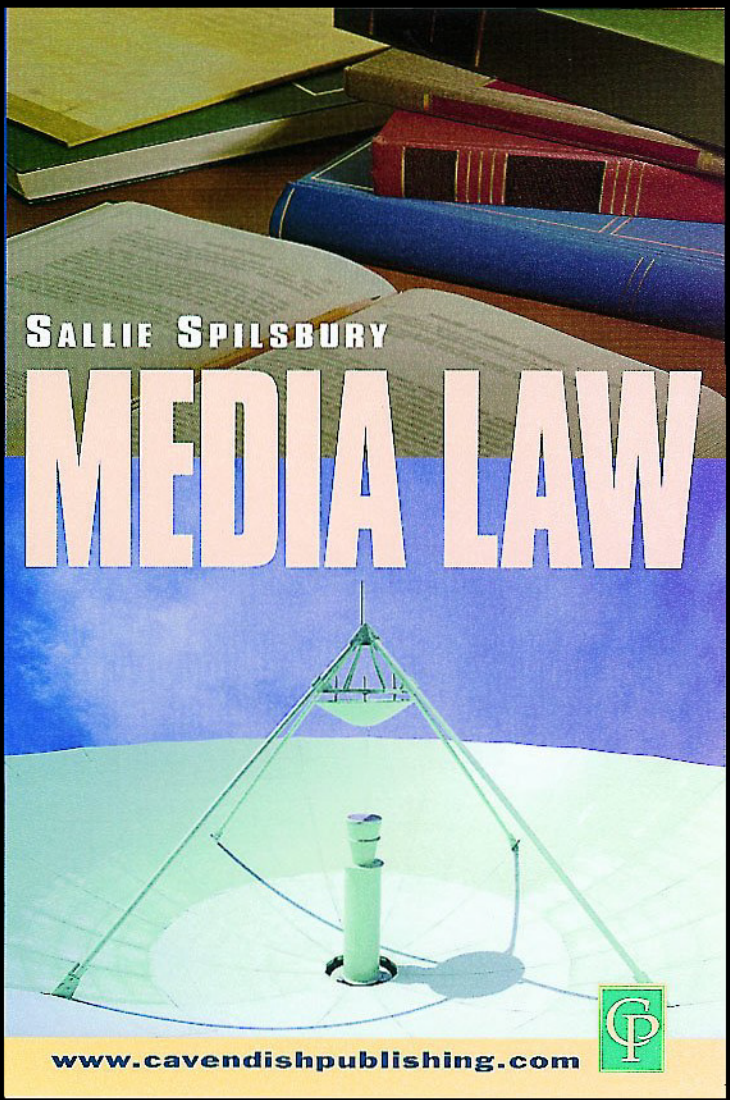
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THE PROTECTION OF TELEVISION FORMATS

The 'format' of a television show means the underlying features of the show. These could include distinctive themes or characters, the use of music or a catchphrase. Formats are valuable to the broadcast media. They define the distinctive character of popular programmes. The media guard them closely and will often take legal action to restrain a rival from copying popular formats.[1]

It is not uncommon for unsolicited formats to be submitted to a media entity for consideration – for example, if I think of a great idea for a game show, I might send it to the BBC or to another television station or production company in the hope that they will commission it. If the recipient does not commission my idea, but subsequently makes its own programme on a similar theme, what redress will be available to me for the unauthorised use?

This chapter examines the extent to which the law provides protection against the copying of formats. Many of the issues considered have already been analysed in Chapters 5 and 6. The reader should refer to those chapters for detail on the points set out below. The aim of this chapter is to draw together the various strands in order to provide an overall picture in a practical context.

COPYRIGHT PROTECTION

Copyright works

Copyright subsists in the types of work which are set out in the Copyright, Designs and Patents Act 1988 (CDPA). The types of work put in place by the CDPA do not include formats as such. But formats usually consist of various features. Some of these features taken individually may be copyright works. The following are examples of this.

1 An example of this type of action occurred in *Green v Broadcasting Corpn of New Zealand* [1989] 2 All ER 1056, which is considered below.

Written material and music

Copyright will exist in original written proposals and scripts (literary works), artistic material (for example, storyboards) (artistic works) and music (for example, theme tunes and jingles) (musical works). The more detailed the material, the easier it will be to establish that copyright subsists in it. Titles, catch phrases and slogans are unlikely to attract copyright protection (see Chapter 6 for further detail). They can, however, often be protected by trade mark registrations (the trade mark registration system is described in Chapter 14) or in some cases by way of an action in passing off (this is also considered in Chapter 14).

Dramatic format

Copyright may subsist in the dramatic format of television shows as an original dramatic work. A dramatic work is a work of action which is capable of being performed in public.[2]

In *Green v Broadcasting Corpn of New Zealand*,[3] the claimant sought to restrain the defendant from broadcasting a television programme which was similar to the claimant's *Opportunity Knocks* show. Opportunity Knocks was essentially a talent show which was presented in a particular manner incorporating certain original features. The claimant relied on copyright in the 'dramatic format' of the show. The dramatic format on which he based his case was not the overall show, but the distinctive features which were repeated in each programme. These consisted of the programme title, the use of certain catch phrases and the use of a device known as a clapometer which measured audience reaction to competitors' performances.

In essence, what the claimant sought to do was to isolate these constant features of the series from the material which changed in each show (for example, the performers' acts). The court found that the features selected by the claimant were too nebulous to be protected by copyright. The court stated 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 the presentation of some other dramatic or musical performance, lack the essential characteristic'.

Opportunity Knocks was essentially a talent show, the general formula of which is not in itself original. Where the format for a show is original, or where the new features are more substantial and unified than they were in the

2 *Norowzian v Arks (No 2)* [2000] EMLR 1.

