



저작자표시-비영리-변경금지 2.0 대한민국

이용자는 아래의 조건을 따르는 경우에 한하여 자유롭게

- 이 저작물을 복제, 배포, 전송, 전시, 공연 및 방송할 수 있습니다.

다음과 같은 조건을 따라야 합니다:



저작자표시. 귀하는 원저작자를 표시하여야 합니다.



비영리. 귀하는 이 저작물을 영리 목적으로 이용할 수 없습니다.



변경금지. 귀하는 이 저작물을 개작, 변형 또는 가공할 수 없습니다.

- 귀하는, 이 저작물의 재이용이나 배포의 경우, 이 저작물에 적용된 이용허락조건을 명확하게 나타내어야 합니다.
- 저작권자로부터 별도의 허가를 받으면 이러한 조건들은 적용되지 않습니다.

저작권법에 따른 이용자의 권리는 위의 내용에 의하여 영향을 받지 않습니다.

이것은 [이용허락규약\(Legal Code\)](#)을 이해하기 쉽게 요약한 것입니다.

[Disclaimer](#)

법학석사학위논문

**Comparative Research on Copyright  
Protection of Reality Television  
Programs in China and Korea**

한중 예능 프로그램 저작권 보호에  
관한 비교 연구

2017 년 2 월

서울대학교 대학원

법학과 법학전공

Qi Xin

**Comparative Research on Copyright**

# Protection of Reality Television Programs in China and Korea

한중 예능 프로그램 저작권 보호에 관한 비교  
연구

지도교수 정상조

이 논문을 법학석사학위논문으로 제출함

2016년 10월

서울대학교 대학원

법학과 법학전공

Qi Xin

Qi Xin 의 석사학위논문을 인준함

2016년 12월

위원장 \_\_\_\_\_(인)

부위원장 \_\_\_\_\_(인)

위원 \_\_\_\_\_(인)

## **ABSTRACT**

# **Comparative Research on Copyright Protection of Reality Television Programs in China and Korea**

Qi Xin

College of law, law

The Graduate School

Seoul National University

With the fast development of Television broadcast and Internet technologies, there are various ways provided for people to enjoy interesting TV programs. Nowadays, it shows an increasing demand of people for high-quality TV shows. Both China and Korea governments are encouraging and promoting culture and entertainment industries by setting political strategies and legislation.

On one hand, highly developed contents industry can bring a thriving and happy mental life for people and make a country identical and reputable in international societies. On the other hand, compared to manufacture industry, with a comparatively low invest, a highly developed contents industry brings out huge monetary benefits for one country in a very environmental-friendly way. It's said by a research institute that contents industry is one of the most promising

industry in near future days.

As a country which has a relatively strong and developed contents industry, Korea manufactures and exports to other countries movies, dramas and TV programs every year. The legislators and policy makers paid attention to and made related laws and policies to support entertainment industry of Korea. The main laws are as below: Copyright Law(저작권법); Contents Industry Promotion Law(콘텐츠산업 진흥법); Culture Industry Promotion Basic Law(문화산업진흥 기본법) and so on.

China is really a huge market for TV broadcasting operators with a large number of population and a wide land. But in the aspect of protection of TV programs, the law is vague and uncertain. Copyright Law or Unfair Competition Law is the main tool for TV program producers to seek protection for their works.

In recent years, especially from 2013, china TV broadcasting stations begin to buy the license of copyright of Korean TV programs. In 2014, Chinese TV stations imported nearly 70 foreign TV shows, among which Korean TV shows charge 10, nearly 15% of the total amount. <Running man><I'm a singer><Where are you going, dad> and other TV programs made great success and became the hottest TV shows in China. As the show is getting more and more popular, the copyright license royalty is also increasing. As reported, before 2014, the license fee to Korean stations is usually between 10 to 30 thousands US dollars per episode.

After a big success, some TV programs even cost as expensive as 10 times. China has the condition to buy copyrights, whereas Korea aims at the huge market of China, both of which contribute to the explosive growth of copyright transaction.

In this thesis, I will concentrate on arguing the following things. Firstly, I will analysis the definition and legal character of format. Should it be protected by copyright law? Secondly, I introduce the situation of legal protection of format in China, Korea and U.S. Lastly I will provide some practice strategy for format holders to protect the format besides the Copyright Law.

***Keywords:*** Reality TV program, format, copyright, China, Korea, Protect strategy, law

***Student Number:*** 2014-25172

# Catalogue

ABSTRACT.....	1
KEYWORDS.....	3
I. Introduction .....	6
II. Definition and legal character of format.....	8
A. DEFINITION OF REALITY TV PROGRAMS AND FORMAT .....	8
1. <i>Definition of reality TV programs</i> .....	8
2. <i>Definition of format</i> .....	10
B. ORIGINALITY ANALYSIS .....	13
C. FIXATION IN TANGIBLE MEDIUM .....	16
D. IDEA V. EXPRESSION .....	17
E. LEGISLATIVE GOAL .....	20
III. The situation of legal protection of format in China.....	22
A. INTRODUCTION OF THE STATE ADMINISTRATION OF PRESS, PUBLICATION, RADIO, FILM AND TELEVISION OF THE PEOPLE'S REPUBLIC OF CHINA .....	22
B. COURT'S OPINION OF LEGAL CHARACTER OF TV PROGRAMS AND FORMAT IN CHINA .	25
1. <i>Abstract of the overall situation of TV program copyright protection cases in courts         of Beijing</i> .....	26
2. <i>The legal character of TV programs</i> .....	28
3. <i>The legal protection of format</i> .....	35
C. CASE ANALYSIS- AN ONGOING DISPUTE OF <VOICE OF CHINA>.....	38
IV. The situation of legal protection of format in Korea.....	40
A. CASE ANALYSIS- CJ E&M SNL KOREA Vs. SBS HALF (짝).....	41
B. CASE ANALYSIS- KBS <REAL LIFE THEATER> (인간극장) Vs. SBS <HUMAN STORY WOMAN>(휴먼스토리 여자).....	42

V. The situation of legal protection of format in the other main countries .....	43
A. THE ATTITUDE TOWARDS FORMAT IN MAIN COUNTRIES .....	43
B. INTRODUCTION OF CASE- ENDEMOL&TV GLOBO Vs. TVSBT (BRAZIL).....	45
C. INTRODUCTION OF CASE- CBS BROAD., INC. Vs. ABC(U.S.A).....	47
1. <i>background</i> .....	47
2. <i>comparison between Survivor and Celebrity and legal test</i> .....	48
3. <i>court's analysis</i> .....	49
4. <i>The standard of establishment of copyright infringement in U.S.A.</i> .....	54
VI. Strategy for format holders .....	60
A. PROTECTING FORMAT BY TRADE SECRET LAW: SIGN A NON-DISCLOSURE AGREEMENT BEFORE DEMONSTRATING AN IDEA OR KNOW-HOW TO OTHERS.....	60
B. PROTECTING FORMAT BY CONTRACT LAW- IMPOSE RESTRICTIONS ON THE TERRITORY, TIME AND DERIVATIVE IN LICENSE AGREEMENT .....	61
C. PROTECTING FORMAT BY UNFAIR COMPETITION LAW: PROVE THE ILLEGAL BUSINESS BEHAVIOR OF PASSING OFF AND THE FACT OF CONFUSING BY AUDIENCE. ....	62
D. PROTECTING FORMAT BY TRADEMARK LAW: REGISTER THE TITLE OF REALITY PROGRAM AS A TRADEMARK IN MAIN TARGET COUNTRIES.....	63
E. VALUE THE INTERNATIONAL ORGANIZATION'S ROLE ON PROTECTION OF FORMAT - FRAPA(FORMAT RECOGNITION AND PROTECTION ASSOCIATION) .....	64
VII. Conclusion .....	65
Reference materials: .....	67



# I. Introduction

In recent years, I saw many Chinese version of Reality TV Programs which belong to a foreign origin. In 2014, Chinese TV stations imported nearly 70 foreign TV shows, among which Korean TV shows charge 10, nearly 15% of the total amount. In 2015 and 2016, the percentage of Korea-original reality TV programs is bigger. <Running man><I'm a singer><Where are you going, dad> and other TV programs made great success and became the hottest TV shows in China.

At the same time, there are some Chinese reality TV programs which are claimed as copycat of Korean version. The Korean TV stations or TV program producers argued the format of original version had been used by Chinese TV station without permission. Thus the dispute attracted both Chinese and Korean audience's attention.

As the fast development of entertainment industry, the transaction of TV formats has charged a big percentage on the whole transaction of copyright market. The unlawful behavior is not rare anymore as we can see many same or similar TV programs. The amount of case disputed on format is increasing fastly in recent year. However, there is few cases in the world which last until the announcement of judgment by the court. Even judged by court, most courts of world intend to deny the copyright protectable character of TV format.

According to big data<sup>1</sup> about situation of TV format right disputes worldwide from 1987 to 2007, among the 59 disputed formats, 64% of disputes turned to a legal case to reach a court. 37% of disputes were ruled by a court whereas copyright infringement was upheld in 12% of disputes. The format disputes happened mostly in UK and US, probably because the main format producers are from UK and US, also the market of TV format in those two countries is big and active. As to the types of claim of disputes, 80% of disputes reaching to court are copyright infringement, the rest is for breach of confidence, contract, and passing off.

This phenomenon about format dispute leads me to consider the legal character of format, should format of reality TV programs be protected by Copyright law. In this thesis, I will concentrate on arguing the following things. Firstly, I will analysis the definition and legal character of format. Should it be protected by copyright law? Secondly, I introduce the situation of legal protection of format in China, Korea and U.S. Lastly I will provide some practice strategy for format holders to protect the format besides the Copyright Law. I will reach my conclusion that format has the copyright character in some condition. It should be protected by Copyright law.

---

<sup>1</sup> ©SukhpreetSingh(2009) Observation from TV Format Rights Disputes Database [http://tvformats.bournemouth.ac.uk/Downloads/TVFormatRightsDisputesObservations\(c\)SukhpreetSingh1.pdf](http://tvformats.bournemouth.ac.uk/Downloads/TVFormatRightsDisputesObservations(c)SukhpreetSingh1.pdf)

## **II. Definition and legal character of format**

### **A. Definition of reality TV programs and format**

#### **1. Definition of reality TV programs**

TV program is the contents broadcast on TV which is often made under the same structure but different in substance and detail by chapters. Following the object and form of TV program, UNESCO investigated the materials of many countries and divide TV programs into 13 categories: 1. Informative programs; 2. Educational programs; 3. Cultural programs; 4. Religious programs; 5. Children's programs; 6. Entertainment programs; 7. Unclassified programs; 8. Advertisements. Entertainment programs means programs intended primarily to entertain. It contains cinema films, programs produced as plays, whether as single complete programs or as serials, programs of which the predominant content is music, whether "live" or recorded, sports programs (but excluding sports news) and other entertainment programs.<sup>2</sup>

Entertainment program is produced for the need of people's mental life. It also plays an important role in making and spreading literary and artistic works.

