Stolen from Stardust and Air: Idea Theft in the Entertainment Industry and a Proposal for a Concept Initiator Credit

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"[I]n the movies you can't have thieves as heroes."

--June Gudmunsdottir (Greta Scacchi) in *The Player*(note 1)

Introduction

It has long been an axiom of copyright law that copyright does not protect ideas, but only the fixed expression of ideas.(note 2) For the entertainment industry, this means that a motion picture, not the underlying idea for the movie, receives copyright protection. In Hollywood, the entire entertainment industry depends upon unprotectable ideas to create the finished product, which will attract audiences into theaters or viewers to television sets. To attract an audience (and thereby to make money), many other projects will frequently use the idea underlying a successful film in hope that the idea will work as well a second time. Others will then use the idea again and again until it stops working.(note 3)

Hollywood is supported by a small community that depends on that most precious of commodities: the original idea. To create entertainment, ideas must be developed until a finished, marketable product can emerge from an initial concept. This development occurs in a number of creative stages. The contributions of writers, directors, editors, producers, and actors all shape the final work. The unprotectable idea eventually develops into a fixed, copyrightable expression.

Copyright, for example, would protect the finished expression of a concept where a man named Joe (for the sake of argument played by Kevin Costner) meets and falls in love with a woman named Miriam (played by Sharon Stone) on a space station near Mars in the near future. Joe, of course, says something insensitive that hurts and alienates Miriam. As a result, Miriam begins a relationship with Joe's evil step-brother Eddie (played by Tom Cruise). Eddie, as it turns out, wants to sell Miriam into intergalactic space slavery and kidnaps her. After a few slick spacecraft fight sequences and nifty special effects, Miriam realizes that she loves Joe. Joe eventually defeats Eddie in battle. The movie ends with Joe and Miriam having a space wedding, and the credits roll.

Copyright protects many parts of this (albeit silly) example, including the actual film prints, the scripts, and the set designs. The tangible fixations of expression receive protection. Ideas underlying the film, however, cannot be copyrighted.(note 4) For example, the generic underlying idea of boy meets girl, boy loses girl, boy eventually wins girl back will not be protected. After all, "Ideas are free as air."(note 5) Copyright does not extend to protecting simple ideas such as boy meets girl.

Between the two extremes of a simple, unprotectable idea and a fully copyrightable expression, a film project goes through many stages where creative decisions are made that may not receive copyright protection. Unless the author tangibly expresses creative decisions, they cannot be copyrighted. Furthermore, ideas are not eligible for independent protection. Therefore, a gap in intellectual property law prevents an artist's creative endeavors from being fully protected. If, for instance, an author creates a synopsis of a proposed plot, copyright will protect the expression in the synopsis. The specific ideas underlying the summation cannot be copyrighted, and thus remain subject to theft.

An unethical writer or studio executive may steal the idea and make sufficient alterations to avoid copyright problems, thereby leaving the original writer without legal recourse. This practice of idea theft has given rise to an intellectual property tort centering around the "based upon" credit.(note 6) The based upon credit tort allows an author to sue to receive credit for an original idea used in another work.

Courts recognized the importance of idea attribution in two recent cases: *Buchwald v. Paramount Pictures Corp.*(note 7) and *King v. Innovation Books*.(note 8) These cases require either acknowledgement of an idea contribution in a film,(note 9) or the removal of a credit where an author has not substantially contributed to a film, and the use of the author's name in connection with the film would harm the author.(note 10)

Unfortunately, there is no consensus as to what exactly "based upon" means regarding the protection of ideas. Neither the legal community nor the creative community has developed a standard meaning and test for the necessity of a based upon credit.(note 11) In order to have legal significance, "based upon" needs to have a clear and precise meaning, or it will be ineffective in protecting the author from idea infringement.

This Note proposes the creation of a single legal standard for a based upon attribution called the "concept initiator" credit. Unlike copyright law, which protects only fixed expressions, the concept initiator credit would protect certain ideas.

This Note defines a three-part test for courts to use when deciding whether a concept initiator credit is needed in an entertainment product. First, the idea is eligible for the concept initiator credit if it qualifies as a "narrative crux." A narrative crux is an idea that is so original and highly specific that the idea's expression would receive copyright protection without being invalidated by the merger doctrine. In a narrative crux, the idea underlying the expression does not extend beyond the expression itself. Second, the idea must be used qualitatively and quantitatively in a second work. Finally, the concept initiator credit will not be required unless the idea was knowingly used in another work.

To avoid confusion, this Note uses the term "concept initiator" instead of the phrase "based upon" in order to differentiate the new standard, which deals exclusively with ideas, from copyright law, which concerns already fixed expressions. This Note uses the "based upon" phrasing when discussing previous case law because the courts have used the "based upon" language.

Part I examines the existing groundwork for the creation of a single concept initiator standard, bearing in mind that existing copyright law has already been expanded to protect some ideas that are fixed in expressions. Since courts have ruled that copyright and based upon actions are similar enough to justify a common test,(note 12) copyright is relevant to explain the creation of the concept initiator standard. Part II defines the concept initiator test. Part III analyzes the effect of such a credit on the legal and artistic communities. Although Hollywood has already been called "lawsuit happy,"(note 13) this new credit will not significantly increase litigation. If the standard is drawn narrowly, it should further protect the creative community without causing a new flood of lawsuits. Finally, this Note concludes that the concept initiator credit will protect against idea theft.

I. Creation of the Concept Initiator Standard

The concept initiator standard is a legally cognizable extension of existing copyright and contract law. Although the individual original ideas or concepts are not copyrightable,(note 14) copyright law provides the most closely analogous system for protecting an author's creative work.

