Safekeeping

Protecting Your TV Show Idea

By Ivan Parron

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In August 2012, NBC debuted a late summer series called *Stars Earn Stripes* to quite a bit of fanfare and a truly impressive amount of cross-platform promotion. It was a reality competition show, produced by *Survivor* creator Mark Burnett, that featured a cast of celebrities including Dean Cain, Laila Ali, and Sarah Palin's husband, Todd, pitted against each other alongside real military service members. The celebrities were to engage in actual military training exercises with the goal of coming out on top and winning money for a charity each had chosen to represent. Aside from some controversy that *Stars Earn Stripes* met upon its debut from a group of Nobel Peace laureates who decried it as making light of the true horrors of war, it is hard to imagine anyone much remembers the show; despite a big push from the NBC Universal properties, it was canceled after only six episodes.

At least one person, however, remembers *Stars Earn Stripes* very well. His name is Richard Dillon, an ex-cop who left public service behind several years ago to become a law enforcement consultant in Hollywood. He remembers the show because, he says, he came up with it. In May 2011, Dillon registered with the Writers Guild of America (WGA) an idea for a reality competition series called *Celebrity SEALS*, which, like *Stars Earn Stripes*, would feature celebrities going through real military training alongside real members of the military, all in the name of charity. He and a co-creator, Jonathan Moss, not only filed their treatment away with the WGA but also, a year later, took it to the U.S. Copyright Office to ostensibly lock it in. Convinced that they had properly secured their idea, they began to shop the treatment for the show, eventually pitching it to Mark Burnett counterpart and *Fear Factor* producer David Hurwitz. While Hurwitz reportedly claimed that he liked the show idea Dillon and Moss had come up with, he ultimately passed on it, calling the project "too cable."

With that in mind, one can imagine the shock felt by Dillon when, a year later, he saw *Stars and Stripes* on his television, produced by Hurwitz, Burnett, and *Law & Order* creator Dick Wolf. As far as Dillon was concerned, the reality show NBC was promoting and airing belonged to him, as it was strikingly similar to the idea and format Dillon had pitched to—and been turned down by—Hurwitz. Dillon did what most in his position would do: he filed a lawsuit against NBC Universal on November 13, 2012, in a California court, alleging, among other things, copyright infringement and breach of implied-in-fact contract. Dillon's complaint claimed that Hurwitz, his producing partners, and NBC Universal misap-

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propriated Dillon's ideas for *Celebrity SEALS*.[1] And because he had taken the time and effort to register those ideas properly, he had a strong case—strong enough that in June 2013 a federal judge denied the defendants' motion to dismiss.

Obtaining IP Rights in TV Show Ideas

What Richard Dillon's case provides us with, so far at least, is a textbook example of both the "right"—or at least most effective—way to legally protect oneself when creating or expanding on a television format and the pitfalls associated with intellectual property rights in the age of media proliferation and reality and other format-driven television. As it appears, Dillon followed the recommended steps to secure his creation and solidify his rights to it: he registered his idea with the WGA, copyrighted it, and was relatively specific with the details of the show he was envisioning. Still, while it is not as difficult as it once was to get a court to rule in favor of a plaintiff claiming misappropriation, enough uncertainty exists that every avenue of precaution should be explored and every option should be exhausted to ensure maximum protection. This is not an option; it is a necessity.

Misappropriation occurs when an entity or person commercially exploits an idea that they do not own without compensating or acquiring the permission from the actual owner. To prevail on a misappropriation claim, one needs to look at the specific state statute. Misappropriation of intellectual property statutes vary from state to state, but most outline the various ways in which an individual or legal entity can violate one's intellectual property law rights, and the damages for doing so. The traditional elements of a misappropriation claim are: (1) the concept is concrete; (2) the concept is novel in absolute terms; (3) the concept was disclosed in the context of a confidential relationship; and (4) the defendant actually used the plaintiff's concept.[2] This is often alleged by individuals when new television shows either begin development or, more commonly, air and closely resemble a treatment or script they developed and possibly presented to television executives. While misappropriation can be a difficult claim to win when it comes to movie scripts and television treatments, proper documentation and communication by all parties involved can ensure the most protection for creators who pitch their concepts to production companies and television and movie studios.

