ZAŠTITA TV FORMATA PUTEM AUTORSKOG PRAVA – MOGUĆNOSTI I DILEME

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Apstrakt

TV formati predstavljaju popularan medijski sadržaj, koji privlači veliki broj gledalaca širom sveta. Međutim, njihova pravna nije dovoljno uređena. Osnovnu dilemu u pravnoj teoriji i sudskoj praksi predstavlja mogućnost autorskopravne zaštite TV formata. Cilj ovog rada je da se analizom domaće i inostrane sudske prakse, kao i postojeće literature pokuša utvrditi mogućnost pravne zaštite TV formata kao autorskog dela. Iako su neki sudovi smatrali da se TV format može štititi u celini, uključujući i njegove tehničke elemente, ovo je više izuzetak nego pravilo. Uglavnom se sporno pitanje svodi na elemente koji su kopirani, a tiču se osnovne ideje ili koncepcije TV formata. Ipak, uočava se tendencija na međunarodnom planu ka sve češćem priznavanju autorskopravne zaštite TV formata, ali pod određenim uslovima. Tako, razređenost, originalnost i tipizirana struktura formata koja može biti ponovljena, te način definisanja autorskog dela u zakonodavstvima neki su od elemenata koji utiču na to da li će TV format biti prepoznat i zaštićen kao autorsko delo.

Ključne reči: *TV formati, pravna zaštita, intelektualna svojina, autorsko pravo, kreativne industrije*

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Uvod

Poslednjih decenija su televizijski formati postali najgledaniji medijski sadržaji, koji privlače veliki auditorijum, kao i oglašivače. Podsećamo na neke od najpoznatijih televizijskih formata (u daljem tekstu: TV formati), koji su emitovani na brojnim TV kanalima širom sveta, kao što su „Veliki brat“, „Survivor“, „X faktor“, „Želite li da postanete milioner“, „The Office“ i drugi.

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Industrija TV formata, kao deo kreativnih industrija[38], vredi više milijardi dolara (Chalaby, 2012), a televizijske kompanije su uvek otvorene za nove i kreativnije formatirane televizijske sadržaje. Proverene „formule“ programa koji su se dokazali uspešnim na tržištima porekla, licenciraju se i emituju u drugim državama, i to neretko uz manje ili veće modifikacije, kako bi se prilagodile potrebama nacionalnog medijskog tržišta.

Televizijski format se definiše na različite načine. Tako, na primer, međunarodna Asocijacija za prepoznavanje i zaštitu TV formata (u daljem tekstu: FRAPA) opisuje TV format kao „karakterističnu kombinaciju sveobuhvatno opisanih televizijskih elemenata (i novih i uobičajenih, koji mogu ili ne moraju biti zaštićeni kao odvojene stavke intelektualne svojine), raspoređenih na nepromenljiv način u bilo kom materijalnom obliku koji stvara originalnu, ponavljajuću narativnu strukturu” (McKenzie, FRAPA, 2017). TV format se sastoji od „nepromenljivih elemenata u programu koji predstavlja osnovu za varijabilne elemente u pojedinačnim epizodama” (Bechtold, 2013). Moran i Malbon (2006) ističu da format obično uključuje zaplet, osnovnu liniju priče, temu, raspoloženje i dramaturgiju emocija, pravila, redosled događaja, režiju, muziku, grafiku, scenografiju i uputstva za produkcioni proces emisije. TV formati su, dakle, sastavljeni od kreativnih, poslovnih i marketinških elemenata. Pored kreativne osnove koju poseduju, uslovljeni su žanrom, tehnologijom i ciljnom publikom programa. Upravo je specifična, jedinstvena kombinacija različitih elemenata ono što privlači gledaoce (Meadow, 1970).

Postoje brojne vrste TV formata, od *game show* programa, preko rijaliti emisija, takmičenja talenata, različitih kvizova i emisija dokumentarne zabave, a u poslednje vreme se proizvode i obrasci serija za globalno tržište. S obzirom na to da mediji masovnog komuniciranja, kako tradicionalni, tako i novi, poseduju velike mogućnosti proizvodnje i plasiranja sadržaja, za očekivati je da će programski formati u budućnosti dobijati nove žanrove i forme.

Međunarodna televizijska industrija definiše TV format kao emisiju koja je prodata na barem jednom stranom tržištu (Schmitt et al., 2005). Međutim, u širem smislu, TV format predstavlja „kalup“ za programski sadržaj, odnosno kombinaciju narativnih elemenata, prepoznatljivu i ponovljivu strukturu, bez obzira na to da li je licencirana i emitovana na stranom tržištu ili ne. Na primer, domaći kviz “Slagalica“ nije prodat na stranom tržištu, ali spada u TV formate. U tom smislu, bez obzira na to da li se radi o TV formatu koji je prodat na stranom tržištu, ili formatu koji je osmišljen i koji se emituje kao TV emisija samo u jednoj državi, ne tako retko, dolazilo je do njihove imitacije, ili kopiranja. Industrija TV

[38] Kreativne industrije se definišu kao delatnosti koje se zasnivaju na kreativnosti, veštinama i talentima pojedinca, i koje imaju potencijal za stvaranje bogatstva i radnih mesta pomoću generisanja i eksploatacije intelektualne svojine (Bop Consulting, 2010).

formata je naročito zainteresovana za problem zaštite od međunarodne „krađe“ onoga što smatraju svojim intelektualnim vlasništvom.

Prva varijanta „krađe“ TV formata javlja se u slučaju da stvaralac jednog formata predstavi ideju određenoj medijskoj kompaniji radi saradnje, te ona, nedugo nakon toga, napravi identičan ili veoma sličan program, bez priznavanja autorstva ili plaćanja bilo kakve naknade. U drugom slučaju je moguće da već emitovan TV format „inspiriše“ drugo medijsko preduzeće da plasira isti ili sličan sadržaj pod svojim zaštitnim znakom. Takvih primera je bilo u praksi, o čemu će biti reči u nastavku rada. To su neki od najočiglednijih razloga potrebe pravne zaštite TV formata, kako bi on što duže donosio materijalne koristi emiterima i autorima formata i obezbeđivao visoke rejtinge (Moran, 2004). Međutim, pravna zaštita bilo kog medijskog sadržaja, a posebno TV formata je vrlo složeno pitanje.

Problem sa zaštitom TV formata leži, pre svega, u njegovoj mešovitoj prirodi. Klasičan TV format se sastoji se iz različitih elemenata: osnovnog koncepta, specifične muzike, scenografije, loga, načina prezentacije određenih segmenata programa i slično. Osim toga, sama suština TV formata, kao manje ili više razrađene ideje, odnosno koncepta, dovodila je, a i dalje dovodi do oprečnih presuda sudova.

Kako je TV format sastavljen iz više raznorodnih elemenata (kako u kreativnom tako i u pravnom smislu), mogućnosti njegove pravne zaštite su različite, ali često nedovoljno pouzdane. Osnovni način zaštite za koji se zalažu kreatori TV formata jeste putem prava intelektualne svojine, konkretno autorskog prava. Osim autorskopravne zaštite, druge mogućnosti uključuju pravila o zaštiti konkurencije (kada se suprotno dobrim poslovnim običajima imitacijom stvara zabuna ili opasnost od zabune u privrednom prometu o nekom svojstvu proizvoda ili ako se parazitski iskorišćava tuđi rad ili ugled) (Popović, 2014), zaštite putem pravila o poslovnoj tajni (čime se sprečava zloupotreba *know-how* informacija), putem žiga (čime se štiti naziv ili logo programa) ili zaštite dizajna (za scenografske i dizajnerske elemente). Osim toga, industrija TV formata oslanja se i na vanpravne načine zaštite svog proizvoda.[39]

Poznato je da mnogi TV formati imaju svoju „produkcijsku Bibliju“, koja sadrži pravila formata i druge ključne informacije o načinu adaptacije TV formata na lokalnim tržištima (Green, 2010). Ona predstavlja određeni „štit“ od plagiranja tuđeg rada, s obzirom na to da je za mnoge kupce sigurnije da kupe TV format sa svim neophodnim podacima kako bi osigurali uspeh i profitabilnost emisije, nego da ga kopiraju. Ipak, krađe i imitacije se i dalje dešavaju, te se stvaraoci TV formata zalažu za njihovu čvršću pravnu zaštitu.

[39] Neke od mogućih strategija su brzina izlaska na tržište i premijerno prikazivanje formata, Džentlmenski sporazum, brend, sistem „letećih producenata“, sistem registracije TV formata, i drugo (FRAPA, 2011).

U ovom radu fokus je se na autorskopravnoj zaštiti TV formata, odnosno na osnovnoj dilemi koja postoji u pravnoj teoriji i sudskoj praksi: da li se i pod kojim uslovima TV format može štititi kao autorsko delo. Kako je ovo višeslojni problem, izlaganje ćemo započeti analizom pojma intelektualnog dobra i intelektualne svojine, njenog pravno-političkog opravdanja, a zatim ćemo preći na analizu autorskog prava i sudske prakse, a sve u kontekstu TV formata.

Teorijska razmatranja o TV formatu kao intelektualnom dobru

Stvaranje TV formata predstavlja određeni kreativni proces pojedinca ili grupe ljudi. Utrošak vremena i materijalnih sredstava neophodnih da bi se osmislio TV format, a zatim i proizveo kvalitetan televizijski sadržaj naizgled opravdava posmatranje formata kao duhovne tvorevine vredne pravne zaštite. Zato se kreatori TV formata i televizijska industrija duži niz godina zalažu za njihovu sveobuhvatnu zaštitu, prevashodno putem prava intelektualne svojine.

