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Once Upon a Time in Hollywood:  
An Examination of “Substantial Similarity” in  
California Idea Submission Cases

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**ONCE UPON A TIME IN HOLLYWOOD:  
AN EXAMINATION OF “SUBSTANTIAL SIMILARITY”  
IN CALIFORNIA IDEA SUBMISSION CASES**

*by* DAVID ARONOFF\*

*I. INTRODUCTION*

It is fundamental that the U.S. Copyright Act does not protect ideas. Thus, a would-be motion picture or TV writer who believes that his or her ideas have been stolen by a Hollywood studio or streaming service in its latest hit programming is generally out of luck in seeking redress under a copyright infringement theory. However, the law has developed alternative theories of implied contract and confidentiality protection for ideas that are submitted for sale to and knowingly accepted by entertainment companies.

Broadly speaking, a plaintiff asserting idea submission claims based on breach of implied-in-fact contract or breach of confidence legal theories must establish a direct contractual or confidential relationship with the defendant and the defendant’s “use” of the plaintiff’s idea in breach of the parties’ contract or confidence. However, the issue of “use” is often problematic in these cases. At what point does the defendant’s creation of a work embodying creative elements that are similar to the plaintiff’s idea cross the line so as to constitute a “use” of the plaintiff’s idea?

This problem can be illustrated by a hypothetical. Assume that a few years ago, you had a chance encounter with the well-known director and producer Quentin Tarantino at Whole Foods. He stood behind you in the check-out line as you were buying a six-pack and he was purchasing organic arugula. Recognizing the famed film auteur, you turned to him and said ironically, “I’ve got a great idea for a movie.” Surprisingly, with a smile, he gamely replied as if at a blackjack table, “Hit me!” Not expecting an encouraging response, you stumbled for a moment, but then you fortuitously glimpsed a headline in the store’s newspaper rack, “Mas-

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termind of murderous cult dead.”<sup>1</sup> So with a stutter you replied, “Charles Manson.” Building confidence, you continued, “You should make a Charles Manson movie set in the 1960’s, but maybe even defeating Manson at the end like Hitler in your *Inglorious Basterds!*” By this time the clerk has rung up your beers. As Tarantino appreciatively shakes his head, you walk away from the store convinced that you have the nous to be a Hollywood producer.

Flash forward to the present. While you have continued your habit of imbibing afternoon beers, Tarantino has written, produced, and released *Once Upon a Time in Hollywood*. The film is an alternate timeline comedy-drama telling the fictional story of Rick Dalton, a faltering actor portrayed by Leonardo DiCaprio, and his stunt double, Cliff Booth, who is played by Brad Pitt, as they navigate the last gasps of Hollywood’s golden age in 1969. In the course of their fictional adventures, Dalton and Booth meet the real-life stars Bruce Lee and Sharon Tate and foil the plot by the murderous cult leader Charles Manson and his deranged followers to kill Tate and a group of her friends.

The release of Tarantino’s film has thrown you for a loop. Like many people in Hollywood, you suffer from “that obsessive conviction, so common among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.”<sup>2</sup> In light of this “obsessive conviction,” a number of questions immediately spring into your mind. Has Tarantino stolen your idea to produce a Charles Manson film in which Manson’s plans are defeated at the end? Could you prevail, or at least survive summary judgment, in an idea submission claim against Tarantino? What is the settlement value of your claim? Most importantly, can you leverage your claim into the Hollywood career that you had always envisioned?

The answers to these questions turn, at least in part (putting aside the problematic question of whether the phrase “hit me!” in these circumstances was sufficient to manifest Tarantino’s consent to the formation of an implied-in-fact contract), on whether Tarantino “used” your idea. More specifically, is *Once Upon a Time in Hollywood* substantially similar to your concept such as to establish the use of your idea by Tarantino? This is an area of law that is not well delineated — especially in contrast to copyright law. Under the Copyright Act, a long line of authorities establishes that a claim of infringement can only be based on substantial similarities in original protectible *expression* after filtering out any alleged similarities based on factual materials, ideas (which are specifically ex-

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<sup>1</sup> L.A. TIMES, Nov. 20, 2017 (headline).

<sup>2</sup> *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984) (citation omitted).

cluded from copyright protection<sup>3</sup>), scenes-a-faire, and other unprotected elements.<sup>4</sup>

After consulting with your lawyer, you realize that your potential copyright infringement claim against Tarantino is meritless because copyright does not protect facts, such as the story of Charles Manson and his followers, or unfixed bare ideas, including your proposal for a film in which Manson is defeated. However, as discussed below, your potential idea submission claim against Tarantino might have more of a chance. After all, both your Charles Manson proposal and *Once Upon a Time in Hollywood* share similar *ideas*. Among other things, they are set in the same time and place, and use some of the same characters to tell a counterfactual version of the Manson family murders in which Manson's plot to kill Sharon Tate and her friends is defeated.

## II. THE ELEMENTS OF A CALIFORNIA IDEA SUBMISSION CLAIM

There is no property right in an idea.<sup>5</sup> “Generally speaking, ideas are as *free as the air*. . . . The general rule of law is that *the noblest of human productions — knowledge, truths ascertained, conceptions and ideas — become, after voluntary communication to others, free as the air to common use.*”<sup>6</sup> Consequently, the law has developed that an idea is generally protected only if there exists an implied-in-fact contract or a relationship of confidence between a person who offers to disclose an otherwise unprotectible idea, and a willing recipient who agrees to the disclosure under conditions that he or she is specifically made aware of and accepts before the idea's disclosure.<sup>7</sup>

To prevail on an idea submission claim based on a breach of implied-in-fact contract theory, the plaintiff bears the burden of proof to establish: (1) plaintiff submitted his or her idea to defendant; (2) before submitting his or her idea, plaintiff conditioned the disclosure on defendant's agreement to pay for the idea if used; (3) defendant knew or should have known

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<sup>3</sup> 17 U.S.C. § 102(b) (2018).

<sup>4</sup> See, e.g., *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1172 (9th Cir. 2003); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.1985); *Litchfield*, 736 F.2d at 1156-57; *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988).

<sup>5</sup> *Spinner v. Am. Broad. Cos., Inc.*, 215 Cal. App. 4th 172, 184 (2013).

<sup>6</sup> *Desny v. Wilder*, 46 Cal. 2d 715, 731-32 (1956) (emphases added); see *Rokos v. Peck*, 182 Cal. App.3d 604, 613 (1986); 17 U.S.C. § 102(b) (2018) (ideas not protected by copyright).

<sup>7</sup> *Desny*, 46 Cal. 2d at 737-39; *Faris v. Enberg*, 97 Cal. App. 3d 309, 318-23 (1979).

about the condition before plaintiff disclosed the idea; (4) defendant voluntarily accepted the idea on plaintiff's terms; (5) defendant actually *used* plaintiff's idea; (6) plaintiff's idea had value.<sup>8</sup>

Under a breach of confidence theory, the plaintiff must prove: (1) that the plaintiff conveyed new and novel information to the defendant in confidence; (2) that both parties understood that the information was being conveyed in confidence before it was actually disclosed; (3) that before plaintiff gave the information to defendant, the defendant had a chance to reject receipt of the information on a confidential basis; (4) that the defendant accepted the information with the understanding that he or she would keep the information confidential; (5) that the defendant *used* the information without the plaintiff's consent; and (6) that the plaintiff was damaged as a result.<sup>9</sup>

Under *both* of these legal theories, proof of “use” — element (5) in each of the causes of action outlined above — is essential. Without a defendant's “use” of the plaintiff's idea in breach of an implied contract or a relationship of confidence, no violation of a plaintiff's rights can occur. Importantly, this issue of “use” itself has two separate prongs, and a plaintiff must satisfy both the first *and* second prongs to prevail. Initially, the plaintiff must prove “derivation” — that his or her idea was actually utilized and relied on in the defendant's creative process.<sup>10</sup> Second, the plaintiff must prove that the ideas contained in the defendant's finished work are “substantially similar” to the plaintiff's submission.<sup>11</sup> To survive

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<sup>8</sup> *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010); *Mann v. Columbia Pictures, Inc.*, 128 Cal. App. 3d 628, 647 n.6 (1982); *Faris*, 97 Cal. App. 3d at 318; *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (1984).

