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‘Minute Winner’ loses out in TV format copyright claim

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Can copyright subsist in the format of a television show?

Until recently, the only judicial decision on this question was back in 1989 in a case concerning the well-known talent show ‘Opportunity Knocks’. In that case, Hughie Green, the show’s author, producer and compere, argued that certain distinctive features repeated in every show, including the use of catchphrases (“*this is your show folks, and I do mean you*”), and a ‘clapometer’ to measure audience reaction to the competitors’ performances, were protected by copyright as literary and dramatic works. The Privy Council disagreed. There could be no literary copyright as the scripts “… *did not themselves do more than express the general idea or concept of a talent quest*” (although it was noteworthy that the scripts were never actually produced in evidence). The Privy Council also held that a dramatic work must have “*sufficient unity*” to be capable of performance but “… *the features claimed as constituting the format of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic*.”

Following this ruling, it was widely believed that TV formats could not be protected by copyright. However, for the first time since the Opportunity Knocks case, the High Court has considered this question again.

In this latest case, the claimant (B) developed a format for a TV game show – ‘Minute Winner’ – which he described in a short document. For reasons of brevity, the contents of that document are not replicated here, but paragraphs 6 to 8 of the judgment are worth a read. B claimed that he pitched his idea for Minute Winner to the defendants at a meeting in November 2005 (a fact denied by the defendants). Subsequently, at the end of 2011, the defendants were involved in the broadcast in England of eight episodes of a game show called “Minute to Win It” which B claimed was substantially derived from the Minute Winner format. He issued proceedings for copyright infringement, breach of confidence and passing off.

The High Court held:

> … *it is at least arguable, as a matter of concept, that the format of a television game show or quiz show can be the subject of copyright protection as a dramatic work. This is so, even though it is inherent in the concept of a genuine game or quiz that the playing and outcome of the game, and the questions posed and answers given in the quiz, are not known or*

> *prescribed in advance; and hence that the show will contain elements of spontaneity and events that change from episode to episode*."

The court declined to rule on the precise conditions that must be satisfied before a TV format can be protected by copyright as a dramatic work. The court did say, however, that copyright protection would not subsist unless, as a minimum

> … (*i) there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and (ii) that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognisable form*."

The High Court held that, tested against those requirements, there was no realistic prospect of B persuading a court that the contents of the document describing Minute Winner qualified for copyright protection. The contents were both very unclear and lacking in specifics, and even taken together they did not identify or prescribe anything resembling a coherent framework or structure that could be relied upon to reproduce a distinctive game show in recognisable form. The features were commonplace and indistinguishable from the features of many other game shows. In any event, B could not hope to make out its allegation that the defendants had copied a substantial part of its (alleged) copyright work. The features of 'Minute Winner' and 'Minute to Win It' were different in every material respect. Accordingly, the High Court dismissed B's claim for copyright infringement.

It is worth noting that the High Court also struck out B's claim for breach of confidence. B had already issued breach of confidence proceedings against the same defendants in the Swedish courts in respect of Minute Winner (and lost). The Swedish court had delivered a final judgment on the merits of B's claim, holding that B did not disclose details of Minute Winner to the defendants at the meeting in November 2005. Accordingly, B was prevented ('estopped') from reopening those issues in the English courts. To do so was an abuse of process.

B's claim for passing off also failed. B needed to show goodwill in Minute Winner – actual customers for the show. As no customers every acquired the rights to Minute Winner, B could not demonstrate that he had any reputation in the show's format.

Comment

The decision on copyright infringement must be right. Successful TV show formats have significant value. The sale of rights to multiple countries can be extremely lucrative. It is right, therefore, that a copyright system that is meant to encourage creativity and investment by awarding a time limited monopoly protects TV shows as a product of creativity like any other. Confirmation of that has, however, been a long time coming.

The lessons from this ruling? Anyone devising a TV format and hoping to assert copyright in it must commit their ideas to paper with care, providing as much explanation, information and detail as possible. In the Minute Winner case, the High Court found that the defendants were not under an

obligation of confidence to B and did not misuse any information that was disclosed to them. However, the case is a useful reminder of the importance of establishing the boundaries of confidence at the outset of any meeting in which a new product or idea (not just a TV format) is to be disclosed. A well-drafted NDA should be used so there is clarity on both sides about what can (or cannot) be done with the information that has been revealed.

It has always struck the authors that the protection of programme formats actually lies somewhere between copyright and the law of passing off. After all, much as a gameshow or other format may have a collection of “regular occurrences” which together constitute the format, each broadcast is a separate and different work. Sonnets and Limericks have similar structures and rhyming schemes, but that does not make the format of the sonnet a matter of IP protection. Nevertheless, if something adopts the trade dress of a commercial programme, and by so doing attracts an audience and advertisers which it would not have achieved otherwise, then it may commit a misrepresentation – because it chooses to be imitative of a work that has acquired reputation and popularity. The debate will no doubt continue, but we are certainly seeing courts begin to recognise the underlying change in commercial structures which has moved from the days of Opportunity Knocks to today’s format driven programming schedules. And practitioners should be alive to the potential for format-style claims to apply not only to television programmes, but to other forms which rely on what might be described as “catchy experiences” such as websites, computer games, apps and forms of gambling.

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