2) of the TRIPS Agreement, which refers expressly to “. . . selection *or* arrangement of their content . . .” (emphasis added, S.J.). For the text of that agreement, see http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1.)

42. In light of the above, the investment and the creativity tests examine two main characteristics of a compilation-type of literary work: the manner in which the data in the work were selected, and alternatively, the manner in which they are arranged and their design within the work. The Court has previously examined two types of compilations, and has recognized both of them as meriting copyright protection. In one case — *State of Israel v. Ahiman* [8] — the Court examined originality in the context of income tax withholding tables. However, as we have seen above, the ruling that the tables were entitled to protection was based on the investment test alone, and the case is therefore not helpful here. In the second case — *Eisenman v. Quimron* [7] — the Court faced the question of whether a person performing the following acts would be entitled to copyright in the entire text: deciphering of an ancient scroll through the assembling, location and arrangement of approximately one hundred of its scraps, filling in the missing parts of the scroll and solving the content written in it. The decision

in that case focused on the originality involved in the *process* of deciphering the scroll (see the above discussion regarding the importance of examining the process of preparing a work) and noted that the restoration of the text could have been carried out in a variety of ways, that the reconstruction of the text could have been carried out in a number of ways, and that the filling in of the missing pieces of the scroll was the fruit of the researcher's thought process, and was not necessarily dictated by the pieces that had been found. The parameters used in that decision for applying the creativity test were the researcher-compiler's knowledge, expertise, and imagination.

'The layers of the work cannot be separated from each other, and they should be seen as one work of creation. An examination of the work, with all its layers, as a single piece, reveals undisputed originality and creativity. Quimron's work was therefore not technical, "mechanical" work, like simple physical labor, the results of which are known in advance. The spirit, the "extra soul" that he put into the pieces of the scroll, which transformed the pieces into a living text, do not fall within the boundaries of an investment of human resources only, in the sense of sweat, within the meaning of "the sweat of a man's brow." These were the fruits of a process in which Quimron used his knowledge, expertise and imagination, exercised judgment and chose between different alternatives' (*ibid.* [7], at p. 833).

43. American case law includes many discussions of copyright protection for compilations. The first comparison that should be drawn, however, is with the case in which the above-mentioned *Feist* rule was developed, both because Israeli law has adopted its conclusions, and, even more importantly, because the conclusions reached in that decision were based on a set of facts which is similar to the set of facts in the case before us.

44. In that case, the United States Supreme Court dealt with an action filed by a company that provided telephone services in several areas, in which the company sought to obtain copyright protection for a telephone directory that it published for its customers. The telephone directory (in the parts that were the subject of the dispute) included a list of the customers' names in alphabetical order, along with the names of the cities in which they lived and their telephone numbers. Similar to the law in Israel, the United States Supreme Court used, as the starting point of its analysis, the assumption that the names of the company's customers and their details, by

themselves, were not protected by copyright, in that they were purely facts, but that the manner in which a compilation of the customers' details had been designed could, as a matter of principle, be entitled to protection. In that case, the United States Supreme Court emphasized the rule that this Court adopted in *Interlego A/S v. Exin-Lines Bros. S.A.* [2], whereby creativity is an essential condition for determining the work's originality:

'As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that *the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever*. The standard of originality is low, but it does exist' (*Feist v. Rural Telephone Service Company* [17], at p. 362, emphasis added, S.J.).

45. The application of the creativity test to the preparation of the telephone directory led the United States Supreme Court to the conclusion that this particular compilation of the company's customers' details was not entitled to copyright protection because it lacked any modicum of creativity, either in the selection of the details that appeared in the telephone directory or in the manner in which they were arranged and designed.

46. An examination of the process of creating the directory indicated that there had been no sorting of the data that was included in it. The records in the directory simply included all the company's customers and contained only the most basic information pertaining to them:

'It publishes the most basic information — name, town, and telephone number — about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original' (*ibid.* [17], at pp. 362-363).

