

FREE TO AIR?—LEGAL PROTECTION FOR TV PROGRAM FORMATS

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“In the media world, programming is the software that gives the hardware a reason for existing.”¹

ABSTRACT

Television is only as strong as its programming. The use of program formats has slowly but surely developed into an important component of the television industry. This Article examines the surprising gap between the constantly growing, multi-billion-dollar trade of program formats and their unclear and contradictory legal treatment. Using an interdisciplinary approach, this Article looks at the characteristics of both the product at hand and the markets it serves to examine possible justification for legal protection. It argues that the use of the term “TV format” is misleading and that a clear separation between the unpublished and published stages of the format creation process is necessary. Next, this Article shows that contract law and internal industry mechanisms create an overall efficient unpublished format market where no additional legal protection is needed. In the international trade market of published program formats, however, the Article concludes that a clearer legal approach offering better protection is justified.

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¹ SUSAN T. EASTMAN & DOUGLAS A. FERGUSON, MEDIA PROGRAMMING STRATEGIES AND PRACTICES 2 (7th ed. Thomson Wadsworth 2006).

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I. INTRODUCTION

Young, unknown singers approach the stage. The host will introduce them soon. The stage lights are on and the surrounding TV cameras are focused on their faces and movements as they perform. Although the panel of judges can provide painful criticism, the contestants know it is the audience in the studio and at home that must be won over. This is their chance to make a dream come true. It is their opportunity to become stars, idols.

This description may sound familiar to the American television audience, but the show described is not *American Idol*—it is the British *Pop Idol*. *Pop Idol*, introduced in 2001, was so popular in Britain that its format was then brought to the United States to create *American Idol*, which went on to become a hit in the new market.

The subject of this Article is television formats or, more specifically, the puzzling gap between the economic reality of a multi-billion-Euro industry in which TV formats are licensed and sold on a regular basis² and the obscure legal framework surrounding these products. Surprisingly, television formats are not usually recognized as protectable under current legal systems. Moreover, even though the question of legal protection is by no means new,³ it seems that the appropriate legal regime for television formats remains undetermined.⁴

The common mindset in the entertainment industry is that “it is the Government’s duty to provide the legal framework within which business may be conducted fairly and efficiently. There is no reason to exclude the inventors of original TV formats from that remit.”⁵ While the industry position is not to be taken lightly, “the fact that a certain market practice exists is not in itself sufficient to warrant giving that practice the force of law by providing legal re-

² The international format industry alone was worth more than €2.4 billion in 2004. Daniel Schmitt et al., *The Global Trade in Television Formats* (Screen Digest 2005) (a research paper compiled by FRAPA and Screen Digest, sponsored by the government of the German State North Rhine Westphalia, under State Secretary for Europe, International Affairs and Media, which analyzed internationally traded formats between 2002 and 2004 in the following countries: the US, Australia, the UK, Germany, France, Italy, Spain, the Netherlands, Belgium, Denmark, Sweden, Norway, and Poland).

³ See generally Robin Meadow, *Television Formats—The Search for Protection*, 58 CALIF. L. REV. 1169, 1169 (1970).

⁴ Most of the writing on this subject can be found in Europe, especially in Germany and the UK. The main works in this area, conducted by Albert Moran and colleagues, examine mostly the cultural and globalization aspects of television formats. The legal and economic aspects, the focus of this paper, received only scant attention in legal writing in the US.

⁵ Anthony Martino & Claire Miskin, *The Price Is Not Right*, 141 NEW L.J. 813 (1991) (quoting Letter from Peter Smith, Thames Television, to THE INDEPENDENT (Jan. 16, 1991)).

medies for its abuse.”⁶ The justification for protection should originate from the underlying policies of the legal system and economic rationales. Without such a basis, any attempt to resolve the eligibility question will be contingent on ad hoc solutions, depending on case-related intuitive judgments, which have so far led to inconsistent and often conflicting results.

The study of the protectability of television program formats is of considerable value, given the importance of the television industry and the changes in television viewing habits, content, and technology. Television format-based shows have captured a central place on broadcasting schedules, and a 2005 study found that the United States is the single most important TV format market in terms of production value.⁷ Globalization further highlights the issue at hand as the United States’ television market continues not only to experience an increased volume of marketing and trade but also to become significantly more open to inbound traffic.

A. *The Definition and Scope of TV Formats*

What exactly are TV formats? Almost every TV viewer can point out examples of different program formats: talent shows, such as *American Idol*;⁸ game shows, such as *Who Wants to Be a Millionaire?*;⁹ competition and reality shows, such as *Fear Factor*¹⁰ and *The Apprentice*;¹¹ and script-based shows such as *Coupling*.¹²

⁶ Meadow, *supra* note 3, at 1171.

⁷ See Schmitt, *supra* note 2, at 22.

⁸ Originating in England under the name *Pop Idol*, broadcast in the U.S. since 2002. Richard Rushfield, *The Battle for ‘Idol,’* NEWSWEEK (Jan. 15, 2011), <http://www.newsweek.com/2011/01/15/the-battle-for-idol.html>.

⁹ Also a show originating in England, from 1998. The success of this format is well illustrated by the 2008 award winning British film *Slumdog Millionaire*. DENISE D. BIELBY & C. LEE HARRINGTON, GLOBAL TV: EXPORTING TELEVISION AND CULTURE IN THE WORLD MARKET 112 (2008); *Slumdog Millionaire* (Celador Films 2008).

¹⁰ First aired in 2001. INTERNET MOVIE DATABASE, *Fear Factor*, <http://www.imdb.com/title/tt0278191> (last visited Feb. 13, 2011).

¹¹ A Donald Trump and NBC production started in 2004. INTERNET MOVIE DATABASE, *The Apprentice*, <http://www.imdb.com/title/tt0364782> (last visited Feb. 13, 2011).

¹² A BBC production whose format was bought by NBC in 2002–2003. INTERNET MOVIE DATABASE, *Coupling* [UK], <http://www.imdb.com/title/tt0237123> (last visited Feb. 13, 2011), *Coupling* [U.S.], <http://www.imdb.com/title/tt0338592> (last visited Feb. 13, 2011).

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Still, finding an agreed upon *legal* definition for a “format” is not an easy task. Though some have attempted, to date, no such definition exists.¹³ As a consequence, court decisions regarding TV formats reflect a disordered and random approach, leading to conflicting standards that are difficult to apply.¹⁴ The task of defining a TV format is difficult but crucial to this discussion.¹⁵

Unlike the legal field, in the business and entertainment industry, “format” is a common, everyday term—a frequently used working phrase understood in terms of what it does or does not include and the “particular industrial set of implications”¹⁶ it carries. It is a commodity that has a specific meaning, set of characteristics, and price.

The most comprehensive legislative attempt to provide a legal definition of a format arose in the United Kingdom in 1990, within the revision of the British Broadcasting Bill.¹⁷ The definition covered both a *format proposal*—a recorded plan for a program format—and a *format program*—a television program created to be repeated and recognized as a series, possessing a certain level of originality.¹⁸ However, this important legislative attempt failed, mainly because of criticism calling this definition “enigmatic” and overly broad, “almost to the point that it does not provide a useful base for analysis.”¹⁹

¹³ See Frank L. Fine, *A Case for the Federal Protection of Television Formats: Testing the Limit of “Expression,”* 17 PAC. L.J. 49, 51 (1985); Shelly Lane, *Format Rights in Television Shows: Law and the Legislative Process*, 13 STATUTE L. REV. 24, 25 (1992) (“‘Format’ is not a legal term of art.”).

¹⁴ See Meadow, *supra* note 3, at 1170. The following quotation illustrates the difficulties of definition:

Formats are thus an unusual sort of literary creation. Unlike books, they are not meant for reading. Unlike plays, they are not capable of being performed. Unlike synopses, their use entails more than the expansion of a story outline into a script. Their unique function is to provide the unifying element which makes a series attractive—if not addictive—to its viewers.

Id.

¹⁵ “The atom of the [legal status for TV formats] problem lies in defining a format.” H. Dawley, *What’s in a Format*, TELEVISION BUSINESS INTERNATIONAL, Nov. 1994, at 25 (quoting Irene Van Affelen, Head of Corporate Legal Affairs, Endemol Group).

¹⁶ ALBERT MORAN, COPYCAT TV: GLOBALIZATION, PROGRAM FORMATS, AND CULTURAL IDENTITY 13 (Luton 1998). See CHRISTOPH FEY, TRADING TV FORMATS 54 (The EBU Guide to the International Format Trade European Broadcasting Union 2007).

¹⁷ See Lane, *supra* note 13, at 35. This attempt arose as a reaction to the result of the famous *Opportunity Knocks* case. See generally *Green v. Broad. Corp. of New Zealand*, [1989] 2 Eng. Rep. 1056.

¹⁸ See Lane, *supra* note 13, at 37–38.

¹⁹ Justin Malbon, *All the Eggs in One Basket: The New TV Formats Global Business Strategy*, 32, 33 (Michael Keane et al. eds., AUSTRALIAN UNESCO, Working Paper No. 1, 2003).

1. The Creation Process

To understand what a format is, one must start by examining a typical program creation process. It is a long journey from the developer's conception of a program idea to viewers enjoying the broadcast television show. This creation process can be broken down into four main stages: (1) coming up with a *program idea*; (2) creating a *paper format*; (3) adding production and business knowledge to create the *program format*; and finally, (4) airing the *episodes*.²⁰

After conceiving the basic idea, the next step is producing a written description of the developed concept and a detailed layout²¹ for the show, generally referred to as the "paper format." The paper format, which can be anywhere from two to seventy pages long, functions as the starting point for the show's production. It embodies the "*study of the idea*"²² and is often used for presentations and sales negotiations.

At the third stage of the creation process of a show, technical and production elements are added, the pilot is shot, and a wider knowledge base for the show is created. This phase is called the "program format." The program format combines many different elements. Some come from the paper format (rules, name, location) and others are driven by the added production knowledge (music, set design, computer programs, participants' and hosts' characteristics, etc.). All shape the show structure and nature. Probably the most important characteristic of a format is its function as a mold that provides the ability to recreate the same format-based program in different territories and settings.²³ These features will be discussed further in the Parts below.

At the fourth and final stage of the creation process, *episodes* of the show, based on the program format, are filmed and broadcast to the public. When a formatted show is being sold, two options exist. Either the final episodes are being sold "as is" (as they were filmed and broadcast in the originat-

²⁰ All these terms are known and used in the American television industry. The terminology used in other television industries around the world is slightly different but has the same basic meaning.

²¹ These can be the visual elements of the show, casting ideas, plot outlines, theme music, etc.

²² ALBERT MORAN & JUSTIN MALBON, UNDERSTANDING THE GLOBAL TV FORMAT 43 (2006) (quoting John Gough, *Distraction Formats, Ltd.* in 2002).

²³ For example, consider the format of the show *Survivor*, broadcast in the U.S. by CBS. This format was adopted around the world and is usually filmed in a different location each season. See INTERNET MOVIE DATABASE, *Survivor*, <http://www.imdb.com/title/tt0239195> (last visited Feb 13, 2011).

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ing territory),²⁴ or the program format is being used to produce a localized version of the show in the adopting territory.²⁵

2. The Definition Difficulties

Cases have failed to create definite rules for the legal protection of program formats for two main reasons. First, lack of understanding of the format creation process described above is leading courts to regard “formats” as a single product. Although bound together in the end product—a produced television show—the trade of unpublished paper formats is different from the program format trade. Each of these products involves different characteristics, originators, markets, goals, and legal challenges, and thus should be examined independently.

The second major source of difficulty in defining TV formats is the tendency to analogize formats to other products in the television market, such as scripted shows. Other products might resemble program formats, but they are nevertheless very different.²⁶

²⁴ I use the term “territory” to refer to a broadcasting market. Since a show may be produced and initially only be broadcast locally in a certain geographic area, it is not accurate to refer to this initial broadcast on a national basis.

²⁵ When program formats, rather than the episodes themselves, are being sold, the sale is usually accompanied by a program format “package.” Such a package may contain important additional benefits not formally part of the program format—mainly consulting services provided by the format holder and the “Production Bible.” MORAN, *supra* note 16, at 13–18. The “Production Bible” is a booklet containing “information about the scheduling, target audience, rating and audience demographics of the program for its broadcast in its original national territory.” *Id.* The complete list of format “knowledge components” that can be for sale includes the paper format, the preprogram bible, production consulting services, blueprint and specifications, computer software and graphics, titles, sounds, scripts, dossier of demographic and rating data, scheduling slots information, off-air videotapes, and insertable footage. See MORAN & MALBON, *supra* note 22, at 23–25.

²⁶ See, e.g., Matthew Sharp, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177, 193 (2005).

[T]he problem lies with a failure to realize that the framework of a reality show does not directly correspond to the framework of a scripted show. When identifying the protected expressive elements of a scripted show, we look to “plot, theme, dialogue, mood, setting, pace and sequence.” But a reality show does not employ these same elements, nor do these elements take the same form in a reality show as they do in a scripted show. Applying the substantial similarity test to reality shows in the same way it is applied to scripted shows leaves the true expressive elements of a reality show unprotected.

Legal definitions cannot sufficiently describe the underlying idea or any other single element of a format. Such treatment shifts attention from the true value of the product that is being traded and developed. Formats are a complete system, and, as with most systems, one part, as important as it may be, does not capture the real value of the product.²⁷

Formats are compounds of creative, business, and marketing elements. Some of these elements are standard and some are unique. Some are dictated by external factors, such as genre or technology, and some are generated by the internal logic of the show, such as its goals (e.g., the type of reaction it wants to generate) and its target audience. The value of a format is derived to some extent from each individual element, but mostly from the combination of elements and the ability to create a symbiotic nexus between them.²⁸ For example, the success of the show *Survivor* depends on finding the right mixture of personalities to send to the isolated location and providing tasks that emphasize those different personalities, expose conflicts, and highlight aspects of human behavior. This success does not come only from the idea of sending a group of strangers to an island to fight nature (found in the paper format). It does not come merely from the rules of the game (again, set out in the paper format), the choice of the host and music (creative/production decision), the camera angles (another production choice), the tone of the show and the way it is presented to viewers (marketing efforts), or the choice of target audience and broadcasting time (business considerations). The *Survivor* format is a system that creates value through the combination of all of these and other, less tangible elements.

Consider Figure 1, which is a modification of Elliott's²⁹ description of the program production process. The middle chart presents detailed stages of the format creation chain. The numbers show the process direction and the arrows represent the connections between all of these elements. If successful, the process generates value outweighing that of the individual elements alone.

Id.

²⁷ Consider, for example, the physical system represented by a building. Its value is not determined only by the quality of each brick or even by the structure in which the bricks are organized; it also derives from the architectural design, the structure's strength, and the integration of the elements that allow it to serve its purpose as a building.

²⁸ See Malbon, *supra* note 19, at 26 (supporting this assessment and discussing the importance of ancillary merchandise in the success of the main product).

²⁹ See PHILIP ROSS & COURTNEY ELLIOTT, *THE MAKING OF A TELEVISION SERIES: A CASE STUDY IN THE SOCIOLOGY OF CULTURE* 64 (1979).

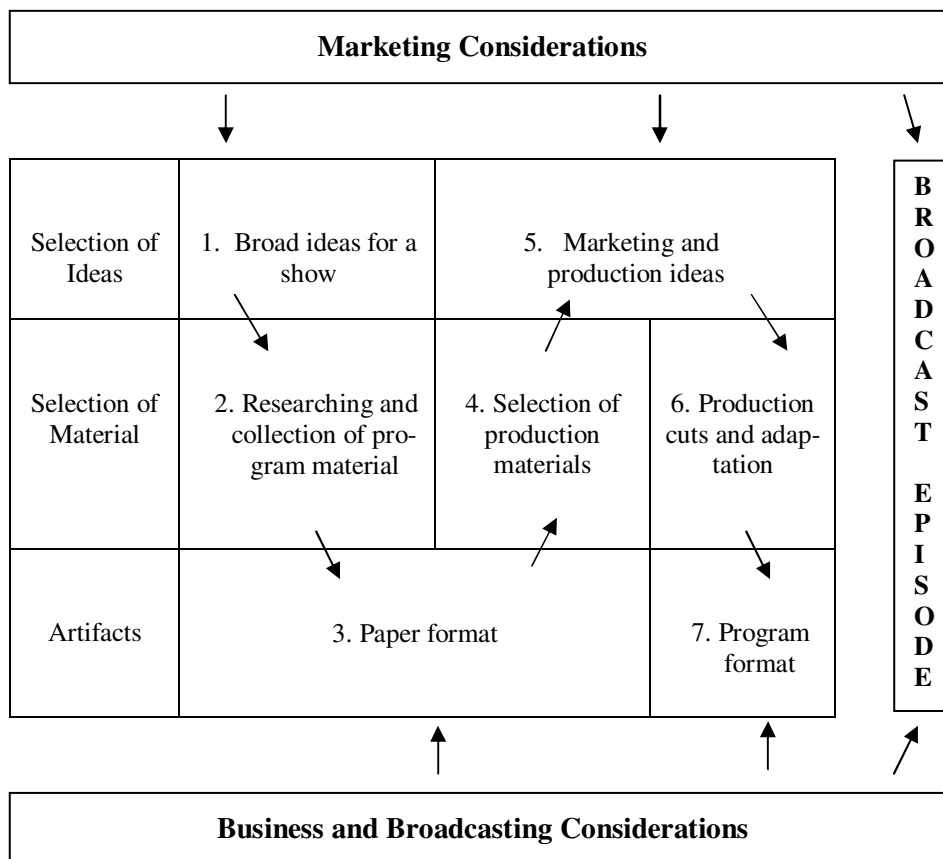


Figure 1: *Elaborated Format Creation Process Chart*

A format, therefore, is the product of a system: the sum value of its elements (the content of each box), their combination and arrangement (the structure), and the strength and quality of its relationships (the arrows in the diagram).

