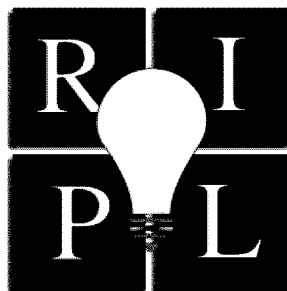


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SUI GENERIS GENIUS: HOW THE DESIGN PROTECTION STATUTE COULD BE AMENDED TO INCLUDE ENTERTAINMENT PITCH IDEAS

LINDSEY WEISSELBERG

ABSTRACT

Hollywood writers and idea men have struggled to gain protection for their entertainment treatments because their works are caught in the realm between unprotected ideas and fully protected expression. In addition to their failure to secure federal copyright protection for their treatments, idea men have also failed to obtain state law protection for their entertainment ideas, leaving them with virtually no legal recourse for idea theft. This comment proposes that Congress should create sui generis protection for ideas in the entertainment industry similar to the protections afforded under the Vessel Hull Design Protection Act.

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SUI GENERIS GENIUS: HOW THE DESIGN PROTECTION STATUTE COULD BE AMENDED TO INCLUDE ENTERTAINMENT PITCH IDEAS

LINDSEY WEISSELBERG*

INTRODUCTION

Imagine moving to Los Angeles to follow your Hollywood dream of making it big as a screenwriter. After several years finding little success in the industry, you are given a shot at developing a drama for a major TV network. You pitch your idea with a fully detailed outline of characters and subplots. But then, after completing the script for the pilot episode, the network fires you; and your involvement in the project is over. The network, however, continues to run with your idea. About a year later, a highly anticipated new show premieres with striking similarities to the original idea you pitched to the network.

Jeffrey Lieber doesn't have to imagine this story at all. It happened to him when ABC took his idea for a show entitled *Nowhere*, and turned it into their hit show *Lost*.¹

Part I of this article discusses Lieber's quest to defend his idea, and the overall importance of protecting ideas in the entertainment industry. Additionally, Part I discusses the shortfalls of the Copyright Act, and relevant state law, in protecting the idea-submissions of Hollywood writers. Part II analyzes the benefits, and feasibility, of a *sui generis* form of protection for these entertainment ideas, similar to the Vessel Hull Design Protection Act, enacted to protect design ideas. Lastly, Part III proposes that Congress should create similar *sui generis* legislation, regulating uniform protection for ideas in the entertainment industry.

I. BACKGROUND

A. Jeffrey Lieber: A Case Study of an Idea Man

Jeffrey Lieber was working in Los Angeles in 2003 when Ted Gold, an acquaintance who headed the drama department at Spelling Productions, contacted him about working on a project for ABC.² The TV network wanted to create a series

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¹ See generally David Bernstein, *Cast Away*, CHI. MAG., Aug. 2007, at 116, 164, available at <http://www.chicagomag.com/Chicago-Magazine/August-2007/Cast-Away/> (detailing the circumstances surrounding the inception of the television series *Lost*, co-produced by ABC and Touchstone).

² *Id.* at 117, 164. ABC spoke to Gold about working together to produce this show. *Id.* at 117. Gold subsequently signed Lieber to a blind-deal, an agreement for a future project that is currently unidentified, to develop the idea and write the script for the upcoming ABC drama. *Id.* at 117, 164.

similar to *CAST AWAY*,³ so Lieber began working on a show idea about the lives of eight to ten plane crash survivors stranded on a deserted Pacific island.⁴ After receiving positive feedback on his pitch, he fleshed out a detailed outline with storylines and character specifics.⁵ Lieber then completed the script for the pilot episode, which, after several weeks of revisions and re-writes, was finally approved by the network.⁶

A few days later, though, ABC decided to replace Lieber with a new team of writers, who continued production without him.⁷ Several months later they shot the pilot episode, which was slated to air in ABC's Fall 2004 line-up.⁸ Feeling exploited by the network, Lieber took his grievance to the Writers Guild of America ("WGA").⁹ One month later, the WGA returned a decision in Lieber's favor, entitling his name to appear on *Lost's* credits.¹⁰

Lieber's case is a somewhat successful story of idea protection in the entertainment industry, largely because he sought relief through WGA arbitration. The same cannot be said of other idea men, who are not members of the WGA, who seek redress for similar claims, but do so in federal or state court.¹¹ Their failures in the court system result from the inadequate legal protection afforded to ideas in general.¹² Considering Lieber's successful arbitration, should all entertainment idea-submission claims be afforded similar protection pursuant to a uniform law akin to copyright? In order to appreciate the need for greater idea protection, it is imperative to understand the vital role ideas play in the entertainment industry.

³ *CAST AWAY* (DreamWorks Pictures, ImageMovers/Playtone Production & Twentieth Century Fox 2000).

⁴ Bernstein, *supra* note 1, at 164. Lieber subsequently pitched the idea for a show entitled *Nowhere*. *Id.* His idea was something similar to *Lord of the Flies*, "a realistic show about a society putting itself back together after a catastrophe." *Id.*

⁵ *Id.* (describing how Lieber's cast of characters included two brothers who compete to serve as leader of the group of survivors: a doctor, a con man, a fugitive, a pregnant woman, a drug-addicted man, a military officer, and a spoiled rich girl).

⁶ *Id.*

⁷ *Id.* (explaining that after the network fired Lieber, the new writers continued to modify the script to reflect a more unrealistic, supernatural plot, and incorporate flashbacks into the show—each episode profiling a different main character).

⁸ *Id.* (describing the two-hour-long, twelve million dollar pilot episode, one of the most expensive in history).