47. The arrangement of the records could not have been more trivial. The customers' names had been arranged in alphabetical order and there was actually no real alternative to that arrangement:

'Nor can Rural [the telephone company that had prepared the directory] claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the

task of alphabetizing the names itself. *But there is nothing remotely creative about arranging names alphabetically* in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course... *It is not only unoriginal, it is practically inevitable* (*ibid.* [17], at p. 363, bracketed words and emphases added, S.J.).

48. Now that we have examined the nature of the originality requirement in Israeli law and we have noted the nature of the tests regarding creativity and investment in works that are entitled to copyright protection in general, and to compilations in particular, we will consider the application of these rules to the case before us, and we will examine whether the fixture lists merit copyright protection.

Copyright for the fixture lists — from the general to the particular

49. The British Leagues' fixture lists include all the football matches played in the annual tournament, and those matches only. The information about each match includes the names of the teams that are playing and the date and venue of the match. The matches are arranged in chronological order, according to the date and hour at which they will be played. On each date, the matches being played are presented alphabetically according to the name of the home team. The letter "v" (versus) appears after the name of the home team and the name of the guest team in that match appears after the "v". After that, the venue at which the match is being played appears within a set of parentheses. The records appearing in the lists are arranged in rows, and they include no design or other special arrangement.

50. It should be noted that an examination of the presence of originality is relevant here only to the process of creating the compilation itself, and certainly not to the work involved in preparing the tournament, nor to the determination of the order of the matches in accordance with the constraints of the teams or the stadiums, nor in accordance with other functional considerations. The selection of the information included in the fixture lists is based on the existing data regarding the details of the matches. The preliminary selection of the teams and the venues of the matches and the coordination among all the parties, with the ultimate aim of holding the football tournament, all relate to the preliminary stage, the stage of the creation of these details. As such, all the creativity and investment that find expression in the organization of the tournament are in no way relevant to the originality requirement in this case. Consideration of these two elements here would be comparable to a consideration of the creativity and efforts invested

by the company that prepared the telephone directories for its customers in *Feist v. Rural Telephone Service* — not only in preparing the directory itself, but also in laying down the telephone infrastructure and connecting customers to it.

51. The investment test is not an obstacle here. It also appears that even if no effort was required in selecting the matches to be included in the lists, the preparation of the records involved at least the minimal effort that satisfies this requirement. On the other hand, I believe that the creativity test has not been met in this case, in which no selection was made among the details that were included in the lists — and in any event, the argument that the selection involved a degree of creativity was not raised before the lower court — nor did any party carry out any selection with respect to the manner in which the details were organized. Therefore, not only is the information appearing in these lists itself not protected by copyright, there is also no copyright protection for the fixture lists as a single unit, and for the manner of the presentation of the matches.

52. It is true that the fixture lists do not include details regarding all the matches that are played during that year, and that they do not include any of the matches that are played in Great Britain other than those that are played as part of the tournament. Therefore, it would seem that there is some “selection” in the information that appears in the lists. Nevertheless, this “selection” does not include any calculated process of data filtering. Even though the “source” of the selection is the author-compiler as required in *Krone AG v. Inbar Reinforced Plastic* [5], this selection includes no substantive expression whatsoever — not even at a most minimal level — of the author-compiler’s spirit and personality, as the rules established in *Interlego A/S v. Exin-Lines Bros. S.A* [2] and in *Geva v. Walt Disney Co.* [6] emphasize. This is also true in light of the fact that we are not dealing here with a “classic” type of literary work, but rather with a specialized table of data. It is obvious that no expertise or imagination was required in this selection (see the test described in *Eisenman v. Quimron* [7]), and that the information that is presented regarding each match is rather trivial. Therefore, as was held in *Feist v. Rural Telephone Service*, even if the assembling of the Leagues football matches in the lists did include a process of selection — it was not a “creative selection” and it therefore lacks any originality.

53. The same conclusion can be reached in relation to the form of the arrangement and the design of the information regarding the matches of the Leagues. It appears that the most logical manner (if not the only logical

manner) for presenting all of the matches taking place in the framework of the football tournament would be in the order in which they are presented in the lists, i.e., according to the dates on which the matches are being played and obviously with an indication of the names of the teams and of the site at which they will be played. The design of the details — the presentation of each match by indicating the name of the home team and then the name of the guest team, divided by the letter “v”, and the placement of the name of the venue of the match in parentheses — lacks any scrap of uniqueness or personal expression. Thus, according to the rules mentioned above, the arrangement of the information also lacks the necessary degree of creativity in order to satisfy the originality requirement.

