

A REAL DRAMA: LEGAL PROTECTION OF REALITY TELEVISION FORMATS

ALISON DAVIS¹

ABSTRACT

[57] Reality television is big business. Broadcasters and producers regularly license reality television formats. This article looks at the issue of legal protection of reality television formats. It considers whether they are protected by copyright and examines alternative ways in which creators of reality television formats may seek to protect their works. It suggests that legal protection of reality television formats should not be presumed and that the definition of dramatic work, as the term is used in the *Copyright Act 1968* (Cth), requires clarification to provide greater certainty to owners of formats.

Introduction

Reality television is not a new phenomenon. In the 1950s and 1960s, *Queen for a Day* was broadcast in the United States. Ordinary housewives were transformed into ‘queens’ (the regal variety) for a day, adorned with a crown and a gown and televised across America. In 1992 *Sylvania Waters* hit Australian screens, a local version of a format that had originated in the United States as *An American Family*, and which had already been replicated in the United Kingdom. Noeline Donaher and her family became household names as Australian audiences were transported into their home, their lives and their domestic dramas.

Reality television is now a prominent feature of commercial television programming. A plethora of reality television productions, both local and foreign, has graced our television sets in recent years. *Popstars* followed the progress of a pop band from the initial audition and selection process right through to the band’s metamorphosis into true popstars, complete with attitude and screaming fans. *Survivor II’s* contestants were stranded in outback Australia, where they were required to fend for themselves, as well as competing in regular physical and mental challenges. In *Big Brother*, contestants were locked in a house riddled with cameras, while viewers watched how they behaved and interacted, and then voted them off one by one.

¹ Legal Officer at the Arts Law Centre of Australia. This paper was undertaken as part of an LLM course at the University of NSW. Thank you to Kathy Bowrey for her comments and suggestions.

Reality television makes good business sense. It is generally cheaper to produce than traditional drama and the Australian public seems to have a voracious appetite for it. 'The United States', suggested *The* [58] *Washington Post*, 'no longer has a monopoly on lowbrow entertainment.'²

This paper will consider what legal rights the producers of reality television programs have in the material they are creating. It will consider the extent to which copyright protects reality television program formats, and will assess what alternative sources of protection are available to format creators, including passing off, s 52 of the *Trade Practices Act 1974* (Cth), trade mark and domain name registration and the law of confidentiality.

The Reality Television Program Format

Reality television is a unique form of entertainment. Unlike soap operas there is no real script. Unlike game shows, there are generally no prepared questions. Instead of actors, real people participate and perform. For the most part reality television programs play out according to the actions and dialogue of the contestants, the content varying from week to week. There are, however, features that remain constant, making the program recognisable, distinctive and ultimately marketable. It is these features that constitute the program's format.

One aspect of a reality television program format is the general premise or concept on which the series is based, such as a show in which participants are stranded on a deserted island, or in which contestants audition for a place in a pop band. The format will generally involve more than a mere setting or context, however, and may include elements such as a title, rules, catchphrases, a series structure and various devices for inspiring audience interest. In the *Survivor II* series, for example, the contestants were formed into tribes. Contestants attended 'tribal council' to vote a member of the tribe out of the show. The host announced the loser with the dramatic words, 'the tribe has spoken'. Contestants participated in immunity challenges. These elements, along with other aspects such as music, regular interviews with contestants and the style of filming, combined to give the series its identity and shape.

² Quoted in M Idato, 'Reality Check', *Sydney Morning Herald*, July 31, 2000, The Guide, 4.

For a reality television program format to be protected by copyright it must fall within the ambit of one of the categories of works set out in the *Copyright Act*.