Pravo intelektualne svojine nastaje kao rezultat potrebe da se kreativne duhovne tvorevine ljudskog uma, intelekta i duha zaštite pravom. Štaviše, intelektualna svojina poseduje značajnu ekonomsku vrednost, što potvrđuju i podaci da je ona danas jedna od najskupljih roba na svetskom tržištu (Marković, Miladinović, 2014). Drugim rečima, socijalne funkcije prava intelektualne svojine su dvojake. S jedne strane, cilj je ekonomsko stimulisanje subjekata da stvaraju nematerijalna dobra, što zahteva investiranje ličnih resursa. Sa druge strane, i kao posledica prve funkcije, jeste podsticanje ekonomskog, kulturnog i tehnološkog razvoja društva.

Prema *Strategiji razvoja intelektualne svojine* Republike Srbije, doslednom zaštitom intelektualne svojine stvaraju se uslovi za ekonomski razvoj države. To se može ilustrovati podatkom da ukupno učešće kreativnih industrija, koje počivaju na iskorišćavaju autorskih dela i srodnih prava, u stvaranju bruto domaćeg proizvoda (BDP) Srbije iznosi čak 4.61%.[40]

Pravo intelektualne svojine možemo podeliti na pravo industrijske svojine i autorska i srodna prava. Autorsko delo štiti se autorskim pravom. Međutim, autorsko pravo nije samo pitanje zakonodavstva, već i ekonomsko i političko pitanje, s obzirom na to da ono služi kao instrument koji se može koristiti u ciklusu akumulacije kapitala za stvaranje novog bogatstva (Joonseok, 2019). Osim ekonomskog opravdanja intelektualne svojine, i pravda nalaže da se onemogući „besplatna vožnja“, tj. da se profitira na tuđem trudu. Nekažnjenim korišćenjem tuđeg izvornog autorskog dela narušava se „pravedna nagrada“, koja

[40] Zanimljivo je da kreativne industrije, među kojima su i radio i TV produkcija, stvaraju više BDP-a od rudarstva, a približno jednako kao finansijske usluge, osiguranje ili snabdevanje električnom energijom (Strategija razvoja intelektualne svojine za period od 2018. do 2022. godine).

bi inače usledila autoru (Marković, 2018). Dakle, jasno je da je određena zaštita ljudskog kreativnog dela od višestrukog značaja za društvo.

Činjenica je da se većina formata sastoji od jedinstvene kombinacije različitih elemenata, koji se tradicionalno štite različitim propisima (zakonom o autorskim i srodnim pravima, zakonom o žigu, zakonom o sprečavanju nelojalne konkurencije, zakonom o zaštiti poslovne tajne itd.). Zbog toga, u literaturi se vode polemike o pravnoj prirodi TV formata i mogućnostima njegove zaštite. Tako, neki autori se zalažu za priznavanje TV formata kao mogućeg objekta intelektualne svojine i to kroz više mogućnosti: kao dramsko delo, hibridni objekat, sintetički objekat, kompilacija ili složeni objekat. Sylkina (2020), na primer, predlaže priznavanje TV formata kao jedinstvenog, *sui generis* složenog objekta intelektualne svojine na koji bi trebalo primeniti jedinstven sistem zaštite. To bi uključivalo mogućnost njegove eksploatacije bez potrebe za koordinacijom svih lica koja su učestvovala u stvaranju objekta i njegovu lakšu pravnu zaštitu. I drugi pravni teoretičari, ali i eksperti TV industrije se zalažu za snažniju i konkretniju zaštitu stvaralaca TV formata od imitiranja, kao legitimnih originalnih duhovnih tvorevina, koje zaslužuju da se njihovim autorima priznaju materijalna i imovinska prava (Koros, 2019).

S druge strane, Gotlib (Gottlieb, 2010) je naveo četiri glavna argumenta protiv zaštite TV formata putem prava intelektualne svojine koja se sreću u literaturi: (1) prekomerno širenje tradicionalnih granica intelektualne svojine, (2) postojanje druge vrste podsticaja za stvaranje formata, čime se umanjuje značaj pravne zaštite, (3) tvrdnja da takva zaštita dovodi do ekonomske neefikasnosti, i (4) intelektualna svojina stvara neprihvatljiv tržišni monopol. U tom smislu Marković (2018: 323) navodi da bi trebalo zaustaviti dalje jačanje prava intelektualne svojine, s obzirom na "nedostatak naučne verifikacije neto društvene koristi od prava intelektualne svojine".

Naveli smo da je osnovna ekonomska uloga prava intelektualne svojine u omogućavanju subjektu zaštite da ostvari materijalnu korist od privredne eksploatacije predmeta zaštite, što podrazumeva isključenje konkurencije. Međutim, pravo intelektualne svojine mora da omogući kompromis između zaštite tvorca intelektualnog dobra i njegove investicije, s jedne strane, i potrebe da se ne ugrozi opšti interes zajednice za razvojem i širenjem kulturne baštine, s druge strane (Marković, Popović, 2021). Kako se TV format nalazi u „sivoj zoni prava" (Malbon, 2006: 128), upravo je pitanje kompromisa između ova dva zaštitna objekta ključno u kontekstu razmatranja pravne prirode i mogućnosti zaštite formata putem prava intelektualne svojine, a naročito putem autorskopravne zaštite.

TV format – autorsko delo, opšta ideja ili tehničko uputstvo?

Stvaraoci TV formata se najviše zalažu za to da formati budu priznati kao autorska dela zaštićena autorskim pravom. Tu se kao sporno javlja pitanje zaštite koncepta, odnosno „ideje“ formata, a ređe problem krađe nespornih autorskih elemenata, kao što su muzika ili grafički elementi, koja se u praksi retko javlja (Popović, 2014). Na primer, plagijator će uglavnom izbeći da upotrebi istu muziku, logo ili scenografiju, ali će osnovni koncept formata biti vrlo sličan ili identičan.

U pravnoj i medijskoj teoriji postoje različiti stavovi u pogledu mogućnosti i svrsihodnosti autorskopravne zaštite TV formata i njegovih posebnih žanrova. Na primer, Bergmanova (2011) smatra da rijaliti formati, kao posebna vrsta TV formata, moraju ostati u javnom domenu, kako se ne bi sputavala kreativnost. Stoga, ona navodi da rijaliti formati, kao najspontaniji vidovi formata, ne mogu biti predmet zaštite autorskog prava. S druge, Čalabi (Chalaby, 2011) insistira na tome da se TV formati ne sastoje samo od ideja, već da je u procesu njihovog stvaranja potrebna velika stručnost. Koros (2019) smatra je format konkretni izražaj ideje koji ima strukturu jedinstvenih prepoznatljivih elemenata, te da zaslužuje autorskopravnu zaštitu.

Međutim, u zakonodavstvu Republike Srbije, a i u mnogim zemljama širom sveta, televizijski format nije predviđen kao posebno intelektualno dobro, koje uživa zaštitu u celini. Nije naveden ni kao posebno autorsko delo. Prema *Zakonu o autorskom i srodnim pravima RS*, „autorsko delo je originalna duhovna tvorevina autora, izražena u određenoj formi, bez obzira na njegovu umetničku, naučnu ili drugu vrednost, njegovu namenu, veličinu, sadržinu i način ispoljavanja, kao i dopuštenost javnog saopštavanja njegove sadržine“. Naš zakon spada u zakone koji sadrže otvorenu listu mogućih autorskih dela, za razliku od drugih, pretežno anglo-saksonskih pravnih sistema, koji predviđaju tačno određene moguće forme autorskih dela. Dakle, naš zakon egzemplarno navodi primere autorskih dela (pisana dela, govorna dela, dramska dela itd.), što znači su mogući i drugi oblici, pod uslovom da ispunjavaju zakonski propisane uslove. Drugim rečima, autorsko delo može da bude izraženo i u nekoj drugoj formi, tako da ona može biti saopštena javnosti. S druge strane, ideja kao takva, ne uživa zaštitu, dok ne dobije određenu formu, odnosno dok ne bude materijalizovana u nekom obliku (Vodinelić, 2017).

Dakle, pravo ne štiti ideje koje nisu materijalizovane u nekoj formi. Međutim, Marić smatra da je odredba našeg zakona o isključivanju opštih ideja iz autorskopravne zaštite nedovoljno precizna, i da bi zapravo trebalo da glasi “misao”. Na taj način se bolje razume distinkcija između misli, kao *neopredmećene* ideje, od ideje koja može biti *izražena* u nekoj formi. Takođe, postavlja se pitanje kako tumačiti pojam “opšte ideje”, koje su eksplicitno

isključene iz zaštite. Isti autor smatra da bi to trebalo da budu vrlo uopštene „zamisli, želje i planovi" da se neko pitanje reši, da se nešto uradi itd. Drugim rečima, ne bi bile isključene iz zaštite sve ideje (pod uslovom da su materijalizovane), već one koje predstavljaju javno dobre, koje su rudimentarne, opšte poznate i slično (Marić, 2021). Odnosno, ukoliko je ideja konkretizovana, to jest dovoljno detaljno razrađena, može da bude autorsko delo: „ideja kao koncept ili koncepcija autorskog dela sadrži već i predlog kako će određeno pitanje da bude rešeno, osnovnu struktura onoga što će izrasti u autorsko delo, a ne samo nameru autora da ga reši" (Marić, 2021:60).

