

# A Bonanza for Lawyers

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**T**he proliferation of reality-type television shows, from “Love and Hip-Hop” to “Keeping Up with the Kardashians” has transformed the market for commercial television. Reality television, it is said, “is now recognized as a staple of television that has thoroughly altered writing, production and distribution practices” in the television industry.<sup>1</sup> As the reality television genre has expanded, legal disputes, many as wacky as the shows themselves, have followed suit, no pun intended. The legal exposure of reality TV show, networks, producers and participants alike is real. Indeed, a reality TV participant in the show “Dating Naked” sued the network over “negligently” exposing and displaying the plaintiff’s genitals.<sup>2</sup>

Whether the lawsuits (or the underlying programs) serve social utility is debatable. What is clear, however, is that the suits have created a bonanza for lawyers, and have developed case law that is central to the field of entertainment law.

Entertainment law is a field that consists at its core of two areas of law—intellectual property (IP)—particularly copyright, trademark, idea misappropriation and right of publicity issues—and contract issues.<sup>3</sup> This article will explore some salient intellectual property law and contract law issues arising out of reality television programs. Despite the lack of creativity of reality TV shows, analysts have noted that “the legal side of reality TV programming requires an uncommon level of creativity at least as far as lawyers are concerned.”<sup>4</sup>

## Copyright Infringement Claims & Reality TV

Copyright law protects both motion picture works (film) and audio-visual works (TV shows). However, copyright infringe-

ment claims are problematic in the reality TV format context. This is because copyright law does not protect basic ideas or concepts, but only the expression of ideas in a tangible medium. However, copyright law does not require novelty in expression, but a very, very low standard of originality (just listen to commercial radio to get a sense of the originality standard).

Copyright infringement occurs whenever a defendant violates any of the exclusive rights of a copyright owner without a valid defense. A successful copyright infringement suit against a major network or studio can generate potentially huge recoveries. The largest copyright infringement recovery to date was for a whopping \$1.3 billion for infringement of software.<sup>5</sup> In the music context, a jury awarded the heirs of the iconic singer Marvin Gaye \$7.4 million for infringement of Gaye’s song “Got to Give It Up” by the song “Blurred Lines.”<sup>6</sup>

Copyright infringement lawsuits provide an automatic forum in federal court and permit generous recovery of both statutory damages (up to \$150,000 for willful infringement) and attorney’s fees for the prevailing party. Copyright claims also provide the ultimate hammer in litigation—the ready availability of an injunction before trial. A major film studio learned this lesson to their chagrin when an obscure artist was able to enjoin exhibition of the film “Twelve Monkeys” for copyright infringement of the plaintiff’s art drawing that the film used without consent.<sup>7</sup>

In an early copyright infringement lawsuit in the reality film context, the producers of the hit TV show “Survivor” sued the producers of “Boot Camp.”<sup>8</sup> In determining whether “Survivor” infringed “Boot Camp,” a court would have to

determine if the shows were substantially similar. A good defense to the suit would be that the similarities extend only to the idea of a competition in a remote setting, but not the expression of the programs. Since copyright does not protect raw ideas, it would be difficult to see how “Boot Camp” takes any protectable expression from “Survivor”, in the same way that Howard Stern cannot claim a monopoly on the idea of evaluating the physical attributes of women by a panel of men. The “Boot Camp” suit surprisingly survived a motion to dismiss by the producers, but subsequently settled.

Copyright is generally a poor vehicle to address appropriation in the reality TV show context, and there is evidence that producers and networks have learned this lesson. Following a number of copyright cases where reality TV show format claims were dismissed by the courts, “networks and producers seemed to accept the notion that reality formats were not the appropriate subject of copyright protection.”<sup>9</sup>

The bottom line is that copyright claims against reality shows generally have little chance of success. For example, does “The Swan” infringe “Extreme Makeovers”? The answer should generally be no—the idea of using plastic surgery to transform applicants can’t be protected, because copyright does not extend to basic ideas. Similarly, anyone could produce a show where gay men or women help fashion-clueless heterosexuals transform their living space and appearances. This would not constitute copyright infringement of “Queer Eye for the Straight Guy” according to hornbook copyright law.

