

TWENTY-FIVE WORDS OR LESS:¹ HOW HOLLYWOOD'S PITCH PROCESS HAS CHANGED THE LAW OF IDEA PROTECTION

REBECCA GIROLAMO*

I. INTRODUCTION

*"Oh yes, the writer. There always had to be a writer." Can you imagine that? . . . That's one of the things that made it very tough for me when I came to Hollywood. I realized what the status of the writer was.*²

In the first thirty minutes of *The Big Picture*, an unknown film-school graduate wins the attention of a studio executive at his graduation showcase.³ The smooth-talking executive invites the wide-eyed graduate to come to the studio's office and pitch an idea for a script. The graduate excitedly attends a series of pitch meetings, hoping that this will be his big break. He buys a Porsche and dumps his girlfriend for a nubile young actress. Yet, at each pitch meeting, the graduate is interrupted by the studio executive or a member of his staff with a "suggestion" for the graduate to incorporate into his idea. By the end of the movie, his black-and-white country film becomes an eighties beach-house comedy. The graduate never objects meaningfully to any suggestion, hoping for a shot to make "his" idea and hit the big time. In the end, the studio drops his movie and he is left looking for any work to make ends meet.

This story has a happy-ending, in which the graduate finds an independent production company to make his dream script. Consider,

1. THE PLAYER (Fine Line Features 1992). Twenty-five words or less is how much "time" the main character, a studio executive, will give to screenwriters and producers for a pitch. Not surprisingly, the studio executive is later harassed by one of the many screenwriters whose pitch he once rejected.

* J.D., 2013, University of Southern California Gould School of Law; B.F.A. Film and Television Production 2001, New York University Tisch School of the Arts. I would like to thank Professors Rebecca Brown and Jonathan Barnett for their comments and guidance throughout the process. Lastly, a special thanks goes to Neil Forman, whose creativity and perseverance in the entertainment industry inspired this Note.

2. This is a recounting of an observation made by one writer after being ignored at his film's premier during the "Golden Age" of the studio system. IAN HAMILTON, WRITERS IN HOLLYWOOD 1915-1951, at 50 (1990).

3. THE BIG PICTURE (Columbia Pictures 1989).

however, an alternative: what if, after the studio “dropped” the idea for his script, it actually produced the graduate’s film? As we can see from the movie’s plot, an unknown writer-director with an “idea” has very little bargaining power with the studio. He had so little power that the studio team completely distorted his original idea. If this were to happen, who would own the final product? The graduate revealed the idea, but the end product was a complete distortion of that idea. Can he still claim to own any part of it?

This is the basic set-up for the conflict in idea protection that exists within the entertainment industry. Although the scenario above engenders immediate support for the unknown graduate, the conflict is not so easily resolved. On one hand, the law should protect the unknown writers and idea submitters because of their clear disadvantage and lack of bargaining power against the all-powerful studios. On the other hand, protection for ideas is contrary to the goals of the U.S. Constitution. The Copyright Clause of the Constitution states that Congress is empowered to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴ From this clause comes the principle that ideas are as “free as air,”⁵ specifically leaving them in the public domain to encourage creators to use those ideas to further the progress of the arts. In the idea submission context, this creates a fundamental conflict with the need to protect the often-powerless idea submitters from the studios, given that the Constitution applies only to “Writings and Discoveries.”

Since the studios were established at the beginning of the twentieth century, the law has struggled to protect writers while preserving the fundamental goals of the Constitution. From this struggle, two major legal theories developed, but not without problems. First, state law has developed protection for writers under a breach of implied-in-fact contract theory for an idea’s disclosure. Second, federal law has attempted to further constitutional goals by including a preemption provision in the Copyright Act of 1976.⁶ These two doctrines have created a great deal of confusion, given that they do not fit together neatly and have vague standards that leave much room for judicial interpretation.

4. U.S. CONST. art I, § 8, cl. 8.

5. Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119, 119 (1954) (citing *Fendler v. Morosco*, 171 N.E. 56 (N.Y. 1930)).

6. 17 U.S.C. § 301 (2006).

Prior scholarship has come down on both sides of the issue. Proponents of idea protection argue that the unequal bargaining power of the writers mandates protection, given that a writer's livelihood is often generated solely from ideas, treatments, and scripts.⁷ In their view, lack of protection means that the studios will have unparalleled and unfair access to the flow of ideas without the cost of any labor.⁸

Opponents of idea protection argue for preemption in favor of constitutional goals. They claim that giving any protection to ideas is at odds with the policies set forth by the Constitution and the Copyright Act, that there are only so many ideas to go around, and that giving protection to writers will lessen the progress of the arts by taking ideas out of the public domain.⁹ Some critics have even argued that the implied-in-fact contract doctrine is nothing but a "fictional legal obligation" intended to punish idea recipients for "reaping" where they have not sown.¹⁰

This Note will examine and trace the law of idea protection as it developed in response to the changing business practices throughout the history of the motion picture and television industries in both California and New York—the epicenters of the industry. Part II introduces the writer's origins and role under the Studio System, and discusses the basic conflict in idea protection and the beginnings of the legal protection of ideas. Part III will examine the industry after the end of the "Golden Era" when the studios were subjected to antitrust proceedings, the writer's place in it, and how various state law protections curtailed the rampant practice of plagiarizing ideas. Part IV will examine Post-War Hollywood and how the law responded to the rise of the writers' union and freelance employment by creating the implied-in-fact contract theory for idea protection. Part V will discuss how the Copyright Act of 1976 and its preemption provision interact with idea protection and have created inconsistencies in application amongst the circuits, with many courts making case-by-case decisions, resulting in instability for both claimants and studios. Part VI will look at the current state of the law in recent cases that illustrate that instability, particularly in California and New York, and argue that both states' attempts to protect writers have backfired. Part VII will summarize how the pitch process has changed as a result of these legal

7. See Brian Devine, Note, *Free as the Air: Rethinking the Law of Story Ideas*, 24 HASTINGS COMM. & ENT. L.J. 355, 381 (2002).

8. See *id.*

9. *Id.* at 363.

10. 6 BILL PATRY, PATRY ON COPYRIGHT § 18:28 (2013).

inconsistencies, examine several proffered solutions, and argue that to achieve balance between idea protection in accord with constitutional goals, a stricter standard should be applied to both preemption and implied contract claims, which will promote stability for both writers and studios, and ensure that only meritorious claims are pursued.

II. THE GOLDEN AGE?: ORIGINS OF THE INDUSTRY AND ITS IDEA SUBMITTERS

Understanding the treatment of the writer today starts with looking at the writer's humble beginnings. In the early 1900s, Hollywood was a newborn industry with few rules, started by several hard-working immigrants with business savvy. Most of their names are now the stuff of Hollywood legend: Paramount's Adolph Zukor, William Fox, the original Warner Brothers, and a handful of others at the "minor studios."¹¹ These men created a kind of factory system for the movies, establishing their dominance over every aspect of the industry using vertical integration, controlling all aspects of moviemaking from development through exhibition.¹² The rise of the studio system saw the studios hiring massive amount of workers to staff their motion picture factories, including actors, directors, craftsmen, cameramen, and, of course, writers.¹³

A. IDEA SUBMITTERS AND WRITERS IN THE STUDIO SYSTEM

1. The Silent Film Era

When the studio systems were developing, silent movies were the norm.¹⁴ Ironically, writers in the studio story departments were, at the time, nothing *but* idea men, "mere provider[s] of ideas and synopses."¹⁵ Additionally, studios often advertised to bring in outside material; some held "scenario contests" and all accepted unsolicited submissions.¹⁶ Unlike in today's world, Anita Loos, one of the first "name" screenwriters, got her job from sending in an unsolicited submission, staying with the studio largely because she got along well with actors and had a talent for writing title cards.¹⁷ The studios also monitored Broadway, popular magazines, and

11. DOUGLAS GOMERY, *THE HOLLYWOOD STUDIO SYSTEM: A HISTORY* 11, 37, 46 (2005).

12. *See generally id.* The "majors" had a system of vertical integration that persisted until the Paramount anti-trust hearings in the 1950s.

13. *See* HAMILTON, *supra* note 2, at 28.

14. *See id.* at 14–15.

15. *See id.* at 2.

16. *Id.* at 3.

17. *Id.* at 7–9.

bestsellers lists for potential material.¹⁸ They openly stole ideas; their “cheerful custom” until the passage of the Copyright Act of 1909 tightened copyright laws.¹⁹ Essentially, because there were no rules, they created their own.

Therefore, early on, it was the director who really had a hand in developing the proffered scenario by making things up as filming went on, and was thus considered the true artist of the motion picture.²⁰ In fact, most working writers, largely playwrights and newspapermen from New York, regarded the movies with a kind of contempt.²¹ Cecil B. DeMille’s brother, William, observed that:

When I left New York for Hollywood in 1914, my friends unanimously agreed that I was committing professional hare-kari . . . that if my name were ever mentioned in the future, it could only be . . . by people lost to all sense of shame and artistic decency. This attitude . . . merely reflected the way in which motion pictures were regarded at the time by all legitimate writers, actors, and producers.²²

During the silent movie era, story departments worked in a collaborative manner and each story editor filled a role: story line, gagman, or scenarist.²³ Future director Frank Capra, who got his start as a writer, recalled that he was told that he should “scribble out [his] own ideas, but no scripts for directors.”²⁴ Few people got screen credit because the ideas generated belonged to the studio, the industry factory, not the screenwriter. Needless to say, as studio contract screenwriters, looked down on by “real” writers and rarely receiving screen credit for their ideas, their bargaining position was at the bottom of the barrel and the foundation was laid for the future struggles with idea protection.

2. The Talking Picture

With the advent of “talkies” in 1928,²⁵ dialogue and scripts took on a new importance and so “[a]n S.O.S. was beamed to the East . . . for . . . real writers, to distinguish them from . . . the idea men and the rest of the

18. *Id.* at 3.

19. *Id.* See *infra* II.B.1.

20. See HAMILTON, *supra* note 2, at 3.

21. See *id.* at 3–4.

22. *Id.*

23. See *id.* at 13.

24. *Id.*

25. The first “talkie” was *The Jazz Singer*, the first spoken line of which was “You ain’t heard nothing yet!”

colorful if illiterate silent contingent.”²⁶ The formerly contemptuous playwrights and newspapermen, invited to Hollywood, begrudgingly came to the studios for the money, which was significantly higher than that of a playwright.²⁷ However, the studio was still a factory, and the transplanted writers were subject to the same conditions and segmented roles as the silent-era idea men.²⁸ Their salaries, however, were considerably higher because of their more elevated status as “real writers.”²⁹ Even so, many of these staff screenwriters never got credit for their ideas or their writing, and the entire screenwriting profession had little protection from all-powerful studio management: Hollywood was an “open shop” town, largely and purposely free of unions.³⁰ Although electricians, engineers, and grips were protected by the International Alliance of Theatrical Stage Employees (“IATSE”), which signed a Basic Minimum Agreement in 1926, neither writers, nor actors, nor directors had any union protection.³¹ In fact, in 1927, shortly after reluctantly signing the IATSE agreement, the studio heads, led by Louis B. Mayer, established the Academy of Motion Picture Arts and Sciences, which purported to be a union covering producers, directors, writers, and technicians.³² Fundamentally this was a company union, meant to stave off organization and unionization of skilled craftsmen: its only interest was to benefit the studios and to increase their overall control.³³ In the end, the studios still controlled everything and everyone else was under contract, overpaid, and overexploited.

In 1933, the “Depression proof” movie industry finally suffered financial losses. Because the “talkies” had required a huge investment in installing sound systems in every theatre across the country, and because Depression-era audiences were finally staying home, the studios began to lose money for the first time.³⁴ More significantly, the factory-like studio system helped create the conditions for its own financial crisis with overproduction and high overhead.³⁵ In 1933, the struggling studios simply

26. HAMILTON, *supra* note 2, at 43.

27. *Id.* at 43–45.

28. *See id.* at 71–72.

29. *See id.* at 50–51.

30. NANCY LYNN SCHWARTZ & SHEILA SCHWARTZ, *THE HOLLYWOOD WRITERS’ WARS* 7–8 (1982).

31. *Id.* at 8.

32. *Id.* The Academy, now, of course is famous mostly for the annual Oscars, so it appears that the Screen Actors’ Guild (“SAG”), the Writers’ Guild of America (“WGA”), and the Directors’ Guild of America (“DGA”) have all forgiven the studios for attempting to suppress their rights.

33. *Id.* at 8–9.

34. *Id.* at 5–6.

