

Copyright and Related Rights Law

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WEEK - 04

LECTURE – 20

TV show format as Dramatic Works

Welcome back to this course on copyright and related rights law. This week, we have been studying the subject matter of dramatic works under copyright law. We had already looked at three subjects: literary works, artistic works, and musical works. Dramatic works are the fourth subject matter. In the previous session, we discussed how dramatic works are different from cinematographic works in some copyright Acts, and in other copyright Acts, how cinematographic works are considered a part of dramatic works. In this particular session, we are going to look at a peculiar form of subject matter, which has been considered as a contestable addition to dramatic works - TV formats.

All of us or many of us are used to browsing through channels on our cable television. Many of the shows that we have watched are television serials. We have also watched game shows. Game shows such as Kaun Banega Crorepati are famous game shows that many of us have watched, hosted by the famous Indian superstar Amitabh Bachchan.

We have also seen reality TV shows like Bigg Boss. Many of these shows are, in fact, now shifting from television as we know it to streaming platforms online. TV shows such as Stranger Things are shows in which specific episodes are released in what is called a season. A season is cohesively connected by a plot in which the characters in the story interact with each other in a particular manner. What we can state is that the script used for a television show such as Stranger Things is a dramatic work.

How do we know that it is a dramatic work? It is a portrayal of life. There are characters. There is certainty of such a performance. There is action in such performance. It is fixed.

Therefore, we know that the script is definitely a dramatic work. The consideration of whether the cinematograph work, or in other words, the eventual recordings that are seen by audiences, is a dramatic work or not depends on how cinematograph works are considered in that specific jurisdiction. We have also seen shows on cooking, shows that bring a contest between competing chefs who make ingenious dishes based on recipes

that are perhaps of their own creation. Can we say that there is a dramatic work in existence in the format of such a show? Why is there some confusion here compared to a TV show here? In reality TV shows such as those involving cooking, spontaneity in action is often present, even though there might be a format that is followed, such as the one used in the show called MasterChef. But the contestants are real; in fact, the manner in which the contestants contest is not fixed in that sense.

It is very similar to how sports were excluded from consideration as dramatic works. How, then, if at all, can TV formats fit within the ambit of dramatic works? Thus, in this session, we are looking at TV formats specifically because they might be satisfying some aspects of dramatic work. But they also seem to contain those elements that are considered to be excluded from the domain of dramatic work. Let us first keep in mind that dramatic works are based on fixated expressions. A script, for example, in relation to a television show, would be a prerequisite for a TV format.

What we can consider is that there are certain guiding structures. Let us call it that. Consider this show where the essential consideration is based on a contest between chefs, but there is a format or guiding structure that runs throughout the entire show. There will be a certain type of host. There will be certain rules or procedures that will guide the contest in a particular way.

The arrangement of the set, all of these things point to a certain specificity, but because the contest itself is spontaneous, there is also ambiguity. Therefore, a TV show and its format point to certain interesting considerations on whether it can, in fact, be brought within the sphere of dramatic work or not. Let us for a moment think back on how we understood the non-application of dramatic work in which there is spontaneity of action. You would recall we discussed that wherein there is a performance, if a dramatic work is to exist, the dramatic work must be created or its fixed form must exist prior to the performance taking place. And therefore, any performance that's taking place is predetermined, and spontaneity in action is not something that can be considered a dramatic work.

Perhaps the most referenced decision in relation to TV formats and their copyrightability is *Green v. Broadcasting Corporation of New Zealand*, a Privy Council decision from 1989. What the court considered was whether the claim that a format of a talent show called *Opportunity Knocks*, which was apparently copied in a similar TV show broadcast by the Broadcasting Corporation of New Zealand, was protected under copyright. What was the claim? That this format was a dramatic work is clear. Something important that must be mentioned at this point is that there was no script presented by way of evidence to the court.

Here in itself, there was an issue with what exactly it was that was being claimed as a dramatic work. It was then alternatively suggested that when we watch game shows or talent shows, there are certain distinctive elements that we will recall from such talent shows. What are these? There will be a specific arrangement for the set. There will be certain sounds that will be particular to an action taking place on the stage. For instance, if the contestant were to win a particular round, there would be a certain kind of demonstration of celebration that we could see.

Therefore, would it not be possible that certain essential features of the show, which remain constant throughout the episodes, can be considered a dramatic work? In other words, can this not be called the format of the show? How the court understood this particular terminology is as follows: Format of the show refers to those characteristic features of the show which are repeated in each performance. These features were in this particular show - Opportunity Knocks in addition to the title, the use of the catch phrases for Opportunity Knocks: "This is your show, folks, and I do mean you," and "make up your mind, time," and the use of a device called a "clapometer" to measure audience reaction to competitors' performances and the use of sponsors to introduce competitors. The court found it to be a stretch of the imagination to extend the ordinary meaning of the term format, to such essential features, that can be noted in different episodes of a show. What it stated is that it is stretching the original use of the word format a long way to use it metaphorically to describe the features of a television series, such as a talent quiz or game show, which is presented in a particular way. With repeated but unconnected use of set phrases and with the aid of particular accessories.

What the Court was referring to here was that these elements were isolated elements, and something that needs to be present for a dramatic work to exist is a connecting thread that connects these elements together. According to the court, this connecting thread was something that was not certain. It stated the difficulty of finding an appropriate term to describe the nature of the work. Is it a format? Is it a structure? Is it some kind of package? It reflects the difficulty of the concept. That a number of allegedly distinctive features of a television series can be isolated, from the changing material presented in each separate performance and identified as original dramatic works.

