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 onto 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, California and participate in Wipeout, the reality game show that premiered on ABC in June 2008 and has been achieving outstanding audience ratings ever since. In Wipeout, contestants compete in a huge, comic, offbeat obstacle course, with commentators mocking and gently insulting the contestants as they compete.

However, this is not your only chance to experience such an obstacle course. You could have had a similar experience close to Yokohama, Japan. On May 2, 1986, the Tokyo Broadcasting System premiered a show on Japanese television that would become a cult television hit around the world. Takeshi’s Castle faced contestants with a variety of silly physical challenges, primarily huge obstacle courses. 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. In the United States, for example, Spike TV broadcast Takeshi’s Castle under the name MXC: Most Extreme Elimination Challenge from 2003 to 2007. MXC combined reedited footage of Takeshi’s Castle with dubbing and commentary in English that effectively spoofed the original show.

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

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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&hl=34.376323,-118.411806&spn=0.002185,0.004128&num=1&t=h&z=19 (last visited Sept. 21, 2013).


6. Id.
7. Id.
8. Id.
10. Id.
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*, I N.Y.U. INT’L 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.


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

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20. Id. at 14.
22. First Amended Complaint, CBS Broad., No. 12-CV-04073-GAF (JEMx), at 31-41.
24. 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.


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.
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. 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. These abstract descriptions of the format form the concept that underlies the series and that is carried out in each episode. A TV show format, therefore, consists of the invariable elements in a program that form the basis for the variable elements in individual episodes.

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. Until the 1970s,
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.


\(^{45}\) 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.

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

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. They have been adapted in territories around the globe with unprecedented speed and in unprecedented quantity. *Who Wants to Be a Millionaire*, a format now owned by 2waytraffic, has been licensed to over 150 countries and has been seen by more than two billion viewers worldwide. *Survivor*, which originated in the United Kingdom and Sweden, has been licensed to over sixty countries. 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. *Big Brother*, a format developed by the Dutch company Endemol, aired in more than seventy countries in 2013. *Idols*, which originated in the United Kingdom, has been licensed to over forty countries, including the United States (*American Idol*), the Philippines, and Iraq. In the Netherlands, the *Idols* format
became the "highest rated series . . . since the start of commercial television" in that country. 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. Other successful formats followed. The British format of The Biggest Loser has been produced in twenty-five countries and shown in ninety, 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.

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), as well as action (24), variety (This Is Your Life), talk (The Dr. Oz Show), documentary (Go Back to Where You Came From), reality (Survivor, The Apprentice, Kitchen Nightmares),

60. 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.
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 produce while delivering relatively high viewer ratings.⁷² TV formats are highly successful on the programming market. Reality shows, for example, have increasingly replaced sitcoms in the race for attractive programming slots.⁷³ 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.


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/Ivasion_Iowa.


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 MITTTEL, 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.


⁷⁴. Carter, supra note 72, at E5.
the show. Broadcasting stations can use TV shows to communicate a particular channel image to their viewers. 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.

Today, the TV format business constitutes a multi-billion-dollar industry. 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. Despite its global reach, the industry puts great effort into adapting formats to the specific demands and cultures of particular territories. *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

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.
version of *Who Wants to Be a Millionaire?* changed when the Indian rupee adopted a new symbol. 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. 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.'"

Before a TV show format is successfully broadcast, it usually undergoes four main stages of development. First, a developer comes up with a program idea. 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. 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. It serves as a blueprint for the later creation of episodes in different territories. 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. 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," this Article focuses on the market for program formats, which can be developed into various episodes later.

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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.
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).
85. *Id.*
86. *Id.*
87. *Id.*
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, 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. 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. 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.

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. Theories of "idea submission" overlap with misappropriation and breach-of-confidence doctrines. Even if the

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90. See infra Section II.B.
91. On the terms "paper format" and "program format," see supra text accompanying notes 83-88.
93. See Gottlieb, supra note 35, at 221-23.
94. See id. at 223-24, 240-43.
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


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.


99. Id. at 615.

100. Id. at 614-15.

101. See id. at 614-16.

102. Id.
and settle disputes. 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. 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.

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. At this stage, imitating a published format does not seem particularly challenging. 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.

