

# The protection of TV formats: Part 1 - copyright

Ben Stevens

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## Subject

Intellectual property

## Other related subjects

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## Keywords

Comparative law; Copyright; Format rights; New Zealand; Programmes; Television

## Cases cited

*Green v Broadcasting Corp of New Zealand* [1989] 2 All E.R. 1056; [1989] 7 WLUK 239 (PC (NZ))

*Celador Productions Ltd v Melville* [2004] EWHC 2362 (Ch); (2005) 28(1) I.P.D. 27112; [2004] 10 WLUK 533 (Ch D)

*Meakin v BBC* [2010] EWHC 2065 (Ch); [2010] 7 WLUK 748 (Ch D)

*Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch); [2018] E.C.C. 4; [2017] 10 WLUK 456 (Ch D)

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**\*Ent. L.R. 18** The legal protection of formats for television shows is a relatively untested area of law. This has not, of course, stopped the licensing of formats from becoming big business. Hugely successful shows such as *Who Wants to be a Millionaire*, *Big Brother*, *Deal or No Deal* and *Strictly Come Dancing* have been licensed in numerous territories all over the world. In these circumstances, it is perhaps curious that there is no bespoke legal right in the UK protecting this type of work. Whilst an amendment to the [Copyright, Designs and Patents Act 1988](#) (CDPA) to provide such protection has been mooted in the past, it is not something that has come to fruition. The courts and those seeking to protect their rights have therefore been left to do the best they can with the rights that are currently available to them.

The law of copyright is the most obvious starting point for protection of a format. The idea of a written document setting out the details of a format has the feel of a script or screenplay and therefore seems, instinctively, like something that should be protected in the same sort of way. But will it?

As mentioned above, case law on this area is limited, but a decision of the Privy Council from 1989 had cast some doubt on the proposition that formats could attract copyright protection. In *Green v Broadcasting Corporation of New Zealand*,<sup>1</sup> the creator of *Opportunity Knocks* had issued a claim for copyright infringement and passing off after the defendant had broadcast a similar television show in New Zealand using the same title.

For the claim based on the "dramatic format" of *Opportunity Knocks*, the claimant relied on the characteristic features of the show which were repeated in each performance. These were identified as the title, the use of various catchphrases, the use of a device called a "clapometer" and the use of sponsors to introduce competitors. The Privy Council gave this short shrift, stating that:

"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."

The judge considered that the difficulty with identifying a copyright work reflected the fact that it was difficult to distinguish the allegedly distinctive features of a television series from the changing material presented in each performance, e.g. the acts of the performers in a talent show.

Approving earlier case law, the judge also pointed out that copyright protection creates a form of monopoly, so there must be certainty in the subject matter. In this case, the subject matter was said to be "conspicuously lacking in certainty". The judge also held that "a dramatic work must have sufficient unity to be capable of performance" and that the features alleged to constitute the format in this case were "unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance" and therefore lacked sufficient unity.

The rather rough treatment that Mr Green received in relation to *Opportunity Knocks* seemed to set the scene for a slightly downbeat view on the protection of television formats. However, in light of more recent case law, this case can be seen more as pointing to the difficulties of establishing as a matter of fact that copyright subsists in a format and that it has been infringed, rather than establishing as a matter of principle that copyright cannot subsist in a format.

The difficulties for the claimant in *Green* primarily stemmed from the fact that no scripts or other documents setting out the details of the format were adduced in evidence. The trial judge said that "no writing has been produced in evidence in this action in which, in my view, copyright could subsist". The Court of Appeal accepted that scripts existed but that evidence as to "what their text contained was exiguous in the extreme". In these circumstances, a claim for copyright infringement is, to put it mildly, bound to be difficult to establish. To the extent that there was evidence of the scripts, it was held that they did not "do more than express a general idea or concept", which cannot be protected by copyright.

The next significant case to take up the mantle on format protection was *Celador v Melville*,<sup>2</sup> which was a hearing of three separate summary judgment applications dealing with various individuals who all independently alleged that the television quiz show *Who Wants to be a Millionaire* (WWM) infringed their rights in formats they had created. They say that failure is an orphan and, in these cases, success does indeed seem to have many (alleged) fathers.

For the purposes of the summary judgment applications, Celador accepted that the three respondents had a real prospect of establishing the existence of copyright (and confidential information) in *\*Ent. L.R. 19* the works on which they relied. The judgment, therefore, only briefly considered the relevant principles on subsistence of copyright.

In relation to the three individuals concerned, the judge's findings were that:

1. Mr Melville: The judge held that "it would not be impossible to infer" that the contents of Mr Melville's format came to the attention of Celador "given the extent of the similarities". However, the issues needed to be resolved at trial given that they involved detailed consideration of the documentary evidence and the credibility of the witnesses. Summary judgment was not awarded.
2. Mr Boone: in relation to Mr Boone's format, the judge said that "[c]opyright exists in the format for HELP! as expressed in the 11-page document on which Mr Boone relies, not in any idea or thought process which may underlie it". Mr Boone's claim was struck out as an abuse of process. However, the judge also concluded that Mr Boone had no realistic prospect of success because of the lack of similarities on which to base an inference that there had been copying of a substantial part of his format. In relation to the alleged similarities between Mr Boone's format and WWM, the judge said that "[f]ew if any of them amount to more than the application of well known presentational techniques" and they were "no more than elements of style or technique" which "when divorced from their context cannot give a cause of action for breach of copyright". Summary judgment was awarded against Mr Boone.
3. Mr Baccini: amidst a dispute as to whether Mr Baccini's format (for a show entitled *Millionaire*) was in fact sent to the relevant parties, the judge held that "the extent of the similarities between the TV format for Millionaire and WWM as transmitted are capable of giving rise to an inference of copying a substantial part". The factual disputes therefore had to be dealt with at trial partly because "the credibility and honesty of Mr Baccini must be assessed on all the evidence". Summary judgment was not awarded.

