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## Idea Theft: Frivolous Copyright-Lite Claims, or Hollywood Business Model?

K. J. Greene

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## **Idea Theft: Frivolous Copyright-Lite Claims, or Hollywood Business Model?**

By K.J. GREENE\*

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## I. Introduction

Two facts regarding idea theft in the creative context are undeniable—first, that idea misappropriation claims against Hollywood studios and television producers are rampant,<sup>1</sup> and second, that the hodge-podge legal regime surrounding idea submission claims is in disarray. Institutional entertainment industry players, such as major Hollywood studios, dismiss idea theft claims as fake and frivolous, a kind of “copyright-lite” claim brought by unsuccessful wannabe writers and producers. In contrast, non established creators seeking entry to the elite and lucrative world of Hollywood tell another tale—that of an industry that relies on the creative ideas of outsiders, and fleeces idea submitters as a routine business practice. Some of these practices no doubt feed into the narrative that represents Hollywood “as a dangerous place for filmmakers with vision and integrity and many filmmakers believe that it is important to stay out of the Hollywood studios entirely in order to maintain their artistic independence.”<sup>2</sup>

Raw ideas comprise the DNA of every entertainment project, and of intellectual property (IP) itself. However, although ideas constitute the building blocks and basic units of IP, neither copyright nor patent law protects ideas. Yet ideas, standing alone, can be phenomenally valuable. The value of raw ideas came into stark relief in the case that launched the hit film, “The Social Network.”

The college roommates of Mark Zuckerberg, the founder of Facebook, alleged in a lawsuit that Zuckerberg purloined the idea for Facebook.<sup>3</sup> Facebook grew from those humble college beginnings as a social networking Internet site to a financial juggernaut. Plaintiffs reportedly settled the case for \$65 million.<sup>4</sup>

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1. See, e.g., Robert M. Winteringham, Notes, *Stolen from Stardust and Air: Idea Theft in the Entertainment Industry and a Proposal for a Concept Initiator Credit*, 46 FED. COMM. L.J. 373, 391 (1994) (noting that “[i]dea theft occurs because of the current Hollywood business structure [and in the small Hollywood community] ‘plagiarism is said to be systemic’”).

2. Sherry B. Ortner, *Against Hollywood: American Independent Film as a Critical Cultural Movement*, 2 HAU: J. ETHNOGRAPHIC THEORY 10 (2012).

3. The case was brought by college roommates of Facebook “founder” Mark Zuckerberg, who claimed that Zuckerberg appropriated the code from their social network site, “Connectu” and included claims of copyright infringement and trade secret appropriation. See Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703, at 711,712 (2005) (noting that “developments in technology, capital markets and distribution have coalesced to make ideas more valuable than ever”).

4. *Id.*

Ideas are indispensable to the entertainment industry.<sup>5</sup> Professor Miller has written that “Hollywood is a small community that depends on that most precious of commodities: the original idea.”<sup>6</sup> Every entertainment project begins with an idea that, with development, becomes a book, article, video game, song, television show, theatrical play or screenplay. Producers hire writers who convert treatments to entertainment products such as motion pictures and TV programming. Idea production and dissemination takes place in a hierarchical studio system populated by economic and legal firms with all its characteristics of hierarchical command and control.<sup>7</sup> Within this Hollywood ecosystem, new entrants—writers and producers—subsist at the bottom of the entertainment food chain.

Despite the often-astounding economic value of ideas, the “law of ideas” provides strikingly little protection to idea originators and submitters. To paraphrase the late comedian Rodney Dangerfield, “ideas get no respect” under legal doctrine. The general legal rules governing disputes over idea ownership posit that creators cannot protect raw ideas—raw ideas alone but are “free as air.”<sup>8</sup> Existing legal doctrine creates a climate that is generally hostile to the protection of ideas. Undoubtedly, overly expansive protection of ideas as a form of intellectual property would impose unacceptable social costs.

The hallmark of American society is the ideal of a “marketplace of ideas.”<sup>9</sup> Courts and commentators recognize that placing robust restrictions on idea dissemination and implementation can impose negative social costs.<sup>10</sup>

However, failing to protect ideas through overly restrictive limits on idea protection also has social costs, particularly if we also value distributive and corrective justice. A thread throughout my work is the notion that the IP system ought to protect the least advantaged in society. Copyright law has historically left the creativity of social “out” groups, such as African Americans

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5. See Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703, 711-712 (2005) (noting that “developments in technology, capital markets and distribution have coalesced to make ideas more valuable than ever”).

6. Winteringham, *supra* note 2, at 374.

7. See Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 4-5 (2004).

8. *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

9. See generally ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 185 (2007) (The phrase is typically attributed to Justice Oliver Wendell Holmes, who, dissenting in *Abrams* posited that “the ultimate good desired is better reached by free trade in ideas—that the best truth is power of thought to get itself accepted in the competition of the market.” The actual phrase, “marketplace of ideas” was actually coined by a writer in a New York Times article in 1936).

10. See e.g., Andrew Beckerman-Roadu, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J. L. & TECH. 36, 38 (2011) (noting that “allowing private parties to own ideas and information can interfere with marketplace competition and with public access to intellectual property.”).

unprotected.<sup>11</sup> The dysfunctional state of “idea law” similarly punishes the folks at the bottom, while enriching institutional elites. I have argued elsewhere that this sad state of affairs is detrimental to inculcating those norms against “piracy” that Hollywood needs in the era of “remix.”<sup>12</sup>

The protection of ideas has important implications for entrepreneurship—the supposed basis of the American dream—“[w]hen a person has an original idea and develops it into a product, an entrepreneur is born—a person who has personal drive, creates an intimate vision, and is willing to take risks.”<sup>13</sup> Further, disincentives on idea protection chill the dissemination and ultimate access to the public of valuable ideas.<sup>14</sup>

Fresh and marketable ideas are indispensable to film and television production in this era of expanding media outlets. Without ideas, content would stall, and if that were possible, become even less innovative and staler. There is increasing recognition that “[i]f open innovation is to thrive, business trading models between [idea creators and corporate users] must ensure that professional business creators are equitably remunerated.”<sup>15</sup> Huge expansions in outlets for entertainment have increased the value of “fresh ideas for sitcoms, game shows, stories of crime and punishment, and, most recently ‘reality’ fare have become the source of the industry’s success.”<sup>16</sup> Fresh ideas, however, seem few and far between based on studio output and obsession with sequels. How many “Lethal Weapon” and “Fast and Furious” films are we up to now?<sup>17</sup>

Idea misappropriation claims are generally unsuccessful against entertainment projects like film and TV shows. As I have said elsewhere, “idea law . . . provides the least firepower in the IP-related arsenal of legal claims, particularly in contrast to copyright law.”<sup>18</sup> This article contends that novel ideas are worthy of stronger protection, particularly for new entrants such as

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11. K.J. Greene, Copyright, *Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 358-59 (1999).

12. *Id.*

13. LOUISE LEVISON, FILMMAKERS AND FINANCING: BUSINESS PLANS FOR INDEPENDENTS 7 (6th ed. 2010).

14. Scholars recognize that nondisclosure of information, including ideas, by “hiding useful information . . . has social costs, as it prevents others from using the information.” See Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575, 584 (2007).

15. See WIPO Magazine, “Ideas Need Industry as Industry Needs Ideas,” 1, August, 2011.

16. Miller, *supra* note 5 at 711, 712.

17. See Igor Dubinsky, *The Race to the Box Office Leads to Cinematic Déjà Vu: Modifying Copyright Law to Minimize Rent Dissipation and Copyright Redundancy at the Movies*, 29 WHITTIER L. REV. 405, 447 (2007) (exploring how, as “author’s ideas are often stolen whole-cloth or taken by pieces” even as “the creative, legal, and economic landscapes encourage . . . the release of similar déjà vu movies.”)