---

<sup>2</sup> <http://unesdoc.unesco.org/images/0006/000687/068746eo.pdf> last visit 2016/10/14 12:30 Tapio Varis. International Flow of Television Programmes. 15.

According to the contents and forms, entertainment programs include game, talk show, celebrity interview, audition, music show, comedy, reality show and variety. Recently, to meet different taste of audience, the program producers combine and mix different types of programs. A specific TV program may have the characters of more than two categories, thus it brings a hybridization usually as reality program and variety, which is what I am going to mainly talk about in this thesis.

Reality television is a genre of television programming that documents supposedly unscripted real-life situations, and often features an otherwise unknown cast of individuals who are typically not professional actors, although in some shows celebrities may participate. It differs from documentary television in that the focus tends to be on drama, personal conflict, and entertainment rather than educating viewers. Reality TV programs also often bring participants into situations and environments that they would otherwise never be a part of. The genre has various standard tropes, including "confessionals" used by cast members to express their thoughts, which often double as the shows' narration. Reality TV shows often have a host who asks questions of the participants and comments on the proceedings. In competition-based reality shows, a notable subset, there are other common elements such as one participant being eliminated per episode, a panel of judges, and the concept of "immunity from elimination."<sup>3</sup>

In conclusion, reality program is a kind of TV program that record by video camera to document a situation of real life without script before, of individuals who are

---

<sup>3</sup> [https://en.wikipedia.org/wiki/Reality\\_television](https://en.wikipedia.org/wiki/Reality_television) last visit 2016.03.22

not actors or sometimes celebrities. Usually following the structure or basic rule which is set up in advance, with or without a host, the individuals behave by his own idea and plan, thus the specific process and result is unpredictable.

## **2. Definition of format**

To express specific thoughts or emotional feelings, the TV producer may have several access to make TV shows, but the market result and effect is totally different by different manufacture technologies and outside forms. Both as music shows, different with traditional music shows, <I am a singer>, both made and broadcast in Korea and China, is arranged in a form that singer stars performance in a stage and compete with each other, eliminate one person once a time, elect the last one as a winner. This new form is creative and attractive enough so it got a big hit at one time.

The format is critical to a success of Reality TVs. British Pop Idol, a hit TV program in British since 2001, also gets popular in America when it is brought to this new market.<sup>4</sup> The change of the contents, the contestants, hosts, specific songs, and other elements, doesn't impact on the success of this reality show. Though the list does not end there, this trend suggests that the format of reality programs, not the content, is the fundamental element that drives the success of the reality craze.

For audience, similar and boring TV programs can not satisfy their mental needs.

---

<sup>4</sup> Neta-Li E. Gottlieb, Free to air?-legal protection for TV program formats, 1.

Audience always want new, interesting, thrilling contents. However the basic contents is limited, just like music, games, or talking. With a new format, even a traditional music show can attract the audience. For producers, the TV format they made can be characteristic, distinctive with others. Audience can easily distinguish one show from others'. In this situation the format becomes a brand. The format has the same function of a brand. It is inspiring for producers to make format well.

According to the Writers Guild of America, a “format” refers to, ‘the framework within which the central running characters will operate and which framework is intended to be repeated in each episode; the setting, theme, premise or general story line of the proposed serial or episodic series; and the central running characters which are distinct and identifiable, including detailed characterizations and the interplay of such characters. It also may include one or more suggested story lines for individual episodes.’<sup>5</sup>

Format is ‘the elements which is creative and original in content or form in one TV program.’ (배정아, 2008)<sup>6</sup>

---

<sup>5</sup> Writers Guild of America, 2008 Theatrical and Television Basic Agreement, [http://www.wga.org/uploadedFiles/writers\\_resources/contracts/MBA08.pdf](http://www.wga.org/uploadedFiles/writers_resources/contracts/MBA08.pdf). This document is known as the Minimum Basic Agreement ( “MBA” ) and includes such provisions as the terms and compensation requirements in connection with television programming.

<sup>6</sup> 배정아, 2008. 방송 시장의 포맷 거래에 관한 연구. <방송과 커뮤니케이션>,9(2), 6-36.

‘Format is a kind of planning about TV programs just like some one states and writes down what he has watched from the beginning to the end of making a TV program. It is the ‘central area’ between the idea of making a TV program and the accomplished TV program. That’s to say, format is the method of expression of what the producer intends to through TV programs and the elements of which is shown in every set and being used repeatedly.’ (하윤금,2003) <sup>7</sup>

As one of the main format distribution companies, FremantleMedia’s understanding of format is “the order of combined elements of the structure of TV program, the style, appearance, graphic and music which is reflected and contained by every episode.”

The other format giant considers format as the license which allows to produce and broadcast the copyrighted TV programs in local version. It also includes format bible, consulting, marketing campaign, the international reputation, legal documents about copyright , the budget of producing, suggestion to guests and so on.(은혜정,2008)<sup>8</sup>

Format even includes the format bible which is the guide book recording all the stages, experience, know-how to make a creative TV program.(Waller, 2008) <sup>9</sup>

---

<sup>7</sup> 하윤금,2003. 왜 프로그램 포맷을 이야기 하는가. <방송문화>, 5 월호.

<sup>8</sup> 은혜정,2008. 세계포맷개발 현황 및 향후 발전방안. (KBI) 포커스, 48, 한국방송영상산업진흥원, 1-19.

<sup>9</sup> Waller, 2008. Formats: A global format perspective around the world in many ways. BCWW 2008 Conference, 3-5, September.

Above all, we can see format is a kind of framework and decorated with elements, which can be used to make a series of TV programs, with the same main subject. Using the same format, by changing guests or background, thousands of different reality programs can be made. Usually, the popularity is depend on a successful format, but not one specific episode. Thus the importance of format can been seen. In reality, the trade of TV format is booming and becoming a prospective entertainment industry.

## B. Originality analysis

The subject matter of copyright is works of authorship. It means to get copyright protection, the format should satisfy the criteria of works. Pursuant to the <Enforcement regulation of Copyright Law of China>(中华人民共和国著作权法实施条例) article 2,

“the works of authorship, means the intellectual property with originality, which can be copied by tangible ways in literary, artistic and scientific fields.”<sup>10</sup>

However, there isn't any explanation or standard of 'originality' in Copyright Law, resulting in a confuse and vague situation when judging whether works is copyrightable or not.<sup>11</sup>

---

<sup>10</sup> <Enforcement regulation of Copyright Law of China>(中华人民共和国著作权法实施条例) article 2

<sup>11</sup> 熊文聪, 作品“独创性”概念的法经济分析, 131, <交大法学>, NO.4 (2015)



The extent of required “originality” of format brings different results to the development of TV programs. For one thing, let us presume the level of required condition of “originality” is low, then almost every format of reality programs get protected by copyright, then TV producers cannot borrow ideas or several elements from others, it may impede the adversity and competition of TV shows in the whole market. For another, if the level and extent of required “originality” is relatively high and strict, one reality show can not get copyright protection effectively, by struggling against copycat, it may frustrate the incentive of making innovated shows.

Therefore, determining the extent of required “originality” is crucial to decide which kind of TV shows can get copyright protection and which ones can not. It is a really hard task for judges to balance.

Work is “original” to author and thus qualifies for copyright protection if work is independently created by author and possesses some minimal degree of creativity.<sup>12</sup> In order for a work to meet originality requirement for copyright protection, the level of creativity required is extremely low, and work satisfies that requirement as long as it possesses some creative spark, no matter how crude, humble or obvious it might be; originality does not signify novelty.<sup>13</sup>

Works with ‘originality’, usually embodies or reflects the author’s own thoughts

---

<sup>12</sup> 17 U.S.C.A. § 101 et seq.; Act March 4, 1909, § 1 et seq., 35 Stat. 1075; U.S.C.A. Const. Art. 1, § 8, cl. 8.

<sup>13</sup> 17 U.S.C.A. § 101 et seq.; Act March 4, 1909, § 1 et seq., 35 Stat. 1075; U.S.C.A. Const. Art. 1, § 8, cl. 8.

and feelings. Different with 'novelty' as required by the Patent Law, the expression of thoughts and feelings doesn't need to be new and creative, but should be created by one's own. And usually the works obviously differs from that of others'. Reality TV Programs usually begin at a certain idea and are made around certain subjects. For example, the parent-children interactive programs meant to express and praise the family-affection; Survival programs in forest or desert meant to express and encourage spirit of adventure; other various reality programs are also expressions of certain thoughts or ideas of producers.

Another factor about the 'originality' is the invest in creating works, involving either intellectual endeavor or monetary invest. Producing reality programs begins at an idea but not end at an idea. To enrich the program, producers make new rules and forms, also trying to set various themes in different scenes or backgrounds. The monetary invest is also high than we expected. Recently, it is reported that the invest of one episode of some famous reality programs is more than ¥10,000,000 Chinese yuan(\$ 1,600,000)<sup>14</sup>, usually consisting of the remuneration of celebrities, the fees of buying or renting equipment and device, the pay of other stage lighting, stylist, video editing and so on.

One scholar even propose a standard 'copy worthy' to emphasis the importance of the factor of invest and market value when judging the 'originality' of works.<sup>15</sup> It is

---

<sup>14</sup> <http://finance.sina.com.cn/chanjing/cyxw/20150109/015421257309.shtml>

last visit 2016.10.14 21:57 韩国综艺节目版权最高涨 10 倍 国内原创节目遇冷

<sup>15</sup> [54] Michael Steven Green, *supra* note [40], at 919,936.

better to say, this doctrine is the evidence that proves the 'originality' condition, than to say it is a standard of judging 'originality' of works. The defendant doesn't have the right to claim the works of plaintiff doesn't meet the requirement of 'originality'. Because the copy or plagiarize itself proves the works should get copyright protection. This doctrine attaches importance to the economic factor, such as the invest and market value of works. The works which don't satisfy the economic conditions don't worth copying.