A. Recent Case Law Supporting the Creation of an Independent Concept Initiator Credit Standard

Two recent cases, *Buchwald v. Paramount Pictures Corp.*(note 15) and *King v. Innovation Books*,(note 16) lay a foundation for a concept initiator credit.

Buchwald dealt with an eight-page screen treatment entitled "It's a Crude, Crude World" by the famous humorist Art Buchwald, and the movie *Coming to America*.(note 17) In early 1982 Art Buchwald prepared "It's a Crude, Crude World," concerning a third-world prince who came to America for "a state visit."(note 18) The screen treatment described the story line in some detail,(note 19) and Buchwald gave a condensed, two-page treatment of the plot to Paramount Pictures. Paramount subsequently entered into a contract with Buchwald whereby Paramount bought the rights to Buchwald's story and concept.(note 20) Paramount wanted to base a movie, starring Eddie Murphy, on Buchwald's story, to be called "King for a Day."(note 21) Another person would write the actual script, but "King for a Day" was to be based on "It's a Crude, Crude World."(note 22)

The production team found hiring both a director and a writer for the "King for a Day" project problematic, but Paramount finally assembled a creative team.(note 23) No one, however, created a satisfactory script, and Paramount officially abandoned the project in March 1985.(note 24) In May 1986, Buchwald optioned "It's a Crude, Crude World" to the Warner Brothers Studio.(note 25)

In the summer of 1987, Paramount began development of a similar script by Eddie Murphy. In this movie (eventually called *Coming to America*), Murphy would play an African prince who comes to America to find a bride. The development of *Coming to America* caused Warner Brothers to cancel further development of Buchwald's story. Buchwald subsequently filed suit against Paramount.(note 26)

The court viewed this case as a breach of contract claim.(note 27) Under contract, Buchwald transferred all rights to his original story concepts to Paramount in return for payment for any future motion picture produced from Buchwald's ideas.(note 28) The breach of contract claim turned on whether *Coming to America* was based upon Buchwald's story treatment. The court found that "based upon" had no standard definition in the entertainment industry, even though many experts testified as to their understanding of the term.(note 29) Therefore, the court applied an analysis similar to that used in copyright to find a standard for a based upon credit, although the court admitted that *Buchwald* was not an infringement case and that copyright had no real application to ideas.(note 30) The court based

its analysis on past California cases that used a copyright-like approach to breach of contract cases involving idea theft.(note 31)

The court noted that the property conferred in the Paramount contract was Buchwald's idea.(note 32) The court applied a two-pronged test to determine whether Paramount used Buchwald's idea.(note 33) This two-part inquiry used the copyright tests of access and substantial similarity to determine the need for a based upon credit.(note 34) The court stated that access would be determined by the adapter's knowledge of the original author's ideas.(note 35) It was undisputed that Paramount creative executives discussed Buchwald's idea with Eddie Murphy and his manager.(note 36) Because it found there was "no real issue concerning access,"(note 37) the court went on to compare the Buchwald story and *Coming to America*.(note 38)

The court stated that an idea may change from its initial adaptation to its expression in the final work. The court, however, found enough similarities to establish an infringement of Buchwald's idea and, thus, a breach of contract by Paramount.(note 39)

The second case that helps set the framework for a concept initiator standard involves an author who sued under "false light" and "right to publicity" theories in order to remove a based upon credit from a movie supposedly adapted from one of his short stories.(note 40) In *King v. Innovation Books*, author Stephen King sold the movie rights for his short story "The Lawnmower Man" to The Great Fantastic Picture Corporation.(note 41) The Great Fantastic Picture Corporation then assigned the movie rights to "The Lawnmower Man" to various entities, with New Line Films eventually having the film's American distribution rights.(note 42) The movie differed significantly from the short story.(note 43) The title of the film, however, was *Stephen King's The Lawnmower Man*, and the credits included the acknowledgement "based upon a short story by Stephen King."(note 44) King sued to have his name removed from the film.(note 45)

As in *Buchwald*, the *King* court found it difficult to determine what exactly "based upon" meant(note 46) and also confronted the problem of how to test the propriety of a based upon credit. This federal court, like the California court in *Buchwald*, decided to use a standard similar to copyright infringement to determine the suitability of a based upon credit in the film.(note 47) The court decided that if the film drew "in material respects from a literary work, both quantitatively and qualitatively, a `based upon' credit should not be viewed as misleading."(note 48)

The court concluded that material resemblances existed between the film and King's short story.(note 49) The court, therefore, held that a based upon credit was appropriate.(note 50)

If an author has a contract with a film studio, some courts have provided a right of attribution (or lack thereof) for the author's ideas used in a film. *Buchwald* and *King*, however, indicate that ideas (created under contract or not) can be explicit enough to warrant protection. By applying elements of copyright and contract law to idea misappropriation, courts have developed the basis for creation of a concept initiator credit.

