

THE



FRAPA
REPORT
2011

Protecting Format Rights

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A message from FRAPA



FRAPA is very proud to present the FRAPA Report 2011, written by the international law firm Olswang LLP and Dr Sukhpreet Singh, with the support of the German State of North Rhine-Westphalia.

Since its foundation in 2000, FRAPA has fought tirelessly for the protection of format rights — a mission that has become ever more vital as formats have soared in value. The last FRAPA Report in 2009 demonstrated the growing impact of the format business on the overall media industry. Between 2006 and 2008, the FRAPA survey revealed that the total global production expenditure on formats stood at around €9.3bn.

In recent years, FRAPA became more than just a simple format protection association. It has positioned itself as a global community, a meet-and-greet platform, a networking forum, an advice shop, an information resource and an industry thought leader. But FRAPA's focus has never waived from its founding principle: to ensure that format rights are recognised and respected throughout the media industries.

The 2011 FRAPA Report focuses on format rights' position under law in 14 key TV territories: Australia, Belgium, Brazil, Canada, Denmark, France, Germany, India, Malta, the Netherlands, New Zealand, Spain, the UK and the USA. It is designed to help format creators maximise their chances of winning legal proceedings in the event of IP disputes.

Many of the report's findings are encouraging. For example, Olswang has found that, while it is true formats are vulnerable to copying, it is nonetheless possible to protect your IP on the international market by a number of legal remedies beyond copyright. Also heartening is the news that, although claims for copyright infringement vis-à-vis copycats continue to be difficult to prove, there have recently been notable successes in a number of markets.

To conclude, FRAPA remains passionate about and dedicated to, providing protection and information to format producers, creators and distributors all over the world.

We hope that you will find our new report valuable not only for the case law it provides but, by extension, as a guide to building maximum protection into your formats as you create, pitch, produce and market them.

Ute Biernat

Chairman, FRAPA



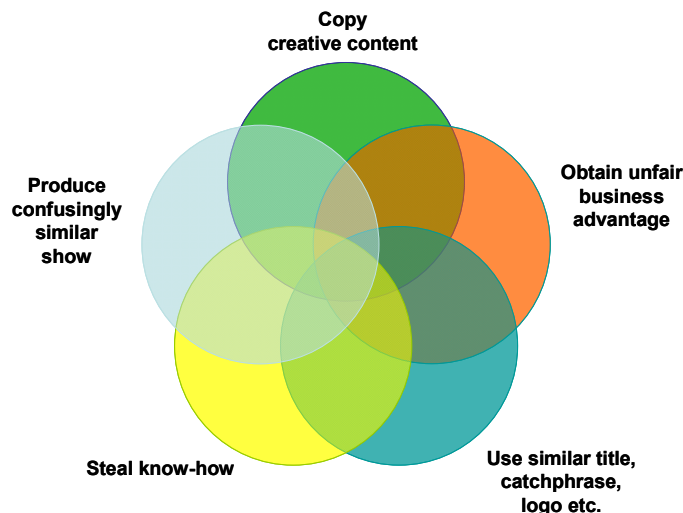
Introduction

The television format industry is undoubtedly global, with successful shows such as "Who Wants to be a Millionaire?", "Big Brother", "Pop Idol" and "Come Dine With Me" generating substantial revenues in countless countries across the globe. The first FRAPA study on the format trade highlighted that from 2002 to 2004 there were 259 original formats which found their way to foreign screens, generating production volumes of €6.4bn. The second FRAPA study established that from 2006 to 2008 there were 445 such formats, generating production volumes of €9.3bn. The 445 formats were tracked across 57 territories and were found to give rise to 1262 adaptations.

Despite the volcanic growth and success of the industry, many are sceptical about the legal protection afforded to television formats. There is an accepted and well established practice of licensing formats, but there remains a belief that television formats remain unprotected by the law and as such they are vulnerable to plagiarism. Historically, format creators have relied on copyright law without much success. Some television formats were found to be generalised ideas, which failed to be protected by copyright. Others rely on the precedent set by the "Opportunity Knocks case" in 1989 in New Zealand in which certain components of that game show lacked sufficient unity to be protected as a copyright work.