54. The conclusion to be drawn from this is that according to Israeli law, anyone may make any use of the details of each match and of the match itself (as they are all unprotected facts) and of the details of all the matches put together as a bloc (since the manner in which the matches were selected is not protected) and of the manner in which these matches are presented in the lists (since the design of the lists is also unprotected) — and no such use will require permission from the appellants, nor any payment whatsoever to them.

55. Once this conclusion has been reached, there is no need to discuss the question of the violation of copyright. As a side point, I will add briefly that even if I believed that the compilation did satisfy the originality requirement both in terms of the investment in its preparation and in terms of the creativity contained in it, this would not be sufficient to accept the appellants' claim. Even if the compilation that was the result of the selection of the matches and the design of the lists were protected by copyright, the respondent did not copy them and did not publish them. Instead, it used only the facts presented in the compilation and these, as stated, are not protected.

56. Moreover, as can be seen in the appellants' tomes of exhibits, the design of the tables in which the respondent publishes the details of the matches is completely different from the arrangement in the lists. This design publicizes the details of only some of the British Leagues' matches rather than the details of all of them, and those that are publicized appear alongside the details of football matches played in Israel and in other countries. Under these circumstances, even if it were assumed that some of the features of the compilation are protected by copyright, it is certain that they have not been copied in full, nor has a significant part of them been copied. Regarding this “significant part” requirement, see s. 11 of the new Law, s.1(2) of the old Law (which uses the phrase “substantial part”), and CA 559/69 *Almagor v.*

Gudik [9], at pp. 830-831; CA 19/81 *Goldenberg v. Benet* [10], at p. 823; CA 139/80 *Harpaz v. Ahituv* [11] at p. 21; CA 8393/96 *Mifal Hapayis v. The Roy Export Establishment Company* [12], at pp. 591-593; CA 360/83 *Krone AG v. Inbar Reinforced Plastic* [5], at p. 381-382.

Unjust enrichment

57. Similarly, I believe that the appellants' arguments regarding the unjust enrichment claim should be rejected as well. The case law of this Court has established, as a basic principle, that the laws of unjust enrichment can also be applied, in certain circumstances, to areas which, as normally defined, should be subject to regulation by the laws of intellectual property. This rule was established by the majority opinion (and against the dissenting opinion of Justice England) in LCA 5768/94 *A.S.I.R. Importing v. Forum Accessories and Consumer Products* [13]:

'The various opinions in the *A.S.I.R.* case, although they do not create a uniform rule, clearly indicate that it is possible, in certain circumstances, to invoke the laws of unjust enrichment to protect ideas that are not protected by intellectual property law' (CA 2287/00 *Shoham Machines and Dies Ltd v. Harar* [14], at para. 10).

Regarding Justice England's position that the absence of a cause of action based on intellectual property will rule out the ability to make a claim based on unjust enrichment, but leaves open the possibility for a claim based on liability law, see *A.S.I.R. Importing v. Forum Accessories* [13], at pp. 445-446, and see also O. Groskopf, *New Horizons in Law — Protection of Competition through the Law of Unjust Enrichment* (2002), at pp. 309-312).

58. The unjust enrichment cause of action is anchored in s. 1(a) of the Unjust Enrichment Law, 5739-1979 (hereinafter: "Unjust Enrichment Law"):

Duty to make restitution	1(a)	A person who has received an asset, service or other benefit (hereinafter: "the beneficiary") other than pursuant to a legal right, which has come to the person from another person (hereinafter: "the provider"), must make restitution to the provider with regard to what has been received, and if restitution in kind is not possible or is unreasonable, the beneficiary must pay the provider the value of
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what has been received.

