article

The Emperor's New Clothes? The Way Forward: TV Format Protection under Unfair Competition Law in the United States, United Kingdom and France: Part 2

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Copyright

The United Kingdom has a closed list of copyright categories so in comparison to the United States and France it is harder for newer works to attain copyright in the United Kingdom if they do not easily fit into a category. TV formats may be protected as literary or dramatic works. For a work to be protected by copyright under specified subject matter it needs to be (1) an expression of an idea (2) original[2] and (3) recorded.[3]

The test for originality in the United Kingdom is labour, skill and judgement.[4] The *CBS* Case mentioned US copyright being extended to protect both the compilation of facts as analysed in *Feist* and also the compilation of ideas (as in TV formats).[5] So, on the borderline of protection in the United States and the United Kingdom it is useful to look at compilation cases.

In the United Kingdom, the House of Lords refused to provide copyright protection in *Cramp v Smythson*[6] to tables in a diary since the selection of tables was *commonplace information*.[7] It is proposed that generic themes/ideas in TV formats should not be protected since they are often commonplace.

Protection was granted to a compilation in football coupons in *Ladbrokes v William Hill*.[8] Lord Evershed distinguished this compilation from *Cramp v Smythson*[9] since the coupons required considerable skill, labour and judgment.

In *IPC Media Ltd v Highbury,*[10] a High Court case relating to format rights in magazines, Laddie J. drew a direct analogy with TV format rights and referred to the *Opportunity Knocks* case (where the Privy Council held that the format e.g. elements such as ''make your mind up time'' and the ''Clapometer'' was not capable of copyright protection, since the separate elements did not sufficiently combine together to form a unified dramatic work capable of protection).[11] He noted that it

> ''does not mean that [you] cannot utilise well known themes and ingredients. If an author puts sufficient relevant *artistic effort* into producing a drawing or other artistic work from known ingredients, it will be protected by copyright.''[12]

Laddie's ''artistic effort'' seems closer to US law's ''minimal creativity''. However, Laddie did not mention any requirement for skill or judgment. So, it is unclear whether a TV format will require skill, effort and/or judgment in merging generic ideas to be original or whether ''artistic effort'' is sufficient.

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2. CDPA 1988 s.1(1)(a).
3. CDPA 1988 s.3(2).
4. *Interlego v Tyco* (1989) 1 A.C. 217.
5. *Feist Publications Inc v Rural Telephone Service Co* (1991) 49 9 US 340.
6. *G. A. Cramp & Sons Ltd v Frank Smythson Ltd* (1944) A.C. 329 HL.
7. *Feist Publications Inc v Rural Telephone Service Co* (1991) 49 9 US 340 at 337.
8. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1980] R.P.C. 539 CA
9. *G. A. Cramp & Sons Ltd v Frank Smythson Ltd* (1944) A.C. 329 HL.
10. *IPC Media Ltd v Highbury* (2004) EWHC 2985.
11. *Green v Broadcasting Corporation of New Zealand* [1989] R.P.C. 700.
12. *Feist Publications Inc v Rural Telephone Service Co* (1991) 49 9 U.S. 340, para.9.

When considering the facts for English copyright cases that deal with the borders of what is and is not copyrightable, the UK courts have arguably been trying to shoe-horn unfair competition and misappropriation-type protection into UK copyright law. Gervais notes that the British Courts' notion of originality is essentially a measure designed to make up for the absence of a sufficiently strong law on unfair competition.[13] However, Gervais does not focus on the later cases that require elements of judgement and skill which take the English cases further away from pure misappropriation cases. If the United Kingdom took one step further and as suggested by Gervais aligned skill with a test of intellectual creation then its law of copyright would be clearer. However, this higher threshold may be harder to satisfy in respect of TV formats. If the United Kingdom legislated for unfair competition including misappropriation it would be able to provide a lower level of protection for TV formats.