However, there have been numerous other format cases in the 22 years since the Opportunity Knocks case. Some of the copyright claims have been successful. Further, format creators have looked beyond copyright law and pursued claims for passing off, unfair competition and breach of confidence with greater degrees of success. This report considers these cases and the protection available to television formats around the world.

The report analyses the available protection by considering the different components of a television format and the ways in which a valuable business asset can be protected. In the absence of specific statutory provision for a "format right", a television format may be considered to be a bundle of proprietary rights all of which are protectable. The key component of a successful television format will be a unique creative concept together with production know-how, distinctive name, other visual features (e.g. stage and lighting), catch-phrase and branding. For example, an infringer may exploit one or more of the following parts of a format:



In order to restrain each of these types of activity, a format creator will need to rely on different legal rights. This report considers each of the rights involved, the elements of a format it protects, its difficulties and how the Courts have approached this right in the context of television formats.

The report is divided as follows:

- Protecting the creative work against copying: applying copyright law
- Protecting a format as a business asset: preventing confusing, competing formats
- Protecting a format as part of the licensing industry: preventing unfair business practices
- Protecting the know-how behind the format: applying the law of confidential information
- Protecting format titles: applying the law of registered trade marks

This report considers the reported cases in a cross-section of markets around the world.

The countries considered are:

Australia	India
Belgium	Malta
Brazil	Netherlands
Canada	New Zealand
Denmark	Spain
France	UK
Germany	USA

Dr Sukhpreet Singh has also provided some further analysis on market-based strategies as an alternative to legal protection based on a case study.

Main Findings

- ❖ Overall, the cases considered in this report show that formats are protectable, whether through copyright, unfair competition, passing off or breach of confidence. The cases are often difficult to reconcile and a particular format may be protected in one country but not in another. Format imitators may be free to copy in one jurisdiction but will struggle to distribute their copycat formats in others. In a global industry, the value of a copycat format is significantly reduced by such restrictions.
- ❖ Claims for infringement of copyright in a format continue to be difficult. Endemol has had some success in Brazil and the Netherlands in relation to its Big Brother format and others have been successful in Belgium, Canada and Spain. Other countries such as Germany pose a more difficult environment for successful copyright claims, in light of a recent decision of the Supreme Court in Germany.
- ❖ Format creators have had greater success with unfair competition cases. The concept of "unfair competition" or "unfair business practices" varies from jurisdiction to jurisdiction. It is based on the infringer confusing the public, acquiring an unfair business advantage or engaging in parasitic behaviour. As recently as 2009, a Belgian Court has listed certain criteria for establishing parasitic behaviour, but they have been defined very widely and are open to interpretation.
- ❖ Format creators have also been successful with breach of confidence claims. These cases are fact specific and usually arise when a creator sends a broadcaster or production company a confidential proposal or pitch for a show, which is then used by the producer or broadcaster without permission. Although copyright does not protect an idea for a format, the law of confidential information will protect an idea where it was communicated in confidence. These claims have been successful in Australia, India and the UK.
- ❖ In light of the inconsistent legal protection, the format industry has adopted a number of market-based strategies to protect its investments. Eleven strategies (ranging from market intelligence to brand identity management) have been identified in the context of the "Who Wants to be a Millionaire?" format.

Market-based Strategies: an alternative to legal protection

"How to protect formats from copycats using market-based strategies?"

By Dr Sukhpreet Singh

The cases considered in this report illustrate that the protection of format rights is often inconsistent across countries. Although there is protection, it can be difficult to predict whether a Court in a particular country will find that a format is protectable, whether through copyright, unfair competition or breach of confidence. In spite of this, the industry continues to thrive. It is global. Formats are bought and sold for significant sums. The industry has chosen to "self-regulate" and has adopted various market-based strategies to protect formats. This case study identifies some of the market-based strategies evolved by the producers of formats to supplement the legal protection.