Of the two claims that were not struck out, the courts do not appear to have been required to provide a Jeremy Kyle-esque ruling on the paternity of WWM and the cases may have been settled.

What is clear from the above, however, is that the decisions are intensely fact-specific and, particularly for Mr Melville and Mr Baccini, the allegations over what documents were sent to whom and when, and the credibility of the witnesses could only be resolved at trial.

The comment in relation to Mr Boone's format is also a useful reminder that copyright subsists in the expression of an idea, not the idea itself or any thought process underlying it.

Our next contender came in *Meakin v BBC*,<sup>3</sup> which was another application for summary judgment. Mr Meakin alleged that the defendants infringed the copyright in his proposals for a television show when they produced *Come and Have a Go If You Think You Are Smart Enough*.

Mr Meakin initially argued that his proposals were literary or artistic works before arguing that they were dramatic works. The judge proceeded on "the basis that the claim to subsistence of dramatic copyright is arguable in light of the factual distinctions between the present case and the *Green* case" (amongst other factors). In fact, the judge proceeded on the "assumption that the copyright may be as a literary work and/or as a dramatic work". However, it is worth noting that the *CDPA s.3(1)* provides that "literary work" means any work, other than a dramatic or musical work", so the categories of literary and dramatic works are mutually exclusive.

In any event, given the assumption that the subsistence of copyright was arguable, the judge's decision focussed on the issue of copying. The judge concluded that "to the extent that they exist, the similarities are extremely general", were "at a high level of abstraction" and related to "matters which were entirely commonplace". When a judge describes a claim as "simply unreal", the writing really is on the wall and summary judgment was, unsurprisingly, awarded against Mr Meakin.

The most recent instalment of this story came in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd*.<sup>4</sup> This was, again, a summary judgment application relating to allegations that the rights in a format for a proposed TV show entitled *Minute Winner* were infringed by a show called *Minute to Win It*.

In contrast to *Meakin*, the claimant nailed its colours to the mast and alleged that copyright subsisted in a document recording the proposed format as a dramatic work. The judge noted at the outset that "it is not alleged to be a literary work, which, under the *CDPA*, is a mutually exclusive category of copyright work". Based on the previous authorities, such as they are, the judge concluded that:

"... it is at least arguable, as a matter of concept, that the format of a television game 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 *\*Ent. L.R. 20* 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."

The judge was not required to set down authoritative guidance on when copyright would subsist in a format, but did say that copyright:

"... will 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."

Summary judgment was ultimately awarded against the claimant on the basis that the contents of the format were "both very unclear and lacking in specifics" and the features of the format were "commonplace and indistinguishable", such that copyright did not subsist in the claimant's work. In terms of similarity, the judge held that the two formats were "different in every material respect", so there was no question of copying. All of this is to say that, as with *Meakin*, the claim was utterly hopeless.

*Banner* is, then, the best authority we have for the proposition that copyright can subsist in the format of a television show, that such copyright could subsist as a dramatic work, and for the circumstances in which such copyright will subsist. The judge, however, did not set down authoritative guidance and could hardly be expected to on an application for summary judgment. Indeed, most of the cases that have been heard on this issue have involved summary judgment applications, meaning that the courts have not had an opportunity to consider these issues and test the arguments in detail. It is also unfortunate that many of the claims have been so unmeritorious, with summary judgment being awarded on the basis that infringement could not be established, meaning that the logically prior question of subsistence has not had to be dealt with in detail at a full trial.

In the absence of more authoritative guidance, for now we can make some practical observations to assist those in the industry:

- At the very least, make sure that your format is in writing. As discussed above, Mr Green's difficulties stemmed largely from the fact that the evidence of his scripts was almost non-existent.
- Include as much detail as possible in the document recording your format. The subject matter of the format must be as certain and as clearly identifiable as possible. In *Banner*, it was observed that the format for *Minute to Win It* was set out in a production bible that included 419 different games that were described in "detailed and prescriptive terms" and were "presented and explained using stylised graphics".
- Keep detailed records of what you have sent to whom and when. This is easier in a world of electronic communications but take extra care with anything sent in hard copy.
- If you are receiving such proposals, keep corresponding records.
- If, as a matter of policy, you do not want to receive speculative proposals and will not read them, make this clear on your website.
- Keep contemporaneous notes of any meetings discussing a proposed format.
- If any meeting discussing a proposed format is intended to be confidential, make sure that is agreed at the outset or, if that cannot be agreed, be prepared to proceed on that basis (more on this in part two of this series).

Quite how the legal principles, as far as they can currently be discerned, will be developed in future is a million-pound question and we may need to use some lifelines to get to the answer.

#### **Postscript**

The author is grateful to Anna Frankum, partner at Penningtons Manches Cooper, for her input into this article.

#### **Ben Stevens**

*ASSOCIATE*

*PENNINGTONS MANCHES COOPER*

#### **Footnotes**

- 1 *Green v Broadcasting Corporation of New Zealand* [1989] R.P.C. 700.
- 2 *Celador Production Ltd v Melville* [2004] EWHC 2362 (Ch); (2005) 28(1) I.P.D. 27112.
- 3 *Meakin v BBC* [2010] EWHC 2065 (Ch).
- 4 *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch); [2018] E.C.C. 4.