

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO.2005CD-002

BETWEEN	CABLE & WIRELESS JAMAICA LIMITED	CLAIMANT
AND	MOSSEL (JAMAICA) LIMITED (T/A DIGICEL)	1ST PARTY AFFECTED
AND	OCEANIC DIGITAL JAMAICA LIMITED	2ND PARTY AFFECTED

Dave Garcia and Sanya Young for the Claimant instructed by Myers Fletcher & Gordon

Paul Beswick, Dianne Daley and Annaliesa Chapman for the 1st Party Affected instructed by Ballentine Beswick & Co.

Harold Brady for the 2nd Party Affected instructed by Brady & Co.

Heard: September 27th and 28th, 2006, January 5th, 2011.

Cor: Rattray, J.

1. In the 1970's when Samora Machel uttered the memorable words, "a luta continua", he perhaps would not have envisioned their applicability to the expanding telecommunications landscape in Jamaica. However, nowhere are those words more appropriate, as the clash of the telecommunications titans Cable & Wireless Jamaica Limited (C&WJ), and Mossel Jamaica Limited (Digicel) continues. The present dispute swirls around whether or not C&WJ owns the copyright and all related rights in its customer

and directory database. C&WJ maintains that it does and has filed legal proceedings by way of an Amended Fixed Date Claim Form seeking a Declaration in those terms. As is to be expected, that application has been met with strenuous resistance by other players in the industry.

2. C&WJ was the first, and for many years the sole, telecommunications service provider in Jamaica. It operated initially under the name Jamaica Telephone Company Limited and then Telephone Company of Jamaica Limited before the assumption of its present name. It was responsible for the creation of the first telephone directory in Jamaica, in which was entered the names, addresses and telephone numbers of Jamaican residents and businesses, who were subscribers of its telephone services. This directory was made available to the public in 1927.
3. The Affidavit of Nicole Bertram, the Directory Publishing and Internet Administrator of C&WJ set out in some detail the work involved in compiling and maintaining the telephone directory. Agents of C&WJ canvassed the entire Island in order to collect names, telephone numbers and address of all residents and businesses that agreed to have their information published in its telephone directory. That information, as well as all transactions relating to the subscribers, such as details of bills generated and listings of bills settled and those outstanding were recorded

in a unified central database known as the Customer Information System (CIS). That database was created in 1992 and is maintained by C&WJ. It is the primary database of C&WJ which feeds Directory Assistance/Enquires utilising 114, the number dialed by customers for assistance or enquires.

4. Nicole Bertram went on to state in her Affidavit, that the creation of the White Pages of a telephone directory, which covered residential and business customers by virtue of universally accepted standards, permitted only one mode of arrangement of the information of subscribers. The subscriber's surname was inserted first, followed by the Christian name and then by the address and telephone number. The listings for the Yellow Pages, which cover business customers only, were done by an alphabetical subject classification and then customers were listed alphabetically within the subject classification. C&WJ decided which subjects were suitable for this classification, taking into account the classifications used elsewhere and the products available in Jamaica.
5. In her Affidavit, Ms. Bertram deponed to the fact that the arrangement of subscriber information for the first time in Jamaica, required the agents of C&WJ to skillfully arrange the data and verify the details so as to ensure accuracy and functionality. A directory of fixed line customers was

published each year and as a result, updating of customer information, as well as the inclusion of information relating to new customers was a continuous process. C&WJ separated some of the listings in the printed directory into categories, due to the increased volume of subscriber information and to facilitate the better arrangement of its data. In 1987, it started to publish Government Listings separately as Blue Pages. In its 2004/2005 Directory, it separated business subscribers from residential subscribers. It now publishes a Residential Directory and a Business Directory, with the latter named Directory also containing the Yellow Pages. The information for the White Pages, Yellow Pages and Blue Pages in both the Residential and Business Directories emanates from CIS database.