This case-study showcases how "Who wants to be a Millionaire?" (known throughout this case study as the "Millionaire" format) came to be sold in more than 100 countries around the world, particularly in the absence of protection from any specific format right. The international television trade fairs were used to construct a purposive sample of interviewees for this case study. The fairs were: Discop East Budapest in June 2008, Asia Television Forum Singapore in December 2008 and NATPE Las Vegas in January 2009. 46 interviews were conducted in a semi-structured manner using a pre-designed protocol as a prompt. Coding was used as a means of analysing these interviews to identify explanations of industry behaviour. The themes in this case study are drawn from those interviews.

Trading Millionaire internationally

Created by radio presenters over a pub lunch, Millionaire, started its life as a paper format titled "Cash Mountain" when it was taken to the UK independent production company Celador. The latter then developed and launched the format on UK's ITV in 1998. Celador subsequently sold the rights of the Millionaire format to a Dutch company called 2waytraffic which was itself later acquired by Sony Pictures Television (part of the Japanese conglomerate Sony) in 2008.

The Millionaire format initially rolled out as an international franchise in Western European countries such as Belgium, Germany, the Netherlands and Portugal. A year after the UK launch, the Dutch weekend version was launched, produced by Endemol Entertainment – the format rights holder for several European countries. Owing to its success in the UK, Australia soon followed with a licensed local version on the Nine Network. However, a major push to the

Millionaire format happened after the US version, co-produced by Celador and Disney subsidiaries ABC and Buena Vista Television, became so successful in America that Celador was besieged with franchising requests. Celador is reported to have sold the remaining international rights of the format by postal bidding.

Millionaire soon became a well marketed brand with extensions in several product merchandising and licensing categories. To satisfy cultural and linguistic requirements, although the format's title changes in several territories, the brand identity and visual appeal remains the same. For example, it consistently uses the original Millionaire wheel but modifies it to suit a local audience (for example when the Indian rupee adopted the " ₹ " sign in 2010, the logo for the format's Indian version "Kaun Banega Crorepati", was changed to incorporate the new sign). The title itself translates into a local language and on many occasions the local version's title differs from the original phrase "Who wants to be a Millionaire?" For example, the Russian version of the show translates as "Oh! Lucky Man," while in Spain, the title for many years read as "50 for 15" (referring to the 50 million pesetas that the contestant takes away after answering 15 questions).

The format predominantly targets a large demographic, typically from 18-65 years of age, and is innovated periodically as per audience research in each country. The updates can be changes such as introducing a new lifeline (such as "Switch the Question"), to a more complex rollout of a faster-paced version of the format (such as "Hot Seat"), and even spin-out programming (such as "50:50").

Strategic Behaviour

Eleven patterns of strategic behaviour emerged from analysis of the semi-structured interviews. The illustrative quotes are reported in a generic form, obscuring the name of a particular format or company, and containing only the comparable industry designation of the respondents.

1. Market intelligence

The producers of Millionaire depended upon enhanced and proprietary channels of information flow to detect format copycatting using a network of "spotters" around key television territories such as USA, Netherlands and Scandinavia.

"The spotter's network is so secretive that I only know the names of the spotters. They work as freelance production executives who channelize things they hear to me and the aim is about getting the knowledge of promising shows coming through from our competitors rather than trying to spot rip offs." Senior Manager, Worldwide Format Distribution Company

2. Gentlemen's agreements and trust

Format producers mostly prefer to use non-legal strategies to solve format disputes, depending less on a bundling of intellectual property rights (such as trade marks and copyright). An attempt

to use legal means of countering format imitators is considered too resource intensive (in terms of finance as well as time). On the other hand judicial inconsistency in format disputes means that a negative decision in the Courts may indirectly encourage further format copycats. Relationships and trust are important in the format business and gentlemen's agreements are considered the cornerstone of global television business where most large companies respect each other's format ideas.

"What drives the format industry is not what is legally protectable or the rights – it is traced back to what is the initial impulse for a television commissioning editor or buyer to buy someone else's TV format – because that impulse is as simple as 'since it worked over there therefore it has a fairly decent chance that it is going to work here as well i.e. there must be some chemistry in the show that works with the audiences. Therefore [our format] is a shining example which goes around the world and achieves very similar results almost everywhere, despite uncertain legal protection." EVP, Worldwide Format Distribution Company

"There is a degree of taint around about very obviously ripping off someone else's show. There is a degree of honour and trust within the industry and it's seen as shameful to be very obviously ripping off somebody else's show." VP, Worldwide Format Distribution Company

3. Deterrent letters – putting copycats on notice

Format producers use established positioning and signalling rhetoric of intellectual property protection to assert ownership of formats. This is achieved through "deterrent letters" (or "letters of claim") usually from an in-house legal department emphasising to format copycats that legal action (based on copyright or unfair competition claims) will be pursued if commercial means fail to find a satisfactory solution to their dispute.