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

As neither trade dress\textsuperscript{112} nor patent law\textsuperscript{113} 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."\textsuperscript{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.\textsuperscript{115} According to this idea/expression dichotomy, copyright protection grants exclusive rights in

\begin{itemize}
  \item \textsuperscript{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); Survivor Media, Inc. v. Survivor Prods., 406 F.3d 625 (9th Cir. 2005) (holding similarly that owner of "Survivor" 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 Mo. B.J., Mar.-Apr. 2007, at 19.
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{114} 17 U.S.C. § 102(a) (2006).
  \item \textsuperscript{115} Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985); 1 Paul Goldstein, GOLDS TAIN ON COPYRIGHT § 2.3 (3d ed. 2013); 1 Nimmer & Nimmer, supra note 95, § 2.03[D].
\end{itemize}
the expression of a protected work, while its theme and ideas may be freely borrowed. 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. And it is at this stage that many copyright claims against TV format imitation fail. 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. This requires that the infringer has misappropriated protectable expression. If the infringer has only built upon the idea of the plaintiff’s work, the copyright in that work has not been infringed. 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.

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.” 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. Judge Loretta Preska of the


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].


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].

U.S. District Court for the Southern District of New York declined to grant the injunction.\textsuperscript{125} In an opinion delivered from the bench, she found no substantial similarity between copyrightable elements of both formats.\textsuperscript{126} Considering the shows’ total concept and feel, Judge Preska noted that \textit{Celebrity} has a comedic tone, while \textit{Survivor} “is one of unalterable seriousness.”\textsuperscript{127} Both shows also have very different plots, hosts, music, and contestants.\textsuperscript{128} The shows express generic elements very differently.\textsuperscript{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.”\textsuperscript{130}

In addition to the idea-expression dichotomy, other copyright doctrines contribute to the difficulty of protecting TV show formats. Under the \textit{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.\textsuperscript{131} In her opinion on the alleged similarity between \textit{Survivor} and \textit{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 \textit{scènes à faire}.\textsuperscript{132} Similarly, in a decision on the television show \textit{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 \textit{scènes à faire}.\textsuperscript{133}

Under the related\textsuperscript{134} merger doctrine, courts will not hold that a work’s original expression is copyrightable if the underlying idea “can effectively

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at *11-43.
\textsuperscript{127} \textit{Id.} at *26.
\textsuperscript{128} \textit{Id.} at *29-33.
\textsuperscript{129} \textit{Id.} at *29, *32-39; see also Sharp, \textit{supra} note 35, at 188-90; Thomas A. Smart, Mark D. Godler & Kerren R. Misulovin, \textit{Reality Check: When Will Two TV Shows in the Same Genre Be Considered Substantially Similar Under Copyright Law?}, 21 \textit{ENT. & SPORTS L.}, Summer 2003, at 1, 15-18; Fox, \textit{supra} note 42, at 242-45.
\textsuperscript{130} \textit{CBS Broad., Inc.}, 2003 U.S. Dist. LEXIS 20258, at *4.
\textsuperscript{131} \textit{GOLDSTEIN, supra} note 115, § 2.3.2.2; \textit{PATRY, supra} note 96, § 4:24; \textit{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, Bapte & Co., 329 F.3d 923, 929 (7th Cir. 2003).
\textsuperscript{132} \textit{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 \textit{Survivor}, the unattractive black worms are set out in a tribal-looking \textit{Wheel of Fortune} layout. In \textit{Celebrity}, the unattractive looking white worm appears on a banquet table with fine linens and fine China adjacent to an absolutely delicious meal.” \textit{Id.} at *41 (formatting added).
\textsuperscript{133} \textit{Zella v. E.W. Scripps Co.}, 529 F. Supp. 2d 1124, 1134 (C.D. Cal. 2007).
\textsuperscript{134} On the relationship between the \textit{scènes à faire} and the merger doctrines, see \textit{GOLDSTEIN, supra} note 115, § 2.3.2.2.
be expressed in only one way." In such cases, the expression and its underlying idea are indistinguishable, and the merged item is not eligible for copyright protection.

Even though the scènes à faire and merger doctrines severely limit the possibility of protecting TV show formats by copyright law, they can still be protected as a compilation under § 103 of the Copyright Act. In fact, the value of a TV format often stems from an interesting combination and symbiosis of various elements. A collection of preexisting materials or data arranged in a particular way can be copyrightable. 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. 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.