Iz zaštite su isključeni i postupci, metode rada, ili matematički koncepti kao takvi, kao i načela, principi i uputstva koji su sadržani u autorskom delu. Ovo nam je posebno značajno za dalju analizu, jer je suština dileme u tome da li konstitutivni elementi TV formata, njegovo idejno jezgro, predstavljaju samo puki koncept, odnosno opštu ideju ili tehnička uputstva, koja nisu zaštićena autorskim pravom, ili predstavljaju originalni *izraz* te ideje, koji se kao takav može pravno štititi (Boppert, 2018).

Za autorsko delo se zahteva i postojanje originalnosti. Pojam originalnosti ne znači da delo mora da bude u potpunosti novo, jer svako delo proizilazi iz društvene i kulturne tradicije, ali mora da ima određene elemente koji su originalni, kao i da bude odraz ličnosti autora (Popović, 2014). To znači da delo ne sme biti rezultat namernog ili nesvesnog podražavanja postojeće kulturne baštine, ili intelektualnog rada determinisanog pravilima koja ne ostavljaju prostora za izražavanje lične duhovne originalnosti.[41]

TV format nije izričito predviđen kao posebno autorsko delo. To znači da mogućnost njegove zaštite moramo tražiti u opštem pojmu autorskog dela. Osim toga, po ugledu na film, TV format bi mogao biti neka vrsta koaturskog dela, ukoliko su delovi neodvojivi ili su koautori imali cilj da stvore jedno zajedničko delo. S druge strane, domaće zakonodavstvo predviđa i postojanje spojenog dela, u smislu da je svaki deo celine moguće zasebno koristiti, što bi možda i najviše odgovaralo prirodi ovog intelektualnog dobra. Ipak, brojni i različiti elementi TV formata komplikuju ovu diskusiju, s obzirom na to da se neki od njih mogu posmatrati kao tehnička uputstva, ili da pripadaju nekom drugom pravu intelektualne svojine, a ne autorskom pravu.

Kako je plagiranje, odnosno kopiranje TV formata predmet brojnih sporova, potrebno je analizirati i pojam plagijata. Sudska praksa poznaje dve vrste plagijata: konceptualni i doslovni plagijat. Plagiranje ne podrazumeva samo doslovno preuzimanje reči, ili nota iz nečijeg autorskog dela, već i preuzimanje koncepta. Konceptualni plagijat bi predstavljao preuzimanje osnovne suštine ili

[41] Presuda Privrednog apelacionog suda Pž n5211/17 do 14. juna 2018. godine (Stamenković, 2020).

strukture određenog dela, uz određenje varijacije na osnovu čega nastaje „novo“ autorsko delo (Marić, 2021 89).

Kako nam postojeći propisi i literatura ne pružaju definitivne odgovore, nužno je analizirati primere iz srpske i inostrane sudske prakse. Sudska praksa u pogledu TV formata nije ujednačena.

Primeri iz sudske prakse u Republici Srbiji

Iako u ovoj oblasti ne postoji veliki broj sporova u Republici Srbiji, niti je sudska praksa formalni izvor prava, izložićemo, kao ilustraciju problema, nekoliko presuda domaćih sudova.

U prvom predmetu koji se analizira, tužilac je osmislio TV igru koja se može komercijalizovati, a koja se sastojala u prodaji stvari javni nadmetanjem sa najnižom jedinstvenom ponudom. Tu ideju je detaljno izrazio u brošuri, koju je zatim i deponovao u Zavodu za intelektualnu svojinu Republike Srbije.[42] Nakon toga, tužilac je sa jednom televizijskom kompanijom zaključio ugovor o poslovno-tehničkoj saradnji, na osnovu čega je trebalo da se emituje emisija zasnovana na brošuri tužioca, a u kojoj bi građani slali SMS poruke i licitirali najnižu cenu za određeni proizvod. Međutim, emisija je ubrzo skinuta sa programa. Nekoliko godina nakon toga, tužena strana „Državna lutrija Srbije“ je priredila igru na sreću „RTS licitacija“ koja se zasnivala na simulaciji inverzne aukcije (inverzne licitacije) u kojoj učesnici slanjem ponuda putem SMS poruka dostavljaju najniže fiktivne ponude za predmet licitacije. Tužilac je tvrdio da je tužena strana narušila njegovo autorsko pravo i „ukrala“ njegovu ideju za emisiju.

Sud je analizirao činjenično stanje i zaključio da su inverzne aukcije zasnovane na već poznatom, standardnom principu koji je sličan tradicionalnoj aukciji sa jedinstvenom ponudom, kao i da je ovaj način prodaje postao popularan od 2002. godine, te da tužiočeva ideja da se roba prodaje javnim nadmetanjem po pravilu najniže jedinstvene ponude cene, „koja jeste stekla materijalizaciju kroz TV format emitovanjem na televiziji, ne predstavlja autorsko delo”, odnosno da je opšte dobro i ne podleže autorskoj zaštiti. Sud se osvrnuo i na tvrdnju tužioca da je on svoje autorsko delo zaštitio prijavom kod Zavoda za intelektualnu svojinu. Sud je naveo da unošenje u evidenciju i deponovanje autorskih dela ne utiče na nastanak autorskog prava, već služi samo kao podatak da je određeno delo evidentirano.

Prvostepeni sud je procenio da se radi o opštoj ideji a ne autorskom delu, a tuženi su osporili da je brošura tužioca autorsko delo. Po pravilima o teretu

[42] Zavod za intelektualnu svojinu je posebna organizacija u sistemu državne uprave Republike Srbije u čijoj su nadležnosti poslovi koji se odnose na prava industrijske svojine i autorska i srodna prava.

dokazivanja[43], tužilac je bio u obavezi da predloži veštačenje „na okolnost da li se radi o originalnoj duhovnoj tvorevini, odnosno da se njegova ideja aukcije po najnižoj jedinstvenoj ceni po svojim karakteristikama razlikuje od svih aukcija sličnog žanra“, što on nije učinio. Dakle, zaključak prvostepenog suda, što je potvrdio i apelacioni sud je bilo da *prima faciae* takve aukcije postoje od ranije, a i da predstavljaju opštu ideju, te ne mogu da uživaju autorsku zaštitu.[44]

U drugom predmetu radilo se o sinopsisu[45] za potencijalni mega šou program, koji je upisan u evidenciju dela domaćih autora 2008. godine. Sinopsis je predviđao da će u šou biti birani top model, naj manekenka i fotomodel, od strane profesionalnog žirija, jedne popularne estradne ličnosti i glasanjem gledaoca putem SMS poruka. Prema sinopsisu su precizirani još neki detalji, kao što je cilj emisije, način snimanja i mogući kandidati. Tužena strana je 2011. emitovala serijal sa sličnom radnjom, uz saglasnost američke kompanije, koja je registrovala autorska prava na serijalu „ANTM“ kod Zavoda za zaštitu autorskih prava SAD. Tužbom se tvrdilo da je emitovanjem sporne emisije 2011. godine, tužena strana povredila autorsko pravo tužioca, jer je emitovana serija identična sa idejom i konceptom tužiočevog autorskog dela. Sud je zaključio da je autorstvo tužioca zavedeno značajno kasnije nego što je originalni američki serijal, na osnovu koga je proizvedena emisija tuženog, registrovan kao autorsko delo kod američkog zavoda, što se desilo već 2003. godine. Osim toga, takav serijal je emitovan i u drugim evropskim zemljama.

Veštak je dao svoj nalaz i mišljenje da autorizovani sinopsis tužioca poseduje elemente nacrta, skice, pregled siže, ali ne i sadržaj, formu i funkciju scenarija, odnosno da sinopsis nije scenario, a da su slične emisije postojale i ranije. Kako je tužilac registrovao sinopsis koji ima veliku sličnost sa formatom koji je već ranije registrovan i emitovan u drugim državama, ne može se smatrati da je tuženi povredio autorsko pravo tužioca. Tuženi je svoje pravo na emitovanje izvodio iz dozvole nosioca autorskog dela američke kompanije, čije je autorstvo priznato ranije. Sud se, međutim, nije bavio pitanjem prirode sinopsisa kao autorskog dela, s obzirom da je autorstvo u konkretnom slučaju sporno jer je emisija tužene strane zasnovana na formatu koji je registrovan ranije nego što je tu učinio tužilac.[46]

U vreme pisanja ovog rada aktuelan je i slučaj koji je privukao veliku medijsku pažnju u Srbiji. Radi se o sporu između kreatorke TV emisije „Utisak nedelje“, popularne političke *talk show* emisije, u kojoj se omogućava kontakt sa

[43] Zakon o parničnom postupku (“Sl. glasnik RS”, br. 72/2011, 49/2013 - odluka US, 74/2013 - odluka US, 55/2014, 87/2018 i 18/2020), čl. 231.
[44] Presuda Apelacionog suda u Beogradu, Gž4 132/18, 19. 5. 2021. godine.
[45] Kako navode Micić i ostali (1980: 53): „Sinopsis je ideja budućeg dela, u kome je veoma sažeto iznesena njena tema i ideja. Obim sinopsisa može da varira ali najčešće ima nekoliko kucanih stranica.
[46] Presuda Vrhovnog kasacionog suda, Rev 1026/2016, 16. 05. 2018. godine.

gledaocima, i u kojoj gostuju poznate ličnosti koji iznose svoje utiske o najaktuelnijim društvenim događajima, s jedne strane, i koautora navodnog plagijata, emisije „Hit-tvit“ koja se emituje ne jednoj drugoj televiziji, s druge strane. Prvostepeni sud je zaključio da format „Hit-tvit“ predstavlja plagijat autorskog dela tužilje, deponovanog kod autorske agencije za Srbiju još 1995. godine, odnosno da je povređeno njeno autorsko pravo. Međutim, drugostepeni sud je ukinuo presudu i vratio na odlučivanje prvostepenom sudu.