18. See K.J. Greene, “*There’s No Business Like Show Business*”: *Using Multimedia Materials to Teach Entertainment Law*, 52 ST. LOUIS U. L.J. 765, 768 (2008).

independent film producers, writers and idea submitters. The new entrant “must take the risk of revealing his format idea to [a] producer without landing the deal . . . [o]nce the producer has learned the idea, he may cancel the contract negotiations [and later] develop the program format without involving the original developer.”<sup>19</sup> Copyright law provides very strong protection for creators, whereas idea law is weak and indeterminate. In thinking about the optimal goals of idea, ideally, idea law should satisfy three goals:

1. Provide optimal incentives to idea generators to submit ideas;
2. Protect idea recipients from specious misappropriation claims; and
3. Preserve a broad public domain in ideas, consistent with democratic notions of a vibrant “marketplace of ideas.”<sup>20</sup>

These three goals are functionally equivalent to the “constitutional policies of copyright: the promotion of learning, the protection of the public domain, and the encouragement of publication to provide public access.”<sup>21</sup> It is not at all clear that current idea law satisfies one, much less all three such goals.

This article contends first that idea protection in the context of submissions to network and cable television productions has national impact and would more appropriately be regulated by a federal regime or dual state-federal regime, much like trademark law. A federal regime would eliminate unfairness that arises from preemption of idea misappropriation claims and the lack of coherency and inconsistency that characterizes state law regimes. A federal regime is needed to create a coherent standard of protection for idea submissions because idea theft is national in scope.

### A. Two Narratives Of Idea Theft

Two dueling narratives of idea theft in Hollywood exist. The first narrative of idea misappropriation is that of industry elites at the top of the food chain. Their narrative runs that loony Hollywood outsiders frivolously claiming idea misappropriation besiege every project. Film studio lawyers contend “there’s nothing more bitter than a scorned writer . . . .”<sup>22</sup> It is said that major motion studios “receive over 20,000 movie and TV show ideas per year, but review only 6,000 of these, many of them over meals with executives from other

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19. See Stephan Betchtold, *The Fashion of TV Show Formats*, 2013 MICH. ST. L. REV. 451, 463.

20. Ronald K. Collins, *Holmejs’ idea marketplace – its origins and legacy*, First Amendment Center, May 13, 2010, <http://www.firstamendmentcenter.org/holmes%E2%80%99-idea-marketplace-%E2%80%93-its-origins-legacy>

21. See L. Roy Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 285 (2009).

22. See Allison Hope Weiner, *Lawyer is Upping the Ante in Claims of Idea Theft in Hollywood*, N.Y. TIMES, July 27, 2006, [http://www.nytimes.com/2006/07/27/movies/27gadf.html?\\_r=0](http://www.nytimes.com/2006/07/27/movies/27gadf.html?_r=0).

networks.”<sup>23</sup> Film industry executives “say that a litigious opportunist is born every time a film strikes box office gold.”<sup>24</sup> This narrative of specious idea misappropriation claims has been validated by the courts, which routinely dismiss claims of idea misappropriation. Indeed, Professor Miller asserts “courts bend over backwards to avoid protecting ideas.”<sup>25</sup> However, there is no empirical evidence of this narrative, outside of cases dismissed based on the narrative. There are also likely a number of cases that settle and remain obscured by confidential settlement agreements.

A second, plausible—if not provable—narrative exists: that Hollywood—institutional elites such as studios and major production companies—routinely appropriate ideas from players on the bottom end of the studio system. Under this narrative, Hollywood functions as a giant fulcrum for idea theft, and is so entrenched a practice that idea theft is an accepted part of the overall business model. Analysts note that accusations of plagiarism “have become so institutionalized that they are no longer a question of ethical ambiguity so much as business as usual.”<sup>26</sup>

Given a long and extensive history of IP misappropriation across various industries, and the tendency of institutional actors on the entertainment stage, whether film studios, television networks or sound recording labels to overreach with one-sided contracts, the narrative of appropriation is far more plausible.<sup>27</sup> New creative entrants to film and television face “formidable obstacles to success . . . [and are forced] to sign waivers giving up or limiting their rights to compensation.”<sup>28</sup> One needs to look no further than the experience of African American creators in the IP system to capture the unfair treatment of the industry lower class.

## B. The African American Experience in Idea Appropriation

Professor Lessig has identified the United States’ long history of piracy and IP theft, noting that if “piracy” means using the creative property of others without their permission . . . then the history of the content history is a history of piracy.<sup>29</sup> Perhaps no better example exists than the experience of African

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23. See Igor Dubinsky, *The Race to the Box Office Leads to Cinematic Déjà Vu: Modifying Copyright Law to Minimize Rent Dissipation and Copyright Redundancy at the Movies*, 29 WHITTIER L. REV. 405, 411 (2007).

24. See Lisa Sweetingham, *Writer claims Sean Connery and others stole idea for ‘The Rock’, but he may be in a hard place*, YAHOO! NEWS, Feb. 16, 2006, <http://news.yahoo.com>.

25. Miller, *supra* note 5, at 720.

26. See Joy Horowitz, *Film; Hollywood Law: Whose Idea Is It, Anyway?*, N.Y. TIMES Mar. 15, 1992, <http://www.nytimes.com/1992/03/15/movies/film-hollywood-law-whose-idea-is-it-anyway.html>.

27. See Rick Smith, Notes and Comments, *Here’s Why Hollywood Should Kiss the Handshake Deal Goodbye*, 23 LOY. L.A. ENT. L. REV. 503, 506-7 (2003)(outlining disparities in bargaining power between studios and networks vis-à-vis new artists).

28. Miller, *supra* note 5, at 708-9.

29. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 53 (2004).

American artists and creators—Professor Trout has noted that “nowhere are the appropriative harms to personality more manifest than in the history of black musical authorship in the United States.”<sup>30</sup> Arguably, no one ethnic group has evidenced more artistic creativity than African Americans, particularly in music, where African Americans pioneered virtually all genres of U.S. popular music, as well as in literature and science.<sup>31</sup> The phrase “real McCoy”, for example refers to an uncredited black inventor of the cotton gin. African Americans have witnessed the fleecing of their intellectual property—including ideas—since the founding of the republic. In the television idea context, there is anecdotal evidence of this dynamic playing out.

In the 1970’s, a number of television shows depicting African American characters burst on the scene, including “The Jefferson’s,” “Good Times,” and “That’s My Mama.”<sup>32</sup> The creative force behind these shows, which were immensely popular not just among blacks but the public at large, was a young African American writer named Eric Monte. Monte, it is said “created characters that were controversial and politically and socially conscious.”<sup>33</sup> Monte wrote or co-wrote the characters for numerous TV shows, including “Good Times,” “The Jefferson’s,” “Sanford and Son” and “That’s My Mama.”<sup>34</sup>

Competing stories exist as to the downfall of Eric Monte, arguably the most inventive African American writer in television history. According to the producer of “All in the Family,” “The Jefferson’s” and “Good Times,” Monte and his co-writer, actor Mike Evans who played the character of “Lionel” on “The Jefferson’s,” “blew it creatively with a poor copycat of a script” for “Good Times.”<sup>35</sup> Lear claims he nonetheless gave credit to the black writers—“even though what they wrote was far cry from what we shot, we did not seek to change their credit as sole co-creators . . . [t]hat would not have happened, at least not gratuitously, if they were white.”<sup>36</sup>

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30. See David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 373, 378 (2010).