Whilst they are not covered in detail by this paper, it is worth noting additional key issues:

- First, what type of copyright subject matter do TV formats come under? TV formats may be protected as literary or dramatic works. Some elements may also be protected as musical works (a theme tune) or artistic works (a set). However, there is no specified type of copyright subject matter for TV formats in the United Kingdom which could lead to problems. It is unclear whether a TV format in its paper format bible form would be a literary work in the United Kingdom. Whilst it is written satisfying s.3(1) CDPA 1988, it would need to pass the threshold of originality as detailed above. Further, some TV formats may be a dramatic works. Following *Norowzian,* [14] for a cinematographic work to be protected it must be both a film and a dramatic work.[15] A TV format may therefore be protected as part of a complete TV programme if it satisfies the requirements of ''film'' within s.5B CDPA 1988 and if the programme qualifies as a dramatic work (with movement, story or action).[16], [17] However, some TV formats may not gain protection either because the finished programme does not amount to a dramatic work or because the underlying elements of a finished cinematographic work do not gain protection as dramatic works alone once separated from a finished TV programme.
- Secondly, the acts restricted by copyright in a work do not necessarily cover copying a format (s16 CDPA 1988). However, if the United Kingdom had a wider definition of adaptation under s.21 CDPA, it could be easier to protect copies of TV formats by granting a wider reproduction right. However, in 1994-96 there was consultation in UK over further copyright protection for TV formats by extending ''copying'' to include borrowing ''format'' elements which did not lead to changes to the CDPA 1988.[18]
- Thirdly, one other area of interesting comparison, is that of copyright protection for computer programmes. If levels of architecture and overall structure of a computer program are protected, surely by analogy TV formats should also be protectable?[19]

France

French doctrine distinguishes two types of action (1) classic disloyal competition and (2) Parasitisme.

French unfair competition

Disloyal competition deals with interference with and obstruction of competition.[20] Case law is based upon arts 1382 and 1383 of the French Civil Code.

A plaintiff needs to establish that unfair trade practices have been committed.[21] There is no pre-set list of behaviour, rather a wrong is behaviour which is contrary to the expectations of the trade.[22]

Disloyal competition may not protect TV formats in all scenarios due to the competitive relationship requirement and the need to show risk of confusion. For example there was no competition between a film producer and soft drink manufacturer over use of words ''thirst for adventure'' and a film maker failed to prevent Coke using its film title ''Thirst for Adventure'' because they were not competitors.[23]

Clauss notes that classic French action of disloyal competition can be very rigid e.g. if the parties are not in a competitive relationship there cannot be disloyal competition.[24] In respect of TV formats, some TV format actions may involve competitors, e.g. one producer copying a format that is being sold by another producer. However an original creator of a format may not be in competition with a broadcaster (unless the broadcaster is also competing with them to sell the format).

Parasitic behaviour

Parasitic behaviour deals with taking a plaintiff's distinctive achievement for the defendant's benefit and does not require confusion on the part of the public[25] neither does it require a

13. Gervais, "The compatibility of the skill and labour originality standard with the Berne Convention and the TRIPs Agreement" [2004] E.I.P.R. 26(2) 75, 75.
14. *Norowzian v Arks Ltd (No. 2)* [1999] F.S.R. 79.
15. T. Aplin, *Copyright Law in the Digital Society* (Hart Publishing Ltd, 2005) p.80.
16. *Creation Records v News Group* [1997] E.M.L.R. 444.
17. CDPA 1988 s.3(1).
18. P. Kamina, *Film Copyright in the EU* (CUP, 2002) p.82.
19. *Cantor Fitzgerald v Tradition (UK)* [2000] R.P.C 95; *Ibcos Computers v Barclays Mercantile* [1994] F.S.R. 275.
20. A. Kamperman Sanders, *Unfair Competition law, the Protection of Intellectual and Industrial Creativity* (Clarendon Press, 1997) p.25.
21. A. Kamperman Sanders, *Unfair Competition law, the Protection of Intellectual and Industrial Creativity* (Clarendon Press, 1997) p.24.
22. R. Clauss, "The French Law of Disloyal Competition" [1995] 11 E.I.P.R. 551.
23. *SARL Teleproduction Bartoli v Societe Coca-cola Export Paris,* January 27, 1984, D, 1984 I.R. 285.
24. R. Clauss, "The French Law of Disloyal Competition" [1995] 11 E.I.P.R. 553.
25. A. Kamperman Sanders, *Unfair Competition law, the Protection of Intellectual and Industrial Creativity* (Clarendon Press, 1997) p.25–6.

direct competitive relationship.[26] It is the French form of action that is most akin to US' misappropriation.

