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CAN REALITY BE COPYRIGHTED?

BY MINDY FARABEE
Daily Journal Staff Writer

It's a typical Hollywood story — boy has idea, boy pitches idea to network, boy loses pitch, boy sees similar show on TV, boy finds lawyer and sues for copyright infringement.

But now there's a new twist. In the last decade, the phenomenal success of reality TV has not just changed the face of entertainment. It has spun off into litigation that is altering entertainment and intellectual property law. And even after 10 years of legal wrangling, big questions still remain: How much of reality TV is actually scripted? And how much of that is copyrightable?

Stanton "Larry" Stein,
Partner, Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP

ROBERT LEVINS

"The law is pretty darn unclear as it relates to copyright or idea theft [and reality TV]," plaintiffs' attorney Glen Kulik noted on the phone from New York (where he's currently litigating a dust up over A&E's "The Two Coreys"). "In the last few years, there's been a lot of reality show litigation filed, but none has yet reached the California Court of Appeals or the state Supreme Court."

With so many lawsuits in progress, though, another precedent-setting decision "could happen at any time," Kulik said.

Larry Stein is a partner in the entertainment litigation department at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, where he has represented various plaintiffs, including reality TV producers, laying claim to copyright infringement. He also teaches entertainment law at USC's Gould School of Law, and lectures on the subject at Stanford, Harvard and Berkeley. He sees the reality TV debate entering a new realm.

"Reality is a lot more scripted than people think," Stein said. The medium, he argues, has matured to the point that, while producers may not be putting words in anyone's mouth, it's becoming harder to deny that behind the scenes hands are orchestrating not just particular conflicts or story lines, but specific story beats or sequences that essentially translate into "scenes."

"The more elements you add, the more protectable it becomes," he said.

That's what he aims to prove in a case now pending in U.S. District Court in California's Central District. His client, Tokyo Broadcasting System (TBS), alleges ABC cut and pasted the format, challenges, shooting style and lighting elements, among other things, for their new series "Wipeout" from several of the Japanese company's obstacle-themed game shows. TBS also brought several unfair competition and Lanham Act violation claims.

With TBS, Stein sees an opportunity to build on recent precedent.

Contentions in the reality world that shows borrow too liberally from each other date back at least to 1986, when Alan Lansburg and his "Bloopers"-esque "Life's Most Embarrassing Moments" prevailed against copyright infringement claims made by "Bloopers & Practical Jokes" producer Dick Clark.

However, it wasn't until 2003 — when CBS, represented by Paul, Weiss, Rifkind, Wharton & Garrison, sued ABC, represented by Kaye Scholer, over "I'm a Celebrity, Get Me Out of Here!" claiming an uncanny resemblance to their reality juggernaut "Survivor" — that the courts formally applied copyright law analysis designed for scripted material to the unscripted world. Though that ruling came down in New York's Southern District — and thus isn't binding for California — and though CBS lost its case, it is widely seen as significant in that it answered the question of whether reality TV is protectable.

"In the history of applying standard copyright analysis and principles, there's been an evolution," said David Ginsburg, executive director of UCLA's Entertainment and Media Law and Policy Program. "It wasn't obvious at the beginning of reality TV that traditional copyright substantial similarity analysis could be applied ... In [*CBS v. ABC*] Judge Preska made the analytical jump."

Yet despite a flurry of early to mid-2000s litigation — in addition to CBS' suit against

ABC, Howard Stern sued ABC, NBC sued FOX, British production company RDF Media sued FOX, CBS sued FOX and ABC simply attempted to publicly shame FOX, to name a few examples — little more has been settled, legally speaking.

Recent history — in cases such as *Livia Milano v. NBC Universal Inc*, et al and *Zella v. E.W. Scripps Co*. — seems to be leaning in one direction, though. In the cases following Preska's analysis, "the result is, once you have those touchstones, it becomes pretty difficult for reality shows to be substantially similar," Ginsburg said.