31. See K.J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 385, VOL. 1 (Peter K. Yu, ed. 2007).

32. See Eric J. Bailey, *BLACK AMERICA, BODY BEAUTIFUL: HOW AFRICAN AMERICAN IMAGE IS CHANGING FASHION, FITNESS AND OTHER INDUSTRIES* 87 (2008) (noting that in “the 1970’s a series of black-oriented situation comedies emerged on mainstream American network television that confronted the gritty realities of inner-city urban life. . .”).

33. Pierre A. Evans, *Q&A: The Legendary Eric Monte*, *SOUL TRAIN*, <http://soultrain.com/2014/01/15/qa-legendary-eric-monte/>.

34. *Id.*

35. See Norman Lear, *Exclusive Norman Lear Memoir Excerpt: Throw Downs with Carroll O’Connor, Race Battles on ‘Good Times’*, *THE HOLLYWOOD REPORTER*, Oct. 2, 2014, <http://www.hollywoodreporter.com/news/norman-lear-memoir-excerpt-throwdowns-736647>.

36. *Id.*

Monte subsequently sued Lear and the network for idea misappropriation in 1977. A copy of the lawsuit could not be obtained, but according to press sources as well as Lear and Monte himself, the case was eventually settled for \$1 million and a one-percent percentage of royalties from the revenues of “Good Times.”<sup>37</sup> If Monte is to be believed, the top African American writer in Hollywood had his ideas fleeced by institutional elites. For a time, Monte lived in a homeless shelter, a true story of rags to riches (he grew up in Chicago’s Cabrini-Green housing projects) and then riches to rags.<sup>38</sup>

I have set forth in numerous articles the litany of ways that the intellectual property system appropriated the cultural production of African Americans, while inculcating stereotypes that fostered social segregation.<sup>39</sup> Blacks can stand in as the “low person on the totem pole” in the social hierarchy where IP is operationalized, and can offer insight in those interested in a more “bottom up” rather than “top-down” IP structure.

If IP law is indeed “serious about providing authors and creators with fair compensation for their efforts,” it has been said, “we need to do more than reform copyright law itself . . . we need to examine the structural reform of the [entertainment industries], using not only copyright law but also the tools of the common law and of unfair competition law.”<sup>40</sup> The African American experience in IP teaches that social structures often work in conjunction with legal structures to turn facially neutral rules—such as the fixation doctrine in copyright—into instruments that functionally subordinate based on race, class and gender.

Social dynamics play a role in the implementation of intellectual property.<sup>41</sup> When we consider that practices become entrenched in a social context, it is disturbing that in the idea context, courts have reified industry customs: “courts sometimes permit evidence of industry custom and practice to function as a

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37. See John L. Mitchell, *Plotting His Next Big Break: Eric Monte Was Once a Successful Hollywood Writer Before Losing It All*, L.A. TIMES, April 14, 2006, <http://articles.latimes.com/2006/apr/14/local/me-monte14>.

38. See Annette John-Hall, *Craving a Return of Good Times, Bad Times have Befallen Eric Monte, Writer of ‘Cooley High’ and Co-creator of ‘70’ Hits But he has more stories to tell*, THE PHILADELPHIA INQUIRER, May 30, 2006, [http://articles.philly.com/2006-05-30/news/25401309\\_1\\_bill-cosby-stories-writer](http://articles.philly.com/2006-05-30/news/25401309_1_bill-cosby-stories-writer).

39. See K.J. Greene, *Copyright Culture and Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 370-71 (1999), see also K.J. Greene, *Trademark Law and Racial Subordination: From Marketing Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431 (2008).

40. See Michael Madison, Comment, *Where Does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 754 (2003).

41. See LAURA S. MURRAY, S. TINA PIPER AND KRISTY ROBERSTON, PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR AND THE EVERYDAY 2, (2014) (noting that the “social and cultural context of any emergent dispute or ownership claim—not to mention the financial circumstances of the parties—dictates how, why and by whom IP law is invoked”).

substitute for any other evidence of the creation of a contract or its terms.”<sup>42</sup> In the entertainment ecosystem metaphor, distributor such as film studios and networks are the sharks, and new writers and producers are the minnows. Any idea regime concerned with distributive and corrective justice would recognize the social background under which idea law operates.

### C. Fundamental Tension in the “Law Of Ideas”

Founding father, noted slave owner, and inventor Thomas Jefferson posited that “if nature has made any one thing less susceptible than all others of exclusive property, it the action of the thinking power called an idea . . . [t]hat ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature.”<sup>43</sup> Whether Jefferson endorsed a natural rights or some other theory of IPR is beyond the scope of this article.<sup>44</sup> The point is that theorists have long recognized a fundamental tension between providing property rights in ideas and information and the policy of maintaining a strong public domain in a society that, perhaps above all, values robust exchange in the marketplace of ideas.

### D. Intellectual Property Protection and Ideas

IP protection in the regimes of copyright and patent only protect ideas that reflect a certain level of innovation or expression. Copyright exists to promote creativity, while in contrast patent exists to promote innovation.<sup>45</sup> The disinclination in the law to protect ideas is in part constitutionally mandated: copyright law, for example, only protects the “writings” of authors, and these must be “fixed” in a tangible medium of expression. Analysts have noted that “all writings, including musical compositions, can be dissected to the point of becoming uncopyrightable ideas . . .”<sup>46</sup> Copyright law does not protect mere ideas: the Copyright Act explicitly provides that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>47</sup>

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42. See Lisa Pearson, *Navigating the Bramble Bush in Idea Submission Cases*, 4 J. MARSHALL REV. INTELL. PROP. L. 36, 40 (2004).

43. See THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON 180-181*, Vol. 6 (H.A. Washington ed., 1854).

44. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?: Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 964-65 (2007).

45. See Doris Estelle Long, *When Worlds Collide: The Uneasy Converge of Creativity and Innovation*, 25 J. MARSHALL J. COMP. & INFO. L. 653, 657 (2009).

46. Yvette Joy Liebsman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q. L.J. 331, 332 (2007).

47. See Copyright Act of 1976 sect. 102(b).

Copyright law provides strong protection for “literary” works, including books and screenplays. A fully formed screenplay is the centerpiece of the film industry; given the expense of feature films, “studios realize the screenplay is a blueprint for a multi-million dollar investment.”<sup>48</sup> However, copyright does not protect “treatments”—plot summaries and outlines of entertainment works. Many film projects begin with “treatments”—defined as “[a]n essay-style description of the story and characters.”<sup>49</sup> Treatments have no standard lengths and can run the gamut from one or two pages to twenty-five to thirty page summaries of ideas for television shows or film projects.<sup>50</sup> However, the Copyright Office has consistently taken the position that treatments are unprotectable, stating in 1973 that the “. . . general idea or title of a radio or television show cannot be copyrighted. . . [t]o be acceptable for copyright registration in unpublished form, a script must be more than an outline or synopsis. It should be ready for presentation or performance so that a program could actually be produced from the script deposited.”<sup>51</sup>

Similarly, in 1977, the Copyright Office again asserted that the “. . . general idea or outline for a program is not copyrightable. Copyright will protect the literary or dramatic expression of an author’s idea, but not the ideas themselves.”<sup>52</sup>

The Copyright Office’s statements on treatments reflects the idea-expression dichotomy of copyright law, designed to “protect the expressive elements of an author’s work while guaranteeing subsequent authors the necessary breathing space to make their own contributions by adding to, reusing, or reinterpreting the facts and ideas embodied in the original work.”<sup>53</sup> Whether copyright truly does incentivize individuals in certain industries such as film to create, or whether the “simple, central truth about the motion picture industry is that copyright sustains a production habitat that is fundamentally antithetical to the success of individual creativity” is a debate for another day.<sup>54</sup>

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48. See Nick Gladden, Note, *When California Dreamin’ Becomes a Hollywood Nightmare: Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359 (2003).

