

Hot Seat Millionaires: Current Television Format Protection, An International Survey

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Abstract: Copyright protection fail to protect television formats, particularly reality television formats. Currently, contract law and course of trade provide protection as best as they can. The Guernsey Image Rights Ordinance may be able to step in and fill this void.

I Introduction

Can a television show have Personality? Perhaps. As the laws regarding the protection of a person's name, portrait, picture, likeness, or voice have struggled to keep up with the evolving media, so too, have the rights in the evolving media formats struggled. The right of publicity has been developing for people, which in turn, has been developing into a concept of image rights. Image rights involve the commercial appropriation or exploitation of a person's identity and associated images linked to that person. Similar to publicity rights, they are related to the distinctive expressions, characteristics or attributes of, or associated with, a personality made available to public perception. The question to be posed here is whether television formats should be granted the same protection.

The Format Recognition and Protection Association (FRAPA) believes they should be. The mission of FRAPA is, quite simply, to be the home of international format business by providing protection and information for producers, creators and distributors all over the world.¹ The Guernsey Image Right legislation can be useful in the protection of a television format's personality. Firstly, it requires fixation; and as such, secondly, it can be registered. This is exactly what FRAPA is striving to achieve.

II Image Rights

Image rights are an integral part of artistic expression and a product of personality. Image Rights (Bailiwick of Guernsey) Ordinance 2012 establishes a new form of intellectual property, previously unrecognized in a registrable form. Two key concepts anchor the legislation: (1) the "registered personality", and (2) "images" which are associated with or registered against that registered personality. The core right is the registered personality.

According to Section 2(1) Image Rights Ordinance (IRO), "A registered personality is a property right obtained by the registration of a personality in the Register in accordance with the provisions of this Ordinance." Personality refers to the personality of the following types of person or subject which is described in the Image Rights Ordinance as the "personnage".²

¹ See generally, <http://www.frapa.org/>

² Section 1(1) IRO describes a "personnage" as follows:

- (a) a natural person,
- (b) a legal person,
- (c) two or more natural persons or legal persons who are or who are publicly perceived to be intrinsically linked and who together have a joint personality ("joint personality"),

“Image rights” are defined in s 5(1) IRO as “exclusive rights in the images associated with or registered against the registered personality.” Section 3(1) IRO defines “image” as:

- “(a) the name of a personage or any other name by which a personage is known,
- (b) the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or
- (c) any photograph, illustration, image, picture, moving image or electronic or other representation (“picture”) of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture.”

Note that there is no requirement to register specific images associated with the registered personality beyond the personality’s name itself. However, for there to be a benefit in registering and for easier enforcement, specific images are useful. A registered image is presumed to be distinctive and of value, which are requirements for infringement, whereas these qualities must be specifically proven in order to enforce rights in an unregistered image. The term ‘image’ is used in an extremely broad context which suggests that ‘formats’ could reasonably fall into this definition.

Academics, critics and lawyers have struggled to define what a “format” is.³ Definitions range between so broad as to be meaningless or so precise as to be inaccurate. Nevertheless, formats are individually identifiable across many genres of programming from talent shows (The X Factor, The Apprentice) to magazine shows (Top Gear, Antiques Roadshow) to reality TV (Big Brother, The Real World) to game shows (Deal or No Deal, The Weakest Link). The New Shorter Oxford English Dictionary defines ‘format’ as “*a style or manner of arrangement or procedure.*”⁴ A significant number of things can go into a successful format, including scripts, set designs, jingles, theme music, catchphrases and the concept itself. It is protecting a detailed collection of such elements and bringing them together as a compelling, cohesive and protected package that makes for valuable personality and likewise, for valuable format rights.

What would be needed to strongly indicate the presence of a personage in a television format?

- (a) The name of the show: *Who wants to be a Millionaire?* (or any variations of the name, i.e., *Hot Seat Millionaire*)

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- (d) two or more natural persons or legal persons who are or who are publicly perceived to be linked in common purpose and who together form a collective group or team (“group”), or
 - (e) a fictional character of a human or non-human (“fictional character”),

whose personality –

- (i) is registered under this Ordinance (and is accordingly a “registered personality” for the purposes of this Ordinance), or
- (ii) is the subject of an application to be so registered.