Copyright infringement claims in the reality TV context “are inherently weak due to the unscripted nature of reality TV



and the well-established copyright threshold of ‘fixed’ expression.”<sup>10</sup> However, despite the lack of strong copyright protection for reality TV show formats, analysts have noted that the reality TV show industry “is managing to survive and thrive in an environment that offers only a limited level of [intellectual property] protection...”<sup>11</sup>

### Idea Theft—Idea Misappropriation Claims

If copyright claims are the handsome prince of the entertainment world, idea misappropriation claims are the ugly frog. Idea theft is thought to be rampant in Hollywood—indeed; some analysts have contended that idea theft is so common in Hollywood as to comprise a standard business model.<sup>12</sup> Virtually all entertainment projects—TV shows, movies, plays, books, and video games—begin with an idea. Imagine, for example, the value of the idea for a hit reality television show such as “American Idol.” Yet despite their value, from a legal perspective, ideas receive the least protection among IP regimes. As a general rule “ideas are as free as air” and can

be appropriated by anyone. Accordingly, while plaintiffs frequently claim idea misappropriation, they rarely prevail in court.

The granddaddy of idea theft in the TV context involved the hit TV program, “The Cosby Show.” There, a New York Federal Court in *Murray v. NBC* held that the originator of the idea for what became “The Cosby Show” could not prevail against NBC.<sup>13</sup> The idea submitter, Murray, had presented numerous “pitches” to the network for a sitcom show that would feature a non-stereotypical African-American family and would star Bill Cosby.

New York law does not protect ideas from misappropriation unless the idea is both novel and concrete. Accordingly, the *Murray* Court held that the idea of a sitcom about a non-stereotypical African-American family was insufficiently novel to warrant protection (notwithstanding that no such show had ever existed pre-“Cosby”—when stereotypical shows such as “Good Times” and “Sanford & Son” proliferated.

In California, where much of the reality TV industry resides, the standards for idea theft are less harsh, although arguably little

better for would be plaintiffs. California, which does not require novelty, but focuses on the existence of an express or implied contract. The California standard allows for an idea theft lawsuit if based on an implied or express contract. The California standard came into play in a recent lawsuit involving the hit reality TV show, “Ghost Hunters.”

The plaintiff Montz “pitched” his idea for a reality TV show about tracking ghosts. Under California law, the conduct of the parties—such as presenting screenplays to TV studios—can create an implied contract, even where there is no written express agreement. However, the trial court, and later the 9th Circuit Court of Appeals dismissed the plaintiff’s claim, because it conflicted with federal copyright law.<sup>14</sup> In contrast, in a case involving the idea theft of movie concept which became the film “Rounder’s,” the Ninth Circuit allowed the claim for idea misappropriation to proceed, because the implied agreement there was to the studio, Miramax Films, to pay the plaintiff for his idea. In contrast, in Montz, the agreement was for the plaintiff ghost investigators to retain copyright ownership

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of the proposed TV show.

Although idea misappropriation lawsuits rarely succeed in court, and the studios and producers almost always win, the lawsuits are nonetheless a fixture in the reality TV show genre and the entertainment industry generally. In a misguided lawsuit a number of years ago, talk show host and self-proclaimed “King of All Media” Howard Stern sued the producers of ABC’s reality show “Are You Hot?” for idea misappropriation.<sup>15</sup> Stern contended that the “Are You Hot” producers had appropriated the idea for their show from a segment on Stern’s radio/TV show entitled “The Evaluators.”

The premise of Stern’s “The Evaluators” entails a panel of “experts” (*i.e.*, perverts) evaluating (in typically crude Stern fashion) whether female applicants would qualify for a photo-spread in *Playboy* or *Penthouse*. Similarly, the premise of “Are You Hot?” was to evaluate which contestants, male and female, are the sexiest in America using a panel of judges. Stern’s suit would not be viable in a New York court, since New York law requires a high degree of novelty, and the mere idea of judging the physical attributes and attractions of female bodies is anything but novel (ever hear of the Cave men?). Not coincidentally then, Stern brought his suit in California. It is far from clear that Stern could have established either requirement—his case seemed patently ridiculous in fact, but the case settled before resolution.

## **Contract Claims**

Contract claims run the gamut in the reality TV show context from garden variety to bizarre. Reality TV contracts are known as being some of the most onerous in the entertainment industry, and perhaps any industry. One common provision in reality TV contracts is participants must keep details about the show confidential. In recent years, reality TV show producers have sued participants, who reveal secret

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details of the shows, most notably, a participant on the hit show “Survivor.”

Because reality TV show contracts are often in extreme in their treatment of participants, challenges to these contracts have focused on their inherent unfairness. The unequal bargaining power between producers and participants is typically vast, and an unknown participant can expect to sign a submission waiver which in essence forecloses any shot at suing for copyright infringement or idea misappropriation.<sup>16</sup> A reality TV writer recently sued E! Entertainment Television for breach of contract and copyright infringement for stealing his idea for the show that became “Opening Act.” However the submission form the plaintiff writer signed acknowledged that “no contract or obligation of any kind...is assumed by E!...or may be implied against E! by reason of E!’s review of the Material and/or discussions or negotiations we may have.”<sup>17</sup> The chances of prevailing in litigation after signing off on such a waiver of rights are basically non-existent.