B. Other Characteristics

TV formats are a form of communication art—an intellectual product that conveys information—or “information goods.”³⁰ Intellectual products have unique characteristics;³¹ although they may be recorded, they exist in an intangible form, and as with all creations, they integrate some level of previous knowledge.³² These factors make it difficult to determine their exact content. Intellectual products are easy to obtain but almost impossible to protect once their information is conveyed, since they cannot be deleted or restored to the sole possession of their originators. Television programs in general are also characterized by their low marginal cost and instantaneous reproduction. They also require relatively rapid product innovation due to their typically very short shelf life.³³

Above all, information goods are distinguished by their characteristics as “public goods” and “experience goods.” A public good is a product that is non-rival (the act of consumption does not diminish its value) and non-exclusive (any other person can consume it in the same way and possibly at the same time).³⁴ An experience good can only be evaluated by being experienced. For example, the taste of an apple is an experience good, since one has to actually try the apple in order to know what it tastes like. In addition, the taste of one apple does not necessarily predict the taste of the next apple. A TV format is similar in this regard. Its quality,³⁵ characteristics, and ultimately its value are

³⁰ CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 3 (1999).

³¹ Especially when compared to traditional definitions of property. See Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 368 (1989).

³² See *CBS Broad., Inc. v. ABC, Inc.*, 02 Civ. 8813, 2003 U.S. Dist. LEXIS 20258, at *1 (S.D.N.Y. Jan. 14, 2003) (stating that television formats, as cultural products, are cumulative creations that borrow “liberally from what has gone before”).

³³ See RICHARD COLLINS ET AL., *THE ECONOMICS OF TELEVISION: THE UK CASE* 9 (1988).

³⁴ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 (6th ed. 2003).

³⁵ “Quality” is a problematic term with regard to television programs and products. See Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. ECON. 194, 196 (1952) (identifying the optimum program as one that “satisfies as many people as much of the time as possible”). For a discussion of a “quality television” standard see generally Betsy Williams, *“North to the Future”: Northern Exposure and Quality Television*, in *TELEVISION: THE CRITICAL VIEW* 141 (Horace Newcomb ed., 5th ed. 1994).

revealed only through experience, and any new format must be experienced in order to be evaluated.³⁶

We have seen that TV formats are two separate products and serve two separate markets. As a practical matter, neither product has intellectual property protection against potential infringement. This Article argues that, while in the unpublished (paper) format trade market industry participants have come to rely on several extralegal mechanisms that maintain efficient practices, the weakening of such mechanisms in the market for published (produced) program formats, signals a need for legal protection.

This Article continues in three main parts. Part II explores the market of unpublished formats.³⁷ After describing the inherent tension governing this stage of the production process, the Article examines the main mechanisms most commonly used by the industry to address this tension. This Article concludes that despite the concerns expressed by some commentators as to the harmful effects of the ambiguous legal status on the industry,³⁸ the current setting, relying heavily on intrinsic industry forces, displays an overall efficiency in that market.

Part III examines the published program format, focusing on the national and international program format trade. Bearing in mind the question of legal protection for TV formats, Part III illustrates the problem of deciding whether to license or copy a format. The Article continues by describing developments in the format trade market and industry customs, offering the conclusion that market place realism, business logic, and public policy all support shifting today's legal approach toward direct recognition of TV program format holders' IP rights. Finally, Part IV summarizes and offers concluding remarks.

³⁶ Nonetheless, one can assess the value of an experience good, using signaling shortcuts, which help in making a purchase decision. Mostly those signals consist of reputation and past experience (i.e., branding). See SHAPIRO & VARIAN, *supra* note 30, at 5–6.

³⁷ Usually the negotiations in this market involve paper formats, although negotiations involving complete program formats or pilots are not rare. For simplicity, I will use the term *paper format*, but it should be understood in my discussion as representative of unpublished formats in general.

³⁸ See, e.g., Jay Rubin, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 696 (2006).

II. THE TRADE AND PROTECTION OF UNPUBLISHED FORMATS

The central relationship in the *paper format* market takes place between the paper format creator and the network or production company (“producer”).³⁹ Producers fulfill two important roles. The first is a commercial function. Networks and production companies hold the professional knowledge and experience needed to sort through the supply of paper formats and select the formats that are appropriate for commercial development. Second, producers have the knowledge and resources required for the next step in the process—that is, to take a paper format and advance it into a program format.

In this setting, the danger of appropriation exists both on a horizontal level (from other creators attempting to claim the format as their own) and on a vertical level (from the production entities approached). While the creator can more easily guard the materials from horizontal appropriation through secrecy, the vertical relationship requires disclosure, and thus presents a greater danger.

A. *Format Negotiations and Arrow’s Information Disclosure Paradox*

We start with the description of the underlying problem in the unpublished format market. In addition to the challenges that parties must overcome to achieve any agreement, information goods such as TV formats add additional bargaining costs to the equation. Although the parties have real incentives to reach an agreement, the high costs they incur during the bargaining stage might negate an otherwise Pareto-efficient agreement.⁴⁰

³⁹ The “producer” function can take many forms and involve different sizes of companies, whether a big network (broadcasters), a small channel, or an independent production company. Broadcasters usually use separate production companies, such as movie studios, for the development (i.e., production) function. Independent production companies (“indies”) are a third party in the creative process. Their main job is to produce and develop a program according to its contract with the network or station, to be later carried on by the broadcaster. Some indies, especially ones dealing with format development, produce their shows independently and then attempt to sell them to networks, independent stations, cable, and satellite. An example of such a company is the international leading format production and development company Endemol (Dutch-based but now Spanish owned). Endemol is responsible for formats such as *Big Brother*, *Pay Day*, *Big Diet*, *1 vs. 100*, and many more. See ENDEMOL, Formats, <http://www.endemol.com/what/formats>.

⁴⁰ A Pareto-efficient transaction exists when one participant’s situation cannot be improved without making another participant worse off. For a more elaborate explanation of efficiency and the “Pareto” term, see POSNER, *supra* note 35, at 11–13.

To illustrate these costs, consider a typical pitch meeting for a new television show. At one end of the table sits the intended producer's agent. The continually growing demand for entertainment and the constant need for fresh shows to provide "quality products in an extremely competitive marketplace"⁴¹ motivate her participation. Nonetheless, she is faced with a very large supply of materials, out of which she will choose the few suitable for further development.⁴² This task requires that she learn about each format's substance as a part of the evaluation and decision-making process.

Across the table sits the paper format creator, who hopes the producer will be interested in developing his format into a broadcast show. The creator is the only informed party at the beginning of the meeting, as he alone possesses complete knowledge of this format. As the negotiation starts, he is faced with a conflict. On the one hand, he will have to expose at least some of the information in order for the producer to evaluate his product. On the other hand, once he presents the information, he loses control over it as well as his bargaining power and potential compensation. This "tension between giving away your information—to let people know what you have to offer—and charging them for it to recover your costs is a fundamental problem in the information economy."⁴³

This bargaining situation is known as Arrow's information disclosure paradox,⁴⁴ which has the potential to generate high transaction costs, thus endangering the efficient outcome of negotiations. Arrow's information disclosure paradox presents a bargaining game over secret information, describing both parties' reluctance to be the first to make a move.⁴⁵ If the format creator

⁴¹ David M. McGovern, *What Is Your Pitch?: Idea Protection Is Nothing but Curveballs*, 15 LOY. L.A. ENT. L. REV. 475, 505 (1995).

⁴² In 1998, the number of new ideas considered by the networks in the U.S. to replace old programs was estimated to be over 6000 each year. See JAMES R. WALKER & DOUGLAS A. FERGUSON, *THE BROADCAST TELEVISION INDUSTRY* 111 (1998). In 1958, NBC received 30,000 to 40,000 "suggestions" each year, of which "[f]rom 2,000 to 3,000 get some serious study." Harry R. Jr. Olsson, *Dreams for Sale: Some Observation on the Law of Idea Submissions and Problems Arising Therefrom*, 23 LAW & CONTEMP. PROBS. 34, 35 (1958). "Each year, the four networks evaluate thousands of concepts for new series and purchase approximately 600 pilot scripts." 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, 1288 (1994).

⁴³ See SHAPIRO & VARIAN, *supra* note 30, at 6.

⁴⁴ See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS; A CONFERENCE OF THE UNIVERSITIES-NATIONAL BUREAU COMMITTEE FOR ECONOMIC RESEARCH* 609, 614–16 (1962).

⁴⁵ *Id.*

reveals his information first, the producer acquires the information at no cost and the format creator loses all bargaining power. The producer has no incentive to make the first move, either. She does not want to make any promises prior to hearing the format pitch, since, even if it is a desirable product, it is possible that her network or company is already independently developing a similar format. This determination, of course, could not be made without actually hearing the pitch. Put differently, parties bear additional *ex ante* “information costs” for the level of trustworthiness of the other party. This is an especially acute problem for new and unknown creators, who are less able to use their reputations to signal the quality of their work. Not only do they have access to a smaller number of producers willing to hear their pitches to begin with, but they are also forced to negotiate from an inferior starting point.⁴⁶

B. Current Industry Solutions

The high costs generated by the information disclosure paradox at the outset of the process suggest that parties will be unable to reach progressive development stages. However, the market for unpublished television programming is both highly competitive and highly productive. Three main groups of solutions can be identified as forming the basis of the industry’s practices.

1. Contract-Based Solutions

The use of contractual tools such as Non-Disclosure Agreements (“NDAs”) can be considered as a means to contract around Arrow’s paradox in the negotiation process described. However, NDAs can only lessen the impact of Arrow’s paradox to some extent. They cannot offer a comprehensive solution. If the producer signs a confidentiality agreement before learning the sug-

⁴⁶ The same problem occurs in the movie industry with script writers. “New writers in particular are vulnerable to infringement because they have to be less discriminating about to whom they send their scripts.” Nick Gladden, *When California Dreamin’ Becomes a Hollywood Nightmare; Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359, 360 (2003). However, it should be stressed that the main difference here is that movie scripts are recognized as protected under copyright law, while formats are not necessarily so recognized. *See, e.g.*, *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t*, 392 F. Supp. 2d 297, 315 (D. Conn. 2005) (“Under the Copyright Act, literary works are subject to copyright ‘regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.’ 17 U.S.C. § 101; *see also* 17 U.S.C. § 102(a). The Second Circuit has treated screenplays as copyrighted works, *see e.g.*, *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 587 (2d Cir. 1999)”)

gested format content, the format creator could potentially halt some of the producer's independent development, claiming the theft of his format. Instead, the producer would prefer that the format creator sign an agreement prior to his format disclosure that releases her in advance from all obligations and possible lawsuits, such as a liability waiver.⁴⁷ However, if the format creator signs such an agreement, he is at the mercy of the producer. Nonetheless, the entertainment industry continues to produce and develop new materials constantly, using exactly this kind of contractual mechanism. The sophisticated producers generally refuse to sign NDAs, especially for unsolicited formats. Paper-format creators may have their suggestions returned unopened (as a means of avoiding legal liability),⁴⁸ or may be required to sign a submission release discharging the potential producer from any obligations regarding their materials to even be considered. This submission release is signed with the understanding that if the paper-format creator's materials are eventually selected, they will be rewarded.

This practice raises two main areas of inquiry. The first relates to cases where the parties encounter a dispute about whether or not their interaction yields an obligation to pay. This scenario is discussed later under the heading of judicial decisions. The second concerns the motivation of creators to seemingly forego their only legal protection and sign such release agreements.

a. The Format Creator's Perspective

One possible answer to this second question relates to the cost of contracting. Producers are often part of established organizations with available legal services, often including in-house attorneys. The costs of a general submission release contract are comparatively small and distributed over all of the creators approaching that specific producer. The creator, on the other hand, will usually have less access to legal advice, and the cost per agreement will be relatively higher. Nevertheless, in instances where price differences for legal services affect the industry, organizational solutions that reduce legal costs will emerge. Indeed, professional groups such as the Writers' Guild of America

⁴⁷ These are also known in the industry as "submission release" agreements.

⁴⁸ "Many studios and production offices are so afraid of lawsuits, they have implemented strict policies, which won't allow employees to listen to or even read unsolicited pitches. Mailed and faxed pitches will often go straight into the trash can." JONATHAN KOCH, ROBERT KOSBERG & TANYA M. NORMAN, *PITCHING HOLLYWOOD, HOW TO SELL YOUR TV AND MOVIE IDEAS* 62 (2004).

(“WGA”)⁴⁹ provide such services; hence the legal costs alone do not explain why creators sign release statements.

The second and third explanations derive from the nature of the market and the product involved. The market of format creators is a talent market. Creators’ earning abilities depend upon the rent they can extract for their work. However, in the initial stages when the creator and the creator’s level of talent are still unknown, the ability to signal the product’s value is very limited. Once the creator’s first work is accepted and considered successful, the bargaining power for future deals will increase significantly⁵⁰ and with it, the ability to make negotiation demands, such as NDAs.

The market assumes that only rational creators who believe in the quality of their product will be willing to take the risk of waiving their present rights in exchange for the opportunity to exhibit their talents for the sake of future deals. The unknown creator who refuses to sign such a waiver risks sending a negative signal to the market about the quality of their work or appearing to be a troublemaker, or both. Thus, while from an *ex post* perspective it might seem that the format creator would prefer to have had some kind of protection, from an *ex ante* point of view, the creator would forego such protection in exchange for raising chances of the format being picked by producers.⁵¹ This can be characterized as the price of “breaking in.”

As for the product itself, the probability of success (in creating, submitting and being selected) is low, and the market is overcrowded. The main di-

⁴⁹ The WGA is a professional association (divided into WGA East and West) providing its members with, among other benefits, the option to register written materials in order to enhance their potential for legal protection. This is a strong collective bargaining union, in charge also of negotiating the minimum basic agreement (“MBA”) for writers. See WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org> (last visited Oct. 31, 2010).

⁵⁰ The television and movie industries “rely heavily on established writer-producers in developing new series . . . [and] series’ pilots described as originating from writer-producers associated with previous hit series were much more likely to be selected for network schedules than pilots created by individuals without proven track records in the industry.” Denise D. Bielby & William T. Bielby, *The Hollywood ‘Graylist’? Audience Demographics and Age Stratification Among Television Writers*, in *CREATORS OF CULTURE: OCCUPATIONS AND PROFESSIONS IN CULTURE INDUSTRIES* 144 (Muriel G. Cantor & Cheryl L. Zollars, eds., 1993); see also IAN GURVITZ, “HELLO,” LIED THE AGENT 28 (2006) (“‘If you haven’t worked on a show, you won’t even get on the lot, let alone in the door.’ Not even a few produced scripts and a WGA card gets you in. It’s based on experience, relationship, and a track record.”).

⁵¹ The argument can be made that having had a good idea in the past does not necessarily indicate a greater likelihood to produce additional successful formats in the future. However, in the television industry, past success is consistently regarded as the highest talent assessment device. See TODD GITLIN, *INSIDE PRIME TIME* 115 (2000).

mension of competition is time (being first to market), rather than marginal cost.⁵² Once a producer has accepted and developed a show, it is less likely that another format based on a similar concept will be chosen. Therefore, once a format is accepted, the value of all similar formats diminishes. The fact that other format creators might have similar competing concepts creates a race effect. Thus, many format creators will be willing to cut short the pre-negotiation period by waiving precautions.

b. The Producer's Perspective

The next argument illustrates a producer's decision model. After the format concept is revealed, the producer faces three options, each carrying some potential responses from the creator, summarized in Figure 2.

	Producer's Actions		
	<i>Reject</i>	<i>Accept (Pay)</i>	<i>Appropriate</i>
Creator's Responses	<ul style="list-style-type: none"> • Go to a competitor • Do nothing (give up) 	<ul style="list-style-type: none"> • Accept offer • Reject offer and go to competitor (now with some signal about market interest) 	<ul style="list-style-type: none"> • Take legal action (such as a legal suit) • Act as if the format was rejected (i.e., do nothing or go to a competitor, regardless of the decision on whether or not to sue)

Figure 2: *Producer's Actions and Creator's Responses*

⁵² See, e.g., Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 663, 664 (1994).