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. In general, courts seem unwilling to grant

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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.
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 Publn'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).
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

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


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.

Breath-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.
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.
European \textit{acquis communautaire} \footnote{157. The \textit{acquis communautaire} includes all legislation, legal acts, and court decisions that form part of the legal order of the European Union.} does not cover all areas of copyright law. \footnote{158. On the piecemeal approach to European copyright harmonization, see TRITTON \textit{et al.}, \textit{supra} note 156, \S\ 4-041; and COOK, \textit{supra} note 156, \S\S\ 3.01, 3.07-.14.} One of the areas of European copyright law that has not been harmonized by the legislator is the required standard of originality. \footnote{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, \textit{Initial Attribution of Authorship}, in \textit{EUROPEAN COPYRIGHT LAW: A COMMENTARY} \S\S\ 16.0.9-.0.20 (Michel M. Walter & Silke von Lewinski eds., 2010); and SEVILLE, \textit{supra} note 156, at 61-68.} While some European copyright directives have created standards of originality for particular work categories, \footnote{160. On such standards in the European Computer Program, Copyright Term, and Database Directives, see Handig, \textit{supra} note 156, at 670; Christian Handig, \textit{Is the Term "Work" of the CDPA 1988 in Line with the European Directives?}, 32 EUR. INTELL. PROP. REV. 53, 54-55 (2010); COOK, \textit{supra} note 156, \S\S\ 3.57-.95; and Gernot Schulze, \textit{Schleichende Harmonisierung des Urheberrechtlichen Werkbegriffs? Anmerkung zu EuGH "Infopaq/DDF,"} 111 \textit{GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT} I 019, 1020 (2009) (describing standards of originality in three European Union Directives).} 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. \footnote{161. TRITTON \textit{et al.}, \textit{supra} note 156, \S\ 4-043. On the sweat-of-the-brow doctrine in U.S. copyright law, see \textit{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, \S\S\ 2, 44. Dutch courts have granted copyright protection to perfumes, while some French courts have refused it. See Tania Su Li Cheng, \textit{Copyright Protection of Haute Cuisine: Recipe for Disaster?}, 30 EUR. INTELL. PROP. REV. 93, 98 (2008); Herman Cohen Jehoram, \textit{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, \textit{Copyright in Perfumes: Smelling a Rat}, 66 CAMBRIDGE L.J. 49 (2007); Sergio Balafá, \textit{Urheberrechtsschutz für Parfüms}, 54 \textit{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).} The next few years will show what the relationship between

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\footnote{157. The \textit{acquis communautaire} includes all legislation, legal acts, and court decisions that form part of the legal order of the European Union.}

\footnote{158. On the piecemeal approach to European copyright harmonization, see TRITTON \textit{et al.}, \textit{supra} note 156, \S\ 4-041; and COOK, \textit{supra} note 156, \S\S\ 3.01, 3.07-.14.}

\footnote{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, \textit{Initial Attribution of Authorship}, in \textit{EUROPEAN COPYRIGHT LAW: A COMMENTARY} \S\S\ 16.0.9-.0.20 (Michel M. Walter & Silke von Lewinski eds., 2010); and SEVILLE, \textit{supra} note 156, at 61-68.}


\footnote{161. TRITTON \textit{et al.}, \textit{supra} note 156, \S\ 4-043. On the sweat-of-the-brow doctrine in U.S. copyright law, see \textit{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, \S\S\ 2, 44. Dutch courts have granted copyright protection to perfumes, while some French courts have refused it. See Tania Su Li Cheng, \textit{Copyright Protection of Haute Cuisine: Recipe for Disaster?}, 30 EUR. INTELL. PROP. REV. 93, 98 (2008); Herman Cohen Jehoram, \textit{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, \textit{Copyright in Perfumes: Smelling a Rat}, 66 CAMBRIDGE L.J. 49 (2007); Sergio Balafá, \textit{Urheberrechtsschutz für Parfüms}, 54 \textit{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).}

\footnote{162. Case C-5/08, \textit{Infopaq Int'l A/S} v. Danske Dagblades Forening, 2009 E.C.R. I-06569, \S\S\ 2, 37, 48 (concerning copyrightability of a news clipping service). Later related decisions include Case C-393/09, \textit{Bezpečnostní 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 62010CJOI45, §§ 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).


