

## Are Formats The Floor Mats Of Copyright?

*Law360, New York (July 10, 2012, 1:34 PM ET)* -- On Friday afternoon, June 15, 2012, U.S. District Court Judge Gary Allen Feess, Central District of California in Los Angeles, denied CBS Broadcasting Inc.'s application for a temporary restraining order that would have prevented ABC Inc. from airing the premier broadcast of its new reality series "Glass House." CBS complained that "Glass House" infringed the copyright in its long-running "Big Brother" series. Both featured contestants isolated in a confined space competing for prizes, building alliances and fighting with each other while they are systematically voted out of the competition. Judge Feess described these elements as "commonplace."

In doing so, Judge Feess dealt another blow to the admittedly fragile protection for one of television's most valued commodities ... a popular, highly marketable format capable of being translated and locally reformatted for domestic consumption in local television markets around the world. The frustration of format owners may have well been summarized by Judge Feess, who observed, "When I first heard of Big Brother, I thought it sounded like Survivor in a house."<sup>[1]</sup>

Formats have been around since the earliest days of television game shows like the "Price is Right," "To Tell the Truth" and "Jeopardy." Although the rules are deemed "ideas" and not protected copyright "expression," the creators of these shows have cobbled together a combination of trademarks, trade dress and copyrights to provide at least a veneer of protection.

The extent of this protection, often denominated as "thin," has only infrequently been explored by the courts with interested parties apparently relying more on custom and practice in the industry to ward off shows that imitate too closely. Format competition, however, has only been sharpened in recent years by the increasing reliance of broadcasters on relatively cheaply budgeted but highly popular format based reality shows to fill their schedules and provide suitable settings for the commercial advertisements that support them. As the value of formats rises, so does the likelihood of conflict and the resulting law suits that take on the appearance of the shows they are trying to protect.<sup>[2]</sup>

So, to repeat the titular question, "Are formats floor mats?" A recent decision involving the venerable Tetris game suggests they are not.

In *Tetris Holding LLC v Xio Interactive Inc.*, decided on May 30, 2012, by Judge Freda Wolfson for the U.S. District Court for the District of New Jersey, Civil Action No. 09-6115, the court found that Xio's iPhone game "Mino," admittedly "inspired" by "Tetris," had instead infringed the protected expression in the game it sought to emulate.

Both involved manipulated pieces composed of square blocks, each made into different geometric shapes, falling from the top of the electronic game board to the bottom where the pieces accumulate. The player attempts to manipulate the pieces to form horizontal lines which, if accomplished earns points and more game time. If the pieces accumulate and reach the top of the board, the game ends. This almost sounds like describing the basic elements of a TV format. Nevertheless, the court found certain combinations of elements to be protected and infringed.

Screenshots of the two games reproduced from the court's decision can be viewed by clicking [here](#). In a passage that could easily describe a viewer's reaction to similar TV formats, the court stated:

Without being told which is which, a common user could not decipher between the two games. Any differences between the two are slight and insignificant. If one has to squint to find distinctions only at a granular level, then the works are likely to be substantially similar. Reviewing the videos of the game play bolsters this conclusion as it is apparent that the overall look and feel of the two games is identical. There is such similarity between the visual expression of Tetris and Mino that it is akin to literal copying.

Among the similarities that impressed the court were: the style of the pieces are indistinguishable; the pieces move, rotate, fall and behave the same way; and the bricks comprising the geometric pieces have similar interior borders suggesting texture with shading and gradation of color used in the same way to suggest that light is being cast onto the pieces.

None of these similarities, standing alone, would have constituted infringing similarity, but the overwhelming similarities between the games did. "It is the wholesale copying of the Tetris look that the court finds troubling more than the individual similarities each considered in isolation." Having said that, the court granted Tetris' motion for summary judgment for both copyright and trade dress infringement. If the court had made a similar analysis of a Tetris-formatted television game show, it would likely have come to the same conclusion. Some similarities, even in the selection and arrangement of commonplace elements, are too great to ignore and, at some point, become infringements of the expression rather than a borrowing of the mere idea.

The recent "Glass House" decision highlights how difficult it is to secure judicial recognition of TV format protection. In contrast, the Tetris decision signals that courts may still be willing to recognize game and TV format protection, at least when there is virtual identity and wholesale copying. At the same time, however, it further demonstrates that, absent wholesale copying, the fine line between "format" and "floor mat" remains an open competition with ties going to the newcomer.

--By Edwin Komen, Sheppard Mullin Richter & Hampton LLP

*Edwin Komen is a partner in the entertainment, media and technology and the IP practice groups in Sheppard Mullin's Washington, D.C., office.*

*The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See Law360, June 15, 2012 (<http://www.law360.com/articles/350730/judge-unlikely-to-shatter-abc-s-glass-house-premiere-plans>, accessed on June 18, 2012) and The Hollywood Reporter, June 15, 2012 (<http://www.hollywoodreporter.com/thr-esq/abc-glass-house-big-brother-337991>, accessed on June 15, 2012).

[2] Such format wars have had a long history with no clear-cut victor as discussed by the undersigned and his partner, Kent Raygor, at length in K. Raygor and E. Komen, "Limitations On Copyright Protection For Format Ideas In Reality Television Programming", 2009 MEDIA LAW RESOURCE CENTER BULLETIN, Issue No. 4, at 97-121 (December 2009).

All Content © 2003-2012, Portfolio Media, Inc.