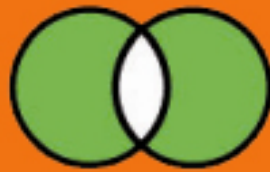


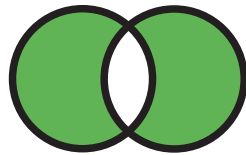
THE



**FRAPA
REPORT
2011**

Protecting Format Rights

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Preamble

Message from the German State of North Rhine-Westphalia



I am delighted to introduce the "FRAPA Report 2011 – Protecting Format Rights" a comprehensive study of protection of global format rights.

This report is funded by the State of North Rhine-Westphalia in recognition of the value it will have for the large community of television professionals who work in the state and farther afield.

North Rhine-Westphalia can proudly call itself the media capital of Germany and is one of the leading media locations in Europe; there are nearly 52,000 media companies operating in the state at present, providing regular employment for over 365,000 people in the media industry. The sales generated total more than 120 billion Euros – considerably more than in Bavaria or Berlin.

Two years ago, FRAPA initiated the second analysis of the global trade in television formats, also supported by the State of North Rhine-Westphalia. The international format market has now become a powerful industry and proved that far from being a lucrative sideline for producers and broadcasters, formats were a major industry in their own right - this includes the protection of intellectual property as an economic branch. The protection of intellectual property from unauthorized copying is one of our most important responsibilities. We hope we can make an important contribution to the growing legal protection of intellectual property and TV formats globally.

The FRAPA report provides a global overview of protecting format rights, the methods of protecting format rights and the application of copyright law from relevant cases in 14 chosen countries.

Based on independent research, it gives an accurate, objective view of global format rights protection.

Marc Jan Eumann

Secretary of State for Federal Affairs,
Europe and Media of North Rhine-Westphalia, Germany

Ministerin für Bundesangelegenheiten,
Europa und Medien
des Landes Nordrhein-Westfalen



A message from FRAPA



FRAPA is very proud to present the FRAPA Report 2011, written by the international law firm Olswang LLP and Dr Sukhpreet Singh, with the support of the German State of North Rhine-Westphalia.

Since its foundation in 2000, FRAPA has fought tirelessly for the protection of format rights — a mission that has become ever more vital as formats have soared in value. The last FRAPA Report in 2009 demonstrated the growing impact of the format business on the overall media industry. Between 2006 and 2008, the FRAPA survey revealed that the total global production expenditure on formats stood at around €9.3bn.

In recent years, FRAPA became more than just a simple format protection association. It has positioned itself as a global community, a meet-and-greet platform, a networking forum, an advice shop, an information resource and an industry thought leader. But FRAPA's focus has never waived from its founding principle: to ensure that format rights are recognised and respected throughout the media industries.

The 2011 FRAPA Report focuses on format rights' position under law in 14 key TV territories: Australia, Belgium, Brazil, Canada, Denmark, France, Germany, India, Malta, the Netherlands, New Zealand, Spain, the UK and the USA. It is designed to help format creators maximise their chances of winning legal proceedings in the event of IP disputes.

Many of the report's findings are encouraging. For example, Olswang has found that, while it is true formats are vulnerable to copying, it is nonetheless possible to protect your IP on the international market by a number of legal remedies beyond copyright. Also heartening is the news that, although claims for copyright infringement vis-à-vis copycats continue to be difficult to prove, there have recently been notable successes in a number of markets.

To conclude, FRAPA remains passionate about and dedicated to, providing protection and information to format producers, creators and distributors all over the world.

We hope that you will find our new report valuable not only for the case law it provides but, by extension, as a guide to building maximum protection into your formats as you create, pitch, produce and market them.

Ute Biernat

Chairman, FRAPA



Introduction



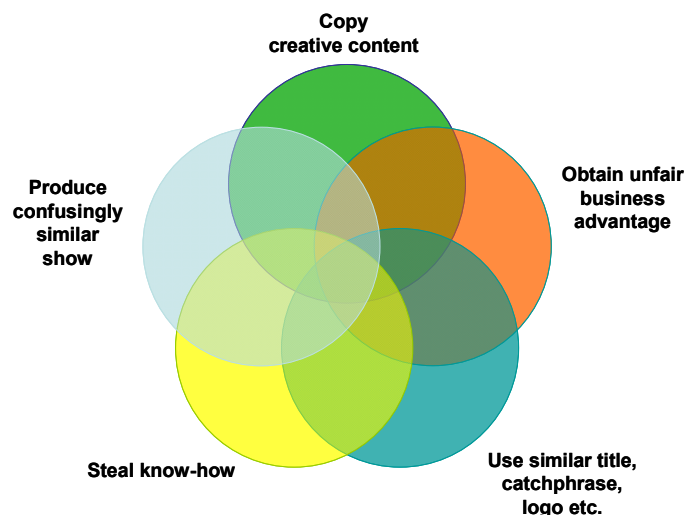
Introduction

The television format industry is undoubtedly global, with successful shows such as "Who Wants to be a Millionaire?", "Big Brother", "Pop Idol" and "Come Dine With Me" generating substantial revenues in countless countries across the globe. The first FRAPA study on the format trade highlighted that from 2002 to 2004 there were 259 original formats which found their way to foreign screens, generating production volumes of €6.4bn. The second FRAPA study established that from 2006 to 2008 there were 445 such formats, generating production volumes of €9.3bn. The 445 formats were tracked across 57 territories and were found to give rise to 1262 adaptations.

Despite the volcanic growth and success of the industry, many are sceptical about the legal protection afforded to television formats. There is an accepted and well established practice of licensing formats, but there remains a belief that television formats remain unprotected by the law and as such they are vulnerable to plagiarism. Historically, format creators have relied on copyright law without much success. Some television formats were found to be generalised ideas, which failed to be protected by copyright. Others rely on the precedent set by the "Opportunity Knocks case" in 1989 in New Zealand in which certain components of that game show lacked sufficient unity to be protected as a copyright work.

However, there have been numerous other format cases in the 22 years since the Opportunity Knocks case. Some of the copyright claims have been successful. Further, format creators have looked beyond copyright law and pursued claims for passing off, unfair competition and breach of confidence with greater degrees of success. This report considers these cases and the protection available to television formats around the world.

The report analyses the available protection by considering the different components of a television format and the ways in which a valuable business asset can be protected. In the absence of specific statutory provision for a "format right", a television format may be considered to be a bundle of proprietary rights all of which are protectable. The key component of a successful television format will be a unique creative concept together with production know-how, distinctive name, other visual features (e.g. stage and lighting), catch-phrase and branding. For example, an infringer may exploit one or more of the following parts of a format:



In order to restrain each of these types of activity, a format creator will need to rely on different legal rights. This report considers each of the rights involved, the elements of a format it protects, its difficulties and how the Courts have approached this right in the context of television formats.

The report is divided as follows:

- Protecting the creative work against copying: applying copyright law
- Protecting a format as a business asset: preventing confusing, competing formats
- Protecting a format as part of the licensing industry: preventing unfair business practices
- Protecting the know-how behind the format: applying the law of confidential information
- Protecting format titles: applying the law of registered trade marks

This report considers the reported cases in a cross-section of markets around the world.

The countries considered are:

Australia	India
Belgium	Malta
Brazil	Netherlands
Canada	New Zealand
Denmark	Spain
France	UK
Germany	USA

Dr Sukhpreet Singh has also provided some further analysis on market-based strategies as an alternative to legal protection based on a case study.

Main Findings



Main Findings

- ❖ Overall, the cases considered in this report show that formats are protectable, whether through copyright, unfair competition, passing off or breach of confidence. The cases are often difficult to reconcile and a particular format may be protected in one country but not in another. Format imitators may be free to copy in one jurisdiction but will struggle to distribute their copycat formats in others. In a global industry, the value of a copycat format is significantly reduced by such restrictions.
- ❖ Claims for infringement of copyright in a format continue to be difficult. Endemol has had some success in Brazil and the Netherlands in relation to its Big Brother format and others have been successful in Belgium, Canada and Spain. Other countries such as Germany pose a more difficult environment for successful copyright claims, in light of a recent decision of the Supreme Court in Germany.
- ❖ Format creators have had greater success with unfair competition cases. The concept of "unfair competition" or "unfair business practices" varies from jurisdiction to jurisdiction. It is based on the infringer confusing the public, acquiring an unfair business advantage or engaging in parasitic behaviour. As recently as 2009, a Belgian Court has listed certain criteria for establishing parasitic behaviour, but they have been defined very widely and are open to interpretation.
- ❖ Format creators have also been successful with breach of confidence claims. These cases are fact specific and usually arise when a creator sends a broadcaster or production company a confidential proposal or pitch for a show, which is then used by the producer or broadcaster without permission. Although copyright does not protect an idea for a format, the law of confidential information will protect an idea where it was communicated in confidence. These claims have been successful in Australia, India and the UK.
- ❖ In light of the inconsistent legal protection, the format industry has adopted a number of market-based strategies to protect its investments. Eleven strategies (ranging from market intelligence to brand identity management) have been identified in the context of the "Who Wants to be a Millionaire?" format.

Protecting Format Rights



Protecting Format Rights

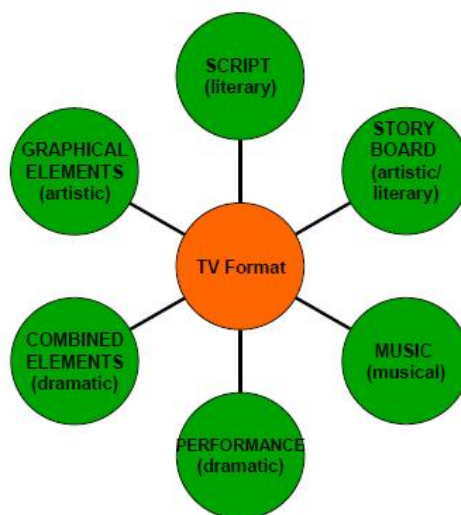
1. Protecting the creative work against copying: applying copyright law

The key component of any successful television format is the unique combination of content, story, characters/hosts, pace, music, lighting and stage/set design (amongst other things). Format creators will invest substantial skill and resources creating such content and generating a format that can be exploited. Copyright law protects the detailed expression of this creativity, in the form of copyright "works". These must be more than ideas for a television show. In the cases to date, claims for infringement of copyright in television formats have been unsuccessful largely because the format has not been recorded or described in sufficient detail, or because the similarities between the format and infringing copy have been at a general level.

1.1 What elements of a format does copyright protect?

Copyright law protects categories of creative works, such as literary, artistic, musical and dramatic works. Copyright will not protect a concept or an idea such as e.g. an outline or a high-level plot. In the context of a television show, there will be numerous copyright works. The typical copyright works are shown in the diagram below.

Typical copyright works
in a TV format

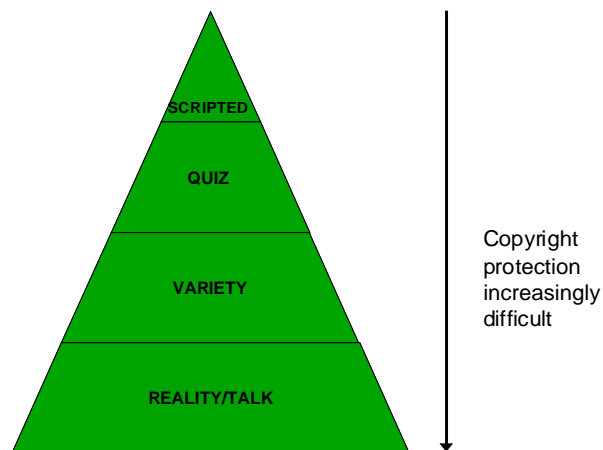


Literary copyright will protect the script; artistic copyright will protect story-boards, set-design and layout as well as any on-screen graphical elements; and musical copyright will protect the

opening music or other music created for the show. Each of these works will be protected individually. In addition, where these elements or other features are combined there may be a dramatic work. In Canada, New Zealand and the UK, the threshold for a dramatic work is quite high. The features claimed to constitute the format must have sufficient unity to be capable of performance. They must be related to each other, be defined specifically and with sufficient certainty. For example, there needs to be a story in the work, a thread of consecutively related events, either narrated or presented by way of dialogue or action or both.

In Spain, a combination of elements may be protected as a format where the copyright works are combined in a predetermined way creating a written sequence of elements that forms a skeleton for a television show, with sufficient detail about how, when and where each of these elements occurs.

Copyright and different content



On that basis, different genres of entertainment are better protected by copyright than others. Apart from the music and graphical elements, scripted formats or programmes will be better protected by literary copyright whereas reality or variety shows that require spontaneous interaction between host and participants will be harder to protect. In the pyramid above, the tightly defined scripted programme with detailed story, characters and narrative will more easily be afforded protection.

In order to attract copyright protection, copyright works must be fixed or recorded in a certain medium (e.g. in writing or recorded) and they require a degree of inventiveness. The required level of inventiveness varies from jurisdiction to jurisdiction. In most cases the work requires a level of originality and intellectual creation, in the sense that the work should be the product of an author's skill and labour, and be sufficiently unique and distinct from works already on the market. The work should not copy another's work or combine well-known, pre-existing elements in a known way. In Spain, there is also a requirement that the work should be the creation of a human author.

Copyright owners have certain basic rights. They may restrain the following unauthorised use of their copyright works: (i) reproduction in various forms, such as printed publications or sound recordings; (ii) public performance, as in a play or musical work; (iii) recordings e.g. in the form of

compact discs, DVDs, or MP3s; (iv) broadcast or communication, by radio, cable, satellite or over the internet; and (v) translation into other languages, or adaptation, such as a novel into a screenplay. In most countries, in order to prove infringement, copyright owners will need to show a substantial similarity between their work and the infringing copy, as well as copying.

In some countries, such as Canada and the USA, copyright must be registered before copyright may be enforced. In these countries, registration facilitates the exercise of copyright and related rights, by providing owners with a simple and effective means to clearly establish authorship and/or ownership of rights.

1.2 What are the difficulties?

It is apparent from the cases discussed below that one of the greatest difficulties in pursuing a claim for infringement of copyright in a television format is **identifying the copyright work**. It is necessary to identify specific copyright works which are original and capable of copyright protection (which go beyond broad concepts or ideas). As explained above, this may be a challenge for unscripted formats where the consistent elements from one programme to another are limited.

In an attempt to demonstrate that a format is a protectable copyright work, the industry relies upon the format bible. The format bible should set out as much detail about the content and structure of the format. Information about the constituent parts (e.g. the rounds in a game show) should be included as well as details about the music, opening sequence, introduction, lighting, stage design, production know-how and camera layout, to evidence the skill and labour invested in creating a television format.

At the same time, the copyright work also needs to be broad enough to capture the infringement. For example, a copy of a television format for a game show is unlikely to have a similar title, use identical questions, hire the same host and reproduce the music and lighting of the original format. A copier is more likely to take the "theme" in the original format or the overall sequence of events and change all the details. If the format creator points to a very detailed description of his format, this may be unlikely to be infringed. If the format creator relies on a high level plot, this will fail to be protected by copyright.

A format creator will also be required to point to objective and detailed similarities between his format and infringing copy. The Courts will look for a similarity in terms of plot, themes, dialogue, mood setting or scenes, pace, sequence and characters. A high level or architectural similarity will be insufficient for infringement. Where there are clear similarities and the infringer had access to the format (e.g. where the original format was well-known or already on air), this may be enough to show a prima facie case of copying. The onus would then be on the infringer to show how he created his programme without reference to the format.

It is the challenge of demonstrating (i) a protectable copyright work (ii) which has been copied (iii) on the basis of detailed and objective similarities between the format and the copy that often makes a claim for infringement of copyright in a television format a difficult claim.

1.3 How has it fared?

The Opportunity Knocks case in New Zealand in the 1980s is usually the starting point for any discussion on the protection of format rights. The Court's decision, in that case, not to protect a few elements of a talent show (including a "clapometer"), is cited as the reason why copyright fails to protect formats. However, copyright law around the world has developed in the 22 years since that case and Courts in countries such as Belgium, Brazil, Canada, the Netherlands and Spain have protected formats through copyright law. Germany and the UK, on the other hand, continue to be difficult countries for format creators to pursue copyright claims.