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).


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. 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. The celebrity was present in the show and sometimes sang the song along with the child. In 1993, the German TV station broadcast a German version of the show, which continued until 2006. 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.

The German court ruled in favor of the defendant. It held that the French show format was not a copyrightable work protected under German copyright law. 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. As a result, format developers have not been successful in using German copyright law to prevent TV format imitation.

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.
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.
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. 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. In a TV format case from New Zealand, the Privy Council—New Zealand’s highest court of appeal at that time—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 copyright-
ble.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181} As a result of this case law, TV formats are hard to protect under U.K. copyright law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185}

\begin{footnotes}

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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 ENTR. L. REV. 96, 100-02 (1990); Richard Bridge & Shelley Lane, The Protection of Formats Under English Law: Part 2, 1 ENTR. 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 HARBOITTLE, COPINGER AND SKONE JAMES ON COPYRIGHT § 3-44 (16th ed. 2011).

\textsuperscript{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 ENTR. L. REV. 155, 156 (2012).

\textsuperscript{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].

\textsuperscript{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 Logeais, Record Fine for Plagiarism of a Reality Show: Is It Safer Under French Law to Sue for Unfair Competition
\end{footnotes}
Despite some harmonization of unfair competition law on the European level,\footnote{186} apart from confusion-based claims,\footnote{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.\footnote{188} At one end of the spectrum, France has an elaborate system of protection against concurrence parasitaire or parasitic competition.\footnote{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.”\footnote{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,\footnote{191} and U.K. judges have upheld the freedom to imitate on many occasions.\footnote{192}


\footnote{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.}


\footnote{190. Freedom of Imitation, supra note 188, at 511.}


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 (concourse déloyale) or as parasitic behavior (concourse parasitaire). 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 copyright claim. It is similar to the misappropriation doctrine under U.S. common law, but much more expansive in scope and application.

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. 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. In 1993, the Versailles Court of Appeal found TF1 guilty of both disloyal competition and parasitic behavior. The court cited the substantial similarities between the competing shows, 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. 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
copying of audio-visual content. In other cases, however, French courts have also denied unfair competition claims in TV format imitation cases. 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. While it may be theoretically possible for TV format copying to violate German unfair competition law in exceptional circumstances, no German court thus far has come to that conclusion. 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.

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. 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. When the format imitation also involves hiring staff from the original format developer,

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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).
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. This may explain why original format developers in Europe, as in the United States, are increasingly raising unfair competition or breach-of-confidence allegations, rather than copyright-based claims, against format imitators. 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. 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.” In general, the industry is interested in settling disputes outside the legal system; it is not interested in suing its potential buyers. 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. Nevertheless, there is a strong tendency to settle lawsuits.

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

209. See supra text accompanying notes 199-200.
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.”).
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.\textsuperscript{218} Launching a successful format on the market often means a roll out in twenty to thirty territories.\textsuperscript{219}

Social norms also play some role. The industry meets at three to four trade shows each year.\textsuperscript{220} These trade shows are not only important because the players in the industry do business with each other on the shows’ market floors,\textsuperscript{221} but also because they facilitate face-to-face interaction and relationships in what is still a “people centered” industry.\textsuperscript{222} The global TV show format industry consists of a relatively small number of players\textsuperscript{223} who run the business and meet with each other on a fairly regular basis.\textsuperscript{224} They develop their reputations by means of this repeated interaction. Illegitimate format imitation is stigmatized by gentlemen’s agreements and reputational effects.\textsuperscript{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.\textsuperscript{226} A strong TV format brand can keep its audience loyal to the format.\textsuperscript{227} Revenue then comes not only from the TV show and TV