Dramatic Works

Scope of dramatic work

One difficulty in determining whether, and when, a program format will be protected as a dramatic work arises out of the lack of a clear definition of dramatic work. The *Copyright Act* provides two examples of work that will constitute a dramatic work, and specifies one example that won't, but provides no guidance as to what falls in between. It states that:

dramatic work includes:

- a choreographic show or other dumb show; and
- a scenario or script for a cinematograph film;

but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.³

Ricketson suggests that dramatic works are intended to be performed or represented.⁴ While shows such as *Survivor* or *Big Brother* are not performed in the traditional sense, the characters merely being filmed as they go about their daily routine on the set, the formats for such programs are clearly intended to be represented in a dramatic form.

Elements such as scenic effects, sets and dramatic devices may be included within the form of expression of a dramatic work, although there is a limit on the extent to which such elements will be [59] protected as dramatic works in their own right. Eve J in *Tate v Thomas* noted that 'scenic effects may be protected as part and parcel of the drama, but they cannot in themselves be subject-matter for the statutory protection'.⁵ Therefore, while the design, layout and format of tribal council in *Survivor II* is unlikely to be protected as a distinct dramatic work, it may be protected as part of the broader dramatic work, the *Survivor II* program format.

³ *Copyright Act 1968* (Cth) s 10(1).

⁴ S Ricketson, *The Law of Intellectual Property: Copyright Designs and Confidential Information* (2nd Ed, 1999) [7.290].

⁵ [1921] 1 Ch 503, 511.

A work must be sufficiently certain to be protected by copyright. Ricketson suggests, for example, that modern participatory theatre, where content changes from performance to performance as a result of audience participation, may be excluded from protection on the basis of uncertainty.⁶ While, to a limited extent, this example is analogous to reality television programs, such as *Boot Camp* or *Popstars*, which rely on their participants for unscripted dialogue, these programs differ from improvisation theatre in that their frameworks are constant and repeated from episode to episode.

In *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* Hill J, when considering whether a fireworks display was capable of constituting a dramatic work, stated that one issue to consider was 'whether the ultimate fireworks display is really a material form of what was planned'.⁷ He noted that there may be a discrepancy between the fireworks display that was planned, and the one that actually takes place. In a reality television program, however, although the individual episodes are not scripted, the various elements of the format may be carefully designed and created.

Green v Broadcasting Corporation of New Zealand

The issue of whether a program format constituted a dramatic work was considered in *Green v Broadcasting Corporation of New Zealand*.⁸ Hughie Green, the creator and compere of the British television talent show, *Opportunity Knocks*, sued the New Zealand Broadcasting Corporation when it produced and broadcast a very similar television show of the same name. Some of the features of Mr Green's show that were repeated in the New Zealand version included the use of a clapometer to measure audience reaction, the phrase 'for you (name of competitor) opportunity knocks', 'make up your mind time' and the use of sponsors who talked about the competitors' backgrounds. Mr Green's action failed at first instance and on subsequent appeals to the New Zealand Court of Appeal and the Privy Council.

⁶ Note, however Gallen J's comments in his dissenting judgement in *Green v New Zealand Broadcasting Corporation* [1989] RPC 469, 493. He considered, by analogy to a game show, an example of experimental theatre, where the author provided only the situation and the characters and allowed the actors to improvise their own dialogue. He concluded that if there was a recognisable structure there would be a dramatic work for the purposes of the New Zealand *Copyright Act 1962*.

⁷ [1999] 48 IPR 333, para 21.

⁸ [1989] RPC 469 (CA of NZ); [1989] RPC 700 (Privy Council).

One of Mr Green's arguments was that the New Zealand Broadcasting Corporation had infringed copyright in his program, which was protected as a dramatic work.⁹ The Court rejected this argument.¹⁰ Lord Bridge, on behalf of the Privy Council, stated:

The subject matter of the copyright claim 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 [60] 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.¹¹

The Privy Council determined that it was not possible to isolate the changing material in each episode from the allegedly distinctive features of the television series. The Court was therefore not willing to consider the format of the show as a separate work to the program based on the format. Having established that the format must be considered in conjunction with the additional unscripted material it contemplated, they concluded that the test of 'sufficient unity' could not be satisfied.

