

THE FASHION OF TV SHOW FORMATS

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“Everybody steals from everybody, that’s Hollywood.”¹

INTRODUCTION

Imagine you are competing against strangers in an obstacle course. After being strapped to a spinning cylinder, you move onto a springboard that propels you on to a horizontally spinning platform. Your task is to make it over to a vertically rotating platform and proceed to a finish platform while avoiding a rotating set of connecting bars aimed at your knees and giant hockey pucks being thrown at you. This may not sound like the most relaxing way to spend your afternoon, but if you are the first to com-

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1. Statement by a character in the movie *Swingers*, played by Vince Vaughn, in a discussion on whether Quentin Tarantino ripped off a slow-motion sequence from Martin Scorsese’s movie *Reservoir Dogs*. *SWINGERS* (Independent Pictures 1996).

plete the obstacle course, you will have a chance to win a \$50,000 grand prize.

You may experience such an obstacle course if you travel to Sable Ranch near Santa Clarita, California² and participate in *Wipeout*, the reality game show that premiered on ABC in June 2008 and has been achieving outstanding audience ratings ever since.³ In *Wipeout*, contestants compete in a huge, comic, offbeat obstacle course, with commentators mocking and gently insulting the contestants as they compete.⁴

However, this is not your only chance to experience such an obstacle course. You could have had a similar experience close to Yokohama, Japan.⁵ On May 2, 1986, the Tokyo Broadcasting System premiered a show on Japanese television that would become a cult television hit around the world.⁶ *Takeshi's Castle* faced contestants with a variety of silly physical challenges, primarily huge obstacle courses.⁷ Watching how most of the contestants failed at the challenges proved to be very funny. Over time, the show was broadcast in over twenty-eight countries, either as a dubbed version of the original or as a local adaptation of the TV show format.⁸ In the United States, for example, Spike TV broadcast *Takeshi's Castle* under the name *MXC: Most Extreme Elimination Challenge* from 2003 to 2007.⁹ *MXC* combined reedited footage of *Takeshi's Castle* with dubbing and commentary in English that effectively spoofed the original show.¹⁰

When *Wipeout* premiered on ABC, various media outlets immediately commented on its similarity to *MXC* and *Takeshi's Castle*.¹¹ Both shows

2. An aerial view of the site is available by searching "25948 Sand Canyon Rd. Angeles National Forest, Santa Clarita, CA 91387" on Google Maps. GOOGLE MAPS, <https://maps.google.com/maps?q=34.375799,-118.411981&ll=34.376323,-118.411806&spn=0.002185,0.004128&num=1&t=h&z=19> (last visited Sept. 21, 2013).

3. On its premiere night, *Wipeout* scored the highest premiere rating of any new show in summer 2008. James Hibberd, *ABC Falls on Good Times: 'Wipeout' Is Net's Top Summer Bow Since '05*, HOLLYWOOD REP., June 26, 2008, available at 2008 WLNR 2560289. On the second *Wipeout* obstacle course located in Argentina, see *infra* text accompanying notes 237-40.

4. *About the Show*, ABC.COM, <http://abc.go.com/shows/wipeout/about-the-show> (last visited Sept. 21, 2013).

5. Takeshi's Castle, WIKIPEDIA (Sept. 19, 2013, 10:54 AM), http://en.wikipedia.org/wiki/Takeshi%27s_Castle.

6. *Id.*

7. *Id.*

8. *Id.*

9. Joanna Weiss, *Will Americans Fall for Japanese-Style Game Shows?*, BOS. GLOBE, June 24, 2008, at E1.

10. *Id.*

11. See Brian Stelter, *Japanese-Style Game Shows: Cash for Winners, Humiliation for Losers*, N.Y. TIMES, June 24, 2008, at E5; Don Kaplan, *Stupid Human Tricks: 'Wipeout' Accused of Ripping Off Spike TV's 'MXC'*, N.Y. POST, July 20, 2008, at 5; Weiss, *supra* note 9.

involve contestants competing in silly physical challenges consisting of huge obstacle courses, with the elimination of contestants during the various stages of the competition and the awarding of prizes to the winners. The contestants' failed attempts are also portrayed in a similar, painful, and comical fashion, highlighted through similar camera angles, instant replays, slow motion, and commentary. The shows have similar introductions. And both shows use similar obstacle courses, such as jumping on a floating island or jumping over large balls. Within a few months of *Wipeout's* premiere, Tokyo Broadcasting System filed a lawsuit accusing ABC and Endemol USA, the actual producer of the show, of copyright, trademark, and unfair competition law violations.¹² After three years of litigation, the case was settled in December 2011.¹³

Only a few months later, a similar legal dispute began. On June 18, 2012, *The Glass House* premiered on ABC.¹⁴ In this show, fourteen strangers, each competing for a \$250,000 prize, live in a house made of glass "with cameras recording their every move."¹⁵ The contestants are "split into two groups and compete in various physical and mental competitions."¹⁶ Every week, the viewing public votes on which of the contestants should be eliminated from the show.¹⁷ In addition, viewers can decide "what the contestants wear, where they sleep and what they eat."¹⁸

12. Order Denying Motion to Dismiss at 1-3, *Tokyo Broad. Sys., Inc. v. Am. Broad. Cos.*, No. CV 08-06550-MAN (C.D. Cal. Dec. 27, 2011); Alexandra Schwartz, *Foreign Formats—Licensing Optional?: Why ABC's "Bombshell" Memo Regarding Foreign Formats Isn't Scandalous at All*, 1 N.Y.U. INTELL. PROP. & ENT. L. LEDGER 29, 40-41 (2009). The actual litigation was more subtle than described here. It involved allegations that Endemol USA had hired a former TBS executive to work on *Wipeout* and that ABC/Endemol USA had purchased Google AdWords to redirect Google search engine users looking for MXC to sponsored advertisements for *Wipeout*. Order Denying Motion to Dismiss, *supra* at 4. Also, in addition to *Takeshi's Castle*, the litigation involved two other Japanese shows: a show called *Sasuke* that has been aired in the United States under the name *Ninja Warrior* and a female spin-off show called *Kunoichi*, which has been aired in the United States under the name *Women of Ninja Warrior*, *Kunoichi (TV series)*, WIKIPEDIA (Sept. 3, 2013, 0:38 AM), http://en.wikipedia.org/wiki/Kunoichi_%28TV_series%29. See also *infra* text accompanying note 62.

13. Order of Dismissal at 2, *Tokyo Broad. Sys., Inc.*, No. CV 08-06550-MAN; *ABC 'Wipeout' Suit Settled*, N.Y. POST, Dec. 24, 2011, at 61; Matthew Belloni, *ABC, Endemol Settle 'Wipeout' Copyright Lawsuit with Japanese Broadcaster*, HOLLYWOOD REP. (Dec. 24, 2011), <http://www.hollywoodreporter.com/thr-esq/wipeout-copyright-lawsuit-abc-endemol-276301>.

14. *The Glass House (2012 TV Series)*, WIKIPEDIA (Sept. 19, 2013, 10:39 AM), [http://en.wikipedia.org/wiki/The_Glass_House_\(2012_TV_series\)](http://en.wikipedia.org/wiki/The_Glass_House_(2012_TV_series)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

This show sounds similar to one of the most successful TV show formats ever. *Big Brother* was first aired in the Netherlands in 1999 and has since been sold to TV companies in over 100 countries, including CBS, which broadcasts the show in the United States.¹⁹ When *The Glass House* was announced, CBS immediately complained that its “plot, themes, dialogue, mood, setting, pace, characters, . . . sequence of events,” and other elements were virtually identical to those of its own reality series.²⁰ CBS also pointed out that *The Glass House* is being produced by over thirty former producers and staff members from *Big Brother* who may have had access to confidential information at CBS.²¹

After the District Court for the Central District of California had declined to issue a temporary restraining order enjoining ABC from airing the premiere of *The Glass House*,²² CBS moved forward with its lawsuit against ABC, alleging copyright infringement and misappropriation of trade secrets, as well as breach of contract and fiduciary duties.²³ When the ratings of *The Glass House* plummeted, CBS voluntarily dismissed the lawsuit against ABC, but initiated trade-secret-related arbitration proceedings against the former employees who had helped to create *The Glass House*.²⁴

Wipeout and *The Glass House* exemplify three trends in today’s television industry. First, TV formats have become a truly global business. TV shows are often highly successful in a number of countries. Second, the TV industry turns to courts to determine whether new TV show formats can benefit from legal protection against imitation. Third, format imitation is a widespread phenomenon in today’s television industry. In fact, format imitation is so common that, in 2008, an ABC executive vice president wrote an internal memo urging employees to “carefully scrutinize” whether licensing foreign formats was “necessary or appropriate.”²⁵ When this memo was

19. Jean K. Chalaby, *The Making of an Entertainment Revolution: How the TV Format Trade Became a Global Industry*, 26 EUR. J. COMM. 293, 300 (2011); *Big Brother (TV Series)*, WIKIPEDIA (Sept. 19, 2013, 5:53 PM), [http://en.wikipedia.org/wiki/Big_Brother_\(TV_series\)](http://en.wikipedia.org/wiki/Big_Brother_(TV_series)); *Big Brother Countries*, WIKIPEDIA, (July 18, 2011, 3:40 PM), http://en.wikipedia.org/wiki/File:Big_brother_countries.PNG.

20. Order Regarding Application for Temporary Restraining Order at 8, *CBS Broad., Inc. v. Am. Broad. Cos.*, No. CV 12-04073-GAF (JEMx) (C.D. Cal. June 21, 2012).

21. *Id.* at 14.

22. *Id.*; see also Bill Carter, *CBS Threatens ABC over Reality Show*, N.Y. TIMES, May 7, 2012, at C2.

23. First Amended Complaint, *CBS Broad.*, No. 12-CV-04073-GAF (JEMx), at 31-41.

24. Gina Hall, ‘Big Brother’ Throws Stones at ‘Glass House,’ L.A. BUS. J., Nov. 19, 2012, available at 2012 WLNR 24659396; Ted Johnson, ‘Glass House’ Team Sues CBS, VARIETY, Nov. 19, 2012, available at 2012 WLNR 24635985.

25. Nikki Finke, *Bombshell ABC Studios Memo Is Blatant Blueprint to Rip Off Foreign TV Series*, DEADLINE HOLLYWOOD (July 10, 2008),

leaked, it created uproar in the TV format industry as it was interpreted as a sign that ABC deemed it appropriate to imitate TV formats without entering into licensing deals with the original format developer.²⁶

For intellectual property scholars, the TV format industry is puzzling. While the legal protection of TV formats is weak,²⁷ there is a vibrant global licensing market on which they are traded. In fact, over the years, the TV format industry has developed into a multi-billion-dollar business.²⁸ At the same time, many TV formats are imitated, both within and across broadcasting territories,²⁹ without any authorization from the original format developer. If one believes that intellectual property protection is necessary in order to provide proper incentives for creative activity,³⁰ it is interesting to analyze how the TV format industry survives in an environment of low intellectual property protection and whether there is a need to change the level of protection.

This Article analyzes how the TV show format industry is managing to survive and thrive in an environment that offers only a limited level of protection for creative activity. The Article identifies various key characteristics of the industry and describes how industry participants are dealing with them. By contributing to an emerging scholarship that focuses on industry studies, the Article locates the TV show format industry within the broader scholarship on “intellectual production without intellectual property.”³¹

Part I of this Article gives an overview of the TV format industry, both in the United States and internationally. Part II begins with an analysis of the extent to which TV formats can be protected by intellectual property and related legal regimes, both in the United States and in Europe. It then discusses the various extra-legal protection mechanisms that the industry sometimes uses successfully, concluding that neither the legal nor the extra-legal mechanisms provide a reasonably high level of protection against TV format imitation. Part III presents a novel theory to explain why the TV format industry is able to survive in an environment of low protection.

<http://www.deadline.com/2008/07/bombshell-abc-studios-memo-a-blueprint-to-rip-off-foreign-tv-series>; Schwartz, *supra* note 12, at 29.

26. See Schwartz, *supra* note 12, at 30.

27. See *infra* Section II.A.

28. See *infra* note 77.

29. For examples of format imitation both within and across borders, see *infra* text accompanying notes 167-71, 290-303. In many cases, but not all, broadcasting territories will coincide with country borders.

30. On the standard law and economics account of intellectual property protection, see *infra* text accompanying notes 240-45.

31. Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 *CARDOZO L. REV.* 1437, 1437 (2010). On this literature, see *infra* text accompanying notes 259-63.

While the industry uses both the legal and extra-legal protection mechanisms available, it also benefits from free format imitation. Because of both supply-side and demand-side herding and the resulting fashion cycle, format imitation is abundant in the industry. Like the fashion industry, the TV show format industry has developed institutions that enable it to cope with uncertain demand and unpredictable profitability in an environment of low intellectual property protection.³² The Article thereby demonstrates the great diversity and flexibility of appropriation strategies in a world of limited and uncertain allocation of property rights.

I. THE TV FORMAT INDUSTRY

While no universally accepted definition of a TV show format exists, a format usually includes the plot, storylines, themes, mood, settings, music, rules, graphics, sequence of events, and production guidelines.³³ These abstract descriptions of the format form the concept that underlies the series and that is carried out in each episode.³⁴ A TV show format, therefore, consists of the invariable elements in a program that form the basis for the variable elements in individual episodes.³⁵

The development and trading of formats is an old phenomenon in the entertainment industry. Radio formats were copied as far back as the 1930s, and the first TV format imitations occurred in the 1940s.³⁶ Until the 1970s,

32. In an article and book on fashion design, Kal Raustiala and Christopher Sprigman argue that the free appropriability of fashion design promotes innovation and benefits originators due to “induced obsolescence” and “anchoring.” See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 43-49 (2012). *But see* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009) (arguing for a system of limited intellectual property protection for fashion design).

33. See Jay Rubin, Note, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 662 n.1 (2006).

34. *Id.*

35. Various definitions and descriptions of the term “TV show format” are given by ALBERT MORAN WITH JUSTIN MALBON, *UNDERSTANDING THE GLOBAL TV FORMAT* 20 (2006); Rubin, *supra* note 33, at 662 n.1; Frank L. Fine, *A Case for the Federal Protection of Television Formats: Testing the Limit of “Expression,”* 17 PAC. L.J. 49, 51 (1985); J. Matthew Sharp, Note, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177, 183-99 (2005); Neta-Li E. Gottlieb, *Free to Air?—Legal Protection for TV Program Formats*, 51 IDEA 211, 214 (2011); and Klaus-Dieter Altmepfen, Katja Lantzsich & Andreas Will, *Flowing Networks in the Entertainment Business: Organizing International TV Format Trade*, 9 INT’L J. MEDIA MGMT. 94, 95 (2007).

36. See Jean K. Chalaby, *At the Origin of a Global Industry: The TV Format Trade As an Anglo-American Invention*, 34 MEDIA CULTURE & SOC’Y 36, 37-38 (2012); MORAN WITH MALBON, *supra* note 35, at 22.

however, programs, movies, and TV series, all of which were often produced in Hollywood, dominated the TV business.³⁷ Thereafter, TV shows bulked larger in the programming decisions of broadcasters.³⁸ While most formats still originated in the United States, TV shows started to travel across the globe.³⁹ Shows such as *The Price is Right*, *Family Feud*, and *Wheel of Fortune* were licensed with great success to various foreign territories.⁴⁰ Still, the industry was highly concentrated, and international format licensing was restricted to a single genre that was usually not aired at prime time: the game show.⁴¹

While primetime programming in the 1980s consisted primarily of scripted series,⁴² the industry changed significantly during the 1990s. Digital broadcasting technologies greatly increased the number of available TV channels and hence the demand for TV programming.⁴³ Moreover, in many European countries, the abolition of public broadcasting monopolies led to an explosion in the number of TV channels available.⁴⁴ In addition to the sheer increase in the number of broadcasters, these new market entrants often lacked the knowledge necessary to create TV shows that were attractive to their audience.⁴⁵ These changes in the technological, economic, and policy landscape spurred significant demand for TV show format development.⁴⁶

In the 1990s, more and more formats were created outside the United States, particularly in Europe.⁴⁷ Truly global TV format production companies emerged,⁴⁸ and U.S. broadcasters increasingly included foreign TV

37. See Chalaby, *supra* note 36, at 43-44.

38. *Id.*

39. See *id.* at 45-46.

40. While *The Wheel of Fortune* generated twenty-three local productions, *The Price Is Right* led to twelve local productions. *Id.* at 44.

41. *Id.* at 45. In the 1980s, one company (Fremantle Corporation) was said to produce or distribute about 50% of all game shows on air worldwide. *Id.* at 44.

42. Daniel Fox, Comment, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223, 224 & n.3 (2005) (citing evidence of primetime programming in the United States in the 1980-1981 season).

43. See Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 529 (2000).

44. Jean K. Chalaby, *The Making of an Entertainment Revolution: How the TV Format Trade Became a Global Industry*, 26 EUR. J. COMM. 293, 304 (2011); see Gottlieb, *supra* note 35, at 256.

45. Chalaby, *supra* note 36, at 45; Chalaby, *supra* note 44, at 304.

46. Chalaby, *supra* note 36, at 45; see Gottlieb, *supra* note 35, at 256.

47. Chalaby, *supra* note 36, at 45, 47; Gottlieb, *supra* note 35, at 256.

48. Gottlieb, *supra* note 35, at 256; see Sukhpreet Singh, *The Protection of Television Formats: Intellectual Property & Market Based Strategies* 16-17 (March 2010) (unpublished Ph.D. thesis, Bournemouth University) (on file with Bournemouth University). On the emergence of Endemol and Pearson Television, see Chalaby, *supra* note 36, at 46.

formats in their programming.⁴⁹ The portfolio of format genres expanded considerably beyond games shows. Reality television and factual entertainment became important cornerstones of the TV format business.⁵⁰

In the late 1990s, four “super-formats” transformed the international TV business: *Who Wants to Be a Millionaire*, *Survivor*, *Big Brother*, and *Idols*. All of these formats originated in Europe.⁵¹ They have been adapted in territories around the globe with unprecedented speed and in unprecedented quantity.⁵² *Who Wants to Be a Millionaire*, a format now owned by 2waytraffic,⁵³ has been licensed to over 150 countries and has been seen by more than two billion viewers worldwide.⁵⁴ *Survivor*, which originated in the United Kingdom and Sweden, has been licensed to over sixty countries.⁵⁵ On U.S. television, it received an average 14.4 rating per episode for the first season and a 28.6 rating for the first season’s finale.⁵⁶ *Big Brother*, a format developed by the Dutch company Endemol, aired in more than seventy countries in 2013.⁵⁷ *Idols*, which originated in the United Kingdom, has been licensed to over forty countries, including the United States (*American Idol*), the Philippines, and Iraq.⁵⁸ In the Netherlands, the *Idols* format

49. Seth Sutel, *Influx of TV Imports on Schedule for Fall*, ALBANY TIMES UNION, Sept. 19, 2000, at B5; Bill Carter, *A World of Imports in TV’s New Season*, N.Y. TIMES, Aug. 26, 2008, at E1.

50. Chalaby, *supra* note 36, at 47; Chalaby, *supra* note 44, at 299-300, 303.

51. Chalaby, *supra* note 44, at 298-301.

52. Chalaby, *supra* note 36, at 37; Chalaby, *supra* note 44, at 294, 298.

53. 2waytraffic is a Dutch Sony subsidiary. Sukhpreet Singh, *Market-Based Strategies: An Alternative to Legal Protection*, in FORMAT RECOGNITION & PROT. ASS’N, THE FRAPA REPORT 2011: PROTECTING FORMAT RIGHTS 49, 49 (2011), available at http://www.frapa.org/wp-content/uploads/Report/FINAL%20FRAPA_Report_2011.pdf.

54. Bill Carter, ‘Millionaire,’ *Far from Its Final Answer*, N.Y. TIMES, Aug. 9, 2009, at AR18.

55. The format premiered in 1997 on Swedish television. *Survivor (TV Series)*, WIKIPEDIA (Sept. 9, 2013, 1:37 PM), [http://en.wikipedia.org/wiki/Survivor_\(TV_series\)](http://en.wikipedia.org/wiki/Survivor_(TV_series)).

56. Jesse Stalnaker, *Has Reality Programming Been Voted off the Island of Copyright Protection? Finding Protection as a Compilation*, 16 SETON HALL J. SPORTS & ENT. L. 162, 162-63 (2006); see also JASON MITTELL, TELEVISION AND AMERICAN CULTURE 89-90 (2010). The Nielsen ratings estimate the proportion of U.S. households equipped with a television set that watch a particular TV show. A 14.4 rating for a program means that, on average, 14.4% of all television-equipped households in the United States watched that program at any given moment. *Nielsen Ratings*, WIKIPEDIA (Sept. 11, 2013, 2:29 PM), http://en.wikipedia.org/wiki/Nielsen_ratings.

57. *Endemol Brings Big Brother to Vietnam*, ENDEMOL (Aug. 23, 2013), <http://www.endemol.com/news/endemol-brings-big-brother-to-vietnam> (Aug. 23, 2013); see also *Big Brother (TV Series)*, *supra* note 19. For a map showing all the countries in which *Big Brother* has been aired, see *Big Brother Countries*, *supra* note 19.

58. *American Idol*, WIKIPEDIA (Sept. 18, 2013, 1:57 PM), http://www.wikipedia.org/wiki/American_Idol. In the United Kingdom, the show is called *Pop Idol*. *Id*. For a map showing all the countries in which *Idols* has been aired, see *Countries with Idols Series*, WIKIPEDIA (June 16, 2013, 12:45 PM), http://en.wikipedia.org/wiki/File:Countries_with_Idol_series.svg.

became the “highest rated series . . . since the start of commercial television” in that country.⁵⁹ The finale of the Czech version (entitled *Česko Hledá Superstar*) was watched by over one-third of the population, and *American Idol* has consistently attracted around twenty-two million viewers per year, ranking it among the most successful TV series in U.S. television history.⁶⁰ Other successful formats followed. The British format of *The Biggest Loser* has been produced in twenty-five countries and shown in ninety,⁶¹ and *Sasuke*, a Japanese all-action obstacle course show, which is called *Ninja Warrior* in the United States and allegedly served as a model for *Wipeout*, has been broadcast in over 150 countries.⁶²

The TV format industry has developed a highly heterogeneous product portfolio. At first sight, one might well associate TV formats with the most notorious game shows (*Deal or No Deal*, *The Dating Game*, *Cash Cab*), quiz shows (*Who Wants to Be a Millionaire?*), and talent shows (*American Idol*, *America's Next Top Model*). But the industry also produces formats for sitcoms (*The Office*),⁶³ as well as action (*24*),⁶⁴ variety (*This Is Your Life*),⁶⁵ talk (*The Dr. Oz Show*),⁶⁶ documentary (*Go Back to Where You Came From*),⁶⁷ reality (*Survivor*, *The Apprentice*, *Kitchen Nightmares*),⁶⁸ teleno-

59. Sukhpreet Singh & Martin Kretschmer, *Strategic Behaviour in the International Exploitation of TV Formats: A Case Study of the Idols Format*, in ADAPTING IDOLS: AUTHENTICITY, IDENTITY AND PERFORMANCE IN A GLOBAL TELEVISION FORMAT 11, 12-13 (Koos Zwaan & Joost de Bruin eds., 2012).