³ The “atom of the [legal status for TV formats] problem lies in defining a format.” H. Dawley, *What’s in a Format*, TBI (London) 25, 26 (Nov 1994), quoting Irene Van Affelen, the head of corporate legal affairs at Endemol Group in 1994.

⁴ *The New Shorter Oxford English Dictionary* (1993) Oxford University Press, New York, Vol. 2

- (b) Any trade marks, catchphrases, set designs, characters, scripts, jingles, theme music, or other similarly potentially copyrightable materials
- (c) Production bibles (e.g. sourcing contestants, audience organisation, production elements and structure); Event bibles (including, but not limited to, all rules, guidelines, any distinctive outfits, positioning of cameras, music played throughout the event, presentation podia, opening and closing ceremonies, the event venue branding, commentator scripts and catchphrases, any software, graphics and logos used for broadcasts)

III The Business of Television Formats

Format trade worldwide has increased by more than 10% annually in the past ten years.⁵ As early as 2002, BBC Worldwide, the commercial arm of the BBC, created a 'Format Factory' which year on year has achieved high revenues, with format sales for 2006 closing at over £35 million.⁶ According to FRAPA - a format producers' industry association - the value of the global TV format business is in the excess of €2.4 billion, with the UK alone being the creator of more than 49% of all format hours broadcast worldwide.⁷ The UK has emerged as a world leader with formats constituting 45 per cent of all TV programmes exports. Though much of the flow of formats tends to be from the developed world towards the developing world, there have been examples of formats originating in countries such as Columbia (Ugly Betty) or Russia which have been sold to countries around the world.⁸

Copyright does not protect ideas but rather the way in which ideas are expressed. All TV programmes/ broadcasting rights are protected in certain respects as literary, dramatic, musical or artistic works by national intellectual property legislation.⁹ But where is the boundary between the idea and the expression? As Learned Hand J. once said, "*nobody has ever been able to fix that boundary, and nobody ever can*".¹⁰ With regard to television formats, this is even more difficult.

IV Why Copyright Law Fails – Infringement Considerations

This article only considers copyright. It will become clear that certain jurisdictions are reluctant to grant copyright protection to television formats and those that have recognized television formats as copyrighted works have been reluctant to allow format owners to successfully assert their rights in copyright infringement proceedings against third parties. Further arguments based upon unfair competition law have been elegantly put forth by Lisa Logan in the European Intellectual Property Review.¹¹

⁵ Ibid

⁶ <http://www.broadcastnow.co.uk/bbc-unveils-plans-for-format-factory/1140651.article>

⁷ <http://www.fremantlemedia.com/home.aspx>

⁸ ESRC Resource on Exploitation of TV formats available at

http://business.bournemouth.ac.uk/news/tv_formats_rights_why_pay_when_you_can_copy_for_free.html#footnotes

⁹ i.e., 17 U.S.C. §102; or CDPA 1988 s 1

¹⁰ *Nichols v Universal Pictures Corp.*, 45 F 2d 119, 121 (2d Cir 1930)

¹¹ The Emperor's New Clothes? The Way Forward: TV Format Protection under Unfair Competition Law in the United States, United Kingdom and France (2009)

A United Kingdom

In the case of *Corelli v Gray*,¹² the standard of infringement for a dramatic sketch of the plaintiff's copyright in a novel was set forth:

*"Under [national legislation], ... no absolute monopoly is given to authors analogous to that conferred in inventors of patents – that is to say, if it could be shown as a matter of fact that two precisely similar works were in fact produced wholly independently of one another, I do not think that the author of that work that was published first would be entitled to restrain the publication by the other author of that author's independent and original work. The right appears to be merely a negative right to prevent the appropriation of the labours of the author by another."*¹³

Resulting in copyright protection only available to works that have actually been copied. Coincidental reproduction does not equate to infringement. In *Corelli*, despite neither novel nor sketch being particularly original, the court held: *"When it appeared that not merely one, two or three stock incidents had been used, but a combination of stock incidents, every one of which had been taken from the plaintiff's book, it would be narrowing the law beyond what was reasonable to say that the plaintiff was not entitled to be protected."*¹⁴

The leading case in the UK is *Green v Broadcasting Corporation of New Zealand*.¹⁵ This concerned the format of the famous UK show "Opportunity Knocks", which had allegedly been copied in New Zealand. The Privy Council found that there was no copyright in this particular game show format because the format itself was not written down and was no more than a general idea for a talent show.

