

On the protection of intellectual property rights in variety show templates

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Abstract. China's variety show industry is growing rapidly, but there have been repeated plagiarism controversies. The protection of variety show templates under both the current copyright law and the anti-unfair competition law has some shortcomings. This article suggests that variety show templates should be included in the scope of intellectual property protection by analyzing the criteria of "works" under copyright law and some inspiring cases at home and abroad. In addition, by analyzing the characteristics of variety show templates, it is suggested that the principle of overall protection of intellectual property rights for variety show templates should be adopted, and that the general audience test should be used to determine whether the works in question are substantially similar to each other, with the aim of better protecting variety show templates as a whole.

Keywords: Variety show template, Copyright, Anti-unfair competition law, Overall protection, General audience test law.

1. Introduction

In recent years, the number of varieties shows in China has exploded, and watching them has become one of the most important forms of entertainment for the public. Although variety shows have been on people's radar for some time, there are still problems with plagiarism and homogenization in the country. This is not only detrimental to the creativity of the original artists, but also to the diversification of variety shows in China, which will seriously affect the development of cultural and creative industries and hinder the construction of an innovative country. It is therefore necessary and incumbent upon us to pay attention to the protection of intellectual property rights of variety show templates.

2. Current status and problems of legal protection of variety show templates

In China's current legal system, parties can rely on the fair competition relationship protected by the anti-unfair competition law to safeguard their rights and interests. In addition, the Copyright Law does not provide for the template of variety shows, but merely identifies the videoed variety shows as works or video productions created in a manner similar to the filming of a movie, respectively, based on the presence or absence of originality, and grants the corresponding protection [1]. However, both the Copyright Law and the Anti-Unfair Competition Law provide limited protection for variety programme templates in relation to fair competition.

In terms of copyright protection, firstly, in disputes relating to the copyright of a variety show template, the courts have often ruled in the negative as to whether the defendant's work constitutes a plagiarism of the plaintiff's work. Many variety shows are nowadays "different from each other" For example, the two variety show templates in the case KOEN Media, a Korean company, v. Jiangsu Radio & TV Station, etc., in the dispute over copyright infringement, which they are similar in their overall framework and the plagiarist only makes some modifications or substitutions in certain partial details that do not affect the overall framework, such as the replacement of background logo, but the partial modifications do not affect the overall structure of the variety show template and its creativity. However, the court held that the defendant's work did not constitute plagiarism of the plaintiff's work due to the formal differences between the two in the comparison of the vast majority, if not all, of the content [2]. In addition, most variety shows are composed of elements that can constitute independent

works in their own right, and the forms and types of their elements are often rich and varied, which leads to a lack of clarity in the objects of intellectual property protection for variety shows, and therefore makes it difficult to protect them in judicial decisions. In summary, copyright law provides some protection for variety shows after they have been visualized, but in judicial practice this protection is not ideal, let alone the protection of the core part of variety shows the variety show template.

From the perspective of anti-unfair competition law, in theory, as long as two variety shows constitute a competitive relationship and the content of the copying party is sufficient to confuse or mislead viewers, they can seek protection under the anti-unfair competition law, but in practice, such protection is very limited. First of all, the competition in the anti-unfair competition law requires that the "consumer groups" of both parties - the viewers - are roughly the same in order to constitute a competitive relationship in the strict sense, while the dispute cases of variety show templates mainly occur between domestic and foreign companies, which are affected by different geographical regions, TV reception restrictions and other factors. Second, program templates are not strictly trade secrets, because once a variety show is on the air, the content of the template will soon be seen by industry professionals and will be directly applied or imitated. Only those variety show templates that have not yet been publicly broadcast exist as trade secrets, but such templates that have not yet been tested in the market are often not favored by the plagiarists, so the possibility of disputes in practice is extremely small; finally, the possibility of audience confusion between the original variety show and the plagiarized program is minimal, because the plagiarists cannot copy exactly what they have copied, and will certainly make some partial content changes. The possibility of confusion between the original variety shows and the copied one is minimal, because it's impossible for the copying party to copy exactly, and they will certainly make some partial changes to the content, which may only give the audience a sense of déjà vu, but not so much as to cause confusion between the two. In view of the above, and the fact that variety show templates are not covered by the closed list of acts under the Anti-Unfair Competition Law, it is not appropriate to adopt this law for the protection of variety show templates.

All in all, the current law is ineffective in protecting variety show templates, and is unable to change the situation where there are more and more homogeneous programmes. Against this backdrop, some scholars have proposed this path of copyright protection for variety show templates from the original legislative intent of copyright law and the practical need to safeguard the interests of viewers and investors, which means that variety show templates are included in the category of objects protected by copyright law [3], but variety show templates, as a synthesis of various elements such as ideas, processes, rules, technical regulations and hosting styles of variety shows, are judicial adjudication is classified as an idea level and not a substantive expression. The copyright law only protects the expression of the work, not the ideas, and therefore is not protected by the copyright law [4].