The cases highlight that a format creator's success will depend on the copyright work relied upon. A paper format will be difficult to protect, but once production know-how and business knowledge are added to create a detailed format bible, the Courts find it easier to identify a copyright work and protect it.

❖ 1980 - 1989

1989, New Zealand: *Green v Broadcasting Corporation of New Zealand*

The most widely discussed format dispute, which laid down a negative precedent for format creators in common law jurisdictions, is the case of Hughie Green who was the producer and presenter of the popular British television show "Opportunity Knocks" broadcast in England between 1956 and 1978 on ITV. When a similar programme by the Broadcasting Corporation of New Zealand ("BCNZ") appeared from 1975 to 1978 in New Zealand, Green objected to the unauthorised adaptation of his talent show "Opportunity Knocks" under the same title. Hughie Green claimed that he wrote the scripts of the shows and relied on various similarities between the shows, including: having the same form of introduction for each competitor, use of the same stock or catchphrases throughout the show and use of a "clapometer" to measure audience reactions to competitors' performances. However, after a second appeal to the Privy Council in the UK, the Privy Council finally ruled that in the absence of precise evidence as to what the scripts contained, the ideas inferred from the scripts were not the subject of copyright. The Court also found that the features of a television series such as a talent, quiz or game show which were presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories, were ever changing and lacked the certainty and unity of a dramatic work.

1989, New Zealand: *Wilson v Broadcasting Corporation of New Zealand*

In 1979 Wilson created the "The Kiwi Kids" format for a children's series detailing how a physically disabled boy and girl engaged in various heroic adventures to fight evil forces. This was submitted, in conjunction with a local children's charity, to BCNZ, in the form of a written document attaching graphics of how some

scenes and characters would look. The concept was set out in a nine and a half page document and Wilson later provided a 57 page feasibility study. However, four years later BCNZ proceeded on its own to make an animated series called "The Kids from OWL". The Court considered that the feasibility study was a dramatic work and in BCNZ's version, Wilson's "*identity of the original idea was never lost*". It was held in 1989 that there was sufficient evidence that Wilson's format was protected by copyright and had been infringed by BCNZ. Damages to the tune of \$25,000 were awarded to Wilson.

The outcome in the *Wilson* case was different from the *Hughie Green* case as Wilson was able to rely on a well defined copyright work. Further in the context of a fictional format, it will be easier to show the requisite level of unity between different elements of the format (e.g. setting, characters, story etc) and identify a dramatic work. Since 1989, format creators such as Green have struggled to protect their copyright in a television format on the grounds that only specific expressions of creative endeavour attract copyright protection. With this precedent set in common law jurisdictions, format imitators assumed that it would be easy to copy formats as an idea for a television programme or an ill-defined format would not be protectable and hence copying such a format would not be an infringement of copyright law. However, as the cases discussed below show, certain countries have since found formats to be protected by copyright.

❖ 1990 - 1999

In the countries considered in this report, this period appears to be dominated by a series of cases in which claims for copyright infringement in formats failed, because the format relied upon did not satisfy the requirements for copyright protection or because the similarities between the format and the copy were at too general a level. For example, in Germany and the Netherlands a description of a fictional television series and another description for a lifestyle programme failed to be protected by copyright as they did not satisfy the requirements of "personal intellectual creation." There is one exception – in 1994, the Spanish Courts found that Endemol's "Love Letters" was protected by copyright and had been infringed.

1990, Canada: *Preston v 20th Century Fox Canada Ltd*

Preston claimed that "Star Wars – Return of the Jedi" infringed the literary copyright in his "Space Pet" manuscript. He claimed that the "Ewoks" in the film were similar to the two species ("Ewoks" and "Olaks") in his manuscript. The Federal Court dismissed the action at first instance and stated that while there were some general similarities in the details depicting the Ewoks, a reasonable person in the intended audiences would find there was no substantial similarity between the "Space Pet" manuscript and the movie "Return of the Jedi". The Court stated that "substantial similarity" should not be assessed only by reference

to the quantity of matter reproduced from a copyrighted work. In fact, the quality of matter reproduced may be more important. The Court laid out a number of factors to be considered in assessing similarity including: plot, themes, dialogue, mood, setting or scenes, pace, sequence and characters.

1992, Canada: *Hutton v Canadian Broadcasting Corporation*

In this case, the Court of Appeal of Alberta considered the protection afforded to television formats. Hutton had created a nightly, count-down music-video format titled "Star Chart" and had registered it as a dramatic work. It was co-produced by and broadcast on CBC. Three years after Star Chart had ceased to be broadcast, the Canadian Broadcasting Corporation created its own similar programme titled "Good Rockin' Tonite". Hutton tried to assert copyright in the format and relied upon the similarities in the shows' structures, scripts and hosts. The Court ruled that Hutton's format was not protected by copyright as a dramatic work as it was essentially a presenter playing music-videos for an audience and that there was no "substantial similarity" (following the *Preston* case discussed above) between the two shows. There were only genre based similarities between Star Chart and Good Rockin Tonite and no substantial copying. Although the two shows were based on chart related music programmes of the 1950s, when viewing them as a whole, the Court considered they were differently premised and had a different structure and feel.

1990, Germany: *Freelancing format developer v ZDF*

The claimant developed a concept for a fictional television series about a widowed forest-ranger and his two children called "Forstrevier Alpsee", and submitted it to ZDF. ZDF rejected the proposal but shortly after, ZDF developed a similar series, about a widowed forest-ranger and his three children called "Forsthaus Falkenau". In part, storylines which were outlined in the claimant's original concept re-appeared in the programme. Both the concept and the ZDF programme also addressed ecological topics. The Court decided that, with regard to fictional programmes, protection of the core story (the tale) was possible. However, in this case, the concept was too vague and the ideas were not sufficiently elaborated to meet the "personal intellectual creation" threshold of German copyright law. In addition, the Court held that, although the ZDF series may have been inspired by the concept, it was an adaptation of well-known topics and therefore did not violate the rights of the format developer.

1992, Sweden: Action Time v Danmarks Radio & Television

Stephen Leahy of Action Time (a UK based formats company) created a format titled "Love at First Sight" which became very popular in the 1990s. He sold several licences around the world (in UK, the format was broadcast on Sky One). Action Time also granted TV4 a licence in Sweden and negotiated with Danmarks Radio (through their local Nordic partners, Wegelius Television), for a Danish version. However, Danmarks Radio rejected the offer of a licence and produced a similar show called "Hjeter Pa Spil" (Heart game). Since Danmarks Radio's programmes could be watched in Sweden, Action Time sued Danmarks Radio in the Swedish Courts alleging copyright infringement. However, there was an out of court settlement between the parties with an undisclosed payment made by Danmarks Radio to Action Time.

After several years of decisions failing to protect formats, the first decision indicating the copyright protection afforded to formats came from Spain and Endemol successfully claimed copyright infringement.

1994, Spain: Endemol Entertainment v Antena 3

In 1994, Endemol's "Love Letters" had already been sold as a format to RTL in Germany, TROS in the Netherlands, VTM in Belgium, TV3 in Norway, TV3 in Denmark and TV4 in Sweden. Endemol started discussions with a Spanish channel (Tele 5) to produce a Spanish version. Sensing an opportunity, the largest Spanish channel at the time, Antena 3, started making its own local version. Endemol sued for copyright infringement in Alcodenas (near Madrid) and the judge ruled in favour of Endemol, finding that Love Letters was protected by copyright and the "key elements" of the format had been copied by Antena 3. The Court prevented Antena 3 from further making or broadcasting its unlicensed version of the format.

1996, Belgium: Show & Tell v VTM

In 1995 the parties signed a production agreement for Show & Tell's format called "Easy Does It" for a lifestyle programme. After having broadcasted five episodes of "Pico Bello", VTM terminated the relationship. Show & Tell sued VTM for non-payment of format fees for the five productions. Although this case was about non-payment of licence fees, the case is interesting as the Court opined on the protection of television formats. The Court held that the short description of the concept of the lifestyle programme did not enjoy copyright protection, as it was a well known concept and the document did not express the intellectual effort of the personality of the author.

The claimants (Arbique and Léveille) alleged that Gabriele's television series, "Les Grands Procès", was a copy of a television series they had been developing since 1985. The Quebec Court found in favour of Gabriele as the evidence showing that Gabriele had knowledge and access to the claimants' work was circumstantial and insufficient to prove copying. The decision was affirmed in 2003 by the Quebec Court of Appeal and at that time, the Court of Appeal added that in spite of the substantial and obvious resemblances between the two works, the evidence given at trial was insufficient for the Court to make a finding of forgery, plagiarism or copying.

❖ 2000 - 2009

Following Endemol's success in Spain, the Dutch Supreme Court followed suit and found that television formats could be protected by copyright law.

2000 - 2004, the Netherlands: Castaway Television Productions Ltd & Planet 24 Productions Ltd v Endemol Entertainment & Jon De Mol Productions

In 2000, a Court in the Netherlands ruled on a dispute between two of the leading formats of the day. This ruling was seen by many as a step towards recognition of the television format as a copyright work, at least in the Netherlands. In this case, Charlie Parsons of the British company Castaway Television Productions had created a format known as "Survivor" which was exported to numerous countries around the world. Castaway asserted that "Survive!" (the Dutch exploitation of the Survivor format) was a copyright work because of its unique combination of 12 specific elements which were repeated in all local versions of the format. He asserted in the Netherlands that Endemol's "Big Brother" was an infringing copy. In this case the Court found that the combination of 12 elements within Survive! when taken together was sufficiently unique and specific to be original. Furthermore, the format had been described in great detail in the format bible. As such, there was a work which would be protected by copyright.

In June 2000 the claim was dismissed at trial because Big Brother was not found to be an infringing copy. In June 2002 the Dutch Court of Appeal upheld that judgment. The Court of Appeal focused on the similarities between the relevant programmes, concluding: "*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 that copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved*". Castaway then appealed to the Dutch Supreme Court

which in 2004 agreed that the Survive! format was a copyright work, but that Big Brother was not an infringing copy.

Several years after the *Hughie Green* case, the highest court in the Netherlands concluded that a television format can be protected by copyright law. The Dutch Courts were prepared to conclude that a combination of specific, clearly identified elements could be protected in broad terms, without limiting their analysis to categories of copyright work. Identifying the similar elements between the original format and the copy would also be the starting point for any infringement claim. Although *Castaway* was not ultimately successful in this instance, this decision may have been the catalyst for *Castaway's* further *Survivor* litigation. *Castaway* sued the producers of the other well known reality show "I'm a Celebrity...Get me out of here!" this time in the USA and the UK, in the hope of winning in a different jurisdiction (as discussed below).

2001, India: TIYL Productions California Ltd & Ralph Edwards Productions v NDTV Ltd & Others

TIYL Productions California and Ralph Edwards Productions instituted a suit against NDTV and Zee Telefilms (amongst others) seeking an injunction restraining infringement of copyright, trade mark and passing off, as well as damages of 2 million rupees. They claimed that NDTV and Zee Telefilms infringed their copyright and trade marks in the format "This is Your Life" by producing and telecasting the show "Jeena Isi Ka Naam Hai". In both the format and the show, the presenter invited famous personalities such as celebrities, film stars, musicians, politicians and sports persons, and traced their personal and professional lives in a dramatic style involving elements of surprise amidst recollection of childhood memories. The parties have filed their evidence and after 25 adjournments and 8 long years in which the allegedly infringing format has been broadcast and considered to have lost its shelf life *twice over*, the case still drags on through the Indian judicial system.

2001, USA: Survivor Productions LLC & CBS v Fox Broadcasting Company

In 2001, *Castaway's* North American company, *Survivor Productions* (makers of "Survivor USA") and the network CBS accused Fox Broadcasting Corporation (the makers of "Boot Camp") of infringing their format. They demanded an injunction from the Federal District Court in Los Angeles to stop *Boot Camp* from continuing on air. The claimants said that the format as well as the "look and feel" of *Boot Camp* was a deliberate copy of *Survivor USA* and thus infringed their intellectual property. Fox asserted that there was "*absolutely no basis*" for the claims and that "*the shows are very different and we believe this is a frivolous lawsuit.*" The case was dismissed after the parties came to an out of court settlement.

2002, UK: Castaway Television Productions Ltd v Granada Media Group & London Weekend Television ("LWT")

Castaway Television Productions sued Granada and LWT for infringement of copyright in its "Survivor" format, seeking an injunction preventing the broadcast of "I'm a Celebrity...Get me out of here!" After setting the American proceedings a year earlier, this case was settled too, in part owing to Granada and LWT's defence that they had independently created their format without copying. Granada and LWT asserted that LWT's executive Peter Davey had written a treatment for "I'm a Celebrity...Get me out of here!" during filming of another documentary "The Place of the Dead" (where Peter Davey had stayed in a Borneo jungle).

2002, Belgium: BVBA Habrasaje en Martin De Jonghe v VRT

Although this case is about a radio format, the Court found that the format was protected. The claimants were a production company and the host of a radio show called "Golfbreker". The show had been broadcast since 1988 and from 1992, Martin De Jonghe presented the programme. In 1998 VRT terminated its relationship with the claimants and continued broadcasting the programme "Golfbreker" with another production company and host. Most of the components of the programme remained the same. The claimants commenced an action for copyright infringement. In these circumstances, the Court was quick to uphold the claim. The Court found that the format was protected by copyright and the format and the copy shared the following elements: title, duration, location, national radio transmission and studio design. In addition, they both provided information about the Belgian coast. VRT was also ordered to pay 100,000 Euros to the claimants.

This case in Belgium was a positive result for format creators because a radio format was considered to be a copyright work. However, this result may have been dictated by the facts of the case. The defendant was continuing to broadcast an identical programme under the same title without the claimants' permission. In the circumstances, the Court was able to conclude there had been infringement.

2002, UK: Miles v ITV Network Ltd & Dream Street Productions Ltd

Miles alleged that he had supplied the defendants with a package of material of promotional material relating to his proposed cartoon television programme "Trusty and Friends", which the defendants then used to produce their programme "Dream Street". Miles argued that the similarities between some of the characters in Dream Street (the main character being a recovery truck) and the concept of using anthropomorphised, traffic furniture were sufficiently close to those in Trusty

and Friends (whose characters included a traffic light, bollards and cones) to give rise to an inference of copying. The Court struck this claim out at an early stage, without a full trial. The Court considered that the only similarity between the programmes was the use of anthropomorphised traffic equipment as characters, which were actually quite different in manner and form. Further, the programmes featured other dissimilar characters and had a different look and feel overall.

2003, USA: Survivor Productions LLC & CBS Broadcasting Inc v Granada plc, Granada Entertainment USA & ABC Inc

Following a win in the Netherlands and a series of settlements, those behind "Survivor USA" sought an interim injunction against the makers and broadcaster of "I'm a Celebrity...Get me out of here!" (USA) arguing that the show was an infringing copy of their "Survivor" format. The claimants said that both programmes featured individuals in remote locations, living off the land and being subjected to elimination one-by-one based on viewers' telephone votes. The defence however, pointed out that the main differences between the two were that while Survivor USA featured unknown individuals competing for cash, I'm a Celebrity featured minor celebrities and the money raised by telephone voting was given to charity. As such, the formats were completely different. The Court refused to grant an interim injunction. The judge said that the more serious and competitive tone of Survivor differed greatly from the less serious and more humorous nature of I'm a Celebrity... The judge said that, "*I find the works to be substantially different in concept and feel*" after a hearing.

The Survivor format was the subject of litigation in four different cases. Only two of these cases were the subject of a judicial decision. In both, the Court concluded that the format was protected by copyright, but it had not been infringed. These cases illustrate that where a format has been developed in detail and the unique elements are set out in writing, the Courts are able to conclude that there is a copyright work. The difficulty is then identifying whether copying has occurred because of the nature of the similarities between the format and the copy.

Despite the positive rulings in the Netherlands and the USA upholding copyright protection for formats, the following case from the German Supreme Court was a set-back for format creators, particularly those who seek to protect reality shows.