Producers may reject the format, accept the format and negotiate the price,⁵³ or reject and appropriate the format. Attempts at appropriation may motivate the creator to take legal action against the producer, but there are other market-specific consequences that represent more profound deterrents. The producer may invest production resources in an appropriated format and still lose in the end because the creator may make a legitimate sale to another producer who is able to release the product to the market first. If, however, the appropriator produces first, the producer still faces the danger of being sued by the creator, the competing producer, or both.⁵⁴ Apart from the fear of legal action, there is the potential damage to a producer's reputation, which can have a direct impact on future earnings. Given the market's competitive nature, creators who are aware of a producer's reputation as an appropriator will simply stop approaching that producer. And since other producers exist, the demand for this appropriating producer will decline.⁵⁵

The producers' choice of whether to use the unpublished format without paying can also be illustrated using a simple cost-benefit analysis. Since producers are wealth-maximizing, rational entities, their decision whether to choose an appropriation strategy will only occur in cases where their expected benefits outweigh their expected harm or costs: $(B_{1+2} \times P_s) \geq [C \times (1 - P_s)]$.

The producer's expected benefits $(B_{1+2} \times P_s)$ are the sum of the tangible revenues he or she will collect from a successful show B_1 plus additional intangible benefits he or she will gain B_2 ,⁵⁶ all multiplied by the probability of success P_s . The expected costs, $C \times (1 - P_s)$, are the probability of failure multiplied by the producer's cost function. The cost function includes the investment needed to produce the show,⁵⁷ but it also depends on other factors, such as the probability of a lawsuit, reputation harm in case of detection, or the lost opportunity to invest in other legitimately acquired shows.

⁵³ In this case another set of questions arises concerning the producer's ability to underpay the creator (*e.g.*, by misrepresenting the perceived value of the format), which is beyond the scope of this paper.

⁵⁴ This was the claimed scenario in the suit initiated by DreamWorks TV and Mark Burnett, creators of the format *The Contender* (broadcast by NBC, which did not join the suit) against Fox's format *The Next Great Champ*. See Sharp, *supra* note 27, at 191–92.

⁵⁵ Compare this to the case of frivolous lawsuits by creators for misappropriation. Here the potential gain is usually greater than the reputation loss, especially for unknown creators with less faith in their ability to compete in the talent market (*i.e.*, creators who do not expect long-term payoffs).

⁵⁶ Such is the advantage a hit show presents against competitors—the possibility of gaining audience loyalty and so on.

⁵⁷ This is cheaper than the “buying” alternative, since the producer does not have to compensate the paper-format creator.

These formulae suggest that producer appropriation will be rare. First, P_s is low.⁵⁸ Even when considering the industry professionals' assumed expertise in discovering the next big hit, the statistical prediction of a new show's success is small.⁵⁹ The "nobody knows" aphorism is often invoked in this regard.⁶⁰

Second, the probability of detection is high. The industry is characterized by many cooperative projects and repeated interactions, which increase the magnitude of the potential damage to reputation (i.e., increased punishment, which equals costs). The high detection probability arises due to a number of factors. First, although formats can be created by almost anyone, in most cases the format creator will be a member of the television or media industry, even if not directly related to the program development field.⁶¹ Second, despite the great development and expansion in this market, the concept development arena can still be regarded as fairly local and concentrated. Because the market is more local, the remaining "old Hollywood" connections are still very much felt throughout the industry, which to a large extent thrives on connection and personal reputation.⁶² A third reason for the high detection probability is the high level of codependency among the different participants in this market, which industry members consider necessary, especially regarding labor management.

⁵⁸ Television shows' chances of success (i.e., a show being renewed for more than one season) are estimated at 250:1. See GURVITZ, *supra* note 51, at 22 ("Television is a business based on the presumption of failure."); Robert E. Kennedy, *Strategy Fads and Competitive Convergence: An Empirical Test for Herd Behavior in Prime-Time Television Programming*, 50 J. INDUS. ECON. 57, 66 (2002) ("For the pooled sample [all prime time network television programs that appeared between September 1961 and October 1989], 63% of new shows were canceled their first year while only 14% lasted five years or more."); see also David K. Barth, *Essays on the Economics of Television Program Supply* 39 (2003) (unpublished Ph.D. dissertation) (on file at Northwestern University) (stating that between 1991 and 2000, 69% of shows ran for not more than one season and only 8.9% lasted for five years or more).

⁵⁹ "An experienced programmer can probably distinguish well-crafted from mediocre scripts and make an informed judgments about the quality of acting, editing, and direction of a pilot. Nevertheless, the programmer has no reliable basis for predicting whether audiences, advertisers, and critics will accept the series." Bielby & Bielby, *supra* note 42, at 1289. See also *supra* note 58 and associated examples.

⁶⁰ GITLIN, *supra* note 51, at 19.

⁶¹ MORAN & MALBON, *supra* note 22, at 31, 34 (exploring the origin of the formats' creative origin).

⁶² "Obviously, stealing ideas is bad business. Most important, personal relationships are vital in the entertainment business. Relationships within studios and between producers take years to establish." KOCH, KOSBERG & NORMAN, *supra* note 48, at 61. See HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* 304, 324 (3rd ed. 2006) (discussing the community of television producers and program executives).

Professional unions such as the WGA and the Alliance of Motion Picture and Television Producers (AMPTP) occupy central roles in this industry and exercise considerable power over labor relations and strategic managerial decision-making.⁶³ The repeated bargaining, joint committees, and general collaborations among the different groups add to the information transparency in the industry and to the development of its information networks. Fourth, since the probability of a format's success is low, a producer will need to appropriate formats, ideas, and scripts on a regular basis to ensure he has the next hit show. However, if a producer does choose such "systematic appropriation" behavior, chances of detection increase with each additional appropriation. Fifth, high detection probability is also influenced by the rigorously followed schedule system used by broadcasters to introduce new shows. Meetings with potential advertisers are held in March, press briefs of the new fall season are released in May, press tours occur in July, and promotional marketing of the new shows usually runs through late August.⁶⁴ Each of these stages is widely covered by industry trade papers⁶⁵ and therefore highly visible to the industry, thus increasing the chances that a "rip off" will be discovered. Lastly, the probability of a lawsuit and the probability of detection will rise in direct correlation to the success of the show, which also affects the levels of B.⁶⁶

In conclusion, the producer decision-making analysis suggests that even though not every act of unlawful appropriation will result in a lawsuit, other inherent factors will still reduce the frequency of appropriation behavior. Admittedly, instances of appropriation by producers do occur. Still, the argument here is not that producers' appropriations do not exist, but that such behavior must be rare. Therefore, the submission release agreements, not the NDAs, are the optimal self-enforcing contracts in the field.⁶⁷

⁶³ Paul & Kleingartner, *supra* note 52, at 666–67.

⁶⁴ See Bielby & Bielby, *supra* note 42, at 1294; Kennedy, *supra* note 58, at 61.

⁶⁵ See Bielby & Bielby, *supra* note 42, at 1296.

⁶⁶ The more successful the show is, and the more people learn about it, the greater the chances for a legal appropriation suit to occur and also, the greater the chances for other people in the industry to learn about the appropriation.

⁶⁷ Put differently, the industry fears false lawsuits from creators more than misappropriation by producers.

c. The Use of Agents

Another way for creators to reduce appropriation risk is through the use of middlemen or agents.⁶⁸ The costs of evaluating an opponent's trustworthiness are reduced when a series of repeated interactions between the parties exist.⁶⁹ First, an agent's investment in getting such information is less transaction-specific, since the agent typically represents several creators. Second, with every additional meeting, the agent collects more information about the producer. Another advantage of repeated interaction is an even greater reduction in the producer's incentives to appropriate materials (short-term gain). Knowing that the parties will meet again enhances both reputation and retribution effects, since potential punishment is more credible. It is important to keep in mind that the relationship is mutual. Producers greatly rely on agents in their search for new ideas and shows, whether through solicited requests or as a function of the agent's ability to recognize a good idea and know what the best producer-client fit will be.⁷⁰ Furthermore, the agent's livelihood is based on her reputation. If she were to breach a confidence and either appropriate a format herself or sell a client's format, her reputation would suffer. She therefore has no incentive to systematically cheat her clients if she wants to remain a long-term player in the market. Also, the use of an agent provides the creator an additional recovery option in case of appropriation in the form of a breach of fiduciary duties and trust suits. Finally, an agent's involvement as a professional negotiator can promote less well-known creators. When the same contractual terms are used for both professional and amateur creators, the latter is bound to gain, since "[t]erms that satisfy professional buyers are likely to be efficient."⁷¹

⁶⁸ This function has many different names and definitions. By "agents," this Article refers to professionals whose job is to facilitate communication between talent buyers and talent suppliers. Agents fulfill a significant and indispensable role. See BLUMENTHAL & GOODENOUGH, *supra* note 62, at 362–65; GITLIN, *supra* note 51, at 143–54.

⁶⁹ Even though the use of agents adds its own transaction costs, in cases where the underlying transaction is socially desirable, they play an important role in advancing such transactions, despite their own costs.

⁷⁰ "[I]f agents did not exist, they would have to be invented . . . [E]xecutives live and breathe by the numbers, [but] they cannot truly rely on an abstract, statistical market to make decisions for them. . . . In this blur of possibility and doubt, agents are a kind of solution." GITLIN, *supra* note 51, at 144.

⁷¹ Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 970 (2005); see *supra* note 69.

2. Single Ownership Mechanisms

a. Complete Ownership Before Broadcasting

The single ownership solution is another way to reduce transaction costs between creators and producers, thereby facilitating value-maximizing transactions. One possibility involves the format creator fully developing an entire work, thus eliminating the need for negotiation with producers. But format creators are usually not in a position to exploit and develop formats as effectively as specialized networks or producers. They lack not only the necessary capital, but also the skills and complex knowledge, expertise, and equipment required for the development and commercialization of a show.⁷² Such a solution could result in a significant reduction in the number of formats conceived,⁷³ as well as suboptimal productions that do not fully exploit the value of the format. Therefore, most creators choose the contractual alternative and sign a submission release, as discussed above in Part II.B.1.

b. Development of Complete Literary Creations

Another weaker or “softer” form of single ownership is where the format creator produces a full literary creation, such as a full script, or rulebook for games, along with the format. Literary creations are protected under copyright law, thereby reducing the fear of appropriation. It should be noted, however, that attempts to acquire copyright protection for formats by claiming they are embodied in a protected creation, such as a script, have generally been rejected, usually based on the idea/expression dichotomy.⁷⁴ Moreover, even such “soft” versions generate some inefficient results and waste resources. Since creators would be obligated to invest more time in each work to fully develop it, they would produce fewer projects. With a smaller number of projects, format creators would no longer be able to spread the risk of rejection over a large number of partly developed works. Each project would therefore carry a higher level of risk. Creators, rather than the commercially knowledgeable networks, would assume the role of selecting development-worthy projects. Taking the control over script and production editing away from broadcasters (the creators’ con-

⁷² Again, even under relatively cheap and accessible creation options like an Internet-based show or a local community project, the program format itself would still not be protected and could potentially be appropriated.

⁷³ See Arrow, *supra* note 44, at 615.

⁷⁴ Meadow, *supra* note 3, at 1172 (mentioning the cases of Dugan v. ABC, 216 F. Supp. 763 (S.D. Cal. 1963) and Richards v. CBS, 161 F. Supp. 516 (D.D.C. 1958)).

sumers) creates further inefficiency, since it is the broadcasters' responsibility to comply with sponsors' and actors' contract demands. Creators are rarely aware of such demands while developing their products.⁷⁵ Above all, attention should be drawn to the fact that the format itself will remain unprotected, exposing its creator to the additional risk of investing resources in a creation that might be rejected and still have its format appropriated. The creator is then left with a worthless work for future sale, losing all the time and effort invested in that work.

c. Vertical Integration

Another form of single ownership solution is vertical integration. Since format transactions promote value-maximizing exchanges, under high transaction costs caused by Arrow's paradox and possible hold-up opportunities,⁷⁶ parties will tend to create integrated entities.⁷⁷ In the vast majority of cases, given the creators' lack of financial resources, the integration would be under the production company. In such a model, the producer employs a group of people responsible for originating formats in-house and refuses any unsolicited formats, consequently reducing the negotiation costs.

This single-owner model of vertical integration is very common in the industry today and is partly the result of confused legal treatment in the past.⁷⁸ Producers altogether eschew formats from unsolicited creators to avoid potential suits.⁷⁹ Naturally, the single-owner solution also has costs, such as monitoring costs, the cost of employment contracts, and the cost of opportunism. In addition, such a solution sacrifices the economic principal of specialization, which leads to market efficiency.⁸⁰ Refusing unsolicited formats narrows production to

⁷⁵ See *Rokos v. Peck*, 182 Cal. App. 3d 604, 613 (Cal. Ct. App. 1986) (“[I]n motion picture story writing and television program writing, it has become necessary to submit ideas to the show producers, and not develop them into complete works until and unless they are approved.”) (quoting John A. Tretheway, *Literary Property: Idea Protection by Contract-Requirement of Novelty*, 26 S. CAL. L. REV. 459, 459–61 (1953)).

⁷⁶ The moment the format creator surrenders his materials, he can no longer take them back. The producer might then use this advantage to extort a change of the agreement's terms.

⁷⁷ R. H. COASE, *THE FIRM THE MARKET AND THE LAW* 7 (Univ. of Chicago Press 1988).

⁷⁸ “Many television projects are produced by company employees. A roughly equal number are produced by vendors and suppliers, whether independent producers or production companies.” BLUMENTHAL & GOODENOUGH, *supra* note 62, at 328.

⁷⁹ See KOCH, KOSBERG & NORMAN, *supra* note 48, at 62.

⁸⁰ Stated differently, why make something yourself when a competitive existing market could produce it in a much more efficient way? See Oren Bar-Gill & Gideon Parchomovsky, *Intellectual Property Law and the Boundaries of the Firm 1* (June 29, 2004) (unpublished manu-

materials generated in-house only, raising the price of innovation and decreasing quality.⁸¹ Therefore, while this solution provides a cost-effective business model for solicited materials, it also creates a suboptimal result for the unsolicited materials market. Consequently this is a type of solution that does—and should—exist alongside the unsolicited materials' market, but not as the sole resource for new shows.

3. Judicial Solutions

Judicial solutions may provide relief for format holders who feel that their rights have been trampled and help in overcoming the high transaction costs incurred at the outset of negotiations for these unsolicited materials. Formats or format rights, as such, are generally not recognized as protectable legal subject matter. However, in some circumstances, courts are willing to provide protection to otherwise unprotected, idea-based products.⁸² This is done mostly under the area of law sometimes referred to as idea-submission law.⁸³ In the context of TV formats, this usually involves a person who has an idea for a show, shares it orally or in written form with an interested party, and after being rejected, discovers that the interested party used the idea without compensating him.

Since formats are a more developed form of creation than mere ideas, one would expect that they would receive greater legal protection. Case law, however, presents a different, inconsistent, and confusing picture. The legal structure used by the courts for idea-submission law combines a list of requirements that the idea or unpublished format must exhibit: novelty, confidentiality of the disclosure, originality, and concreteness, with legal theories of confidential information, property, and contract law (which includes implied contracts and the unjust enrichment doctrine).⁸⁴ After 1978, the ability to protect such

script), available at <http://ssrn.com/abstract=559195> (summarizing the work of Williamson, 1975; Aghion and Trole, 1994; Arora, 2001; Arora and Merges, 2004).

⁸¹ Even attempts to keep the creative divisions separated from the rest of the producer organization cannot fully compensate for the potential loss. *Tangled Webs*, THE ECONOMIST, May 25, 2002, <http://www.economist.com/node/1143374> (“Independent screenwriters argue that creativity has been stifled now that the broadcast networks have been swallowed up, with production houses, into giant conglomerates.”).

⁸² 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.02 (2010).

⁸³ See, e.g., Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 688–89 (2006).

⁸⁴ Celine Michaud & Gregory Tulquois, *Idea Men Should Be Able to Enforce Their Contractual Rights: Considerations Rejecting Preemption of Idea-Submission Contract Claims*, 6 VAND. J. ENT. L. & PRAC. 75, 77–78 (2003).