As the development of new technologies, more and more new types of works appears. Format of reality programs is one of them. For this, we should consider the economic value, which is a contribution to the society. This also conforms to the legislative purpose of Copyright.

A format, as the arrangement of a series of elements, although it begins from an idea, as long as it is the original works expressing the producers' own thought and feeling, it should get copyright protection.

## **C. Fixation in tangible medium**

China is one of the countries that the copyright law requires all works get copyright protect only when it has been fixed in material form.

Pursuant to the <Enforcement regulation of Copyright Law of China>(中华人民共和国著作权法实施条例) article 2,

“the works of authorship, means the intellectual property with

originality, which can be copied by tangible ways in literary, artistic and scientific fields.”<sup>16</sup>

China requires the ‘fixation’ by national legislation. In practice, a format bible is made before the manufacture of reality TVs. All the elements, from the general style and subject, to the specific rules or process, form the settings, the stage atmosphere, to the music, decorations, and the host, the interaction of characters, recording technologies, and scripts. All the things are prepared in detail.

The format is either fixed in the ‘format bible’ or can be extracted and purified by TV programs videos. Natural people can feel and recognize the TV program format by reading the bible or by viewing videos. Thus it satisfied the ‘fixation’ condition required by the Berne Convention and national copyright laws.

## **D. Idea V. expression**

The U.S. Copyright Act of 1976 grants federal copyright protection to “original works of authorship fixed in any tangible medium of expression.” Essential to this basic principle is the exclusion of ideas, facts, procedures or concepts from the realm of copyright protectable expression. 17 U.S.C.A. § 102(b), ‘In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied

---

<sup>16</sup> <Enforcement regulation of Copyright Law of China>(中华人民共和国著作权法实施条例) article 2

in such work.<sup>17</sup> This principle has also been applied in most other countries, including China and Korea. There is confusion that whether format belongs to the realm of idea.

Although the reality TV programs are composed mainly by acts of natural people

---

<sup>17</sup> 17 U.S.C.A. § 102

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

on their own mind, which looks like a series of real happened facts, however, the happen of facts are conducted and arranged under certain subject, following certain game rule and in certain backgrounds. Besides, the characters, even the interrelationship is arranged according to the format. Reality show is not only naturally happened facts, but a kind of result under the man-operated format.

General view to games is that the rule of games belongs to the realm of idea, because it can be deemed as the method or procedure of playing. While for the format of reality programs, a series of games are selected between a various of games. And the selected games conform to the theme and content of the reality program. Also the arrangement of order also shows the ingenuity of producers, making the reality show more thrilling and attracting. Analogous to works of compilation, when the selection and arrangement of works or facts embodies originality, it gets copyright protection.

It is a so difficult task to tell idea or concept from expression. They are inseparable and linked with each other and the bound of them is vague. Expression embodies some kind of idea at the least extent. The idea or concept should only be known or perceived by express it out. In my opinion, the core is whether we add more things to the works and make the works detailed enough to express our own feelings, emotions, or thought, which is characteristic and distinctive with others' (original). Such works is what the Copyright law protects and promotes. Obvious, basic idea or concept or natural laws is the basic of creating cultural works. Every one should have an equal right to make use of them to create more and more cultural fruits. When we add more and more elements to a work, to make it more

and more detailed, the work could be further and further from the realm of 'idea', in other words, the work is getting closer to the 'expression' by added enough detailed things.

Let me turn back to the format issue. Beginning with the main abstract idea, the producers, with the cooperation with other faculty, put lots of elements to make the reality show interesting to make sure to get a high market value. Although the main structure, including the procedure and game rule is critical to the success of a reality show. The subject, script, style, background, staging lighting, post production or process work including background music, subtitle, effect of animation are also vital to a reality show. The whole elements are added to a main structure and the performance of people, making the format detailed and thus transfer to 'expression' from 'idea'.

## **E. Legislative goal**

The law can not regulate all the things and situations literally, because the legislators can not foresee everything especially in the modern society, with a high-speed develop of information technology. The inherent flaw of the character of law requires us to interpret law from the legislative purpose just as we are the legislator.

The legislative purpose of copyright is to protect the copyright of literal, artistic and scientific works of authorship, and the copyright related rights, to encourage the creation and broadcast of works, thus to promote development of the cultural

and scientific industry.

Specific to economic, cultural, social aspects of the purpose of copyright, format of reality TV program should be protected as copyright. The reason from the economic aspect is, the produce and development procedure of reality TV programs usually costs much money. The performance fee paid to celebrities, the fee of technology manufacture, fee of advertise before broadcast, is not a small number. By protection of Copyright law, the right to exclude others from using the same format to make reality TV programs without permission of author, the economic invest can be guaranteed.

From the aspect of culture development, the format is playing an important and active role contributing to the boom of entertainment industry. To make it well protected, the incentive of making creative and high-quality reality programs may be promoted. Finally this kind of protection will result in the boom of human culture property.

Lastly, from the point of view of the whole society, similar and low-quality reality shows can not satisfy the demand of entertainment works of audience. What audience want is the variety and high quality of reality shows broadcast on TV or by internet, to satisfy the need of people in different ages, different education background, different social classes, and all kinds of specific needs.

All in all, the legislative purpose of copyright requires the copyright protection of format right of reality TV programs.



### **III. The situation of legal protection of format in China**

#### **A. Introduction of The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China**

The State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (国家新闻出版广电总局) is responsible for the distribution of dramas and films, the administration of broadcast and television providers, the registration of imported works, and making policies and strategies to direct related contents industry. The role of this state administration is really important in China and must be paid attention to related policy.

The various regulations of The State Administration of Press, Publication, Radio, Film and Television should be paid attention by Korean and foreign TV stations, because the policies influence on the importation of foreign TV Program formats heavily. Years ago, the State Ministration has drafted and announced several policies to local TV stations to ban the broadcast of hot foreign dramas, animations and TV Programs. In 2011, the Administration has issued <Related to the Strict Administration of TV Programs ><sup>18</sup>, to strictly control the total amount of

---

<sup>18</sup> 《广电总局将加强电视上星综合节目管理》

the similar, large amounts of TV shows with low quality, especially the dating programs, auditions, game shows, talk shows and other reality TV Programs. In 2014, <The Notice about the Arrangement and Registration of TV Programs of Local Official TV Stations><sup>19</sup> requires every local official TV stations can broadcast no more than 3 entertainment TV programs every week on 5pm to 10pm. Every local TV stations can import no more than one TV program format copyright. Moreover, in that year, that TV program can not be broadcast on 7:30pm to 10pm. From 1<sup>st</sup> January 2014, the import of format TV program should be registered before 2 months. And all the TV programs which are broadcast between 7:30pm to 22pm should be registered following the related regulations.

Before these strict regulations, in 2010, JiangSu TV Station has launched a new dating show and has achieved a big success, since that, almost every main local TV providers began to imitate or even copy the format of Jiangsu TV Station's program. The similarity and low-quality of Programs frustrated the incentive of making new and creative shows, having a bad influence on the contents industry of China. To make the structure of TV shows various and rich to cater to different needs of different audience, it is a big success. However, overly strict regulations may also hurt the contents industry. Limiting the amount and content of TV programs, the economic profit of local TV stations may get frustrated.

The other object of the strict regulations is to protect Chinese native TV programs. For Korean format copyright sellers, the strategy may be a big hit. Thus, Korean format copyright holders must try to get away from the new policy by different

---

<sup>19</sup> 《关于做好 2014 年电视上星综合频道节目编排和备案工作的通知》

ways .

First, Korea can sell format copyright to different Chinese TV stations. In the past, the main importers of Korean TV Program formats are strong and rich Chinese stations, such as Hunan, Jiangsu, and Shanghai. But because of the restrict of the State Administration, Korean copyright holders can also shake hands with other Chinese local stations.

Second, Korean TV program makers can also develop and manufacture TV programs with Chinese Stations together. <Dream Team of China and Korea> is a sport game Reality TV Program produced by ShenZhen TV, Yaoke Entertainment and KBS Korea.<sup>20</sup> Korean and Chinese stars competing on the same stage, jointly developed and manufactured by Korea and China groups, live broadcast on both countries, the new forms become precedent of joint develop of international Reality TV Programs. What's more, the TV Program which is also made by China will be broadcast on Korean TVs, it is reverse-imported to Korea too. The culture communication and copyright trade of China and Korea can get active and promoted.

---

20

<http://baike.baidu.com/link?url=TveB5XB890Ffa6NFAxFMcmzKaQ3562-SKGJ1UkCUJQZ-rjLHNzf7JhixRZ-IH0KtyIpDofSkUvLaW77iegmTqifvBrEwLB9F0Km12iKOKC2-r2IlZLMLpBmqk-hT2lpF>

last visit : 2016/10/16

## **B. Court's opinion of legal character of TV programs and format in China**

In 2001, a famous TV show of Beijing TV <Dreams coming true> suffered from unauthorized copies by other TV stations. Thus it filed a patent application to the state's Intellectual Property Office, but got refused. The reason is there is no precedent before. After this, the producer argued for protection by copyright to the State's copyright administration office but got refused as well.<sup>21</sup>

To get protection by a patent, the first issue is whether it belongs to patent subject matter. The definition of invention in patent law is the new scientific or technological plan to production, method or the promotion of them. Obviously, the format of TV shows belongs to the area of culture and artistic, not science or technology. Furthermore, the patent law requires the creativity of inventions, it is really hard for TV programs to reach the standard. Although the technology of producing the TV program may be protected by patent law, the long filing period and complicated procedure may frustrate the market value of a TV program.

Concerned to the fact that there is no current state law or administrative regulation about the format question, the Intellectual Property Department of Higher People's Court of Beijing announced <The Research about the question when judging copyright protection cases of TV programs> in April 2015 as follow.

---

<sup>21</sup> 试论电视知识产权的综艺保护，柯冬英

Recently, main local TV stations are contributing on making new TV programs to increase the market share and rating. At the same time, the development of every kinds of new media companies are in a booming. Big Internet Companies also participate in self-making TV programs to compete for the market share with traditional media companies. The import of foreign format, the profession and complexity of produce procedure, the upgrade of produce ability, is the main factors that make the TV programs popular so as to bring to them huge monetary benefits. In the contrary, the copycat phenomenon appears actively. To promote the innovation of entertainment industry, the Intellectual Property Court of the Higher People's Court of Beijing investigate in 'the copyright protection of TV programs'.