6. In 2001, C&WJ created and designed an information exchange programme between the CIS and its Directory Database Publishing System, known as “Yellow Magic”. Under this programme, information collected from the application forms compiled by new subscribers was entered into the CIS where it was then channeled through C&WJ’S Directory Clean Up Programme. This programme standardized the listings and formatted the telephone and address details. Once formatted, the information was imported into Yellow Magic where it was checked

for quality and updated for final compilation and publishing. Yellow Magic was used by C&WJ to create its printed Directory each year and was maintained by its Directory Services Team, at a cost of approximately \$35,000,000.00 per annum.

7. Ms. Bertram in her Affidavit further outlined information as to the work involved by C&WJ in compiling and maintaining the directory, including the employment of systems analysts, database administrators, information technology specialists and other personnel, both locally and in the United Kingdom. A Directory Assistance Service was developed by C&WJ to increase the level of service to its customers and was first offered to the public in 1948. Information for this service was derived from its primary database, the CIS, the maintenance cost of which was approximately US\$2,000,000.00 per annum.
8. Ms. Bertram described the total directory product offering of C&WJ to subscribers as consisting of the Directory Assistance Service, the Telephone Directory and the Internet Phone Book located at www.jamaicayp.com. She asserted that her company had invested considerable time, capital, skill, labour and judgment in creating its directory databases and printed and electronic/internet directories. As such, she stated in her Affidavit that if no copyright were deemed to vest

in the Directory Database of C&WJ, the company would be required to provide other telecommunications service providers with the database and access thereto, at a cost which it felt would be inconsistent with its rights and the value of its ownership.

9. In response to the application by C&WJ, the 1st Party Affected Mossel (Jamaica) Limited (t/a Digicel Jamaica), filed a Notice of Application for Court Orders seeking the following Orders:-

1. That the Claim be dismissed for uncertainty of subject matter and uncertainty of the rights sought by the Claimant in respect of said subject matter.
2. Further, or in the alternative to order no.1, a Declaration that the Copyright Act does not accord protection by way of copyright or related rights to facts or data comprised in the Claimant's directory database/listings or at all.
3. Further, or in the alternative to order no.1, a Declaration that the Claimant's customer and directory database/listings do not qualify as original intellectual creations and as such are not protected by the Copyright Act.
4. As an alternative to order no.3, in the event the Court may find that any copyright exists in the Claimant's customer and directory database/listings whether in whole or in part, a declaration that such protection does not extend to the factual information or data comprised therein and that, accordingly, access to that information by the Applicant ought not to be impeded by virtue of the Copyright Act.
5. The cost of this application be costs in the claim.

10. An Affidavit was filed by Stacey Mitchell, the Legal Counsel for Mossel (Jamaica) Limited, ("Digicel") in support of its Notice of Application for Court Orders and in opposition to the claim by C&WJ for the

Declarations sought in this matter. In her Affidavit, Miss Mitchell identified Digicel as a telecommunications and GSM mobile service provider that had been operating in Jamaica since April, 2001. At the time she deponed to this Affidavit, it provided services to over one million customers. She stated that Digicel offered services to the Jamaican population as a whole and as such, had a vested interest in obtaining access to the factual contents of the Claimant's directory database, namely the names, addresses and phone numbers of the subscribers of C&WJ. From advice received from Digicel's Database Administration Manager, Ms. Mitchell was of the view that other information pertaining to C&WJ'S subscribers could be safeguarded, as inherent in the creation of a database such as that belonging to C&WJ, was the ability to limit access to the contents or certain aspects of the database in accordance with predetermined criteria. In such an instance, not all users of a database would have access to all the information contained therein.

11. In answer to Ms. Bertram's statement that C&WJ created and distributed the first telephone directory in Jamaica in 1927, Ms. Mitchell responded that C&WJ was the sole telecommunications provider in Jamaica at that time and in fact up to 2001. There was therefore no competing

telecommunications service then and as consequence, no comparable telephone directory in Jamaica. She went on to contend that it was the subscribers of C&WJ who provided it with information as to their personal and/or business names and residential and/or business address. It was those subscribers, she further contended who were the originators of the said information. As it was admitted that the said subscribers of the first Telephone Directory were responsible for bringing to the attention of C&WJ any errors in that Directory, she stated that that amounted to an admission that the subscriber information was not generated by C&WJ. That information she further stated, was provided by the subscribers who completed the application form requesting telephone service, was factual in nature and was therefore not protected by the Copyright Act.

