Protection of television formats

Jim Thomson examines the recent Privy Council judgment of Green v Broadcasting Corporation of New Zealand

It is trite law that copyright does not protect an idea itself, but the expression of the idea. In *Plix Products* v *Frank Winstone* (1986), Justice Prichard analysed the process by which a general idea or basic concept (which is not protected) is developed into concrete expression by furnishing it with details of form and shape.

"Each author will draw on his skill, his knowledge of the subject, the results of his own researches, his own imagination in forming his idea of how he will express the basic concept. All these modes of expression have their genesis in the author's mind - these too are "ideas". When these ideas (which are essentially constructive in character) are reduced to concrete form, the forms they take are where the copyright resides."

The difficulty which has often faced the courts is to determine where in the continuum between the formulation of an idea and its expression protection is to be granted.

The Green case

The "idea-expression dichotomy", as it has come to be known, was examined in the context of television show formats in a Privy Council judgment delivered last year.

The Privy Council determined that Hughie Green, the inventor of the talent show "Opportunity Knocks", had no claim to copyright in the format of that show. Accordingly, judgment was given for the Broadcasting Corporation of New Zealand, against which Green had brought an action for breach of copyright.

While the decision creates a precedent of sorts, the result is not surprising. Although organisations have for years been "licensing" formats, there has been little case law on whether a format of a television talent show attracts copyright. Nevertheless, the reactions of some overseas game show producers call for a statement of what the decision may mean to television organisations, both as format devisors, and as potential users of existing formats.

For about twenty years, Green was the author, presenter and compere of a television talent show entitled "Opportunity Knocks" in the united kingdom. South Pacific Television (the predecessor of the Broadcasting Corporation of New Zealand) broadcast in 1975 and 1978 a similar show also entitled "Opportunity Knocks". The elements that South Pacific were held to have copied from Green were the title "Opportunity Knocks"; the phrase "for you (name of competitor) Opportunity Knocks"; "make up your mind time"; the use of "sponsors" who talked about the competitors' backgrounds; and of a "clapometer" which was supposed to measure audience response (but was in fact operated by a technician).

The judgment

The Privy Council found:

"It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were "structure" or "package".

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"This difficulty in finding an appropriate term to describe the nature of the "work" in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show, etc) and identified as an "original dramatic work". The protection which copyright gives creates a monopoly and "there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world: (Tate v Fulbrook [1908]). The subject matter of the copyright claimed for the "dramatic format" of "Opportunity Knocks" is conspicuously lacking in certainty. Moreover, it seems to their Lordships that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the "format" of a television show, being unrelated to each other except as accessories to be used in presentation of some other dramatic or musical performance, lack that essential characteristic."

The judgment can be reduced to a number of propositions:

1. In order to qualify for copyright protection, an entity must be a "work" of some kind - for example, a literary, dramatic, musical or artistic work.
2. In "Opportunity Knocks" Green had a number of unconnected set phrases and "accessories" which remained constant while the performances which made up each show (the acts of the participants) changed with each presentation.
3. It is not possible to isolate these phrases from the structure of each show and confer on them the status of an "original dramatic work".
4. Further, the phrases in themselves, together with the "accessories" - the clapometer and the use of sponsors - were unrelated to each other and did not have sufficient unity to themselves be capable of performance, which quality is essential to the existence of an "original dramatic work."
5. Copyright gives the individual owning it a monopoly, and thus it would be unjust to grant this important status to a work which was uncertain, in the sense that its boundaries were difficult to fix. What precisely constituted Green's "dramatic format" was uncertain, and thus not a copyright work.

The respondent's submission

This conclusion reflects the submission I made as counsel for the Broadcasting Corporation of New Zealand in the New Zealand Court of Appeal, referring to Mr Green's "format":

There is no framework of a serial, there is no setting, theme premise or general story line. There is no treatment of central running characters, nor detail characterisation. There is no treatment of the interplay of characters and the reason for this is that a talent show, by its very nature, is incapable of such treatment. Mr Green's "Opportunity Knocks" was a talent show like so many others. Its uniqueness was that it had as its compere Mr Green, who was identified with the programme, as Mr Green himself concedes.

The content of each programme of "Opportunity Knocks" varied considerably each week with the input of the various singers, comedians and variety artists who appeared on those programs.