Naime, drugostepeni sud je naveo da je prvostepeni pogrešio što nije angažovao trećeg veštaka, jer su veštaci obe strane dali različite nalaze veštačenja. Iako su se veštaci složili da se u oba slučaja radi o „audiovizuelnim delima po modelu kontakt programa sa voditeljom i gostima u studiju i glasanjem gledao za predloge“, veštaci se nisu složili da emisija „Hit-tvit“ predstavlja plagijat. Sud se osvrnuo na to da ovakva forma programa nije originalna tvorevina, jer je takvih emisija bilo i ranije, što je poznata činjenica, te da između emisija moraju postojati neke druge sličnosti. Kako spor još nije okončan, ne možemo da damo zaključnu ocenu, međutim zanimljiv je stav drugostepenog suda da je potrebno utvrditi da li su imitirani originalni segmenti emisije, te da li postoji i nešto što je originalno u emisiji tuženih.[47]

Iz ovih predmeta može se izvesti nekoliko zaključaka. Prvo, deponovanje autorskog dela u Zavodu za intelektualnu svojinu ne čini to delo zaštićenim autorskim pravom, ali predstavlja značajno olakšanje prilikom dokazivanja autorstva. Da li se u datom slučaju radi o autorskom delu ili ne, prema Zakonu o autorskim i srodnim pravima, zavisi od njegove originalnosti, što je faktičko pitanje, o čemu se uglavnom izvodi veštačenje stručnjaka iz ove oblasti. Drugo, na tužiocu je da dokazuje da njegovo delo jeste autorsko delo, odnosno da je delo tuženog plagijat. Sud se, u prvom primeru, i sam osvrnuo na to da su određeni elementi TV formata, koji je bio predmet spora, opšte dobro, odnosno da nemaju dovoljnu originalnost da uživaju autorskopravnu zaštitu.

Zbog okolnosti ovih slučajeva, nažalost, ostali smo uskraćeni za podrobnije razmatranje sudova o elementima originalnosti TV formata i u čemu se sastoji plagijat.

Primeri iz inostrane sudske prakse

Inostrana sudska praksa je daleko bogatija u pogledu TV formata, ali su sudovi dolazili do različitih zaključaka. Predmet *Green vs. Broadcasting Corporation of New Zealand* iz 1989. godine predstavlja značajan momenat u razvoju pravne zaštite TV formata, koji je postavio negativan precedent za kreatore formata u *common law* pravnim sistemima. Naime, voditelj Hjui Grin je tužio New Zealand Broadcasting Corporation da je plagirala njegov talent šou “Opportunity Knocks”.

[47] Rešenje Apelacionog suda u Beogradu, Gž4 201/21, 24. 12. 2021. godine.

Sud je odlučio da je njegova tužba bespredmetna jer se ideja ne može štititi autorskim pravom. Takođe je zaključio da format *nije dramsko delo* s obzirom na to da ne postoji dovoljno jedinstvo ili koherentnost.[48]

Sličnu argumentaciju imao je i Savezni sud Nemačke u predmetu *TV-Design v. SWR*, koji se ticao navodnog imitiranja TV formata „L'école des fans". Sud je naveo da je TV format pre *skup uputstava* za pretvaranje određenog TV programa u formu, nego što je forma sam po sebi. Postupanje po uputstvima ili receptu za televizijski program ne može predstavljati povredu autorskog prava. Ono što može da uživa zaštitu jeste *scenario*, koji zaista i predstavlja autorsko delo (FRAPA, 2011).

Međutim, postoje određeni primeri koji pokazuju da sudovi ipak priznaju autorskopravnu zaštitu TV formatima, pod određenim uslovima. U predmetu *TV Globo & Endemol v. TV SBT*, brazilski sud je stao na stanovište da je *produkcijska Biblija* izraz ideje, koja se može koristiti kao dokaz originalnosti TV formata. Sud je zaključio da je format *Big Brother* zaštićen autorskim pravom i da je emisija "Casa dos Artistas" predstavljala kopiju. Sudija je naveo, na osnovu veštačenja, sledeće:

> *„ogromna sličnost između oba programa ne proizilazi iz slučajnosti, već iz loše prikrivene i grube kopije formata programa Veliki brat... (koji) promišlja program sa početkom, sredinom i krajem, sa detljanim opisom, ne samo atmosfere u kojoj će ljudi živeti određeno vreme, već i mesta gde su kamere postavljene. Format se sastoji od detalja kao što je upotreba mikrofona vezanih za tela učesnika, povezana 24 sata dnevno, muzički stilovi, aktivnosti itd.".*

Zanimljivo je da je sud u ovom slučaju priznao zaštitu kako umetničkim tako i tehničkim elementima formata, kao što su pozicije kamera, vizuelni i audio elemente, čiji je cilj predstavljanje određene dramske situacije, te je zaključio da je emisija „Casa dos Artistas" predstavljala povredu autorskog prava autora formata „Big Brother".

Format „Big Brother" je bio predmet još jednog spora, ali kao tužena strana. Tužilac je tvrdio da format „Survivor" predstavlja autorsko delo, a da je „Big Brother" njegov plagijat. Holandski vrhovni sud je stao na stanovište da kombinacija dvanaest elemenata "Survive" formata uzetih zajedno jeste dovoljno jedinstvena i specifična da bi bila original i zato predstavlja zaštićeno delo "u celini". Ipak, sud je presudio da *Big brother* nije kopija ove emisije (FRAPA,

[48] Apelacioni sud Novog Zelanda, Green v. Broadcasting Corporation of New Zealand [1988] 2 NZLR 490 (CA).

2011).[49] Zanimljiv je i predmet *Twentieth Century Fox Film Corporation v Zee Telefilms Ltd & Ors*, u kome je tužilac tvrdio da emisija predstavlja nedozvoljenu upotrebu njegovog serijala *24*. Sud je odbio navode tužioca i zaključio da su teme serijala opšte, ali da se narativi dovoljno razlikuju. Sud je naveo da puka sličnost u prezentaciji serijala nije dovoljan osnov za autorskopravnu zaštitu. Sud je izložio i nekoliko važnih vodećih principa koji se tiču zaštite formata. Naime, da bi se pokazalo da je delo plagijat potrebno je da je prekopiran značajan deo, i to onaj koji se tiče kvaliteta, a ne kvantiteta; nema zaštite za ideju, koncept, princip ili otkriće, potrebna je originalnost; puka tema ili okvir ne može biti zaštićen pravom intelektualne svojine. Ipak, jedinstvena i prepoznatljiva tema ili radnja jeste zaštićena kao književno ili dramsko delo.[50]

U predmetu *Maradentro Producciones S.L. v Sogecable, S.A.* španski sud je naveo da se formati *načelno mogu štiti autorskim pravo* zato što autorsko pravo štiti scenario i priču, crteže, planove, modele, skice. Ukoliko se format može uporediti sa pričom ili scenariom onda se takođe mora štititi, ali mora da postoji „kvalitativni skok od pukog opšteg koncepta" koji rezultira u stvaranju kompleksne kreacije, koja je detaljna i formalno strukturisana (FRAPA, 2011). U duhu prethodne odluke, u predmetu *Atomis Media, S.A & Outright Distribción Ltd v Televisión De Galicia, S.A. & CTV, S.A*.,[51] iz 2010. godine, španski sud je zaključio da formati mogu biti zaštićenim autorskim pravom ukoliko ih je stvorio čovek, ukoliko su izraženi putem nekog medija i ukoliko su originalni. Sud je naveo da format mora biti sličan scenariju ili priču. Ukoliko se format sastoji od niza elemenata, koji su strukturisani i kombinovani na određeni način, nije neophodno da svaki individualni element bude originalan, ali njihova jedinstvena kombinacija omogućava autorskopravnu zaštitu. U konkretnom slučaju, format nije bio zaštićen s obzirom na to da je sud zaključio da nije bio dovoljno originalan, i da nije uključivao „kompleksan proces" (FRAPA, 2011).

Neke od novijih odluka takođe priznaju formatima pravo na zaštitu. Tako, italijanski Vrhovni kasacioni sud je u presudi iz 2017. godine[52] zaključio da TV formati mogu biti zaštićeni u skladu sa italijanskim Zakonom o autorskim pravima, te pojasnio koji su uslovi da bi takva zaštita bila moguća. Naime, delo se može kvalifikovati kao format, ukoliko ima logičku i tematsku vezu koja se sastoji od naslova, osnovne narativne strukture, scenografije i fiksnih likova, što

[49] Vrhovni sud Holandije, Castaway Television Productions Ltd & Planet 24 Productions Ltd v. Endemol Entertainment & Jon De Mol Productions, predmet br. C02/284HR, 2000. (FRAPA, 2011: 17-18).