## **1. Abstract of the overall situation of TV program copyright protection cases in courts of Beijing**

From 1999, the courts in Beijing began to accept complaints around the issue of copyright of TV programs, most of which are copyright infringement cases. The disputed cases are mainly CCTV and local TV stations' TV programs which have a high reputation and TV rating, such as concert show 'Chun Wan'(春晚), dating TV programs 'Fei cheng wu rao' (非诚勿扰), and 'Let's date'(我们约会吧), entertainment reality show 'Happy camping' (快乐大本营) and 'Cosplay show'(百变大咖秀), audition show 'Dream show of

China’(中国梦秀). From 2009, internet infringement cases of TV programs come into the eyes, becoming the main type of infringement cases of TV programs. The main internet copyright infringement behavior includes online playing, online broadcasting, download service, or the service of providing storage space of infringed videos for users, or broadcast on air TV programs by PC video apps by technology means, or broadcast on air TV programs by intercepting TV station signals, or even broadcast on air TV programs by mobile phone device. Most of the copyright infringement cases of TV programs are heard by district courts, with a high rate of withdraw and a low rate of judgment. According to the statistics, the rate of final judgment of TV programs copyright case is lower than 15%, the compensation fee is from ¥900 Chinese yuan to ¥120,000 yuan. The compensation of TV program infringement is from 40,000 to 120,000 yuan, which is got by ‘Chun Wan’ produced by CCTV. The copyright infringement cases of local TV programs are usually alleged in one set or several sets, the highest claimed compensation amount is 50,000 yuan, the judged compensation amount is from 900 to 8000 yuan every set.

When judging copyright infringement cases of TV programs, the main issues are: (1). The legal character of TV programs. It is the basic question, as well as the most deputed question, which decides the legal status and relationship of all involved parts. (2). The legal character of format. It is deputed mainly in TV programs producing

companies. (3). The judgment of the amount of infringement compensation of TV programs on internet. It relates to the extent of legal protection of TV programs copyright.

## **2. The legal character of TV programs**

### **(1) Three main doctrines**

The first one is cinematographic-liked works of authorship.(Copyright Law article 3. (6) ) This is the most popular doctrine in China. This doctrine holds that from the plot arrangement, the video-filing procedure, to the accomplishment of film editing, the whole procedure embodies originality, which is replicable in tangible form, thus belongs to the intellectual property protected by Copyright law of China.

The second one is compilation works.(Berne Convention for the Protection of Literary and Artistic Works Article 2.5 and TRIPS Article 10) In practice, it mainly refers to music and dance shows such as 'Chun Wan'. Some judges hold that "the main contribution to the whole TV show by CCTV is the selection and arrangement of sequence of well-prepared shows." The distinguish and selection of creative, well-performed, popular and successful shows among many original shows embodies originality obviously. Moreover, the arrangement of many shows embodies originality as well. "Chun wan, as a whole, can

be deemed as compilation works.”<sup>22</sup> but it only refers to the live performance. As compiler, CCTV enjoys copyright of ‘Chun wan’.

The third one is video recordings.(Copyright law of China Article 42.) This doctrine is ‘Chun wan, as the TV program which aims to exhibiting wonderful live performance, is obviously distinguished with cinematographic works, especially concerned to the selection of recording subject, the control of stage performance, the arrangement of related single shows, the producer is not in the dominant position. Also, the edition and expression of directors and video recorders on their own will is limited. Thus the originality of “Chun wan” is not as high as what the cinematographic works requires, it should not be deemed as cinematographic-liked works, but belongs to video recordings, defined as successive images, pictures with or without audios except for cinematographic works.’<sup>23</sup>. Because there are several opinions about the legal character of TV programs, some courts get away from this issue, giving general protection to the complaints.

Here, I want to analysis cinematographic-liked works vs. Video recording works in China.

From view of the definition, similar to cinematographic, the cinematographic-liked works is the videos which is successive pictures or images with or without audios

---

<sup>22</sup> 北京市西城区人民法院（2012）西民初字第 16143 号民事判决书。

<sup>23</sup> 北京市海淀区人民法院（2009）海民初字第 9477 号民事判决书。



recorded by camera devices and can be shown on screen, such as drama, documents, cartoon and MTV. It is created by many staffs who play different role in contributing on the works. Just like making movies, the creation of novel and script by author, the conduct of director, the compose of music and lyrics by author of that, the work of video recorder, and the performance of actors, all contribute to the accomplishment of movies or cinematographic-liked works, embodying an expression and originality in different way.

In contrary, video recordings refer to the the videos which is successive pictures or images with or without audios recorded by camera devices except for cinematographic or cinematographic-liked works. It mainly refers to the videos which is recorded upon others authorized works, such as videos recording actor's performance or professor's lecture. The video recording embodies less originality by simply recording by camera devices.

From the view of the subject of copyright, although the cinematographic-liked works consists of creation and originality of many people, considering the huge investment and arrangement and coordination by the producer, Copyright Law of China confers the copyright to the producer. The video recorder enjoys the neighboring right, because the video is made upon others' works of authorship and embodies less originality.

And then, from the view of the object of copyright, pursuant to Copyright Law Article 3, cinematographic works and cinematographic-liked works belongs to works of authorship. The author enjoys complete right of copyright, both moral

rights and property rights, whereas the video recordings are made by using others' works of authorship, the right of video recordings is a neighboring right, it is limited in several aspects compared to copyright.<sup>24</sup> (Article 40: producing video recordings based upon other's works of authorship, the video recorder should get permit from authors and pay loyalty; Article 41: producing video recordings, the video recorder should make contract to performers, and pay loyalty; Article 42: video recorders enjoy the right to exclude others from copying, distributing, renting, broadcasting through internet; the expiring time is December 31 in the year after 50 years from the accomplish of the works. Copying, distributing, renting, broadcasting though internet should get license from authors and performers.)

## **(2) The problem of the method of identifying legal character of TV programs**

To understand the legal character of TV programs, the prerequisite is to distinguish live performance of TV programs to the video of TV

---

<sup>24</sup> 电影作品、类似摄制电影的方法创作的作品与录音录像制品的区别

[http://wenku.baidu.com/link?url=D0sY-UzWIHQltDmotmHBnJa45Vbvhn4gvSJ8v6CaLwskjsVfBgqOozDASpncQF0no1FRe2fFBd8JhOC\\_oKCIpiNjMGBZDv84penqlbxMqrG](http://wenku.baidu.com/link?url=D0sY-UzWIHQltDmotmHBnJa45Vbvhn4gvSJ8v6CaLwskjsVfBgqOozDASpncQF0no1FRe2fFBd8JhOC_oKCIpiNjMGBZDv84penqlbxMqrG)

programs. The TV programs, as TV programs broadcast by TV or internet, are all recorded by camera devices and then be broadcast. Even for the live broadcast TV programs, the content of the TV program which audience could see is what the staffs have edited or modified, the only difference from usual TV programs is this edition is did at the same time when the live performance is broadcast. As we all know, the feeling of watching a show on site is not the same as watching before a TV. The live performance of a TV program is the object of video recording, whereas the video recording is the result and fixation of live performance. It's totally different concept. According to investigation, in practice, what the complaints allege for is the video recording of TV programs. In conclusion, analysis the legal character of TV programs should divide it into live performance of TV programs and video recording of TV programs.

### **(3) Live performance of TV programs and video recording of TV programs**

By different types of TV programs, the expression forms of live performance are different. the live performance of the music shows is songs and dance, comedy episodes, magic shows and so on, the main content of talk shows is talking, game competing TV programs mainly contain sport or game shows. In our opinion, if the live performance of TV programs belongs to the "performance" in Copyright Law, the producer of TV programs can be protected by the right of

performance organizer; if the live performance of TV programs isn't "performance" in Copyright law, but other act or behavior, such as the sports activity, then it can not get protection by copyright.

The video of TV programs, is the fixed information on material container after recording the whole live performance. After the execute of third revised version of Copyright law (not go in effect now), the legal character of video of TV programs will not be disputed anymore. This is because the revised copyright law excludes the definition of cinematographic and video product, but combines those two things as audiovisual works. However in the framework of current copyright law, it is necessary to distinguish the character of video of TV programs. Because the main difference between cinematographic and video product is the exist and extent of originality, we shall not discuss it here, so the question is whether the video of TV programs construes compilation?

The reasons why videos of TV programs are not considered compilation in copyright law are as follows:

First, it is out of the definition of compilation. Compilation is the selection and arrangement of works, episode of works, fact or materials. Video of TV programs is the recording of live performance by camera device, the recorder doesn't select nor arrange the live performance, moreover, it is a successive, complete recording

procedure, no one select or arrange any single cinematographic or cinematographic-liked works. Some courts hold that the contribution of CCTV to “Chun Wan” is the selection and arrangement of various single shows. This argument blurred the difference of live performance of TV programs and video of TV programs.

Second, it’s not consistent with the normal method of classify works of authorship. The cinematographic works is regulated in Copyright law Article 3 which is about the types of works of authorship, whereas the compilation is regulated in Chapter 2, Section 2 of Copyright law which is about the author of copyright. Some holds that the statute of compilation applies only when it can not be covered by the works of authorship statute.<sup>25</sup> The substance of video of TV programs is consistent with the definition of cinematographic an cinematographic-liked works(article 3).

Third, thinking about the huge investment by producers or TV stations, it is not proper to categorize to compilation. Taking “Chun wan” for example, according to our investigation, producing and broadcasting “Chun Wan”, is not singly a procedure of selection and arrangement of various shows. There should also be a script, a shooting script, the complexity and professional is no less than that of producing dramas. Other TV programs are similar to “Chun wan”. If we consider TV programs which is produced by huge investment as compilation,

---

<sup>25</sup> 王迁著，《知识产权法教程》，中国人民大学出版社 2014 年 3 月第 4 版，182.

although the author of single works is protected, the labor of producer or organizer of TV programs will be ignored.

Lastly, from the legislative history of copyright law, it's not proper to interpret TV programs to compilation. Pursuant to 1990 copyright law, article 3.5, the types of works are cinematographic, TV works, and video works. In 2001, the same article of new copyright law is revised to cinematographic and cinematographic-liked works. Dramas and TV programs are put into cinematographic-liked works. Above all, the video of TV programs is not compilation, but cinematographic or cinematographic-liked works in Copyright law.

