

Reality Television has a Personality All of its Own

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Abstract: Does a television show have Personality? If so, could it have a right of publicity? Currently, contract law and course of trade provide the answers to these questions. Intellectual property laws have spotty and inconsistent application. The Guernsey Image Rights Ordinance may be able to provide a unique alternative. Talent shows have been used to explain how this would be possible.

I Introduction

Does a television show have Personality? If so, could it have a right of publicity? Currently, contract law and course of trade provide the answers to these questions. Intellectual property laws have spotty and inconsistent application. 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.¹ 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*”.² With regard to television formats, this is even more difficult.

The Format Recognition and Protection Association (FRAPA) mission is to be the home of international format business by providing protection and information for producers, creators and distributors all over the world.³ 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 personage’s identity and associated images linked to that personage.⁴ Similar to publicity rights, image rights 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.⁵ Talent shows have been used as a test case here.

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.

¹ See, 17 U.S.C. §102; or CDPA 1988 s 1

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

³ See generally, <http://www.frapa.org/>

⁴ Personage is defined in Section 1(1) of the Guernsey Image Rights legislation.

⁵ This question was posed in an earlier article by the author entitled *Hot Seat Millionaires: Current Television Format Protection, An International Survey* (2013)

II The Business of Television Formats

Format trade worldwide has increased by more than 10% annually in the past ten years.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% of all TV programmes exports.⁸

Certain jurisdictions are reluctant to grant copyright protection to television formats. Those recognizing television formats as copyrighted works have been reluctant to allow format owners to successfully assert their rights in copyright infringement proceedings against third parties.⁹

III 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". 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"),
- (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.

⁶ Ibid

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

⁸ 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. 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 Further arguments based upon unfair competition law have been elegantly put forth by Lisa Logan in the European Intellectual Property Review. *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 Can a television format be a personage?

Conceivably, television formats could be considered to have legal personality, and thus be considered a legal person. To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.¹⁰ Whatever the controversies regarding the 'essential nature' of legal personality, there seems to be a uniform concurrence as to the test of its existence in a given subject and the manner in which it is conferred, whether upon a natural person or upon an inanimate thing.¹¹ A Hindu idol has been held to be a legal person.¹² A corporation "is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own."¹³ A ship can be described as a "mere congeries of wood and iron".¹⁴ Upon being launched, it takes on a personality of its own, a name, volition, capacity to contract, employ agents, commit torts, sue and be sued.¹⁵ A fictional character (human or non-human) has been conferred with legal personality under the definition of personage.¹⁶

The ship, the corporation, the fictional character and the natural person all require the same thing to make them legal persons, namely, to be a party to legal relations. None of them require anything more.¹⁷ "The legal personality of the so-called natural person is as artificial as is that of the thing or group which is personified. In both cases, the character or attribute of personality is but a creation of the jurist's mind – a mere conception which he finds it useful to employ in order to give logical coherence to his thought."¹⁸ The legal personality of an idol, a ship, a fictional character or a corporation is just as real as and no more real than the legal personality of a normal human being. In any of these cases, it is an abstraction similar to title, possession, rights and duties.¹⁹

A useful analogy for this would be to compare title to personality. To suggest that a subject has legal personality is to suggest that it is a party to legal relations without specifying sufficiently what the relations are. Likewise, to suggest that one has title, is to suggest that one is a party to a particular class of legal relations, i.e., those belonging to the ownership of property. In either situation, to take away all rights, powers, privileges, and immunities that shelter the term, there is nothing left except the shelter, which becomes a meaningless word.²⁰ To regard legal personality as a thing apart from legal relations is to commit a similar mistake as separating title from the rights, powers, privileges, and immunities which are intrinsic to its definition. Without *relations*, there is no more left than the smile of the Cheshire Cat after he has disappeared.²¹

¹⁰ Gray, J (1921) *The Nature and Sources of the Law* (New York: Columbia University Press); Salmond, J (1916) *Jurisprudence* (London: Sweet & Maxwell)

¹¹ Smith, B (1928) *Legal Personality*, 37 Yale Law Journal 3

¹² *Pramatha Nath Mullick v Pradyumna Kumar Mullick*, L.R. 52 I.A. 245 (1925); see Comment (1925) 41 L.Q. Rev. 419

¹³ Geldart, W (1911) *Legal Personality*, 27 L.Q.Rev. 90

¹⁴ Justice Brown in *Tucker v Alexandroff*, 183 U.S. 424 (1902) cited by Justice McKenna in *The Western Maid*, 257 U.S. 419 (1922)

¹⁵ Hohfeld, W (1923) *Fundamental Legal Conceptions* (New Haven, CT: Yale University Press)

¹⁶ IRO s 1(1)(e)

¹⁷ Smith, supra.