[50] Delhi High Court. Twentieth Century Fox Film .. vs Zee Telefilms Ltd. & Ors. on 10 July, 2012. https://indiankanoon.org/doc/72003037/

[51] Apelacioni sud u Korunji, Atomis Media, S.A. & Outright Distribution Ltd v. Television De Galicia S.A. & CTV, S.*A*., 31. jul 2010.

[52] RTI Reti Televisive Italiane Spa v Ruvido Produzioni Srl, Vrhovni sud, presuda 18633/17 (27 July 2017).

rezultuje strukturom koja se može ponavljati. Navedeno je i da ukoliko se TV program sastoji pretežno od improvizovanih elemenata, ne može se smatrati formatom (Rosati, 2017).

Zanimljivo je da je turski Vrhovni apelacioni sud 2008. godine utvrdio da TV format koji je razrađen na osnovu teksta i sadrži gotovo sve detalje, kao što su specifične formulacije koje će se koristiti prilikom najave reklama, svetla kamere i tehnike snimanje biće zaštićeno kao *naučno i književno delo*.[53] U jednom drugom sporu iz 2016. godine turski sud je ustanovio да „format koji ne sadrži detaljan opis neće uživati zaštitu autorskih prava, jer ne odražava osobine njegovog autora“, što podrazumeva da formati koji imaju karakteristike i nadilaze apstraktna objašnjenja ideje su zaštićene autorskim pravima.[54] Dakle, u Turskoj TV formati mogu da uživaju zaštitu prema Zakonu o autorskim pravima pod uslovom da izražavaju osobine svojih autora i da su posebno detaljni (Basaran, 2019).

Diskusija i zaključak

Televizijska industrija se duži niz godina oslanja na TV formate kao proverene „mamce“ za gledaoce. Putem prodaje i licenciranja na međunarodnom tržištu TV formati čine vrlo unosan biznis. Iz ovih razloga kreatori TV formata, njihova udruženja i televizijska industrija se zalažu za konkretniju i sigurniju pravnu zaštitu od plagijata, pre svega putem autorskog prava.

Na osnovu analiziranih predmeta iz strane sudske prakse, uočava se širok spektar odluka, koje se kreću od potpunog odbacivanja mogućnosti autorskopravne zaštite za TV formate, zato što su oni samo ideja ili puki skup uputstava, do stavova da mogu da se štite kao dramsko delo, pod uslovom da su dovoljno koherentni, ili kao scenario, ukoliko su dovoljno detaljni, pa do priznavanja svih elemenata TV formata, uključujući i tehničke elemente, kao jedinstvenu celinu koja je zaštićena autorskim pravom.

Takođe, s izvesnom rezervom, može se uočiti i sve češća sklonost sudova različitih država da priznaju načelnu mogućnost zaštite TV formata kao autorskih dela i sankcionisanja onih koji su povredili imovinska i moralna prava njihovih autora. Međutim, kako će sud koji odlučiti, zavisi od više faktora i okolnosti svakog konkretnog slučaja. Ukratko, najviše izgleda za zaštitu poseduje materijalizacija ideje formata kroz pisani tekst, brošuru ili scenario, koji je dovoljno detaljan, koji sadrži kako originalne, tako i neoriginalne elemente, povezane na taj način da je nesumnjivo da predstavljaju izraz ličnosti kreatora,

[53] Presuda 11. građanskog odeljenja Vrhovnog apelacionog suda br. E. 2008/5996, K. 2008/12126, od 03.11.2008, (http://www.kazanci.com)
[54] Presuda 11. građanskog odeljenja Vrhovnog apelacionog suda br. E. 2015/10650, K. 2016/5199, od 9.5.2016 (http://www.kazanci.com).

dovoljno razrađeni da nisu puka opšta ideja, već da imaju originalnu, specifičnu i prepoznatljivu strukturu. Krajnje rudimentarne ideje, žanrovske karakteristike, i neoriginalni elementi formata ne bi mogli da budu zaštićeni autorskim pravom. Takođe, način na koji je definisan pojam autorskog dela u zakonodavstvima može da igra ulogu. Šire, otvorene definicije zaštićenih autorskih dela, ili onoga šta predstavlja kršenje prava, ostavljaju veći prostor sudovima da se prilagode socio-kulturnim i tehničko-tehnološkim inovacijama (Ohly, 2009).

Nakon što je utvrđeno da je TV format autorsko delo, prelazi se na analizu da li je program tužene strane njegova kopija ili ne, odnosno da li je došlo do kršenja moralnih i imovinskih prava autora. To je uglavnom faktičko pitanje, koje zavisi od analize suda i veštačenja stručnjaka. Ono što je jasno jeste da obimom autorskopravne zaštite nisu obuhvaćeni neoriginalni elementi autorskog dela. Odnosno, ukoliko se „kopiranje“ sastoji samo u adaptaciji opštih mesta, ideja koje nisu originalne, već poznate od ranije i predstavljaju opšte dobro, niti dovoljno razrađene načelno neće doći do povrede prava. Međutim, kopiranje određenog broja originalnih elemenata TV formata (aspekt kvantiteta) i to takvih da čine suštinu onoga što predstavlja njegovu originalnost (aspekt kvaliteta), svakako da ispunjava uslove da bude protivpravno.

Sumarno, da bi određeno lice uspelo u svom zahtevu, mora prvo da dokaže postojanje autorskog dela i da je on autor tog dela. Zatim je potrebno dokazati da se plagijatorsko delo potpuno ili u bitnoj meri podudara sa izvornim delom, kao i da je to drugo delo nastalo kasnije. Neophodan element je i da je plagijatorsko delo nastalo namernim ili nemarnim preuzimanjem izvornog dela, da je objavljeno bez navođenja originalnog dela, da je objavljeno kao sopstveno te da protivpravnost objavljivanja nije izuzetno isključena.[55]

Polazeći od toga da u osmišljavanje mnogih TV formata ulazi značajna kreativnost, znanje, veština i trud, može se zaključiti da postoje argumenti u prilog njegove autorskopravne zaštitu. Kreativnost stvaralaca TV formata se ogleda u spajanju različitih elemenata u originalnu strukturu, na osnovu sopstvenog promišljanja, veštine i kreativnosti. S obzirom na to da medijske kompanije iskazuju potrebu za novim televizijskim formatima, pitanje njihove zaštite biće aktuelno i u budućnosti. Štaviše, novi vidovi ljudske kreativnosti otelotvoreni u složenim medijskih formama će zahtevati i novo promišljanje pravne zaštite i prilagođavanje propisa i njihovog tumačenja savremenim prilikama.

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TV FORMAT PROTECTION THROUGH COPYRIGHT - OPPORTUNITIES AND DILEMMA

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Abstract

TV formats represent popular media content, which attracts a large number of viewers around the world. However, their legal is not regulated enough. The basic dilemma in legal theory and judicial practice is the possibility of copyright protection of TV formats. The aim of this paper is to try to determine the possibility of legal protection of the TV format as an author's work by analyzing domestic and foreign judicial practice, as well as the existing literature. Although some courts have held that a TV format can be protected as a whole, including its technical elements, this is more the exception than the rule. Most of the time, the disputed question comes down to the elements that have been copied, and concerns the basic idea or concept of the TV format. Nevertheless, there is a tendency on the international level towards more and more frequent recognition of copyright protection of TV formats, but under certain conditions. Thus, rarefaction, originality and typed structure of the format that can be repeated, as well as the way of defining the author's work in legislation are some of the elements that influence whether the TV format will be recognized and protected as an author's work.

Keywords: *TV formats, legal protection, intellectual property, copyright, creative industries*

JEL: *K11, 034*

Introduction

In recent decades, television formats have become the most watched media content, attracting large audiences as well as advertisers. We recall some of the most famous television formats (hereinafter: TV formats), which were broadcast on numerous TV channels around the world, such as "Big Brother" "Survivor" "X Factor", "Do you want to become a millionaire" "The Office" and others. The TV format industry, as part of the creative industries [58], is worth several billion dollars

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[58]Creative industries are defined as activities that are based on the creativity, skills and talents of an individual, and that have the potential to create wealth and jobs through the generation and exploitation of intellectual property (Bop Consulting, 2010).

(Chalaby, 2012), and television companies are always open to new and more creatively formatted television content. Proven "formulas" of programs that have proven successful in their markets of origin are licensed and broadcast in other countries, often with minor or major modifications, in order to adapt to the needs of the national media market.

The television format is defined in different ways. So, for example, the international Association For recognition and for protection TV format (hereinafter: FRAPA) describes the TV format as " characteristic " combination comprehensive described television elements i new ones and ordinary ones who I can or not they have to to be for the protected like separate items intellectual properties arranged on the immutable the way in there were com material form which one creates the original I will repeat narrative structure " (McKenzie, FRAPA, 2017). The TV format consists of "invariable elements in a program that form the basis for variable elements in individual episodes" (Bechtold, 2013). Moran and Malbon (2006) point out that format usually includes plot, basic story line, theme, mood and emotion dramaturgy, rules, sequence of events, direction, music, graphics, set design and instructions for the show's production process. TV formats are therefore composed of creative, business and marketing elements. In addition to the creative basis they possess, they are conditioned by the genre, technology and target audience of the program. It is precisely the specific, unique combination of different elements that attracts viewers (Meadow, 1970).

There are numerous types of TV formats, from *game* shows, through reality shows, talent competitions, various quizzes and documentary entertainment shows, and recently, series models for the global market are being produced. Given that mass communication media, both traditional and new, have great possibilities for content production and marketing, it is to be expected that program formats will acquire new genres and forms in the future.