### **3. The legal protection of format**

The plagiarism of TV programs is closely related to format. The question is what is format, and is it idea or expression, if format is idea, it can not get protection from copyright law. Otherwise, it should get protection. The most popular doctrine is that the format of TV programs is belong to "idea", the copyright law only protect "expression" of ideas, thus format is not the subject matter of copyright law. The District court of Haidian, Beijing expresses their opinion about the talk show 'Mask' case, "the creative idea of the talk show 'Mask' can be copied in tangible form only when the idea is expressed by words, symbol, lines, colors, styles and be felt and sensed by people. At the same time, when the expression is original,

it can be deemed as works of authorship.”<sup>26</sup> if the format of TV programs can not get the protection of copyright law, then can plagiarism be prohibited or not? In reality, although it is not rare to see plagiarism on TV, we can not find two exactly identical shows. If the format is construed as works of authorship, theoretically, plagiarism may be found, but how to compare and judge it, or are there other relief systems, the question is to be solved.

Format is the concept of TV production industry. Although the formal commercial transaction rules of format has been formed, it has not a generally acknowledged definition.<sup>27</sup> From the production process of format, first there should be an general idea about the TV program. Then the idea will be formalized and transferred as a “Format Bibles”. In this stage the process of TV program, the games and rules, the technical plans will be designed and put in the “Bibles”. At last, as the illustration of the “Bible”, TV program will be produced and broadcast. The style of host, specific slogans will be added to “Bible” at this time.<sup>28</sup>The format of TV programs consist of some basic ideas and a series of specific elements, such as process, rules, technology rules, stage designs, and the style of host.

---

<sup>26</sup> 北京市海淀区人民法院（2005）海民初字第 15050 号民事判决书。

<sup>27</sup> 罗莉，电视模板的法律保护，《法律科学》，2006 年第 4 期，第 133 页。

<sup>28</sup> 吴京，韩笑梅，《电视节目模板的著作权法保护困境和出路》，《黑龙江省政法管理干部学院学报》，2010 年第 2 期，63。

The format is in words and similar to literal works, so it is easy to accept that it should be protected by Copyright. However, until now, the format has not been acknowledged as a special works of authorship in copyright law. The reason is that the format is a compound of a series of elements based on an creative idea. The core of format is the idea which decide the result of a TV program, whether popular or not. Whereas if the idea is protected by copyright law, it results in an monopoly on specific idea by some one. It violates the basic rule of law of democracy. The other elements, such as game rules, host styles and process, is also difficult to get protect as an expression. However, if the “Bible” of TV format, or the script, design of dance, music can be construed as works of authorship, it can be protected independently, but this doesn’t mean the format are protected by copyright as a whole.

In summary, the Intellectual Property Court of the Higher People’s Court of Beijing holds that the format of TV programs has not been acknowledged as a special works of authorship in Copyright law. The reason is that the format is a compound of a series of elements based on an creative idea. The core of format is the idea which decide the quality of a TV program. Whereas the idea is not protected by Copyright law. The other elements, such as game rules and process, is also difficult to get protect by Copyright law.



## C. Case analysis- an ongoing dispute of <Voice of China>

<The voice of China> (中国好声音) is a top-rated reality audition show broadcast on Zhejiang TV Station from 2012. This is a famous format show developed by a Holland format produce company Talpa. From season 1 to season 4, a company in Shanghai named Star., Co(灿星) got the license to produce a Chinese version of <The voice of..> and got a big success. However in 2016, Talpa licensed <The voice of China> to another Chinese company Tang De(唐德) Company at a price almost 50 times as before. <sup>29</sup>

In 2006, Star company and Zhejiang TV station changed various elements compared to the Talpa's format and launched a new version of <The voice of China>.

In June 2016, Tang De sued Star company(Shanghai) and Century Bright (世纪丽亮) (Beijing) to the Beijing's Intellectual Property Court, for the trademark infringement of 'The Voice of China', claiming for a compensation of 0.51 billion Chinese yuan.

---

<sup>29</sup> <http://www.cn12330.cn/djdt/mt/201604/25699.html> last visit: 2016.08.22

18:00

On 20th June, Beijing Intellectual Property Court made a temporary injunction to Star company and Centary Bright, to stop marketing and popularizing the reality TV program using the title or trademark 'The voice of China'.

Tangde Hold that the hit reality audition show 'The voice of China' should be protected as famous service trademark. The V gesture holding a voice tube is also registered as a trademark by Holland Talpa Inc. Holding the license of Talpa, Tangde claims it holds the related intellectual property rights of <The voice of China> season 5 to 8.

Tangde sues for an injunction to Star and Centary Company for the use of the trademark in the procedure of marketing, audition, manufacture and broadcast of the program, claiming the defendant should apologize on the newspaper, and a compensation of ¥ 0.51 billion.<sup>30</sup>

On 20<sup>th</sup> June 2016, Beijing Intellectual Property Court imposes an injunction to Star company to prohibit the use of "The Voice of China" TV program title and related trademarks.<sup>31</sup>

The dispute is ongoing now so we can not see the result and the court's opinion

---

<sup>30</sup> <http://finance.sina.com.cn/stock/t/2016-06-25/doc-ifxtmwri4444505.shtml>

last visit: 2016.08.22 18:00

<sup>31</sup> <http://zj.zjol.com.cn/news/387473.html>

now.

In the background that the format right is not widely recognized by the law in China, just like exploring a new path, seeking the help of trademark law is also a good choice. For format producers, the first thing is the trademark registration of subject of reality show in the trademark office of the countries, which are or may be the main market of produced format. It should better be accomplished before launching of the new TV program. The case I introduce reminds TV program producers to make the program title as a trademark before using. It may be a strong weapon to fight against copycat programs later on. By filing a trademark infringement sue is another way of relief besides copyright infringement suit.

## **IV. The situation of legal protection of format in Korea**

It is a pity that Korea either enacts any law and statute about the legal character of format, nor do the cases admit the copyright of format directly or indirectly. The TV program holders file complaint to defenders who copycat or run over their TV programs by alleging an infringement of videos of TV programs or an unlawful behavior against Unfair Competition law. What's more, some TV stations or TV program producers are seeking for the help of Korea Communications Standards Commission. The Korea Communications Standards Commission is playing a significant role in dispute solving by quick and efficient judge and intermediation.

## A. Case analysis- CJ E&M SNL Korea Vs. SBS Half (짜)

In 2012, the TV program “SNL Korea” produced by CJ E&M is sued by SBS for the parody of “짜”, claiming for compensation of copyright infringement pursuant to Copyright Law and Unfair Competition Law. The court holds that “although the complaint argues the creative scenes should be protected by copyright law, we found most of the scene is ‘idea’ which is not protected by copyright law. The disputed scenes are only a small portion of the complaint’s video works and the behaviors, talks and plots between performers compose almost all the TV program, the creativity or originality of complaint’s video works is depend on the plots between performers. Although we found some similar scenes or talks in defender’s TV program, the similar parts are really minimum in amounts and the originality that lining up couples in a village are not embodied in defender’s works; the plots between performers in defender’s TV program is different from that of complaint’s. The similar rules or process belongs to the field of idea. Thus we find there is no substantial similarity in both parties’ works. We didn’t find any unfair competition behaviors as well.” SBS also lost the lawsuit on the appeal.<sup>32</sup>

Through this case, we can see the attitude of Korean courts towards format of TV programs is also negative. They put the format to the side of “idea”. Alleging copyright infringement of format is also not a good choice even in Korea. The TV

---

<sup>32</sup> 서울중앙지법 2013.8.16.2012 가합 80298 서울고법  
2014.5.29.2013 나 54972

program producers must protect themselves by various ways.

## **B. Case analysis- KBS <Real life theater> (인간극장) Vs. SBS <Human story woman>(휴먼스토리 여자)**

The another case disputed for copyright protection of format is the case between KBS <Real life theater> (인간극장) and SBS <Human story woman>(휴먼스토리 여자). <Real life theater> is a documentary program using some elements of dramas. For example, they make separate but successive episodes, more attractive to audience. It has the appearance of drama and the substantial content is documentary, because it is real facts between normal people and they have narration read by a narrator. SBS <Human story woman> is similar with the creative form of <Real life theater> by using the drama-liked forms. The producer of <Real life theater> insists that even though documentary programs are made on facts and combined with script and music, the specific process and elements of making documentary embodies originality. Whereas the side of <Human story woman> argues that the documentary focuses on women and tries to get sense of identity of women audience, thus they don't think they copycat the KBS <Real life theater>. At first, <Real life theater> argues and resists the copycat of <Human story woman> through phones and emails, but they didn't get any answer. On March 2002, <Real life theater> was registered as literal works of authorship and SBS ended its documentary on April 2004.

In the situation that the Korea court tends to translate format as idea, this case reminds the format producers to make format bibles or script before preparing. If the “originality” is satisfied, it is easy for the format bibles or scripts to get copyright protection. Also, in an attempt to demonstrate that a format is a copyrightable work, the industry relies upon the format bible. The format bible should be set out as much detailed as possible about the content and structure of the format. Information about the constituent parts (e.g. The rounds in a game show) should be included as well as details about the music, opening sequence, introduction, lighting, stage design, production know-how and camera layout, to evidence the skill and labour invested in creating a television format.

## V. The situation of legal protection of format in the other main countries

### A. The attitude towards format in main countries

country	case	Attitude of court
<i>UK</i>	Fraser Vs. Thames Television	The idea which is not in the form of expression or edited in words may be protected. The “shoes” story in the TV program may be protected as creative ideas.
<i>US</i>	CBS Vs. ABC	The court applied the same rule of literal works of authorship when judging format

		infringement. The compilation of idea affirmed.
<i>Brazil</i>	TV Globo & Endemol Vs. TV SBT(2004)	The format bible is affirmed copyright protection in this case.
<i>Germany</i>	TV Design Vs. Sudwestrunfuk	The typical case which has big influence on other cases not affirming copyright character of format.
<i>Spain</i>	Maradentro Producciones Vs. Sogecable(2009)	Although complaint lost the case, the Spain court firstly affirmed format can get copyright protection.
	Atomis Media Vs. Television de Galica(2010)	The case points out the specific requirement of copyright protected format. That is even if every element of format doesn't have creativity or originality, if the elements are arranged and ordered in a creative way, copyright protection should be given.
<i>Australia</i>	Talbot Vs. General Television Corporation	The first case in Australia that format gets protect as a part of intellectual property.

## **B. Introduction of case- Endemol&TV Globo Vs. TVSBT (Brazil)**

The Dutch company Endemol, entered into a negotiation with Brazil broadcast company, TVSBT, with the purpose of broadcasting in Brazil the program called Big Brother. The negotiation did not reach a conclusion. Later, the format of the program was licensed by Endemol to TV Globo. However, TVSBT launched the program Casa dos Artistas, which is very similar to Big Brother before TV Globo beginning to advertise and market the licensed Big Brother.

