©2017 Tilleke & Gibbins International Ltd.

Alec Wheatley
Consultant
alec.w@tilleke.com

Protecting TV Show Formats

Licensing of TV show formats is big business, generating billions of dollars in global revenue every year for show creators. In licensing popular show formats, licensees obtain security by investing in TV shows which have already been proven successful, and show creators enjoy the extra revenue streams created by licensing their shows for production and broadcast in new markets, which can strengthen their brand and increase the value of future licenses. In addition, viewers in licensee countries are able to take part in global TV phenomenons which have been adapted to appeal to their local cultures and viewing preferences.

Surprisingly, intellectual property protection in this area remains uncertain. Despite the continued popularity of licensing TV show formats, it is also common for shows exhibiting very similar formats to pop up on competing networks once a given show has proven successful. This article will examine some of the legal hurdles encountered in protecting TV show formats, and some strategies show creators can implement to ensure they do not fall prey to competing broadcasters who want to free ride on their intellectual property.

Definition of a TV Show Format

While there is no single accepted legal definition of what a TV show format includes, the Format Recognition and Protection Association defines a show format as:

> "A distinctive combination of comprehensively described television elements (both new and commonplace which may or may not be protected as separate intellectual property items) fixed in any material form that creates an original, repeatable narrative structure."

As shown by this broad definition, TV show formats may include a wide array of items which may not even be protectable on their own, but may be combined in a unique way to create an original protectable work. Simply put, a show's format is what makes the show unique and recognizable between different episodes or seasons, and includes the behind-the-scenes knowledge that actually makes the show work.

To understand what a format includes, it may be helpful to compare different types of TV shows to see how formats may differ between genres. Traditional scripted shows are written out in advance to determine the plot, dialogue, character development, mood, pacing, and other elements. An example of a scripted show which has been licensed multiple times is the popular workplace comedy series *The Office*. While the writing may change for each licensed version to account for cultural differences, the defining aspects of the characters and their relationships to each other largely remain the same between versions.

In comparison, talent competition shows, game shows, and reality shows rely on spontaneity for much of their content, and as a result the core content changes from episode to episode. Examples of these kinds of shows include *Survivor, The Voice, Who Wants to Be a Millionaire,* and *Wife Swap*. These shows do not utilize scripts for much of their content, and so the formats consist of the show premise and structure, visual features, branding, and production know-how.

Limitations on Protection under Copyright Law

Copyright law is the primary form of legal protection for original creative works such as TV shows. However, copyright law provides several limitations on the protectability of TV show formats, namely: (1) the idea/expression dichotomy; (2) *scènes à faire*, or "scenes to be made"; and (3) merger doctrine.

The idea/expression dichotomy says that *ideas* are not protected under copyright law, only the *expressions* of those ideas. This means that the mere idea for a show where contestants compete to be voted the best singer is not protectable. This has allowed a plethora of singing competition shows to flourish, and not given any one broadcasting network monopoly rights over the idea.

Scènes à faire doctrine states that some scenes flow naturally from a given genre, and consequently will not be protectable under copyright. Take, for example, a shoot-out scene in a western show, or an award ceremony in a talent competition show. This doctrine provides that no one creator may have the sole rights to utilize these kinds of generic scenes in their show.

The merger doctrine states that some simple ideas may only be expressed in limited ways. In these cases, the idea and its expression are said to merge and so neither the idea nor its expression will be protected. An example of this is a competitive reality show where the contestants are eliminated in each successive round until there is only one left. This doctrine complements the idea/expression dichotomy and prevents shows utilizing simple ideas from gaining sole rights to those ideas due to the limited options available for their expression.

These limitations, combined with the largely spontaneous content of many reality and competition-based shows, make it difficult to protect many types of TV show format from imitators under copyright. Admittedly, the mere idea of a popular TV show alone is not enough to guarantee that a copied show will be successful, and so creators should also look to protect additional aspects of their shows.

Brand and Production Know-How

The relatively light legal protections available under copyright law belie the strength of the TV show format marketplace. This may be due in part to the additional benefits that come with a standard licensing agreement. For one, the brand surrounding a popular format, including the show name, may be very valuable to show licensees, as it guarantees that a certain number of viewers will already be familiar with the show.

Continued on page 3

Protecting TV Show Formats (from page 2)

In addition, show licensees may have the most interest in obtaining the production know-how accrued by the original show creators, such as how to make the format profitable, the best times to air the show to acquire the most viewers, and other logistics which can only be discovered through trial and error. Obtaining access to the production know-how of a show ensures that a licensee will be able to successfully implement the format, and will benefit from the experience of the show creators.

Protection Strategies

In order to thoroughly protect their TV show formats from competitors, creators should pursue a multipronged protection strategy. As discussed above, TV show creators should take efforts to build up the brand of their show by registering trademarks in multiple jurisdictions for the show name and other distinctive catch phrases used in the show. Similarly, show creators should safeguard their production know-how as trade secrets and maintain strict confidentiality procedures to prevent inadvertent disclosure.

> "copyright law is the primary form of legal protection for original creative works such as TV shows"

TV show creators may find additional protection through contracts, by requiring third parties to sign nondisclosure agreements covering any information disclosed during pitch sessions. Alternatively, and depending on the jurisdiction, show creators may require show staff to sign noncompete agreements so that competitors are unable to swoop in and rehire an entire show's production team en masse.

Finally, compiling all information pertaining to a TV show format into a "format bible" will support protection in two ways. First, it will represent a valuable resource to potential licensees interested in purchasing the right to use the show format, and may even discourage potential imitators from trying to pursue a similar show without the benefit of the extensive know-how available to licensees. Second, in the event of legal action, the format bible may serve as evidence of the extensive creativity and originality contained within the show, which may be used to argue that the show should be protected under copyright as an original creative work.

As always, TV show creators should seek the advice of experienced counsel to develop effective strategies to protect their valuable intellectual property.

©2017 Tilleke & Gibbins International Ltd.