12. The legal officer of Digicel attested that prior to the liberalization of the telecommunications industry in or about 2000, the allocation of telephone numbers was the prerogative of the Government of Jamaica. Subsequent to liberalization, the allocation of telephone numbers was assumed by the Office of Utilities Regulation (OUR) pursuant to statute. In those circumstances, Ms. Mitchell was of the view that C&WJ had no

proprietary rights in respect of the telephone numbers, and that such information was at all material times factual in nature and not copyrightable.

13. Ms. Mitchell in her Affidavit highlighted what she referred to as C&WJ'S own admission that as regards its White Pages, the arrangement and selection of the contents had been based on universally accepted standards and that there was only one mode of arrangement. Accordingly, she maintained that there could be no claim of originality by C&WJ in the selection or arrangement of the contents of the White Pages. Similarly, with respect to its Yellow Pages, where the arrangement of its listings was done by an alphabetical subject classification and then alphabetically within that subject classification, this process was described by Ms. Mitchell as the typical format for Yellow Pages directories generally. Additionally, she contended that C&WJ could claim no originality in the classification of its Yellow Pages, in light of its admission that it took into account the classifications used elsewhere and the products available in Jamaica based on pre-existing classifications. She further contended that the selection of listings in C&WJ'S directories was in accordance with accepted, commonplace standards of selection in the industry. This

further contention was based on the admission by C&WJ, that its selection as to which subjects were suitable for classification was limited to its own reliance on universally accepted standards for classification of White Pages and Yellow Pages and telephone directories.

14. A similar argument was advanced by Ms. Mitchell in her Affidavit responding to the position taken by C&WJ to separate its Residential Directories from Business Directories, as well as the publishing of the listing of Government subscribers in the Blue Pages. Ms. Mitchell claimed that such a pattern of selection and arrangement was in no way original and merely followed the accepted commonplace standards in the industry. To bolster this assertion, she exhibited to her Affidavit, extracts from the White Pages, Yellow Pages and Government Listings of the United Telecommunications Services Directory for Curacao, published in 2000. She further claimed that any skill employed by agents of C&WJ in the arrangement of the data and the verification of details to ensure accuracy and functionality was immaterial and did not render the arrangement original.
15. Another issue raised by Ms. Mitchell in her Affidavit, was the fact that both Digicel and C&WJ had participated in public consultations by the telecommunications regulatory agency, the Office of Utilities Regulation

(OUR) on liberalizing access to the directory services and products, with particular reference to access to C&WJ'S core database, which contained factual subscriber information. As a result of those consultations, the OUR issued a document entitled "Determination Notice: Access to Directory Database Information Document No: TEL 2002/05, the introduction to which stated:

"In order to provide consumers with reasonable access to directory listing information as required under Section 48 of the Act (ie the Telecommunications Act), a service provider must purchase and resell the services of the incumbent DQ operator ie C&WJ) or provide its own DQ service. The provision of its own service requires access to directory listing information from other service providers..."

She went on to identify the first Determination of the OUR as follows:-

"Determination 1.0

Refusal to grant service providers access to directory listings (whether printed or in machine readable form) at reasonable tariffs will be viewed as an attempt to limit competition.

Determination 1.1

Tariffs for access to directory listings shall be-

- (i) non-discriminatory;*
- (ii) reasonable and transparent; and*
- (iii) cost oriented*

Determination 1.2

The terms and conditions of access to directory listings shall be non-discriminatory, reasonable and transparent."