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\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{221} Sometimes the more important deals are struck in anticipation of the trade shows.
\textsuperscript{222} Singh, supra note 48, at 181-82; Gottlieb, supra note 35, at 228, 259.
\textsuperscript{223} Probably in the hundreds.
\textsuperscript{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] is 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.”).
\textsuperscript{225} Singh, supra note 48, at 186-95.
\textsuperscript{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.
\textsuperscript{227} Singh, supra note 48, at 210.
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advertising, but also from merchandising.\textsuperscript{228} The \textit{Idols} brand has been licensed for interactive games, T-shirts, cars, and perfumes.\textsuperscript{229} The merchandising for \textit{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 formats\textsuperscript{233} or to more complex format types,\textsuperscript{234} or the introduction of elements that are hard to copy.\textsuperscript{235} Some firms

\begin{footnotesize}
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\item \textsuperscript{228} Singh \& Kretschmer, \textit{supra} note 59, at 21-22; Singh, \textit{supra} note 53, at 55; Singh, \textit{supra} note 48, at 21, 204-19.
\item \textsuperscript{229} Singh, \textit{supra} note 48, at 209.
\item \textsuperscript{230} Chalaby, \textit{supra} note 44, at 299. In 2011, Mattel paid $680 million for the British entertainment distribution company HIT Entertainment (\textit{Barney \& Friends, Bob the Builder, Thomas \& Friends}) in order to benefit from ancillary revenue and tie-in products. See Chozick, \textit{supra} note 61, at B7.
\item \textsuperscript{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, \textit{supra} note 35, at 259-61; and Moran with Malbon, \textit{supra} note 35, at 102-04. But see Singh, \textit{supra} note 48, at 220-26, who points to the limited effectiveness of the registration system.
\item \textsuperscript{233} Such as the Russian version of \textit{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, \textit{20th Makes Big Putsch}, \textit{Daily Variety}, Apr. 8, 2010, available at 2010 WLNR 7293187.
\item \textsuperscript{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, \textit{supra} note 35, at 255 n.194.
\end{enumerate}
\end{footnotesize}
use economies of scale in order to make format imitation harder.\textsuperscript{236} As described in the introduction, the reality game show \textit{Wipeout} is filmed at an obstacle course near Santa Clarita, California.\textsuperscript{237} However, you may find a virtually identical obstacle course in Benavidez, close to Buenos Aires, Argentina.\textsuperscript{238} It turns out that, while the U.S. version of \textit{Wipeout} is filmed in California, the main footage of the British version of \textit{Wipeout}, which premiered in January 2009 on BBC One, is filmed in Argentina.\textsuperscript{239} In fact, the Netherlands-based production company Endemol has sold \textit{Wipeout} to more than thirty countries, including Belarus, the Czech Republic, Slovakia, Germany, and Pakistan.\textsuperscript{240} All localized \textit{Wipeout} versions, apart from the United States one, fly their competitors and staff out to the central \textit{Wipeout} course in Argentina and do all of their shooting there.\textsuperscript{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.\textsuperscript{242} Big players in the TV format business use elaborate shows in order to keep smaller potential competitors out of the market.\textsuperscript{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.\textsuperscript{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.\textsuperscript{245}

\begin{thebibliography}{99}
\bibitem{236} Economies of scale exist if average costs of production fall as output increases. \textsc{Dennis W. Carlton} \& \textsc{Jeffrey M. Perloff}, \textit{Modern Industrial Organization} 36 (4th ed. 2005).
\bibitem{237} \textit{See supra} text accompanying notes 2-3.
\bibitem{238} An aerial view of the site is available by searching “Av de Los Constituyentes 6851-7199 Benavidez, Buenos Aires, Argentina” on Google Maps. \textsc{Google Maps}, \texttt{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).
\bibitem{239} \textit{Total Wipeout}, \textsc{Wikipedia} (Aug. 11, 2013, 3:30 PM), \texttt{http://en.wikipedia.org/wiki/Total_Wipeout}.
\bibitem{240} \textit{Wipeout} (2008 \textit{U.S. Game Show}), \textit{supra} note 62.
\bibitem{241} \textit{Total Wipeout}, \textit{supra} note 239.
\bibitem{242} \textit{Gottlieb}, \textit{supra} note 35, at 255.
\bibitem{243} \textit{Id.}
\bibitem{244} \textit{Id.} at 232-33, 261-63; \textit{Singh}, \textit{supra} note 48, at 19, 209. In 2011, \textit{Time Warner} made an—ultimately unsuccessful—1.4 billion dollar bid to acquire the Dutch format developing company Endemol (\textit{Big Brother}, \textit{Fear Factor}, \textit{Deal or No Deal}, \textit{Wipeout}, etc.) and paid \$100 million for a 55% stake in the British production company Shed Media (\textit{Super Nanny}, \textit{Footballers’ Wives}), and \textit{News Corporation} paid \$674 million for the British production company Shine Group (\textit{The Biggest Loser}, \textit{Masterchef}). \textsc{See Chozick}, \textit{supra} note 61, at B7.
\bibitem{245} \textit{Singh}, \textit{supra} note 48, at 162-67.
\end{thebibliography}
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.\textsuperscript{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.\textsuperscript{247} This includes knowledge of how the format can be turned into a commercial success;\textsuperscript{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.\textsuperscript{249} The buyer gets access to format bibles\textsuperscript{250} and to so-called “flying producers,” who provide consultancy services for rolling out an existing TV format in a new territory.\textsuperscript{251} Such tacit knowledge may also be protectable as a trade secret by misappropriation and breach-of-confidence theories.\textsuperscript{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

