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COMMENT

THE LAW OF IDEA MISAPPROPRIATION IN NEW YORK: AN ARGUMENT FOR CHANGE

I. INTRODUCTION

The amount of protection against appropriation that an idea receives depends upon the jurisdiction in which a claim for misappropriation is brought.¹ For example, while New York provides a minimal amount of protection for the creator of ideas, California's protection is practically the same level as that which it provides for expressions of ideas that may be copyrighted.²

The dearth of protection for creators in New York is largely caused by the reliance of its courts on confusing and arbitrary standards.³ These standards are inherently ambiguous, offer inadequate guidelines, and, thus, result in a lack of uniformity for protection. Consequently, cases with practically identical facts often result in inconsistent decisions.⁴

Moreover, these standards are incredibly difficult to satisfy.⁵

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

2. *Id.* at 117-18.

3. *Id.* "[B]ecause of the way the courts use [these standards,] they are no longer effective measures of protectibility [sic]. Instead, they serve as complete barriers to idea protection." *Id.* at 122. The New York standards of "novelty" and "concreteness" are discussed *infra* at part II.

4. Compare *Healey v. R.H. Macy & Co.*, 297 N.Y.S. 165 (App. Div. 1937), *aff'd*, 14 N.E.2d 388 (N.Y. 1938) (finding in favor of the plaintiff where the defendant failed to compensate the plaintiff for using only the slogan developed by the plaintiff as part of an advertising campaign) with *Bailey v. Haberle Congress Brewing Co.*, 85 N.Y.S.2d 51 (Syracuse Mun. Ct. 1948) (finding in favor of the defendant where the defendant failed to compensate the plaintiff for using the slogan developed by the plaintiff, but where there was no broader advertising campaign developed by the plaintiff).

5. See generally Nory Miller, Note, *Selection Processes: An Inadvertent Gap in Intellectual Property Law*, 87 COLUM. L. REV. 1009 (1987).

Thus, the stringent and inoperative standards have wrought unjust outcomes for many creators who have been forced to depend upon the courts of New York to have their rights adjudicated. Furthermore, through their use of these poorly defined standards, the courts in New York have exacerbated the problem by creating "loopholes" for injustice. This unfortunate state of affairs will end only if the legislature in New York addresses the inequities of the situation and enacts appropriate legislation.

A case which exemplifies the ineffective and unfair results of New York's standards for idea misappropriation is *Murray v. National Broadcasting Co.*⁶ *Murray* involved the alleged misappropriation of the plaintiff's idea by the defendant.⁷ Despite the marked similarities between the plaintiff's idea for a television show and National Broadcasting Company's ("NBC") *The Cosby Show*, the plaintiff was unsuccessful in his suit against NBC.⁸

In accordance with New York jurisprudence, the court applied the "novelty" standard to determine if the idea was sufficiently novel and concrete to be afforded legal protection.⁹ The court found that the idea was not novel and stated that the issue of misappropriation could not be litigated.¹⁰ Thus, the court's application of New York's standard precluded the creator from partaking in the success of his own creation.¹¹

In contrast, California law requires that a court deemphasize arbitrary and stringent standards, and focus, instead, on the relationship between the parties by examining the actions between the parties which gave rise to the litigation.¹² Such a standard provides greater protection to the creator of the idea.¹³ Therefore, if *Murray* had been decided in a California court, the key question of who actually conceived of the idea for *The Cosby Show* would have been heavily considered in the court's analysis. It is clear that such a standard of review is better suited to reveal the truth behind misappropriation.

6. 671 F. Supp. 236 (S.D.N.Y. 1987), *aff'd*, 844 F.2d 988 (2d Cir. 1988), *cert. denied*, 488 U.S. 955 (1988).

7. *Id.*

8. *Id.* at 237.

9. *Id.* at 239.

10. *Id.* at 245.

11. *See id.*

12. Swarth, *supra* note 1, at 127. "Instead of judging an idea by its value afforded as consideration, [California] courts . . . concentrate on the existence of a contractual relationship, or lack thereof." *Id.*

13. *Id.*

priation claims and is, thus, better suited to achieve equitable results.

The first part of this Note discusses the standards used in New York in evaluating a claim for idea misappropriation and explores the problems with these standards.¹⁴ The next section analyzes the *Murray* case, illustrating the difficulties in the application of the "novel" and "concrete" standards used in New York. This Note then compares the standards used in California for misappropriation cases and suggests that New York adopt similar standards.¹⁵ Finally, this Note concludes by briefly examining potential ramifications of continuously allowing claims of misappropriation to be evaluated under inadequate standards.

II. THE PROBLEM WITH NEW YORK'S STANDARDS FOR IDEA MISAPPROPRIATION

A. *The Standards: Concreteness and Novelty*

In New York, an idea must be sufficiently concrete before it will be considered property entitling the creator to legal protection.¹⁶ It has long been held by the courts that there is no property right in ideas that have not been reduced to a tangible and concrete form.¹⁷ The rationale for this is the theory that only the form of an idea warrants protection, not the idea itself.¹⁸

In *O'Brien v. RKO Radio Pictures*,¹⁹ the plaintiff's idea for a motion picture, built around a colorful story of the "Palace Theatre"

14. See discussion *infra* notes 16-84 and accompanying text.

15. See discussion *infra* notes 209-63 and accompanying text.

16. McGhan v. Ebersol, 608 F. Supp. 277, 284 (S.D.N.Y. 1985).

17. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926); *Fendler v. Morosco*, 171 N.E. 56 (N.Y. 1930).

It must be acknowledged—as the defendants point out—that nearly a century ago our court stated that common-law copyright extended to "[e]very [sic] new and innocent product of mental labor which has been embodied in writing, or some other material form." *Palmer v. De Witt*, 47 N.Y. 532, 537 [(N.Y. 1872)] (emphasis supplied). And, more recently, it has been said that 'an author has no property right in his ideas unless . . . given embodiment in a tangible form.' *O'Brien v. RKO Radio Pictures*, D.C. [sic], 68 F.Supp. [sic] 13, 14 [(S.D.N.Y. 1946)]. However, as a noted scholar in the field has observed, "the underlying rationale for common law copyright (i.e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form" (Nimmer, Copyright, § 11.1, p. 40) [sic]. The principle that it is not the tangible embodiment of the author's work but the creation of the work itself which is protected finds recognition in a number of ways in copyright law.

Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 254 (N.Y. 1968).

18. *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946).

19. *Id.*

and old vaudeville characters, was not considered sufficiently concrete to satisfy the standard.²⁰ The court held that the story of the theater itself was too abstract and too general to give rise to a claim of literary property, even if it was copied by a film producer.²¹ The lack of concreteness was evidenced by the plaintiff's own statement within his initial proposal, which stated that "[the] real story of the Palace Theatre would stem naturally from the material that thorough and painstaking research would uncover."²²

The second legal obstacle that an idea creator must overcome to obtain protection is the novelty requirement. In *Murray v. National Broadcasting Company*, the court held that the lack of novelty in an idea precluded a plaintiff from having the court enjoin its unauthorized use.²³

An examination of New York case law reveals that there are several definitions of novelty, instead of just one. For example, it has been held that an idea is not novel if it is a matter of common knowledge or if it is simply an adaptation of existing knowledge.²⁴ It has also been stated that if an idea exists in the public domain, it is not novel.²⁵ An idea will not meet the novelty standard if it is in the industry at the time of the creator's submission,²⁶ or if it is merely an improvement of a standard technique or quality, a judicious use of existing means, or a mixture of known ingredients in somewhat different proportions.²⁷

20. *Id.* at 14.

21. *Id.*; *Compare Stone v. Liggett & Myers Tobacco Co.*, 23 N.Y.S.2d 210 (App. Div. 1940) (where an advertising idea reduced to a script was found not to be a concrete form, and, thus, was not afforded protection) and *Carneval v. William Morris Agency, Inc.*, 124 N.Y.S.2d 319, 320 (Sup. Ct. 1953), *aff'd*, 137 N.Y.S.2d 612 (App. Div. 1954) (where the court held that the plaintiff could not successfully prosecute a case unless he proved "independent creation of a new, novel, unique idea or a combination of ideas reduced to a concrete form").

22. *O'Brien*, 68 F. Supp. at 14.

23. 671 F. Supp. at 236.

24. *McGhan*, 608 F. Supp. at 286.

25. *Granoff v. Merrill Lynch & Co., Inc.*, 775 F. Supp. 621 (S.D.N.Y. 1991); see *Ed Graham Prods., Inc. v. National Broadcasting Co.*, 347 N.Y.S.2d 766, 769 (Sup. Ct. 1973) (holding that "the idea for larger-than-life heroes with juvenile helpers fighting evildoers and embarking on all sorts of fantastic adventures" lacks novelty, is in the public domain, and may, therefore, be used with impunity without incurring liability for misappropriation).