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products under state law was further restricted by the 1976 Copyright Act (“the Act”) preemption clause, limiting state protection to rights not governed by the Act.⁸⁵ The following discussion points out the effect of this restriction by examining the application of each of these legal mechanisms for the protection of paper formats.

a. Misappropriation and “Breach of Confidence”

Misappropriation and “breach of confidence” theories can be used to provide remedies against wrongful appropriation behavior.⁸⁶ While § 301(a) of the Copyright Act generally preempted state laws implementing the theory of misappropriation, the element of confidential disclosure remains a strong ground for idea submission claims.⁸⁷ The theory of confidential information is typically applied in cases where the parties share special relationships, such as those with family members, friends, agents, employers, or employees.⁸⁸ After such a confidential relationship is established, protection can be afforded

⁸⁵ 17 U.S.C. § 301(a) (2006); Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703, 752 (2006) (discussing constitutional and federal preemption and concluding that “[i]t is the Copyright Act . . . that presents the most significant obstacle for creating a common law of ideas”); see also Aileen Brophy, *Whose Idea Is It Anyway? Protecting Idea Purveyors and Media Producers After Grosso v. Miramax*, 23 CARDOZO ARTS & ENT. L.J. 507, 515 (2005); Glen L. Kulik, *Copyright Preemption: Is This the End of Desny v. Wilder?*, 21 LOY. L.A. ENT. L. REV. 1, 9 (2000); Michaud & Tulquois, *supra* note 84, at 76.

⁸⁶ Note that U.S. trade secret law is usually not applicable in cases where the idea submission is unsolicited. This is because “the idea fails to meet all the criteria for a trade secret . . . seldom is it being used in the submitter’s business to achieve a competitive advantage.” Steven N. S. Cheung, *Property Rights in Trade Secrets*, 20(1) Econ Inquiry 40, 45–46 (Jan. 1982).

⁸⁷ Confidence disclosure was found to be an extra element that survives the preemption clause. Miller, *supra* note 85, at 752–53, 766–67; Rubin, *supra* note 38, at 686–87. For such recognition directly in a television preemption case, see generally *Metrano v. Fox Broad. Co.*, No. CV-00-02279 CAS JWJX, 2000 WL 979664 (C.D. Cal. Apr. 24, 2000).

⁸⁸ Breach of confidence theory protects “information that does not qualify as a trade secret if the information is disclosed in confidence and later used in a manner that breaches the confidence.” JAMES POOLEY, TRADE SECRETS § 3.04[4] (Law Journal Press 2010) (1997) (quoting *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 299 (2d Cir. 1986)). Bear in mind that in the situation of idea submission, the idea-holder conveys his idea voluntarily to the defendant only under confidential terms. In *Keane v. Fox Television Stations, Inc.*, 129 F. App’x 874 (5th Cir. 2005), the plaintiff sued under trademark and trade secret theories, claiming that he owned the rights for the name *American Idol*. *Id.* at 876. His trade secret claim was rejected since he sent out unsolicited letters and published his idea freely. *Id.*

through one of the contractual theories or under doctrines concerning breach of confidence.⁸⁹

The theory of confidential relationship is limited compared to contract law, given its demand to show a special relationship. But where a contract does not exist, its importance lies in its ability to provide protection even outside the reach of traditional contract law. In instances where the recipient of an idea transfers it to a third party who is unaware of the initial confidential relationship, the confidential relationship theory may be the only remedy.⁹⁰

b. Concepts of Property Law

In rare cases, property interests in ideas have been recognized by some courts in two areas: advertising slogans and television or radio formats.⁹¹ Proponents of property protection for television formats (here, paper formats) emphasize the many similarities between formats and other literary creations, such as plots,⁹² story lines, characters,⁹³ and sometimes even single scenes.⁹⁴ Since those creations are widely accepted as protectable, the burden should shift to the

⁸⁹ McGovern, *supra* note 41, at 498; *see also* Heckenkamp v. Ziv Television Programs, Inc., 321 P.2d 137, 141–42 (Cal. Ct. App. 1958) (“[Appellant] . . . states that . . . the copying he refers to is not the copying of his script but is the copying of his idea which he revealed in confidence; that if, after comparing the scripts, the over-all impression is that the format of defendants’ program is like plaintiff’s format . . .”).

⁹⁰ Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 25 (1994).

⁹¹ NIMMER, *supra* note 82, at § 19D.01; McGovern, *supra* note 41, at 481.

⁹² *See e.g.*, Bradbury v. Columbia Broad. Sys., Inc., 287 F.2d 478, 485 (9th Cir. 1961); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55 (2d Cir. 1936) (“Surely the sequence of these details [i.e. the plot] is pro tanto the very web of the authors’ dramatic expression . . .”); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (“[W]e do not doubt that two plays may correspond in plot closely enough for infringement.”); *see also* Rice v. Fox Broad. Co., 330 F.3d 1170, 1174 (9th Cir. 2003); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266 (11th Cir. 2001) (“[A]s plots become more intricately detailed and characters become more idiosyncratic, they at some point cross the line into ‘expression’ and are protected by copyright.”); Shaw v. Lindheim, 919 F.2d 1353, 1362–63 (9th Cir. 1990) (“Where plot is . . . properly defined as the sequence of events by which the author expresses his theme or idea, it constitutes a pattern which is sufficiently concrete so as to warrant a finding of substantial similarity if it is common to both plaintiff’s and defendant’s works.”) (internal quotations omitted).

⁹³ *See e.g.*, Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954); Nichols, 45 F.2d at 121. For cases decided after the 1976 Copyright Act, *see also* Warner Bros., Inc. v. Am. Broad. Co., 530 F. Supp 1187, 1187 (S.D.N.Y. 1982); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp 388, 388 (S.D.N.Y. 1981).

⁹⁴ Meadow, *supra* note 3, at 1173–74 nn.25–26.

critics of format protection to show why formats should be excluded from such protection.⁹⁵ This argument exploits the broader principle of the necessity of legal consistency: the same policy consideration used for justifying the protection of those other literary creations mentioned should be applied to TV formats as well. Still, it is important to note that the cases concerning television formats, distinct from radio formats, mostly rejected this approach in view of the idea/expression dichotomy.⁹⁶ Unlike communication subject to contractual theories, property protection of ideas is currently more likely to be preempted.⁹⁷ Furthermore, cases mentioned by scholars as recognizing television format idea protection are to be read with a skeptical eye. It seems that such recognition of property interest in an idea might have resulted from courts believing the subject matter involves more than just an idea (i.e., a more developed form of creation).⁹⁸

As might be expected, the main property theory to establish format protection is copyright law. Before the 1976 Copyright Act,⁹⁹ claims were focused on common law copyright, combined with other theories and state laws.¹⁰⁰ This stance seemed to be supported by the courts¹⁰¹ and scholars of the time, as state law cases had not completely denied common law copyright protection to for-

⁹⁵ See Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL. STUD. 321, 334 (1995) (making a similar argument with respect to copyright protection for computer software). The criticism, along with some responses, appears in the next Part of this paper.

⁹⁶ See, e.g., *Falotico v. WPVI-Channel 6*, 1989 U.S. Dist. LEXIS 14094, 8–9 (E.D. Pa. Nov. 22, 1989); *Herwitz v. Nat'l Broad. Co.*, 210 F. Supp. 231, 235 (S.D.N.Y. 1962).

⁹⁷ Rubin, *supra* note 38, at 678; see 17 U.S.C. § 301(a) (2006).

⁹⁸ See McGovern, *supra* note 41, at 485 (“[C]ourts frequently refer to ‘property rights’ in ideas, but seldom do these loose-lipped references mean anything more than a property interest created by contract or a special relationship.”). Property protection for ideas creates impossible burdens as it obligates the idea to standards of novelty and concreteness, which “by definition require more than a mere idea.” *Id.* at 486.

⁹⁹ The Copyright Act of 1909 and its relevant House Report were unsurprisingly silent regarding television formats, since the industry was still struggling with its first steps at that time. Fine, *supra* note 13, at 52–53.

¹⁰⁰ In 1954 the U.S. Copyright Office published its position, stating that an idea for a movie, television or any other cannot be registered for copyright. 37 C.F.R. § 202.6 (1960). This position was understood to eliminate the potential for copyright protection for formats. See Fine, *supra* note 13, at 53; M. William Krasilovsky, *The Copyright Dilemma*, 7 TELEVISION Q. 33, 34 (1968); Robert Y. Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 759 (1967); Meadow, *supra* note 3, at 1173.

¹⁰¹ Fine, *supra* note 13, at 53 (“[C]ourts in these cases said nothing by way of dicta to indicate that the author could have asserted ownership of a federal copyright.”).

mats.¹⁰² However, copyright protection is very unclear in scope and consistency among the different jurisdictions and is also subject to the effects of the preemption clause of the 1976 Act.¹⁰³

(i.) Pre-1976 Copyright Act Cases

The cases dealing with paper formats prior to the 1976 Act resulted in confusing and contradictory rulings. In the 1965 case *Silver v. Television City*,¹⁰⁴ the court dealt with a television format submitted in a “tape recording, typewritten format, and dummy script.”¹⁰⁵ The court described the product as a “literary production” containing more than just an idea: “Radio and television programs may be such literary productions as are protected by the common law. However, they must evidence the exercise of skill, description and creative effort.”¹⁰⁶ This case involved unique circumstances. It featured a well-known plaintiff in the entertainment industry who had made a formal presentation to an official agent.¹⁰⁷

Two later rulings by the California Court of Appeals generated conflicting decisions. In the 1968 case *Minniear v. Tors*,¹⁰⁸ which featured facts similar to those found in *Silver*, the court declared that the case could not be resolved based on theories of literary property, but only on rules of literary idea protection.¹⁰⁹ Only two years later, the court in *Fink v. Goodson-Todman Enterprises*¹¹⁰ concluded that television formats could be protected under common law

¹⁰² Meadow, *supra* note 3, at 1179, (“Since federal copyright protection does not appear to be forthcoming, format protection must be sought under state law, to the extent that it has not been preempted in this area.”); *id* at 1189.

¹⁰³ *Id.* at 1185–89.

¹⁰⁴ 215 A.2d 335 (Pa. Super. Ct. 1965).

¹⁰⁵ *Id.* at 151.

¹⁰⁶ *Id.* at 154 (citations omitted).

¹⁰⁷ *Id.* at 158.

¹⁰⁸ 72 Cal. Rptr. 287 (Cal. Ct. App. 1968).

¹⁰⁹ *Id.* at 503–04. The plaintiff unsuccessfully attempted to sell his idea and format for an underwater TV series (at the time of the plaintiff’s attempts, no such show existed on television). *Id.* at 498. He made a pilot shot and had an outline for further episodes which he presented to the defendant. *Id.* Two years later, the defendant produced its own underwater TV show using the plaintiff’s photographer, some of the outline ideas, and attempted to hire the plaintiff’s leading actor. *Id.* The plaintiff contended infringement of his “format, stories, character, development and plot plays.” *Id.* at 498–99.

¹¹⁰ 88 Cal. Rptr. 679, 694 (Cal. Ct. App. 1970) (the defendant aired a TV series allegedly based on the plaintiff’s format, which was presented earlier to defendants’ producers, and was found to be improper).

copyright. The court concluded that while ideas are not protected, “along the road to a fully expressed dramatic work there are selective developments which achieve the standard for protection.”¹¹¹ Protection cannot be prevented as a matter of law because of a limited level of originality, nor due to the fact that only part of the plaintiff’s work was taken. The court said that this part—the format—was the essence of the work, and deemed it had “sufficient concreteness and novelty to be classified as protectible [sic].”¹¹² In the court’s words, the part that was taken included “the plan for an entire series, the full back story, the molding of an important part of the hero’s character and personality, the method for presenting and recapturing the back story in the sequential episodes, and various portrayal techniques.”¹¹³

Aware of its controversial ruling, the court distinguished *Fink* from others, such as *Minniear* and *Desny*.¹¹⁴ The court concluded:

We recognize that our decision will probably take its place in the so-called zig-zag frontier. We are aware of the feeling of certain leaders in this field that the idea-expression concept is outmoded and that making case-by-case decisions in the uncertain middle ground is not a true solution. But it seems to us that this is not the court nor the case to be the progenitor of a redefinition [sic] of rules and policy.¹¹⁵

(ii.) The Copyright Act of 1976

While most paper format copyright claims failed,¹¹⁶ careful optimism can be drawn from the court’s approach to the analysis of television formats in the case of *Sheehan v. MTV Networks*.¹¹⁷ Plaintiffs provided MTV officials with

¹¹¹ *Id.* at 693.

¹¹² *Id.* at 694.

¹¹³ *Id.* at 693.

¹¹⁴ *Id.* at 694; *see also* *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956) (concerning only a three-page presentation of limited scope for a work that was not a series); *Minniear v. Tors*, 72 Cal. Rptr. 287, 294 (Cal. Ct. App. 1968) (claiming that the subject matter was limited to a basic theme).

¹¹⁵ *Fink*, 88 Cal. Rptr. at 695.

¹¹⁶ For example, in *Robinson v. Viacom Int’l, Inc.*, 93 Civ. 2539 (RPP), 1995 U.S. Dist LEXIS 9781, at *21 (S.D.N.Y. July 13, 1995), the court approached the format comparison by separating it from its underlying elements. This approach led to the conclusion that the format was made out of elements common in many sitcoms, and therefore “not a protectible [sic] element of Plaintiff’s work.” *Id.* at *30.

¹¹⁷ No. 89-CIV-6244 (LJF), 1992 U.S. Dist LEXIS 3028 (S.D.N.Y. Mar. 12, 1992). Despite the fact that the court ended up granting the defendant’s motion for summary judgment, the *Sheehan*’s court recognized television formats as copyrightable. The end result of this case

oral presentations and copies of “written rules and a format for the show, artwork depicting the set and props, and a schematic drawing detailing some of the audiovisual features of the program.”¹¹⁸ Three months after the meetings, MTV started its own show, allegedly very similar to the plaintiff’s format.¹¹⁹ Whereas in *Falotico v. WPVI-Channel 6*,¹²⁰ the term “format” was used in a general way, the *Sheehan* court characterized the format as a combination of elements that would be protected under copyright law, as would any other compilation.¹²¹

Here, too, however, one must note the exceptional circumstances surrounding this case. MTV had never produced or broadcast a game show prior to the plaintiffs’ approach, and its first independently produced show appeared only three months after the plaintiff’s proposal.¹²² In addition, the plaintiffs had registered their materials with the Copyright Office and held official meetings with MTV personnel, including the vice-president of the channel.¹²³

c. Contract Law

Courts usually find contract law to be the strongest theoretical basis for idea protection.¹²⁴ The courts have long recognized the notion that some ideas bear a potential commercial value and that a person who conveys such a valuable idea is entitled to compensation.¹²⁵ Judge Trayner’s dissent in *Stanley v.*

did not arise from plaintiffs’ inability to enter the gates of copyright law, but from their failure to successfully establish the copyright infringement standard of substantial similarity.

¹¹⁸ *Id.* at *2.

¹¹⁹ *Id.* at *3.

¹²⁰ No. 89-5175, 1989 U.S. Dist. LEXIS 14094 (E.D. Pa Nov. 2, 1989).

¹²¹ Compare *id.* at *1, with *Sheehan*, No. 89-CIV-6244 (LJF), 1992 U.S. Dist LEXIS 3028, at *7–*8 (“Although plaintiffs’ proposal is, to some extent, a mere combination of standard ideas for a game show, the proposal does have unique elements, such as its distinctive arrangement and its primary ‘hook,’ In combination, those unique elements transform the proposal into a copyrightable work.”).

¹²² *Sheehan*, No. 89-CIV-6244 (LJF), 1992 U.S. Dist LEXIS 3028, at *2–*3.

¹²³ *Id.*, at *1–*2.

¹²⁴ It would also survive preemption in most cases. Miller, *supra* note 85, at 757; Michaud & Tulquois, *supra* note 84, at 79; Sobel, *supra* note 90, at 23.

¹²⁵ In the television format context, see *Desny v. Wilder*, 299 P.2d 257, 266 (Cal. 1956): “Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay” See also *Fink v. Goodson-Todman Enter.*, 88 Cal. Rptr. 679, 689 n.16 (Cal. Ct. App. 1970) (“The person who can and does convey a valuable idea to a producer who . . . solicits the service . . . knowing that it is tendered for a price should . . . be entitled to recover.”) (citation omitted) (internal quotation marks omitted); *Minnear v. Tors*, 72 Cal. Rptr. 287, 292 (Cal. Ct. App. 1968) (“In the field of entertainment

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*Columbia Broadcasting Systems*¹²⁶ opened the gates for the use of contract law in the protection of idea, stating that although copyright law does not protect ideas, ideas can nevertheless be protected under contract law.¹²⁷ That same logic serves formats as well. Format creators can protect themselves through various contractual means, such as literary acquisition agreements, employment contracts, and NDAs.

(i.) Express Contracts

In cases where parties freely agree to bind themselves by an express contract, courts will usually find it easier to recognize and protect information passed in a “pitch meeting.”¹²⁸ Protection for materials exchanged under an express contract is not subject to the preemption clause of the 1976 Act and is therefore highly valuable to the creator.¹²⁹ Still, in the vast majority of cases, the format creator is not in a position to demand a contract. Furthermore, many pitch meetings are held in informal settings, which do not lend themselves to the creation of express contracts.¹³⁰

(ii.) Implied-in-Fact Contracts

An implied-in-fact contract does not require an express agreement or offer, as it is “inferred from the parties’ conduct in light of the surrounding circumstances.”¹³¹ In the seminal case of *Desny v. Wilder*, a writer submitted a synopsis of a movie script over the telephone to the defendants’ secretary.¹³² He later sued for breach of an implied-in-fact contract when the defendants pro-

the producer may properly and validly agree that he will pay for the service of conveying to him ideas which are valuable and which he can put to profitable use.”) (citation omitted) (internal quotation marks omitted); *Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130, 134 (Cal. Ct. App. 1966).