"Most of the times ... you can solve [things] in a simple way i.e. by sending a couple of angry letters." In-house Legal Counsel, Worldwide Format Distribution Company

4. Speed to market

The first format of a genre to reach the market (i.e. to be broadcast) usually beats the intended imitators. This is also true of imitators who beat the original to the broadcast date. Hence, by a speedy roll-out throughout the main television territories of the world, the original maintains its supremacy over imitators. This strategy was widely employed by the creator of Millionaire since it quickly signed franchise deals with broadcasters and production companies from around the world.

"Speed to market is the key to protecting our formats. We have bases in every major television territory. Know-how of successful previous versions coupled with a highly skilled technical team ensures we get the commission to produce a licensed version." Senior Manager, Worldwide Format Distribution Company

"We are an international worldwide production and distribution company with offices across the globe – anyone who places a format with us for distribution gets access to all these territories. Hence presence on the ground enhances the ability to protect our formats. In other words, the way we are structured helps ensure protection." Senior Manager, Worldwide Format Distribution Company

A real example of this strategy was highlighted in the Danish case of *Celador v Danmarks Radio and Television* (discussed earlier in this report). If Celador's licensee TV2 had been able to make and broadcast the Danish version more quickly than it did, Celador would not have had to resort to uncertain and expensive legal action. In that instance, Celador were successful and the Court ordered the infringing copycat producers to bear the costs of the litigation.

5. Production know-how

The originators of the Millionaire format provide development support to local versions in terms of "format bibles" (reportedly around 170 pages), style guides, initial graphics, the signature theme music score, lighting arrangements, set designs, and other technical know-how (supplied under confidentiality and non-disclosure agreements). This creates a highly complex product that has inherent value to the licensee. Additionally, keeping this know-how secret makes it difficult for would-be copycats to copy the original easily.

"If you want to copy [our format] properly, then you really have to get hold of the bible which we hold relatively tightly. In our production territories, we don't give the production bibles to the broadcasters. It's a bit problematic in licensing territories since you are passing the bible across to broadcasters or other production companies. But I don't know examples of our bibles being passed around – because it can be traced back to someone." EVP, Worldwide Format Distribution Company

"The technical know-how or the 'production bible' is the crown jewel which we wish to protect. We never release it without a contract having been signed." Partnerships Manager, Worldwide Format Distribution Company

6. Flying producers system

There is a network of "flying producers" who help to keep the formats on screen as well as inherent values intact. By policing the format production process as closely as possible according to the original production's standards, the flying producers maintain the format's quality and integrity in franchised territories. They give the format a distinct identity and quality besides bringing to each new production the knowledge gained in producing all the previous productions. Flying producers know what has been tried in other territories, and what has worked and what has not.

"[Our format] was put together in-house – there is an awful lot going on beneath the surface; and if you have access to the people who created the original show, you have access to all that

knowledge going on under that surface. If you don't have access to that you are only guessing what it is, then you make mistakes because then you don't actually know the true source of where the magic comes from." Flying Producer, Worldwide Format Distribution Company

"People in the industry have a degree of trust when the show is coming from [our company] – they know they will get what they pay for. That is because of our production management system which is run in sync with the flying producers – it's all about knowledge transfer. When we buy-in a format to sell further on, we send some flying producers to sit in on the original production of the show. They learn from the people who first created the show and create a long format bible and this goes into detail about how to make the show, its finances, budgetary requirements etc." Distribution Manager, Worldwide Format Distribution Company

In the case of Millionaire, the lack of a robust flying producer system in the initial few years of the franchise may have contributed to a legal setback the format faced from its Indonesian licensee Arief International. The agreement between Celador and Arief was constructed as an "evergreen licence", thus allowing Arief to keep producing the format in Indonesia as long as it followed the terms of the contract and as long as the format was viable. This was ostensibly done to encourage continued local investment by the licensee and an adherence to quality standards. When Celador terminated Arief's contract and awarded the Indonesian version to an Australian company, Arief took Celador to court in UK in 2004 and won the case, forcing Celador to pay damages plus legal costs. A robust flying producer system may have avoided this problem.