26. *Ed Graham Prods.*, 347 N.Y.S.2d at 768.

27. *Eenkhorn v. New York Tel. Co.*, 568 N.Y.S.2d 677 (App. Div. 1990) (citing *Educational Sales Programs, Inc. v. Dreyfus Corp.*, 317 N.Y.S.2d 840, 843-44 (Sup. Ct. 1970)); see *Ring v. Estee Lauder, Inc.*, 702 F. Supp. 76 (S.D.N.Y. 1988), *aff'd*, 874 F.2d 109 (2d Cir. 1989) (an idea is not novel if it is merely a variation on a basic theme); see also *Koret, Inc. v. RJR Nabisco, Inc.*, 702 F. Supp. 412, 414 (S.D.N.Y. 1988) (holding that an idea is not

One commentator has suggested that the courts' denial of recovery for idea misappropriation is due to an accumulation of factors, which include the "inherent difficulty of enforcing rights in ideas, the desire to protect buyers of ideas from harassing litigation, the public policy against the encouragement of monopoly of ideas, and the difficulty of measuring the value of such intangibles. . . ."28 New York courts rationalize the necessity for the stringent standards as a method to find novelty in an idea; consequently, they order compensation based upon that "novelty or uniqueness."²⁹

A case which illustrates how this standard is applied is *Ed Graham Productions, Inc. v. National Broadcasting Co.*³⁰ In *Graham*, the court granted the defendant's motion for summary judgment in an action for misappropriation of an idea for a cartoon series because the court found that the plaintiff's idea was not sufficiently novel.³¹ The plaintiff, a firm in the business of developing and producing television programming material, claimed that it had come up with an idea for an animated children's television series entitled "Birdman and Sparrow."³² Sample scripts and drawings of the characters in the proposed series were submitted to the vice-president for daytime programming at NBC, but NBC rejected the plaintiff's idea.³³ Instead, the network adopted a different agency's proposal also entitled "Birdman."³⁴ The court found that the plaintiff's "Birdman" was entirely dissimilar from the defendant's "Birdman": one

novel if it has been suggested or known by the public at a prior time).

28. Edward M. Swartz, *The Protection of Intangible Interests*, 49 MASS. L.Q. 107, 121 (1964).

29. *Educational Sales Programs, Inc. v. Dreyfus Corp.*, 317 N.Y.S.2d 840, 843-44 (Sup. Ct. 1970). Unless it is novel, an idea does not merit protection. *Id.* at 844. An idea which is merely a sensible suggestion may not necessarily be legally protected as an idea. *Id.* at 843. Courts following this rationale recognize that an idea might be the subject of general knowledge. *See, e.g., id.* at 843. Unless the idea's creator can show that the idea is novel, the creator has not thought of anything new and, therefore, has no property right to protect. *See, e.g., Ring v. Estee Lauder, Inc.*, 702 F. Supp. 76 (S.D.N.Y. 1988), *aff'd*, 874 F.2d 109 (2d Cir. 1989) (holding that plaintiff's intellectual property claims were completely precluded under New York law where they arose out of a third party's public use of the idea of videotaping a "makeover" session at which a cosmetician instructed a customer about the appropriate application of cosmetics and giving a copy to the customer); *Soule v. Bon Ami Co.*, 195 N.Y.S. 574 (App. Div. 1922), *aff'd*, 139 N.E. 754 (N.Y. 1923) (advice to raise prices in order to increase profits was not advice worthy of compensation).

30. 347 N.Y.S.2d 766 (Sup. Ct. 1973).

31. *Id.* at 770.

32. *Id.* at 767.

33. *Id.* at 768.

34. *Id.*

had "super" powers, while the other did not.³⁵ Based upon these distinctions, the court held that no evidence existed that the defendant had misappropriated the plaintiff's idea.³⁶ Furthermore, the court found that the plaintiff's idea lacked novelty, stating that the idea of "larger-than-life heroes with juvenile helpers fighting evil-doers" was not an original concept.³⁷

B. *The Ineffective Standards for Measuring Idea Protection*

Despite the policy justifications in support of using the novelty and concreteness standards, such standards are ineffective in determining whether an idea deserves protection. Rather than achieving equitable results, these standards, instead, serve as complete barriers affording no protection to the creators of ideas.³⁸ It has been argued that by utilizing novelty and concreteness as substantive elements, courts are unnecessarily distracted from the ultimate question of whether a defendant actually used a plaintiff's idea.³⁹ As a result, courts use "a shotgun approach to eliminate meritless claims [which] needlessly forecloses meritorious claims as well."⁴⁰ Furthermore, there is a suspicion that courts manipulate the law to sidestep juries by giving substantial weight to such amorphous elements.⁴¹ Proof of actual use should be sufficient to support a claim of misappropriation, and evidence of such use is what courts should really scrutinize.

1. The Inherent Vagueness of the Concreteness Standard

The standard of concreteness that must be proved in order for a court to afford legal protection to an idea is problematic and few cases have fashioned a practical definition of the term.⁴² Some courts have attempted to define it in the negative, and illustrate what is not concrete; however, there has been little guidance regarding the correct use of the standard.⁴³ It has been stated that "[t]he critical elements of concreteness are matters dependent largely upon the 'eye of

35. *Id.*

36. *Id.*

37. *Id.* at 769.

38. Swarth, *supra* note 1, at 122.

39. See Joseph E. Kovacs, Note, *Beyond the Realm of Copyright: Is There Legal Sanctuary for the Merchant of Ideas?*, 41 BROOK. L. REV. 284 (1974); see also Harold C. Havighurst, *The Right to Compensation for an Idea*, 49 NW. U. L. REV. 295 (1954).

40. Kovacs, *supra* note 39, at 323.

41. See Havighurst, *supra* note 39, at 303, 305; see also Kovacs, *supra* note 39, at 323.

42. Swarth, *supra* note 1, at 122.

43. *Id.*

the beholding' court."⁴⁴ It can be concluded from this statement that the arbitrary distinction between abstract and concrete only serves to facilitate the ad hoc decision of a court of whether or not "*this* plot, *this* theme, or *these* characters should . . . be granted the sanctuary of the copyright laws."⁴⁵

New York courts also have different ideas about what the standard of concreteness is intended to measure. These varying conceptions range anywhere from a general conceptualization to the full definition of the idea,⁴⁶ increasing the inherent vagueness about what must be proved to satisfy this standard.⁴⁷ Where courts have not indicated which of the definitions apply, concreteness is usually shown via a written expression of the idea in question;⁴⁸ however, even this apparent commonality has produced inconsistent results. For example, in *Healey v. R.H. Macy & Co.*,⁴⁹ R.H. Macy & Co. (Macy's), the defendant, used the plaintiff's Christmas advertising slogan, "A Macy Christmas Means a Happy New Year."⁵⁰ The plaintiff alleged that Macy's previously agreed to pay a stated sum if it used the plaintiff's idea, but Macy's refused to compensate the plaintiff.⁵¹ The plaintiff successfully sued on a theory of implied contract to recover the value of the advertising slogans and ideas submitted to the defendant.⁵² Thus, the slogans were deemed sufficiently concrete to be

44. Miller, *supra* note 5, at 1019 n.65 (quoting Joseph E. Kovacs, *supra* note 39, at 289, 296).

45. Robert Y. Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 740 (1967) (emphasis in original).

46. *Id.*; see, e.g., *Stone v. Marcus Loew Booking Agency*, 63 N.Y.S.2d 220 (Sup. Ct. 1946) (in order to be protected, an idea must take a physical form at the time of disclosure).

47. Swarth, *supra* note 1, at 123.

48. See *Stone v. Marcus Loew Booking Agency*, 63 N.Y.S.2d at 222 (stating that "an idea which never takes a concrete form at the time of disclosure, even if novel, is not the subject of a property right or of a contract"); *Carneval v. William Morris Agency, Inc.*, 124 N.Y.S.2d 319, 320 (Sup. Ct. 1953, *aff'd*, 137 N.Y.S.2d 612 (App. Div. 1954) (where the trial court held that the plaintiff could not successfully prosecute a case for quasi-contractual relief, unless he proved "independent creation of a new, novel, or unique idea or a combination of ideas reduced to concrete form"). In NIMMER ON COPYRIGHT, the authors criticize this use of a writing as a touchstone for concreteness because an abstract idea may be put on paper (for example, the idea in *O'Brien*, while in the written form, was very abstract) and a highly-developed and detailed idea may be presented orally. 3 MELVILLE B. NIMMER & DAVID NIMMER. NIMMER ON COPYRIGHT § 16.08[A], at 16-53 (1990).

49. 297 N.Y.S. 165 (App. Div. 1937), *aff'd*, 14 N.E.2d 388 (N.Y. 1938).

