

TV COPYCATTING: DETERMINING THE THRESHOLD BETWEEN LEGAL COPYING AND COPYRIGHT INFRINGEMENT

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ABSTRACT

TV formats are so popular and widely traded all around the world. Therefore, they lead highly-profitable business and this turns TV formats into precious assets. Hence, it is essential to protect these assets in legal context. The problem is that TV formats are composed of ideas and concepts and these are not under protection of copyright law. So, is it free to copy a whole format? Of course not, but there is a thin and blurry line between legal copying and copyright infringement. This paper aims to provide help on the determination of the threshold between legal copying and copyright infringement.

Keywords: *TV formats, TV copycatting, copyright infringement, copyright law*

TV FORMATLARININ KOPYALANMASI: TELİF HAKLARINA AYKIRILIK EŞİĞİNİN SAPTANMASI SORUNU

ÖZET

TV formatları, sadece ülkemizde değil bütün dünyada çok popüler olan ve gün geçtikçe daha çok izlenen şovlardır. Popülerliklerinden dolayı formatların hakları çoğu ülkeye pazarlanmakta ve oluşturduğu bu pazarın hacmi günümüzde medya sektörüne yön verebilecek büyüklüktedir. Tüm bu nedenlerden dolayı, TV formatları, medya sektöründe hukuken koruma altına alınmak istenen önemli mal varlığı kalemlerindedir. Bu noktada akla ilk gelebilecek alan olan telif hukuku mevcut düzenlemeleriyle, TV formatlarına koruma sağlamada önemli bir engel getirmektedir çünkü formatlar, fikir ve konseptlerin bir araya getirilmesiyle oluşturulmaktadır. Ancak tabii ki, TV formatları, telif hukukunun koruma alanının tamamen dışında değildir yalnızca bir formatının bu alana girip girmediği çok hassas bir değerlendirme ile saptanabilir.

Anahtar Kelimeler: *TV formatları, TV şovları, telif hakkı, fikir ve sanat eserleri,*

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Introduction

TV format business is a global business that has a high trade volume around the world. According to the FRAPA 2011 Report, the production volume generated by traded formats has grown from €6.4bn (2002 – 2004) to approximately €9.3bn (2006 – 2008). This quick growth is the result of successful formats such as “Who Wants to be a Millionaire?”, “Big Brother”, “Survivor”, “Pop Idol” or “Fear Factor”¹.

Although the trade of TV formats has a sizable economic prominence, there is no precise legal definition for TV formats². We can simply put it into words that a TV format is a concept which has been programmed to be sold to TV channels for adaptations in different countries³.

Various elements are being added to the format in the development process and these elements make the TV format unique⁴. Because of the variety of these elements, different methods are being used for the legal protection of TV formats, including copyright, trademark, laws against unfair competition, confidentiality agreements and several market strategies⁵. This paper focuses only on the copyright aspect of TV formats.

In the creation process of a new TV show, there is always a blurry line between using commonplace elements and copying specific elements from other formats. Consequently, there is no international legal framework for legal copying and copyright infringement of TV formats and court practice on this issue tends to be uneven⁶.

The aim of this paper is to expound the threshold between legal copying and copyright infringement with regard to TV formats. To achieve this, we have scanned legal disputes about TV format copying from different

¹ FRAPA 2011 Report, http://www.frapa.org/wp-content/uploads/Report/FINAL%20FRAPA_Report_2011.pdf p.5, (accessed on 26.12.2014).

² Neta-Li E. Gotlieb, ‘Free to Air?’, *IDEA*, 2011, 51(211), p.214.

³ Chalaby, Jean K, ‘The Making of an Entertainment Revolution: How the TV Format trade Became a Global Industry’, *E.J.C.*, 2012, 26(4), p.296.

⁴ A. Moran, J. Malbon, *Understanding the Global TV Format*, (Intellect Books, 2006), p.20.

⁵ M. Kretschmer, and S. Singh, “The Exploitations of TV Formats: an Empirical Study, Intellectual Property and Non-Law Based Strategies”, <http://www.hiig.de/wp-content/uploads/2013/10/Exploitation-of-TV-Formats-Empirical-Study.pdf> (accessed on 26.12.2014).