¹⁸ Willoughby, W (1924) *The Fundamental Concepts of Public Law* (London: Macmillan)

¹⁹ Ibid

²⁰ Hohfeld, supra

²¹ Smith, supra

Under the assumption that a legal person is a party to legal relation and that this legal personality is not necessarily a human being, then one must abandon the premise that only natural persons are parties to legal relations.²² If a sovereign power confers legal personality upon an idol, a ship, a fictional character or an abstraction, such as one of the functional aspects of an individual or of an organized group, such idol, ship, fictional character or functional abstract ipso facto is party to legal relations. To insist that only human beings are competent to the part is to confuse the concept of legal personality with unnecessary anthropomorphisms.²³

B The Personage of a Production Company

Alternatively, the production company, set up as a protected cell company (PCC) on Guernsey, would be the personage (core) protecting separate personalities in separate cells of the company. The personage is the legal person whose personality will be registered. Each television show that is produced by the production company would be a distinct personality of that personage in need of distinct protection via a protected cell within the company.

A PCC is a limited liability company with a board of directors. A PCC may create one or more cells, the assets and liabilities of which are segregated from the assets of the PCC itself (the core) and from the assets and liabilities of other cells. Reference to the “core” is to the non-cellular assets of a PCC. A cell is established by a board resolution. A PCC may, in respect of its cells, create and issue cell shares, the proceeds of which will form part of the “cellular assets” attributable to that cell.

The key advantage of a PCC is that a distinction is made between the core assets and the cellular assets. As such, when a cell incurs liabilities in respect of the business it carries out, those liabilities will only be attributed to the assets of that cell. Creditors of a cell are not able to have recourse against the assets attributable to other cells or to the core assets and thus the assets of another cell or the core are referred to as protected assets. This enables a number of portfolios to be established in the same company but with fewer risks attaching to contagion of claims between asset classes or lines of business or television formats.

How this would work for television formats and their image rights is a unique proposition. For example, the talent show *The Voice* is owned by Warner Horizon Television which is one of the television production arms of Warner Bros. Entertainment, itself part of Time Warner. Warner Horizon Television would establish a PCC on Guernsey entitled WHT, PCC. The Legal Person applying to register their personality would be *WHT PCC The Voice Cell*. The proprietor would be Warner Horizon Television, and the personage would be WHT, PCC.

It is necessary to have the extra corporate structure in place in order for the personage to establish multiple registered personalities. This is not evident when actually applying for image rights protection. When applying for a simple registration of a personality all

²² Cf. Hohfeld, *supra*

²³ Smith, *supra*

that is required is a name and photograph of the personality. In the current example, the name is *The Voice*. The photograph would be:



C What images would indicate 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 personage’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.²⁴ 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.*”²⁵ 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.

²⁴ 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.

²⁵ *The New Shorter Oxford English Dictionary* (1993) Oxford University Press, New York, Vol. 2

Reality television is a genre of formatting that documents unscripted situations and actual occurrences, and often features a previously unknown cast. The genre often highlights personal drama and conflict to a much greater extent than other unscripted television such as documentary shows. The genre has various standard tropes, such as reality TV confessionals used by cast members to express their thoughts, which often double as the shows' narration. In competition-based reality shows, a notable subset, there are other common elements such as one participant being eliminated per episode, a panel of judges, and the concept of immunity from elimination.

What characteristics of a television format would be considered images of the personality?

- (a) The name of the show: *Who wants to be a Millionaire?* (or any variations of the name, i.e., *Hot Seat Millionaire*)
- (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 Simon Fuller & Idol v Simon Cowell & X Factor

Each of these television formats appear very similar to each other and to *The Voice*. However, just like two human beings who are dressed in similar fashions, there are distinctive differences which proclaim their unique identity. Their personage is distinct with regard to their individual legal relations. Each handles their legal relations differently. *Idol* and *X Factor* have been clashing with one another but have not brought *The Voice* into the comparison battle.

A Background

Simon Fuller, the creator of *American Idol*, accused Fox Broadcasting Co. and Fremantle Media North America Inc. in California state court of failing to provide him with an executive producer credit for the "X Factor" TV show as required by an agreement that helped resolve a copyright infringement suit. Simon Fuller, the producer who came up with "Pop Idol" in the U.K. and turned the singing competition show into a worldwide franchise, claims the defendants contractually promised that when "X Factor" aired in the U.S., he would receive an executive producer credit and a fee, and in return, Fuller settled a suit against former "American Idol" judge Simon Cowell for producing "X Factor" in England that aimed to compete against "Pop Idol."

"As often happens in Hollywood, however, binding promises made one day for expediency turn out to be cast aside when it comes time to perform," the complaint said. "This is such a case."²⁶ Fuller and his production companies lodged an infringement and breach of contract suit in England against Cowell and his production firm after "X Factor"

²⁶ *Simon Fuller v. Fox Broadcasting Co. et al.*, case number SC113449, in the Superior Court of the State of California, County of Los Angeles.

premiered on British TV in October 2004, claiming the rival music talent competition show was strikingly similar to the “Idol” franchise and constituted an infringement of Fuller’s intellectual property rights.