⁹ *Id.* at 164, 182. ABC and Touchstone initially attempted to avoid the situation. *Id.* at 164, 82. They claimed Lieber had no creative input into the show, because his original idea was so different from the show in its current form. *Id.* at 182. However, the parties eventually agreed to arbitration. *Id.* Lieber then submitted a ten-page document to the committee listing the similarities between his original pitch for *Nowhere* and the final shooting script for *Lost*. *Id.* Among the similarities were plot developments, character traits, relationships, and even dialogue. *Id.*

¹⁰ *Id.* (discussing the WGA ruling that Lieber would be entitled to sixty percent of *Lost's* 'created by' credit, to be shared with the new production team).

¹¹ *Contra* *Desny v. Wilder*, 299 P.2d 257, 260–65 (Cal. 1956) (detailing how the court afforded protection for idea man, but only based on contract theory); *Buchwald v. Paramount Pictures Corp.*, 13 U.S.P.Q.2D (BNA) 1497, 1501 (Cal. App. Dep't Super. Ct. Jan. 8, 1990) (same).

¹² *See* 17 U.S.C. § 102(b) (2006) (explaining that federal copyright protection for a work does not extend to any idea).

B. The Function of the Hollywood Idea

Story ideas for movies and television shows are the driving force of Hollywood.¹³ Producers are always looking for the next big blockbuster or hit show, and every good project starts with a great idea.¹⁴ Not all show ideas come from within a studio's own staff conferences or pitch meetings.¹⁵ Typically, producers will receive pitches and story ideas from a writer's agent, or on occasion, will meet directly with writers themselves when seeking idea inspiration.¹⁶ Because studios are inundated with so many ideas, producers typically only review idea-submissions in the form of "treatments."¹⁷ Submitting ideas in this format allows for the most efficient use of both the writer's and producer's time.¹⁸

Despite the great importance of treatments and idea-submissions in fueling the entertainment industry, writers and idea men face constant obstacles in protecting the ideas they share.¹⁹ Studios and producers have made common practice of exploiting the ideas they hear from writers and idea men.²⁰ After all, it is much easier and less expensive for the studios to modify someone else's idea than to invest their own time and money developing a new and risky concept.²¹

¹³ See *Desny*, 299 P.2d at 265 (discussing how ideas can be of great value to show-business producers); David M. McGovern, *What Is Your Pitch?: Idea Protection is Nothing but Curveballs*, 15 LOY. L.A. ENT. L.J. 475, 505 (1995) (discussing how over the past few decades, the demand for entertainment has steadily risen; and in order to continue feeding the demand for entertainment products, studios continue to rely on good ideas).

¹⁴ See *Desny*, 299 P.2d at 265; McGovern, *supra* note 13, at 505.

¹⁵ See *Desny*, 299 P.2d at 265 (describing how producers often depend on others for the procurement of ideas, or the "dressing up" of their own ideas; they do not always come up with ideas on their own).

¹⁶ McGovern, *supra* note 13, at 475–76.

¹⁷ See *Desny*, 299 P.2d at 262; KENNETH ATCHITY & CHI-LI WONG, WRITING TREATMENTS THAT SELL: HOW TO CREATE AND MARKET YOUR STORY IDEAS TO THE MOTION PICTURE AND TV INDUSTRY 9 (Henry Holt & Co. 2003). A treatment is a brief synopsis or outline of the story ideas. ATCHITY & WONG, *supra*. Producers prefer to review ideas in this "treatment" format because they are often very busy and do not have time to read fully developed screenplays which average around 120 pages long. See *id.*; see also *Desny*, 299 P.2d at 262 (stating that when writer, Victor Desny, wished to submit a copy of his sixty-five page story to Billy Wilder, a producer at Paramount Pictures, Wilder's secretary insisted he would not read the script, and instructed Desny to submit a synopsis).

¹⁸ ATCHITY & WONG, *supra* note 17, at 7. The use of treatments allows producers to quickly review the summaries first, and based upon their feeling about the general concept, can request full scripts on projects for which they see potential. See *id.* This is also more efficient for the writers because studios generally approve very few ideas for production, compared to the influx of idea-submissions they receive. *Rokos v. Peck*, 182 Cal. App. 3d 604, 613 (Cal. Ct. App. 1986) (explaining that it has become necessary to submit ideas to producers, but not develop the work fully until it has been approved).

¹⁹ *Rokos*, 182 Cal. App. 3d at 613 (describing how courts have become aware of the lack of protection for writers in submitting their ideas to producers); see also McGovern, *supra* note 13, at 475 (suggesting that regardless of how writers submit their ideas, there is always a gray area concerning the rights of producers and the rights of idea men to the idea presented).

²⁰ See e.g. *Rokos*, 182 Cal. App. 3d at 609 (detailing this very claim by an idea-woman against a studio in the 1950s).

²¹ *Id.*

C. The Limits of Federal Copyright Law

Producers continue to exploit idea-submissions because Hollywood idea men are unable to assert ownership of a copyright in their work, a necessary precursor to proving copyright infringement.²² There are two major roadblocks that limit idea men in securing protection for their work: (1) the scope of the current Copyright Act,²³ and (2) the doctrine of “scenes-a-faire.”²⁴ The Copyright Act of 1976 protects original works of authorship fixed in a tangible medium of expression.²⁵ Ideas, however, are not subject to protection under the Act.²⁶ Because industry standards mandate the use of treatments, and a treatment is essentially a well thought out idea, this invokes the problem of the idea/expression dichotomy.²⁷ When addressing these issues, courts must distinguish between unprotected ideas and true protected expression.²⁸ By making this distinction courts are able to resolve these matters while still adhering to the true purpose of copyright law: promoting the “progress of science and useful arts.”²⁹

²² See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985))).

²³ See 17 U.S.C. § 102(b)(2006) (explaining that copyright protection does not extend to any idea or concept, regardless of the form in which it is described or explained).

²⁴ See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994) (discussing how, among other things, courts apply the doctrine of “scenes-a-faire” to determine the scope of copyright protection).

²⁵ 17 U.S.C. § 102(a) (outlining that copyright protection is provided for original works of authorship in the following eight categories: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works).