49. See GREGORY GOODELL, *INDEPENDENT FEATURE FILM PRODUCTION: A COMPLETE GUIDE FROM CONCEPT THROUGH DISTRIBUTION* 79 (1998).

50. *Id.*

51. Library of Congress Copyright Office, *II Compendium of Copyright Office Practices* (1973).

52. See Camilla M. Jackson, “*I’ve Got This Great Idea for a Movie!*” *A Comparison of the Laws in California and New York That Protect Idea Submissions*, 21 COLUM.-VLA J.L. & ARTS 47, 49 (1996).

53. See Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW U. L. REV. 1607, 1615 (2009).

54. See David Lange, *A Comment on New York Times v. Tasini*, 53 CASE W. RES. L. REV. 653, 655 (2003).

## II. Ideas and Analogues under Copyright Law and Patent Law

Copyright and patent laws protect the expression of ideas, not the ideas themselves. If a court, under a copyright analysis, concludes that the subject matter at issue is an “idea” or analogous to one, no copyright infringement will be found. The idea-expression dichotomy “rests in balancing the interests of society in the free flow of information against the property interests of authors” as protected by the First Amendment and copyright clause of the Constitution.<sup>55</sup> For example, courts conclude that “scenes a faire,” elements and devices in a plot that would be inherent to the genre of film, cannot constitute copyright infringement.<sup>56</sup> Courts also have held that thin copyright will exist in history, which functions as an idea under the idea-expression dichotomy. Thus, films about historical incidents such as the Hindenburg disaster and the Amistad slave revolt have been held not to infringe on literary works on the same topics.<sup>57</sup> In the same vein as history is the news, the subject matter of the famous INS case.<sup>58</sup> In the musical realm, short sequences of notes are not copyrightable.<sup>59</sup> Scholars conceive that the world of ideas is analogous to the public domain commons, “where material is free for anyone to take and use without restriction.”<sup>60</sup> Such restrictions “in the public domain are seen as restrictions on creativity.”<sup>61</sup>

Patent law also does not protect ideas including forces of nature, but does protect useful inventions that meet specific standards for patent protection, such as novelty and nonobviousness. Patent law provides two important types of incentives: “incentive to invent and incentive to disclose.”<sup>62</sup> Patent law’s incentive to disclose is deemed “valuable because it adds information that might have been kept secret to the store of . . . public technical knowledge.”<sup>63</sup> The patent law doctrine of nonobviousness is designed to promote innovation: “[t]he whole point of the doctrine is to separate trivial advances from more substantial advances, and to ensure only the latter receive patents.”<sup>64</sup>

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55. Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 561 (1990).

56. See *Denker v. Uhry*, 820 F. Supp. 722, 731-734 (S.D.N.Y. 1992) (denying copyright infringement of the novel and play “Horowitz and Mrs. Washington” by play and film “Driving Ms. Daisy”).

57. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978-979 (2d Cir. 1980) (involving film on the Hindenburg disaster—no copyright infringement) and *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D.Cal. 1997) (involving film *Amistad* in suit brought by author or a book on the *Amistad* slave ship revolt).

58. See *International News Service*, 248 U.S. 215.

59. See *Newton v. Diamond*, 204 F. Supp.2d 1244 (C.D.Cal. 2002) (Beastie Boys sampling case).

60. See Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMUL. REV. 55, 85 (2007).

61. *Id.*

62. See Katherine J. Strandburg, *The Research Exemption to Patent Infringement: The Delicate Balance between Current and Future Progress*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE, VOL. 2 107, 108 (Peter K. Yu ed., 2007).

63. *Id.*

64. See Gynn S. Lunnery, Jr. and Christian Johnson, *Not So Obvious After All: Patent’s Nonobvious Requirement, KSR, and the Fear of Hindsight Bias*; See *Warner Bros. v. American Broadcasting Co.*,

## A. Unhelpful Doctrines for Idea Submitters

There are a number of related, but typically unhelpful doctrines in the context of idea submissions and entertainment properties. Doctrines such as the misappropriation doctrine, trade secret law and trademark law can be ruled out as alternative claims to idea theft. The classic misappropriation doctrine is moribund and limited to “hot news” to the degree it has any life left. Trade secret law is based on nondisclosure, the opposite of submission. Trademark law offered glimmers of hope under the misattribution doctrine of Lanham Act section 43(a). However, Justice Scalia torpedoed the doctrine in the landmark case of *Dastar*.<sup>65</sup>

### 1. Misappropriation Doctrine

The misappropriation doctrine provides a limited property right to “hot news” and other information as between competitors under the INS case.<sup>66</sup> However, misappropriation claims are pre-empted by copyright protection. Most idea claims in the film/TV context do not fall within a “hot news” exception, and so the misappropriation doctrine, a common law doctrine still good under federal law, is typically unhelpful.

### 2. Trade Secret Law

Trade secret law consist of state law regimes that protects virtually any kind of information that provides a competitive advantage in business that an owner takes reasonable precautions to keep from being disclosed and becoming general knowledge (think about the method of getting those little “m’s” on the M&M candy). Trade secret law is not generally helpful in the idea submission context of entertainment properties, which by nature require disclosure to accrue profitability.

Particularly, new entrants cannot obtain agreements from studios and networks to maintain confidentiality or nondisclosure of their ideas. Indeed, far from securing nondisclosure agreements, new entrants are typically forced to sign standard form contracts that release studios from legal liability for idea misappropriation.

### 3. Trademark Law

Trademark law formerly provided an alternative claim and a modicum of protection to idea submitters where all else fails. Until 2003, if an idea submitter could show that a Hollywood studio had either failed to provide or provided

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720 F.2d 231, 247 (2d Cir. 1983) (holding no copyright infringement of “Superman” character by “Greatest American Hero” TV show and no misappropriation claim either).

65. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

66. *See International News Service*, 248 U.S. 215.

misleading credit on a completed project, such as a film, she could sue for false designation of origin under Lanham Act Section 43(a). Thus in 2000, a plaintiff claimed that ABC copied its idea for a TV show format for a talk show entitled “Girl Friends” through ABC’s show “The View.”<sup>67</sup> Failure by ABC to provide credit as to the creator constituted a separate cause of action from idea misappropriation.<sup>68</sup> Ultimately, the court dismissed plaintiff’s claim for misattribution under section 43(a) of the Lanham Act on summary judgment because it found “The View” was not based on plaintiff’s show.<sup>69</sup> Under settled law of the time, a lack of substantial similarity would defeat a claim of misattribution under Lanham Act.<sup>70</sup>

The U.S. Supreme court, in an opinion by Justice Scalia, effectively destroyed claims for misattribution in the context of creative products in the case of *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>71</sup>

The *Dastar* opinion eviscerated a two-decade line of precedent “that held that failure to give credit to an entertainment product such as a film or a song, or providing misleading credit, was a violation of trademark law.”<sup>72</sup> *Dastar* is a rare example of a cut-back in IP rights in an era of IP expansion; ironically, it most impacts those at the bottom of the entertainment industry hierarchy.<sup>73</sup>

#### 4. Contract Law

Contract law, in theory, provides an avenue for idea protection. The avenue, however, usually leads to a dead-end for idea-submitters: “[c]ourts have placed many obstacles in the path of the idea-person seeking protection under a contract theory.”<sup>74</sup> Contract law forms the basis for the California approach to idea misappropriation in the entertainment context. The easiest—and rarest cases involve an express contract to pay for an idea. The leading case involving and express contract was *Buchwald v. Paramount Pictures*, which involved a suit by best-selling author Art Buchwald for a treatment he submitted to Paramount about an African king who seeks romance and marriage in the United States.<sup>75</sup> Paramount produced the blockbuster film “Coming to America,” but despite an express contract to provide credit and pay Buchwald and his co-author if Paramount made a film “based upon” the treatment, Paramount refused to pay.