60. *Id.*

61. Amy Chozick, *Trolling Overseas for Concepts to Mine: A Reality Show's 'Format' Can Be Churned Globally*, N.Y. TIMES, Nov. 21, 2011, at B1.

62. See *Wipeout (2008 U.S. Game Show)*, WIKIPEDIA (Sept. 15, 2013, 10:23 PM), [http://en.wikipedia.org/wiki/Wipeout_\(2008_U.S._game_show\)](http://en.wikipedia.org/wiki/Wipeout_(2008_U.S._game_show)); Gavin J. Blair, *Japan Eyes the Global Market*, HOLLYWOOD REP., Mar. 21, 2012, available at 2012 WLNR 6100202.

63. *The Office* debuted in 2001 in the United Kingdom, where it became a hit. See William M. Kunz, *Prime-Time Island: Television Program and Format Importation into the United States*, 11 TELEVISION & NEW MEDIA 308, 320 (2010). It premiered in the United States in 2005. *Id.*

64. While the action TV series *24* has been broadcast in many territories in its English-language original or as a synchronized version, 20th Century Fox announced in 2011 that it had licensed the format to create an Indian version of *24* with actor Anil Kapoor (*Slumdog Millionaire*) playing the Indian version of Jack Bauer. See Lacey Rose, *'Slumdog Millionaire's' Anil Kapoor to Play Indian Jack Bauer*, HOLLYWOOD REP., Nov. 9, 2011, available at 2011 WLNR 27165128.

65. In this show format, a host surprises a special guest and takes him through his life in front of an audience. This is *Your Life*, WIKIPEDIA (June 28, 2013, 10:51 PM), http://en.wikipedia.org/wiki/This_Is_Your_Life.

66. In the fall of 2010, Sony Pictures Television licensed the format of *The Dr. Oz Show* to Chinese television. See *Sony's 'Dr. Oz Show' Commissioned in China* INDIANTELEVISION.COM (Oct. 4, 2010, 12:25 PM), <http://www.indiantelevision.com/headlines/y2k10/oct/oct13.php>.

67. In March 2012, BBC America announced that it would make a local U.S. version of the hit Australian documentary series *Go Back to Where You Came From*. See Pip

vela (*Ugly Betty*),⁶⁹ hoax (*The Joe Schmo Show*),⁷⁰ and factual show formats (*SuperNanny*, *Farmer Wants a Wife*, *Wife Swap*, *Trading Spaces*).⁷¹

From the perspective of a broadcasting station, TV show formats are highly attractive content. Many of them are relatively cheap to produce⁷² while delivering relatively high viewer ratings.⁷³ TV formats are highly successful on the programming market. Reality shows, for example, have increasingly replaced sitcoms in the race for attractive programming slots.⁷⁴ Moreover, broadcasting stations can use TV show formats as a branding device. Successful TV shows can lock in their audience over the lifetime of

Bulbeck, *Australia's SBS, Cordell Jigsaw Sell Top Rating Doc Format to BBC America*, HOLLYWOOD REP., Mar. 13, 2012, available at 2012 WLNR 5385474. In this documentary format, six Australians are taken "'back' to where identified asylum seekers began their journey to Australia." *Id.* They experience immigration raids in Malaysia, slums in Jordan, and Kenyan refugee camps. *Id.*

68. On these formats, see *Survivor (TV series)*, *supra* note 55; *The Apprentice (U.S. TV series)*, WIKIPEDIA (Aug. 28, 2013, 2:35 AM), http://en.wikipedia.org/wiki/The_Apprentice_%28U.S._TV_series%29; *Kitchen Nightmares*, WIKIPEDIA (Oct. 23, 4:35 AM), http://en.wikipedia.org/wiki/Kitchen_Nightmares.

69. Telenovelas are TV soap operas originating in Latin America. See John Hecht, *A Novel Approach: After Years of Garnering Huge Ratings in Spanish-Speaking Markets, Mexico's Telenovelas Have Become a Global Phenomenon*, HOLLYWOOD REP., Sept. 26, 2006, available at 2006 WLNR 24592231. *Ugly Betty* is based on the Colombian telenovela *Yo Soy Betty, la Fea*. Kunz, *supra* note 63, at 320. The format has been licensed to over one hundred countries. *Id.*

70. In this show airing on Spike, "target . . . persons are led to believe that they are contestants on a reality television show." *The Joe Schmo Show*, WIKIPEDIA (Sept. 16, 2013, 11:54 PM), http://en.wikipedia.org/wiki/The_Joe_Schmo_Show. In addition to the U.S. version, the show has been produced in New Zealand, France, and Spain. *Id.* On a show in which the residents of Riverside, Iowa were made to believe that William Shatner would film a science fiction movie in their town, see *Invasion Iowa*, WIKIPEDIA (June 5, 2013, 4:44 AM), http://en.wikipedia.org/wiki/Invasion_Iowa.

71. On this categorization, see FORMAT RECOGNITION & PROT. ASS'N, *THE FRAPA REPORT 2009: TV FORMATS TO THE WORLD 18-19* (2009). For other categorizations, see *THE TELEVISION GENRE BOOK* (Glen Creeber ed., 2001).

72. Bill Carter, *The Laughter Is Fading in Sitcom Land: Reality Shows, Costs and Innovative Comedy Threaten a TV Staple*, N.Y. TIMES, May 24, 2004, at E1 (noting that scripted shows cost between \$850,000 and \$1.2 million on average to produce, whereas an average reality show costs about \$500,000); see also MITTELL, *supra* note 56, at 91; Ted Magder, *Television 2.0: The Business of American Television in Transition*, in REALITY TV: REMAKING TELEVISION CULTURE 141, 147 (Susan Murray & Laurie Ouellette eds., 2d ed. 2009). The show *Shark Tank* cost about \$750,000 to produce, which is considered cheap given its ratings. Bill Carter, *Reality TV, Shaking Off Recession, Takes Entrepreneurial Turn*, N.Y. TIMES, Mar. 28, 2011, at B1; see also Carter, *supra* note 54, at AR18 (noting that shows such as *Who Wants to Be a Millionaire?* "were supposed to provide half the rating or more for 75 percent of the price"). *The Voice*, however, cost \$2.3 million to produce. Kim Masters & Lacey Rose, *The Miracle of The Voice*, HOLLYWOOD REP. (June 24, 2011), available at <http://www.hollywoodreporter.com/news/miracle-voice-202039>.

73. Singh, *supra* note 48, at 16-17, 21.

74. Carter, *supra* note 72, at E5.

the show. Broadcasting stations can use TV shows to communicate a particular channel image to their viewers.⁷⁵ Finally, the production of TV formats readily aligns with the vertical disintegration that can be observed in some areas of the television business over the last decades. Nowadays, broadcasting stations often contract out TV productions to specialized companies that can produce TV content at lower cost. In fact, many important formats—including *Who Wants to Be a Millionaire?*, *Survivor*, *Big Brother*, and *Idols*—were developed by independent production companies that specialize in the programming market.⁷⁶

Today, the TV format business constitutes a multi-billion-dollar industry.⁷⁷ This industry is a truly global one. The United Kingdom is the largest exporter of TV formats, followed by the United States, the Netherlands, Argentina, Sweden, and Germany.⁷⁸ Despite its global reach, the industry puts great effort into adapting formats to the specific demands and cultures of particular territories.⁷⁹ *Who Wants to Be a Millionaire?* is called *Oh! Lucky Man* in Russia; *Britain's Got Talent* had to change its title when it aired in the United States for obvious reasons; and the logo for the Indian

75. Singh, *supra* note 48, at 55; Gottlieb, *supra* note 35, at 245.

76. Chalaby, *supra* note 44, at 305. For a more nuanced picture of the TV format industry and its different players, see Singh, *supra* note 48, at 18-21; Gottlieb, *supra* note 35, at 257; and Altmeyden, Lantzsch & Will, *supra* note 35, at 97-101. On the reverse trend towards vertical integration, see *infra* text accompanying note 244.

77. According to one industry report, the production volume generated by traded TV formats was €9.3 billion for the years 2006-2008, with 445 original formats traded among fourteen countries. FORMAT RECOGNITION & PROT. ASS'N, *supra* note 71, at 7-8. Other estimates range between €9.3 and 13.1 billion. See Singh, *supra* note 48, at 17.

78. An industry study of the TV format industry in fourteen countries (Argentina, Australia, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, the United Kingdom, and the United States) between 2006 and 2008 found that the United Kingdom had exported 146 unique formats; the United States, 87; the Netherlands, 35; Argentina, 28; Sweden, 22; and Germany, 21. FORMAT RECOGNITION & PROT. ASS'N, *supra* note 71, at 11. Analysis of the hours of production generated worldwide by exported formats shows that the United Kingdom again takes the lead (13,781 hours), followed by the United States (10,783 hours), the Netherlands (9,677 hours), Argentina (7,203 hours), France (3,252 hours), Australia (2,510 hours), and Germany (2,242 hours). *Id.* at 13; see also Mimi Turner, *U.K. Still Wears Crown in Exporting TV Formats*, HOLLYWOOD REP., Aug. 21, 2008, available at 2008 WLNR 25731792; Singh, *supra* note 48, at 17-18. According to Amy Chozick, 33% of Discovery's 2010 revenue, 46% of New Corporation's, and 29% of Time Warner's came from international operations. Chozick, *supra* note 61, at B7.

79. Singh, *supra* note 48, at 195-203; Gottlieb, *supra* note 35, at 245; Chozick, *supra* note 61, at B7 (quoting Marco Bassetti, then acting chief executive of Endemol, saying, "We always say, think local but package globally."); see also Chalaby, *supra* note 36, at 45; Chalaby, *supra* note 44, at 304. On the general concept of "glocalization," see Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in GLOBAL MODERNITIES 25 (Mike Featherstone, Scott Lash & Roland Robertson eds., 1995); and see generally ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992).

version of *Who Wants to Be a Millionaire?* changed when the Indian rupee adopted a new symbol.⁸⁰ But the localization of TV show formats goes beyond mere changes in titles or logos. The content of the format can also be heavily adapted to specific territories. While in the Indian version of *The Biggest Loser*, contestants must engage in Bollywood-inspired dances and bake whole-wheat naan bread, in the Middle Eastern version women work out in separate gyms and must cover themselves during weigh-ins.⁸¹ When the British format of *The Office* was adapted to a United States audience, producer Greg Daniels said, “I’m doing the exact same series but with 10 percent more hope.”⁸²

Before a TV show format is successfully broadcast, it usually undergoes four main stages of development.⁸³ First, a developer comes up with a *program idea*.⁸⁴ This idea is then developed into a written description of the concept and a detailed show layout including visual elements, titles, scripts, theme music, target audience, and casting ideas. This *paper format*, which can range from two to seventy pages, is then developed into a full-fledged *program format*.⁸⁵ The program format contains detailed information on the technical and production elements of the show, such as music, set design, computer programs, budget overview, audience demographics, and characteristics of participants.⁸⁶ It serves as a blueprint for the later creation of episodes in different territories.⁸⁷ It is usually laid down in a so-called format bible, which is accompanied by style guides containing descriptions and visualizations of logos, fonts, and colors.⁸⁸ The final *episodes* are developed out of the program format to be broadcast by a broadcasting station in a particular territory. While final episodes are sometimes sold “as is,”⁸⁹ this Article focuses on the market for program formats, which can be developed into various episodes later.

80. Singh, *supra* note 53, at 50. For other examples of adapting TV show formats to local territories, see Singh, *supra* note 48, at 195-203.

81. Chozick, *supra* note 61, at B7.

82. Bill Carter, *supra* note 49, at E6. On the differences between the Danish and the Australian version of *Idols*, see Pia Majbritt Jensen, *How Media System Rather than Culture Determines National Variation: Danish Idols and Australian Idol Compared*, in ADAPTING IDOLS: AUTHENTICITY, IDENTITY AND PERFORMANCE IN A GLOBAL TELEVISION FORMAT, *supra* note 59, at 27 (arguing that the differences between the two versions cannot be explained by the cultural differences between the two countries).

83. Gottlieb, *supra* note 35, at 215-16; Altmeppen, Lantzsch & Will, *supra* note 35, at 95; see also MORAN WITH MALBON, *supra* note 35, at 23-25.

84. Gottlieb, *supra* note 35, at 215.

85. *Id.*

86. *Id.*

87. *Id.*

88. Singh, *supra* note 48, at 173. A typical format bible and style guide run from sixty to 300 printed pages. *Id.*

89. Gottlieb, *supra* note 35, at 215.

II. THE TV FORMAT INDUSTRY AS A LOW PROTECTION INDUSTRY

As the preceding Part has shown, the TV format industry has developed into a vibrant global industry over the last twenty-five years. Protecting TV formats by intellectual property law is, however, complicated, as the following Section demonstrates. While some of the deficits of legal protection can be outweighed by other protection mechanisms outside the law,⁹⁰ in general, the TV format industry lives in an environment with a considerable amount of legal uncertainty, a low level of protection, and a high level of format imitation.

A. Legal Protection

With respect to the trading and protection of TV formats, two stages of the format development process must be distinguished. In the first stage, the creator of a paper format contacts a production company or TV network in order to propose developing it into a full-fledged program format.⁹¹ During the negotiations between the paper format developer and producer, the format developer must take the risk of revealing his format idea to the producer without landing the deal.⁹² Once the producer has learned the idea, he may cancel the contract negotiations and, a few months later, develop the program format without involving the original developer.⁹³

This situation happens frequently and has been the subject of considerable discussion, litigation, and case law in contract and intellectual property law. Whether the format developer can protect his format idea in such a case depends on questions of non-disclosure agreements as well as implied-in-fact and implied-in-law contracts.⁹⁴ Theories of “idea submission” overlap with misappropriation and breach-of-confidence doctrines.⁹⁵ Even if the

90. See *infra* Section II.B.

91. On the terms “paper format” and “program format,” see *supra* text accompanying notes 83-88.

92. See Aileen Brophy, Note, *Whose Idea Is It Anyway? Protecting Idea Purveyors and Media Producers After Grosso v. Miramax*, 23 CARDOZO ARTS & ENT. L.J. 507, 508 (2005).

93. See Gottlieb, *supra* note 35, at 221-23.

94. See *id.* at 223-24, 240-43.

95. For a detailed description of the mechanisms offered by contract and intellectual property law, see Rubin, *supra* note 33. See generally Kenneth Basin & Tina Rad, “I Could Have Been a Fragrance Millionaire”: Toward a Federal Idea Protection Act, 56 J. COPYRIGHT SOC’Y U.S.A. 731 (2009); Gottlieb, *supra* note 35, at 221-43; Samuel M. Bayard, Note, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603 (2001); Brophy, *supra* note 92; Kelly Rem, Note, *Idea Protection in California: Are Writers Too Readily Compensated for Their Screenplays?*, 28 HASTINGS COMM. & ENT. L.J. 333 (2006); Jonathan S. Katz, Note, *Expanded Notions of Copyright Protection: Idea Protection Within the*

format developer can protect his format idea on such grounds, the relationship between idea-submission law and copyright preemption is a complex one.⁹⁶

The negotiations between the paper format developer and the producer, and the problem of how to protect unpublished formats in such negotiations, jointly constitute a typical contract theory problem.⁹⁷ It is based on the information paradox identified by Kenneth Arrow in the 1960s.⁹⁸ The potential purchaser of an idea wants to know the characteristics of that idea before deciding whether or not to buy it.⁹⁹ Once the purchaser knows the characteristics, however, the seller has effectively transferred the idea to the purchaser without any compensation.¹⁰⁰ As this can be foreseen by the seller, he may well be reluctant to engage in negotiations with the purchaser or may even be less motivated to come up with the idea in the first place, as he may not be able to profit from selling it.¹⁰¹ This bargaining situation can lead to inefficient bargaining solutions or even breakdowns, resulting in inefficiencies.¹⁰²

This Article does not focus on this stage of TV format development for two reasons. First, the legal system and Hollywood practice have developed various mechanisms for overcoming potential misappropriation of ideas by the TV format purchaser. Industry participants use non-disclosure and submission release agreements, agents, and vertical integration, as well as misappropriation and breach-of-confidence doctrines, in order to prevent

Copyright Act, 77 B.U. L. REV. 873 (1997); Brian Devine, Note, *Free as the Air: Rethinking the Law of Story Ideas*, 24 HASTINGS COMM. & ENT. L.J. 355 (2002); Camilla M. Jackson, Note, *"I've Got This Great Idea for a Movie!" A Comparison of the Laws in California and New York That Protect Idea Submissions*, 21 COLUM.-VLA J.L. & ARTS 47 (1996); 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D (2013). See also *Kienzle v. Capital Cities/Am. Broad. Co.*, 774 F. Supp. 432 (E.D. Mich. 1991); *Smith v. Weinstein*, 578 F. Supp. 1297 (S.D.N.Y. 1984).

96. On this question, see *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011); *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424 (2d Cir. 2012); and Bayard, *supra* note 95. On other copyright cases concerning unpublished TV formats, see 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:12 n.3 (2013); and *Meakin v. British Broad. Corp.*, [2010] EWHC (Ch) 2065 (Eng.).

97. An unpublished format exists on paper, but has not been publicly broadcast and is, therefore, only known to the original developer, as well as to potential producers, broadcasters, and other involved parties. On this terminology, see Gottlieb, *supra* note 35, at 221.

98. Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 614-16 (Richard R. Nelson ed., 1962).

99. *Id.* at 615.

100. *Id.* at 614-15.

101. See *id.* at 614-16.

102. *Id.*

and settle disputes.¹⁰³ The Writers Guild of America operates a script registry allowing authors to provide a dated record of their claim to script authorship in case of a dispute.¹⁰⁴ Second, this is not a problem specific to the TV format industry. Arguably, the entire patent and trade secrecy system can be understood as partial solutions to Arrow's information paradox.¹⁰⁵

Instead, this Article focuses on the second stage of the TV format trade. Once episodes of a fully developed TV format have been broadcast by a broadcasting station, other stations in the same or another territory can develop and broadcast close or partial imitations of the original format.¹⁰⁶ At this stage, imitating a published format does not seem particularly challenging.¹⁰⁷ Once broadcast, much information about the TV format is publicly available, either by watching TV or by searching for episodes on YouTube, a common distribution channel for international TV formats these days.¹⁰⁸

At first sight, trademark protection looks as if it could offer some help against imitation of published TV formats. While the titles, logos, and similar signs of most TV formats can indeed be protected with trademarks, such protection does not help avoid format imitation.¹⁰⁹ Typically, a competing broadcasting station will imitate the structure and idea of an existing TV format without using its trademarks. Rather, the station will market its derivative format under a different brand. While trademark-related TV format disputes exist, trademark law does not protect TV format developers or

103. Gottlieb, *supra* note 35, at 223-33. On the various legal mechanisms, see *supra* note 95.

104. *WGAWest Registry*, WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org/registration/index.html> (last visited Sept. 21, 2013); Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 BERKELEY J. EMP. & LAB. L. 215 (2011); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1366-68 (1996).

105. On literature showing how the patent system provides an escape from Arrow's information paradox, see Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 748 n.228 (2012). On trade secrets, see Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets As IP Rights*, 61 STAN. L. REV. 311, 336-37 (2008). For a general critical assessment of the relationship between Arrow's information paradox and the intellectual property system, see Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227 (2012).

106. Gottlieb, *supra* note 35, at 246.

107. On the terminology of unpublished versus published formats, see Gottlieb, *supra* note 35, at 220.

108. For reasons why broadcasters may still have an interest in paying for a TV format license at this stage, see *infra* Section II.B.

109. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 10:1, :6, :20 (4th ed. 2013); Akash Sachdeva & Jonathan McDonald, *Television Formats: Does English Law Adequately Protect the Industry and What Can the Industry Do to Protect Itself?*, 24 ENT. L. REV. 10, 11-12 (2013).

broadcasters against format imitation under a different brand.¹¹⁰ Without consumer confusion as to source or sponsorship, a trademark is not a powerful tool to prevent TV format imitation.¹¹¹

As neither trade dress¹¹² nor patent law¹¹³ protects against imitating published TV formats, this Article now turns to copyright and unfair competition law. In the United States, copyright law grants protection to “original works of authorship fixed in any tangible medium of expression.”¹¹⁴ While the potential media of expression are very broad, it is a guiding principle of U.S.—and, in fact, international—copyright law that a copyright cannot subsist in ideas, facts, procedures, or concepts. Rather, only the expression of a work of authorship can be copyrighted.¹¹⁵ According to this idea/expression dichotomy, copyright protection grants exclusive rights in

110. *Sullivan v. CBS Corp.*, 385 F.3d 772, 779 (7th Cir. 2004) (holding that the band “Survivor” cannot enforce its trademark against CDs and merchandise of the TV show *Survivor*, as no likelihood of confusion as to the origin of the CDs and merchandise was presented); *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625 (9th Cir. 2005) (holding similarly that owner of “Surfvivor” mark for beach-themed products could not enforce its trademark against *Survivor* merchandise, as no likelihood of confusion as to the origin of the merchandise was presented); see also Cheryl L. Slay, *Trademark Lessons from Reality TV: Real Issues, Real Solutions*, 40 MD. B.J., Mar.-Apr. 2007, at 19.

111. While this Article points to some similarities between the market for TV shows and the market for fashion, important differences do exist between these two markets. Compared to the fashion market, trademark protection is less important in the TV format market, as TV formats are not positional goods. See Dreyfuss, *supra* note 31, at 1450 (explaining the importance of trademark protection for the analysis of the fashion industry); RAUSTIALA & SPRIGMAN, *supra* note 32, at 1693-94, 1718-20 (describing fashion as a positional good).

112. In *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 564 (C.D. Cal. 2005), the court rejected a trade dress claim based on an alleged format imitation between *Wife Swap* and *Trading Spouses*, noting that the plaintiff was “merely repackaging its copyright claims in trademark causes of action.” On the general question whether the content of a creative work can serve as a trademark for itself, see 1 MCCARTHY, *supra* note 109, § 6:17.50; *EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopolus Inc.*, 228 F.3d 56, 63 (2d Cir. 2000); *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 13 (D.D.C. 2004); *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003).