<sup>9</sup> *Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel. Co.*, 168 Cal. App. 3d 455, 46 (1985); *see also Faris*, 97 Cal. App. 3d at 320-23.

<sup>10</sup> This is why independent creation is an absolute defense, regardless of the level of similarity between the parties' works. *See, e.g., Spinner*, 215 Cal. App. 4th at 185 (“Even when the plaintiffs raise an inference of use . . . the defendants may dispel that inference with evidence that conclusively demonstrates the defendants independently created their product.”); *Hollywood Screentest of Am. Inc. v. NBC Universal*, 151 Cal. App. 4th 631, 648 (2007) (“Because [defendant] has presented undisputed evidence of independent creation, thus preventing a finding of *use*, none of [plaintiff's] causes of action can survive.”) (emphasis added).

<sup>11</sup> As a result, even if the defendant uses the plaintiff's work as a template or inspiration, there is no cause of action if the defendant makes sufficient modifications to render the works ultimately dissimilar. *See, e.g., Benay*, 607 F.3d at 631 (“the weight of California authority is that there must be ‘substantial similarity’ between plaintiff's idea and defendant's production to render defendant liable.”) (citations omitted); *Kurlan v. Columbia Broad. Sys.*, 40 Cal. 2d 799, 809 (1953) (holding that the works at issue must share “some substantial similarity” to create a jury issue); *Stanley v. Columbia Broad. Sys.*, 35 Cal. 2d 653, 660 (1950); *Klekas*, 150 Cal. App. 3d at 1114; *Donahue v. United Artists Corp.*, 2 Cal. App. 3d 794, 807-08 n.5 (1969) (approving jury instruction requiring plaintiff to show that defen-

summary judgment, a plaintiff must raise genuine issues for trial under *both* prongs because neither an independently-derived duplicate<sup>12</sup> nor a work inspired by the plaintiff's submission that nonetheless lacks any "substantial similarity" with plaintiff's creation<sup>13</sup> constitutes "use" of the plaintiff's idea.

This "substantial similarity" requirement in idea submission cases has been said to "align[ ] this field with copyright infringement" and "[i]t also means that copying less than substantial material is non-actionable."<sup>14</sup> In order to make such a "substantial similarity" showing, a plaintiff must demonstrate that the *ideas* contained in the works at issue are substantially similar as to specific identifiable elements, such as characters, settings, subject matter, themes, storyline, sequence of events, dramatic gimmicks, and plot ideas.<sup>15</sup> This comparison of the ideas contained in two works to determine whether a jury issue exists as to "substantial similarity" can

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dant used "substantial portion" of plaintiff's submission); *Henried v. Four Star Television*, 266 Cal. App. 2d 435, 437 (1968); *Sutton v. Walt Disney Prods.*, 118 Cal. App. 2d 598, 603 (1953); *see also* *Whitfield v. Lear*, 751 F.2d 90, 93-94 (2d Cir. 1984) (applying California law); *A Slice of Pie Productions, LLC v. Wayans Brothers Entm't*, 487 F. Supp. 2d 41, 52 (D. Conn. 2007) (applying California law). Under circumstances where the parties have contractually agreed to a different standard than substantial similarity, however, the contract will be enforced by the courts – for example, if compensation is due when one work is "based on" another work regardless of substantial similarity. *See Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 792 (1953) (noting that an express contract in which the defendants agreed to pay for the plaintiff's submission "no matter how slight or commonplace the portion which they used" was "conceivable, even though improbable. . . ."); *see also* note 104, *infra*.

<sup>12</sup> *Hollywood Screentest*, 151 Cal. App. 4th at 648.

<sup>13</sup> *Kurlan*, 40 Cal. 2d at 809.

<sup>14</sup> 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.08[A], at 19D-98 (emphases added); *accord* Lionel S. Sobel, *The Law of Ideas Revisited*, 1 UCLA ENTM'T L. REV. 9, 77 (1994) ("[t]he weight of California authority is that there must be 'substantial similarity' between the plaintiff's submission and the defendant's production in order for the defendant to be liable").

<sup>15</sup> *See, e.g., Desny*, 46 Cal. 2d at 746-49 (reversing summary judgment for defendants where the works shared numerous common elements, including similar storylines, settings, characters, sequences of events); *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 601 (1966) (finding "enough similarities in basic plot ideas, themes, sequences and dramatic 'gimmicks'" to create a jury issue); *Henried*, 266 Cal. App. 2d at 436-37 (affirming order sustaining demurrer because, after comparing characters, themes and storylines, only a single similarity could be found — which is "grossly inadequate to sustain a claim of substantial similarity"); *A Slice of Pie*, 487 F. Supp. 2d at 52 (granting summary judgment after assessing "[the] lack of substantial similarity between the works with respect to, *inter alia*, their respective plots, elements and themes").

often be conducted by the court as a matter of law.<sup>16</sup> However, the fact that “substantial similarity” is a required element in idea submission claims in no way answers the ultimate question of how *much* similarity is necessary for it to be *substantial*. To put it another way, in the context of our hypothetical, is Tarantino’s *Once Upon a Time in Hollywood* *substantially* similar to your “Charles Manson” idea? A review of the idea submission cases in which the substantial similarity requirement was developed may assist this inquiry.

### III. THE CASE LAW ADDRESSING SUBSTANTIAL SIMILARITY IN IDEA CASES

One of the first cases considering the degree of similarity required to maintain an idea submission claim was the California Supreme Court’s 1950 decision in *Stanley v. Columbia Broadcasting System, Inc.*<sup>17</sup> In *Stanley*, the plaintiff had prevailed at trial on claims for breach of express and implied contract pertaining to the sale of an idea for a proposed radio show entitled *Hollywood Preview*, in which motion picture executives would describe proposed ideas for movie productions, which would be commented on by a board of experts, and the at-home audience was encouraged to submit written comments. The defendant, after receiving plaintiff’s proposed script, format, and demo recording, had launched a similar radio show also entitled *Hollywood Preview*. However, the defendant’s program had a somewhat different format. Unlike plaintiff’s proposed show, defendant’s production lacked experts who evaluated the potential movie productions and only the studio audience was asked to submit written comments. Citing these differences, on appeal the defendant contended that the parties’ respective radio shows were not sufficiently similar as a matter of law. The Supreme Court rejected this argument, strongly suggesting that the issue of similarity is generally a jury question:

The problem of similarity between two compositions, whether literary, musical or dramatic, is a *question of fact* to be determined ultimately by a comparison of the two works upon the basis of *the opinion of the average individual* possessing a practical understanding of the subject.<sup>18</sup>

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<sup>16</sup> See *Klekas*, 150 Cal. App. 3d at 1114 (affirming summary judgment); *Kurlan*, 40 Cal. 2d at 809 (holding on demurrer, where the works are before the court, “the court may determine whether there is substantial similarity”); *Henried*, 266 Cal. App. 2d at 436-37 (affirming order sustaining demurrer); *Sutton*, 118 Cal. App. 2d at 603-04 (same); *A Slice of Pie*, 487 F. Supp. 2d at 52 (granting summary judgment).

<sup>17</sup> *Columbia Broad. Sys., Inc.*, 35 Cal. 2d at 660.

<sup>18</sup> *Id.* (emphases added).

Applying this standard, the court concluded that the jury's verdict for plaintiff reflected the opinions of an "average, reasonable man" and deserved deference.<sup>19</sup> Despite the format differences between the parties' works, the court affirmed the judgment — holding that "[t]he evidence, in the form of the two programs alone, shows that there is substantial similarity to support the verdict."<sup>20</sup>

Three years later, the California Supreme Court issued companion decisions likewise addressing the issue of substantial similarity in the context of idea submission cases — *Weitzenkorn v. Lesser*<sup>21</sup> and *Kurlan v. Columbia Broadcasting System, Inc.*<sup>22</sup> In *Weitzenkorn*, both the plaintiff's written synopsis entitled *Tarzan in the Land of Eternal Youth* and the defendants' motion picture *Tarzan's Magic Fountain* featured the well-known fictional character Tarzan and his cohorts, Jane and Cheeta, as well as the myth of the fountain of youth. The trial court had held that the parties' works — which had been incorporated by reference into plaintiff's complaint and thus were subject to judicial review on demurrer — were not sufficiently similar. Accordingly, the trial court had sustained the defendants' demurrer to plaintiff's common law copyright,<sup>23</sup> express contract, and implied contract claims counts without leave to amend. On appeal, the Supreme Court held that the demurrer had been properly sustained as to the common law copyright claim because the parties' works were not similar in original *protectible* expression.<sup>24</sup> However, the court reversed the judgment for defendant on plaintiff's breach of express and implied contract causes of action because of the similarities in *unprotectible* elements, such as "the combination of characters, locale, and myth."<sup>25</sup> The court further held that it was "conceivable" that the parties entered into an agreement in which the defendants "agreed to pay for [plaintiff's] production regardless of its protectibility and *no matter how slight or commonplace the portion which they used.*"<sup>26</sup>

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<sup>19</sup> *Id.* at 662.