The international television industry defines a TV format as a program that has been sold in at least one foreign market (Schmitt et al., 2005). However, in a broader sense, the TV format represents a "mould" for program content, that is, a combination of narrative elements, a recognizable and repeatable structure, regardless of whether it is licensed and broadcast in a foreign market or not. For example, the domestic quiz "Slagalica" was not sold on the foreign market, but it belongs to TV formats. In this sense, regardless of whether it is a TV format that was sold on a foreign market, or a format that was designed and broadcast as a TV show only in one country, not so rarely, there was an imitation of them, or copying. The TV format industry is particularly interested in the problem of protection against international "theft" of what they consider their intellectual property.

The first variant of "theft" of a TV format occurs when the creator of a format presents an idea to a certain media company for cooperation, and it, not long after, makes an identical or very similar program, without acknowledging the authorship or paying any compensation. In another case, it is possible that an already broadcast TV format "inspires" another media company to market the same or similar content under its trademark. There were such examples in practice, which will be discussed later. These are some of the most obvious reasons for the need for legal protection of the TV format, so that it would bring material benefits to the broadcasters and authors of the format as long as possible and ensure high ratings (Moran, 2004). However, the legal protection of any media content, especially TV format, is a very complex issue.

The problem with the protection of the TV format lies, first of all, in its mixed nature. The classic TV format consists of various elements: basic concept, specific music, scenography, logo, way of presenting certain segments of the program and the like. In addition, the very essence of the TV format, as a more or less developed idea, that is, the concept, it led, and continues to lead to conflicting judgments of the courts.

As the TV format is composed of several diverse elements (both in the creative and legal sense), the possibilities of its legal protection are different, but often insufficiently reliable. The basic method of protection for which the creators of the TV format advocate is through intellectual property rights, specifically copyright. In addition to copyright protection, other possibilities include the rules on competition protection (when, contrary to good business practices, confusion or danger of confusion is created in the commercial circulation of some property of the product or if someone else's work or reputation is used parasitically) (Popović, 2014), protection through business secret rules (which prevents misuse of *know-how* information), through trademark (which protects the name or logo of the program) or design protection (for scenographic and design elements). In addition, the TV format industry relies on illegal means of protecting its product.[59]

Many TV formats are known to have their own "production bible", which contains format rules and other key information on how to adapt the TV format to local markets (Green, 2010). It represents a certain "shield" against the plagiarism of someone else's work, given that for many customers it is safer to buy a TV format with all the necessary data to ensure the success and profitability of the show, than to copy it. However, thefts and imitations still happen, and the creators of TV formats are advocating for their stricter legal protection.

[59]Some of the possible strategies are speed to market and format premiere, Gentleman's Agreement, branding, "flying producer" system, TV format registration system, and others (FRAPA, 2011).

In this paper, the focus is on the copyright protection of the TV format, that is, on the basic dilemma that exists in legal theory and judicial practice: whether and under what conditions the TV format can be protected as an author's work. As this is a multi-layered problem, we will begin the presentation with an analysis of the concept of intellectual property and intellectual property, its legal and political justification, and then we will move on to an analysis of copyright and court practice, all in the context of the TV format.

Theoretical considerations on the TV format as intellectual property

The creation of a TV format represents a certain creative process of an individual or a group of people. The expenditure of time and material resources necessary to design a TV format and then produce quality television content seemingly justifies viewing the format as a spiritual creation worthy of legal protection. That is why the creators of TV formats and the television industry have been advocating for their comprehensive protection for many years, primarily through intellectual property rights.

Intellectual property law arises as a result of the need to protect the creative spiritual creations of the human mind, intellect and spirit by law. Moreover, intellectual property has a significant economic value, which is confirmed by the data today one of the most expensive goods on the world market (Marković, Miladinović, 2014) In other words, the social functions of intellectual property rights are twofold. On the one hand, the goal is the economic stimulation of subjects to create intangible goods, which requires the investment of personal resources. On the other hand, and as a consequence of the first function, is the encouragement of the economic, cultural and technological development of society.

According to *the Intellectual Property Development Strategy* of the Republic of Serbia, consistent protection of intellectual property creates conditions for the economic development of the country. This can be illustrated by the fact that the total participation of creative industries, which rest on the exploitation of copyrights and related rights, in the creation of the gross domestic product (GDP) of Serbia amounts to 4.61%.[60]

Intellectual property law can be divided into industrial property law and copyright and related rights. Author's work is protected by copyright. However, the author's right it's not only Question legislation but also economic and politician question s considering on the that that servant like instrument which one se can to use in cycle accumulation capital For creation the new one wealth Joonseok 2019).

[60] It is interesting that creative industries, including radio and TV production, generate more GDP than mining, and approximately as much as financial services, insurance or electricity supply (Intellectual Property Development Strategy for the period from 2018 to 2022)

Apart from the economic justification of intellectual property, justice also dictates that the "free ride", i.e. to profit from someone else's effort. Unpunished use of someone else's original author's work violates the "just reward", which would otherwise follow the author (Marković, 2018). Therefore, it is clear that certain protection of human creative work is of multiple importance for society.

The fact is that most formats consist of a unique combination of different elements, which are traditionally protected by various regulations (the law on copyright and related rights, the law on trademarks, the law on the prevention of unfair competition, the law on the protection of business secrets, etc.). For this reason, there are polemics in the literature about the legal nature of the TV format and the possibilities of its protection. Thus some authors advocate For recognition TV format like I can eg of the object intellectual properties and that through the more possibilities as dramatic work hybrid object synthetic object compilation or complex object Sylkina (2020), for example, proposes the recognition of the TV format as a unique, *sui generis* complex object of intellectual property to which a unique system of protection should be applied. This would include the possibility of its exploitation without the need for coordination of all persons who participated in the creation of the object and its easier legal protection. Other legal theorists, as well as TV industry experts, are advocating for a stronger and more concrete protection of the creators of TV formats from imitation, as legitimate original spiritual creations, which deserve to have their authors' material and property rights recognized (Koros, 2019).

On the other hand, Gottlieb (Gottlieb, 2010) is stated four main argument against for shields TV format via rights intellectual properties which se good luck in literature (1) excessive expansion traditional border intellectual property (2) the existence of another type of incentive to create formats, which diminishes the importance of legal protection, (3) the claim that such protection leads to economic inefficiency, and (4) intellectual property creates an unacceptable market monopoly. In this sense, Markovi ć (2018: 323) states would be should have stop further strengthening rights intellectual property s considering on " lack science verification not that society uses from the rights intellectual properties "

We stated that the basic economic role of intellectual property rights is to enable the subject of protection to realize material benefits from the economic exploitation of the subject of protection, which implies the exclusion of competition. However, right intellectual properties must allow for a compromise between for shields creator of intellectual property and his investments, on the one hand, and the need not to jeopardize the community's general interest in the development and expansion of cultural heritage, on the other hand (Marković, Popović, 2021). As the TV format is in the "gray zone of law" (Malbon, 2006: 128), the question of compromise between these two protective objects is crucial in the context of considering the legal nature and the possibility of protecting the

format through intellectual property rights, and especially through copyright protection.

TV format - author's work, general idea or technical instruction?

Creators of TV formats are most advocating for formats to be recognized as works of authorship protected by copyright. This is where the question of protecting the concept, that is, the "idea" of the format, arises as a dispute, and less often the problem of theft of indisputable author's elements, such as music or graphic elements, which rarely occurs in practice (Popović, 2014). For example, a plagiarist will generally avoid using the same music, logo or scenery, but the basic concept of the format will be very similar or identical.

In legal and media theory, there are different views regarding the possibility and expediency of copyright protection of the TV format and its special genres. For example, Bergman (2011) believes that reality formats, as a special type of TV format, must remain in the public domain, so as not to hinder creativity. Therefore, she states that reality formats, as the most spontaneous types of formats, cannot be subject to copyright protection. On the other hand, Chalaby (Chalaby, 2011) insists that TV formats do not consist only of ideas, but that great expertise is required in the process of their creation. Koros (2019) considers the format to be a concrete expression of an idea that has a structure of unique recognizable elements, and that it deserves copyright protection.

However, in the legislation of the Republic of Serbia, and in many countries around the world the television format is not provided as a special intellectual property which enjoys protection as a whole. It is not listed as a separate author's work either. According to *the Law on Copyright and Related Rights of the RS* " author work is original spiritual creation author expressed in certain form without regardless on the his artistic scientific or another value his purpose size content and the way manifestations like and admissibility public announcements his content " Our law belongs to the laws that contain an open list of possible works of authorship, in contrast to other, predominantly Anglo-Saxon legal systems, which provide precisely defined possible forms of works of authorship. Therefore, our law exemplifies examples of author's works written works speech works dramatic works etc. what is it so other forms are also possible, provided they meet the legally prescribed conditions In other words, author's work can be expressed and in someone to another form like that she can to be tena 's statement public. On the other hand, an idea as such does not enjoy protection until it receives a specific form that is while not be materialized in someone form (Vodinelić, 2017)

Therefore, the law does not protect ideas that are not materialized in some form. However, Marić believes that the provision of our law on the exclusion of general ideas from copyright protection is insufficiently precise, and that it should actually read "thought". In this way, the distinction between thought, as *an unmaterialized*

idea, and an idea that can be *expressed* in some form is better understood Also, the question arises how to interpret the term "general ideas", which are explicitly excluded from protection. The same author believes that these should be very general " ideas, wishes and plans" to solve an issue, to do something, etc. In other words, not all ideas would be excluded from protection (provided they are materialized), but those that represent public goods, that are rudimentary, generally known, and the like (Marić, 2021). That is, if the idea is concretized, i.e. worked out in sufficient detail, it can be an author's work: "an idea as a concept or conception of an author's work already contains a proposal for how a certain question will be solved, the basic structure of what will grow into an author's work, and not only the author's intention to solve it" (Marić, 2021:60).