⁶ U. Klement, ‘Protecting Television Show Formats under Copyright Law’, *E.I.P.R.*, 2007, 29(2), p.52.

jurisdictions and in light of the findings from these decisions, we are going to set some criteria to help determine whether a given situation could give rise to an infringement claim. Legal disputes, which were used for threatening rivals or which ended up in settlements without a summary judgment, are excluded from the scope of this paper. In the first part of the paper, we are going to examine some of the more significant legal disputes and their results of greater relevance. In the second part, we will analyze the current practice and based on it propose criteria for telling apart legal imitation from copyright infringement.

I. Copycatting Cases

1. Green v Broadcasting Corporation of New Zealand⁷

This case is the starting point of TV format copying disputes. “Opportunity Knocks” was a famous talent show and Hughie Green was the producer and the presenter of the show. The Broadcasting Corporation of New Zealand broadcasted a similar show under the same title in New Zealand.

According to the claims of Green, similarities between the two shows were the same title, the same form of introduction for each competitor, the same catch phrases and the “clapometer” which measures the reaction of audience to the performances of competitors. Green also claimed that he had written the scripts of the shows and these similarities were copied from the scripts.

The Privy Council ruled that there was no concrete evidence about the content of the scripts and the ideas in the scripts cannot be the subject of copyright. The Council also noted that such talent shows were often presented in a similar way, used the same kind of phrases and particular accessories, and added that the elements in the format were also found in other shows. Thus, the TV show format lacks certainty and unity which are necessary qualifications for a dramatic work. Therefore, the Council found that no infringement had taken place.

Preston v 20 th Century Fox⁸

In this case, Preston claimed that defendant’s “Star Wars: Return of the Jedi” had infringed his copyright because one character in the movie had been

⁷ Green v Broadcasting Corp of New Zealand [1989] R.P.C. 469 (N.Z.C.A.).

⁸ Preston v. 20th Century Fox Canada Ltd. (1990), 33 C.P.R. (3d) 242 (Fed.T.D.), aff’d (1994), 53 C.P.R. (3d) 407 (Fed. C.A.).

copied from his work. The Canadian Court compared a number of factors, including plot, themes, dialogue mood, setting and scenes, pace, sequence and characters to find out if there were copied elements in the movie produced by the defendant. The Court concluded that the question whether there is substantial similarity between the two works should not be determined only by assessing the quantity of similar elements and added that the quality of similar elements may be more important than the quantity.

*Arbique v Gabriele*⁹

The importance of this decision lies in the finding of the Quebec Court that the defendant's access to the claimant's format was insufficient to prove copying. On appeal, in spite of substantial and obvious similarities, the Court of Appeal concluded that the evidence presented was insufficient to conclude that the defendant had copied claimant's format.

*Baccini v Celador Productions Ltd*¹⁰

In these conjoined cases, the Court compared Baccini's "Millionaire" and whose "Who Wants to be a Millionaire?" and found that there were similar elements including: the title, £1 million prize, the multiple choice questions, a mechanism for the doubling of prizes and an initial pool of 10 contestants. The Court concluded that these similarities were sufficient evidence to support the inference of copying of a substantial part of the format.

*TV Globo & Endemol Entertainment v TV SBT*¹¹

In this case, Endemol, owner of the "Big Brother" format, and TV Globo, Brazilian adapter, claimed that the defendant's format "Casa dos Artistas" was an infringing copy of their work. The defendant claimed that a reality show is nothing more than an idea and that the claimant's format was based on locking up different people inside a house and observing them which is taken from George Orwell's "1984". The court heard expert opinion to the effect that a TV format is a wider concept that does not include the central idea, but also includes an extensive amount of technical, artistic, economic

⁹ *Arbique v Gabriele*, [1998] J.Q. n° 3794 (QL) (Sup. Ct.), aff'd 2003 CanLII 16298 (Que. C.A.).

¹⁰ *Celador Productions Limited v Melville - Boone v ITV Network and Others – Baccini v Celador Productions Limited and Others* [2004] EWHC 2362 (CH).

¹¹ *TV Globo Ltda. & Endemol Entertainment International B.V. v TVSBT & Canal 4 de Sao Paulo S.A.*, Civil Appeal No. 994.04.082658-4 – Osasco, <http://www.ifla.tv/big%20brother%20brazil%20judgment.pdf> (accessed on 26.12.2014).

and business information. After that, the Brazilian Court accepted the claims that “Big Brother” format is not limited with locking up people in a house and spying on them; it has a detailed structure with a beginning, middle and end. The format consists of several details; including the positions of cameras, use of microphones tied to contestants 24 hours a day, music styles, activities and the form of contestants’ contact with external world.