<sup>20</sup> *Id.* at 663.

<sup>21</sup> 40 Cal. 2d 778 (1953).

<sup>22</sup> 40 Cal. 2d 799 (1953).

<sup>23</sup> Because *Weitzenkorn* and many of the other cases cited in this paper were decided under the law in effect before January 1, 1978, the effective date of the Copyright Act of 1976, there was no federal preemption of copyright claims under 17 U.S.C. § 301 and thus common law copyright infringement and plagiarism claims could be asserted in state court without concern for Copyright Act preemption.

<sup>24</sup> 40 Cal. 2d at 791 ("[a] careful comparison of [plaintiff's] composition and the motion picture shows no similarity between them as to form and manner of expression [although] [i]t is true that a portion of the 'basic dramatic core' might be found similar").

<sup>25</sup> *Id.* at 792.

<sup>26</sup> *Id.* (emphasis added).



In *Kurlan*, the plaintiff alleged the theft of his idea to create a radio program adaptation of the popular stage play and motion picture *My Sister Eileen*, a comedy concerning two sisters (one smart, the other not) sharing an apartment in New York. The trial court, as in *Weitzenkorn*, had sustained the defendants' demurrer to, among other causes of action, plaintiff's breach of express and implied contract counts after comparing the parties' works (which had been incorporated by reference in plaintiff's complaint) and finding that they were not sufficiently similar. The Supreme Court reversed the judgment entered by the trial court, as in *Weitzenkorn*, holding that:

[A]lthough there is *no* similarity between protectible portions of the literary content of [plaintiff's] program and the defendants' broadcasts, *there is the possibility of finding some similarity in the use by each production of a 'dumb' character who produces difficult situations for a 'smart' character, both being girls who share an apartment in New York City.*<sup>27</sup>

Thus, echoing its companion decision in *Weitzenkorn*, the court concluded that: "The terms of the contract and the content of the programs present questions of fact for the jury as to the contractual provisions, access, similarity, and copying."<sup>28</sup>

In the same year that *Weitzenkorn* and *Kurlan* were decided, the Court of Appeals decision in *Sutton v. Walt Disney Productions* adopted a somewhat more stringent approach to evaluating the "use" of an idea.<sup>29</sup> In *Sutton*, the plaintiff had authored a book entitled *Circus in Nightland* — a fantasy featuring a child named Nancy who cannot attend the circus because of a foot injury. After hearing a friend describe the circus, Nancy dreams of being escorted into the woods by a fairy to attend a "nightland circus" — which is performed by a group of small animals "endowed with intellectual attributes."<sup>30</sup> In contrast, the defendant's work was a live action nature documentary featuring wildlife common in Minnesota and Montana.<sup>31</sup> The trial court had sustained defendant's demurrer without leave to amend on the grounds that the works lacked substantial similarity, and the Court of Appeals affirmed, holding that:

A comparison of the two works *leaves no suspicion that the film is a reproduction of the book*. The only ground of similarity is that both relate to animals. The book is a fantasy of animals, reptiles, amphibians and insects endowed with intellectual attributes; the film is a real-life portrayal of animals in the wilds with no particular order or story except the loose thread of a young beaver's adventures in establishing his own dam.

<sup>27</sup> 40 Cal. 2d. at 810 (emphases added).

<sup>28</sup> *Id.*

<sup>29</sup> *Sutton v. Walt Disney Prods.*, 118 Cal. App. 2d 598 (1953).

<sup>30</sup> *Id.* at 600, 603.

<sup>31</sup> *Id.* at 603.

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Accordingly, the holding of the trial court that the two finished products have no substantial similarity to each other . . . was correct.<sup>32</sup>

The court concluded that “the lack of substantial similarity between the book and the motion picture precludes appellant from stating a cause of action whether specifically pleaded as an express contract or generally as an implied-in-fact contract.”<sup>33</sup>

In 1956, three years after *Weitzenkorn, Kurlan, and Sutton*, the California Supreme Court issued its seminal decision in *Desny v. Wilder*, an ambitious attempt to clarify the law of implied-in-fact contracts for the use of ideas.<sup>34</sup> The plaintiff’s idea in *Desny* was based on a dramatization of the real life story of a man whose entrapment in a cave briefly grabbed national attention.<sup>35</sup> The plaintiff conveyed his idea for a motion picture based on this story to an assistant working for defendant Billy Wilder, the famous director, in two telephone conversations. In the first phone call with Wilder’s assistant, plaintiff “blurted” the basic outline of his idea; however, during the second phone call he first conditioned his verbal disclosure of a detailed written synopsis on payment.<sup>36</sup> Of course, Billy Wilder later produced the film *Ace in the Hole*, starring Kirk Douglas as an unscrupulous reporter who turns the story of a treasure hunter trapped in a mineshaft into a national media sensation. Although the trial court had granted summary judgment for defendants, the California Supreme Court reversed in part — ruling that plaintiff’s claim for breach of implied-in-fact contract raised triable issues for the jury based on the plaintiff’s second submission to Wilder’s assistant. Although the court did not detail any specific test or criteria for determining “substantial similarity,” it ruled that a triable issue existed as to this issue, holding that defendants’ motion picture “obviously does bear a remarkable similarity to plaintiff’s story both in respect to the historical data and the fictional material originated by plaintiff.”<sup>37</sup> The court also strongly emphasized that under California

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<sup>32</sup> *Id.* at 602 (emphasis added).

<sup>33</sup> *Id.* at 603.

<sup>34</sup> 46 Cal. 2d 715, 733 (1956) (distinguishing *Stanley*, which held that the plaintiff’s idea must be original or novel).

<sup>35</sup> *Id.* at 746-48.

<sup>36</sup> As a general matter, a person who “blurts” his or her idea before an implied contract is formed loses any claim for relief. *Desny*, 46 Cal. 2d at 739 (“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.”); see also *Ousley v. Krasnow*, No. B222726, 2011 WL 2936771 (Cal. Ct. App. July 19, 2011). This is because, absent contract protection, ideas are generally “free as the air.” *Desny*, 46 Cal. 2d. at 731. In *Desny*, the California Supreme Court held it was a jury question as to whether defendants merely used the blurted idea in the first call or breached an implied contract arising during the plaintiff’s disclosure of his more detailed synopsis during the second phone call. *Id.* at 739.

<sup>37</sup> *Desny*, 46 Cal. 2d at 749.

law ideas are generally “free as the air” unless they are disclosed pursuant to a contract under which the recipient of the idea had an opportunity to reject the submission prior to disclosure with knowledge of the offeror’s terms.<sup>38</sup>

In 1966, a decade after *Desny*, the Court of Appeals addressed the substantial similarity issue again in *Donahue v. Ziv Television Programs, Inc.*<sup>39</sup> The court in *Donahue* reversed the trial court’s entry of judgment notwithstanding the verdict in favor of the defendants, holding that a triable issue existed on the issue of substantial similarity. In *Donahue*, the plaintiff’s submission, which consisted of a written format, twelve story outlines, one screenplay, and a production budget for a proposed TV show entitled *Underwater Legion*, and the defendants’ program, *Sea Hunt*, both featured scuba-diving crime fighters.<sup>40</sup> The *Donahue* court held that a breach of contract claim, unlike a copyright claim, could be maintained for the use of unoriginal creative elements, and that a jury could “easily” find the two works were “quite similar.”<sup>41</sup> Without exhausting the list of similarities,<sup>42</sup> or outlining any criteria, methodology, or test for determining substantial similarity, the court ruled that both works featured “[a] strong similarity in the basic dramatic core,” “[s]imilarities in basic theme and dramatic situations,” “similarities in basic plot ideas, themes, sequences and dramatic gimmicks,” and similarities in “the use of various types of equipment for operating under water [and] the extensive use of underwater photography.” Indeed, the court noted that “[t]he list of differences is shorter than that of the similarities,” and ultimately concluded that “Defendants’ television series follows the [plaintiff’s] format in most of its important facets . . . .”<sup>43</sup>

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<sup>38</sup> *Id.* at 731-32; see also *supra* note 6 and accompanying text.