16. Ms. Mitchell in her Affidavit suggested that the claim by C&WJ of copyright in this matter was made in a effort to circumvent the Determinations of the OUR as telecommunications regulator. She further suggested that by applying for the declaration sought as to copyright ownership and in relying on its financial investment as justification for same, C&WJ was using the Copyright Act to obtain an illegal monopoly over subscriber information, in light of recent movements to liberalize the telecommunication and directory markets in Jamaica. The quest by C&WJ to assert copyright ownerships over its directory databases and printed and electronic/internet directories, according to Digicel, amounted to an attempt to obtain a virtual monopoly over subscriber information, the effect of which would hinder any further plans for the liberalization of those markets.
17. Ms. Mitchell observed that C&WJ referred to its total directory product offering as including the Internet Phone Book. It also referred to its directory databases and printed and electronic/Internet Directories. Those products she maintained encompassed a number of outputs including factual information and proprietary material belonging to third parties. In support of this observation she referred to response of C&WJ

at the public consultations held by the OUR where in respect of its directory services offerings C&WJ admitted

“that third party suppliers have intellectual property rights in the software and systems that form an integral part of the Cable & Wireless Jamaica Limited directory services offerings. These third parties are suppliers (from outside of Jamaica) who have provided essential systems for the operation of directory services.”

She further maintained that the subject matter in respect of which C&WJ sought ownership was unclear, vague and potentially overbroad.

18. Digicel, through the Affidavit of its legal Counsel argued that were the Court to declare that copyright vested in C&WJ in its customer and directory database listings, the practical effect would be the grant to C&WJ of perpetual proprietary rights in facts and other non copyrightable material. Further that a Declaration by the Court that the Claimant was entitled to copyright protection in its customer and directory database/listings, including continual updates thereto would be of potential perpetual duration and would be inimical to public interest.
19. The starting point in this matter is the Copyright Act. Section 6(1) of that Act provides that-

S.6(1) “Copyright is a property right which subject to the provisions of this section, may subsist in the following categories of work-

- (a) original literary dramatic, musical or artistic works;*
- (b) sound recordings, films, broadcasts or cable programme;*
- (c) typographical arrangements of published editions,*

and copyright may subsist in a work irrespective of its quality or the purpose for which it was created.”

The definition of a “literary work” is set out in Section 2(1) of the Copyright Act as follows;

“‘literary work’ means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes-

(a) a written table or compilation;

(b) a computer programme;

and for the purpose of paragraph (a) of this definition,

‘compilation’ means a collection of works, data or other material, whether in machine – readable form or any other form, which constitutes an intellectual creation by reason of the selection or arrangement of the works, data or other material comprised in it.”

Section 6(3A) of that Act goes on to state that-

“Copyright subsisting in a literary work that is a compilation does not extend to any works, data or other material comprised in the compilation and does not affect any copyright which may exist in such works, data or other material.”

20. What is clear from the above cited provisions of the Copyright Act is that-

- i) an original literary work is entitled to copyright protection regardless of its quality, style or the use for which it was created.
- (ii) a literary work includes a compilation, such as trade catalogues or directories
- (iii) for a compilation to be designated a literary work which would be entitled to copyright protection under the Act, the collection of data, works or material of which it is comprised must constitute an intellectual creation by reason of its selection or arrangement.(emphasis mine)
- (iv) any copyright which subsists in respect of a compilation lies in respect of that compilation as a whole and not as regards the data, works or other material comprised in the compilation.

21. The Jamaican Copyright Act of 1993 was amended in 1999 pursuant to the country's Accession to the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The Memorandum of Objects and Reasons for the Copyright Amendment Act, 1999 indicate the basis for the amendment and so far as is relevant reads-

"This Bill seeks to amend the Copyright Act primarily to implement provisions relating to copyright contained in two Agreements to which Jamaica is a party namely-

- (a) the Agreement on Trade-Related Aspects of Intellectual Property Rights; and*
- (b) the Intellectual Property Rights Agreement between Jamaica and the United States of America.*

The Bill amends the Act so as-

- (a) to make explicit the conferment of copyright protection on compilation of works, such as databases;"*

Article 10 of the TRIPS Agreement sets out the protection afforded to Computer Programs and Compilations of Data and reads;-

"10.1 Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

10.2 Compilation of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."

The effect of the 1999 Amendment was to extend copyright protection in Jamaica to compilations, such as databases.

22. As literary works must be original to enjoy copyright protection, it is important to identify what the word “original” means in that context: In the case of **University of London Press, Limited v. University Tutorial Press, Limited** [1916] 2 Ch.D.601 at 608-609, Peterson J. stated;-

“The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of ‘literary work,’ with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work-that it should originate from the author.”