2003, Germany: TV-Design v Südwestrundfunk ("SWR")

The subject of much judicial criticism, the judgment in this case established that television formats for non-scripted shows will be difficult to protect through copyright in Germany. TV-Design owned a format for a children's programme entitled "L'école des fans" in which children sang on a stage, they were

interviewed by a celebrity, their performances were graded and the host distributed presents to them. This programme was broadcast on F2, a French TV Channel. SWR was offered the format, but declined it. SWR later broadcasted a show called "Kinderquatsch mit Michael". SWR's programme followed the structure of L'école des fans. TV-Design brought an action against SWR for copyright infringement (as well as breach of confidence). SWR contended that L'école des fans could not be protected under German copyright law.

The claims were rejected at first instance and this decision was upheld on appeal to the Bundesgerichtshof (the German Supreme Court). The Supreme Court stated that copyright did not subsist in the format in question and there was no infringement of copyright. Protection could only be awarded to the material form of a created programme, but not to the concept on which such creation was based. According to the German Supreme Court, a format is a set of instructions for turning a concept for a television programme into a form, rather than a protected form itself. In order to be protected by copyright, a work must be the result of the original creation of specific content or physical material, rather than just a pattern for the similar creation of further material. A programme could be created using different means – participants, phrases, theme songs, set design, camera work, lighting or editing, could all vary from show to show. Following directions or a recipe for a television programme could not be an infringement. As such a format did not constitute a protected work within the categories of protected works in German law and was therefore not protected under copyright law.

This is now seen as the landmark case on television formats in Germany. The Court considered that television formats are a "mould" or a series of directions for a television programme. The German Court stated that fictional programmes would continue to benefit from copyright protection (as in the earlier *Forsthaus Falkenau* case above). This is because the story underlying the format would be a protectable literary work.

Despite the result in Germany, the trend in the Netherlands and the USA of protecting formats by copyright was followed next in Brazil. The *L'école des fans* case can be contrasted with the decision in Brazil a year later which found the Big Brother format to be protected by copyright. In another victory for format creators, the Brazilian Court went further and found the protected format to be infringed.

2004, Brazil: TV Globo & Endemol Entertainment v TV SBT

A decision which paved the way for the recognition of copyright in a format in the emerging Latin American economies was the Brazilian case of *TV Globo & Endemol Entertainment v TV SBT*. It concerned the "Big Brother" format that had originally been the subject of licence discussions between the format's creators, Endemol, and a Brazilian TV station. The Brazilian station decided not to take the licence, but later began broadcasting a similar programme called "Casa dos

Artistas" (The Artist's House). TV Globo and Endemol sued TV SBT for damages claiming infringement of copyright in the Big Brother format. TV SBT, in its defence, claimed that a reality show is no more than an idea, citing the lack of scripts. TV SBT further claimed that the format bible was a simple manual that described methods and procedures. The Brazilian District Court decided that the Big Brother format was a copyright protected work and that Casa dos Artistas was an infringement. The judge stated, based on expert testimony, stated 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... (which) 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, activities, etc.*" The Court awarded damages of about £400,000 to Endemol and damages of over £1 million to TV Globo. Although SBT appealed against this judgment, the Sao Paulo Court of Appeal reaffirmed the first instance decision in 2010 and banned SBT from airing Casa dos Aristas. SBT may appeal further and in the meantime, this is a success for format creators.

2004, UK: 19TV Ltd v FremantleMedia Ltd, Simon Cowell & Syco TV

Simon Fuller of 19TV, the creators of "Pop Idol", sued the producers of "X Factor" for £100 million for copyright infringement, breach of confidence and breach of contract (alleging that members of X Factor's production team previously worked on Pop Idol and signed contracts preventing them from working on rival shows). 19TV alleged that each episode of Pop Idol and the series as a whole were protected as dramatic works under copyright law and that X Factor involved the reproduction of the whole or a substantial part of the Idol episodes/series. 19TV claimed that (i) Fremantle used the 300 page production bible of Pop Idol for X Factor, (ii) thirty technical aspects which were copied included music, lighting and structure, and that (iii) presenters on Pop Idol used to use the phrase "*We're looking for the X Factor*". Although initially Fremantle refuted all allegations saying there were many differences in both the shows, the opportunity for judicial consideration of format rights in the UK was lost as the case was settled out of court. 19TV is reported to have received an undisclosed payment as well as a stake in the X Factor format franchise worldwide.

2004, UK: (3 cases) Melville, Boone, Baccini v Celador Productions Ltd & ITV Networks Ltd

Mr Melville, Mr Boone and Mr Baccini brought three separate claims against Celador Productions Ltd, the owners and producers of the internationally

successful format "Who wants to be a Millionaire?" They claimed that the format Who Wants to be a Millionaire? infringed copyright in formats for game shows they had created previously (or had misused their confidential information). Celador and ITV applied to have these claims dismissed without a full trial as they considered that there was no real prospect of the claims succeeding. The Court found that two of the three claims should proceed to trial.

Mr Boone's claim that Who Wants to be a Millionaire? infringed the rights in his television format for a quiz show called "HELP!" devised in 1997 was dismissed. The Court found that the similarities Mr Boone relied on were no more than elements of style or technique, which, when divorced from their context, could not give rise to a cause of action for breach of copyright and nor did they constitute confidential information.

Mr Melville and Mr Baccini's claims were ordered to proceed. Mr Melville claimed that his format for the game show "Millionaires' Row" was devised in April 1995 and it included a top prize of £1 million. He claimed he sent a proposal for Millionaires' Row to a number of television companies including Carlton who rejected it. As the final credits for Who Wants to be a Millionaire? referred to "Carlton Presentation for ITV", Mr Melville concluded that Carlton had passed his work to Celador.

Mr Baccini claimed that he had created a format for two games, "Millionaire" and "BT Lottery" both of which were created before 1995. The Court concluded that there were similarities between Mr Baccini's Millionaire and Who Wants to be a Millionaire? (such as both including a £1 million prize, a mechanism for the doubling of prizes, the title, the use of multiple choice questions and an initial pool of 10 contestants) which were capable of giving rise to an inference of copying of a substantial part.

Although this decision from the UK High Court is a summary judgment decision and determined without a full trial, the decision was encouraging for format creators as the Court found that two of the three claims should proceed to a full trial. The UK Court did not consider it appropriate to dismiss the claims without a trial as it did in the *Miles v ITV & Dream Street* case. Mr Melville and Mr Baccini's claims are likely to have settled as is often the case after a summary judgment application and these cases have not been reported further.

In the following case in Australia, the defendants appeared to accept that the claimants' format (as described in a production bible) was protected by copyright. However, the claimants were unsuccessful on infringement as the similar elements were considered to be commonplace.

2005, Australia: Nine Films & Television Pty Ltd v Ninox Television Ltd

Nine Films had licensed the "Dream Home" format in Australia from Ninox TV and it was produced and broadcast in 2000. As part of the licence, Nine Films was given a production bible. The programme was about two couples competing against each other in the renovation and decoration of two houses. In 2002, Nine Films produced another home renovation programme (with four couples renovating four apartments in a block) called "The Block". Ninox alleged that the Dream Home format was a dramatic work and The Block infringed its copyright in that work. Nine Films commenced an action for groundless threats of copyright infringement and by way of counterclaim, Ninox alleged copyright infringement.

The parties agreed that Ninox owned the copyright in the Dream Format as a dramatic work. The Court therefore focused on the issue of infringement. Nine Films submitted that it independently created The Block and that there was no substantial similarity between The Block and Dream Home. The Court compared the key elements in both programmes and concluded that there was no infringement because of unscripted dialogue and interaction. The Court considered that the general similarities between the programmes were common to all renovation reality shows. The more unique elements were points of distinction rather than similarity. Further, there was no infringement when "*someone independently creates a program without copying or where there is no substantial reproduction, or similarity to the material in which concepts are embodied*".

2005, Belgium: Tailor-Made Films Ltd v VRT

Tailor-Made Films created and produced television programmes. In 2002, it developed the format "Don't get Mad,...Get Even" for an interactive quiz, in which some teams are present in the studio and others are at home. In 2004 the parties negotiated a licence for the format but no deal was ultimately done. In 2005 Tailor-Made Films learnt that VRT was due to broadcast the programme "De Thuisploeg", which was alleged to be copy of the Don't Get Mad,...Get Even format. The Court found that the Don't Get Mad,...Get Even format was protected by copyright but was not infringed. In comparing the programmes, the Court found that there were significant differences. VRT's programme was not live, it did not contain a break, the set was designed to re-create the feel of a living room and the main colour was red (as opposed to blue in Tailor-Made's format). In addition VRT's presentation and interaction with the viewers was different.

2005, Canada: Cummings v Canwest Global Broadcasting Inc

Cummings claimed he had developed a concept for a programme in the 1990s called "Dreams Come True". Cummings sued Canwest for infringement of copyright by producing and broadcasting the television series "Popstars". The

Quebec Court dismissed the action as frivolous and clearly unfounded, and stated that the Dreams Come True concept document could not be said to merit protection under copyright law as it lacked development and did not meet the requirements of originality. The Court also found that there were no similarities between the works. This decision was upheld in 2007 by the Quebec Court of Appeal. The Court of Appeal found that Cummings' concept document was the "*mere skeleton of an idea*". It would need to be fleshed out and this flesh would have value from a copyright perspective.

2007, Malta: Endemol International v TVM Malta & Others

"L-ispjun" (The Spy), produced by Watermelon Media & Communications and P&D Communications, and broadcast in Malta by the public service broadcaster TVM and Melita Cable TV, was a Maltese television programme based on the Big Brother format. Endemol filed a claim against the broadcasters and producers claiming that its copyright had been infringed, demanding that the derivative show be stopped and seeking unspecified damages. The Court ruled in Endemol's favour and ordered the seizure of the producer's studio equipment, props, tapes and other devices used as part of the production of the programme, as well as freezing bank accounts and other assets of the defendants.

2008, Belgium: K. Verbraeken v VRT & BVBA De Filistijnen

The claimant developed the format "Super Champs", in which the skills of several athletes would be tested and a "super champ" would be crowned. The claimant sent a document describing this format to several producers, including the defendants. VRT and De Filistijnen broadcasted "Eeuwige Roem" (Fame Forever), which the claimant alleged was based on the document he had sent them. The claimant issued a claim for copyright infringement. The Court stated that it was impossible to visualise what an episode would look like, based on the claimant's document. The claimant's format was not protected by copyright as the format was not set out in a detailed and concrete form in the document and it did not meet the requirement of "intellectual effort of the author". It was therefore unnecessary to analyse whether the format Eeuwige Roem was an infringement.

In this case, as in the Canadian *Cummings* case above, the Court declined to offer paper formats copyright protection on the basis that the document did not describe the format in sufficient detail.

2008, Belgium: BVBA T. & J.D.B. v VZW W.T., NV R.M.M & VZW

Here, the claimants claimed copyright in a format for a programme which provided information about a city and where the information was revealed by inhabitants of that city. The claimants were involved in the production of the programme (e.g. by making a trailer, intro, music and editing). The defendants contested that the claimants owned such a format particularly because this format had already been used by another television broadcaster. The claimants brought a claim for infringement of copyright. The Court held that it had not been shown that the claimants had authored a copyright work. The format, as expressed by the claimants in a note, was not considered to be original and it was not protected by copyright as it did not evidence an intellectual effort. The note simply described some elements of the programme and the format, as described, was considered to be a "standard" format.

2009, Spain: Maradentro Producciones S.L. v Sogecable, S.A.

In this case, Maradentro claimed that its copyright in a format for "Epitafios" had been infringed by Sogecable's "Epilogo" (initially called "Postdata"). Maradentro claimed that there were the following similarities between the programmes: (i) both programmes consisted of interviews of a well-known personality (who, due to old age or illness, was close to death) and were broadcast once the individual was dead; (ii) the programmes made it appear (using special effects) as though the recently deceased personality was answering the questions after his/her death; (iii) the interview ended with an epitaph, chosen by the interviewee. Sogecable argued that there was no protectable format, but only a sketch or diagram without details – a mere idea.

The appellate Court found in this instance that there was no protectable copyright work as Maradentro was asserting copyright over a generic idea or a concept with ill-defined features. However, the Court stated that formats are protectable by copyright because: (i) copyright protects drawings, plans, models, mock-ups and sketches; (ii) copyright protects scripts and storylines; (iii) if the format can be compared to a script or a storyline then it must be protected as well; (iv) in order for a format to be protected there must be a qualitative leap from a mere general concept, in a detailed and formally structured way, resulting in a creation of some complexity. The description of the format does not need to be as complex and detailed as a script, but it does require a sufficient level of detail.

This case considers the protection of television formats in Spain after Spanish copyright legislation was revised in 1996. As such, it is a better precedent than the *Love Letters* case in Spain in 1994. This case confirms the willingness of the Spanish Courts to protect formats, where they are described in sufficient detail.

❖ 2010 - to date

Given the positive indications in Belgium, Brazil, the Netherlands and Spain, format creators continue to rely on copyright to protect their formats in addition to other claims (discussed further in this report). Although some of the claims have failed, there has been some success in Canada and Spain.

2010, Germany: *Juegel v DSF (now "Sport1")*

The claimant had developed a concept for a football casting show called "Spiel deines Lebens". After casting and training a team of amateurs over several episodes of the programme, the team would play against a Bundesliga club in the final show. The claimant, who worked as a freelancing format developer, submitted his 10 page concept paper to private broadcaster DSF, but never heard back from DSF. However, the following year, DSF started broadcasting a similar show called "Kicken gegen die Profis" that largely corresponded to the format the developer had submitted in his concept paper. The Court refused copyright protection, stating that the idea of a television format and its realisation were not eligible for copyright protection. The Court followed the reasoning of the German Supreme Court in the *L'école des fans* case. In addition, the Court held that, in any case, the concept did not have the required individuality and level of creative content required by the Copyright Act, but largely consisted of elements that were pre-existing and well known from other shows. Accordingly, the format also lacked the distinctiveness required for protection under the law against unfair competition.

2010, UK: *Meakin v British Broadcasting Corporation & Others*

Meakin claimed that the BBC had infringed his literary and/or dramatic copyright in written proposals for various versions of a "Cash Call Millions" game show format. He claimed that the BBC's "Come and Have a Go...If You Think You're Smart Enough" was a copy because (i) the majority of questions were "*general knowledge questions based on logic and questions based on still, film and music footage*", (ii) the size of the jackpot was proportional at least in part to the number/value of premium rate calls received, (iii) the studio contestants participated in heats which resulted in one finalist, team taking part in the play-off final against the top viewer contestant; and (iv) in the final the contestants were able to confer with family and friends.

The BBC applied to have the claim determined summarily without a full trial and its application was successful. The Court held that the similarities between the respective works were insufficient to create an inference of copying. The similarities were held to be general, related to matters commonplace in the television game-show arena and at a high level of abstraction.

2011, Canada: Robinson & Les Productions Nilem Inc. v France Animation, Cinar Corporation & BBC

Robinson filed an action for infringement of copyright in his format "Robinson Curiosité". Robinson relied on copyright in drawings and character descriptions. Both had been sent to France Animation prior to France Animation producing an animated television series called "Robinson Sucroë". At first instance and on appeal, the Quebec Court upheld Robinson's claim and stated that there was, in this case, a substantial similarity and significant amount of copying. The similarities between the two works could not simply be due to a common source of inspiration.

Here, the Court found that sketches were sufficiently developed to constitute a copyright work, which would restrain infringement in the form of an animated series. This is because an animated series will consist of a series of artistic works, making the comparison between the copyright work and the alleged infringement, a relatively straightforward one.

2010, Spain: Atomis Media, S.A & Outright Distribción Ltd v Televisión De Galicia, S.A. & CTV, S.A.

In this case, the claimants claimed infringement of copyright in the format "What Kids Really Think" (originally from the UK, which was exploited in Spain as "No Em Ratllis", "No Te Enrolles" and "Ya Te Vale"), as well as unfair competition based on bad faith and a confusingly similar format. The claimant alleged that the defendants' "O País Dos Ananos" was a copy because it reproduced the following elements: (i) a talk show with a fun and friendly tone with a main presenter who talks to children to find out what they think of issues that concern adults (such as money, employment, family, politics, etc.); (ii) two regular adult guests who talk to the children during the programme; and (ii) the presenter gives real statistics on the topics discussed.