113. See Andrew F. Knight, *A Potentially New IP: Storyline Patents*, 86 J. PAT. & TRADEMARK OFF. SOC’Y 859 (2004) (proposing protection for storylines in patent law). But see Ben Manevitz, *What’s the Story with Storyline Patents—An Argument Against the Allowance of Proposed Storyline Patents and for the Rejection of Currently Pending Storyline Patent Applications*, 24 CARDOZO ARTS & ENT. L.J. 717 (2006) (arguing against the protectability of storylines by patent law); Anu R. Sawkar, Note, *Are Storylines Patentable?: Testing the Boundaries of Patentable Subject Matter*, 76 FORDHAM L. REV. 3001 (2008) (arguing also against the protectability of storylines by patent law); and Lyda v. Fremantle Media N. Am., Inc., No 10 Civ. 4773(DAB), 2012 WL 957498 (S.D.N.Y. Mar. 8 2012) (dismissing a patent infringement claim involving voting devices allegedly used in *American Idol*).

114. 17 U.S.C. § 102(a) (2006).

115. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.3 (3d ed. 2013); 1 NIMMER & NIMMER, *supra* note 95, § 2.03[D].

the expression of a protected work, while its theme and ideas may be freely borrowed.¹¹⁶ As a result of the idea/expression dichotomy, the idea of running a cooking show is not copyrightable. If, however, some conversations between the host and guests on the show are scripted, a verbatim copying of this conversation in another show may result in a copyright violation.

The idea/expression dichotomy is at the heart of the debate on whether TV show formats are copyrightable.¹¹⁷ And it is at this stage that many copyright claims against TV format imitation fail.¹¹⁸ A copyright infringement occurs if the plaintiff can prove that he owns a valid copyright in a work and that the alleged infringer copied protected elements of that work, making the plaintiff's and the infringer's works substantially similar.¹¹⁹ This requires that the infringer has misappropriated protectable expression.¹²⁰ If the infringer has only built upon the idea of the plaintiff's work, the copyright in that work has not been infringed.¹²¹ The idea of *Big Brother* and *The Glass House* may be similar, but this similarity does not manifest itself in similar protectable, concrete expressive elements.¹²²

Even if a court identifies copyrightable elements in a TV format that originate from another format, it also has to find both formats to be "substantially similar."¹²³ Courts are reluctant to do so. In 2003, CBS sought a preliminary injunction against the broadcasting of *I'm a Celebrity . . . Get Me Out of Here!* by rival station ABC because of alleged similarities to *Survivor*, which had been a big success for CBS.¹²⁴ Judge Loretta Preska of the

116. *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 612 (2d Cir. 1945) (per curiam); *Harper & Row Publishers*, 471 U.S. at 556; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

117. This debate dates back to the 1950s, when the Register of Copyright declared program ideas and formats uncopyrightable, see Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 758-59 (1967); and Elliott M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMP L. REV. 133, 183 (1988).

118. Gottlieb, *supra* note 35, at 231.

119. 4 NIMMER & NIMMER, *supra* note 95, § 13.03.

120. 3 PATRY, *supra* note 96, § 9:64.

121. 4 NIMMER & NIMMER, *supra* note 95, § 13.03[A][1].

122. Order Regarding Application for Temporary Restraining Order at 9, *CBS Broad., Inc. v. Am. Broad. Cos.*, No. CV 12-04073-GAF (JEMx) (C.D. Cal. June 21, 2012) (declining application for temporary restraining order); see also *Bethea v. Burnett*, No. CV04-7690JFWPLAX, 2005 WL 1720631, at *11-12 (C.D. Cal. 2005) (holding that *The Apprentice* and *C.E.O.* only share similar ideas, not similar expressions).

123. On the different tests courts use to determine substantial similarity between copyrighted works, see Jessica E. Bergman, *No More Format Disputes: Are Reality Television Formats the Proper Subject of Federal Copyright Protection?*, 4 J. BUS. ENTREPRENEURSHIP & L. 243, 249-51 (2011); 4 NIMMER & NIMMER, *supra* note 95, § 13.03[A][1].

124. *CBS Broad., Inc. v. Am. Broad. Cos.*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 13, 2003).

U.S. District Court for the Southern District of New York declined to grant the injunction.¹²⁵ In an opinion delivered from the bench, she found no substantial similarity between copyrightable elements of both formats.¹²⁶ Considering the shows' total concept and feel, Judge Preska noted that *Celebrity* has a comedic tone, while *Survivor* "is one of unalterable seriousness."¹²⁷ Both shows also have very different plots, hosts, music, and contestants.¹²⁸ The shows express generic elements very differently.¹²⁹ Judge Preska pointed out that both shows "combined standard, unprotectable elements of reality shows, game shows and other television genres, and used them separately to create the programs."¹³⁰

In addition to the idea/expression dichotomy, other copyright doctrines contribute to the difficulty of protecting TV show formats. Under the *scènes à faire* doctrine, courts will withhold copyright protection if an expression embodied in a work necessarily flows from a commonplace idea so that the unprotectable idea preordains the expression.¹³¹ In her opinion on the alleged similarity between *Survivor* and *I'm a Celebrity . . . Get Me out of Here!*, for example, Judge Preska noted that, in a remote, hostile environment, a worm-eating scene is part of the *scènes à faire*.¹³² Similarly, in a decision on the television show *Rachael Ray*, the U.S. District Court for the Central District of California held that the "elements of a host, guest celebrities, an interview, and a cooking segment" in a cooking- and home-related talk show are unprotected *scènes à faire*.¹³³

Under the related¹³⁴ merger doctrine, courts will not hold that a work's original expression is copyrightable if the underlying idea "can effectively

125. *Id.*

126. *Id.* at *11-43.

127. *Id.* at *26.

128. *Id.* at *29-33.

129. *Id.* at *29, *32-39; see also Sharp, *supra* note 35, at 188-90; Thomas A. Smart, Mark D. Godler & Kerren R. Misulovin, *Reality Check: When Will Two TV Shows in the Same Genre Be Considered Substantially Similar Under Copyright Law?*, 21 ENT. & SPORTS L., Summer 2003, at 1, 15-18; Fox, *supra* note 42, at 242-45.

130. *CBS Broad., Inc.*, 2003 U.S. Dist. LEXIS 20258, at *4.

131. 1 GOLDSTEIN, *supra* note 115, § 2.3.2.2; 2 PATRY, *supra* note 96, § 4:24; 4 NIMMER & NIMMER, *supra* note 95, § 13.03[B][4]; *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003).

132. *CBS Broad., Inc.*, 2003 U.S. Dist. LEXIS 20258, at *40. Judge Preska also noted that the mood during the worm-eating episode in both formats is significantly different: "In *Survivor*, the unattractive black worms are set out in a tribal-looking *Wheel of Fortune* layout. In *Celebrity*, the unattractive looking white worm appears on a banquet table with fine linens and fine China adjacent to an absolutely delicious meal." *Id.* at *41 (formatting added).

133. *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1134 (C.D. Cal. 2007).

134. On the relationship between the *scènes à faire* and the merger doctrines, see 1 GOLDSTEIN, *supra* note 115, § 2.3.2.2.

be expressed in only one way.”¹³⁵ In such cases, the expression and its underlying idea are indistinguishable, and the merged item is not eligible for copyright protection.¹³⁶

Even though the *scènes à faire* and merger doctrines severely limit the possibility of protecting TV show formats by copyright law,¹³⁷ they can still be protected as a compilation under § 103 of the Copyright Act.¹³⁸ In fact, the value of a TV format often stems from an interesting combination and symbiosis of various elements.¹³⁹ A collection of preexisting materials or data arranged in a particular way can be copyrightable.¹⁴⁰ Although facts or ideas cannot be protected by copyright, their compilation may be if the selection, coordination, and arrangement process exhibits a sufficient level of originality.¹⁴¹ While it is not unthinkable that a TV format might contain an arrangement of elements that can be protected as a compilation, a typical format that includes the theme, characters, and similar items will simply be a collection of unprotectable ideas.¹⁴²

In general, copyright law is not very sympathetic to granting protection to TV show formats. This becomes apparent when analyzing the case law on published TV formats.¹⁴³ In general, courts seem unwilling to grant

135. *Id.* § 2.3.2; see also *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967); 2 PATRY, *supra* note 96, § 4:46; 4 NIMMER & NIMMER, *supra* note 95, § 13.03[B][3].

136. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

137. Bergman, *supra* note 123, at 252-53.

138. 17 U.S.C. § 103 (2006).

139. Gottlieb, *supra* note 35, at 217. On the various elements of a TV show format, see *supra* text accompanying notes 33-35.

140. “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101.

141. *Feist Publ’n’s, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991); 1 GOLDSTEIN, *supra* note 115, § 2.16.1. Stalnaker argues,

Survivor is a compilation of ideas from such sources as the novel *Lord of the Flies* and the sitcom *Gilligan’s Island* (a group of participants stranded in a remote environment who collectively work for their survival); British television shows such as *King of the Mountain* and *Krypton Factor* (confrontation of and endurance of challenges to win rewards); and numerous other reality shows and game shows such as *American Idol* and *Big Brother* (elimination of contestants one-by-one).

Stalnaker, *supra* note 56, at 170.

142. *CBS Broad., Inc. v. Am. Broad. Cos.*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *7, *11 (S.D.N.Y. Jan. 13, 2003); Fine, *supra* note 35, at 70; Bergman, *supra* note 123, at 254-55. *But see* Stalnaker, *supra* note 56, at 165 (arguing that reality TV show formats can be protected as a compilation).

143. On the terminology of published versus unpublished formats, see Gottlieb, *supra* note 35, at 220-21, 244. This analysis is also supported by case law dealing with unpublished TV show formats. See, e.g., *Metcalf v. Bochco*, 294 F.3d 1069, 1072 (9th Cir. 2002); *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1453 (9th Cir. 1988); *Apple Barrel Prods., Inc. v. Beard*,

copyright protection to TV formats. Most claims are dismissed or settled out of court.¹⁴⁴ When Fox Family, producer of *Race Around the World*, filed a copyright infringement suit against CBS's production of *The Amazing Race* in 2000, the injunction was denied without discussing the copyright claim, and the case was voluntarily dismissed.¹⁴⁵ When, shortly thereafter, CBS sued Fox over an alleged similarity between *Survivor* (CBS) and *Boot Camp* (Fox), the case was ultimately settled in a confidential agreement.¹⁴⁶ But even when litigation continues, courts are leaning away from copyright protection of TV formats.¹⁴⁷

Recognizing that it is very hard to protect TV formats by copyright law, format developers and producers in the United States have turned their attention to unfair competition law.¹⁴⁸ Setting aside confusion-based doctrines, which seldom prove helpful,¹⁴⁹ common law misappropriation torts are of only limited assistance, as they are severely limited by the preemption doctrine and by federal copyright law.¹⁵⁰ Things look more favorable for

730 F.2d 384, 387 (5th Cir. 1984). For more cases, see 2 PATRY, *supra* note 96, § 4:12 nn.3 & 5.

144. Bergman, *supra* note 123, at 255; Sharp, *supra* note 35, at 193; Lisa Logan, *The Emperor's New Clothes? The Way Forward: TV Format Protection Under Unfair Competition Law in the United States, United Kingdom and France: Part 1*, 20 ENT. L. REV. 37, 42 (2009). It is common in the TV format industry to use litigation as a signaling device. See *infra* note 216 and accompanying text.

145. Stipulation of Dismissal with Prejudice and Order Thereon, Fox Family Props., Inc. v. CBS, Inc., No. CV 00-11482 (C.D. Cal. May 28, 2003); Bergman, *supra* note 123, at 255-56.

146. Stipulation of Dismissal with Prejudice Under Fed. R. Civ. P. 41(a) of Claims Against Fox Broad. Co., *Survivor Prods. L.L.C. v. Fox Broad. Co.*, No. CV 01-03234 (C.D. Cal. Sept. 5, 2001); Bergman, *supra* note 123, at 256; Sharp, *supra* note 35, at 186-87.

147. The unsuccessful litigation of CBS (*Survivor*) against ABC (*I'm a Celebrity . . . Get Me out of Here*) is an example. See *supra* text accompanying notes 126-30, 132.

148. On this development, see Bergman, *supra* note 123, at 257-58.

149. On the limited effectiveness of trademark protection for TV formats, see *supra* text accompanying notes 109-11.

150. 2 MCCARTHY, *supra* note 109, § 10:47; Logan, *supra* note 144, at 90. On the limited role of the misappropriation doctrine, which originates from *International News Service v. Associated Press*, 248 U.S. 215 (1918), but has been of limited importance due to the preemption doctrine of 17 U.S.C. § 301, see 2 MCCARTHY, *supra* note 109, §§ 10:47-73; and 1 NIMMER & NIMMER, *supra* note 95, § 1.01[B][1][f]. In *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 559 (C.D. Cal. 2005), the British producer of *Wife Swap* sued the U.S. producers of *Trading Spouses* for unfair competition (as well as copyright and trade dress infringement). The court rejected state law unfair competition claims because they were based on Lanham Act claims, which the court had rejected before due to their similarity to copyright claims and because of the preemption doctrine. *Id.* at 565-66. Ultimately, this litigation was settled out of court. When Fox aired a TV show analogous to NBC's *The Contender*, NBC claimed a violation of California's Business and Professions Code. A California judge ultimately dismissed the claim and refused the request for a preliminary injunction. See Bergman, *supra* note 123, at 258-59; Sharp, *supra* note 35, at 191-92. *The Contender* was a reality TV show in which a group of boxers competed with one another

plaintiffs if the case involves alleged breach of confidence. The litigation over *Wipeout* and *The Glass House* included, in each case, allegations that the format imitator hired productions staff from the original format developer in order to benefit from their experience and, potentially, confidential information.¹⁵¹ In the *Glass House* litigation, allegedly confidential information included instructions on how to restrict communication between contestants and crew members, as well as manuals on how to produce and edit a TV show twenty-four hours a day; all this had been the result of thirteen years of trial and error by the developers of *Big Brother*.¹⁵² Such allegations can be very effective, even if they are only used as a threat in settlement negotiations.

Breach-of-confidence claims do not help the original format developer in a pure case of published TV format imitation.¹⁵³ In practice, in many disputes over published TV format imitation, format imitators do not only observe the format characteristics on TV, but also lure away former staff from the original format developer.¹⁵⁴ The industry has increasingly realized that, given the low protection U.S. intellectual property law affords published TV show formats, breach-of-confidence claims can be an important weapon against TV format imitation, as the litigation over *Wipeout* and *The Glass House* exemplifies. Apart from employment relationships giving rise to breach-of-confidence theories, however, U.S. intellectual property law provides TV formats with very limited protection against imitation.¹⁵⁵

Under European intellectual property law, the situation is somewhat similar, although slightly more heterogeneous. As in the United States, whether European copyright law protects a TV format against imitation depends on whether the format is a copyrightable subject matter and whether substantial copying of copyrightable elements occurred between two formats. While the European Union (EU) has increasingly harmonized copyright laws across EU member states over the last twenty-five years,¹⁵⁶ the

in an elimination-style competition and was hosted by professional boxers, such as Sugar Ray Leonard and Sylvester Stallone. Scott Collins, *Boxing Shows' Breaks*, L.A. TIMES, Aug. 25, 2004, at E1.

151. See *supra* notes 12, 24 and accompanying text.

152. First Amended Complaint, *supra* note 23, at 10-11.

153. In such a case, the imitation is only the result of watching the TV format on TV. See *supra* text accompanying notes 107-08.

154. For examples, see *supra* text accompanying notes 21, 152, and see *infra* text accompanying notes 196-202.

155. Gottlieb, *supra* note 35, at 247.

156. For more information on the history of EU copyright law, see CATHERINE SEVILLE, EU INTELLECTUAL PROPERTY LAW AND POLICY 24-68 (2009); GUY TRITTON ET AL., INTELLECTUAL PROPERTY IN EUROPE §§ 4-040 to -043 (3d ed. 2008); TREVOR COOK, EU INTELLECTUAL PROPERTY LAW §§ 3.07-.14 (2010); and Christian Handig, *The Copyright Term "Work"—European Harmonisation at an Unknown Level*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 665, 666-67 (2009).

European *acquis communautaire*¹⁵⁷ does not cover all areas of copyright law.¹⁵⁸ One of the areas of European copyright law that has not been harmonized by the legislator is the required standard of originality.¹⁵⁹ While some European copyright directives have created standards of originality for particular work categories,¹⁶⁰ outside their reach, European copyright law fluctuates between an originality standard based on the “author’s own intellectual creation,” originally stemming from continental European copyright systems, and a weakened “sweat of the brow” approach, originally stemming from the United Kingdom.¹⁶¹

In recent years, the European Court of Justice has initiated an increasing harmonization of the standard of originality. Starting with a decision in 2009, the court has held on several occasions that a work must express the “author’s own intellectual creation” in order to be eligible for copyright protection.¹⁶² The next few years will show what the relationship between

157. The *acquis communautaire* includes all legislation, legal acts, and court decisions that form part of the legal order of the European Union.

158. On the piecemeal approach to European copyright harmonization, see TRITTON ET AL., *supra* note 156, § 4-041; and COOK, *supra* note 156, §§ 3.01, 3.07-14.

159. On other areas of European copyright law that have not been harmonized (e.g., questions of initial ownership, moral rights, copyright levies, copyright terms for neighboring rights, and collective management), see Michel M. Walter, *Initial Attribution of Authorship*, in EUROPEAN COPYRIGHT LAW: A COMMENTARY §§ 16.0.9-0.20 (Michel M. Walter & Silke von Lewinski eds., 2010); and SEVILLE, *supra* note 156, at 61-68.

160. On such standards in the European Computer Program, Copyright Term, and Database Directives, see Handig, *supra* note 156, at 670; Christian Handig, *Is the Term “Work” of the CDPA 1988 in Line with the European Directives?*, 32 EUR. INTELL. PROP. REV. 53, 54-55 (2010); COOK, *supra* note 156, §§ 3.57-95; and Gernot Schulze, *Schleichende Harmonisierung des Urheberrechtlichen Werkbegriffs? Anmerkung zu EuGH “Infopaq/DDF,”* 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 1019, 1020 (2009) (describing standards of originality in three European Union Directives).

161. TRITTON ET AL., *supra* note 156, § 4-043. On the sweat-of-the-brow doctrine in U.S. copyright law, see *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 353 (1991). As a result of this lack of harmonization, for example, furniture design is not copyrightable under Italian copyright law, but it is under German, French, and U.K. copyright law. See, e.g., Case C-456/06, *Peek & Cloppenburg KG v. Cassina SpA*, 2008 E.C.R. I-02731, §§ 2, 44. Dutch courts have granted copyright protection to perfumes, while some French courts have refused it. See Tania Su Li Cheng, *Copyright Protection of Haute Cuisine: Recipe for Disaster?*, 30 EUR. INTELL. PROP. REV. 93, 98 (2008); Herman Cohen Jehoram, *The Dutch Supreme Court Recognises Copyright in the Scent of a Perfume the Flying Dutchman: All Sails, No Anchor*, 28 EUR. INTELL. PROP. REV. 629 (2006); Catherine Seville, *Copyright in Perfumes: Smelling a Rat*, 66 CAMBRIDGE L.J. 49 (2007); Sergio Balañá, *Urheberrechtsschutz für Parfüms*, 54 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT: INTERNATIONALER TEIL 979 (2005) (analyzing reasons why perfume manufacturers became interested in claiming intellectual property protection on their perfumes in France and the Netherlands).

162. Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569, §§ 2, 37, 48 (concerning copyrightability of a news clipping service). Later related decisions include Case C-393/09, *Bepečnostní Softwarová Asociace—Svaz Softwarové*

this standard and the British approach really is.¹⁶³ As no case law on TV show formats at the EU level exists and as, according to the European Court of Justice, it is still up to the national courts to determine whether a particular work fulfills the standard of originality,¹⁶⁴ the Article now turns to the TV show format case law of the EU member states.

Germany has developed the most elaborate case law in Europe in this regard. In Germany, a rich academic literature on television-show formats has been developing over the last twenty years,¹⁶⁵ and at least fifteen court decisions have dealt with the protection of TV show formats.¹⁶⁶ German courts usually decline to grant copyright protection against TV format imi-

Ochrany v. Ministerstvo Kultury, 2010 E.C.R. I-13971, §§ 46, 49 (holding that a graphical user interface can be protected by copyright “if it is its author’s own intellectual creation” and developing a merger doctrine); and C-403/08 & C-429/08, Football Ass’n Premier League Ltd. v. QC Leisure & Murphy v. Media Prot. Servs. Ltd., 2011 E.C.R. I-09083, §§ 97-100, 155, 159 (holding that sporting events are not copyrightable subject matter under the European Information Society Directive, but leaving room for protection by the laws of individual member states). The court modified the test in a later decision by holding that “an intellectual creation is an author’s own if it reflects the author’s personality”; the author thereby “express[es] his free and creative choices in the production” of the work and stamps the work “with his ‘personal touch.’” Case C-145/10, Painer v. Standard VerlagsGmbH, 2011 EUR-Lex CELEX LEXIS 62010CJ0145, §§ 88, 92, 94, 99 (Dec. 1, 2011); *see also* Case C-604/10, Football Dataco Ltd. v. Yahoo! UK Ltd., 2012 EUR-Lex CELEX LEXIS 62010CA0604, §§ 38-39 (Mar. 1, 2012).

163. *See, e.g.*, Newspaper Licensing Agency Ltd. v. Meltwater Holding BV, [2011] EWCA (Civ) 890, [2012] R.P.C. 1 (Eng.); Eleonora Rosati, *Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision*, 33 EUR. INTELL. PROP. REV. 746 (2011); Andreas Rahmatian, *Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure*, 44 INT’L REV. INTELL. PROP. & COMPETITION L. 4, 29-33 (2013).

164. *See, e.g.*, Case C-5/08, §§ 48, 51; Case C-393/09, §§ 47-48; Case C-145/10, § 94; Case C-406/10, SAS Inst. Inc. v. World Programming Ltd., 2012 EUR-Lex CELEX LEXIS 62010CA0406, § 68 (May 2, 2012).

165. For early examples, Von Wolf Schwarz, *Schutz und Lizenzierung von Fernsehshowformaten*, in URHEBERRECHTLICHE PROBLEME DER GEGENWART: FESTSCHRIFT FÜR ERNST REICHARDT ZUM 70. GEBURTSTAG 203 (Ernst Hartmut Reichardt, Andreas Scheuermann & Angelika Strittmatter eds., 1990) (analyzing whether TV show formats can be protected under German copyright, trademark, and unfair competition law). Other extensive treatments include RÜDIGER LITTEN, *DER SCHUTZ VON FERNSEHSHOW-UND FERNSEHSERIENFORMATEN: EINE UNTERSUCHUNG ANHAND DES DEUTSCHEN, ENGLISCHEN UND US-AMERIKANISCHEN RECHTS* (1997); MATTHIAS LAUSEN, *DER RECHTSSCHUTZ VON SENDEFORMATEN* (1998); MARC HEINKELEIN, *DER SCHUTZ DER URHEBER VON FERNSEHSHOWS UND FERNSEHSHOWFORMATEN* (2004); MICHAEL KRÄMER, *SCHUTZMÖGLICHKEITEN FÜR TV-FORMATE: EINE RECHTSVERGLEICHENDE UNTERSUCHUNG NACH DEUTSCHEM UND US-AMERIKANISCHEM RECHT* (2006); and Frank Eickmeier & Harro von Have, *Statutory Protection of Television Show Formats*, 9 ENT. L. REV. 9 (1998). On Germany and Switzerland, *see* GABRIELE SIEGERT ET AL., *DER SCHUTZ INNOVATIVER PUBLIZISTISCHER KONZEPTE IM MEDIENWETTBEWERB: EINE MEDIENÖKONOMISCHE UND MEDIENRECHTLICHE UNTERSUCHUNG* (2006).