Instead, Ginsburg said, with a reality TV premise what often arise are questions of *scenes a faire*, or the generic elements that naturally flow from a particular idea. Thus any show about weight loss is going to feature diet and exercise and probably lots of scales. Ginsburg offers the Western as an analogy, "You'll have good guys and bad guys, you'll have a small town sheriff, you'll have a whore with a heart of gold — under copyright law, those things that you would normally see in Westerns ... all flow naturally from a common setting and are typically unprotectable."

In 2002, the courts tangled with the question of format in *Metcalf v. Bocho* (Sedgwick Detert Moran & Arnold and the Michael A. Lotta Law Offices for the plaintiffs versus Lathrop & Gage, Norminto & Wiita and Leopold Petrick & Smith for the defense). In that instance, the plaintiff and defendant showed up in the U.S. 9th Circuit Court of Appeals with different screenplays which unfolded through a jaw-dropping number of similar story beats, even by Hollywood standards.

"The court said a particular sequence can itself be a protectable element," said Lee Brenner, a partner at White O'Connor Fink & Brenner.

But once the 9th Circuit sent *Metcalf* back to the trial court, a jury came back finding no copyright infringement occurred. Plaintiffs' lawyers still like to cite the case, Brenner said, because of the 9th Circuit's conclusion that a sequence of unprotectable ideas could conceivably rise to the level of a protectable sequence. In fact, Brenner faced off against Stein over the issue in *Zella v. E.W. Scripps Co* (Latham & Watkins also represented the defense). In that case, Stein's clients sued the Rachael Ray show claiming copyright infringement based on several format similarities - such as the use of a host, celebrity guests, an interview segment and a cooking segment.

"They relied on *Metcalf*," Brenner said. "And the court threw it right out. Many courts are reluctant to extend beyond *Metcalf*."

Of course, *Metcalf* isn't the only one trying to test the waters. Gail Title, managing partner of the entertainment group at Katten Muchin Rosenman, has represented networks and producers in a number of copyright infringement cases, including NBC in *Milano v. NBC* (Wyman & Isaacs also argued for the defense), which centered on "The Biggest Loser." Plaintiffs in that case were represented by Tisdale & Nicholson and the Alvin L. Pittman Law Office.

Title points out that new and novel trademark, IP, and unfair competition arguments are surfacing in the reality world, but so far, they haven't gained much traction. Take for instance the case of SciFi Channel's supernatural unscripted "Ghost Hunters," in which a plaintiff sued not only on the grounds that the network swiped his idea, but also because he physically resembled one of the characters on the show.

"He said he had a right of publicity claim because [that character was] really him," Title said. "That didn't get very far. New and unusual claims are only of value if they stick."

A few years back, Stein represented RDF Media, makers of "Wife Swap," when they sued FOX over "Trading Spouses: Meet Your New Mommy," which was represented by McDermott Will & Emery and Mitchell Silberberg & Knupp. Like many of these cases, RDF's claim settled out of court and relatively early in the process. There's a motion to dismiss pending in the TBS case, but Stein is feeling confident his clients will make it all the way to trial.

"[ABC] only challenged the unfair competition and Lanham Act charges," Stein said. "They didn't even challenge the copyright infringement."

If they can get to a jury, Stein believes TBS's suit presents a perfect opportunity to revisit Preska's analysis.

"If you read [*CBS v. ABC*], it's very specific to that factual context. If you're planning on ripping off a show, I don't think that opinion gives you much consolation," Stein said. "Networks like to say that it resolved the issue, but if it was determinative, then people would not be bringing these actions and networks would not be settling them."

LA 1100 Glendon Avenue, 14th Floor Los Angeles, CA 90024.3505 t.310.500.3500 f.310.500.3501
SF 199 Fremont Street, 20th Floor San Francisco, CA 94105.2255 t.415.489.7700 f.415.489.7701
www.linerlaw.com