B. Elements of Existing Copyright Case Law Support the Concept Initiator Standard

The Copyrights Act of 1976 explicitly protects only fixed expression.(note 51) The courts, however, have historically recognized that certain elements outside the specific expression were protectable.(note 52) In *Sheldon v. Metro-Goldwyn Pictures Corp.*,(note 53) Judge Learned Hand stated that an expression's copyrightable elements extended beyond speech to gestures, scenery, costumes, and even the actor's appearance.(note 54) Examples of such elements from other cases include "total concept and feel" of a work,(note 55) and character protection.(note 56)

1. Copyright Protection of Ideas Underlying Expression

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. illustrates the movement of copyright law to protect concepts underlying expression.(note 57) *Krofft* presented a two-part test for determining similarity between a copyrighted work and an allegedly infringing work. The test component compared identifiable factors such as plot,

setting, artwork, and material used in the expression. The court called this an extrinsic test.(note 58) The second, or intrinsic, test compared whether an ordinary reasonable person would believe that a substantial similarity exists between the two works.(note 59)

Applying the test, the court held that McDonald's "McDonaldland" commercials infringed Krofft's *H.R. Pufnstuf* television show because McDonaldland "captured the `total concept and feel' of the Pufnstuf show."(note 60) Both the imaginary land in Pufnstuf and McDonaldland had caves, ponds, roads, castles, and human faces on inanimate objects.(note 61) The court said that these similarities went beyond idea similarity and into expression infringement.(note 62)

Despite the court's claim that it was only shielding expression,(note 63) a closer analysis shows that the court in *Krofft* was actually protecting ideas.(note 64) A land with roads, ponds, castles, and talking trees hardly seems to be expression-specific.(note 65) The court essentially admits that it is protecting ideas by saying that McDonaldland captured the "total concept" of the land in Pufnstuf.(note 66)

2. Copyright Protection for Character Ideas

Ideas for characters also currently receive protection. In its discussion of the extrinsic test, the court in *Shaw v. Lindheim*(note 67) used similar plots, characters, and general theme traits as evidence to show that one television show infringed upon another show.(note 68) The court used abstract traits such as the main character being well-educated, wealthy, self-assured, and faithful as an example of similar attributes,(note 69) although such themes are not expression- specific and should not be copyrightable.(note 70)

The court in *Shaw* stated further that satisfaction of the extrinsic test (comparing among other things, plot and settings) alone created a triable issue of fact for copyright infringement.(note 71) The court admitted that "a man who will equalize the odds, a lone man working outside the system" is an idea and unprotectable by copyright.(note 72) Nevertheless, when general traits such as wealth and education are added to the idea of a lone equalizer, the court stated that the idea becomes an expression.(note 73) An educated, rich, cocky, faithful man who works outside the law for the forces of good, however, does not describe an expression-specific character.

Shaw is only one example in a long line of federal cases offering copyright protection to ideas for characters. In 1954, in *Warner Bros. Pictures v. CBS, Inc.*,(note 74) the Ninth Circuit implied that characters who constituted the basis of a story could be copyrighted separately from the expression that contains the character.(note 75) Conversely, incidental characters, "chessm[e]n in the game of telling the story,"(note 76) cannot receive independent copyrights.(note 77) The court, however, stated that the characters of an author's imagination are bound to fall into a "limited pattern."(note 78) Therefore, by protecting the character, the court actually protects the idea underlying the character, which can be used in more than one work by different authors.

In 1983 the court in *Warner Bros. v. ABC*(note 79) continued to afford copyright protection without regard to any specific expression. The court went so far as to say that the fact that a character

> may be an idea does not diminish the expressive aspect of the combination [of particular traits]. But just as similarity cannot be rejected by isolating as an idea each characteristic the characters have in common, it cannot be found when the total perception of all the ideas as expressed in each character is fundamentally different.(note 80)

Thus an amalgamation of ideas can acquire copyright protection regardless of the surrounding expression.(note 81)

Characters are therefore taking on copyrightable lives of their own and are no longer bound to a singular expression. A fictional character can be an idea or a general concept.(note 82) As long as the court can recognize a personality trait, or a character type, the court can find copyright and infringement.(note 83)

C. The Coexistence of the Concept Initiator Credit and Copyright

Principles

Not only does current copyright law support the concept initiator credit, the proposed credit also does not contradict established copyright principles. For example, the merger doctrine, which keeps a work from being copyrighted if the expression and the larger idea underlying the expression are inseparable, is not at odds with the proposed standard.(note 84) The narrow definition of the concept initiator credit's narrative crux(note 85) ensures that a more general idea does not extend beyond the expression. It is not similar to the boy meets girl theme, which can be expressed in an infinite number of ways.(note 86) The idea expressed in a plot synopsis, like the Joe and Miriam story, extends only as far as the expression that evolves from the idea. In the same way, the concept initiator credit covers only the original material elements underlying one finished product.

Moreover, the concept initiator credit is analogous to the derivative works doctrine. Creators of copyrighted works can grant to other authors the right to create derivative works from the original expression.(note 87) Derivative works do not directly apply to the concept initiator credit tort because the derivative work doctrine only applies to copyrighted works. As with copyrightable derivative works, concept initiator works take some preexisting material and add to or change the underlying narrative crux. "Concept initiator," like the derivative work doctrine, allows the adapter to have access to the conceptualized idea while at the same time allowing the creator of the idea to control, or at least receive credit for, the underlying work.

Past and current case law shows that all of the necessary elements for a concept initiator credit already exist. Unique and exact ideas, which warrant protection when fixed in an expression, should be treated as protectable property before they are fixed in expression, regardless of whether the idea was created while under contract.(note 88)

II. A Proposal for the Concept Initiator Credit Standard

The definition of "concept initiator" includes three inquiries: first, whether the idea is a narrative crux; second, whether the narrative crux was used quantitatively and qualitatively in a second work; and third, whether the adapter knowingly used the narrative crux. If all three inquiries are answered affirmatively, the second work should include the concept initiator credit.

The first part of the concept initiator credit involves deciding whether an idea is an independently created narrative crux. The definition of narrative crux refers to well-defined ideas that, if fixed in an expression, would be sufficiently original to warrant copyright, without being invalidated by the merger doctrine. The content of a narrative crux does not extend beyond the sole expression of the idea itself. If the idea can be fixed in more than one expression, the narrative crux criteria is not met. Under this definition, a plot-line synopsis like the Joe and Miriam example is a narrative crux. A general theme such as boy meets girl, however, does not meet the definition because it can be fixed in more than one expression.