The appellate Court emphasised that formats may be protected by copyright if they are created by a human being, if they are expressed through a medium and if they are original. Furthermore, the Court maintained that if a format can be compared to a script or a storyline then it must be protectable. In relation to originality of a format, the Court considered that if a format consists of a series of elements, which are ordered, structured and combined in a particular way, the individual elements themselves do not need to be original, but their unique combination will afford protection to the format as a whole.

Despite acknowledging the various similarities between the programmes in the case, the Court concluded that the disputed format was not protected by copyright as it did not contain the required degree of specificity and originality to be considered creative, and it did not involve a "complex processing", which went

beyond the effort inherent in the production of any programme of this class. Moreover, the Court considered that the characteristics of a talk-show could not be proprietary.

2011, Spain: Sociedad Española de Radiodifusión, S.L. v Radio Popular, S.A.

Sociedad Española asserted copyright protection for a radio format called "Carrusel Deportivo". Sociedad Española claimed that Radio Popular's "Tiempo de Juego" was infringing its copyright and unfairly competitive as it was an imitation and hindering business activities in bad faith. Sociedad Española pointed to the following similarities: the programmes were live radio shows hosted by the director of the show and an entertainer; there was a fusion between information and publicity; there were independent sections of the show each sponsored by a single company; there was a Morse code alarm indicating goals in football matches; and there were technical effects during certain parts of the transmission (e.g. repeating the mistakes of the commentators).

Sociedad Española sought an interim injunction. Radio Popular did not deny the similarities asserted by Sociedad Española. The Court stated that although a format may be protected by copyright when the legal requirements are met, there was a doubt whether this format was protectable. An injunction was refused because the Court required further evidence and there was a concern that informative programmes were not protected by copyright.

2011, Spain: Corporación Radiotelevisión Española, S.A. ("TVE") v Gestevisión Telecinco, S.A.

TVE claimed that its format for "Tengo Una Pregunta Para Usted" was protected by copyright and Telecinco's "España Pregunta, Belén Responde" was an infringement as well as unfairly competitive. TVE claimed that Telecinco's programme was also a live interview show characterized by having a number of spectators representing a wide cross-section of the population where each of them would ask the interviewee a question. The interviewee was not informed of the questions before-hand, so that the answers were as spontaneous as possible. Telecinco argued that the elements relied upon were common in the industry, they were not new or original.

Following the guidance in the *What Kids Really Think* case (see above), the Court concluded that TVE's format was protected by copyright and Telecinco's programme was a copy as it had the same structure, with a moderator and a personality invited to answer questions live from spectators of the show.

2. Protecting a format as a business asset: preventing confusing, competing formats

Irrespective of whether a copy of a format infringes the format creator's copyright, the copy may cause confusion in the marketplace. Viewers or buyers may be confused into believing that the copy originates or is also written by the format creator. In these circumstances, a format creator may rely on the laws of unfair competition or passing off (in common law jurisdictions) to protect its format from confusing formats. In order to successfully restrain a confusingly similar copy of a format, a format creator will need to show that it has acquired a goodwill in, or a reputation for, its format in the relevant territory, evidence of confusion in the marketplace as well as some form of damage.

2.1 What elements of a format does it protect?

This action focuses on whether a "copycat" format is confusing the market. In some jurisdictions it is not necessary to show that the infringer has copied the format in question. Instead, the action protects a format as an asset of a format creator's business by preventing confusingly similar, competing formats.

Generally, in common law jurisdictions, a format creator would need to show that it owned goodwill or had a reputation in its format or some other part of the format (such as the title or other visual features comprising the "get-up" of the format e.g. lighting or stage design). Further, that the imitation, deliberately or inadvertently, had misappropriated the goodwill such that members of the relevant public would be confused or deceived into thinking that the copy was created by the format owner, causing the format owner loss and damage. The relevant public may be viewers or buyers of the format in question.

In civil law jurisdictions, an action of this nature is usually part of the law of unfair competition. In some countries such as Germany, it will be necessary to show more than copying to make out a claim for unfair competition.

For example, in Spain, an unfair practice may arise when the acts (i) give rise to confusion, (ii) imitate a format creator's activities or practices, or (iii) take advantage of a format creator's reputation. In this section, we address those activities which create confusion. Activities which may be unfair generally (absent any confusion) are considered in the next section of this report. In Spain, acts which imitate a format creator's activities or practices may arise where the activity:

- (i) generates a risk of association in the minds of consumers; or
- (ii) is aimed at obtaining an unfair advantage of the format creator's reputation or effort (where the association or advantage could have been avoided); or
- (iii) relates to a systematic imitation of the format creator's activities and business initiatives with the purpose of blocking those activities and preventing their development in the

market, (provided that the acts complained of cannot be considered to be accepted or expected behaviour in the market).

One of the key requirements will be showing that the format has a reputation in the relevant country. This is achieved by demonstrating consistent ratings and significant audience shares, as well as highlighting press coverage and income. This may be a relatively easy requirement where the format has been broadcast in that country for some time or alternatively, where the programme has had virtually instant success. For example, in the latter scenario a creator of a format for a stripped television show may be able to show goodwill and a strong reputation in its format in a matter of months from launch, based on daily audience shares.

Where a format has not yet broadcast in the relevant country, but has had substantial success abroad, it may be possible to argue that the format has become "famous" in the country as a result of spill-over reputation or goodwill. This is traditionally difficult to prove, but may become easier in an era where foreign television channels are available through satellite television and members of the public have access to foreign content through the internet and sites such as YouTube™.

2.2 What are the difficulties?

As indicated above, the key element in such actions is proving that the format has a reputation in the relevant country. Where the format has not yet been broadcast or has only recently been broadcast, this may be difficult.

Further, local requirements of proving confusion will vary from country to country. Some countries may require only a likelihood of confusion. Other countries may require detailed statements from confused individuals, requiring the format creator to canvass its viewers' opinions or monitor and collate queries from buyers and scouts in the market. The strength of this evidence is also central to such actions.

The requirement to show confusion may be difficult where the copycat format is being broadcast on a different channel from the original format. Members of the public may consider that the copycat format is inspired by the original format, but their broadcast on different channels may be sufficient to dispel any potential confusion over the source of the two programmes.

2.3 How has it fared?

Although Hughie Green did not succeed in his claim for passing off, more recently countries such as France and Spain have used their laws of unfair competition to prevent confusingly similar formats. In the successful cases, the format creators were able to show that they had lost an opportunity to market their formats to other broadcasters or had lost audience shares as a result of the copycat format.

❖ 1980 - 1989

1989, New Zealand: Green v the Broadcasting Corporation of New Zealand

In addition to copyright infringement, Hughie Green claimed that BCNZ was passing off its programme as his format in New Zealand. Please see page 13 above for a detailed discussion of the copyright claim. Green's claim for passing off failed as Green's (British) Opportunity Knocks had not been broadcast in New Zealand and was only known to a small group of English expats and New Zealanders who had been to the UK. The Court concluded that Green's Opportunity Knocks had not generated any goodwill or acquired a reputation in New Zealand. As such, Green had not suffered any damage.

If this case were brought today, the outcome of the passing off claim may have been different. British programmes may more easily generate goodwill or a reputation abroad today where greater travel and the internet has revolutionised an audience's access to foreign content. This was one of the rationales behind the judgment in the Danish case of "Who wants to be a Millionaire?" (for which see below).

❖ 1990 - 1999

In the UK, claims of passing off are distinct from copyright infringement claims and thus there is no requirement to show copying in a passing off case. As the following cases show, in Germany, in order for the copycat format to be unfairly competitive, the format creator would need to show an unfair practice beyond the act of copying.

1995, Germany: MME v WDR/ARD

MME, a production company, produced a short clip of about 5 minutes, which was broadcast by private broadcaster VOX. The clip showed a taxi driving through the city of Hamburg at night. The clip included interviews of a few randomly chosen passengers who were asked questions about topical subjects during the taxi ride. The other part of the programme documented Hamburg's night life and the problems of taxi drivers in the city. After positive reactions to the clip MME produced a detailed concept and a trailer for a show called "Taxi-TV" and offered it to several television stations. A few months later the public broadcaster ARD broadcasted a clip (of about 4 minutes) called "Taxi-Talk", in which a host interviewed randomly chosen passengers. The taxi was driving through the city of Cologne. Compared to Taxi-TV, the clip was more focused on the interview and the interviewer's questioning method.

The Higher Regional Court of Düsseldorf found that Taxi-Talk was not unfairly competitive and dismissed the case. The Court stated that copying a product or concept that is not protected by copyright law, does not usually involve unfair competition. The Court found that a different assessment under competition law was only possible if there were additional anti-competitive aspects that went beyond mere copying. In this regard, the Court stressed that Taxi-Talk was not a direct copy of Taxi-TV, but a sufficiently independent format and that, accordingly, the show could not be considered anti-competitive.

1995, Germany: developer v ZDF

In this case, the claimant's "Labyrinth" and ZDF's "Goldmillion" centred on teams that had to move through a maze, guided by other team members. In Labyrinth, the maze was entirely computer generated and virtual, only visible to the audience, but not to the team member who had to move on an empty stage. Advancing through the maze depended on instructions by his team members and the answering of questions. In ZDF's version, completing the maze was only one part of the show. In ZDF's version, the maze was real, but the team member moving through the maze was blindfolded and therefore relied on the assistance and instructions of other team members.

The Court acknowledged that the show Labyrinth, on account of the creative use of a *virtual* maze, the quiz elements and the particular way it was hosted, was, in principle, sufficiently distinct to profit from protection under the law of unfair competition. However, the Court held that the elements used in both shows (a maze, instructions by team members, time pressure) were not, as they were well known elements. The Court also held that the overall appearance of the programmes was sufficiently different. The Court rejected the allegation of unfair competition and concluded that the appearance of the two shows was sufficiently different overall.

❖ 2000 - to date

More recently, the Courts have upheld claims preventing confusingly similar or imitations of a format in France and Spain. In both countries, the claims have succeeded as the format creators were able to show that they had suffered real damage as a result of the confusing format in the form of a loss of opportunity to market their respective formats.

2003, Germany: TV-Design v SWR

As seen on page 20 above, the French format "L'école des fans" was deemed to be unprotectable under copyright in Germany. The format owners also failed to

establish that "Kinderquatsch mit Michael" was unfairly competitive or confusing the market.

2005, France: Saranga Productions & Others v Canal Plus & Others

Canal Plus sought programme proposals from production companies for a politically themed programme. Accordingly, Saranga Productions presented its format titled "Crise-en-direct". However, Canal Plus then commissioned a different company to produce a programme called "C'est déjà demain" using themes from and characteristics of Saranga's format. Saranga brought an action for unfair competition (the equivalent of passing off in France). The claimants had to show that the defendants had intentionally taken characteristic features of their format, that such formats were of economic value and that this had caused them loss. Canal Plus defended the claim saying that (i) they had independently developed their programme before they met with Saranga's representatives and (ii) Saranga's format had no independent economic value because it lacked originality and that it used themes and characteristics from the public domain. The Court found no evidence that Canal Plus had already developed its programme before meeting representatives from Saranga. The Court also held that the issue of originality was not relevant to this cause of action, as would be the case in copyright law. The Court ruled that the broadcast of the Canal Plus programme had caused Saranga a financial loss by depriving it of the opportunity to market its format to another broadcaster and hence, Canal Plus was ordered to pay damages to Saranga of €150,000.

2006, UK: A&E Television Networks v Channel 4 Television Corporation & Another

A&E broadcasted a show called "Intervention" in the USA. A&E sought an injunction against Channel 4 preventing Channel 4 from using the word "intervention" in the title of its documentary series called "Intervention: We're coming to get you". The High Court found that the central issue in this case was that the titles of both programmes were descriptive of the programme itself i.e. relating to a specific psychotherapeutic technique known as "intervention", in which people suffering from addictions or compulsive behaviour disorders are treated by a professional "interventionist" who arranges a surprise confrontation between the patient and his or her family/friends. The Court dismissed the application holding that the law of passing off would not countenance the unfair monopolization of descriptive words or terms.

2007, Spain: Televisión Autonomía De Madrid, S.A. v Televisión Española, S.A. ("TVE")

TeleMadrid claimed that TVE's "España Directo" was unfairly competing with its "Madrid Directo", more specifically unfair competition acts of imitation, confusion and taking unfair advantage of a third party's reputation. An expert gave evidence as to the following similarities between the programmes including: an innovative way of presenting news (quotidian facts) and entertainment simultaneously; internal structure of the programmes and their external presentation; titles of the programmes had the same structure; the shows began with a summary of the news told by the reporters; the news was broadcasted with the handy cam technique and there were interviews with ordinary people.

The Court found that there were no acts of confusion or advantage taken of a third party's reputation. Nonetheless, the Court found that there was an unfair imitation act and said the imitation was unfair because: (i) TVE's programme was identical and it was taking unfair advantage of TeleMadrid's programme's reputation; (ii) the reputation was derived from the competitive singularity of TeleMadrid's programme, which had particular characteristics, not present in other similar programmes, that were easily recognizable by spectators; (iii) taking unfair advantage was avoidable and TVE had not made any effort to avoid the imitation; and (iv) TVE used this reputation to attract an audience to its new programme, opening a new market (of broader geographical scope) and hampering TeleMadrid's development in such market. It was shown that TeleMadrid's audience share had decreased.

Further, as TVE had hired employees of TeleMadrid that had been responsible for Madrid Directo, the Court found that TVE had also induced TeleMadrid's employees to terminate their employment contracts. The acts were designed to cause a severe disruption to TeleMadrid's regular activities, as there was no reason or necessity to hire a competitor's workers.

2010, Spain: Atomis Media, S.A & Outright Distribción Ltd v Televisión De Galicia, S.A. & CTV, S.A.

As set out on page 28 above, in this case the claimants claimed Televisión de Galicia's "O País Dos Ananos" was unfairly competing with the Spanish exploitation of "What Kids Really Think". As well as finding that there was no copyright infringement, the Court found that the requirements for acts of unfair competition were not met, stating that there was no evidence that the claimants' programme had acquired a reputation. The claimants had therefore failed to prove that the defendants were taking advantage of any reputation or effort. Therefore, even if the defendants' programme was an imitation, it would be legitimate.

2011, Spain: Corporación Radiotelevisión Española, S.A. v Gestevisión Telecinco, S.A.

As set out on page 29 above, TVE claimed that Telecinco's "España Pregunta, Belén Responde" was infringing its copyright as well as committing unfair competition acts of imitation with unfair advantage of third party reputation. Once the Court had found that there was an infringement of copyright, the Court also found that there were unfair competition acts of confusion and imitation taking unfair advantage of a third party's reputation.

3. Protecting a format as part of the licensing industry: preventing unfair business practices

In addition to passing off style claims, civil jurisdictions also provide a remedy for unfair business practices as part of their law of unfair competition. As formats are widely licensed and distributed, a copycat format may secure an unfair business advantage by copying an original format without having to pay a licence fee. Some Courts will also consider whether such behaviour is "parasitic". Although the concepts are not always well defined, format creators have had good measures of success, particularly in countries such as Denmark and France.

3.1 What elements of a format does the law of unfair business practices protect?

The law of unfair competition and unfair business practices recognises the underlying creative elements of the format, as well as the global, format licensing industry. Claims of unfair business practices rely on the copycat format adopting unfair business or marketing practices and acquiring an unfair business advantage. Each case is examined on its own facts based on the particular activities in question.

Claims for unfair business practices usually arise in civil jurisdictions which are predicated on an extensive codified system of law (unlike common law jurisdictions such as the UK in which a significant corpus of law is not based on statutory provisions, but comprises case-law and precedent). In countries such as Germany and Spain, passing off and unfair business practices are sub-sets of unfair competition law generally. Format creators will often claim unfair competition and rely on both acts of confusion and unfair business practices generally.

