

The Reality of It: Consideration of intellectual property rights relating to reality television formats.

Submitted in partial fulfilment of the requirement for the degree LLM

by

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## Abbreviations

ABC	-	American Broadcasting Company
BBC	-	British Broadcasting Corporation
CBC	-	Canadian Broadcasting Corporation
CBS	-	Columbia Broadcast System
FRAPA	-	The Format Recognition and Protection Association
INS	-	International News Service
NBC	-	National Broadcasting Company
PPA	-	Performers Protection Act
SABC	-	South African Broadcasting Corporation
UK	-	United Kingdom
UKUO	-	The United Kingdom Ukulele Orchestra
UOGB	-	The Ukulele Orchestra of Great Britain
USA/US	-	United States of America
UWG	-	Gesetz gegen den Unlauteren Wettbewerb (Unfair Competition Act)
ZDF	-	Zweites Deutsches Fernsehen (Second German Television)

# 1 Introduction

Today, arguably the most dominant form of television entertainment is *formatted TV* programmes or rather *reality TV*.<sup>1</sup> So much so, that dedicated lifestyle channels like *BBC Lifestyle*, *TLC*, *E!* and, more locally, *Vuzu* and *Via* are specifically designed to host ‘reality’ type programmes. These channels get more popular every year and the business of buying and selling reality shows keeps on growing despite the initial anticipation of its quick demise.<sup>2</sup>

South Africa was slow to embrace the television revolution, only introducing television and beginning to broadcast in the mid 1970’s and then offering just one channel for a couple of hours per day, delivered by the SABC, but this industry has grown rapidly in the past 40 years.

Although, there has been a rise in South African made programming now available, many of the programmes currently available in South Africa were actually created or produced, for and by Europe or North America.<sup>3</sup>

Licences to broadcast reality TV programmes can be bought by South African broadcasters as complete episodes and series to air on local channels or the rights to reproduce local versions of these programmes can be obtained by producers. In acquiring the rights to reproduce a programme the purchaser obtains the *format* of the show it wishes to reproduce.

Format-based (reality-based) shows seem like a goldmine at first, with no professional actors as participants work for free or very little payment, having no need for professional writers or many other support staff, and a low initial investment creating very low risk for producers.<sup>4</sup> But, there has been and remains one problem that continues to plague this industry. Reality shows are easily imitated<sup>5</sup> leaving producers and broadcasters to try and protect their

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<sup>1</sup> Deery (2004) *Popular Communication* 1.

<sup>2</sup> *Idem* 2.

<sup>3</sup> Mytton (2017) *International Journal of Communication* 34.

<sup>4</sup> Deery (2004) *Popular Communication* 3.

<sup>5</sup> The word ‘imitate’, although capable of being used synonymous with copy, means “to take or follow as a model” seems to better describe the situation present in the format industry. It does not often happen that a format is exactly copied,

investments.<sup>6</sup> With the expansion of this genre and the rise of private broadcast channels it is becoming more noticeable that some shows overlap in format and idea.

A common practice in the TV format industry was made evident in 2008 when an office memo from one of ABC's executive vice presidents was leaked to the public. The contents thereof encouraged employees to bring foreign formats to ABC Studios in order for them to use the formats without paying any licensing fees.<sup>7</sup>

The memo states that "often times what is appealing in the format may be nothing more than a general underlying premise, which, in and of itself, may be no reason to license the underlying property".<sup>8</sup> The EVP then goes on to say that, there are many reasons to "carefully scrutinize entering into a transaction based on an underlying format".<sup>9</sup> Some of the reasons listed are that format rights holders might seek some form of creative control or involvement; the significant costs of entering into a license agreement will have an impact on the production budget; and a large amount of the profit will have to go to the format creators.<sup>10</sup>

The recognition of property rights in formats, by members of the industry, became apparent through the leaked memo. It also became clear that there exists a common practice of ignoring this right in order to advance one's own competitive position. This memo leaking out to the public was interpreted as a sign that ABC deemed it appropriate to imitate TV formats, without authorisation from the creators.<sup>11</sup>

A common misunderstanding in the industry is that copyright protects the underlying idea, but in truth copyright protection only extends to the expressions of ideas.<sup>12</sup> These expressions consist of scripts or scenarios, such as written

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but it is more likely that an almost identical format will be created by using the elements of an original format as a model. For this reason, the word 'imitate' is more likely to be used in discussions dealing with formats.

<sup>6</sup> Raygor (2009) *Media Law Resource Centre* 99.

<sup>7</sup> Nikki Finke (2008) <http://deadline.com/2008/07/bombshell-abc-studios-memo-a-blueprint-to-rip-off-foreign-tv-series>.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Bechtold (2013) *Michigan State Law Review* 455.

<sup>12</sup> Choi (2015) *The Conversation* <https://theconversation.com/reality-bites-when-copyright-law-and-reality-cooking-meet-only-the-lawyers-win-46006>.



outlines of movies, novels, or stage directions giving details of the plots and individual scenes<sup>13</sup> as well as the recording and broadcast of a show.

This means that the concept incorporated in the format that forms the basis of a reality TV show can be reused by others, but not the elements reduced to a fixed form of literary work, recording or broadcast.

So far this has not been an issue in South Africa, but as more channels emerge, it is interesting to look at how format disputes have been dealt with in other jurisdictions and how our law might offer assistance should such disputes arise.

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<sup>13</sup> *Ibid.*



## 2 Formats

### 2.1 What are Formats?

Formats are hard to place in a single definition. It has been said that a format is any show that anyone is willing to pay for, while others believe that there can be no such thing as a format since ideas cannot be protected.<sup>14</sup> The industry, however, disagrees with this view, and believes that formats are not merely made out of ideas, but combine a great deal of expertise. Lyle<sup>15</sup> defines a format as “the ordering of the television elements such that a distinctive narrative progression is created”. While Chalaby defines a format as “a show that can generate a distinctive narrative and is licenced outside its country of origin in order to be adapted to local audiences”.<sup>16</sup> In another of his many articles trying to pin down what exactly a format is, Chalaby explains that “a good format creates and organises a story in a fashion that is not dissimilar to scripted entertainment”.<sup>17</sup> The format should have ups and downs, tension, conflict, twists and drama. A format is thus the engine of a show designed to create drama and produce a story line.<sup>18</sup> The Format Recognition and Protection Association<sup>19</sup> (FRAPA) explains that a successful format is the “unique combination of content, characters/hosts, pace, music, lighting and stage/set design” the creation of which takes “substantial skill and resources”.<sup>20</sup>

Gottlieb<sup>21</sup> explains that finding an agreed legal definition for formats is essential, because at this point in time court decisions regarding formats “reflect a disordered and random approach”. In 1990 the UK attempted to provide a legal definition for formats.<sup>22</sup> This definition consisted of two parts: *format proposal* defined as a recorded plan for a programme format and *format programme* defined as a television programme created to be repeated and recognised as a series,

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<sup>14</sup> Chalaby (2011) *European Journal of Communication* 294.

<sup>15</sup> David Lyle, founder of the Format Recognition and Protection Association; Chalaby (2011) *European Journal of Communication* 294.

<sup>16</sup> Chalaby (2012) *Media, Culture & Society* 37.

<sup>17</sup> Chalaby (2011) *European Journal of Communication* 294.

<sup>18</sup> *Ibid.*

<sup>19</sup> FRAPA is the protective trade body which aims to combat TV format imitation, more on this origination will follow below on page 15.

<sup>20</sup> Singh (2011) *The FRAPA Report* 10.

<sup>21</sup> Gottlieb (2011) *IDEA* 3.

<sup>22</sup> *Idem* 4.

possessing a certain level of originality.<sup>23</sup> This attempt, however, failed due to criticism deeming the definition ambiguous and not providing a useful base for analysis.<sup>24</sup>

The creation process might help to better understand the concept of a format. The process consists of four stages: 1) the program *idea*; 2) the *paper format*; 3) adding production and business knowledge to produce the *programme format*; 4) broadcasting the *episodes*.<sup>25</sup>

It is in step two that the idea on which the format is based gets reduced to a material form, by producing a *paper format* consisting of a written description of the developed concept and a detailed layout of the show.<sup>26</sup> This embodies a study of the idea and acts as the starting point of the show's production.

Thereafter technical and production elements are added and the *programme format* or *format bible* comes into existence.<sup>27</sup> It is at this stage that many different elements are combined to create a viable TV show. Some of these elements will come from the paper format, including the rules, name and location, and others are production knowledge such as suitable music, set designs, choosing suitable participants, camera angles and more.<sup>28</sup> It is a combination of these elements that form the nature and structure of the show,<sup>29</sup> creating a mould to ensure the format's ability to be recreated in different territories. In the final stage episodes based on the format bible are recorded and broadcast to the public.<sup>30</sup>

In a discussion of what a format is and how to create one oneself, two award-winning format creators explain that a format “refers to a show that relies on repeatable, (so called) tent-pole moments that occur at the same point in every episode”.<sup>31</sup> It is also explained that some of the shows that seem to have no

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<sup>23</sup> Gottlieb (2011) *IDEA* 4.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Idem* 5.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> <http://www.scriptmag.com/features/writers-guide-to-pitching-reality-tv>.

format, like those following ordinary people in their day to day lives, usually have a 'hidden format'.<sup>32</sup>

A hidden format is explained as being a story engine that ensures every episode would still have the same structure.<sup>33</sup> An example of this would be a travel show following a famous chef around. In the first part of the show the chef would talk to locals and show the viewer certain restaurants in the town he is visiting. Thereafter, in an interview style, he would talk about what he finds interesting about the place featured in the episode and maybe share a childhood story or some other personal memory. And finally, the last part of the show would feature the chef creating a dish from the inspiration he found in the places he visited or memory shared during the episode. Each episode would follow the same structure of events, but there would not be control over how the events will play out. The structure of events is the 'tent-pole moments' which the format and programme are comprised of.

This type of reality TV programme is a hybrid between having a format with set directions and real-life events, meaning that even programmes that seem to consist of just following people around still have some kind of underlying work on which it is based.

It is my view that a format should for legal purposes be, as was attempted in the UK, defined in two parts. First, it is a written document (format bible) containing a detailed outline and production know-how to create the programme. Second, the format can be identified in the sequence that is visible in the produced show based on the format bible.

## ***2.2 Format Trade Industry***

For the purpose of this dissertation, it is important to understand not only what a format is, but what is meant by the format trade industry.

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

The format trade industry originated in the late 1940's with cross-border adaptations of sound broadcasts from the USA that were imitated by radio stations in the UK and Australia.<sup>34</sup> It is known that stations bought the scripts for the American dramas they were adapting but it is unlikely that format licenses were acquired where the ideas of the 'light entertainment' genre were used.<sup>35</sup> This genre included talent shows, spelling contests and other programmes similar to what we know today as reality TV.

The first format to be 'traded' and aired on TV was the US programme *It Pays to Be Ignorant*. The BBC bought the rights to air this programme on its radio station in 1942 and made a one-time TV broadcast of their version called *Ignorance is Bliss*, which was screened at the Paris Cinema in London in 1947.<sup>36</sup>

After the success of the *It Pays to Be Ignorant*-format came *Twenty Questions*, a quiz show that was aired on radio and later on TV in America.<sup>37</sup> The programme was again sold to the BBC as a radio show, but despite its popularity never made it to TV because of a dispute over the rights.<sup>38</sup>

The disputes regarding formats were mostly not about the fees, but about the rights vested in the format.<sup>39</sup> The BBC could not internalise the concept of paying for something as intangible as the concept of a show.<sup>40</sup> With *Ignorance is Bliss* there were scripts forming part of the format and even though these scripts were hardly ever referred to when adapting the program, the BBC had no objection to paying a fee for obtaining them.<sup>41</sup> The BBC was however heavily opposed to paying a licence fee for the programme itself.<sup>42</sup> This was because the BBC did not want to broadcast the show under a licence. In regard to this the BBC asked for any ambiguity about the nature of the payments to be removed and that the fee they were paying was exclusively for the scripts provided by the Americans.<sup>43</sup>

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<sup>34</sup> Chalaby (2012) *Media, Culture & Society* 37.

<sup>35</sup> *Idem* 38.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Idem* 39.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

A similar situation arose when the BBC purchased the rights to *Twenty Questions*. The BBC emphasised that it was happy to pay a fee as long as it was not “akin to a royalty payment”.<sup>44</sup> There were no scripts accompanying this programme and the BBC’s legal department insisted that this fee would be a payment for obtaining the US recordings. After a few months, the BBC wrote a letter to the Americans saying that it had concluded that no copyright existed in either English or American law in the title, plan, idea or form of the programme.<sup>45</sup> Enclosed was £150 for the service of bringing them the idea of the programme in a form suitable for broadcasting.<sup>46</sup>

The US creators were not impressed with the BBC’s actions and argued that even if there was no copyright in the idea, copyright did exist in the format.<sup>47</sup> The BBC approached one of its lawyers based in New York, and he agreed that this type of right may exist.<sup>48</sup> The BBC was advised to tread with caution as the format owner could bring a lawsuit against them on grounds including unfair competition and copyright infringement.<sup>49</sup> He further warned that at that time in several cases, the court recognised the recovery of compensation for “a combination of ideas expressed in a concrete” original formula.<sup>50</sup> It was emphasised that mere ideas cannot be subject to copyright, but the particular method of portrayal of that idea is subject to copyright, meaning that there could be literary piracy even without making use of the actual dialog.<sup>51</sup> This dispute was settled by an agreement that made no mention of copyright and included a payment of £1000 for the sound broadcasts of *Twenty Questions*. The show could never be adapted for television in the UK as the BBC did not admit to there being any TV rights attached to the programme in the settlement.<sup>52</sup>

A year after this settlement was reached, in 1951, came the first format that was traded as a TV show. *What’s My Line?* first aired on the US network NBC and a year later the format debuted on the BBC.<sup>53</sup> With this show the BBC did sign a

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<sup>44</sup> Chalaby (2012) *Media, Culture & Society* 39.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Idem* 40.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Idem* 39.

licensing agreement before the programme's first broadcast. The first clause of the agreement stated that the BBC was granted the right to broadcast 26 single performances on TV and it paid £300 for this right.<sup>54</sup> Other rights, including film rights, stage rights, sound broadcasting rights, foreign rights and rights to publication were reserved.<sup>55</sup>

This contract regulated the first transaction of TV format trading and established the legal foundations of the format trade industry as they are today.<sup>56</sup> It was the first time that a broadcaster agreed to pay for the idea and package of a programme as opposed to something tangible like scripts, giving birth to the concept of a format.<sup>57</sup>

This is how the way for the modern trade industry as it is today, was paved.

Skipping forward 40 years to the boom of reality TV in the 1990's: Since the early 1990s, reality television has exploded and became a multibillion-dollar industry.<sup>58</sup> By the turn of the century the vitality of this industry was confirmed by what is known as the four super formats: *Who Wants to Be a Millionaire?*, *Survivor*, *Big Brother* and *Idols*.<sup>59</sup> These programmes reached global success by being adapted in more territories than any previous TV format.<sup>60</sup>

The format trade industry that came from the humble beginning of an agreement between NBC and the BBC now had protective trade bodies, award ceremonies and super formats aired around the world.

The industry expanded resulting in the creation of production companies at which new TV genres were created that could easily be formatted and localised to new

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<sup>54</sup> Chalaby (2012) *Media, Culture & Society* 40.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Any moderately successful format is expected to sell in the USA, Australia, the 'Big Five' European markets (Italy, Spain, France, Germany and the UK), Benelux and across Scandinavia. The best performers sell over 30 licences and cover all world regions. The number of companies involved in the production and distribution has gone up from a handful to a few hundred. An event focusing on formats organized in Cannes the day before MipTV in April 2010 – the world's largest international TV programming market – was attended by more than 300 companies from 54 countries. (Chalaby (2015) *Media, Culture & Society* 472).

<sup>59</sup> Chalaby (2015) *Media, Culture & Society* 472.

<sup>60</sup> *Ibid.*



territories.<sup>61</sup> At this time, the hub of TV formats moved from the US to Europe. The demand for formats also grew as the number of broadcasters increased. Broadcasters realised that local programming offered the best ratings but they lacked the expertise to create such programming resulting in the “expansion and globalisation of the international format flow”.<sup>62</sup>

It was then that the first two global format production companies were formed. Joop van den Ende and John de Mol formed *Endemol*<sup>63</sup> a Dutch production company, which soon became the world’s largest independent production company.

*Pearson Television*<sup>64</sup> was also formed at this time. Specialising in media assets, the first in a long line of production companies they acquired was *Thames Television*<sup>65</sup> in the UK, and after realising that the growth of production companies came from international transactions the company expanded its business to Asia, Latin America, the US and Europe.<sup>66</sup> One of the most significant acquisitions by *Pearson* was *All American Communications*<sup>67</sup> the value of this production company resided in *Fremantle*<sup>68</sup> which it had acquired only three years earlier.<sup>69</sup> Within a few years *Pearson* became the biggest producer of formats in the world. The head of *Pearson’s* TV division fully understood the value of TV formats and the overseas expansion thereof and by 2000 the company was selling formats in 36 territories.<sup>70</sup>

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<sup>61</sup> Chalaby (2012) *Media, Culture & Society* 45.

<sup>62</sup> *Ibid.*

<sup>63</sup> Back then *Endemol Entertainment International BV*, but as of 5 April 2011, the *Endemol Shine Group* operates as a subsidiary of *Twenty-First Century Fox, Inc.* (<https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=855207>).

<sup>64</sup> *Pearson Television* was created in 1996 and named *Pearson plc.* after of its founder/CEO Ian Pearson (a British-based media conglomerate) (<http://www.closinglogos.com/page/Pearson+Television+%28UK%29>).

<sup>65</sup> *Thames Television PLC* (<https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=5704745>).

<sup>66</sup> Chalaby (2012) *Media, Culture & Society* 46.

<sup>67</sup> *All American Communications, Inc.* known as *All American Television*, was a television syndication company active from 1981 was purchased by *Pearson plc.* and reincorporated as *Pearson Television* in 1997 (<http://www.closinglogos.com/page/All+American+Television>).

<sup>68</sup> *Fremantle Corporation*, was a British-based production company founded in 1952 by Paul Talbot. *All American Communications* acquired *Fremantle* in July 1994. *All American Communications* was then acquired by *Pearson plc.* in 1997 (<http://www.closinglogos.com/page/Fremantle+International+%28UK%29>).

<sup>69</sup> Chalaby (2012) *Media, Culture & Society* 46.

<sup>70</sup> *Ibid.*

After the expansion of these two companies there came an increasing number of TV production companies when the value of TV formats became apparent to others.