50. *Bailey v. Haberle Congress Brewing Co.*, 85 N.Y.S.2d 51, 53 (Syracuse Mun. Ct. 1948) (discussing *Healey v. R.H. Macy & Co.*, 297 N.Y.S. 165 (App. Div. 1937)).

51. *Healey v. R.H. Macy & Co.*, 14 N.E.2d 388 (N.Y. 1938).

52. *Id.*

considered literary property.⁵³

Yet in a later case, *Bailey v. Haberle Congress Brewing Co.*,⁵⁴ whose facts were similar to those in *Healey*, the court denied the plaintiff's implied contract claim.⁵⁵ In *Bailey*, the plaintiff claimed that the defendant improperly used the slogan "Neighborly Haberle"—a phrase which the plaintiff had created, and which was communicated to the defendant by the plaintiff at an earlier date.⁵⁶ The court distinguished the case from *Healey* by pointing out that, in *Healey*, the "plaintiff submitted to the defendant not merely a slogan, but a full and complete advertising campaign plan in writing, featuring the slogan, with drawings and sketches, and 200 words of carefully phrased advertising material."⁵⁷ It is difficult to discern whether the "*Bailey* court viewed the writing submitted in *Healey* as simply a tangible expression of the plaintiff's idea, or as a fully developed concept."⁵⁸ Regardless of how the *Bailey* court viewed the writing, the two cases appear irreconcilable because both defendants only used the slogan, and never utilized any of the additional submissions.⁵⁹

Moreover, if a court looks at the level of conceptual development as a means of measuring concreteness, instead of judging the concreteness by the physical tangibility of the idea, problems arise in discerning how the court determines the particular level of conceptual development.⁶⁰ Two lines of analysis have been used to identify the point at which an idea is concrete. The first is that an idea is concrete only when it has been developed and is "ready for immediate use without any additional embellishment."⁶¹ Under this analysis, at least one authority on copyright law suggests that the slogans in *Healey* and *Bailey* were both concrete.⁶²

The question under the second analysis is whether the defendant could have produced the end product if the plaintiff did not produce the elaborated idea in the first place.⁶³ "If the answer is no, then the

53. See *id.*

54. 85 N.Y.S.2d 51 (Syracuse Mun. Ct. 1948).

55. *Id.* at 52.

56. *Id.*

57. *Id.* at 53.

58. Swarth, *supra* note 1, at 123.

59. See NIMMER, *supra* note 48, § 16.08[A], at 16-55.

60. *Id.* § 16.08[A], at 16-52.

61. *Id.* ("to speak of an idea developed to the point where it is ready for use presents a contradiction in terms since if an idea is so developed it ceases to be merely an idea").

62. *Id.* § 16.08[A], at 16-55.

63. Deborah A. Levine, Case Note, *The Cosby Show: Just Another Sitcom?*, 9 *LOY.*

plaintiff has a right in the elaborated idea and is entitled to protection."⁶⁴ Ultimately, the commentators argue that the courts which adhere to the doctrine that protects only concrete ideas do not really protect ideas to any significant degree.⁶⁵

2. The Inability to Satisfy the Novelty Standard

The novelty requirement imposes an insurmountable burden on the creator before his idea will be protected as a property right.⁶⁶ In reference to *Murray*, Swarth stated:

The New York approach creates a separate, lower status for idea vendors, as opposed to purveyors of any other type of product. . . . "Novelty" is not an implied requirement in a contract for any other type of service or product. For example, when NBC asks one of its suppliers to show pencils for sale, and uses one of them, it cannot deny the contract to pay for its use on the ground that a pencil can be gotten anywhere. However, NBC asked Murray to show his product, and then, having used it, [footnote omitted] sought to deny responsibility to pay for it on the basis that this product could be gotten elsewhere.⁶⁷

Rather than identifying the creator, this standard requires an idea to be unique; a standard which is virtually impossible to achieve.⁶⁸ Absolute novelty is indeed a rarity, especially in literature.⁶⁹ This is particularly true in dramatic literature, where it has been said that there are only thirty-six possible dramatic plots.⁷⁰ Consequently, the novelty standard has been universally criticized by commentators exploring the law of ideas.⁷¹ "[W]here a court addresses itself to nov-

ENT. L.J. 137, 146 (1989) (citing Rubenstein, *Copyright Protection for "Elaborated Ideas"*, LAW TIMES, Dec. 6, 1957, at 296, col. 1).

64. *Id.*

65. NIMMER, *supra* note 48, § 16.08[A], at 16-53.

66. *Id.* at 16-58 to 16-66; see also Richard J. Greenstone, "It's Not Sufficiently Novel," *Held the Judge*, ENT. & SPORTS L., Fall 1987, at 5, 6.

The novelty requirement imposes a nearly impossible standard for the protection of an idea—that it be new or not formerly known to anyone. Our society thrives on the use of that which has come before to achieve advances in the arts, literature, science and technology. Especially in literature, very little material is truly novel. The novelty standard has been universally criticized by commentators exploring the law of ideas. . . .

Id.

67. Swarth, *supra* note 1, at 127.

68. See Greenstone, *supra* note 66, at 6.

69. *Id.*

70. *Desny v. Wilder*, 299 P.2d 257, 271 (Cal. 1956) (en banc).

71. See, e.g., Miller, *supra* note 5, at 1018-19; see also Kovacs, *supra* note 39, at 294-

elty, as a matter of law or fact, it may be presumed to be looking for the means by which to dismiss the complaint."⁷²

III. *MURRAY v. NATIONAL BROADCASTING CO.*

A. *The Procedural History*

In September, 1985, Hwesu S. Murray commenced suit against NBC and Brandon Tartikoff on charges of misappropriation.⁷³ He sought damages and declaratory and injunctive relief as the "sole owner of all the rights in, and the idea, proposal and property [known as] 'Father's Day.'"⁷⁴ His complaint asserted various causes of action arising out of the defendants' alleged misappropriation of his idea including, but not limited to, misappropriation and unjust enrichment.⁷⁵ He claimed that he would prove that what had become the enormously successful and lucrative *Cosby Show* was his idea, and that NBC had stolen it.⁷⁶

Both parties stipulated that New York law governed the action;⁷⁷ thus, a finding of concreteness and novelty was required by the trial court in order for the plaintiff to be successful.⁷⁸ The defendants made a motion for summary judgment on the grounds that Murray's idea was neither "novel" nor "concrete," and that, under New York law, Murray could not obtain recovery for an idea which lacked those characteristics.⁷⁹ Judge Cedarbaum, writing for the majority in the United States District Court for the Southern District of New York, granted the defendants' motion, holding that Murray's idea was not sufficiently novel to create a property interest.⁸⁰ Naturally, Murray appealed.⁸¹

On appeal, the United States Court of Appeals for the Second Circuit upheld the lower court's decision.⁸² Murray petitioned the Supreme Court to consider whether he had been deprived of due

96.

72. Kovacs, *supra* note 39, at 296.

73. *See Murray*, 671 F. Supp. at 239.

74. *See id.*

75. *Id.* at 238-39.

76. *Id.* at 238.

77. *Id.* at 239.

78. *Id.*

79. *Id.*

80. *Id.* at 245.

81. *See Murray v. National Broadcasting Co.*, 844 F.2d 988 (2d Cir. 1988).

82. *Id.* at 995.

process; however, certiorari was denied.⁸³

B. *The Facts*

In 1979, NBC hired Murray as a unit manager in its sports division.⁸⁴ In 1980, Murray contacted an NBC official, William Dannhauser, about some ideas—which he developed while outside the scope of his employment with NBC—for future television programs.⁸⁵ Dannhauser told him to submit his proposals in writing, and, soon thereafter, Murray submitted five written proposals—one of which was entitled “Father’s Day.”⁸⁶ He informed NBC that if it was interested in any of the proposals, he expected to be named executive producer and to receive appropriate credit and compensation as the creator of the program.⁸⁷

Dannhauser encouraged Murray to “flesh out” his proposal and submit it to Josh Kane, then an NBC vice-president and top official with NBC Entertainment—the division of NBC responsible for network television programming.⁸⁸ In accordance with Dannhauser’s directive, Murray submitted an expanded proposal for “Father’s Day” to Kane.⁸⁹

“The expansion of ‘Father’s Day’ took Murray several months to accomplish and included preparation of notes, drafts, program elements, a biography of the father in the show and extensive research.”⁹⁰ After this extensive research, Murray concluded that Bill Cosby would be the best choice for the lead role in “Father’s Day.”⁹¹ Murray also suggested roles for a working spouse and five children.⁹² He indicated that the proposed series would “combine humor with serious situations in a manner similar to the old *Dick Van Dyke Show*” but “with a Black perspective.”⁹³ Murray’s expanded propo-

83. *Murray v. National Broadcasting Co.*, 488 U.S. 955 (1988).