²⁶ *Id.* § 102(b) (explaining that copyright protection does not extend to any idea or concept, regardless of the form in which it is described or explained); *Harper & Row*, 471 U.S. at 547–56 (explaining that no author can establish a copyright in facts or ideas). Copyright protection is limited only to the expression in a work, where the author displays his or her stamp of originality. *Harper & Row*, 471 U.S. at 547. *But see* *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1058–59 (C.D. Cal. 2000) (noting that ideas are not treated the same for protection and preemption purposes: while ideas may be precluded from the scope of copyright protection, they are still considered within the scope of the Copyright Act for preemption purposes).

²⁷ See *Harper & Row*, 471 U.S. at 556 (explaining that copyright’s idea/expression dichotomy proscribes the protection of ideas, while still protecting an author’s expression).

²⁸ See, e.g., *Apple Computer*, 35 F.3d 1435 at 1443 (“It is not easy to distinguish expression from ideas However, it must be done, as the district court did in this case.”).

²⁹ See U.S. CONST. art. 1, § 8, cl. 8 (describing the right granted to Congress to enact laws promoting the progress of science and useful arts); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 372 (1991) (noting that copyright assures authors the right to the original expression in their works, but also encourages others to build freely upon their ideas); *Harper & Row*, 471 U.S. at 582–87 (noting that this limitation on copyright, prohibiting the protection of ideas, helps promote science and the arts as the framers intended). The creative process would be stifled if authors were able to prevent people from using their concepts or ideas. *Harper & Row*, 471 U.S. at 582. Therefore, there can be no monopoly over information or ideas. *Id.*

The doctrine of “scenes-a-faire” also limits an idea man’s ability to obtain copyright protection for his treatments.³⁰ “Scenes-a-faire” refer to incidents, characters, or settings, which are so standard to a topic or plot that they necessarily follow from that theme.³¹ This doctrine has significant implications in infringement claims. A defendant who proves the only copied elements at issue are “scenes-a-faire,” will escape liability for copyright infringement.³² Therefore, due to the limitations posed by the idea/expression dichotomy and the doctrine of “scenes-a-faire,” it is difficult to argue that federal copyright protection exists for these treatments and idea-submissions.

D. Does State Law Fill the Protection Gap?

Recognizing the frequency with which these idea-submission claims arose, and their importance in the entertainment field, state courts have devised other ways of combating this protection issue.³³ Although other theories have been suggested in various state courts, contract law is used most frequently.³⁴

When deciding the contractual basis for idea protection, courts focus on the circumstances surrounding the disclosure of the idea and the agreement between the parties involved.³⁵ As is standard with all contract cases, the theory of idea protection involves an agreement between two parties, either express or implied.³⁶ Essentially, in this bargained-for exchange, the idea man agrees to disclose his non-copyrightable idea as consideration for a promise by the producer that he will

³⁰ See, e.g., *Apple Computer*, 35 F.3d 1435 at 1444; see also Feist, 499 U.S. at 371 (“[T]he mere fact that a work is copyrighted, does not mean that all the elements in the work may be protected.”).

³¹ See, e.g., *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982) (“*Scenes a faire* refers to ‘incidents, characters or setting which are as a practical matter indispensable, or at least standard, in the treatment of a given [ideal.]’ (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)); *Metro-Goldwyn-Mayer v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1294 (C.D. Cal. 1995) (noting that elements naturally found in any action film are unprotected scene a faire).

³² See, e.g., *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983) (noting that “*scenes a faire*” are “unprotectable forms of expression” that flow from “unprotectable ideas”).

³³ *Desny v. Wilder*, 299 P.2d 257, 263–65 (Cal. 1956). No idea may be acquired without cost. *Id.* at 365. Ideas are the subject of a contract and may be protected as such, even though other laws might not afford protection. *Id.* at 263. In these situations, a party is suing not for plagiarism, but for refusal to pay for use of the idea as agreed upon in the contract. *Id.*; see *Stanley v. Columbia Broad. Sys., Inc.*, 221 P.2d 73, 85 (Cal. 1950) (Traynor, J., dissenting) (noting that just because policy precludes protection of an idea by copyright does not prevent its protection by contract).

³⁴ *Desny*, 299 P.2d at 265–66. Other possibly pertinent theories to protect ideas are: property theory, quasi-contract theory, express contract theory, implied-in-fact contract theory, and the confidential relationship theory. *Id.* However, property rights in ideas have generally not been recognized either in common law or statutory law, and therefore are not protected in California. *Id.* at 265.

³⁵ See, e.g., *Buchwald v. Paramount Pictures Corp.*, 13 U.S.P.Q.2D (BNA) 1497, 1501 (Cal. App. Dep’t Super. Ct. Jan. 8, 1990).

³⁶ *Desny*, 299 P.2d at 264–69; see also Pierce O’Donnell & William Lockard, *You Have No Idea*, 23 L.A. LAW. 32, 35–36 (2000) (noting that even without any express language discussing an agreement for compensation, the context of the exchange and the customs of the industry can make it clear that each of the parties was engaged in a commercial transaction).

compensate him if he uses his idea.³⁷ Most idea-submission contract cases in Hollywood are implied,³⁸ and courts use a two-prong test to determine the existence of an implied-in-fact contract.³⁹ First, the idea man must clearly condition his disclosure upon an obligation to pay if the idea is used, and second, the producer must know the condition and voluntarily accept disclosure based on its value to him.⁴⁰

Courts can ensure their rulings do not clash with the underlying policy rationale of copyright law by utilizing this bilateral agreement principle of contract law to protect ideas. Unlike copyright law, which protects a work against anyone who may copy it, contract cases pose no threat of an ownership monopoly over an idea because that agreement binds only the two contracting parties.⁴¹ This creates problems specific to such collaborative fields as the entertainment industry, though, because it is very common for additional parties to become involved in a project as it is developed.⁴² Here, any person or corporation not a party to the original contract would be free to use the idea without any legal obligation to the idea originator.⁴³