The show is like real drama experienced by a group of people inside a house, with no telephone, television or Internet access, monitored by cameras and microphones to record their attitudes during a certain period of time. The people remain confined in order to necessarily live with each other, preparing their own food and doing their own laundry. From time to time, one of the participants is expelled from the group and the final winner receives an award corresponding to a substantial amount of money.

For one thing, the court affirmed the originality of format. “The idea, the fruit of a collective or individual creation work, which is materialized and embodied by means of writings, formats, manuals, recordings, must receive, and does receive,

---

<sup>33</sup> 2012.11.30 방송 포맷의 권리보호 방안 연구 한국콘텐츠진흥원



protection under our law. All artistic, literary, musical or any other creation has its origin in an idea, which, from the moment it departs the field of conjectures and intellectual lucubration and is somehow materialized and embodied, acquires an economic content, therefore enjoying copyright protection.” The format of the program Big Brother, known as Bible, is not a mere conception, is not only in the field of the ideas, since it combines a series of elements that characterize it, as unique and particular in its composition, it is an inventive fruit of the human spirit.

For another, the court holds plagiarism shall not be understood only as the literal copy of a work, it exists by the reproduction of characteristics which have an identity relationship with the original work. The similitude between the formats of the two shows is substantial.

The court finally imposed TVSBT to pay a compensation of £400,000 to Endemol and a license fee of £1000,000 to TV Globo. The court holds that the format of TV programs consist more than idea, but also include technological, artistic, and economic business information and content. The court also recognize the economic and legal value of format bible. <sup>34</sup>The Brazil court affirmed the copyright character of format in this case. It is a milestone for the copyright protection of format in the legislative history.

---

<sup>34</sup> 방송 포맷의 권리보호 방안 연구, Kocca 연구보고서 12-40, 80.

## **C. Introduction of case- CBS Broad., Inc. Vs. ABC(U.S.A)**

### **1. background**

In 2002, the American TV network, CBS, brought suit against a planned American version of I'm A Celebrity . . . Get Me Out of Here ("Celebrity"), claiming that the show was infringing their international hit, Survivor, where contestants are isolated in the wilderness and compete for cash and other prizes before voting one another off the program until the final contestant remains and wins the title of "Sole Survivor." Bob Geldof, Charlie Parsons and Lord Alli co-own Castaway Television Productions that own the rights to the reality-TV Survivor format. Geldof claimed that the idea of Celebrity was stolen from his own production company's show Survivor,<sup>35</sup> and Parsons confidently predicted that CBS would easily win the court case against ABC.<sup>36</sup>

---

<sup>35</sup> <http://news.bbc.co.uk/2/hi/entertainment/2290199.stm> last visit 10:43 Feb. 8, 2015

<sup>36</sup> <http://www.theguardian.com/media/2003/jan/14/broadcasting.realitytv> , last visit 10:58 Feb. 8, 2015

## 2. comparison between Survivor and Celebrity and legal test

In fact, even the presiding Judge Preska had difficulty navigating between the somewhat incompatible legal tests announced by the Supreme Court, the Ninth Circuit Court of Appeal, and the Second Circuit Court of Appeals. With regard to protection of expression, the Ninth Circuit has announced and reiterated that “protectable expression includes the specific details of an author’s rendering of ideas or ‘the actual concrete elements that made up the total sequence of events and the relationships between the major characters.’” *CBS Broad., Inc. v. ABC*, 2003 U.S. Dist. LEXIS 20258, \*8 (S.D.N.Y. Jan. 14, 2003) (quoting *Metcalf v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002)).

The Court also went through the discussion of the protectability of a collection of otherwise generic ideas in the situation confronted by the Supreme Court in *Feist Publications*. *Id.*, \* 9. By invoking the Feist test, the Court seemed to suggest that reality TV programs might resemble a compilation of existing elements: “Feist was somewhat analogous to the situation presented here in that the Court there addressed a compilation of otherwise nonprotectable facts. Whereas here, we have a combination of nonprotectable generic ideas.” *Id.*, at \*10-\*11. “A difference,” the Court continues, “is that the acts specifically provides for copyright in a compilation of facts.” *Id.* at \*11.

The court then went to examine binding Second Circuit caselaw – *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F. 3d 996 (2d Cir. 1995) and *Judi Boisson v. Banian, Ltd.*, 272 F. 3d

262 (2d. Cir. 2011). *Knitwaves* requires the fact finder to examine, among other things, “the total concept and feel” of the 2 works. CBS Broad., at \*12. With regard to *Boisson*, the court observed some confusion with the Second Circuit Court’s instructions. Id. at \*12. (“I [Judge Preska] confess to some confusion as to the court’s instructions thereafter [in *Boisson*].”) On one hand, “what must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation.” On the other hand, “in applying this test a court is not to dissect the works at issue into separate components and compare only the copyrightable elements.” Id., \*13 (quoting *Boisson*, 272 F. 3d at 272).

After going through these somewhat inconsistent legal standards, the court proceeds to adopt the following standard announced in *Boisson*:

“when evaluating claims of infringement involving literary works, we have noted that while liability would result only if the protectable elements were substantially similar out examination would encompass” the similarities in such aspects as the total concept in feel, theme, characters, plot, sequence, pace and setting . . . Id., at \*13-\*14.<sup>37</sup>

### **3.court’s analysis**

The court conducted a quite detailed comparison between *Survivor* and *Celebrity* in the decision. CBS Broad., \*27-\*42.

---

<sup>37</sup> Ya ping Zhang, TEACHER’S MANUAL : Reality TV

	<b>Survivor</b>	<b>Celebrity</b>
<i>Tone and feel</i>	“unalterable seriousness”	“comedic”
<i>Production values</i>	“highest professional level” “artful photography and painstaking etiquette”	“home video look”
<i>Host</i>	Jeff Probst “unknown prior to the first series” “nothing but serious”	Ann and Deck “well known as a comedy team” “nothing, if not funny”
<i>Participants</i>	“regular folks”	“celebrities”
<i>Goal</i>	Winning a million dollars as the last survivor	“project the best image possible to the viewing audience”
<i>Challenges</i>	Physically difficult For example, “obtain on their own all of their food”	Consistent with the comedic tone “adequate supply of rice and beans”
<i>Elimination of contestants</i>	Tribal Council “ritualized, serious, lengthy” “Sometimes a sense of personal betrayal”	“casual, light-hearted” The first week: the audience only votes as to which Celebrity will be tested on a

		<p>particular challenge</p> <p>The second week: the audience votes for its favorite. No negative vote.</p>
<i>Music</i>	“deep, chanting, tribal”	“As an outsider, I [the judge] would characterize it as ‘upbeat and kicky’”
<i>Interstitial Shots of Wildlife</i>	“serious, dangerous nature of the animal”, such as the crocodile’s menacing jaws and tail, the menacing view of the snake’s tongue	“pretty or comic features of the wildlife”, such as the green and orange frog whose throat goes in and out, some hairy bird-like beast, maybe a bat hung upside down, and a little chimp.
<i>Panoramic landscape photography</i>	“they are very pretty, they are lush, they are fabulously beautiful shots, often with a stylized speedframe photography of the clouds moving overhead adding to the drama”	“plain old landscape, with the photography perhaps one step up from home video”
Example:	“First, I note parenthetically that in a remote, hostile	

<p>“my favorite” worm eating scene</p>	<p>environment, or deserted island setup, eating unattractive, crawling creatures is part of the scenes a faire.”</p>	
	<p>“The mood is tense and competitive. There is a great deal of pressure on the contestants to perform for their respective teams, because this is an immunity challenge.”</p> <p>“the unattractive black worms are set out in a tribal-looking Wheel of Fortune layout.”</p>	<p>The result is not so important to the contestants. They already have a sufficient quantity of rations and the worm eating will only determine if the individual contestant earns higher quality rations for the group.”</p> <p>“the unattractive looking white worm appears on a banquet table with fine linens and fine China adjacent to an absolutely delicious meal, which apparently the contestants can all</p>

		smell.”  “the element of life or death is absent”.
--	--	--

38

Based on the above analysis, the Court held that CBS was not likely to succeed in showing substantial similarity, and denied its application for preliminary injunction. Id. at \*43-44.

As we can see, the court finally compare the two reality TVs by the method used usually on literal works comparison. It mainly can be divided as :

General impression about the shows: feel, mood;

Elements of the shows: music, participants, host(s);

Structure of the stream – opening, challenges, voting procedure;

Although CBS failed to prove the substantial similarity between two TVs, it means a lot in format copyright protection history. In this case, the court use the same “substantial similarity” standard to judge the copyright infringement of reality TV programs just as the literary works.<sup>39</sup>

---

<sup>38</sup> The reality of reality television: Understanding the unique Nature of the Reality Genre in Copyright Infringement cases.(p189), by J.M Sharp(2005),8, Vand.J.Ent.& Tech.L.177

<sup>39</sup> 채정화, 이영주. 방송프로그램의 포맷의 대한 저작권 보호 및 실질적 유사성의 판단기준에 관한 연구-리얼리티 프로그램을 중심으로. 303.



## **4. The standard of establishment of copyright infringement in U.S.A.**

Through the CBS vs ABC case, the court applied the same rule of literary works of authorship when judging format infringement. Then I will introduce the standard of establishment of copyright infringement in U.S.A.

In the typical copyright infringement cases, when a 'substantial similarity' between accused work and copyright protected work has been proved, there constitutes copyright infringement. Obvious, the precondition is that there must be a copyright-protected work first, but the question is, how much similarity of expression and what kind of similarity is required to qualify as "substantial"? It differs case by case. In U.S Courts, they usually use the following inquiries when determining if there is a 'substantial similarity'.