Part two of the definition looks to the quantitative and qualitative use of the narrative crux in the creation of a second work.(note 89) As with copyright infringement,(note 90) exact copying is not needed for concept initiator infringement to occur. The author of the second work must only use the original idea "quantitatively and qualitatively" in the adaptive expression.(note 91)

Fink v. Goodson-Todman Enterprises, Ltd.(note 92) recognized that similarities do not have to be as pronounced in a case that involves adaption of an idea as they do in a case that compares two fixed expressions.(note 93) To determine whether or not a based upon credit was needed, the *Fink* court used the same quantitative and qualitative infringement test that is used to determine copyright infringement.(note 94) The court said that this test was appropriate even when the similarity is quantitatively insignificant in the second work.(note 95) In applying the test, the court asked whether there was a "structural spine" in the alleged adaptation's work that had the same "structural dimensions" as the originator's idea.(note 96) The court ignored inconsequential modifications such as changes in setting.(note 97) In essence, this meant that a based upon credit was appropriate despite the fact that a second work merely used the original author's idea and not the original expression.(note 98)

Finally, under the definition of the concept initiator standard, adaptive creators must be aware that they are using the original author's narrative crux as the basis for the adaptation. This requirement addresses the issue of access.(note 99) Access in the concept initiator context is proven by evidence such as a contract, documentation, or striking similarity. To accommodate the new standard, the traditional meaning of access must be broadened to include situations such as overhearing a narrative crux and taking the fully developed idea, or stealing the idea from a short synopsis or screen treatment.

Unfortunately, this standard increases the possibility of frivolous suits. Currently, copyright law uses a flexible standard centered around a preponderance of the evidence to prove infringement.(note 100) In order to discourage unmeritorious suits, yet still protect against idea theft, the burden of proof should be raised to a clear and convincing standard. Adoption of the clear and convincing standard would help protect narrative cruxes, yet keep general ideas in the public realm.

III. The Significance of the Concept Initiator Standard

The concept initiator standard is needed not only in the area of entertainment law, but in other areas of creative endeavor as well. "Idea theft," says entertainment lawyer Pierce O'Donnell, "is a cancer in Hollywood. In an industry where imagination and creativity [are] the key[s] to success, idea theft is grand larceny. And it is prevalent."(note 101)

Beyond *Buchwald*, many of Hollywood's latest hits and even major box office bombs have been the subjects of lawsuits for idea theft. Recently, Martha Raye sued producers over the movie *For the Boys*. Raye claimed the movie told her life story without giving her credit. A Canadian filmmaker claimed that *Die Hard* is "wholesale cinematic `Xeroxing"' of his own movie entitled *Kings and Desperate Men*. People also sued over the plot of *Home Alone*. The storyline of a French movie, *Pre Noel*, in which a boy left home alone on Christmas must defend his home from an intruder, does sound familiar. The director of *Pre Noel* filed suit.(note 102)

Idea theft occurs because of the current Hollywood business structure. Writers freely pitch oral ideas, and the line between a remake and a blatant infringement frequently blurs.(note 103) Another root of the idea theft problem is the fact that Hollywood is such a small community. In essence, everyone works with everybody else.(note 104) Plagiarism is said to be systemic.

New writers must openly promote their ideas in hope of landing their first contract. Unfortunately, studio executives may turn around and give the idea to a top (A-list) writer to develop, while the original writer receives nothing for his or her creation.(note 105) The sometimes brazen attitude of the studio executives has been described as the "we can get away with it, so let's do it" mentality.(note 106)

Studio executives sometimes even view idea theft as ethical.

> "There are people in this town [Hollywood]--everybody knows their names--who are wildly unethical in the way they do business, but you can't ignore them because they have proven they can make successful movies," says a producer who has worked both independently and as studio executive. "There's the attitude at the studios that if it's legal, it's ethical. Well, people are screwed legally in this town every day."(note 107)

Many executives also have decided to let writers sue for a stolen idea because the suit will be settled later for less money than owed on the original contract.(note 108) Frequently, an idea theft settlement includes a confidentiality agreement so the public does not know anything about the idea theft.(note 109)

The idea theft problem frequently becomes compounded by the popular idea and sequel phenomena. It has been suggested that there are only thirty-six different dramatic situations.(note 110) Hollywood productions regularly deal with approximately seven of the thirty-six situations.(note 111) Hollywood also experiences fads for the same theme.(note 112) In past years, two productions of *Robin Hood*, two productions of *Dangerous Liaisons*,(note 113) and two productions of *Christopher Columbus* were being filmed simultaneously in a race to be the first to reach the theaters.(note 114) These competing productions can spawn idea theft suits.(note 115)

The entertainment industry also thrives on the sequel phenomenon. A sequel will usually earn money based upon the popularity and audience familiarity with the characters and situations presented. Once a particular plot line or character proves to be successful, others will copy it in an effort to capitalize on the original product's popularity.(note 116)

The creation of a concept initiator standard would help alleviate idea theft. Writers would benefit most directly. Currently, the only protection a writer can obtain for a fully developed original idea is to register the idea treatment with the Writer's Guild of America.(note 117) This precaution, however, frequently falls short.(note 118) Art Buchwald could successfully sue Paramount because his contract promised payment for any idea made into a movie, not because he registered his work with the Writer's Guild.(note 119)

The concept initiator credit would at least force credit to be acknowledged where it is due. If fully conceptualized ideas can be the subject of a contract,(note 120) they are sufficiently concrete and legitimate to give rise to an independent idea theft suit. Currently, if an idea not generated under contract gets stolen, others get the credit, notoriety, and profits from an adaptation.