\textsuperscript{246.} Singh & Kretschmer, supra note 59, at 18-19.
\textsuperscript{247.} Id.
\textsuperscript{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, \textit{Waiting to Imitate: On the Dynamic Pricing of Knowledge}, 119 J. Pol. Econ. 959 (2009).
\textsuperscript{249.} Gottlieb, supra note 35, at 246, 248; Carter, supra note 49; Ariel Katz, \textit{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 \textit{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.
\textsuperscript{250.} See supra text accompanying note 88.
\textsuperscript{251.} Singh, supra note 48, at 169-80.
\textsuperscript{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

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-

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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. Standard law and economics of intellectual property suggests that, without better TV format protection, an inefficient undersupply of TV formats could occur. 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. 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. 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. Dotan Oliar and Christopher Sprigman have demonstrated how social norms militate against appropriation, authorship, and transfer of works amongst stand-up comedians.

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.
262. Oliar & Sprigman, supra note 234; see also RAUSTIALA & SPRIGMAN, supra note 32, at 177-79.
property law.\textsuperscript{263} Rather, they claim, it thrives \textit{because of} this low level of protection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{266}

\textsuperscript{263}Raustiala & Sprigman, \textit{supra} note 32, at 1733.

\textsuperscript{264}Id.; see also RAUSTIALA & SPRIGMAN, \textit{supra} note 32, at 21.

\textsuperscript{265}Hemphill & Suk, \textit{supra} note 32, at 1153.


Michele Belot, V. Bhaskar & Jeroen van de Ven, \textit{Promises and Cooperation: Evidence from a TV Game Show}, 73 J. ECON. BEHAVIOR & ORG. 396 (2010) (Dutch game show \textit{Will ($S$)he Share or Not}?)

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


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 Großbritanniens 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 Milliarden-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.

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

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-


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).


272. Allègre 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.
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. At the aggregate level of the market, such imitation among rivals can lead to conformity and fads in firm behavior.

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. Other examples of herding behavior in the face of uncertainty include the decision of banks where to locate branches and of Wall Street securities analysts to initi-

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

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, 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. Therefore, when a broadcasting station decides to air a new TV format, the decision carries with it an “informational externality,” as Cass Sunstein calls it, which may impact the decisions of its competitors. 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.


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.

and fashions in TV programming. 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. Following Project Runway, “at least eight reality fashion shows and one scripted series” went into production.

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.

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. 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.

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

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.
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.
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. 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.

Format imitation also occurs across borders. The Afghan station Tolo TV has created unauthorized versions of The Office and 24; the Canadian series Canada Sings has been accused of being a knockoff of the Dutch Singing Office format; 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.

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. 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. Market participants will tol-

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).
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.

307. On this question, see supra Section III.D.
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.\textsuperscript{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.\textsuperscript{310}

In such markets, consumers’ consumption decisions are often influenced by what other consumers are doing.\textsuperscript{311} A consumption decision by one consumer therefore carries an informational externality, from which other consumers may benefit when making their own decisions.\textsuperscript{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.\textsuperscript{313} The same dynamics can be observed in movie consumption. Movie watchers are influenced in what they like by what their peers are doing.\textsuperscript{314}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

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

\textsuperscript{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).

\textsuperscript{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 Intrahousehold 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{318} Such feedback effects can be supported by the advertising market. As advertising revenue increases with the size of the target audience,\textsuperscript{319} TV stations have considerable incentives to air successful TV show formats.\textsuperscript{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-

\textsuperscript{315} See supra Section III.A.