Another shift in the industry came when formats started to expand beyond game shows to embrace the “emerging genres of reality television and factual entertainment”.<sup>71</sup> Today the factual entertainment genre is the prime genre of the format industry in both number of exported episodes and exported productions.<sup>72</sup>

FRAPA also came into existence in 2000 and explains the different categories into which formats of reality TV can be placed. The oldest of the categories is *game shows* which include programmes such as *Who Wants to Be a Millionaire?*, *Family Feud*, *The Weakest Link* etc. Next is *factual entertainment* with a very broad scope. It includes the life swap genre (*Faking It*, *Trading Places*, *Wife Swap*, etc.), makeover/coaching (*How to Look Good Naked*, *Supernanny*, etc.) and observational reality programming (e.g. *Come Dine With Me*, *Who Do You Think You Are?*). Then there is *reality*, this category essentially consists of game shows shot on location such as *Big Brother*, *Survivor*, *The Apprentice* and *The Bachelor*. Lastly there are *talent contests*, where judges are in search of the ‘next big thing’ and voting is mostly done by the public like *Pop Idol*, *Britain’s Got Talent*, *Strictly Come Dancing* etc.<sup>73</sup>

A format purchaser has one of two options, buying the show ‘as is’, meaning that what is bought will be the completed episodes, or buying the format in the form of a format bible to produce a localised version of the show.<sup>74</sup> In recent years the industry has shifted from a licensing agreement model to an international production model.<sup>75</sup> Previously format owners would sell the rights to their formats to distribution companies who then sold a licence to either a broadcaster or local production company.<sup>76</sup> Now, an increasing number of format owners keep the format rights and produce their own shows in territories where they have facilities.<sup>77</sup>

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<sup>71</sup> Chalaby (2012) *Media, Culture & Society* 47.

<sup>72</sup> *Ibid.*

<sup>73</sup> Chalaby (2011) *European Journal of Communication* 303.

<sup>74</sup> Gottlieb (2011) *IDEA* 5.

<sup>75</sup> Chalaby (2015) *Media, Culture & Society* 463.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

For this dissertation, I will focus on aspects relevant to purchasing a format in its written form as opposed to purchasing already produced episodes.

Moran<sup>78</sup> defines the acquisition of a format (in its written form) as “practical, trade knowledge made available in licensing agreements”. When a format gets traded, the buyer does not only acquire the written description of the show itself and the ‘stage directions’, but also a transfer of know-how.<sup>79</sup>

The purchaser receives a format bible that contains all of the elements that contribute to the reproduction of the programme<sup>80</sup> and consultant producers. These format bibles teach the local producers everything they need to know about the production of the show.<sup>81</sup> Format bibles can consist of more than 100 pages and include style guides, initial graphics, the signature theme music score, lighting arrangements, set designs, run throughs, budgets, casting procedures, selection of contestants and hosts and all other technical know-how associated with the production of the show.<sup>82</sup>

Format bibles form a complex product that has inherent value to a licensee.<sup>83</sup> Production models set out in format bibles are fully refined, short cuts have been found and mistakes have been eliminated, leaving the purchaser with the best possible version of the format.<sup>84</sup> For this reason, purchasing an already tried and tested format holds more benefits to broadcasters.

In an extremely competitive environment such as the TV industry, formats enable networks to offer local programming and improve ratings at a very low risk as they already have knowledge that the same format has been successful in other markets and territories.<sup>85</sup> New formats are expected to outperform the shows they are replacing, to be adaptable to new markets and territories, and to be as versatile as possible regarding length and slot times.<sup>86</sup>

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<sup>78</sup> Moran (2013) *Critical Studies in Television* 10.

<sup>79</sup> Chalaby (2015) *Media, Culture & Society* 465.

<sup>80</sup> Keinonen (2016) *Media, Culture & Society* 2.

<sup>81</sup> Chalaby (2011) *European Journal of Communication* 295.

<sup>82</sup> Singh (2011) *The FRAPA Report* 12; Chalaby (2011) *European Journal of Communication* 295.

<sup>83</sup> Chalaby (2011) *European Journal of Communication* 295.

<sup>84</sup> Chalaby (2015) *Media, Culture & Society* 465.

<sup>85</sup> *Idem* 472.

<sup>86</sup> *Ibid.*

The format industry is dynamic and because it has grown at such a rapid pace the underlying legal aspects that govern format trade and format protection have been unable to keep pace. According to Bechtold<sup>87</sup> format trade has become a truly global business, format imitation is a widespread phenomenon in today's television industry, and networks turn to courts to determine whether formats can benefit from legal protection against imitation.

### 2.3 Legal Aspects

In theory, an intangible product such as a format, that seems to have no clear legal protection should be able to be copied freely and have no economic value at all.<sup>88</sup> This, however, has not stood in the way of the globalisation and impressive expansion of the format trade industry.

The format trade industry is fascinating and puzzling but even with its booming global market, formats are still being imitated without authorisation within and across networks and broadcasting territories.<sup>89</sup> In some instances producers and broadcasters scan the world for new formats and as this information is easily accessible, formats are reproduced without any licence agreement with the owner or original producer.<sup>90</sup>

For instance in the leaked ABC memo, discussed above,<sup>91</sup> employees were instructed to make their own independent evaluation of whether “the license of the property is necessary or appropriate” when they receive any communication from the owner of a foreign format, or when they came across a foreign format on their own.<sup>92</sup> At the end of the memo, employees were assured that ABC is “actively, competitively and aggressively engaged in developing product based on foreign formats” and that in this regard they should only go into negotiations if it

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<sup>87</sup> Bechtold (2013) *Michigan State Law Review* 455.

<sup>88</sup> Kretschmer (2010) *Idols Case Study* 14.

<sup>89</sup> Bechtold (2013) *Michigan State Law Review* 455.

<sup>90</sup> Kretschmer (2010) *Idols Case Study* 14.

<sup>91</sup> See *Introduction* chapter page 4 above; <http://deadline.com/2008/07/bombshell-abc-studios-memo-a-blueprint-to-rip-off-foreign-tv-series>.

<sup>92</sup> *Ibid.*

is determined by their independent analysis that the underlying rights to a format are required.<sup>93</sup>

Actions like those described in the leaked memo have resulted in numerous lawsuits over the IP rights pertaining to reality TV formats.

The early 2000s were the height of reality TV production and also brought about most lawsuits involving reality TV formats. While the industry still faces countless hardships, format rights have come a long way. Since the turn of the century format owners have gradually become more successful in protecting their formats.<sup>94</sup> Not only are courts starting to rule more in the favour of format owners,<sup>95</sup> but a wider range of options regarding protection is now available.

As the protective trade body of the format industry, FRAPA's main goal is to combat TV format imitation. It has developed a code of conduct to serve as the conscience of the global format industry and supports and protects the format trade business.<sup>96</sup> The code starts off by describing FRAPA as a global organisation dedicated to understanding and respecting original formats and their creators.<sup>97</sup> The fourth point in their code of conduct states that members of the organisation pledge to not knowingly steal the creative work of others and may expect the same from others in the industry.<sup>98</sup>

FRAPA also aims to establish global industry standards and is determined to advocate for the value of original formats against theft in an industry where no consistent and clear legal regulations and definitions exist.<sup>99</sup> It urges members to respect the intellectual property of others in a sensible and lawful way and by adhering to the standards set out in the code of conduct, create an environment of shared values.<sup>100</sup>

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<sup>93</sup> *Ibid.*

<sup>94</sup> Chalaby (2015) *Media, Culture & Society* 472.

<sup>95</sup> Especially on the ground of copyright infringement; *Ibid.*

<sup>96</sup> <https://www.frapa.org/code-of-conduct/>.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

There is, however, still no simple solution to the adequate protection of formats. For as long as there are no specific statutory provisions for ‘format rights’, it should be considered to be a “bundle of proprietary rights all of which are protectable”.<sup>101</sup>

The local production of formatted TV shows only commenced in South Africa in the late 1990’s when Africa’s global connectivity increased and the demand for TV programmes rose.<sup>102</sup> With a rise in South African private TV channels and more formats purchased to be developed in our country it is clearly relevant to look at how our law could possibly approach the question of format imitation and also how the problem has been addressed in other jurisdictions and past cases.

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<sup>101</sup> Singh (2011) *The FRAPA Report* 5.

<sup>102</sup> Ndlela (2013) *Critical Studies in Television* 58.

## 3 Copyright

### 3.1 Introduction

According to FRAPA, most of the recognisable copyright works inherent in a reality TV format are identifiable and exist in the format bible, the aim of which is to set out as much detail as possible about the content and structure of a TV show.<sup>103</sup> Even if this is true for literary and artistic works, two very important copyright works in relation to formats, namely, cinematograph films and broadcasts, are not and cannot be included in the format bible. This relates to the statement that the definition of what a format is, should be made up of two parts, the format bible and the recorded programme.<sup>104</sup> The format bible is essential to cinematograph films or broadcasts as it forms the underlying work on which these works are based.

As discussed above, acquiring a TV format means acquiring a licence to remake a version of a programme in a certain territory.<sup>105</sup> This right may coexist with other licensable copyrights such as video rights, television broadcast rights and the like.<sup>106</sup> Although the structure of the programme is set out in the format bible, a large part of a reality TV programme depend on the interaction between participants. For example, programmes that have a more extensive script will enjoy greater copyright protection as literary works than programmes that require spontaneous actions and interactions between the participants.<sup>107</sup> The licensee thus essentially accepts to pay for a show's structure (the format) and this differentiates reality TV from other shows, for example sitcoms, where the buyer obtains a script.<sup>108</sup>

In 1989 in *Green v Broadcasting Corporation of New Zealand*<sup>109</sup> (*Green-case*), which will be discussed in more detail below,<sup>110</sup> it was held that there was no copyright in the format of the TV game show *per se* because it was not expressed

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<sup>103</sup> Singh (2011) *The FRAPA Report* 12.

<sup>104</sup> See *Formats* chapter, page 7 & 12 above.

<sup>105</sup> Chalaby (2015) *Media, Culture & Society* 471.

<sup>106</sup> *Ibid.*

<sup>107</sup> Singh (2011) *The FRAPA Report* 12.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056.

<sup>110</sup> See 3.2.1 *Comparative Analysis*, page 19 below.

in a sufficiently material form.<sup>111</sup> For there to be copyright in a work there must be certainty in the subject matter and Singh is of the opinion that, as emphasised in this case, the hardest part of pursuing a copyright infringement claim based on a format is to identify the type of copyright work.<sup>112</sup>

Past cases based on copyright infringement claims have failed because “the format has not been recorded or described in sufficient detail”.<sup>113</sup>

The types of copyright works that make up formats include:<sup>114</sup>

- a) literary works in the form of scripts and stage directions;
- b) artistic works such as story-boards, set designs and layouts, and graphic representations of lighting;
- c) cinematograph films in the finished production; and
- d) broadcasts of the films or of live events.

In this chapter, I will consider different categories of work and how copyright may protect aspects of a reality TV format. Even if the format as a whole cannot be protected, the various individual works that make up the format may be protectable under copyright law. I will first consider a line of format cases from different foreign jurisdictions that have been based on copyright infringement and how courts have dealt with the (alleged) copyright infringement. Thereafter, the principles of South African copyright law will be discussed and their applicability to the subject under discussion.

## 3.2 Comparative Analysis

### 3.2.1 1980 - 1999

Although in general there can be no copyright in a central idea or theme, in 1982 the Australian case of *Universal Studios v Zeccola*<sup>115</sup> (*Zeccola*-case), dealt with a novel (literary work), screenplay (dramatic work) and (cinematograph) film that had allegedly been reproduced, as a cinematograph film. It was held that copyright

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<sup>111</sup> Dean (2012) 1-27.

<sup>112</sup> Singh (2011) *The FRAPA Report* 12.

<sup>113</sup> *Idem* 10; *Green Supra* n109 at 1056.

<sup>114</sup> Singh (2011) *The FRAPA Report* 10.

<sup>115</sup> *Universal Studios v Zeccola* [1982] AIPC 90-019 (VicSC).



may subsist in the combination of situations, events and scenes that make up the expression (in a literary work or cinematograph film) of the idea. It was held that when dealing with “incidents and characters familiar in life or fiction” it is the “association, grouping and arrangement of those incidents and characters in such a manner that presents a new concept or a novel arrangement”.<sup>116</sup>

In this case it was clear that even where the underlying factors were merely generic or general ideas, if the arrangement thereof is novel, copyright could subsist, in this case, in a literary work, dramatic work and cinematograph film. This view has however not necessarily been followed in cases dealing with copyright in formats as such.

One of the very first cases regarding copyright in a format was the *Green*-case<sup>117</sup> in 1989. In this case the Privy Council decided that the format of the TV game show *in causa* was not eligible to be a dramatic work for copyright purposes, because it did not exist in a sufficiently material form. The judge found that:<sup>118</sup>

“Finding an appropriate term to describe the nature of the ‘work’ in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the question and answers in the quiz show etc.) and identified as an ‘original dramatic work’.”

The court held that:<sup>119</sup>

“There must be certainty in the subject matter of copyright; that a work must have sufficient unity to be capable of performance; and that the features of the format of a television show were unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, and therefore lacked the essential characteristic of unity.”

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<sup>116</sup> *Universal Studios Supra* n115.

<sup>117</sup> *Green Supra* n109 .

<sup>118</sup> *Idem* par 30.

<sup>119</sup> *Dean* (2012) 1-27; *Green Supra* n109 at par 40.

It was thus found that there could be no copyright in the format *in causa*.

In 1992 the case of *Hutton v Canadian Broadcasting Corporation*<sup>120</sup> (*Hutton*-case) went before the Canadian Court of Appeal of Alberta. In this case, the dispute concerned a video countdown show called *Star Chart*, which was created and co-produced by CBC and Hutton. After the show had been cancelled, CBC produced a new video countdown show, featuring the same host as *Star Chart*, called *Good Rockin' Tonight*. Hutton brought a claim for copyright infringement and argued that the format was a dramatic work.

The court came to the conclusion that a dramatic work had to include a “story or thread of consecutively related events”<sup>121</sup> and that the format *in causa* did not consist of “enough dramatic incident and a seminal storyline”.<sup>122</sup> McCormack remarked, in relation to this case, that if a format consisted only of a host “trying to be himself” presenting videos and hosting interviews and trivia contests, there is not enough dramatic incident to be regarded as a dramatic work.<sup>123</sup> Singh also observed that there could be no copyright in a format that consisted of genre based elements alone<sup>124</sup> and that had no sufficient dramatic incident or storyline.

### 3.2.2 Early 2000s

In 2000 in *Castaway Television Productions v Endemol*,<sup>125</sup> the *Gerechtshof* (Dutch Court of Appeal) found that, by applying the principles of the *Auteurswet* (Copyright Act), the format of the *Survive* (a survival game show) programme was protected under copyright.<sup>126</sup> In their assessment the court relied on the written program proposal (format bible). This document was made up of: an over view of the format consisting of seventeen pages; the rules of the game consisting of ten pages; and the production strategy consisting of fifteen pages.<sup>127</sup> It had to be determined if this document was original and existed in a sufficiently material

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<sup>120</sup> *Hutton v Canadian Broadcasting Corporation* (1989) 29 C.P.R. (3d) 398 (Alta Q.B.), aff d (1992) 41 C.P.R. (3d) 45 (Alta C.A.).

<sup>121</sup> McCormack (2010) *Juris Publishing Inc* 225; *Hutton Supra* n120.

<sup>122</sup> *Hutton Supra* n120.

<sup>123</sup> McCormack (2010) *Juris Publishing Inc* 225.

<sup>124</sup> Singh (2011) *The FRAPA Report* 15.

<sup>125</sup> *Castaway Television Productions Ltd & Planet 24 Productions Ltd v Endemol Entertainment & John De Mol Productions* 1026/00 (2002) (Translated from the Dutch version by myself).

<sup>126</sup> *Castaway Television Productions* (2002) *Supra* n125 at par 4.3.

<sup>127</sup> *Idem* par 4.6.

form.

To determine originality the court relied on the elements as set out by Castaway in the original court documents. The court and the parties involved all agreed that separately the elements were not original in terms of copyright.<sup>128</sup> The question was, however, not whether each individual element was protectable under copyright, but whether the entirety of the combination of elements form a unit that can be seen as an original work.<sup>129</sup> The court found that if taken together the elements form a specific and unique combination and deemed the *Survive*-format as a complex programme formula that was original in terms of copyright.<sup>130</sup>

The court also affirmed that the document (format bible) consisted of a detailed enough outline, that a reader could get a concrete perception of what an episode of the programme would look like.<sup>131</sup> For this reason it was found that the format existed in a sufficiently material form.

On appeal in 2004, the *Hoge Raad* (Dutch Supreme Court) again confirmed that a television format can be protected by copyright law as such<sup>132</sup> and stated that:<sup>133</sup>

“If a format consists of a combination of unprotected elements, as the format in causa, an infringement can only be involved if a similar selection of multiple of these elements are identifiable and has been adopted in a comparable way. After all, if all the elements have been copied, there is no doubt that copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved. How many elements have to be copied to constitute infringement cannot be determined in general terms, but would depend on the facts of each case.”

Therefore, a combination of specific and clearly identifiable elements could be protected if the court did not strictly limit their analysis to existing categories of

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<sup>128</sup> *Castaway Television Productions* (2002) *Supra* n125 at par 4.8.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Idem* par 4.9.

<sup>131</sup> *Idem* par 4.12.

<sup>132</sup> *Castaway Television Productions Ltd & Planet 24 Productions Ltd v Endemol Entertainment & John De Mol Productions* C02/284HR (2004) par 6 & par 8 (Translated from the Dutch version by myself).

<sup>133</sup> *Castaway Television Productions* (2004) *Supra* n132 at par 8.

copyright works.<sup>134</sup> The court, however, found that the elements from the *Survive*-format that were taken over by *Big Brother* did not amount to adaptation or reproduction and there was no copyright infringement.<sup>135</sup>

In the US, CBS sued Fox in 2001, in *Survivor Productions v Fox Broadcasting*.<sup>136</sup> This case concerned allegations that Fox had infringed CBS's copyright in the format bible (literary work) for the *Survivor* programme format (a game show featuring contestants 'surviving' on an island). The basis of the claim was that Fox's programme *Boot Camp* reproduced *Survivor's* 'significant elements'.<sup>137</sup> These elements included: the harsh and unfamiliar conditions that the contestants were placed in; contestants working together in teams; and ending each episode in a ritual ceremony where one contestant gets voted off.<sup>138</sup> The case was however settled.

In 2002 in *BVBA Habrasaje v De Vlaamse Radio- en Televisieomroep*<sup>139</sup> the Brussels Court of Appeal (Belgium) afforded copyright protection to a format in the form of a broadcast, in this case, of a radio programme series.<sup>140</sup> The claimants were a production company and the host of the programme. The broadcaster terminated its relationship with the claimants, but continued to broadcast the show, under the same name, using a different production company and host.<sup>141</sup> Some minor changes were made to the programme but most of the components remained the same. The court found that, the format of a radio show can enjoy copyright protection, as long as the elements that the programme is made up of "have been associated in an original way".<sup>142</sup> Because there was no substantial difference between the two programmes, the claimants action for copyright infringement of the format based on the original broadcasts succeeded.<sup>143</sup>

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<sup>134</sup> *Idem* par 6; Singh (2011) *The FRAPA Report* 18.

<sup>135</sup> *Castaway Television Productions* (2004) *Supra* n132 at par 6.

<sup>136</sup> *Survivor Prod. LLC v Fox Broad. Co.*, 2001 U.S. Dist. LEXIS 25512 (C.D. Cal. 2001) (Filed 11 June 2001).

<sup>137</sup> White (2004) *National Law Journal* <http://www.nationallawjournal.com/id=900005416285/TKO>.

<sup>138</sup> *Ibid.*

<sup>139</sup> *BVBA Habrasaje v De Vlaamse Radio- en Televisieomroep* (Unreported, October 15, 2002) (App (Brussels)) (Belgium) (This case is unavailable and all discussions thereof are based on articles and case comments).

<sup>140</sup> Chalaby (2015) *Media, Culture & Society* 473.

<sup>141</sup> Singh (2011) *The FRAPA Report* 19.

<sup>142</sup> Van Nuffel (2004) *European Intellectual Property Review* N61.