166. The German case law is described in LAUSEN, *supra* note 165, at 12, 119-38; and HEINKELEIN, *supra* note 165, at 192-209.

tation. The leading case involved an alleged imitation of a French TV show by a German TV station and was decided by the highest German court in civil matters, the *Bundesgerichtshof*, in 2003.¹⁶⁷ In the French weekly show *L'école des fans*, which was initially broadcast from 1977 to 2002, children, aged between four and six, sang a song by a featured celebrity singer and received a grade for their performance.¹⁶⁸ The celebrity was present in the show and sometimes sang the song along with the child.¹⁶⁹ In 1993, the German TV station broadcast a German version of the show, which continued until 2006.¹⁷⁰ The French company sued for copyright violation, arguing that the German show had copied the sequence of the show, the camera work, the dramaturgy, and the positioning of the candidates from the French version.¹⁷¹

The German court ruled in favor of the defendant.¹⁷² It held that the French show format was not a copyrightable work protected under German copyright law.¹⁷³ While the court acknowledged that putting together the elements of the show format might represent some creative achievement, it held that a mere set of instructions on arranging elements was not subject to copyright protection even if the elements themselves might be copyrightable.¹⁷⁴ As a result, format developers have not been successful in using German copyright law to prevent TV format imitation.¹⁷⁵

167. Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, Case No. I ZR 176/01, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 987, 988 (2004).

168. *Id.*

169. *Id.* (providing more information on the show). The original German decision is published in Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 155, 257.

170. In Germany, the show, called *Kinderquatsch mit Michael*, was broadcast by a public broadcasting station. In addition, a Québécois version of the show existed between 2004 and 2008.

171. Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, Case No. I ZR 176/01, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 987 (2004).

172. *Id.* at 988.

173. *Id.*

174. *Id.* at 989. The court carefully distinguished between TV format cases and TV series cases, in which German courts have granted copyright protection against unauthorized sequels. Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 155, 257, 263 (only available in the German version of the decision). While TV series are tied by a unifying plot, that is usually not the case with episodes emanating from TV formats. *Id.*

175. Rainer Jacobs, *Die Urheberrechtsfähigkeit von Sendeformaten*, in Festschrift für Peter Raue: Zum 65. Geburtstag am 4. Februar 2006, 499, 513 (Rainer Jacobs et al. eds., 2006) (noting that claiming copyright protection for TV show formats have not been successful in German courts); Frank Eickmeier & Verena Fischer-Zernin, *Ist der Formatschutz am Ende? Der gesetzliche Schutz des Fernsehshowformats nach der "Sendeformat"-Entscheidung des BGH*, 110 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 755, 757 (2008); Marc Heinkelein & Christoph Fey, *Der Schutz von Fernsehformaten im deutschen Urheberrecht: Zur Entscheidung des BGH: "Sendeformat,"*

Similarly, in France, copyright infringement actions against TV format imitation have often failed either because of the idea/expression dichotomy or because only non-copyrightable features were copied between similar formats.¹⁷⁶ In the United Kingdom, copyright protection of TV formats against format imitation likewise stands on shaky grounds. Various attempts to include formal format protection in U.K. copyright law failed in the 1990s.¹⁷⁷ In a TV format case from New Zealand, the Privy Council—New Zealand's highest court of appeal at that time¹⁷⁸—held that the subject matter of a particular TV format broadcast in the United Kingdom, titled *Opportunity Knocks*, lacked sufficient certainty and unity to be copyrighta-

53 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT: INTERNATIONALER TEIL 378, 383-84 (2004); Matthias Lausen, *Der Schutz des Showformats*, in AKTUELLE RECHTSPROBLEME DER FILMPRODUKTION UND FILMLIZENZ: FESTSCHRIFT FÜR WOLF SCHWARZ ZU SEINEM 80. GEBURTSTAG 169 (Jürgen Becker & Mathias Schwarz eds., 1999). Other German-speaking countries have followed similar paths; concerning Austria, see Oberster Gerichtshof [OGH] [Supreme Court] Aug. 11, 2005, 23 MEDIEN UND RECHT 478 (rejecting a copyright claim for a talk show format because no copying of copyrightable elements had occurred); and von Clemens Thiele, *Nochmals: Der (urheber-)rechtliche Schutz von Fernsehformaten*, 24 MEDIEN UND RECHT 314, 315 (2006) (describing Austrian case law denying copyright protection for TV show formats). On Switzerland, see DIRK SPACEK, SCHUTZ VON TV-FORMATEN: EINE RECHTLICHE UND ÖKONOMISCHE BETRACHTUNG (2005) (pointing to problems of protecting TV show formats under Swiss law).

176. Logan, *supra* note 144, at 90; XAVIER LINANT DE BELLEFONDS, DROITS D'AUTEUR ET DROITS VOISINS §§ 104, 242 (2004); MICHEL VIVANT & JEAN-MICHEL BRUGUIÈRE, DROIT D'AUTEUR § 142 (2009); PIERRE-YVES GAUTIER, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE § 41 (7th ed. 2010); Alessandra Gagliardi, "Les idées sont de libre parcours": *Programme Format Protection in the French and Italian Systems: Part 1: France*, 9 ENT. L. REV. 200, 201-03 (1998); Gunnar W.G. Karnell, *Copyright to Sequels—With Special Regard to Television Show Formats*, 31 INT'L REV. INTELL. PROP. & COMPETITION L. 886, 908-11 (2000); PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 82-83 (2002); CHRISTINE HUGON, LE RÉGIME JURIDIQUE DE L'ŒUVRE AUDIOVISUELLE 39-43 (1993); Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Sept. 28, 2012, D. 2012, 217 (Fr.) (holding that the TV show format *Code de la route, le grand examen* was not copyrightable); Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Mar. 27, 1998, D. 1999, 417 (Fr.) (denying copyright claims in a TV show format case because the copied elements were inherent to the concept of the show and not copyrightable). *But see* Bernhard Edelman, *La protection des jeux télévisés*, 175 RECUEIL DALLOZ 417 (1999) (arguing that TV show formats can be copyrighted under French copyright law). On the idea/expression dichotomy in French copyright law, see FRÉDÉRIC POLLAUD-DULIAN, LE DROIT D'AUTEUR 82-91 (2005); ANDRÉ LUCAS, HENRI-JACQUES LUCAS & AGNÈS LUCAS-SCHLOETTER, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE § 30 (4th ed. 2012); VIVANT & BRUGUIÈRE, *supra*, §§ 58-66; GAUTIER, *supra*, §§ 37-45; and LINANT DE BELLEFONDS, *supra*, §§ 98-108.

177. Karnell, *supra* note 176, at 901-03; David Rose, *Format Rights: A Never-Ending Drama (or Not)*, 10 ENT. L. REV. 170, 170-71 (1999); Shelley Lane & Richard McD Bridge, *Programme Formats: The Write-in Vote*, 7 ENT. L. REV. 212 (1996); Sachdeva & McDonald, *supra* note 109, at 10.

178. In 2004, New Zealand abolished the jurisdiction of the London-based Judicial Committee of the Privy Council in favor of its own Supreme Court of New Zealand.

ble.¹⁷⁹ This has become a landmark case on copyright protection of TV formats in the common-law world. In 2005, the High Court of the United Kingdom restated key principles of that decision in a case concerning magazine format copying and drew an analogy with TV formats.¹⁸⁰ Also in 2005, the Federal Court of Australia dismissed copyright claims against an alleged copy of a home renovation TV show on similar grounds.¹⁸¹ As a result of this case law, TV formats are hard to protect under U.K. copyright law.¹⁸²

While many European copyright systems are reluctant to grant protection against TV format imitation, TV format creators have sometimes been more successful by using unfair competition doctrines.¹⁸³ Unlike the situation in the United States, in many European countries, both intellectual property and unfair competition law are federal in nature or no general rule exists to determine which of these areas of law trumps the other area. As a result, no preemption doctrine exists to assist courts in delineating either body of law.¹⁸⁴ The relationship between misappropriation doctrines and intellectual property protection is a complex one in Europe, but misappropriation doctrines frequently play a larger role in Europe than in the United States.¹⁸⁵

179. *Green v Broad. Corp. of N.Z.* (1989) 2 NZLR 490 (CA); see also Ute Klement, *Protecting Television Show Formats Under Copyright Law—New Developments in Common Law and Civil Law Countries*, 29 EUR. INTELL. PROP. REV. 52, 53-56 (2007).

180. *IPC Media Ltd. v. Highbury-Leisure Publ'g Ltd.*, [2004] EWHC (Ch) 2985, [442], [2005] F.S.R. 20 (Eng.); Klement, *supra* note 179, at 57.

181. *Nine Films & Television Pty Ltd. v Ninox Television Ltd.*, [2005] FCA 1404 (Austl.). In the United States, this show was broadcast under the title *The Block*. See Klement, *supra* note 179, at 57-58.

182. For a more detailed analysis, see Logan, *supra* note 144, at 87-88; Klement, *supra* note 179, at 56-57; Rose, *supra* note 177, at 173; Richard Bridge & Shelley Lane, *The Protection of Formats Under English Law: Part 1*, 1 ENT. L. REV. 96, 100-02 (1990); Richard Bridge & Shelley Lane, *The Protection of Formats Under English Law: Part 2*, 1 ENT. L. REV. 131 (1990); KAMINA, *supra* note 176, at 81-82; Sachdeva & McDonald, *supra* note 109. *But see* 2 MARY VITORIA ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* § 40.25 (4th ed. 2011) (arguing that television formats can be copyrightable if the format contains a sufficient density of detail); 1 KEVIN GARNETT, GILLIAN DAVIES & GWILYM HARBOTTLE, *COPING AND SKONE JAMES ON COPYRIGHT* § 3-44 (16th ed. 2011).

183. On a recent preliminary injunction by an Italian court that acknowledges copyright protection in the TV format *Dancing with the Stars*, see Rebecca Swindells & Michael Sweeney, *The Difficulty with TV Formats and Copyright Protection*, 23 ENT. L. REV. 155, 156 (2012).

184. On the role of the preemption doctrine in distinguishing intellectual property law from misappropriation doctrines under U.S. common law, see 2 MCCARTHY, *supra* note 109, §§ 10.47-73; and 1 NIMMER & NIMMER, *supra* note 95, § 1.01[B][1][f].

185. French courts, for example, are willing to use actions grounded in unfair competition law—particularly *concurrence parasitaire*—regardless of whether or not the work in question is protected by an intellectual property right. See Elisabeth Logcais, *Record Fine for Plagiarism of a Reality Show: Is It Safer Under French Law to Sue for Unfair Competition*

Despite some harmonization of unfair competition law on the European level,¹⁸⁶ apart from confusion-based claims,¹⁸⁷ the unfair competition laws of various European countries vary greatly in the level of protection they grant against unfair appropriation of a competitor's product or service.¹⁸⁸ At one end of the spectrum, France has an elaborate system of protection against *conurrence parasitaire* or parasitic competition.¹⁸⁹ In Germany "it is not unusual to take action against product imitation not only" on copyright grounds, but also concurrently on the basis of unfair-competition-based "doctrines of unfair copying or slavish imitation."¹⁹⁰ At the other end of the spectrum, U.K. common law has no special provisions prohibiting imitation beyond intellectual property or confusion based claims,¹⁹¹ and U.K. judges have upheld the freedom to imitate on many occasions.¹⁹²

Rather than for Copyright Infringement?, 4 ENT. L. REV. 116, 118-19 (1993). On general differences between unfair competition law in the United States and in Europe, see Mary LaFrance, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*, 2011 MICH. ST. L. REV. 1413.

186. This was achieved mainly through the Unfair Commercial Practices Directive and the Comparative Advertising Directive. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2005 O.J. (L 149) 22 [hereinafter Unfair Commercial Practices Directive]; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising, 2006 O.J. (L 376) 21.

187. The Unfair Commercial Practices Directive prohibits the marketing of a product that creates confusion with any product or trademark of a competitor. See Unfair Commercial Practices Directive, *supra* note 186, at 28.

188. Ansgar Ohly, *The Freedom of Imitation and Its Limits—A European Perspective*, 41 INT'L REV. INTELL. PROP. & COMPETITION L. 506, 507-09 (2010) [hereinafter *Freedom of Imitation*]; Ansgar Ohly, *Hartplatzhelden.de oder: Wohin mit dem unmittelbaren Leistungsschutz?*, 112 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 487, 490 (2010); LaFrance, *supra* note 185, at 1423-28.

189. On the French doctrine of *conurrence parasitaire*, see LUCAS, LUCAS & LUCAS-SCHLOETTER, *supra* note 176, § 21 ("La portée de cette jurisprudence ne doit pas être sous-estimée"); JÉRÔME PASSA, *CONTREFAÇON ET CONCURRENCE DÉLOYALE* 254-95 (1997); and FRAUKE HENNING-BODEWIG, *UNFAIR COMPETITION LAW: EUROPEAN UNION AND MEMBER STATES* 123-24 (2006).

190. *Freedom of Imitation*, *supra* note 188, at 511.

191. ROGIER W. DE VREY, *TOWARDS A EUROPEAN UNFAIR COMPETITION LAW: A CLASH BETWEEN LEGAL FAMILIES* 204-07 (2006); HENNING-BODEWIG, *supra* note 189, at 148; Handig, *supra* note 156, at 682-83. In fact, U.K. courts sometimes use copyright protection to compensate for the lack of a strong unfair competition concept. See WILLIAM CORNISH, DAVID LLEWELYN & TANYA APLIN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* § 11-09 (7th ed. 2010); Estelle Derclaye, *Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law*, 32 EUR. INTEL. PROP. REV. 247, 249 (2010).

192. ANSELM KAMPERMAN SANDERS, *UNFAIR COMPETITION LAW: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL CREATIVITY* 52-53 (1997); Jennifer Davis, *Unfair Competition Law in the United Kingdom*, in *LAW AGAINST UNFAIR COMPETITION: TOWARDS A NEW PARADIGM IN EUROPE?* 183 (Reto M. Hilty & Frauke Henning-Bodewig eds., 2007);

This heterogeneity in approaches is also reflected in the way national unfair competition laws treat TV format imitation. Under French unfair competition law, TV format copying may be considered either as ordinary “disloyal” competition (*concurrency déloyale*) or as parasitic behavior (*concurrency parasitaire*).¹⁹³ Parasitic behavior requires neither confusion on part of the public nor a direct competitive relationship between both companies, but it does require extra elements that are not needed for a copy-right claim.¹⁹⁴ It is similar to the misappropriation doctrine under U.S. common law, but much more expansive in scope and application.¹⁹⁵

Given the expansiveness of French unfair competition law, it is not surprising that French courts are comparatively open to applying such doctrines to TV format cases. One case of slavish imitation involves the U.S. format *Rescue 911*. A leading French public TV channel (Antenne 2) broadcast a reality show called *La Nuit des Héros* (Heroes’ Night) based on the U.S. format, which Antenne 2 had licensed from CBS.¹⁹⁶ Two months after the show’s host had resigned from the show and from Antenne 2, a private TV channel competitor, TF1, broadcast a similar show entitled *Les Marches de la Gloire* (Steps of Glory), featuring the same host and using the same staff. Antenne 2 sued TF1 for unfair competition, including commercial parasitism.¹⁹⁷ In 1993, the Versailles Court of Appeal found TF1 guilty of both disloyal competition and parasitic behavior.¹⁹⁸ The court cited the substantial similarities between the competing shows,¹⁹⁹ as well as the fact that TF1 had hired not only the same show host but also the entire former team from Antenne 2, effectively disrupting Antenne 2’s activities.²⁰⁰ In the end, the court ordered TF1 to pay damages of fifty-five million French Francs, at that time the largest fine ever imposed in France for unauthorized

KAMINA, *supra* note 176, at 83; Bridge & Lane, *supra* note 182, at 97-99; DE VREY, *supra* note 191, at 298-99.

193. Logan, *supra* note 144, at 88; VIVANT & BRUGUIÈRE, *supra* note 176, § 142.

194. POLLAUD-DULIAN, *supra* note 176, at 89; PASSA, *supra* note 189, at 241; Logan, *supra* note 144, at 89; Logeais, *supra* note 185, at 118.

195. Logan, *supra* note 144, at 89; PASSA, *supra* note 189, at 254-95; LaFrance, *supra* note 185, at 1422.

196. Cour d’appel [CA] [regional court of appeal] Versailles, 123e ch., Mar. 11, 1993, D. 1993, 219 (Fr.) (partially translated in *France—Unfair Competition: Television: Plagiarism of a Television Show*, 4 ENT. L. REV. E63 (1993)).

197. *Id.* at 221.

198. *Id.* at 228, 230.

199. The similarities included the use of the same show concept, rhythm, cutting pattern, presentation style, as well as the same illustration of moral values of daily life and sport. *Id.* at 223, 225.

200. *Id.* at 223; see also Gagliardi, *supra* note 176, at 203-04; Logeais, *supra* note 185, at 118; Karnell, *supra* note 176, at 910.

copying of audio-visual content.²⁰¹ In other cases, however, French courts have also denied unfair competition claims in TV format imitation cases.²⁰²

In Germany, several courts have had to decide whether TV format imitation violates unfair competition laws, but have usually denied such violation on a variety of grounds.²⁰³ While it may be theoretically possible for TV format copying to violate German unfair competition law in exceptional circumstances,²⁰⁴ no German court thus far has come to that conclusion.²⁰⁵ Finally, owing to the limited scope of unfair competition torts in the United Kingdom, in particular the lack of a broad misappropriation tort, the possibility of protecting TV formats by using unfair competition law is rather limited in the United Kingdom.²⁰⁶

As this analysis has shown, it is hard to protect TV formats against imitation under U.S. copyright law. In Europe, despite the harmonization of intellectual property laws over the last few decades, TV format imitation disputes are still subject to national laws. As far as pure cases of published TV format imitation are concerned, in Germany and the United Kingdom, TV formats are hard to protect by either copyright or unfair competition laws.²⁰⁷ While the situation looks similar in France with regard to copyright law, French unfair competition law is slightly more open to format protection due to its broad parasitic behavior misappropriation doctrine, which is not necessarily preempted by French copyright law.²⁰⁸ When the format imitation also involves hiring staff from the original format developer,

201. Logeais, *supra* note 185, at 116; Gagliardi, *supra* note 176, at 204.

202. See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Sept. 12, 2012, D. 217 (Fr.) (denying unfair competition claims in a TV format imitation case involving the French version of *Big Brother*).

203. See Oberlandesgericht München [OLG München] [Munich Court of Appeals] Sept. 10, 1992, Case No. 6 U 2761/92, 8 RECHTSPRECHUNGS-REPORT 619, 1993 (Ger.) (vacating a lower court's preliminary injunction and holding that a television station could not enjoin a competing station from broadcasting a show with the same moderator, title music, stage set, and interview format as the original show because the distinct features of the show were inextricably linked with the personality of the particular moderator and not with the show format as such); Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Düsseldorf Court of Appeals] Sept. 15, 1995, Case No. 2 U 100/94, 41 WETTBEWERB IN RECHT UND PRAXIS 1032 (1034-37), 1995 (Ger.) (vacating a lower court's preliminary injunction, stressing the freedom to imitate in unfair competition law, pointing to various differences between the formats, holding that only abstract concepts were copied and, as a result, rejecting unfair competition claims).

204. Eickmeier & Fischer-Zernin, *supra* note 175, at 760-63; Harro von Have & Frank Eickmeier, *Der Gesetzliche Rechtsschutz von Fernseh-Show-Formaten*, 38 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 269, 276-77 (1994); Eickmeier & von Have, *supra* note 165, at 12-15; LAUSEN, *supra* note 165, at 116-17.

205. LAUSEN, *supra* note 165, at 170.

206. Logan, *supra* note 144, at 42; Sachdeva & McDonald, *supra* note 109, at 12.

207. On such cases, see *supra* text accompanying notes 166-75, 177-80, 182, 203-06.

208. See *supra* text accompanying notes 193-94.

breach-of-confidence claims based on unfair competition doctrines may prove effective.²⁰⁹ This may explain why original format developers in Europe, as in the United States,²¹⁰ are increasingly raising unfair competition or breach-of-confidence allegations, rather than copyright-based claims, against format imitators.²¹¹ In general, however, in all the countries analyzed, protecting TV formats against imitation is a complicated, uncertain, and cumbersome process.

B. Other Protection Mechanisms

Given the weak protection of published TV show formats by intellectual property law, it is interesting to observe that the format industry has developed several mechanisms to cope with this low level of protection.²¹² In fact, the industry does not rely heavily on formal legal protection when it comes to format imitation. As a member of the management of a large British format distributor put it: “The format industry is not necessarily reliant on legal protection. It certainly helps that there is a degree of perceived legal protection but the industry is aware of how dubious that legal protection is, particularly at the creative end.”²¹³ In general, the industry is interested in settling disputes outside the legal system; it is not interested in suing its potential buyers.²¹⁴ Sometimes, taking competitors to court is part of a business and signaling strategy, as publicly announced litigation might inform the market about claims to TV format ownership.²¹⁵ Nevertheless, there is a strong tendency to settle lawsuits.²¹⁶

In this environment, the TV format industry relies on other protection strategies outside the legal system to foster format trade.²¹⁷ First-mover advantages are important. TV format developers and broadcasters try to be the

209. See *supra* text accompanying notes 199-200.

210. See *supra* text accompanying notes 148-50.

211. FORMAT RECOGNITION & PROT. ASS'N, *supra* note 53, at 8, 40-44.

212. On this terminology, see *supra* text accompanying notes 95-108.

213. Singh, *supra* note 48, at 129 (quoting the Executive Vice President of a large British format distributor, Worldwide Production).

214. *Id.* at 128, 130-33, 141-42 (quoting a Vice President of Business & Legal Affairs of a large British format distributor: “Litigation is a very small part of my work. . . . We don’t litigate a lot.”).

215. *Id.* at 133, 143, 168, 259.