It is important to understand that there are several ways to protect an idea in television—reality television in particular—and that it is best to undertake not just one or two of them but, if possible, all of them in tandem. First and foremost, the defining nature of what constitutes a protectable property interest in television must be understood. The fact is, it is impossible to protect an "idea" per se—only the expression of that idea. This means the way the idea for the show is executed or carried out is what is protectable, not the idea itself. For example, an idea for a show that holds a singing competition would not be protectable; however, as you add to that same idea specific, definable, and unique ways in which the singing competition is structured and executed (such as incorporating three celebrity judges, allowing viewers to vote contestants off the show, holding different sub-competitions, assigning voice and performance coaches to the contestants, etc.), the idea is gradually expressed in the legal sense and the creator has a valid protectable intellectual property claim. An unexpressed idea is, obviously, worthless. Once an idea is affixed in writing or in a recording, then and only then does it become valuable. The flip side of that, however, is that once an idea is expressed in a tangible way, only what is

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specifically expressed has value and is protectable—the idea itself, any parts of it not communicated clearly and fully, will not be covered or secured. Again, the idea is not what is being protected, merely the expression of it, as limited as that may be.

Be Specific

This truth of intellectual property law and reality television is what leads us to the first piece of advice an attorney should give to his or her client when it comes to securing that person's idea for a reality television show or format: Write down that idea from the very beginning and be as specific as possible. The amount of space provided in a person's idea is precisely what a production company or network can use to wiggle through in court. More to the point, it is almost impossible to properly protect an ambiguous idea. For example: If I were to write a treatment about a spy who enjoys martinis and is popular with the ladies, there's very little "there" to claim as my own. However, if I begin adding details—this spy enjoys his martinis shaken, not stirred; he drives a silver Aston Martin; his weapon of choice is a Walther PPK—then I have created a situation where it would be more obvious to a court that any appropriation of these combined qualities for an entertainment product likely had to have come from my idea. The more detail, the more an idea becomes "yours" and less a notion that someone can argue is so generic that it could belong to almost anyone.

This example is derived from the seminal case between MGM and Honda Motors alleging that Honda created a commercial using a substantially similar character and plot as James Bond and the James Bond film franchise in which MGM held valid copyrights.[3] MGM successfully argued that all of the specific details taken together (a handsome male protagonist alongside a beautiful woman engaging in a high-speed chase with a villain, the fact that James Bond remains calm and uses technology and gadgets to evade the villain, and depicting similar specific scenes from James Bond movies, one of which includes James Bond evading a helicopter in a high-speed chase) point to the fact that Honda copied the *expression* used by MGM in the James Bond films, and thus violated MGM's copyrights in the James Bond films. Further, MGM successfully argued that its copyright in the James Bond character was also violated because the character is unique and always possesses the same qualities, regardless of the actor portraying him. MGM proved Honda had "access" to the James Bond character after the lead writer of the commercial admitted to having seen portions of a James Bond film, and additionally, the casting agent requested that the actor be a "James Bond-like character."

Register and Copyright the Idea

Once any idea has been crafted into a detailed treatment—in the case of Dillon, he made it clear that *Celebrity SEALS* was to feature military vets as coaches, a charity prize, and a respected military advisor as a host (*Stars Earn Stripes* was hosted by retired general and former presidential candidate Wesley Clark)—there are several ways to ensure that it is officially cataloged as belonging to the person who created it, providing ownership. Dillon followed the most recognized of these: By registering his treatment—the written expression of his reality show idea—with the WGA and then federally copyrighting it, he created a legal paper trail tying the specific details of the show he had in his head back to him and his co-creator. This was the next logical step in protecting himself, and it is an advisable one for anyone considering pitching his or her show proposal to a network or production company. WGA registration provides the creator an established and published completion date for his or her material, as

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well as a dated record of the creator's claim to authorship of the material—in this case, a treatment for a reality television show. The WGA will produce the material as evidence if legal action so requires (such as settling a dispute like Dillon's with NBC). There are, however, further and equally advisable steps that can be taken to secure intellectual property in the world of television, particularly reality television, a genre which breeds look-alike shows faster and more efficiently than rabbits.