7. Stimulating demand with taped versions

A broadcaster is occasionally supplied with a licence by format producers to broadcast the original tape for a specific number of times on its channels. Local audiences experience a highly developed product and this helps the broadcaster in creating an appetite for a local version.

"It helps that we have very strong tape sales operations. Broadcasters around the world not only rely on us for formats but also finished shows – tape sales. So if you copy our formats, you are cutting off your supplies." Senior Manager, Worldwide Format Distribution Company

"The international growth of [our format] was initially slow but it got a major push from tape sales of its American version – territories which had bought the American tape as it is wanted to create their own local versions. Tie-in with tape sales helped us set a benchmark for local versions which only we can deliver, hence copycat producers are not successful with broadcasters." Senior Partnerships Manager, Worldwide Format Distribution Company

8. Power relations & retaliatory clout

Millionaire is produced by 2waytraffic, a production company which is part of a large diversified television media conglomerate, Sony Pictures Television. Owing to its powerful position, it is able to influence buyers to buy a format in combination with other programmes. If buyers try to copy the format, they become the objects of retaliatory measures such as cutting off supply of other

programmes or being blacklisted from industry relations. Thus, broadcasters, who depend on a library of finished programming from the producers of Millionaire, will not attempt any copycatting. This retaliatory clout is not just restricted to large corporations, but companies recognised for their innovation in devising new formats.

"Being local and being large means that our company is noticed – a copycat can surely expect our local representative to knock on their doors in case of a suspected infringement. We have the size and scale in terms of churning out regular formats and a copycat will cut off the supply of not only future licensed versions but also tape sales from us." VP Development, Worldwide Format Distribution Company

"Because we come out with more and more outstanding formats, the broadcast community understands the importance of keeping good relations with us; hence they tend not to jeopardize relations with us by bringing out a format too close to our own." Senior Manager, Worldwide Format Distribution Company

9. Role of trade fairs

The producers of Millionaire attend large international television trade fairs to promote the format to the industry. Launching and showcasing Millionaire at trade fairs legitimises Sony's 2waytraffic as the originator of the Millionaire style format. This dissuades copycatting by creating ground rules for engaging in business relationships within the industry.

"Trade fairs are used only to build relationships for formats. For shows where a really fast roll-out is necessitated, along with marketing the uniqueness of the show, a trade fair helps to create an event around the format and pitch the show to a range of broadcasters." Senior Manager, Worldwide Format Distribution Company

"MIP is one of the important trade fairs for us. It is about sitting down with our buyers as well as one of the few opportunities that the whole company could come together. Before MIP, we internally decide a list of priority formats we wish to push at the market." Senior Manager, Worldwide Format Distribution Company

10. Cultural localizations

Millionaire producers attempt to suit the local culture of their formatted versions so that these can easily be accepted by local broadcasters and audiences. Format productions that align with a territory's cultural values prolong the lifespan of a format and its brand - this prevents imitators from originating their own localised imitations as there is a finite market share for a certain programme type within a certain genre.

Millionaire underwent numerous cultural localizations in order to appeal to local audiences in diverse territories around the world. For example, in territories where a million does not easily

translate into a catchy and marketable financial figure, the prize money is changed to 5 or 10 million of a local currency.

11. Managing the brand identity

Millionaire producers nurture the brand by managing closely a consistent brand identity through the format bible, style guides and the flying producer system. They then seek to extend this identity to merchandising, off-air licensing and spin-off programming so that it drives audiences back to the on-air product. Millionaire was extended not only into traditional quiz books and board games but also instant win lottery scratch cards, interactive DVDs, online and mobile games, and digital apps.