<sup>143</sup> *Ibid.*

Singh is of the opinion that, even though this case had a positive outcome for format creators, the success might have largely been dependant on the fact that the defendant continued to broadcast under the same name.<sup>144</sup>

CBS found itself in yet another copyright dispute in 2003, in the US case of *CBS Broadcasting v ABC*.<sup>145</sup> It was alleged that ABS's *I'm a Celebrity Get Me Out of Here!* was copied from the *Survivor* format.<sup>146</sup> In this case the judge stated that TV shows were considered to be literary works and, when comparing the underlying works, infringement could only be found if the protectable elements were substantially similar.<sup>147</sup> The court found that because both shows were a combination of well-known elements there was no copyright infringement and stated that "providing protection to a combination of generic elements without consideration of the presentation or expressions of those elements would stifle innovation".<sup>148</sup>

Thereafter in the UK in 2004, Simon Fuller, one of the original creators of the talent search programme, *Idols*, reportedly sued the producers of *X Factor* for copyright infringement.<sup>149</sup> It was alleged that each episode of the series and the series as a whole, were dramatic works protected under copyright and that *X Factor* made reproductions of the whole or a substantial part of the *Idols* episodes and series.<sup>150</sup> It was claimed that *X Factor* used the production bible from *Idols* to copy thirty technical aspects and the catchphrase '*We're looking for the X Factor*'.<sup>151</sup> Initially the producers of *X Factor* denied these allegations, but in the end this dispute was settled out of court and again no principle was set on whether episodes or a series, based on a format, would be regarded as dramatic works in the UK<sup>152</sup> for purpose of copyright protection.

The UK Copyright, Design and Patents Act<sup>153</sup> gives a very narrow definition of what a dramatic work is and states that a dramatic work "includes a work of dance

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<sup>144</sup> *Ibid.*

<sup>145</sup> *CBS Broadcasting Inc. v ABC Inc.*, No. 02 Civ. 8813 (2003) U.S. Dist. Lexis 20258.

<sup>146</sup> *CBS Broadcasting Inc Supra* n145.

<sup>147</sup> White (2004) *National Law Journal* <http://www.nationallawjournal.com/id=900005416285/TKO>.

<sup>148</sup> *CBS Broadcasting Inc Supra* n145 at 24 & 25; Raygor (2009) *Media Law Resource Centre* 109.

<sup>149</sup> Singh (2011) *The FRAPA Report* 22.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Copyright, Design and Patents Act* of 1988 Chapter 48.

or mime”.<sup>154</sup> Elam has summarised some of the standard features of dramatic works that have been identified in British case law.<sup>155</sup> One of the essential features is that a dramatic work must include “some sort of movement, story or action”.<sup>156</sup> It was later added that a “work of action, with or without music, which is capable of being performed...” would also constitute a dramatic work.<sup>157</sup> Elam further contended that a film which is “merely a recording of real life events”, such as sporting events, “may not be considered as a work of action”, but other films such as ‘docu-soaps’ may be.<sup>158</sup>

Docu-soaps are considered to be dramatic works, because the creative choices of editing and producing, to bring about entertainment and drama, turns a real-life event into a dramatic work, which takes skill and labour.<sup>159</sup> Even though films like docu-soaps simply involve filming ordinary people, there is still some form of control over their actions. As discussed above,<sup>160</sup> the format bible sets out certain instructions to be followed by the ‘actors’ used in the show and, even if the interactions between the subjects of reality TV are spontaneous, there will always be some form of stage direction to ensure that there is enough dramatic material to make the show work.

In 2004 a dispute, similar to the *X Factor*<sup>161</sup> dispute, arose in Australia in *Nine Films v Nixon TV*.<sup>162</sup> Nine Films had licenced, from Nixon, a show by the name of *Dream House*. The show featured two couples competing against each other by each renovating a house, and was given a production bible for the format.<sup>163</sup> Later, Nine Films produced a similar show called *The Block*. This show was also about couples competing in a renovation challenge, but featured four couples renovating four apartments. Nixon alleged that *Dream House* was a dramatic work and that Nine Films’ new show infringed its copyright in that work. Both parties agreed that Nixon owned the copyright in *Dream House* as a dramatic work, leaving the court to decide whether there was infringement. It was held by the court that there

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<sup>154</sup> Copyright, Design and Patents Act S 3(1).

<sup>155</sup> Elam (2015) *Entertainment and Sports Law Journal* 23.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Idem* 24.

<sup>158</sup> *Idem* 26.

<sup>159</sup> *Ibid.*

<sup>160</sup> See 2.1 *What are Formats?*, page 7 above.

<sup>161</sup> Singh (2011) *The FRAPA Report* 22; see full discussion on page 23 above.

<sup>162</sup> *Nine Films & Television Pty Ltd v Ninox Television Ltd* [2005] FCA 140467 IPR.

<sup>163</sup> *Nine Films & Television Surpa* n162 at 46; Singh (2011) *The FRAPA Report* 24.

was no infringement, because there was no scripted dialogue, the show was interactive in nature and that the similarities between *Dream House* and *The Block* were due to common elements of a renovation reality show.<sup>164</sup> The court nevertheless held that a format can constitute a dramatic work in terms of copyright.

### 3.3.3 2010 - Present

In 2010, in *Atomis Media v Televisión De Galicia*,<sup>165</sup> the Spanish Court of Appeal found that a format as such may be protected by copyright, if it is created by a human being, expressed through a medium and is original.<sup>166</sup> In this case the court came to the conclusion that, if there is a script or storyline (literary work) on which the format is based, protection should be granted subject to the format being made up of a series of elements (tent pole moments of the format), that when reduced to material form, are ordered, structured and combined in a particular way.<sup>167</sup> The elements themselves do not have to be original, only the combination thereof.<sup>168</sup>

Thus, in Spain, copyright was afforded to a combination of elements comprising a format, expressed as a literary work. If the work is combined in a predetermined way “creating a written sequence of elements that forms a skeleton” for a TV show (much like stage directions), with enough detail about how, when and where each element occurs the work will be susceptible to copyright.<sup>169</sup>

Recently in 2015, the possibility of copyright protection for a format (in this case the format was related to a stage performance) was revisited. In *Ukulele Orchestra of Great Britain v The United Kingdom Ukulele Orchestra*<sup>170</sup> it was once again demonstrated how difficult it is to protect a format as a copyright work.

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<sup>164</sup> Singh (2011) *The FRAPA Report* 24.

<sup>165</sup> *Atomis Media, S.A & Outright Distribución Ltd v Televisión De Galicia S.A. & CTV S.A.* 2010; as translated by Singh (Singh (2011) *The FRAPA Report* 28).

<sup>166</sup> Singh (2011) *The FRAPA Report* 28.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Idem* 11.

<sup>170</sup> *Ukulele Orchestra of Great Britain v. Erwin Clausen & Yellow Promotion GmbH & Co Kg (t/a The United Kingdom Ukulele Orchestra)* (2015) EWHC 1722 (IPEC).

The claimant in this case, The Ukulele Orchestra of Great Britain (UOGB), based its main claim on the allegation that the defendant, The United Kingdom Ukulele Orchestra (UKUO), had infringed its registered trade mark. The claimant also brought claims on the grounds of passing-off and copyright infringement in relation to two dramatic works.<sup>171</sup> The allegation of infringement in the first dramatic work comprised the following;

“...In about 1985 it (UOGB) created a dramatic work in which copyright subsists...The dramatic work relied on is said to comprise the following elements:

1. a group of musicians the majority of which play ukuleles, one of which plays a bass instrument;
2. those instruments being of differing musical registers;
3. all of the musicians are formally attired;
4. all of the musicians (other than the double bass player) play their respective instruments in seated positions on chairs;
5. all of the musicians read music from music stands positioned in front of those musicians;
6. all of the musicians play music which is not originally recorded for the ukulele;
7. the musicians also sing as well as play in one other of the musical pieces they play;
8. the musicians all speak scripted or improvised humorous monologues;
9. the musicians introduce themselves as ‘We are the Ukulele Orchestra of Great Britain’.”

In 1989 the dramatic work was modified by replacing the double bass with a bass ukulele and the attire of the male musicians was changed to black tie and that of the female musicians black and white formal gowns. The work as changed constituted the second dramatic work. The claimant alleged that a combination of all the elements making up the two versions of its performances, could also be found in the performances of UKUO.<sup>172</sup>

The court however found that, while it did take the view that copyright might

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<sup>171</sup> *Ukulele Orchestra of Great Britain Supra* n170.

<sup>172</sup> Lee (2016) *IIC-International Review of Intellectual Property and Competition Law* 202.



subsist in the formats of UOGB's performance, on the facts before the court there was no copyright in the two dramatic works and, therefore no copyright infringement.<sup>173</sup> In his judgement, the judge relied on the *Green*-case<sup>174</sup> and repeated that a format did not amount to a dramatic work because it lacked certainty and unity.<sup>175</sup> He further held that the lack of clarity pertained to uncertainty about the number of musicians, the precise nature of their attire, the precise nature and order of the songs they performed and what was to be spoken during the performance.<sup>176</sup> The lack of unity was said to be because of the "vast array of alternative performances which would potentially infringe any copyright subsisting in them".<sup>177</sup>

Lee<sup>178</sup> is of the opinion that the reason for the claimant's case failing was that it "elected to define the alleged dramatic works by reference to a list of elements, rather than tethering them to two particular performances fixed by recording" i.e. a cinematograph film. White and Brenner<sup>179</sup> are also of the opinion that a plaintiff must meet a higher standard in order to establish copyright infringement where the selection and sequence of a number of elements of a programme, each of which is individually unprotectable, is at issue.

### 3.3.4 Summary

The reviewed cases, in the jurisdictions referred to above, have had very different approaches regarding claims of copyright, in relation to formats, where it had to be determined whether a format is a work in terms of copyright.

In the first case under review, the *Zeccola*-case, it was established that, in Australia, copyright may subsist in a combination of elements. If the combination of elements makes up an expression of an idea, in a form recognised as a work of copyright under the relevant legislation.

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<sup>173</sup> *Ibid.*

<sup>174</sup> *Green Supra* n109.

<sup>175</sup> *Ukulele Orchestra of Great Britain Supra* n170; Lee (2016) *IIC-International Review of Intellectual Property and Competition Law* 202.

<sup>176</sup> *Ibid.*

<sup>177</sup> Lee (2016) *IIC-International Review of Intellectual Property and Competition Law* 202.

<sup>178</sup> *Ibid.*

<sup>179</sup> White (2004) *National Law Journal* <http://www.nationallawjournal.com/id=900005416285/TKO>.

In the *Green*-case, in New Zealand, it was recognised that determining whether a format is a work protected by copyright law is one of the hardest tasks in disputes regarding formats. The court held that, because of the lack of unity of the elements that make up a programme based on a format, it could not qualify as a dramatic work and, therefore not be protected under copyright.

In the Canadian *Hutton*-case the court held that for a work to be considered a dramatic work it had to have consecutively related events.

The Dutch court found, in the *Castaway*-case, that formats should be regarded as copyright works as such. It will, however, still have to be shown that the combination of elements that make up the format are original, and that the imitated show is made up of a substantial part of the original elements.

One case that has seen success, in Belgium, was the *BVBA*-case, based on the format of a radio series. The claimants relied on previous broadcasts of the show to prove the similarities, and thus succeeded with his copyright claim.

In the US in the *CBS*-case the formats *in casu* were considered to be literary works, but because of the generic elements that the works were comprised of, no copyright infringement was found.

On the other hand, in the UK, in a dispute that never made it to court, it was alleged that a format should be regarded as a dramatic work. Elam is of the opinion that, in the UK, even a 'docu-soap' may qualify as a dramatic work because of the skill and effort that goes into the creative choices and production of a cinematograph film.

Later in Australia, in the *Nine Films*-case, it was held that because of the interactive nature of the format *in casu*, there was an insufficient thread and storyline in the format and therefore, it did not qualify as a dramatic work.

In the Spanish *Atomis*-case, although it was not argued that a format was a dramatic work *per se*, the court determined that the 'tent pole moments' that are set out in the format bible can be compared to a storyline, and protection should

be granted to the combination of elements set out in the format, as a *sui generis* type of work.

Lastly, in the UK in the *UOGB*-case, the difficulty to prove that a combination of elements constitutes an original work by listing the elements in an attempt to describe the format was recognised. It was thus suggested that, in order to protect a format, the elements should be tethered to a fixation for example a recording.

One can extract the following principles and approaches from all these cases:

- a) the categories of works that have been relied on to establish copyright in a format are either literary works or dramatic works (in countries that recognise dramatic works as copyright works as such);
- b) most cases have failed because the underlying literary content of a reality TV format does not set out sufficient detail of the programme's sequence or because of a lack of unity of the elements that make up the work;
- c) in most jurisdictions protection is afforded to a combination of elements, if the combination is original and in a material form;
- d) in most claims based on copyright the elements were expressed as a list of elements and failed because of the ambiguity of the listed elements;
- e) cases that have seen success were either in jurisdictions that recognise formats as copyright works as such or the claim was based on the format being expressed in, for example, a broadcast;
- f) in none of the cases was a claim ever based on copyright in the cinematograph films (each episode or series as a whole) of the programme;
- g) as suggested by Lee, if the list of elements can be attached to a fixed form presented as, for example, a recording of a cinematograph film, a claimant would fare better in protecting its format.

### **3.4 South African Copyright Law**

The South African Copyright Act<sup>180</sup> sets out the works to which copyright protection is extended. The list includes literary works, musical works, artistic

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<sup>180</sup> Copyright Act 98 of 1978 (as amended up to Copyright Amendment Act 2002) (hereafter 'the Act').

works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programs.

Reality TV formats include numerous copyright works, but the most important copyright works, in relation to formats, are: cinematograph films; broadcasts; literary works; and artistic works.

Cinematograph films are defined in section 1 of the Act as:

“Any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sound embodied in a sound-track associated with the film.”

A broadcast as defined in the Act includes:<sup>181</sup>

“A telecommunication service of transmissions consisting of sounds, images, signs or signals which...takes place by means of electro-magnetic waves of frequencies...transmitted into space without an artificial conductor...and is intended for reception by the public or sections of the public.”

The definition of literary works in the Act is very extensive. The Act states that copyright will vest in a literary work irrespective of the literary quality of the work or the form in which it is expressed.<sup>182</sup> In copyright law, a literary work refers to “any combination of letters and/or numerals which embody the results of a measure of intellectual effort or skill”.<sup>183</sup>

In relation to formats, one of the categories in the definition of literary works include “dramatic works, stage directions, cinematograph film scenarios and broadcast scripts”.<sup>184</sup> The only one of the literary works in this category that the Act defines is a ‘dramatic work’, which is a “choreographic work or entertainment

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<sup>181</sup> S 1 of the Act.

<sup>182</sup> S 1 of the Act.

<sup>183</sup> Dean (2012) 1-8.

<sup>184</sup> S 1(1) of the Act.

in dumb show, if reduced to the material form in which the work or entertainment is to be presented”.<sup>185</sup> This category of literary works make up ‘performable literary works’ and are the closest in nature to reality TV formats, as set out in the format bible. The format bible is likely to contain some, if not all, of the works mentioned in this category, and will further be discussed later in this chapter.

An artistic work is defined in the Act, as a work irrespective of the artistic quality including paintings, sculptures, drawings, engravings and photographs; and works of architecture or works of craftsmanship not falling under one of these categories.<sup>186</sup> Artistic works are in effect “visual representations of ideas or of the results of intellectual efforts in a material form”.<sup>187</sup>

For a work to be susceptible to copyright protection, it has to meet certain requirements. Copyright solely subsists on the basis of statutory law, and without registration, once it has met the inherent requirements of being original<sup>188</sup> and of being in material form<sup>189</sup>. External requirements that the author is a qualified person, or the first publication having taken place, or the work having been made in South Africa, must also be met.<sup>190</sup>

Cinematograph films differ from other copyright works in that the copyright in films can be registered. The Registration of Copyright in Cinematograph Films Act<sup>191</sup> provides a recordal system which serves as an effective way of proving the subsistence of copyright and ownership.<sup>192</sup> This Act is ancillary to the Copyright Act and registration is available to persons claiming to be the owner of copyright in a film as stipulated in the Copyright Act.<sup>193</sup> Registration is not necessary for copyright to exist in films because copyright will automatically exist in terms of the Copyright Act.

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<sup>185</sup> S 2 of the Act.

<sup>186</sup> S 1(1) of the Act.

<sup>187</sup> Dean (2012) 1-12.

<sup>188</sup> S 2(1) of the Act.

<sup>189</sup> S 2(2) of the Act.

<sup>190</sup> S 3 of the Act.

<sup>191</sup> *Registration of Copyright in Cinematograph Films Act 62 of 1977.*

<sup>192</sup> Du Plessis *et al* (eds) (2011) 263.

<sup>193</sup> *Ibid.*

The requirement of section 2(1) that a work must be original, does not mean that the work has to be the “vehicle for new and inventive thought”.<sup>194</sup> To determine originality the work as a whole should be considered, and not just certain parts of the work.<sup>195</sup> For a work to be regarded as original the work must arise from the skill and effort of the author, meaning that the author must have utilised enough skill and effort to give the work its own quality and character.<sup>196</sup> The work must also not have been copied from an earlier work. A work may consist of a compilation of earlier works if the skill and effort that went into the creation is enough to give the work a new quality and character.<sup>197</sup>

The requirement of section 2(2) that a work must be in material form stems from the fact that copyright protection does not extend to ideas, but that it is the material form of expression that is the subject matter of copyright.<sup>198</sup> There are two exceptions to this requirement, namely broadcasts and programme-carrying signals, which will only become eligible for copyright once they have either been broadcast or once the signal has been transmitted.<sup>199</sup>

I now look at what constitutes an act of infringement under the South African Copyright Act. Infringement will first be discussed in general terms and the specific acts of infringement in relation to the relevant works will be individually discussed later on.

To determine whether there has been infringement the court applies a subjective and objective test. The objective test determines if the extent of copying is sufficient to constitute infringement.<sup>200</sup> According to section 1 (2A)<sup>201</sup>, infringement does not only take place when the entire work gets misappropriated or misused.<sup>202</sup> Where a small but essential part of the work has been copied the

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<sup>194</sup> *Appleton and Another v Harnischfeger Corporation and Another* [1995] 2 All SA 693 (A); *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) par 10.

<sup>195</sup> Van der Merwe *et al* (2016) 204; *Moneyweb Supra* n194 at par 16.

<sup>196</sup> Du Plessis *et al* (eds) (2011) 224; *Appleton Supra* n194; *Moneyweb Supra* n194 at par 10.

<sup>197</sup> Du Plessis *et al* (eds) (2011) 225; *Moneyweb Supra* n194 at par 10.

<sup>198</sup> Dean (2012) 1-25; S 2(2) of the Act.

<sup>199</sup> Du Plessis *et al* (eds) (2011) 224.

<sup>200</sup> *Idem* 240.

<sup>201</sup> S 1 (2A) of the Act provides that, doing any act in relation to any work should be interpreted to include doing such act in relation to a substantial part of a work. Even where a small, but substantial, part of a work is reproduced it would constitute a reproduction and infringe the owner’s copyright.