It was defined by the Court of Appeal in *SARL Parfum Ungaro v SARL JJ Vivier* as:

> ''it is an economic parasitism which, as in the animal world, can be analysed as the taking of the substance of another who will therefore be impoverished and will sometimes be caused to die. The advantages of parasitism are equal to the investments made by its victims.''[27]

To avoid excessive remedies, Kamperman Sanders suggests relief in parasitic competition cases should be obtained under principles of unjust enrichment, i.e. nothing more than recovery of the enrichment.[28] A compensatory approach is fairer since a claimant may suffer losses that are greater than the defendant's gain (see discussion of *Heroes' Night* Case[29] damages below).

TV format right cases and unfair competition in France

SA TF1 v Antenne 2[30]

The Court of Appeal upheld both disloyal competition and parasitism in respect of a TV format.

Antennae 2 (A2) broadcast a reality program *La Nuit des Heros* (*Heroes' Night*) presented by Cabrol on its major public channel. The presenter resigned and two months' later presented two reality programmes, on a French private channel TF1. A2 sued TF1 for unfair competition: confusion, imitation, disruption of a competing business, capture and parasitism.

TF1 was found to have unduly taken advantage of the work, reputation and success of A2. TF1 was ordered to pay damages to A2 of F.Fr 50 million for financial loss including 25 per cent loss of audience and 64 per cent drop in advertising revenue.

In respect of disloyal competition, unfair trade practices were committed that were contrary to professional honesty, e.g. by the slavish copying of A2's program by TF1. TF1 copied the theme, construction, length, cutting pattern, structure of sequences, presentation style and contracted the same presenter. Whilst no mens rea was required under French law, TF1 were negligent in not requiring their producer and team, taken from A2, to produce an ''original work and creative effort''. A2 and TF1 were competing for the same audience and so in a competitive relationship albeit one was a public TV channel and the other a private channel. A2 suffered damage from loss of audience and advertising revenues. Finally, the court inferred confusion from the slavish copying of the programme.

Logeais argues that in the *Heroes' Night* Case[31] the court found unlawful copying of ''theme, construction, cutting and length and pattern of sequences'' without addressing what elements were standards in common use by the industry and therefore could be fairly copied.[32] The finding of plagiarism was very broad without any indication of where a line should be drawn between plagiarism and fair use of general themes within the TV industry. Further, Logeais questions the validity of a finding of confusion. The court found that ''confusion was obvious since TF1 implemented the same schema, sequences and schedules'' and used the presenter and film crew.[33] She notes that it is debatable whether audiences were really confused between the public and private channels' programs of different titles. Firm evidential basis of confusion should have been required by the court on the facts rather than for the court to infer confusion.

The court also held TF1's behaviour was an act of parasitism since A2 had paid a significant price for a legitimate licence from CBS to adapt the US format of show *Rescue 911* and invested to launch *Heroes' Night*.

Logeais finds the parasitism ruling of the case most convincing.[34] Although she states that the court overlooked TF1's higher costs at hiring the same production company. Since parasitism is about the investment taken from the plaintiff, it is submitted that the court were right only to consider the costs of the TV format licence from CBS and A2's investment to launch *Heroes' Night*. It would not have been right for the court to consider TF1's additional costs and Logeais is confusing parasitism with unjust enrichment by looking at the defendant's loss/overall gain.