A talent show must have characteristics common to every other, by reason of what each show sets out to achieve. This is the displaying before an audience the varied talents and expertise of a number of diverse performers and entertainers, who themselves provide the essence of the show and the rationale for its existence. In other words, the essence of a talent show is the sum of its parts and is not capable of having imposed upon it a format or framework in which its performers will move and be directed."

Implications for television broadcasters

Despite the alarm that greeted the Green decision in the United Kingdom the consequence of the decision are not as dramatic as some commentators have claimed.

First, the Privy Council has not said that copyright in a television format can never exist. It must be remembered that the "format" their Lordships were considering was sketchy, consisting as it did only of a number of catchphrases and accessories. This leaves open the possibility that in a future claim for breach of copyright in a format the decision can be distinguished. A complex and highly specific format, containing detailed outlines of the performance of the presenter, describing the exact nature of the sets, background music, theme tunes and accessories could, it is submitted, if sufficiently elaborate and detailed, be found to be a "dramatic work". For this reason, the decision should not be seen as giving **carte blanche** to copy established formats.

Secondly, the law relating to passing-off must be considered. To establish passing-off, it must be shown that the business of the plaintiff has acquired goodwill or reputation and the actions of the defendant cause potential customers of the plaintiff to confuse the two businesses with consequent likely loss to the plaintiff's business. In the Green case, it was held in the High Court of New Zealand that, as no significant number of New Zealanders was aware of the existence of Green's original "Opportunity Knocks", the show possessed no goodwill in New Zealand. Even if it had, the original show was so dominated by Green as a presenter that nobody seeing the two productions could reasonably think that they were the same.

However, where there is existing goodwill in a particular country in respect of a format, and the copied version does cause confusion in the mind of the viewer, the possibility of a successful action for passing-off exists.

Thirdly, the use of an established format could result in a successful action as being misleading conduct in terms of Trade Practices or Fair Trading legislation. It is possible that a television company could mislead the public into thinking that the show presented was in fact that of some other company with an established reputation.

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Fourthly, the action for breach of confidence lies where information of a confidential nature is communicated "in circumstances importing an obligation of confidence", and unauthorised use is made of the information to the detriment of the person originally communicating it. In *Talbot* v *General Television Corporation* (1981), Talbot developed a concept for a series called "To Make A Million". He prepared a written submission setting out the concept to detail and disclosed it to a television company in the course of negotiations. He heard nothing more from the company which, without any further communication with him, broadcast a program identical to his concept. He succeeded in an action for breach of confidential information.

Other considerations

There are other matters to be taken into account in considering format rights. Many formats are bought with associated rights and benefits, such as sets of questions for game shows, opening and closing themes, production assistance and so on. In these cases the use of those rights and accessories is of equal importance as the use of the format and cannot realistically be separated. Further, there is the practical consideration of maintaining friendly relations between television organisations which, at the international level at least, maintain a co-operative association. The copying of a television format, even if not prohibited by law, may result in a disastrous falling out between two erstwhile friendly organisations.

Conclusions

- The *Green* case does not mean that television companies can simply copy formats devised by others.
- Where a television show has a reputation in a particular country (whether or not it has been shown there) an action in passing-off or under the Fair Trading Act or the Trade Practices Act could lie.
- Where a program concept has been communicated in confidential circumstances, that concept cannot be used without risking an action for breach of confidence.
- The circumstances where a television company could safely "copy" another format is where there is no reputation in the relevant country and where the elements of the format are relatively simple. For example, a variation on a simple "dating game" format would, it is submitted, probably not be capable of protection.
- In order, to protect their own formats, as far as this is possible, television companies should reduce to writing every detail of the manner in which the format is to be worked through and presented on screen. The written document should carry an unequivocal heading drawing attention to its confidential nature.
- Despite the caveats set out above, the decision has provided useful guidelines for television companies. It has confirmed that not every so-called "format" has the protection of copyright. This accords with common sense, as every format owes something to similar formats of the same type, and there are only a limited number of ways of producing, for example, a talent show. Where a format idea appeals to a producer, it is suggested that he or she seeks legal advice before parting with a "format fee". The Green judgment has given the television industry the benefit of the application, in the area of television formats, of the principle that copyright protects the expression of ideas. As Justice Somers said in the New Zealand Court of Appeal *"Not surprisingly (Mr Green) feels his ideas have been appropriated. But that I am afraid is all that has happened. Whether taken item by item or as a whole, I am of the opinion that the scripts as they are inferred to be from the description given in evidence, did not themselves do more than express a general idea or concept for a talent quest and hence were not the subject of copyright."*

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