



WHOSE FORMAT IS IT ANYWAY?


FRENCH PHILOSOPHER, ROLAND BARTHES BELIEVED IN THE DEATH OF THE AUTHOR, ARGUING THAT THE REAL OWNERS OF ART ARE THE AUDIENCES WHO WATCH, READ AND LISTEN. FORTUNATELY, THE LAW DISAGREES, SAYS JEREMY DICKERSON FROM BURGESS SALMON LLP

In the entertainment industry, the traditional remit of copyright has been to protect literary, musical and artistic works in a tangible or material form, including film scripts, music and moving images. However, as technologies and tastes have developed, new forms of copyright have emerged to cover new concepts, such as the format of reality TV shows.

But, even though the printed plot of a play may be protected by copyright in the UK, the potentially lucrative format of a TV programme (the global market in formats is estimated to be €2.4 billion) may not receive the same protection. Indeed, the Law Lords in the 1989 case of *Green v Broadcasting Corporation of New Zealand* confirmed that there was no copyright in the format of *Opportunity Knocks* as it was classed as an 'idea'. This remains the position in most jurisdictions, but two cases in the Netherlands and Brazil suggest that we may be moving towards greater protection for these formats.

WHO OWNS AN IDEA?

A claim for infringement of copyright by TV company Endemol in Brazil raised arguments as to how the television programme *Big Brother* could be subject to copyright, as, without scripts, the format of the programme amounted to no more than an idea. However, the court ruled that more than a mere idea had been used, and it was held that the 'whopping similarity' of the format used by the defendant did 'not stem from chance' and so Endemol's claim was successful and damages were awarded – confirming that the show itself did attract copyright protection. However, in the Netherlands in 2004, the Dutch Supreme Court ruled that the *Survivor* television format, although a copyright-protected work, was not infringed by the *Big Brother* format. It seems that short statements of unformulated ideas are simply too vague to protect, whereas specific and fully developed original concepts may well be capable of enjoying copyright protection.

In the publishing arena, the recent judgement in *The Da Vinci Code* case in the UK reiterates the general proposition that there is no copyright in an idea; it is the expression of that idea which will attract protection. 

AMANDA SEARLE, TIM ANDERSON/CHANNEL 4 TELEVISION

HOW TO PROTECT YOUR BRAND ON-LINE

THE INTERNET PROVIDES AN UNRIVALLED METHOD OF COMMUNICATING WITH CUSTOMERS, BUT IT CAN ALL TOO EASILY BE EXPLOITED, SAYS JANET SATTERTHWAITE OF VENABLE LLP. THE ANSWER IS A SENSIBLE DOMAIN NAME AND SEARCH ENGINE POLICY THAT MONITORS FOR MISUSE OF YOUR IP

The success of the Internet has allowed today's businesses to more readily interact with their target audiences, to freely provide information about their brands and corporate set-up and, in many cases, to sign up customers or sell goods, at the touch of a button; however, it has also opened businesses up to the threat of cyberpiracy, brand infringement and, more recently, phishing and pharming. Without a tailored domain name and digital content policy that monitors and protects against these risks, you may be opening your products and services up to infringement.

Protect your domain names

Cyberpirates, also known as cybersquatters, register variations of your brand in order to generate profit by driving traffic to their own websites or from selling the names for a profit. Competitors and pirates can also misuse your brand in order to gain favourable search engine placement.

Thanks to the ICANN Uniform Dispute Resolution Policy (UDRP) and other tools, brand owners can recover domain names with relatively little expense. In clear-cut cases, it takes experienced counsel only a few hours to prepare a complaint that establishes the brand owner's rights and shows why the respondent registration was registered and used in bad faith. If the case is not a

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clear case of cybersquatting, then a court action may be advisable, as the UDRP is not set up to handle cases where each side may have a valid argument.

But, as quickly as one threat is dealt with, another emerges. 'Automated registration programs', many of which are US-based, are proving to be the latest cyberpiracy trend. These programs seek out popular websites, create variations of the domain names, and register them. They then generate a web page with links to websites with related topics – a profit-generating drive because many of those legitimate linked sites pay per click for traffic to be driven to their sites via these links. These companies tend to change aliases in WHOIS, but those of us who deal with cyberpiracy every day generally are aware of who they are.

In addition to the UDRP and various country-code top-level domain name (ccTLD) DRPs, some national laws may also be available. For example, the US Anticybersquatter Consumer Protection Act may be



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used to recover almost any generic top-level domain name (gTLD). Since the underlying registries for all top-level domains are located in Northern Virginia, the court here has ultimate control over every name. The Digital Millennium Copyright Act can, in the right circumstances, be used to shut down a pirate site.

Monitor search engines

For most brand owners, the new frontier is search engines. Anecdotal experience suggests that consumers do not try to guess the correct domain name, but go directly to a search engine to find it. As a result, Google and other search engines are selling brandowners' trademarks to competitors, so that when searching for Brand A, a consumer may encounter a 'sponsored link' for Brand B, the competition.

International courts are inconsistent on whether a brand owner can successfully block Google from selling its trademarks to third parties. The French Courts have had no trouble ruling that this was trademark infringement and ordering Google to stop; as in the case of *Hotels Méridien v Google France* in early 2005; however in a US case brought by Government Employees Insurance Company in 2005, a federal court ruled that the sale of trademarks by Google was not trademark infringement *per se* because the plaintiff had failed to show that consumers would be confused.

Keep up-to-date with the latest threats

Brand owners should work with their domain name management company and IP counsel to develop a strategy that works best for them. The management company will have policing tools while the outside trademark counsel will be knowledgeable about which ccTLDs are a problem, the latest cyberpirate trends, watch services and the most up-to-date practices on developing and running a domain name management strategy.

'Good domain management suppliers will have an understanding of IP and their clients' requirements, as well as a comprehensive on-line delivery tool to expedite them,' explains Dominic Speller, domains specialist, at CPA. 'They should also be able to tailor access for all of the different stakeholders involved in digital content management. Accessing only the pertinent information required for each job function can be complex, but the domain name management supplier should understand who all these stakeholders are and be able to support them across a potentially intricate relationship structure.'

The general consensus among brand owners with well-developed domain name management strategies is to register the names you need and perhaps a few strategic defensive registrations. When you spot infringement, take immediate action. 