<sup>39</sup> *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593 (1966).

<sup>40</sup> *Id.* at 599-601. In *Donahue*, the plaintiff submitted a “format in written form, together with twelve story outlines, one screenplay and a proposed budget.” *Id.* at 597.

<sup>41</sup> *Id.* at 600-02.

<sup>42</sup> *Id.* at 601 (“Only length, but little else, would be added to this opinion were we to set down in detail what these similarities are. Those concerned know what we refer to.”).

<sup>43</sup> *Id.* at 600-01. Ironically, the case law holds that *Sea Hunt* was stolen twice, from two separate sources. A few years after the decision in *Donahue* reversed the trial court’s grant of JNOV for defendants, in *Minniear v. Tors*, 266 Cal. App. 2d 495 (1968), a case citing and relying on *Donahue*, the Court of Appeals affirmed the trial court’s judgment that someone else, i.e., the plaintiff in *Minniear* rather than the plaintiff in *Donahue*, had conceived the idea for *Sea Hunt*. *Minniear*, 266 Cal. App. 2d at 505 (holding “there are enough similarities in the basic plot ideas, themes, sequences and dramatic ‘gimmicks’ between *Sea Divers* and *Sea Hunt* for a jury to infer that appellant’s ideas and format were the inspiration for *Sea Hunt* and respondent . . . in fact, used appellant’s ideas and format.”). Thereafter, the

One year later, however, the Court of Appeals in *Ware v. Columbia Broadcasting System, Inc.*<sup>44</sup> adopted a more rigorous approach to the determination of substantial similarity — adopting a copyright-like standard under the facts of that case. In *Ware*, the plaintiff submitted a thirty-five-page teleplay to defendants, who thereafter produced an allegedly similar work as an episode of the TV series *Twilight Zone* without crediting plaintiff. The plaintiff sued defendants for common law copyright infringement and breach of implied contract. The trial court granted defendants' motion for summary judgment and the Court of Appeals affirmed. The *Ware* court first dispensed of the common law copyright infringement claim by holding that the two works lacked substantial similarity in protectable expression. The plaintiff's teleplay featured a gentle old man who worked as a night watchman at a department store. The man is depicted befriending and conversing with the store mannequins. Eventually, when the man's body is found dead, a mannequin closely resembling him mysteriously is placed with the mannequins that the man had befriended. In contrast, the defendants' *Twilight Zone* episode featured a bitter thirty-five-year-old man who, while visiting a museum, views a glass display case containing a miniature model of a 1890's town house that is inhabited by the figurine of a beautiful miniature woman — who appears alive to the man. After he sees the woman being assaulted, the man breaks the glass case, is forcibly removed from the museum, and is forced to seek mental health treatment. The *Twilight Zone* episode ends when a museum guard sees a miniature figurine of the man seated next to the miniature woman within the display case. The *Ware* court noted that the two works shared only a common theme — a man who “finds happiness with an inanimate figure, whom he treats as a real person” — that is as at least as old as ancient Greek myths. The court noted that the “characterizations, character relationships, scenes, incidents and dialogue are all markedly different.”<sup>45</sup> Thus, the court affirmed the dismissal of the plaintiff's common law copyright claim, concluding that there was no substantial similarity between the *Twilight Zone* episode and the protectable elements of the plaintiff's teleplay.<sup>46</sup>

The court in *Ware* also granted summary judgment on plaintiff's breach of implied contract claim on the same grounds — i.e., lack of sub-

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claims in *Donahue* were retried (apparently without the plaintiff in *Minnear* testifying for defendants), and a jury again returned a verdict for plaintiff. *Donahue v. United Artists Corp.* (“*Donahue II*”), 2 Cal. App. 3d 794 (1969). On appeal, it was held that substantial evidence supported the jury's finding that plaintiff's work had been used in “substantial portion” to create *Sea Hunt*. *Donahue II*, 2 Cal. App. 3d at 806-08 & n.5.

<sup>44</sup> *Ware v. Columbia Broad. Sys., Inc.*, 253 Cal. App. 2d 489 (1967).

<sup>45</sup> *Id.* at 492.

<sup>46</sup> *Id.* at 493-94.

stantial similarity between the works. The court noted that plaintiff's complaint alleged the breach of an implied agreement pertaining to the use of not mere ideas, but "literary property." The complaint alleged that the defendants agreed to compensate plaintiff should they use this "literary property," and that the defendants' *Twilight Zone* episode constituted such use. The *Ware* court found that this fact distinguished the case from *Desny*, which involved the alleged use of only "ideas":

The record here is significantly different from the *Desny* record. Plaintiff here attached to his complaint not a mere synopsis but a *complete dramatic work*. The complaint alleges that he submitted it to defendants "with the express oral understanding and agreement that in the event plaintiff's said literary property was thereafter used or telecast by said defendants, or any of them, in whole or in part, defendants would pay plaintiff the reasonable value of such use or telecast." Each of the other contract counts alleges similarly that the matter offered was plaintiff's "literary property." *Plaintiff does not allege that the parties contracted with respect to any idea, synopsis, or format. Literary property is what plaintiff had for sale; that is what he submitted to defendants, and that is the subject matter of his complaint.* The consistent use of the term "literary property" in the complaint does not appear to have been an inadvertence of the pleader. There is nothing in the record to suggest that plaintiff was, like *Desny*, offering to sell a public domain story idea.<sup>47</sup>

The court in *Ware* concluded that when a breach of implied contract claim is predicated on the submission of such "literary property," a copyright-like standard must be applied in determining the issue of substantial similarity:

*It would have been fatuous for plaintiff to have alleged that when his story was submitted defendants agreed, by implication, to pay him if they ever in the future made a picture embodying any stock situation which plaintiff had drawn upon in constructing his play.* Plaintiff has not so alleged, and we therefore need not decide whether such a claim could be maintained under the *Desny* rationale.<sup>48</sup>

Accordingly, the Court of Appeals affirmed summary judgment on the breach of implied contract claim, holding that "plaintiff submitted *literary property* to defendants, but an examination of the plaintiff's work and the defendants' telecast establishes as a matter of law that defendants did not use plaintiff's *property*."<sup>49</sup> In fact, however, this holding was somewhat disingenuous. The complaint filed by the plaintiff in *Ware* actually alleged that defendants had breached an implied contract concerning the use of the plaintiff's literary property "in whole *or in part*," which also put at issue the *ideas* in his teleplay.<sup>50</sup>

<sup>47</sup> *Id.* at 494-95 (emphases added).

<sup>48</sup> *Id.* (emphases added).

<sup>49</sup> *Id.* at 495-96 (emphases added).

<sup>50</sup> *Id.* at 494 (emphasis added).

The copyright-like approach to substantial similarity in *Ware* was seemingly extended by the Court of Appeals holding in *Henried v. Four Star Television*,<sup>51</sup> decided the following year. In *Henried*, the plaintiff alleged that he had entered into an implied contract with the defendant arising from his submission of a seven-page synopsis for a proposed TV program to be entitled *The Two Manhattans*. The complaint alleged that this implied contract was breached when the defendant subsequently produced a television series, entitled *Burke's Law*, based on the synopsis. Plaintiff's *The Two Manhattans* turned on the adventures of a wealthy father-son international crime-fighting duo. The defendant's show *Burke's Law* featured a wealthy bachelor homicide detective. Although both works featured rich crime fighters, the trial court sustained defendant's demurrer on the grounds that the two works were not substantially similar and the Court of Appeal affirmed:

The only point of similarity, a point to which plaintiff desperately clings, is that both heroes travel in chauffeur-driven Rolls Royces. In this respect art imitates life, and follows the tracks of Ian Fleming and countless others who, after coming into money, favored the same automobile manufacturer with their patronage. *But a resemblance based solely on the use of a well-publicized, even bromidic, symbol for wealth and luxury seems grossly inadequate to sustain a claim of substantial or material similarity between elements of the two properties.*<sup>52</sup>

In other words, the court's holding in *Henried* is to the effect that wealthy crime fighters driving about in chauffeured Rolls Royces is a stock element that cannot be protected under an implied contract. As such, the decision echoes *Ware* without citing that case.