Due to the international discussion triggered, a closer examination of the case would be useful. The following is excerpted from Caroline Gault's article entitled *To What Extent are Game Shows and Other Forms of Reality Television protected against Imitation under the Copyright Laws of: New Zealand and the United Kingdom; The United States and Canada; and Germany? What are the Likely Consequences for the Law of Copyright if such Protection is Granted?*¹⁶

"The plaintiff, Hughie Green, was the author, producer and compere of a successful television talent quest produced and transmitted in the UK under the name 'Opportunity Knocks' from the early 1960's until 1978. The defendant devised and commenced transmission of a similar talent show under the same name in New Zealand. The defendant's show also reproduced other elements of the plaintiff's, including the use of catch phrases, the use of a 'clapometer' and the use of sponsors to

¹² (1913) 29 TLR 570

¹³ *Corelli v Grey*, (1913) 29 TLR 570 (in this case the plaintiff was successful due to substantial similarity).

¹⁴ *Ibid*

¹⁵ [1989] RPC 700

¹⁶ LAWCOMM 754 Research Paper available at <http://www.ifla.tv/formatspaper.htm>

introduce competitors. Green sued for breach of copyright in the title, the scripts and the dramatic format of the programme¹⁷ and for passing off.

Court of Appeal Decision

On appeal Green accepted the lower courts inevitable ruling there was no copyright in the title of the programme, due to existing decisive case law¹⁸. Green lost the passing off claim as he failed to show any protectable good will or reputation in NZ. The court was divided on the question of infringement of copyright in a dramatic work. No written scripts were produced, however Green gave evidence to prove that these had existed, and had included the title, various catch-phrases, the general order of appearances and happenings and the clapometer. Somers J and Casey J agreed that Green's scripts could not support a claim of copyright in a dramatic work, because they could not themselves be acted or performed, and were no more than a "*general scheme for entertainment*".¹⁹ Somers J was of the opinion there could not be a claim for copyright in a format which is not either a dramatic or literary work itself, or perhaps a combination of both. Casey J. was of the view that the protection of a format could not be brought within the framework of the Act to prevent appropriation of a basic concept underlying a series of changing dramatic works.

In regard to the scripts being a literary work, it was difficult for the court to come to any firm conclusions in the absence of the physical manifestation of them. It was concluded that "*If the general idea which underlies or forms the basis of the work has alone been taken then there will be no infringement*", and that the scripts as they were inferred to be did nothing but express a general concept or idea, which could not be the subject of copyright protection.²⁰

Gallen J disagreed with the majority. He was of the view that the real strength of Green's case was not "*from looking for any rather strained interpretation of the word 'script'. It is to be found in his contention that he had produced a dramatic format which was entitled to protection*".²¹

Gallen J. suggested that if the combination of material on which the person seeking protection relied has a recognisable framework or structure and that framework is such as to impose a shape upon the other constituent parts of the show produced within it, then it would be contrary to the principles of copyright to deny such material protection. Gallen J concluded that on the facts of the case Green was entitled to copyright protection in respect of the repetitive structure of his show.

¹⁷ It should be noted Green was decided under the 1962 Act, which allowed a work to be both a literary and a dramatic work. Today, under the 1994 Act, the categories appear to be mutually exclusive.

¹⁸ *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd* [1940] AC 112 (PC)

¹⁹ *Green v Broadcasting Corp of New Zealand* [1988] 2 NZLR 490 at 497

²⁰ *Ibid* at 498

²¹ *Green v Broadcasting Corp of New Zealand* [1988] 2 NZLR 490 at 509.