216. In fact, simply threatening a lawsuit is a more frequent ploy than actually suing an imitator. See Gottlieb, *supra* note 35, at 262; Singh, *supra* note 48, at 129, 140-41 (quoting a licensing manager of a large Dutch format producer: “There is no real IP right. What we do as a company is we scare people. That’s a way to protect your IP right, to send a letter and so on. . . . If legal-wise we think we will never win because of the legal situation in that jurisdiction is not in place, we just use our size and our budgets to wear the other party down.”).

217. Singh, *supra* note 48, at 28. On the emergence of private intellectual property rights systems in general, see Merges, *supra* note 104, at 1361-71.

first to put out a format in order to stay ahead of their competitors, and they try to reach as many territories as possible in a short amount of time.²¹⁸ Launching a successful format on the market often means a roll out in twenty to thirty territories.²¹⁹

Social norms also play some role. The industry meets at three to four trade shows each year.²²⁰ These trade shows are not only important because the players in the industry do business with each other on the shows' market floors,²²¹ but also because they facilitate face-to-face interaction and relationships in what is still a "people centered" industry.²²² The global TV show format industry consists of a relatively small number of players²²³ who run the business and meet with each other on a fairly regular basis.²²⁴ They develop their reputations by means of this repeated interaction. Illegitimate format imitation is stigmatized by gentlemen's agreements and reputational effects.²²⁵

Successful brand management is also an important tool in coping with potential format imitation. TV formats are increasingly designed as brands, not as mere shows.²²⁶ A strong TV format brand can keep its audience loyal to the format.²²⁷ Revenue then comes not only from the TV show and TV

218. Singh & Kretschmer, *supra* note 59, at 18; Singh, *supra* note 53, at 51-52; Singh, *supra* note 48, at 152-56; Gottlieb, *supra* note 35, at 266.

219. Singh, *supra* note 48, at 155 (noting that *Hole in the Wall* was sold to thirty-two countries in one year and that *The Apprentice* was sold to fourteen countries in six months); ADAPTING *IDOLS*: AUTHENTICITY, IDENTITY AND PERFORMANCE IN A GLOBAL TELEVISION FORMAT, *supra* note 59, at 223-24 app. 1 (providing a table showing that *Idols* aired in eighteen countries within two years).

220. The most important trade shows include MIPTV, MIPCOM, and MIPFormats in Cannes and NATPE in Las Vegas. Other trade shows exist in Budapest and Singapore. See Gottlieb, *supra* note 35, at 258-59; Singh, *supra* note 48, at 180-86; Singh & Kretschmer, *supra* note 59, at 20; Singh, *supra* note 53, at 54; MORAN WITH MALBON, *supra* note 35, at 73-83.

221. Sometimes the more important deals are struck in anticipation of the trade shows.

222. Singh, *supra* note 48, at 181-82; Gottlieb, *supra* note 35, at 228, 259.

223. Probably in the hundreds.

224. Singh & Kretschmer, *supra* note 59, at 20; Singh, *supra* note 48, at 136 (quoting a management director of a large German format developer: "'It's a small world—everybody knows the show[']s coming out. You have broadcasters from America having their scouts sitting in London looking at the European market; or producers from France with their scouts sitting in Germany. . . . So if there is a new successful show coming from any of the key territories, certainly those scouts will communicate the information.'").

225. Singh, *supra* note 48, at 186-95.

226. *Id.* at 209 (quoting the Creative Director of Media Licensing for a large British format distributor: "'*Idols* was deliberately conceived as a brand, not just a TV show[;] . . . we effectively borrowed from other industries.'"); Sachdeva & McDonald, *supra* note 109, at 11; MITTELL, *supra* note 56, at 91.

227. Singh, *supra* note 48, at 210.

advertising, but also from merchandising.²²⁸ The *Idols* brand has been licensed for interactive games, T-shirts, cars, and perfumes.²²⁹ The merchandising for *Who Wants to Be a Millionaire?* “expanded to 140 product lines—from board games to Christmas crackers—and at one stage represented 40 percent of the format revenue. The television show was simply considered a shop window for all the merchandising behind it.”²³⁰

The TV format industry has also developed a format registration system that is intended to provide proof of which format developer created which format at what time.²³¹ From time to time, industry participants use a dispute resolution system administered by the World Intellectual Property Organization. In 2010, the World Intellectual Property Organization extended its mediation and arbitration system in the film and media sector to cover TV format disputes as well.²³²

Furthermore, parts of the industry are using strategies to change the industry structure so that it is less susceptible to format imitation. Some broadcasters are, for example, adopting formats that are harder to imitate. This may include a move to scripted formats²³³ or to more complex format types,²³⁴ or the introduction of elements that are hard to copy.²³⁵ Some firms

228. Singh & Kretschmer, *supra* note 59, at 21-22; Singh, *supra* note 53, at 55; Singh, *supra* note 48, at 21, 204-19.

229. Singh, *supra* note 48, at 209.

230. Chalaby, *supra* note 44, at 299. In 2011, Mattel paid \$680 million for the British entertainment distribution company HIT Entertainment (*Barney & Friends*, *Bob the Builder*, *Thomas & Friends*) in order to benefit from ancillary revenue and tie-in products. See Chozick, *supra* note 61, at B7.

231. This system, which can be used to establish evidence of format creation dates, is administered by the Format Recognition and Protection Association (FRAPA). For more information, see Gottlieb, *supra* note 35, at 259-61; and MORAN WITH MALBON, *supra* note 35, at 102-04. But see Singh, *supra* note 48, at 220-26, who points to the limited effectiveness of the registration system.

232. *WIPO to Provide Dispute Resolution Services for TV Show Format Industry*, WORLD INTELLECTUAL PROP. ORG. (Apr. 7, 2010), http://www.wipo.int/pressroom/en/articles/2010/article_0009.html; see also Gottlieb, *supra* note 35, at 260.

233. Such as the Russian version of *How I Met Your Mother*, which is based on the same script as the U.S. version, but is played by Russian actors. See Michael Schneider, *20th Makes Big Putsch*, DAILY VARIETY, Apr. 8, 2010, available at 2010 WLNR 7293187.

234. Such as a move from reality formats to telenovelas or an increased engagement of TV viewers. Throughout its 2005 season, *American Idol* generated more than 500 million telephone votes. MITTELL, *supra* note 56, at 92. On a similar argument concerning stand-up comedians, see Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1841-67 (2008). Concerning music, see RAUSTIALA & SPRIGMAN, *supra* note 32, at 222-27. More generally, see RAUSTIALA & SPRIGMAN, *supra* note 32, at 179-84.

235. Such as the introduction of an unusual prize for a contest winner (e.g. an apprenticeship with an English football club) or a lavish location. See Gottlieb, *supra* note 35, at 255 n.194.

use economies of scale in order to make format imitation harder.²³⁶ As described in the introduction, the reality game show *Wipeout* is filmed at an obstacle course near Santa Clarita, California.²³⁷ However, you may find a virtually identical obstacle course in Benavidez, close to Buenos Aires, Argentina.²³⁸ It turns out that, while the U.S. version of *Wipeout* is filmed in California, the main footage of the British version of *Wipeout*, which premiered in January 2009 on BBC One, is filmed in Argentina.²³⁹ In fact, the Netherlands-based production company Endemol has sold *Wipeout* to more than thirty countries, including Belarus, the Czech Republic, Slovakia, Germany, and Pakistan.²⁴⁰ All localized *Wipeout* versions, apart from the United States one, fly their competitors and staff out to the central *Wipeout* course in Argentina and do all of their shooting there.²⁴¹ The main reason for this strategy involves economies of scale. Building a gigantic obstacle course makes the show very attractive to its audience, but requires large financial resources. This reduces the number of potential competitors.²⁴² Big players in the TV format business use elaborate shows in order to keep smaller potential competitors out of the market.²⁴³

To overcome transaction costs and potential hold-up problems, some firms integrate vertically so that they can cover the entire production process in-house, from originating the format, for which purpose they employ a group of creative developers, up to the production of individual shows based on that format.²⁴⁴ As in the patent world, some firms are assembling TV format portfolios, which can be used against broadcasters who air format imitations by threatening to stop supplying them with further content.²⁴⁵

236. Economies of scale exist if average costs of production fall as output increases. DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 36 (4th ed. 2005).

237. See *supra* text accompanying notes 2-3.

238. An aerial view of the site is available by searching “Av de Los Constituyentes 6851-7199 Benavidez, Buenos Aires, Argentina” on Google Maps. GOOGLE MAPS, <http://maps.google.com/maps?q=-34.411937,-58.703735&ll=-34.411194,-58.704844&spn=0.004368,0.008256&num=1&t=h&z=18> (last visited Sept. 21, 2013).

239. Total *Wipeout*, WIKIPEDIA (Aug. 11, 2013, 3:30 PM), http://en.wikipedia.org/wiki/Total_Wipeout.

240. *Wipeout (2008 U.S. Game Show)*, *supra* note 62.

241. Total *Wipeout*, *supra* note 239.

242. Gottlieb, *supra* note 35, at 255.

243. *Id.*

244. *Id.* at 232-33, 261-63; Singh, *supra* note 48, at 19, 209. In 2011, Time Warner made an—ultimately unsuccessful—1.4 billion dollar bid to acquire the Dutch format developing company Endemol (*Big Brother*, *Fear Factor*, *Deal or No Deal*, *Wipeout*, etc.) and paid \$100 million for a 55% stake in the British production company Shed Media (*Super-Nanny*, *Footballers' Wives*), and News Corporation paid \$674 million for the British production company Shine Group (*The Biggest Loser*, *Masterchef*). See Chozick, *supra* note 61, at B7.

245. Singh, *supra* note 48, at 162-67.

Moreover, the industry benefits from the fact that TV format buyers may prefer to acquire a license for a format, rather than imitating it, because as buyers, they can get access to tacit knowledge.²⁴⁶ Even if a TV format can be watched on TV, the original format developer and broadcaster may be able to provide information that is not available to a person merely watching the format.²⁴⁷ This includes knowledge of how the format can be turned into a commercial success:²⁴⁸ the original format developer may have particular experience regarding the production choices and programming time slots that were particularly successful and information about how audience ratings and advertising revenue could be influenced by the design format.²⁴⁹ The buyer gets access to format bibles²⁵⁰ and to so-called “flying producers,” who provide consultancy services for rolling out an existing TV format in a new territory.²⁵¹ Such tacit knowledge may also be protectable as a trade secret by misappropriation and breach-of-confidence theories.²⁵² Finally, entering into a license agreement with the original format developer or broadcaster eliminates the risk of a legal conflict with those parties. In essence, licensing buys legal certainty. TV show format producers and broadcasters often want to avoid litigation, as an allegedly infringing format may be enjoined, which can provide even a nuisance litigant with considerable bargaining power. They are also careful in not establishing precedents that would restrict their legal position in other future litigation. These motivations provide further reasons why TV format producers and broadcasters

246. Singh & Kretschmer, *supra* note 59, at 18-19.

247. *Id.*

248. *Id.* On a related economics discussion about the incentives to innovate in the absence of formal IP protection, but with existing knowledge transfer contracts, see Emeric Henry & Carlos J. Ponce, *Waiting to Imitate: On the Dynamic Pricing of Knowledge*, 119 J. POL. ECON. 959 (2009).

249. Gottlieb, *supra* note 35, at 246, 248; Carter, *supra* note 49; Ariel Katz, *Substitution and Schumpeterian Effects over the Life Cycle of Copyrighted Works*, 49 JURIMETRICS J. 113, 149 (2009); Singh, *supra* note 48, at 225 (quoting a Swedish format distributor: “When you buy the format, you don’t buy the legal right, you buy the knowledge and knowhow from the producer.”). An informative example of such information is provided by Singh, quoting a research manager of a large British format distributor:

When we launched *Idols*, it had a very distinct pattern of the audience. For the auditions phase, we had an upward curve of the audience, and the group stage when they cut down to the final 12, the viewers will tune out for some reason. And the final live stage it will go up again—it was a U shaped curve and we discovered that this was the same pattern in all countries. So the middle section was made compact and a bit more dynamic so that we didn’t lose so much of the audience in between.

Singh, *supra* note 48, at 207.

250. See *supra* text accompanying note 88.

251. Singh, *supra* note 48, at 169-80.

252. See *supra* text accompanying notes 148-53, 183-211.

may be willing to license a TV show format even when the intellectual property claim of the original format developer is weak.²⁵³

C. Conclusion

The above analysis has shown that the legal protection against TV format imitation is limited. Copyright protection often fails due to the idea/expression dichotomy or the finding that no substantial copying of copyrightable elements occurred. Claims based on unfair competition doctrines often fail as well, either because they are preempted by intellectual property laws or because the doctrines are limited in scope in the first place.

This does not mean that legal protection against TV format imitation is impossible. There have been cases where courts found that TV format imitations violated copyright, unfair competition, or breach-of-confidence doctrines. Some unfair competition laws—in particular the broad French law of parasitism and other misappropriation-based doctrines—provide a certain degree of protection for TV formats. However, in most of these cases, the courts' willingness to grant protection can be traced back to particular circumstances of the case: A broadcasting station hires the staff and the host of a TV show and starts a very similar TV show a few months later; another attempts to convince its audience that its new TV show is related to or endorsed by an earlier show. The industry is slowly moving its litigation and arbitration strategy from copyright-based to unfair-competition-based approaches. Apart from these special circumstances related to unfair competition and breach of confidence, the intellectual property systems of the countries analyzed are remarkably uniform in their reluctance to grant protection against TV format imitation.

At the same time, the industry has developed mechanisms outside the legal system to cope with TV format imitation. Such mechanisms include first-mover advantages, social norms and gentlemen's agreements, active brand management, merchandising, dispute resolution systems, vertical integration, format portfolio building, tacit knowledge, and risk management, as well as changes in format types, elements, and production. Each of these mechanisms may, either directly or indirectly, provide some level of protection against format imitation.

III. THRIVING IN A CREATIVE INDUSTRY WITH LOW PROTECTION

While the industry can rely on various mechanisms outside the legal system and intellectual property offers some limited protection, the current level of protection against TV format imitation cannot be compared to a

253. Gottlieb, *supra* note 35, at 248.

fully developed and enforced intellectual property right. In fact, imitating TV formats is a common practice in the industry. As Judge Preska noted in the *Survivor* litigation, “the evolution of TV shows . . . is a continual process involving borrowing liberally from what has gone before.”²⁵⁴ If this observation is correct, the question is how an industry can survive in an environment of relatively low and uncertain protection against product imitation. This Part of the Article develops a theory to provide an answer to that question.

In some markets, justifying intellectual property protection is relatively straightforward. There is ample empirical evidence to show, for example, the beneficial impact of patent protection on research and development investment in the pharmaceutical sector.²⁵⁵ Without such protection, one would expect market participants to free ride on the innovative activities of their fellow competitors. Knowledge and creative works, after all, share the characteristics of a public good, each being non-rivalrous in use and non-exclusive in consumption. Without property rights, public goods may be underprovided because of free riding.²⁵⁶ A standard law and economics analysis suggests that providing intellectual property protection in such markets is a wise policy decision. The standard response of intellectual property law to market failures resulting from the public-good characteristics of information is to provide property rights.

This reasoning could, in theory, be applicable to the TV show format market as well. Once a TV format has been broadcast, much of the information contained in the format can be observed by watching episodes. This information has become a public good. Without protection, competing broadcasters could freely imitate the format. Such free riding would decrease revenues for the original format developer and broadcaster. Foresee-

254. *CBS Broad., Inc. v. Am. Broad. Cos.*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *1 (S.D.N.Y. Jan. 13, 2003). On this litigation in general, see *supra* text accompanying notes 125-32. On different kinds of format imitation, see Singh, *supra* note 48, at 25-28.

255. Richard C. Levin et al., *Appropriating the Returns from Industrial Research and Development*, 3 BROOKINGS PAPERS ON ECON. ACTIVITY 783 (1987); Edwin Mansfield, Mark Schwartz & Samuel Wagner, *Imitation Costs and Patents: An Empirical Study*, 91 ECON. J. 907, 913 (1981); Mark Schankerman, *How Valuable Is Patent Protection? Estimates by Technology Field*, 29 RAND J. ECON. 77 (1998). This is not to say that the patent system works smoothly in the pharmaceutical sector. See C. Scott Hemphill & Bhaven N. Sampat, *When Do Generics Challenge Drug Patents?*, 8 J. EMPIRICAL LEGAL STUD. 613 (2011); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

256. On the public-good nature of knowledge and creative works, see Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1476, 1476-77 (A. Mitchell Polinsky & Steven Shavell eds., 2007); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13-14, 19-20, 23-24 (2003).

ing this, the original format developer and broadcaster would not invest resources in format development in the first place. While market participants employ the various protection mechanisms identified in the previous Part of this Article, they still have to endure a high level of format imitation.²⁵⁷ Standard law and economics of intellectual property suggests that, without better TV format protection, an inefficient undersupply of TV formats could occur.²⁵⁸ The market for TV formats could break down because no sufficient incentives for format development would exist.

Yet, the market has not broken down. Instead, it seems to flourish, and the question is why. Over the last few years, intellectual property scholarship has identified markets in which the link between innovation and intellectual property protection is less straightforward than the standard law and economics theory of intellectual property suggests.²⁵⁹ In particular, intellectual property scholars have pointed to various markets in which a low level of intellectual property protection exists alongside a relatively low level of free riding. They have identified various mechanisms developed by market participants in order to reduce free riding despite the low level of intellectual property protection. Private contracting, collective institutions, and social norms play an important role. Robert Merges has pointed to the Hollywood script registry and the Fashion Originators' Guild of America in the 1930s as examples of privately created intellectual property regimes.²⁶⁰ In their study of French *haute cuisine*, Emmanuelle Fauchart and Eric von Hippel point to strong social norms that deter accomplished French chefs from copying recipes from each other.²⁶¹ Dotan Oliar and Christopher Sprigman have demonstrated how social norms militate against appropriation, authorship, and transfer of works amongst stand-up comedians.²⁶²

While numerous markets exist in which a low level of intellectual property protection coincides with a low level of imitation, there are also opposite cases. In their article on the piracy paradox, Kal Raustiala and Christopher Sprigman have argued that the U.S. fashion industry does not suffer from the low level of protection for fashion design in U.S. intellectual

257. See *infra* text accompanying notes 279-303.

258. On this reasoning, see Gottlieb, *supra* note 35, at 246-47.

259. Dreyfuss, *supra* note 31, at 1450 (providing an overview of the scholarship and its challenges); see also Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011); RAUSTIALA & SPRIGMAN, *supra* note 32.

260. Merges, *supra* note 104, at 1361-68; see also Dreyfuss, *supra* note 31, at 1442-43; Fisk, *supra* note 104, at 268-73; Raustiala & Sprigman, *supra* note 32, at 1695-98; RAUSTIALA & SPRIGMAN, *supra* note 32, at 30-34; Rubin, *supra* note 33, at 703-04; *supra* note 104.

261. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORGANIZATIONAL SCI. 187 (2008).

262. Oliar & Sprigman, *supra* note 234; see also RAUSTIALA & SPRIGMAN, *supra* note 32, at 177-79.

property law.²⁶³ Rather, they claim, it thrives *because of* this low level of protection.²⁶⁴ Other scholars have taken a more moderate view on the U.S. fashion industry. Scott Hemphill and Jeannie Suk distinguish between close copies of fashion and participation in common fashion trends. They see a need for protection against close fashion imitation, while common fashion trends should remain free from appropriation.²⁶⁵

As the following Section demonstrates, the TV format industry is another example of an industry coping with a low level of protection against format imitation. It shares some, although not all, features with the fashion industry. The Section will put forward a novel theory to explain why the industry is able to survive in an environment of low protection.²⁶⁶ In addi-

263. Raustiala & Sprigman, *supra* note 32, at 1733.

264. *Id.*; see also RAUSTIALA & SPRIGMAN, *supra* note 32, at 21.

265. Hemphill & Suk, *supra* note 32, at 1153.

266. While this theory is inspired by economics research and while economists have extensively studied TV show formats, their focus is usually on other research questions. In particular, empirical and experimental economists have studied human behavior in game shows quite extensively by focusing on questions of discrimination, cooperation, fairness, risk preferences, bounded rationality, and, indeed, fertility. See, e.g., Steven D. Levitt, *Testing Theories of Discrimination: Evidence from Weakest Link*, 47 J.L. & ECON. 431 (2004) (analyzing data from the game show *The Weakest Link*); Kate Antonovics, Peter Arcidiacono & Randall Walsh, *Games and Discrimination: Lessons from The Weakest Link*, 40 J. HUM. RESOURCES 918 (2005) (*The Weakest Link*); Andrew Metrick, *A Natural Experiment in "Jeopardy!"*, 85 AM. ECON. REV. 240 (1995) (*Jeopardy!*); Gabriella Sjögren Lindquist & Jenny Säve-Söderbergh, *"Girls Will Be Girls", Especially Among Boys: Risk-Taking in the "Daily Double" on Jeopardy*, 112 ECON. LETTERS 158 (2011) (*Jeopardy!*); Jonathan B. Berk, Eric Hughson & Kirk Vandezande, *The Price Is Right, but Are the Bids? An Investigation of Rational Decision Theory*, 86 AM. ECON. REV. 954 (1996) (*The Price Is Right*); Randall W. Bennett & Kent A. Hickman, *Rationality and the 'Price Is Right'*, 21 J. ECON. BEHAVIOR & ORG. 99 (1993) (*The Price Is Right*); Rafael Tenorio & Timothy N. Cason, *To Spin or Not to Spin? Natural and Laboratory Experiments from The Price Is Right*, 112 ECON. J. 170 (2002) (*The Price Is Right*); John A. List, *Friend or Foe? A Natural Experiment of the Prisoner's Dilemma*, 88 REV. ECON. & STAT. 463 (2006) (*Friend or Foe?*); Felix Oberholzer-Gee, Joel Waldfogel & Matthew W. White, *Friend or Foe? Cooperation and Learning in High-Stakes Games*, 92 REV. ECON. & STAT. 179 (2010) (*Friend or Foe?*); Gabrielle Wall, *Outwit, Outplay, Outcast? Sex Discrimination in Voting Behaviour in the Reality Television Show Survivor*, 45 N.Z. ECON. PAPERS 183 (2011) (*Survivor*); Jungmin Lee, *American Idol: Evidence of Same-Race Preferences?*, B.E. J. ECON. ANALYSIS & POL'Y, July 2009, at 1 (*American Idol*); Robert Gertner, *Game Shows and Economic Behavior: Risk-Taking on "Card Sharks"*, 108 Q.J. ECON. 507 (1993) (*Card Sharks*); Shamena Anwar, *Testing for Discrimination: Evidence from the Game Show Street Smarts*, 81 J. ECON. BEHAVIOR & ORG. 268 (2012) (*Street Smarts*); Thierry Post et al., *Deal or No Deal? Decision Making Under Risk in a Large-Payoff Game Show*, 98 AM. ECON. REV. 38 (2008) (U.S., German, and Dutch versions of *Deal or No Deal?*); Michèle Belot, V. Bhaskar & Jeroen van de Ven, *Promises and Cooperation: Evidence from a TV Game Show*, 73 J. ECON. BEHAVIOR & ORG. 396 (2010) (Dutch game show *Will (S)he Share or Not?*); Roel M.W.J. Beetsma & Peter C. Schotman, *Measuring Risk Attitudes in a Natural Experiment: Data from the Television Game Show Lingo*, 111 ECON. J. 821 (2001) (Dutch game show *Lingo*); Pavlo Blavatsky & Ganna Pogrebna, *Risk Aversion When Gains Are Likely and Unlikely:*

tion to relying on legal protection mechanisms, it is the development of extra-legal protection mechanisms and the combination of herding behavior on the supply and demand side and the resulting fashion cycles, which have enabled the industry to thrive. The Section will first develop these arguments and then consider their normative implications.