35. *Id.*

could not meet their enormous payroll.³⁶ Consider this observation from Samuel Goldwyn:

The Industry is filled with incompetents who are coasting along on their reputations and receiving fat salaries. . . . A writer who turns in a good story . . . is worth all the money he gets . . . [T]he contract system should be eliminated . . . writer[s] should be free-lance.³⁷

Along those same lines, screenwriter and later blacklisted writer, Dalton Trumbo advocated that writers should be freelance, arguing that with choice, the quality of entertainment would rise and the profits would rise correspondingly.³⁸ The studios had a different approach: an eight-week industry-wide pay cut.³⁹

During this time, the powerless creative talent in the industry had no option but to accept the pay cut.⁴⁰ After all, the producers and studios themselves led the talent's collective bargaining. On the other hand, IATSE and its members refused the pay cut entirely, which did not go unnoticed.⁴¹ The writers and idea men, encouraged by IATSE's stand against the studios, began organizing their own union: The Screenwriters' Guild.⁴² For the next six years, the Screenwriters' Guild ("SWG") struggled to ally itself with East Coast organizations and gain recognition from the studios, which it did not officially achieve until after the New Deal era National Labor Relations Board forced the studios to recognize the union.⁴³ The first Producers-Screenwriters Minimum Basic Agreement was not signed until 1940.⁴⁴ Writers were now protected by the Guild and able to work outside of the studio system as freelancers, but what about the writers whose specialties were ideas, scenarios, and treatments? And what of the ideas stolen from the new freelancers' scripts?

36. *Id.* at 9.

37. *Id.* at 6.

38. *Id.* at 9.

39. *Id.*

40. *Id.* at 10.

41. *Id.* The IATSE's refusal to take the pay cut caused the studios to shut down for a day—the first closure of that nature in movie history.

42. *Id.* at 29.

43. *Id.* at 123.

44. TIMELINE, WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org/content/default.aspx?id=4803> (last visited Mar. 10, 2013). The contract included a minimum pay rate of \$125 per week, assurances for minimum periods of employment, controlled layoffs, arbitration for credits controlled by the SWG, and speculative writing was outlawed. SCHWARTZ & SCHWARTZ, *supra* note 30, at 173.

3. The End of the Golden Age

Although the studios had managed to monopolize the motion picture industry since its inception, the beginning of the end came in the mid-1940s when the United States commenced antitrust proceedings against all of the studios.⁴⁵ The vertical integration that had paved the way for the Industry's success was the very thing cited by the United States as proof of a conspiracy to monopolize.⁴⁶ In 1948, the Supreme Court ordered the studios to create and implement a divorcement plan immediately.⁴⁷

Concurrent with the implementation of the studios' divorcement plans, the national audience that had so rabidly supported the movies began to decrease for several reasons.⁴⁸ First, following the end of the World War II, many families relocated to the suburbs and away from the urban downtown movie palaces.⁴⁹ Second, the advent of television encouraged families to become stay-at-home viewers rather than going out to the theatres.⁵⁰ These factors combined caused a major loss of revenue for the studios, which in turn forced cuts to production.⁵¹ As a result, the studios instituted a consolidation process, making massive cuts to staff, including talent.⁵² The contract system was ending. The nonexclusive freelance contract became the norm, and the agent became an important part of business transactions.⁵³ For writers and idea submitters, this meant that they were now hired on a per-project basis, they had the ability to join a union, and the television market opened new avenues to employment.⁵⁴ It seemed that things were looking up. The question was: were they any better off than under the studio system?

45. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140–41 (1948). The major studios were charged with attempting to monopolize and monopolizing the production of motion pictures, and the minor studios for collusion. *Id.* See also DREW CASPER, *POSTWAR HOLLYWOOD 1946–1962*, at 39–41 (2007).

46. See *Paramount*, 334 U.S. at 141 (“It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants violated” sections 1 and 2 of the Sherman Antitrust Act.).

47. CASPER, *supra* note 45, at 41.

48. *Id.* at 43. For example, in 1946, 90 million Americans attended the movies every week. By 1956, that number had dropped to just over 46.5 million. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 44, 46.

53. See *id.* at 46.

54. See *id.* at 43, 46; HAMILTON, *supra* note 2, at 95.

B. LEGAL PROTECTION OF IDEAS

While the writer's role in the motion picture industry evolved, so too did the limited legal protections that were available for their ideas. As a result, two sources of law developed to help insure that writers maintained some level of ownership over their ideas by helping them to receive their deserved credit and compensation: (1) the Copyright Act of 1909 and (2) state common law.

1. The Copyright Act of 1909

The Copyright Act of 1909 established two systems of copyright: (1) "published" works protected by federal copyright, and (2) "unpublished" works protected by various state law regimes.⁵⁵ Under this statute, a work was "published" if it had been distributed to the general public, which usually meant that the work had been commercially exploited by the author.⁵⁶ To obtain federal protection, a copyright owner had to meet several requirements, including: registering the work, depositing copies of the work with the Copyright Office, and affixing notice of copyright to the work.⁵⁷ Successful completion of these requirements resulted in a federal copyright for an initial term of twenty-eight years, followed by a renewal period of another twenty-eight years, after which the work entered the public domain.⁵⁸ By contrast, state law protection for "unpublished" works required no affirmative steps and had potentially infinite duration, so long as that work remained unpublished.⁵⁹

The most important distinction for idea submitters during the Golden Age of Hollywood was that although the Copyright Act of 1909 did not extend copyright protection to ideas, which largely remained as "free as air,"⁶⁰ some state laws initially did offer such protection.⁶¹

2. State Common Law Protections

California and New York, as the two enduring entertainment industry hubs, developed state common law protections for ideas that were distinct from the Copyright Act of 1909's federal protection.

55. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (1909).

56. See Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 6 (2007) (observing that the "nature and extent" of the published work's distribution was "imprecise and unpredictable").

57. *Id.* at 7.

58. *Id.*

59. *Id.* at 6.

60. Nimmer, *supra* note 5, at 119 (citing *Fendler v. Morosco*, 171 N.E. 56 (N.Y. 1930)).

61. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (1909).

a. California

For a short time, California tried to even the playing field in favor of the underdogs. Prior to 1947, section 980 of the California Civil Code provided that “the author of any product of the mind . . . has an exclusive ownership therein,”⁶² which was understood as protection for simply an idea or a theme rather than for its form or expression.⁶³ Under this version of the statute, for example, an idea without concrete expression was protectable because “[l]iterary property in the fruits of a writer’s creative endeavor extend to the full scope of his inventiveness.”⁶⁴ In *Golding v. R.K.O. Pictures*, this protection extended to the “basic dramatic core” of a play that had been used to create a movie with a similar overall theme, but had a distinguishable plot.⁶⁵ The sole, but ambiguous, limitation under this version of section 980 was that “only the product of the writer’s creative mind . . . is protectable,” but not those items in the public domain.⁶⁶ In *Golding*, Justice Traynor’s dissent addressed the ambiguities that result from idea protection, especially where the only similarity between the works was a “common plot” from the public domain.⁶⁷ He further noted that both federal and New York courts had consistently refused to recognize idea protection in those instances.⁶⁸ Nonetheless, statutory protection existed in California until eliminated by the 1947 amendment to section 980, when the legislature deleted the words “product of the mind” from the statute.⁶⁹

62. CAL. CIV. CODE § 980 (1872) (current version at CAL. CIV. CODE § 980 (Deering 2013)). See also Ronald Caswell, Comment, *A Comparison and Critique of Idea Protection in California, New York, and Great Britain*, 14 LOY. L.A. INT’L & COMP. L. REV. 717, 724 (1992).

63. Caswell, *supra* 62, at 724. See also *Burtis v. Universal Pictures, Co.*, 256 P.2d 933, 939 (Cal. 1953).

64. *Golding v. R.K.O. Pictures, Inc.*, 221 P.2d 95, 97 (Cal. 1950) (“This may well include . . . the entire plot, the unique dialogue, the fundamental emotional appeal or theme of the story, or merely certain novel sequences or combinations of otherwise hackneyed elements.”).

65. *Id.* at 98–99.

66. *Id.* at 97. Possibly attempting to clarify this limitation, the California Supreme Court in *Burtis* interpreted *Golding* as requiring a combination of ideas into a theme to be protectable, even if the ideas themselves might be unoriginal or in the public domain.

67. *Golding*, 256 P.2d at 104 (Traynor, J., dissenting).

68. *Id.* Although *Golding* was decided under the 1945 version of section 980 because the cause of action was commenced while it was still in effect, it was decided after the 1947 amendment. Traynor’s dissent was, therefore, possibly a reflection of the law as it stood at that time after the amendment.

69. CAL. CIV. CODE § 980 (Deering 2012).

b. New York

In contrast to the one-time statutory exception in California under California Civil Code section 980, New York's early protection for ideas generally conformed to federal copyright and other states' common law copyright regimes, initially holding that ideas were not protected as a general property right, but allowing the possibility that parties may contract for an idea's disclosure.⁷⁰

Later, in *Soule v. Bon Ami Co.*, the New York Court of Appeals officially accepted that disclosure of an idea could be protected by contract theory.⁷¹ In *Soule*, the parties entered into a contract in which the plaintiff disclosed his idea to increase the defendant's profits by incrementally increasing the prices of defendant's products.⁷² The Appellate Division, in this case, recognized that a contract for the disclosure of an idea could be valid; nevertheless, the Court held that the plaintiff's idea was not novel because "[n]o person can by contract monopolize an idea that is common and general to the whole world,"⁷³ thereby introducing the now familiar New York "novelty" requirement for the disclosure to be sufficient consideration.⁷⁴ Commentator Ronald Caswell observed that a majority of the New York Court of Appeals, while affirming that the disclosure of an idea could be protected under contract, did not actually decide whether novelty was required, instead holding that plaintiff's case failed because he could not accurately prove increased profits.⁷⁵

As a result, the New York courts continued to find that ideas were protectable by express or implied contract,⁷⁶ but for some years following

70. See e.g., *Bristol v. Equitable Life Assurance Soc'y of U.S.*, 30 N.E. 506, 507 (N.Y. 1892) (holding that the disclosure of an idea for a "system of advertising" was not protectable and that its value as property was lost in the disclosure, but that "[w]ithout denying that there may be property in an idea . . . [i]f it cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure").

71. *Soule v. Bon Ami Co.*, 195 N.Y.S. 574, 576 (1922), *aff'd*, 139 N.E. 754 (N.Y. 1923).

72. *Id.* at 575.

73. *Id.* at 576.

74. *Id.* at 575–76 ("When information is offered under these circumstances, the very nature of the offer suggests that the information must be new. To call attention to a fact already known is not imparting information.")

75. Caswell, *supra* note 62, at 740.

76. Generally, in New York, even non-novel ideas can be protected under an express contract. See, e.g., *Cole v. Phillips H. Lord, Inc.*, 28 N.Y.S.2d 404, 409 (App. Div. 1941).

offered inconsistent decisions as to whether novelty was required for the disclosure to be sufficient consideration for an implied contract.⁷⁷

III. POST-WAR HOLLYWOOD AND THE COLLAPSE OF THE STUDIO SYSTEM

Because of the studio system's collapse, the advent of the television industry, the writers' new freelance status, and the 1947 amendment to section 980 of the California Civil Code, the gap between the relative bargaining power of the writers and the studios widened. Even when the SWG joined with other writers' organizations to form the Writers Guild of America, the power disparity between writers outside the system and those executives running the studios still existed. Simply put, the studios would not go quietly: they joined the television industry. As a result, writers began to demand some kind of protection for their ideas, given that in the new Hollywood "it ha[d] become necessary to submit ideas to . . . producers, and not develop them . . . unless they [were] approved."⁷⁸ As a reflection of the writers' unequal bargaining power, many state courts recognized the need for some legal theory to protect ideas.⁷⁹

A. THE DEVELOPMENT OF A NEW STANDARD

Shortly after the 1947 amendment to section 980 of the California Civil Code, which eliminated protection for "product[s] of the mind," a line of cases emerged showing that California courts were beginning to grapple with a workable alternative theory to protect writers and their ideas without "run[ning] afoul of the historical concept that there is no property right in an idea."⁸⁰ The legal theory that emerged as best suited to the protection of the writers' interests—arguably still property-type rights—was contract law.

In *Stanley v. Columbia Broadcasting System*, the plaintiff submitted a radio program format to defendants several times between 1942 and 1944

77. *Id. Compare* Keller v. Am. Chain Co., 174 N.E. 74, 75 (N.Y. 1930) (finding novelty in a plaintiff's idea) with Williamson v. N.Y. Cent. R.R., 16 N.Y.S.2d 217, 226–27 (App. Div. 1939) (finding it unnecessary to analyze novelty).

78. John A. Tretheway, Case Note, *Literary Property: Idea Protection by Contract-Requirement of Novelty*, 26 S. CAL. L. REV. 459, 460 (1953). *See also* Rokos v. Peck, 227 Cal. Rptr. 480, 485–86 (Ct. App. 1986); LIONEL SOBEL, 4-19D NIMMER ON COPYRIGHT § 19D.01 (2012).

79. *See* Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 19 (1994).