In respect of damages, the court took a loss based approach, compensating A2 for its loss of audience and advertising revenues as opposed to an unjust enrichment approach of returning TF1's profits to A2 on a restitutionary remedy basis. Whilst Logeais argues parasitism often relates to unjust enrichment and the defendant's gain, she does not note that the court awarded damages on a compensatory basis.[35] In contrast to Kamperman Sander's views above, this is another example of a French case that focused on the misappropriation of the claimant's investment as opposed to the defendant's gain and damages were awarded on a compensatory basis.

Once the content of the two shows had drifted apart, the court no longer saw fit to require TF1 to stop broadcasting its show. So, the court's flexible approach did not extend to preventing broadcast of a changed program which would have meant parasitism extended too far.

Hopefully, on different facts the French Courts would not protect all uses of another's format, e.g. similar genres unless

26. F. Henning-Bodewig, *Unfair Competition in EU and member states* (Kluwer Law, 2006) p.123.
27. *SARL Parfum Ungaro v SARL JJ Vivier* Paris May 18, 1989, D.1990 340.
28. A. Kamperman Sanders, *Unfair Competition law, the Protection of Intellectual and Industrial Creativity* (Clarendon Press, 1997) p.30.
29. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993
30. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993
31. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993
32. E. Logeais, "Record fine for Plagiarism of a reality show: is it safer under French law to sue for unfair competition rather than copyright infringement?" [1993] Ent. L.R. 116, 117.
33. E. Logeais, "Record fine for Plagiarism of a reality show: is it safer under French law to sue for unfair competition rather than copyright infringement?" [1993] Ent. L.R. 116, 117.
34. E. Logeais, "Record fine for Plagiarism of a reality show: is it safer under French law to sue for unfair competition rather than copyright infringement?" [1993] Ent. L.R. 116, 118.
35. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993

the copying was almost ''slavish copying'' such as in the *Heroes' Night* Case.[36]

Saranga Production v Canal Plus [37]

Two[37] journalists had presented a concept for a programme to Canal Plus that involved presenting a major fictional crisis and asking politicians to comment on how to deal with each scenario. The channel broke off negotiations but a few months later launched its own program. The plaintiffs considered that this programme copied their concept and brought an action for unfair competition and parasitism.[38]

The court found that there was no evidence that the defendants had independently developed their concept for the programme before meeting the claimants. The court noted that in an action for unfair competition, the court does not need to establish originality as in a copyright action.[39]

The court held that the claimants had suffered loss by not being able to market and sell their format to another broadcaster and upheld an action for parasitism by taking a concept of economic value.

This case goes further than *Heroes' Night* Case[40] by just protecting a concept. It is interesting that the court recognised the economic value of a format and extended the law of parasitism to cover the use of such an investment without the program having been made. The main problem is that again there is no clear dividing line offered by the court between the use of another's investment in the creation of a format and generic themes/ideas.

Copyright

France has an open list of copyright works so a TV format could be protected provided it meets the requirements of expression and originality.[41] The test for originality in France in order to attain a copyright work is that the work is an ''imprint of an author's personality''.[42] However, a concept for a TV show aimed at women with ideas for debated themes and technical process of interviews was not an ''intellectual creation'' and not protected by copyright.[43] The idea for a talent show with live performance and judged by professionals was also refused protection.[44] Although a game show was judged to be an original compliation of well-known elements and protectable by copyright. However, the infringement action failed since the similar programme was judged to only take common features common to all game shows.[45]

So, like the United Kingdom and the United States more complex TV formats could be protected as compilations of ideas but this protection is paper-thin and any case dealing with a copycat which is similar may fail.

Contrasting the United States, French and United Kingdom approaches to unfair competition

All three countries protect against the more classic form of unfair competition that creates confusion with a competitor: disloyal competition (France), § 43a Lanham Act (United States) and passing off in United Kingdom. In respect of TV formats, a confusion-only based action provides weak protection since audiences may not be confused by copycat programmes where a TV format creator's substantial investment and effort has been appropriated.