¹²⁶ 221 P.2d 73 (Cal. 1950).

¹²⁷ *Id.* at 85.

¹²⁸ McGovern, *supra* note 41, at 495, 491 (discussing mechanisms for protecting information given in a “pitch meeting”).

¹²⁹ Rubin, *supra* note 38, at 681–82.

¹³⁰ This is partly due to the unofficial nature of the meeting and partly since the “idea man” feels his chances will be threatened by such a demand.

¹³¹ Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in The United States Claims Court*, 40 CATH. U. L. REV. 605, 607 (1991); *see also* *Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130, 137 n.8 (Cal. Ct. App. 1966).

¹³² 299 P.2d 257, 262–63 (Cal. 1956).

duced an allegedly similar screenplay.¹³³ The importance of this case is the court's finding that while ideas cannot be subjected to ownership, this does not prevent protection by contract, even when the idea is not novel or is widely known.¹³⁴ The logic of this analysis rests on the ability of the plaintiff to show both the possible valuable nature of the idea and the parties' agreement "to convey the idea upon an obligation to pay for it if it is used."¹³⁵ The California Court of Appeals further clarified that the person having conceived the idea should also show that he created the idea.¹³⁶ When these conditions exist, the promise of payment serves the plaintiff as the main basis of the contract claim, and the court will afford protection.¹³⁷

Generally, the promise of payment and the contractual relationship is considered an extra element, not equivalent to the Copyright Act requirements, and therefore not preempted.¹³⁸ Surprisingly, despite this accepted notion of surviving preemption, the unpublished television format cases generated the opposite result. A ruling of the District Court of California found that the implied-in-fact claim was preempted. In *Endemol, B.V. v Twentieth Television, Inc.*,¹³⁹ Endemol argued that defendant's show *Forgive and Forget* was "based upon the format, expression and concepts of [its show] *Forgive Me*."¹⁴⁰ The plaintiff presented the show's paper and program format to a producer, who later developed it under his own production label and submitted it to the defendants.¹⁴¹ The court analyzed the copyright infringement and implied-in-fact contract claims and found that the two prongs of the preemption clause were satisfied; that is, that the materials were within the scope of copyright law and

¹³³ *Id.* at 260.

¹³⁴ *Id.* at 266; *see* *Chandler v. Roach*, 319 P.2d 776, 781–82 (Cal. Ct. App. 1957) (stating that no justification exists for applying tests of novelty and concreteness in implied-in-fact contracts with authors).

¹³⁵ *Desny v. Wilder*, 299 P.2d 257, 270 (Cal. 1956).

¹³⁶ *Faris v. Enberg*, 158 Cal. Rptr. 704, 709 (Cal. Ct. App. 1979).

¹³⁷ *See* *Minnear v. Tors*, 72 Cal. Rptr. 287, 293 (Cal. Ct. App. 1968); *Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130, 137 (Cal. Ct. App. 1966). Protection was denied in *Keane v. Fox Television Stations, Inc.*, 129 F. App'x 874, 876 (5th Cir. 2005), where the plaintiff sued, arguing that his musical was an earlier iteration of an idea he called *American Idol*, which later became one of the defendant's hit shows. The court found that no implied contract arose since the plaintiff did not indicate that disclosure of his idea was contingent on payment. *Id.*

¹³⁸ *Rubin*, *supra* note 38, at 685; *see also* *Miller*, *supra* note 85, at 768–70; *Sobel*, *supra* note 90, at 23.

¹³⁹ No. CV98-0608 ABC, 1998 U.S. Dist LEXIS 19049 (C.D. Cal. Sept. 29, 1998).

¹⁴⁰ *Id.* at *4 (internal quotations omitted) (citation omitted).

¹⁴¹ *Id.*

that the rights sought were equivalent to those awarded by the Act.¹⁴² The court therefore concluded that the contract claim was preempted. Two years later this conclusion was affirmed in *Metrano v. Fox Broadcasting Co.*,¹⁴³ which preempted an implied-in-fact claim of yet another television format case. However, some hope may be drawn from the Ninth Circuit's decision in *Grosso v. Miramax*,¹⁴⁴ which "[p]erhaps because of dissatisfaction with decisions like *Selby* and *Endemol* . . . has overruled the California district courts' preemption approach, limiting the strong preemption doctrine to the Second and Fourth Circuits."¹⁴⁵

(iii.) Implied-in-Law Contracts

Unlike the implied-in-fact contract, the implied-in-law contract does not require the display of an agreement or of mutual assent. It exists when one party is unjustly enriched at the expense of the other.¹⁴⁶ The situation in which a party voluntarily accepts a service and is enriched at the first party's expense calls for court interference, even when traditional contract law does not cover this subject matter. There are no precise formulae or tests for courts to consider; they are free to consider many elements and requirements.¹⁴⁷

The judicial solutions described are not free of problems. In addition to the inconsistent treatment of the preemption question, the idea-submission field itself is highly dissimilar in different courts, and the outcomes of such cases are very obscure. Courts vary not only in legal theory but also in their requirements from plaintiffs and their interpretation of those requirements.¹⁴⁸ Another prob-

¹⁴² *Id.* at *11, *17 (holding that ideas are within the subject matter of copyright law, and that a promise not to benefit from a copyrighted work is equivalent to the copyright rights).

¹⁴³ No. CV-00-02279 CAS JWJX, 2000 WL 979664 (C.D. Cal. Apr. 24, 2000).

¹⁴⁴ 383 F.3d 965 (9th Cir. 2004) (concerning idea submission for a film).

¹⁴⁵ Brophy, *supra* note 85, at 521.

¹⁴⁶ Boyd & Huffman, *supra* note 131, at 607–08.

¹⁴⁷ MICHAEL A. EPSTEIN, *MODERN INTELLECTUAL PROPERTY* 285 (2d ed. 1992). For an example of attempt to use an implied-in-law argument (which was ultimately rejected by the court), see *Murray v. Nat'l Broad. Co.*, 671 F. Supp. 236, 238 (S.D.N.Y. 1987), *aff'd*, 844 F.2d 988 (2d Cir. 1988).

¹⁴⁸ Nory Miller, *Selection Processes: An Inadvertent Gap in Intellectual Property Law*, 87 COLUM. L. REV. 1009, 1018–19 (1987):

One court has defined a novel idea as one that had never previously existed; others held even such ideas non-novel if they were merely an improvement of standard technique or a mixture of known ingredients; yet another considered novel any idea not previously known to the defendant. Definitions of 'concrete' have varied from 'ready for immediate use' to merely 'written' to rele-

lem is that courts' decisions about the allocation of rights have considerable influence on this economic market. Aside from markets usually being better mechanisms for determining transaction prices than courts, the judicial solution only applies *ex post* and bears the additional costs of legal action enforcement.

The paper format stage takes place between the parties themselves and is characterized by a relatively high level of control over the materials. Contract-based solutions enable the parties to freely decide the terms and nature of their agreement, including the level of protection to be enforced, even when formal law does not recognize that subject matter as protectable. However, the negotiation of formats presents high transaction costs, derived from the need to communicate information prior to the exchange, which interferes with the parties' ability to reach a voluntary exchange.

In cases where the court is reasonably confident that, in the absence of the high transaction costs, an agreement would have been reached, the court's willingness to recognize the existence of implied contracts leads to value-maximizing outcomes. The fact that it is industry practice to pay for the paper formats strengthens the courts' assumptions regarding the parties' intention to seek compensation, even if an express contract for confidentiality or anti-appropriation does not exist.¹⁴⁹ Finding a profitable format is a highly valued service in the entertainment industry and therefore should be protected in order to assure that "both the purchaser and seller are aware of their legal rights and responsibilities."¹⁵⁰

In sum, at least three distinctive mechanisms are used to offset the difficulties surrounding paper format negotiation, especially the high transaction costs. While no solution is free from inefficiency, paper format market organization and practices do display overall efficiency.¹⁵¹ The following Part will investigate the subsequent market of program formats.

gations of whole categories of ideas—for example, business management plans—as presumptively abstract.

See also Brophy, *supra* note 85, at 513; Larissa Katz, *A Power-Based Approach to the Protection of Ideas*, 23 *CARDOZO ARTS & ENT. L.J.* 687, 693 (2006); Michaud & Tulquois, *supra* note 84, at 78 (referring to Miller, *supra* note 86).

¹⁴⁹ *Desny v. Wilder*, 299 P.2d 257, 269 (Cal. 1956); Pierce O'Donnell & William Lockard, *You Have No Idea*, 23 *L.A. LAW.* 32, 53 n.18 (2000) ("In most commercial situations, the expectation of payment is obvious to all the participants . . .").

¹⁵⁰ McGovern, *supra* note 41, at 507.

¹⁵¹ The portrayed nature of the product and this competitive industry support the general economic perception that contractual terms consistently used by industries overlap an efficient outcome. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 132 (Harvard Univ. Press 1987) (explaining that industries have no other reason to develop norms than that their cost outperforms their benefits); Alan Schwartz & Robert E.

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III. PUBLISHED PROGRAM FORMATS

The development and creativity levels in the program format stage are second only to those of the aired show. This aired show is an extension of the paper format, combining its ideas and creative elements with the entire production team's efforts and knowledge, along with the business strategies, marketing, and show sponsorships. The program format is the show's blueprint, the mold within which the content of each individual episode will be formed and the formula that will lead the show to success or failure.

Once the program format is fully realized, the main focus shifts from assessment and development to mass distribution. This Part explores the program format market trade:¹⁵² the licensing of format packages, which includes program formats already known in their primary market ("known or published formats") as well as additional know-how and materials in secondary markets.¹⁵³ Here, the main interest is commercialization and the ability to derive the full potential value from the product by selling or licensing the rights to reproduce the program with local content in the purchasing territory. The global format trade has two main tiers. While the licensing of the rights, known as the acquisition stage, is undoubtedly the essence of the process, the trade also depends on the successful adoption and adaptation of the format in the new territory, or the reproduction/rebroadcasting stage.¹⁵⁴ This Article's analysis will concentrate on the trade market in the acquisition stage, forming the main source of the legal tension examined herein. However, the complex patterns in which this trade is organized are an important mechanism implemented by the industry and will be further addressed when discussing industry customs.

Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545–46 (2003) ("Firms and markets are structured so as to minimize the likelihood of systematic cognitive error by important decisionmakers [sic] within the firm."). For more on the tendency of industries to develop norms that are wealth maximizing, see Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992) and Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 84 (1989).

¹⁵² I explore the issue of format trade as opposed to the relationship between a producer and a broadcaster in the development of a new program format, or the question of who will own the format rights. These are largely determined according to the financial risk taken by the parties in the production process and their ability to access the international markets for further trade, as shown in the previous Part.

¹⁵³ As with the "production bible," this may contain production and development data, rating data, copies of aired programs in other territories, and other related materials.

¹⁵⁴ Klaus-Dieter Altmeppen et al., *Flowing Networks in the Entertainment Business: Organizing International TV Format Trade*, 9 INT'L J. ON MEDIA MGMT. 94, 100 (2007).

Licensing a known program format for local production is a highly desirable option. The main reason is the broadcaster's ability to tailor the local production of a known format to its specific needs.¹⁵⁵ The show can be made in a way that will best match the image the broadcaster wants to project, and elements can be reduced or added to match sponsors' and advertisers' demands. A local version can be produced to meet the local audience's taste and to eliminate cultural differences that might impair the success of the show in the new market.¹⁵⁶ Local productions can produce additional revenue from interaction with the local audience, such as audience voting, merchandising, and multi-platform content strategies.¹⁵⁷ Additionally, the local production of program formats can be made to align with home regulation quota demand and other political aspects, such as local employment rates.¹⁵⁸

Another significant benefit of choosing a known format is that its risk of failure is lower than a new show. Entertainment agent Ben Silverman, who

¹⁵⁵ For some examples, see Silvio Waisbord, *McTV: Understanding the Global Popularity of Television Formats*, 5 TELEVISION & NEW MEDIA 359, 380 (2004):

Unlike versions in Northern Europe, the Spanish producers of *Big Brother* decided to include outdoor swimming pools because of better weather. The Russian producers of *Who Wants to Be a Millionaire* eliminated the 'ask the audience' lifeline because people intentionally give the wrong answer to contestants. The Argentine edition of *The Price is Right* had to make room for winners to celebrate effusively with the friendly host and to include more games with low-price prizes (people there prefer more opportunities to win cheaper items than fewer chances to win big-ticket consumer goods).

¹⁵⁶ *Id.*

¹⁵⁷ Ted Magder, *The End of TV 101, Reality Programs, Formats, And the New Business of Television in REALITY TV, REMAKING TELEVISION CULTURE* 137 (Susan Murray and Laurie Ouellette, eds., University Press 2004) gave the example of *Big Brother*, noting:

The Real Network/CBS webcast of *Big Brother 2* in summer 2001 drew 56,026 consumers who paid monthly subscription fees of between \$9.95 and \$19.95 to receive round the clock video feeds of the program In the United Kingdom, where *Big Brother* captured up to 35 percent of the television audience in summer 2002, 3.5 million viewers voted on the eviction of Adele Roberts. They paid 25 pence each to do so, which translates into £875,000, more than the cost of producing the episode

Id. at 150. Magder also mentioned the reality genre as highly attractive for other business strategies, such as product placement and merchandise tie-ins. *Id.* For more on the growing importance and future effect of interactive formats, see Victoria Silverman and Anna Carugati, *A Matter of Trust*, TV Formats (World Screen) Magazine, 368–374 (Oct 2007).

¹⁵⁸ MORAN, *supra* note 16, at 22; Waisbord, *supra* note 155, at 363 (describing additional examples, such as the Indonesian ban of the use of subtitles and quota policies which encouraged local production of known formats as "part of business strategies to bypass local programming quotas").

acted as a middleman in many format deals, estimated a renewal rate of three out of four *known* formats (seventy-five percent),¹⁵⁹ compared to the general television program non-renewal rate of sixty-nine percent.¹⁶⁰ A show that has already been aired and tested elsewhere comes with important information which increases the show's chances of success and represents a considerable cost savings.¹⁶¹ This, in turn, makes it easier for a broadcaster to sell a known, working format to sponsors and advertisers: “[The formats] come with a track record [which] gives the broadcaster the capacity to sell the show That means that before even building the sets, they can go out and enlist probably the majority of major sponsors and advertisers for the show”¹⁶² Yet, despite the great importance of program formats to the industry, there is considerable ambiguity as to whether these products can be legally protected, and if so, under what legal paradigm.

A. *The Problem of Protection*

For a concept to reach the program format stage, multiple professionals must invest a substantial amount of effort and resources. Conversely, the reproduction of pre-existing formats is fairly cheap and easy. Accordingly, unprotected program formats are subject to “rip-offs” by competitors who are able to free-ride on the original developers' initial development costs.

Most of the information contained in a program format can be easily inferred from broadcast episodes. As the episodes are aired, access to this information goes out of the creator and broadcaster's control and is exposed to the danger of appropriation by others. This danger of appropriation in a secondary market affects both that market and the primary market, where development decisions are determined. Due to formats' “public good” aspects, others can exploit an original creator's work (once available) by reproducing the product at marginal cost, without having to incur the initial investment costs. The contract-based solutions used in the unpublished formats market bind only the in-

¹⁵⁹ Magder, *supra* note 157, at 137–156, 147.

¹⁶⁰ See Barth, *supra* note 58.

¹⁶¹ Such as production experience, target audience rating data, advertising data, and optimal time slot choices. Also, the time needed to develop a program from scratch is a highly valuable resource, which can be saved by adopting a known format. When a successful format is exported into the United States, most of the reproduction work isn't about “re-invent[ing] the wheel, it's to Americanise it. 80% of that is casting and the other 20% is tweaking.” John Hazelton, *Re-made in the USA*, TBI (Oct. 2000) (quoting Stone Stanley Entertainment).

¹⁶² Alana Rosenbaum, *Page to Screen*, THEAGE.COM.AU (July 22, 2004), <http://www.theage.com.au/articles/2004/07/21/1090089208854.html>.

involved parties to the agreement, not unknown third parties. If a format is revealed to a third party outside the agreement's scope, that party is generally free to use the format as he or she deems fit. Program formats of aired shows, therefore, present a different protection challenge. The considerations are no longer the degree of development, access, control, and the limited number of party relationships. Aired programs are available worldwide, and there is no control over viewing access.