While the Court did not conclude that a program format can never constitute a dramatic work, it did conclude that the format of Mr Green's series was not protected, and it imposed such an onerous test on dramatic works that program formats will, by their nature, struggle to satisfy it. It is difficult to reconcile the Court's approach in *Green* to dramatic works with the low threshold of protection that the courts have afforded literary and artistic works.¹² Works, in all categories, must be original and sufficiently certain to be protected by copyright, but the Court in *Green* insisted that dramatic works must meet a more onerous 'sufficient unity' test. No other category of

⁹ *Copyright Act 1962* (NZ) s 2 states: 'Dramatic work includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film'.

¹⁰ The case note reports that Mr Green did not argue before the Privy Council that copyright subsisted in his show as a dramatic work, although the Privy Council did consider the issue. It was argued before, and considered by, the Court of Appeal.

¹¹ [1989] RPC 700, 702 (Privy Council).

¹² A doctor's medical certificate was protected in *Latham v Stevens* [1911–16] MacG Cop Cas 83 (Ch D); a manual of instructions was protected in *Flocast Australia Pty Ltd v Purcell* (1997) 39 IPR 177 (FCA); and Telstra's white and yellow pages were protected in *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* [2001] FCA 612.

work formally requires sufficient unity as a prerequisite to protection.¹³ It is arguable that the Court was making an implicit high art/ low art distinction by concluding that only works with a definable narrative structure are able to qualify as dramatic works. The Court was unable, or unwilling, to recognise any such unity or narrative structure in the game show.

The Court's conclusion that a dramatic work must have sufficient unity echoes the definition of dramatic work in the British *Copyright Act 1911*, as it applied to cinematograph film.¹⁴ Under that Act, films were protected as dramatic works where 'the arrangement, the acting form or the combination of incidents represented' gave the work an original character.¹⁵ Historically, there has been a reluctance to provide protection to audio-visual works, and it is, perhaps, in that context that the limited notion of what constitutes a dramatic work, for the purposes of establishing copyright in a film, is explicable. What is not clear is why the Court in *Green* applied such a similarly limited concept of dramatic works to a game show format.

Gallen J, of the New Zealand Court of Appeal, dissented on the question of whether the program could be protected as a dramatic work. His judgment is of interest in its support of the proposition that a program format can, and often will, be protected by copyright. He concluded that 'there was an established framework of the show *Opportunity Knocks* recognisable from the combination of repeated material identified and associated with the show and which justified copyright protection as a dramatic work'.¹⁶

¹³ There is some evidence that the courts are more willing to extend protection to works where the content can be attributed to an author who provided a narrative. In *Sega v Galaxy* (1996) 35 IPR 161 Burchett J concluded that integrated computer games encoded in integrated circuits were cinematograph films. He resolved the problem of a lack of embodiment by recourse to the games' narrative-like structure. In *Kalamazoo (Australia) Pty Ltd v Compact Systems Pty Ltd* (1985) 5 IPR 213, 238 Thomas J made reference to the fact that the accounting forms under consideration 'have their own character, their own form of expression and in a sense tell their own story to the user'. Considered in K Bowrey, 'The Outer Limits of Copyright Law — Where Law Meets Philosophy and Culture' (2001) 12:1 *Law and Critique* 1–24.

¹⁴ Under the British *Copyright Act 1911* cinematograph film was not protected as a distinct category of work.

¹⁵ Section 35(1). The provision was based on Art 14(2) in the Berlin Act of the *Berne Convention* (1908), which provided that cinematographic productions should be protected as literary or artistic works provided that the author had given the work an original character. Discussed in J Lahore, *Copyright and Designs* (1996) vol 1, [8045].

¹⁶ [1989] RPC 469, 493 (CA of NZ).