The studios would also benefit from the creation of a concept initiator standard. The concept initiator credit would act as extra insurance that a competing studio would not use the same concept in a similar movie before copyright can attach. The studio would thus be better able to protect the ideas generated by its pool of writers.

Arguably, a potential problem with the creation of a concept initiator credit would be an increase in the number of suits. When the court decided *Buchwald*, many commentators felt it would cause an increase in the number of lawsuits because of the public perception of receiving easy money.(note 121) This increase in suits, however, would not result from the concept initiator standard.

The proposed test for the concept initiator credit includes a safeguard to prevent an increase in suits. The use of current legal requirements for similarity and access would in effect preclude most concept initiator suits as the tests already do for copyright infringement cases. Most copyright infringement suits are not valid claims. The suits usually fail because they do not meet the basic legal standards required to prove a legitimate cause of action for infringement.(note 122) In fact, studios label most copyright suits as nuisance suits.(note 123) "If you write a hit movie, the odds are good you'll get sued," said Craig Jacobson, a Hollywood entertainment lawyer.(note 124)

Infringement accusations may be easy to make, but the claims are difficult to prove and expensive to litigate. The cost and difficulty of litigating deters most people from suing.(note 125) The proposed concept initiator credit requirement retains these same expense and difficulty factors.

In addition, the creation of a concept initiator standard will not cause further harm, such as bankrupting the entertainment industry. The studios already protect themselves from idea theft allegations through the use of insurance. Production companies regularly buy errors and omissions (E&O) insurance.(note 126) Errors and omissions insurance protects against all infringement liabilities.(note 127) Although E&O insurance, by itself, is not a reason to adopt a concept initiator standard, it shows that the concept initiator credit tort will not create insurmountable problems in the entertainment field.

Ideas from the creative community need and deserve protection from rampant idea theft.(note 128) A combination of lack of effective writer protection, a closed community, and a premium placed on a few popular ideas and sequels creates an atmosphere where unprotected ideas will continue to be taken without protection.(note 129) Creating the concept initiator credit will at least partially remedy the situation without causing a significant increase in litigation or expense.

Conclusion

Buchwald and *King* lay a foundation to create a concept initiator credit, but provide no uniform definition for the term "based upon."(note 130) Using the *Buchwald* and *King* cases as a springboard, the concept initiator credit cause of action can be created. The action for a concept initiator credit starts with a narrative crux, which is a highly developed,

but not yet fixed, idea whose fixed expression would received copyright protection. If an adaptor knowingly uses a narrative crux quantitatively and qualitatively to adapt it into another expression, a concept initiator credit should appear.

The proposal for a mandatory concept initiator credit is not a legal anomaly without any basis in current law. The concept only slightly extends the similar existing copyright law, which has begun to protect the idea in an expression.(note 131) Characters and other features that transcend a single expression already receive protection through copyright.(note 132) Federal courts already recognize a based upon credit in other contexts as a legitimate claim,(note 133) and California has ample case law permitting suits for idea misappropriation in a contract context.(note 134)

The creative community needs a concept initiator credit to protect against idea theft. This proposal provides a practical solution for a continuing problem in intellectual property law without contradicting established copyright doctrine.

It is time to create a uniform concept initiator credit standard to protect the author of a fully conceptualized, original, discrete idea that only needs fixation to complete its development. This small step will greatly help the entertainment, creative, and artistic communities. Authors should receive credit for their own unique ideas, but they often do not. Art Buchwald best summed up the idea theft problem for the unattributed writer after he saw *Coming to America*. He said, "It was an awful movie, but it was my awful movie."(note 135)

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Notes

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1. The Player (Fine Line Features 1992). Return to text

2. *See* Mazer v. Stein, 347 U.S. 201, 217-18 (1954); Baker v. Selden, 101 U.S. 99, 102-03 (1879). Return to text

3. Sheila Johnston, *Doubletake: What Happens When Too Many People Chase Too Few Ideas? Two Robin Hoods, Two Dangerous Liaisons*, The Independent (London), July 19, 1991, at 17. Return to text

4. *See* 17 U.S.C. sec. 102(b) (1988). Return to text

5. Fendler v. Morosco, 171 N.E. 56, 58 (N.Y. 1930). Return to text

6. *Cf.* King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992); Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. (BNA) 1257 (Cal. Ct. App. 1990). Return to text

7. *Buchwald*, 17 Media L. Rep. (BNA) 1257. Return to text

8. *King*, 976 F.2d 824. Return to text

9. *See Buchwald*, 17 Media L. Rep. (BNA) 1257. Return to text

10. *See King*, 976 F.2d 824. Return to text

11. Entertainment experts disagree about the definition of "based upon." Paramount creative executive David Kirkpatrick testified in the *Buchwald* trial that "based upon" has two aspects--access to the author's work and "that the antecedents were of a significant story nature to claim a based upon credit." *Buchwald*, 17 Media L. Rep. (BNA) at 1262. According to Kirkpatrick, a movie is based upon another work if it "was created out of

significant elements from the underlying materials." *Id.* Kirkpatrick gave comparable characters, story similarities, and like plot structures as examples of "significant elements." *Id.* One Paramount attorney, Helene Hahn, testified that it meant that a movie "had been derived from and incorporated the elements of author's work," while another, Alexandra Denman, said *Coming to America* was based upon Buchwald's story if it were written "with the elements of Mr. Buchwald's story, I mean the specific elements of the story, which is the work." *Id.* According to writer David Rintels, "based upon" includes "intent" and a "similarity in spirit" that can be recognized from experience. *Id.* Although writer Edmond H. North said that similarity in plot, theme, and characters would be important to the determination, *id.*, writer Lynn Roth would not consider plot, characters, or motivation, *id.* at 1263. These, she said, relate to "development of the project" rather than the basic theme. *Id.* According to Roth, "based upon" means "something came from something else." *Id.* at 1262.