Article 10 bis (2) Paris Convention does not require a competitive nexus to establish unfair competition. Although there is no requirement for a competitive relationship under the United Kingdom's law of passing off, a common field of activity makes it easier to establish likely misrepresentation. [46] Similarly s.34a Lanham Act if the parties are competitors less evidence is required to find likelihood of confusion. These US and UK laws may therefore arguably be in breach of the Convention by favouring claims with a competitive relationship. French disloyal competition requires a competitive relationship however its broad law of parasitism has no such requirement and ensures it complies with the Paris Convention. The US law of misappropriation is unclear on this point, it was not a requirement in *INS* case[47] but that featured competitors. The *Motorola* case[48] 5 step test proposes a requirement of a direct competitive relationship arguably in breach of Paris Convention intentions. As per the paragraph on *French Unfair Competition* above, it may be hard to prove a competitive relationship in TV format disputes.

Only the United States and France protect against misappropriation-type behaviour. The United States gave hope with its initial *INS* decision as a basis for misappropriation in 1918 however this has been subsequently narrowed by various pre-emption cases. It is now unclear whether the US pre-emption principles regarding copyright would prevent protection of TV format rights under state laws against misappropriation. France has the widest approach when comparing the three jurisdictions above. The broad scope of the laws of parasitism in particular protects against taking another's distinctive achievement with no requirement of confusion and was applied successfully in the *Heroes' Night* case.[49]

36. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993
37. *Saranga Production v Canal Plus* Paris Court of First Instance, September 7, 2005 unpublished; P. Marcangelo-Leos, "Case Summary" [2005] I.R.I.S.10:12/22.
38. O. Banchereau, "What's in a format—the protection of television programme formats in France" (Copyright World, February 2006).
39. J. Coad J and E. Adams, "French Court Gives Protection To Tv Format: *Saranga Production v Canal Plus*" *http://www.ifla.tv/saranga.html* [Accessed January 24, 2009].
40. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993
41. P. Kamina *Film Copyright in the EU* (CUP, 2002) p.82.
42. P. Kamina *Film Copyright in the EU* (CUP, 2002) p.77.
43. Paris Court of Appeal, October 10, 1975.
44. Paris Court of Appeal February 12, 1992.
45. Paris Court of Appeal March 3, 1998.

46. R.W. de Vrey, *Towards a European Unfair Competition Law: a clash between legal families. A comparative study of English, German and Dutch law in light of existing European and international legal instruments* (Leiden/Boston, Martinus Nijhoff Publishers, 2005) p.235.
47. *INS v Associated Press* 248 US 215 (1918).
48. *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).
49. *TF1 SA v Antenne 2* (1993) E.L.R. E-63, Cour d'Appel de Versailles (123rd chamber) March 11, 1993

Additional requirements

A general law of misappropriation could be too wide to protect intangibles such as TV formats unless there are some additional requirements to ensure only certain forms of trading are restricted. Factors suggested include:

1. the importance of the work to the public interest (Dworkin)[50];
2. the efforts invested by the creator and the copier (Dworkin)/plaintiff collects information at some cost (*Motorola*) [51];
3. the information is time-sensitive (*INS/Motorola*)[52];
4. the intensity of the copying (Dworkin)[53];
5. the mental state of the copier (Dworkin, Kamperman Sanders, Gordon)[54];
6. the existence of alternatives of copying (Dworkin)[55];
7. the defendant's use of the information is free-riding (*Motorola*)[56];
8. the result of the copying on economic investment (Dworkin)/ the use is not equivalently valuable to the plaintiff over the long run (Gordon)[57];
9. the defendant's use is in direct competition (*Motorola*); takes sales from a plaintiff's actual or expected market (Gordon)[58]; and
10. free-riding would reduce incentive to produce on the plaintiff such that the existence of the product/service was substantially threatened (*Motorola*)/ asymmetrical market failure (Gordon).[59]

Factor 1: it is submitted that importance of the work is not a helpful factor since a work could become valuable at a later stage. Also who is to decide public value? Would the entertainment value of *Big Brother* or the intellectual value of *Mastermind* be regarded as sufficiently important?