[61] In contrast to the test of ‘sufficient unity’ imposed by the majority, Gallen J was of the view that, provided a work has a recognisable structure, it may qualify as a dramatic work. His approach to assessing whether it possessed a ‘recognisable structure’ was an interesting one. Essentially he proposed that if it is possible to conclude that a work has been substantially reproduced, then as a matter of course the original work must possess a sufficiently recognisable structure to qualify as a dramatic work. His Honour stated:

I do not see how one show can be said to be similar to or to have been copied from another, unless the features which lead to that conclusion are sufficiently significant to be definitive of that show and if they are not they must come a long way towards establishing that there exists that kind of structure which may be properly described as a dramatic format. Put in another way, repetition of these features, even though they may be unoriginal, will go some distance towards establishing the existence of a particular format. When those features, by repetition or in combination, identify the show so that they are recognisable in another show and to the extent that the conclusion may fairly be come to, that that other show has been copied from the first, the conclusion would seem to me to be inevitable that there was something sufficiently structured to be copied.¹⁷

During a debate in the House of Lords on an amendment that sought to protect program formats, several of their Lordships considered that the copyright pronouncements in *Green* were obiter because the case was really about inadequate evidence.¹⁸ That may be a rather simplistic interpretation of the decision. There was a lack of evidence in relation to the scripts, but what really tolled the death knell for Mr Green was the Court’s heavy-handed approach to dramatic works.

While the case is not authority for the proposition that there can never be copyright protection of program formats, it does raise doubts as to the subsistence of copyright in certain types of format programs. In particular, the decision does not provide much comfort to the creators of game shows and reality television shows, whose formats are unlikely to meet the stringent ‘sufficient unity’ test.

¹⁷ Ibid.

The *Green* decision was cited with approval in New Zealand in *Television New Zealand v Newsmonitor Services Ltd*, in which the Court concluded that the detailed creative structure of a news program into which recorded news clips were inserted was not a dramatic work.¹⁹ The Court in *Norowzian v Arks* also interpreted dramatic work very narrowly.²⁰ The plaintiff was the copyright owner of a film that involved a man dancing on a rooftop. The film was edited in such a way that there were sudden changes in the dancer's position. The defendant, an advertising company, made a film very similar to the plaintiff's film. The Court endorsed the decision of the Privy Council in *Green* that a dramatic work must have sufficient unity to be capable of performance. As the dance sequence shown in the plaintiff's film had been edited in such a way that it was not fluid and continuous, the Court found that it was not capable of physical performance.²¹ This narrow approach to dramatic works has the potential effect of excluding a range of forms of creative expression in television, film and theatre from copyright protection.

[62] *Protection of Ideas*

Copyright does not protect general concepts, but it can protect the way ideas are expressed. To establish whether a program format may be protected by copyright it is necessary to consider whether it is merely a basic idea or whether it is sufficiently developed so as to warrant copyright protection. There is no clearly definable line between unprotectable ideas and protectable expression, and it is a matter that must be judged from case to case.²² The question that must be asked in each situation is, at what point does an idea become the expression of the idea? While a mere idea or concept is not protected by copyright, an idea that has been developed into a work with staging, scenic effects and structure may be.²³ In *Plix Products v Frank M*

¹⁸ Parliamentary Debates (Lords) (UK) 26 July 1990. Referred to in G P McLay, 'Whither the Shadow: The Copyright Protection of Concepts, Characters and Titles' (1991) 21(4) *Victoria University of Wellington Law Reports* 346.

¹⁹ 20–22 September 1993 (judgement on 15 November 1993) unreported, referred to in S Lane & R Bridge, 'Format Rights in Television Shows: Your Starter for 10: The Department of Trade and Industry Consults' [1994] 6:6 *Entertainment Law Review* 198, 199.

²⁰ [1999] FSR 79.

²¹ The judge also held that it did not constitute a dramatic work as it had only been recorded in film.

²² J A L Sterling, *World Copyright Law* (1998) 190.