<sup>202</sup> Dean (2012) 1-65; *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 1 SA 276 (A); *Moneyweb Supra* n194 at 620.

owner's right would have been infringed.<sup>203</sup> Thus, there has to be an objective similarity between a substantial part of the copyrighted work and the infringing work.<sup>204</sup>

A substantial part, in relation to a copyright work, refers to quality and not quantity of the work.<sup>205</sup> There has to be an assessment of the degree of similarity between the original work and the later work.<sup>206</sup> The court must first conclude which part of the copyrighted work is original and then assess the similarity between the two works.<sup>207</sup> If it is found that what was taken from the copyrighted work has substance, it could constitute infringement.

The subjective test relates to determining whether there is a causal connection between the copyright work and the infringing work<sup>208</sup> and it must be proven that the infringing work was derived from the copyright work.<sup>209</sup> The subjective test is mostly based on evidence and is used to determine if there has been actual copying.<sup>210</sup> Evidence will have to be given to prove that the creator of the infringing work had access to the original work.<sup>211</sup> Because a copyright work will only be infringed if there was actual copying, if the second work came about independently and without any reference to the first work, it will not constitute an infringement even if the two works are similar.<sup>212</sup>

If either of these tests are not met, a reproduction or adaptation of a substantial part of the copyrighted work did not take place, meaning that there has been no infringement.<sup>213</sup> The onus to prove that a substantial part has been copied rests on the plaintiff.

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<sup>203</sup> Dean (2012) 1-65.

<sup>204</sup> *Galago Publishers Supra* n202.

<sup>205</sup> *National Soccer League t/a Premier Soccer League v Gidani Ltd* [2014] 2 All SA 461 p484.

<sup>206</sup> *Moneyweb Supra* n194 at 619.

<sup>207</sup> Dean OH (2012) 1-66; This type of assessment can be seen in the *Moneyweb*-case (*Moneyweb Supra* n194).

<sup>208</sup> Van der Merwe *et al* (2016) 275.

<sup>209</sup> *Ibid*; *Galago Publishers Supra* n202; *Moneyweb Supra* n194 at 618.

<sup>210</sup> Du Plessis *et al* (eds) (2011) 240.

<sup>211</sup> Van der Merwe *et al* (2016) 278.

<sup>212</sup> Dean (2012) 1-75.

<sup>213</sup> *Ibid*.

Making a reproduction of an original work is a common form of infringement. Section 1 defines a ‘copy’ to mean a “reproduction of a work”.<sup>214</sup> ‘Reproduction’ is defined in relation to:<sup>215</sup>

- a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;
- b) an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;
- c) and any work, includes a reproduction made from a reproduction of that work.

For there to be infringement by reproduction, a substantial part of the original work must be used to produce a ‘new’ copy of the work in question.

The idea/expression dichotomy is closely associated with the copyright requirement that infringement only takes place if a substantial part of a work has been reproduced<sup>216</sup> and limits copyright protection to the expression of the idea. It has to be determined if the similarity between two works is due to the “common ideas or concepts embodied in them” or rather to the “similarity of material expression of ideas”.<sup>217</sup> The reason behind copyright not being extended to the idea *per se* is that copyright is essentially concerned with copying the apparent and outwardly recognisable form of the work in issue.<sup>218</sup>

Copyright works essentially consist of ideas and information reduced to a material form.<sup>219</sup> In some cases, taking an idea which has been expressed in material form, without taking the entire work, can amount to reproduction of a substantial part and lead to infringement.<sup>220</sup> It would however be a question of degree to determine whether the idea itself or the material expression has been copied.<sup>221</sup>

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<sup>214</sup> S 1 of the Act.

<sup>215</sup> *Ibid.*

<sup>216</sup> Dean (2012) 1-76; *Moneyweb Supra* n194.

<sup>217</sup> Dean (2012) 1-76.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> *Idem* 1-25.

<sup>221</sup> *Ibid.*



The difficulties in determining where the idea ends and the work starts was well illustrated in 2001 in the British case *Designers Guild v Russell Williams*.<sup>222</sup> In this case, which has been quoted with approval by South African courts, the artistic work of the claimant was reproduced, by the defendant, on a textile design and it had to be decided if this amounted to infringement of the original work. The court did not focus on the detail but rather on the combination of flowers and stripes, the way they were painted and related to each other and the over-all combination of the elements to determine if a substantial part of the work had been copied.<sup>223</sup> The court then held that it was the copying of this specific look and feel that amounted to reproduction of a substantial part, which resulted in infringement.<sup>224</sup>

Although this case is not directly in relation to copyright in formats, the UK court's recognition that the "look and feel of a work arising from the selection, arrangement and style of the elements of the work, as a substantial part of a work",<sup>225</sup> is important for the discussion relating to South African copyright law.

For purpose of this discussion, an important form of infringement, where the look and feel of a work plays a big part, is making an adaptation of a work. Adaptation differs from reproduction in that the substantial part of the original work that is used is the intellectual content of the original work.

Section 1 of the Act defines adaptation through a list of examples in relation to different types of works for which an adaptation is a restricted act. Section 1 defines adaptation to include:<sup>226</sup>

- a) a literary work, includes—
  - i. in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
  - ii. in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;
  - iii. a translation of the work; or

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<sup>222</sup> *Designers Guild v Russell Williams* [2001] FSR 113.

<sup>223</sup> Dean (2012) 1-78; *Designers Guild Supra* n222 at 113.

<sup>224</sup> *Ibid*; *Ibid*.

<sup>225</sup> Dean (2012) 1-79.

<sup>226</sup> S 1 of the Act.

- iv. a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;
- b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;
- c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable;
- d) a computer program includes—
  - i. a version of the program in a programming language, code or notation different from that of the program; or
  - ii. a fixation of the program in or on a medium different from the medium of fixation of the program

It is immediately to be noticed that the Act is silent on the subject of adaptation of cinematograph films, this is referred to below in the discussion of cinematograph films.

The ordinary meaning of adaptation given by the Macmillan Dictionary is “the process of changing something so that it can be used for a different purpose”.<sup>227</sup> The Oxford Living Dictionary meaning of adaptation is “the action or process of adapting or being adapted”<sup>228</sup> and that of adapt is to “make (something) suitable for a new use or purpose; modify”<sup>229</sup>.

From the definition in the Act and the ordinary meaning of the word, it is evident that the concept of adaptation includes a transformation of a work.<sup>230</sup> Even though the Act sets out specific definitions of adaptation, the definitions are all prefaced by the word ‘include’. It is therefore possible that the definition can be interpreted wider.<sup>231</sup> In *Bosal v Grapnel*,<sup>232</sup> the court held that the definition of adaptation, given in the Act, is not exhaustive, but representative of the types of acts that can constitute an adaptation of a work and should be seen as an explanation of the concept of adaptation.

<sup>227</sup> <https://www.macmillandictionary.com/dictionary/british/adaptation>.

<sup>228</sup> <https://en.oxforddictionaries.com/definition/adaptation>.

<sup>229</sup> <https://en.oxforddictionaries.com/definition/adapt>.

<sup>230</sup> Dean (2012) 1-73; *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd and Another* 1985 (4) SA 882 (C) 892.

<sup>231</sup> Du Plessis *et al* (eds) (2011) 244.

<sup>232</sup> *Bosal Supra* n230 at 892; *Rapid Phase Entertainment v SABC* [1997] JOL 393 (W) 13.

Because the definitions are not confined to the specifics given in the Act, it is my opinion that if *any* copyright work, for which adaptation is an act of infringement, is transformed<sup>233</sup> in such a way that its features are recognisable, it would constitute an adaptation and be an infringement on the first copyright work. Adaptation can be described as producing a version of the original work incorporating the same product of originality, but expressing it in a different manner. It would thus constitute an adaptation if a work still presents substantially the same work as the original.

As portrayed in the *Designers Guild*-case,<sup>234</sup> where the look and feel of the work still remains recognisable it may constitute an infringement.<sup>235</sup> The copying of a specific look and feel of the work could amount to a substantial part of the work being copied and could be an infringement on the owner's copyright.

It was also held in *Lorimar Productions v Sterling Clothing*,<sup>236</sup> discussed below, that:

“The view is most commonly taken that copyright is connected with the protection of the outward physical form by means of which ideas are expressed and not with the ideas themselves. Yet the Legislature dealt to a certain extent also with copying of ideas. This is evident by the definition of ‘adaptation’.”

Adaptation is generally no more than a form of reproduction.<sup>237</sup> In broad terms reproduction means to make a copy and adaptation means to alter, modify or transform the features or attributes of a work.<sup>238</sup> These acts of infringement will be discussed below in relation to specific copyright works.

I will now consider certain specific categories of copyright work to determine whether formats, or at least part of them, can be protected under copyright law in South Africa.

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<sup>233</sup> meaning a “marked change in the form, nature, or appearance”, <https://en.oxforddictionaries.com/definition/transform>.

<sup>234</sup> *Designers Guild Supra* n222 at 113; see 3.4 South African Copyright Law page 35.

<sup>235</sup> *Galago Supra* n202; *Designers Guild Supra* n222 at 113; *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197.

<sup>236</sup> *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T).

<sup>237</sup> Du Plessis *et al* (eds) (2011) 244.

<sup>238</sup> Dean (2012) 1-73; *Rapid Phase Entertainment Supra* n232.

### 3.4.1 Cinematograph films

As already mentioned, Lee's<sup>239</sup> view is that in disputes regarding the subsistence and infringement of copyright, a fixed recording of a format may be more helpful than describing the format as a list of elements. In the case of reality TV, a fixed recording of the elements found in the format is a cinematograph film. I therefore first explore whether this opinion holds good in a South African context.

Section 8(1) of the Copyright Act sets out the nature of copyright in cinematograph films. The exclusive rights of the owner of a film include reproduction of the film in any manner or form, broadcasting the film, causing the film to be transmitted, making an adaptation of the film and doing any of the restricted acts in relation to an adaptation.<sup>240</sup>

To determine whether there has been infringement in relation to a cinematograph film, the objective and subjective tests discussed above<sup>241</sup> will have to be applied. The degree of similarity between the two works will have to be examined, and if it can be found that what has been reproduced from the original cinematograph film has substance, in terms of the objective test, it would constitute an infringement.

Thereafter it will have to be proven that there has been actual copying. Using a subjective test, it must be shown that the infringing work was derived from the original work. In relation to formats, the cinematograph film, and broadcast thereof, are the only parts of a format that will ultimately be available to imitators. If it can be shown that an imitator had access to a cinematograph film (which incorporates the format), and that the reproduction or adaptation was derived from that work, it would constitute an infringement.

A reproduction of a cinematograph film includes “anything in a form where a substantial part of the film is recognisable as a result of copying”.<sup>242</sup> Reproduction of a cinematograph film does not have to be a slavish reproduction, but there may

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<sup>239</sup> Lee (2016) *IIC-International Review of Intellectual Property and Competition Law 202*; see 3.2 *Comparative Analysis*, page 27, above.

<sup>240</sup> S 8(1) a-f of the Act.

<sup>241</sup> See page 23 of this chapter.

<sup>242</sup> Du Plessis *et al* (eds) (2011) 244.

be reproduction in situations where the substance of the cinematograph film has been taken to such an “extent that the substance of the original is clearly identifiable in the alleged reproduction”.<sup>243</sup> The format of a reality TV programme will constitute an essential part of the cinematograph film. Although the footage may differ, the ‘tent-pole moments’ that make up the programme will form a substantial part of the cinematograph film. It is my view that, if it can be shown that these moments have been reproduced or adapted in a way that they are still recognisable, infringement could possibly be proven.

The extent of the meaning of adaptation in relation to cinematograph films is, however, not clear.<sup>244</sup> For adaptation of a work to have taken place, it is the look and feel that has been reproduced.

As mentioned above, what would constitute adaptation of a cinematograph film is not defined in the Act. Acts of adaptation are, however, not limited to the definitions mentioned in the Act, but may include situations where any copyright work is transformed in a way that the original features still remain recognisable.<sup>245</sup> Relying on this view, it would constitute an adaptation, of a cinematograph film, where the arrangement of elements that make up the work, are reproduced and used in such a way that a substantial part of the original film can be recognised, infringing the owner’s copyright.

If what would constitute an adaptation is not limited to the examples given in the Act, making an adaptation where the substantial features or the look and feel of the cinematograph film are recognisable may amount to an infringement, and might offer the best way to claim infringement in terms of a reality TV format.

As have been seen in other jurisdictions, most format disputes have failed because, instead of relying on a fixed form of the format, the elements that make up the format were listed in affidavits to describe the sequence of events. The formats could not be protected because the courts in different jurisdictions have on numerous occasions found that these lists of elements do not constitute a fixed

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<sup>243</sup> Du Plessis *et al* (eds) (2011) 241.

<sup>244</sup> S 1(2A) of the Act; Du Plessis *et al* (eds) (2011) 244.

<sup>245</sup> See page 35 of this chapter.

form, which is a requirement for the subsistence of copyright in a work.<sup>246</sup> This brings us back to Lee's argument that if in the *Ukulele Orchestra*-case the claimant decided to rely on a fixed recording of its performance, like a cinematograph film, there might have been sufficient certainty to grant protection.<sup>247</sup>

In South Africa each individual episode, of a reality TV series, will be a cinematograph film and the elements (tent-pole moments) of a format will be identifiable in the fixed recording and will enjoy copyright protection. Proving that an imitated format is derived from a cinematograph film, in which the format was originally presented, will be easier than trying to prove that the imitator is somehow in possession of the format bible. Making a cinematograph film the type of copyright work in which a causal connection can most easily be proven. The original and imitated work will have to be compared to determine the degree of what has been taken. If a show is imitated by either reproducing a substantial part of these elements (the tent pole moments presented in the cinematograph film) or by adapting the elements (the look and feel of the cinematograph film) to a new show in a way that they are still identifiable, it would constitute an infringement.

### 3.4.2 Broadcasts

Another form in which a format is expressed, after or during production, is by broadcasting the show, live or as a cinematograph film. If the broadcast is of a cinematograph film it will be protected as such. Thus, copyright protection as a broadcast will be in relation to programmes that are being broadcast live.

Section 10 of the Act sets out the nature of copyright in broadcasts. This section provides that the owner has the exclusive right to reproduce, directly or indirectly, the broadcast in any manner or form, rebroadcast or cause the broadcast to be transmitted in a diffusion service. For broadcasts, adaptation is not included in the Act to be a restricted act.

Rebroadcasting is defined in section 1 of the Act as "the simultaneous or subsequent broadcasting by one broadcaster of the broadcast of another

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<sup>246</sup> *Green Supra* n109; *Survivor Productions Supra* n136; *Ukulele Orchestra of Great Britain Supra* n170.

<sup>247</sup> Lee (2016) *IIC-International Review of Intellectual Property and Competition Law* 202.

broadcaster”. The Act then further states that a reproduction in relation to a broadcast will include a “reproduction in the form of a record or a cinematograph film”.<sup>248</sup>

The question, therefore, is whether reproduction is limited to making a, second and separate, recording or cinematograph film of the actual broadcast. It might also be regarded as a reproduction if a producer sees a broadcast of a TV show incorporating a format, and thereafter makes a cinematograph film or recording made up of substantial part of the content of the original broadcast.

Because a broadcast is a telecommunication or a transmission, it would be the content of the broadcast that is reproduced.<sup>249</sup> The content of a broadcast in relation to reality TV, is the programme, broadcast live or in the form of a cinematograph film which incorporates the format. Copyright in a broadcast exists separately from the copyright in the underlying works, in the case of formats the format bible, and is subject to copyright regardless of the fact that it is intangible.<sup>250</sup> Even if there is no copyright protection for the format as a literary or other type of work, once the episodes of the format are broadcast they are protected by copyright.

Regarding the reproduction of a broadcast, it has been suggested that a reasonable test will be to determine if the “material that has been copied, standing alone, has any significant commercial value”.<sup>251</sup> It might be enough proof of ‘significant commercial value’ if it can be shown that another network or broadcaster is or has been willing to pay for the rights to broadcast the programmes of a certain format.

As already mentioned above, ‘reproduction’ has an extensive definition and is understood to include a reproduction in any manner or form.<sup>252</sup> This means that not only will it be an infringement if the actual broadcast is rebroadcast or where the broadcast was recorded and broadcast again. It would also be an infringement where, after a broadcast has taken place, the content of the broadcast is copied.

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<sup>248</sup> S 1 of the Act.

<sup>249</sup> Du Plessis *et al* (eds) (2011) 241.

<sup>250</sup> Van der Merwe *et al* (2016) 198.

<sup>251</sup> Du Plessis *et al* (eds) (2011) 240.

<sup>252</sup> Van der Merwe *et al* (2016) 236.

The reproduction does not have to be a “slavish reproduction”. If a substantial part of the content of the original broadcast has been taken to an extent that the substance of the original work is identifiable it will constitute a reproduction.<sup>253</sup>

A reproduction of a broadcast may thus include making a cinematograph film or recording of the original broadcast or reproducing the content of a broadcast that has commercial value. A substantial part of the content of a broadcast in relation to a reality TV show is the format, in the same way that the format is a substantial part of a cinematograph film. Making an imitation of the format by recording or reproducing episodes in which a substantial part of the original work is used, would be an infringement of the original work, and might offer adequate protection to the owners of formats.

### 3.4.3 Literary works

The Copyright Act, as already indicated,<sup>254</sup> gives a very wide definition of what literary works are. A format bible, which is a literary work, is likely to include dramatic works, stage directions or cinematograph film scenarios.

The owner of a literary work has the exclusive right to reproduce the work in any manner or form; publish the work if it has not yet been published; perform the work in public; broadcast the work; cause the work to be transmitted in a diffusion service; make an adaptation of the work; or do any of the mentioned acts in relation to an adaptation of the work.<sup>255</sup>

So far there has not been any claim of copyright infringement based on a format as a dramatic work, or at all, in South Africa.<sup>256</sup> Therefore, foreign case law might act as a guide to suggest how our court may approach the question of what type of literary work a format bible is.

In South Africa, a dramatic work is not defined as a separate category of work, but as a literary work. Consequently, it will have to be determined if the format

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<sup>253</sup> Du Plessis *et al* (eds) (2011) 241.

<sup>254</sup> See page 30 of this chapter.

<sup>255</sup> S 6 of the Act.

<sup>256</sup> Dean (2012) 1-8.



bible includes enough material to be regarded as a dramatic work. This will differ from format to format, and because the format bible does not set out the entire storyline it might be difficult to protect as a dramatic work.

In foreign disputes based on copyright, it has been decided that a work needs to have a story or thread of consecutively related events to qualify as a dramatic work.<sup>257</sup> Evidence of this ‘thread’ can be found in the format bible which sets out the tent-pole moments of a show. Even a show that seems to be only reality based, still has some sort of underlying instructions that control the sequence of events, creating certainty and making the work capable of being performed

Because a format relies on tent-pole moments that occur at the same point in every episode,<sup>258</sup> it is possible that these repeatable moments, as described in the format bible, might be a literary work in the form of ‘stage directions’. Stage directions are not defined in the Act, but the dictionary meaning is “instruction in the text of a play, especially one indicating the movement, position, or tone of an actor, or the sound effects and lighting”.<sup>259</sup> Even if the format of a reality TV programme does not have a full script the format bible does set out instructions for the movement, sound, set, lighting and more. This could constitute ‘stage directions’ which are, in terms of South African law, considered to be literary works susceptible to copyright protection.

Another possibility is that the format bible constitutes a cinematograph film scenario. The dictionary meaning of a ‘scenario’ is “a written outline of a film, novel or stage work giving details of the plot and individual scenes” or a “postulated sequence or development of events”.<sup>260</sup> The outline given by the format bible provides details of the plot and scenes, even in cases of reality based shows.