84. *Murray*, 671 F. Supp. at 237.

85. *Id.* at 238.

86. *Id.* at 237. He described his program, in part, as follows: “The father will not be a buffoon, a supermasculine menial or a phantom. Children will not engage in eye-rolling ‘sassiness’ or abusive anti-social behavior. The mother will be neither a heavy-set cleaning woman, nor a struggling person without purpose or direction.” *Id.* at 240.

87. *Id.* at 238.

88. *Murray*, 844 F.2d at 990.

89. *Id.*

90. Brief for Appellant at 20, *Murray v. National Broadcasting Co.*, 844 F.2d 988 (2d Cir. 1988) (No. 87-7695) [hereinafter Brief].

91. *Id.*

92. *Murray*, 844 F.2d at 990.

93. *Id.*

sal concluded with the observation that "[l]ike *Roots*, the show will attempt to depict life in a [closely-knit] Black family, with the addition of a contemporary, urban setting."⁹⁴

On November 21, 1980, Kane returned the "Father's Day" submission to Murray and informed him that "we are not interested in pursuing [its] development at this time."⁹⁵ Specifically, Kane told Murray that his superiors had decided that NBC would not acquire Murray's rights in "Father's Day."⁹⁶

Four years later, in the fall of 1984, *The Cosby Show* premiered on NBC.⁹⁷ *The Cosby Show* was a half-hour weekly situation comedy series about everyday life in an upper middle-class black family in New York City.⁹⁸ Furthermore, the lead role was played by Bill Cosby.⁹⁹ In its first season, *The Cosby Show* soared to the top of the Nielsen ratings and became one of the most popular programs in television history.¹⁰⁰ Subsequent to the broadcast of *The Cosby Show*, NBC moved from last place to first place in the network television ratings.¹⁰¹ The entire industry attributed the dramatic rise to the phenomenal success of *The Cosby Show*. Industry watchers said that the show's popularity was caused by its refreshing premise that black families could be discovered living in middle-class America.¹⁰²

Brandon Tartikoff, the president of NBC Entertainment, Bill Cosby, and Carsey-Werner, the production company, were credited with the creation and development of *The Cosby Show*.¹⁰³ However, Carsey-Werner never submitted any written treatment, story, literary property, program idea, format or concept to NBC for *The Cosby Show*.¹⁰⁴ Furthermore, Tartikoff was a supervisor of Kane—the man who, four years earlier, rejected Murray's expanded

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* In 1980, NBC was in last place among the three major television networks and had been unable to obtain and develop successful entertainment programs. Brief, *supra* note 90, at 18. Additionally, at that time, Bill Cosby was not involved with any regularly scheduled show in prime-time television. *Id.*

101. *Id.* at 19.

102. *Id.* at 18. Cosby, Tartikoff, an adoring press, and NBC's contract with the producers all stated that the show was a "unique intellectual property." Joe Winski, *Hwesu v. Huxtable*, *ADVERTISING AGE*, October 3, 1988, at 44.

103. *Murray*, 844 F.2d at 990-91.

104. Brief, *supra* note 90, at 24.

proposal for "Father's Day."¹⁰⁵

In September, 1984, Murray and his wife watched the premiere of *The Cosby Show*.¹⁰⁶ Despite the change in the name from "Father's Day" to *The Cosby Show* and a few other minor variations on his idea, Murray knew *The Cosby Show* was directly derived from his proposal which had been rejected by NBC four years earlier.¹⁰⁷

Immediately after viewing the premiere, Murray wrote a series of letters to NBC claiming that *The Cosby Show* derived from his idea for "Father's Day."¹⁰⁸ NBC denied the claim and stated that "Father's Day" had "absolutely no role [in] the genesis" of *The Cosby Show*, which was "developed and produced independently" by Carsey-Werner.¹⁰⁹ Murray, through counsel, responded to NBC by stating that he believed the defendants had used his property, "Father's Day," and, thus, violated his rights.¹¹⁰ Moreover, NBC never suggested that Murray did not have rights in "Father's Day" and, in fact, confirmed the existence of those rights.¹¹¹

C. *The Majority's Incorrect Analysis*

The United States District Court for the Southern District of New York granted NBC's motion for summary judgment, concluding that Murray's idea was not "sufficiently novel."¹¹² The court analogized "Father's Day" to such well-known television series as *Father Knows Best* and *The Dick Van Dyke Show*,¹¹³ and held that Murray's proposal for a family situation comedy with black actors was merely a simple variation of an often-used theme—a family situation comedy with a white family.¹¹⁴

105. *Murray*, 844 F.2d at 991.

106. Winski, *supra* note 102, at 44. Murray recalled that "[i]t was like an immediate kick in the stomach. My wife and I just sat there in stone silence. We couldn't believe what we were seeing." *Id.*

107. *Id.*

108. *Murray*, 844 F.2d at 990.

109. Brief, *supra* note 90, at 21. Murray wrote on November 7, 1984 that *The Cosby Show* used "the basic concept, with no essential change" and after another denial by NBC, Murray wrote "it is clear to me that my proposal is being used by NBC." *Id.*

110. *Id.*; see *Murray*, 844 F.2d at 991.

111. Brief, *supra* note 90, at 21; see *infra* notes 123-33 and accompanying text, arguing that the contract between NBC and Carsey-Werner described the underlying idea as property and also called the idea property.

112. *Murray*, 671 F. Supp. at 246.

113. *Id.* at 241.

114. *Id.* Thus, the court viewed *The Cosby Show* as simply an extension of Cosby's humor and style. *Id.* at 241-43.

D. *The Dissent of the Second Circuit*

On appeal to the United States Court of Appeals for the Second Circuit, the *Murray* decision was upheld by a two-thirds majority.¹¹⁵ Justice Pratt, disagreeing with both the lower court and the majority in the Second Circuit, stated that the standard for determining the novelty of Murray's idea is that "where plaintiff's idea is *wholly lacking* in novelty, no cause of action in contract or tort can stand based upon the alleged misappropriation of that idea."¹¹⁶ However, Justice Pratt argued, the majority defined the sole issue in the case as "whether the idea . . . was *sufficiently novel* to support a claim for its unlawful use."¹¹⁷ Thus, implicit in the majority's holding was the acknowledgment that *some* novelty existed in Murray's idea.¹¹⁸ Therefore, Justice Pratt concluded that, if the majority applied the correct standard—"wholly lacking in novelty"—its decision was erroneous, because, under that standard, Murray's idea, as conceded by the court, was not entirely lacking in novelty.¹¹⁹

Moreover, Justice Pratt argued that the court summarily dismissed facts crucial to Murray's case.¹²⁰ While conceding that there was evidence that Murray's idea was not novel, Justice Pratt argued that there was also evidence which raised a genuine issue of material fact which should have been decided by a jury.¹²¹ The dissent relied heavily upon the agreement between NBC and the producers, Carsey and Werner.¹²² In that agreement, NBC referred to the series as "unique, intellectual property,"¹²³ supporting the opinion that NBC perceived the idea to be novel and to have value.¹²⁴ NBC argued, and the majority agreed, that this clause referred to a "fully-produced television series,"¹²⁵ and not Murray's program idea; however, such analysis ignored two important points, according to Justice Pratt. Initially, the "unique, intellectual property" language was

115. *Murray*, 844 F.2d. at 990.

116. *Id.* at 991 (quoting *Ed Graham Prods. Inc. v. National Broadcasting Co.*, 347 N.Y.S.2d 766 (Sup. Ct.1973)) (emphasis added).

117. *Id.* at 991 (emphasis added).

118. *Id.* at 996.

119. *Id.* at 997.

120. *Id.* at 996.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

found in the remedies section of the development agreement.¹²⁶ This section gave NBC the right to prevent the loss of its "unique, intellectual property" in the event Carsey-Werner failed to perform.¹²⁷ Thus, if Carsey-Werner failed to develop the television series, the only "unique, intellectual property" that would have been protected was the series' underlying idea.¹²⁸ At a minimum, according to Justice Pratt, the Carsey-Werner agreement constituted admissible evidence that Murray's idea was unique, thus, making the determination of novelty a question of fact.¹²⁹

Justice Pratt also stated that the majority ignored the definition section of the development agreement which specifically defined "property" to be the "story, literary property, program idea, and/or program format *which form(s) the basis*" for the television series.¹³⁰ This provision provided additional evidence that what NBC sought to protect as a unique and novel property was Murray's underlying idea and not the developed elements of the series as a whole.¹³¹

Finally, Justice Pratt stated that NBC admitted that Murray had "rights" in "Father's Day."¹³² NBC also admitted that the reason why rejected proposals were usually returned was because the material "belonged" to the submitter.¹³³ Thus, NBC implicitly recognized that the material belonged to Murray.