\textsuperscript{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.

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


\textsuperscript{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, \textit{A Two-Sided, Empirical Model of Television Advertising and Viewing Markets}, 27 MARKETING SCI. 356 (2008).

\textsuperscript{320} Production costs for each of the thirteen episodes in the first season of \textit{Survivor} were about $1 million. MITTLE, supra note 56, at 91. The show generated roughly $32 million in ad revenue from eight core sponsors over the season. Id.
As a result, sequels to blockbusters prove more successful than stand-alone movies, 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.

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.

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." Collectively, the supply side

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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).


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.

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.\textsuperscript{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.\textsuperscript{327}

Supply- and demand-side herding does not continue indefinitely, however.\textsuperscript{328} First, format imitations are often less profitable to broadcasters than the original format.\textsuperscript{329} Second, after a certain time, TV viewers will get tired of a particular format and call for something new.\textsuperscript{330} These saturation points in consumer demand ensure that the TV format industry does not suffer from perpetual format imitation.\textsuperscript{331} Rather, format imitation contributes to the fact that cycles in the TV show format industry are limited in time.\textsuperscript{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.\textsuperscript{333}

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

\begin{footnotesize}
\begin{enumerate}
\item 326. \textit{See supra} Section III.A.
\item 327. \textit{See} Bergemann & Välimäki, \textit{supra} note 275, for a formal model in which both market sides are affected by informational externalities.
\item 328. On the importance of time constraints on imitation in creative markets dominated by fashion cycles, see Barnett, Grolleau & El Harbi, \textit{supra} note 305, at 161. On the general importance of cycles in media markets, see Katz, \textit{supra} note 249, at 126-38.
\item 330. For example, ratings for \textit{Who Wants to Be a Millionaire?} dropped when ABC started airing the format five nights a week. \textit{See} Masters & Rose, \textit{supra} note 72.
\item 331. Bill Carter, \textit{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, \textit{supra} note 32, at 1721.
\item 332. \textit{See infra} text accompanying note 335.
\item 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 \textit{supra} note 220. On the importance of trade shows for coordinating fashion trends, see Barnett, Grolleau & El Harbi, \textit{supra} note 305, at 183-86.
\end{enumerate}
\end{footnotesize}
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.

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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.”).


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.\textsuperscript{341} Even if \textit{Wipeout} was a format imitation of \textit{Takeshi’s Castle},\textsuperscript{342} earlier obstacle-course competitions include the European \textit{It’s a Knockout} in the 1960s\textsuperscript{343} and ABC’s \textit{Battle of the Network Stars} in the 1970s.\textsuperscript{344}

After CBS launched the highly successful \textit{Survivor} in 2000,\textsuperscript{345} it did not take long for competing broadcasters to air similar formats. In 2001, ABC released \textit{The Mole}, Fox created \textit{Boot Camp}, and NBC aired \textit{Lost}.\textsuperscript{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 \textit{Survivor} declined inexorably from close to thirty million viewers in the first two seasons to about twelve million viewers in the 2011-2012 season.\textsuperscript{347} To counteract this trend, broadcasting stations have moved towards niche formats based on the general \textit{Survivor} idea: TeenNick aired \textit{Girls v. Boys} between 2003 and 2005,\textsuperscript{348} ABC broadcast \textit{Celebrity Mole: Hawaii} in 2003,\textsuperscript{349} and CBS intro-

\begin{itemize}
\item \textsuperscript{341} In \textit{Talent Scouts}, “scouts” performed before a live studio audience and exhibited their talents with the audience determining a winner each show. See \textit{Arthur Godfrey’s Talent Scouts}, \textsc{Wikipedia} (June 28, 2013, 7:55 PM), http://en.wikipedia.org/wiki/Arthur_Godfrey%27s_Talent_Scouts; \textit{Talent Scouts}, \textsc{Internet Movie Database}, http://www.imdb.com/title/tt0040028 (last visited Sept. 21, 2013); \textsc{Arthur J. Singer}, \textit{Arthur Godfrey: The Adventures of an American Broadcaster} 74-78 (2000).
\item \textsuperscript{342} See supra text accompanying notes 12-13.
\item \textsuperscript{343} This BBC format was based on a European-wide game show called \textit{Jeux Sans Frontières}. See \textit{Jeux Sans Frontières}, \textsc{Wikipedia} (Aug. 3, 2013, 6:10 PM), http://en.wikipedia.org/wiki/Jeux_Sans_Frontieres.
\item \textsuperscript{345} The show format originated in Sweden under the name \textit{Expedition Robinson}. See \textit{Expedition Robinson}, \textsc{Wikipedia} (Aug. 27, 2013, 3:08 AM), http://en.wikipedia.org/wiki/Expedition_Robinson.
\item \textsuperscript{348} \textit{Girls v. Boys}, \textsc{Wikipedia} (July 3, 2013, 3:00 PM), http://en.wikipedia.org/wiki/Girls_v._Boys.
\end{itemize}
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 Gay* (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.