80. Tretheway, *supra* note 78, at 460. *E.g.*, *Stanley v. Columbia Broad. Sys., Inc.*, 221 P.2d 73 (Cal. 1950) (allowing recovery by the originator of an idea from an infringer of that idea); *Weitzenkorn v. Lesser*, 256 P.2d 947 (Cal. 1953) (same); *Kurlan v. Columbia Broad. Sys.*, 256 P.2d 962 (1953) (same). *See also* Sobel, *supra* note 79, at 18–19.

with the implication that plaintiff would be compensated if the idea was used.⁸¹ Defendants rejected the submissions, but later produced a program substantially similar to plaintiff's program.⁸² Unlike in *Golding*, in which idea similarities between the two works "basic dramatic cores" were sufficient to find infringement, the plaintiff's radio program format in *Stanley* was developed and concrete with multiple similarities to defendants' program, but it was not necessarily a "product of the mind" in the same way as a "basic dramatic core."⁸³ As such, the Court made a broader inquiry than in *Golding* into the similarities between the two radio programs but still found the combination of plaintiff's ideas to be sufficiently novel to find support for the cause of action under the 1945 version of section 980, and further added that such novelty provided a basis for an implied contract claim, as well.⁸⁴

Stanley's most important contribution to the development of the idea protection doctrine, however, lay in Justice Traynor's dissent, which became the basis for many subsequent California decisions using implied contracts to protect the disclosure of ideas.⁸⁵ Justice Traynor argued that the plaintiff's combination of ideas was not novel because none of the ideas contained in the format were novel, and was thus undeserving of protection.⁸⁶ Nevertheless, he noted that under some circumstances the disclosure of an idea may be sufficient consideration for a promise to pay for that idea under an express or implied contract theory.⁸⁷ He also acknowledged, however, that:

It is not a reasonable assumption . . . [that] in the absence of an express promise, or unequivocal conduct from which one can be implied, that one would obligate himself to pay for an idea that he would otherwise be free to use If the idea is not novel, the evidence must establish that the promisor agreed expressly or impliedly to pay for the idea whether or not it was novel.⁸⁸

81. *Stanley*, 221 P.2d at 79. *Stanley* was commenced under the 1945 version of section 980 but decided after the 1947 amendment.

82. *Id.* at 74.

83. *Id.* at 79.

84. *Id.*

85. Caswell, *supra* note 62, at 725.

86. *See Stanley*, 221 P.2d at 85 (Traynor, J., dissenting).

87. *See id.* ("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.")

88. *Id.* at 85–86 (Traynor, J., dissenting).

Thus, Justice Traynor's approach to the idea protection did not require novelty as consideration for a promise to pay, given that under this approach two parties could expressly contract for even non-novel ideas.⁸⁹ Novelty should be required, however, in an evidentiary role where an implied contract is concerned because of the difficulties of ascertaining the promisor's conduct, especially where an idea may already be in the public domain and "free to use."⁹⁰ Ultimately, this stricter "novelty" requirement provides very little actual protection to idea submitters absent an express contract or unequivocal conduct;⁹¹ nonetheless, Traynor's dissent in *Stanley* became the foundation for protecting ideas under contract theory in California.

In 1947, the California Legislature chose to fall in line with the other states' common law copyright regimes and amended Civil Code section 980 by removing the words "product of the mind" and "therein," thereby eradicating copyright protection for ideas.⁹² The courts later observed that the prior form of the statute "transcend[ed] the normal bounds of common law copyright," and officially "abrogated the rule of protectibility of an idea . . . accept[ing] the traditional theory of protectible [sic] property under common law copyright."⁹³ Immediately, the amendment was reflected in idea protection cases.⁹⁴ In *Weitzenkorn v. Lesser*, the two works at issue were both about Tarzan and the Fountain of Youth, but the similarities ended at that general theme.⁹⁵ Acknowledging the 1947 amendment, the Court observed that the plaintiff could no longer proceed on her claim for idea protection as a property right.⁹⁶ Yet, seemingly following Traynor's dissent from *Stanley*, it allowed her to maintain her express and implied contract causes of action based on the originality of her story's "basic dramatic core," given that the disclosure of her original theme could have

89. *Id.*

90. *Id.* at 86.

91. See Caswell, *supra* note 62, at 726.

92. CAL. CIV. CODE § 980 (Deering 2012). See also Caswell, *supra* note 62, at 725, n.29.

93. *Weitzenkorn v. Lesser*, 256 P.2d 947, 955–56 (Cal. 1953). See also SOBEL, *supra* note 78 ("For a short time [after the 1947 amendment], California plagiarism claims, like those in other states, had to satisfy common law copyright standards.").

94. See, e.g., *Weitzenkorn*, 256 P.2d 778; *Palmer v. Metro-Goldwyn-Mayer Pictures*, 259 P.2d 740, 742 (Cal. Dist. Ct. App. 1953) (finding no protection where the similarity between two works was based on only abstract ideas about baseball, and that after the 1947 amendment to section 980, ideas were "matters . . . not subject to protection under the amended phraseology").

95. *Weitzenkorn*, 256 P.2d at 951. *Weitzenkorn* was one of the founding members of the Screenwriters' Guild.

96. *Id.* at 957–58.

been of value to the defendants.⁹⁷ Thus, the courts began allowing the alternative implied contract theory for idea protection more consistently, but also initially imposed an “originality” or “novelty” requirement for an evidentiary purpose.⁹⁸ Even at this early stage of the doctrine’s development, Justice Carter’s dissent in *Weitzenkorn* noted the beneficial value of statutory idea protection; he argued that the majority interpreted the 1947 amendment too narrowly in light of the authors’ unequal bargaining power and contrary to the Constitution’s goals of promoting the “progress of literature,” given that a plagiarist need only change plot elements to avoid copyright liability under the majority’s interpretation.⁹⁹ He further observed the difficulty of interpreting the “originality” requirement,¹⁰⁰ laying out one of the basic problems with the idea protection doctrine that continues to the present day.

1. California’s New Test: *Desny v. Wilder*

Shortly after California cases held that an idea could be protected under a contract theory, provided the idea was novel, John Tretheway observed that “[t]o apply the novelty test to the consideration for a contract is in effect questioning the adequacy of the [contract’s] consideration.”¹⁰¹ He further suggested that if the courts insisted on a novelty requirement, it should be understood as novel to the idea’s recipient, rather than to the world at large.¹⁰² The contours of California’s contract theory, including whether novelty was required, however, were not established until a few years later in *Desny v. Wilder*.¹⁰³

In the seminal case for idea protection, *Desny v. Wilder*, the California courts officially adopted Traynor’s dissent from *Stanley* as law and set clearer standards for idea protection under contract, also suggesting elimination of any novelty requirement.¹⁰⁴ In *Desny*, the writer-plaintiff called Paramount Pictures to submit a sixty-five-page script that he had written based on the real-life national headline story of a man that had been trapped in a cave for two weeks.¹⁰⁵ *Desny* described the entire plot to a

97. *See id.*

98. *See id.*

99. *Id.* at 960 (Carter, J., dissenting).

100. *Id.*

101. Tretheway, *supra* note 78, at 461.

102. *Id.* This observation was later made a part of the law of ideas in New York in *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000).

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

104. *Id.* at 270. *See also* Sobel, *supra* note 79, at 22–23.

105. *Desny*, 299 P.2d at 261–62.

secretary over the phone, asking for her permission to pass on the script to director Billy Wilder.¹⁰⁶ In response, the secretary advised him to cut the script to a three-to-four-page treatment, given that Wilder would not read something too long. No mention of compensation was made during his initial call.¹⁰⁷ Two days later, he called the secretary again, looking to submit his shortened synopsis. Rather than accept a hard copy, the secretary requested Desny read it to her over the phone, which she then copied down shorthand.¹⁰⁸ More significantly, during the second call, Desny told the secretary that he expected to be compensated if the studio used the story, to which the secretary responded that “naturally [they would] pay [Desny] for it.”¹⁰⁹ He had no further contact with anyone at Paramount until the studio released *Ace in the Hole*, which, even though it did not mention the real-life victim, closely resembled Desny’s shortened outline, including one particular fictional scene.¹¹⁰

Because Desny had not registered his script or his treatment with the Copyright Office, nor did he claim plagiarism, he sued Paramount under the newly available contract theory, claiming that Paramount had breached an implied contract by failing to compensate him for the use of his ideas.¹¹¹ The court not only followed the new theory, it also expressly adopted part of Justice Traynor’s dissent from *Stanley* as the “law of California,”¹¹² in particular:

The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. 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. Even though the idea disclosed may be “widely known and generally understood,” it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty.¹¹³

The court, analogizing the idea-submission process as akin to a doctor or lawyer rendering services to a client, held that an idea submitter could prevail on an idea protection claim under either an express or an implied contract theory, setting forth a five-part test to establish when an idea

106. *Id.* at 262.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 276.

111. *See id.* at 263.

112. *Id.* at 266.

113. *Id.*

submitter could prevail.¹¹⁴ To prevail, the idea submitter had to show that (1) he created the idea; (2) he clearly disclosed the idea for sale; (3) the recipient, under the circumstances, voluntarily accepted the disclosure knowing the condition before he knew the idea; (4) the idea is valuable; and (5) the recipient then made unauthorized use of the idea.¹¹⁵

Recognizing the possibility for abuse of the *Desny* test, the court limited it by emphasizing a “voluntary” acceptance of the idea submission on the recipient’s part was key:

Unless the [recipient] has opportunity to reject [the idea submission] he cannot be said to accept. The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. . . . The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed¹¹⁶

As such, the idea submitter must be clear in his conveyance, otherwise it would be considered gratuitous and unenforceable as a contract.¹¹⁷ In *Desny*, no express contract existed between the parties; nevertheless, the Court implied one based on the parties’ conduct during the phone calls, and the fact that the similarities between the outline and the film indicated that Paramount likely used the idea.¹¹⁸

Finally, *Desny* attempted to settle any ambiguity surrounding whether an idea must be novel to afford its protection: it suggested that the requirement be eliminated.¹¹⁹ The Court launched into an extensive discussion of novelty based on “literary property” principles, suggesting that the possibility for truly novel concepts is so limited that authors must work with ideas and facts from the public domain.¹²⁰ Thus, the author need only originate the material and show that it is valuable to prove consideration, novelty is both not required and likely unattainable. Ultimately, the Court confusingly used intellectual property principles to support idea protection under contract theory. Nonetheless, based on this

114. *Id.* at 266, 270.

115. *See id.* at 270.

116. *Id.* (internal citations omitted).

117. Caswell, *supra* note 62, at 728. *See also* Faris v. Enberg, 158 Cal. Rptr. 704, 709–10 (Ct. App. 1979) (holding the an obligation to pay could not be inferred from the “mere fact of submission” or that defendant returned plaintiff’s phone call regarding the opportunity to read plaintiff’s “unconditionally submitted” idea).

118. *See Desny*, 299 P.2d at 273–75; Caswell, *supra* note 62, at 729–30.

119. *Desny*, 299 P.2d at 271–72. *See also* Glen L. Kulik, *Copyright Preemption: Is This the End of Desny v. Wilder?*, 21 LOY. L.A. ENT. L. REV. 1, 4 (2000).

120. *See Desny*, 299 P.2d at 271–72.

reasoning, the novelty requirement was effectively repudiated, as adopted in later cases,¹²¹ and the Court concluded that even though Desny's treatment was based on an idea widely available in the public domain, he was not precluded from recovering on the breach of implied contract.¹²²

a. Desny's Shortcomings

In the end, *Desny* failed to address several important considerations. First, the *Desny* court's elimination of the novelty requirement was founded on circular reasoning. Rather than simply hold novelty unnecessary for consideration under contract theory, the court engaged in a lengthy analysis of the difficulties associated with a novelty requirement under a literary property theory, that is, copyright principles.¹²³ Yet if ideas cannot be protected under copyright, the court should not have engaged in this discussion at all and should have confined itself to discussing the act of disclosure as sufficient consideration for contract. By discussing idea protection in light of property principles, it implies that ideas may still be a property right that is now simply being protected by contract. In fact, Justice Carter's strongly-worded concurrence dismissed the "interminable discussion" as superfluous to the real cause at hand, which was the unequal bargaining positions of the parties in question.¹²⁴ Bringing to light the growing difficulties of the writers' life and employment after the collapse of the studio system, he further observed that *Desny* was a perfect illustration of the "practical difficulties besetting a writer" because "[i]f [a writer] says to whomever he is permitted to see . . . 'I won't tell you what my idea is until you promise to pay me for it,' it takes no Sherlock Holmes to figure out what the answer will be!"¹²⁵ Thus, the court should have relied only on contract theory to establish the doctrine and emphasized the need to protect the writers' inferior bargaining position.

Second, the most significant gap in *Desny's* logic is that in relying on Traynor's dissent from *Stanley* to adopt idea protection under contract, it failed to acknowledge that Traynor did not advocate doing away with the novelty requirement altogether.¹²⁶ Instead, he argued that novelty was not

121. See, e.g., *Blaustein v. Burton*, 88 Cal. Rptr. 319, 330 (Ct. App. 1970); *Donahue v. Ziv Television*, 54 Cal. Rptr. 130, 142 (Dist. Ct. App. 1966); *Chandler v. Roach*, 319 P.2d 776, 781 (Cal. Ct. App. 1957).

122. See *Desny*, 299 P. 2d at 277.

123. See *id.* at 271-73.

124. *Id.* at 280 (Carter, J., concurring).