*Castaway v Endemol*¹²

In this case, Castaway claimed that the “Big Brother” format was an infringing copy of their “Survive!” format. The Dutch First Instance Court found that there was a combination of 12 different elements in “Survive!” and when these elements were considered collectively there was a sufficiently unique and specific format to be original in the copyright context. Court also added that there was a sufficient description about the format in the format bible. Therefore “Survive!” was found to be the object of copyright but the claim was dismissed by the Court because “Big Brother” format was not found to be an infringing copy. The Dutch Court of Appeal upheld the judgement. The Court focused on the similarities and concluded that a format consists of a combination of unprotected elements and an infringement can only be involved if there is a similar selection of several elements and these elements were copied in an identifiable way. The Court also added that if all of the elements have been copied then there is a copyright infringement but if only one unprotected element has been copied then there is no infringement of copyright. The Dutch Supreme Court agreed with the previous judgments and concluded that the “Survive!” format was a copyrighted work, but Big Brother was not an infringing copy of it.

*Maradentro Producciones v Sogecable*¹³

The Spanish Court stated that a copyrighted format should be detailed and complex reflecting an intellectual creation. On the other hand, a sufficient level of detail does not mean that there should be a complexity and detail as in scripts. The Court also added that if there is a script or a storyline which helps to make a comparison, the format should be protected and in order to provide copyright protection for a format, there should be a qualitative leap from a general concept or an idea.

¹² Cast Away Television Productions Ltd v Endemol Entertainment International BV, ECLI: NL: HR 2004: AO3162.

¹³ FRAPA, p. 26.

*Atomis Media & Outright Distribción v Televisión De Galicia & CTV S.A.*¹⁴

The Court stated that a format may be considered subject to copyright if there is an original work which is created with an intellectual effort of a human mind and expressed through a medium. The court also pointed out that if there is a script or a storyline to make a comparison then the format should be protected. In the originality context, the Spanish Court stated that a format is the combination of different unprotected elements and there is no need for elements to be original by themselves but the combination should be sufficiently unique to be original.

*Meakin v BBC*¹⁵

In this case, Meakin's format was a game show and BBC broadcasted a similar game show. Meakin claimed that BBC had infringed his copyright because; the majority of questions were "*general knowledge questions based on logic and questions based on still, film and music footage*", the size of the jackpot was proportional, the studio contestants participated in heats which resulted in one finalist, and that finalist competes in play-off final; and in the final the contestants were able to confer with family and friends. But the UK Court dismissed the claim and concluded that the similarities were general and commonplace in TV game shows.

II. 4-Step Test

In light of the decisions above, we can propose a 4-step test to help determine whether there is an infringement of copyright of a TV format. Different jurisdictions have different approaches and standards for providing copyright protection to TV formats and determining infringing copies of formats. Therefore our aim is not to provide a universally applicable standard, but to set out some general and common criteria.

(1) Assessing the claimant's format whether it is identifiable as a copyright work

The starting point should be assessing the format whether it is identifiable as a copyrighted work. In this context, formats must be more than an idea, ideas are the mere skeleton of a format and there is a need for format to be fleshed out with elements that have copyright value¹⁶.

¹⁴ FRAPA, p.28.

¹⁵ Meakin v BBC [2010] EWHC 2065 (Ch).

¹⁶ T. Steffenson, 'Rights to TV Formats – from a Copyright and Marketing Law Perspective', *Ent.L.R.*, 2000, 11(5), pp.85-86.

Endemol v TV SBT case provides guidance on this step by stating that a TV format is a wider concept than an idea with artistic, technical, business and economical information. The findings of the court on “Big Brother”; such as the images and audio situations, positions of cameras, activities and the form of contestant’s contact with external world, display the elements which provides a copyright flesh for formats. So a copyright format can be considered as an imaginative and technical way to convey dramatic situation¹⁷. In addition to this, these elements must be different than common elements in similar formats as the court stated in Green v BCNZ. But the important issue on the assessment of elements whether they are common or not, was considered by the Dutch Court in Castaway v Endemol case and the Spanish Court in Atomis V TDG, which said that a TV format is a combination of unprotected elements and there is no need for elements to be original by themselves, but the combination must be original. The decisions on Atomis v TDG and Maradentro v Sogecable provide additional help on this step by explaining that if there is a script or storyline to follow the format then the format should be considered subject to copyright.

As a result, there should be something more than idea in the format; elements which can collectively give copyright value when they taken into consideration with an idea¹⁸. So every format is a different combination of these elements and if there is a unique and specific combination of the elements then we can conclude that the format is identifiable as a copyright work¹⁹.