Privy Council decision

The Privy Council decision is famed for its brevity. It upheld the Court of Appeal decision for the following reasons:

1. the subject matter of the copyright claim in the dramatic format was lacking in certainty;
2. *“a dramatic work must have sufficient unity to be capable of performance, and the features claimed as constituting the “format” of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic”*.²²; and
3. that the scripts did no more than express a general idea or concept and could not therefore be protected by copyright.²³

The recent UK case *Norowzian v Arks Ltd*²⁴ (*“Norowzian”*) recently affirmed the Privy Council’s decision, stating that a dramatic work must have sufficient unity to be capable of performance. The performance of the actor in the plaintiff’s film was not able to be performed due to the “jump-cutting” techniques used by the editor.

The concept “unity of performance” has been criticised for being vague and overly subjective. Rose suggests that a more objective test such as “structured performance” would allow judges to apply a more fact based test similar to the manner in which literary and artistic works are assessed.²⁵ This approach would be potentially more favourable to creators of formats seeking copyright protection.

However in *Norowzian*, the court stated that whilst there was striking similarity between the filming and editing style of the two films, *“no copyright subsists in mere style or technique”*.²⁶ This could arguably be said to extend to the technique used in structuring of a television programme.

This view was given support in *Celador Productions Ltd v Melville anor*, in which similarities between two game shows were termed as *“[no] more than the application of well-known presentational techniques”*. The judge went on to say *“What I have identified as similar elements are no more than elements of style or technique which, as the Court of Appeal held in Norowzian v Arks, when divorced from their context cannot give cause of action for breach of copyright.”*^{27,28}

²² *Green v Broadcasting Corp of New Zealand* [1989] 3 NZLR 18 (PC)

²³ As Rose points out, this is legally incorrect because the scripts would have been protected as literary works, if a substantial amount had been copied.

²⁴ (No. 2) [2000] EMLR 67; Affirmed in *TVNZ Ltd v Newmonitor Services Ltd* [1994] 2 NZLR 91

²⁵ Rose, David, *Format Rights: A Never-Ending Drama (Or Not)*, Ent. L.R. 1999, 10(6), 170-174 at 172

²⁶ *Ibid* at 368

²⁷ [2004] EWHC 2362 (CH) at para.82-83. The similarities were in the sets, lighting, background noise, cutting to the relations of contestants in the audience, the destruction of cheques and the use of a glass-sided box full of money.

²⁸ Gault, *supra*.

The Green approach was next followed in *Miles v ITV Network Ltd.*²⁹ Miles alleged that he supplied ITV with promotional material for a cartoon and that they copied his cartoon format in their programme “Dream Street”. The claimant, James Miles, appealed the decision of a Master who dismissed the claim on the ground that it had no hope of succeeding. That decision has been affirmed by Mr Justice Laddie. Miles alleged that in 1998 he supplied the ITV Network with promotional material for his cartoon, *Trusty and Friends*. The main character was a traffic light, and the ancillary characters were “traffic furniture” such as bollards and cones. The later ITV *Dream Street* had a recovery truck as its main character and, as Miles conceded, the look and feel of the two programmes were very different. Miles argued that there was sufficient inference of copying for the matter to go to trial because of similarities between the characters in the two programmes, and the fact that they both featured traffic equipment. The creator of *Dream Street*, however, produced evidence that designs for his programme had been in existence since 1997, i.e., before Mr Miles had sent his material to the ITV Network. The judge dismissed the appeal since, on the evidence, the only similarity between *Trusty and Friends* and *Dream Street* was the use of anthropomorphised traffic equipment, which meant the claim was “hopelessly weak”.³⁰

The next possibility of a new ruling occurred in 2005 when a high profile legal action was commenced against the creators of the TV programme “X Factor”. Simon Fuller, who created the format for the earlier “Pop Idol”, claimed that his copyright had been infringed by the rival “X Factor”. Thirty similarities between the two shows were highlighted to demonstrate that there had been “substantial copying” (the test for copyright infringement). Although it would have been interesting to see the court’s review and assessment of the protection available for the similarities listed, the claim settled confidentially out of court.