This was compounded by the fact that no script was presented by the plaintiff. What the court stated is that the subject matter of copyright claimed for the dramatic format of "Opportunity Knocks" is conspicuously lacking in certainty. A dramatic work must have sufficient unity to be capable of performance, and the features claimed as constituting the format of a television show must be unrelated to each other. Except as accessories to be used in the presentation of some other dramatic musical performances, they lack that essential characteristic. In holding that opportunity knocks and the format that was claimed as a dramatic work is not a dramatic work.

The court explained that this was so because these features were independent and there was no unity among them. As discussed in the previous session, what connects the elements in a script is the plot. Similarly, in this particular case, what is it that is connecting these particular features where the performances themselves in the contest were completely varied in different episodes? These features could only be considered accessories in presentation and not as a dramatic work. In other words, if we were trying to piece together these features, are we able to arrive at some kind of whole? And if we are not, then it doesn't seem to be a dramatic work. In another case that came before the court in the UK, *Wilson versus Broadcasting Corporation of New Zealand*.

In this case as well, the claimant was stating that there is a TV format in existence which she was claiming as a dramatic work. What was the specific subject matter? She had developed the concept of a television series for children, in which the central characters were a physically disabled adolescent boy and girl, who together performed heroic and magical acts in a general confrontation with evil forces. The show was titled "The Kiwi Kids." The defendants in this case had produced a show along similar lines called *The Kids from OWL*. The court stated that the quintessential part of the feasibility study relating directly to *The Kiwi Kids* is a dramatic work.

According to the court, the dramatic work is in a material form. All the key components of the plaintiff's concept and format were there. It might be a simple enough idea expressed that way. But the roots of the defendant's program go straight back to the plaintiff's feasibility study of March 1980. The court has been able to arrive at this particular consideration based on the fact that there is a material form of the dramatic work.

How do you make a distinction between the first case and the second cases? In the first case, there is an absence of a script. In the second case, what is called a feasibility study is, in fact, a fixated work, and this fixation has, in fact, helped the court in objectively assessing the presence of a dramatic work. According to the court, the dramatic work is in a material form. If we refer back to the *University of London Press versus the University Tutorial Press*, we will recall that an expression, in order to be considered a work, must satisfy the objective assessment of what is required from such an expression. In this scenario, in order to be a dramatic work, fixation is a necessary consideration because the claimant had, in fact, fixed the expression.

There was sufficient certainty in how the performances were expected in this feasibility study where a similar show was created. It was considered to infringe. Let us look at another case that comes from the U.K. This is *Banner Universal Motion Pictures versus Endemol Shine Group*.

This particular case concerned a TV game show called Minute to Win It. Why is this case important? It helps link the cases that we have discussed in terms of the concept we are attempting to understand. What the court is saying is that the authorities on the point of dramatic work existence seemed to be saying that, as a minimum, there were a number of clearly identified features which, taken together, distinguished the show in question from others of a similar type. And that, those distinguishing features were connected with each other in a coherent framework that could be repeatedly applied, to enable the show to be reproduced in a recognizable form. What is the court saying? Firstly, there must be some identifiable features that are not common, and secondly, these identifiable features must be connected by some connecting thread.

If that was the case, then it was possible for a TV show and its format to be considered a dramatic work. In other words, the features that seem to be isolated can be brought together in a cohesive whole; the format could be considered a dramatic work. In this particular case, though, with respect to this particular show, the manner in which the court is explaining that it is not a dramatic work helps us understand how these features will be identified and what kind of connection the court is looking to find. You can see the court says there is no realistic prospect of the claimant persuading a court that the contents of the Minute Winner document qualify for copyright protection. This is because those contents were both very unclear and lacking in specifics, and even taken together, they did not identify or prescribe anything.

Resembling a coherent framework or structure that could be relied upon to reproduce a distinctive game show in recognizable form. Rather, the features were commonplace and indistinguishable from those of many other game shows. Neither the title nor the phrase "one minute to win" can be said to be clear or distinctive. The words "one minute to win" were not even identified in the Minute Winner document as a catchphrase that was required to be repeated in the program or how that should occur. The performance of a task against the clock to win a game, or a prize was a common feature of most game shows, and it did not become distinctive because the time to complete the task was limited to one minute.

It also had to be noted that the show would give members of the public the chance to win something on television. Having their reactions recorded was entirely non-specific, inherent in the very nature of a television game show, and entirely banal. The Minute Winner document also did not, for example, prescribe where the action was to take place; rather, it suggested that it could take place anywhere. Moreover, it did not contain any specification of who the contestants should be or how they were to be identified and approached; and it did not seek to prescribe the type of one-minute tasks that were to be performed in such a way, that might form a recognizable or repeatable structure. Although it was suggested that a distinctive feature of the format was that the task to be

performed within a minute should involve the very item that then formed the prize if the task was completed successfully.

The claimants' manifest difficulty was that this was not actually specified anywhere in the Minute Winner document. The length of the program was also not defined in the indication in the Minute Winner document; the times the show could be aired were entirely non-specific, indicating that the show could be aired at virtually any time. What do we understand from these points that the court has highlighted with respect to the show? The court is targeting the non-specificity in the document known as the Minute Winner document, where a particular ingredient or a particular connection between ingredients could be claimed as some kind of dramatic work that was not present in the document. Whenever a TV format is claimed as a dramatic work, there must be a fixation. And the fixation must clearly provide information on what it is that the format is looking to protect, the specific nature of such an ingredient, and what it is that is connecting these ingredients together.

With that, we finish this week on the subject matter of dramatic works. Not just that, we also finished our foundational study on the basic subject matters of copyright, which are literary, dramatic, musical, and artistic works. Next week, we will start our discussion on originality, a very important consideration in whether copyright can subsist in the work or not.

Thank you for joining me. See you next week. Thank you.