"We nurture format brands by having a consistency of graphics, music, programme structure, etc. As time progresses, there is a need to evolve the brand and hence being a large global company helps as successful ideas from one territory can be implemented in others." EVP, Worldwide Format Distribution Company

"From the outset we have been obsessive about the brand elements of [our format]. We make available to all our format licensees, production assets from other productions such as the logo, the theme music, the opening title sequence, etc. Locally produced shows couldn't generate that kind of productions because of cost issues. So, here was this incredibly glossy and world class framed and branded show in a country which had never seen it before; plus it allowed it to be done at a price suitable for that country. So that's another element that we can provide outstanding good value for what you pay and what you get to broadcast on your screens is better or glossier than locally generated productions. So the branding elements can change the way the name can change but we do try to be very obsessive about key branding elements – and we mandate that territories do not change the key branding elements." EVP, Worldwide Format Distribution Company

"A strong brand has several benefits – it can leverage a whole host of products. Not only opens various revenue opportunities but also embeds the products in people's lives and feeds back to make audiences loyal to the show audiences loyal to the TV show." EVP, Worldwide Format Distribution Company

Model for Non-legal Protection of a Format

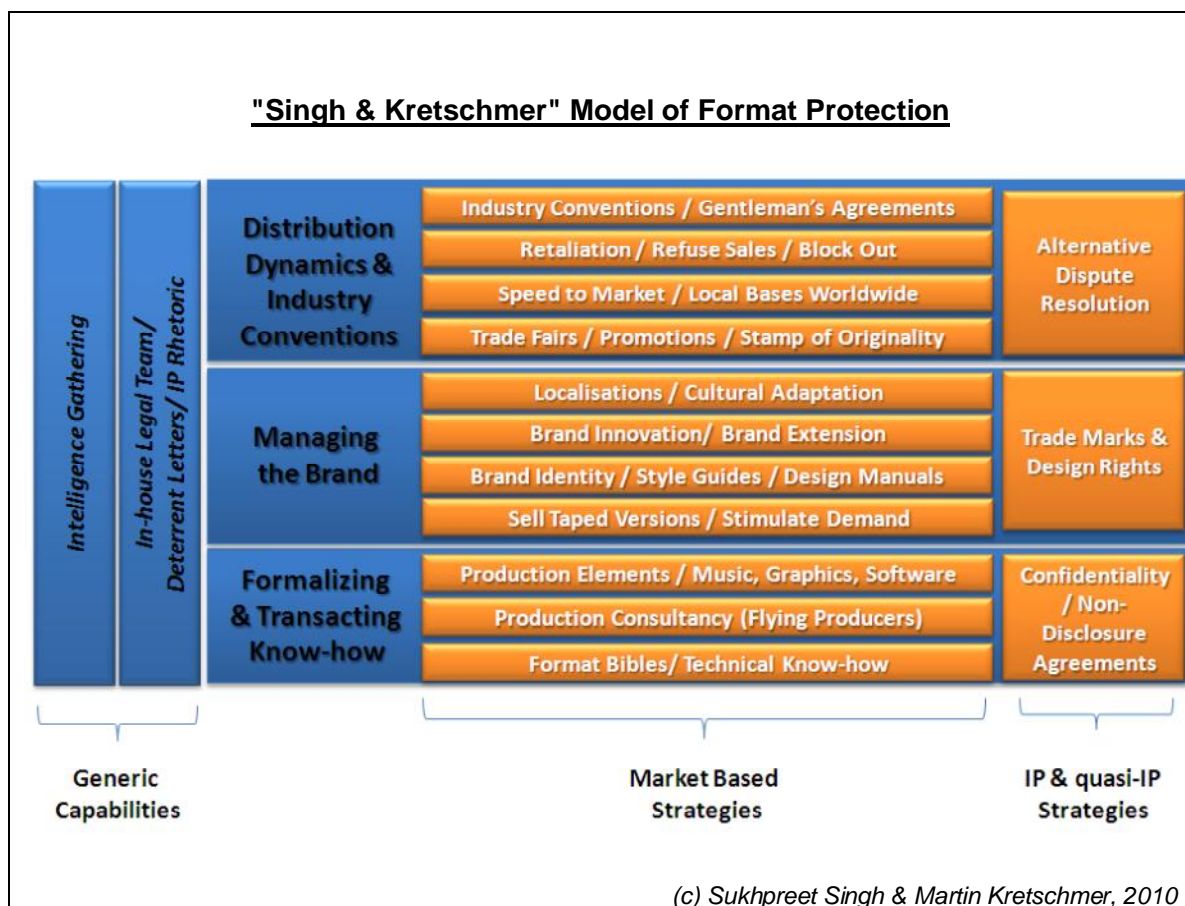
Having mapped and analysed the above patterns of market-based behaviour, three groups of strategies emerge, each combining legal and market-based means of preventing copycats of Millionaire.