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67. *Girlfriend Productions, Inc. v. ABC, Inc.*, 56 U.S.P.Q.2d 1692 (S.D.N.Y. 2000).

68. *Id.*

69. *Id.*

70. *Id.*

71. 539 U.S. 23 (2003).

72. See K.J. Greene, *Trademark Law and Racial Subordination: From Marketing Stereotypes to Norms of Authorship*, 59 SYRACUSE L. REV. 431, 442 (2008).

73. *Id.*, (contending that *Dastar* “penalizes the artist farthest down the ‘food chain’ in the entertainment industry.”)

74. See Samuel M. Bayard, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603,606 (2001).

75. 13 U.S.P.Q.2d (BNA) 1497 (L.A. SUPER. CT. 1990).

Paramount contended first, that it did not make a movie as the agreement specified “based upon” Buchwald’s treatment. Paramount also contended that even if “Coming to America” was based upon Buchwald’s treatment, the film had not recouped its costs and therefore no payment of “net profits” was due and owing. When Paramount released “Coming to America” in 1988, it provided Eddie Murphy with story credit.<sup>76</sup> However, although Murphy had discussed Buchwald’s story with Paramount executives, no story credit was provided to Buchwald.<sup>77</sup>

The Buchwald case illustrates the difficulties that even an established writer faces in obtaining credit and compensation from a major studio where there is an express contract to pay. For new entrants, novice or junior writers or producers, the odds are much more daunting, and contract law, which Justice Scalia blithely posited would protect artists in the attribution context, provides small solace. Indeed, for new entrants and those below “superstar” status in the industry, contracts act as a tool of creative extraction rather than an aid. A claim for breach of an express contract against a studio or network rarely arises; “due to their superior bargaining power over screenwriters, producers will seldom make explicit agreements.”<sup>78</sup>

The custom of the film industry evidences that studios require idea submitters to sign “submission agreements,” which some have said “might better be called waiver-of-all rights-just-to-get-a-chance-to-pitch agreements.”<sup>79</sup> Industry lawyers, in zealous representation of their clients note that parties (studios and production companies) can “preempt” claims by submission contracts with “express language rejecting any agreement can be implied concerning any ideas later discussed between the parties.”<sup>80</sup> The industry custom today is that “producers . . . will typically refuse to read [unsolicited] materials unless the screenwriter agrees to sign a release or waiver, effectively eliminating any legal recourse for idea theft.”<sup>81</sup> Thus contract law is more foe than friend to new entrants with ideas for film or television.

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76. See Adam J. Marcus, Comment, *Buchwald v. Paramount Pictures Corp. and the Future of Net Profit*, 9 *CARDOZO ARTS & ENT. L.J.* 545, 550 (1991).

77. *Id.*

78. See Brian Casido, *Benay v. Warner Bros. Entertainment, Inc.: New Standard Needed for Determining Actual Use*, 41 *GOLDEN GATE U. L. REV.* 327, 328 (2011).

79. See Michael C. Donaldson, *CLEARANCE AND COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION* 17 (3d. ed. 2008).

80. See Mark Rachman & Andrew Keinsner, *Case Study: Forest Park Pictures v. Universal Television*, *LAW 360* (July 9, 2012), <http://www.law360.com/articles/357142/case-study-forest-park-pictures-v-universal-television>.

81. See Julia A. Byren, Note, *When the Million-Dollar Pitch Doesn't Pay a Dime: Why Idea Submission Claims Should Survive Copyright Preemption*, 28 *BERK. TECH. L.J.* 1037, 1046 (2013).

### III. Standards of Protection in Intellectual Property

Standards of intellectual property protection run a spectrum from high to low in terms of how much creativity is required. At the highest end is patent law, although commentators in academia have been quite critical of lowered patent standards in the realm of business method patents.<sup>82</sup> To obtain a patent, an inventor must demonstrate both novelty and nonobviousness. At one point, courts required an extraordinarily high standard of novelty and nonobviousness is which an inventor had to demonstrate a “flash of creative genius” in order to obtain a patent.<sup>83</sup> Today, the standards for patentability are less stringent, but still the strongest of the entire IP family.

In contrast to patent law, copyright law has a low standard of protection—originality. Under the Supreme Court’s articulation of originality, all that is required is “independent creation plus a modicum of creativity.”<sup>84</sup> Under the copyright standard, a creator need only manifest a minimal level of originality. Trade secret law occupies a medium position. Under trade secret law, a trade secret owner had to show efforts to maintain secrecy and economic value in the underlying idea.<sup>85</sup>

Idea submission law evidences a standard that could be high or low, depending on the jurisdiction. The spectrum is evidenced by the approach of idea misappropriation of New York and California. The contract standard of California points to a standard of minimal originality. In contrast, the standard employed under the New York approach is a higher standard requiring both novelty and concreteness.

#### A. The “Law of Ideas”: A Weak and Incoherent Body of Law

The so-called “law of ideas” is actually a misnomer—there is no law of ideas, but rather an analytically incoherent mish-mash of state law doctrines. In all, there are five legal theories for the protection of ideas: property, express contract, implied contract, quasi-contract and confidential relationship. Some doctrines protect ideas on a property rationale, while others focus on contractual or other rationales, such as fiduciary duty. Critics of the property approach

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82. See Katherine J. Strandburg, *What if There Were a Business Method Use Exemption to Patent Infringement*, 2008 MICH. ST. L. REV. 245, 264 (2008) (noting that commentators have argued patents are unnecessary to invent business methods because business methods tend to have very low innovation costs” while imposing “very high social costs . . .”)

83. See *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1942).

84. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). For a summary of critiques of the Feist originality requirement, see Tom Braegelmann, *Copyright Law in and Under the Constitution: A Comparison Between American and German Constitutional Copyright Law*, 27 CARDOZO ARTS & ENT. L.J. 99, 114-115 (2011).

85. See e.g., Mark A. Lemley, *The Surprising Virtues of Trade Secrets as an IP Right*, 61 STAN. L. REV. 311, 317 (2008).

contend that it “makes use of the rhetoric of property without really undertaking to treat ideas as property.”<sup>86</sup> Whatever the basis of the doctrine, on the whole, state law regimes provide very weak protection for raw or undeveloped ideas. Moreover, copyright law definitely does not extend protection to ideas—only the expression thereof. Plaintiffs suing for idea misappropriation are more properly seen as people who do not have colorable copyright claims. Thus idea claims are viewed as a kind of “copyright lite” by those lured “by a potential windfall. . . increasing the number of frivolous claims.”<sup>87</sup>

#### IV. Doctrinal Contours of Idea Law

##### A. California Law — Contract Theory

In California the main basis of idea law protection subsists in establishing an express or implied contract for payment for the idea. Cases involving express contracts to furnish ideas are rare, as anyone with the clout to secure an express contract with a major studio is likely able to avoid conflict which would lead to litigation. For example, individuals such as Oprah Winfrey or John Grisham are not likely to be kicked around even by major studios when such luminaries have a contract in hand. Ironically, established superstars may not even need an express contract, but might rely on a “handshake” deal given their influence.