First, the court need to distill protected expression of works from the unprotected ideas, concepts or facts. An alleged infringing work, when viewed as a whole, may appear substantially similar to a copyrighted work but this impression may rest heavily upon similarities which are not copyrightable, because the elements are underlying ideas or expressions that are not original to the plaintiff or for some like reason. Therefore, in order to properly resolve the issue of substantial similarity, the court should first distill the protected parts of a work from the unprotected (i.e., ideas, scenes a faire, etc.) and then compare only the similarities

between the accused work and the protected parts of the copyrighted work.<sup>40</sup>

Not all similarities amount to an infringement or, as expressed by the Second Circuit, “parrotry does not always mean piracy.” The critical inquiry is therefore

---

<sup>40</sup> See *Williams v. Crichton*, 84 F.3d 581, 588, 38 U.S.P.Q.2d 1810 (2d Cir. 1996) (when a work contains both protectable and unprotectable elements, the court must ascertain whether “the protectible elements, standing alone, are substantially similar”) (quoting *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002, 36 U.S.P.Q.2d 1737 (2d Cir. 1995) (emphasis added)). See also *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1227, 45 U.S.P.Q.2d 1259 (C.D. Cal. 1997) (“Scenes a faire and factual material must be filtered out of any analysis of substantial similarity.”) (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444, 32 U.S.P.Q.2d 1086 (9th Cir. 1994)). Compare *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 370, 73 U.S.P.Q.2d 1321, 65 Fed. R. Evid. Serv. 1366 (5th Cir. 2004) (abrogated on other grounds by, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18, 38 Media L. Rep. (BNA) 1321, 93 U.S.P.Q.2d 1719 (2010)) (commenting on the need to evaluate the work as a whole):

When evaluating probative similarity, a court should compare the works in their entirety, including both protectable and unprotectable elements. This is appropriate because although the plaintiff must ultimately establish infringement by showing that the defendant copied a substantial amount of protectable elements (i.e., meet the “substantial similarity” standard), the fact that non-protectable elements were copied, although not a basis for liability, can be probative of whether protected elements were copied (i.e., help establish probative similarity).

whether the defendant copied too much of the copyrightable elements of the plaintiff's work.<sup>41</sup>

Similarity in expression cannot be used to show copyright infringement when

---

<sup>41</sup> See *Blumcraft of Pittsburgh v. Newman Bros., Inc.*, 373 F.2d 905, 906, 153 U.S.P.Q. 91 (6th Cir. 1967). See also *Narell v. Freeman*, 872 F.2d 907, 910, 16 Media L. Rep. (BNA) 1579, 10 U.S.P.Q.2d 1596 (9th Cir. 1989) (noting that the underlying question is whether protected elements of the plaintiff's book was copied); *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513, 534-35, 88 U.S.P.Q.2d 1723 (S.D. N.Y. 2008) ( "In evaluating the quantitative extent of copying in the substantial similarity analysis, the Court 'considers the amount of copying not only of direct quotations and close paraphrasing, but also of all other protectable expression in the original work.' ") (citing *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 140 n.6, 47 U.S.P.Q.2d 1321 (2d Cir. 1998)); *LaChapelle v. Fenty*, 812 F. Supp. 2d 434, 445, 101 U.S.P.Q.2d 1283 (S.D. N.Y. 2011) ( "As a threshold matter, I consider which elements of the Photographs are not protectable—namely, the common theme of S & M and those elements that 'flow naturally and necessarily from the choice' of S & M as a subject. Elements of leather or latex-clad women, whips, ball gags, people in restraints, men on leashes, and other aggressive, sexually-charged motifs common to both [the Rihanna video] and [Dave LaChapelle's photographs] are not, as subjects, protectable elements." ); *Oriol v. H&M Hennes & Mauritz L.P.*, (2:13-cv-05088) (C.D. Cal. February 10, 2014) (neither the choice of whether to photograph in black and white or in color, nor the decision to shoot the subject matter—a hand—from the front, nor the decision that the photographed hand should be adorned with jewelry were protectable elements).

there is only one way or only a few ways of expressing an idea.<sup>42</sup>

Secondly, we can not deny that how much amount of the original protected works are similar to that accused decides and influences whether it is 'substantial'. That means the more parts of plaintiff's work are used in accused work, the more possibly the two works are substantial similar. But the rule is not always like this. Even only a little part of copyright protected works is similar to that corresponding part of defendant's works, if it is substantial or material in quality. It will be deemed as unlawful copyright infringement.

There is also a fair amount of support that the qualitative importance of the copying must be considered.<sup>43</sup> So 'substantial similarity' means similarity

---

<sup>42</sup> Schoolhouse, Inc. v. Anderson, 275 F.3d 726, 160 Ed. Law Rep. 298 (8th Cir. 2002)

<sup>43</sup> See, e.g., Newton v. Diamond, 349 F.3d 591, 596, 68 U.S.P.Q.2d 1740, 62 Fed. R. Evid. Serv. 1178 (9th Cir. 2003), opinion amended and superseded on denial of reh'g, 388 F.3d 1189, 73 U.S.P.Q.2d 1152 (9th Cir. 2004) ("The substantiality of the similarity is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."); Baxter v. MCA, Inc., 812 F.2d 421, 425, 2 U.S.P.Q.2d 1059 (9th Cir. 1987) ("Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.").

"It is not possible to determine infringement through a simple word count ... the quantitative analysis of two works must always occur in the shadow of their

quantitatively or qualitatively substantial.

In some jurisdictions, substantial similarity, for purpose of showing a defendant's work is substantially similar to material protected by a copyright, is a two-pronged test in which a plaintiff must show that the two works are extrinsically similar because they contain substantially similar ideas(concepts or feelings) that are subject to copyright protection and intrinsically similar in the sense that they express those ideas in a substantially similar manner from the perspective of the intended audience of the works.<sup>44</sup>

And last, from the perspective of result, the 'ordinary observer test' will be held.

---

qualitative nature.” Warner Bros. Entertainment Inc. v. RDR Books, 575 F. Supp. 2d 513, 535, 88 U.S.P.Q.2d 1723 (S.D. N.Y. 2008) (citing Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65, 70, 27 Media L. Rep. (BNA) 1171, 49 U.S.P.Q.2d 1516 (2d Cir. 1999)). As Nimmer explains: “The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work. The quantitative relation of similar material to the total material contained in plaintiff's work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity.”) Nimmer on Copyright § 13.03[A][2].

<sup>44</sup> Universal Furniture Intern., Inc. v. Collezione Europa USA, Inc., 618 F.3d 417 (4th Cir. 2010), as amended, (Aug. 24, 2010).

Ordinary observer test, which asks whether the ordinary observer would recognize the copy as having been taken or appropriated from the copyrighted work.

Under such test, the works at issue will be said to be substantially similar if a reasonable, ordinary observer, upon examination of the works, would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression.<sup>45</sup>

Nevertheless, the standard of 'substantial similarity' is still vague and difficult to practice. By following the three steps when judging 'substantial similarity', first, we

---

<sup>45</sup> *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3d Cir. 1975); *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280 (10th Cir. 1996); *Baby Buddies, Inc. v. Toys R Us, Inc.*, 611 F.3d 1308 (11th Cir. 2010); *White v. Alcon Film Fund, LLC*, 2014 WL 4960669 (N.D. Ga. 2014).

The test of substantial similarity is whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982).

The standard test for substantial similarity between two items is whether an ordinary observer, unless he or she sets out to detect the disparities, would be disposed to overlook them and regard the aesthetic appeal as the same. *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57 (2d Cir. 2010).

select out the “expression” part, which is copyright protected parts. Second we analysis and compare the same elements in two formats, considering quantitatively and qualitatively, and last we consider whether the ordinary audience would be reminded of the original reality TV program when they are watching the sued one. Then a rational conclusion whether a “substantial similarity” exists would be made.

## **VI. Strategy for format holders**

Since the whole environment of format copyright protection is not on the side of format holders, The format holders need to seek for other relief approaches in order to protect their initial Intellectual Properties.

### **A. Protecting format by Trade Secret Law: sign a non-disclosure agreement before demonstrating an idea or know-how to others**

In practice, for the aim of attracting investment of venture companies, or to seek partners in another country to help produce a licensed format reality program, or even seeking partners to joint develop new format programs with a new idea, before presenting it to others, it is better to sign a Non-disclosure agreement.

If the producer signs a confidentiality agreement before learning the suggested format content, the format creator could potentially halt some of the producer’s

independent development, claiming the theft of their format.<sup>46</sup> The risk of the loss of a creative idea by demonstrating it to partners or competitors can be reduced by signing a Non-disclosure agreement in advance.

## **B. Protecting format by Contract Law- impose restrictions on the territory, time and derivative in license agreement**

In practice, to avoid being involved in a copyright infringement lawsuit, and to get the detailed know-how to make popular reality programs, Chinese producers usually contact Korean reality program manufacture companies to get copyright license. Making Chinese version of popular Korean reality shows, on one hand, the R&D invest is deducted, on the other hand, the market value of such format is verified, for the reason that China and Korea share a similar culture and value. The big hit of several reality programs which is bought from Korea testified this truth.

There are some points that Korean licensor must pay attention to. Usually Chinese companies make exclusive license agreement with Korea to make sure the big success and benefit of reality TV program. In spite of this, the Korea company can also restrict Chinese by limiting the license to certain period and area.

Another important aspect is about the derivative. In China, after the big success of

---

<sup>46</sup> Neta-Li E. Gottlieb, Free to air? Legal protection for TV program formats, 51 IDEA 211, 6



the Chinese version ‘Father, where shall we go?’, Chinese producers made and launched the theme song, which is inserted into the TV reality program as the same time as the beginning in 2013. And then, in 2014, a movie is manufactured and distributed by Chinese companies in China in which the same format is used.<sup>47</sup> Different from other traditional movies, the movie doesn’t have a script before shooting, and the content is extremely similar as that of TV program version of ‘Father, where shall we go?’. Not only that, later on, the same titled mobile phone game is launched and gets popular riding on the famous name of TV program ‘Father, where shall we go?’. So it may be an alert for Korea format holders that the conditions or restrictions for derivative works should be clear. It will also be a good suggestion to make a consensus on the profit distribution of format derivative.

### **C. Protecting format by Unfair Competition Law: prove the illegal business behavior of passing off and the fact of confusing by audience.**

This action means to protect format as an asset of business of reality producers. In the case of a reality program is launched and get a good reputation among relevant audience in specific area, a copycat format may cause the confuse of

---

<sup>47</sup> <http://games.qq.com/a/20150211/049267.htm#p=4> last visit: 2016/10/16 14:12

《爸爸去哪儿 2 大电影》首映 官方手游推出

audience into believing that the confusing format program is originated from or must have some relation to the original one.<sup>48</sup> In civil law system, this action can claim for protect by Unfair Competition Law. The four factors may be required to prove in order to get protect by Unfair Competition Law.