Additional Safeguards during the Pitch

Once a treatment is made official and begins being pitched, it is vital to keep in mind that simply having registered that written idea may not be enough to keep it fully protected. When it comes to the pitch, the best way for someone to keep a concept safe from future misappropriation is to insist that as a condition of communicating the proposal, one expects to be compensated should the concept be used or otherwise put into practice at a later date. Case law has demonstrated that this is an effective way to provide legal standing to a claim of misappropriation.[4] Granted, production companies might be more likely to pass on listening to a pitch if they believe they are on the hook in any way from the very start, but it simply comes down to a personal decision between security and opportunity. The advantage of a misappropriation claim rather than a copyright claim is that a misappropriation claim will protect a story idea and can be based on an oral contract (which is the most likely scenario when pitching movie and television show concepts). Oral, or implied, contracts are not evidenced by the explicit agreement of the parties, but rather inferred by law as a matter of reason and justice from the parties' acts or conduct. When a creator submits a proposal to a movie or television studio, there is usually an implied understanding that the information is not free and clear for use or misappropriation. The creator sends the information with the understanding that the studio will in good faith not misappropriate the creator's idea, and should the studio decide to use the idea will compensate the creator.[5] One of the most famous idea misappropriation cases involved Eddie Murphy and the movie *Coming to America*, which helped spark the movement for increased protection of ideas and further develop the established principles we have today.[6]

Another way to keep an idea safe is to have the network or production company being pitched sign a nondisclosure agreement up front; this guarantees that the information being presented cannot legally be shared. Again, the problem, however, is that many networks and production companies will likely pass on a project that asks them up front to sign away their executive privilege. In fact, more often than not, the company or network will insist on a submission release being signed by the person making the pitch to protect it from being liable should that person decide later that any or all of his or her idea was used in a future project.

An important technique that can be used to protect a show idea is for the creator to publicly tie the idea to himself or herself and then create value in that brand. This can be done by securing representation through an entertainment attorney or agent, trademarking the name of the show or any associated catchphrases, and registering the URL online. Also, if a specific cast is in mind for the project, one can attempt to enter into a written agreement with that talent and use the group influence to work in one's favor when shopping for a deal. All of this adds meat to the project and clarifies one's role in it and in the creative process that spawned it, making it harder to misappropriate without being held liable in court.

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TV Show Idea vs. Format

Any discussion of the law and reality television must make clear the distinction between an idea and a show format. Reality television formats—such as the one that created *American Idol*, which is now worth somewhere in the neighborhood of $2.5 billion—are both successful with and beloved by television executives precisely because they can be licensed across many countries and television markets. Federal copyright law protects original works of authorship fixed in any tangible medium of expression, where "works of authorship" include the following categories: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[7]

Protecting a show format is challenging but has seen some success with copyright law, affording security to the creation of the format; provided, however, that a thorough record of the creative process can be shown during all aspects of the format's development. While there are many "singing competition" shows and "talk shows," again the detail is key, and it is the little differences in one's own specific singing competition show or talk show that can set it apart and therefore make it easier to protect legally. *American Idol* and *The Voice* are both singing competitions, but it is the coaching involvement of the judges on *The Voice* that makes it a separate product owned legally by a separate entity. After registering a format with the Format Recognition and Protection Association (FRAPA), a detailed description of the creative process is what will legally protect that expressed format idea from eventual misappropriation.

Conclusion

Essentially, protectability boils down to one thing: details. The more detailed documentation one has regarding his or her show idea—expressed clearly, registered, dated, and updated—the higher likelihood that ownership for that idea will legally lie with that person. A judge already ruled that Richard Dillon's registered and well-documented idea for *Celebrity SEALS* bore enough of a resemblance to NBC Universal's long-since-canceled *Stars Earn Stripes* that the case was able to move forward. But as far as anyone knows, it's not over yet. Despite everything Dillon presumably did correctly, there is always room for NBC to target a specific step in the protection process that he did not do correctly—or fully—and exploit it for its own personal gain and without compensating Dillon. That is its job. The job of a smart aspiring creator of reality TV—as well as his or her legal representation—is to ensure that there is nothing for production companies and television and movie studios to work with. This goal should start at the very beginning of the creative process and continue all the way through it. n

Endnotes

1. Dillon v. NBCUniversal Media LLC, No. CV 12-09728 SJO AJWx, 2013 WL 3581938 (C.D. Cal. June 18, 2013).
2. 3 THOMAS P. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 15:3 (3d ed. 2013).
3. Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995).
4. Blaustein v. Burton, 88 Cal. Rptr. 319, 334–35 (Ct. App. 1970).
5. Yadkoe v. Fields, 151 P.2d 906 (Cal. Ct. App. 1944).

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6. Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 WL 357611 (Cal. Super. Ct. Jan. 8, 1990); Keino D. Campbell, *Idea Misappropriation: A Vehicle of Relief for Authors*, AFRICAN AM. LITERATURE BOOK CLUB (Feb. 3, 2014), http://aalbc.com/writers/idea.htm.

7. 17 U.S.C. § 102.

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