A. Supply-Side Herding: Innovate or Imitate?

Creating TV formats is a highly uncertain business. It is very hard, if not impossible, to predict whether a new TV show will be a commercial success or failure. Even experienced industry veterans stop short of making predictions.²⁶⁷ Empirical research shows that many new programs are a failure. In a study of all prime time network television programs between 1961 and 1989, Robert Kennedy found that 63% of new shows were broadcast for one season only while 14% lasted five years or more.²⁶⁸

In this regard, TV formats are similar to movies. *Ex ante*, it is very hard to predict whether a movie will be successful at the box office. This inspired Academy Award-winning screenwriter William Goldman's famous

Evidence from a Natural Experiment with Large Stakes, 64 THEORY & DECISION 395 (2008) (British and Italian versions of *Deal or No Deal?*); Ganna Pogrebna, *Naïve Advice When Half a Million Is at Stake*, 98 ECON. LETTERS 148 (2008) (Italian version of *Deal or No Deal?*); Martijn J. van den Assem, Dennie van Dolder & Richard H. Thaler, *Split or Steal? Cooperative Behavior When the Stakes Are Large*, 58 MGMT. SCI. 2 (2012) (on the British game show *Golden Balls*); Eliana La Ferrara, Alberto Chong & Suzanne Duryea, *Soap Operas and Fertility: Evidence from Brazil*, AM. ECON. J. APPLIED ECON., Oct. 2012, at 1 (on Brazilian telenovelas).

267. See TODD GITLIN, *INSIDE PRIME TIME 20-21* (Routledge 1994) (1983) ("In this lush landscape of myth, scandal, and rumor, the workings of prime-time TV remain mysterious. . . . [T]he workings of the system are so opaque, even to insiders, the decisions apparently so arbitrary, the errors so abundant and visible, the products seemingly so inexplicable. . . . Often I began an interview by saying that I was trying to understand how decisions got made about what to put on the air. . . . 'If you figure it out, please let me know'; or 'I've been in this business X years, and I don't understand it.'"); KERSTIN FRÖHLICH, *INNOVATIONSSYSTEME DER TV-UNTERHALTUNGSPRODUKTION: KOMPARATIVE ANALYSE DEUTSCHLANDS UND GROBBRITANNIENS* 166-67 (2010) (quoting from interviews with a British and a German broadcaster: "'It's just a higher game of poker. You're playing at the big table, not the afternoon quiet tables'"; "'In welcher anderen Industrie warden Millionen-Aufträge nur auf Grund von zehn Seiten Powerpoint-Präsentation vergeben?'" [In which other industry will orders be commissioned just on the basis of a ten-slide Powerpoint presentation?]); IAN GURVITZ, "HELLO," *LIED THE AGENT* 22 (2006) ("Television is a business based on the presumption of failure."); William T. Bielby & Denise D. Bielby, "All Hits Are Flukes": *Institutionalized Decision Making and the Rhetoric of Network Prime-Time Program Development*, 99 AM. J. SOC. 1287, 1289-90 (1994) ("An experienced programmer . . . has no reliable basis for predicting whether audiences, advertisers, and critics will accept the series."); Gottlieb, *supra* note 35, at 228.

268. Robert E. Kennedy, *Strategy Fads and Competitive Convergence: An Empirical Test for Herd Behavior in Prime-Time Television Programming*, 50 J. INDUS. ECON. 57, 66-67, 81 (2002).

remark that “NOBODY KNOWS ANYTHING.”²⁶⁹ This judgment is not only shared by industry participants,²⁷⁰ but is also supported by econometricians who have attempted to analyze movie success rates with standard regression analysis techniques.²⁷¹ The reasons why individual movies become blockbusters and the explanations of performance differentials among movies largely remain a mystery.²⁷²

Not only is the success of a new TV format hard to predict, the return on TV formats is also highly skewed. A few formats are very successful, leading to large profits for the broadcasting station and, potentially, the for-

269. WILLIAM GOLDMAN, ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING 39 (1983); see also Arthur De Vany, *The Movies*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 617, 623 (Victor A. Ginsburgh & David Throsby eds., 2006); *United States v. Griffith Amusement Co.*, 68 F. Supp. 180, 196 (W.D. Okla. 1946) (“Moving picture films are a fluctuating and uncertain product. Until a film has been exhibited no one knows or can accurately estimate its value as a box-office attraction, either as a first-run exhibition or a subsequent run exhibition. What the demand for its exhibition may be by the public is an unknown factor.”). From 1984 through 1996, only 22% of movie releases were profitable in the United States and Canada. Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets* 5 (USC Law & Econ. Research Paper Series No. C12-9, USC Legal Studies Research Paper No. 12-15, 2012), available at <http://ssrn.com/abstract=2118918>.

270. See Paul G. Anderson, *Back to the Future[s]: A Critical Look at the Film Futures Ban*, 29 CARDOZO ARTS & ENT. L.J. 179, 180 n.3 (2011) (highlighting the thoughts of Robert Pisano, then President and Interim CEO of the Motion Picture Association of America, who elaborated on the unpredictable nature of movie success).

271. Using data from 1998 theater releases, Jeffrey S. Simonoff & Ilana R. Sparrow show that it is impossible to predict the success of most movies prior to their release. Jeffrey S. Simonoff & Ilana R. Sparrow, *Predicting Movie Grosses: Winners and Losers, Blockbusters and Sleepers*, 13 CHANCE 15 (2000).

272. Allège L. Hadida, *Motion Picture Performance: A Review and Research Agenda*, 11 INT’L J. MGMT. REVIEWS 297, 297 (2009); Jordi McKenzie, *The Economics of Movies: A Literature Survey*, 26 J. ECON. SURVEYS 42, 45-48 (2012) (providing an overview of this research). 6.3% of all movie releases between 1984 and 1996 earned 80% of total profits. See Barnett, *supra* note 269, at 5; see also McKenzie, *supra*, at 64 (“It has become well understood that motion pictures are an inherently uncertain product.”); Arthur De Vany & W. David Walls, *Bose-Einstein Dynamics and Adaptive Contracting in the Motion Picture Industry*, 106 ECON. J. 1493, 1493 (1996) (“[N]obody knows what makes a hit or when it will happen. . . . A hit is generated by an information cascade. If supply can ride the cascade, a superstar might be the result.”); De Vany, *supra* note 269, at 641; Christoph Engel & Michael Kurschilgen, *Fairness Ex Ante and Ex Post: Experimentally Testing Ex Post Judicial Intervention into Blockbuster Deals*, 8 J. EMPIRICAL LEGAL STUD. 682, 682-83 (2011); HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 142 & 170 nn.73-76, 144 & 171 nn.77-79, 145 & 171 nn.80-81 (8th ed. 2011). The uncertainty of the movie industry led to the creation of a market for movie futures—an endeavor that came to an end with the passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 that banned domestic trading in movie futures. On this development, see Anderson, *supra* note 270, at 182-88.

mat developer. The vast majority of TV formats are, however, commercial failures.²⁷³

As in other markets characterized by uncertainty about demand and highly skewed profits, one must ask how TV show format market participants cope with these market characteristics. Looking at markets with similar features may provide insight in this respect. Economists have long been interested in markets in which information about demand is hard to obtain. When it is difficult for firms to find out what their customers want, it is also difficult for them to decide whether they should imitate their competitors or do something different.

Models of herding and information cascades demonstrate that, in such markets, firms can have incentives to imitate their rivals. In a market where product qualities are uncertain or information about demand is costly and time consuming to obtain, firms may rely on what their rivals are doing in their own decision-making process. They do not only observe, but may also imitate the behavior of their rivals, as this is the only reliable source of information they have.²⁷⁴ At the aggregate level of the market, such imitation among rivals can lead to conformity and fads in firm behavior.²⁷⁵

This is not only a theoretical prediction. Such behavior can be observed in various markets. In an empirical study of twenty-four chemical product industries over twenty years, Richard Gilbert and Marvin Lieberman showed that smaller firms tend to follow the investment activities of their rivals and that such “jumping on the bandwagon” behavior can lead to a stable equilibrium because the firms treat the investment activities of their rivals as a “signal of market opportunities” and trends.²⁷⁶ Other examples of herding behavior in the face of uncertainty include the decision of banks where to locate branches²⁷⁷ and of Wall Street securities analysts to initi-

273. Gottlieb, *supra* note 35, at 228.

274. Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, J. ECON. PERSP., Summer 1998, at 151, 164; Kennedy, *supra* note 268, at 79.

275. Bikhchandani, Hirshleifer & Welch, *supra* note 274, at 164; *see generally* Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797 (1992); Ivo Welch, *Sequential Sales, Learning, and Cascades*, 47 J. FIN. 695 (1992); Marvin B. Lieberman & Shigeru Asaba, *Why Do Firms Imitate Each Other?*, 31 ACAD. MGMT. REV. 366 (2006) (“Environmental uncertainty promotes certain types of imitation.”); Kennedy, *supra* note 268, at 79; Dirk Bergemann & Juuso Välimäki, *Experimentation in Markets*, 67 REV. ECON. STUD. 213 (2000). The underlying economic models often formalize Bayesian learning processes. For an overview of the theoretical and empirical literature, see Lieberman & Asaba, *supra*, at 368-70.

276. Richard J. Gilbert & Marvin Lieberman, *Investment and Coordination in Oligopolistic Industries*, 18 RAND J. ECON. 17, 18, 26 (1987).

277. Steven Deller & Reka Sundaram-Stukel, *Spatial Patterns in the Location Decisions of US Credit Unions*, 49 ANNALS REGIONAL SCI. 417, 427-28 (2012).

ate—and subsequently abandon—coverage of Nasdaq-listed firms,²⁷⁸ as well as firms' decisions regarding where to locate factories.²⁷⁹

Similar trends can be observed in the TV format industry. When a format developer decides whether to develop a new format, or a broadcasting station decides whether to air it, ideally they would base their decision on the expected commercial success of the new format. Due to the impossibility of predicting success and the highly skewed profitability distribution, reliable information about commercial success is often unavailable. Given this lack of reliable information about product profitability, a TV format supplier will often base his decision on whether to develop and broadcast a new format solely on the behavior of his competitors. Their behavior is the only reliable information the format supplier has.

When a broadcasting station decides to roll out a new TV format, neither the station nor its competitors will have any reliable information about the success and profitability of the new format. Given this uncertainty, a broadcasting station will observe carefully what kind of TV formats have turned out successful over the last few seasons on competing channels. This is done by observing the programming behavior of rival broadcasters and the newest trends at TV trade shows,²⁸⁰ and by hiring specialized consultancy firms and format scouts. If a particular format has a proven track record, this increases the chances of it being successful again.²⁸¹ Therefore, when a broadcasting station decides to air a new TV format, the decision carries with it an “informational externalit[y],” as Cass Sunstein calls it, which may impact the decisions of its competitors.²⁸² At the level of the individual broadcaster, this may lead to imitation of their rivals' behavior. At the aggregate level, such informational externalities can lead to cascade effects

278. Hayagreeva Rao, Henrich R. Greve & Gerald F. Davis, *Fool's Gold: Social Proof in the Initiation and Abandonment of Coverage by Wall Street Analysts*, 46 ADMIN. SCI. Q. 502 (2001).

279. Witold J. Henisz & Andrew Delios, *Uncertainty, Imitation, and Plant Location: Japanese Multinational Corporations, 1990-1996*, 46 ADMIN. SCI. Q. 443 (2001); Stalnaker, *supra* note 56, at 163. For an overview of herding behavior in financial markets, see Andrea Devenow & Ivo Welch, *Rational Herding in Financial Economics*, 40 EUR. ECON. REV. 603 (1996); David Hirshleifer & Siew Hong Teoh, *Herd Behavior and Cascading in Capital Markets: A Review and Synthesis* (Munich Personal RePEc Archive, Paper No. 5186, 2001) available at <http://mpira.ub.uni-muenchen.de/5186/>; and Welch, *supra* note 275. For a general overview of the literature, see Lieberman & Asaba, *supra* note 275.

280. See *supra* text accompanying notes 220-21.

281. This is only true until saturation points are reached; on demand-side herding effects, see *infra* Section III.B.

282. Sunstein, *supra* note 43, at 515. On the question whether information about the market success of a product should be subject to exclusive protection by intellectual property law, see Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929 (2011).

and fashions in TV programming.²⁸³ As a result, a new, successful TV show format will often give rise to similar formats. Such trends can be frequently observed. When *The Bachelor* premiered on ABC, this spawned roughly a dozen imitations on rival stations.²⁸⁴ Following *Project Runway*, “[a]t least eight reality fashion shows and one scripted series” went into production.²⁸⁵

I call this tendency of TV format suppliers to imitate formats because of demand uncertainty “supply-side herding.” Empirical research has shown that supply-side herding is not just a theoretical experiment in the television industry. In the study of all prime-time network television programs that appeared between 1961 and 1989, Robert Kennedy used econometric techniques to show that the broadcast networks’ program introductions were influenced by their rivals’ behavior. Networks introduced programs in categories where their rivals were introducing new programs as well, and they canceled programs in categories where their rivals had recently canceled programs.²⁸⁶

Even if decisions to broadcast a new TV format carry an informational externality influencing the behavior of rival broadcasters, it is still questionable whether this can lead to a stable equilibrium in which market participants tolerate a certain amount of format imitation. Standard law and economics theory would predict that innovators would have no incentive to innovate in such a market.²⁸⁷ Suppose there is one broadcaster that is very good at putting innovative TV formats on the market, while his competitors are much worse at the job. In such a situation, it could be that the competitors are always imitating the behavior of the innovative broadcaster, thereby considerably reducing his incentives to innovate. If this were the case, the TV format industry would suffer from a significant undersupply of TV formats, as constant free riding on TV format innovation would eliminate incentives to innovate.²⁸⁸

In reality, this does not seem to happen. The TV format industry is thriving, and there seems to be a large amount of format innovation and

283. Sunstein, *supra* note 43, at 515-16.

284. Bill Carter, *Reality TV Hits (Further) Below the Belt*, N.Y. TIMES, May 10, 2004, at C5.

285. Cathy Horyn, *On TV, More of the Same*, N.Y. TIMES, Apr. 10, 2011, at 4ST. For more examples, see Bergman, *supra* note 123, at 244 n.4 (citing similarities between *Supernanny* and *Nanny 9-1-1* and between *The Apprentice* and *The Rebel Billionaire*); Bill Carter, *The Ratings Teach Some New Rules*, N.Y. TIMES, Dec. 26, 2004, at AR34 (pointing to “rip-off reality shows”); Sharp, *supra* note 35, at 178-79 (addressing “copycat shows”); and Stalnaker, *supra* note 56, at 164 (discussing reality television show imitations).

286. Kennedy, *supra* note 268, at 70-73. The study also tries to measure the impact of imitative behavior on profitability, although the methods used to measure the profitability of a particular program are very indirect and somewhat questionable.

287. See *supra* text accompanying notes 255-58.

288. This is the general free-rider story used to justify intellectual property protection. See *supra* text accompanying note 256.

variety on the global TV market. This is due, at least in part, to another particular feature of the TV format industry. Companies tend to develop original formats at some times and imitate outside formats at other times.²⁸⁹ Industry participants cannot be neatly divided into format innovators and format imitators. Rather, everyone is an innovator at some time and an imitator at another time.

Consider Endemol, the Dutch TV format powerhouse. It created *Big Brother* and *Deal or No Deal*, but has been accused of imitating *Takeshi's Castle* in *Wipeout*.²⁹⁰ FremantleMedia, the British format production company that gave the world *Farmer Wants a Wife* and *The Price is Right*, has been accused of copying elements from the *Pop Idol* format—from which *American Idol* is derived—when it co-created *The X Factor*.²⁹¹ After Fox Family, producer of *Race Around the World*, filed a copyright infringement suit against CBS's production of *The Amazing Race* in 2000,²⁹² it only took a few months for CBS to sue Fox over an alleged similarity between *Survivor* (CBS) and *Boot Camp* (Fox).²⁹³ Similarly, Fox broadcast the game show *Greed* after ABC aired *Who Wants to Be a Millionaire?*, and *Rebel Billionaire: Branson's Quest for the Best* after NBC aired *The Apprentice* with Donald Trump.²⁹⁴

After the success of ABC's *Who Wants to Be a Millionaire?*, NBC revived *21*, which is modeled on the late 1950s game show *Twenty One*, and CBS created *Winning Lines*.²⁹⁵ CBS has accused ABC of alleged similarities between *Survivor* and *I'm a Celebrity . . . Get Me out of Here!*²⁹⁶ ABC and the British format developing company RDF claimed that its *Wife Swap* format was the model for Fox's *Trading Spouses*;²⁹⁷ NBC's *Average Joe* and *For Love or Money* are similar to ABC's *The Bachelor*;²⁹⁸ ABC's *Supernanny* is not too far apart from Fox's *Nanny 911*; nor is Fox's *American*

289. See Fox, *supra* note 42, at 224-25; Gottlieb, *supra* note 35, at 258; Singh, *supra* note 48, at 22.

290. See *supra* text accompanying notes 1-13; see also *supra* note 275.

291. Charlotte Hinton, *Can I Protect My Format?*, 17 ENT. L. REV. 91, 91 (2006); Matthew Belloni, *Courts Are Gaining on TV Networks in the Race for Reality Programming*, HOLLYWOOD REP., Oct. 22, 2008, available at 2008 WLNR 25836967.

292. Fox Family Prods., Inc. v. CBS, Inc., No. CV00-11482RMT(Ex) (C.D. Cal. filed Nov. 14, 2000).

293. *Survivor Prods. L.L.C. v. Fox Broad. Co.*, No. CV 01-3234 LGB (SHx), 2001 U.S. Dist. LEXIS 25512 (C.D. Cal. June 11, 2001); Bergman, *supra* note 123, at 255-56.

294. Carter, *supra* note 284, at C5; MITTELL, *supra* note 56, at 88.

295. Carter, *supra* note 54, at 18AR; MITTELL, *supra* note 56, at 88.

296. *CBS Broad., Inc. v. Am. Broad. Cos.*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 13, 2003); Bergman, *supra* note 123, at 256-57.

297. *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556 (C.D. Cal. 2005). Ultimately, this litigation was settled out of court. See Belloni, *supra* note 291; Sharp, *supra* note 35, at 190-91; Bergman, *supra* note 123, at 258; Schwartz, *supra* note 12, at 40.

298. Carter, *supra* note 284, at C5.

Idol significantly different from NBC's *The Voice*.²⁹⁹ TV show formats also form the basis for hoax shows. Fox's *My Big Fat Obnoxious Boss* was a parody of *The Apprentice* and made contestants believe they were competing for a job at a Chicago-based company that did not exist.³⁰⁰

Format imitation also occurs across borders. The Afghan station Tolo TV has created unauthorized versions of *The Office* and *24*,³⁰¹ the Canadian series *Canada Sings* has been accused of being a knockoff of the Dutch *Singing Office* format;³⁰² and a German TV station created a format inspired by the U.S. format of *Queer Eye for the Straight Guy*, where the main difference was that the German show employed four, instead of five, gay lifestyle experts.³⁰³

Stories of mutual imitation abound in the TV format industry. The industry is characterized by repeat players who are both innovators and imitators, but at different times in their repeated interaction.³⁰⁴ If an imitator builds on an innovation by an original innovator, it may be harmful to the latter at this stage. But if the original innovator is likely to become an imitator himself at a later stage and if both parties foresee this repeated interaction, they may be perfectly happy with it. As market participants realize that the ability to innovate is relatively equally distributed among the industry, so that no participant always outperforms his competitors, a regime that allows everyone to be a successful innovator at different times may have benefits for all participants.

Jonathan Barnett, Gilles Grolleau, and Sana El Harbi have developed a similar argument for the fashion industry. They argue that, in a market characterized by demand uncertainty and skewed returns, a property regime that permits some level of imitation operates as a collective insurance mechanism against the risk of recoupment failure.³⁰⁵ Market participants will tol-

299. Amy Chozick, *An Idolatrous Echo Across Networks*, N.Y. TIMES, June 6, 2012, at C1.

300. My Big Fat Obnoxious Boss, WIKIPEDIA (May 29, 2013, 10:04 AM), http://en.wikipedia.org/wiki/My_Big_Fat_Obnoxious_Boss.

301. David Ignatius, *Kabul Meets the Cookie Monster*, WASH. POST, Aug. 7, 2011, at A17; Scott Roxborough, *MIPTV 2012: From 'Arab Idol' to Turkish 'Housewives,' the Mid-east Is Hot for American TV*, HOLLYWOOD REP., Apr. 4, 2012, available at 2012 WLNR 7146244.

302. Etan Vlessing, *Glee Club TV Competition Shows in Copyright Infringement Dispute*, HOLLYWOOD REP., Nov. 25, 2011, available at 2011 WLNR 27166934 (noting that the allegations became public shortly after Endemol acquired the Canadian format).

303. Ed Meza, *'Queer Eye' for a New Format*, DAILY VARIETY, Nov. 18, 2003, available at 2003 WLNR 8817184.

304. Rubin, *supra* note 33, at 664.

305. Jonathan M. Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, 39 J. LEGAL STUD. 159, 160-61 (2010). Their model also builds on the assumption that the market participants benefit from long lead times and are subject to rapid product obsolescence. *Id.* at 160. While lead time and fashion cycles

erate imitation behavior by their rivals if they know that their rivals' success is highly uncertain and that, at a later stage in the repeated interaction, they may themselves imitate their rivals' behavior and find themselves in the situation that their rivals are in now.³⁰⁶

The same mechanism is in operation in the TV show format market. Because the TV show format market is characterized by highly uncertain demand, skewed returns, repeat players, and blurred boundaries between innovators and imitators, format imitation allows market participants to recoup their investments at one stage while failing at another stage. Compared to a highly protective regime, market participants may prefer a regime that permits some imitation, as every participant will, from time to time, engage in and benefit from such imitation. For the industry as a whole, limited appropriability serves as an insurance mechanism against commercial failure for particular market participants in particular periods of the repeated interaction on the market.