59. The section sets three conditions for this cause of action to arise: that there has actually been enrichment; that the beneficiary has “received an asset, service or other benefit ...”; that the said enrichment has “come” to the beneficiary from the provider and at the provider’s expense; and that the beneficiary’s enrichment at the expense of the provider has been “other than pursuant to a legal right.” The case law has added the requirement of “an additional element” with respect to the third condition, for the purpose of proving the cause of action:

‘The third element, according to which the question of whether the enrichment was “other than pursuant to a legal right” is examined, indicates that the fact that there was enrichment is not sufficient, *per se*, to give rise to an unjust enrichment claim. It is also not sufficient for the enrichment to have come from the provider and for it to have been at the provider’s expense. For the unjust enrichment claim to arise, another element is necessary. This additional element focuses on the nature of the enrichment’ (LCA 371/89 *Leibowitz v. E. and J. Eliahu Ltd* [15], at pp. 321-322).

60. In *A.S.I.R. Importing v. Forum Accessories* [13], all the justices agreed that “imitation or copying of a product ‘*per se*’, in the absence of an intellectual property right in the product pursuant to the statutory law ... does not grant a right to restitution under the Unjust Enrichment Law.” They also agreed that “a condition for a right to restitution is that an ‘additional element’ compounds the copying or the imitation” (*ibid.* [13], at p 449). However, in that case, the Court dealt at length with, and offered differing interpretations of, the nature of the “additional element” and the manner in which it should be properly applied in circumstances that are ordinarily regulated by intellectual property law, and in which an action brought pursuant to intellectual property law has been dismissed.

61. According to Justice Strasberg-Cohen’s suggestion in that decision, the additional element is present when there has been bad faith conduct (*ibid.* [13], at pp. 431-432). President (ret.) Barak accepted this interpretation, but offered a more focused test, according to which unfair competition in violation of commercial practice will fulfill the “additional element” requirement (*ibid.* [13], at pp. 474-477). Deputy President (ret.) Levin and Justice Or also adopted the unfair competition test. (For additional tests that were not accepted by the majority opinion, see Justice I. Zamir’s “special severity” test, *ibid.* [13], at p. 492; Justice Cheshin’s “quasi-tort” test, *ibid.*

[13], at pp. 371-373. See an extensive discussion of the various approaches and the scope of the application of the unjust enrichment laws in cases of this type in *Shoham Machines and Dies Ltd v. Harar* [14], at para. 11.)

62. In that judgment, President Barak listed a number of considerations that must support a determination as to whether this test has been met under the circumstances, and whether it substantiates the claim of unjust enrichment: the importance, the innovativeness and uniqueness of the work from which the beneficiary was enriched; the effort that was invested in its preparation; the number of times that the work was copied, and the frequency of such copying; the beneficiary's awareness of the fact that the work was copied; in cases of products with a functional use — the existence of reasonable alternatives for manufacturing similar products; and the results of the copying and the degree of its impact on the provider (*ibid.* [13], at pp. 477–479. See also Justice Cheshin's opinion, *ibid.* [13], at pp. 431–432, which focuses on two of the tests, and *Shoham Machines and Dies Ltd v. Harar* [14], at para. 12.)

63. In the case before us, the possibility of determining the presence of an “additional element” according to the unfair competition test can be immediately dismissed due to the respondent's status as the only body authorized to arrange betting on the results of sports games and competitions in Israel (see ss. 1 and 11 of the Regulation of Sports Betting Law, 5727-1967). The issue of unacceptable commercial competition is not relevant in this case, because *ab initio* there cannot be any competition between the respondent and the appellants. Therefore, arrangement of the betting cannot in any way harm the appellants' existing or potential business or profits, even though the details relating to the British Leagues matches are based on the fixture lists.

64. As an aside, I would comment that even if the betting were not under the respondent's exclusive authority as a statutory body, the respondent's use of the details of the British Leagues' matches would not amount to unfair competition. The preparation and publication of the fixture lists are indeed very important for the purpose of informing the public of the program for the football tournament, but the copying of the work for the purpose of arranging the betting can only help to publicize that program. It is highly doubtful that there is any innovation and uniqueness contained in these lists, as we have seen above. Additionally, the effort invested in the preparation of the lists — as distinguished from the undoubtedly significant investment that was involved in preparing the tournament and setting up the matches — was

rather minimal. On the assumption that the appellants, too, can arrange betting on the Leagues' matches, it appears that requiring the respondent to pay royalties to the appellants for the use of the details of the matches would actually create unfair competition on the part of the appellants, who will in that case hold a monopoly on the information.