B New Zealand

Just as it is in the UK, New Zealand also follows the case law set out in *Green v Broadcasting Corp of New Zealand*.³¹

Following that case was *Wilson v Broadcasting Corp of New Zealand*.³² This case concerned a concept for a television series for children in which handicapped adolescents together performed heroic and magical acts in defeat of evil forces. The concept was presented to the defendant in a nine and a half page document and a 57 page feasibility study was later provided. Negotiations for the commission of the program commenced, but were never completed. Four years later the defendant produced and transmitted a television series, the themes, characters and format of which the plaintiff alleged were derived from their copyright material.³³

²⁹ [2003] WL 23192242

³⁰ *Ibid*

³¹ [1989] 3 NZLR 18 (PC)

³² [1990] 2 NZLR 565

³³ *Ibid*

In the decision the court referred to the meaning of “originality” as discussed in *University of London Press Ltd University Tutorial Press Ltd*³⁴: “The originality required relates to the expression of the thought. But the Act does not require that the expression must be in original or novel form, but that the work must not be copied from another work – that it should originate from the author”.³⁵

It was held that the quintessential part of the feasibility study was a dramatic work within section 7 of the 1962 Act, and was not in the realm of unprotected ideas. Because all key components of the plaintiff’s format – including the plot line of two adolescent handicapped children using their stick and wheelchair as weapons to fight evil and do good – had been reproduced in the material form of the television programme, the plaintiff’s copyright was infringed. “It might be a simple enough idea...but the roots of the defendant’s programme go straight back to the plaintiff’s feasibility study...”³⁶ Further, it was noted that: “A man may take part, or even the whole, of a copyright work, without being liable, if he adds to it a considerable amount of matter.”³⁷

C United States

Prior to the Copyright Act 1976, the court in *Fink v Goodson-Todman Enterprises*³⁸ concluded that television formats could be protected under common law copyright. The court concluded that while ideas are not protected, “along the road to a fully expressed dramatic work there are selective developments which achieve the standard for protection.”³⁹ Protection cannot be prevented as a matter of law because of a limited level of originality, nor due to the fact that only part of the plaintiff’s work was taken. The court said that this part—the format—was the essence of the work, and deemed it had “sufficient concreteness and novelty to be classified as protectable.”⁴⁰ In the court’s words the part that was taken included “the plan for an entire series, the full back story, the molding of an important part of the hero’s character and personality, the method for presenting and recapturing the back story in the sequential episodes, and various portrayal techniques.”⁴¹

After the changes to the copyright laws, formats were more difficult to protect. However, the plaintiff was successful in the case of *Sheehan v MTV Networks*.⁴² Plaintiff provided MTV officials with oral presentations and copies of “written rules and a format for the show, artwork depicting the set and props, and a schematic drawing detailing some of the audio-visual features of the program.”⁴³ Three months after the meetings, MTV started its own show which was very similar to the plaintiff’s format. The *Sheehan* court described the

³⁴ (1916) 2 Ch 601

³⁵ *Ibid* at 608-609

³⁶ *Wilson v BCNZ* 2 NZLR 565 at 572

³⁷ (1916) 2 Ch 601 at 606

³⁸ 9 Cal App 3d 996 (Cal Ct App 1970) (The defendant aired a TV series allegedly based on the plaintiff’s format, which was presented earlier to defendants’ producers.)

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² 1992 US Dist LEXIS 3028 (DNY 1992)

⁴³ *Ibid*

format as a combination of elements that would be protected under copyright law, as would any other compilation.⁴⁴

Nonetheless, exceptional circumstances provided this result. MTV had never produced or broadcast a game show prior to the plaintiffs' approach, and its first independently produced show appeared only three months after the plaintiff's proposal.⁴⁵ In addition, the plaintiffs had their materials registered with the copyright office, and they had official meetings with MTV personnel, including the vice-president of the channel. Most importantly, the plaintiff's game was extremely unique at that time, featuring the use of a laser gun, which had not been used in any game show before, but did appear in the defendants' show.⁴⁶

However, in *Pelt v CBS Inc*⁴⁷ the court held that the format similarities of the plaintiff's and defendant's television talk shows, including the use of an opening song, a moderator, audience participation etc. are all generic and unoriginal ideas and thus not protectable by copyright. This was followed by *CBS Broadcasting Inc v ABC, Inc*⁴⁸ where the plaintiff was the producer of the extremely successful reality television show *Survivor*. It sued the defendant, alleging that the defendant's show *I'm a Celebrity Get Me Out of Here* infringed the copyright in its format.