3. Feasibility analysis of copyright law protection for variety show templates

3.1. The Variety Show Template is a Specific "Expression" rather than an "Idea"

Some opponents argue that variety show templates belong to the category of creativity only and their contents are very fluid [5], especially in the case of game shows, which often do not follow the scripts completely in the production process. This is one of the biggest points of disagreement between opponents and supporters.

The main body of the variety show template can be broadly divided into two parts. The plot content and the program arrangement, depending on the expression, so to prove that the variety show template, which consists of only these two parts, is an expression, it is possible to prove that both parts can constitute a substantial expression. The plot content of a variety show template refers to the main part of the show that is presented to the audience, including the script, game set-up and other parts, while the programming refers to the technical and procedural aspects of linking, arranging and filming the

content of the variety show, which acts as the "glue" in forming the complete variety show. The sequence, filming requirements, etc. This article will argue in turn that the two parts of a variety show template constitute substantive 'expression'[6].

A variety show template is like a complete thesis, it must have a concise thesis and a series of rigorous arguments. The theme of the show in the variety show template is equivalent to the thesis of the thesis, and the arrangement of the content is the argument for the theme of the show. First, the theme of the program is classified as an idea because it lacks concrete expression. And the argument can be made in a variety of ways. Each creator has to choose from many ways of argumentation and think of a way that can deeply reflect the theme of the program, a process that reflects the creator's unique choices, judgments and trade-offs, and constitutes a personalized expression. Secondly, in order to maximize the profound expression of the program's theme, the creator often takes great pains in the argumentative process to design each detail as well as possible, to the extent that it is specific enough to produce a unique experience of perceiving the source of a particular work, so this part should be classified as an expression.

In addition, with regard to the program arrangement in the variety show template, the creator often arranges the program in such a way that each segment of the program is interlocked and advanced in layers in order to better express the theme of the program, and often makes specific choices in the shooting of different scenes or in order to render different atmospheres. These reflect the creator's personalized judgment and trade-offs. Secondly, the filming requirements, video editing and other elements are highly professional, so in order to improve their operability, they are often expressed in more detail and distinguished from ideas without substance.

Both the plot content and the program arrangement of the variety show template reflect the creator's unique thinking and choices, and they have reached a sufficiently detailed and specific level that a variety show template consisting of only the two is definitely a more specific expression than an idea, and more detailed than an idea.

3.2. The Variety Show Template is a Specific "Expression" rather than an "Idea"

There are two main definitions of a variety show template, the programme framework theory and the layout package theory. The layout package theory states that the flow of the programme, the filming schedule, the change of background music, etc., are usually arranged in chronological order during the filming planning stage in the form of a written script, recording, video, etc., forming a programme layout package, also known as an instruction manual [7]. They are often detailed in order to ensure that the programme is presented without error and can be perceived, reproduced or otherwise disseminated by the staff involved. As such, they are the central outward expression of a variety show's production output in recent years, some Chinese television stations have imported many variety programmes from abroad, such as "Please Refrigerator", "Run, Brother" and "I am the Singer", some of which have been "copied" and "localised" by purchasing the rights to the overseas programmes and then relying on the content of their instruction manuals. In summary, the variety show template can be expressed in many external forms and can be objectively perceived and reproduced, which is why it has a separate commercial value.

3.3. Variety show Template as Creative Intellectual Output

In the early stages of programme planning, the creators need to decide on the theme, the general content and the format of the programme. This requires a lot of brainstorming and brainstorming, as well as a lot of discussion and thought before the show is fully decided. As for how to set up the suspense, how to choose the guests, how to increase the attention and so on, it is only after the collision of ideas and subtle choices that the spark of thought gradually takes shape on the paper. Therefore, whether it is the overall choreography or the details of the programme's title and script, they all come from the staff's ideas, choices and planning, and are all the fruit of their creative intellect.

3.4. The Variety show Template Meets the Criteria of Originality

Originality as the soul of a work, 'originality' and 'creativity' should be understood separately, with 'originality' referring to independent creation and 'creativity' " refers to a certain level of intellectual creativity [8]. In terms of originality, the programme template can be divided into two levels of originality: one is the originality of the overall concept and framework; the other is the originality of the specific expression and choreography. The core of a variety show is the concept and framework system with original features, and a high quality show needs to have a high level of originality in this area, which requires the creators to give full play to their creative consciousness in order to produce a variety show template that is different from similar variety shows and achieves a certain level of intellectual creativity. However, the concept and the framework design are obviously ideological, and the expression of the ideas requires a special arrangement to make the program's effect layer by layer, which fully reflects the creator's innovative thinking and individual choice^[9]. The variety show therefore meets the criteria for originality.