In contrast, most new entrants seeking to pitch their ideas to studios or networks will be forced to rely on an implied contract theory. An implied contract action, unlike an express contract theory, is based on actions or conduct of the parties, not the words in a written agreement.<sup>88</sup> Whereas breach of an express contract subjects the breacher to expectation damages, under an implied contract action, the remedy is typically restitution for unjust enrichment.

An implied contract action, based on the landmark case of *Desny v. Wildner* consists of 4 elements:

1. Plaintiff submitted ideas to defendant, and defendant received them.
2. Before submission of the idea, plaintiff clearly conditioned disclosure on defendant’s agreement to pay if used.
3. Defendant voluntarily accepted submission on plaintiff’s terms and impliedly agreed to pay for the use of ideas.
4. Defendant used plaintiff’s ideas, and created a work based substantially on them rather than defendant’s own or ideas from other sources.<sup>89</sup>

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86. See Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 701 (2006).

87. See David E. Fink & Dumaris M. Diaz, *Hey That Was My Idea: Understanding Damages in Idea Submission*, 29 COMM. LAWYER 4 (Jun. 2012).

88. See Joseph J. Siprut, *Are Ideas Really Free as Air? Recent Developments in the Law of Ideas*, 51 IDEA 111, 113 (2011).

89. *Desny v. Wildner*, 299 P.2d 257 (Cal. 1956).

An example of a court using the implied contract approach was *Smith v. Recrion Corp.*<sup>90</sup> The plaintiff, employee at the Stardust Hotel, conceived an idea for a recreational vehicle park as part of the hotel.<sup>91</sup> Smith made a brochure detailing his idea, and met with the general manager of the hotel.<sup>92</sup> Smith unequivocally made known to the defendant that he wanted compensation for the idea. After hearing Smith's "pitch," the general manager said he was not interested in the idea. As is the common tagline in idea cases, the defendants opened a RV park two years later called "Camperland." Smith demanded compensation for his idea but the defendants refused.<sup>93</sup>

Smith sued on theories of breach of express contract, implied contract, quasi-contract, common law copyright, and fraud.<sup>94</sup> The court addressed the issue as to the difference between an express contract versus an implied contract.<sup>95</sup> An express contract is stated in words, whereas an implied contract is manifested by conduct. The court could find no facts evidencing a promise for compensation, and so dismissed the express contract claim.<sup>96</sup> Furthermore, plaintiff could not recover on an express contract theory for two reasons. First, Smith's idea was entirely unsolicited and voluntarily disclosed before the parties discussed compensation.<sup>97</sup> Secondly, the court refused to find consideration after the disclosure, because at common law, past consideration is no consideration.<sup>98</sup>

As for plaintiff's implied contract claim, the court would have to find that both parties intended to make a contract that they exchanged promises. Here the court could not find either intent to contract or an exchange of promises, so it dismissed the implied contract claim.<sup>99</sup> As to why Smith could not prevail on a common law copyright theory, the court insisted that common law copyright, a doctrine now preempted by the 1976 Copyright Act, would require a showing of concreteness and novelty.<sup>100</sup> According to the court, an idea is concrete when it is ready for immediate use without any embellishment.<sup>101</sup> The court seemed confused by the meaning of originality.<sup>102</sup> It believed that novelty means originality and perhaps innovative character. The brochure did not meet the test of concreteness because it was not in ready for immediate use—just a raw idea, undeveloped in character. As for novelty, the court never reached this issue.<sup>103</sup>

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90. *Smith v. Recrion Corp.*, 541 P.2d 663 (Nev. 1975).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Smith*, 541 P.2d 663.

96. *Id.* at 665.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Smith*, 541 P.2d at 665.

101. *Id.*

102. *Id.*

103. *Id.*

So, one might ask how Smith could have secured such protection for his idea. According to the court, one cannot disclose an idea without first securing a promise for compensation.<sup>104</sup> However, this is an unworkable standard—a corporation would rarely, if ever, pay in advance for an idea it has not yet seen or heard. The court would require a plaintiff, such as Smith, to have to sufficiently detail the idea by providing architectural plans for the RV park, research studies, and maps. This begs the question of why one would need to bring an idea misappropriation claim at all—sufficiently developed ideas are eligible for copyright protection.

The implied contract theory in the idea submission context is burdened with numerous caveats and exception, wrought from the rather convoluted law of unjust enrichment. One well-established limit is the volunteer doctrine—it is well-established that “volunteers”, also known as “officious intermeddlers” cannot recover in restitution.<sup>105</sup> The law gives particularly harsh treatment to unsolicited submissions—which are rarely found to evidence an implied contract. An idea submitter cannot merely blurt out her idea first, and ask for compensation afterwards. Analysts note that the “law will not, from demands stated subsequent to an unconditional disclosure of an idea, imply a promise to pay for the idea, for its use, or for its prior disclosure.”<sup>106</sup> California law explicitly denies protection on the basis of lack of consideration where an offeree does not have “an opportunity to reject. . .the proffered conveyance of the idea before it is conveyed.”<sup>107</sup>

## B. New York Law — Property Theory

In contrast to California law, New York law focuses on the quality of the idea seeking protection. Under the New York approach, an idea can be property if it meets two criteria: novelty and concreteness.<sup>108</sup> The novelty requirement in New York is generally traced to *Downey v. General Foods Corp.* In *Downey*, the court refused to protect the plaintiff, who had submitted an unsolicited idea submission to a food company for a Jell-O called “Mr. Wiggle.”<sup>109</sup> Although the “wiggle” element was used to great effect in subsequent ads featuring Bill Cosby, the *Downey* court held that “[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use.”<sup>110</sup>

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104. *Id.*

105. For an exploration of the volunteer doctrine in the IP context, see Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution and Intellectual Property*, 21 J. L. STUDIES 449 (1992). Professor Gordon contends that “the reason for denying recovery in volunteer cases do not apply to most conflicts over intellectual property.” *Id.*, at 463.

106. See Elliot Axelrod, *Ideas, A Dime a Dozen or Worth Protection?*, 13 U. DEN. SPORTS & ENT. L.J. 3 (2012),

107. See CAL. CIV. CODE §1584 (2012).

108. See *Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2nd. Cir. 2000).

109. See *Downey v. General Foods Corp.*, 286 N.E.2d 257 (N.Y. 1972).

110. *Id.*

The draconian zenith of the novelty requirement came in the case of *Murray v. National Broadcasting Company, Inc.*, the infamous “Cosby Show” case.<sup>111</sup> Murray, an employee of NBC’s sports division, proposed creating a new situational comedy to be called “Father’s Day” in a two-page memo to NBC entertainment division executives.<sup>112</sup> Murray’s treatment proposed “wholesome family entertainment that will focus on the [closely-knit] family life of a Black American family [in a] contemporary urban setting.”<sup>113</sup> The father, in Murray’s vision, would be played by Bill Cosby. Murray informed NBC executives that he expected compensation if they used his idea, and credit, and employment as executive producer on the show.<sup>114</sup> The case is a cautionary tale in the context of taking steps to protect ideas. It is said that “the best way for someone to keep a concept safe from future misappropriation is to insist that as a condition of communicating the proposal, one expects to be compensated should the concept be used . . .”<sup>115</sup> Murray expressly stated his desire to be compensated, provided a detailed concept, had numerous meetings with network executives, and still lost his idea.<sup>116</sup>

NBC “passed” on Murray’s concept, but four years later released “The Cosby Show”—which went on to become the most watched TV show in television history. The Murray court held that Murray’s idea misappropriation claim did not meet New York law’s requirement that an idea be both novel and concrete to qualify for protection.<sup>117</sup> The idea here lacked novelty because:

1. Cosby did an interview in 1965 that mentioned a similar idea;
2. The idea of TV show about a stable, middle class Black family with Bill Cosby as star is not novel and merely represents an adaptation of existing knowledge, a variation on the basic theme of situation comedy.<sup>118</sup>

The *Murray* court essentially viewed the Cosby Show as the Brady Bunch or Partridge family in black face. Despite the fact that NO network television show had ever portrayed an intact, nonstereotypical African American family in prime time during the entire history of television, the *Murray* court found the idea of such a family to be not novel.<sup>119</sup> The shows that preceded Cosby all had stereotypes of one sort or another—the heavy-set black matriarch in “That’s My

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111. *Murray*, 844 F.2d at 988.