A combination of the meaning of stage directions and film scenarios can be used to describe a reality TV format as a literary work set out in the format bible. The format bible gives an outline of the plot that a show will follow, and the instructions

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<sup>257</sup> Singh (2011) *The FRAPA Report* 11.

<sup>258</sup> <http://www.scriptmag.com/features/writers-guide-to-pitching-reality-tv>.

<sup>259</sup> [https://en.oxforddictionaries.com/definition/stage\\_direction](https://en.oxforddictionaries.com/definition/stage_direction).

<sup>260</sup> <https://en.oxforddictionaries.com/definition/scenario>.

to the different production elements to bring about the final product of the show. Therefore, more success might be achieved by relying on the format bible setting out stage directions or a film scenario, rather than it being a dramatic work, as has been done in other jurisdictions. It will, however, be up to a court to decide whether a format bible sets out enough detail to be considered a literary work as defined in the Act.

If a substantial part of the stage directions or cinematograph film scenario is used in a reproduction or adaptation it could infringe the copyright in the literary work. It will have to be determined what a substantial part of the literary work is and a causal connection will have to be shown between the original format and the imitated version.

The tent-pole moments, as set out in the literary work, would form a substantial part of the format and can be identified in the cinematograph film. Because the format bible (literary work) it is not readily available to the public, it should be kept in mind that paragraph c of the definition of reproduction, in the Act, includes making a reproduction of a reproduction.<sup>261</sup> In relation to the format of a reality TV show, a cinematograph film, based on a format bible (literary work), would be a reproduction of that literary work. If a substantial part of a cinematograph film which incorporates a literary work (format bible), is reproduced it would constitute an infringement of the literary work, by way of a reproduction of a reproduction.

It would thus infringe copyright in the format bible (literary work) if a cinematograph film of a reality TV show is imitated.

For the imitated show to constitute a reproduction it will have to be shown that the imitation incorporates a substantial number of the tent-pole moments as set out in the literary work. Adaptation is also a restricted act in relation to literary works. If the extended definition of adaptation is relied on, it would constitute an infringement where the features (tent-pole moments) set out in the literary work (format bible) are still recognisable in the imitated version of the show.

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<sup>261</sup> S 1 of the Act.

To determine if reproduction or adaptation has taken place will be a question of degree and will depend on the facts of each case.

Thus, if the tent pole moments, as set out in the format bible, are identifiable in an imitated show it would be an infringement of the format bible as a literary work, even if the reproduction was made based on the cinematograph film in which the format is incorporated.

#### 3.4.4 Artistic works

Most format ‘bibles’ include depictions of sets, graphic representations of the lighting and storyboards, and more.<sup>262</sup> These depictions, although contained in a literary work, are artistic works.

The restricted acts in relation to artistic works include making a reproduction of the work in any manner or form, publishing an unpublished work, including the work in a film or TV broadcast, causing the work to be transmitted in a diffusion service, making an adaptation of the work and doing any of the restricted acts in relation to an adaptation of the work.<sup>263</sup> Reproduction in relation to artistic works extends to include converting a two-dimensional work into three dimensional work, or converting a three-dimensional work into a two-dimensional work.<sup>264</sup>

When an artistic work, as depicted in the format bible (literary work) or presented in the programme (cinematograph film or broadcast), is reproduced by format imitators, so that the original two-dimensional drawing or depiction is reproduced into a three-dimensional work (or *vice versa*), it would constitute an infringement.

Adaptation in relation to artistic works include “a transformation of the work in such a manner that the original or substantial features thereof remain recognisable”.<sup>265</sup> It would constitute an infringement of copyright in an artistic work if the original work is still recognisable in the imitated version.

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<sup>262</sup> Singh (2011) *The FRAPA Report* 11.

<sup>263</sup> S 7 of the Act.

<sup>264</sup> Van der Merwe *et al* (2016) 243.

<sup>265</sup> S 1 of the Act.

To determine if there has been infringement the court will again apply the objective test and compare the similarity of the two works. Proving a causal connection where a reproduction of an artistic work has been made, can be done by showing that a reproduction has been made from a reproduction of the original work, as was explained in relation to literary works. Thus, if a reproduction or adaptation, of an artistic work set out in the format bible or presented in the show, was made from the cinematograph film incorporating the literary work, it would constitute an infringement of the artistic work.

If the original or substantial features of the set designs, layouts, graphic representation of lighting or storyboards, as depicted in the format bible or presented in a recording or broadcast of the original show, are reproduced or adapted in an imitated version of the show, it would constitute infringement.

### ***3.5 Copyright Summary***

Until the recognition of formats as works on their own, as was done by the Dutch court, it seems that the best form of protection under copyright would be to identify and protect each individual work. As Singh stated in the 2011 FRAPA report, TV formats should be considered as a bundle of proprietary rights, consisting of numerous works, and in the absence of one specific statutory provision should be protected as such.

In relation to copyright and formats it can be extracted that:

- a) in claims based on copyright, in the foreign jurisdictions under review, the elements (tent-pole moments) were expressed as a list and failed because of the ambiguity of the listed elements;
- b) in Lee's opinion, if the list of elements can be attached to a fixed form presented as, for example, a recording of a cinematograph film, a claimant might fare better in protecting its format;
- c) in none of the cases was a claim ever based on copyright in the cinematograph films (each episode or series as a whole) of the programme;
- d) in South Africa copyright infringement will be determined by applying an objective test to determine whether there is substantial similarity between the works and a subjective test to determine if there has been actual

copying;

- e) if artistic works as set out in the format bible or as seen in a cinematograph film or broadcast of the show has been reproduced or adapted it would constitute infringement;
- f) the tent-pole moments as set out in the format bible make up a substantial part of the programme and can be seen in the cinematograph films and broadcasts of the programme;
- g) to constitute an infringement the imitation format has to be derived from original. The cinematograph film or broadcast of a format are ultimately the only works available to the public. However, making a programme derived from a cinematograph film or broadcast incorporating the format as set out in the format bible would still infringe the format bible, because making a reproduction from a reproduction is a restricted act in terms of the Act;
- h) in terms of making an adaptation of the original work, the definition of adaptation should not be limited to the examples given in the Act of what would constitute adaptation. If any work is reproduced in a way that the substantial features (look and feel) thereof remain recognisable, it would constitute an adaptation of that work;
- i) if the tent-pole moments are reproduced or adapted and still identifiable in the imitated version of the show, it would be an infringement on either the literary work, or the cinematograph film or broadcast incorporating the literary work.

The format owner will, thus, be able to rely on different works and legal rights in order to protect the end product. The owner will have to identify the works that have been reproduced or adapted and claim infringement for each work separately.



## 4 Performers Protection Rights

If it can be determined whether the underlying format bible of a reality TV programme is in fact a copyright work, ‘performing’ that work would constitute a performance, opening another possibility of protection to format owners through the Performers Protection Act (PPA)<sup>266</sup>. Protection granted to performers through this act are related to copyright and protects a person giving a rendition of a literary or artistic copyright work.<sup>267</sup>

The PPA protects performances of “actors, singers, musicians, dancers, or other persons who act, sing, deliver, declaim, play in or otherwise perform literary, musical, dramatic and dramatico-musical and artistic works and expressions of folklore”.<sup>268</sup> The PPA, however, does not protect performances which are not of (literary or artistic) ‘works’ as defined in the Copyright Act.<sup>269</sup> To qualify for protection under the PPA a performance must take place, be broadcast live or be first recorded in South Africa or in a country belonging to the WTO.<sup>270</sup>

In terms of the PPA the owner of the performance has the exclusive right to make a reproduction of the performance. Section 1 of the PPA defines a reproduction as “a copy made of a fixation of a performance” and section 1(2) states that performing a restricted act in relation to a performance includes executing that act in relation to a substantial part of the performance.<sup>271</sup> The restricted acts in relation to performances are set out in section 5 and include making a reproduction of a recording of a performance if the reproduction is made from a recording that was made with the consent of the performer, but the reproduction was made for purposes outside of the scope of consent given by the performer.<sup>272</sup>

It also needs to be determined who the rights would belong to in the case of a reality TV show in which a performance takes place. Usually these rights vest in the performer, but where several performers perform together as a group the

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<sup>266</sup> *Performers Protection Act 11 of 1967* (hereafter ‘the PPA’).

<sup>267</sup> Dean (2012) 1-191.

<sup>268</sup> S 1 of the PPA.

<sup>269</sup> Dean (2012) 1-192.

<sup>270</sup> S 3 & S 4 of the PPA.

<sup>271</sup> Dean (2012) 1-195.

<sup>272</sup> S 5(1)(a)(iii) of the PPA; Dean (2012) 1-194.

manager or authority in charge of the group can give consent for the performance to be used.<sup>273</sup> Meaning that in the case of TV formats the rights will belong to the producer or production company, and where a reproduction is made without the authorisation of the production company it will be an infringement of the rights they have in the performance.

Some questions arise when dealing with performers protection in relation to reality TV formats.

The first issue is that, to qualify for protection under the PPA, the performance must be of a literary or artistic work as defined in the Copyright Act. Reality TV formats, as set out in a format bible, will most likely qualify as literary works, but it will be up to the court to determine if the underlying work of a reality TV format qualifies as a work in terms of the Copyright Act.

If the format bible can be regarded as a literary work, the performance thereof can be protected through the PPA. It will then have to be determined if a reproduction of the performance has been made.

In *SABC v Pollecutt*<sup>274</sup> the question of what constitutes a reproduction was discussed. In this case an audio-visual fixation of a performance was reprocessed into an audio version, the court however concluded that this audio version was not a reproduction of the original fixation.<sup>275</sup> There is some criticism on the outcome of this case, because the audio version was still a derivative of the original fixation and constitutes a reproduction as defined in the Act. No new recording was made of a further performance, but the court nonetheless held that there was no reproduction of the original audio-visual fixation.<sup>276</sup>

The protection, in relation to reproduction, granted by the PPA is very narrow and extends only to very specific situations. The reason for this narrow protection is that the Copyright Act will offer adequate protection where the PPA is not applicable. Performer's rights differ from copyright in that the actor's behaviour

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<sup>273</sup> S 6(1) of the PPA; Dean (2012) 1-195.

<sup>274</sup> *South African Broadcasting Commission v Pollecutt* (98/94) [1995] ZASCA 112; 1996 (1) SA 546 (SCA).

<sup>275</sup> *South African Broadcasting Commission Supra* n274; Dean (2012) 1-194.

<sup>276</sup> Dean (2012) 1-194.



or portrayal of the underlying copyright work is what is protected. A reproduction would thus have to be of the actual performance by the original performer.

Performers' protection offers very narrow protection in relation to the performers or producers of reality TV programmes. Protection will be limited to using footage that includes the actual performers performing a literary or artistic work, and would not be of much help, even where a performance is exactly copied by another 'actor' in an imitation show.

If the definition of what constitutes a reproduction in regard to a performance could be interpreted wider, it might be of some assistance. But, for example, not even making an audio version of an audio-visual performance was regarded as a reproduction, as was seen in the *SABC*-case. It would only constitute a reproduction where the original performers' actual performance is reproduced without authorisation. Whereas with imitation of a reality TV show, there would be a portrayal of the underlying format bible by another set of actors to bring about a substantially similar performance. The PPA will thus not grant protection where an imitation of a reality TV show is made without using the actual footage of performers in the original show.



## 5 Unlawful Competition

### 5.1 Introduction

Ohly<sup>277</sup> starts his article on imitation by saying;

“If imitation is unfair, it follows that intellectual property protection against misappropriation is appropriate, even where there is no evidence that such protection is beneficial for society. The protection of well-known marks against dilution and misappropriation of goodwill, for example, can easily be justified. Overlaps between intellectual property rights are generally acceptable, and unfair competition law can be relied on in order to fill gaps between intellectual property rights.”

What he suggests is applicable to the circumstances surrounding reality TV formats because, as we have seen, when it comes to the protection of a format, it does not comfortably, or singly, fit into the established intellectual property categories, and is difficult to protect as a whole. Because of this, owners of reality TV formats might usefully turn to the law of unlawful competition for a measure of relief.

Competition law in general involves “a struggle between rivals endeavouring to obtain the same end”.<sup>278</sup> The basis of competition law is the right to attract custom and goodwill. Goodwill and the right to attract custom should not be used synonymously. The right to attract custom includes the right to exploit goodwill, but it does not rely on the existence of goodwill.<sup>279</sup> Protection against unlawful competition can thus be claimed without goodwill having been established, and only requires the parties to be engaged in business.<sup>280</sup> A person who is not a competitor cannot restrain the conduct of another on the basis of unlawful competition.<sup>281</sup>

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<sup>277</sup> Ohly (2010) *International Review of Intellectual Property and Competition Law* 506.

<sup>278</sup> Van der Merwe *et al* (2016) 39.

<sup>279</sup> Webster (2015) 15-6.

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*

Goodwill is the attractive force that brings in custom<sup>282</sup> or the favourable attitude among a substantial number of persons, brought about by the characteristics of the business, one of which is its reputation.<sup>283</sup> In the *Lorimar*-case<sup>284</sup>, which will be discussed in detail below, van Dijkhorst J, by referring to several other cases, defined goodwill. His discussion can be summed up as follows: goodwill is the “benefit and advantage of a good name, reputation, and connection of a business”<sup>285</sup>, “it is the one thing that distinguishes an old-established business from a new business”<sup>286</sup> and “goodwill, as the subject of proprietary rights is incapable of subsisting by itself”.<sup>287</sup> Neethling and Van Heerden<sup>288</sup> are of the opinion that goodwill comes into existence as soon as the underlying entrepreneurial components are bound together as an organisational unit. These ‘entrepreneurial components’ can be described as the various facets that are involved in the running of a business – for example, the goods or services, the name, the get-up, business secrets and more.<sup>289</sup>

Having a successful format contributes and forms part of a production company’s business and, therefore, its goodwill and right to attract custom. The principles of unlawful competition may, therefore, be of assistance to protect a format as part of the producers’ right to attract custom and to protect its goodwill as an asset of its business.<sup>290</sup>

One of the specific forms of unlawful competition in South Africa is passing-off. Where a format is imitated, resulting in the deliberate or inadvertent misappropriation of the goodwill, in such a way that members of the relevant public would be confused or deceived into thinking that the programmes originated from the same source or that formats are affiliated with each other, causing detriment to the original format owner,<sup>291</sup> it might constitute passing-off.

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<sup>282</sup> Webster (2015) 15-5.

<sup>283</sup> Van der Merwe *et al* (2016) 41.

<sup>284</sup> *Lorimar Productions Supra* n236.

<sup>285</sup> *Idem* 1138.

<sup>286</sup> *Ibid.*

<sup>287</sup> *Idem* 1139.

<sup>288</sup> Neethling (2008) 100.

<sup>289</sup> Van der Merwe *et al* 2013 *De Jure* 46.4 1040.

<sup>290</sup> Singh (2011) *The FRAPA Report* 30.

<sup>291</sup> *Ibid.*

To determine whether, in South Africa, unlawful competition may be relied on to prevent format infringement is a fruitful exercise. This will be assisted by examining how this subject has been addressed in certain foreign jurisdictions, although their legal systems are not based on Roman-Dutch law as in South Africa. Under South African common law, unlawful competition as part of the general law of delict will be discussed. First by referring to instances where no confusion arises, and thereafter, when they do (under the law of passing-off).

## 5.2 Comparative Analysis

### 5.2.1 United States of America (USA)

Looking first to the USA, 'unfair competition' is not a well-defined area of law but it has been described by the courts as conduct which is contrary to the rules of fair play and morals of the market place.<sup>292</sup> It has also been said that this area of law relates to so many practical situations that a general definition would be deceptive.<sup>293</sup> In the US unfair competition laws are found in various sources of law, including statutes, regulations and court decisions.<sup>294</sup> Unfair competition law in the US is derived from common law and the development of US trade mark law, which has had a very big influence on the development of unfair competition in the US.<sup>295</sup> Because unfair competition law in the US is made up of both common law and statutes there is no general clause of unfair competition.<sup>296</sup>

One of the situations that does fall under unfair competition in the US is the misappropriation of 'trade value'. The origin of the US common law tort of misappropriation of trade value is attributed to *International News Service v The Associated Press (INS-case)*<sup>297</sup> that was decided by the US Supreme Court.<sup>298</sup> In this case, the defendant appropriated news gathered by the plaintiff to sell to the defendant's clients, as if the news was a product of its own skill and labour. It was held that this conduct constituted unfair competition in trade and was an unlawful

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<sup>292</sup> Corgill in Henning-Bodewig (ed) (2013) 622.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Idem* 623.

<sup>295</sup> *Idem* 624.

<sup>296</sup> *Idem* 631.

<sup>297</sup> *International News Service v The Associated Press* (1918) 248 US 215.

<sup>298</sup> Corgill in Henning-Bodewig (ed) (2013) 644.

misappropriation of trade value. The court used the property law theory of industrious effort, the so called ‘sweat of the brow’ approach, to establish a *quasi*-property right in the news stories, to resolve this issue.<sup>299</sup> By doing this the court created a property right in the trade value (news stories) leading to the misappropriation (through the unauthorised use of the stories) being unlawful.

In this case it was also held that there is no limitation on a person purchasing a newspaper and spreading the knowledge of the content for any purpose not reasonably interfering with the owners right of selling the newspaper. But, if the news was to be transmitted for commercial use in competition with the owner it would constitute an act of unfair competition.<sup>300</sup>

By taking the material that had been acquired by the expenditure of labour, skill and money of the owner and selling it to the public, the defendant who appropriated the news, in competition with the owner, was “endeavouring to reap where it has not sown”.<sup>301</sup> Doing so would result in a loss in the owner’s profit as the appropriator would divert this profit to those who were not burdened with the expense of gathering the news.<sup>302</sup> This case differed from other unlawful competition cases because, instead of the defendant misrepresenting his own goods as that of the complainant the defendant sold the complainant’s goods as his own, substituting misrepresentation for misappropriation.<sup>303</sup> Because of this, the court held that instead of testing the right of the complainant against the public interest, the rights of the complainant and the defendant, as competitors in business, should be considered.<sup>304</sup>

Callmann<sup>305</sup> is of the view that this case imported the concept of unjust enrichment into the law of unfair competition. Before it, if competitive wrongs did not fall within the categories of tort, breach of contract or passing-off, the complainant had no remedy. The *INS*-case expanded the concept of unfair competition to include the “misappropriation of what equitably belongs to a competitor”.<sup>306</sup>

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<sup>299</sup> *Ibid.*

<sup>300</sup> *International News Service Supra* n297 at 239.

<sup>301</sup> *Idem* 240.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> Callmann (1942) *Harvard Law Review* 597.

<sup>306</sup> *Ibid.*

The *Restatement (Third) of Unfair Competition*<sup>307</sup> defined the tort of misappropriation of trade value as “causing harm to the commercial relations of another by appropriating the other’s intangible trade values”.<sup>308</sup>

In *National Basketball Association v Motorola*<sup>309</sup> the Court of Appeals for the Second Circuit added extra elements to this tort. This case, dealt with the gathering and communication of statistics of basketball games. The court held that the tort relating to trade value was limited to cases where: the plaintiff generates or gathers information at a cost; the information is time sensitive; a defendant’s use of the information constitutes free-riding on the plaintiff’s efforts; the defendant is in direct competition with the plaintiff; and the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>310</sup>

The scope of this tort is not fully defined and still subject to development in the USA, and while the doctrine has not been rejected in its entirety, courts seem to limit misappropriation to situations where no other relief is available for improper conduct.<sup>311</sup>

Another recognised form of unfair competition in the US is passing-off, often referred to as palming-off. Passing-off in the US, is based on the English common law and protects a competitor’s interest in the goodwill it has in its trade mark or other identifiers of its products or services, and protects against consumer deception as to source or sponsorship of products or services.<sup>312</sup> Passing-off in the US is directed at the appropriation of another’s goodwill or deception.