Parties seeking protection under contract theory might also encounter the problem of federal preemption, as can be the case with any state law.⁴⁴ In an idea case, federal law will preempt the contract claim if the subject matter of the claim comes within the subject matter of the Copyright Act, and if the rights protected by the state law claim are equivalent to the exclusive rights protected by the Act.⁴⁵

³⁷ See *Desny*, 299 P.2d at 263–69. For a contract to exist there must be a meeting of the minds, or mutual assent to the same thing upon the same terms, and agreed to by both parties. *Id.* at 264. One party cannot thrust upon another party a contractual relationship just by his words or actions alone. *Id.* In the entertainment industry, conveyance of an unprotected idea can constitute valuable consideration for the promise to pay because ideas are valuable and often produce profit for the studios. *Id.* at 269.

³⁸ Celine Michaud & Gregory Tulquois, *Idea Men Should Be Able To Enforce Their Contractual Rights: Considerations Rejecting Preemption of Idea—Submission Contract Claims*, 6 VAND. J. ENT. L. & PRAC. 75, 75 (2003). Parties have filed both express and implied idea submission contract claims seeking compensation owed, but true express contracts are rare. *Id.* Therefore, courts rely mostly on finding the existence of an implied-in-fact contract, *ex post*, when the idea man seeks payment on a disclosure he says was made pursuant to a contract. *Id.*

³⁹ *Desny*, 299 P.2d at 269–70.

⁴⁰ See *id.* at 270. An implied contract only exists where the producer knowingly accepted the conditions upon which disclosure was tendered, and had the opportunity to reject disclosure of the idea before it was conveyed. *Id.* The law will not recognize acceptance of the proposal unless the producer has the option of rejecting the disclosure before it is made. *Id.* “The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power.” *Id.*

⁴¹ *Chandler v. Roach*, 319 P.2d 776, 782 (Cal. Dist. Ct. App. 1957). Any person not a party to the contract is free to use the idea without restriction. *Id.* This does not withdraw the idea from use by the public. *Id.*

⁴² See generally Bernstein, *supra* note 1 (noting that in Lieber’s case, he originally contracted with Gold at Spelling Productions, and with ABC; but his idea was ultimately used by both ABC and Touchstone—who later joined with the TV network to co-produce *Lost*).

⁴³ See *Chandler*, 319 P.2d at 782 (noting that contract law does not provide a “remedy good against the world,” as does copyright law).

⁴⁴ U.S. CONST., art. VI.

⁴⁵ 17 U.S.C. § 301 (2006). Section 301 lists the requirements of the two-prong test for preemption. *Id.* If both factors are answered in the affirmative, there is preemption. *Id.*; see, e.g., *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1057–58 (C.D. Cal. 2000). If the state law claim contains an “extra element,” then the rights protected are not equivalent, and there is no

Courts disagree over how to apply the elements of this two-prong test.⁴⁶ This has resulted in inconsistent verdicts and unfairly forces idea men to risk going to trial with little confidence in how the court will rule.⁴⁷ It is also important to note that in those cases where courts have held that the Copyright Act preempts these idea claims, the possibility of bringing an idea-submission claim is essentially eliminated because it is unlikely to survive under federal copyright law.⁴⁸ Because of these problems with federal preemption and inconsistent verdicts in state contract disputes, many Hollywood writers and idea men seeking protection under state law can end up with no protection at all.⁴⁹ What's more, critics of the lack of protection in this field argue that if producers continue to exploit the ideas of Hollywood writers without properly compensating them, this could lead to less idea sharing and ultimately a decline in creativity.⁵⁰

The entertainment industry is not the only field to suffer from inadequate legal protection for ideas. Other industries, such as boat manufacturing and fashion design, have dealt with similar problems of infringement of design ideas. Both industries have sought Congressional assistance to obtain independent *sui generis* protection, separate from the Copyright Act, as a way to curb infringement and promote creativity.⁵¹

II. ANALYSIS

The explosive growth of the entertainment industry has increased the demand for more quality projects, thereby spurring the need for more good ideas.⁵² Idea men, though, are becoming increasingly resistant to sharing their ideas because of the lack of legal protection for their treatments.⁵³ However, the solution to their protection problem is not to expand the current Copyright Act to include all ideas, or to ignore

preemption. *Groubert v. Spyglass Entm't Group*, 63 U.S.P.Q.2D (BNA) 1764, 1765 (C.D. Cal. Jul. 23, 2002) (citing *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987)).

⁴⁶ Compare, e.g., *Selby*, 96 F. Supp. 2d 1053, with, e.g., *Groubert*, 63 U.S.P.Q.2D (BNA) 1764.

⁴⁷ McGovern, *supra* note 13, at 478. State law, while not leaving the idea man completely unprotected, poses sufficient problems of its own. *Id.* Because of the conflicting court opinions on this matter, idea men are left to grapple with unpredictable and inconsistent protection for their claims. *Id.*

⁴⁸ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

⁴⁹ *Musto v. Meyer*, 434 F. Supp. 32, 37 (S.D.N.Y. 1977) (holding that if the only copying involves the idea, this is not actionable under the law).

⁵⁰ McGovern, *supra* note 13 at 508.

⁵¹ See Vessel Hull Design Protection Act of 1997: Hearing on H.R. 2696 Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary, 105th Cong. 16 (1997) (statement of Mary Beth Peters, Register of Copyrights) [hereinafter Vessel Hearing]; Protection for Fashion Design, Subcomm. on Courts, the Internet, and Intellectual Property Comm. on the Judiciary, 109th Cong. 199 (2006) (written statement of the United States Copyright Office in connection with the Subcommittee's hearing on H.R. 5055)[hereinafter Fashion Hearing].

⁵² McGovern, *supra* note 13, at 505.