125. *Id.*

126. See *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 88-90 (Traynor, J., dissenting). See also William O. Knox, *The Role of Novelty in a California Idea Submission Case*, 11 UCLA ENT. L. REV.

required where there was an express contract for the idea disclosure or “unequivocal conduct” from which a contract could be implied, but his argument remained silent on whether novelty was required absent either of those two circumstances.¹²⁷ Therefore, *Desny*’s actual result was not the express adoption of Traynor’s dissent as the “official law of California,” but a distorted expansion of Traynor’s narrower reasoning.¹²⁸ This distinction may not have made a difference in *Desny* because the phone calls between Desny and the secretary, and the fairly transparent unauthorized use of his outline by Wilder and Paramount, certainly amounted to “unequivocal conduct” that would imply an enforceable contract. The problem emerged later, as courts tried to apply *Desny* to less clear-cut examples of conduct between parties in an idea submission.¹²⁹ Those circumstances and cases that followed *Desny*, in which conduct between the parties was more ambiguous and the unauthorized use less certain, often could have benefitted from novelty as an evidentiary requirement, rather than as a property right.

b. Post-Desny Cases: Expanding Protection in California

The cases following *Desny* have not only adopted its somewhat faulty reasoning, they have also expanded the doctrine and loosened the requirements for a breach of implied contract claim. For example, in *Chandler v. Roach*, the plaintiff, a “professional writer” represented by an agent, submitted an idea for a television series based on the activities in a public defender’s office.¹³⁰ Next, during a series of meetings between the two parties, oral agreements were made for the idea’s disclosure, and the two parties exchanged, but did not sign, two contracts to “solidify the understanding” between them.¹³¹ Ultimately, the contracts went unsigned, the plaintiff never heard anything further, and the defendant then produced a television series about a public defender’s office.¹³² On appeal, the court

27, 30 (2004) (noting that “both the majority opinion and Justice Traynor’s dissenting opinion in *Stanley* indicate that novelty is a required element in an idea submission case asserting a claim for breach of an implied-in-fact contract”).

127. See *Stanley*, 221 P.2d at 85 (Traynor, J., dissenting); Knox *supra* note 126, at 29–30.

128. See Knox, *supra* note 126, at 30.

129. See, e.g., *Blaustein v. Burton*, 88 Cal. Rptr. 319 (Ct. App. 1970); *Donahue v. Ziv Television*, 54 Cal. Rptr. 130 (Dist. Ct. App. 1966); *Chandler v. Roach*, 319 P.2d 776 (Cal. Ct. App. 1957). Cf. *Ware v. Columbia Broad. Sys.*, 61 Cal. Rptr. 590 (Ct. App. 1967) (holding no breach of implied-in-fact contract existed where plaintiff did not allege theft of an idea but had instead submitted a completed script to producers of *The Twilight Zone*).

130. *Chandler*, 319 P.2d at 778.

131. *Id.*

132. *Id.*

again rejected a novelty requirement, noting the 1947 amendment to Civil Code section 980 and its abrogation of statutory idea protection, then explicitly reinforced *Desny* by holding novelty unnecessary to a writer's claim because no other form of implied contract claim required it.¹³³

While the reasoning in *Chandler* comports more with contract theory, by throwing any comparison to property rights out the window, there is still an important distinction: two unsigned contracts existed between the parties.¹³⁴ The court decided the case based on an implied contract theory—because the contracts between the parties were unsigned—stating that: “it is reasonably understood that a professional author expects payment of the reasonable value of the idea or the material . . . so that the conduct of the producer in accepting it implies a promise to fulfill those reasonable expectations.”¹³⁵ Yet even if the documents did not qualify as an express contract, a significant paper trail and “unequivocal conduct” indicated an agreement had been made between the parties.¹³⁶ No conduct was needed to imply assent here because of that very paper trail. Thus although *Chandler* clearly lays out why novelty is not required based on *Desny*'s holding, neither case addressed the problems inherent with having no novelty requirement where conduct was not unequivocal.¹³⁷ As a result, the *Chandler* holding is overly broad.¹³⁸ It should, with *Desny*, be limited to the situations described by Traynor in *Stanley*.¹³⁹

Several cases following *Chandler* have extended the doctrine to situations in which the parties' conduct was increasingly more ambiguous and cemented elimination of a novelty requirement.¹⁴⁰ Most of the previous cases involved some sort of written submission or otherwise unequivocal conduct.¹⁴¹ By contrast, the line of cases after *Chandler* extended idea protection to include a series of pitch meetings with no paper trail or even

133. *See id.* at 783 (“We see no reason to impose blindly and automatically upon the implied-in-fact contract the elements which may be necessary to establish a property right.”).

134. *Id.* at 778.

135. *Id.* at 780.

136. *Id.* at 778.

137. *See Knox, supra* note 126, at 33.

138. *Id.* William Knox, exploring the role of novelty, further observed that although *Chandler* was the first case to expressly eliminate the novelty requirement and became precedent for deciding idea protection cases in California, it was actually only an appellate-level decision, and therefore lacked the authority to modify the state supreme court's ruling in *Stanley*. *Id.*

139. *See id.*

140. *See, e.g., Blaustein v. Burton*, 88 Cal. Rptr. 319 (Ct. App. 1970); *Donahue v. Ziv Television*, 54 Cal. Rptr. 130, 131–32 (Dist. Ct. App. 1966).

141. *See Caswell, supra* note 62, at 734–35.

unsigned contracts;¹⁴² compensation discussions which lacked any agreement or specifics;¹⁴³ and finally, a series of oral statements made over the course of several months to various people.¹⁴⁴ At the same time, the courts also reinforced the idea that novelty was not required to survive an idea protection claim,¹⁴⁵ emphasizing that the unauthorized *use* of an idea was sufficient as value for consideration.¹⁴⁶ Yet the courts also acknowledged that there was still some need for an evidentiary requirement.¹⁴⁷

Thus, after this line of cases, it was clear that an evidentiary requirement for idea protection claims was more important than ever, given the potential for frivolous suits based on increasingly ambiguous behavior between parties during pitch meetings. Even though the courts acknowledged this need, they nonetheless eliminated the novelty requirement as value for consideration. In the end, the courts should have recognized that even if novelty was not necessary in that role, it fit in an evidentiary role quite effectively. Ultimately, the courts' intention was probably to even the playing field between the studios and writers, which continued to work in the idea submitters' favor until the advent of the Copyright Act of 1976.

2. New York

Around the time that the Golden Era ended, but before the advent of federal copyright preemption, New York further developed its own alternative theories for idea protection. Unlike California, New York

142. See *Donahue*, 54 Cal. Rptr. at 131–32. In *Donahue*, plaintiffs submitted a written idea, twelve story outlines, and a proposed budget to defendant-production-company. *Id.* Sometime later, defendant produced a similar program but failed to compensate plaintiffs. *Id.*

143. See *id.*; *Blaustein*, 88 Cal. Rptr. at 327–28. In *Blaustien*, the parties met but compensation was not specifically discussed. The plaintiff indicated that, as a working producer, he expected to be compensated for the idea if the film was made. *Id.*

144. See *Blaustein*, 88 Cal. Rptr. 319. In *Blaustein*, the plaintiff, an experienced producer, approached Richard Burton's agent about making a film adaptation of *The Taming of the Shrew*, directed by Franco Zeffirelli and starring Burton and then-wife Elizabeth Taylor. *Id.* at 322. Over several months, plaintiff met with the following people, separately: Burton and Taylor, their agent and lawyer, his own lawyer, and Zeffirelli's agent. *Id.* at 322–26. During that time, Burton said to plaintiff that "[t]his idea is such a good one . . . I think we should plan on doing it." *Id.* at 324. See also Caswell, *supra* note 62, at 734–35.

145. In *Blaustein*, it was clear that a film adaptation of *The Taming of the Shrew* starring two well-known actors was not novel, but the fact that the movie was made strongly demonstrated the value of its use. See *Blaustein*, 99 Cal. Rptr. at 326–27. Thus, had novelty been required, the plaintiff likely could not have recovered.

146. See *Donahue*, 54 Cal. Rptr. at 142; *Blaustein*, 88 Cal. Rptr. at 329.

147. See *Donahue*, 54 Cal. Rptr. at 138–39.

acknowledged that an idea may have property rights, and so developed both contract and property theories to allow idea submitters to recover.¹⁴⁸ Moreover, New York began to emphasize, rather than abolish, a novelty requirement under both theories.

During this time, the courts put an end to the inconsistent decisions following *Soule v. Bon Ami*, setting forth the oft-quoted standard that “[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use,”¹⁴⁹ officially adopting the novelty requirement as the law of New York.¹⁵⁰ The courts, proceeding on a property theory, found that the “critical” issue in idea protection cases was whether the idea was original or novel because otherwise no promise to pay could be implied.¹⁵¹ Thus a novelty requirement was established for alternative theories of idea protection under implied contract theory in New York, although the court did not address whether an express contract required novelty to be enforceable.¹⁵² Commentator Ronald Caswell suggested that by failing to discuss express contracts, the courts did not intend to overturn earlier precedent holding that novelty was not required in those cases.¹⁵³ Nevertheless, it was clear that a plaintiff in New York would have to show novelty to prevail in a misappropriation claim.

On the other hand, whether novelty was required in a contract action was left open to some interpretation during this time. Some cases held that an implied contract for idea protection was analogous to misappropriation of an idea and required novelty to act as consideration for the contract.¹⁵⁴ Still others held the opposite, that parties could have an enforceable contract even when the information was available in the public domain.¹⁵⁵ Despite these inconsistencies in New York’s contract theory, which would be settled after the enactment of the Copyright Act of 1976, New York was

148. Aileen Brophy, Note, *Whose Idea Is It Anyway? Protecting Idea Purveyors and Media Producers After Grosso v. Miramax*, 23 CARDOZO ARTS & ENT. L.J. 507, 513 (2005).

149. *Bram v. Dannon Milk Products, Inc.*, 307 N.Y.S.2d 571, 571 (App. Div. 1970) (holding that the idea of a baby sitting in a high-chair eating yogurt was not novel and thus not protectable, even if used by defendants).

150. *Downey v. General Foods Corp.*, 286 N.E.2d 257, 259 (N.Y. 1972) (denying protection for plaintiff’s proposed marketing idea for Jell-O based on a character called “Mr. Wiggle” because the idea was not novel given that the defendant had conceived of the idea earlier and the word “wiggles” had appeared both on television and in a newspaper ad). *See also* Caswell, *supra* note 62, at 745.

151. *See Downey*, 286 N.E.2d at 259.

152. *See id.* *See also* Caswell, *supra* note 62, at 746.

153. *See* Caswell, *supra* note 62, at 746.

154. *See Educ. Sales Programs, Inc. v. Dreyfus Corp.*, 317 N.Y.S.2d 840, 844 (Sup. Ct. 1970).

155. *See Krisel v. Duran*, 258 F. Supp. 845, 860–61 (S.D.N.Y. 1966). This case was actually used for support in California’s *Blaustein v. Burton* to eliminate the novelty requirement.

diametrically opposed to California when it came to the rights of idea submitters.

B. HOLLYWOOD CHANGES HOW IT DOES BUSINESS

Desny and its progeny left an “indelible” mark on the way Hollywood operated.¹⁵⁶ Following these decisions, the Writer’s Guild incorporated *Desny* into the 1966 Memorandum of Minimum Basic Agreement.¹⁵⁷ More importantly, studios began instituting submissions procedures, including use of submissions releases.¹⁵⁸ No longer would they accept anything unsolicited, nor presumably would they allow secretaries or other studio employees to accept ideas over the phone, thereby exposing the studios to liability. Thus, the pitch meeting as it is known today was born. Thereafter agents played an integral and necessary role in the creative process, setting up the meetings and getting the writers access to the decision-makers at the studios.

IV. THE COPYRIGHT ACT OF 1976, PREEMPTION, AND CIRCUIT SPLITS

A. THE COPYRIGHT ACT OF 1976 AND ITS PREEMPTION PROVISION

Twenty years after the California Supreme Court decided *Desny*, Congress abolished the Copyright Act of 1909’s dual copyright system and enacted the Copyright Act of 1976 (“the 1976 Act”), aiming for a new federal system that would accomplish a “fundamental” change.¹⁵⁹ Congress acknowledged that the prior system was “uncertain, impractical, and highly complicated,”¹⁶⁰ given that differing state common law regimes had resulted in not only perpetual copyright durations, but also many unpredictable decisions—both of which were completely opposed to constitutional goals of “limited times” and national uniformity.¹⁶¹ Moreover, in the modern era, technology created “methods for dissemination” for an author’s work that were “incomparably broader and faster” than under the previous Act.¹⁶² As such, Congress created a more

156. PETER DECHERNEY, *HOLLYWOOD’S COPYRIGHT WARS* 100 (2012).

157. *Id.*

158. *See id.*

159. H.R. REP. NO. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.

160. *Id.*

161. *Id.* at 130.