E. *The Injustice to Murray: The Grant of Summary Judgment*

Murray was denied his day in court, despite the concession by Judge Cedarbaum that the court assumed that NBC had, in fact, used his idea without providing him with any compensation.¹³⁴ Unfortunately, the court held that assumption to be inconsequential, unless Murray's idea was found to be novel.¹³⁵

Not only should a jury have determined the originality of Murray's idea, but a jury also should have been allowed to address the alleged independent origin of *The Cosby Show*. The court recognized that NBC used the idea, therefore, the defendants' lack of truth in

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; see, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

130. *Murray*, 844 F.2d at 996 (emphasis added).

131. *Id.*

132. *Id.*

133. *Id.* at 996-97.

134. *Murray*, 671 F. Supp. at 239.

135. *Id.* at 239-40.

their claims could have been used to shed light on other issues before the court. Based on the compilation of evidence, reasonable people could have easily differed on whether or not Murray's idea was novel and, thus, misappropriated by NBC. Furthermore, the novelty issue, as a factual question, should have been subject to further discovery.

1. Murray's Idea Was Concrete

Despite the faulty standards, it is arguable that Murray, nevertheless, satisfied both the concreteness and novelty standards.¹³⁶ Under the concreteness requirement, the courts sometimes require only a written expression of the idea in question. Using this guideline, Murray's two-page proposal clearly embodied the requisite physical and tangible concreteness.

If the slogan in *Healey* was considered to be concrete, literary property worthy of legal protection, it is inconceivable that Murray's submission to NBC was inadequate.¹³⁷ Consequently, it should have been afforded the same protection. At the very least, the expanded proposal that Murray submitted met the *Healey* test.¹³⁸ Thus, a possible explanation for the *Murray* case is the inherent difficulty in using a standard that comes without set guidelines or a clear definition to enable uniform application.

If the concreteness standard is employed, the previously discussed "elaborated idea" analysis is more appropriate for cases where the plaintiff divulged an idea which was later exploited by the defendant.¹³⁹ Under such a test, Murray's idea would have satisfied

136. See discussion *supra* notes 42-72 and accompanying text (regarding the novelty and concreteness standards).

137. See discussion *supra* notes 49-59 (concerning the problems with the concreteness standard as illustrated in the comparison of *Healey* and *Bailey*). Not only did Murray present an oral presentation describing his proposal, but he also submitted the original proposal to Kane; months later, after a great deal of research and hard work, he submitted the revised proposal which was an intricate, lengthy and detailed version of the prior submission. *Murray*, 844 F.2d at 990. The lengthy, written memoranda were as concrete, if not more concrete, than the slogan in *Healey*.

138. In *Healey*, the plaintiff was successful because he submitted a full and complete advertising plan in writing, not merely a slogan. See *supra* notes 49-53, 57 and accompanying text. *Contra* *Bailey v. Haberle Congress Brewing Co.*, 85 N.Y.S.2d 51 (Syracuse Mun. Ct. 1948) (holding that a mere slogan is not afforded protection). The latter case can be distinguished from the *Murray* case because Murray did not submit a mere skeletal structure or idea, but a two-page detailed proposal of the situation comedy, the story, the characters, and the like. See *supra* notes 89-94 and accompanying text. Even if the first proposal of *Father's Day* is analogous to the slogan in *Bailey*, the revision is analogous to the written plan in *Healey*.

139. See *supra* notes 63-64 and accompanying text.

the standard for concreteness.

For example, in *Fink v. Goodson-Todman Enterprises, Ltd.*,¹⁴⁰ a case similar to *Murray*, the plaintiff proposed a program entitled "The Coward" to the defendants.¹⁴¹ The idea behind the program was that a person whose courage had been challenged would purposely place himself in situations which repeatedly tested his courage.¹⁴² At the defendants' request, the plaintiff submitted his written presentation and, later, a script for the initial episode of the proposed series.¹⁴³

Five years thereafter, the defendants aired a show called *Branded* which had the same basic theme as that proposed by the plaintiff.¹⁴⁴ The *Fink* court stated that the plaintiff's presentation was a "partial (but substantial) development of a fully worked out sub-theme toward a completely expressed television series, well calculated to give a clear insight to what the finished article would be like."¹⁴⁵ Furthermore, the court held that it was "not likely that [the] defendants would have produced their end product if [the] plaintiff had not authored and supplied his elaborated idea."¹⁴⁶ The court also noted that a large part of the plaintiff's presentation was the plan for an entire series including full background story, the molding of the hero's character and personality, the method for flashing back on the story, and various portrayal techniques.¹⁴⁷

Like *Fink*, *Murray* submitted more than just an idea. His proposal was a substantial development toward a complete television show with a clear insight to the finished article. As in *Fink*, *Murray* submitted an expanded proposal for "Father's Day" at NBC's request.¹⁴⁸ *Murray* made casting suggestions, presented numerous, very specific ideas for the characters and storylines, and proposed that the show be a combination of humor and serious situations.¹⁴⁹ *The Cosby Show* embodied virtually all of the elements that were contained in *Murray's* expanded proposal.¹⁵⁰ The similarities be-

140. 88 Cal. Rptr. 679 (Ct. App. 1970).

141. *Id.* at 683.

142. *Id.*

143. *Id.* at 684-85.

144. *Id.* at 685.

145. *Id.* at 687.

146. *Id.* at 693.

147. *Id.*

148. *Murray*, 844 F.2d at 990.

149. *Id.*

150. *Id.*

tween Murray's proposal and *The Cosby Show* would lead a reasonable person to believe that NBC would not have produced the show without Murray's proposal.¹⁵¹ Although the elaborated idea standard was not applied, if it was, Murray's idea would have been entitled to protection.¹⁵²

2. Murray's Idea Was Novel

Murray satisfied the novelty standard. Cosby and Tartikoff stated that they believed that *The Cosby Show* was novel and unique.¹⁵³ Assuming, as the court did, that *The Cosby Show* was merely a derivation of "Father's Day," Tartikoff admitted to the novelty of "Father's Day."¹⁵⁴ Moreover, an affidavit presented at trial from Mr. J. Fred MacDonald, a history professor at Northeastern Illinois University in Chicago, firmly established the existence of novelty in "Father's Day."¹⁵⁵

Additionally, the court erroneously relied upon *Downey v. General Foods Corp.*¹⁵⁶ in granting the motion. In *Downey*, the New York Court of Appeals established the general proposition that "[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use."¹⁵⁷ The plaintiff in *Downey* wrote to the defendant, stating that he had an "excellent idea to increase the sale of [the defendant's] product JELL-O . . . making it available for children."¹⁵⁸ "Several days later, the defendant sent the plaintiff an

151. Levine, *supra* note 63, at 137.

152. *Murray*, 844 F.2d at 996-97.

153. *Murray*, 671 F. Supp. at 240.

154. *See id.* ("Tartikoff described *The Cosby Show* as adding a new and unique dimension to the American television family genre.")

155. Brief, *supra* note 90, at 13. Professor McDonald stated:

[T]elevision has never before had a show like "*The Cosby Show*." That show presents a Black American nuclear family, where the family is whole and where both parents are professionals who work at their professions. The father is the predominant figure. The children all interact with their parents obediently and respectfully. This is not a Black situation comedy, but it is a realistic comedy. To the extent Black families have been shown in the past, they were almost always poor and/or split, without any dominant father figure. None of these shows portrayed a Black family as does "*The Cosby Show*." That portrayal has never before been seen on television.

Id.

156. 286 N.E.2d 257 (N.Y. 1972).

157. *Id.* at 259 (quoting *Bram v. Dannon Milk Prods., Inc.*, 307 N.Y.S.2d 571 (App. Div. 1970) (where the idea submitted by the plaintiff to the defendants—depicting an infant in a high-chair eating yogurt—was lacking in novelty and had been utilized by the defendants and their competitors prior to its submission)).