(2) Listing the key elements of the disputed formats and discerning the similarities

General approach of the courts in deciding infringement is comparing “the key elements” of disputed formats, as in *Endemol v Antena 3*²⁰ and *Nine Films v Ninnox*²¹. So in this step, one should examine the contested formats for their “key elements” and then compare the resultant lists in order to discover similarities.

¹⁷ L. Day, ‘A Copyright Dilemma: TV Format’, *J. Broad*, 1978, 22(2), p.250.

¹⁸ J. Rubin, ‘Television Formats: Caught in the Abyss of the Idea/ Expression Dichotomy’, *Fordham IP and Media Law Journal*, 16:661, p. 675.

¹⁹ F. Eickmeier, H. Von Have, ‘Statutory Protection for Television Show Formats’, *Ent.L.R.*, 1998, 9(1), p.9.

²⁰ FRAPA, p.16.

²¹ *Nine Films & Television Pty Ltd v Ninnox Television Limited* [2005] FCA 1404.

(3)Assessing the similar elements and figuring out whether they are commonplace or original

As the third step, similar elements of disputed formats should be assessed. The Court in *Green v BCNZ*, looked at the elements the two formats had in common and concluded that these were commonplace elements in talent shows. The UK Court in *Meakin v BBC*, followed the same approach stating that similarities between the two contested formats were general and commonplace in the game show arena²². Courts adopted a similar approach in *Nine Films v Ninox* and *Cummings v Global Television*²³.

The outcome of the *Arbique v Gabriele* case was also important in regards to ascertaining the originality of the similar elements. There the court had information about the defendant having had access to claimant's format but decided that defendant's access alone was insufficient and merely circumstantial and therefore there was no evidence of copying.

With the guidance from these judgements we can conclude that where the elements that make up the similarities between the disputed formats are elements commonly found in the kind of TV shows in question, these similarities will not support the finding of infringement²⁴. Also, if the defendant has never had access to the claimant's format, there is a higher possibility of using common elements²⁵.

(4)Assessing the quantity and the quality of similar elements

Last step is assessing the quantity and the quality of similar elements. Both should be taken into consideration in the same time, because neither the quantity and nor the quality are the decisive criteria. The quantity is a clear criteria but the quality means the effect of the similar elements to whole format - whether the common elements are a substantial part considering the

²² D.Fields, 'Come and have a go ... if you think you are smart enough: High Court grants defendants summary judgment in TV format case', *Ent.L.R.*, 2011, 22(2), p.63.

²³ *Cumming v Global Television Network Quebec Ltd & Others* [2005] 17671 (QC CS).

²⁴ Stefan Bechtold, 'The Fashion of TV Show Formats', *Michigan State Law Review*, 2013, V.451, pp.468-469.

²⁵ Barry Sookman, 'Robinson v Cinar in the Supreme Court', Barry Sookman, <http://www.barrysookman.com/2013/12/24/robinson-v-cinar-in-the-supreme-court/>, (accessed on 26.12.2014).

format in its entirety²⁶. In *Preston v 20. Century Fox* case, the Court concluded that the similar element, which was a character in both works, had not a big impact in the defendant's movie because there was a combination of different complex elements and different characters. As a result, if an element, which has a significant importance on the format, is copied then it means that the requirement of this step has been fulfilled. If numerous elements have been copied but the elements do not have a big influence on the format then the total influence of all elements shall be assessed and if the total effect of all elements has a big impact then the requirement of this step also has been fulfilled.

Conclusion

In the global TV format business there can be similar formats which might be a result of common ideas or might be the result of copied elements and there is a blurred line between copyright infringement and using similar elements without copyright infringement. Therefore, courts have the duty to set the copyright infringement threshold for TV formats. In light of the decisions from different jurisdictions, a 4-step test can be used to determine if a copyright infringement of a TV format has occurred. First, claimant's format shall be examined for whether it is identifiable as a copyright work, then each of the disputed formats will be examined for their key elements and those key elements then compared to see which of them coincide. As the third step, the uniqueness of similar key elements shall be assessed. Lastly, the quantity and the quality of the similar elements shall be assessed in light of the format as a whole. If all of the steps have been passed in a dispute then we can say that there is an infringement of copyright of a TV format.

²⁶ Rebecca Swendells, Michael Sweeney, 'The Difficulty with TV Formats and Copyright Protection', *Ent.L.R.*, 2012, 23(6), p.155.

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