Reality TV has proliferated because the costs of many programs are low, and participants receive little in comparison to the massive revenues made by producers and networks. A lawsuit from a recent American Idol winner highlights this persistent problem.

Season 11 winner Phillip Phillips has sued the producers of American Idol before the California Labor Commission to escape

what he terms the “oppressive” contract Idol participants are forced to sign. Phillips claims, for instance, that he has been forced to perform for free for Idol sponsors, and has been denied basic information about the management of his music career. The question remains whether the Idol contract participants must sign is worth the pound of flesh they must provide.

The American Idol agreement, like others in the industry, permits the producers to reveal highly embarrassing information about contestants and to \$5 million in penalties for revealing any of the show’s secrets. Contestants give up basically all artistic control over their careers, and some have complained that they were forced to record music that they hate.

A contentious point of reality TV show contracts is also arbitration clauses, which limit a parties’ right to sue in court for damages or other release. In a case involving the hit show “Extreme Home Makeover,” a group of orphans sued ABC and the show’s producers to escape an arbitration clause in their agreement.<sup>18</sup>

At issue in Higgins was an arbitration clause, which required the orphan participants to forgo their right to sue in court, but allowed the producers the option of suing in court. The court felt this was simply too much, and declared the arbitration clause unconscionable, meaning legally unfair and unenforceable. The victory of the orphans was short-lived however, as their underlying claim of misrepresentation, breach of contract and unfair competition, among others was soon dismissed. Like other reality TV show contestants and participants, the orphan plaintiffs in Higgins learned the hard way: reality TV is great for producers and networks, but for most contestants, not so much.

<sup>1</sup> See Leigh H. Edwards, *The Triumph of Reality TV: The Revolution in American Television* 11 (2013).

- <sup>2</sup> This was a \$10 million dollar lawsuit by a participant from the show “Dating Naked” against Viacom for failing to properly blur the participant’s genitals on the show. A New York judge tossed plaintiff’s case—and ordered her to pay attorney’s fees as well. See *Niewitz v. Viacom International, Inc.*, N.Y. Sup. Ct. Index No. 158029, March. 6, 2015.
- <sup>3</sup> See K.J. Greene, “There’s No Business Like Show Business: Using Multimedia Materials to Teach Entertainment Law,” 52 *St. Louis U. L.J.* 765, 767 (2008).
- <sup>4</sup> See Aaron Gafni, “At Least You Don’t Have to Sign Away Your Firstborn Child to Be a Reality TV Contestant....Yet”, *Lawland Blog* (Oct. 13, 2010).
- <sup>5</sup> See *Oracle Corp. v. SAP AG*, No. 12-16944 (9th Cir. 2013) (\$1.3 billion jury verdict for infringement of business application software, affirmed in part).
- <sup>6</sup> See *Williams v. Bridgeport Music, Inc.*, CV 1306004 (C.D. Cal. 2013).
- <sup>7</sup> See *Woods v. Universal City Studios, Inc.*, 960 F. Supp. 62 (S.D.N.Y. 1996).
- <sup>8</sup> See, *Survivor Productions LLC v. Fox Broadcasting Co.*, 2001 U.S. Dist. LEXIS 25511 (C.D. Cal. June 12, 2001)
- <sup>9</sup> See Jessica Bergman, *Nom More Format Disputes: Are Reality Television Formats the Proper Subject of Federal Copyright*

- Protection?*, 4 *J. Business, Entrepreneurship & L.* 242, 257 (2011).
- <sup>10</sup> See Brooke Olausson, *Why Copyright Law Won’t Protect Reality TV*, *American U. Intellectual Property Brief*, July 28, 2012.
- <sup>11</sup> See Stefan Bechtold, *The Fashion of TV Show Formats*, 2013 *Mich. St. L. Rev.*, 451, 455 (2013).
- <sup>12</sup> See K.J. Greene, *Idea Theft as a Hollywood Business Model*, 7 *Hastings J.L. Sci. & Tech* 15 (2015).
- <sup>13</sup> See *Murray v. National Broadcasting Co.*, 844 F.2d 988 (2nd Cir. 1988).
- <sup>14</sup> See *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153 (9th Cir. 2010).
- <sup>15</sup> See *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004).
- <sup>16</sup> See Complaint at 1, *Stern v. Telepictures Prods.*, No. BC292018 (C.D. Cal. 2003).
- <sup>17</sup> See *Haraway v. E! Entertainment Television*, CV13-00628 FMO (C.D. Cal. 2013).
- <sup>18</sup> See *Higgins v. Superior Court of L.A. County*, 141 Cal. App. 4th, 45 Cal. Rptr. 3d 293 (2006).

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