²³ The issue of whether a fireworks display could constitute a dramatic work was considered in *Nine Network Pty Ltd v Australian Broadcasting Corporation*, above n 7. Hill J stated that the real problem with an argument that a fireworks display is protected by copyright is that copyright does not protect ideas, but only the physical manifestation of an original work. It is suggested that this is not a problem shared by program formats, which involve a number of definable and distinctive elements: at [22].

Winstone (Merchants) Ltd, Prichard J commented on the idea and expression of idea dichotomy:

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 a concrete form, the forms they take are where the copyright resides.²⁴

The very nature of a program format is that it prescribes a method or formula for producing various episodes of that program, but it is generally far more than a mere concept. It is arguable, for example, that the idea of making a series based on the manufacture and marketing of a pop band would not be protected. It is suggested, however, that once that idea is developed into details about the auditioning process, the voyeuristic style of filming, the recurring interviews with band members and the simultaneous promotion of the band's music, the format crosses the hazy line from mere idea to creative expression. *Backyard Blitz* does not have exclusive rights over the concept of backyard transformations, but it is arguable that its particular approach to backyard makeovers should be protected.

In the *Zeccola* case, the respondents claimed that the appellants had infringed copyright in the novel, screenplay and film of *Jaws* by producing a film, *The Great White*.²⁵ The appellants argued that *Jaws* was a genre film, and that the respondents were not entitled to copyright in the general idea of a savage shark that terrorises a community. Lockhart and Fitzgerald JJ noted that there is no copyright in the central idea or theme of a story, regardless of how original it is. They concluded, however, that copyright subsists in the combination of situations, events and scenes, which constitute the particular working out of expression of the idea or theme.²⁶

²⁴ (1985) 3 IPR 390, 419.

²⁵ *Re: Giovanni Zeccola, Liliana Zeccola, Superstar International Films Pty Ltd Franco Benito Adolfo Zeccola, Vincenzo Zeccola, Gregory Phillip Lynch, G L Film Enterprises Pty Ltd v Universal City Studios* (1982) 67 FLR 225.

A different, and arguably questionable, approach was taken by the Danish High Court in considering whether Danmarks Radio had infringed copyright in the format developed by the English company, Celador Productions, for the quiz show, *Who Wants to Be a Millionaire*, by broadcasting a radio show based on the English program.²⁷ The Court found that there was no copyright infringement as a television [63] format is a compilation of ideas and principles, which are not, if viewed separately, able to be protected by copyright. It is suggested that the Court may have over-simplified the distinction between ideas and their expression by concluding that a format will not, by its nature, be protected by copyright. Copyright may subsist in the form of expression of an idea or principle, and on that basis a program format that sufficiently describes a concept may be protected.

Originality

A program format must be original to be protected by copyright.²⁸ It is not necessary, however, that it be the first format of its kind to satisfy the requirement of originality. It may be sufficient that the format creator determines and expresses what the format will consist of. As stated by Peterson J in *University of London Press v University Tutorial Press*:

The originality, which is required, relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author.²⁹

Provided that the creator has applied some independent skill and effort a format is likely to be considered original.

²⁶ The Court determined that *The Great White* infringed the copyright in the book on which it was based, but held that there was no copyright infringement in the actual film, *Jaws*, as this would have required actual copying.

²⁷ [1999] *Danish Weekly Law Report* 1762 (Danish High Court) referred to in T Steffensen, 'Rights to TV Formats — from a Copyright and Marketing Law Perspective' [2000] (issue 5) *Entertainment Law Review* 85, 86.

²⁸ *Copyright Act 1968* (Cth) s 32(1).

²⁹ [1916] 2 Ch 601, 608–9.

It is not essential that the individual components are original, provided that they combine to create a work that is.³⁰ In assessing whether a program format is original, the various elements should be looked at together.