112. *Id.*

113. *Id.*

114. *Murray*, 844 F.2d at 989-90.

115. See Ivan Parron, *Protecting Your TV Show Idea*, LANDSLIDE ABA MAG. Vol. 6, No. 5, pg. 4 (2013).

116. *Murray*, 844 F.2d at 989-90.

117. *Id.* at 994.

118. See *Murray*, 844 F.2d at 994.

119. *Id.*

Mama,” the dysfunctional father in “Sanford and Son,” the ghetto projects setting and buffoonish character of “J.J.” in “Good Times.” New York law still requires novelty for “all theories of idea protection other than post-disclosure contracts . . . .”<sup>120</sup> However, cases after *Murray* have “systematically weakened the novelty requirement.”<sup>121</sup> Under current standards, under an express or implied contract, New York courts require only that the idea be novel to the buyer, not necessarily to the world.<sup>122</sup> New York courts have also approved of the use of a Desny-style implied contract action where the parties are in relationship.<sup>123</sup> However, “for a quasi-contract/unjust enrichment claim, or a claim arising from a breach of a confidential relationship, the idea must be absolutely novel; it is not sufficient that it is unknown only to the recipient of the disclosure.”<sup>124</sup> Indeed in a recent case alleging that Arianna Huffington misappropriated the idea for the *Huffington Post*, a New York judge refused to dismiss the claim, noting that novelty could not be decided on summary judgment.<sup>125</sup> However, the great bulk of idea cases are dismissed by the New York courts for lack of novelty, which must be proved by a plaintiff unless there is a “pre-disclosure contract expressly waiving novelty . . . a post-disclosure contract entered into after the buyer has had time to evaluate the idea . . . or unequivocal conduct by the parties from which an express waiver can be implied.”<sup>126</sup> Invariably, studios and networks contend that they independently created ideas submitted previously by new entrants. Independent creation is a viable defense to idea misappropriation.<sup>127</sup>

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120. See Mary LaFrance, *Something Borrowed, Something New: The Changing Role of Novelty in Idea Protection Law*, 34 SETON HALL L. REV. 485, 493 (2004).

121. See Kenneth Basin, *“I Could Have Been A Fragrance Millionaire”: Toward a Federal Idea Protection Act*, 56 J. COPYRIGHT SOC’Y U.S.A. 731, 737 (2009).

122. *Id.* See also, *Nadel*, 208 F.3d 368 (setting standard that idea need not be novel to the world, just to the recipient).

123. See *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424 (2nd Cir. 2012).

124. See Mary LaFrance, *Something Borrowed, Something New: The Changing Role of Novelty in Idea Protection Law*, 34 SETON HALL L. REV. 485, 487-500 (2004) (positing that the “requirement of novelty. . . may be viewed as substitute for the express or implied-in-fact assent that would be needed for a true contract to be formed”).

125. The suit against the *Huffington Post* settled for an undisclosed sum. See Eriq Garnder, *Arianna Huffington Settles Website Theft Lawsuit*, HOLLYWOOD REPORTER (May 15, 2014), [www.hollywoodreporter.com/thr-esq-huffington-settles-website-theft-704536](http://www.hollywoodreporter.com/thr-esq-huffington-settles-website-theft-704536).

126. See William O. Knox, *The Role of Novelty in a California Idea Submission Case*, 11 UCLA ENT. L. REV. 27, 39 (2004).

127. See *Kienzle v. Capital Cities/American Broadcasting Co.*, 774 F. Supp. 432 (E.D. Mich. 1991)(TV series “Have Faith” not copied from author’s sixteen page treatment submitted to defendant; none of those involved in developing defendant’s show had seen plaintiff’s treatment).

### C. Television Programming Context

Reality television is one of the fastest growing segments of the television, consisting of “real-life participants engaged in activities ranging from surviving on a desolate island to surviving in a household of disparate socioeconomic statuses.”<sup>128</sup> Cases involving reality television programming demonstrate that the incoherence and inconsistency of state-based idea law leads to disparate results that negatively impact idea submitters.

## V. Submission/Misappropriation Disputes

### A. TV Shows

Reality TV shows have been the subject of much litigation, most of which fails to provide relief to idea submitters, as a case involving Ozzy Osborne shows.<sup>129</sup> Binkow, a producer claims that he registered a treatment with the Writer Guild regarding “a real-life docu-sitcom . . . [that would] showcase the trials and tribulations of real-life rock star Ozzy Osbourne based on the Osbourne family, and met with couple and execs at Miramax TV in 1999 and 2000 to pitch his idea.”<sup>130</sup> The plaintiff claims that the Osbournes development of the show constitutes misappropriation of his idea and concept.<sup>131</sup>

### B. Characters

In *Wrench LLC v. Taco Bell Corporation*, plaintiffs developed a cartoon character called “Psycho Chihuahua” described as “feisty, edgy, confident Chihuahua with a big dog’s attitude” and marketed the Chihuahua on t-shirts and other goods.<sup>132</sup> Plaintiffs pitched use of the dog to Taco Bell executives at a trade show. The parties negotiated; Taco Bell conceded that evidence existed that parties had a basic agreement that Taco Bell would compensate plaintiffs if it used the Chihuahua idea concept or image.<sup>133</sup> Taco Bell used the image in commercials with no compensation to plaintiffs, who sued for breach of implied contract and idea misappropriation.<sup>134</sup> The District Court dismissed the case on summary judgment finding that the plaintiffs did not establish an implied contract, and even if they had, the Copyright Act preempts such claims.<sup>135</sup> Plaintiff asserted rights to prohibit Taco Bell’s use of the cartoon dog as a derivative work, which is equivalent to copyright law exclusive right to produce derivative works.<sup>136</sup>

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128. See Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223, 224 (2006).

129. See *Binkow v. Sharon Osbourne Management* (filed July 2002 in L.A. Superior Ct).

130. *Id.*

131. *Id.*

132. *Wrench LLC v. Taco Bell Corp.*, 51 F. Supp. 2d 840 (W.D. Mich. 1999).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

The Sixth Circuit reversed, finding no preemption on the equivalency prong of preemption.<sup>137</sup> The court noted that an extra element beyond the exclusive rights provided by copyright law existed—the promise to pay for the idea.<sup>138</sup> In the jury trial that followed, the jury awarded the plaintiffs a whopping \$30 million.