Factor 2: considering economic justifications for protection, greater effort as an additional factor should gain more protection. Further, the user's lack of effort (Factor 7) should add weight to a creator's protection under misappropriation. However, the existence of alternatives to copying is vital (Factor 6). Whilst this may mean the first to create a particular intangible product is less protected, unless a TV format is a new genre, most creators should be able to develop alternatives.

Factor 3: there is a strong argument to protect intangibles that have a value which is time-sensitive. A TV format would be ''hot'' for as long as it is not broadcast.

Factor 4: is a difficult area since the intensity of the copying is an approach more akin to copyright infringement. It is proposed that the focus should be on the claimant's investment to ensure it is an action based on misappropriation and not copyright infringement by another name.

Factor 5: is a valid restriction and would be workable for TV formats. A user should be aware he is copying a format and it would help to limit the action.

Factors 8–10: we have seen in the United States that it may be difficult to prove that the existence of the product/service was substantially threatened . It should not be necessary for failure (or a substantial threat) to justify protection. Further, to require direct competition or taking sales from a plaintiff's actual or expected market overly restricts protection. On economic grounds, to provide an incentive to create should surely include the right to reap the benefit of all uses. A creator would be more motivated to create TV formats by the likely revenues if he/she knew that all revenues derived from their format were rightly theirs including unforeseen markets.

The problem with misappropriation is in drawing the line between protecting an investment that leads to the development of a fully fledged format and generic ideas and themes.

Conclusion

Copyright

Copyright may not be the best legal mechanism to protect TV format rights due to (1) the international differences in treatment of originality as a threshold for works that gain copyright protection and (2) the international differences in subject matter that can be classed as copyright works. First, in respect of originality, for borderline copyright works such as TV formats, it is difficult in practice to find a dividing line between generic ideas within a TV

50. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184.

51. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184. and *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).

52. *INS v Associated Press* 248 US 215 (1918); *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).

53. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184.

54. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184. and A. Kamperman Sanders, *Unfair Competition law, the Protection of Intellectual and Industrial Creativity* (Clarendon Press, 1997) and Gordon "On owning information: Intellectual Property and the Restitutionary Impulse" [1992] 78 Virginia L.Rev 149 p.223.

55. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184.

56. *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).

57. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184.and Gordon "On owning information: Intellectual Property and the Restitutionary Impulse" [1992] 78 Virginia L.Rev 149 p.223.

58. *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997) and Gordon "On owning information: Intellectual Property and the Restitutionary Impulse" [1992] 78 Virginia L.Rev 149 p.223.

59. *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997) and Gordon "On owning information: Intellectual Property and the Restitutionary Impulse" [1992] 78 Virginia L.Rev 149 p.223.

format and an original copyright work. This is further complicated by the differing requirements for originality in the United States, United Kingdom and French copyright laws. Since there is no underlying definition of originality in Berne Convention,[60] it is unlikely to be harmonised internationally in the near future. Secondly, when regarding subject matter, while art.2(1) Berne Convention[61] has a broad definition of subject matter (in the literary, scientific and artistic domain), France and the United States have open lists but the United Kingdom has a closed list which does not specifically mention TV format rights.

Sui generis right

Within the European Union, certain intangible properties have been granted sui generis protection like databases.[62] The problem with creating sui generis rights is that rights in different intangible properties become protected on a list basis. Unless there is substantial lobbying from the TV Industry, it is unlikely any sui generis rights will be created for TV formats and it is submitted that creation of more sui generis rights should be avoided.