162. *Id.* at 129 (“One of the fundamental purposes behind the copyright clause of the Constitution . . . was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author’s rights under the differing laws . . . of the various States.”).

effective and efficient single-copyright system to better support the Constitution's goals.¹⁶³

For works to be copyrightable under the 1976 Act they need only be “original works . . . fixed in any tangible medium of expression,” and there was no publication requirement for protection.¹⁶⁴ But protection still did not extend to ideas.¹⁶⁵ Under the 1976 Act, the line between federal protection for published works and state protection for unpublished works became a line between federal protection for fixed works and state protection for unfixed works. The fixation requirement is applied broadly, defining “tangible medium” as any form or manner “now known or later developed.”¹⁶⁶ This left few categories apart from unfixed works under state law protection, helping Congress better achieve national uniformity. Lastly, the rights accorded by the 1976 Act included the right to reproduce, to prepare derivative works, to distribute the work, to publicly perform the work, and to publicly display the work.¹⁶⁷

The most significant aspect of the 1976 Act, however, was 17 U.S.C. § 301—the act's “bedrock provision.” Section 301 preempts and abolishes all state rights “equivalent” to those under federal copyright law,¹⁶⁸ even if they simply “frustrate the purpose” of federal law absent a direct interference with a federal provision.¹⁶⁹ Essentially, Congress planned for preemption to prevent states from creating similar protections to bypass the federal system.¹⁷⁰ Section 301 sets forth a test that determines that a work has been preempted when: (1) the disputed work comes “within the subject matter of copyright,” and (2) the rights granted under state law are “equivalent to any of the exclusive rights” within § 106.¹⁷¹ Furthermore, Congress intended § 301 to state in the “clearest and most unequivocal

163. See *id.* at 129–30; Bauer, *supra* note 56, at 1.

164. 17 U.S.C. § 102 (2006). The new Act also eliminated any previously existing registration requirements.

165. See *id.*

166. *Id.* See also H.R. REP. NO. 94-1476, at 52 (observing the medium need only be “capable of perception” and may include: “words, numbers, notes, sounds, pictures, or any other graphic indicia or symbolic indicia”).

167. 17 U.S.C. § 106.

168. 17 U.S.C. § 301. See also H.R. REP. NO. 94-1476, at 130–31; Bauer, *supra* note 56, at 3; Brophy, *supra* note 148, at 515.

169. Brophy, *supra* note 148, at 516.

170. Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL'Y 83, 92–93 (2006).

171. *Del Madera Props. v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987) *overruled on other grounds by* *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

language possible . . . and to avoid the development of any vague borderline areas between State and Federal protection.”¹⁷²

Commentator Joseph Bauer addressed the incoherency of § 301, noting, “[b]oy, did they get it wrong!”¹⁷³ Neither the language of § 301 nor its corresponding test helped avoid the “vague borderline areas” between state and federal protection, as demonstrated in the following years by their inconsistent application to hundreds of cases.¹⁷⁴ The test is problematic because Congress neither defined the subject matter within the “scope” of the Act, a term used frequently and confusingly,¹⁷⁵ nor did it define what rights might be equivalent to the rights protected under § 106.¹⁷⁶ This Note will consider each part of the test and its problems separately.

1. Subject-Matter

Under the first prong of the test, a work must fall within the scope of the subject matter of copyright to be subject to federal preemption.¹⁷⁷ Somewhat confusingly, Congress suggested that “complete preemption” means that works not subject to the “narrower” scope of the 1976 Act, but protected under broader common law copyright, such as unfixed works, might still ultimately be preempted.¹⁷⁸ For our purposes, this begs the question: are ideas, which are not explicitly covered by the 1976 Act, still subject to preemption?

Remarkably, some circuits have suggested that ideas are within the scope of preemption because “scope and protection are not synonyms” and the “shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”¹⁷⁹ For example, in *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, a graduate student claimed

172. H.R. REP. NO. 94-1476, at 130; Bauer, *supra* note 56, at 3.

173. Bauer, *supra* note 56, at 3.

174. Bauer, *supra* note 56, at 3, 118; Brophy, *supra* note 148, at 515.

175. H.R. REP. NO. 94-1476, at 131 (“The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.”).

176. See 17 U.S.C. § 301 (2006).

177. *Del Madera*, 820 F.2d at 976.

178. H.R. REP. NO. 94-1476, at 131.

179. *United States ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997). See also *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 454–56 (6th Cir. 2001) (holding that state laws that protect ideas are within the subject matter of federal copyright). Cf. *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 156–57 (1989) (holding a state law that provided protection for an otherwise unpatentable boat design was preempted because the state law could not provide protection for public domain elements that are unprotectable under federal law).

that ideas from her dissertation were stolen, arguing that because ideas were expressly excluded from copyright protection, they were outside the scope of the 1976 Act and thus her conversion claim was not preempted.¹⁸⁰ However, the court found her claim to be preempted, perhaps basing their decision on Congress' intent to avoid "vague borderline areas" between state and federal protection and the desire to avoid allowing claimants to circumvent federal copyright policy on mere technicalities.¹⁸¹ As support for this interpretation, consider House Report 1476, which states "[a]s long as a work fits within one of the general subject matter categories of sections 102 and 103, [states are prevented] from protecting it even if it fails to achieve federal copyright because it is too minimal or lacking in originality to qualify."¹⁸² For circuits following *Berge*, then, ideas are subject to preemption even if they are not otherwise copyrightable.

Yet even though some circuits allow for preemption of ideas based on a broader scope requirement, ambiguity remains because other circuits, including the Ninth Circuit and more recently the Second Circuit, have allowed idea protection claims to continue without preemption.¹⁸³ Given that the Supreme Court has never addressed the scope of the subject matter of copyright as it relates to this test, confusion among the circuits will continue without "unequivocal" guidance on the matter.¹⁸⁴

2. Equivalency—the "Extra Element"

Equivalency, under § 301, has emerged as the more problematic part of the test because it is mostly undefined by both the 1976 Act and its legislative history, and thus has developed largely from judicial interpretation. Initially, the House Committee version of the bill that became the 1976 Act included a list of state law theories that would not be preempted, including "rights against misappropriation not equivalent to any of such exclusive rights" and "breaches of contract."¹⁸⁵ This language, however, was deleted from the final version of the Act.¹⁸⁶ Even so, confusion remains because several theories have developed as to why the

180. See *Berge*, 104 F.3d at 1463.

181. *Id.* See Brophy, *supra* note 148, at 518.

182. H.R. REP. NO. 94-1476, at 131. See also Olson, *supra* note 170, at 93.

183. See, e.g., *Forest Park Pictures v. Univ. Television Network, Inc.*, 683 F.3d 424 (2d Cir. 2012); *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F. 2d 1193 (9th Cir. 1986) (finding for the plaintiff, who had submitted his idea for a Scrabble book to Scrabble in order to seek its permission to use its trademark).

184. See *Montz*, 649 F.3d at 975.

185. Bauer, *supra* note 56, at 37.

186. *Id.*

language was deleted, including either: (1) that Congress found the language unnecessary and that it added nothing to the Act's objectives; or (2) that Congress realized that elements of state claims might vary and develop over time, and thus did not want the Act to be conclusive;¹⁸⁷ or (3) that Congress decided these state law theories should, in fact, be preempted. One commentator has suggested that the "general scope" language in the provision includes subject-matter in both §§ 102 and 103, as well as those rights conferred by § 106 and other analogous rights that could have been, but were not, explicitly afforded protection by the statute.¹⁸⁸ In the end, none of the interpretations help to clarify any legislative history or the standard for equivalency.

Generally, courts have found that to survive preemption, a state law claim must have an "extra element" that establishes that it is not "equivalent" to any of the rights under § 106.¹⁸⁹ An "extra element" is anything that protects rights that are qualitatively different from rights under copyright, such that it "changes the nature of the action."¹⁹⁰ In idea protection, then, the key inquiry is whether a state law contract claim provides an "extra element" that *qualitatively* changes the "nature of the action" to avoid preemption.¹⁹¹

Does the "extra element" test actually clarify what claims are or are not equivalent to copyright claims? Absolutely not. As it relates to idea protection, the "extra element" test as applied by the Fifth Circuit to breach of implied contract claims has preempted those claims, finding those rights to be the same as § 106's right to reproduce or right to produce derivative works.¹⁹² On its rationale for preemption, one court explained that "if the language of the act could be so easily circumvented, the preemption provision would be useless, and the policies behind a uniform Copyright statute would be silenced."¹⁹³ On the other hand, the Ninth Circuit has gone in the complete opposite direction and has found that a contract claim's "promise to pay" is a valid "extra element" that is qualitatively different

187. *Id.*

188. *See id.* at 18–19.

189. *Del Madera Props. v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987) *overruled on other grounds by* *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

190. *Id.*

191. *See Brophy, supra* note 148, at 519.

192. *Daboub v. Gibbons*, 42 F.3d 285, 290 (5th Cir. 1995) ("Finding no disharmony between the elements of the state law claims and the federal law in this case, we have no hesitancy in pronouncing enough equivalency to satisfy § 301(a).").

193. *Id.*

from a right under copyright, thereby avoiding preemption.¹⁹⁴ In the end, the circuit split that developed following the 1976 Act demonstrates that the interpretation and application of the “extra element” test has done nothing to achieve Congress’ goal of “national uniformity.”

B. INSTABILITY AMONGST THE CIRCUITS

Even with the preemption test, the facially ambiguous language of the statute and the test itself have led circuit courts across the country to employ varying analyses based on case-by-case application of the test, resulting in a lack of consistency and predictability for the idea submission process.

1. California

Until *Grosso v. Miramax Film Corp.* was decided in 2004, courts in California wrestled with whether *Desny*-type claims were preempted by the Act.¹⁹⁵ Generally, the trend until *Grosso* was that studio-defendants could successfully defeat idea protection claims by removing the state law contract claims to federal court and having them preempted under the Act, which gave the studios a huge advantage.¹⁹⁶

Initially, courts heavily found in favor of preemption even before the test was announced in *Del Madera Properties v. Rhodes and Gardner, Inc.*,¹⁹⁷ but acknowledged the difficulty of deciding such cases in California “because of their importance and value to the entertainment industry . . . ‘idea men’ have been able to protect their interests . . . in their literary ideas.”¹⁹⁸ In *Rokos v. Peck*, additional difficulties stemming from idea protection were revealed when the plaintiff, arguing that the idea’s originator assigned to her an interest in it, attempted to sue for the protection of that idea.¹⁹⁹ First, the court acknowledged the legal precedent

194. See *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 986 (9th Cir. 2004).

195. See, e.g., *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193 (9th Cir. 1986); *Rokos v. Peck*, 227 Cal. Rptr. 480 (Ct. App. 1986); *Buchwald v. Paramount Pictures Corp.*, No. C 706083, 1990 WL 357611 (Cal. Super. Ct. 1990).

196. See, e.g., *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1057 (C.D. Cal. 2000); *Endemol Entm’t B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524, 1528 (C.D. Cal. 1998). See also Aaron J. Moss & Gregory Gabriel, *The Enforcement of Implied Contracts After Grosso v. Miramax*, L.A. LAW., Mar. 2006, at 16, available at <http://www.lacba.org/Files/LAL/Vol29No1/2239.pdf>.

197. See *Rokos*, 227 Cal. Rptr. at 490–91; *Klekas v. EMI Films, Inc.*, 198 Cal. Rptr. 296, 304 (Ct. App. 1984) (assuming that preemption applied and the only real issue at hand was whether the date of the breach was before or after the enactment of the 1976 Act). *Del Madera* was decided in 1987.

198. *Rokos*, 227 Cal. Rptr. at 487.

199. *Id.* at 484.

set by the line of cases following *Desny*, recognizing the need for the “legal ‘fiction’ of the implied-in-fact contract” to protect the authors who “must . . . disclose [ideas] to producers.”²⁰⁰ Even so, the court called foul on the plaintiff’s assignment argument given that the divisibility of rights was unique to the 1976 Act and further noted that “to adopt [it] would thus place producers . . . to whom ideas are ‘pitched’ in jeopardy of unforeseen or uncontemplated liability.”²⁰¹ Following their previous decision in *Klekas v. EMI Films*, the court then found the claim to be preempted as an infringement claim in disguise.²⁰²

Even with the trend toward preemption, courts applied it inconsistently, often struggling with whether it applied to idea protection claims in light of the realities of the writers’ unequal bargaining power. After the test was announced, some cases simply did not address the preemption question, still relying on the *Desny* test to find for the idea submitters.²⁰³ In *Buchwald v. Paramount Pictures*, famed columnist and Hollywood outsider, Art Buchwald prevailed in an action against Paramount, alleging that the studio developed the hit movie *Coming to America* based on an idea in a short treatment he submitted to them for “King for a Day.”²⁰⁴ The court never addressed the preemption issue and found for Buchwald, arguably because the case actually involved an extensive paper trail, which detailed the multi-year submission and development process and included several contracts.²⁰⁵ Conceivably, the court could have considered an express contract claim to be qualitatively different than one based on an implied contract, where the parties’ conduct might ambiguously suggest that the rights bargained for in the idea submission were more similar to rights under copyright.

Other courts have extensively discussed preemption, applying the test and still coming out with inconsistent results.²⁰⁶ Preemption advocates

200. *Id.* at 487–88.

201. *Id.* at 488.

202. *Id.* at 490–91.

203. *See* *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F. 2d 1193, 1193 (9th Cir. 1986) (finding for the plaintiff, who had submitted his idea for a Scrabble book to Scrabble in order to seek its permission to use its trademark); *Buchwald v. Paramount Pictures Corp.*, No. C 706083, 1990 WL 357611 (Cal. Super. Ct. 1990).

204. *Buchwald*, 1990 WL 357611 at *1–6.

