Format Fortunes: Is there Legal Recognition for the Television Format Right?

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Most people who are involved in exploitation, global licensing and merchandising of television programmes know the value of a television format – whether it be Who Wants To Be a Millionaire?, Big Brother, Wheel of Fortune, Pop Idol, or Family Fortunes. Licensing formats – where the creator of a format licenses a broadcaster or production company in another territory with the right to produce a version of that format – is a massive global industry worth tens of millions of dollars. However, there is also a huge ‘copycat’ industry, with rival ‘versions’ of these formats being developed by other broadcasters and producers. The recent question troubling both the industry and the courts has been whether or not television formats enjoy any legal protection themselves, and whether copycats can be stopped.

IN UK law, the starting point when looking at the licence of format rights is the 1989 case of Green v Broadcasting Corporation of New Zealand where presenter Hughie Green lost a Privy Council decision when he sought to establish a format right to his programme concept, Opportunity Knocks. Simply speaking, the Law Lords who made up the Court reaffirmed the general principle in UK law that – on the facts of this case – there could be no copyright in an idea, and they established that there could be no copyright in the format of this game-show. It should be said, however, that the details of the format presented to the court were fairly limited: the format was a talent show with the winner being the act who registered the highest audience applause on a ‘clapometer’ – and Green had a number of unique ‘catchphrases’. Some modern formats are far more detailed than this particular example.

In United Kingdom law, under the provisions of the Copyright, Designs & Patents Act 1988, copyright subsists in original literary, dramatic, musical and artistic works. With literary, dramatic and musical works these must be expressed in a permanent form. The definition of a literary work has been extended to a timetable index, trade catalogues, street directories and football fixture lists – provided there is sufficient skill, judgement and labour involved. But Petersen J, giving judgement in 1916, determined that copyright was concerned with protecting the “expression of thought”, and not the “originality of ideas”. Copyright does not require that an expression be original – just that it is not copied from another work.

This determination has led to a particular problem with television programme formats in the United Kingdom, where there seems to be no protection in law of the basic idea in a format – however unique and original – despite the fact that there is a growing business licensing these very format ‘rights’. Whilst the written plot of a play has, in England, been held to be protected by copyright, the format of a quiz show has not, even when expressed in written form. This tension between what is and is not protected has long tested the courts in many jurisdictions. In 1930, the wonderfully titled United States Judge Learned Hand pointed out that whilst an author could prevent the use of the ‘expression’ of his ideas, he could not prevent the use of his ‘ideas’ to which protection never extended. The Judge pointed out that there was no clear line between the two, stating that “Nobody has ever been able to fix that boundary, and nobody ever can”.

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In simple terms, anyone can write a horror story – the idea of a ‘horror story’ is not protected – provided they do not copy another work. But what about copying the basic outline ideas of a vampire story from another book: Man gets bitten by Dracula, man becomes vampire, man gets hunted down or saved – or using a specific character such as a Frankenstein monster? It is here that the law has some trouble determining what does and does not have copyright protection.

Two recent cases from the UK and the US support the position set out in Green v Broadcasting Corporation of New Zealand. However, there have also been two recent decisions – in Brazil and Holland – which go some way towards giving television formats a ‘copyright’ protection in their own right. This position seems supported by recent decision in India which again protects the right of an author to stop the production of a television programme ‘inspired’ by a plot taken from the author’s book.

The UK case of Miles v ITV Network Limited (2004) concerned a dispute over the rights to an ITV 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. 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”.

Perhaps more relevant was the case between US broadcasters CBS and ABC in early 2003 in the US District Court NY. Here Judge Loretta Preska reaffirmed the principle that there was no copyright in an idea, and that on the facts of that case there were no format rights in a television programme. CBS had claimed that the programme, I’m A Celebrity Get Me Out of Here, was a copy of their programme, Survivor, and sought injunctive relief against ABC to prevent the programme going to air. ABC successfully argued that their show was an original format, and that injunctive relief was not an appropriate remedy.

The position is the same in international law. The World Intellectual Property Organisation (WIPO) states that “Broadcast content … can also be protected by copyright and related rights, depending on the national legislation. Television formats, however, have not been discussed at WIPO as subject of a separate international protection.”

Nevertheless, recent Dutch and Brazilian cases are perhaps more interesting. In Castaway Television Productions Ltd & Planet 24 Productions Limited v Endemol (2004) 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). 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.

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.