This dicta was approved and adopted by the Judicial Committee of the Privy Council in the case of **Macmillan and Co. Limited vs. Cooper** (1923) 40 TLR 186 at 190. A work is therefore treated as original as long as it was not copied from another work, but originated from the author.

23. I do not accept the submissions of Counsel for C&WJ that the words “intellectual creation” ought to be interpreted as meaning that the compilation must be original, that is, that it is the author’s own creation, not copied from someone else. That in my view is too restrictive an approach to take. True it is that the compilation cannot belong to someone else or be copied from someone else. However, copyright

subsists in original literary works. Literary works include a compilation, which is a collection of data, works or material which constitute an intellectual creation by reason of the selection or arrangement of the contents of the compilation. If the phrase “intellectual creation” is taken to mean that the compilation must be original, the only prerequisite for a compilation to be afforded copyright protection would be that the work in question ought not to be copied from someone else. That is not what the statute requires. Apart from originality in the selection or arrangement of the works contained in the compilation there must also be an element of intellectual creativity in that selection or arrangement for the compilation, whether it be a database or a directory to be entitled to copyright protection under the Act. I am satisfied that under the Jamaican Copyright Act, a database is not treated as being distinct from a compilation. I am further satisfied that in an instance where copyright subsists in such a compilation, the protection afforded by that copyright does not extend to the actual contents of the compilation. (see Section 3A of the Act).

24. Counsel for C&WJ Mr. Garcia contended in his written submissions that copyright law is generally concerned with the prevention of appropriation of material that is the product of labour, skill and capital of a person. He

further contended that the inclusion of the word “compilation” in the Copyright Act, (which occurred by way of Amendments in 1993 and 1999) recognized that the labour and skill employed in selecting and arranging existing subject matter may give rise to copyright protection in the resulting work. Counsel relied on the dicta of Lord Atkinson in the case of **MacMillan and Co. Limited v. Cooper** (1923) 40 TLR 186 at 188, where the learned Law Lord stated:

“It will be observed that it is the product of the labour, skill, and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use that expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that labour, skill, and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.”

Counsel submitted that the labour, skill and capital employed by his client in canvassing, selecting and arranging raw material would give copyright protection to the resulting work.

25. Mr. Garcia pointed out that there have been several cases dealing with the existence of copyright in compilation and in particular, directories. He referred to three nineteenth century cases, **Kelly v. Morris** (1866) LR 1 Eq 697; **Morris v. Ashbee** (1868) LR 7 Eq 34 and **Morris v. Wright** (1870) 5 Ch.App.279 to illustrate the existence of copyright in

directories. In the case of **Morris v. Ashbee**, Vice Chancellor Giffard stated at pages 40-41;-

“The Plaintiff incurred the labour and expense first of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement,... that in a case such as this no one has a right to take the results of the labour and expense incurred by another for the purpose of a rival publication, and thereby save himself the expense and labour of working out and arriving at those results by some independent road. If this was not so, there would be practically no copyright in such a work as a directory.”

26. Counsel for Digicel, Ms. Daley in her response on this issue urged the Court in its interpretation of the relevant provisions of the Copyright Act to refer to jurisprudence from jurisdictions having provisions under their respective Copyright statutes which were equivalent or very similar to the relevant provisions of the Jamaican Copyright Act. In that regard, certain provisions of the United States Copyright Act 1976, the Canadian Copyright Act and the United Kingdom Copyright, Designs and Patents Act, 1988 were referenced and relied on. Section 101(3) of the US Copyright Act 1976 defined a compilation as-

“A work formed by the collection and assembling of preexisting materials or data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”

Ms. Daley argued that it was clear that the definition focused on the “selection” and “arrangement” of the materials and that the elements of originality and authorship which incorporated the “creativity element” were all components of the TRIPS definition. She maintained that when compared with the definition under the Jamaican Copyright Act and the current UK Legislation as amended in 1998, all the elements were common.