Procedures, methods of work, or mathematical concepts as such, as well as principles, principles and instructions contained in the author's work are also excluded from protection. This is particularly important to us for further analysis, because the essence of the dilemma is whether the constituent elements of TV format, its conceptual core, represent only mere concept that is general idea or technical instructions which they are not for the protégé author's by right or represent the original *expression* of te ideas which se like such a can legally protect (Boppert, 2018).

Originality is also required for an author's work. The concept of originality does not mean that the work must be completely new, because every work stems from social and cultural tradition, but it must have certain elements that are original, as well as be a reflection of the author's personality (Popović, 2014). This means that the work must not be the result of deliberate or unconscious imitation of the existing cultural heritage, or intellectual work determined by rules that leave no room for the expression of personal spiritual originality.[61]

The TV format is not expressly intended as a separate author's work. This means that we have to look for the possibility of its protection in the general concept of author's work. In addition, following the example of the film, the TV format could be a kind of co-authored work, if the parts are inseparable or the co-authors had the goal of creating one joint work. On the other hand, the domestic legislation also provides for the existence of a combined part, in the sense that each part of the whole can be used separately, which would perhaps best suit the nature of this intellectual property. However, the many and varied elements of the TV format complicate this discussion, given that some of them can be seen as technical instructions, or belong to some other intellectual property right than copyright.

Since plagiarism, i.e. copying TV formats, is the subject of numerous disputes, it is necessary to analyze the concept of plagiarism. Jurisprudence recognizes two

[61]Judgment of the Commercial Court of Appeal Pž n5211/17 until June 14, 2018 (Stamenković, 2020).

types of plagiarism: conceptual and literal plagiarism. Plagiarism does not mean only taking verbatim words or notes from someone else's work, but also taking over the concept. Conceptual plagiarism would represent the taking over of the basic essence or structure of a certain work, with the determination of a variation on the basis of which a "new" author's work is created (Marić, 2021:89).

As the existing regulations and literature do not provide us with definitive answers, it is necessary to analyze examples from Serbian and foreign judicial practice. Jurisprudence regarding TV formats is not uniform.

Examples from court practice in the Republic of Serbia

Although there is not a large number of disputes in this area in the Republic of Serbia, nor is judicial practice a formal source of law, we will present, as an illustration of the problem, several judgments of domestic courts.

In the first case under analysis, the plaintiff devised a commercializable TV game that consisted of selling items by public bidding to the lowest unique bidder. He expressed this idea in detail in a brochure, which he then deposited in the Intellectual Property Office of the Republic of Serbia. [62]After that, the plaintiff concluded a contract on business and technical cooperation with a television company on the basis of which a program based on the plaintiff's brochure was to be broadcast, in which citizens would send SMS messages and bid the lowest price for a certain product. However, the show was soon taken off the air. A few years after that, the defendant "State Lottery of Serbia " organized a game of chance "RTS auction" which was based on the simulation of an inverse auction (inverse auction) in which participants send bids via SMS messages to submit the lowest fictitious bids for the auction item. The plaintiff claimed that the defendant infringed his copyright and "stole" his idea for the show.

The court analyzed the factual situation and concluded that reverse auctions are based on an already known, standard principle that is similar to a traditional auction with a unique offer, as well as that this method of sale has become popular since 2002, and that the plaintiff's idea to sell goods to the public by tendering as a rule the lowest unique price offer, "which has materialized through the TV format by being broadcast on television, does not represent an author's work", i.e. that it is a public good and is not subject to copyright protection. The court also referred to the plaintiff's claim that he protected his copyright by registering with the Intellectual Property Office. The court stated that the registration and deposit of copyright works does not affect the creation of copyright, but serves only as information that a specific work has been registered

[62]The Intellectual Property Office is a special organization in the system of state administration of the Republic of Serbia, whose competence is related to industrial property rights and copyright and related rights.

The first-instance court assessed that it was a general idea and not an author's work, and the defendants contested that the plaintiff's brochure was an author's work. According to the rules on the burden of proof [63], the prosecutor was obliged to propose expert testimony " about whether it is an original spiritual creation, that is, that his idea of an auction at the lowest single price differs from all auctions of a similar genre in terms of its characteristics ", which he did not do. Therefore, the conclusion of the first-instance court, which was also confirmed by the appellate court, was that *prima faciae* such auctions have existed since before, and that they represent a general idea, so they cannot enjoy copyright protection.[64]

In the second case, it was about a synopsis [65]for a potential mega show program, which was registered in the register of works by domestic authors in 2008. The synopsis predicted that the top model, top model and photo model will be chosen in the show by a professional jury, a popular pop personality and by viewer voting via SMS messages According to the synopsis, some other details are specified, such as the goal of the show, the method of filming and possible candidates. In 2011, the defendant broadcast a series with a similar plot, with the consent of the American company, which registered the copyright of the series "ANTM" with the US Copyright Office. The lawsuit claimed that by broadcasting the disputed show in 2011, the defendant violated the plaintiff's copyright, because the broadcast series is identical to the idea and concept of the plaintiff's original work. The court concluded that the plaintiff's authorship was filed significantly later than the original American series, based on which the defendant's show was produced, registers n as author's work at the Institute of Statistics, which happened already in 2003. In addition, such a series was broadcast in other European countries

The expert gave his findings and opinion that the authorized synopsis of the plaintiff has elements of drafts, sketches, overview, but not the content, form and function of the script, that is, that the synopsis is not a script, and that similar shows existed before. As the plaintiff has registered a synopsis that has a great similarity with the format that has already been registered and broadcast in other countries, it cannot be considered that the defendant has violated the copyright of the plaintiff. The defendant derived his right to broadcast from the license of the copyright holder of the American company, whose authorship was recognized earlier. The court, however, did not deal with the issue of the nature of the synopsis as an author's work, given that the authorship in the specific case is

[63] Law on Civil Procedure ("Official Gazette of RS", no. 72/2011, 49/2013 - US decision, 74/2013 - US decision, 55/2014, 87/2018 and 18/2020), Art. 231.
[64]Verdict of the Court of Appeal in Belgrade Gž4 132/18 19 May 2021.
[65]As stated by Micić et al. (1980: 53): "A synopsis is the idea of a future work, in which its theme and idea are presented very succinctly." The length of the synopsis can vary, but it usually has several typed pages.

disputed because the defendant's show is based on a format that was registered earlier than the plaintiff did [66]

At the time of writing this paper, there is also a current case that attracted a lot of media attention in Serbia. It is a dispute between the creator of the TV show "Impression of the Week", a popular political *talk show* in which contact with viewers is possible, and in which celebrities are guests who express their impressions of the most current social events, on the one hand, and the co-author of the alleged plagiarism, of the "Hit-Twit" show, which is broadcast on no other television, on the other hand. The first-instance court concluded that the "Hit-tweet" format represents plagiarism of the plaintiff's author's work, deposited with the copyright agency for Serbia in 1995, that is, that her copyright was violated. However, the second-instance court annulled the verdict and sent it back to the first-instance court for decision.

Namely, the second-instance court stated that the first-instance was wrong in not hiring a third expert, because the experts of both sides gave different expert opinions. Although the experts agreed that in both cases they were "audiovisual works based on the model of a contact program with the presenter and guests in the studio and watched by voting for suggestions", the experts did not agree that the show "Hit-Tweet" represented plagiarism. The court referred to the fact that this form of program is not an original creation, because there were such shows before, which is a known fact, and that there must be some other similarities between the shows. As the dispute has not yet been concluded, we cannot give a final assessment, however, the opinion of the second-instance court is interesting that it is necessary to determine whether the original segments of the show were imitated, and whether there is something original in the show of the defendants.[67]

Several conclusions can be drawn from these cases. First, depositing an author's work in the Intellectual Property Office does not make that work protected by copyright, but it is a significant relief when proving authorship. According to the Law on Copyright and Related Rights, whether a given case is an author's work or not depends on its originality, which is a factual question, on which the expertise of experts in this field is mainly performed. Second, it is up to the plaintiff to prove that his work is an author's work, that is, that the defendant's work is plagiarism. In the first example, the court itself referred to the fact that certain elements of the TV format, which was the subject of the dispute, are common good, that is, they do not have sufficient originality to enjoy copyright protection.

Due to the circumstances of these cases, unfortunately, we were deprived of a more detailed consideration of the courts on the elements of the originality of the TV format and what constitutes plagiarism.