The first group is characterised as the attempt to formalise knowledge, so that it can be transacted – these include elements such as know-how and knowledge that resides, not on screen but behind the camera: e.g. how to source contestants, how to involve audiences, where to place the lighting and how to pace a series. These are laid down in a format bible, supplied

under confidentiality agreements, implemented by flying producers and supported by raw production elements (such as music and graphics).

The second group takes its lead from the discipline of marketing. It involves floating possible formats through tape sales of the large and successful Millionaire productions, localisation of format elements and crucially, providing a distinct brand identity while at the same time constantly evolving the brand it so that it becomes harder to copy. Merchandising and other product tie-ins also fall within this group. The use of trade mark law to protect titles and logos of the show is the complementary legal strategy.

The third group relies on strategies that can be understood in the context of media economics. If distribution structures enable a speedy role out, using local production bases, Millionaire becomes the market leader, leaving little space for competing shows in the same genre. Also relying on the structure of distribution networks are strategies that conceive of social norms as sources of incentives. Deviant producers will face reputation sanctions in the context of trade fairs, and may no longer have access to new ideas or finished programming and library content from the same production house.



Underlying these groups of strategies are two more generic competences. The first relates to the gathering of market intelligence, ability to spot trends, as well as responding to copycats by

putting deviant producers on notice. The second is a sophisticated in-house legal competence that enables elements of all three groups of strategies – producing non-disclosure agreements, contracting over production bibles, registration of logos and trademarks, instigating mediation, and drawing up deterrent letters.

So, how to protect formats from copycats using market-based strategies? The empirical data suggests that for competitors, copying incurs considerable costs. A format licence buys insight and implementation expertise that is only available from the format's originator (who also is trying hard to keep the target moving, again increasing the costs of copying). Educating the market on the benefits of buying a licence is a long term beneficial strategy. Attending international trade fairs and signalling the originality of a format to the industry ensures less attempts at imitation. In contrast, unauthorised copycat producers fear losing their access to channels of trade within the international network of television programme producers. Ultimately, there is a significant deterrent cost attached to deviant behaviour, which is recognised by the sophisticated producer.

This case study is based upon results of a substantive Economics and Social Research Council (ESRC, UK) funded project titled "Exploitation of TV Formats" available as a digital learning resource on <http://tvformats.bournemouth.ac.uk/>. Any queries regarding this case study may be sent to ssdheer@gmail.com.

About the Authors

Olswang LLP

Olswang is a leading business law firm with a distinctive approach. It has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Olswang's Film and Television practice is recognised as being home to many of the industry's foremost legal experts. These lawyers advise production companies, free- and pay-TV broadcasters, aggregators and platforms on commercial contracts in all aspects of business, from development to production and distribution and on corporate transactions, collaborations, format and brand protection and litigation. They are consistently ranked in the top tier for their area of practice by legal directories such as Chambers & Partners, The Legal 500 and Juve.

Founded in 1981 as a niche film and television law firm, our firm has grown to a team of over 600, including more than 100 partners, across four European offices, with leading lawyers in all legal disciplines. This report has been drawn from the experience of the specialist rights lawyers with assistance from Dr Sukhpreet Singh whose biography is below.

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Dr Sukhpreet Singh

Dr Sukhpreet Singh is a Research Fellow at the Centre for Intellectual Property Policy and Management at Bournemouth University – one of the leading research centres of intellectual property in the UK. Dr Singh holds a PhD in intellectual property rights management and has written extensively on TV format protection and exploitation strategies. In January 2009, the National Association of Television Production Executives (NATPE, USA) invited him to be a NATPE Educational Fellow.