Literary Works

A written record of a format, such as a treatment, may be protected as a literary work. Production of a program based on the format could therefore constitute infringement in that work, although the format must be set out in sufficient detail to enable a finding of substantial reproduction. Where the format is only expressed in general terms it will be difficult to establish that performance of the work constitutes substantial reproduction. Direct reproduction of the written work, such as copying it in another treatment, may nevertheless constitute infringement.³¹

Scripted elements of reality television programs, such as specific words and catchphrases used by the presenter, will also be protected as literary works. The production of a television program based on the work may constitute substantial reproduction and infringe copyright in the script.³² Generally, however, reality television programs, such as *Popstars* or *Big Brother*, are virtually unscripted, the program format consisting not of dialogue, but of a range of other elements that combine to create the program.³³

One of Mr Green's arguments in *Green* was that the New Zealand Broadcasting Corporation had infringed copyright in his program, protected as a literary work. His argument that copyright in the scripts had been infringed was an interesting one, as he failed to submit the scripts on which his claim [64] was based. He argued, however, that he had written scripts setting out the framework of the program, specifying various catchphrases and referring to the use of sponsors to represent competitors and

³⁰ In *Kalamazoo (Australia) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213 the court considered a collection of accounting forms. Individually the accounting forms were ordinary, everyday forms with columns and boxes, but taken together they constituted an accounting system that was sufficiently original to warrant protection.

³¹ As was the situation in the *Zeccola* case, above n 25.

³² D Rose, 'Format Rights: A Never Ending Drama (or not)' [1999] (issue 6) *Entertainment Law Review* 170, 173.

³³ One of the reasons format disputes rarely arise in fictional programs is because copying the scripts without infringement is impossible. Of course it may be possible to infringe rights in a fictional program by taking distinctive elements of that program without actually using its script.

a clapometer. His argument was rejected by the trial judge, by the Court of Appeal and by the Privy Council. Somers J of the Court of Appeal concluded that 'the scripts did not themselves do more than express a general idea or concept for a talent quest and hence were not the subject of copyright'.³⁴

Lord Bridge, on behalf of the Privy Council, noted, however, that the primary difficulty of Mr Green was that he did not produce the scripts.

While the case confirms the need to record a format in some detail, the Court's decision on the issue of protection of formats as literary works can certainly be confined to its own particular and rather peculiar facts. Formats may be protected as literary works, but format creators should carefully and thoroughly document the details of their format to maximise the likelihood of copyright protection.³⁵

Artistic and Musical Works

The underlying works of a program, such as music and artworks, will generally be protected by copyright. However, a producer wanting to reproduce the format could do so without necessarily using the same or even substantially similar music and artworks. Unless the music or a particular artwork forms an integral part of the format, it will be possible to borrow the central concept and identifying characteristics of the show, but to avoid infringement in the music and artworks by creating an original soundtrack and set.

Copyright Infringement

To establish copyright infringement in a format, the owner of the format must first succeed in establishing that his or her format is protected by copyright, either as a dramatic or literary work, and secondly that the offending program substantially reproduces it.³⁶

If the Court does conclude that a format is a protected work, then it will look to see if recognisable elements from that work have been taken. The issue of substantial

³⁴ [1989] RPC 469, 478 (CA of NZ).

³⁵ Format creators should also consider registering their work with the Australian Writer's Guild as a way of documenting their authorship of the work.

reproduction is clearly a matter of degree and an one that can only be resolved on a case by case basis. If, however, a producer creates a program based on an existing series, and takes only the premise of that series, for example a series that follows the progress of contestants through army boot camp, that may, on its own, be insufficient to constitute infringement. If other elements are reproduced, such as specific contestant challenges, the structure of each program and catchphrases, substantial reproduction is more likely to be established.

In the United States the producers of *Survivor* recently sued the producers of *Boot Camp* for copyright infringement, arguing that there are substantial similarities between the shows.³⁷ In both series groups of non-actor contestants work together to accomplish various tasks and at the end of each episode vote someone off. In both series the episodes are interspersed with interviews with various contestants as well as landscape and wildlife photography. Copyright is therefore not being claimed merely on the basis that *Boot Camp* copied the general idea behind *Survivor*, but that it had reproduced a variety of distinctive elements from the series.