⁵³ See *supra* Parts I.C–D.

the issue of preemption and allow these claims to proceed in state courts.⁵⁴ However, one must also consider the possibility of enacting separate, *sui generis* legislation tailored to protecting this single category of entertainment treatments.

A. Expanding the Copyright Act: A Perfect Fit for Television and Film Ideas?

Most idea-submission claims filed under current federal copyright law are instant losers simply because the law explicitly precludes protection for ideas.⁵⁵ Over the years, though, some courts began extending copyright protection to elements of works that were previously considered unprotected ideas; such as characters, themes, and other “scenes-a-faire.”⁵⁶ Thus far, courts have only extended the scope of the Act’s protection for those few elements of a work that are significantly detailed.⁵⁷

To illustrate the level of specificity required to warrant protection under this “extended copyright” view, consider the case of *Metro-Goldwyn-Meyer v. American Honda Motor Co.*⁵⁸ Here, Metro-Goldwyn-Meyer (“MGM”), owner of the copyrights to sixteen James Bond films, sought to enjoin Honda from airing a television commercial with James Bond-like scenes and characters because the use was infringing on its copyrights.⁵⁹ The court rejected Honda’s argument that the elements at issue constituted unprotectable ideas.⁶⁰ Instead, it granted protection to those elements because they had been developed and expressed, not in one instance, but throughout an entire series of films.⁶¹ In holding for MGM, the court found that

⁵⁴ See H.R. REP. NO. 94-1476, at 129 (1976) (explaining that by substituting a single Federal system for the highly complicated dual system, this greatly improves the operation of copyright law and helps to carry out the basic constitutional aims of uniformity).

⁵⁵ See 17 U.S.C. § 102(a) (2006).

⁵⁶ See generally *Metro-Goldwyn-Meyer v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (describing how the plaintiff was able to prove ownership of a copyright in the James Bond character, and specific movie scenes, as developed throughout the sixteen films).

⁵⁷ See *id.* at 1295–96.

⁵⁸ *Id.* at 1287.

⁵⁹ *Id.* at 1291, 1293. The defendant, along with its advertising agency, developed a commercial entitled “Escape” for their Honda del Sol convertible, which boasted a detachable roof. *Id.* at 1291. The commercial featured a young, well-dressed couple in the Honda del Sol, in the middle of a high-tech helicopter chase with a grotesque villain. *Id.* When the villain jumped from the helicopter and onto the car’s roof, the male driver (after a flirtatious look at his female passenger), “deftly release[d] the Honda’s detachable roof . . . sending the villain into space and effecting the couple’s speedy get-away.” *Id.*

⁶⁰ *Id.* at 1293–94. As to the alleged infringement from using similar scenes from the film, defendant argued that the plaintiff was simply trying to obtain a monopoly over the “action/spy/police hero genre” which contradicted the purpose of copyright law. *Id.* at 1293. Defendant argued that the scenes it used, like the helicopter chase scene, were common themes that could naturally flow from any action genre film. *Id.* at 1294. These images were considered unprotected “scenes-a-faire.” *Id.* Regarding the similarity in characters, the defendant argued that the James Bond character was an “unprotected dramatic character,” and that all other characters were just unprotectable stock characters. *Id.*

⁶¹ *Id.* at 1303 (holding that the visual delineation of the fictional character of James Bond, as developed over sixteen films and several decades, required greater protection than perhaps other lesser developed works); see also *Chandler v. Roach*, 319 P.2d 776, 779 (Cal. Dist. Ct. App. 1957) (noting that the in order to get protection, the idea must have identifying characteristics, and enough “flesh and blood to come to life.”).

the film sequences brought together elements that were quintessentially James Bond,⁶² and the unique character traits of Bond himself were sufficiently distinct to merit protection.⁶³

In light of *MGM*, it is clear that idea men must show an extraordinarily high level of specificity in their treatments in order to obtain copyright protection for their pitches. Courts, though, might be hard-pressed to find that same level of specificity and detail in an idea man's film or TV treatment.⁶⁴ Idea men and writers compose these synopses to convey to producers just the bare bones of a much bigger idea; they are not the proper vehicles to communicate fully fleshed-out movie or television projects.⁶⁵ The problem is, while they are arguably more developed than the abstract ideas precluded from protection under the Copyright Act, these treatments do not quite reach the level of full expressions.⁶⁶ Therefore, if Congress were to expand the Copyright Act to protect these ideas, they would be guaranteeing the writer a monopoly over something short of copyright-protected expression.⁶⁷ What's more, protection under the Copyright Act would generally ensure ownership of that idea for the entire life of the author, plus an additional seventy years.⁶⁸ Consequently, such action by Congress would frustrate the underlying policy rationale behind the Copyright Act because authors would be free to withdraw these ideas from use by other authors.⁶⁹ This would narrow the pool of ideas open for development by other writers and idea men, and ultimately stifle creativity in the field.⁷⁰ Thus, it is difficult to argue that the Copyright Act, as it stands right now, should extend to entertainment treatments.

⁶² *Metro-Goldwyn-Meyer*, 900 F. Supp. at 1294–95. The court agreed that the James Bond films portrayed unique and protectable film sequences. *Id.* at 1295. Any filmmaker could produce a helicopter chase scene in several different ways, but only the James Bond films incorporated so many distinct components. *Id.* at 1294.

⁶³ *Id.* at 1296. The James Bond character was protectable because he had been developed with enough specificity to constitute protectable expression. *Id.* Bond is a unique character whose specific traits remain constant, even though the actors change every few years. *Id.*

⁶⁴ See McGovern, *supra* note 13, at 506 (explaining that by their very nature, treatments are comprised of under-developed ideas and are often presented in the form of lesser-developed summaries, and moderately developed ideas fleshed out as “spec” scripts).