### C. Theme Parks

Every now and then, an idea submitter hits the jackpot. In *All Pro Sports Camp v. Walt Disney Co.*, a Florida state court jury found that Walt Disney Co. misappropriated the idea of a sports theme park from a former baseball umpire and an architect, and awarded \$240 million in damages.<sup>139</sup> Disney listened to a pitch about a sports-themed park from the plaintiffs, and evidence revealed that Disney engaged in two hundred phone calls with the plaintiffs, inferential proof that Disney both had access to the idea and that plaintiff was not acting officiously.<sup>140</sup>

The plaintiffs claimed eighty-eight similarities between its proposed park, called “Sports Island,” and the one subsequently developed by Disney, which Disney called the “Wide World of Sports.”<sup>141</sup> The trial court dismissed the case initially, but on appeal the court reversed, finding that the question of novelty was one of fact, and allowed the case to go to the jury.<sup>142</sup> The case later settled for an unspecified amount, but thought by analysts to be in the range of \$10 million.<sup>143</sup> In a telling twist, after the *All Pro Sports Camp* case, Florida enacted a statute that in essence barred a claim for idea misappropriation in the absence of an express contract.<sup>144</sup> A representative that received the most campaign contributions from Disney sponsored the bill.

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137. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 459 (6th Cir. 2001). The court also applied a California-style approach as to the quality of the idea, finding that novelty was not required to prevail (see discussion beginning page 459). See also Jonathan H. Ancshell, Jennifer B. Hodlik & Allison S. Roherer, *The Whole Enchilada: Wrench LLC v. Taco Bell Corp. and Idea Submission Claims*, 21-WTR COMM. LAWYER, at 2.

138. *Wrench*, 256 F.3d at 456.

139. *All Pro Sports Camp, Inc. v. Walt Disney Co.*, No. 97-102 (Fla. 5th DCA filed Feb. 26, 1999).

140. *Id.*

141. *Id.*

142. *Id.*

143. Anthony Colarossi & Robert Johnson, *Disney Settles All Pro Sports Case*, ORLANDO SENTINEL (Sept. 25, 2002), [http://articles.orlandosentinel.com/2002-09-25/news/0209250167\\_1\\_walt-disney-pro-sports-sports-camps](http://articles.orlandosentinel.com/2002-09-25/news/0209250167_1_walt-disney-pro-sports-sports-camps).

144. See Fla. Stat. §501.972 (2006) (providing that “the use of an idea . . . that is not a work of authorship protected under federal copyright law does not give rise to a claim or cause of action . . . unless the parties to the claim . . . have executed a writing sufficient to indicate that a contract has been made between them governing such use.”).

## VI. Advantages of a Federal Regime

It has been said that “[a]s a matter of policy, Congress has decided not to extend federal protection to ideas . . . [and as result idea submitters] . . . have historically relied on various state law theories to protect their ideas.”<sup>145</sup> This policy is misguided; idea misappropriation cases have national consequences—if submitters do not submit ideas, the national store of film, television, video games and other products of the mind is reduced. Because the scope of idea misappropriation has national ramifications, a federal regime is appropriate to address it. Providing a single standard, or at least something like it, would benefit the “little guy” idea submitters and the big studios, networks and production companies. Some advantages are listed to below.

### A. Avoidance Of Forum-Shopping

The convoluted patch-quilt of idea laws creates a state of flux, and encourages flagrant forum shopping. A perfect example of this was an absurd lawsuit by radio/media mogul Howard Stern against a television producer of a short-lived reality themed show called “Are You Hot: The Search for America’s Sexiest People.” Stern claimed that the show was a rip-off of a segment on his radio and TV show entitled “The Evaluators.” Preposterously, Stern “alleged that Are You Hot incorporated many elements similar to Evaluators, such as three-judge panel, a ten-point rating system, and having a single male host.”<sup>146</sup> How this basic idea—the notion of men evaluating women’s bodies—could ever be protected must have been evident to the very prominent Hollywood law firm Stern hired. Stern’s complaint began, incredulously, with a claim for violations of California’s unfair practices consumer protection statute.<sup>147</sup> Of course Stern’s entire base of operations is in Manhattan, but aware of the novelty/property approach of New York courts, he and his lawyers chose a California venue.

Lawyers will of course take the opportunity to forum shop in an adversarial system. However, as Professor Moore notes, “[i]t is a fundamental tenet of any legal system that the law ought not be manipulable and its application ought to be uniform . . . manipulability of the administration of law thwarts the ideal of neutrality in a system whose objective is to create a level playing field for resolution of disputes.”<sup>148</sup>

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145. See Jonathan Richard Sandler, Note, *Idea Theft and Independent Creation: A Recipe for Evading Contractual Obligations*, 45 LOY. L.A. L. REV. 1421, 1425 (2012).

146. Kent R. Raygor & Edwin Komen, *Limitations on Copyright Protection for Format Ideas in Reality Television Programing*, MEDIA LAW RESOURCE CENTER, 97, 111 (2009) [http://www.sheppardmullin.com/media/article/806\\_Reality%20Format%20Paper.pdf](http://www.sheppardmullin.com/media/article/806_Reality%20Format%20Paper.pdf).

147. See *Complaint, Stern v. Telepictures Productions Inc.*, No. BC 292018 (C.D. Cal. 2003).

148. Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI-KENT L. REV. 1325, 1332 (2002).

## B. Coherent and Consistent Standards

Idea misappropriation lawsuits have been bedeviled by the problem of copyright preemption where courts have been all over the map. The fact that some courts apply a property/novelty approach and others a contract/relationship approach also leads to a very inconsistent standard for idea claims. One standard would better serve both sides on the idea submission divide, but more importantly, if we take seriously the notion of IP incentives, the idea area should be so unprotected and rife for exploitation by institutional elites like studios. As it stands, there is one consistent standard—that idea submitters are not serious creators, and their claims of appropriation are likely suspect.

## VII. Conclusion

Idea protection under state law regimes is woefully inadequate in protecting new entrants to Hollywood. It has been said that both the New York and California approaches to idea misappropriation, while differing, “[b]oth threaten the free flow of ideas necessary to the progress and development of the arts,” by either under or over-protecting ideas.<sup>149</sup> Although many analysts, myself included,<sup>150</sup> have criticized the break-neck expansion of intellectual property, the treatment of new writers and producers of independent film and television in some respects mirrors the mistreatment of African American artists under IP law. In a deeply ironic twist, there is strong evidence that some of the most popular television shows about African Americans, including “The Jeffersons” and “Good Times”, as well as the ground-breaking “Cosby Show” were created by—and stolen from—African American idea men. Idea protection law, like the rest of IP, should look to the bottom of the production chain, where most creativity exists, rather than mechanically protecting the interests of noncreative and hierarchical distributors such as major studios and networks.

The strong assumption that Hollywood routinely steals the creativity of “idea men” and women is known to new entrants, and the chilling effect this could have on idea submissions is one that leaves society worse off for creativity. Because ideas are part of the grander scheme of protection for creative works that lead to copyright, a chill at the idea stage is a chill on incentive theory that ostensibly powers copyright law. If we take incentive theory seriously, the underprotection of ideas is a serious problem: the “television industry relies heavily on the process of receiving and exploiting pitched formats.”<sup>151</sup> Without protection, “there is little incentive to invest in creative ideas . . . reducing any incentive for innovation. “Furthermore, in the spirit of Locke, “[c]reativity without a property right, or at the very least attribution, has been compared to the very alienation of one’s self.”<sup>152</sup> For these reasons, an idea regime that recognizes that novel ideas have value and cannot be freely appropriated is highly preferable to current, chaotic regime of idea protection.

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149. Peter Swarth, *The Law of Ideas: New York and California Are More Than 3,000 Miles Apart*, 13 HASTINGS COMM. & ENT. L.J. 115, 118 (1990).

150. See K.J. Greene, *Intellectual Property Expansion: The Good, the Bad and the Right of Publicity*, 11 CHAPMAN L. REV. 521, 543 (2008).

151. See Jay Rubin, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 665 (2006).

152. See Orly Lobel, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS & FREE RIDING 169 (2013).\*