This case used the "abstractions test" from *Computer Associates International Inc v Altai Inc*,⁴⁹ in which the court devised a three step test to help distinguish ideas from expression. This test has become known as the 'abstraction-filtration-comparison test' (the "Altai Test"), and the steps are as follow:

1. Abstraction: Using Learned Hand J's abstraction test as outlined above, the court must assess whether the similarity between works is simply one of ideas, or something more developed.
2. Filtration: Once the court has ascertained similarity in the expression of a work, it must filter out non-copyrightable materials, including such elements which are dictated by efficiency or external constraints, and taken from the public domain.⁵⁰ Filtration includes applying the relevant limiting doctrines in the context of the particular medium involved, including the scènes-a-faire and merger doctrines. Scenes, situations, incidents, characters or events that flow naturally from an unprotectable themes, setting or basic plot premise are scènes-a-faire. The merger

⁴⁴ *Sheehan v MTV*, supra. "Although plaintiffs' proposal is, to some extent, a mere combination of standard ideas for a game show, the proposal does have unique elements, such as its distinctive arrangement and its primary 'hook'.... In combination, those unique elements transform the proposal into a copyrightable work."

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ 30 U.S.P.Q. 2d 1639 (C.D. Calif. 1993)

⁴⁸ 2003, U.S. Dist. LEXIS 20258

⁴⁹ 982 F 2d 693 (2nd Cir 1992); Whilst this test was devised in relation to copyright in software, it has since been applied more widely. Whilst not referred to explicitly in *CBS* some of its key principles are applied.

⁵⁰ Ibid

doctrine is when there are so few ways of expressing an idea that the idea and its corresponding expression have merged to become one and the same.⁵¹

3. Comparison: compare what remains after the filtration process of the derivative work with the allegedly copied work. Whether any similarity is sufficiently substantial will be dictated by the scope of protection that was defined using the filtration method outlined above.⁵²

Further, this case has been referred to as evidence that in the US television formats, rather than being precluded from meaningful copyright protection, shall be subject to the same copyright analysis applicable to shows in all other genres of television programming, and included when courts are considering the reproduction of other expression content concepts such as “plot” and “character”. A plaintiff must first establish ownership of a copyright work, and then copying of the work’s protected elements amounting to improper appropriation.⁵³

D Canada

There is authority in Canada that concepts and formats can qualify as dramatic works. In *Kantel v Grant*,⁵⁴ the format for a children’s radio sketch was protected because the structure of the show was clearly outlined. What constitutes a “substantial” reproduction of a submission or format is both a qualitative and quantitative exercise, taking into account “plot, themes, dialogue, mood, setting or scenes, pace, sequence and characters.”⁵⁵ The standard to be applied is that whether “the average lay observer, at least one for whom the word is intended, would recognize the alleged copy as having been appropriated from the copyrighted work.”⁵⁶

*Hutton v Canadian Broadcasting Corp*⁵⁷ is one of the few examples of a Canadian court having to consider alleged copyright infringement in respect of an unscripted television show format. The parties jointly co-produced a music program featuring elements such as a host, hit countdown and music videos. The plaintiff retained the copyright in it. Several years after the cancellation of the show, the defendant produced a similar show using similar characteristics.

The court applied the *Altai* test, firstly setting out the component parts of each program, extracting those elements not protected (including scènes-a-faire) and finally undertaking a qualitative and quantitative measurement of the copying that has occurred. Despite acknowledging the similarities between the shows, the court found no infringement had

⁵¹ These doctrines are not without their critics. See Tarantino (2012) *I’ve Got This Great Idea for a Show... – Copyright Protection for Television Show and Motion Picture Concepts and Proposals*, 17 IPJ 2

⁵² *Sony Pictures Entertainment Limited Inc v Fireworks Entertainment Group Inc*, 156 F. Supp. 2d. 1148, 1158 (CD Cal 2001). The plaintiff owned the copyright in the motion picture “Zorro” and the associated comic book.