In light of this, proponents of TV format protection base their arguments on general philosophical grounds, stressing the need to compensate the creator for the resources invested in the format creation¹⁶³ and fairness arguments.¹⁶⁴ However, current case law and the consensual view generally discourage providing TV formats with legal protection. The creation of legal rights and protection does come with social costs. The arguments against protection are centered on concerns over granting format holders too much power and reserving too little benefit for society.¹⁶⁵

The analysis of TV format protection should therefore reflect both the special characteristics of formats as intellectual products and social and economic goals. Next, this Article examines the program format trade market, describes its recent changes, and attempts to address the arguments against awarding legal protection to program formats. The Article then suggests that providing a clearer legal framework favoring protection would contribute to a more efficient marketplace and increase both audience and format rights holders' welfare.

The legal uncertainty and lack of empirical studies in this field make the task of proving this theory a very difficult undertaking. Program formats are only one within a large group of programming options available to broadcasters. Isolating and measuring formats' specific influence on overall decisions is al-

¹⁶³ Fine, *supra* note 13, at 52; Shelly Lane & Richard McD. Bridge, *The Protection of Formats Under English Law Part I*, 3 ENT. L. REV. 96, 96 (1990).

¹⁶⁴ Fairness arguments, focusing on creators' right to be identified with their work, have particular salience for the entertainment industry, where crediting plays a central role in building a reputation and attracting future work. See S. T. Lowe & A. Khosla, *Feature: Where Credit is Due: In Dastar, The U.S. Supreme Court Narrowed The Meaning of "False Designation of Origin" in the Lanham Act*, 27 LOS ANGELES LAWYER 40 (2004). Credits are also a central part of format licensing agreements. See Robert I. Freedman & Robert C. Harris, *Game Show Rights Contracts: Winners and Losers*, 1 ENT. L. REV. 209, 212 (1990). Based on this line of reasoning, a possible argument might suggest leaving format protection to the moral rights system. But moral rights arguments have little salience in United States intellectual property law. And regardless, protection based on moral rights alone, without the ability to secure economic incentives, is doomed to fail.

¹⁶⁵ See discussion *infra* Part III.D.

most impossible, and the net effect in a developing market, where the rate of demand growth exceeds almost every other influence, is too complex to establish. Although it is hard to evaluate the exact extent of the presented observations, there are some indications that support the argument in favor of legal protection for program formats.

B. Uses of Existing Formats

We begin with an illustration of the problem. Since program formats are not generally recognized as legally protected subject matter, broadcasters who wish to pursue the option of using an existing, previously aired format are faced with two possibilities: *buy* the format (through a licensing agreement) or *copy* it.

1. Licensing

The idea of paying a license fee for a program format seems puzzling. If program formats are not necessarily protected, why would profit-driven companies and broadcasters pay for something the law allows them to have for free?

There are actually several advantages to paying for a license. First, a sale will usually include the transfer of additional materials and knowledge not visible on the screen.¹⁶⁶ Second, the license agreement allows the buyer to use the reputation and “risk reduction element” of the known format to leverage its own show to the audience and to potential advertisers. Furthermore, buying the format eliminates the risk of a conflict with the format holder and reputation damage within the industry.

Finally, the tenuous, unclear legal setting also encourages some licensing. Despite the law’s general reluctance to protect program formats, some cases have generated rulings favorable to format protection. The more successful a show is, the higher the threat of a lawsuit and subsequent unfavorable results. Choosing to pay for the use averts the danger of a legal setback, reduces the possibility of expensive litigation, and helps to protect the investment in the new production. However, even when a license is purchased, the lack of legal protection means that the buyer will pay the licensor for an exclusivity right that cannot be guaranteed. Thus, the buyer could bear the cost of a license and then be forced to compete within its own market with a copier who has skirted the economic burden of a license. This means that as the market becomes increa-

¹⁶⁶ Such as target audience data and other information included in the program format bible or package.

singly competitive with more and more legal decisions that do not protect program formats, more members of the production community are likely to abandon the licensing strategy.

The choice between copying and paying depends heavily upon the ability to protect the advantages of paying. It also depends on the specific circumstances under which the format will be reused. Copying a program format that originated outside the copier's territory, for example, bears less risk of professional conflict and reputation damage (if the copying is even discovered). Another consideration is the format-seeking broadcaster's ability to use its economic power as a way to prevent others from copying in its market. While financially strong competitors can face the possibility of highly risky and expensive legal action, either as plaintiff or defendant, less secure competitors would likely strive to avoid such a situation.¹⁶⁷ Likewise, more established competitors are also in a better position to forego the production expertise that can be provided by the holder of the format rights. Lastly, the legal and societal attitude of a broadcaster's territory toward intellectual rights also plays an important role in the decision of whether or not to license.¹⁶⁸

2. Copying

Unlike licensing, under the current ambiguous legal system, copying a format is much more intuitive—if the product is not protected, one can use all of the advantages of a tested program format without having to pay for them. The main questions surrounding the choice of copying concern the potential harm of such behavior and its effects on the market.

Competition between copied and original or licensed program formats falls into two categories: copying between markets (sometimes regarded as international copying) and copying within the same market (or domestic copying). Under the former scenario, a broadcaster copies a program format from a different territory and broadcasts the copy in its own market. This happens either before or after the originator has managed to license the right to produce its pro-

¹⁶⁷ MORAN, *supra* note 16, at 21 (“[T]he capacity of format owners to protect formats would seem to be directly related to their commercial strength and ability to bring legal pressure on others.”).

¹⁶⁸ For example, in the Netherlands, where the giant format company Endemol is located, the chance of obtaining a favorable ruling on format protection is greater than other territories. See *supra* note 42. Similarly, the attitude toward IP protection in the U.S. is much more durable than the one in China. See, e.g., Mark Liang, *A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China*, 11 CHI. J. INT’L L. 285, 287 (2010).

gram format in that market. In the latter scenario, the program format originator or a licensed broadcaster faces competition from a broadcaster who starts airing a copied format in the same territory.¹⁶⁹

a. Copying Between Markets

Copying program formats that were originally broadcast in other territories avoids the impact of direct competition while securing the advantages of broadcasting known formats at a low reproduction cost. When a broadcaster in a territory different than the originator copies a program format and airs it first in its own market, the originator's opportunity cost can be considerable. If the copied format fails, the originator will find it very difficult to convince another broadcaster in that territory to license and produce its format. On the other hand, if the copied format succeeds, the originator's chances of licensing its format in that geographic market are still low, as demand for that type of format will be reduced.

These circumstances also affect the primary market where a format is developed. The decision to develop a new show depends upon the costs of production (fixed costs plus the cost of producing copies) and the sum of expected revenues over the time in which the format will be produced and broadcast in both primary and secondary markets.¹⁷⁰ Since research and development in television programs is already a high-risk investment,¹⁷¹ the additional risk of format appropriation affects the overall investment appraisal.¹⁷²

Additionally, a clone (or very closely copied) program format that substitutes for an original product reduces the de facto market share of the original. TV programs that are "widely circulated or plagiarized" lose their value,¹⁷³ a definite consideration in decisions whether or not to develop new programs. In June 2003, the German Federal Supreme Court held that copyright protection

¹⁶⁹ The application of a case where a copier airs before the originator within the same market is covered in *supra* Part II.

¹⁷⁰ See, e.g., Marie-Agnes Bruneau, *Up For the Prize*, 13 TELEVISION BUS. INT'L 1 (2001) ("Today when people are developing formats, they are targeting the international market at the beginning.") (quoting Denis Mermet, CEO of Adventure Line).

¹⁷¹ COLLINS ET AL., *supra* note 33, at 9–10.

¹⁷² That is also because the practice of licensing mitigates the effect of business failures by generating additional return on investment, and thus reducing the waste of resources.

¹⁷³ Michael Keane, *As a Hundred Television Formats Bloom, a Thousand Television Stations Contend*, 11 J. CONTEMP. CHINA 5, 9 (2002); Kennedy, *supra* note 58, at 58 ("[I]mitation . . . leads to lower average ratings and shorter average program longevity than does differentiation.").

could not cover program formats.¹⁷⁴ As a result of this ruling, the price of format licensing in Germany dropped dramatically.¹⁷⁵ This finding leads to an assumption that the lack of a protection regime will significantly reduce a program format's potential return and hence will stifle the incentive to develop.

Income reduction due to opportunity loss caused by copying might also lead to a decision not to develop certain formats at all. Developers in less populous countries are the ones most likely to be influenced, and they might decide not to develop programs if the only revenues they can foresee are from their own territory. The same logic applies to the development decisions of independent production companies and small broadcasters, who will be unable to distribute development risk when there is no legal protection for program formats.

Another effect of appropriation of foreign competitors' assets is the raising of entry barriers to that market. Since the originators will not be able to protect their shows from competing with clones, entering such a market becomes more costly, thus lowering the likelihood and extent of international players' involvement in that market.¹⁷⁶

b. Copying Within a Market

A copied program format appearing second in the same market as the original may at first glance seem to be less of a problem than a copied format beating the original to market in a foreign territory. In this instance, since the original appears first, it has a "first to market" competitive advantage and enjoys

¹⁷⁴ Show Format Case, Bundesgerichtshof [BGH] [Federal Court of Justice] (2003), 35 I.L.C. 987, 2004 (Ger.).

¹⁷⁵ Program format licensing fees are usually calculated as a percentage of the local production budget, usually 4–10%. Prices depend upon market size and the way in which the production budget is calculated. After the German federal court ruling, licensing fees in Germany dropped from approximately 6–7% to 2–3%, and later stabilized at about 4% of the production budget. Schmitt, *supra* note 2, at 69; Telephone Interview with Christoph Fey, former legal advisor of FRAPA (Dec. 12, 2007); Katja Lantzsch, *Der Internationale Fernsehformathandel. Akteure, Strategien, Strukturen, Organisationsformen* [The International TV Format Trade. Actors, Strategies, Structures, Organizational Forms], 137–44, 176–81, 253–54 (PhD dissertation, Wiesbaden, Ger. 2008) (interviewing key players in the European format industry).

¹⁷⁶ STEVEN S. WILDMAN & STEPHEN E. SIWEK, *INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS* 102 (1988) (quoting a CBS survey of trade barriers: "executives in the motion picture and television, prerecorded entertainment, publishing, and advertising industries believe that *the most serious trade barrier is copyright infringement*") (citation omitted) (internal quotation marks omitted).

the opportunity to attract at least some initial revenue. Nonetheless, the copied show can still inflict damage by reducing the audience share of the original program.

The ability to lure an audience from the original broadcasting channel to a channel that has copied a format usually requires that the former channel be smaller or about equal in attraction size to the latter. The reason is that viewers gain more value from watching programs broadcast on leading channels than on smaller channels. Television watching involves a virtual network effect,¹⁷⁷ such that viewers may enjoy a program on its own merits, but their preferences are also influenced by added value created by other viewers watching that show.¹⁷⁸ Other viewers serve as a *reference group*: their behavior influences the individual's responses, cognition, and behavior in a direct or indirect way.¹⁷⁹ One type of reference group is the *membership group*, which can be an informal and close group, such as family and friends, or a formal one, such as a social organization, which has a direct influence on the individual.¹⁸⁰ Both the *number* and *type* of other viewers of a show will influence program watchers (or channel consumers) in their viewing choices. In economic terms, the number will indicate the existence of a “solidarity good,” and the type a “partnership good.”¹⁸¹

¹⁷⁷ The economic network effect exists in markets in which the value consumers attach to a product (consumer utility) increases as additional users consume that same good. Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effect*, 86 CALIF. L. REV. 479, 483 (1998). It is customary to distinguish between actual network and virtual network effects. *Id.* at 488 (citing M. L. Katz & C. Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985)). In an actual network, the benefit consumers enjoy derives from the existence of the network itself. *Id.* at 488–89. Take, for example, a fax machine: there is no value to the owner of a fax machine if no one else has one. In a virtual network, the user enjoys the product for its inherent qualities, but the benefit to the user grows as more and more users join the network. An example of this is a software program, which has attributes that an individual user may enjoy on his own; the more people who use that software, the easier it is to share files, and so an extrinsic benefit accrues as well. *See id.*

¹⁷⁸ An example can be found in S. Yang et al., *Estimating the Interdependence of Television Program Viewership Between Spouses: A Bayesian Simultaneous Equation Model*, 25(4) MARKETING SCI. 336 (2006), wherein the authors developed a model of TV-watching behavior that was also empirically tested, and found an interdependence between spouses in their program choices.

¹⁷⁹ PHILIP KOTLER, *PRINCIPLES OF MARKETING* 126 (Prentice-Hall 2d ed. 1983).

¹⁸⁰ *Id.* Other types of groups are: a *dissociative group*, whose values are rejected by the consumer and to which the consumer does not want to belong, *id.* at 127, and an *aspirational group*, a reference group that individual consumers aspire to join or emulate, for example, athletes or celebrities, *id.* at 126–27.

¹⁸¹ Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity Goods*, 9 J. POL. PHIL. 129, 135, 143 (2001).

Say, for example, that an admired person in a certain consumer's group—a boss or a favorite celebrity—is a big *Survivor*¹⁸² fan; watching the same show provides the consumer with a sense of shared experience with the consumer's role model. In addition, sharing a viewing experience with a membership group generates a sense of belonging and acceptance. If the talk of the day at the office water cooler is the last episode of *Dancing with the Stars*,¹⁸³ anyone who watches the show has the ability to become involved in a personally fulfilling experience and participate in a cultural process.¹⁸⁴ Reference groups influence consumer behavior and choice more powerfully than most other marketing forces.¹⁸⁵ Achieving the additional social benefits of group membership (on top of the private benefits of program enjoyment) can most likely be accomplished by watching the big network broadcasts ("mass appeal channels").¹⁸⁶ Furthermore, those additional social benefits increase a viewer's private switching cost¹⁸⁷ if he decides to watch a competing channel instead.

Therefore, large competitors in the broadcast market enjoy the advantage of the ability to lure audiences from smaller channels by "adopting" (copying) a successful program format and leveraging its large audience base as an additional social incentive for viewers to watch its production. The opposite case—a smaller broadcaster copying a format from a big broadcaster that is a direct competitor—is rarely found. A small channel's choice to invest in the development of an original program format to compete with a big broadcaster's content could turn out to be an even worse alternative. The originator's risk in this case is doubled. Either the format fails and its investment is lost, or the format succeeds and thus becomes subject to possible (and potentially legal) plagiarism from outside the original territory or by bigger channels in the primary market. The result is not only a disincentive for smaller broadcasters to in-

¹⁸² A CBS hit reality show, started in the U.S. in 2000 (based on an international format). Compare INTERNET MOVIE DATABASE, *Survivor* [U.S.], <http://www.imdb.com/title/tt0239195> (last visited Feb 13, 2011), with INTERNET MOVIE DATABASE, *Expedition: Robinson* [Swed.], <http://www.imdb.com/title/tt0264245> (last visited Feb 13, 2011).

¹⁸³ A BBC worldwide production for the ABC channel, based on the international format show *Come Dancing*. See James Hibbard, *How "Dancing with the Stars" was Born*, THE HOLLYWOOD REPORTER (Nov. 2, 2010, 10:04 PM), <http://www.hollywoodreporter.com/blogs/live-feed/dancing-stars-born-34664>.

¹⁸⁴ Online forums and discussion rooms can also exemplify the importance of the social and cultural dialog within a group of viewers devoted to various television shows.

¹⁸⁵ JAMES U. MCNEAL, CONSUMER BEHAVIOR: AN INTEGRATIVE APPROACH 194 (1982).

¹⁸⁶ EASTMAN & FERGUSON, *supra* note 1, at 2.

¹⁸⁷ The costs a consumer incurs by switching from one product to another. Different price, time, and retraining are general examples of such costs.

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vest in new formats' development, but also an unfair competitive disadvantage against them, arising from the larger competitors' ability to appropriate a highly valuable asset from them—a successful program format.¹⁸⁸

Conditions in both the international and domestic markets influence the decision in the primary market whether to develop a program format, by potentially shortening the period for making a return on the investment and by potentially reducing the size of the market for the product. Even with no legal protection of formats, some developers will still decide to create new products, since there is some competitive advantage in being first to market. However, potential licensees' willingness to pay for use of a format depends on the format creator's ability to protect it. Thus, the lack of protection threatens at least one source of potential revenue and reduces the incentives for new program development.

In addition, with no legal protection, diversity becomes a fragile and dangerous competition strategy, as its advantage can be easily lost to copied shows. Evidence suggests that generally, in the television programming market, broadcasters tend to imitate their competitors, despite the fact that such a strategy results in suboptimal payoffs.¹⁸⁹ In the program format market, the tendency to imitate is even higher, not only because of all of the advantages offered by this type of programming, but also because program formats are easier to copy than other types.¹⁹⁰ From the viewers' perspective, imitation is not desirable either, since it may lead to a decrease in program diversity.¹⁹¹ As research of format piracy in high piracy markets suggests, this effect is already noticeable: flooding these markets with clones of foreign formats reduces the level of diversity and lowers production quality, leaving the public worse-off, with a poorer quality of entertainment.¹⁹² To some extent, licensing a format guarantees a quality production. The licensor has a strong incentive to help the format suc-

¹⁸⁸ The value of a successful format can be immense. When CBS broadcasted the finale of the first season of *Survivor*, it attracted more than fifty-eight million viewers, and the cost of a thirty-second advertisement during the half-hour slot went up to \$600,000. Hazelton, *supra* note 161. It is difficult to find "for the record" information of strong competitors doing this kind of copying from smaller broadcasters. *But see* Rosenbaum, *supra* note 162 (where an independent producer admits to having dealt with this issue but refuses to name the offending network "for fear of reprisal").