⁶⁵ *Desny v. Wilder*, 299 P.2d 257, 262 (Cal. 1956). In *Desny*, the plaintiff screenwriter was asked to condense his sixty-five-page story into a three to four page outline, for a pitch lasting approximately ten minutes. *Id.* By communicating the idea as a synopsis, the main emphasis became just the central idea: the story of a boy trapped in a cave some eighty feet deep. *Id.*

⁶⁶ See O'Donnell & Lockard, *supra* note 36, at 34 (explaining that entertainment treatments are caught in the idea/expression dichotomy—falling somewhere in between the unprotected abstract idea, and the protected full expression).

⁶⁷ *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 84–85 (Cal. 1950) (Traynor, J., dissenting).

⁶⁸ 17 U.S.C. § 302(a) (2006).

⁶⁹ U.S. CONST. art. 1, § 8, cl. 8; *Stanley*, 221 P.2d at 84–85. Writers would be “stifled in their efforts to create forms worth protecting, if in the common through which they ranged they were diverted from their course by one enclosure after another.” *Stanley*, 221 P.2d at 84.

⁷⁰ See *id.* at 84–85.

B. Is State Contract Law Too Problematic to Protect Entertainment Ideas?

With no protection for entertainment treatments under federal law, many writers and idea men have sought protection under state contract law. States began granting writers the use of contract law as a form of idea protection after recognizing the importance of their work and the lack of federal copyright protection for their ideas.⁷¹ Indeed, idea men are free to plead their cases in state court, provided they can argue around federal preemption.⁷² However, because of the potential for varying court decisions regarding preemption issues, as well as the limited scope of protection afforded by contract law, state law can prove to be an impractical tool for deciding these types of idea protection cases.⁷³

State idea protection through contract law is often unpredictable and unreliable because the law permits state courts to approach the issue of preemption in many different ways.⁷⁴ For instance, consider the differing views among courts in applying the first prong of the preemption test: whether or not the subject matter of the contract claim comes within the subject matter of the Copyright Act.⁷⁵ On the one hand, it is possible to argue this prong is not satisfied simply because ideas are not considered within the subject matter of the Copyright Act.⁷⁶ Most courts, however, follow the *Selby v. New Line Cinema Corp.*⁷⁷ line of reasoning, which holds that ideas do indeed fall within the subject matter of copyright for preemption purposes.⁷⁸ With this, defendants are able to prove the first prong of the test supporting preemption, and can move on to the second prong: whether the rights granted under state law are equivalent to any of the exclusive rights within the general scope of copyright.⁷⁹ One court in particular has held that the rights under contract law and copyright are not equivalent, rejecting a finding of preemption.⁸⁰ However, most courts have disagreed with that logic and have found the rights under both contract and

⁷¹ *Rokos v. Peck*, 182 Cal. App. 3d 604, 613–614 (Cal. Ct. App. 1986). Courts eventually agreed that literary artists should have some protection for their ideas, since it had become standard practice to submit ideas to producers in the form of lesser-developed synopses. *Id.* Once the producer approved the treatment, only then could the writers submit a fully-developed work. *Id.* Their solution to this problem was to make contract law available to protect the disclosure of the idea. *Id.*

⁷² See 17 U.S.C. § 301.

⁷³ See *supra* Part I. A.

⁷⁴ See *Groubert v. Spyglass Entm't Group*, 63 U.S.P.Q.2D (BNA) 1764, 1766 (C.D. Cal. Jul. 23, 2002).

⁷⁵ See *id.* at 1766.

⁷⁶ 17 U.S.C. § 102(b) (stating that the Act expressly excludes ideas from the pool of protectable subject matter).

⁷⁷ 96 F. Supp. 2d 1053 (C.D. Cal. 2000).

⁷⁸ *Id.* at 1058–59; see e.g. *Metrano v. Fox Broad. Co.*, No. CV–00–02279, 2000 WL 979664, at *3–5 (C.D. Cal. Apr. 24, 2000).

⁷⁹ *Id.* at 1059 (noting that with this step, many courts find it critical to determine whether the state claim contains an “extra element” that distinguishes the nature of the action from copyright).

⁸⁰ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454–55 (7th Cir. 1996). In copyright law, one has a “right against the world”; whereas in contract law, one’s rights only affect the contracting parties. *Id.* at 1454. Therefore, these cannot be said to be equivalent rights. *Id.* Additionally, the requisite promise to perform on the contract constitutes the “extra element” needed to make the contractual right distinct from copyright. *Id.*

copyright law to be sufficiently equivalent to support a finding of preemption.⁸¹ For instance, the court in *Selby* found the rights under the state claim were equivalent to copyright because the contractual promise the plaintiff sought to enforce prohibited nothing more than the defendant's use of an idea, which is already proscribed under copyright law.⁸² As evidenced by the above examples, the decision to litigate their claims in state court leaves idea men with the potential for two very unpromising outcomes: either face federal preemption before getting to trial, or hope that the court rules in the minority and finds no preemption problem. The more probable outcome is that the court will preempt the idea claim and leave the writer with no legal redress.⁸³

As a remedy for this potential unfairness to writers, many courts have ruled that contract claims involving ideas would not be preempted.⁸⁴ However, it is important to recall that Congress had clear intentions when it passed the preemption provision, and these policies should not be ignored.⁸⁵ In passing section 301,⁸⁶ congress intended to preempt any applicable state law in favor of uniform federal law to handle copyright issues.⁸⁷ This prevented states from offering protection equivalent to copyright, and eliminated the potential for plaintiffs to accomplish an "end run" around federal copyright law by suing for the same claim under state law.⁸⁸ If states granted all idea claims access to their courts, they would be operating in opposition of clear congressional mandate.