In Spain, an unfair practice may arise when the acts (i) give rise to confusion, (ii) imitate a format creator's activities or practices, or (iii) take advantage of a format creator's reputation. Acts of confusion were considered in the previous section of this report. In this section, we focus on activities which are unfair practices. In Spain, acts which take unfair advantage of a format creator's reputation will consist of those acts which take illegitimate advantage, to the benefit of oneself or third parties, of the industrial, commercial or professional reputation, acquired by the format creator on the market.

In countries such as Belgium and France, parasitism or free-riding may amount to an unfair business practice. In Belgium, for example, parasitism may arise if the following criteria are met:

- (i) the original must be the result of creative efforts and investments;
 - (ii) the original must represent an economic value;
 - (iii) the free rider must benefit directly from the creative efforts and investments of the creator;
- and

- (iv) the free rider did not make any creative efforts and investments itself.

The precise scope of what amounts to unfair trade practices is unclear. In a recent judgment in May 2009, in the case of *Noël Marquet & Cie v Orac NV & Others*, the Supreme Court of Belgium (the "Cour de Cassation"), indicated that copying is permissible unless intellectual property rights are infringed or other circumstances indicate that there are unfair trade practices. The Court did not indicate what would amount to unfair trade practices so it is unclear how the Courts will interpret this proviso.

3.2 What are the difficulties?

Claims of unfair business practices vary from jurisdiction to jurisdiction, leading to a variety of experiences which are sometimes difficult to reconcile. What amounts to an "unfair practice" will depend on the Court's sense of the facts of each case and whether the alleged infringer has done something "wrong", "bad" or "unfair". All of these concepts are subjective resulting in a series of nebulous results within a country, as well as from country to country.

In order to claim unfair business practices successfully, in some countries it is necessary to identify an unfair practice which goes beyond the act of copying. In Germany, passing off and unfair business practices are sub-sets of the German Unfair Competition Act. To date, the German Courts have been reluctant to find a copycat format (which is not infringing copyright) to be unfairly competitive. The general assumption is that if the copycat format is not infringing the more specific copyright provisions, then the copycat format is permissible. In order for the copycat format to be unfairly competitive, the format creator would need to show an unfair practice beyond the act of copying. An unfair practice could consist of confusing the public, or exploiting or damaging the format creator's reputation. As discussed in section 2.2 above, confusion may be difficult to establish. German Courts have not yet considered whether a copycat format could damage the reputation of the format creator or exploit the audience's appreciation for the original. To date, German Courts have dismissed cases based on unfair competition or passing off on the basis that there was an insufficient similarity between the programmes or because the format in question was not sufficiently distinctive/inventive.

3.3 How has it fared?

Despite the subjectivity involved, format creators have been successful in claims for unfair competition, particularly in continental Europe. There are few reported cases as a number of countries often do not have a strict doctrine of precedent. In the two cases we consider below, the claimants were successful in both cases. In both cases, the Courts found that the copycat format would confuse the public and went further to find an unfair business practice. The cases illustrate the synergy between confusing formats and formats which are contrary to business practices. Where confusion is shown, the Courts are able to find that the copycat format has also profited from an unfair business advantage.

1999, Denmark: Celador Productions v Danmarks Radio & Television

Celador Productions filed a claim against Danmarks Radio and Television ("DRTV") alleging that the copyright in its "Who Wants to be a Millionaire?" format was infringed by DRTV's programme entitled "Kvit Eller Dobbelt". Celador had licensed the format to DRTV's competitor TV2, but the authorised Danish version was not going to be ready until the following year. The Danish Court dismissed the claim for copyright infringement, but provided protection to Celador's format and considered, according to the Marketing Practices Act in Denmark, that DRTV's version was a copy of Celador's concept and took unfair advantage of Celador's efforts and market position. The Danish Court ruled that DRTV's format would be considered to be the Danish version of Celador's format and was therefore designed to confuse audiences. DRTV was also held to have full knowledge of Celador's format before embarking on creating its show so DRTV could not suggest that there was simply a casual similarity. DRTV was forced to cease broadcast of the programme after the Court granted Celador an injunction. DRTV's appeal was dismissed in July 1999.

2011, France: Endemol Productions v ALJ Productions & Others

Endemol claimed that "Dilemme", produced by ALJ Productions (which was a company founded by a former Endemol employee), infringed its "Big Brother" format. Endemol claimed that the broadcast of Dilemme on the W9 DTV channel, constituted unfair parasitic competition. The Court found that Dilemme reproduced certain features of Endemol's format including the following key elements: Endemol's "confinement" format, the characteristic features of the places of "confinement", the mechanics of the programmes, the casting of the participants and the way in which the programmes were broadcast.

The Court found that reproduction of these features had created a degree of confusion in the minds of the public as the concept of the programmes was identical, directed at the same audience, and with a form and content displaying broad similarities and insignificant variations that made it difficult to distinguish clearly between the programmes. The Court found that this wrongful imitation constituted unfair competition. However as the defendants had demonstrated their investment in producing Dilemme, the Court held their behaviour was not parasitic. The Court prevented the defendants from broadcasting their programme and ordered them to pay Endemol 900,000 Euros. ALJ has appealed against this judgment.

4. Protecting the know-how behind the format: applying the law of confidential information

The production know-how behind a television format is often as valuable as the creative component. Production information which cannot be gleaned from the broadcast of a television format may be confidential. This may be protected by the law of confidential information. The cases to date have centred on circumstances in which a proposal or treatment was disclosed to a producer or broadcast in confidence and the producer/broadcaster wrongly used that information without permission.

4.1 What elements of a format does the law of confidential information protect?

Consultant or "flying" producers play an integral role in maintaining a consistent and coherent format across multiple territories. They will have intimate knowledge of what makes a particular format a success and details of lessons learnt from other territories. They may also be the source of technical production know-how. If this information is confidential (in the sense that it is not in the public domain, e.g. technical production information not identifiable from the broadcast), a format creator may rely on the law of confidential information to protect it.

As well as showing that the information is confidential, a format creator would need to show that the information was imparted to a recipient in confidence. Where an idea for a format, or a paper format or treatment is disclosed to another under cover of a non-disclosure agreement, or it is clearly marked confidential, this requirement will be satisfied easily.

4.2 What are the difficulties?

The two main difficulties associated with breach of confidence claims are showing that (i) the information has the necessary quality of confidence and (ii) the information was imparted under an obligation of confidence.

In relation to the former, where a format has been widely broadcast and/or it is easy to copy the format without requiring much production information, it will be difficult to assert that the information is truly confidential. In relation to the latter, depending on the circumstances of the case, it may be difficult to identify the circumstances from which a duty of confidentiality may be established. A duty of confidentiality may be express (under contract e.g. a non-disclosure agreement) or implied from the circumstances.

4.3 How has it fared?

The majority of the cases considered in this section of the report involve format creators relying on confidential information to protect proposals or paper formats which were pitched to broadcasters and were subsequently used by the broadcasters to produce similar or identical programming. In the UK, this extends to oral discussions. In these circumstances, the Courts have found that the idea or concept was confidential and had been misappropriated, with particular success in India. This can be contrasted with copyright protection which will not protect a mere idea. More recently Simon Fuller and 19TV Ltd relied on breach of confidence to restrain Simon Cowell's X-Factor in the UK. However the case was settled before it was considered by the English Courts.

❖ 1970 -1989

1977, Australia: Talbot v General Television Corporation Pty Ltd

Bob Talbot created a paper format entitled "To make a Million" and entered into discussions with General Television's Channel 9. As well as a detailed concept note, he submitted planned production details, budget and a pilot of the format. However, after a few months, Talbot learnt through television advertisements that Channel 9 was about to broadcast its own but strikingly similar format. Talbot immediately sought an interim injunction alleging mainly breach of confidence and copyright infringement. The injunction was granted by the Victoria Supreme Court, but the defendants did not comply with it in time and broadcast their programme. At trial, the Court found in favour of Talbot, finding that Talbot's paper format was "*a concept or idea that has been developed to the stage where he has developed his concept, [and] it is capable of being the subject of a confidential communication.*" Talbot was awarded damages of \$150,000, interest, costs and Channel 9's appeal to the Supreme Court was rejected. The Supreme Court (comprising 9 judges) accepted the definition of the format in this case, especially since it had been expressed in detail and was communicated under confidence.

1983, UK: Fraser & Others v Thames Television

Don Fraser was the manager for The Rock Bottom Group consisting of three female singer/actresses Gaye Brown, Diane Langton and Annabel Leventon. The group entered into discussions with Thames Television and optioned (for £500) a reality show portraying their lives and the formation of a three girl, rock-band. Although there was some written paperwork, most of the discussions were oral. Thames Television went on to produce a series called "Rock Follies" based upon the above idea and cast other actresses in the lead role. Fraser and the actresses sued Thames Television on several counts, but most notably breach of confidence, claiming that the idea was divulged in confidence and that it should

not have been used without their consent. Although Thames Television contended that the law of confidence did not extend to an idea that had been expressed orally, the Court held in favour of the claimants and found that there was a breach of confidence. The Court considered it appropriate to restrain unauthorised disclosures, provided that the circumstances in which the idea was communicated imported an obligation of confidence and the idea (whether written or oral) was clearly identifiable, original, of potential commercial attractiveness and capable of reaching fruition. The Rock Bottom Group was awarded damages of £250,000.

1989, UK: Wilson v Broadcasting Corporation of New Zealand

Although most of the above case discussed the copyright claim (for which see page 13 above), the Court also held that a breach of confidence had taken place, as BCNZ had been in negotiation with Wilson and had access to Wilson's original, confidential material, before proceeding to create its own series.

❖ 1990 - 1999

1990, Canada: Hutton v Canadian Broadcasting Corporation

Much of this case addressed the copyright claim (for which see page 15 above). However, Hutton also alleged that there was a breach of confidence when his music-video format called "Star Chart" was allegedly copied by the Canadian Broadcasting Corporation's "Good Rockin' Tonite". However, the Court held that music-video formats had already proliferated much of the Western television culture and hence there was no confidentiality, either in the idea of the music video or the negotiations surrounding the making of the programme, which could be protected. It was unclear on the evidence whether the information conveyed was actually confidential and while the broadcaster would have benefited from the experience gained while working on Star Chart with Hutton to produce the new show, this did not result from the use of any confidential information.

❖ 2000 - to date

2001, India: Gupta v Dasgupta & Others

In a decision of significance for the format industry in India, the Delhi High Court found that a significant satellite TV broadcaster, Sony Entertainment Television, had misappropriated confidential information. Anil Gupta, a media consultant, had held a series of meetings with the broadcaster Sony TV and discussed a proposal for a reality show format. His format for a match-making show was called

"Swayamvar" and was derived from (and named after) practices which were in vogue in the royal classes of ancient India. This concept had not yet been explored on Indian television. Gupta had provided written notes, oral presentations and PowerPoint presentations describing his format. Sony chose to create and broadcast its own format entitled "Shubh Vivaah" (Happy Marriage), which was based on themes similar to Swayamvar.

Gupta commenced proceedings restraining Sony TV from transmitting or enabling the transmission by television of any programme concerning the type of matchmaking he had described. The Court, finding in favour of Gupta, held that ideas, concepts, and programme themes are raw materials for the entertainment industry and their protection is vital. When an idea has been developed to a stage where it is actualised, then the concept is capable of being the subject of a confidential communication. In its defence, Sony TV stated that that the idea, concept and structure of a reality show based on matchmaking was in the public domain. The Court held that the Swayamvar concept had been developed and evolved by Gupta and the novelty and innovation lay in combining a reality show with the subject of matchmaking. Somewhat unusually, the Court gave Gupta a head start of six months over Sony TV to launch his programme.

2004, UK: 19TV Ltd v FremantleMedia Ltd, Cowell & Syco TV

As seen in several format cases above, the claimants relied on the laws of copyright and confidential information. 19TV claimed that FremantleMedia (the creator of X Factor) had co-produced 19TV's Pop Idol and had thereafter misused 19TV's confidential information when it co-produced X Factor. Also nearly 30 individuals from X Factor's production team had previously worked on Pop Idol. Owing to an out-of-court settlement, there was no judicial opinion provided on these claims of breach of confidence.

2007, India: Chiang v Global Broadcast News Ltd & Another

Urmi Juvekar Chiang, a noted script writer residing in Mumbai had created a reality TV format called "Work in Progress" about "citizen activism and solving civic problems". She fixed this idea in a written concept note and subsequently a production plan, and presented it to representatives of an Indian satellite TV channel named CNN-IBN (owned by Global Broadcast News Ltd). After some negotiation, CNN-IBN created and broadcast its own format (titled "Summer Showdown") which was similar to Chiang's format. Chiang sued CNN-IBN in the Bombay High Court on two counts – breach of confidential information and copyright infringement. Although the Court ruled in favour of Chiang on both counts, the issue of breach of confidence was considered in detail in this case. The Court held that the law of breach of confidence was broader than the statutory

right of copyright and thus, not only did the Court accord copyright protection to Chiang's concept note and production plans (which it accepted were infringed by CNN-IBN), it also held that there was a breach of confidence. Chiang had divulged detailed workings of her format in confidence and the channel had used these without permission to create its own work. The Court did not accept CNN-IBN's assertions that the format allegedly created by Chiang was from material already in the public domain. The Court awarded Chiang interim relief. CNN-IBN appealed seeking that the interim ruling be overturned, but it was dismissed at a later stage.

5. Protecting format titles: applying the law of registered trade marks

A successful format, such as "Big Brother", has strong branding and a consistent programme title across the relevant territories. Some formats are largely sold on the strength of their programme titles alone. Programme titles may be protected by registering them as trade marks across a variety of goods and services. This would allow a format creator to restrain use of the programme title in relation to a competing format as well as in respect of unauthorised merchandise.

5.1 What elements of a format does the law of registered trade marks protect?

Trade marks will protect distinctive programme titles, logos and potentially strap-lines and catchphrases. Trade marks are registered in respect of certain goods and services. Format titles may be registered for television entertainment services as well as a variety of merchandise and branded consumer goods. Once registered, a trade mark will provide protection against identical or similar signs, used in relation to a variety of goods or services. Depending on whether the goods or services are identical, similar or dissimilar, a registered trade mark owner would need to show that there is a likelihood of confusion, or that the sign was taking unfair advantage of or was detrimental to the distinctive character or repute of the trade mark.

Countries such as Germany offer additional protection in the form of "title rights". There is no formal legal requirement for the protection of "work titles", but there is a register for work titles ("Titelschutzanzeiger") which is used to notify the intended use of a title. While the registration does not confer a right to use the title, the registration can be used to show an earlier entitlement to the work title, if the title is used shortly after registration.

5.2 What are the difficulties?

The trade marks will need to be registered in the relevant country for the relevant goods and services before they are enforced. This may be a complex and expensive process depending on the number of countries involved. Further, if a format title is translated or tailored for local versions of the format, this may give rise to a need to register multiple trade marks in each territory.

Registered trade marks will prevent third parties from using identical or similar trade marks. They do not prevent use of the format. As such, copiers can avoid infringement by changing that aspect which has been registered as a trade mark. For example a copier could choose a less similar programme title, or a different logo etc.

5.3 How has it fared?

There is a plethora of trade mark cases around the world each year. However, this section of the report contains a selection of reported cases in the television entertainment sector to illustrate how registered trade marks can be used to protect formats. The two cases in Germany considered below were "work title" cases. In India, a registered trade mark for the local programme title of *Who Wants to be a Millionaire?* was used to restrain an unconnected gaming website. Finally, in Spain format creators were able to recover trade marks for the local programme title which had been registered by an unconnected third party.

❖ 2000 - to date

2000, Germany: UFA Grundy v Sat1

This is a work title case. "Gute Zeiten, schlechte Zeiten" (Good times, bad times) is the title of a very successful soap broadcasted by RTL in Germany. Sat1 developed a documentary with the title "gute Nachbarn, schlechte Nachbarn" (Good neighbours, bad neighbours). The Higher Regional Court of Berlin held that RTL's title was distinct and well known, and use of a similar title conferred an unlawful advantage to the new show. Sat1 was ordered to change the name of its show.