158. *Id.*

'Idea Submittal Form' . . . which included a form letter and a space for explaining the idea."¹⁵⁹ The plaintiff returned it with a suggestion that the product "be packaged and distributed to children under the name 'WIG-L-E' (meaning wiggly or wiggley) or 'WIGGLE-E' or 'WIGGLE-EEE' or 'WIGLEY.'" ¹⁶⁰ He explained that his own children wished to eat JELL-O more often under the suggested names than by the actual name, JELL-O.¹⁶¹ This was the only recorded proof of the plaintiff's idea.¹⁶² In response, the defendant wrote a letter to the plaintiff, indicating that it had no interest in his idea or its promotion.¹⁶³ Later that year, however, the defendant introduced a JELL-O product into the market called "Mr. Wiggle."¹⁶⁴ The plaintiff brought suit, and the defendant answered, stating that it independently created the name before plaintiff's initial submission.¹⁶⁵ Court findings indicated a clear lack of novelty; among other things, the defendant had made use of the word "wiggles" in advertisements that appeared prior to plaintiff's submission.¹⁶⁶

The facts of *Downey*, however, are clearly distinguishable from those of *Murray*. In contrast to *Downey*, the defendant in *Murray* expressed an interest in the idea and encouraged the plaintiff to "flesh it out."¹⁶⁷ After months of work caused by NBC's interest in his idea, Murray submitted an expanded proposal.¹⁶⁸ Furthermore, in *Murray*, the defendant made numerous arguments regarding the genesis of *The Cosby Show* which, after investigation, appeared to be suspect.¹⁶⁹ In this respect, *Murray* mirrors the situation in *Hea-*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 259. A television commercial prepared in 1959 contained the phrase "all that wiggles is not Jell-O," and a 1960 newspaper advertisement depicted Indian puppets and the words "make a wigglewam of Jell-O for your tribe tonight." *Id.*

167. *Murray*, 844 F.2d at 990.

168. *Id.* It set forth every detail of the proposed situation comedy including the characters, specific actors to play such roles, the plot, the number of children and the location. See *supra* notes 89-94 and accompanying text.

169. Although the defendants claimed that Tartikoff and Carsey-Werner independently created *The Cosby Show*, *Murray*, 844 F.2d at 991; Brief, *supra* note 90, at 19, "it [wa]s uncontested that the idea for Bill Cosby to do a show about a Black, middle-class family which led to 'The Cosby Show' came from NBC, and not from Cosby, Carsey, or Werner." *Id.* at 17-19. NBC also stated that *The Cosby Show* originated from a proposal from the William Mor-

ley, where the court found for the plaintiff because of inconsistencies in the defendant's testimony.¹⁷⁰

Some courts in New York have indicated that if the novelty requirement must be maintained, its severity should be mitigated by requiring the idea to be novel only to the defendant; the defendant must first learn of the idea through the plaintiff's disclosure.¹⁷¹ The theory is that, even if an idea is not novel to the world because others may have the same idea, it is novel if the defendant has never heard of it.¹⁷² Under this standard, if the defendant first learns of the idea from the plaintiff, even if the idea was not originated by the plaintiff, the idea is sufficiently novel to the defendant and the plaintiff should be allowed to recover.¹⁷³

In *Murray*, it was suggested that one of the reasons that novelty did not exist was because of a 1965 interview in which Bill Cosby expressed an interest in the type of series Murray had later proposed.¹⁷⁴ However, NBC failed to present evidence demonstrating that it was aware of the interview or that Cosby had such an interest.¹⁷⁵ Under New York's theory, because NBC was apparently unaware of Cosby's intentions, the interview should not have any bearing on the court's determination of whether or not the idea was novel to NBC.¹⁷⁶

While the elements of an idea may not be novel, courts have held that a combination of ideas is novel.¹⁷⁷ In *Stanley v. Columbia Broadcasting Systems, Inc.*,¹⁷⁸ the court concluded that the plaintiff had a right to protection for his radio program idea.¹⁷⁹ In *Stanley*, the plaintiff had submitted a recording of a radio program similar to the one later broadcast by the defendant.¹⁸⁰ The plaintiff's program

ris Agency. *Id.* at 22. However, an official from the William Morris Agency testified that the William Morris Agency had nothing to do with the creation of *The Cosby Show*. *Id.*

170. *Healey*, 297 N.Y.S. at 165.

171. See *Greenstone*, *supra* note 66, at 6; see, e.g., *Berry v. Glidden Co.*, 92 F. Supp. 909 (S.D.N.Y. 1950); *Weitzenkorn v. Lesser*, 256 P.2d 947 (Cal. 1953); *Soule v. Bon Ami Co.*, 795 N.Y.S. 574, 575 (App. Div. 1922); *Burwell v. Baltimore & Ohio R.R.*, 164 N.E. 434 (Ohio Ct. App. 1928).

172. *NIMMER*, *supra* note 48, § 16.08[B], at 16-62 to 16-63.

173. *Id.* § 16.08[B], at 16-63.

174. *Murray*, 671 F. Supp at 244.

175. *Murray*, 844 F.2d at 997.

176. See *Levine*, *supra* note 63, at 146.

177. *Stanley v. Columbia Broadcasting Sys., Inc.*, 221 P.2d 73, 79 (Cal. 1950) (en banc).

178. *Id.*

179. *Id.*

180. *Id.*

format, entitled "Hollywood Preview," presented a story likely to become a movie.¹⁸¹ Listeners were asked to send their opinions of the story and suggestions for casting to the broadcasting station, and the best letters received cash prizes.¹⁸² The defendant's show was also called *Hollywood Preview* and involved the performance of a radio version of a story being made into a movie.¹⁸³ The theater audience filled out cards giving their opinions and casting suggestions.¹⁸⁴

The *Stanley* court stated that "the question of originality of [the] plaintiff's program is not one of law to be determined by the court, but is one of fact for the jury's determination."¹⁸⁵ The court upheld the jury's verdict for the plaintiff,¹⁸⁶ stating that the selection, arrangement, and combination of old ideas into new ideas required skill, discretion, and creative effort.¹⁸⁷

Although the dissent in *Stanley* did not agree that the combination of the elements in plaintiff's proposal was novel, it did state that "[a] new twist to a worn idea may be as much entitled to credit as an entirely new idea."¹⁸⁸ Furthermore, the dissent stated that "[a] fresh application of the familiar, however dull or commonplace it may appear to the critical, may be a marketable idea if it gives enough promise of winning the attention of the public."¹⁸⁹ Thus, even an idea lacking in creativity may still be marketable and have value, if it wins the public's attention.

Murray satisfied the *Stanley* test because the combination of the elements in his proposal was novel. Instead of a white family situation comedy, Murray suggested using black actors in a family situation comedy in non-stereotypical roles.¹⁹⁰ Even the trial court acknowledged that *The Cosby Show* was an industry breakthrough.¹⁹¹ However, instead of finding novelty, the trial court concluded that this was merely the achievement of a fairer, more positive, and realistic portrayal of blacks; a need which many Americans, including Bill Cosby, had recognized for many years.¹⁹²

181. *Id.* at 74-75.

182. *Id.*

183. *Id.* at 74.

184. *Id.* at 77.

185. *Id.* at 80.

186. *Id.* at 81-82.

187. *Id.* at 79.

188. *Id.* at 89.

189. *Id.* at 90.

190. *Murray*, 844 F.2d at 991-92.

191. *Murray*, 671 F. Supp. at 238.

192. *Murray*, 844 F.2d at 992.

The court should have considered this as a new twist on an old idea—the statement that it merely “won the public’s attention” or was a “marketable and valuable idea” was a gross understatement.

Due to the sufficient novelty of Murray’s idea, the court should not have overlooked, much less ratified, the violative behavior cast against an unassuming Murray. The requirement of novelty should never be blindly or automatically applied merely because the subject matter of the litigation happens to be an idea.¹⁹³ Other New York courts applying the same standard acted cautiously, not blindly, albeit in a faulty manner.¹⁹⁴

For example, in *Werlin v. Reader’s Digest Ass’n, Inc.*,¹⁹⁵ the defendant, Reader’s Digest Association (RDA), had encouraged the plaintiff to submit ideas for articles to the defendant for consideration during a ten year period.¹⁹⁶ The defendant developed one of the plaintiff’s ideas into a lead article for an issue of the defendant’s magazine,¹⁹⁷ but failed to compensate the plaintiff for his idea.¹⁹⁸ The *Werlin* court held that “to permit RDA to refuse to pay . . . would be, notwithstanding the fact that RDA did not act in bad faith, to permit an injustice of the most fundamental sort.”¹⁹⁹

The court’s discussion of the unjust enrichment of RDA at the expense of the plaintiff indicates that New York courts are not completely adverse to looking at factors other than novelty in deciding whether an idea has been misappropriated. The court stated that “if the civil law has any reason for its existence, it is to remedy situations such as this one.”²⁰⁰ The *Murray* court ignored *Werlin* and other cases which were analogous to the instant case. Rather, the *Murray* court relied on dissimilar cases in precluding recovery for Murray.²⁰¹ Moreover, because Murray’s proposal, “Father’s Day,”

193. NIMMER, *supra* note 48, § 16.08[B], at 16-65.

194. *Id.*

195. 528 F. Supp. 451 (S.D.N.Y. 1981).

196. *Id.* at 451.

197. *Id.* at 452.