This is not to say that a regime that allows TV format imitation among repeat players is the optimal regime for fostering innovation in TV formats.³⁰⁷ Rather, the argument is that, in a market characterized by highly uncertain demand, skewed returns, repeat players, and blurred boundaries between innovators and imitators, market participants may cope with these market characteristics by tolerating format imitation.³⁰⁸ Imitation allows participants to adopt demand signals and to cope with skewed profit distributions. Individually, they may suffer from the regime at some time, but they will benefit from it at other times. Collectively, they may have coordinated on an equilibrium that allows the industry to survive despite a high level of product appropriability.

B. Demand-Side Herding

As the preceding Section has shown, the TV format industry is characterized by highly uncertain demand, highly unpredictable success, and repeated interaction among market participants who are both innovators and imitators. These factors may lead to supply-side herding behavior in which TV format developers and broadcasters imitate each other because it mitigates the uncertainty in the market.

The TV format industry is not only subject to herding behavior on the supply side of the market, however. TV viewers are also prone to herding behavior. TV formats are experience goods. These are goods whose charac-

also play an important role in the TV format industry, see *infra* Section III.C, it is hard to evaluate their relative quantitative importance vis-à-vis both markets.

306. Barnett, Grolleau & El Harbi, *supra* note 305, at 160-61.

307. On this question, see *supra* Section III.D.

308. Barnett, Grolleau & El Harbi, *supra* note 305, at 193.

teristics—their content or quality, for example—are hard to assess in advance. Rather, consumers need to consume those goods in order to assess their qualities.³⁰⁹ Before a TV viewer has watched a new show, he cannot really know what to expect. This makes it hard for TV viewers to decide which TV programs to choose among the many offered.³¹⁰

In such markets, consumers' consumption decisions are often influenced by what other consumers are doing.³¹¹ A consumption decision by one consumer therefore carries an informational externality, from which other consumers may benefit when making their own decisions.³¹² It is hard for a TV viewer to evaluate the quality and appeal of a new TV show before he has watched it. As a result, his consumption decision will be influenced by whether his friends and peers have watched the show before, by what he reads about it in the press, and so on.

Like supply-side herding, demand-side herding in TV show format markets is not just a theoretical exercise. Empirical research has demonstrated that spouses influence each other in their TV program choices.³¹³ The same dynamics can be observed in movie consumption. Movie watchers are influenced in what they like by what their peers are doing.³¹⁴

309. Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311-13 (1970) (describing situations in which consumers learn about product characteristics not when purchasing the product, but when consuming it).

310. Katz, *supra* note 249, at 137; Gottlieb, *supra* note 35, at 219-20; De Vany, *supra* note 269, at 624. On cultural goods as credence goods, see Martin Kretschmer, George Michael Klimis & Chong Ju Choi, *Increasing Returns and Social Contagion in Cultural Industries*, 10 BRIT. J. MGMT. S61, S63 (1999).

311. Bikhchandani, Hirshleifer & Welch, *supra* note 274, at 152-53, 162; Katz, *supra* note 249, at 128-29; Kretschmer, Klimis & Choi, *supra* note 310, at S63, S65; Gottlieb, *supra* note 35, at 252; Arthur De Vany & Cassey Lee, *Quality Signals in Information Cascades and the Dynamics of the Distribution of Motion Picture Box Office Revenues*, 25 J. ECON. DYNAMICS & CONTROL 593, 594 (2001); Robin Cowan, William Cowan & G.M. Peter Swann, *Waves in Consumption with Interdependence Among Consumers*, 37 CANADIAN J. ECON. 149, 150-51 (2004).

312. On informational externalities on the supply side of the market, see *supra* text accompanying notes 282-83.

313. Sha Yang, Vishal Narayan & Henry Assael, *Estimating the Interdependence of Television Program Viewership Between Spouses: A Bayesian Simultaneous Equation Model*, 25 MARKETING SCI. 336, 337 (2006) (demonstrating an interdependence in TV program viewing habits between husbands and wives where, interestingly, the wives' viewing behavior depends more strongly on their husbands' viewing behavior than vice versa).

314. De Vany & Walls, *supra* note 272, at 1493 ("Film audiences make hits or flops and they do it, not by revealing preferences they already have, but by discovering what they like."); see also Byeng-Hee Chang & Eyun-Jung Ki, *Devising a Practical Model for Predicting Theatrical Movie Success: Focusing on the Experience Good Property*, 18 J. MEDIA ECON. 247, 249-50 (2005); Sha Yang et al., *Modeling the Intra-household Behavioral Interaction*, 47 J. MARKETING RES. 470, 471 (2010). Other consumer markets show a similar peer influence on consumer choice. See Vishal Narayan, Vithala R. Rao & Carolyne Saunders, *How Peer Influence Affects Attribute Preferences: A Bayesian Updating*

As with the described dynamics on the supply side, this can lead to conformity and herding effects on the demand side.³¹⁵ TV viewers tend to watch the same shows, thereby concentrating demand on a select number of shows. In addition, feedback effects can occur. If a certain TV format becomes a hit, even more consumers will want to watch it.³¹⁶ It becomes fashionable to watch and talk about a particular TV show. For some TV show formats, TV viewers like to participate in the fan communities that are created by the broadcaster as a branding and merchandising tool.³¹⁷ The larger this fan community becomes, the more TV viewers are likely to want to join. In other words, TV show formats are subject to network externalities, which reinforce the feedback effects.³¹⁸ Such feedback effects can be supported by the advertising market. As advertising revenue increases with the size of the target audience,³¹⁹ TV stations have considerable incentives to air successful TV show formats.³²⁰

Furthermore, media consumption patterns are sticky. Once TV viewers have become accustomed to a particular TV show, they often like to watch this show or similar shows again and again. Think of the phenomenon of movie sequels. Among other reasons, Hollywood studios produce sequels to box-office hits because movie audiences love to watch a movie that has a plot that is similar to, but varies slightly from, the plot of the orig-

Mechanism, 30 *MARKETING SCI.* 368 (2011); Terry L. Childers & Akshay R. Rao, *The Influence of Familial and Peer-Based Reference Groups on Consumer Decisions*, 19 *J. CONSUMER RES.* 198 (1992); Raghuram Iyengar, Christophe Van den Bulte & Thomas W. Valente, *Opinion Leadership and Social Contagion in New Product Diffusion*, 30 *MARKETING SCI.* 195 (2011); Wesley R. Hartmann, *Demand Estimation with Social Interactions and the Implications for Targeted Marketing*, 29 *MARKETING SCI.* 585 (2010).

315. See *supra* Section III.A.

316. Gottlieb, *supra* note 35, at 253. On the general importance of positive feedback effects in the information society, see CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 175-79 (1999); and Katz, *supra* note 249, at 129.

317. Fan communities and social networks surrounding TV show formats are an important branding vehicle for shows such as *Who Wants to Be a Millionaire?* or *American Idol*. See *infra* text accompanying note 359.

318. On the role of network effects in general, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 *CALIF. L. REV.* 479 (1998); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 *AM. ECON. REV.* 424 (1985); and Joseph Farrell & Paul Klemperer, *Coordination and Lock-In: Competition with Switching Costs and Network Effects*, in 3 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 1967 (Mark Armstrong & Robert Porter eds., 2007).

319. Advertising time is usually sold based on gross rating points, program reach, and ad frequency. See VOGEL, *supra* note 272, at 170, 292, 385. However, TV viewers are also adverse to watching too many ads. See Kenneth C. Wilbur, *A Two-Sided, Empirical Model of Television Advertising and Viewing Markets*, 27 *MARKETING SCI.* 356 (2008).

320. Production costs for each of the thirteen episodes in the first season of *Survivor* were about \$1 million. MITTELL, *supra* note 56, at 91. The show generated roughly \$32 million in ad revenue from eight core sponsors over the season. *Id.*

inal hit.³²¹ As a result, sequels to blockbusters prove more successful than stand-alone movies,³²² and producing sequels is a way for movie producers to minimize risks. All of this suggests that movie goers are influenced by their own and their friends' past media consumption when choosing their current movie entertainment.³²³

The fact that TV formats are experience goods and that media consumption patterns are sticky leads to what I call "demand-side herding" in the TV format market. Once a TV format has become successful, rival broadcasters have an incentive to broadcast slight variations of it, as it is what the audience loves to watch at this point.³²⁴

C. Fashion Cycles in the TV Format Industry

The TV show format market is characterized by uncertainty about demand, highly-skewed profits, and repeat players on the supply side who are both innovators and imitators. Additionally, the market includes experience goods, feedback effects, and sticky media consumption patterns on the demand side. This leads to herding effects on both sides of the market. Particular TV formats become trendy as producers and broadcasters imitate each other because of supply-side herding effects. This development is reinforced by demand-side herding effects as an ever-increasing number of TV viewers are "jumping on the bandwagon."³²⁵ Collectively, the supply side

321. It is important that a sequel does not mimic the original movie too closely. Research has shown that consumers value a certain degree of dissimilarity in movie sequels so that they do not become satiated. Sanjay Sood & Xavier Drèze, *Brand Extensions of Experiential Goods: Movie Sequel Evaluations*, 33 J. CONSUMER RES. 352 (2006); see also RICK ALTMAN, *FILM/GENRE* 115-21 (1999).

322. S. Abraham Ravid, *Information, Blockbusters, and Stars: A Study of the Film Industry*, 72 J. BUS. 463, 480, 488 (1999) (measuring box office returns); Chang & Ki, *supra* note 314, at 263, 265 (measuring box office returns and length of run); Barry R. Litman & Linda S. Kohl, *Predicting Financial Success of Motion Pictures: The '80s Experience*, 2 J. MEDIA ECON. 35, 46 (1989) (measuring theatrical rentals); Jay Prag & James Casavant, *An Empirical Study of the Determinants of Revenues and Marketing Expenditures in the Motion Picture Industry*, 18 J. CULTURAL ECON. 217, 220 (1994) (measuring rental revenues); Suman Basuroy, Kalpesh Kaushik Desai & Debabrata Talukdar, *An Empirical Investigation of Signaling in the Motion Picture Industry*, 43 J. MARKETING RES. 287 (2006) (exploring interaction effects on box office revenues between sequels and advertisement expenditure); see also Hadida, *supra* note 272, at 314; McKenzie, *supra* note 272, at 45.

323. Litman & Kohl, *supra* note 322, at 48.

324. Cass Sunstein argues that broadcasters may suffer from an availability heuristic and thereby create "fashions" in programming, which TV viewers actually do not want. Sunstein, *supra* note 43, at 515-16. To what extent commercial firms—as opposed to individuals—suffer from the availability heuristic is an empirical question, which Cass Sunstein's article does not address. Nor does his argument take account of demand-side herding effects, which may lead consumers to actually prefer programming "fashions" over programming diversity, at least as far as entertainment formats are concerned.

325. Gilbert & Lieberman, *supra* note 276, at 18.

appreciates a regime of low TV format protection because it allows format developers and broadcasters to both innovate and imitate over time in an inherently uncertain market. By imitating each other, market participants on the supply side of the market adopt demand signals and deal with highly skewed profits.³²⁶

The demand side appreciates the regime because it satisfies their sticky media consumption patterns. Hence, the most interesting feature about the TV format market is not that herding effects occur on either the supply or the demand side of the market. It is that these herding effects exist on both sides of the market and that their interaction can create fashions and trends in TV show formats.³²⁷

Supply- and demand-side herding does not continue indefinitely, however.³²⁸ First, format imitations are often less profitable to broadcasters than the original format.³²⁹ Second, after a certain time, TV viewers will get tired of a particular format and call for something new.³³⁰ These saturation points in consumer demand ensure that the TV format industry does not suffer from perpetual format imitation.³³¹ Rather, format imitation contributes to the fact that cycles in the TV show format industry are limited in time.³³² The industry is characterized by fashion cycles. Due to herding effects on both sides of the market, particular TV formats become trendy. While a particular format is in fashion, format developers and broadcasting stations want to participate in the trend, leading to a high level of format imitation during the fashion cycle. The industry can use trade shows to coordinate and influence the current trends in TV show formats.³³³

Once a saturation point has been reached, the format goes out of fashion. Format developers and broadcasters stop worrying about imitation. At

326. See *supra* Section III.A.

327. See Bergemann & Välimäki, *supra* note 275, for a formal model in which both market sides are affected by informational externalities.

328. On the importance of time constraints on imitation in creative markets dominated by fashion cycles, see Barnett, Grolleau & El Harbi, *supra* note 305, at 161. On the general importance of cycles in media markets, see Katz, *supra* note 249, at 126-38.

329. Carter, *supra* note 285, at AR34; Gottlieb, *supra* note 35, at 250. *But see* Brian Stelter, 'Idol' Grapples with Its Own Competition, N.Y. TIMES, May 23, 2012, at C2 (attributing the decline in *American Idol* ratings in the 2012 season to the competitors *The Voice* and *The X Factor*); Amy Chozick, *supra* note 299, at C1; Masters & Rose, *supra* note 72.

330. For example, ratings for *Who Wants to Be a Millionaire?* dropped when ABC started airing the format five nights a week. See Masters & Rose, *supra* note 72.

331. Bill Carter, *supra* note 72, at E1 (noting that industry saturation with sitcoms contributed to the surge in reality TV formats in television programming). On similar inflection points in the fashion industry, see Raustiala & Sprigman, *supra* note 32, at 1721.

332. See *infra* text accompanying note 335.

333. At trade shows such as MIPFormats in Cannes, various panels and presentations focus on current trends and exciting newcomers in the TV format industry. On the important TV format trade shows, see *supra* note 220. On the importance of trade shows for coordinating fashion trends, see Barnett, Grolleau & El Harbi, *supra* note 305, at 183-86.

this stage they all have incentives to create and broadcast new formats. Competitive pressure forces them to innovate in order to escape their competitors.³³⁴ In the TV format industry, fashion cycles may last longer than in the clothing industry. But after a few seasons, TV formats typically go out of fashion. After some time, though, demand for particular TV formats may return as they come into fashion again.

The interaction of supply- and demand-side herding, as well as saturation points, leads to fashion cycles in TV formats that are limited in time, thus forcing the industry to keep innovating new formats at the end of each cycle.³³⁵ Some anecdotal and empirical evidence indicates that fashion cycles do indeed exist with TV formats.³³⁶ Sitcom series, some of which are sold as TV formats,³³⁷ go in and out of fashion every few years.³³⁸ NBC is currently exploring the possibility of reviving the 1960s sitcom *The Munsters* in an updated version under the title *The Mockingbird Lane*.³³⁹ *Who Wants to Be a Millionaire?* is not an unprecedented format: *The \$64,000 Question* was a highly successful similar show that ran on CBS from 1955 to 1958.³⁴⁰ *American Idol* and *The X Factor* may remind some viewers of Arthur Godfrey's *Talent Scouts*, a radio and TV format that ran on CBS

334. On the importance of this “escape competition effect” for creative destruction, see Katz, *supra* note 249, at 148-50. For an experimental investigation of this effect, see Philippe Aghion, Stefan Bechtold, Lea Cassar & Holger Herz, *The Causal Effects of Competition on Innovation: Experimental Evidence* (Sept. 20, 2013) (unpublished manuscript) (on file with author). For the underlying theoretical argument and related empirical findings, see Philippe Aghion et al., *Competition, Imitation and Growth with Step-by-Step Innovation*, 68 REV. ECON. STUD. 467 (2001); and Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q.J. ECON. 701 (2005).

335. See Katz, *supra* note 249, at 149. For a related argument in the fashion industry, see Raustiala & Sprigman, *supra* note 32, at 1718-28. For a general argument on the relationship between copying and fads, see RAUSTIALA & SPRIGMAN, *supra* note 32, at 175.

336. MITTELL, *supra* note 56, at 236, 252. On the observation of Judge Preska in the *Survivor* litigation, see *supra* text accompanying note 254; see also Horyn, *supra* note 285; and Gautam Malkani, *Haven't We Seen That Programme Somewhere Before?*, FIN. TIMES, Sept. 21, 2004, at 8 (quoting the then managing director of the Format Recognition and Protection Association, Christopher Fey: “TV lives from borrowing from what has gone before.”).

337. Prominent examples include *The Golden Girls* and *The Office*. On foreign versions of *The Golden Girls*, see *The Golden Girls: Foreign Versions*, WIKIPEDIA (Oct. 6, 2013, 5:13 PM), http://en.wikipedia.org/wiki/The_Golden_Girls#Foreign_versions. On the British and the U.S. versions of *The Office*, see *supra* note 63.

338. Joanne Ostrow, *The Evolution of the Sitcom*, DENVER POST, May 2, 2004, at F01; see also MITTELL, *supra* note 56, at 88.

339. See Bill Carter, *NBC May Exhume 'The Munsters'*, N.Y. TIMES, Nov. 18, 2011, at C2.

340. See MITTELL, *supra* note 56, at 88. On other similarities between TV show programming in the 1950s and today, see Wendy J. Williams, *Prime-Time Time Travel: Game Shows, Live Drama Resurrect 1950s*, BOS. HERALD, Mar. 10, 2000, at S03.

from 1946 until 1958.³⁴¹ Even if *Wipeout* was a format imitation of *Takeshi's Castle*,³⁴² earlier obstacle-course competitions include the European *It's a Knockout* in the 1960s³⁴³ and ABC's *Battle of the Network Stars* in the 1970s.³⁴⁴

After CBS launched the highly successful *Survivor* in 2000,³⁴⁵ it did not take long for competing broadcasters to air similar formats. In 2001, ABC released *The Mole*, Fox created *Boot Camp*, and NBC aired *Lost*.³⁴⁶ After a period of time, the idea of putting a group of strangers in a remote location, where they had to perform challenging tasks in order to earn a reward, was so commonplace that it became increasingly hard to attract large audiences with such formats. Viewership ratings for *Survivor* declined inexorably from close to thirty million viewers in the first two seasons to about twelve million viewers in the 2011-2012 season.³⁴⁷ To counteract this trend, broadcasting stations have moved towards niche formats based on the general *Survivor* idea: TeenNick aired *Girls v. Boys* between 2003 and 2005,³⁴⁸ ABC broadcast *Celebrity Mole: Hawaii* in 2003,³⁴⁹ and CBS intro-

341. In *Talent Scouts*, "scouts" performed before a live studio audience and exhibited their talents with the audience determining a winner each show. See *Arthur Godfrey's Talent Scouts*, WIKIPEDIA (June 28, 2013, 7:55 PM), http://en.wikipedia.org/wiki/Arthur_Godfrey%27s_Talent_Scouts; *Talent Scouts*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0040028> (last visited Sept. 21, 2013); ARTHUR J. SINGER, *ARTHUR GODFREY: THE ADVENTURES OF AN AMERICAN BROADCASTER 74-78* (2000).

342. See *supra* text accompanying notes 12-13.

343. This BBC format was based on a European-wide game show called *Jeux Sans Frontières*. See *Jeux Sans Frontières*, WIKIPEDIA (Aug. 3, 2013, 6:10 PM), http://en.wikipedia.org/wiki/Jeux_Sans_Frontieres.

344. *Battle of the Network Stars*, WIKIPEDIA (Aug. 3, 2013, 10:37 PM), http://en.wikipedia.org/wiki/Battle_of_the_Network_Stars; see also Matthew Belloni, *Is Wipeout a Rip-Off? A Copyright Suit Against ABC Challenges the Copycat Syndrome in Reality TV*, HOLLYWOOD REP., June 9, 2011, available at 2011 WLNR 11459817.

345. The show format originated in Sweden under the name *Expedition Robinson*. See *Expedition Robinson*, WIKIPEDIA (Aug. 27, 2013, 3:08 AM), http://en.wikipedia.org/wiki/Expedition_Robinson.

346. Not to be confused with the series *Lost*, which aired on ABC from 2004 to 2010. See *Lost (TV Series)*, WIKIPEDIA (Sept. 12, 2013, 4:07 AM), http://en.wikipedia.org/wiki/Lost_%28TV_series%29; *The Mole (U.S. TV Series)*, WIKIPEDIA (June 30, 2013, 3:13 PM), http://en.wikipedia.org/wiki/The_Mole_%28U.S._TV_series%29; *Boot Camp (TV Series)*, WIKIPEDIA (Feb. 27, 2013, 4:09 PM), http://en.wikipedia.org/wiki/Boot_Camp_%28TV_series%29.

347. *Survivor (U.S. TV Series)*, WIKIPEDIA (Sept. 19, 2013, 12:38 AM), [http://en.wikipedia.org/wiki/Survivor_\(U.S._TV_series\)](http://en.wikipedia.org/wiki/Survivor_(U.S._TV_series)).

348. *Girls v. Boys*, WIKIPEDIA (July 3, 2013, 3:00 PM), http://en.wikipedia.org/wiki/Girls_v._Boys.

349. *The Mole (U.S. season 3)*, WIKIPEDIA (Aug. 19, 2013, 7:35 AM), http://en.wikipedia.org/wiki/The_Mole_%28U.S._Season_3%29.

duced *Survivor* derivatives such as *Survivor: All-Stars* in 2004.³⁵⁰ This is another indication that TV formats are subject to fashion cycles: New formats are created, have their heyday, and are then gradually replaced by other, newer formats. Over time, old format ideas get recycled and the fashion cycle starts anew.

While the interaction of supply-side and demand-side herding, and the existence of fashion cycles that are limited in time, may explain how the TV format industry in a certain territory copes with uncertain demand and unpredictable profitability, it may seem harder to determine the impact of fashion cycles on the industry across territories, such as on a global scale.³⁵¹ Given the global reach of many TV formats today, and the similarities among TV markets in the Western world, supply-side herding may actually occur across countries. Many important players in the TV format business are global players these days.³⁵² If a new TV format is successful in one or more countries, its chances of success in other countries increase as well. This means that TV format suppliers can decide whether or not to develop and broadcast a new format based on what other suppliers are doing in other countries. Informational externalities created by TV programming decisions can reach across borders.³⁵³ Anecdotal evidence shows that supply-side herding occurs across borders. *Wipeout* is similar to the highly successful earlier Japanese show *Takeshi's Castle*;³⁵⁴ *Boot Camp* (U.S.) resembles *Survivor* (U.K.),³⁵⁵ *Trading Spouses* (U.S.) resembles *Wife Swap* (U.K.);³⁵⁶ the *Queer Eye for the Straight Guy* (U.S.) has inspired a German gay lifestyle format;³⁵⁷ and *Canada Sings* sounds akin to the Dutch *Singing Office*.³⁵⁸

Demand-side herding may also occur across country borders. TV formats such as *Who Wants to Be a Millionaire?*, *Survivor*, and *Big Brother* have been designed as global brands, building a loyal fan community across the globe. Global formats are supported not only by a global brand and merchandising strategy, but also by episodes that bring together participants from various local versions of a format.³⁵⁹ In such cases, viewership behavior in one country may influence viewership behavior in another country

350. *Survivor: All-Stars*, WIKIPEDIA (Oct. 3, 2013, 0:25 AM), http://en.wikipedia.org/wiki/Survivor:_All-Stars.