2001, Germany: ARD v ProSieben

"Tagesschau" is the central German news and current affairs programme broadcast on ARD. At the time, the 8pm primetime show was watched by up to 9 million viewers each day. ProSieben launched a news programme with the title "Tagesbild". In another work title case, the Supreme Court held that although the title Tagesschau (daily show) was not particularly distinct, it had acquired a considerable secondary meaning and therefore had to be considered a protected title. However, the Court found that by using a similar title for its news programme, ProSieben had not created a risk of confusion, as the audience, which clearly attributed Tagesschau to ARD, would not take Tagesbild to be a programme from the same broadcaster. The Court further concluded that, even though Tagesschau was a well known title, it could not entirely monopolize descriptive title elements such as "Tages-" (day or daily) that had to be kept free for the rest of the trade.

2002, India: Celador Productions Ltd v Mehrotra

Gaurav Mehrotra started running a website at www.crorepatikaun.com with an online version of the Indian version of "Who Wants to be a Millionaire?" – "Kaun

Banega Crorepati". Mehrotra was charging members of the public £8-£14 to play his unauthorised game which also reproduced the format's images, logos, music and other format elements. Celador (in conjunction with Star Plus, the Indian licensees) sued Mehrotra in the Delhi High Court alleging, amongst other things, infringement of its trade marks. The Court granted an ex parte injunction restraining Mehrotra from operating and hosting any website using a similar domain name as Kaun Banega Crorepati and from offering on-line games based on the game show's distinctive format, design and features.

2011, Spain: ITV Global Entertainment Ltd & Others v. Europroducciones TV, S.A.

ITV and the creators of the format "The Alphabet Game" (exploited in Spain with the title "Pasapalabra") brought a claim against Europroducciones, seeking recovery of the trade marks for "Pasapalabra" registered by Europroducciones. ITV claimed that the marks had been registered in bad faith as Europroducciones knew of the success of the Alphabet Game in France and Italy (broadcast as "Passaparola") prior to registering the marks. The Court found that Europroducciones had applied for the trade marks in bad faith. Europroducciones believed that the format was going to be commercialised in Spain and Passaparola would be translated to Pasapalabra in Spanish as it was derived from a catchphrase used in the programme. The Court considered that Europroducciones applied for the Pasapalabra trade marks in Spain with the intention of free-riding on the success of the programme and knowing that the rights belonged to third parties. The Court did not consider that ITV was entitled to the marks as ITV had not used Passaparola or Pasapalabra in Spain at the relevant time. The trade marks were invalidated. This decision is pending appeal.

Market-Based Strategies: an alternative to legal protection



Market-based Strategies: an alternative to legal protection

"How to protect formats from copycats using market-based strategies?"

By Dr Sukhpreet Singh

The cases considered in this report illustrate that the protection of format rights is often inconsistent across countries. Although there is protection, it can be difficult to predict whether a Court in a particular country will find that a format is protectable, whether through copyright, unfair competition or breach of confidence. In spite of this, the industry continues to thrive. It is global. Formats are bought and sold for significant sums. The industry has chosen to "self-regulate" and has adopted various market-based strategies to protect formats. This case study identifies some of the market-based strategies evolved by the producers of formats to supplement the legal protection.

This case-study showcases how "Who wants to be a Millionaire?" (known throughout this case study as the "Millionaire" format) came to be sold in more than 100 countries around the world, particularly in the absence of protection from any specific format right. The international television trade fairs were used to construct a purposive sample of interviewees for this case study. The fairs were: Discop East Budapest in June 2008, Asia Television Forum Singapore in December 2008 and NATPE Las Vegas in January 2009. 46 interviews were conducted in a semi-structured manner using a pre-designed protocol as a prompt. Coding was used as a means of analysing these interviews to identify explanations of industry behaviour. The themes in this case study are drawn from those interviews.

Trading Millionaire internationally

Created by radio presenters over a pub lunch, Millionaire, started its life as a paper format titled "Cash Mountain" when it was taken to the UK independent production company Celador. The latter then developed and launched the format on UK's ITV in 1998. Celador subsequently sold the rights of the Millionaire format to a Dutch company called 2waytraffic which was itself later acquired by Sony Pictures Television (part of the Japanese conglomerate Sony) in 2008.

The Millionaire format initially rolled out as an international franchise in Western European countries such as Belgium, Germany, the Netherlands and Portugal. A year after the UK launch, the Dutch weekend version was launched, produced by Endemol Entertainment – the format rights holder for several European countries. Owing to its success in the UK, Australia soon followed with a licensed local version on the Nine Network. However, a major push to the

Millionaire format happened after the US version, co-produced by Celador and Disney subsidiaries ABC and Buena Vista Television, became so successful in America that Celador was besieged with franchising requests. Celador is reported to have sold the remaining international rights of the format by postal bidding.

Millionaire soon became a well marketed brand with extensions in several product merchandising and licensing categories. To satisfy cultural and linguistic requirements, although the format's title changes in several territories, the brand identity and visual appeal remains the same. For example, it consistently uses the original Millionaire wheel but modifies it to suit a local audience (for example when the Indian rupee adopted the " ₹ " sign in 2010, the logo for the format's Indian version "Kaun Banega Crorepati", was changed to incorporate the new sign). The title itself translates into a local language and on many occasions the local version's title differs from the original phrase "Who wants to be a Millionaire?" For example, the Russian version of the show translates as "Oh! Lucky Man," while in Spain, the title for many years read as "50 for 15" (referring to the 50 million pesetas that the contestant takes away after answering 15 questions).

The format predominantly targets a large demographic, typically from 18-65 years of age, and is innovated periodically as per audience research in each country. The updates can be changes such as introducing a new lifeline (such as "Switch the Question"), to a more complex rollout of a faster-paced version of the format (such as "Hot Seat"), and even spin-out programming (such as "50:50").

Strategic Behaviour

Eleven patterns of strategic behaviour emerged from analysis of the semi-structured interviews. The illustrative quotes are reported in a generic form, obscuring the name of a particular format or company, and containing only the comparable industry designation of the respondents.

1. Market intelligence

The producers of Millionaire depended upon enhanced and proprietary channels of information flow to detect format copycatting using a network of "spotters" around key television territories such as USA, Netherlands and Scandinavia.

"The spotter's network is so secretive that I only know the names of the spotters. They work as freelance production executives who channelize things they hear to me and the aim is about getting the knowledge of promising shows coming through from our competitors rather than trying to spot rip offs." Senior Manager, Worldwide Format Distribution Company

2. Gentlemen's agreements and trust

Format producers mostly prefer to use non-legal strategies to solve format disputes, depending less on a bundling of intellectual property rights (such as trade marks and copyright). An attempt

to use legal means of countering format imitators is considered too resource intensive (in terms of finance as well as time). On the other hand judicial inconsistency in format disputes means that a negative decision in the Courts may indirectly encourage further format copycats. Relationships and trust are important in the format business and gentlemen's agreements are considered the cornerstone of global television business where most large companies respect each other's format ideas.

"What drives the format industry is not what is legally protectable or the rights – it is traced back to what is the initial impulse for a television commissioning editor or buyer to buy someone else's TV format – because that impulse is as simple as 'since it worked over there therefore it has a fairly decent chance that it is going to work here as well i.e. there must be some chemistry in the show that works with the audiences. Therefore [our format] is a shining example which goes around the world and achieves very similar results almost everywhere, despite uncertain legal protection." EVP, Worldwide Format Distribution Company

"There is a degree of taint around about very obviously ripping off someone else's show. There is a degree of honour and trust within the industry and it's seen as shameful to be very obviously ripping off somebody else's show." VP, Worldwide Format Distribution Company

3. Deterrent letters – putting copycats on notice

Format producers use established positioning and signalling rhetoric of intellectual property protection to assert ownership of formats. This is achieved through "deterrent letters" (or "letters of claim") usually from an in-house legal department emphasising to format copycats that legal action (based on copyright or unfair competition claims) will be pursued if commercial means fail to find a satisfactory solution to their dispute.

"Most of the times ... you can solve [things] in a simple way i.e. by sending a couple of angry letters." In-house Legal Counsel, Worldwide Format Distribution Company

4. Speed to market

The first format of a genre to reach the market (i.e. to be broadcast) usually beats the intended imitators. This is also true of imitators who beat the original to the broadcast date. Hence, by a speedy roll-out throughout the main television territories of the world, the original maintains its supremacy over imitators. This strategy was widely employed by the creator of Millionaire since it quickly signed franchise deals with broadcasters and production companies from around the world.

"Speed to market is the key to protecting our formats. We have bases in every major television territory. Know-how of successful previous versions coupled with a highly skilled technical team ensures we get the commission to produce a licensed version." Senior Manager, Worldwide Format Distribution Company

"We are an international worldwide production and distribution company with offices across the globe – anyone who places a format with us for distribution gets access to all these territories. Hence presence on the ground enhances the ability to protect our formats. In other words, the way we are structured helps ensure protection." Senior Manager, Worldwide Format Distribution Company

A real example of this strategy was highlighted in the Danish case of *Celador v Danmarks Radio and Television* (discussed earlier in this report). If Celador's licensee TV2 had been able to make and broadcast the Danish version more quickly than it did, Celador would not have had to resort to uncertain and expensive legal action. In that instance, Celador were successful and the Court ordered the infringing copycat producers to bear the costs of the litigation.

5. Production know-how

The originators of the Millionaire format provide development support to local versions in terms of "format bibles" (reportedly around 170 pages), style guides, initial graphics, the signature theme music score, lighting arrangements, set designs, and other technical know-how (supplied under confidentiality and non-disclosure agreements). This creates a highly complex product that has inherent value to the licensee. Additionally, keeping this know-how secret makes it difficult for would-be copycats to copy the original easily.

"If you want to copy [our format] properly, then you really have to get hold of the bible which we hold relatively tightly. In our production territories, we don't give the production bibles to the broadcasters. It's a bit problematic in licensing territories since you are passing the bible across to broadcasters or other production companies. But I don't know examples of our bibles being passed around – because it can be traced back to someone." EVP, Worldwide Format Distribution Company

"The technical know-how or the 'production bible' is the crown jewel which we wish to protect. We never release it without a contract having been signed." Partnerships Manager, Worldwide Format Distribution Company

6. Flying producers system

There is a network of "flying producers" who help to keep the formats on screen as well as inherent values intact. By policing the format production process as closely as possible according to the original production's standards, the flying producers maintain the format's quality and integrity in franchised territories. They give the format a distinct identity and quality besides bringing to each new production the knowledge gained in producing all the previous productions. Flying producers know what has been tried in other territories, and what has worked and what has not.

"[Our format] was put together in-house – there is an awful lot going on beneath the surface; and if you have access to the people who created the original show, you have access to all that

knowledge going on under that surface. If you don't have access to that you are only guessing what it is, then you make mistakes because then you don't actually know the true source of where the magic comes from." Flying Producer, Worldwide Format Distribution Company

"People in the industry have a degree of trust when the show is coming from [our company] – they know they will get what they pay for. That is because of our production management system which is run in sync with the flying producers – it's all about knowledge transfer. When we buy-in a format to sell further on, we send some flying producers to sit in on the original production of the show. They learn from the people who first created the show and create a long format bible and this goes into detail about how to make the show, its finances, budgetary requirements etc." Distribution Manager, Worldwide Format Distribution Company

In the case of Millionaire, the lack of a robust flying producer system in the initial few years of the franchise may have contributed to a legal setback the format faced from its Indonesian licensee Arief International. The agreement between Celador and Arief was constructed as an "evergreen licence", thus allowing Arief to keep producing the format in Indonesia as long as it followed the terms of the contract and as long as the format was viable. This was ostensibly done to encourage continued local investment by the licensee and an adherence to quality standards. When Celador terminated Arief's contract and awarded the Indonesian version to an Australian company, Arief took Celador to court in UK in 2004 and won the case, forcing Celador to pay damages plus legal costs. A robust flying producer system may have avoided this problem.

7. Stimulating demand with taped versions

A broadcaster is occasionally supplied with a licence by format producers to broadcast the original tape for a specific number of times on its channels. Local audiences experience a highly developed product and this helps the broadcaster in creating an appetite for a local version.

"It helps that we have very strong tape sales operations. Broadcasters around the world not only rely on us for formats but also finished shows – tape sales. So if you copy our formats, you are cutting off your supplies." Senior Manager, Worldwide Format Distribution Company

"The international growth of [our format] was initially slow but it got a major push from tape sales of its American version – territories which had bought the American tape as it is wanted to create their own local versions. Tie-in with tape sales helped us set a benchmark for local versions which only we can deliver, hence copycat producers are not successful with broadcasters." Senior Partnerships Manager, Worldwide Format Distribution Company

8. Power relations & retaliatory clout

Millionaire is produced by 2waytraffic, a production company which is part of a large diversified television media conglomerate, Sony Pictures Television. Owing to its powerful position, it is able to influence buyers to buy a format in combination with other programmes. If buyers try to copy the format, they become the objects of retaliatory measures such as cutting off supply of other

programmes or being blacklisted from industry relations. Thus, broadcasters, who depend on a library of finished programming from the producers of Millionaire, will not attempt any copycatting. This retaliatory clout is not just restricted to large corporations, but companies recognised for their innovation in devising new formats.

"Being local and being large means that our company is noticed – a copycat can surely expect our local representative to knock on their doors in case of a suspected infringement. We have the size and scale in terms of churning out regular formats and a copycat will cut off the supply of not only future licensed versions but also tape sales from us." VP Development, Worldwide Format Distribution Company

"Because we come out with more and more outstanding formats, the broadcast community understands the importance of keeping good relations with us; hence they tend not to jeopardize relations with us by bringing out a format too close to our own." Senior Manager, Worldwide Format Distribution Company

9. Role of trade fairs

The producers of Millionaire attend large international television trade fairs to promote the format to the industry. Launching and showcasing Millionaire at trade fairs legitimises Sony's 2waytraffic as the originator of the Millionaire style format. This dissuades copycatting by creating ground rules for engaging in business relationships within the industry.

"Trade fairs are used only to build relationships for formats. For shows where a really fast roll-out is necessitated, along with marketing the uniqueness of the show, a trade fair helps to create an event around the format and pitch the show to a range of broadcasters." Senior Manager, Worldwide Format Distribution Company

"MIP is one of the important trade fairs for us. It is about sitting down with our buyers as well as one of the few opportunities that the whole company could come together. Before MIP, we internally decide a list of priority formats we wish to push at the market." Senior Manager, Worldwide Format Distribution Company

10. Cultural localizations

Millionaire producers attempt to suit the local culture of their formatted versions so that these can easily be accepted by local broadcasters and audiences. Format productions that align with a territory's cultural values prolong the lifespan of a format and its brand - this prevents imitators from originating their own localised imitations as there is a finite market share for a certain programme type within a certain genre.

Millionaire underwent numerous cultural localizations in order to appeal to local audiences in diverse territories around the world. For example, in territories where a million does not easily

translate into a catchy and marketable financial figure, the prize money is changed to 5 or 10 million of a local currency.

11. Managing the brand identity

Millionaire producers nurture the brand by managing closely a consistent brand identity through the format bible, style guides and the flying producer system. They then seek to extend this identity to merchandising, off-air licensing and spin-off programming so that it drives audiences back to the on-air product. Millionaire was extended not only into traditional quiz books and board games but also instant win lottery scratch cards, interactive DVDs, online and mobile games, and digital apps.