Furthermore, even if all state courts defied congressional intent and agreed to bypass the issue of preemption, the inherent policies of contract law still would not guarantee full protection for the disclosure of ideas. In keeping with the fundamental principles of contract law, a contract to pay for use of an idea is only valid between the contracting parties.⁸⁹ This allows anyone that was not a party to the original contract to use the idea with absolutely no legal recourse for the idea man.⁹⁰ Therefore, writers would still be vulnerable to idea theft by anyone who had access to their ideas, apart from the opposing party in the contractual relationship. State contract law simply does not afford idea men the necessary protection they deserve for their labor.

⁸¹ See *Selby*, 96 F. Supp. 2d at 1058–62.

⁸² *Id.* at 1060–62.

⁸³ *Id.*

⁸⁴ See *Lennon v. Seaman*, 63 F. Supp. 2d 428, 437 (S.D.N.Y. 1999) (listing courts that have found that breach of contract claims generally are not preempted).

⁸⁵ H.R. REP. NO. 94-1476, at 129–31 (1976); *Selby*, 96 F. Supp. 2d at 1060. Preemption should continue to dismiss those claims that are labeled as contract claims, but in fact allege substantively similar claims to copyright. *Selby*, 96 F. Supp. 2d at 1060. In those cases, the contract claims are so "inextricably entwined with the copyright that to permit the [party] to sue upon [contract law] would undermine the preemption feature of the Copyright Act." *Id.*

⁸⁶ 17 U.S.C. §301 (2006).

⁸⁷ See H.R. REP. NO. 94-1476, at 129–30 (explaining that this would avoid the practical difficulties associated with the differing laws of the separate states, and would prevent confusion as to borderline areas between state and federal protection).

⁸⁸ *Id.* at 131.

⁸⁹ *Chandler v. Roach*, 319 P.2d 776, 781 (Cal. Dist. Ct. App. 1957).

⁹⁰ *Id.*

C. Could the Entertainment Industry Benefit from Sui Generis Legislation Afforded to Designs?

As alluded to earlier, other industries have struggled with a lack of legal protection for their creative works. To fill the gap in protection, some have appealed to Congress seeking separate, statutory protection.⁹¹ However, not every industry that has approached Congress for assistance has been successful.⁹² The boating industry is one example of success in obtaining legislative protection for vessel hull designs with the Vessel Hull Design Protection Act (“VHDPA”).⁹³ In contrast, even after years of congressional hearings, the fashion industry is still struggling to pass similar legislation to protect works in their own field.⁹⁴ In order to see why the entertainment industry could benefit from similar *sui generis* protection afforded to the boating industry, it is important to understand some similarities, and points of contrast, among these fields.

To begin, consider the recent history of the boat manufacturing industry leading to the enactment of the VHDPA. For quite some time, the boating industry had been plagued by a practice known as “hull splashing,” or the unauthorized copying of another’s hull design.⁹⁵ When boat manufacturers fell prey to hull splashing, they were unable to protect themselves from this design theft. Much like Hollywood idea men, manufacturers lacked federal protection for their vessel hull designs. This is because boats are considered “useful articles”—unprotectable subject matter under copyright law.⁹⁶ Additionally, they were often denied state law protection because of

⁹¹ See, e.g., H.R. REP. NO. 2696; H.R. REP. NO. 5055.

⁹² See Fashion Hearing, *supra* note 51, at 197–98.

⁹³ 17 U.S.C. §§ 1301–1332 (2006); see U.S. COPYRIGHT OFFICE & U.S. PATENT & TRADEMARK OFFICE, THE VESSEL HULL DESIGN PROTECTION ACT: OVERVIEW AND ANALYSIS 1 (2003) [hereinafter VHDPA REPORT]; see also 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8A.13 (2008) (explaining that the VHDPA confers a form of protection on designs limited to boat hulls; a completely separate and self-contained scheme, independent of general copyright protection). The VHDPA added chapter 13 to title 17 of the United States Code entitled “Protection of Original Designs.” 17 U.S.C. §§ 1301–1332. While it is contained in title 17, it does not provide copyright protection. VHDPA REPORT, *supra*. Rather, it establishes *sui generis* protection for original designs of vessel hulls. *Id.*

⁹⁴ See generally Fashion Hearing, *supra* note 51, at 198–99 (noting that Congress has yet to pass similar *sui generis* protection for the fashion industry, despite efforts to amend chapter 13 of title 17 of the United States Code to include “articles of apparel” in addition to vessel hull designs); see also JESSICA G. JACOBS, COPYRIGHT PROTECTION FOR FASHION DESIGN: A LEGAL ANALYSIS OF THE DESIGN PIRACY PROHIBITION ACT, H.R. 2033 4 (2007) [hereinafter CRS REPORT FOR CONGRESS] (same).

⁹⁵ See Fashion Hearing, *supra* note 51, at 199. Boat manufacturers invest significant research and development in the designs of vessel hulls (the frames of the vessels). *Id.* at 199. They estimate the cost of designing and developing just one of these models is upwards of \$500,000. *Id.* “Hull splashing” occurs when someone uses another’s fully-produced boat model to reproduce and sell similar models as their own, essentially stealing the design. *Id.* This presents a problem for the original manufacturers because these “boat-design-thieves” are able to sell their reproduced models for less money, since they do not have to account for the costly research and development that went into the original boat design. *Id.* This leaves the original engineers at an extreme economic and competitive disadvantage. *Id.*

⁹⁶ See Vessel Hearing, *supra* note 51 at 17–18. Copyright protection only extends to those designs that incorporate pictorial, graphic, or sculptural features that can be identified separately from the utilitarian aspects of the article. *Id.* This separability test excludes most industrial

federal preemption issues very similar to those faced by Hollywood writers.⁹⁷ The case of *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*⁹⁸ illustrates the demise of state law protection for vessel hull designs due to federal preemption. Here, the United States Supreme Court affirmed the Florida Supreme Court's decision to strike down a Florida statute that made it unlawful to use a direct molding process to duplicate, for sale or distribution, another's vessel hull design, because federal patent law already regulated this area.⁹⁹ With no state or federal protection to curb hull splashing, boat manufacturers argued this design theft was hindering innovation because engineers were becoming less inclined to invest in new boat designs.¹⁰⁰ Congress responded positively to the boating industry's pleas and enacted the VHDPAs as part of the separate Digital Millennium Copyright Act,¹⁰¹ in large part, to suppress infringement of these vessel hull designs and encourage the creation of new designs.¹⁰²