However, in *Fink v. Goodson-Todman Enterprises, Ltd.*,<sup>53</sup> two years later, the Court of Appeals chose to follow a more relaxed standard for determining substantial similarity in reversing the trial court's order sustaining defendants' demurrer without leave to amend. In *Fink*, the plaintiff had submitted to defendants various materials pertaining to a proposed TV show to be entitled *The Coward*, including a full script for the pilot episode and a detailed written presentation that included plot summaries of fifteen episodes. *The Coward* told the story of a brave 1960's New York police officer who is driven to court danger by the shame of his service as an army officer during WWII, when he was court-martialed for surrendering, in violation of his orders, in a futile effort to save the men under his command. Plaintiff alleged that his implied contract with defendants had been breached by their production of *Branded* — a TV show concerning a brave itinerant cowhand in the American West of

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<sup>51</sup> 266 Cal. App. 2d 435, 436 (1968).

<sup>52</sup> 266 Cal. App. 2d at 437 (emphasis added).

<sup>53</sup> 9 Cal. App. 3d 996 (1970).

the 1850's who is motivated by the public disgrace of his prior service as an army officer at a time when U.S. troops were battling American Indians, when he was wrongfully court-martialed for supposedly fleeing the field of battle. Based on the "structural spine" of the two stories, the Court of Appeals held that the plaintiff had stated a viable cause of action for breach of implied contract in light of the similarities in the themes, back stories, and portrayal devices to be utilized in the two works — despite the pervasive differences in the characters, settings, time periods, and other concrete expressive elements of the works.<sup>54</sup> Interestingly, the court candidly acknowledged that determining substantial similarity in idea submission cases is a "zig-zag frontier" in which "[d]ecisions must . . . inevitably be *ad hoc*."<sup>55</sup>

That same year, in *Blaustein v. Burton*,<sup>56</sup> the Court of Appeals reversed the trial court's grant of summary judgment for defendants in a case involving the idea to film a motion picture version of Shakespeare's play *The Taming of the Shrew* starring the actors Richard Burton and Elizabeth Taylor, and directed by Franco Zeffirelli, a stage director who was well known for his staging of *Romeo and Juliet*. Plaintiff alleged that he had submitted to defendants not only the idea to film Shakespeare's play with Burton, Taylor, and Zeffirelli, but that he had also proposed the additional ideas of eliminating the play-within-a-play device used by Shakespeare, filming the movie in Italy, and including in the film two scenes that in Shakespeare's play occur offstage and are only described by the characters.<sup>57</sup> The court concluded that such relatively obvious concepts for adapting a film from a preexisting public domain stage play can nonetheless be protected by implied-in-fact contracts:

The producer and the writer should be free to make any contract they desire to make with reference to the buying of the ideas of the writer; *the fact that the producer may later determine, with a little thinking, that he*

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<sup>54</sup> The Court in *Fink* essentially cherry-picked the similarities between the works at a high level of abstraction, not merely ignoring the differences between the works, but citing them as possible evidence of the defendants' alleged culpability — holding that "the variations are such as might be deliberately contrived to disguise piracy." *Fink*, 9 Cal. App. 3d at 1012. However, a more appropriate approach to such variations would have been that "[c]opying deleted or so disguised as to be unrecognizable is not copying." See *v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983). Additionally, the result in *Fink* might be explained by the fact that the plaintiff alleged an oral contract under which he supposedly was owed compensation by defendants if they created a series "based on Plaintiff's [proposed] Program or any material element contained in [it]" (*Fink*, 9 Cal. App. 3d at 1002 (emphasis added)) — a seemingly lower standard than substantial similarity in the usual case where the parties' alleged contract is not express but implied-in-fact.

<sup>55</sup> 9 Cal. App. 3d at 1013 (citations omitted).

<sup>56</sup> *Blaustein v. Burton*, 9 Cal. App. 3d 161 (1970).

<sup>57</sup> *Id.* at 167.

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*could have had the same ideas and could thereby have saved considerable money for himself, is no defense against the claim of the writer. This is so even though the material to be purchased is abstract and unprotected material.*<sup>58</sup>

In reversing the summary judgment entered for defendants, the Court of Appeals held that “[t]he motion picture as completed utilizes the . . . ideas disclosed by [plaintiff] to [defendants]. . . .”<sup>59</sup> The court further held that the issue of *when* a use of plaintiff’s idea triggering an obligation to pay arose (for example, when the preliminary script was written or when the completed film was released to the public), thus causing accrual of the statute of limitations, was to be determined by the jury based on “the manifested intent of the parties.”<sup>60</sup>

Subsequently, however, the Court of Appeals in *Klekas v. EMI Films, Inc.* followed the approach of *Ware* and *Henreid*, rather than the approach in *Donohue*, *Fink*, and *Blaustein*, in affirming the trial court’s grant of summary judgment for defendants.<sup>61</sup> In *Klekas*, the plaintiff had claimed that the motion picture *The Deer Hunter* had infringed plaintiff’s common law copyright and had copied plaintiff’s ideas in breach of an implied contract. The plaintiff in *Klekas*, like the plaintiff in *Ware*, claimed that he had submitted literary property to the defendants — specifically, a novel entitled *The Fields of Discontent*. Both the plaintiff’s novel and the defendants’ motion picture concerned military veterans who returned to the U.S. following their tours of duty overseas and “both works deal generally with the subjects of friendship, courage, honor and the effects of war on the human spirit.”<sup>62</sup> Nonetheless, the trial court granted summary judgment for defendants, finding that there had been no use of *The Fields of Discontent* in the creation of *The Deer Hunter*. The Court of Appeals affirmed, holding that “[a]fter a thorough review of both literary works, we can only conclude that there are substantial differences between them, especially in the use of contexts, characters and language through which the themes are expressed.”<sup>63</sup> Citing *Ware*, the court in *Klekas* concluded that the undisputed evidence established that “the screenplay of ‘The Deer Hunter,’ is, as a matter of law, substantially *dissimilar* to plaintiff’s novel,” establishing as a matter of law that “there is nothing in the record to estab-

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<sup>58</sup> *Id.* at 183 (quoting *Chandler v. Roach*, 156 Cal. App. 2d 435, 442 (1957)) (emphasis added).

<sup>59</sup> *Id.* at 172.

<sup>60</sup> *Id.* at 186. Of course, this begs the question as to how such intent could have been “manifested” when the contract at issue was merely implied-in-fact from conduct.

<sup>61</sup> 150 Cal. App. 3d 1102, 1114 (1984).

<sup>62</sup> *Id.* at 1112-13.

<sup>63</sup> *Id.* at 1113.



lish the use of [plaintiff's] work.”<sup>64</sup> In other words, general stock similarities inherent in themes of war and its aftermath were insufficient to establish *substantial* similarity of ideas.

Similarly, in *A Slice of Pie v. Wayans Brothers Entertainment*, the District Court of Connecticut, applying California law, held that the plaintiff failed to raise a triable issue as to substantial similarity on either its copyright infringement or its state law breach of implied contract claims.<sup>65</sup> In *A Slice of Pie* the plaintiff claimed that the defendant's motion picture *White Chicks* was based on plaintiff's screenplay *Johnny Bronx*. Both works involved African American law enforcement officers who disguised themselves as Caucasians to go undercover and foil a crime. The court first granted summary judgment on the copyright infringement claim, holding that, after reviewing the expressive elements of each work, “the premise, plot and scenes depicted in each work is so dissimilar that no reasonable juror could find them to be substantially similar to support a conclusion of unlawful appropriation.”<sup>66</sup> The court likewise granted summary judgment on plaintiff's implied contract claim, following the same reasoning adopted in *Ware*, *Henried*, and *Klekas* in ruling that:

[G]iven the Court's assessment of *lack of substantial similarity between the works with respect to, inter alia, their respective plots, elements, and themes* [in affirming summary judgment as to the copyright count], which assessment is used to infer *use*, plaintiff has *insufficient evidence of use by defendants of plaintiff's screenplay and/or the ideas therein*.<sup>67</sup>

In 2008, the California Court of Appeal issued its unpublished decision<sup>68</sup> in *Reginald v. New Line Cinema Corp.*,<sup>69</sup> which also applied a high standard for determining substantial similarity.<sup>70</sup> In *Reginald*, the plaintiff alleged that defendants' movie, *Wedding Crashers*, was based on his unpublished work, *The Party Crasher's Handbook*, which he had submitted to defendants. The trial court granted summary judgment on the grounds that no triable issue existed as to substantial similarity and the Court of Appeal affirmed. On appeal, the court surveyed the pertinent cases, including the *Weitzenkorn*, *Desny*, *Donahue*, *Klekas*, and *Henried* decisions, and concluded that “the degree of similarity required to meet the substan-

<sup>64</sup> *Id.* at 1115.