¹⁸⁹ Kennedy, *supra* note 58, at 58 ("imitation is common but . . . it leads to lower average ratings and shorter average program longevity than does differentiation").

¹⁹⁰ See FEY, *supra* note 16, at 19 ("Their unscripted nature facilitates the quick production of knockoffs.").

¹⁹¹ Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 516 (2000).

¹⁹² See Keane, *supra* note 173.

ceed in its new market in order to increase the probability of licensing it further. It will therefore share its production knowledge and experience with the licensee.¹⁹³ The impact of format piracy on diversity is bound to be more severe in the case of program formats than for piracy of other types of shows. The legal protection of scripted shows forces imitators to be creative enough to avoid infringement suits; copies of formatted shows bear no such requirement of originality.

The high rate and negative consequences of imitation have caused developers to shift their preferences toward more expensive-to-produce formats. Developers pursue concepts that require a high level of investment, with the hope that such programs will be more difficult for others to duplicate.¹⁹⁴ These preferences can be regarded, at least to some extent, as a self-help mechanism of over-investment, or defensive measures, against copying.¹⁹⁵

C. *Recent Changes in the Program Format Trade Market*

This Article's argument in support of legal protection for program formats considers the consequences of copying in light of two recent changes in the trade market for known program formats. The first change is the globalization of trade and the expansion into new territories. The second, which results from the first, is the change in the traditional business model of the participants. These changes, along with the special characteristics of the product and the competition structure described above, have weakened the industry's ability to mitigate the public-good market failure outside the legal system.

¹⁹³ And in fact, many program formats' licensing agreements include a "quality control" clause. See FEY, *supra* note 16, at 23.

¹⁹⁴ Mansha Daswani, *Asian Games*, TV ASIA PACIFIC (WORLD SCREEN) MAGAZINE 42, 48 (Dec. 2007) (quoting Simon Spalding, CEO, FremantleMedia Licensing Worldwide with regard to licensing television formats in Asia):

A key to protecting intellectual property lies in developing shows 'that are not possible to copy. Our Soccer Prince format [in China] has a unique prize . . . apprenticeship with an English football club. People could copy all the elements, but being unable to deliver that prize makes [the show] less compelling.

See also Brooks Barnes, *Unscripted Shows Become a Money Pit—New 'Stars' Like Mr. Trump Demand Raises, Perks; An Assistant for the Dog*, WALL ST. J., Jul. 28, 2004, at A1 ("Networks are paying six-figure fees for lavish location shoots to set their shows apart.").

¹⁹⁵ See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 57 (2003).

1. Expansion of Trade

The international trade market for program formats was not a significant factor for the television industry until the late 1980s. It developed well into the 1990s and was highlighted by the first format trade fair in Monte Carlo in 1999.¹⁹⁶ The development of this market can be attributed to a number of factors, the largest among them being telecom deregulation and privatization. As a result of these, a number of territories that were considered “closed” markets became accessible, boosting the volume of trade. In addition, companies in more countries outside the U.S. found their way into the production, exportation, and distribution of television programming. While the United States is still the largest producer and exporter of television programming, the effect of the industries of other countries, especially in the trade of program formats, is substantial.

Technological developments in broadcasting and distribution mechanisms made the program trade possible by enabling the standardization and integration of television systems and commercial practices.¹⁹⁷ In addition, technological advances created a variety of options for viewers, allowing audience fragmentation through niche channels, increasing the demand for local content and tailored production styles.¹⁹⁸ The ability of program formats’ production to ad-

¹⁹⁶ An interesting indicator can be found by examining the fall prime time broadcasting schedules of U.S. networks. The number of formatted shows grew dramatically from an average of 1.9 shows per schedule, representing a total of 15 broadcasting hours in the years 1976–1985 to an average of 2.6 shows per schedule and a total of 18 broadcasting hours in the years 1986–1995, to an amazing average of 9.4 shows per schedule and a total of about 91 broadcasting hours in the years 1996–2006. TIM BROOKS & EARLE MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946–PRESENT* (9th ed. 2007). Schmitt, *supra* note 2, at 41–45. MORAN & MALBON, *supra* note 22, at 86 stating:

[T]he 2004 MIPTV website listed details of 471 companies that had identified themselves as operating in the TV programme format and the interactive format business Of these, there were 291 in Europe, including the United Kingdom while there were 68 in the United States and Canada, 12 in South America, 63 in Asia, 14 in the Middle East, 4 in Africa and 19 in Australia and New Zealand.

See also Chris Pursell, *To Import or to Format? That Is the Question*, 20 *ELECTRONIC MEDIA* 64 (2001); discussion of professional trade fairs, *infra* Part III.C.3.b.(i).

¹⁹⁷ Waisbord, *supra* note 155, at 364.

¹⁹⁸ Evidence of the general preference for local productions has been found in several studies. See, e.g., TIM COLWELL & DAVID PRICE, *RIGHTS OF PASSAGE: BRITISH TELEVISION IN THE GLOBAL MARKET 11* (2005) (a report commissioned by British Television Distributors’ Association and U.K. Trade & Investment).

just to the explicit local preferences became a key component in their increasing importance.

2. Changes in the Business Model

Market growth, expressed both in terms of geography and demand size, also attracts more participants. The programming market has become not only less concentrated but also more open to new business models. Unlike previously, there are now a greater number of independent and small-firm participants from more territories, some specializing in only segments of the process, such as production or distribution. Organizations that can now be found in the format field can be categorized into four main types:¹⁹⁹ (i) fully vertically integrated firms, which are involved in almost every aspect of the process, from initiation, development, and production to distribution and adaptation deals;²⁰⁰ (ii) firms that specialize in television content distribution, part of which are formats that are licensed to broadcasters; (iii) independent production companies, producing self-developed or licensed formats; and (iv) other firms that do not fit under the former three categories, such as special format distribution companies. The traditional model of a big, integrated network, which controls the entire generation, creation, and distribution process for all program types, exists side by side with companies who specialize in only a few segments of the process.

3. Industry Custom and Internal Mechanism Effects

Globalization, the increase in product demand, and the entry of more diverse participants into the television business have reduced the industry's ability to enforce format rights using extralegal norms of practice. Several practices are pointed out as central to coping with the threat of piracy.

¹⁹⁹ MORAN & MALBON, *supra* note 252, at 85.

²⁰⁰ These types of companies hold large format catalogs, operate through joint venture projects, and keep production offices in territories they deal with. Peter Bazalgette, chairman of Endemol U.K. and the Chief Creative Officer of the Endemol group, noted in a 2005 interview that his company has offices in twenty-three territories, each with a production company. Endemol creates about 250 formats a year, many of which get on the air, and its catalogue contains about 1400 formats. Anna Carugati, *Nurturing Creativity, Endemil's Bazalgette*, TV FORMATS (WORLD SCREEN) MAGAZINE, 290 (Apr. 2005).

a. Reputation Damages

In the past, the fear of reputation damages had a greater impact on decisions made by competitors to copy or buy existing formats for three main reasons. First, the risk associated with copying was greater because the market was more concentrated, leading to higher chances of repeated interactions between competitors and detection of improper behavior. Second, the traditional networks, structured to control the entire chain of creation, production, distribution, and broadcasting, have operated in the program trade market both as buyers and sellers of shows. Such “playing both sides of the field” lessened the incentive for acts that might be interpreted by others as not collegial. With the increase of participants in the market and specialization of companies, a deal can now include multiple numbers of organizations, and single actors. Therefore, the strength of the ties between the participating actors have been reduced. Third, the trade was previously restricted to a limited number of territories with a relatively homogeneous legal approach to the concepts of intellectual property rights and copying, and so the parties making deals shared similar views regarding which behaviors were acceptable and which were not.

*b. Industry Institutions**(i.) Agents and Industry Trade Fairs*

The use of agents, although somewhat rare, is not unheard of in the international trade arena. Format companies will mainly use agents as distribution aids to new territories where agents are an integral part of the market structure (like in the United States) and hold powerful connections.²⁰¹ As noted in the discussion of the unpublished format market above, the use of a middleman reduces the information costs of the involved parties’ trustworthiness because of the agents’ repeated interactions.²⁰²

The more common scenario for international trade is direct dealing between the format rights holder and the licensee, facilitated by the industry trade fairs, the main stage for trading deals.²⁰³ The fairs host different kinds of televi-

²⁰¹ MORAN & MALBON, *supra* note 252, at 71.

²⁰² See discussion, Part II.B.1.c.

²⁰³ See generally Albert Moran & Michael Keane, *Cultural Power in International TV Format Markets*, 20 CONTINUUM: J. MEDIA & CULTURAL STUD. 71 (2006) (reviewing extensively the different types and characteristics of the various industry events that relate to format trade).

sion content and deals, and are of particular importance for the format trade.²⁰⁴ The existence of these industry events allows members to be updated with current trends and new materials and to create personal connections and cooperation. The fairs are closed to the public and form a type of a club where repeated attendance bears special importance.²⁰⁵ Therefore, these types of events increase the potential reputation damages in cases of appropriation, in addition to strengthening intrinsic ties between members. Still, Moran notes, “[a]lthough drawn from all corners of the world, nevertheless there are a disproportionate number of participants from the United States, the United Kingdom and Western Europe.”²⁰⁶ Therefore, the extent to which these fairs are able to influence industry members’ behavior is limited.

(ii.) The Format Recognition and Protection Association

Among some industry members, despite the ambiguity of past legal rulings, the general approach is to act “as if there were exclusive property rights to a format.”²⁰⁷ As the market continues to grow, participants are seeking ways to reinforce this code of mutual respect, despite the antitrust issues such treatment might raise.²⁰⁸ In 2000, industry members formed the Format Recognition and Protection Association (“FRAPA”), whose goal is “to ensure that television formats are respected by the industry and protected by law as intellectual property.”²⁰⁹ According to its website, FRAPA now “consists of more than 100 companies from within the television and broadcasting industries.”²¹⁰

²⁰⁴ See FEY, *supra* note 16, at 163 (listing the industry main trade fairs and festivals, but stressing that “when it comes to the formats business, MIPTV and MIPCOM are the places to be.”); see also MORAN & MALBON, *supra* note 252, at 77.

²⁰⁵ Moran & Keane, *supra* note 203, at 75, 79 (citing remarks from an industry member in a 2002 interview):

It’s a case of networking. It’s not good enough to go to the market once. You have to go to the market ten times before they say —“good to see you again—I’ve been thinking about what you said last market.” Because it’s not going to happen straight away. It’s going to take years for that person working at home to get something up.

²⁰⁶ MORAN & MALBON, *supra* note 252, at 74.

²⁰⁷ FEY, *supra* note 16, at 50.

²⁰⁸ See *infra* note 216.

²⁰⁹ FRAPA, <http://www.frapa.org> (last visited Feb. 22, 2011).

²¹⁰ FRAPA, *Members*, <http://www.frapa.org/about-frapa/members.html> (last visited Feb. 22, 2011). There are an estimated 120 institutional members, a number that seems to hold more or less constant owing to regular membership turnover. The months of April and October,

FRAPA conducts industry studies, manages a specific registration system for paper formats, and creates guidelines for fair competition through its mediation services. The registration system is meant to provide a sort of public record for formats, to help in establishing evidence of format creation dates, and to aid members in their fight against appropriation, while also reducing the number of potential disputes between members. FRAPA feels that its main contribution is its dispute resolution services for members. According to one source, in its first thirty months of existence, FRAPA provided services in eight to ten disputes.²¹¹ Another source points to the rise in this number in 2003, when FRAPA was involved in eighteen format plagiarism disputes.²¹² In 2008, the organization assisted with forty-four disputes, where “in 80% of the disputes FRAPA has been able to steer the warring parties to a mutually agreed and signed solution.”²¹³

However, the use of third parties in resolving disputes through mediation or arbitration processes has both advantages and disadvantages. Unlike legal action, such processes are not always binding. They can be held in private without publicity, and participation is usually voluntary for both sides. This also means that an unwilling party can decide not to submit to the process or to be bound by its resolution. Naturally, a copier will be less likely to agree to such a process, especially since the effect of peer pressure within the television industry is losing force.

FRAPA’s existence and membership list are telling signs of the industry’s sense of the need for such measures. The mechanism of “peer pressure” still has not completely lost its force, but there is no doubt that it has been weakened in a growing market.²¹⁴ Additionally, “although FRAPA has been broadly successful in signing many of the larger US/UK/Western European companies

when MIP conferences are held, is the time where most new membership applications are filed each year. E-mail from Eva Stein, member of FRAPA management, to author (Mar. 6, 2008) (on file with author).

²¹¹ MORAN & MALBON, *supra* note 252, at 104.

²¹² Press Release, Government of the State of North Rhine-Westphalia and Format Recognition and Protection Association 3 (2004), <http://entertainment-media-law.de/Presse/MIP-TV%202004.pdf>.

²¹³ Stein, *supra* note 210.

²¹⁴ COLWELL & PRICE, *supra* note 198, at 40 (quoting David Lyle, former chairman of FRAPA):

Under the present legal framework the business is generally run as a series of gentlemen’s agreements. Sadly, many people don’t act like gentlemen. Or, more precisely, they act like upstanding, law-abiding gentlemen most of the time, but find the pressure of competition forces them to behave badly just this once . . .

that feel they belong to the format ‘club,’ nevertheless companies elsewhere have elected not to join.”²¹⁵ Given the difficulties in membership recruiting and the continual growth of the market, this organization’s ability to serve as an effective alternative to extrinsic mechanisms, such as the legal system, is limited.²¹⁶

c. Vertical Integration

Vertical integration is still the strongest industry mechanism for dealing with the threat of copying and the uncertainties posed by the legal system, since under an integrated structure, the payment of licensing fees is secured. The developing network will sell or license its formats to its distributors, which will sell the program format to subsidiary channels or local stations. Thus, much of the development cost is distributed along the firms’ channels, and the end users, being a part of the same corporate structure as the developer, have a vested interest in paying. Paying licensing fees under this system also serves other functions, such as complying with employment agreements and reducing tax burdens. Still, as noted, while vertical mergers create efficiencies, such as lowering transaction costs, they also lead to strategic practices of market foreclosure (driven by the tendency to prefer in-house products) and the surrendering of specialization.

Market growth, along with weakening industry customs and internal mechanisms, has led to more copycat shows²¹⁷ and as a result, disputes between competitors have increased. The number of parties taking their disputes to court is still relatively low compared to the number of unlitigated complaints about piracy, but increasing numbers of program format suits claiming both domestic

²¹⁵ MORAN & MALBON, *supra* note 252, at 101, 103 (“FRAPA is only effective if its membership is universal among people operating in the business. I think that if someone stands outside of FRAPA, thumbs its nose at it, it might as well not be there. Our experience with FRAPA and *Pop Idol* was pretty unsatisfactory.”) (quoting Bob Campbell, *SCREENTIME* (2003)).

²¹⁶ It should also be noted that past attempts to organize industries to fight unprotected products from piracy, even when proven successful, were found to be in violation of the anti-trust rules. So, for example, the fashion industry trade association (established in 1935) succeeded in reducing piracy of design, but was struck down later by the Supreme Court. *Fashion Originators’ Guild, Inc. v. FTC*, 312 U.S. 457, 464 (1941). See Safia A. Nurbhai, *Style Piracy Revisited*, 10 J. L. & POL’Y 489, 495–496 (2002) (quoting Stuart Jay Young, *Freebooters in Fashions: The Need for a Copyright in Textile and Garment Designs*, 9 COPYRIGHT L. SYMP. (ASCAP) 76, 103 n.10 (1958)).

²¹⁷ Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concept to Protect*, 20 ENT. L. & FIN. 3, 3 (2004).

and international format theft are being brought to courts.²¹⁸ The increase in lawsuits, despite the ambiguity of the law in these cases, is driven partly by plaintiffs' hopes that their cases have special characteristics that will shift the court's opinion in their favor.²¹⁹ Mostly, however, it seems as if format holders go to court as a business strategy, signaling to competitors their willingness to protect their assets, even at the price of expensive, unpredictable, and lengthy legal action.²²⁰ Of course, when plaintiffs lose their cases, the industry receives a dangerous signal that the practice of copying formats pays off.²²¹

The industry's diminishing ability to self-regulate, combined with a lack of certainty about the legal framework and the growth in numbers of disputes, undercuts industry goals (particularly innovation and profitability) and supports the case for recognizing at least some legal protection for program formats. Legal protection would likely promote trading and licensing within the market-

²¹⁸ See, e.g., *CBS Broad., Inc. v. ABC*, 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *2–*4 (S.D.N.Y. Jan. 14, 2003); *Barris/Fraser Enters. v. Goodson-Todman, Enters.*, No. 86 Civ. 5037 (EW), 1988 U.S. Dist. LEXIS 146, at *1 (S.D.N.Y. Jan. 4, 1988); *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556 (C.D. Cal. 2005); *Nine Films & Television Pty. Ltd. v. Ninox Television Ltd.* (2005) FCA 1404 (Austl.); HR april 2004, No. C02/284HR, m.nt. (Castaway/Endemol) (Neth.); Complaint at 15, *Stern v. Telepictures Prods., Inc.*, No. BC 292018 (Los Angeles Co., Cal. Super. Ct. Mar. 13, 2003); see also FEY, *supra* note 16, at 19; White & Brenner, *supra* note 217, at 3–5 (discussing numerous cases between networks concerning reality show formats).