Unfair competition law

In the absence of effective copyright protection and in order to avoid the creation of more sui generis rights, it is proposed that unfair competition law is a more appropriate legal mechanism to protect TV formats. This is because unfair competition laws can be extended to protect investment, e.g. in time, money and effort to create a TV format as opposed to any requirement that the finished product achieve a certain threshold (of originality). However, it is not without difficulty. Whilst there is at least a definition in art.10bis (2) the Paris Convention, there is uneven application of the Paris Convention in national laws.[63] For TV formats to be protected internationally, protection for misappropriation is required, i.e. without any confusion requirement. It is acknowledged that heavyweight lobbying is required for any amendment to the Paris Convention (or related international conventions such as TRIPS) and that this may not necessarily be lobbying from the TV industry alone but may benefit the TV industry.[64] Should an opportunity arise for amendment of the Paris Convention, it is proposed that the Paris Convention be confirmed as protecting unfair competition without the need for confusion.[65] This would help towards harmonisation of the laws of the United States, France and United Kingdom covered in this article with respect to unfair competition. A requirement for laws protecting against misappropriation could be added to art.10 bis (3) together with factors 2–7 above to limit the action. Otherwise, it is acknowledged that such protection of misappropriation without any requirement of confusion could hinder fair competition. A lesser term could be introduced to protect intangibles such as TV formats under misappropriation, e.g. 20 years. Or an even shorter holdback period could be offered to provide protection for the initial investment by providing creators with the time to release products into the marketplace. For TV format creators this would give time to: (1) sell the programme abroad (2) make programmes in various territories and (3) broadcast before copycat versions are allowed into the market. Furthermore, member countries could be required to introduce a system of registration, compulsory licensing and compensation after such holdback period to provide a further income stream to creators. In TV this could provide a further income stream to TV format creators and help clarify the extent to which their TV formats are protected. If a holdback and compulsory licensing were introduced then creators would arguably gain some benefit from uses that he/she did not foresee. Such a system would provide a better incentive than one in which their work is taken for other markets with no protection or benefit in return.

An initial holdback period in TV could be 18 months (an average time to make, sell and broadcast a TV programme). Perhaps a TV industry body, e.g. PACT in the United Kingdom or FRAPA (the international association) could police this right like other collecting societies and take a percentage of the fees to cover costs?

Substantial long-term lobbying and/or other political impetus will also be required for an EU Directive or Regulation covering unfair competition. At present EU member states have widely differing unfair competition laws, e.g. France and the United Kingdom detailed above. However, should the European Union harmonise unfair competition laws, it could benefit the TV industry and help to protect TV format rights. Henning-Bodewig and Schricker suggest harmonising unfair competition law in the European Union. They suggest a general clause and a list of types of unfair competition.[66] Harmonisation would help protect TV format rights if it includes misappropriation. Although any list approach should be non-exhaustive to allow for new forms of unfair competition including those that affect TV formats.

Like the emperor who couldn't see the cloth, TV producers cannot ensure that their TV format rights exist in each jurisdiction but pretend all the same that the rights exist. For a global format market worth EURO 6.4 billion in 2002/4, the economic justifications for providing greater protection are paramount. However, any change to either Paris Convention (or closer to home, to EU legislation) as proposed above will require substantial lobbying from industries likely to benefit from harmonised laws of unfair competition including the TV industry.

60. Berne Convention for the protection of Literary and Artistic Works 1886.

61. G. Dworkin, "Unfair Competition: is it time for European harmonisation?" *Essays in honour of W. Cornish, Intellectual Property in the New Millennium* edn. Vaver and Bently (CUP, 2004) p.184. and *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).

62. Directive 96/9 on the legal protection of databases [1996] OJ L77.

63. Paris Convention for the Protection of Industrial Property 1883.

64. Paris Convention for the Protection of Industrial Property 1883; Agreement on trade related aspects of Intellectual Property Rights including Trade in counterfeit goods (TRIPs) 1994.

65. *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997) and Gordon "On owning information: Intellectual Property and the Restitutionary Impulse" [1992] 78 Virginia L.Rev 149 p.223.

66. *INS v Associated Press* 248 US 215 (1918); *NBA v Motorola* 105 F 3d 841 (2nd Cir 1997).and Henning-Bodewig and Schricker (2002) p.274.