"We nurture format brands by having a consistency of graphics, music, programme structure, etc. As time progresses, there is a need to evolve the brand and hence being a large global company helps as successful ideas from one territory can be implemented in others." EVP, Worldwide Format Distribution Company

"From the outset we have been obsessive about the brand elements of [our format]. We make available to all our format licensees, production assets from other productions such as the logo, the theme music, the opening title sequence, etc. Locally produced shows couldn't generate that kind of productions because of cost issues. So, here was this incredibly glossy and world class framed and branded show in a country which had never seen it before; plus it allowed it to be done at a price suitable for that country. So that's another element that we can provide outstanding good value for what you pay and what you get to broadcast on your screens is better or glossier than locally generated productions. So the branding elements can change the way the name can change but we do try to be very obsessive about key branding elements – and we mandate that territories do not change the key branding elements." EVP, Worldwide Format Distribution Company

"A strong brand has several benefits – it can leverage a whole host of products. Not only opens various revenue opportunities but also embeds the products in people's lives and feeds back to make audiences loyal to the show audiences loyal to the TV show." EVP, Worldwide Format Distribution Company

Model for Non-legal Protection of a Format

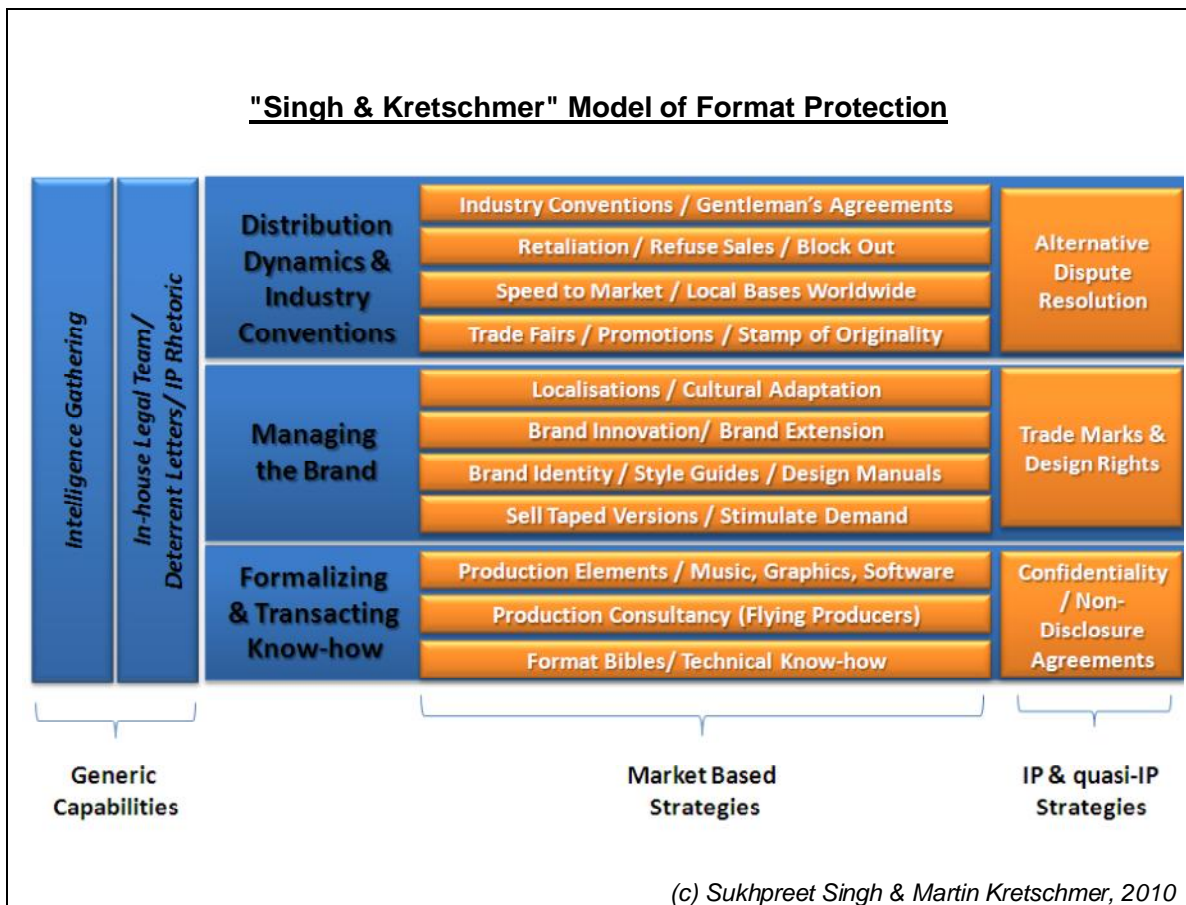
Having mapped and analysed the above patterns of market-based behaviour, three groups of strategies emerge, each combining legal and market-based means of preventing copycats of Millionaire.

The first group is characterised as the attempt to formalise knowledge, so that it can be transacted – these include elements such as know-how and knowledge that resides, not on screen but behind the camera: e.g. how to source contestants, how to involve audiences, where to place the lighting and how to pace a series. These are laid down in a format bible, supplied

under confidentiality agreements, implemented by flying producers and supported by raw production elements (such as music and graphics).

The second group takes its lead from the discipline of marketing. It involves floating possible formats through tape sales of the large and successful Millionaire productions, localisation of format elements and crucially, providing a distinct brand identity while at the same time constantly evolving the brand it so that it becomes harder to copy. Merchandising and other product tie-ins also fall within this group. The use of trade mark law to protect titles and logos of the show is the complementary legal strategy.

The third group relies on strategies that can be understood in the context of media economics. If distribution structures enable a speedy role out, using local production bases, Millionaire becomes the market leader, leaving little space for competing shows in the same genre. Also relying on the structure of distribution networks are strategies that conceive of social norms as sources of incentives. Deviant producers will face reputation sanctions in the context of trade fairs, and may no longer have access to new ideas or finished programming and library content from the same production house.



Underlying these groups of strategies are two more generic competences. The first relates to the gathering of market intelligence, ability to spot trends, as well as responding to copycats by

putting deviant producers on notice. The second is a sophisticated in-house legal competence that enables elements of all three groups of strategies – producing non-disclosure agreements, contracting over production bibles, registration of logos and trademarks, instigating mediation, and drawing up deterrent letters.

So, how to protect formats from copycats using market-based strategies? The empirical data suggests that for competitors, copying incurs considerable costs. A format licence buys insight and implementation expertise that is only available from the format's originator (who also is trying hard to keep the target moving, again increasing the costs of copying). Educating the market on the benefits of buying a licence is a long term beneficial strategy. Attending international trade fairs and signalling the originality of a format to the industry ensures less attempts at imitation. In contrast, unauthorised copycat producers fear losing their access to channels of trade within the international network of television programme producers. Ultimately, there is a significant deterrent cost attached to deviant behaviour, which is recognised by the sophisticated producer.

This case study is based upon results of a substantive Economics and Social Research Council (ESRC, UK) funded project titled "Exploitation of TV Formats" available as a digital learning resource on <http://tvformats.bournemouth.ac.uk/>. Any queries regarding this case study may be sent to ssdheer@gmail.com.

Appendix



Appendix

Case Summaries by Country

A synopsis of the reported judgments discussed in this report, arranged by country.

Format/Alleged copy	Parties	Summary
Australia		
<u>Format:</u> To make a Million <u>Copy:</u> Unknown	<i>Talbot v General Television Corporation Pty Ltd, 1977</i>	Talbot claimed Channel 9 had infringed his copyright and misused confidential information. The Court ruled that Talbot's paper format was "a concept or idea that has been developed to the stage it is capable of being the subject of a confidential communication."
<u>Format:</u> Dream Home <u>Copy:</u> The Block	<i>Nine Films & Television Pty Ltd v Ninox Television Ltd, 2005</i>	Ninox's claim for infringement of copyright in its Dream Home format failed as the similarities were common to all renovation reality shows and Nine Films was able to show that a number of different shows inspired its programme The Block.
Belgium		
<u>Format:</u> Easy Does It <u>Copy:</u> Pico Bello	<i>Show & Tell v VTM, 1996</i>	The claim was for non-payment of licence fees. The judge considered that a short description of a lifestyle programme did not enjoy copyright protection because it did not express the intellectual effort of the author.
<u>Format:</u> Golfbreker <u>Copy:</u> Golfbreker	<i>BVBA Habrasaje en Martin De Jonghe v VRT, 2002</i>	The claimants claimed copyright infringement as the defendants terminated their relationship with them, but continued to broadcast the claimants' format with a different host and produce the format with a different company. The claim succeeded.
<u>Format:</u> Don't Get Mad,... Get Even <u>Copy:</u> De Thuisploeg	<i>Tailor-Made Films Ltd v VRT, 2005</i>	Tailor-Made Films claimed copyright infringement in its format. The Court found that the format was protected by copyright, but had not been infringed as there were significant differences.

Format/Alleged copy	Parties	Summary
<u>Format:</u> Super Champs <u>Copy:</u> Eeuwige Roem	<i>K. Verbraeken v VRT & BVBA De Filistijnen, 2008</i>	The claimant claimed copyright infringement in its paper format. The Court found that the format was not protected, as it had not been worked out in a detailed and concrete form.
<u>Format:</u> Unknown <u>Copy:</u> Unknown	<i>BVBA T. & J.D.B. v VZW W.T., & Others, 2008</i>	The claimant brought a claim for copyright infringement in a format for a television programme. The judge held that the format was not protected by copyright as it did not represent an intellectual effort.
Brazil		
<u>Format:</u> Big Brother <u>Copy:</u> Casa dos Artistas	<i>TV Globo & Endemol Entertainment v TV SBT, 2004</i>	Endemol claimed TV SBT had infringed its copyright in the Big Brother format. The claim succeeded.
Canada		
<u>Format:</u> Space Pet <u>Copy:</u> Star Wars – Return of the Jedi	<i>Preston v 20th Century Fox Canada Ltd, 1990</i>	The claimant sued for copyright infringement of his manuscript. The Court found no substantial similarity between the claimant's work and the defendants' film and hence no copyright infringement.
<u>Format:</u> Star Chart <u>Copy:</u> Good Rockin' Tonite	<i>Hutton v Canadian Broadcasting Corporation, 1992</i>	The claimant claimed for copyright infringement and for breach of confidence for its music count-down format. The copyright claim failed as the Court considered the formats had a different feel. Breach of confidence was dismissed as there was no confidential information.
<u>Format:</u> Television series that the claimants had been developing since 1985 <u>Copy:</u> Les Grands Procès	<i>Arbique v Gabriele & Others, 1998</i>	The claimants argued that the defendants' series was a forgery of the series they had been developing. The Court held that there was insufficient evidence to show that the defendants had copied.

Format/Alleged copy	Parties	Summary
<u>Format:</u> Dreams Come True <u>Copy:</u> Popstars (and its sequels)	<i>Cummings v Canwest Global Broadcasting Inc., 2005</i>	The claimant sued the defendant for copyright infringement. The Court held that there were no similarities between the format and copy and that the concept document did not have copyright protection as it was so lacking in development and thus did not meet the requirements of originality.
<u>Format:</u> Robinson Curiosité <u>Copy:</u> Robinson Sucroë	<i>Robinson & Les Productions Nilem Inc. v France Animation & Others, 2011</i>	The claimant claimed infringement of copyright in his sketches and character descriptions. The Court found in favour of the claimant, stating that there was, in this case, a substantial amount of copying. The similarities between the claimant's works and the defendants' animated series could not simply be due to a common source of inspiration.
Denmark		
<u>Format:</u> Who wants to be a Millionaire? <u>Copy:</u> Kvit Ellar Dobbelt	<i>Celador Productions v Danmarks Radio & Television, 1999</i>	The claimant claimed copyright infringement in 'Who wants to be a Millionaire?' and unfair competition. The Court found that the format was protected under the Danish Marketing Practices Act. The copy was deemed to be a deliberate imitation and designed to confuse the public and an injunction was granted.
France		
<u>Format:</u> Crise-en-direct <u>Copy:</u> C'est déjà demain	<i>Saranga Productions & Others v Canal Plus & Others, 2007</i>	The defendants acquired a format proposal from the claimants, but engaged a different production company to produce it. This was held to be 'passing off' since the broadcast of the resulting programme had caused Saranga a financial loss by depriving it of the opportunity to market its format to another broadcaster. The issue of originality was not relevant to establishing 'passing off', as is the case in copyright law.
<u>Format:</u> Big Brother (and various adaptations) <u>Copy:</u> Dilemme	<i>Endemol Productions v ALJ Productions & Others, 2011</i>	The claimant claimed unfair competition. It was found that there was wrongful imitation by the defendant, which did amount to unfair competition. The case is pending appeal.
Germany		
<u>Format:</u> Forstrevier Alpsee <u>Copy:</u> Forsthaus Falkenau	<i>Freelancing format developer v ZDF, 1990</i>	The claimant sent a television show concept to the defendant, which was rejected. The defendant developed a similar show soon after. The Court dismissed the appeal, holding that the claimant's concept was too vague and the ideas were not sufficiently elaborated to meet the 'personal intellectual creation' threshold of German copyright law.

Format/Alleged copy	Parties	Summary
<u>Format:</u> Taxi-TV <u>Copy:</u> Taxi-TV	<i>MME v WDR/ARD 1995</i>	The claimant claimed unfair competition. The Court said that copying a product or concept which is not protected by copyright law is usually not a case of unfair competition. There would only be unfair competition where there were additional anti-competitive aspects which went beyond mere copying.
<u>Format:</u> Labyrinth <u>Copy:</u> Goldmillion	<i>Developer v ZDF, 1995</i>	The claimant claimed Goldmillion was unfairly competing with his format. The Court held that in principle the claimant's show could be protected under unfair competition law, but as the elements used in both shows were well known and their overall appearance different, the claim failed.
<u>Format:</u> Gute Zeiten, schlechte Zeiten <u>Copy:</u> Gute Nachbarn, schlechte Nachbarn	<i>UFA Grundy v Sat1, 2000</i>	Gute Zeiten, schlechte Zeiten is a very successful TV series. The Court held that its title was both distinct and well known, and that the use of a similar title by a new show would confer an unlawful advantage to the new show.
<u>Format:</u> Tagesschau <u>Copy:</u> Tagesbild	<i>ARD v ProSieben, 2001</i>	The claimant claimed a new news show with a similar title to its news show was confusingly similar. No risk of confusion was found, since the relevant audience would not associate the copy with the claimant's broadcaster.
<u>Format:</u> L'école des fans <u>Copy:</u> Kinderquatsch mit Michael	<i>TV-Design v Südwestrundfunk, 2003</i>	The claimant claimed breach of copyright in a television format. The Court found that a format did not constitute a protected work and therefore could not be protected under copyright law. On the additional claim of unfair competition, the Court held that the defendant was not unfairly competing with the claimant.
<u>Format:</u> Spiel deines Lebens <u>Copy:</u> Kicken gegen die Profis	<i>Juegel v DSF (now "Sport1"), 2010</i>	The claimant submitted a concept paper for a television show to the defendant, but never heard back. The defendant later began broadcasting a similar show. The Court refused copyright protection, arguing that the format and its realisation were not eligible for copyright protection.
India		
<u>Format:</u> Swayamvar <u>Copy:</u> Shubh Vivaah	<i>Gupta v Dasgupta & Others, 2001</i>	The claimant claimed breach of confidence as he had sent the defendants a proposal for a match-making television show. The defendant had broadcast its own version of the show. The Court found in favour of the claimant as he had developed and evolved the concept for the show and disclosed it in confidence.

Format/Alleged copy	Parties	Summary
<u>Format:</u> Kaun Banega Crorepati <u>Copy:</u> crorepatikaun.com	<i>Celador Productions Ltd v Mehrotra, 2002</i>	The Court granted an injunction restraining the defendant from operating and hosting any website using a similar domain name as the local title for Who Wants to be a Millionaire? and from offering on-line games based on the distinctive format, design and features.
<u>Format:</u> Work in Progress <u>Copy:</u> Summer Showdown	<i>Chiang v Global Broadcast News Ltd & Another, 2007</i>	The claimant had submitted a written proposal for a reality TV format. The defendant broadcast its own version utilizing material from the claimant's proposal. The Court held that breach of confidential information and copyright infringement had taken place.
Malta		
<u>Format:</u> Big Brother <u>Copy:</u> L-ispjun	<i>Endemol International v TVM Malta & Others, 2007</i>	The claimant sued the defendant claiming that its copyright in the Big Brother format had been infringed when the defendant broadcast a very similar format. The Court ruled in the claimant's favour.
Netherlands		
<u>Format:</u> Survive <u>Copy:</u> Big Brother	<i>Castaway Television Productions & Another v Endemol Entertainment & Another, 1999</i>	The claimant alleged its Survive! format was a copyright work because of its unique combination of 12 specific elements which were repeated in all local versions. The claimant claimed that Big Brother was an infringing copy. The Court held that several protected and unprotected elements together constituted a format and could be protected, but in this instance enough of these elements were not copied, hence there was no copyright infringement.
New Zealand		
<u>Format:</u> Opportunity Knocks <u>Copy:</u> Opportunity Knocks	<i>Green v the Broadcasting Corporation of New Zealand, 1989</i>	The claimant sued for copyright infringement and passing off of his Opportunity Knocks format. The claim failed because the claimant could not show that his format had the requisite unity and certainty and hence, could not attract copyright protection, and because the UK format did not have any existing reputation in New Zealand to found an action of passing off.
<u>Format:</u> The Kiwi Kids <u>Copy:</u> The Kids from OWL	<i>Wilson v Broadcasting Corporation of New Zealand, 1989</i>	The claimant claimed breach of confidence in and copyright infringement of his format. The Court held that the claimant's format was capable of copyright protection and that a breach of confidence had taken place since the defendant had been in negotiation with the claimant and had full access to the original and additionally created material, before proceeding to create its own series.