Passing Off and Misleading and Deceptive Conduct

A producer may be able to rely on a claim of passing off or misleading and deceptive conduct to restrain the broadcast by a competitor of a program based on its format.

[65] In order to succeed in an action for passing off the plaintiff must establish that as a result of the defendant's conduct there is a likelihood of deception amongst viewers and a likelihood of damage to its reputation.³⁸ It is also necessary that there is some goodwill attached to the original program in the jurisdiction in which the action is brought.

One of Mr Green's arguments in *Green* was that the New Zealand Broadcasting Corporation had passed off its program as his, or as an adaptation authorised or approved by him. His argument of passing off failed because the Court found that his show, *Opportunity Knocks*, had an insufficient reputation in New Zealand, not having

³⁶ *Copyright Act 1968* (Cth) s 14.

³⁷ Reported in (April 2001) 5:10 *Entertainment Law Digest*, see www.entlawdigest.com.

³⁸ *Conagra v McCain* [1992] 23 IPR 193.

been previously broadcast there. The trial judge, its decision confirmed unanimously by the Court of Appeal, also found that the two programs were sufficiently different such that it was unlikely that an ordinary viewer would be confused or misled.

The action of passing off will be of no assistance to a format creator or producer of a format program where the format is reproduced before public release and therefore before there is any kind of goodwill attached to the format. It is also arguable that changes in title, presenter, set design and music could make the lack of association between the two programs clearly evident to viewers, even where the format itself is copied.

A producer may also be able to rely on s 52 of the *Trade Practices Act*, which prohibits a corporation from engaging in misleading and deceptive conduct, to protect his or her format from unauthorised reproduction. As with passing off, it is necessary to establish that there is a reputation attached to the original program. This means, that the action will be of limited assistance to format producers whose work has been copied in a jurisdiction, in which the original program has not been broadcast.

Trade Marks and Domain Names

The titles of programs will generally not be protected by copyright on the basis that a title is not sufficiently substantial to justify protection.³⁹ Trade mark registration will ensure that the title of the program, and any logo or other symbol by which it is distinguished, cannot be used by anyone else in the category of goods and services and in the territory in which it is registered. For example, if *Big Brother* are planning to not only broadcast the television series, but also to sell *Big Brother* merchandise, by registering the name 'Big Brother' in the relevant categories they ensure that they have the exclusive rights to use that name as an indicator of source.

Format producers may also want to register the program's name as a domain name in order to use its name to promote and exhibit the program online. The internet has become an intrinsic part of the process of distribution, and reality television lends itself to online exploitation. *Big Brother*, for example, was promoted both as a

³⁹ The courts have, however, refrained from making a blanket rule that words and titles can never be original works. See Ricketson, above n 4, [7.225].

television program and as a website, the website allowing even more probing access to the inhabitants of the house.

Confidential Information

The law of confidence has extremely limited application to the protection of television formats, as it only protects ideas not yet in the public domain. In order to bring an action for breach of confidence the information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence and there must be unauthorised use of that information to the detriment of the party communicating it.⁴⁰ Even if the plaintiff can establish that the format idea was communicated in confidence, it must also show that the idea was sufficiently original. It will potentially only provide protection to format creators during the process of pitching their ideas to producers or broadcasters, or during the development or production. Once the program has been [66] broadcast, the law of confidence clearly has no application to actions against third parties who copy the format. In *Talbot v General Television Corporation Pty Ltd* the plaintiff submitted a proposal to Channel 9 for a series called *To Make a Million*, which was about the success stories of various millionaires, and had the objective of inspiring viewers to make their own fortunes.⁴¹ Without the plaintiff's knowledge or consent Channel 9 produced a program based on this premise. The plaintiff obtained an injunction restraining the broadcast of the program on the basis that his concept had been communicated in confidence and was sufficiently developed to be capable of protection as confidential information.