27. Ms. Daley asserted that prior to the TRIPS Agreement, some jurisdictions sought to protect non-creative or factual databases (referred to as sweat of the brow databases), by virtue of the level of effort or investment in their creation granting them copyright protection. She further asserted that other jurisdictions followed the so called “creativity school” confirming copyright only on databases which were original and creative. She stated that the cases relied on by C&WJ such as **Kelly v. Morris, Morris v. Ashbee, Morris v. Wright and Macmillan & Co. v. Cooper** were all cases which leaned towards the “sweat of the brow” school. These she contrasted with the American case of **Feist Publications, Inc. v. Rural Telephone Service Co.** 499 US 340 (1990) which followed the creativity school. In that case, the Court held that no copyright existed in a White Pages directory. Further, that originality required independent

creation plus a modicum of creativity, before the originality threshold for copyright protection was met.

27. Counsel also cited the Canadian case of **Tel- Direct (Publications) Inc. v. American Business Information Inc.** (1997) 76 CPE (3d) 296, which applied US law. That case subscribed to the same criterion for copyright protection outlined in the TRIPS Agreement and it was held that there was no copyright in the information contained in the Yellow Pages. Further, that for a compilation of data to be original, it must be a work that was independently created by the author and displayed at least a minimal degree of skill, judgment and labour in its overall selection or arrangement. The Court also found that the amount of labour was not a determinative source of originality.
29. Ms. Daley in her submissions contended that the criterion for copyright protection in compilations of works, data and other material was unified at an international level by the TRIPS Agreement, despite slight variations of the wording of the operative provisions in domestic law. As such the definitions in the United States, United Kingdom and Jamaican Statutes were all derived from the TRIPS Agreement. Ms. Daley expressed the view that the TRIPS criterion contributed a higher originality test, the effect of which was to nullify the “sweat of the brow”

requirement as a definitive criterion for copyright protection in databases.

As a result, she suggested that factual databases which were purely the product of sweat and brow efforts were no longer entitled to copyright protection.

30. Courts have never been hesitant to examine and if necessary to apply authorities from other jurisdictions with similar legislation which, although they may not be binding, could provide some assistance in the consideration of issues, being determined. As far back as 1923, Lord Atkinson in delivering the Judgment of the Judicial Committee of the Privy Council in the case of **MacMillan and Co. Limited v. Cooper** referred to a Judgment of Mr. Justice Storey in *Emerson v. Davies*, decided in the Supreme Court of the United States. Although he pointed out that that decision was not binding on the Tribunal, he went on to state that in the opinion of the Board, the decision was “sound, able convincing and helpful.” It is accepted that by virtue of the 1999 Amendment to the Jamaican Copyright Act, certain provisions of the TRIPS Agreement were incorporated into our local legislation, particularly as regards copyright protection in compilations including databases, as well as the introduction of the requirement of intellectual creativity in the selection or arrangement of such a compilation. Based

on these changes, I am of the opinion that authorities in which copyright protection was obtained solely on the basis of the level of effort or investment involved (ie sweat of the brow) ought not to be blindly followed. I find that it is the satisfaction of the requirement of original intellectual creation in the selection or arrangement of a compilation, which gives rise to copyright protection. Accordingly the jurisdiction, it is the creative school of thought which ought to be applied when considering whether or not to confer copyright protection in a compilation. I am also of the view that the US and Canadian authorities cited by Ms. Daley are of more relevance on the issue before this Court and I am prepared to be guided by them in my determination of this matter.

31. The Claimant in this matter seeks a Declaration that it is the owner of the copyright and all related rights in its the customer and directory database/listings. This would include its Telephone Directory as well as its database which contains factual subscriber information such as names, addresses and telephone numbers. It is a commonly accepted principle of copyright law that there is no copyright in ideas, discoveries or things of a similar nature. This principle is also embodied in Section 6(8) of the Jamaican Copyright Act which states-

“Copyright protection does not extend to an idea, concept, process, principle, procedure, system, or discovery or things of a similar nature.”