The *King* court summarized the testimony of John Breglio, an attorney specializing in entertainment law:

> [T]he industry standard for determining the meaning of a "based upon" movie credit is very similar to that used by copyright lawyers in examining issues of copyright infringement. Breglio further explained that this standard involved looking "at the work as a whole and how much protected material *from the underlying work* appears in the derivative work."

King, 976 F.2d at 829 (emphasis in original). Return to text

12. *See King*, 976 F.2d at 829. Return to text

13. Joy Horowitz, *Hollywood Law: Whose Idea Is It, Anyway?*, N.Y. Times, Mar. 15, 1992, sec. 2, at 1. Return to text

14. *See* Mazer v. Stein, 347 U.S. 201, 217-18 (1954). Return to text

15. *Buchwald*, 17 Media L. Rep. (BNA) 1257. Return to text

16. *King*, 976 F.2d 824. Return to text

17. *Buchwald*, 17 Media L. Rep. (BNA) 1257. Return to text

18. *Id.* at 1264. Return to text

19. *Id.* at 1264-65. Return to text

20. *Id.* at 1258. Return to text

21. *Id.* Return to text

22. *Id.* Return to text

23. The film production team went through at least two writers and two directors before work even began on the project. For a fully detailed description of the troublesome search for creative talent to work on "King for a Day," see the factual synopsis in *Buchwald*, *id.* at 1257-61. Return to text

24. *Id.* at 1260. Return to text

25. *Id.* at 1261. Return to text

26. *Id.* Return to text

27. *Id.* Return to text

28. *Id.* at 1262. Return to text

29. *Id.* at 1262-63; *see also supra* note 11. Return to text

30. The court here quoted *Nimmer on Copyright*:

> "*However, the copyright requirements that similarity between plaintiff's and defendant's work be `substantial' . . . is not applicable in idea cases.* If the only similarity is as to an idea then by definition such similarity is not substantial in the copyright sense. . . . *If there is a contractual or other obligation to pay for an idea, the defendant cannot avoid such liability by reason of the fact that he did not copy more than the abstract or basic idea of plaintiff's work.*"

Buchwald, 17 Media L. Rep. (BNA) at 1263-64 (*Buchwald*'s emphasis) (citations omitted) (quoting 3 Melville B. Nimmer, Nimmer on Copyright sec. 16.08[B] at 16-64 to 16-65 n.58). Return to text

31. *Id.* at 1264 (citing Fink v. Goodson-Todman Enters., 88 Cal. Rptr. 679 (Ct. App. 1970); Minniear v. Tors, 72 Cal. Rptr. 287 (Ct. App. 1968)), 1267 (citing Blaustein v. Burton, 88 Cal. Rptr. 319 (Ct. App. 1970)). Return to text

32. *See id.* at 1267. Return to text

33. *Id.* at 1263. Return to text

34. *Id.* Return to text

35. *Id.* Return to text

36. *Id.* Return to text

37. *Id.* Return to text

38. *Id.* at 1264. Return to text

39. *Id.* at 1268. Return to text

40. King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992). Return to text

41. *Id.* at 826. Return to text

42. *Id.* at 827. Return to text

43. The court describes the short story:

> The Short Story . . . involves Harold Parkette, a homeowner in the suburbs. Parkette begins to neglect his lawn after an incident in which the boy who usually mows his lawn mows over a cat. By the time Parkette focuses his attention again on his overgrown lawn, the boy has gone away to college. Parkette therefore hires a new man to mow his lawn. The lawnmower man turns out to be a cleft- footed, obese and vile agent of the pagan god Pan. The lawnmower man also is able to move the lawnmower psychokinetically--that is, by sheer force of mind.
>
> After starting the lawnmower, the lawnmower man removes his clothing and crawls after the running mower on his hands and knees, eating both grass and a mole that the mower has run over. Parkette, who is watching in horror, phones the police. Using his psychokinetic powers, however, the lawnmower man directs the lawnmower after Parkette, who is chopped up by the lawnmower's blades after being chased through his house. The Short Story ends with the discovery by the police of Parkette's entrails in the birdbath behind the home.

Id. at 826.

The court then describes the movie:

> The protagonist of the two hour movie is Dr. Lawrence Angelo. Experimenting with chimpanzees, Dr. Angelo develops a technology, based on computer simulation, known as "Virtual Reality," which allows a chimp to enter a three-dimensional computer environment simulating various action scenarios. Dr. Angelo hopes to adapt the technology for human use, with the ultimate goal of accelerating and improving human intelligence.
>
> Eventually, Dr. Angelo begins experimenting with his technology on Jobe, who mows lawns in Dr. Angelo's neighborhood and is referred to as "the lawnmower man." Jobe, a normal-looking young man, is simple and possesses a childlike mentality. Dr. Angelo is able greatly to increase Jobe's intellect with Virtual Reality technology. However, the experiment spins out of control, with Jobe becoming hostile and violent as his intelligence and mental abilities become super-human. In the build-up to the movie's climax, Jobe employs his newly acquired psychokinetic powers to chase Dr. Angelo's neighbor (a man named Harold Parkette) through his house with a running lawnmower, and to kill him. The police discover the dead man's remains in the birdbath behind his home, and, in the climax of the movie, Dr. Angelo destroys Jobe.