Format/Alleged copy	Parties	Summary
Spain		
<u>Format:</u> Love Letters <u>Copy:</u> Unknown	<i>Endemol Entertainment v Antena 3, 1994</i>	The claimant sued for infringement of copyright in its television show format. The Court ruled that there was infringement as the 'key elements' of the format Love Letters had been copied.
<u>Format:</u> Madrid Directo <u>Copy:</u> España Directo	<i>Televisión Autonomía de Madrid, S.A. v Televisión Española, S.A., 2007</i>	The claimant claimed unfair competition (imitation, confusion and taking unfair advantage of a third party's reputation). The Court found that there were no acts of confusion or advantage taken of a third party's reputation, but found that there was unfair imitation as the defendant's programme was identical to the claimant's and had hampered the claimant's activities.
<u>Format:</u> Epitafios <u>Copy:</u> Epílogo (initially called Postdata)	<i>Maradentro Producciones S.L. v Sogecable, S.A., 2009</i>	The claimant claimed copyright infringement over a TV format. The Court held that while TV formats can be protected by copyright, the claimant's format was not protected as it was a generic idea and a concept with ill defined features.
<u>Format:</u> What Kids Really Think, exploited in Spain as No Em Ratllis, No Te Enrolles and Ya Te Vale <u>Copy:</u> O País Dos Ananos	<i>Atomis Media, S.A & Another v Televisión de Galicia, S.A. & Another, 2010</i>	The claimants claimed copyright infringement in, and unfair competition with, their television show. The Court found that the format did not contain the required degree of originality to be protected by copyright and there was no evidence that the claimant's show had acquired a reputation so even if the defendants had been imitating the show, the imitation would have been legitimate. No infringement or unfair competition was found.
<u>Format:</u> Carrusel Deportivo <u>Copy:</u> Tiempo de Juego	<i>Sociedad Española de Radiodifusión, S.L. v Radio Popular, S.A., 2011</i>	The claimant asserted copyright protection for a radio format, as well as unfair competition. The Court stated that although a format can be protected by copyright when the legal requirements are met, there was doubt whether this format was protectable. An injunction was refused.
<u>Format:</u> Tengo Una Pregunta Para Usted <u>Copy:</u> España Pregunta, Belén Responde	<i>Corporación Radiotelevisión Española, S.A. v Gestevisión Telecinco, S.A., 2011</i>	The claimant claimed that their format was protected by copyright. The Court agreed and found that the defendant's programme was a copy.

Format/Alleged copy	Parties	Summary
<u>Format:</u> Alphabet Game, exploited in Spain as Pasapalabra. <u>Copy:</u> Pasapalabra	<i>ITV Global Entertainment Ltd & Other v Europroducciones TV, S.A., 2011</i>	The claimant sought recovery of certain trademarks, claiming they had been registered in bad faith. The Court found that this was the case and that the defendant had intended to profit from the success of the claimant's format in other jurisdictions. The trade marks were invalidated.
UK		
<u>Format:</u> A series on the lives of the members of band The Rock Bottom Group <u>Copy:</u> Rock Follies	<i>Fraser & Others v Thames Television, 1983</i>	The claimants claimed breach of confidence after disclosing an idea for a programme to the defendant. The defendant produced a similar show of its own. The Court held that there was a breach of confidence, notwithstanding the fact that ideas during the meetings between litigants had been expressed orally, saying that the content of the idea was clearly identifiable, original and of value.
<u>Format:</u> Trusty and Friends <u>Copy:</u> Dream Street	<i>Miles v ITV Network Limited & Dream Street Productions Ltd, 2002</i>	The claimant claimed the defendants had used his material to produce their programme. The Court struck this case out holding that the programmes had an overall different look and feel overall.
<u>Format:</u> Millionaires Row / HELP / Millionaire <u>Copy:</u> Who Wants to Be a Millionaire?	<i>Melville, Boone, Baccini v Celador Productions Ltd & ITV Networks Ltd, 2004</i>	The claimants claimed that the format "Who Wants to be a Millionaire?" infringed copyright in formats for game shows they had created previously. Two of the three claims were ordered to proceed to trial.
<u>Format:</u> Intervention <u>Copy:</u> Intervention: We're coming to get you	<i>A&E Television Networks v Channel 4 Television Corporation & Another, 2006</i>	The claimants sought an injunction to restrain the defendant's use of the word 'intervention' in its documentary. The Court dismissed the application on the grounds that the word 'intervention' was descriptive of a specific psychotherapeutic technique, and that the law of passing off would not countenance the unfair monopolisation of descriptive terms.

Format/Alleged copy	Parties	Summary
<p><u>Format:</u> Various "Cash Call" games</p> <p><u>Copy:</u> Come and Have a Go...If You Think You're Smart Enough</p>	<p><i>Meakin v British Broadcasting Corporation & Others, 2010</i></p>	<p>The claimant claimed copyright infringement in proposals for various versions of a game show format. The BBC applied for summary judgment and won; the Court held that the similarities between the respective works were insufficient to create an inference of copying.</p>
USA		
<p><u>Format:</u> Survivor (USA)</p> <p><u>Copy:</u> I'm a Celebrity...Get me out of here! (USA)</p>	<p><i>Survivor Productions LLC & CBS Broadcasting Inc v Granada plc & Others, 2003</i></p>	<p>The claimant brought a claim for copyright infringement which failed as the Court considered that the formats had a substantially different concept and feel.</p>

About FRAPA

FRAPA (Format Recognition and Protection Association) was created 2000 in Monaco, when industry figures from around the globe met to debate the creation of an international industry organisation to combat television format piracy. FRAPA is the international format industry association dedicated to the protection of formats and aims to ensure that television formats are respected by the industry and protected by law as intellectual property. Since its creation, FRAPA acts as an industry pressure group to lobby for legal recognition of format rights. FRAPA has more than 100 members from all over the world – creating an extremely strong international community.

FRAPA aims to create a framework for format protection by:

- Undertaking research, in order to assess the economic significance of the international trade in formats and to investigate the means of strengthening the protection of formats under law.
- Introducing industry-acceptable business practices and defining a code of conduct for fair competition.
- Acting as an industry pressure group to lobby for the legal recognition of format rights.

What does FRAPA do?

Over the past 11 years, FRAPA has worked tirelessly to promote the protection and recognition of format rights. FRAPA's services and events include:

- In conjunction with WIPO, providing mediation services in relation to disputes arising out of claims of format plagiarism.
- Registration of format proposals (Paper Format Registry & Online Format Registry).
- Creating guidelines for fair competition.
- Educating the industry and the law.
- Introducing industry acceptable business practices and defining a code of conduct for fair competition.
- Acting as an industry pressure group to lobby for legal recognition of format rights.
- Supporting format producers with information about the latest business affairs practices.

Dispute resolution (WIPO)

At the heart of its suite of services, is FRAPA's mediation expertise which has benefited the format community as a whole. In an impressive 80% of the disputes in which it has been called to mediate, FRAPA has succeeded in steering the warring parties towards a mutually acceptable solution.

To date, some 35 format-plagiarism disputes have been mediated successfully. However, since confidentiality is an intrinsic part of this service, FRAPA's mediation track record remains largely unknown by the wider industry.

In 2010 — the year of its 10th anniversary — FRAPA further strengthened its mediation offering by joining forces with the World Intellectual Property Organisation (WIPO). FRAPA members can now call on the services of the non-profit-making UN agency, which offers alternative dispute resolution (ADR) mechanisms for IP and related disputes.

Why refer disputes to mediation?

There are many reasons that mediation is preferable to litigation when resolving disputes, such as allowing the parties to:

- Preserve business relationships.
- Retain control over the process and the outcome.
- Reach a speedy settlement.
- Protect sensitive information through confidentiality.
- Negotiate freely to create value.
- Invent business-driven solutions.

FRAPA Format Price Calculator

Launched in early 2011, FRAPA has developed a unique price calculator, which is available free to all members. Designed to assist concept creators with format-fee proposals, the calculator has been devised by some of the format industry's most experienced and successful operators, including several FRAPA board members. Having taken six months to perfect, the format price calculator is based on input from some of the format world's most experienced brokers and traders and is proving to be a vital tool for all those involved in the world of format rights.

FRAPA Contract Generator Tool

Another new innovation launched in 2011 by FRAPA is the Contract Generator Tool. Based on the review of most standard format licence and option contracts currently used, gathered from FRAPA members and friends in the international market place, members have access to this standard contract form where they will be able to add, delete and modify clauses according to their specific requirements.

Also included is a contract check list to allow users to revise their own contracts from an extensive list of model clauses encompassing all types of contract listed by genre and media.

FRAPA Format Register

FRAPA runs a Digital Online Registry which allows members to register their formats. It provides credible evidence of the date of creation of the format in question. The best evidence of such creation of a format concept is a signed declaration by a neutral third-party custodian, attesting that the manuscript was received on a certain date and has been kept in seclusion since. This is what registration with the FRAPA Paper Format Registry (available only to FRAPA members) or the FRAPA Digital Online Registry provides.

The FRAPA Format Awards

The FRAPA Format Awards were launched in 2003 at the Monte Carlo TV Festival.

From 2005 to 2006 they were presented at the Rose d'Or Television Festival in Lucerne, Switzerland. The winners were selected by a jury of industry experts that awarded formats in a growing number of categories.

In 2007, FRAPA decided to rebrand the Awards in order to raise their international impact. It therefore joined forces with the influential entertainment business publisher C21 media and the competition was moved to the world's foremost audiovisual content trade show: MIPCOM in Cannes, France.

Renamed **C21Media/FRAPA Format Awards**, the annual event now takes place at an exclusive beach-front venue in Cannes, attended by some 250 MIPCOM delegates.

The C21 Media/FRAPA Format Awards are unique not only because they are devoted exclusively to television formats, but also because of the online screening and voting mechanism that lies at their heart. The judge and jury are C21's 35,000 strong online community, which votes via the C21screenings.net video portal. As a result, the awards are truly international, truly democratic and a true reflection of the best creativity in the global format industry.

Each year, the Awards committee also presents a Gold medal to an organisation or individual that has made an outstanding contribution to the worldwide format business. The previous winners are listed below.

C21/FRAPA Format Award winners: 2010

Best Competition Reality Format: *Three in a Bed* (All3Media)

Best Comedy Format: *Benidorm Bastards* (SevenOne International)

Best Multiplatform Format: *Final Punishment* (beActive Entertainment)

Best Factual Entertainment: *The Fairy Jobmother* (All3Media)

Best Studio-based Gameshow: *Minute to Win* (NBC Universal)

Best Scripted Format: *Ezel* (Sparks Networks)

Best Brand-generated Format: *HP Space* (ice-TV)

IFA Gold Medal Award: Reg Grundy

C21/FRAPA Format Awards: 2009

Best Competition Reality Format: *Relentless* (Zig Zag Productions)

Best Comedy Format: *I Get That a Lot* (CBS Studios International)

Best Multi-screen Format: *Married on MySpace* (Endemol)

Best Observational Documentary Format: *Undercover Boss* (All3Media International)

Best Gameshow: *Pretty Smart* (Talpa Distribution)

Best Scripted Format: *Being Erica* (BBC Worldwide/Temple Street)

IFA Gold Medal Award: Peter Bazalgette

C21/FRAPA Format Awards: 2008

Best Factual Entertainment Show: *Born to be Wild* (Zodiak)

Best Competition Reality Show: *Make it Short* (Distraction Formats)

Best Multi-screen/Future Media Format: *The Cell* (Endemol)

Best Studio-based Gameshow: *The Encounter* (Sera Film Services)

Best Sketch Comedy: *Headcases* (ITV Global Entertainment)

Best Scripted Format: *El Cartel* (Caracol TV)

IFA Gold Medal: Stephen Leahy and Trish Kinane

C21/FRAPA Format Awards: 2007

Best Factual Entertainment Show: *Wasted* (Fumes)

Best Entertainment Reality Show: *Just the Two of Us* (BBC Worldwide)

Best Multi-screen/Future Media Format: *40 Weeks* (Magyx)

Best Studio-based Gameshow: *8 out of 10 Cats* (Zeppotron)

Best Sketch Comedy: *Spoons* (Endemol)

Best Scripted Format: *Serial Frank* (Distraction Formats)

Best Competition Reality Show: *Ladette to Lady* (RDF Rights)

IFA Gold Medal: Merv Griffin

FRAPA Format Awards: 2006

Best Gameshow: *Deal or No Deal* (Endemol)

Best Reality Format: *The Biggest Loser* (Reveille Productions)

Best Scripted Format: *The Nanny* (Sony Pictures International)

FRAPA Format Awards: 2005

Best Gameshow: *Test the Nation* (Eyeworks)

Best Reality Format: *The Apprentice* (Mark Burnett Productions)

Best Scripted Format: *Ladykracher* (Brainpool Productions)

FRAPA Format Awards Winners: 2004

Best Gameshow: *Who Wants to Be a Millionaire* (Celador)

Best Reality Format: *Wife Swap* (RDF Right)

Best Scripted Format: *Love Bugs* (Distraction Formats)

FRAPA Format Awards Winners: 2003

International Format of the Year: *The Price is Right*

Special Award 2003: Reg Grundy

About the Authors

Olswang LLP

Olswang is a leading business law firm with a distinctive approach. It has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Olswang's Film and Television practice is recognised as being home to many of the industry's foremost legal experts. These lawyers advise production companies, free- and pay-TV broadcasters, aggregators and platforms on commercial contracts in all aspects of business, from development to production and distribution and on corporate transactions, collaborations, format and brand protection and litigation. They are consistently ranked in the top tier for their area of practice by legal directories such as Chambers & Partners, The Legal 500 and Juve.

Founded in 1981 as a niche film and television law firm, our firm has grown to a team of over 600, including more than 100 partners, across four European offices, with leading lawyers in all legal disciplines. This report has been drawn from the experience of the specialist rights lawyers with assistance from Dr Sukhpreet Singh whose biography is below.

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Dr Sukhpreet Singh

Dr Sukhpreet Singh is a Research Fellow at the Centre for Intellectual Property Policy and Management at Bournemouth University – one of the leading research centres of intellectual property in the UK. Dr Singh holds a PhD in intellectual property rights management and has written extensively on TV format protection and exploitation strategies. In January 2009, the National Association of Television Production Executives (NATPE, USA) invited him to be a NATPE Educational Fellow.

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The distribution of television formats has grown explosively across the world in the last decade. There is also a well-established, industry practice of licensing formats. However, in the absence of a specific "format right" the legal protection of formats is unclear. The FRAPA Report 2011 (written by international law firm, Olswang LLP) provides a practical guide to the ways in which format creators can protect different aspects of their formats. The report considers how format creators can:

- ❖ **Protect their creative works against copying**
- ❖ **Prevent confusing, competing formats**
- ❖ **Prevent unfair business practices**
- ❖ **Protect the know-how behind their formats**
- ❖ **Protect their format titles**

The report describes the variety of legal rights that can be used to achieve the above objectives. The report also addresses the relative difficulties associated with each right and how each right has fared by reference to over 40 reported case reports from around the world.

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