205. *See id.*

206. *Compare* *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000) (granting the defendant’s motion to dismiss the plaintiff’s implied-in-fact contract claim), *and* *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816 (C.D. Cal. 1997) (denying the plaintiff’s motion to remand a claim for breach of contract), *with* *Groubert v. Spyglass Entm’t Grp., LP*, No. CV 02-01803-SVW (JTLx), 2002

touted *Endemol v. Twentieth Television, Inc.*²⁰⁷ and *Selby v. New Line Cinema*²⁰⁸ as the new line of cases solving the preemption question correctly.²⁰⁹ In both cases, plaintiffs submitted an idea to established studios.²¹⁰ Applying the preemption test, the cases expressly adopted *Berge's* interpretation of subject-matter to find ideas within the scope of copyright preemption, observing that to allow otherwise would let plaintiffs have “two bites at the apple.”²¹¹ As to the second prong of the test, *Endemol* interpreted the implied contract at issue as equivalent to the derivative right under copyright,²¹² while *Selby* observed a “troubling aspect” of allowing a promise to pay as a sufficient “extra element” in an implied contract claim, namely that a promise could be so “inextricably intertwined” with copyright rights that to permit the idea submitter to sue on it would undermine copyright preemption entirely.²¹³

On the other hand, *Groubert v. Spyglass Entertainment*, applying the same test to nearly identical facts, reached the opposite conclusion.²¹⁴ Acknowledging the results in *Endemol* and *Selby*, the court nonetheless distinguished the case and required an examination of the specific contractual rights at issue.²¹⁵ In this case, the defendants’ promise to pay was not “equivalent” to rights under copyright, which protects only certain forms of expression.²¹⁶

Clearly, the law in California from the enactment of the 1976 Act until 2004 did nothing to achieve the goals of national uniformity of law or to avoid “vague borderline areas” between state and federal protection; nor did it offer any predictability to either writers or studios. In fact, the law was even less clear under the Act than it was when the only precedent for

WL 2031271 (C.D. Cal. 2002) (denying the defendant’s motion to dismiss the plaintiff’s breach of contract claim).

207. *Endemol Entm’t B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524 (C.D. Cal. 1998).

208. *Selby v. New Line Cinema Corp.*, 95 F. Supp. 2d 1053 (C.D. Cal. 2006).

209. See 5 BILL PATRY, PATRY ON COPYRIGHT § 18:28 (2013); Brophy, *supra* note 148, at 521.

210. *Selby*, 96 F. Supp. 2d at 1055; *Endemol*, 48 U.S.P.Q.2d at 1525.

211. See *Selby*, 96 F. Supp. 2d at 1058 (citing *Endemol*, 48 U.S.P.Q.2d at 1526); *Endemol*, 48 U.S.P.Q.2d at 1526.

212. *Endemol*, 48 U.S.P.Q.2d at 1528.

213. *Selby*, 96 F. Supp. 2d at 1060 (“Suppose, *e.g.*, that the defendant promised ‘I will not infringe any copyright or copyright protection in the script you are proposing to show me.’”).

214. *Groubert v. Spyglass Entm’t Grp., LP*, No. CV 02-01803-SVW (JTLx), 2002 WL 2031271, at *5 (C.D. Cal. 2002). In *Groubert*, the plaintiff pitched a story to the defendant and its parent company, Disney, alleging breach of implied contract based on a promise to compensate the plaintiff if his idea was used. *Id.* at *1.

215. *Id.* at *3.

216. *Id.* at *4.

idea protection was *Desny*, under which there was no unpredictable interference from preemption. In 2004, *Grosso v. Miramax Film Corp.* reversed the swinging of the preemption pendulum, putting the power back squarely with idea submitters and writers.²¹⁷

a. *Grosso v. Miramax Film Corp.*

In *Grosso v. Miramax Film Corp.*, the Ninth Circuit finally took a stand and officially held that § 301 would not preempt implied contract claims.²¹⁸ Yet the parties' conduct in *Grosso* exhibited some of the most unclear facts to date on which to base a claim.²¹⁹ The plaintiff had sent his screenplay about Texas Hold'em, unsolicited, to a production company that had a first-look deal²²⁰ with the defendant, but never submitted the screenplay directly to the defendant.²²¹ Alleging that the defendant's relationship with the first-look production company gave it an opportunity to steal his screenplay's ideas to create the defendant's movie *Rounders*, a movie also based on the underworld of Texas Hold'em poker players, the plaintiff sued for breach of implied contract based on his expectation of compensation for the use of his idea.²²² In a brief opinion, which failed to address the line of cases including *Selby* and *Endemol*,²²³ the court applied the extra element test, calling the equivalency prong the "dispositive preemption issue" in the case.²²⁴ With little explanation, the court held that the complaint successfully alleged a *Desny* claim, and that "implied promise to pay" was enough to transform the action "from one arising under the ambit of the federal statute to one sounding in contract" and was thus not preempted.²²⁵

As a result, on the facts of *Grosso*, a "promise to pay" now seems to be interpreted very broadly, given that the plaintiff had sent an unsolicited

217. *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004). See also Moss & Gabriel, *supra* note 196, at 16.

218. See *Grosso*, 383 F.3d at 968.

219. See *id.*

220. A first-look deal is a "contractual agreement between a studio and independent producer that the studio have first rights to consider a film by that producer for production or distribution by giving financial support during the development period." IRA KONIGSBERG, *THE COMPLETE FILM DICTIONARY* (1997), available at http://en.wikipedia.org/wiki/First_look_deal (last modified Aug. 29, 2012).

221. Moss & Gabriel, *supra* note 196, at 18. See also Anne Thompson, *Appeals Court Ruling May Shift Power to Writers*, N.Y. TIMES, Oct. 13, 2004, <http://www.nytimes.com/2004/10/13/movies/13pitc.html>.

222. Thompson, *supra* note 221; Moss & Gabriel, *supra* note 196, at 18.

223. Brophy, *supra* note 148, at 525.

224. *Grosso*, 383 F.3d at 968.

225. *Id.*

submission to a company merely affiliated with the defendant and had never spoken directly with the company. Other problems with the *Grosso* decision lay in the application of the *Desny* test, revealing the aforementioned weakness in a lack of novelty requirement. The Ninth Circuit conceded that there was almost no similarity between the two works except for some dialogue stemming from the “use of common, unprotectable poker jargon.”²²⁶ Thus, the plaintiff had very little evidentiary support for his cause of action: there was almost no concrete evidence of a promise to pay, nor was there evidence of any meaningful similarity.²²⁷ Yet based on the Ninth Circuit ruling and the erroneous interpretation of novelty as it relates to a *Desny* claim, the plaintiff was allowed to proceed, setting a new standard in California for idea protection.

b. Hollywood Reacts to Grosso

Following *Grosso*, some commentators observed that “Hollywood legal circles have been puzzling over the decision, which declares that [industry] executives enter an implied contract every time they . . . hear a pitch.”²²⁸ Legal commentators suggested that the new standard allows plaintiffs to take “two bites at the apple” and greatly expands idea protection for writers and idea submitters,²²⁹ the very thing that the courts in *Endemol* and *Selby* were trying to avoid. Furthermore, the Ninth Circuit’s reasoning seemingly indicates that these *Desny*-style claims will rarely be preempted so long as the idea submitter claims to have had an actual agreement with the idea recipient, regardless of whether it is express or implied.²³⁰

Yet, the brief *Grosso* opinion does not address the difficulties inherent in determining whether parties have acted in a way that their conduct implies a contract. Should industry custom be used to fill in these gaps? Could Miramax have reasonably understood an unsolicited submission to an affiliated company to have precluded them from ever producing a movie about Texas Hold’em?²³¹ Arguably, Miramax was never truly given *Desny*’s opportunity to reject and should probably not then have had a valid claim at all, never mind one that survived preemption.

226. *Id.* at 967.

227. *See id.*

228. Thompson, *supra* note 221.

229. *See Moss & Gabriel, supra* note 196, at 19.

230. *Id.*

231. *Id.*

Nevertheless, practice guides and articles following *Grosso* warned that the decision had troubling implications for idea protection litigation, predicting that these claims would no longer be decided at the motion to dismiss or summary judgment stage, forcing defendants to settle.²³² Of course, since *Desny*, studios have generally used submissions releases and returned unsolicited submissions unopened.²³³ However, because of the increased threat of expensive litigation after *Grosso*, studios and production companies were advised to consider including in submissions releases an arbitration provision and a waiver of the right to bring an implied contract claim.²³⁴ Other steps to lessen liability included simply being more selective about the pitches that companies do hear, possibly limiting those pitches heard to select agents with stellar reputations.

Even if *Grosso* was intended to swing the pendulum back to the writers and idea submitters, did it accomplish its task? With stricter submissions policies, they will have less opportunity and access to present their ideas in the first place,²³⁵ which could ultimately slow the progress of the literary arts.

2. New York

Unlike California, New York seemed to have a more stable interpretation of preemption as it related to the idea protection doctrine for a time. Two significant observations can be made about this period of stability: (1) New York further developed its novelty requirement as it related to both property and contract theories, and (2) New York did not preempt claims nearly as often as California.²³⁶ Was this because New York accepted that ideas should be recognized as both a property right and as a right protectable by contract? In *Katz, Dochtermann & Epstein, Inc. v. Home Box Office*, an implied contract claim for theft of an advertising campaign—It's not TV, it's HBO—was not preempted because the promise to pay was an “extra element” that rendered the claim “entirely

232. *Id.* at 20.

233. See DECHERNEY, *supra* note 156, at 100; BROOKE A. WHARTON, THE WRITER GOT SCREWED (BUT DIDN'T HAVE TO) 25 (1997).

234. WHARTON, *supra* note 233, at 20; Brophy, *supra* note 148, at 526–27.

235. WHARTON, *supra* note 233, at 221.

236. See, e.g., *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 993 (2d Cir. 1988); *Katz, Dochtermann & Epstein, Inc. v. Home Box Office*, 50 U.S.P.Q.2d 1957, 1960 (S.D.N.Y. 1999) (holding implied-in-fact claim for HBO ad campaign was not preempted because the contract's promise to pay was an extra element for the purposes of preemption); *Apfel v. Prudential Bache Secs., Inc.*, 616 N.E.2d 1095 (N.Y. Ct. App. 1993). See also Brophy, *supra* note 148, at 513–14.

separate” from a copyright claim.²³⁷ In California, before *Grosso* agreed with this result, *Selby* found *Katz* “troubling” because the promise to pay could include a promise not to use the work without permission, essentially a copyright claim in disguise.²³⁸

Even without preemption, idea submitters did not often prevail because of New York’s initially high standard of the novelty requirement.²³⁹ Idea recipients, knowing that the requirement was difficult to meet, could simply have avoided the added step of removal to federal court for preemption. Recognizing the difficulty for claimants, New York courts, and then the Second Circuit, developed and clarified a more easily applied novelty standard that addressed both avenues of recovery for idea protection.

a. The Novelty Requirement

For purposes of idea protection, *Murray v. National Broadcasting Co.* was, for many years, the landmark New York case holding that novelty was required for idea protection as it related to both misappropriation claims and contract claims.²⁴⁰ In *Murray*, an NBC employee had submitted an idea for a new sitcom revolving around a middle-class black family with Bill Cosby possibly playing the father, which was officially rejected by NBC.²⁴¹ Four years later NBC premiered *The Cosby Show*, one of the most popular television programs in history.²⁴² Setting the novelty standard for years to come, the court followed *Downey* for both property and contract theories, expressly requiring that an idea be “original or novel” to be protected by both a misappropriation claim and for an *implied* contract claim.²⁴³ Thus, even though *The Cosby Show* was a breakthrough in television, the show was not novel because it represented an “adaptation of existing knowledge” already in the public domain.²⁴⁴

Murray sets forth an exceptionally high novelty standard, which the dissent suggested was far too strict given that novelty is highly subjective, especially when it relates to media where “the very existence of [it]

237. *Katz*, 50 U.S.P.Q.2d at 1960.

238. *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1060 (C.D. Cal. 2000).

239. See Camilla M. Jackson, Note, “I’ve Got this Great Idea for a Movie!” A Comparison of the Laws in California and New York that Protect Idea Submissions, 21 COLUM. J.L. & ARTS 47, 60 (1996).

240. *Murray*, 844 F.2d at 993.

241. *Id.* at 990.

242. *Id.*

243. *Id.* at 993–94.

244. *Id.* at 992.

depends on the generation of development of ideas, it may be impossible to formulate a concept that has not previously been expressed by someone, somewhere.”²⁴⁵ Furthermore, under this absolute novelty standard it is difficult to discern whether the idea is novel to the creator or the world-at-large.²⁴⁶

The dissent in *Murray* brings to light the difficulties of a subjective novelty test and perhaps an indication as to why California courts chose to judicially interpret it out of existence. Rather than follow California’s eradication of the novelty requirement, however, future cases in New York allowed for a distinction between the novelty required for a misappropriation claim and the novelty required for an implied contract claim: notably, the cases never entirely eliminated the requirement.²⁴⁷ The first step toward distinguishing between property and contract as it related to novelty came in *Apfel v. Prudential-Bache Securities, Inc.*, in which the court acknowledged that under traditional principles of contract law, parties are free to bargain for whatever consideration they deem appropriate.²⁴⁸ As acknowledged earlier by a commentator in California, the court should not question the adequacy of that consideration.²⁴⁹ Thus the court held that, under a contract theory, the “key inquiry” was no longer whether the idea was novel, but rather whether it had value.²⁵⁰ The *Apfel* court, however, did not define value or offer much guidance as to its application, but it did suggest that a showing of novelty to the buyer addresses *evidentiary* concerns regarding unauthorized use of the idea.²⁵¹

Seven years later, the Second Circuit clarified New York’s *Apfel* rule in *Nadel v. Play-By-Play Toys*, noted the “important distinction” between property and contract law with respect to novelty, and stated that:

Contract-based claims require only a showing that the disclosed idea was novel to the buyer By contrast, misappropriation claims require that the idea at issue be original and novel in absolute terms. . . . [U]noriginal, known ideas have no value as property and the

245. *Id.* at 997 (Pratt, J., dissenting).