4. Inspiration for copyright protection of variety show templates from relevant cases at home and abroad

Foreign countries have an early start in variety shows and have accumulated a wealth of experience in handling cases concerning disputes over variety show templates, which can therefore provide some inspiration and guidance for the relevant discussions in China. For example, in the decision of the Italian Supreme Court (Corte di Cassazione) in July 2017 in the case of RTI Reti Televisive Italiane Spav Ruvido Produzioni Srl, the court confirmed that the TV programme template was protected by the Italian Copyright Act (Legge 633/1941) in accordance with Italian copyright law. The Italian Supreme Court held that a television programme model is likely to be protected by Italian copyright law if the relevant elements of a variety programme template embody a logical and thematic link, together forming a tight basic structure, with the qualities of a set-piece, reproducibility and fixity, as well as a certain degree of creativity. These criteria are more or less the same as those used in China to determine whether a work constitutes a work within the meaning of copyright law. Therefore, under the conditions of a work as defined in China's copyright law, China can draw on relevant foreign jurisprudence to grant protection to variety show templates within the meaning of copyright law [10].

There is no precedent of copyright protection for variety show templates in China, but we can find some new ideas from the "First Case of Short Video Template Infringement in China " - Copyright Infringement Dispute between Shenzhen Facemeng, Microcast Vision and Hangzhou Technology Co. The judge in this case found that the short video in question was an infringement of copyright. The judge in the case held that the short video template in question constituted an organic and unified audiovisual whole by finding suitable background music and pictures, then matching different stickers, special effects, filters, animations and other elements according to the rhythm point of the music, and coordinating the arrangement, size, order and duration of various elements with subjective needs. The short video template has the characteristics of a "work" in the sense of copyright law, so the trial in this case granted copyright protection to the short video template in question. The short video template has the characteristics of a "work" in the sense of copyright law, which is similarly reflected in the variety show template, and its adjudication ideas provide a certain practical reference for future breakthroughs in the judicial dilemma of copyright protection for variety show templates.

5. Legislative proposals for the protection of variety show templates

5.1. The Vrpinciple of Holistic Conservation

The author also believes that a variety show template needs to have a more complete integrity in order to be protected by copyright law, and that the elements it contains can be judged according to the criteria of the object of copyright law to determine whether they belong to its scope and whether

they are protected. If there are elements that are in the public domain, it would not be appropriate to grant separate protection. If all elements of a variety show template are not protected as a whole, this may lead to monopoly of use or abuse of rights.

5.2. General Audience Test Method

The general audience test, also known as the overall perception method, originated from the 1970 Roth Greeting Cards vs United Card Co. case, which refers to the determination of whether a work constitutes substantial similarity from the perspective of an ordinary, rational audience. The comparison method takes the work as a whole and judges it from the perspective of the general audience, placing more emphasis on the general public's perception of the work, focusing on the reader's experience of appreciation, and making no technical distinction between ideas and expression. Firstly, I believe that the audience is the main target of variety shows, and is the "consumer" of variety shows, whose revenues and reputation, etc. are derived from the audience. Thus, both the criteria for judging its merits and what constitutes "substantial similarity" should be assessed by the general audience, such as whether it causes confusion, how similar it is, whether the overall perception is similar, etc. Secondly, watching variety shows from the perspective of the general audience is easy to form an overall view of variety shows, and the examination of details and memory is often lacking compared to that of professional variety directors and other professionals. Therefore, adopting the general audience test to determine whether the relevant variety show constitutes substantial similarity not only highlights the importance of the audience to variety shows, but also takes into account the application of the principle of overall protection.

6. Conclusions

Only by improving the relevant legislation and giving legal respect and incentive to the original artists can the healthy development of China's variety show industry be strongly promoted. As to how to better protect the intellectual property rights of variety show templates in judicial practice, this article suggests that the protection of variety show templates should adopt the principle of holistic protection based on the characteristics of variety show templates, and proposes a method to determine whether the variety show templates in question constitute substantial similarity to each other, with the aim of better promoting the realisation of the protection of intellectual property rights of variety show templates. These propositions have yet to be tested and amended in judicial practice, and also call for the improvement of relevant laws. The discussion on the protection of variety show templates in this article is still quite preliminary, for example, the question of what type of copyright works should be classified as variety show templates has not yet been resolved, and the author looks forward to more and more in-depth discussions and research.

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