²¹⁹ Gautam Malkani, *Television—Haven't We Seen That Programme Somewhere Before? Got Any Good Ideas? If So, Beware the Copycats, As Protection of TV Formats Is Weak And You'll Need A Detailed "Bible" To Stop The Rip-Offs*, FINANCIAL TIMES (London), Sept. 21, 2004, Creative Business at 8.

²²⁰ Don Groves, *Fighting the format rip-offs*, TELEVISION ASIA, Oct. 2007, at 8 (quoting Avi Armoza of Israel-based Armoza Formats):

If you find yourself in a situation that your format has been duplicated, you try to resolve it outside of court through FRAPA. If needed, do not . . . hesitate to go to court. The protection of the IP is the core of our business and our message should be loud and clear that any formats [sic] infringement would not be tolerated.

²²¹ See, e.g., George Winslow, *The Weakest Link: Copyright Protection*, WORLDSCREEN MAGAZINE (Oct. 2003):

"The lack of legal protection is a real concern," notes Andrea Jackson, the director of international television at Zeal Television. "I think the future and fate of format companies lies in resolving this issue. If we don't respect the I.P. [intellectual property] of others, the industry will unravel. All you need is a few high-profile cases where people rip off formats and then people will stop seeing the need to pay for formats."

Id. at 222.

place. The practice of licensing enables creators and developers to receive compensation for their work, thus providing even relatively small players with incentives to create. This kind of business conduct can lead to prosperity in the entire TV production market (not only the formatted shows market) and to the additional byproduct of the redistribution of resources within the markets, since more independent producers could participate in this process. Such changes would also benefit television consumers, because greater competition allows the market to better satisfy diverse tastes. A market with more unique creations can respond with greater flexibility and efficiency to audience diversity and demands.

D. The Case Against Legal Protection

TV formats have received little attention from legal scholars. However, the legal debates over recognizing protection for other new intellectual property products, such as those for computer software, computer games, business methods and databases, have generated a line of arguments that apply to formats as well. The case against protection breaks down into four main issues: (1) concerns about the overexpansion of IP's traditional boundaries; (2) the existence of incentives for format creation outside the scope of IP policy (thus eliminating the necessity for legal intervention); (3) the claim that economic inefficiency results from such protection; and (4) antitrust and market power concerns.

1. Overexpansion of IP's Traditional Boundaries

The main concern is imbalance between public and private control of resources.²²² Providing private individuals with rights over knowledge depletes the common pool of resources available to subsequent innovators, putting social progress at risk rather than promoting it. In the television world this criticism is fortified by formats being assembled from many (sometimes generic) elements and the industry having a habit of "borrowing liberally from what has gone before."²²³ However, one needs to keep in mind that in order to achieve proper policy, the danger of foreclosing future creation should be balanced with the current progress of program format development.

²²² See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

²²³ *CBS Broad., Inc. v. ABC*, 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *1 (S.D.N.Y. Jan. 13, 2003). This concern is also demonstrated in the *Opportunity Knocks* case. See *Green v. Broad. Corp. of N.Z.*, [1989] 2 Eng. Rep. 1056 (P.C.) (appeal taken from N.Z.).

In addition, there are concerns that increased protection would pose a threat to smaller and weaker competitors, who might often face infringement suits, partly as a competitive business strategy by larger firms. This issue for small, independent competitors, however, would not arise immediately, if at all. *Ex ante*, even small competitors would choose to have their creations protected. A protection regime under which a competitor might get sued is preferable to no protection regime, where plagiarism by competitors limits some participants' ability to compete in the first place.

These types of concerns are not specific to program formats, but a general matter of achieving the right policy. It would be too simplistic to respond to such arguments with a mere refusal to extend protection to this new area. Instead, the debate should lead to questions of the appropriate scope of protection within the IP system: which elements should be protected, how, and to what effect?²²⁴

2. Incentives to Create Without Legal Protection

a. *General Incentives*

The source of this type of objection lies in the fact that inventions and art were being developed long before they had any legal protection.²²⁵ Therefore, the argument goes, creative activity will prosper regardless of the availability of legal protection.²²⁶

However, this argument tends to ignore market realities. Historically, the variant cost of each copy was extremely high, which made copying less profitable and thus the necessity of legal protection minimal. In addition, investments in creations were generally small. In the modern world, the artists or scientists who create new products are rarely the ones capable of delivering those products to the market. The art of television, in particular, exists within a commercial arena and the required investment is very high.²²⁷ If investors know

²²⁴ Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 617–18 (7th Cir. 1982) (“[T]hat a work is copyrighted says very little about the scope of its protection.”).

²²⁵ Eben Moglen, *Anarchism Triumphant: Free software and the Death of Copyright*, FIRST MONDAY (1999), <http://moglen.law.columbia.edu/publications/anarchism.html>.

²²⁶ Feeding on non-monetary incentives such as egotism, the will to leave a token to society, the need to be heard, and so on.

²²⁷ BRUCE M. OWEN, THE FUTURE OF TELEVISION: UNDERSTANDING DIGITAL ECONOMICS, IN A COMMUNICATIONS CORNUCOPIA 605 (Roger G. Noll & Monroe E. Price, eds., 1998) (“In a market economy, goods and services are available because someone expects to make a profit and is therefore prepared to pay the costs and to undertake the risks of production.”).

in advance that they will not be able to recoup their investment, they will direct their funds into other forms of investments.²²⁸

The natural development argument also ignores the important issue of efficient production levels. While a certain number of new creations will be developed even without protection, the lack of protection is bound to negatively affect their number and quality, resulting in under- or over-creation.

b. Marketplace Incentives

New and innovative program formats provide developers with an important competitive advantage in the programming market. Such an advantage cannot be acquired solely through direct copying, since “[a] fair amount of change has to be made with each individual show in order to keep the viewer from becoming bored with the new products.”²²⁹ Therefore, market forces will produce an efficient allocation of resources, without the extra incentives provided by legal protection, in a way that ensures the optimal level of creation and progress.

Even if this argument has merit in direct competition markets, despite potential losses resulting from confusion and the copy being a substitute product, it does not address the copying of foreign television formats. If a new audience is unfamiliar with a copied foreign format, then its producers do not have to make any significant creative change to the format to prevent audience boredom. Copying a format to a new territory will allow the copier to free-ride on the originator’s initial investment without having to invest much in adjustments. The existence of this market failure, therefore, indicates the need for legal protection to help competitors protect their creations and enhance their competitive power.

Second, data regarding audience reaction to programs identified by the audience as imitations are inconclusive. Some data shows rejection by audiences,²³⁰ while other data shows that programs with similar concepts received high ratings.²³¹ A plausible explanation for this variance might be that audience acceptance or rejection of a copied format depends on production quality and is

²²⁸ See POSNER, *supra* note 35, at 38, and Part III.B.2.a.

²²⁹ Suzanne Sitelman, *Copyright Law, Creativity, and Reality Television*, 4 IMMEDIACY (2005).

²³⁰ Kennedy, *supra* note 58, at 60 (“Imitative introductions have, on average, lower ratings and shorter lives than differentiated programs.”).

²³¹ See Michael Keane & Albert Moran, *Television New Engines*, 9 TELEVISION & NEW MEDIA 155, 163 (2008); Michael Keane, *Content, Formats and Crisis in Chinese Television*, (paper presented at the Memory and Media in and of Contemporary China Conference, University of California, Berkeley, March 1–4, 2001).

influenced by the broadcasting channel more than by the originality of the program.

c. First-Mover Advantage

Another market-related incentive for format development without legal protection is the advantage of being the first to offer a product to the public. The importance of being a first mover can be enormous, and in the format market itself, competition can be characterized as a race to broadcast first.²³²

However, this incentive does not entirely make up for the absence of legal protection. A smaller channel's first-mover advantages can be severely reduced when its format is appropriated and broadcast by a channel with a larger audience base. When this happens, even if the audience recognizes the format as an imitation, chances are that they will prefer watching the show on the large channel because of the added social benefits and the low switching-costs of watching such channels.

In the international market, the problem is aggravated, as a local copier whose imitated show goes on the air before the original producer has a chance to license the format or to enter that market directly can preempt the first-mover advantage from the show's originator. Even when the original producer is able to be the first mover in a market, he may not enjoy any advantage without legal protection. Since formats can be reproduced relatively quickly, without legal support, closely duplicated substitute products will soon arise and abolish advantages (such as audience loyalty) created by first entry to the market.

3. Economic Inefficiency Resulting from Legal Protection

Anthony Martino and Claire Miskin, use economic analysis of TV format protection to argue against protection.²³³ Their analysis seems to mainly consider the primary unpublished paper format market. However, some of their conclusions oppose the claims presented in this Part regarding the influence of conditions in the secondary market on development incentives in the primary market.

²³² FEY, *supra* note 16, at 19–20. Many cases that have been brought to court involve in one way or another an attempt to prevent or protect the first-mover position. *See, e.g.*, Sharp, *supra* note 27, at 191–92 (discussing the legal battle between NBC and Fox over *The Contender* format).

²³³ Martino & Miskin, *supra* note 5, at 815.

Martino and Miskin's first argument concerns the problem of external costs. In the case of TV formats, they claim that overexploitation is not a problem because "there will always be a certain supply of existing and newly created formats."²³⁴ Therefore, while the overuse of a format certainly hurts its originator, in their view the cost to society is negligible. New formats will always be available, and it will always be cheaper to create another format than to protect an existing one.

This argument is similar to the claim that market incentives are sufficient for the continuation of production without legal protection. Still, the fact that some level of format development and trade will exist even without legal protection does not necessarily indicate that protection would be wasteful. For example, it does not have any bearing on the quality or diversity of the formats that would continue to be produced.²³⁵ It also says nothing about the level of desirable production. As the market size and volume increase through audience growth, the demand for new formats will rise naturally, along with production. If developers find it increasingly difficult to benefit from new productions, the shift in their production preferences, from producing innovative products to imitative products, becomes the problem, not whether or not production will terminate.

The claim that a format can be cheaply replaced does not consider the reality of the market, where not every paper format will reach the broadcasting stage.²³⁶ One of the reasons for the existence of a market for trading existing program formats is that formats are not so easily replaced; a successful format has considerable value. Format development (or replacement) demands great financial and resource investment, which is much more expensive and complex than Martino and Miskin's claim acknowledges.²³⁷ In addition, the risk reduc-

²³⁴ *Id.*

²³⁵ MARK LITWAK, *CONTRACTS FOR THE FILM & TELEVISION INDUSTRY* 6 (1994) ("[T]he movie and television industry is different from other industries. The commodity being sold is creativity. . . . It's not like making soap, where once you devise the right formula you can churn out the same product time and again.").

²³⁶ Rosenbaum, *supra* note 162 (referring to the main commercial channels in Australia and noting that only one out of ten submissions is even considered viable, few are selected to be produced, and about six programs a year that get to the stage of shooting a pilot "never see the light of day").

²³⁷ On top of that, the development process can be very long. Moran and Malbon report that it took a little over three years, from the time the idea for the show came to David Briggs in 1995 to the first broadcast episode in September 1998 of the successful British format *Who Wants to Be a Millionaire*. An additional year was required to complete the American version of the format. MORAN & MALBON, *supra* note 252, at 51, 54.

tion, saved costs, and advanced production knowledge embodied in successful formats are precious resources that new formats lack.

The misguided views on the ease of format creation color the second part of Martino and Miskin's argument: that only the format holder incurs heavy damages from piracy, while the public and society remain unharmed. But when competition (whether in the domestic or international market) is impaired and piracy prospers, the audience suffers from the resulting reduction in quality, originality, and diversity.

Another claim raised by these authors is that protection will lead to potential economic rents: "The ideas or concepts underlying a format or a format work are for the most part 'obvious.' . . . 'Obviousness' implies a low cost of discovery and development . . ." ²³⁸ The response to the authors' first argument applies here as well. Their claim would make perfect sense if development were "simple," "obvious," and "cheap." Their claim would also be true if formats were comprised only of ideas and concepts, but that is not the case. The discovery of a good format, and the development of concepts into a full-blown production can be very expensive. ²³⁹

Another factor that drives up development costs is the low success rate of new television programs. Developers must earn enough from their few successful programs to cover the losses from the many that fail. The ideas and concept behind a program format may not be worth much by themselves, but the execution—finding the right combination of elements to turn the format into a successful program—and the proven success of formats that have already been tried in a different territory have great value. The willingness of sophisticated industry members to invest heavily in the acquisition of good formats is an indication of that value.

Martino and Miskin's final argument defends the denial of property rights for ideas. The authors use as an example the area of trademark law, where allowing the private control of common words deprives competitors of the ability to properly describe their products, and hence to compete effectively. Similarly, they argue, granting copyright protection to formats would have a chilling effect on the market. If format ideas were protected, competitors would be unable to present their similar concept shows on the air.

As demonstrated, even though formats are based on ideas, their value emerges from a combination of many additional elements. Therefore, while Martino and Miskin's analysis certainly has merit with regard to the question of

²³⁸ Martino & Miskin, *supra* note 5, at 816.

²³⁹ Rosenbaum, *supra* note 162 (stating that the cost of a game show pilot alone can be anywhere from \$300,000 to \$600,000); *see also supra* note 237.

idea protection, in the context of TV formats the situation is different. The dangers described in trademarks' appropriation of common words cannot be applied to program formats or even to paper formats.

4. Antitrust and Market Power Concerns

A possible social cost of the IP system is monopoly pricing, which results in deadweight losses and the suffocation of competition. Judges dealing with program format cases seem to be especially concerned with the possible monopoly effects that protecting formats might produce.²⁴⁰

However, the legal protection of IP rights alone would not necessarily result in the creation of market power, let alone monopoly power. Firms possessing monopoly power have the ability to control levels of production and product prices. This is not at issue in the program format market, where the right to exclude others from the use of one's product does not necessarily guarantee one's ability to extract commercial value from it. Monopoly pricing is possible in markets where few substitute products exist. TV programs, however, are by their nature substitute products (though not perfect substitutes), and so the danger from such a pricing policy is low. This is not to say that property rights over a very successful program format would not create a significant competitive advantage for the owner. Still, the number of formats that actually succeed in gaining strong market positioning and a long shelf life is extremely low.

Program formats' protection will generate some social costs. But protection can also encourage more competition, create lower entry barriers, and ensure creators' ability to benefit from their work. In addition, protecting formats does not mean blocking others from being inspired by them, a view well understood by the industry.²⁴¹

²⁴⁰ See, e.g., *CBS Broad., Inc. v. ABC*, 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *24–25 (S.D.N.Y. Jan. 13, 2003); *Green v. Broad. Corp. of N.Z.*, [1989] 2 Eng. Rep. 1056 (P.C.) (appeal taken from N.Z.); see also *Survivor Prods. LLC v. Fox Broad. Co.*, CV 01-3234 LGB (SHx), 2001 U.S. Dist. LEXIS 25511, at *16 n.5 (C.D. Cal. Jun. 11, 2001) (noting Fox's claim that CBS was attempting to create a monopoly for reality television shows.).

²⁴¹ Dawley, *supra* note 15, at 26 (citing Dick Barovick, former CEO of the Grundy Worldwide production company, in an interview about TV format protection, referring to the difference between format piracy and concept imitation). With regard to creating shows based on similar concepts, Barovick said, "Is that theft? No. That's business." *Id.*

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From both the social and commercial standpoints, television formats are valuable creations. Understanding the two products, the paper and program stages, of a television format and their respective markets is fundamental to its legal protection discussion.

Interestingly, under current law, the less-developed stages of the process (program ideas and paper formats) are awarded more protection than the aired program format, which accumulates higher levels of investment, creativity, and expression. Internal industry mechanisms, such as vertical integration, reputation damages, and industry institutions, exist in both markets and are still able to control and influence members' behavior to some extent. However, while the influence of internal industry mechanisms is still strong in the paper format market, in the program format market, which continues to grow, such mechanisms have weakened, amplifying the importance of a clear legal system.

The absence of protection will certainly not completely eliminate the production of new program formats. However, these factors do not add up to a case against protection. The changes in the program format market in the last two decades support the theory that the overall effect of providing legal protection for TV formats would promote beneficial competition and encourage more original creation. The underlying question for television formats should not be whether to protect but rather how.