246. Deborah A. Levine, Case Note, *The Cosby Show: Just Another Sitcom*, 9 LOY. L.A. ENT. L.J. 137, 141 (1989).

247. *See, e.g.*, *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000); *Apfel v. Prudential-Bache Secs., Inc.*, 616 N.E.2d 1095 (N.Y. Ct. App. 1993).

248. *Apfel*, 616 N.E.2d at 1097.

249. *See Tretheway, supra* note 78, at 461.

250. *Apfel*, 616 N.E.2d at 1095. *See also Brophy, supra* note 148, at 514.

251. *See Apfel*, 616 N.E.2d. at 1098.

law does not protect against the use of that which is free and available to all.²⁵²

Thus, with *Nadel*, the Second Circuit had officially adopted novelty requirements for both misappropriation and implied contract claims. Therefore, even if a claim survived preemption, the standards for idea protection remained at odds with the Ninth Circuit and California.

V. THE CURRENT STATE OF AFFAIRS

A. CHAOTIC PROSPECTS?

Until 2012, it appeared that California and New York would forever remain at odds in their approach to idea protection. In fact, one California judge predicted “chaotic prospect[s]” for writers and studios resulting from having to meet so many different, conflicting laws as they navigated the idea submission process.²⁵³

1. California: *Montz v. Pilgrim Films & Television*

Recently, in *Montz v. Pilgrim Films & Television*,²⁵⁴ the Ninth Circuit had the opportunity to reconsider *Grosso*, but instead solidified California’s idea protection doctrine. In fact, it again expanded the doctrine, further weakening copyright preemption.²⁵⁵ In *Montz*, the plaintiffs pitched an idea for a television show about a paranormal investigator who travels the world looking for ghosts to multiple studios and production companies from 1996 to 2003, including NBC and the defendant production company.²⁵⁶ The pitch included screenplays, videos, and other related materials.²⁵⁷ The studios all rejected the idea, but three years later NBC and the defendant-production-company premiered *Ghost Hunters* on the Sci-Fi channel.²⁵⁸ The plaintiffs claimed an implied contract based on: (1) a promise to partner in the production and share in its profits, not on a promise to pay; and (2) on a promise not to exploit their ideas without compensation and without obtaining their consent.²⁵⁹ Applying the “extra element” prong of

252. *Nadel*, 208 F.3d at 380.

253. *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir.), *cert. denied*, 132 S. Ct. 550, 986 (2011) (Gould, J., dissenting).

254. *Id.*

255. *See id.* at 977; Allison S. Brehm, *Idea-Theft Claimants Get a Ghost of a Chance*, NAT’L L.J. (Aug. 15, 2011), available at <http://www.kelleydrye.com/publications/articles/1511>.

256. *Montz*, 649 F.3d at 977.

257. *Id.*

258. *Id.*

259. *Id.* at 978.

the preemption test, the court found “no meaningful difference” between a promise to pay and a promise to partner, expressly reaffirming *Grosso*.²⁶⁰

In *Montz*, the majority explicitly aimed to fill what they saw as a “gap” between state contract law and federal copyright law in the entertainment industry.²⁶¹ If Congress’s goals had been considered in either *Grosso* or *Montz*, however, these decisions may have come out the other way, given that the preemption provision was included to prevent “vague borderline areas” between state and federal law. Therefore, it appears that the court’s true purpose in expanding the idea protection doctrine was not the gap in the law, but the policy underlying *Desny*:

The *Desny* innovation serves to give some protection for those who wish to find an outlet for creative concepts and ideas but with the understanding that they are not being given away for free. Without such legal protection, potentially valuable creative sources would be left with very little protection in a dog-eat-dog business.²⁶²

The *Montz* court was unequivocal in its decision to uphold *Grosso* in order to even the playing field and increase the writers’ bargaining power.

This Note argues, however, that the *Montz* decision impermissibly expanded the scope of idea protection, in the exact way that *Selby* and *Endemol* predicted.²⁶³ Moreover, a divided court demonstrates that the interpretation of *Grosso* in *Montz* is arguably an inaccurate application of preemption.²⁶⁴ What the majority failed to address when it found no “meaningful difference” between a promise to pay and a promise to partner was that part of the promise to partner included a promise not to use the plaintiff’s idea without authorization or compensation.²⁶⁵ As Judge O’Scannlain correctly observed in his dissent, these rights are equivalent to those rights of copyright owners: namely, the exclusive rights to reproduce, distribute, and to prepare derivative works.²⁶⁶ Thus, the promise to partner should not have passed the “extra element” test and should have been preempted.²⁶⁷ O’Scannlain did not, however, suggest that all *Desny* claims should be preempted and differentiated a promise to pay from the promise to partner:

260. *Id.* at 977.

261. *Id.* at 981.

262. *Id.*

263. *See supra* notes 206–10.

264. *Montz*, 649 F.3d at 983 (O’Scannlain, J., dissenting).

265. *Id.* at 984.

266. *Id.* at 983.

267. *See id.*

Where a copyright owner authorizes the use of his work, but does not receive the consideration he was promised, he has a contract claim; where a copyright owner does not authorize the use of his work, but, nonetheless, someone uses it to produce a substantially similar work, he has a copyright claim.²⁶⁸

Therefore, allowing an idea-submitting plaintiff to survive preemption essentially gives the plaintiff more state law protection for a copyright claim than he or she would get in the federal system, circumventing the stricter copyright requirements set out by Congress.²⁶⁹

Additionally, Judge Gould's dissent recognized the added danger of applying *Montz* in the modern entertainment industry:

Under such a legal regime, film production and network companies face the chaotic prospect of having to meet conflicting federal and state standards on essentially the same question, a result the [1976] Act aimed to avoid. Studio and network ventures need stable law that does not unsettle expectations.²⁷⁰

Both dissenting Judges have the better interpretation of preemption and implied contract claims. The majority's decision is diametrically opposed to the goals of the Act, allowing for the increase of "vague borderline areas" between state and federal law and allowing writers access to increased protection under state law that they would not otherwise receive.

The fact is that the Ninth Circuit's interpretation of preemption and implied contract theory rests on two false underlying assumptions: (1) industry custom always implies that the studio has assented to a promise to pay for the idea's disclosure during a pitch meeting,²⁷¹ and (2) allowing more idea protection litigation places writers in a better bargaining position. *Grosso* is a perfect example of why these assumptions are false. As noted above, it was highly unlikely that Miramax assented to a promise to pay that would preclude its use of a general idea like Texas Hold'em in exchange for an unsolicited submission from an affiliated company. What about executives that meet with idea submitters as a favor to others?²⁷² Should a promise be implied where they have no intention of ever using an

268. *Id.* at 985.

269. *See id.*; Brehm, *supra* note 255.

270. *Montz*, 649 F.3d at 986 (Gould, J., dissenting).

271. Anna R. Buono & Alonzo Wickers IV, *Montz v. Pilgrim Films & Television, Inc.: Copyright Preemption and Idea Submission Cases*, 28 COMM. LAW. 4, 4 (2011).

272. *Id.* at 7.

idea, but still allow a pitch meeting to take place? That seems as unfair to studios as not providing any protection is to writers.

The second assumption is that writers are better off with more litigation opportunities. Yet, *Grosso* again should be a cautionary tale. Even though commentators labeled the case a “game changer,” the plaintiff spent eight years in expensive litigation, only to have his case dismissed for failing to state a *Desny* claim.²⁷³ For a studio, this litigation is a drop in the bucket, but should the Ninth Circuit really encourage unknown writers to spend significant amounts of income on litigation? When an unknown writer has that “obsessive conviction, so common . . . that all similarities between their works and any others . . . must inevitably be . . . plagiarism,”²⁷⁴ how does that really help that writer’s bargaining power?

2. New York: A Flexible Preemption Interpretation

Across the country, the Second Circuit had previously adopted a “vastly different” approach to preemption of idea protection claims.²⁷⁵ In 2011, two claims with nearly identical facts to *Grosso* and *Montz* had been preempted, recognizing the same concerns that Justice Gould addressed in his *Montz* dissent.²⁷⁶ In *Forest Park Pictures v. Universal Television Network, Inc.*, the plaintiffs submitted to the defendant-network “character biographies, concepts, themes, and plot/story lines” for a television series about a doctor who makes house calls to the wealthy.²⁷⁷ Sometime later, the plaintiffs also participated in a pitch meeting with the defendant network.²⁷⁸ Ultimately, the defendant network rejected the idea but later aired a series with a similar theme, set in a different location.²⁷⁹ Applying the “extra element” test, the court had found the claim was based on a

273. Brehm, *supra* note 255. See also *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620 (9th Cir. 2010). The Benay brothers initially filed a claim in 2005 against Bedford Falls for stealing their ideas to make *The Last Samurai*. *Id.* at 623. After seven years of motions, appeals, and convoluted discovery, their case is just now going to trial. Eriq Gardner, “*Last Samurai*” Trial Begins: What’s the Value of a Good Idea in Hollywood?, HOLLYWOOD REP. (Mar. 20, 2012), <http://www.hollywoodreporter.com/thresq/last-samurai-trial-tom-cruise-ed-zwick-302054>.

274. Brehm, *supra* note 255 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984)).

275. *Id.*

276. See *Muller v. Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429, 432–33 (S.D.N.Y. 2011); *Forest Park Pictures v. Universal Television Network, Inc.*, No. 10 Civ. 5168(CM), 2011 WL 1792587 (S.D.N.Y. 2011).

277. *Forest Park*, 2011 WL 1792587, at *1.

278. *Id.* at *2.

279. *Id.*

promise to compensate for the *use* of plaintiff's original idea and was thus preempted.²⁸⁰ Similarly, in *Muller v. Twentieth Century Fox Film Corp.*, exhibiting the post-*Grosso* concern about a plaintiff having "two bites at the apple," plaintiff claimed both copyright infringement and breach of implied-in-fact contract,²⁸¹ succeeding on neither claim under the same reasoning as *Forest Park*.²⁸²

Recently, however, the Second Circuit vacated the *Forest Park* decision.²⁸³ Applying the extra element test, the court noted that there were several ways in which an implied-in-fact contract claim for use of an idea was qualitatively different than a copyright claim, including: (1) a copyright does not provide for express payment for the use of a work, rather it gives the owner a right to prevent use of the work; (2) a plaintiff must prove the extra elements of valid consideration and mutual assent in an implied-in-fact contract claim; and (3) a contractual claim affects only the rights of the contracting parties and not the rights against the public-at-large.²⁸⁴ Citing *Nimmer on Copyright, Montz*, and decisions from several other circuits, the court stated that at least some contract claims falling within the subject matter of copyright do not contest rights equivalent to those under copyright and are thus not preempted.²⁸⁵ The court then vacated the prior decision and remanded, continuing on to hold that for preemption purposes there was no difference between an express and an implied-in-fact contract that includes a promise to pay; therefore, the plaintiff's claim was not preempted where the elements of a contract were properly pleaded.²⁸⁶

The Second Circuit's ruling in *Forest Park* adopted the Ninth Circuit's interpretation of preemption going forward.²⁸⁷ Interestingly, apart from *Montz*, many of the cases cited in the Second Circuit's *Forest Park* opinion were based on express contracts rather than implied-in-fact

280. *Id.* at *3.

281. *Muller*, 794 F. Supp. 2d at 432.

282. *See id.* at 449.

283. *Forest Park Pictures v. Univ. Television Network, Inc.*, 683 F.3d 424 (2d Cir. 2012).

284. *Id.* at 431.

285. *Id.* at 431–32.

286. *Id.* at 436. The court continued on by noting that an implied-in-law contract would be preempted because a plaintiff need not allege the existence of an actual agreement between the parties. *Id.*

287. *See Muller v. Anderson*, No. 11-1694-cv., 2012 WL 5439910, at *2 (2d Cir. 2012). On review of *Mueller v. Twentieth Century Fox Film Corp.*, the plaintiff failed because he alleged *no* facts showing a promise to pay. *Id.* at *3. By contrast, in its review of *Forest Park*, the Second Circuit implied the promise to pay based on industry custom—like in *Grosso* and *Montz*.

contracts.²⁸⁸ In *Muller*, the plaintiff was not preempted but failed on his breach of implied-in-fact contract claim because he alleged *no* facts showing a promise to pay.²⁸⁹ By contrast, *Forest Park*, like *Grosso* and *Montz* implied the promise to pay based on industry custom.²⁹⁰ Even though the Second Circuit reversed direction and aligned with the Ninth Circuit's interpretation of preemption, these two cases show its inconsistent results and walk a very thin line between what is and is not sufficient for a promise to pay. Thus, as did the Ninth Circuit, the Second Circuit failed to acknowledge the need for an evidentiary requirement to show a *qualitative* difference from copyright where a plaintiff alleges that a studio promised to pay for the use of an idea based on an implied-in-fact contract.