Section 43 of the Lanham Act<sup>313</sup> is of particular importance in relation to passing-off in the US. Section 43(a) provides protection against the false designation of origin which is likely to cause confusion or deception as to the affiliation,

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<sup>307</sup> *Restatement (Third) of Unfair Competition* 1995.

<sup>308</sup> Corgill in Henning-Bodewig (ed) (2013) 645; *Restatement (Third) of Unfair Competition* S38.

<sup>309</sup> *National Basketball Association v Motorola Inc* 105 F.3 d 841 (2d Cir. 1997).

<sup>310</sup> *National Basketball Association Supra* n309 at 70.

<sup>311</sup> Corgill in Henning-Bodewig (ed) (2013) 645.

<sup>312</sup> *Idem* 628.

<sup>313</sup> Lanham Act of 1946, S 43(a), 15 U.S.C. S 1125(a) (1982) (hereafter referred to as Section 43).

connection or association between persons.<sup>314</sup> Beser explains that the Lanham Act protects resource expenditures to develop identification for products and allows producers to exclude others from using that identification up to the point that consumers would get confused as to the source of the products.<sup>315</sup>

In *Two Pesos v Taco Cabana*,<sup>316</sup> infringement was alleged based on the confusingly similar trade dress<sup>317</sup> of two Mexican restaurants in terms of section 43(a). The court stated that the Lanham Act was intended “to protect persons engaged in commerce against unfair competition”.<sup>318</sup> Although, for a number of years, the Act had been construed narrowly, it was always the intention to include the common law tort of passing-off.<sup>319</sup> This tort is described as “one passing-off his goods as the goods of another”.<sup>320</sup>

Over time the interpretation has expanded to include all kinds of confusion as to origin, affiliation and more. The test to succeed with a claim of “false description or representation” in terms of the Lanham Act a likelihood of confusion as to affiliation, association or connection must be proven.<sup>321</sup> To rely on a claim based on section 43(a) “a plaintiff must identify the mark and allege three basic elements: 1) distinctiveness; 2) non-functional; and 3) likelihood of consumer confusion”.<sup>322</sup>

The only US judgement, which I have been able to find, dealing with reality TV formats and unfair competition is *RDF Media Ltd v FOX Broadcasting Company*<sup>323</sup> from 2005. *RDF Media* sued *Fox*, in the US District Court of California, for making a programme called *Trading Spouses* which was identical to its original show *Wife Swap*.<sup>324</sup> *RDF* claimed that *Fox* had copied the expressive elements and trade dress of the show. It was argued that the trade dress included the format, opening segments, casting, the rules, production value and dialog.<sup>325</sup> The court found that

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<sup>314</sup> S 43(a) of the Lanham Act.

<sup>315</sup> Beser (2004) 41 *San Diego L. Rev.* 1795.

<sup>316</sup> *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

<sup>317</sup> In South Africa known as ‘get-up’.

<sup>318</sup> *Two Pesos Supra* n316 at 768.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Idem* 787.

<sup>321</sup> *Idem* 780.

<sup>322</sup> *Ibid.*

<sup>323</sup> *RDF Media Ltd v FOX Broadcasting Company* 372 F.Supp.2d 556 (2005) 562.

<sup>324</sup> *RDF Media Supra* n323.

<sup>325</sup> *Idem* 559.



this was an attempt to establish the *corpus* of the show as a trademark<sup>326</sup> The claim was therefore rejected on the base that what has been described does not qualify as trade dress in terms of US law.

Although there is no general clause against unfair competition in the US, there are specific situations that have been recognised by courts and legislation which might be helpful in relation to formats, if all of the requirements can be proven.

Because there is only one case regarding formats and unfair competition in the US, I will consider unfair competition more broadly from which one can extract that:

- a) the tort of misappropriation of trade value imported the concept of unjust enrichment into the law of unfair competition;
- b) where no other remedy is available the tort of misappropriation of trade value might offer some assistance in protecting a format as ‘trade value’ where a rival intends to ‘reap where he did not sow’;
- c) passing-off in the US protects against misappropriation of goodwill and deception and relies on the goodwill a business has in its trade mark or other identifiers of its products or services. S 43(a) provides protection against false designation origin which is likely to cause confusion or deception as to the affiliation, connection or association;
- d) for a format case to succeed on the grounds of passing-off the entirety of the show will not be regarded as ‘trade dress’. Thus, it is important to properly determine and identify what the trade mark of identifier is in claiming passing-off of in a format dispute.

### 5.2.2 United Kingdom (UK)

I now turn to the UK to review relevant English law. Under English law, as in the USA, there is no general law of unlawful competition and, as a “matter of principle and practice”, it is defined narrowly.<sup>327</sup> The courts have generally confined the regulation of competition to instances involving “recognised forms of value”, such as intellectual property rights and goodwill.<sup>328</sup>

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<sup>326</sup> Raygor (2009) *Media Law Resource Centre* 112

<sup>327</sup> Davis in Henning-Bodewig (ed) (2013) 601 & 603

<sup>328</sup> *Idem* 603

Even though there is some statutory protection for competition law in the UK,<sup>329</sup> none of the acts making mention of competition has relevance to this dissertation, and I will accordingly focus my discussion, pertaining to competition law in the UK, on the common law.

The common law of tort plays a big part in the regulation of competition in the UK. Among the torts are those directed toward economic wrongs, known as economic torts, which include breach of contract, unlawful means, intimidation, conspiracy, deceit, malicious falsehood and passing-off.<sup>330</sup> The torts of malicious falsehood and passing-off are the most prominent torts regulating competition in the UK.

The tort of malicious falsehood is concerned with “statements made by the defendant which harm the trading interests of the claimant”.<sup>331</sup> The tort of malicious falsehood also does not have relevance to this dissertation and will not be discussed in detail.

One well-recognised species of tort relates to passing-off, which is unfair conduct that is likely to lead to deception or confusion. The elements for a claim of passing-off were affirmed in *Reckitt & Colman Products v Borden*<sup>332</sup> and are summed up by Helling as 1) an established goodwill; 2) misrepresentation by the defendant and damage; OR 3) likelihood of confusion and damage.<sup>333</sup>

In the UK goodwill is distinct from the get-up or indicia under which the claimant trades and is seen as a form of property.<sup>334</sup> Misrepresentation is central to the tort of passing-off and it is necessary to show that customers have been deceived.<sup>335</sup> Confusion *per se* no longer has to be proven to succeed with a claim of passing-off, but rather that there has been misrepresentation. The tort encompasses a wide range of misrepresentations, including lookalikes where the

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<sup>329</sup> *Idem* 601.

<sup>330</sup> *Idem* 606.

<sup>331</sup> *Idem* 607.

<sup>332</sup> *Reckitt & Colman Products Ltd v. Borden, Inc.*, 1990 R.P.C. 341.

<sup>333</sup> Helling (2005) *LLM Theses and Essays* 35.

<sup>334</sup> Davis in Henning-Bodewig (ed) (2013) 609.

<sup>335</sup> *Ibid.*

get-up of the claimant has been adopted and misrepresentation as to trade connections, for example licence agreements or endorsements.

In *Cadbury Schweppes v Pub Squash*<sup>336</sup> a decision by Judicial Committee of the Privy Council was given by Lord Scarman. The dispute regarded a lemon drink which was heavily advertised by the plaintiff creating a market which the defendant then entered taking deliberate advantage of the campaign created by the plaintiff. In the decision it was emphasised that competition should not be stifled and there would be no wrongful act if a competitor enters a market created by another and then competes with the creator.<sup>337</sup> Lord Scarman further stated that a balance has to be maintained between protecting the plaintiff's investment and protecting free competition, and suggests that this be done by "granting protection against misappropriation only where the misappropriation constitutes a misrepresentation because what is misappropriated is distinctive of the plaintiff's products and as such is an 'intangible property right' of the plaintiff".<sup>338</sup>

English courts have, however, held that the kind of misrepresentation which may give rise to passing-off should not be defined too narrowly and the emphasis should rather be on whether the misrepresentation has damaged or is likely to damage the plaintiff's goodwill.<sup>339</sup> Passing-off has, thus, been used to provide a remedy for misappropriation, mostly in cases where the "purported damage to the claimant is tenuous at best, but the advantage to the defendant is clear cut".<sup>340</sup>

In *Irvine v TalkSport*,<sup>341</sup> the court held that passing-off can occur with the mere appropriation of reputation or goodwill without a licencing agreement.<sup>342</sup> In this case, confusion in the traditional sense was absent, but the public was deceived as to the existence of consent in the form of a licencing agreement.<sup>343</sup>

There are no format cases in the UK where passing-off has been relied on. Claims of passing-off are described to be "distinct from copyright infringement claims

<sup>336</sup> *Cadbury Schweppes (Pty) Ltd and Others v Pub Squash Co (Pty) Ltd* (1981) 1 All ER 213.

<sup>337</sup> *Cadbury Schweppes Supra* n336 at 213.

<sup>338</sup> *Ibid.*

<sup>339</sup> Webster (2015)15-17.

<sup>340</sup> Davis in Henning-Bodewig (ed) (2013) 611.

<sup>341</sup> *Irvine v TalkSport* [2002] EWCA Civ 95.

<sup>342</sup> Helling (2005) *LLM Theses and Essays* 35.

<sup>343</sup> Lee *et al* (eds) (2014) 72.

and thus there is no requirement to show copying in a passing off case”,<sup>344</sup> misrepresentation will, however, need to be proven. Because what would constitute misrepresentation has been interpreted extensively, the tort of passing-off will be helpful where customers are confused or deceived as to a possible licence agreement between the owners or producers of the original format and the imitated format. LaFrance<sup>345</sup> is of the view that a substantial portion of the public knows that, for example, using characters on goods would involve some kind of licencing agreement, making it likely that the public would believe that there would be such an agreement pertaining to the goods.<sup>346</sup>

Most remedies available against unlawful competition in the UK are based on the tort of passing-off, which has, despite the reluctance form to courts, been described as a law of unfair competition.<sup>347</sup> Form the above it can be extracted that:

- a) the requirements of the tort of passing-off have been interpreted widely, and will thus include much more than what the understanding of the law of passing-off includes in other jurisdictions;
- b) the tort of passing-off does include misrepresentation where the get-up is likely to deceive customers or where customers are likely to believe that there exists some sort of association, like a licence agreement between the claimant and defendant;
- c) if it can be shown that customers believe there is an association between two formats, like for example a licence agreement, a claim of passing-off might succeed;
- d) it, however, remains to be seen how the tort of passing-off might be useful in disputes pertaining to reality TV formats in the UK.

### 5.2.3 Germany

In German law, unlawful competition is regulated by statute. The *Gesetz gegen den Unlauteren Wettbewerb*<sup>348</sup> (UWG).

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<sup>344</sup> Singh (2011) *The FRAPA Report* 32.

<sup>345</sup> LaFrance (2011) *Michigan State Law Review* 1419.

<sup>346</sup> *Ibid.*

<sup>347</sup> Davis in Henning-Bodewig (ed) (2013) 611.

<sup>348</sup> *Gesetz gegen den Unlauteren Wettbewerb* of 3 July 2004 (Act Against Unfair Competition) (hereafter ‘the UWG’).

The UWG has a general clause in section 3 which states that:<sup>349</sup>

1. Unfair commercial practices shall be illegal.
2. Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behaviour of consumers.
3. The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal.
4. When assessing commercial practices in relation to consumers reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to these practices or the underlying goods or services because of their mental or physical infirmity, age or credulity in a way which the entrepreneur could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group.

And, section 3a states:

Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors.

Section 3 also provides a lengthy annexure describing all the acts that might be considered unlawful (wrongful). The annexure mentions thirty acts of unlawful competition, including “making the false statement that the terms of the approval, endorsement or authorisation have been complied with”.<sup>350</sup> The acts listed in the annexure are always prohibited, and if these ‘*per se*-prohibitions’ do not apply a competitor’s act will be judged on one of the specific prohibitions found in the rest of the UWG.<sup>351</sup> An act that does not fall under one of the specific provisions of the UWG can only be prohibited, under the general clause, if it is “suited to tangible

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<sup>349</sup> S 3 of the UWG.

<sup>350</sup> Number 4 of the Annexure to S 3 of the UWG.

<sup>351</sup> Boesche in Henning-Bodewig (ed) (2013) 236.

impairment of the interests of competitors, consumers or other market participants”.<sup>352</sup>

The general provision, found in section 3, is also concretised by a list of case typical unfair conduct in sections 4-7,<sup>353</sup> which prohibits unlawful commercial practices that are likely to significantly affect the interests of competitors, consumers or other market participants.<sup>354</sup> Section 4 no 9, referred to as “supplementary protection of achievements”,<sup>355</sup> addresses the imitation of goods and services, which is of particular importance to this dissertation. In the English translation section 4 no 9 is formulated to include:<sup>356</sup>

Offering goods or services that are replicas of goods or services of a competitor if he:

- a) causes avoidable deception of the purchaser regarding their commercial origin;
- b) unreasonably exploits or impairs the assessment of the replicated goods or services; or
- c) dishonestly obtained the knowledge or documents needed for the replicas;

Although section 4 no 9 mentions only three specific instances of prohibited imitation, it is not exhaustive<sup>357</sup> and if an act of imitation is contrary to the general clause in section 3 it might be prohibited. The minimum conditions for imitation to be unlawful is that the essential features of the original must be imitated and that the imitator had knowledge of the original item.<sup>358</sup> The item that is imitated must also display ‘competitive individuality’, namely, an individual character and a modest degree of market recognition.<sup>359</sup>

The UWG is also concerned with taking unfair advantage of, or causing damage, to a competitor’s goodwill or reputation. It would constitute unlawful competition to offer goods or services that are imitations or replicas of a competitor’s goods

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<sup>352</sup> Boesche in Henning-Bodewig (ed) (2013) 243.

<sup>353</sup> Lee *et al* (eds) (2014) 14.

<sup>354</sup> Margoni (2016) *IIC-International Review of Intellectual Property and Competition Law* 406.

<sup>355</sup> Boesche in Henning-Bodewig (ed) (2013) 238.

<sup>356</sup> S 4 of the UWG.

<sup>357</sup> Boesche in Henning-Bodewig (ed) (2013) 250.

<sup>358</sup> *Idem* 251.

<sup>359</sup> Lee *et al* (eds) (2014) 16.

or services where the original provider's reputation is being unfairly exploited or impaired.<sup>360</sup> This conduct is unfair because the reputation of another is 'borrowed' to promote the wrongdoer's own commercial gain.

Where additional features are present in the unfair conduct, as mentioned in the UWG, (for example taking advantage of, or causing damage to goodwill) all of the relevant factors will have to be proven to succeed.<sup>361</sup> Thus, for an imitated format to be unfairly competitive the producer or owner of the original format will have to show an "unfair practice beyond the act of copying".<sup>362</sup>

In *Developer v ZDF*<sup>363</sup> (*ZDF-case*) the claimant had a format to a game show, featuring a virtual maze that was computer generated and only visible to the audience and a team member who had to advance through the maze, by answering questions and being instructed by other team members.<sup>364</sup> The defendant's version featured an actual maze, the team member who needed to complete the maze was blindfolded and relied on instructions by other team members to make it through the maze.<sup>365</sup> It was acknowledged by the court that the creative elements of the show, including the "virtual maze, quiz elements and the particular way it was hosted" was sufficient to be protected under the law of unfair competition.<sup>366</sup> The overall appearance of the programmes were, however, sufficiently different and the court rejected the claim of unfair competition.<sup>367</sup>

The UWG provides a considerable degree protection against unfair practices, prohibiting many acts that are regarded as wrongful in relation to competition. From the discussion, it can be seen that:

- a) the unlawful conduct complained of must be roughly in line with those acts expressly prohibited by the UWG;
- b) where a specific act does not fall under one of the situations mentioned in either section 4-7 or the annexure to section 3 in the UWG, the court can still prohibit certain acts under the general provision of section 3;

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<sup>360</sup> Clark (2011) *Journal of Intellectual Property Law & Practice* 221.

<sup>361</sup> Margoni (2016) *IIC-International Review of Intellectual Property and Competition Law* 406.

<sup>362</sup> Singh (2011) *The FRAPA Report* 32.

<sup>363</sup> *Developer v ZDF* OLG München, 15.03.1990 – 29 U 4346/89 (this case is only available in German, therefore Singh's discussion in the FRAPA Report will be used).

<sup>364</sup> Singh (2011) *The FRAPA Report* 33.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*

- c) the UWG regulates the misappropriation of another's work or the exploitation another's reputation;<sup>368</sup>
- d) to succeed with a claim in terms of the UWG all features mentioned in the relevant section need to be proven;
- e) in the *ZFD*-case the court found that a format can be protected under the provisions of unfair competition, but the unique elements that make up the original programme need to be identifiable in the imitated version and will depend on the facts of every case.

### 5.3 South Africa: Delict and Unlawful Competition

#### 5.3.1 South African principles of Unlawful Competition

In South Africa, which has a Roman-Dutch legal system, the basis for protection against unlawful competition can be found in the common law principles of the law of delict as developed by the courts.<sup>369</sup> There are a small number of isolated legislative provisions which are of relevance in this field,<sup>370</sup> but there is no single comprehensive statute covering the field of unlawful competition. For the purposes of this dissertation, I will limit my discussion to the common law principles of unlawful competition.

The law of unlawful competition may be considered as a species of the law of delict genus. In South Africa, the basic elements of delict are that there has to be an act, wrongfulness (intended or by negligence) and a causal connection leading to damage or the likelihood of damage. The recognition of unlawful competition as one form of delict is a manifestation of general liability derived from the *Aquilian*-action.<sup>371</sup> An act of unlawful competition will thus be an act of delict that takes place between competitors.

The recognition of delictual liability in the field of unlawful competition, offers to a prejudiced competitor a broad and ample remedy, even in the absence of a direct

<sup>368</sup> Clark (2011) *Journal of Intellectual Property Law & Practice* 221.

<sup>369</sup> Neethling in Henning-Bodewig (ed) (2013) 459.

<sup>370</sup> *Ibid.*

<sup>371</sup> Webster (2015) 15-5; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) 179-182.



precedent in case law.<sup>372</sup> Situations that give rise to damages in terms of unlawful competition are expanding and should be interpreted by courts in light of existing legal principles.<sup>373</sup> Where the competitor undertakes a ‘new’ wrongful act there is no need to try and fit this act within the framework of one of the recognised forms of unlawful competition or another form of particular illegality.<sup>374</sup>

The rights on which the plaintiff relies in disputes involving unlawful competition, are his right to attract custom and goodwill. A wrongful interference with these rights, causing customers or potential customers to deal with the competitor rather than the plaintiff, would constitute unlawful competition.<sup>375</sup>

The critical issue in all cases involving alleged delict is to prove that the act complained of is unlawful (wrongful). South African jurisprudence is well developed in this regard and a brief summary follows below.