\(^{351}\) 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.\textsuperscript{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.\textsuperscript{361} Fashion design piracy then becomes "paradoxically beneficial for the fashion industry, or at least . . . not very harmful."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{365} TV formats can be in fashion for a few years.\textsuperscript{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.\textsuperscript{367} In rare cas-

\textsuperscript{360}. See supra text accompanying note 312.
\textsuperscript{361}. Raustiala & Sprigman, supra note 32, at 1722.
\textsuperscript{362}. Id. at 1727.
\textsuperscript{363}. On fashion as a positional good, see Raustiala & Sprigman, supra note 32, at 1693-94, 1718-20.
\textsuperscript{364}. This does not mean that no externalities between consumers' TV show format consumption choices exist. See supra Section III.B.
\textsuperscript{365}. Raustiala & Sprigman, supra note 32, at 1692, 1712, 1714, 1727-30.
\textsuperscript{366}. See supra text accompanying note 268.
\textsuperscript{367}. See Gottlieb, supra note 35, at 223-43.
es, protection against format imitation may come from copyright law.\textsuperscript{368} In other, more frequent cases, it may come from unfair-competition and breach-of-confidence theories.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{372} Claims related to breach of confidence have often involved cases in which imitators created a direct competitor to a format.\textsuperscript{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.\textsuperscript{374} Participation in the latter does not necessarily involve the former.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{368} See id. at 238-39.
\item \textsuperscript{369} See id. at 239-40.
\item \textsuperscript{370} See supra Part I.
\item \textsuperscript{371} See Gottlieb, supra note 35, at 257-63.
\item \textsuperscript{372} See supra text accompanying note 123.
\item \textsuperscript{373} On the litigation concerning \textit{Wipeout} and \textit{The Glass House}, see supra text accompanying notes 22-24, 151. On the litigation concerning \textit{La Nuit des Heros}, see supra text accompanying notes 195-96.
\item \textsuperscript{374} Hemphill \& Suk, supra note 32, at 1153.
\item \textsuperscript{375} \textit{Id.} at 1159.
\item \textsuperscript{376} \textit{Id.} at 1184-85, 1187.
\end{itemize}
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. 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. 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. 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 implies 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. Economists and management scholars have pointed out that herding behavior may lead to inefficient outcomes.

377. See supra text accompanying notes 363-66.
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.
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, 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. General research on the relationship between intellectual property protection and the homogenization of information production raises at least some doubts about this argument. 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.

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. 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. 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.


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.

per the ability of follow-on innovators to build upon the ideas and information conveyed by a copyrighted work. This would severely undermine the free cumulative innovation process that, outside of derivative works, copyright law keeps open with its idea/expression dichotomy. 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. 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. In general, the idea/expression dichotomy is a tool by which copyright advances the progress of science and art; 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. 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. 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. 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.

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.
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{398} as are returns in the music\textsuperscript{399} and movie industries.\textsuperscript{400} Many media markets are "characterized by highly uncertain and unpredictable demand."\textsuperscript{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.\textsuperscript{402}

\textsuperscript{396} Vincenzo Denicolo, Do Patents Over-Compensate Innovators?, 22 ECON. POL'Y 679 (2007).
\textsuperscript{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.
\textsuperscript{401} Katz, supra note 249, at 128.
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. 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. In the movie, music, and publishing industries, participants actively enforce, and lobby for, strengthened intellectual property rights. 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 formats and uses the limited legal and extra-legal protection mechanisms available 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. 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. It is the combination of limited protection afforded by legal and extra-legal mechanisms and the benefits resulting from free fash-
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.
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.