First, the original format must be launch earlier and gets a goodwill or a reputation. This can be proved by a material of TV program ratings or a market share. Advertisement material or certificates of award are also good evidence. In the situation where a foreign format is appropriated by confusing format, because of the convenient access to internet or satellite nowadays, by proving the original format is “famous” in the accused jurisdiction, this criteria can be satisfied. Second, there must be a appropriated behavior of intentional imitate of original format, either the title or other elements. Third, there must be the confuse by audience into believing that the confusing format program is originated from or must have some relation to the original one. Last, the damage should be proved as a result of such illegal business behavior.

#### **D. Protecting format by Trademark Law: register the title of reality program as a trademark in main target countries.**

This action means to protect format by register the title of reality show as trademark. It had better be accomplished before the launching of the new TV

---

<sup>48</sup> Final FRAPA Report 2011

program. It may be a strong weapon to fight against copycat programs later on. And sometimes it is also critical to the success of the format itself. The title of the format shouldn't infringe the right of registered trademark of others.

“Fei cheng wu rao”(非诚勿扰) is the famous date matching reality TV program made by Jiangsu TV station, broadcast from 2010. In 2009, a person named Jin applied for the trademark “非诚勿扰” to the Trademark Office and got trademark registration certificate(No. 7199523) in September 2010. The authorized service category is “service of date matching, marriage agency”. And then Jin opened and managed a marriage agency. In 2013, Jin sued Jiangsu TV station to Shenzhen Nanshan District Court for trademark infringement. The court dismissed the case for the reason that the TV program can not fall into the realm of the authorized service category, but belongs to the “TV program” category. Since Jin appealed to Shenzhen's Middle Court, the court announced an injunction of using the TV program title “非诚勿扰” to Jiangsu TV station for infringement of Jin's valid trademark.

## **E. Value the International organization's role on protection of format - FRAPA(Format Recognition and Protection Association)**

FRAPA is a Non-profitable International Association, which aims to ensure that television formats are respected by the industry and protected by law as intellectual property. FRAPA is providing various service to format creators,

producers, distributors and broadcasters including format registration, dispute mediation, format value calculation, format marketing and business matching, format market researching and format bible generating.<sup>49</sup>

Even though the registration on FRAPA doesn't mean copyright protection in law. It can be a good tool when format holders want to prove he is the first creator of the specific format in a dispute.

Furthermore, considering the huge loss of time and money when involved in a law suit, FRAPA, joining forces with WIPO Arbitration and Mediation Center , provides mediation of disputes arising out of claims of format plagiarism. Considering the advantages of mediation, such as Preserving business relationships, retaining control over the process and the outcome, and protecting sensitive information through confidentiality, it might be a good choice for format creators, producers, distributors and broadcasters.

## **VII. Conclusion**

Taking an overview of the legal protection of format worldwide, it is still not a feasible way to claim for copyright protection now. Only courts of a few countries admit the copyrightability of format directly or indirectly (like Brazil, U.S, U.K, Spain, Australia). As analysed in this thesis, it is proper to establish the format copyright in law step by step, since it is consistent with the legal principal and is beneficial to the TV industry in the long run. I believe in the near future the system will be established and completed.

---

<sup>49</sup> <https://www.frapa.org/>

However, thinking of the special character of format, as being the middle of idea and expression, the legal copyright protection could be limited or weakened by some means. In judging the 'originality' of format, the standard can be a little bit strict than other works. Or even the law can give a relatively shorter copyright protection period just like neighboring right. Balancing the benefit of every parts, trying to make the format copyright protection system well-operated corresponding to the reality of each country is the basic core when making format copyright provisions.

To protect format from piracy, it is better for format producers, distributors, broadcasters to make detailed format bibles first. In an attempt to demonstrate that a format is a protectable copyright work, a bible is necessary. The more details of the contents and structure of a reality program are included in a format bible, the easier the bible will be considered a copyright work by courts.<sup>50</sup> Making Non-disclosure agreement before demonstrate it to others when in a negotiation is also suggested. After the piracy happened, seeking help of FRAPA, WIPO will be more effective and efficient than drag the dispute to a court. When it is necessary to solve the dispute at a court, arguing in Contract Law, Trademark Law or Unfair Competition Law is also a good choice.

This thesis aims to analysis the basic legal theory to support the establishment of copyright protection of format in reality TV programs, also means to provide some basic strategy for format producers in real business practice.

---

<sup>50</sup> FRAPA Report 2011, 12.

## Reference materials:

### Chinese reference:

1. 《北京市高级人民法院关于审理综艺节目著作权案件相关问题的调研》
2. 郑丽娜 《反不正当竞争法视野下电视节目模板法律保护的出路》
3. 柯冬英 《试论电视综艺节目的知识产权保护》
4. 许云龙 《试谈电视节目模式的著作权保护》

### Korean reference:

1. 배정아, 2008. 방송 시장의 포맷 거래에 관한 연구. <방송과 커뮤니케이션>, 9(2), 6-36.
2. 하운금, 2003. 왜 프로그램 포맷을 이야기 하는가. <방송문화>, 5 월호.
3. 은혜정, 2008. 세계포맷개발 현황 및 향후 발전방안. (KBI) 포커스, 48, 한국방송영상산업진흥원, 1-19.
4. 한국콘텐츠진흥원, 2012.11.30 방송 포맷의 권리보호 방안 연구
5. 정상조, 經濟的 不法行爲 試論 아이디어의 유통을 둘러싼 민사법적 문제
6. 김명중, TV 포맷의 시장 분석과 법적 권리보호에 관한 연

7. 노동렬, 방송 예능프로그램 포맷의 진
8. 임수정 류증현, 방송 프로그램 포맷 보호에 대한 저작권법적 관찰

## English reference:

1. SukhpreetSingh(2009) Observation from TV Format Rights Disputes Database
2. Tapio Varis. International Flow of Television Programmes. 15.
4. Neta-Li E. Gottlieb, Free to air?-legal protection for TV program formats, 1.
5. Writers Guild of America, 2008 Theatrical and Television Basic Agreement.
6. Waller, 2008. Formats: A global format perspective around the world in many ways. BCWW 2008 Conference, 3-5, September.
7. Final FRAPA Report 2011
8. Zelda Gerard , The legal status of reality TV show participants in US and in France

## Website reference:

1. [https://en.wikipedia.org/wiki/Reality\\_television](https://en.wikipedia.org/wiki/Reality_television)
2. [http://wenku.baidu.com/link?url=D0sY-UzWIHQltDmotmHBnJa45Vbvhn4gvSJ8v6CaLwskjsVfBgqOozDASpncQF0no1FRe2fFBd8JhOC\\_oKCIpiNjMGBZDv84penqlbxMqrG](http://wenku.baidu.com/link?url=D0sY-UzWIHQltDmotmHBnJa45Vbvhn4gvSJ8v6CaLwskjsVfBgqOozDASpncQF0no1FRe2fFBd8JhOC_oKCIpiNjMGBZDv84penqlbxMqrG)
3. [http://tvformats.bournemouth.ac.uk/Downloads/TVFormatRightsDisputesObservations\(c\)SukhpreetSingh1.pdf](http://tvformats.bournemouth.ac.uk/Downloads/TVFormatRightsDisputesObservations(c)SukhpreetSingh1.pdf)

4.<http://news.bbc.co.uk/2/hi/entertainment/2290199.stm> last visit 10:43 Feb. 8, 2015

5.<http://www.theguardian.com/media/2003/jan/14/broadcasting.realitytv> , last visit 10:58 Feb. 8, 2015

6.<http://www.cn12330.cn/djdt/mt/201604/25699.html> last visit: 2016.08.22 18:00

7.<http://finance.sina.com.cn/stock/t/2016-06-25/doc-ifxtmwri4444505.shtml>  
last visit: 2016.08.22 18:00



# 초록

## 한중 예능 프로그램 저작권 보호에 관한 비교 연구

Qi Xin

법학과 법학전공

서울대학교 대학원

방송통신 기술의 발달로 시청자들은 여러 수단을 통해 예능 프로그램을 접하며 즐겨 보기도 한다. 한국이나 중국 정부는 문화산업의 활발한 발전을 촉진하기 위해서 관련 법률이나 정책을 제정하고 있다. 콘텐츠 산업의 발전은 국가 이미지의 형성에 도움이 될 것이고, 또한 국가 지주산업이 되어 높은 금전 이익을 만들 수도 있는 것이다. 한 연구기관의 분석결과에 따르면 콘텐츠 산업은 개발가치가 높은 미래 산업이라는 것이다.

상대적으로 발달한 콘텐츠 강국 한국은 한류 문화로 세계적으로

유명해져 매년 수많은 영화, 드라마, 노래, 예능프로그램을 만들어 해외진출에 앞장서고 있다. 한국 콘텐츠산업의 발전을 촉진하는 데에 <저작권법> <콘텐츠산업 진흥법> <문화산업진흥 기본법> 등 법률이 중요한 역할을 한 것으로 보인다. 이와 마찬가지로 중국정부도 관련 법률의 개정으로 문화산업의 진흥에 대해 힘을 기울이고 있다.

최근 몇 년간, 특히 2013년부터 2014년까지 중국 방송국들이 수입한은 70여 외국 예능프로그램 중 한국 예능이 10편이었다. 짧은 기간임에도 <런닝맨> <아빠 어디가?>등 예능프로그램이 가장 인기있는 방송 예능으로 눈길을 끌었다. 한 뉴스에 따르면 2014년 이전에는 한국 예능 저작권 사용료가 미국 달러로 한편당 만 원에서 3만 원 수준이었으나, 중국에서 큰 성공을 얻은 후에는 특정 예능프로그램 가격은 열 배나 늘었다. 중국으로부터 구입 수요가 있고, 한국이 중국 시장에 관심이 높아 양국가간 저작권 거래시장은 활발하게 움직이고 있는 것으로 보인다.

본 논문에서는 다음과 같은 내용을 중점적으로 연구하였다. 첫째, 예능프로그램의 법적 성격이 무엇이며, 저작권법에 의하여 보호 받을 수 있는 것인가? 둘째, 현재 한중미 법률체계 하에 예능프로그램이 어떤 보호를 받고 있는 것인가를 분석하였다. 셋째, 현재 법률체계에서 예능 포맷 제작자들이 어떤 대응을 하는 것이 바람직한가를 제시하였다. 마지막에는 독창성있는 예능 프로그램 포맷이 저작권의 보호를 받아야 하는 당위성을 제시하였다.

저작권 보호에 관한 본 논문의 연구결과가 한중 예능프로그램의 저작권 거래 사업에 조금이라도 도움이 되었으면 한다.

주요어: 예능프로그램 포맷 저작권 중국 한국 보호전략  
법

학 번: 2014-25172