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 best selling 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 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.

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

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.

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.

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 pounds sterling, and to their Brazilian licensees of over 1 million pounds.

Whilst both these cases support the concept of a copyright for a programme format, they are not binding in UK law. One must presume that the position in UK law is still where Hughie Green reluctantly left it – a format is an idea, and in itself as an idea it cannot be protected in copyright law.
All that said, there is some protection which can be given by the law: all television programmes actually made are protected by the Copyright Designs & Patents Act 1988 (Section 5). A name (and logo) of a programme (or a programme format) can be trademarked, if the name and/or logo is original, distinctive and capable of graphic representation; scripts, set designs, stage designs and lighting plots can be all protected by copyright as can any original music used. It is important to take proper legal advice at an early stage to see what elements of your ‘perspiration’ can be protected – ‘inspiration’ is far harder to defend.

But what is really needed in the UK, and indeed other jurisdictions, is a clear decision (or legislation) to set out the broad parameters of protection of a format (or otherwise), and an answer to the basic question of whether or not Green v Broadcasting Corporation of New Zealand is still good law, and whether a format can now be copyright protected.

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ADDENDUM
New clues to the treatment of TV formats in the UK Courts IPC Media v Highbury-SPL Publishing
One of the UK's leading intellectual property judges (Mr Justice Laddie) has restated the key principles in the UK law of copyright on which format rights cases will be judged in the case brought by the publishers of Ideal Home (IPC Media) against the publishers of Capital Homes magazine (Highbury-SPL Publishing). The judge found that no copying had taken place, and the action failed.

IPC claimed that its commercial rival (Highbury) had copied aspects of the design, subject matter, theme and presentational style of its magazine, *Ideal Home*. IPC sought to persuade the court that the style and design of the rival magazine were sufficiently similar to raise an inference of copying by the rival publisher. This allegation was comprehensively rejected by the judge, who, however, helpfully set out in a preamble to the judgment guidelines on how the court would approach such claims. The relevance to television formats was clear, since the claim by IPC amounted effectively to an allegation that the themes, styles and ideas in their magazine had been copied by their commercial rivals.

The judge drew his own analogy with television formats in his judgment by making reference to the decision in the Privy Council in *Green v Broadcasting Corporation in New Zealand*. In that case the television presenter Hughie Green sought to assert that the general structural format of his television programme called "Opportunity Knocks" was a dramatic work protected by copyright. Mr Justice Laddie quoted with approval this part of the judgment of Lord Bridge:

"It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or gameshow which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were "structure" or "package". This difficulty in finding an appropriate term to describe the nature of the "work" in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts, the performers and the talent show, the question and answers in the quiz show etc) and identified as "an original dramatic work" ... The protection which copyright gives creates a monopoly and "there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world ... The subject matter of the copyright claimed for the "dramatic format" of "Opportunity Knocks" is conspicuously lacking in certainty."

Mr Justice Laddie warned against, in all copyright cases, simply excluding all the distinctive elements between the two copyright works at issue, and concentrating exclusively on the similarities in an attempt to prove that an infringement has taken place. He described this as an attempt to "create similarity by excision". He stressed that the differences "may be just as important in deciding whether copying has taken place."

The judge also stressed that the law of copyright has never protected general themes, styles or ideas. Accepting that it is impossible to define the boundary between the mere taking of the general concept of ideas on one hand, and copying in the copyright sense on the other, he also cited with approval the judgment of the great US Judge Learned Hand in *Nicholls v Universal Pictures* who said:

"Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas", to which, apart from their expression, his property is never extended."

Mr Justice Laddie concluded his short but helpful exposition of the relevant copyright principles by quoting Lord Hoffman in *Designers Guild Limited v Russell Williams (Textiles) Limited*:

"Certain ideas expressed by copyright work may not be protected because, although they are ideas of literary, dramatic or artistic nature, they are not original, or so common place as not to form a substantial part of the work ..."
Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution for the author's skill and labour, tends to lie in the detail with which the basic idea is presented."

The remarks made by Mr Justice Laddie in this case indicate that, at least so far as he is concerned, the courts will maintain the cautious approach to television format disputes that it adopted in the Green case, where a television format claim was made in an attempt to protect a largely unscripted talent show which nonetheless had a number of distinctive features. This indicates that the UK courts may approach the issue of television formats more conservatively than some other jurisdictions (see above concerning format claims in Holland and Brazil).

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