In reality, the law of confidence is of minimal assistance to the budding format creator. It is standard industry practice for producers to reject any proposals accompanied by a confidentiality notice. In many cases producers require creators submitting proposals to sign a release in which they confirm that there is no relationship of confidence and that the producer has the right to develop works on the same or similar subject matter as that of the proposal.

⁴⁰ *Coco v Clark* [1969] RPC 41, 47 (Megarry J).

⁴¹ [1980] VR 224.

Industry Knowledge

Knowledge about how to actually produce a particular program format may be valuable to those wanting to replicate it. Licensees of the *Big Brother* format, for example, may rely on the know-how of the originators of the format in relation to the selection process of participants to ensure maximum conflict, raw emotion and sexual tension. Licensees of the *Survivor* format may rely on the original producer's resources to select a location, develop challenges and choose competitors. There is, therefore, a practical incentive, rather than a legal obligation, to negotiate with the owner of the format for both the right to reproduce it and the instruction on how to do it.

Industry Practice

It is cheaper to produce a program based on an existing format than to develop a new concept. It is also less risky. A formula that has been successful in another territory is a more attractive proposition to a broadcaster or investor than an untried and original concept. Producers do not need to invest substantial time and money into research and development, but instead are able to produce a program by following the formula provided to them, and adapting it, where necessary, to local conditions.

There is a strong incentive to find assurance that program formats, a commodity traded throughout the world, are legally protected. Producers do, in fact, generally behave as though formats are legally protected. The television industry continues to recognise and respect format rights, and it is standard practice to pay for the rights to exploit them. There are several annual international fairs where format licences are marketed, bought and sold.⁴² The British Broadcasting Corporation has had a format licensing division since 1993. It produces a *BBC Format and Production Kit* series, a do-it-yourself guide on how, for a fee, to create your own version of various television series.⁴³ Popular formats are licensed around the world. The format for *Big Brother*, for example, has been licensed in sixteen different countries.⁴⁴ Whatever legal conclusions are drawn about the legal protection of television formats, the television industry has clearly acknowledged the value it assigns to them.

⁴² See Steffensen, above n 27, 86.

⁴³ A Moran, *Copycat Television: Globalisation, Program Formats and Cultural Identity* (1998) 14.

Conclusion

While the *Green* decision prompted intense industry debate, and led to proposals in the UK for [67] legislative change, no specific legislation for protection of format rights was introduced.⁴⁵ The issue of legal protection of program formats, both in Australia and overseas, therefore continues to be primarily addressed by assessing whether a format falls within one of the existing general categories of copyright protected works. As has been discussed, there are alternative sources of legal protection to copyright law, but there are obvious limits to the extent of their protection.

It is suggested that, in general, the existing provisions of the *Copyright Act* are equipped to deal with the protection of formats. What is required, however, is a clarification of the definition of dramatic work. Clearly works that are nothing more than general ideas or concepts should not be protected as dramatic works, but works that are adequately described, and intended to be represented in some way, should be. If the approach in *Green* is followed, program formats are not the only forms of creative expression that will potentially fall on the wrong side of the definition of dramatic works. Works such as improvisation theatre and performance art are unlikely to be protected. What needs to be considered, therefore, is the issue of protection of dramatic works in general, rather than any specific legal protection of television formats.

In practice, the television industry generally accords reality television program formats the status of copyright protected works. While the legal basis for that approach remains slightly murky, it ensures that the market for reality television format rights continues to flourish, and the voyeuristic tendencies of Australian viewers continue to be indulged.

⁴⁴ 'Can Viewers Survive Another Dose of Reality?', Reuters at <www.news.findlaw.com/entertainment/s/20010516/realityukdc.html>

⁴⁵ In 1994 the UK Patent Office issued a consultation paper on the protection that might be given to program formats. The paper sought comment, among other things, on a draft Members' Bill, which had been drafted by those arguing for greater protection for formats. As a result of that paper the Patent Office worked on alternative legislative approaches to the protection of formats, and in 1996 it released another consultation paper on the issue.