Fox, which owned the U.S. broadcast rights to both “American Idol” and “X Factor,” encouraged Fuller and Cowell to settle their dispute, according to the complaint. The current suit alleged that in November 2005, Fox wrote a letter to Fremantle and Fuller’s production company stating that if Fox decides to order episodes of the U.S. version of “X Factor,” that “Fox will approve Simon Fuller as an executive producer on the series and will recognize in the applicable budget an executive producer fee for Simon Fuller that is commensurate with his duties and stature in the entertainment industry.”²⁷ Based on the promises made by Fox and Fremantle, Fuller settled his suit against Cowell for a confidential amount, and the parties agreed that “X Factor” would not be shown in the U.S. until 2011, that Cowell would remain a judge on “American Idol” until 2010 and that Fuller would receive a minority interest in “X Factor,” according to the complaint.²⁸

The current suit alleges that “X Factor” will be broadcast in the U.S. in September 2011, but the defendants have refused to honor their obligations and have refused to negotiate in good faith. “Fox and Fremantle made hundreds of millions of dollars thanks to the creative efforts of Fuller,” the complaint said. “Defendants’ refusal to honor their promises made to Fuller is particularly malicious given that but for Fuller’s agreement, the X Factor show would not be able to be broadcast in the United States at all.”²⁹

The suit also took a shot at Fox’s parent company, News. Corp.³⁰ Fuller contends that Fox and News Corp. have demonstrated a “callous disregard for Fuller’s rights, which given recent developments, reflects a corporate culture — if not a pattern and practice — of wrongful behavior.”³¹

Fox and Fremantle responded that Fuller had not been hired and did not perform any duties on the U.S. version of “X Factor.” “His suit seeks payment and credit as an executive producer despite his neither having been approved by the required parties, nor hired, as such,” the companies said. “We believe this lawsuit is without merit and we expect to prevail.”³² The suit asserts claims of breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel and declaratory relief.

B The Format

	American Idol	X Factor
Contestant Eligibility	15 – 28 year individuals Only 1 person can be an Idol each season.	Minimum age of 12, no upper age limit Duos and Groups are welcome.

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ News Corp owned the British tabloid News of the World which was subsequently shut down after illegal reporting practices and a phone hacking scandal were brought to light.

³¹ Fuller, supra

³² Ibid

Demographics	For the past four years, <i>Idol</i> has been dominated by a dynasty of cute white boys who seem to have a lock on the crown. No non-white singer has made it to the <i>Idol</i> finale in four years. No African-American male has made it farther than fourth place in eight years.	<i>The X Factor</i> , which will typically feature everything from hip-hop to tween confessionals, sounds utterly of the moment provided by a diverse group of performers.
The Stakes	<i>Idol</i> winners are awarded a \$1 million contract — and, these days, a blink-and-you'll-miss-it recording career.	The <i>X Factor</i> winner will take home the biggest prize offered by any American TV talent competition: A \$5 million recording contract (not to mention a starring role in a Pepsi commercial that will air at this year's Super Bowl).
Sponsors	Coca-Cola	Pepsi
Production	Weekly shows are filmed in front of a small theatre audience. The finale is filmed in a larger theatre with over 6,000 audience members.	The result is a weekly display of some breathtaking visual effects surrounding the singers, whose numbers, complete with costumes and backup dancers, create an effect that feels like a big-budget arena concert from top to bottom.
Judges	Three judges who are supporting and nurturing.	The judges are mentors to the contestants which makes it possible for them to direct their harshest barbs at each other's guidance rather than at the hapless singers themselves. A redirection that allows the show to be paradoxically more vicious and more humane.

C Solution

Had any of these companies registered their personalities with the Guernsey Image Rights Registry, an in-depth review of which, if any, intellectual property rights had been infringed could have been made and suitable action taken. The cost of registration is not great in comparison to the value of the formats themselves. By registering characteristics of the format as images of the personality, the PCC can specifically delineate those aspects of the personality it wishes to sell, license, or exclude from future contracts. Having a publicly registered personality puts the world on notice that a personality will be protected to fullest extent available at law.

V Conclusion

“The law is the theory of things, as received and acted upon within the courts of justice, and this theory may or may not conform to the reality of things outside.”³³ Granting television formats legal personality in the way described would recognize changes in economic value that stem from the development of new technology and the opening of new markets. In providing production companies via the vehicle of protected cell companies with an opportunity to protect the images of their television formats as discrete legal personalities, it should be remembered why this is being done. The world of artistic expression is a marketplace in which resources are scarce.³⁴

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. . . .”³⁵ By registering with the Guernsey Image Rights Registry, format owners may be able to formalize their rights and dress their formats.³⁶

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.

³³ Gray, J supra.

³⁴ Adrian, A (2013) *Mickey Mouse wants to live forever: The Guernsey Image Rights Ordinance may allow that*, European Intellectual Property Review

³⁵ 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.

³⁶ Adrian, A (2013) *Hot Seat Millionaires: Current Television Format Protection, An International Survey*

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