It is generally accepted in our law that, in the absence of legal protection, that a concept, product or service which has been made public may be freely and exactly copied.<sup>376</sup> In *Schultz v Butt*,<sup>377</sup> which will be discussed below, it was stated that “anyone may ordinary make anything produced by another which is in the public domain: One may freely and exactly copy it without his leave and without payment of compensation”.<sup>378</sup> However, imitation in general terms is acceptable in our law, a number of related factors may render imitation unlawful, as the cases reviewed below reveal.

In 1969, in *Dun and Bradstreet v SA Merchants Combined Credit Bureau*<sup>379</sup> a competitor gained information which the plaintiff had compiled by his own skill and labour to distribute to its clients on a confidential basis. The competitor used that information to advance his own business which constituted a deliberate misappropriation, leading to unlawful competition.<sup>380</sup>

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<sup>372</sup> Neethling in Henning-Bodewig (ed) (2013) 458.

<sup>373</sup> Van der Merwe *et al* (2013) *De Jure* 1039.

<sup>374</sup> Neethling in Henning-Bodewig (ed) (2013) 458.

<sup>375</sup> Webster (2015) 15-5.

<sup>376</sup> Neethling in Henning-Bodewig (ed) (2013) 474.

<sup>377</sup> *Schultz v Butt* 1986 (3) SA 667 (A).

<sup>378</sup> *Schultz* *Supra* n377 at 681.

<sup>379</sup> *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

<sup>380</sup> Webster (2015) 15-7.

In 1969 in the *Dun and Bradstreet*-case, the court also referred to established examples of unlawful competition. The conduct that was alleged to be unlawful did not, however, fall under any of the listed examples and it had to be established whether there was any broad criterion of unlawfulness. Although the act complained about was a 'new' unlawful act, the court held that most importantly, for an act to be unlawful it should satisfy the requirements of *Aquilian* liability.<sup>381</sup> In light of this it was held that:<sup>382</sup>

“Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limit of unlawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade.”

This case set fairness and honesty as the standard for deciding whether an act that does not fall under the established examples, constitutes unlawful competition.

The first case in which the yardstick for wrongfulness was set as the *boni mores* was *Atlas Organic Fertilizers v Pikkewyn Ghwano*<sup>383</sup> in 1981. This case concerned competitors in the fertiliser industry. After resigning from Atlas, one of the employees started his own company in the same field and manufactured the same product. There was a list of claims by the plaintiff including: misappropriation of production and production secrets and know-how; industrial sabotage; acquiring favourable contracts at the expense of the competitor; enticement of staff and passing-off. Van Dijkhorst J noted that there is one delict, unlawful competition, that encompasses all of the above claims.<sup>384</sup> The judge then further stated that “what is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play”.<sup>385</sup> It was then concluded that the norm to be applied was an “objective one of public policy, the general sense of justice of the community, the *boni mores* manifested in public opinion”.<sup>386</sup>

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<sup>381</sup> *Dun and Bradstreet Supra* n379 at 218.

<sup>382</sup> *Ibid.*

<sup>383</sup> *Atlas Organic Fertilizers Supra* n371.

<sup>384</sup> *Idem* 179.

<sup>385</sup> *Idem* 188.

<sup>386</sup> *Ibid.*

The *Lorimar*-case<sup>387</sup> (referred to above), also in 1981, regarded local entrepreneurs using elements of the well-known TV series *Dallas*, on merchandise and the name, interior and menu of a restaurant without any authorisation or licence from the owners. It had to be decided whether using the creation of another to advance one's own business was unlawful and against the *boni mores*.<sup>388</sup>

The court held that to determine whether an act is *contra bonos mores*, attention must be given to protection granted by statute and the common law in that field or closely related fields.<sup>389</sup> If there is an absence of a remedy in these areas, but there is a remedy provided by Parliament or common law in an area closely related to the area of alleged injustice it might be an indication that the injustice is not obvious or unjust.<sup>390</sup> Therefore, applying the norm of public policy consideration should be given to statutes, established remedies and the morals of society.<sup>391</sup>

The *boni mores* is the standard now set to determine wrongfulness in relation to unlawful competition. The court should thus try to mirror the general sense of justice of the community, by weighing the interests of the competing parties, while keeping in mind the interests of society.<sup>392</sup>

Shortly after the *Lorimar*-case in 1986 came the *Schultz*-case<sup>393</sup> (referred to above). In this case the defendant used the mould of a boat hull that he had acquired from the plaintiff under the pretence of using it to make a boat for his own private use. Instead, he used the mould to make imitations of the plaintiff's boat and sell them in competition with the plaintiff. The defendant then tried to register the hull that he had copied from the plaintiff as his own design. In the Appellate Division's decision both the *Dun and Bradstreet*- and the *Lorimar*-case were cited.

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<sup>387</sup> *Lorimar Productions Supra* n236.

<sup>388</sup> *Ibid*; Webster (2015) 15-9.

<sup>389</sup> *Idem* 1155.

<sup>390</sup> *Ibid*.

<sup>391</sup> Webster (2015) 15-10.

<sup>392</sup> *Lorimar Productions Supra* n236 at 1155.

<sup>393</sup> *Schultz Supra* n377.

The essential question was thus whether imitating another's product and then going into competition with that person was unlawful. Referring to the *Lorimar*-case the court stated that it does not suggest that every instance of imitation is unlawful. The lawfulness of such an act will depend on a number of factors including the nature of the article; the time, effort and skill spent by the original creator; the type of business conducted; the nature and extent of the market and demand for the article and most importantly the method of copying employed by the competitor.<sup>394</sup> In this case the contributing factor that made mere copying or imitation unlawful, was the fact that the defendant used the imitated product to compete with the appellant and tried to register the product as his own design.

The complaint in this case was not of imitation alone, but of the appellant's act of making an exact physical duplication by using the respondent's actual product. It was therefore not only the idea being used, but the respondent's accomplishment.<sup>395</sup> It was again confirmed that to determine whether a competitor is acting unlawfully an objective test based on the *boni mores* is applied, and that regard should be given to the fact that the norm of public policy may differ from community to community.<sup>396</sup>

The court held that the respondent was correct in merely expecting "the appellant to start in the boat-building business where all other competitors start, namely by taking what is common knowledge in the trade and designing their own vessels".<sup>397</sup> Every person has the right freely to carry on his trade or business in competition with his rivals, but the competition must remain lawful.<sup>398</sup> If competition is carried on unlawfully in a way that involves a wrongful interference with another's rights, it would constitute damage that results in loss.<sup>399</sup> The *Aquilian*-action will then be available for the aggrieved party.<sup>400</sup>

Although imitation *per se* is allowed, and in most cases even encouraged in our law, there is no doubt that the community would condemn using a person's product to form a mould to make an almost identical product, for the purpose of going into

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<sup>394</sup> *Schultz Supra* n377 at 672.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Idem* 671.

<sup>397</sup> *Idem* 673.

<sup>398</sup> *Idem* 678.

<sup>399</sup> *Idem* 679.

<sup>400</sup> *Ibid.*

competition with that person, as unfair and unjust.<sup>401</sup> South African legislation does not limit protection of the law to cases where the plaintiff enjoys protection under intellectual property statutes, the fact that there is no protection under the patents, design or copyright act does not grant a competitor the right to carry on his business in a way that is in unfair competition with his rivals.<sup>402</sup> If there is no countervailing public interest that indicates that the competition is fair, it will be concluded that the competitor's (*Schultz*) conduct was unlawful.

In 2001, the case of *Daimler Chrysler Aktiengesellschaft and another v Afinta Motor Corporation*<sup>403</sup> came before the court in the former Transvaal Provincial Division. This case also dealt with imitation and the boundaries of unlawful competition. *Afinta* used body parts manufactured by *Daimler Chrysler* to produce a vehicle that was argued to be a look-alike to *Daimler's* Sprinter. It was held that *Afinta* had competed unfairly, even though the body parts were freely available on the market.<sup>404</sup>

Dealing with the delict of unlawful competition Judge Southwood stated the following regarding the general principles of the law relating to unlawful competition:

- 1) as a general rule, everyone is entitled to freely carry on their trade or business in competition with his rivals, within lawful bounds. If such competition involves a wrongful interference another trader's rights it will be unlawful and actionable should the act result in a direct loss;
- 2) in order to succeed with an action based on unlawful competition the plaintiff must establish all the requirements of *Aquilian* liability;
- 3) unlawful acts are not limited to acts which fall under categories of recognised illegality;
- 4) to determine whether a certain act is unlawful certain criteria need to be considered, including fairness and honesty (*boni mores* of a certain section of the community) and public policy.

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<sup>401</sup> *Schultz Supra* n377 at 684.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Daimler Chrysler Aktiengesellschaft and another v Afinta Motor Corporation (Pty) Ltd* 2001 (2) All SA 219 (T).

<sup>404</sup> *Daimler Chrysler Aktiengesellschaft Supra* n403 at 231; Webster (2015) 15-13.

Not all interferences in competition are wrongful, it is the essence of competition to contend and impact the goodwill of another. Infringement might take place where a trader advances his own goodwill at the expense of his competitor, and the *boni mores* will be used to determine if use of one's own goodwill constitutes an unlawful act.<sup>405</sup>

It can be established from the discussed case law that the *boni mores* are morals of society or public policy. This is a well-known criterion to determine unlawfulness, not only in our law but also in other jurisdictions, as seen in the comparative analysis. Despite the uncertainty surrounding the *boni mores* it is the only "acceptable and practicable criterion" that can be used without suppressing the development of unlawful competition law.<sup>406</sup>

### 5.3.2 Formats and Unlawful Competition

As mentioned in the introduction to this chapter, a format forms part of the product and service of an enterprise, and is related to the right to attract custom and the goodwill as an asset of an owner or producer's business. In addressing the subject, it needs to be determined what the *boni mores* would be in this context.

It should be considered against public policy to misappropriate the achievements of another, as it costs nothing to appropriate these efforts, but the appropriator derives some form of financial gain in doing so.<sup>407</sup> There is no difference between the direct adoption and the identical copying of a competitor's achievements. In both instances, the appropriator makes the achievements of his rival the basis of his own business.<sup>408</sup> Actions such as these do not amount to the mere use of another's idea, but is a parasitic use of a competitor's achievements.

For instance, it would not be unlawful if a producer decides to produce a talent competition after seeing *The Voice*. This merely amounts to using the idea. It would, however, be expected that the show he develops differs from the original format by adding features *other* than, for example, the judges sitting on swivel

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<sup>405</sup> Van der Merwe *et al* (2016) 53.

<sup>406</sup> Webster (2015) 15-9.

<sup>407</sup> Marshall (2016) *Journal of Intellectual Property Law & Practice* 289.

<sup>408</sup> Neethling (2008) 238.

chairs and turning around to signal that the contestant made it through to the next round, which is one of the unique features associated with *The Voice*. Where a producer uses the original programme format to make a pattern in order to create his own version of that show, without having the expense of developing a format or paying a fee to obtain a licence to produce the format, it might be considered *contra bonos mores*.

Misappropriating a rival's achievements should be considered in conflict with the competition principle, and therefore *contra bonos mores*.<sup>409</sup> The law should thus intervene to prevent misappropriation and to preserve investments in original efforts.<sup>410</sup> Whether acts of this nature are unlawful will be a question of degree and will have to be determined on a case to case basis.

To misappropriate the achievements of another is unfortunately a common practice in the TV format industry, and was brought to light by the leaked office memo from *ABC*, discussed in the introduction chapter.<sup>411</sup> The actions described in the memo echo the acts deemed unlawful in the *INS*-case<sup>412</sup> and the *Schultz*-case<sup>413</sup>.

After the memo leaked David Lyle stated that “formats belong to the people who create them and that they should not be used unlawfully by any company”.<sup>414</sup> Not producing and licencing formats honestly should be considered a wrongful act.

It is true that the public can benefit from (substantially) copying a rival's achievements because consumers will be offered more choice, but this practice is also harmful to the economy. To quote Van Heerden and Neethling:<sup>415</sup>

“In this connection, it must be remembered that the real benefit of free competition lies in the stimulus it provides to the individual competitor to promote his own interests through his own initiative. But this stimulus can only gain full strength if the competitor is as far as possible enabled to reap

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<sup>409</sup> *Ibid.*

<sup>410</sup> Marshall (2016) *Journal of Intellectual Property Law & Practice* 289.

<sup>411</sup> See Introduction page 4 above.

<sup>412</sup> *International News Service Supra* n297.

<sup>413</sup> *Schultz Supra* n377.

<sup>414</sup> <https://www.frapa.org/press/press-releases/frapa-response-to-leaked-abc-memo/>.

<sup>415</sup> Neethling (2008) 243 & 244.

the fruits of his own initiative himself. He should therefore not be deprived of these fruits by another competitor who is enabled to gain the lead in the competitive struggle merely by his act of misappropriation – thus avoiding the initiative, skill, labour, effort and cost which the development of an unusual performance normally requires.”

On the outset, it is seen that there is no statutory protection available to formats. The common law principles of unlawful competition are, however, well developed through case law and can be applied to situations dealing with the imitation of formats. Through the case law, discussed in the previous section, it is established that, in South Africa, the convictions of society will be used to determine whether an act was unlawful.

South Africa ratified the Paris Convention<sup>416</sup>. Article 10*bis* of the Paris Convention offers a general clause against unfair competition, which provides that:

- 1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- 2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- 3) The following in particular shall be prohibited: all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Although article 10*bis* offers some specifically prohibited acts in the third paragraph, paragraph two makes mention that ‘*any act contrary to honest practices*’ would constitute unlawful competition. In South Africa, the yardstick of fairness and honesty in light of

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<sup>416</sup> Paris Convention for the Protection of Industrial Property of March 1883.



the *boni mores* is used to determine the unlawfulness of a competitive act,<sup>417</sup> which seem to incorporate article 10*bis* into our law.

There are also other factors apart from fairness and honesty that play a role in determining the unlawfulness of an act. The *boni mores* depend on the view of a certain society or community, in a particular circumstance, in the case of TV formats, one source of the norms of the industry might be found in FRAPA's code of conduct. Such a code of conduct sets out the morals of a certain community and can offer assistance in determining if public policy would allow a certain act or not. Although the FRAPA code of conduct sets it out in layman's terms, using words like 'steal' and theft', it is clear that they do not stand for the misappropriation of an achievement brought about by the skill, time, effort and expense of another.

The statements made in FRAPA's code of conduct also relate to the *INS*-case, where the 'sweat of brow' approach was used to establish a property right. In the *INS*-case it was held that if property of a person is used by another to go into competition with the owner it would constitute unlawful competition.

FRAPA's response to the leaked ABC memo, referred to above,<sup>418</sup> also emphasised that imitation "runs contrary to FRAPA's core mission, which is to ensure that television formats are respected by the industry and protected by law as intellectual property".<sup>419</sup>

In relation to format imitation in South Africa:

- a) for an act to be in unfair competition with a rival, fairness and honesty and later the *boni mores* were set as the standard to uphold;
- b) public policy of a certain community will be used to determine whether imitation was *contra bonos mores*;
- c) more specifically, imitation is permitted in South African law, but it will be a question of degree and means of copying to determine whether imitation amounts to using the idea or misappropriation of another's achievements;

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<sup>417</sup> Neethling in Henning-Bodewig (ed) (2013) 469.

<sup>418</sup> See *Introduction* page 4.

<sup>419</sup> <https://www.frapa.org/press/press-releases/frapa-response-to-leaked-abc-memo/>.

- d) the competition principle requires the merit of achievements to be one's own. Even if the idea of a rival's achievement may be taken over and used as the basis of an achievement "only a performance which is made independently in every other way" should be recognised as an own achievement;<sup>420</sup>
- e) it would be fair to expect every person to start in the same point of business, using what he knows to create an own achievement from there.

It is by no means suggested that imitation should be prohibited completely but it is clear, that where it is felt to be unfair the law should intervene.<sup>421</sup>

### 5.3.3 Summary

It can thus be extracted that:

- a) in South Africa, the criteria used to determine whether an act constitutes unlawful competition is fairness and honesty in light of the *boni mores*;
- b) although imitation is not prohibited, it can in certain cases be argued that imitation amounts to unlawful competition. Where a competitor bases his achievements purely on those of his rival, an unfair business advantage will be gained by bypassing the expense, time and effort to create an own achievement;
- c) it would, thus, be fair to expect every person to start in the same point of business, using what he knows to create an own achievement from there;
- d) in the US, the tort of misappropriation of trade value imported the concept of unjust enrichment into the law of unfair competition and might offer some assistance in protecting a format as 'trade value' where a rival intends to misappropriate the achievement of another and 'reap where he did not sow';
- e) in Germany, the UWG regulates the misappropriation of another's work<sup>422</sup> and to succeed with a claim in terms of the UWG all features mentioned in the relevant section need to be proven. Thus, more than mere copying will have to be proven, as in our law, and the act that lead to the imitation will have to be in unfair competition with a competitor. In the *ZFD*-case the German court found that imitating a format can be considered as unfair

<sup>420</sup> Neethling (2008) 244.

<sup>421</sup> Webster (2015) 15-11.

<sup>422</sup> Clark (2011) *Journal of Intellectual Property Law & Practice* 221.

competition, but original format must be identifiable in the imitated version and other relevant factors need to be proven. Whether imitation is unlawful will thus depend on the facts of every case;

- f) in South Africa, to determine whether imitation amounts to an unlawful practise will depend on the facts of a case. The standard will be the general sense of justice of the community at issue and fairness and honesty, as provided in article 10*bis* of the Paris Convention;
- g) one of the sources of the *boni mores*, in relation to the format industry, can be found in FRAPA's code of conduct. FRAPA states in its code that imitating formats are against the morals of the industry, but whether imitating a format constitutes an unlawful act will however be a question of degree and depend on the facts of each case.

## 5.4 Passing-off

### 5.4.1 South African Principles of Passing-Off

An important form of unlawful competition is passing-off. In South Africa, the action of passing-off consists of a wrongful representation by one person that his business or merchandise is that of another, or is in some way associated with the business of another.<sup>423</sup>

In *Capital Estates v Holiday Inns*<sup>424</sup> it was determined what would constitute passing-off under South African law. The court held that passing-off occurs when a competitor (intentionally or negligently) misrepresents that its goods or services are those of another or that there is an association.<sup>425</sup> To determine whether a representation amounts to passing-off, an inquiry has to be done regarding whether there is a reasonable likelihood that members of the public may be confused into believing that the business of one person is, or is connected with, that of another.<sup>426</sup> It will however be a question of fact and should be determined on the facts of each case.

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<sup>423</sup> Webster (2015) 15-16.

<sup>424</sup> *Capital Estates and General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A).

<sup>425</sup> Du Plessis *et al* (eds) (2011) 183.

<sup>426</sup> *Capital Estates and General Agencies Supra* n424.

Passing-off, as a species of unlawful competition, involves another's rights in reputation and is based on goodwill.<sup>427</sup> Under the infringing acts that constitute passing-off the objective of the alleged infringer is to promote its own goodwill, while also harming the goodwill of another.<sup>428</sup> Accordingly, to succeed in a claim for passing-off, the claimant must prove that it has acquired a reputation in a mark (including a name, trade mark or get-up), that there was misrepresentation which is likely to deceive, as to origin or connection, and that damages will be suffered as a result.<sup>429</sup>

Because the proprietary right protected by this action is the reputation associated with the mark of the plaintiff,<sup>430</sup> it will have to be established that a business has a reputation in that mark,<sup>431</sup> which can consist of anything that identifies the owner of the goods or services.<sup>432</sup> Reputation will have to be established by the plaintiff by giving proof that its mark has become renowned among a reasonable number of consumers.<sup>433</sup> The overall impression that is left in the mind of the average consumer is of importance.<sup>434</sup> It does not have to be shown that the mark is generally known, but rather that the mark enables consumers to distinguish the plaintiff's products or services from others.