<sup>65</sup> 487 F. Supp. 2d 41 (D. Conn. 2007).

<sup>66</sup> *Id.* at 50-51.

<sup>67</sup> *Id.* at 52 (emphases added).

<sup>68</sup> In California state court, such unpublished appellate decisions cannot be cited. See CAL. R. CT., 8.1105, 8.1110, 8.1115. Nonetheless, in the context of this article, discussion of a few unpublished California appellate opinions seems helpful if only to illustrate how the Courts are struggling with the issue of substantial similarity in these kinds of cases.

<sup>69</sup> No. B190025, 2008 WL 588932 (Cal. Ct. App. Mar. 5, 2008).

<sup>70</sup> *Id.* at \*4 n.5, \*8 n.7.

tial similarity standard is high in the idea submission context.”<sup>71</sup> The court held that substantial similarity requires the plaintiff to establish that the defendant based his or her work “on a *material* element” of plaintiff’s work<sup>72</sup> using a standard similar to that used in copyright cases save that, in contract cases, unprotectable elements are not filtered out prior to comparing the works.<sup>73</sup> Although the plaintiff had identified fourteen purported similarities between the parties’ works, including the titles, the “basic storyline,” and the fact that both works featured a male duo who crash weddings to meet women,<sup>74</sup> the court held that none of the similarities pertained to “material elements” — e.g., “characters, character motivations, settings, basic dramatic core and themes, storylines, plot ideas, the dramatic sequence and dramatic gimmicks”<sup>75</sup> — because they “would be common to any two works that included a wedding crashing sequence.”<sup>76</sup> The court ruled, as a matter of law, that the two works were not substantially similar and affirmed the entry of summary judgment.<sup>77</sup>

Two years later, however, in *Benay v. Warner Bros.*,<sup>78</sup> the Ninth Circuit ignored *A Slice of Pie*, *Klekas*, and *Henried*, and distinguished *Ware*, in holding the fact that the works “are not substantially similar for purposes of copyright infringement does not preclude a finding of substantial similarity for purposes of an implied-in-fact contract under California law.”<sup>79</sup> The works at issue in *Benay*, i.e., the screenplay submitted by plaintiffs and the motion picture ultimately produced by defendants, shared the same title, *The Last Samurai*, and each concerned an American war veteran who travels to Japan at the time of the Satsuma Rebellion of 1877 where he meets the Emperor, trains the Imperial Army in modern warfare, fights against the samurai, and in the end is spiritually restored. In affirming summary judgment for defendants on the plaintiff’s copyright infringement claim, the Ninth Circuit held that these similarities were insufficient to raise a jury issue as to possible copyright infringement, ruling that:

A number of similarities between the works arise out of the fact that both works are based on the same historical events, take place at the same time and in the same country, and share similar themes. These similarities are largely between *unprotected elements* — historical facts, charac-

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<sup>71</sup> *Id.* at \*5.

<sup>72</sup> *Id.* at \*6 (quoting *Fink*, 9 Cal. App. 3d at 1007 (emphasis in *Reginald*)).

<sup>73</sup> *Id.* at \*8 n.7.

<sup>74</sup> *Id.* at \*6-7.

<sup>75</sup> *Id.* at \*7.

<sup>76</sup> *Id.* at \*8.

<sup>77</sup> *Id.* at \*9.

<sup>78</sup> 607 F.3d 620, 631 (9th Cir. 2010).

<sup>79</sup> *Id.* at 631.

teristics that flow naturally from their shared premise, and scenes-a-faire.<sup>80</sup>

However, the Ninth Circuit in *Benay* reached the opposite conclusion as to plaintiff's idea submission claim, reversing the trial court's grant of summary judgment for defendants despite holding that "[t]he requirement of substantial similarity for implied-in-fact contract claims 'aligns this field with copyright infringement . . . [and] also means that copying less than substantial material is non-actionable.'"<sup>81</sup> The court reexamined the exact same unprotected elements that it held insufficient to support the copyright claim — e.g., "an embittered American war veteran who travels to Japan where he meets the Emperor, trains the Imperial Army . . . [and], fights against the samurai. . ."<sup>82</sup> — but held them sufficient to raise genuine issues for trial on plaintiff's idea submission claim "because [when] the claim is based in contract, unauthorized use can be shown by substantially similar elements that are not protected under copyright law."<sup>83</sup> In reaching this conclusion, the Ninth Circuit distinguished *Ware* on the grounds that the plaintiff in that case alleged the breach of an implied contract for the use of "literary property" instead of merely averring that defendants had breached an implied contract for the use of "ideas."<sup>84</sup> However, this was a seemingly disingenuous distinction since the plaintiffs in *Benay* had submitted a full screenplay to defendants — i.e., "literary property" — and contended that "important aspects of the Film were copied from the Screenplay."<sup>85</sup>

A few years later, however, in *Ryder v. Lightstorm*,<sup>86</sup> the California Court of Appeals side-stepped the approach taken by the Ninth Circuit in *Benay*, and instead followed in the footsteps of *A Slice of Pie*, *Klekas*, *Henried*, and *Ware* in affirming the trial court's grant of summary judgment for defendants. In *Ryder*, the plaintiff had authored a science fiction short story entitled *KRZ 2068* ("KRZ") inspired by Joseph Conrad's classic novel *Heart of Darkness*. According to plaintiff, James Cameron's film *Avatar* copied plaintiff's ideas from *KRZ* without authorization. However, several years before allegedly having access to *KRZ*, the creators of

<sup>80</sup> *Id.* at 629 (emphasis added). Of course, copyright infringement claims must be supported by substantial similarities in original, copyright-protected expression.

<sup>81</sup> *Id.* at 631.

<sup>82</sup> *Id.* at 632.

<sup>83</sup> *Id.* at 631.

<sup>84</sup> *Id.* at 631-32.

<sup>85</sup> *Id.* at 623. Moreover, while it is correct that the plaintiff in *Ware* alleged the wrongful use of his "literary property," his pleading actually averred that defendants had breached an implied contract concerning any use of his literary property "in whole or in part," which certainly put at issue the *ideas* within his teleplay. *Ware*, 253 Cal. App. 2d at 494 (emphasis added).

<sup>86</sup> *Ryder v. Lightstorm Entm't, Inc.*, 246 Cal. App. 4th 1064 (2016).