Id. at 827. Return to text

44. *Id.* at 826. Return to text

45. *Id.* at 828. Return to text

46. *See id.* at 829-30. Return to text

47. *Id.* at 829-30. Return to text

48. *Id.* at 830. Return to text

49. The court stated:

> As King himself described it, "the core of my story, such as it is, is in the movie." . . .
>
> We recognize that several important and entertaining aspects of the Short Story were not used in the film, and that conversely the film contains a number of elements not to be found in the Short Story. However, when the resemblances between the Short Story and the motion picture at issue here are considered together, they establish to our satisfaction that the movie draws in sufficiently material respects on the Short Story in both qualitative and quantitative aspects.

Id. Return to text

50. *Id.* at 830-31. Return to text

51. 17 U.S.C. sec. 102(a) (1988). Return to text

52. *See, e.g.*, Sid & Marty Krofft TV Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); *see also* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 Tenn. L. Rev. 321, 353 (1989) (recognizing that the *Krofft* decision borders on allowing the infringement of ideas alone to constitute a case for copyright infringement). Return to text

53. *Sheldon*, 81 F.2d 49. Return to text

54. *Id.* at 55. Return to text

55. *See Krofft*, 562 F.2d at 1167. Return to text

56. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940); King Features v. Fleischer, 299 F.2d 533 (2d Cir. 1924); Hill v. Whalen & Martell, 220 F. 359 (S.D.N.Y. 1914). Return to text

57. *See Krofft*, 562 F.2d at 1167. Return to text

58. *Id.* at 1164. Return to text

59. *Id.* Return to text

60. *Id.* at 1167 (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)). Return to text

61. *Id.* n.9. Return to text

62. *Id.* at 1167. Return to text

63. *Id.* Return to text

64. *See* Samuels, *supra* note 52, at 353. Return to text

65. *Id.* Return to text

66. *See Krofft*, 562 F.2d at 1167. Return to text

67. *Shaw*, 919 F.2d 1353 (9th Cir. 1990). Return to text

68. *Id.* at 1357-58 (comparing a series pilot with the show *The Equalizer*, which allegedly infringed upon the pilot). Return to text

69. *Id.* at 1358. Return to text

70. *See* 17 U.S.C. sec. 102(a) (1988). Return to text

71. *See Shaw*, 919 F.2d at 1357. Return to text

72. *Id.* Return to text

73. *Id.* at 1358. Return to text

74. *Warner Bros. Pictures*, 216 F.2d 945 (9th Cir. 1954). Return to text

75. *See id.* at 950. Return to text

76. *See id.* Return to text

77. *Id.* Return to text

78. *Id*. The court then quotes Holmes:

> "He must be a poor creature that does not often repeat himself. . . . Why, the truths a man carries about with him are his tools; and do you think a carpenter is bound to use the same plane but once to

> smooth a knotty board with, or to hang up his hammer after it has driven its first nail? I shall never repeat a conversation, but an idea, often."

Id. n.5 (quoting O.W. Holmes, The Autocrat of the Breakfast Table 9 (reprint of the original edition)). Return to text

79. *Warner Bros.*, 720 F.2d 231 (2d Cir. 1983). Return to text

80. *Id.* at 243. Return to text

81. *Id.* at 242. Return to text

82. Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 Stan. L. Rev. 623, 624 (1992) (citing Leon Kellman, *The Legal Protection of Fictional Characters*, 25 Brook. L. Rev. 6 (1958)). Return to text

83. *Id.* at 631.

> Fully realized characters in literature are little different from fully defined personalities in daily life, and it is no surprise that the test of protectibility that courts apply [or should be applying] to literary characters is closely akin to the criterion that individuals apply in daily life to determine whether they in truth know someone. A literary character can be said to have a distinctive personality, and thus to be protectible, when it has been delineated to the point at which its behavior is relatively predictable so that, when placed in a new plot situation, it will react in ways that are at once distinctive and unsurprising.

1 Paul Goldstein, Copyright: Principles, Law and Practice sec. 2.7.2, at 128 (1989) (citations omitted), *quoted in* Helfand, *supra* note 82, at 631 n.38. Return to text

84. In the merger context, protecting the expression would also confer a monopoly on the underlying idea. Baker v. Selden, 101 U.S. 99, 103 (1879); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 741 (9th Cir. 1971); Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Crume v. Pacific Mut. Life Ins. Co., 140 F.2d 182, 184 (7th Cir.), *cert. denied*, 322 U.S. 755 (1944); *see also* Continental Casualty Co. v. Beardsley, 253 F.2d 702, 705-06 (2d Cir. 1955), *cert. denied*, 358 U.S. 816 (1958). The theory behind the merger doctrine holds that if the expression cannot be copyrighted without also copyrighting the idea underlying the expression, then copyright will not attach. *See Baker*, 101 U.S. at 103. The merger doctrine exists to prevent the protection of ideas when the idea is so intertwined with the expression that the expression cannot be created without also using the particular idea. *See, e.g.*, *id.*; *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 742; *Morrissey*, 379 F.2d at 678-79; *Crume*, 140 F.2d at 189. The merger doctrine keeps ideas in the public domain for the use of all authors and artists. To do otherwise would risk idea monopolization and severely limit the number of concepts that could be expressed without infringement. Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 966-67 (1990). Return to text

85. *See infra* part II. Return to text

86. *Cf. Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 740-42 (using idea-expression dichotomy concept to declare jeweled bee pin an idea not capable of receiving copyright protection). Return to text