3 *Green v Broadcasting Corpn of New Zealand* [1989] 2 All ER 1056.

Opportunity Knocks case, it might be possible for a claimant to establish that copyright subsists in a dramatic format as a dramatic work.

Copyright infringement

Copyright will be infringed where a substantial part of the work has been reproduced without consent. 'Substantial' is a test of the quality of what has been reproduced rather than the quantity. If a small, but key, part of the material/format is taken, that might infringe copyright in the material.

The claimant must demonstrate the fact that copying has taken place, but if it can adduce evidence to show that the alleged copyist had access to the material which has been reproduced, and if it can also be shown that there is sufficient similarity between the copyright work and the alleged copy, the two factors taken together will create an inference that copying has taken place which the defendant must displace, for example, by showing that its material pre-dates the claimant's material.

Hints and tips under copyright law

In order to support a claim under copyright law, evidence which shows that the material which makes up the format is original should be retained. These might include scripts, drafts, briefings, artwork and other relevant documents. Details of the identity of the creator(s) and the relevant dates should also be kept.

The retention of this type of information will also assist those faced with a copyright claim against them to prove that their work has not been copied from the claimant's material.

It is advisable that the symbol which denotes the existence of copyright (©) followed by the copyright owner's name and the year when the work was first created, is used on all works. It should be shown prominently, for example, on any title page or at the foot of artwork. Whilst the symbol does not in itself confer rights on the copyright owner, it informs third parties that copyright is claimed in the material. It can therefore operate as a deterrent to potential copyists.

Protection for formats: the future for copyright law

In 1996, the patent office produced a consultation paper on a proposal for copyright protection for programme formats as copyright works in their own right. So far as the author is aware, there are no firm proposals for the law to be amended in line with the proposals. However, developments in this area may well take place in the near future.

Further details about copyright infringement claims are contained in Chapter 6.

BREACH OF CONFIDENCE

An action for breach of confidence can prevent the unauthorised use of formats even where copyright protection cannot be claimed. It will, however, apply only where the format has not been made public.

There is a broad principle recognised in law that a party who receives information in confidence, either directly or indirectly, should not profit from the unauthorised use of that information. The principle applies not only to the original recipient of the information, but also, as a general rule, to any subsequent recipient of the information, provided that the subsequent recipients are on notice of the obligation in confidence.

The principle requires that the following criteria should be satisfied:

- the information must not be known to the general public;
- it must have been imparted in circumstances importing an obligation of confidentiality, whether express or implied;
- there must be unauthorised use of the information to the detriment of the person who originally supplied it.[4]

The confidential information or idea can be in writing or oral. To be capable of protection, the idea must be sufficiently developed in the sense that it is an identifiable idea which is capable of being realised as an actuality.[5] It should be at a development stage where it has some attractiveness as an advertisement or promotion. This does not necessarily mean that it has to be in the form of a full synopsis or script. It does not necessarily have to be developed to the same extent as would be required under copyright law.

The information must be original in the sense that it is not yet in the public domain. It must also be new. Originality can either mean a significant new twist or slant to a well known concept or a completely new idea.

The obligation of confidence

The obligation of confidence does not have to be provided for expressly. But in the interests of certainty it is always preferable to have a written agreement signed by all relevant parties confirming the existence and the terms of the duty of confidence.

4 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41; [1968] FSR 415.

5 *Fraser v Thames Television* [1983] 2 All ER 101; *De Maudsley v Palumbo* [1996] FSR 447.

For the sake of clarity, it will help if confidential material submitted to third parties is clearly labelled as such (although merely labelling material as confidential will not guarantee that it will be found to have that status. The question whether material is confidential focuses on substance rather than form). An express statement that material is confidential which is accepted on that basis will create a presumption that the information has been imparted in confidence.

Case law indicates that where information or ideas of a commercial or industrial value are given on a businesslike basis with some avowed common object in mind, for example, a joint venture, there is a presumption that an obligation of confidence exists even where there is no express obligation in place.[6] Any person seeking to show that there was, in fact, no implied obligation of confidence, will have a heavy burden to discharge.

In industries where there is generally perceived to be an ethical or moral obligation to treat ideas or information as being submitted in confidence, that perception will give rise to a presumption that an obligation of confidence exists.

How to protect confidential information

The information should be in writing for reasons of certainty. Where disclosures are made orally, they should be confirmed in writing. Confidential information should be clearly labelled as such.

The fact that the information has been submitted in confidence should be stated clearly and in writing. Ideally, a confidentiality agreement should be drawn up and signed by all relevant parties. Such an agreement need not be complex. They may take the form of a one page letter.[7]

Confidential information should be kept secure.

Recipients of confidential information

Recipients of information which may be confidential, for example, unsolicited ideas for programmes, should safeguard their position against claims for breach of confidence. To help them to rebut any such claim, they should make a note of exactly what has been disclosed to them, on what basis, by whom and to whom. Often, claims for breach of confidence are difficult to defend because the defendant has no record of the above details.

All relevant development material should be recorded in writing and retained with a view to demonstrating that the complainant's idea has not been copied or otherwise made use of.

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6 *Fairie v Reed* (1994) unreported.

7 The contents of a typical confidentiality agreement are considered in Chapter 17.

Where recipients do not intend to make use of a proposal which is contained in unsolicited material, the material should be returned to the recipient with a note indicating that the recipient is not interested in the material. The note should state that copies of the material have not been retained. Such a step will help to avoid future proceedings for breach of confidence.

The law relating to breach of confidence was considered in more detail in Chapter 5.