Counsel for Digicel submitted and I agree, that facts are equated with discoveries in that the person who uncovers the facts or makes the discovery cannot claim authorship of the facts so uncovered. I accept that Copyright therefore does not extend to the actual facts, mere data or factual information. In the present case, the database of C&WJ, that is the Customer Information System, contains factual subscriber information. I find that such data under Jamaican law does not attract copyright protection. In the United States, case law supports the contention that there is no valid copyright in facts. Even where a valid copyright subsists in a factual compilation, a subsequent compiler is free to use the facts contained therein in preparing a competing work, as long as that competing work does not feature the same selection and arrangement.(see *Feist Publications Inc. v Rural Telephone Service Co.*)

32. The burning issue in this case is whether C&WJ’s customer and directory database/listings qualify for copyright protection. The answer depends on whether the compilation constitutes original intellectual creation by reason of the selection or arrangement of its contents. The focus then is not on the contents, but on the originality and intellectual creativity

applied in the selection or arrangement of the compilation. What does the evidence disclose? Ms. Bertram in her Affidavit filed on behalf of C&WJ stated that the Claimant created the telephone directory by having its agents canvass the Island collecting the names, addresses and telephone numbers of residents and businesses which agreed to have their information published. No claim to copyright can succeed by the mere collection of this factual information, even if it were to be accepted that C&WJ was the first to discover those facts. Copyright protection does not extend to the discovery of facts. As was stated in the Feist Publications case, “no one may claim originality as to facts”.

33. The selection or arrangement of the data must therefore be looked at to ascertain whether the test of original intellectual creation has been met. Critical to this assessment is whether the selection or arrangement process was copied from another’s work and if not, whether sufficient skill and judgment had been applied. Through the Affidavit of Ms. Bertram, C&WJ admitted that the creation of the White Pages of the telephone directory, which covered residential and business customers, by virtue of universally accepted standards permitted only one mode of arrangement of subscriber information. The subscriber’s surname was inserted first, followed by the Christian name and then by the address and

telephone number. In light of this admission, I find that there can be no claim of originality nor any intellectual creativity in the selection or arrangement of the White Pages of the Claimant's telephone directory. It should be noted that in the Feist Publications Inc. case, persons wishing to subscribe to Rural's telephone service filled out an application form and were issued with a telephone number. In preparing its White Pages, Rural took the data provided by its subscribers and listed it alphabetically by surname. The Court found that "the end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity." I find the situation the same in the present case.

34. With regard to the Claimant's Yellow Pages, which cover only business subscribers, the listings are done by alphabetical subject classifications and then alphabetically within the subject classification, C&WJ decides which subjects are suitable for the classification taking into account classifications used elsewhere and products available in Jamaica. I find that the reliance by C&WJ on classifications used elsewhere deprives it of any claim to originality or intellectual creativity and from any entitlement to copyright protection in the Yellow Pages.
35. The Affidavit evidence filed on behalf of the Claimant discloses that in 1987, C&WJ rearranged its customer data to separate Government

listings into “Blue Pages”. In 2004/2005, C&WJ separated its Residential and Business Listings resulting in two (2) Directories – a Residential Directory and a Business Directory with Yellow Pages. Despite this separation and the colour charge for Government listings to Blue Pages, these listings were still based on the universally accepted standards applicable to the White Pages. The format remained the same. I find therefore that the selection and/arrangement of the listings do not satisfy the requirements for entitlement to copyright protection.

36. The Claimant’s Customer Information System (CIS) is the unified central database containing the listings of the Residential and Business Directories. It is comprised of all factual information relating to its customer base. I am not satisfied that C&WJ has made out a case for copyright protection with respect to this database. In the event that I am wrong however, I find that C&WJ is not entitled to protection by way of copyright in factual data contained therein.
37. In light of my findings as outlined in this Judgment, It is hereby ordered that –
 - (a). the Application by Claimant as set out in the Amended Fixed Date Claim Form is refused.

- (b) A Declaration is granted that the Copyright Act does not accord by way of copyright or related rights to facts or data comprised in the Claimant's directory database/listings or at all.
- (c) A Declaration is granted that the Claimant's customer and directory database/listings do not qualify as original intellectual creations and as such are not protected by Copyright Act
- (d) Costs to the 1st and 2nd Party Affected to be taxed if not agreed.