[66]Judgment of the Supreme Court of Cassation Rev 1026/2016, 16. 05. in 2018
[67] Decision of the Appellate Court in Belgrade Gž 4 201/21 24. 12. in 2021

Examples from foreign court practice

Foreign jurisprudence is far richer in terms of TV formats, but the courts have come to different conclusions. The case of *Green vs. Broadcasting Corporation of New Zealand* from 1989 represents a significant moment in the development of legal protection of TV formats which set a negative precedent for format creators in *common law* legal systems. Namely, presenter Huey Green sued the New Zealand Broadcasting Corporation for plagiarizing his talent show "Opportunity Knocks". The court ruled that his lawsuit was moot because the idea could not be protected by copyright. He also concluded that the format *is not a dramatic work* given that there is not enough unity or coherence.[68]

The Federal Court of Germany had a similar argument in the case of *TV-Design v. SWR* which concerned the alleged imitation of the TV format "L'école des fans". The court stated that a TV format is *a set of instructions* for converting a particular TV program into a form, rather than a form in itself. Following instructions or a recipe for a television program cannot constitute copyright infringement. What can enjoy protection is *the screenplay* which really represents the author's work (FRAPA, 2011).

However, there are certain examples that show that courts still recognize copyright protection for TV formats, under certain conditions. In the case of *TV Globo & Endemol v. TV SBT* the Brazilian court took the view that *the production Bible is* an expression of an idea, which can be used as proof of the originality of the TV format. The court concluded that the *Big Brother format is* protected by copyright and that the show "Casa dos Artistas" was a copy The judge stated the following, based on expert testimony:

> *"the enormous similarity between the two programs does not arise from coincidence, but from a poorly disguised and crude copy of the format of the Big Brother program .. (which) contemplates a program with a beginning, middle and end, with a detailed description, not only of the atmosphere in which people will live a certain time, but also the places where the cameras are placed. The format consists of details such as the use of microphones attached to the participants' bodies, connected 24 hours a day, musical styles, activities, etc."*

It is interesting that in this case the court recognized the protection of both the artistic and technical elements of the format, such as camera positions, visual and audio elements, the aim of which is to present a certain dramatic situation, and concluded that the show "Casa dos Artistas" represented an infringement copyright of the author of the "Big Brother" format.

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[68] Court of Appeal of New Zealand Green c Broadcasting Corporation of New Zealand [1988] 2 NZLR 490 CA

The "Big Brother" format was the subject of another dispute, but as a defendant. The plaintiff claimed that the "Survivor" format was a work of authorship, and that "Big Brother" was his plagiarism. The Dutch Supreme Court held that the combination of the twelve elements of the "Survive" format taken together is sufficiently unique and specific to be an original and therefore constitutes a protected work "as a whole". However, the court ruled that *Big Brother* is not a copy of this show (FRAPA, 2011). [69]Also interesting is the case of *Twentieth Century Fox Film Corporation v Zee Telefilms Ltd & Ors* in which the plaintiff claimed that the show constituted an unauthorized use of his series *24* The court rejected the plaintiff's allegations and concluded that the themes of the series are general, but that the narratives are sufficiently different. The court stated that the mere similarity in the presentation of the series is not a sufficient basis for copyright protection. The court also laid out several important guiding principles regarding format protection. Namely, in order to show that the work is plagiarism, it is necessary that a significant part has been copied, namely the one that concerns quality, not quantity; no protection for idea, concept, principle or discovery, originality required; a mere theme or framework cannot be protected by intellectual property rights. However a unique and recognizable theme or action is protected as a literary or dramatic work.[70]

In *Maradentro Producciones SL v Sogecable, SA* the spanish court stated that formats *can in principle be protected by copyright* because copyright protects the script and story, drawings, plans, models, sketches. If the format can be compared to a story or screenplay then it must also be protected, but there must be a "qualitative leap from a mere general concept" that results in the creation of a complex creation, which is detailed and formally structured (FRAPA, 2011). In the spirit of the previous decision, in the case *Atomis Media, SA & Outright Distribción Ltd v Televisión De Galicia, SA & CTV, SA* [71]from 2010, the Spanish court concluded that formats can be protected by copyright if they are created by a person, if they are expressed through a medium and if they are original. The court stated that the format must be similar to a screenplay or story. If the format consists of a series of elements, which are structured and combined in a certain way, it is not necessary that each individual element be original, but their unique combination enables copyright protection. In this particular case, the format was not protected as the court concluded that it was not original enough, and did not involve a "complex process" (FRAPA, 2011).

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[69]Supreme Court of the Netherlands, Castaway Television Productions Ltd & Planet 24 Productions Ltd v. Endemol Entertainment & Jon De Mol Productions, case no. C02/284HR, 2000. (FRAPA, 2011: 17-18).

[70]Delhi High Court. Twentieth Century Fox Film .. vs Zee Telefilms Ltd. & Ors. on July 10, 2012. https://indiankanoon.org/doc/72003037/

[71]Court of Appeal in A Coruña, Atomis Media, SA & Outright Distribution Ltd v. Television De Galicia SA & CTV, S.A. July 31, 2010.

Some of the more recent decisions also recognize formats as being entitled to protection. Thus, the Italian Supreme Court of Cassation ruled in 2017 years[72] concluded that TV formats can be protected in accordance with the Italian Copyright Law and clarified the conditions for such protection to be possible. Namely, a work can be qualified as a format if it has a logical and thematic connection consisting of a title, a basic narrative structure, scenography and fixed characters, which results in a structure that can be repeated. It was also stated that if a TV program consists mainly of improvised elements, it cannot be considered a format (Rosati, 2017)

It is interesting that in 2008, the Turkish Supreme Court of Appeal found that a TV format that is developed on the basis of the text and contains almost all the details, such as the specific wording that will be used during the announcement of commercials, camera lights and recording techniques will be protected as *scientific and literary work* [73]In another dispute from 2016, Turkish the court is established that "a format that does not contain a detailed description will not enjoy copyright protection, because it does not reflect the characteristics of its author", which implies that formats that have characteristics and go beyond abstract explanations of ideas are protected by copyright.[74] Thus in Turkey, TV formats can enjoy protection under the Copyright Law provided that they express the characteristics of their authors and are particularly detailed (Basaran, 2019)

Discussion and conclusion

For years, the television industry has relied on TV formats as proven "bait" for viewers. Through sales and licensing on the international market, TV formats make a very profitable business. For these reasons, the creators of TV formats, their associations and the television industry advocate for more concrete and safer legal protection against plagiarism, primarily through copyright.

Based on the analyzed cases from foreign court practice, a wide range of decisions can be observed, ranging from completely rejecting the possibility of copyright protection for TV formats, because they are just an idea or a mere set of instructions, to the views that they can be protected as a dramatic work, on the condition that they are coherent enough, or as a script, if they are detailed enough, until the recognition of all elements of the TV format, including technical elements, as a unique whole that is protected by copyright.

[72]RTI Reti Televisive Italiane Spa v Ruvido Produzioni Srl, Supreme Court, judgment 18633/17 (27 July 2017).
[73]Judgment of the 11th civil department of the Supreme Court of Appeal no. E. 2008/5996, K. 2008/12126, dated November 3, 2008, (http://www.kazanci.com)
[74]Judgment of the 11th Civil Department of the Supreme Court of Appeals no. E. 2015/10650, K. 2016/5199, dated May 9, 2016 (http://www.kazanci.com).

Also, with a certain reserve, one can observe the increasingly common tendency of the courts of different countries to recognize the possibility in principle of protecting TV formats as works of authorship and sanctioning those who have violated the property and moral rights of their authors. However, how the court will decide depends on several factors and the circumstances of each specific case. In short, the materialization of the idea of the format through a written text, brochure or script, which is sufficiently detailed, which contains both original and non-original elements, connected in such a way that they are undoubtedly an expression of the personality of the creator, is sufficiently elaborated that they are not a mere general idea, but to have an original, specific and recognizable structure. The most rudimentary ideas, genre features, and unoriginal elements of the format would not be copyrightable. Also, the way in which the notion of author's work is defined in legislation can play a role. Broader, open definitions of copyrighted works, or what constitutes infringement, leave more room for courts to adapt to socio-cultural and technical-technological innovations (Ohly, 2009).

After it has been determined that the TV format is an author's work, the next step is to analyze whether the defendant's program is a copy of it or not, that is, whether there has been a violation of the author's moral and property rights. It is mainly a factual question, which depends on the analysis of the court and the expertise of experts. What is clear is that the scope of copyright protection does not include non-original elements of the author's work. That is, if "copying" consists only in the adaptation of common places, ideas that are not original, but known from before and represent the common good, nor will it be sufficiently developed in principle that there will be no violation of rights. However, copying a certain number of original elements of the TV format (aspect of quantity) and such that they form the essence of what represents its originality (aspect of quality), certainly meets the conditions to be illegal.

In summary, in order for a certain person to succeed in his claim, he must first prove the existence of the author's work and that he is the author of that work. Then it is necessary to prove that the plagiarized work completely or substantially matches the original work, as well as that the other work was created later. A necessary element is that the plagiarized work was created by deliberate or negligent copying of the original work, that it was published without citing the original work, that it was published as one's own, and that the illegality of the publication is not exceptionally excluded [75]

Starting from the fact that considerable creativity, knowledge, skill and effort go into designing many TV formats, it can be concluded that there are arguments in favor of its copyright protection. The creativity of the creators of the TV format is reflected in combining different elements into an original structure, based on their

[75] Verdict of the Appellate Court in Belgrade, Gž 4 no 92/17 25. 06. in 2018

own thinking, skill and creativity. Given that media companies express the need for new television formats, the issue of their protection will be relevant in the future as well. Moreover, new forms of human creativity embodied in complex media forms will require a new rethinking of legal protection and adaptation of regulations and their interpretation to contemporary circumstances.

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