This was tested in *Spur Steak Ranches v Saddles Steak Ranch*<sup>435</sup> where the applicants alleged that a big part of its success was due to the distinctiveness of the "décor, layout and ambience of their restaurants" which made up a substantial part of its reputation and goodwill.<sup>436</sup> It was emphasised that the applicants aimed to protect its goodwill and not a mark or design.

A number of décor and layout features were, allegedly, deliberately copied by *Saddles*, after a decision to recreate the 'vibe' or look and feel distinctive to

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<sup>427</sup> Webster (2015) 15-22.

<sup>428</sup> Van der Merwe (2013) *De Jure* 1044.

<sup>429</sup> Webster (2015) 15-26.

<sup>430</sup> Du Plessis *et al* (eds) (2011) 183.

<sup>431</sup> *Ibid.*

<sup>432</sup> Van der Merwe (2013) *De Jure* 1044.

<sup>433</sup> Van der Merwe *et al* (2016) 57.

<sup>434</sup> Lee *et al* (eds) (2014) 44.

<sup>435</sup> *Spur Steak Ranches LTD and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C).

<sup>436</sup> *Spur Steak Ranches Supra* n435 at 708.

*Spur*.<sup>437</sup> In this case the court had to determine whether the applicants had established a distinctive get-up that could be susceptible to protection by law.<sup>438</sup>

*Spur* argued that the application of certain elements made up its get-up and *Saddles* infringed on this by applying these elements in a similar way. It was found that the distinctive design and layout that the applicants claim was based on was never defined in its founding papers and the court was unwilling to accept its existence without any concrete proof.<sup>439</sup> Because the claim of the uniqueness of *Spur's* get-up was based on the notion that such a definition existed, the absence thereof proved damning to the applicant's argument.<sup>440</sup>

In this instance, the case failed because the applicant could not prove that it had a specific get-up and therefore it did not have a reputation in relation thereto. *Spur* relied only on witnesses and a list of alleged features set out in an affidavit, but no proof could be found of a distinct character in the founding papers or anywhere else.

After reputation or goodwill has been established, it will have to be determined whether there is a reasonable likelihood that a misrepresentation made by a competitor can lead to members of the public being confused or deceived to believe that there exists a connection between the two businesses.<sup>441</sup> Evidence of actual confusion is not necessary and confusion can occur even where no name, logo or trade mark has been used. Whether there is a likelihood of deception or confusion is a conclusion that may be drawn by the court.<sup>442</sup>

The most recent case in South Africa regarding passing-off and get-up is *De Freitas v Jonopro*.<sup>443</sup> To summarise the facts of this case: the applicant and respondent were business partners for a number of years, running an adult entertainment business with numerous locations around the country. Their business, called *Cheeky Tiger*, had a distinctive logo, get-up and layout, which they took time developing and incorporated at all of the locations.

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<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*

<sup>441</sup> Webster (2015) 15-16.

<sup>442</sup> Du Plessis *et al* (eds) (2011) 183.

<sup>443</sup> *De Freitas v Jonopro (Pty) Ltd and Others* 2017 (2) SA 450 (GJ).

After a falling out they went their separate ways and the applicant continued to run one of the locations in Kempton park. The respondent convinced the applicant to change his business' name to *Manhattan Nights*, where after the respondent opened a similar establishment 300m from the applicant's newly branded location. The respondent's new establishment traded under the name *Cheeky Tiger* and had a get-up and layout identical to what used to be the applicant's get-up and layout. The respondent failed to disclose this to the applicant when he convinced him to rebrand his own business.

The applicant argued that the goodwill he had acquired in the area now went over to the respondent. The applicant unwittingly gave up his goodwill to the respondent's new establishment. The court held that the "non-disclosure of his plan to capture" the applicant's goodwill without compensation was *prima facie* actionable.<sup>444</sup>

The matter went to court and an interdict was granted, prohibiting the respondent to trade under the name *Cheeky Tiger*. While the respondent did change the name he was trading under, he continued doing business near the applicant. Moreover, he continued to use the get-up and layout which the applicant argued to be made up of every significant element of its previous get-up and layout.<sup>445</sup> The applicant contends that the respondent has "deliberately gone about to replicate the Cheeky Tiger brand in all but the name".<sup>446</sup>

The matter came before the court again, this time for the passing-off of the applicant's get-up and layout. Spilg J was of the opinion that the court *a quo* did not consider the possibility that the respondent would use the get-up without the name, after an order had been given.<sup>447</sup> It was now up to the applicant to prove his case of passing-off in relation to the get-up in order to obtain a remedy in this regard.<sup>448</sup>

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<sup>444</sup> *De Freitas Supra* n443 at 451.

<sup>445</sup> *Idem* 456.

<sup>446</sup> *Ibid.*

<sup>447</sup> *Idem* 457.

<sup>448</sup> *Ibid.*

Spilg J further stated that both in his opinion, and that of the Georgiadis J (court *a quo*), there was a distinctive get-up made up of the colour scheme, layout, logo and turnstile.<sup>449</sup> In relation to this get-up Spilg J stated that “one does not need affidavits from patrons to draw the conclusion that they would go to what was familiar to them and believe that it was simply a continuation of the applicant’s business”.<sup>450</sup> It was concluded that making use of the applicant’s distinctive get-up would result in confusion among clients and therefore constitutes passing-off.

The *De Freitas*-case is a good example of how confusion can still be present even without using a similar name or trade mark, but only the elements that form part of the get-up of a business. McKenna is of the opinion that recognisable creative content, like get-up, does not necessarily *tell* the consumer anything about the source of the goods or services, but it is assumed that recognisable content can *indicate* source and is therefore likely to be treated as a mark.<sup>451</sup>

Confusion among members of the relevant public does not have to be in regard to the origin of the goods or services. If there is confusion in relation to there being *any* connection or affiliation between the parties involved, it can constitute passing-off.

Lastly, to succeed with a claim of passing-off it will have to be proven that damage will be suffered by the plaintiff as a result of the passing-off.

In the *Lorimar*-case it was held that “cases of passing-off injury take the form of a diversion of custom from the business of the aggrieved party and/or injury to the business’ reputation of the aggrieved party”.<sup>452</sup> Confirming that damages are apparent in two forms namely prejudice to the competitor’s reputation and a diversion of custom.<sup>453</sup>

Thus, to succeed with a claim of passing-off under South African law, it will first have to be established that there is a mark in which a business has goodwill. Thereafter, the three elements of passing-off will have to be proven, namely

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<sup>449</sup> *Idem* 461.

<sup>450</sup> *Ibid.*

<sup>451</sup> McKenna (2012) *Journal of Intellectual Property Law* 381 (footnote 85).

<sup>452</sup> *Lorimar Productions Supra* n236 at 1155.

<sup>453</sup> Van der Merwe *et al* (2016) 65.

reputation in any mark associated with the business, a likelihood of confusion (in relation to *any* form of connection or affiliation between the parties involved) and damages.

If all of this can be proven a claim of passing-off will succeed.

#### 5.4.2 Formats and Passing-Off

In common law jurisdictions, such as South Africa, it would have to be shown that a reputation exists in some part of a format in order to succeed in a claim of passing-off in relation to TV formats.<sup>454</sup> This can be done by making use of the trade marks of the show, the title or other visual features.

The ‘other visual features’ can be found in the way the show is presented or the get-up of the show, as set out in the format bible, which will include the set layout and design, lighting, judging styles and the like. The format bible is important in proving the specific get-up of a programme, because it defines the distinctive features and character of the get-up in a concrete way.

In claims based on passing-off, the format owner will in most jurisdictions have to prove that their format has gained goodwill, specifically in the country where the case is brought.<sup>455</sup> This requirement will vary from country to country each having their own standard that has to be met.<sup>456</sup>

In relation to TV formats proving reputation will, according to FRAPA, be done by “demonstrating consistent ratings and a significant audience, as well as highlighting press coverage and income”.<sup>457</sup> Proving a reputation in a format that has been broadcast in a certain territory for some time will be easy, but if the format is newly released this task may become more difficult.<sup>458</sup> In cases where a format has reached a certain amount of success abroad it can be argued that it had required a reputation as a result of spill-over reputation or goodwill.<sup>459</sup>

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<sup>454</sup> Singh (2011) *The FRAPA Report* 30.

<sup>455</sup> Chalaby (2015) *Media, Culture & Society* 473.

<sup>456</sup> Singh (2011) *The FRAPA Report* 31.

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid.*

<sup>459</sup> Singh (2011) *The FRAPA Report* 31.



In the *Green*-case<sup>460</sup> one of the claims were based on passing-off. This claim, however, failed because the show had not yet been broadcast and was only known by a small group of expats who knew it from their home country. It is believed that if the same case was brought again at a later stage the outcome would be different because the show has since gained an enormous following and became well known in many territories.<sup>461</sup>

It will also have to be proven that there is some form of confusion among customers leading to damage. To show confusion when dealing with reality TV formats might be difficult.<sup>462</sup> Being a factual question, determined on the facts of each case, it will need to be shown that ordinary consumers are likely to be confused or deceived by the similarities between the presentation styles of the format. For there to be a likelihood of confusion or deception, A link between the product of the imitator and original owner must be formed in the mind of the consumer.

Viewers might be confused into believing that an agreement exists between the format producers or owners. As discussed above, confusion of association in terms of passing-off, in the UK, can also be with regard to whether consent has been given for the use of it's goodwill by another. Black puts this into perspective and states that the owner of a copyright or a plot of land is entitled to prevent others from using his work or land while also granting another use of this property on terms that are acceptable to him.<sup>463</sup> The same principle applies to goodwill as property. Where the owner did not give consent, it should be sufficient proof if confusion arises pertaining to the fact that there was consent to use the goodwill, in the form of an agreement.<sup>464</sup>

Consumers believing that there might be a connection in terms of a licencing agreement between programmes can lead to damages in the form of diversion of custom. Viewers might be drawn to the imitated show thinking it is a spinoff of

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<sup>460</sup> *Green Supra* n109.

<sup>461</sup> *Ibid.*

<sup>462</sup> Singh (2011) *The FRAPA Report* 31.

<sup>463</sup> Black (2007) *SCRIPTed* 164.

<sup>464</sup> *Ibid.*

the original or is associated in some other way. Damage can also occur as a result of the dilution of the format's reputation brought about by a knock off format.

To succeed with a claim of passing-off in terms of formats:

- a) the mark on which goodwill is based could be the presentation style of the programme of the get-up of the show;
- b) a reputation in the get-up can be proven by using ratings and press coverage;
- c) a likelihood of confusion may be regarding the fact that most people know that to produce a similar show there would be some sort of licence agreement. The lack of which will create a connection between the parties in the mind of the consumer;
- d) and lastly, damages will be in terms of a diversion of viewers or a dilution caused by a knock-off show.

The get-up of a format is designed to distinguish a certain format from others. Where features (get-up or features of the presentation style of a format) that have become associated with a certain format<sup>465</sup> have been used without authorisation in a way that is likely to lead to deception or confusion as to a connection between the parties involved,<sup>466</sup> it might be actionable under passing-off.

### 5.4.3 Summary

From the above it can be extracted that:

- a) to succeed with an action of passing-off, reputation; misrepresentation leading to confusion or deception; and damages need to be proven;
- a) reputation does not have to be in the name or trade mark associated with the product or service, but can be in relation to the get-up. In the case of reality TV programmes, the get-up will be the presentation style of the show;
- b) reputation or goodwill in the US relies on a business' trade mark or other identifiers of its products or services, which the unauthorised use of is likely to cause confusion or deception as to the affiliation, connection or

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<sup>465</sup> Singh (2011) *The FRAPA Report* 30.

<sup>466</sup> Webster (2015) 15-50.

association between parties. But as seen in the *RDF*-case, the entirety of the show will not be regarded as 'trade dress' and, as in South Africa (seen in the *Spur*-case) it is important to properly determine and identify what the get-up (trade dress) or identifier is in claiming passing-off of in a format dispute;

- c) in the UK, the tort of passing-off is interpreted widely and includes misrepresentation which is likely to deceive customers to believe that there exists some sort of association, like a licence agreement between the parties;
- d) confusion in South Africa is also not limited to confusion as to the origin of goods or services, but can be in relation to any connection between parties formed in the mind of the average customer;
- e) regarding reality TV programmes, customers might think that there exists a connection in the form of a licence agreement between parties;
- f) thus, if the get-up used by the imitator is so similar to that of the original programme that consumers will be under the impression that there exists an association or connection of authorised use between the two parties, the plaintiff might have success in bringing a claim of passing-off.

### ***5.5 Unlawful Competition and Passing-Off Summary***

Unlawful competition might be a suitable remedy in cases of format imitation as it is not limited to exact copying. In all of the South African cases discussed under unlawful competition the judges were careful not to set strict boundaries regarding this area of law. Therefore, to determine if an act would be unlawful the general sense of justice of the community is of importance.

In South African law, the principles of unlawful competition are flexible enough that disputes of this nature can be approached on the same basis as in the US *INS*-case. By importing the concept of unjust enrichment, unlawful competition, based on the principles of delict, can be expanded to include the misappropriation of intangible property brought about by skill and effort, in this case a format, that belongs to a competitor.

In Germany, making use of another person's achievement to gain an advantage is unlawful, this might also be considered to be true in the South African context. As

was said in the South African *Schultz*-case, it is fair to expect a person to start where all competitors start, by taking knowledge that is common to a specific trade in combination with their own knowledge and experience, to build one's own business. German law has a specific clause prohibiting imitation and a German court has also recognised that imitating a TV programmes' format might lead to unlawful competition.

The general sense of justice within the format industry will be the standard by which the unlawfulness of an act is measured in South Africa. Taking FRAPA's code of conduct and statements as an indication of the norms in this sector, the imitation of formats seems to be *contra bonos mores*.

It is my view that where a dispute regarding reality TV formats is argued on the grounds of unlawful competition and the criterion to be applied is the *boni mores*, the claim might succeed. It will, however, depend on more than mere copying and the extent of what was taken from the original format and the method of imitation will have to be taken into account.

Passing-off might also be useful in format disputes but only where there is a misrepresentation leading consumers to be confused or deceived to believe that there is a connection or affiliation between parties.

Passing-off in South Africa will provide narrow protection and be applicable only in situations where a substantial portion of the public would believe that formats presented in a similar way (with a similar get-up) might have some form of connection.

In the UK, the tort of passing-off is used in most unlawful competition cases. This tort has been interpreted widely and will include confusion as to a connection in terms of, for example, a licence agreement between the parties. A wider interpretation of what may constitute confusion will be of more help in format disputes.

All of the mentioned available actions will however have to be determined on the facts of each case and it cannot be predicted how a court would react in any of these instances.

## 6 Conclusion

As can be seen from the discussion above, trying to protect the rights of the owner of a format is a difficult task.

The first difficulty is that there exists no agreed or clear definition of what a format is. In my opinion, it should be a definition in two parts, as was suggested in the UK. First, the underlying work of the programme in its written form, the format bible, that gives an outline of the sequence of events (tent-pole moments) and instructions to the technical aspects, in its written form a format is similar to stage directions. Then, secondly, the programme in its produced form where the information contained in the format bible is applied in such a way that the format can be identified through the repeated- or tent-pole moments and technical aspects present in the cinematograph film or broadcast of every episode.

Until a legal definition is found and formats are considered to be copyright works as such, the owner of a format might rely on the following under South African law:

Firstly, in terms of copyright law all the works that make up the format will have to be identified as individual works. The types of works involved in formats will include literary works, artistic works, cinematograph films and broadcasts.

Works from the original format, that have allegedly been infringed, in either the format bible or its produced form, will have to be compared with the imitated versions thereof to determine whether a substantial part of the original work has been copied. Actual copying will also have to be proven. Proving access to artistic works, cinematograph films and broadcasts will be easy as these works will be available to anyone who has a TV. The format bible is only available to a limited number of people and it will be difficult to prove that an infringer had access to the literary work (format bible). Making a reproduction of a work incorporating the literary work will, however, still infringe the owner's copyright in that literary work.

In my opinion, the best protection in a claim of copyright infringement in relation to a reality TV format, will be based on the copyright in a cinematograph film or in a literary work incorporated in a cinematograph film of the programme involved.

Cinematograph films are recordings of all the elements that make up the format as set out in the format bible. In terms of cinematograph films, access is evident. Comparing the produced episodes of the original programme with similar episodes of the imitated programme might prove substantial similarity. Substantial similarity might also be proven by comparing the literary work incorporated in the cinematograph films of the original format with the cinematograph films of the imitated format. Adaptation is also a restricted act in relation to cinematograph films and literary works. Relying on the extended definition, if the original features (look and feel) of a cinematograph film or literary work incorporated in a cinematograph film are still recognisable (in the imitated version of the format) it might constitute an infringement as an adaptation of the original work.

Secondly, the Performers Protection Act might only offer very narrow protection for reality TV programmes. Protection in terms of the PPA will only be in relation to performances based on a literary or artistic works. For reproduction to occur, it will have to be shown that actual footage featuring a specific performer has been used.

Thirdly, principles pertaining to unlawful competition might be useful in protecting a format against imitation. The format will form part of the goodwill of the company as a business asset that attracts custom. To succeed with a claim of unlawful competition in South Africa the principles of the law of *delict* apply.

One of the requirements for competition to be unlawful, is that there must be an unlawful or wrongful act between competitors. To determine whether an act is wrongful, the general convictions of society, the *boni mores*, will be taken into account. In South Africa, the *boni mores* are used to uphold the competition principle. This principle states that that the competitor offering the best goods or services should prevail over inferior goods or services. Misappropriating someone else's achievement as your own will be against this principle and thus *contra bonos mores*. In doing so the appropriator gains an advantage in competition without any of the expenses, making it unfair and unjust. Internationally, article 10*bis* of the

Paris Convention sets a general standard for competition and makes mention of fairness and honesty. Thus, not licencing formats honestly can be regarded as *contra bonos mores*. Taking into account the code of conduct by industry's protective trade body, FRAPA, it would seem that the format industry regards copying someone's format without authorisation as *contra bonos mores*. These are just some examples of what might be *contra bonos mores* and be considered as wrongful acts in relation to the format industry.

Whether a claim of unlawful competition will succeed will, however, depend on the facts of each case and the general sense of justice of the community at issue.

Lastly, the owner might rely on a claim for passing-off, if it can be proven that there is a reputation in some part of the presentation style or get-up of the programme and that there has been a misrepresentation leading to deception or confusion. It might be enough to prove confusion as to a connection if a reasonable number of customers believe that there exists some form of licencing agreement between the parties. This will depend on the similarity between the programmes and the stretch of the reputation enjoyed by the parties, but will have to be decided on the facts of each case.

Reality TV has proven to be not just a phase or of a passing nature, and deserves some concrete form of legal protection. It is not the intention to stifle innovation in the industry and therefore, it should be accepted that a certain amount of imitation will always be permitted. But, there should be relief against imitation that creates an unfair market place and unearned advantages.

In my opinion, protecting a format might be achieved by claiming copyright in the episodes as cinematograph films or the literary work incorporated in the episodes, along with a claim of unlawful competition for misappropriating or imitating the format of the original owner. Success will however be determined by the facts of each case and because every format is so different in nature it will never be sure what the outcome may be.





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