198. *Id.*

199. *Id.*

200. *Id.*

201. Brief, *supra* note 90, at 37-38; see *Cole v. Phillips H. Lord, Inc.*, 28 N.Y.S.2d 404, 406-07 (App. Div. 1941) (reversing the trial court’s dismissal of a similar case involving a proposal for a radio program due to lack of novelty). The Appellate Division did not even discuss novelty, finding it sufficient that the jury “would have been justified in concluding that *as between these parties* it was [the] plaintiff’s original basic idea” *Id.* (emphasis added). *But see*, *Ed Graham Prods., Inc. v. National Broadcasting Co.*, 347 N.Y.S.2d 766 (Sup. Ct. 1973) (where the court found that the defendant’s program was independently created, not similar to the plaintiff’s proposal, and admitted to be derived from an existing character al-

was a valuable idea, developed by substantial effort, and was misappropriated for the defendants' own profit to the disadvantage of Murray, the defendants "cannot be heard to say that it is too fugitive or evanescent to be regarded as property."²⁰²

Justice Pratt did not believe that New York defined "novelty" so strictly,²⁰³ if it did, then the state would be discouraging the submission of ideas and would be threatening the free flow of ideas.²⁰⁴ It has been stated that "[t]he New York scheme offers only illusory protection to the 'idea man,' removing any incentive for him to divulge his idea."²⁰⁵ The inevitable result of this approach forces idea creators to refrain from revealing their ideas to anyone for fear that there will be no recourse when the ideas are stolen.²⁰⁶

Therefore, while a few disclosure cases state that novelty is a requirement without which there is no claim,²⁰⁷ the courts have actually focused on the specific conduct and the relationship of the parties.²⁰⁸ Accordingly, the clear existence of novelty in Murray's idea (which alone should have mandated denial of the motion) as well as the facts related to the conduct of the defendant and Murray should have been considered by the court.

V. THEORIES TO CURTAIL THE MISAPPROPRIATION OF IDEAS

Other jurisdictions base their decisions in idea misappropriation cases on principles of equity, rather than the subjective standards that New York applies. The liberal approach to idea protection adopted by California does not require the plaintiff idea creators to

ready known to the public as "Batman"); *McGhan v. Ebersol*, 608 F. Supp. 277 (S.D.N.Y. 1985) (The idea for "Friday Night Videos," a television series, was admittedly not the plaintiff's idea, but that of the defendants. Furthermore, the defendant's proposal was based on "MTV" also known as "Music Television Video.").

202. Brief, *supra* note 90, at 41 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 236, 240 (1918), where the Supreme Court held that when parties in the same field seek to profit from the same subject matter, "[it] hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi-property, irrespective of the rights of either as against the public."

203. *Murray*, 844 F.2d at 997.

204. *See Swarth, supra* note 1, at 118.

205. *Id.*

206. *Id.* at 121.

207. *See supra* text and cases accompanying notes 24-37.

208. Brief, *supra* note 90, at 35; *see Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981), *aff'd*, 697 F.2d 301 (2d Cir. 1982) ("[W]hile the idea disclosure cases generally refer to the idea in suit as the plaintiff's claimed 'property,' the decisions have focused primarily on the relationship between the parties (or lack thereof) and not on a *priori* recognition of exclusivity in the idea.").

prove novelty or concreteness, which results in a more favorable environment for idea creators.²⁰⁹

If Murray had brought suit in California, it is likely that he would have recovered damages because the California courts would have focused on the confidential relationship of the parties, and the fact that NBC took advantage of that relationship.²¹⁰ Instead of imposing the strict standard of novelty, a California court would have concentrated on the reliance Murray placed on the defendants when he submitted his idea, and the fact that the parties did not deal at arm's length throughout their relationship.²¹¹

A California case illustrating this approach is *Landsberg v. Scrabble Crossword Game Players, Inc.*,²¹² which resulted in the protection of the plaintiff's abstract idea.²¹³ In that case, the plaintiff wrote a book on strategies for winning the Scrabble board game.²¹⁴ He then contacted the defendant, the owner of the Scrabble trademark, and requested permission to use the trademark.²¹⁵ The defendant requested the manuscript, and the plaintiff provided it.²¹⁶ After negotiations between the parties broke down, the defendants published a Scrabble strategy book based upon the plaintiff's manuscript.²¹⁷

In *Landsberg*, the plaintiff's contract claim succeeded because, in California, novelty is irrelevant in an action seeking recovery for the use of an idea disclosed pursuant to a contract.²¹⁸ However, California courts will not find that an implied contract exists if disclosure of the plaintiff's idea occurs before it is known that the defendant's use of the plaintiff's idea is conditioned upon the payment of compensation.²¹⁹ Murray also satisfied this standard because he made it known to NBC that, if it used his idea, he expected to be given compensation and credit as the producer of the show.²²⁰

209. Swarth, *supra* note 1, at 127.

210. *Id.*

211. *Id.*

212. 802 F.2d 1193 (9th Cir. 1986).

213. *Id.*

214. *Id.* at 1196.

215. *Id.*

216. *Id.*

217. *Id.*

218. See Swarth, *supra* note 1, at 121.

219. *Id.*

220. See discussion of facts *supra* notes 84-87 and accompanying text.

A. *The Contract Theory: Unjust Enrichment*

Unjust enrichment exists where a party has been enriched "under such circumstances that in equity and good conscience he ought not to retain it. . . ." ²²¹ In his article entitled, *The Protection of Intangible Interests*, ²²² Edward M. Swartz focused on the inequity inherent in predicaments like that of *Murray*, and suggested that emphasis should be placed on the injury to idea creators in situations similar to that in *Murray*. ²²³ He stated in pertinent part:

Equitable jurisdiction has been steadily expanding to provide protection for the whole array of intangible values The existence of a legal benefit should not, in every instance, be made to depend upon the existence of a property interest. What should be controlling is that the defendant, by injuring the plaintiff, has acquired a benefit which in equity and good conscience should belong to the [p]laintiff. It is apparent that intangible values can be appropriated to [a] defendant's great benefit. Yet it is questionable whether these interests will qualify as property. If these interests can be called property, so much the better. However, where the court finds that no property interest is involved, the search for legal benefit should not stop with that determination. ²²⁴

Contract law provides a remedy for the unauthorized use of ideas. ²²⁵ "Where an unjust enrichment has been gained, the law has adopted the [implied-in-fact] contract to raise up an obligation in order to promote justice." ²²⁶ Unjust enrichment allows recovery if the plaintiff can prove that the goods provided or the services rendered were not intended as a gift, and that the plaintiff actually conferred a benefit on the defendant. ²²⁷ Courts have found that when a defendant uses a plaintiff's idea, the defendant implies acceptance of the plaintiff's offer to sell the idea. ²²⁸ If the defendant accepts the offer, then the defendant's failure to pay is a breach of the implied-in-fact

221. *Miller v. Schloss*, 113 N.E. 337 (N.Y. 1916) (stating that unjust enrichment "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another").

222. Swartz, *supra* note 28.

223. *See id.* at 109-10.

224. *Id.*

225. *Id.* at 125.

226. *Id.*

227. *Miller*, *supra* note 5, at 1020-21.

228. *Robbins v. Frank Cooper Assoc.*, 241 N.Y.S.2d 259, 261 (App. Div. 1963), *rev'd*, 200 N.E.2d 860 (N.Y. 1964).

contract.²²⁹

At least one treatise on copyright law notes that, in most cases where a defendant requests that the plaintiff disclose his idea, the courts will find that such request or solicitation implies a promise to pay for the idea if the defendant uses it.²³⁰ This theory has been accepted frequently in the entertainment field.²³¹ "In the entertainment industry, television and movie studios buy ideas for shows separately from the shows themselves, even paying for unsolicited ideas if used."²³² Courts infer a recipient's promise to pay based on his knowledge of this industry practice.²³³

It has been held that industry custom provides sufficient notice that someone submitting materials expects to be paid if the recipient uses them.²³⁴ In an industry where ideas are customarily bought and sold, "courts have found that industry custom furnishes notice to a television or movie studio that a writer submitting a story idea expects to be paid if the studio actually uses the idea. . . ."²³⁵

"In the absence of a sufficient industry custom, courts have inferred a promise to pay for an idea from the parties' previous negotiations [regarding] the idea."²³⁶ The assumption is that the creator does not intend to bestow a gift upon the defendant.²³⁷ "Courts can ensure that a defendant received a benefit by requiring proof that the defendant actually used the idea. By actually using the submit-

229. *Id.*

230. NIMMER, *supra* note 48, § 16.01, at 16-3; *see, e.g.*, *Kurlan v. Columbia Broadcasting Sys.*, 256 P.2d 962 (Cal. 1953) (en banc); *Weitzenkorn v. Lesser*, 256 P.2d 947 (Cal. 1953) (en banc); *American TCP Corp. v. Strauss Stores Corp.*, 136 N.Y.S.2d 76 (Sup. Ct. 1954), *aff'd*, 140 N.Y.S.2d 884 (App. Div. 1955).