⁵³ Fiore and Rogoway, *Reality Check*, Los Angeles Lawyer, July-August 2005, 34
http://www.agsk.com/Articles/74_Reality%20Check.pdf

⁵⁴ [1933] Ex CR 84

⁵⁵ Ibid

⁵⁶ *Preston v 20th Century Fox Canada Ltd* (1990), 22 C.P.R. (3d) 242

⁵⁷ (1989), 102 A.R. 6 at 39 (Q.B.), affirmed (1992) 120 A.R. 291 (C.A.)

occurred, because: (1) a large number of the similarities were found to be unprotected; and (2) the dramatic tone of the two shows were entirely different (not that this in itself is a barrier to a finding of infringement).

In the most recent Canadian recent case of *Productions Avanti Ciné-Vidéo c. Favreau*⁵⁸ the issue before the court was “what constitutes a substantial element of a dramatic work.” The court found that copyright subsisted not only in the characters featured in the fictional television series but also in the integrated expression of all elements comprising the show, and that infringement had occurred. The “copying” consisted of reproduction of visual and audio elements including costumes, mannerism, décor, opening presentation, all the quirks of language and characteristic expressions.⁵⁹

E. Elsewhere

In the Dutch and Brazilian case, *Castaway Television Productions Ltd & Planet 24 Productions Limited v Endemol*, the Dutch Supreme Court of the Hague rejected the appeal by Castaway Television Productions Ltd and Planet 24 Productions Ltd against the decision of the Dutch Court of Appeal which in turn confirmed the decision of the Dutch Court of first instance. The trial judge had ruled that the format of Big Brother is not an infringing copy of the Survivor format (the "Survive" format).⁶⁰ Castaway Television asserted that the Survive format is a copyright work by virtue of its unique combination of 12 elements. Endemol denied that the Survive format was entitled to copyright protection. It also denied that the Big Brother format was an infringing copy of the Survive format. In June 2000 these claims were dismissed at the trial of the action, and in June 2002 the Dutch Court of Appeal upheld that judgement. Castaway and Planet 24 then appealed to the Dutch Supreme Court. The Dutch Court of Appeal had taken a pragmatic view of the issue basing its judgement on the similarities between the relevant programmes. The Court concluded that:

*"A format consists of a combination of unprotected elements... An infringement can only be involved if a similar selection of several of these elements have been copied in an identifiable way. If all the elements have been copied, there is no doubt. In that case copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved. A general answer to the question of how many elements must have been copied for infringement to be involved cannot be given; this depends on the circumstances of the case."*⁶¹

The Dutch Supreme Court agreed with the Court of Appeal in deciding that the Survive format was a copyright work, but that the Big Brother format was not an infringing copy.

A successful claim for breach of copyright has now been made in Brazil based on the Big Brother format. Endemol had entered into negotiations with TV SBT of Brazil in the course of

⁵⁸ (1999) 1 CPR (4th) 129

⁵⁹ Ibid

⁶⁰ (unrep, 16 April 2004, Dutch Supreme Court)

⁶¹ Ibid

which Endemol provided extensive information on the Big Brother format. TV SBT chose not to acquire a license for the format and produced "Casa Dos Artistas" (the Artist's House), which the Brazilian Court described as a "rude copy". Endemol and its Brazilian licensee for the Big Brother format (TV Globo) sued TV SBT seeking an injunction and damages.⁶²

The defendants claimed that a reality show is no more than an idea, citing the lack of scripts. They claimed that the format bible was "in reality a simple manual that describes methods and procedures...; the idea of locking up people inside places and observing them is not new; ... the work "1984" by George Orwell deals with this theme..."⁶³ However, the Court heard expert academic opinion that: "[a] Television programme format, in the sense employed by the television business media, is a much wider concept that does not only include the central idea of the programme but also encompasses an extensive group of technical, artistic, economical, business... information. The format of television programmes is not just the idea of the programme, it is the idea and much more."⁶⁴