87. Stewart v. Abend, 495 U.S. 207, 226-27 (1990). The Copyrights Act of 1976 grants to copyright owners the right to create derivative works. 17 U.S.C. sec. 106(2) (1988). The derivative author, however, has only a copyright in the new things that he or she adds to the underlying work. Durham Indus., Inc. v. Toomy Corp., 630 F.2d 905, 909 (2d Cir. 1980); L. Batlin & Son v. Snyder, 536 F.2d 486, 490 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976). The derivative work concept exists to strike a "balance between the artist's right to control the work . . . and the public's need for access to creative works." *Stewart*, 495 U.S. at 228. Return to text

88. *See* Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. (BNA) 1257 (Cal. Ct. App. 1990). Return to text

89. *Cf.* King v. Innovation Books, 976 F.2d 824, 830 (2d Cir. 1992). Return to text

90. *See* Runge v. Lee, 441 F.2d 579, 582 (9th Cir.), *cert. denied*, 404 U.S. 887 (1971); Williams v. Kaag Mfrs., 338 F.2d 949, 951 (9th Cir. 1964); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947). Return to text

91. *Cf.* Sid & Marty Krofft TV Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). Return to text

92. *Fink*, 88 Cal. Rptr. 679 (Ct. App. 1970). Return to text

93. *Id.* at 689. Return to text

94. *Id.* at 690-91. Return to text

95. *Id.* at 693. Return to text

96. *Id.* Return to text

97. *Id.* at 692. Return to text

98. *See generally id.* For instance, incidental points and scenes that result from a common genre, like spaceships in a science fiction movie, do not qualify as appropriate similarity comparisons because they are not essential to the author's idea. Olson v. NBC, 855 F.2d 1446, 1451 (9th Cir. 1988). Return to text

99. Access must be established to prove copyright infringement. Reyher v. Children's TV Workshop, 533 F.2d 87, 90 (2d Cir. 1976). Return to text

100. As the court in *Sid & Marty Krofft Television Productions v. McDonald's Corp.*, stated:

> No amount of access will suffice to show copying if there are no similarities. This is not to say, however, that where clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may not be lower than when access is shown merely by a preponderance of the evidence. As Professor Nimmer has observed: "[C]lear and convincing evidence of access will not avoid the necessity of also proving substantial similarity since access without similarity cannot create an inference of copying. However, this so-called `Inverse Ratio Rule' . . . would seem to have some limited validity. That is, since a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof."

Krofft, 562 F.2d 1157, 1172 (9th Cir. 1977) (citations omitted) (quoting 2 Melville B. Nimmer, Nimmer on Copyright sec. 143.4, at 634 (1976)); *see also* Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. (BNA) 1257, 1264 (Cal. Ct. App. 1990) ("[P]laintiff has the burden of proving similarity by a preponderance of the evidence."). Return to text

101. Horowitz, *supra* note 13, at 1. Return to text

102. *Id.* at 22. Return to text

103. *Id.* Return to text

104. *See id.* Return to text

105. *See id.* Return to text

106. *Id.* at 23. Return to text

107. Jack Mathews, *How Blind Is Hollywood Ethics?*, L.A. Times, Apr. 22, 1990, Calendar Section, at 8. Return to text

108. *Id.* Return to text

109. Horowitz, *supra* note 13, at 22. Return to text

110. G. Polti, The Thirty Six Dramatic Situations 3 (1968). Return to text

111. Johnston, *supra* note 3. Return to text

112. *Id.* Return to text

113. *Id.* Return to text

114. Jack Mathews, *Voyage of Rediscovery*, L.A. Times, May 3, 1992, Calendar Section, at 3. Return to text

115. *Id.* Return to text

116. Johnston, *supra* note 3. Return to text

117. Horowitz, *supra* note 13, at 23. Return to text

118. *Id.* Return to text

119. Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. (BNA) 1257, 1261 (Cal. Ct. App. 1990). Return to text

120. *See id.* Return to text

121. Horowitz, *supra* note 13, at 22. Return to text

122. *Id.* Return to text

123. *Id.* Return to text

124. *Id.* at 1. Return to text

125. *Id.* at 22. Return to text

126. Lee Proimos, *That's Entertainment; Excess and Surplus Lines*, Best's Review: Property/Casualty Insurance Edition, Aug. 1988, at 54, 56. Return to text

127. *See* Mathews, *Voyage of Rediscovery*, *supra* note 114. Return to text

128. Horowitz, *supra* note 13, at 1. Return to text

129. *See* Johnston, *supra* note 3. Return to text

130. *See supra* note 11. Return to text

131. *See* Sid & Marty Krofft TV Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). Return to text

132. *See* Warner Bros. v. ABC, 720 F.2d 231 (2d Cir. 1983); Warner Bros. Pictures, Inc. v. CBS, Inc., 216 F.2d 945 (9th Cir. 1954). Return to text

133. *See* King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992). Return to text

134. *See, e.g.*, Buchwald v. Paramount Pictures, Corp., 17 Media L. Rep. (BNA) 1257 (Cal. Ct. App. 1990); Mann v. Columbia Pictures, Inc., 180 Cal. Rptr. 522 (Ct. App. 1982); Fink v. Goodson-Todman Enters., 88 Cal. Rptr. 679 (Ct. App. 1970); Blaustein v. Burton, 88 Cal. Rptr. 319 (Ct. App. 1970); Minniear v. Tors, 72 Cal. Rptr. 287 (Ct. App. 1968). Return to text

135. Douglas Kari, *Buchwald v. Paramount: Minding Hollywood's Business*, Ent. L. Rep., May 1991; *see also* Mark Christensen, *Coming to Los Angeles*, Cal. Mag., Feb. 1991, at 36; Dennis McDougal, *Playing in Court, an Inside Look at an Eddie Murphy Movie Deal*, L.A. Times, Dec. 24, 1989, at B1. Return to text