231. *See, e.g.*, *Fink v. Goodson-Todman Enters., Ltd.*, 88 Cal. Rptr. 679 (Ct. App. 1970) (television series); *see also* NIMMER, *supra* note 48, § 16.01, at 16-4 (development of contract theory to protect ideas).

232. *Miller, supra* note 5, at 1014 (citing *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601, 608 (S.D.N.Y. 1971)).

233. *Id.* (citing *Whitfield v. Lear*, 751 F.2d 90, 93 (2d Cir. 1984) (allegations that a studio customarily returned scripts unopened if uninterested in reviewing them, and that, in this case, the studio had forwarded the script by mailgram to its subsidiary, were sufficient to withstand summary judgment); and *Minnear v. Tors*, 72 Cal. Rptr. 287 (Ct. App. 1968)).

234. *See id.* at 1014, 1021.

235. *Id.* at 1021; *see, e.g.*, *Fink v. Goodson-Todman Enters., Ltd.*, 88 Cal. Rptr. 679 (Ct. App. 1970) (television series); *Robbins v. Frank Cooper Assoc.*, 241 N.Y.S.2d 259, 261 (App. Div. 1963), *rev'd*, 200 N.E.2d 318 (N.Y. 1964) (court awarded damages only); *Cole v. Phillips H. Lord, Inc.*, 28 N.Y.S.2d 404 (App. Div. 1941) (radio program).

236. *Miller, supra* note 5, at 1014.

237. *See id.* at 1022. If the *Murray* court had looked solely at the events which had transpired between the parties prior to the submission of the proposal, it would have arrived at a just decision.

ted idea, the client shows that it found value in the idea."²³⁸ Benefit to the defendant can be measured by the value to the recipient of what was received.²³⁹

Actual use can be shown indirectly.²⁴⁰ Whether the benefit a prospective client has wrought from submitted work is services, property, or something in between, the defendant's receipt of something valuable may be shown by the defendant's actual use. For example, actual use was found where a "significant aspect of the final project" was shown to be "so similar to the rejected submitted idea that it raised an inference that the client used the submission in developing the project."²⁴¹

The requirements of novelty and concreteness are erroneously relied upon to distinguish which ideas have value and, in turn, to merit protection as a property right.²⁴² If the defendant uses the idea, he obviously finds the idea valuable enough. Thus, it is more appropriate to measure an idea's value to the defendant by considering whether or not the defendant found enough value in the idea to use it, rather than by deciding whether or not the plaintiff had a property interest in the idea.²⁴³

The fact that Murray submitted his idea with the understanding that he expected to receive credit and compensation, if the idea was used by NBC, negated any conclusion that he intended his submission to be a gift. Additionally, the evidence clearly indicated that NBC benefitted by its use of Murray's idea. Finally, the court's assumption that NBC used Murray's idea in the creation of *The Cosby Show* should have been sufficient to satisfy the "actual use" test to support a claim for unjust enrichment.

B. *Labor as Consideration*

Some courts have relied partially on a plaintiff's services in deciding whether or not a plaintiff has property rights in particular ideas.²⁴⁴ In one case, the court rejected the defendant's reliance on

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See id.* at 1023-24.

243. *See, e.g.,* Swartz, *supra* note 28, at 110. The control should be based upon whether the defendant acquired a benefit while injuring the plaintiff. *Id.* Legal benefits should not always be based upon whether a property interest exists. *Id.*

244. *See, e.g.,* Nash v. Alaska Airlines, Inc., 94 F. Supp. 428 (S.D.N.Y. 1950) (industrial design); How J. Ryan & Assocs. v. Century Brewing Ass'n, 55 P.2d 1053 (Wash. 1936).

*Downey*²⁴⁵ and held that an idea cannot support a right to recovery unless the idea is original.²⁴⁶ In *Chajet Design Group, Inc. v. Warner/Lauren Ltd.*,²⁴⁷ plaintiff prepared and submitted drawings of a flask-like and cube-like bottle design to the defendant.²⁴⁸ It was implied that the plaintiff was required to use his best efforts and professional expertise to develop and select from among the many possible bottle designs one which would suit the needs of the defendant.²⁴⁹ The defendant stated that the plaintiff's choices were unacceptable and would not be used; however, the plaintiff's design was, in fact, used by the defendant.²⁵⁰

The court held that consideration was not merely the idea itself, but the services rendered.²⁵¹ Thus, if an idea does not constitute a sufficient basis upon which a court might find a contractual agreement, the labor expended in procuring such an idea can meet the requirements. The rule is that ideas are "as free as air;"²⁵² this rule can be justified on the theory that what is really bargained for is the act of conveying the idea.²⁵³

The excessively strict standard for protection required by New York law was renounced long ago by the California courts.²⁵⁴ In California, courts base recovery for implied-in-fact contracts in the entertainment area on the plaintiff's services in disclosing an idea.²⁵⁵ For instance, in *Desny v. Wilder*,²⁵⁶ the Supreme Court of California stated:

The lawyer or doctor who applies specialized knowledge to a state of facts and gives advice for a fee is selling and conveying an idea. In doing that, he is rendering a service. The lawyer and doctor have no property rights in their ideas, as such, but they do not ordinarily convey them without solicitation by [a] client or

245. 334 N.Y.S.2d 874 (N.Y. 1972).

246. *Chajet Design Group, Inc. v. Warner/Lauren Ltd.*, 124 N.Y.S.2d 319, 320 (Sup. Ct. 1953).

247. *Id.*

248. *Id.*

249. *Id.* at 275-77.

250. *Id.* at 276.

251. *Id.* at 278.

252. NIMMER, *supra* note 48, § 16.01, at 16-2.

253. *Id.*

254. Swartz, *supra* note 28, at 122.

255. *See, e.g., Desny v. Wilder*, 299 P.2d 257 (Cal. 1956) (en banc); *Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130 (Ct. App. 1966).

256. 299 P.2d 257.

patient.²⁵⁷

In *Desny* the plaintiff telephoned the defendant, a writer-producer for Paramount Pictures Corporation, on a number of occasions and described his idea for a story to the defendant's secretary, at the secretary's insistence.²⁵⁸ After the plaintiff completely divulged his idea to the defendant's secretary, the secretary said that she would talk it over with the defendant.²⁵⁹ The plaintiff explained that the story idea cost him a great deal of time and effort and, therefore, if the defendant wanted to use the idea he would have to pay for it.²⁶⁰ The defendant ended up using the plaintiff's idea; however, no compensation was provided to the plaintiff.²⁶¹

The *Desny* court stated that "a compiler who merely gathers and arranges, in some concrete form, materials which are open and accessible to all who have the mind to work with like diligence is as much the owner of the result of his labors as if his work were a creation rather than a construction."²⁶² Under the reasoning in *Desny*, any creator is not automatically disqualified from protection simply because elements of his idea have been previously used. One commentator concludes that "[i]ntangible interests should receive the same treatment as is traditionally reserved for tangible interests, and the courts and attorneys alike should be ever vigilant to ensure, where possible, that incorporeal as well as corporeal rights receive equal protection."²⁶³

VI. CONCLUSION

Murray demonstrates the maltreatment of an idea creator by a powerful defendant through New York's legal system. If future cases are similarly analyzed, New York will cease to benefit from the labors of its creative citizens. Instead, these people will create, construct, innovate, and develop their ideas in jurisdictions in which their ideas may flourish and rights be protected at the same time.

In a larger sense, the effect of minimal protection of the creation of new ideas can be very detrimental. "[W]e must take care to guard against . . . [the possibility] . . . that men of ability, who have

257. *Id.* at 266.

258. *Id.* at 261-62.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 272.

263. Swartz, *supra* note 28, at 129.

employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour"²⁶⁴ It appears that, unless an idea creator, who has put great effort and dedication into an idea, is assured of his rights in that idea, he will lose faith in the ability of the legal system to protect him from the theft of his accomplishment.

Murray's creativity was grossly exploited, and as a result, NBC was able to unjustly benefit from Murray's idea and property. Clearly, Judge Cedarbaum legitimized NBC's unjust enrichment when she granted the motion for summary judgment.²⁶⁵ If the lack of protection the court provided for Murray becomes the rule rather than the exception, progress of the arts will be inhibited, and the world may be deprived of future artistic innovations. Let *Murray* instead be used to demonstrate that judicial decisions occasionally merit reversal, and that New York laws which impose incredible obstacles in the path of the idea creator must be changed.

Kim Radbell

264. Swarth, *supra* note 1, at 116 (quoting Justice Mansfield in *Cary v. Longman*, 102 Eng. Rep. 138, 139-40 n.b (1785) (reprinting *Sayre v. Moore*)).

265. See *Murray v. National Broadcasting Co.*, 671 F. Supp. 236 (S.D.N.Y. 1987).