*Avatar* had written a detailed 102-page “scriptment” — i.e., a “highly detailed script-length treatment that . . . was in a narrative rather than dialogue form, and laid out the story, characters, setting and many of the visual images for *Avatar* in great detail.”<sup>87</sup> Thus, in evaluating substantial similarity, the court held that it must first “‘filter out’ those preexisting elements [from the scriptment]” because they could not have been copied from *KRZ*.<sup>88</sup> The court then examined twelve remaining elements that plaintiff alleged were later added to “*Avatar*” by defendants, supposedly based on *KRZ*, after the scriptment had been completed. These twelve “similarities” were described by plaintiff in abstract generalities, including, for example: “The protagonist is enlisted as a spy by the corporation.”; “The protagonist survives a life-threatening situation by escaping into a rushing torrent of water.”; and “The corporation depends on the spy to facilitate the continued mining.”<sup>89</sup> However, the court did not accept these generalized purported “similarities” at face value as the Ninth Circuit did in *Benay*. Instead, the Court of Appeals, much like a federal court analyzing substantial similarity in a copyright infringement case,<sup>90</sup> dissected the specific expressive details of each purported “similarity” to rule that the twelve points of alleged similarity relied on by plaintiff, as a matter of law, were in fact not “*substantially* similar” after taking into account the numerous divergent elements of the works.<sup>91</sup>

However, in *Sullivan v. Pure Flix*,<sup>92</sup> a recent unpublished decision, the lessons of *Ryder* were ignored and the pendulum swung yet again in favor of plaintiffs. In *Sullivan*, the plaintiffs’ work was a screenplay entitled *Proof* concerning a debate between two college professors over the existence of God versus science — with one of the professors, whose tenure is placed in jeopardy, inspired by the actor Robin Williams’s character in the film *Dead Poets Society*. The defendants in *Sullivan* had access to the screenplay for *Proof*, but later created an ensemble film entitled *God’s Not Dead*, supposedly based on a rock song with the same title, in which a college student accepts a challenge from an atheist professor to deliver a class presentation proving that God is not dead while other interlocking stories involving other characters (much like in the films *Crash* or *Love Actually*) also deal with the themes of faith and God. In the trial court, defendants won summary judgment. On appeal, relying on *Ryder*, the de-

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<sup>87</sup> *Id.* at 1068.

<sup>88</sup> *Id.* at 1074.

<sup>89</sup> *Id.* at 1076-78.

<sup>90</sup> See note 4 *supra*; see also *Benay*, 607 F.3d at 629 (affirming dismissal of plaintiffs’ copyright infringement claim).

<sup>91</sup> *Ryder*, 246 Cal. App. 4th at 1078.

<sup>92</sup> *Sullivan v. Pure Flix Entm’t, LLC*, No. B280305, 2018 WL 5993817 (Cal. Ct. App. Nov. 15, 2018).

defendants argued that the works were not substantially similar and that pre-existing ideas already known to the defendants had to be “filtered out” of the substantial similarity analysis. However, the Court of Appeals disagreed on both points and reversed the trial court’s ruling. In particular, court in *Sullivan* concluded that *Ryder* was wrongly-decided and declined to “filter out” any creative elements known to defendants before receiving *Proof* — holding that “the approach used in *Ryder* ignores the difference between copyright law and idea submission law.”<sup>93</sup> Further, by focusing on the fact that both works dealt with the same general themes of God and faith in the setting of college campuses, and ignoring the divergent specific expressive details of the kind that had been dispositive in *Ryder*, the court in *Sullivan* ruled that “the similarities in the core storylines of both *Proof* and *God’s Not Dead* are sufficient to preclude a finding of no substantial similarity as a matter of law. Instead, the question is a factual one that we leave for a jury to decide.”<sup>94</sup>

#### IV. THE SO-CALLED INVERSE RATIO RULE

Some cases, including *Sullivan*, have held that determining substantial similarity in an idea submission case may be facilitated by the so-called “inverse ratio rule” — a “rule” that is also sometimes invoked in copyright infringement cases.<sup>95</sup> Under this purported “rule,” if the defendant has a high level of access to the plaintiff’s work, a lower level of similarity may be sufficient for the plaintiff to prevail.<sup>96</sup>

For example, in *Golding v. R.K.O. Pictures*, a 1950 common law copyright case in which the plaintiff alleged that his stage play *The Man and His Shadow* had been infringed by the motion picture *Ghost Ship*, the court held that “[w]here there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown . . . .”<sup>97</sup> The inverse ratio rule has been described as follows:

Although access and similarity are separate components of the “actual use” equation, they are linked to one another whenever they constitute the evidence from which an inference of actual use arises. The law recognizes that a great deal of evidence of one of these elements can compen-

<sup>93</sup> *Id.* at \*14.

<sup>94</sup> *Id.* at \*15.

<sup>95</sup> *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987); *Sullivan*, 2018 WL 5993817 at \*12.

<sup>96</sup> *Fink*, 9 Cal. App. 3d at 1007 fn. 14 (“[T]here is ample similarity, given the unlimited access pleaded, to take the case beyond the demurrer stage. . . . Less similarity is required where access is strong.”).

<sup>97</sup> 35 Cal. 2d 690, 695 (1950); *see also Benay*, 607 F.3d at 625 (“we assume without deciding that the inverse ratio rule applies to lower the burden on [plaintiffs] to show similarity.”).

sate for a shortage of evidence of the other, in the minds of reasonable people asked whether they would infer actual use from the evidence presented. Thus, when circumstantial evidence of actual use must be relied on, the law requires less similarity when the evidence of access is great, and less evidence of access when the similarity is great.<sup>98</sup>

However, this reasoning is highly suspect. It does not logically follow that “more” access to the plaintiff’s work increases the likelihood that the defendant “used” it. Moreover, even if heightened access is deemed to increase the likelihood of use, it does not logically follow that the quantum of substantial similarity required to prove such use should therefore be reduced by a “ratio” or any other amount. Thus, it has been observed: “While it is true that one cannot copy something to which one does not have access, it is also true that one can have complete access to a [creative] work . . . but not copy that work. No degree of access necessarily leads to any degree of copying.”<sup>99</sup>

Because of its logical weaknesses, the inverse ratio rule is frequently cited by the courts only as a makeweight argument that “can apply only to justify a result after a showing of similarity has been made.”<sup>100</sup> Thus, the inverse ratio rule should not be accorded significant weight in the analysis of substantial similarity.<sup>101</sup> “In fact, the Ninth Circuit has recently abrogated the inverse ratio rule by holding that ‘access, however, in no way can prove substantial similarity.’”<sup>102</sup> As a result, it has been observed that: “Happily, therefore, the end result . . . in the Ninth Circuit, [is] access no longer [has] bearing on substantial similarity.”<sup>103</sup>

<sup>98</sup> 5 NIMMER & NIMMER, *supra* note 14, § 19D.07[C][1][c]. But the Nimmer treatise is of two minds concerning the inverse ratio rule. In the section of the treatise dealing with idea submission claims, the validity of the “rule” is unquestioned. However, in the section of the treatise dealing with copyright infringement claims, the inverse ratio rule is criticized and referred to as a “flawed proposition.” See 4 *id.* § 13.03[D] (“The *flawed proposition* that powerful proof of access can substitute for demonstration of the requisite degree of substantial similarity is sometimes labeled the ‘Inverse Ratio Rule.’”) (emphasis added).

<sup>99</sup> 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:91 (2019) (“The inverse ratio theory is based on a false postulate.”).

<sup>100</sup> *Arc Music Corp. v. Lee*, 296 F.2d 186 (2d Cir. 1961).

<sup>101</sup> *Aliotti*, 831 F.2d at 902; see also David Aronoff, *Exploding the Inverse Ratio Rule*, 55 J. COPYRIGHT SOC’Y 125 (2008) (analogizing the inverse ratio rule to such pseudo-scientific beliefs as crop circles, astrology, and phrenology).

<sup>102</sup> *Skidmore as Trustee for Randy Craig Wolfe Trust v. Zeppelin*, 2020 WL 1128808\*, at 10–13 (9th Cir. Mar. 9, 2020) (citing David Aronoff, *Expanding the Inverse Ratio Role*, 55 J. COPYRIGHT SOC’Y 125 (2008)).

<sup>103</sup> 4 NIMMER & NIMMER, *supra* note 14, § 13.03[D].