The Court found that the Big Brother format enjoyed copyright protection under the Brazilian law of copyright, and noted that Brazil was a signatory to the Berne Convention (which gives a work from another territory certain basic protections and in all events accord the work the same treatment as they offer their own nationals). It observed that the format "is not limited to spying [on] people locked up in a house for a certain period of time; it contemplates a programme with a beginning, middle and end, with meticulous description, not only of the atmosphere in which the people will live for a certain period of time but also the places where cameras are positioned. The format consists of details such as the use of microphones tied to the participants' bodies, linked 24 hours a day, music styles, the form through which the participants will have contact with the external world, activities, among others. The images and audio situations captured for hundreds of thousands of people through the daily inserts in the programming of the television services and through the Internet with the consequent commercial exploitation is also a unique characteristic of the format."⁶⁵

The judge did not spare the defendants, stating that; "the whopping similarity between both programmes does not stem from chance, but from a badly disguised and rude copy of the format of the programme Big Brother". The Court made awards of damages to Endemol of approximately £400,000, and to their Brazilian licensees of over £1 million.⁶⁶

In May 2003 the author Barbara Taylor Bradford won an injunction in the Indian Supreme Court to prevent transmission of a 260-episode Bollywood serial 'inspired' by her bestselling novel *A Woman Of Substance*. The novel tells of the heroine's rise from an impoverished servant to become head of a business empire; the Bollywood serial *Karishma - the Miracles*

⁶² Coad, J (2004) *Endemol wins Copyright Protection for Big Brother in Brazil*, Swan Turton e-bulletin

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

Of Destiny charts a similar story. Both stories begin with the heroine recounting her adventures in old age. Taylor Bradford won an injunction at first instance in the Calcutta High Court and although this was overturned on appeal the injunction was confirmed in the Supreme Court.⁶⁷

V Conclusion

“There is currently a strong trend to ‘propertize’ everything in the realm of information. Intellectual property law is expanding on an almost daily basis as new rights are created or existing rights are applied to give intellectual property owners rights that they never would have had in an earlier time.”⁶⁸ Private property rights in intellectual property goods are a simple result of changes in economic value that stem from the development of new technology and the opening of new markets. In providing for ownership of personas, it should be remembered why this is being done. The world of artistic expression is a marketplace in which resources are scarce.⁶⁹

The global exploitation of television show formats such as “Who wants to be a Millionaire” and “X Factor” is a multi-million dollar market. The sums involved have resulted in an increasing recognition (or at least a demand from those in the entertainment industry) that the law must develop in conjunction with the market to offer protection. The value of any format is based on the assumption that it is unique and cannot be copied with immunity.

Whilst commercial practice would indicate that format rights are a licensable commodity, the legal reality is that they are not recognized by statute or the courts as attracting their own species of protectable rights. This is out of sync with contracts that talk of format fees and define “format rights” whilst independents who “own” format rights are known to borrow against the security of the “format rights” that they own. “Under the present legal framework the business is generally run as a series of gentlemen’s agreements. Sadly, many people don’t act like gentlemen . . . formats are bought and sold, licence fees are paid. . . However, this assumed security is largely illusory. It is as tangible as the emperor’s new clothes. . .”⁷⁰ By registering with the Guernsey Image Rights Registry, format owners may be able to formalize their rights and dress their formats.

This note is only intended to give a brief summary and general overview of this area of law. It is not intended to be, nor does it constitute, legal advice and should not be relied upon as doing so.

⁶⁷ Challis, B & Coad, J (2004) Format Fortunes - Is There Now Legal Recognition for the Television Format Right? Swan Turton e-bulletin citing Copied Book Plot Results In Indian Injunction: Law Updates June 2003 and The Times, May 14th 2003

⁶⁸ Lemley, M (1997) *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873

⁶⁹ Adrian, A (2013) *Mickey Mouse wants to live forever: The Guernsey Image Rights Ordinance may allow that*, European Intellectual Property Review

⁷⁰ David Lyle, Chairman of the Format Recognition and Protection Association 2003. T. Colwell and D. Price, *Rights of Passage, British Television in the Global Market*, A Report by the TV Research Partnership (February 2005) UK Trade and Investment, p.40.



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