Ultimately, the dissent in *Montz* has the best interpretation of the law as it relates to preemption concerning breach of implied contract. However, the current situation is that the laws in the epicenters of the entertainment industry are not particularly writer-friendly, despite what the courts have tried to achieve. Moreover, the Second Circuit's rulings in *Forest Park* and *Muller* illustrate how easily the circuits can reverse or overrule precedent without guidance from the Supreme Court as to preemption as it relates to a breach of implied-in-fact contract. In the end, all that exists is inconsistency among the circuits, which will promote only further instability when plaintiffs and studios choose to forum shop to achieve the result they want.²⁹¹

B. STUDIO SAFEGUARDS

*I was just thinking what an interesting concept it is to eliminate the writer from the artistic process. . . . [M]aybe we've got something here.*²⁹²

1. Submissions Releases

Since just after a Paramount secretary promised Victor Desny that if the studio used his idea “[they] would pay for it,” studios have used submissions releases. All studios and most independent production companies now have very strict submissions policies, requiring all unsolicited idea and script submitters to sign releases before a studio will accept any work. In the Frequently Asked Questions section of the

288. See *Forest Park*, 683 F.3d at 431–32.

289. *Muller*, 2012 WL 5439910 at *2.

290. See *Forest Park*, 683 F.3d at 435 (“Industry custom may establish an implied promise by the offeree to pay the offeror if the idea is used under the circumstances of a particular transaction.”).

291. Lisa Pearson, *Navigating the Bramblebush in Idea Submission Cases*, 4 J. MARSHALL REV. INTELL. PROP. L. 36, 50 (2004).

292. THE PLAYER (Fine Line Features 1992).

Paramount Pictures website, for example, the answer to whether an idea submitter can send something in to the studio is simple: “Sorry, but we do not accept unsolicited script or story submissions. Submissions sent via postal or email will be destroyed without being read.”²⁹³ The practice is so common and well-established that almost any and every book on how to break into Hollywood includes a sample submission release.²⁹⁴ For example, in *The Writer Got Screwed (but didn’t have to)*, Brooke Wharton outlines three things that will happen upon attempting to submit a script unsolicited: (1) the studio will not read it and return it to the sender unopened; (2) the studio will not read it unless submitted by an agent or attorney; and (3) the studio will read it if and only if the submitter signs a submissions release form.²⁹⁵ Wharton then details the reasons for the policy, including the studios’ fear of an unwanted implied contract situation.²⁹⁶ On the following pages is a “typical” release form, by which the idea submitter essentially gives up all rights to the idea and any ability to sue in the event of its use.²⁹⁷ A release form that forces an idea submitter to abdicate all rights to his or her idea certainly does nothing to even the playing field between the parties, but instead goes further in cementing the studios’ advantage and superior bargaining power as it relates to idea submission.

2. Errors and Omissions Insurance and Clearance Procedures

Another studio safeguard, carried by nearly all studios and production companies, is Errors and Omissions insurance (“E&O”). E&O insurance protects studios from a host of possible claims including defamation, invasion of privacy, trademark and copyright infringement, and idea protection claims.²⁹⁸ Of course, by definition E&O does not cover intentional wrongdoing—for example, intentional idea theft—but it will pay frivolous claims that appear even when no wrongdoing has occurred.²⁹⁹ For this reason, many studios and production companies have attorneys review scripts for potential liabilities and to determine their origins, often a

293. *FAQs*, PARAMOUNT PICTURES, <http://www.paramount.com/inside-studio/community/faqs> (last visited Mar. 12, 2013).

294. *See, e.g.*, STEPHEN F. BREIMER, *CLAUSE BY CLAUSE*, 155 (1995); MARK LITWAK, *DEALMAKING IN THE FILM & TELEVISION INDUSTRY* 187 (2d ed. 2002).

295. WHARTON, *supra* note 233, at 25.

296. *Id.*

297. *Id.* at 27–28.

298. LITWAK, *supra* note 294, at 50; Steven Katz, *Production Insurance and Completion Guarantees*, in *PRODUCING FOR MOTION PICTURES AND TELEVISION: A PRACTICAL GUIDE TO LEGAL ISSUES* 237, 238 (Vance Scott Van Petten ed. 1983).

299. LITWAK, *supra* note 294, at 50.

requirement before any policy is issued.³⁰⁰ Typically, E&O applications will include a list of clearance procedures, specifically including that: “It must be determined whether the applicant . . . received any submission of any similar material or production, and if so, Company must be fully advised of all [related] circumstances . . . in an attachment to the application.”³⁰¹ The insurance typically covers any liability incurred plus expenses.³⁰² Generally, large studios have blanket policies, while smaller production companies can buy policies on a per project basis.³⁰³

The downside of E&O insurance is that it is very expensive and often carries relatively high deductibles, such that many studios would probably prefer to settle claims out of court rather than go forward with litigation.³⁰⁴ Moreover, a savvy studio executive, in the event of an idea protection claim threat, could use E&O insurance strategically to encourage settlement by notifying potential litigants that if they choose to pursue a claim, they will be dealing with the insurance company rather than the studio.

Before a studio can obtain E&O insurance, it must clear itself of any possible idea submissions that might incur liability.³⁰⁵ Clearance, however, typically requires far more than just that one procedure and can include: copyright reports, title reports, script research reports, music rights clearance, location releases, and many others.³⁰⁶ Clearance procedures, unlike submissions releases, generally occur during development, throughout filming, and extend for some time after production. Some production companies have staff dedicated to compiling the forms listed above in a “deliverables binder,” which is submitted to the network or studio along with a final cut of the project.

The point of both E&O insurance and the extensive clearance procedures is to monitor any potential liabilities that might pop up. Productions typically take many months and many hands to assemble. At any given point, an individual may get an idea from elsewhere that could be translated into a shooting script well after the submissions procedure has

300. *Id.*

301. Katz, *supra* note 298, at 261 (providing a sample clearance procedures form). *See also* MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION 385 (3d ed. 2008).

302. DONALDSON, *supra* note 301, at 385.

303. *See id.* at 363.

304. *See id.*

305. *See* Katz, *supra* note 298, at 261.

306. *See id.*

ended. Studios are adept at using these safeguards to manage, if not eliminate, their risk as it relates to areas including and beyond idea protection.

3. Lawsuits

The newest and most recent trend in safeguards employed by the studios are lawsuits against those writers and idea submitters who have filed frivolous idea protection claims.³⁰⁷ In essence, the studios have adapted to the broad reach of the implied contract theory under *Grosso* and *Montz* by fighting back and suing for the studios' costs and attorney's fees after the idea protection suit has come to a close, particularly when the idea submitter has lost the case.³⁰⁸ The studios have been successful in their pursuit of these claims. For example, one writer was ordered to pay nearly \$900,000 in attorney's fees to Warner Brothers after losing an idea protection claim.³⁰⁹ Another writer was ordered to pay almost \$600,000 to Sony Pictures,³¹⁰ while another writer was required to pay \$40,000 after losing a claim against Twentieth Century Fox.³¹¹ In the end, it's clear that the studios will not take the expansion of idea protection law lying down. Instead, they have chosen to combat its expansion if only to deter future lawsuits and frivolous claims, even if some of the idea protection claims do have merit.³¹²

307. Eriq Gardner, *Judge: Writer Must Pay Fox \$40,000 for Claiming 'Alien v. Predator' Stole His Script*, HOLLYWOOD REP. (Aug. 24, 2011), <http://www.hollywoodreporter.com/thr-esq/judge-writer-pay-fox-40000-227204> [hereinafter Gardner, *Alien v. Predator*]; Eriq Gardner, *You Sue a Studio, They Make You Pay*, HOLLYWOOD REP. (Feb. 3, 2011), <http://www.hollywoodreporter.com/news/sue-studio-pay-95267> [hereinafter Gardner, *You Sue a Studio*].

308. See Gardner, *Alien v. Predator*, *supra* note 307; Gardner, *You Sue a Studio*, *supra* note 307. See also Eriq Gardner, "Ugly Betty" Idea Theft Lawsuit Dismissed, HOLLYWOOD REP. (Aug. 22, 2011), <http://www.hollywoodreporter.com/thr-esq/ugly-betty-idea-theft-lawsuit-225839>. In the *Ugly Betty* case the magistrate judge recommended that the uncooperative plaintiff be ordered to pay attorney's fees, though the studio had not yet pursued that claim. *Id.*

309. Gardner, *You Sue a Studio*, *supra* note 307.

310. Gardner, *Alien v. Predator*, *supra* note 307.

311. Gardner, *You Sue a Studio*, *supra* note 307; Gardner, *Alien v. Predator*, *supra* note 307. This is the same *Muller* case discussed above in Part V.A.2.

312. Gardner, *You Sue a Studio*, *supra* note 307. In fact, the head of litigation at Sony has publicly admitted to committing resources to defeat these claims for deterrence purposes. *Id.* In the *Muller* case, Fox actually only requested \$150,000, half of the \$300,000 it claims to have spent on the litigation, specifically stating that the lesser award would "adequately serve the statutory goals of compensation and deterrence." Gardner, *Alien v. Predator*, *supra* note 307.

VI. CONCLUSION

Ultimately, the law has always responded and adapted to the entertainment industry's practice and not vice versa. One of those industry practices that played a role in the law's development is the idea submission and pitch process. In the beginning, when the newborn entertainment industry was ungoverned by law, ideas were not only freely submitted, but also solicited by studios in newspapers and magazines. Pitch meetings were unnecessary because idea submitters did not need agents, nor did they sign submissions releases. Yet, at the same time, studios regularly denied these submitters credit and compensation.

Later, as cogs in the wheels of the all-powerful studio factory system, writers freely pitched ideas to each other and to studio executives. Although they were compensated, many of these idea men and formerly well-known writers remained uncredited. The pitch meeting, as we know it today, developed only after the fall of the studio system, the emergence of the freelance writer, and the NLRB's ruling that the studios must recognize the new writers' union. No longer were ideas freely discussed in dingy studio writers' rooms. Studios, without the ability to control and own every idea, learned the hard way in *Desny* that they could no longer just take whatever they wanted. Over time, more and more protective procedures were instituted: the use of agents, submissions releases, clearances procedures, and insurance. Because of years of idea protection claims and the studios' response to them, the ability for an unknown writer to even get a pitch meeting with a studio became nearly impossible. Today, with few exceptions, a writer must be represented by an established agent with a good reputation or sign away all his rights in a submissions release to get a pitch meeting. So has the idea protection doctrine really worked to even the bargaining power between studios and the idea submitters?

The real harm in this pitch process as it relates to idea protection is not to studios, which have had the upper hand since their inception. The current situation is this: ideas do need to be protected, but studios will not be put out of business by these lawsuits. Yes, idea submitters and writers are vital to the entertainment industry, which needs constant generation of ideas to operate. Realistically, a new or unknown writer may, psychologically, feel that his idea was really stolen. The fact of the matter is, however, that studios hear thousands of ideas a year and the likelihood of overlap is high. Furthermore, few projects will be made without the studios' financial and operational support. In the end, the powerless writers and idea submitters still bear the brunt of the costs for idea protection litigation. Studios, by and

large, factor liability and idea protection claims into their budgets. They need not work on eliminating the risk, they simply manage it. Moreover, when it comes to unknown writers and their lack of bargaining power, a studio could likely buy his idea for the same amount as it would cost to settle the claim, so why would a studio bother to steal it?

What should be done to curb idea protection lawsuits and end the inconsistencies amongst the circuits? Some commentators have suggested the passage of a Federal Idea Protection Act under the authority of the Commerce Clause.³¹³ Some have discussed a lesser-known “based upon” test, which looks at whether an average reasonable person would find that the defendant’s work is “based upon” the plaintiff’s work in any way.³¹⁴ Caswell suggested that this test would be better at balancing the interests of idea submitters with the studios.³¹⁵ The “based upon” test, however, may still result in inconsistent, case-by-case solutions by relying on what an “average reasonable person” might consider.

As such, the best resolution to the problem is to institute New York’s previous higher standard for idea protection claims by recognizing that the novelty-to-the-buyer requirement has a strong evidentiary purpose in pursuing these claims. Adding the novelty requirement to the already existing implied-in-fact contract standard is probably the most feasible solution to showing that a claim for breach of an implied-in-fact contract is qualitatively different than a copyright claim and can survive preemption. The danger without such a standard is that idea submitters will feel more inclined to sue based on their own inflated self-worth, which may cause them to suffer financially and possibly get a reputation in the industry that makes them unhireable. With a more enforceable standard, a writer (and his lawyer) would have a better idea *ex ante* of whether he or she had a valid claim. Ultimately, the parties need to achieve a balance in the law and in their relative bargaining power because it would be contrary to constitutional goals to shut either party down, given that it would halt creativity and the progress of the Arts completely.

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

314. Caswell, *supra* note 62, at 761–62.

315. *Id.*