## V. THE QUESTION OF INTENT

The level of “substantial similarity” that must be proved by the plaintiff under a breach of implied-in-fact contract legal theory may also be affected by the intent of the parties entering into an implied-in-fact contract for the use of ideas. For example, several cases have suggested that a contractual agreement requiring compensation when a later work is “based on” a prior work may require payment even when the similarities are not “substantial.”<sup>104</sup> Additionally, in *Weitzenkorn*, the court noted that while “improbable” it was nonetheless possible that the plaintiff could show that the defendants had agreed to pay plaintiff “no matter how slight or commonplace the portion which they used.”<sup>105</sup>

The use of the word “improbable” in *Weitzenkorn*, however, was a gross understatement. As a practical matter, it is virtually impossible that any plaintiff could introduce credible, substantial evidence of a contract to pay for “slight or commonplace” ideas of the kind postulated in *Weitzenkorn*. For obvious reasons, no defendant in a breach of implied contract action would expressly admit to such intent, and it is highly unlikely that any entertainment industry custom or practice could impliedly support such an intent to pay for slight or commonplace ideas. To the contrary, the entertainment industry’s custom and practice is quite the opposite — as one commentator has observed:

It is of course industry custom to pay for movie and television rights to copyright-protected expression, because federal copyright law requires that permission be obtained to film, distribute and perform such expression. *But the existence of an industry custom to pay for copyright-protected expression does not amount to a custom to pay for mere ideas; and thus evidence of one does not prove the existence of the other.*<sup>106</sup>

Accordingly, a plaintiff testifying, as suggested in *Weitzenkorn*, that his or her own intent was to create a contract under which payment was required for any use of ideas no matter how “slight or commonplace” would run the

<sup>104</sup> Thus, in *Fink* the plaintiff alleged an express oral contract under which he supposedly was owed compensation if defendants created a series “based on Plaintiff’s [proposed] Program or any material element contained in [it].” *Fink*, 9 Cal. App. 3d at 1002 (emphasis added); see also *Buchwald v. Paramount Pictures Corp.*, No. C706083, 1990 WL 357611 \* 10 (Cal. Sup. Ct., Jan. 8, 1990) (holding that a written contract requiring payment to plaintiff if a motion picture was “based on” the plaintiff’s treatment meant that the plaintiff was to be paid if the defendant’s work “is based upon a material element of or was inspired by [plaintiff’s] treatment.”).

<sup>105</sup> 40 Cal. 2d at 792 (emphasis added); see also *Chandler*, 156 Cal. App. 2d at 442 (“The producer and the writer should be free to make any contract they desire to make with reference to the buying of the ideas of the writer . . .”).

<sup>106</sup> Sobel, *supra* note 14, at 45 (emphasis added).

risk of negating the existence of any contract at all by proving the lack of a “meeting of the minds” as to an essential term.<sup>107</sup>

Although implied contracts as to “slight or commonplace” ideas as suggested in *Weitzenkorn* may be very unlikely to exist, it is much more probable for parties impliedly to agree to application of a higher copyright-like standard of substantial similarity. Indeed, such an understanding would be in keeping with “industry custom to pay for movie and television rights to copyright-protected expression.”<sup>108</sup> Accordingly, whenever a plaintiff’s submission to the defendant is a written “literary property,” it is a fair assumption that the parties’ intent was that “use” of such property — i.e., a copyright standard of substantial similarity — would be required to trigger an obligation to pay. Indeed, it is precisely this assumption that animated the Court of Appeals’ decision in *Ware*.<sup>109</sup>

#### VI. CONCLUSION: CAN YOU WIN YOUR CLAIM AGAINST TARANTINO?

After examining the case law, it is apparent that the Court of Appeals decision in *Fink* was correct at least in its observation that substantial similarity in idea submission cases is a “zig-zag frontier” in which “[d]ecisions must . . . inevitably be *ad hoc*.”<sup>110</sup> Nonetheless, we are still left with the fundamental question posed by our hypothetical: Can you successfully pursue an idea submission claim against Tarantino? Or, to put it more delicately, can you at least raise a triable issue as to the “use” of your idea by Tarantino through proof that *Once Upon a Time in Hollywood* is substantially similar to the ideas in your Charles Manson proposal?

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<sup>107</sup> That said, the California courts are liberal in allowing industry custom evidence to fill the gaps of where there is no express meeting of the minds as to essential terms in the context of implied-in-fact contracts. See *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 103 Cal. App. 4th 27 (2002); *Whitfield v. Lear*, 751 F.2d 90, 93 (2d Cir.1984) (applying California law); *Forest Park Pictures v. Universal Television*, 683 F.3d 424, 435 (2d Cir. 2012) (“California courts . . . enforce contracts without exact price terms as long as the parties’ intentions can be ascertained”). Other states may not be so lenient. *Lapine v. Seinfeld*, 918 N.Y.S.2d 313 (Sup. Ct. N.Y. Cnty. 2011) (dismissing implied contract claim where there was no meeting of the minds as to price); see also *Marraccini v. Bertelsmann Music Grp., Inc.*, 644 N.Y.S.2d 875, 877 (3d Dep’t 1996) (dismissing an implied-in-fact contract claim on the pleadings because there were open-ended terms, and industry standards that plaintiff claimed could fill them were not identified); but see *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 376 and n. 5 (2d Cir. 2000) (noting that an implied-in-fact contract must have mutual assent, but that it can be inferred from “the specific conduct of the parties, industry custom, and course of dealing”) (citing *Maas v. Cornell Univ.*, 699 N.Y.S.2d 716, (1999)).

<sup>108</sup> Sobel, *supra* note 14, at 44.

<sup>109</sup> *Ware*, 253 Cal. App. 2d at 494-96.

<sup>110</sup> 9 Cal. App. 3d at 1013 (citations omitted).



Under several submission cases, including *Benay*, *Sullivan*, *Fink*, *Weitzenkorn*, and *Kurlan*, your claim may at least have a chance of surviving summary judgment. Specifically, these cases focused on the existence of similar ideas and themes at a high level of abstraction, without taking into account divergent expressive details. Under these cases, a triable issue may exist as to substantial similarity based on the facts that both your idea and Tarantino's film use some of the same characters, and are set at the same time and similar locations, to tell a counterfactual version of the Manson family murders in which Sharon Tate and her friends are not killed. In other words, it could possibly be concluded by some courts, at a very high level of abstraction, that the "spine" of these stories is substantially similar.<sup>111</sup>

The much better approach, however, as reflected by such cases as *Ryder*, *Klekas*, *A Slice of Pie*, *Ware*, and *Reginald*, would be to apply a standard that is more akin to copyright law by analyzing the works in closer detail, and not at a high level of abstraction. These cases, especially *Ware*, sometimes implicitly take into account the fact that a plaintiff's submission of "literary property" — for example, a detailed treatment or screenplay — is indicative of the parties' intent that a copyright-like standard of substantial similarity is necessary to trigger any contractual obligations by the defendant.<sup>112</sup> Under such authorities, your claim against Tarantino is more likely to be defeated since a detailed objective review of the works reveals that the principal action and themes in *Once Upon a Time in Hollywood* concern the friendship and interactions between Rick Dalton, the faltering actor portrayed by Leonardo DiCaprio, and his stunt double, Cliff Booth, played by Brad Pitt, as they navigate the ins and outs of Hollywood in 1969. Although Charles Manson's followers are deflected from their plan to kill Sharon Tate and her friends, and are then defeated by Dalton and Booth, these incidents are not the "substantial" focus of Tarantino's film. Thus, the film and your idea are not *substantially* similar.

Unfortunately, given the "zig-zag frontier" created by the case law in this area, there exists no guarantee that any particular court will adopt one approach instead of the other. That said, it can be argued that a high standard for substantial similarity — in line with *Ryder*, *Klekas*, *A Slice of Pie*, *Ware*, and *Reginald* — is mandated by the strong public policy recognized in *Desny* that ideas are generally "free as the air" because a contrary rule, under which a studio could be blocked from using ideas that are only remotely similar to a plaintiff's submission, would have an unwarranted chilling effect on free expression and the open exchange of ideas.<sup>113</sup> It is

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<sup>111</sup> *Fink*, 9 Cal. App. 3d at 1010-11 (focusing on the "spine" of the works).

<sup>112</sup> *Ware*, 253 Cal. App. 2d at 494-96.

<sup>113</sup> *Desny*, 46 Cal. 2d at 731 ("An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their

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probably for this reason that the Court of Appeals in *Reginald* expressly concluded that “the degree of similarity required to meet the substantial similarity standard is high in the idea submission context.”<sup>114</sup>

In short, under the relevant authorities, there is a good chance that your claim against Tarantino ultimately may be knocked out for lack of substantial similarity. However, if you nonetheless are fixed to take on Tarantino, you can take cold comfort from the fact that, somewhat like the down-on-his-luck boxer portrayed by Bruce Willis in Tarantino’s film *Pulp Fiction*, you may at least have a slugger’s chance of surviving summary judgment under such cases as *Benay*, *Sullivan*, *Fink*, *Weitzenkorn*, and *Kurlan*.

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powers of cerebation and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons”).

<sup>114</sup> 2008 WL 588932 at \* 5.