351. On the distinction between format imitation within the same market and between markets, see Gottlieb, *supra* note 35, at 249.

352. See *supra* text accompanying note 78.

353. See *supra* text accompanying notes 282-83.

354. See *supra* text accompanying notes 1-13.

355. See *supra* text accompanying note 293.

356. See *supra* text accompanying note 297.

357. See *supra* text accompanying note 303.

358. See *supra* text accompanying note 302.

359. *Big Brother*, for example, has exchanged housemates among different countries' versions and has organized competitions between teams from different countries' versions. See *Big Brother (TV Series)*, *supra* note 19.

and may contribute to demand-side herding across country borders. The informational externalities created by TV viewership decisions may travel across borders as well.³⁶⁰ As a result, TV format fashion cycles may not only occur within a territory, but may also develop concurrently across several territories.

To some extent, the TV show format industry features are similar to those of the U.S. fashion industry as described by Kal Raustiala and Christopher Sprigman. Both industries are subject to fashion cycles and thrive in an environment of low intellectual property protection. Kal Raustiala and Christopher Sprigman argue that it is the absence of intellectual property protection that makes the fashion industry thrive. According to their view of the U.S. fashion industry, the lack of protection leads to an “induced obsolescence” of fashion design, a shortening of innovation cycles, and an accelerated diffusion of fashion designs.³⁶¹ Fashion design piracy then becomes “paradoxically beneficial for the fashion industry, or at least . . . not very harmful.”³⁶²

The TV show format industry differs in at least two important aspects from the U.S. fashion industry. First, unlike fashion, TV show formats are usually not positional goods.³⁶³ While it may matter greatly for the social status of a consumer what kind of fashion she wears relative to other consumers, choosing which TV show to watch usually does not influence the social status of a consumer.³⁶⁴ Second, cycles in TV show formats typically last longer than cycles in the fashion industry. While fashion cycles often last for only one season,³⁶⁵ TV formats can be in fashion for a few years.³⁶⁶

The fact that TV show formats are usually not positional goods and that cycles last longer may indicate that, compared to the fashion industry, the innovation and imitation cycles resulting from supply-side and demand-side herding are less stable in the TV show format industry. This could also explain why, compared to U.S. fashion designers, innovators in the TV show format industry have developed more tools to prevent format imitation. While the legal protection against format imitation cannot be compared to a fully developed and enforced intellectual property right, the TV show format industry does not operate in a protection-free vacuum.³⁶⁷ In rare cas-

360. See *supra* text accompanying note 312.

361. Raustiala & Sprigman, *supra* note 32, at 1722.

362. *Id.* at 1727.

363. On fashion as a positional good, see Raustiala & Sprigman, *supra* note 32, at 1693-94, 1718-20.

364. This does not mean that no externalities between consumers' TV show format consumption choices exist. See *supra* Section III.B.

365. Raustiala & Sprigman, *supra* note 32, at 1692, 1712, 1714, 1727-30.

366. See *supra* text accompanying note 268.

367. See Gottlieb, *supra* note 35, at 223-43.

es, protection against format imitation may come from copyright law.³⁶⁸ In other, more frequent cases, it may come from unfair-competition and breach-of-confidence theories.³⁶⁹ In even more cases, protection against format imitation will stem from mechanisms outside the law, such as first-mover advantages, social norms and gentlemen's agreements, active brand management, merchandising, dispute resolution systems, vertical integration, format portfolio building, tacit knowledge, and risk management, as well as changes in format types, elements, and production.³⁷⁰

Compared to industries with fully developed intellectual property protection, the TV show format industry does not operate in an environment of free appropriability, but rather in one of limited appropriability.³⁷¹ The combination of legal and non-legal protection mechanisms provides some level of protection against format imitation. This protection is most likely to be effective in cases of close format imitation. Copyright-based claims against format imitation will be more successful if the format has been closely copied, as substantial similarity is a prerequisite for copyright infringement.³⁷² Claims related to breach of confidence have often involved cases in which imitators created a direct competitor to a format.³⁷³ The effectiveness of social norms, gentlemen's agreements, first-mover advantages, and other extra-legal protection mechanisms is particularly pronounced when it comes to close copies.

It is helpful to introduce a distance measure when considering format imitation. In their study of the fashion industry, Scott Hemphill and Jennie Suk draw a distinction between close copies of fashion design and participation in common trends.³⁷⁴ Participation in the latter does not necessarily involve the former.³⁷⁵ They argue that allowing close copies of fashion design would be detrimental to innovation in the industry because it reduces incentives to innovate, whereas keeping general fashion trends free from property rights may be beneficial.³⁷⁶

This distinction may also be fruitful for the TV show format market. While TV format developers operate in a market characterized by a relatively low level of protection and limited appropriability, they are not without protection, particularly when it comes to close format imitations. What

368. *See id.* at 238-39.

369. *See id.* at 239-40.

370. *See supra* Part I.

371. *See* Gottlieb, *supra* note 35, at 257-63.

372. *See supra* text accompanying note 123.

373. On the litigation concerning *Wipeout* and *The Glass House*, see *supra* text accompanying notes 22-24, 151. On the litigation concerning *La Nuit des Héros*, see *supra* text accompanying notes 195-96.

374. Hemphill & Suk, *supra* note 32, at 1153.

375. *Id.* at 1159.

376. *Id.* at 1184-85, 1187.

makes the TV show format market interesting is that this low level of protection is not afforded by a homogenous property right, but by an amalgam of various legal and extra-legal mechanisms. Beyond this limited scope of protection, format developers collectively benefit from free format imitation. The potential negative effects of this free appropriability are offset by the fashion cycles that result from supply-side and demand-side herding. While, compared to the fashion industry, some industry characteristics of the TV show format industry may lead to a less stable equilibrium of innovation and mutual imitation, this is offset by more effective legal and extra-legal tools against imitation.³⁷⁷ The comparison across industries indicates how market participants develop and calibrate their protection strategies depending on particular characteristics of the market they are operating in.

D. Is Low Protection the Best of All Possible Property Regimes?

In the TV format industry, demand is hard to predict, return on TV formats are highly skewed, many repeat players exist who both develop and imitate formats, and TV viewers love to watch similar shows again and again.³⁷⁸ These industry characteristics lead to supply-side and demand-side herding effects, which, in the aggregate, create fashion cycles in the TV show format industry. Beyond the protection afforded by legal and extra-legal mechanisms, format development is subject to these cycles. As the cycles are limited in time, the TV format industry has found ways to cope with uncertain demand and unpredictable profitability in such an environment despite a low level of format protection.

While these industry features may lead to a situation in which the TV format industry thrives by coordinating fashion cycles, this does not answer the question of whether the current property regime is the optimal regime to incentivize creativity in the industry.³⁷⁹ If a regime of strong intellectual property protection, which would encompass those fashion cycles, led to a higher quantity or quality of TV format creativity, this would imply a need to seriously consider increasing protection for TV formats. This is of particular importance because a suboptimal property regime might lead not only to fewer TV formats being produced, but also to formats of poorer quality.³⁸⁰ Economists and management scholars have pointed out that herding behavior may lead to inefficient outcomes.³⁸¹

377. See *supra* text accompanying notes 363-66.

378. See Gottlieb, *supra* note 35, at 265-66.

379. On the general relationship between "intellectual production without intellectual property" and optimal incentive regimes, see Dreyfuss, *supra* note 31, at 1437, 1460-62; and Raustiala & Sprigman, *supra* note 32, at 1734.

380. Gottlieb, *supra* note 35, at 254.

381. Banerjee, *supra* note 275 (demonstrating inefficiencies in a herding model); Kennedy, *supra* note 268, at 58 (pointing out that herding in TV programming "leads to

Although various authors have called for an increase in intellectual property protection for published TV formats,³⁸² there are several reasons why this Article remains skeptical of such proposals. First, it is far from clear whether an increase in intellectual property protection would lead to an increase in TV format diversity, as some authors suggest.³⁸³ General research on the relationship between intellectual property protection and the homogenization of information production raises at least some doubts about this argument.³⁸⁴ Second, in a situation where not just one, but both sides of the market are subject to herding effects and informational externalities, it is less clear that the interaction of herding effects on both sides of the market leads to economic inefficiencies.³⁸⁵

Third, increasing intellectual property protection for TV formats would potentially limit the space of freely appropriable ideas that is usually protected by the idea/expression dichotomy.³⁸⁶ Excluding ideas from copyright protection is an important cornerstone of copyright law and policy. If ideas were protected by copyright, the cost of expression for follow-on creators building on those ideas would be prohibitively high, either because they would incur licensing or transaction costs or because they would have to invest time and effort in order to create around the idea. As a result, the idea would be underused.³⁸⁷ Extending copyright protection to ideas would ham-

lower average ratings and shorter average program longevity than does differentiation,” but suffering from some data problems); Lieberman & Asaba, *supra* note 275, at 366 (“Environmental uncertainty promotes certain types of imitation and raises the likelihood of undesirable outcomes.”). *But see* Gottlieb, *supra* note 35, at 265-66 (pointing out that the empirical data on the impact of TV format imitation on audience reaction is inconclusive). On the importance of herding behavior in the TV format market, see *supra* Sections III.A-B.

382. See Gottlieb, *supra* note 35, at 266-70 (arguing for increased legal protection of the published program format market); Stalnaker, *supra* note 56, at 163-65 (arguing for a thin protection of TV show formats as compilations); Abramson, *supra* note 117, at 183-85. See generally Sharp, *supra* note 35 (focusing on published TV formats). For literature on unpublished TV formats, see *supra* text accompanying notes 95-105. For the distinction between unpublished and published formats, see *supra* notes 97, 105 and accompanying text.

383. See Gottlieb, *supra* note 35, at 254-55, 267-68.

384. See generally Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT’L REV. L. & ECON. 81 (2002); Richard A. Peterson & David G. Berger, *Cycles in Symbol Production: The Case of Popular Music*, 40 AM. SOC. REV. 158 (1975).

385. For a formal model that takes account of the interaction between the two market sides, in particular via pricing, see generally Bergemann & Välimäki, *supra* note 275.

386. On the idea/expression dichotomy in general, see *supra* text accompanying notes 114-20.

387. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 347-48 (1989); LANDES & POSNER, *supra* note 256, at 91-93; Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217 (2004); 1 GOLDSTEIN, *supra* note 115, § 2.3.1.1; 4 NIMMER & NIMMER, *supra* note 95, § 13.03[B][2][a]; 2 PATRY, *supra* note 96, §§ 4:35, :43. For a related argument in support of

per the ability of follow-on innovators to build upon the ideas and information conveyed by a copyrighted work.³⁸⁸ This would severely undermine the free cumulative innovation process that, outside of derivative works, copyright law keeps open with its idea/expression dichotomy.³⁸⁹ Also, innovators would have an incentive to develop ideas with minimal expression covering the broadest possible range of subsequent works, leading to the “equivalent[] of patent races”: Creators would engage in rent-seeking activities and aim for the broadest possible protection for their ideas.³⁹⁰ Furthermore, it would be very hard, or at least very costly, to define and identify each idea protected by copyright and to determine its boundaries. Extending copyright protection to ideas would significantly increase the administrative and enforcement costs of the system.³⁹¹ In general, the idea/expression dichotomy is a tool by which copyright advances the progress of science and art;³⁹² it should not be touched without very good reason.

Fourth, much of the format “innovation” that occurs in the TV format industry uses a limited number of building blocks that are well known within the industry.³⁹³ A limited number of format genres exist, and the possibility of varying formats within these genres is similarly limited. A format developer starts with some basic building blocks, such as theme, setting, and plot, and creates a detailed story around those blocks.³⁹⁴ Developing new formats often means rearranging existing building blocks and being responsive to current trends in the television market. Fashion cycles in TV formats enable format developers to reuse elements from earlier cycles.³⁹⁵ In such a market, it may not make sense for a small number of market participants to monopolize the few existing building blocks that everyone utilizes.

calibrating copyright protection according to different levels of originality of works, see generally Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009).

388. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).

389. Katz, *supra* note 249, at 145. On the general relationship between copyright law and cumulative innovation processes, see Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997).

390. LANDES & POSNER, *supra* note 256, at 93; Landes & Posner, *supra* note 387, at 349.

391. See 2 PATRY, *supra* note 96, § 4.36 (arguing that the idea/expression dichotomy “is no dichotomy, but rather a continuum”); 1 GOLDSTEIN, *supra* note 115, § 2.3; Landes & Posner, *supra* note 387, at 349; LANDES & POSNER, *supra* note 256, at 93.

392. Feist Publ'ns, Inc., 499 U.S. at 350; see also U.S. CONST. art. I, § 8, cl. 1, 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); 4 NIMMER & NIMMER, *supra* note 95, § 13.03[B][2][a].

393. On the similarities between *Who Wants to Be a Millionaire?* and the 1950s show *The \$64,000 Question* and similar cases, see *supra* text accompanying notes 337-42. On the limited number of building blocks in the fashion industry, see Raustiala & Sprigman, *supra* note 32, at 1727-28.

394. See Gottlieb, *supra* note 35, at 215.

395. On such reuse across cycles, see *supra* text accompanying notes 335-43.

Such monopolization could lead to an overall decrease in innovative activity. In economic terms, in a market with a limited elasticity of innovation supply, increasing intellectual property protection may not be a wise policy.³⁹⁶ Providing protection to the generic building blocks upon which the TV format industry builds, without considering the presentation or expression of those elements, could stifle the creative process that has characterized the industry for many years.³⁹⁷

Because of herding behavior on both the demand and supply sides, as well as fashion cycles that are limited in duration, the TV format industry has learned to cope with format imitation beyond the limited level of legal protection. Nevertheless, it is important to point out that other media markets show similar features and have developed in very different ways. One example is profit distribution and information about demand in other media markets. The distribution of book sales is likewise highly skewed,³⁹⁸ as are returns in the music³⁹⁹ and movie industries.⁴⁰⁰ Many media markets are “characterized by highly uncertain and unpredictable demand.”⁴⁰¹ Yet, the book, music, and movie industries all are backed by relatively strong intellectual property protection. Compared to the TV format industry, these industries have developed entirely different strategies with respect to product imitation. In general, they are seeking to enforce their property rights as far as possible and are still in search of new business models.⁴⁰²

396. Vincenzo Denicolò, *Do Patents Over-Compensate Innovators?*, 22 *ECON. POL'Y* 679 (2007).

397. See *CBS Broad., Inc. v. Am. Broad. Cos.*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *24-25 (S.D.N.Y. Jan. 13, 2003).

398. Alan T. Sorensen, *Bestseller Lists and Product Variety*, 55 *J. INDUS. ECON.* 715, 724-25 (2007).

399. Ken Hendricks & Alan Sorensen, *Information and the Skewness of Music Sales*, 117 *J. POL. ECON.* 324, 324, 332-33 (2009); F.M. Scherer, *The Innovation Lottery*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 12-15 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001); Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music*, in 1 *HANDBOOK OF THE ECONOMICS OF ART AND CULTURE*, *supra* note 269, at 684-85. On attempts by Apple to induce fashion cycles in music consumption on iTunes, see RAUSTIALA & SPRIGMAN, *supra* note 32, at 176. On fashion cycles in the music industry in general, see Peterson & Berger, *supra* note 384.

400. De Vany, *supra* note 269, at 641; see also *supra* text accompanying notes 269-72. On fashion cycles in the movie industry, see ALTMAN, *supra* note 321, at 59-61, 64-68, 115-21. On demand uncertainty in the fashion industry, see Barnett, Grolleau & El Harbi, *supra* note 305, at 160-61, 164-67, 189-90.

401. Katz, *supra* note 249, at 128.

402. On the content industry in general, see Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 *J. TELECOMM. & HIGH TECH. L.* 125 (2011). On the book industry and Google Book Search, see Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 *MINN. L. REV.* 1308 (2010). See also Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 *J. COMP. L. & ECON.* 383

Studying both technological and cultural innovations, Mike Scherer has argued that unpredictable demand and skewed profits in innovation markets should lead to strong intellectual property protection as risk takers are attracted by the small chance of a big reward.⁴⁰³ Applied to the TV show format market, this would speak for an expansion of intellectual property protection. Risk-seeking format developers would be attracted by the potentially large rewards, thereby fostering innovation in TV show formats.

What distinguishes the TV show format industry from other creative and innovative industries is not primarily the underlying industry characteristics. Rather, it is the strategies that industry participants have devised to cope with those characteristics.⁴⁰⁴ In the movie, music, and publishing industries, participants actively enforce, and lobby for, strengthened intellectual property rights.⁴⁰⁵ In general, they do not appreciate imitation and aim at recouping the entire income generated by their products. By contrast, the TV show format industry uses a mixed approach. On the one hand, it applies the rhetoric of intellectual property protection to TV show formats⁴⁰⁶ and uses the limited legal and extra-legal protection mechanisms available⁴⁰⁷ in the hope of recouping its investments at least in part. On the other hand, the industry's lobbying associations have scaled back their efforts to gain statutory intellectual property protection for formats.⁴⁰⁸ Rather, some industry participants seem to survive in spite of—and sometimes even benefit from—the current level of TV format imitation that is so pervasive throughout the industry.⁴⁰⁹ It is the combination of limited protection afforded by legal and extra-legal mechanisms and the benefits resulting from free fash-

(2009). Compared to movies, TV show formats are relatively cheap to produce. *See supra* note 72.

403. Scherer, *supra* note 399, at 20; *see also* Dennis D. Crouch, *The Patent Lottery: Exploiting Behavioral Economics for the Common Good*, 16 GEO. MASON L. REV. 141 (2008); F.M. Scherer & Dietmar Harhoff, *Technology Policy for a World of Skew-Distributed Outcomes*, 29 RES. POL'Y 559 (2000).

404. On fashion cycles for cultural products in general, *see* Kretschmer, Klimis & Choi, *supra* note 310, at S64. Yet the length and importance of fashion cycles differs greatly across industries. *See* Barnett, Grolleau & El Harbi, *supra* note 305. On different strategies in different industries for coping with similar industry characteristics, *see* Barnett, Grolleau & El Harbi, *supra* note 305, at 188-89.

405. *See* Lemley, *supra* note 402.

406. Singh, *supra* note 54, at 51 (citing cease-and-desist letters as an enforcement strategy even if a legal enforcement of rights is unclear).

407. *See supra* Sections II.A-B.

408. Singh & Kretschmer, *supra* note 59, at 15; Singh, *supra* note 48, at 28-29, 131-32 (noting that calls for increased format protection often come from smaller format producers who are new to the business); *see also* FORMAT RECOGNITION & PROT. ASS'N, *supra* note 53, at 5 (noting that copyright protection for TV formats is limited, but pointing to other ways to protect TV formats against imitation).

409. *See supra* text accompanying note 255.

ion cycles that explain how the TV format industry copes with uncertain demand and skewed profits.

Under this regime, as compared to a strong intellectual property regime, format developers may forfeit some revenues in the case of a big format success. However, by diversifying the risk of format failure across all market participants, format developers may ensure a more stable cash flow even if a format does not turn out to be a blockbuster. Compared to the pharmaceutical or the movie industry, the up-front investment costs are still low in the TV show format industry. In such an environment, the benefits from limited protection and free fashion cycles may offset any potential benefits that increased intellectual property protection might provide to risk-seeking format developers.⁴¹⁰

However, the current regime is not necessarily optimal for the TV format industry. Given the limited knowledge of cumulative innovation processes, the lack of robust empirical data on the TV format industry, and the difficulty of empirically validating counterfactual situations, any such argument would be hard to maintain. Instead, the TV format industry has developed particular mechanisms and institutions that have enabled it to survive in an environment characterized by a low level of protection, supply-side and demand-side herding effects, and fashion cycles that are limited in duration. As in other industries with low intellectual property protection, fashion cycles are the key to understanding this phenomenon.⁴¹¹

Whether this is the optimal regime for inducing format creativity is hard to say. But this Study exemplifies the great diversity and flexibility of appropriation strategies that are available in an industry with limited and uncertain allocation of property rights. In such an environment, market participants may use limited appropriation strategies while simultaneously benefiting from the free appropriability that lies beyond the reach of property rights. Pushing for stronger property rights in such environment may underestimate the ability and willingness of market participants to adapt to market conditions and benefit from the mixed situation of limited property rights and free appropriability. This Section has proposed a novel theory explaining why the TV format industry has stabilized in an equilibrium of low protection and why it may be inadvisable to change this status,⁴¹² given that any stronger protection regime would be hard to implement and the lack of

410. See Barnett, Grolleau & El Harbi, *supra* note 305, at 188-89.

411. *Id.* at 189-92.

412. On the role of expressive law as a coordination device to influence equilibrium selection, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87 (2005); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

sound theoretical and empirical evidence that such a regime would lead to a superior world with more and better TV formats.

CONCLUSION

The TV format industry is a global creative industry. The protection against TV format imitation provided by the legal system and other mechanisms is limited. There are cases in which courts have enjoined broadcasting stations from airing TV show imitations. While copyright protection is of limited help, protection by misappropriation and breach-of-confidence theories has sometimes proven successful. Such cases are restricted to special circumstances, such as a broadcasting station hiring the host and crew of a successful TV show and creating its own rip-off version. When no special circumstances exist, such as a situation in which a broadcasting station simply imitates an existing TV show by observing its characteristics during a public broadcast, courts are reluctant to prevent imitation. In today's TV format market, format imitation is a highly common, often accepted, and sometimes even desired phenomenon in the industry.

This Article has proposed a novel theory to explain how the TV format industry is able to cope with format imitation beyond the limited degree of format protection. Like other media industries, the TV format industry is characterized by supply-side and demand-side herding effects that lead to fashion cycles, which are limited in duration. Unlike other media industries, the TV format industry has developed mechanisms to cope with this situation, without having to rely too much on format protection. Beyond a core protection against close format imitation, format developers and broadcasters, who are often both innovators and imitators, benefit from a regime of free-format appropriability, as this enables them to allocate profitability risk across the industry and to cope with uncertainty of demand. TV formats go in and out of fashion, and the format industry has developed tools to coordinate and ride the fashion cycle. The key to understanding TV format imitation is the cycle that can make an industry thrive beyond the borders of a weak property regime. Being successful in such a market may not require stronger intellectual property protection. Rather, it requires market participants to figure out smart ways to combine protection and imitation strategies. Intellectual property law should be careful not to base its policies on a simple economic account of property rights as a solution to a public goods problem. Rather, it should embrace the great diversity and flexibility of appropriation strategies in a world of limited allocation of property rights.