65. The respondent has not engaged in any improper behavior that justifies the payment of royalties to the appellants, even according to the broad good faith test established in *A.S.I.R. Importing v. Forum Accessories* [13]. The respondent is not abusing its authority and it is not denying the appellants any other indirect profits for broadcast rights for the matches or from the sale of accompanying products relating to the football teams. It is not impossible that the gambling actually increases the awareness of the British Leagues' matches in Israel. In light of this, there is no basis for invoking an unjust enrichment claim in the circumstances of this case. Furthermore, obligating the respondent to pay royalties would lead to the unjust enrichment of the appellants. In view of the nature of the respondent's activity and its exclusivity in relation to the arrangement of betting, the other tests that were proposed in *A.S.I.R. Importing v. Forum Accessories* [13] regarding the interpretation of the "additional element" are not relevant here. Therefore, the appellants' arguments with respect to this issue must be rejected as well.

66. As a marginal point I will comment that the discussion in *A.S.I.R. Importing v. Forum Accessories, ibid.* [13] related to a number of products that should have been regulated by patent and industrial design laws (bathtub fixtures; equipment for processing and cutting aluminum; and a unique manner of attaching the pages in a photo album), and not to works whose protection would be determined by copyright. The intellectual property laws did not apply in those circumstances, as the plaintiffs in that case had not registered the products as required by law. In light of this, Grinman proposes that a distinction be made between situations in which protection under intellectual property law has been denied due to technical defects, and cases in which the protection has been denied due to the essence of the product or the work — in light of specific interests, or because of proper policy considerations, etc. — and particularly when the enrichment occurred in relation to information or data that are in the public domain. His position is that the application of the unjust enrichment laws must be more limited in the latter situation:

‘Since these laws already involve an internal balancing between the conflicting public interests, and particularly a balancing between the interest in encouraging creative work and the public interest in freedom of expression and of information, it would be wrong to apply the laws of unjust enrichment to this area in a manner that would violate this balancing’ (Grinman, *Copyright, supra*, at p. 65).

67. This proposal is consistent with the position — recently fortified in the case law — that the overuse of causes of action based on unjust enrichment in areas that overlap with intellectual property law is undesirable:

‘Indeed, only in unusual cases will the elements of the inventiveness that characterize the product, its uniqueness, innovativeness and the resources of time, money and human effort that were invested in its development be of a degree that justifies the tipping of the scales in favor of the grant of relief pursuant to the laws of unjust enrichment, and not pursuant to the natural and accepted coverage of the intellectual property laws and the laws of tort’ (CA 9568/05 *Shimoni v. “Moby” Birnbaum Ltd* [16], and the sources cited there).

68. Nevertheless, since in this case the unjust enrichment claim would not arise even under the criteria established in *A.S.I.R. Importing v. Forum Accessories* [13], we leave for further examination the question of adapting the “additional element” tests established in that judgment to circumstances in which an idea or information constitutes the basis for the unjust enrichment claim.

69. In conclusion, I believe that the appellants are not entitled to any relief with respect to the use made by the respondent of the details in the fixture lists, because these lists are not protected by copyright and because of the absence of a claim based on unjust enrichment. Therefore, if my opinion is accepted, the appeal in all its parts must be denied.

70. The appellants will bear the costs of the appeal and attorneys’ fees for the respondent, in the amount of NIS 30,000.

Justice N. Hendel

I concur.

Justice M. Naor

The respondent, as noted by my colleague Justice Joubran, makes use of the details that appear in the fixture lists. I agree with my colleague’s

conclusion that there is no protection for this use, and that the appellants must bear the costs, as proposed by my colleague.

Appeal denied.

28 Adar 5770.

14 March 2010.