The fashion industry, on the other hand, has not been as successful in lobbying congress for *sui generis* protection. For years, designers have made similar complaints to boat hull designers. By allowing the widespread copying of designs through a lack of copyright protection,¹⁰³ the law in many ways contributes to a competitive disadvantage in the market.¹⁰⁴ In conjunction with these claims, designers have proposed that fashion design protection be incorporated into chapter thirteen's provision protecting original designs.¹⁰⁵ Unlike the boat manufacturers,

designs from copyright protection, including vessel hull designs. *Id.* Therefore, there existed this gap in federal copyright protection for boat manufacturers' designs. *Id.*; see 17 U.S.C. § 101.

⁹⁷ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 131–68 (1989). States have the power to adopt rules within their own jurisdictions, as long as that law can peacefully co-exist with any federal law. *Id.* at 166–68. However, when a state law conflicts with the federal law in place, it will be struck down by the Supremacy Clause. *Id.* at 145.

⁹⁸ 489 U.S. 141 (1989).

⁹⁹ *Id.* at 141. Patent protection only extends to inventions that are novel and non-obvious. 35 U.S.C. §§ 101–103 (2006). The court could not allow a manufacturer to get patent-like protection under state law for something that the federal law already recognized as unpatentable. *Bonito Boats*, 489 U.S. at 168. Therefore, it was forced to strike down the Florida statute at issue because it conflicted with the present federal scheme. *Id.*

¹⁰⁰ See Fashion Hearing, *supra* note 51 at 199–200.

¹⁰¹ See Vessel Hearing, *supra* note 51 at 16–20. The VHDPAs created a new intellectual property right in design, specifically for vessel hulls. *Id.* at 16. After registering the design with the Copyright Office, within one year of making the design available to the public, the design is eligible for ten years of protection. *Id.* at 18; see also VHDPAs REPORT, *supra* note 93, at 4–5 (explaining that, as opposed to copyright law, where protection arises at the moment of creation, an original vessel hull design is only protected after it is made public or registered with the Copyright Office). Protected designs also must bear a proper design notice to give “reasonable notice that the vessel contains a protected design. *Id.* at 5.

¹⁰² See VHDPAs REPORT, *supra* note 93, at 9.

¹⁰³ See generally Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (explaining that because fashion designs have remained unprotected, retailers and manufacturers have freely copied designs). Because copyright law does not protect “useful articles,” garments usually escape copyright protection. *Id.* at 1699. While a sketch of fashion design is protected by copyright as a pictorial work, the garment produced by the sketch does not qualify.

¹⁰⁴ See Fashion Hearing, *supra* note 51 at 208–209.

¹⁰⁵ See *id.* at 209. Proponents of fashion design protection have suggested extending the design protection in chapter thirteen of title seventeen to include “an article of apparel,” in addition to a vessel hull. *Id.* The protection for fashion would be identical to vessel hulls, except that the term of

however, fashion designers have been unable to convince Congress to grant this protection as there is little evidence this copying actually stifles creativity or seriously threatens the industry.¹⁰⁶ On the contrary, critics have thus far persuaded Congress that the industry continues to flourish, despite the design copying, and that copying might actually help drive the industry.¹⁰⁷ This is because much of the fashion world operates like the structure of a pyramid.¹⁰⁸ Designers at the top of the pyramid showcase their high-fashion clothing on runways, and then other designers inexpensively copy these couture trends to feed the consumer's desire to emulate what is "fashionable."¹⁰⁹ This copying drives the cycle even faster and spurs more creativity because top designers stop producing designs that become overly copied, and create new trends; thereby starting the creative cycle over.¹¹⁰

However, the rationale for denying the fashion industry statutory design protection need not apply to Hollywood writers because these two industries function so dissimilarly. It would be difficult to argue that the entertainment industry is fueled by a similar "copy cycle," or that it benefits at all from rampant copying like the fashion industry.¹¹¹ The fact is, the existence of a similar Hollywood "copy cycle" could potentially destroy the business, as consumers would tire of watching "knock off" film after "knock off" film.¹¹²

It is much more logical to compare the entertainment and boat manufacturing industries, and how the entertainment field might benefit from statutory protection similar to that granted to vessel hull designs. After all, as was the case with vessel hull designers, entertainment writers desire protection for their ideas so they no

protection would only be 3 years. *Id.* at 210. This shortened term of protection would prevent "knock offs" from undercutting the market for the hot new fashion designs, but only during those initial years when the high-end clothing is sold at premium prices. *Id.* at 209; *see also* CRS REPORT FOR CONGRESS, *supra* note 95 (noting another reason there is a smaller window of protection for fashion is that trends arise and fade rather quickly).

¹⁰⁶ *See* Fashion Hearing, *supra* note 51 at 209. The Copyright Office speculates that designers have not presented Congress with sufficient information to reach a conclusion about the need for such legislation. *Id.* To be persuaded, Congress would need more evidence quantifying the nature and extent of the harm done to fashion designers because of the lack of protection for their designs. *Id.*

¹⁰⁷ *See id.*; *see also* Raustiala & Sprigman, *supra* note 103, at 1718 (opining that because of the nature of the industry, it is possible that designers are not overwhelmingly harmed by the lack of protection, and may even benefit from this low level of protection).

¹⁰⁸ *See generally* Raustiala & Sprigman, *supra* note 103 (describing that the very top of the pyramid is the high-end, high-price, haute couture clothing that is custom made for runway shows, and the lower tiers of the pyramid are "better fashions" and "commodity clothing").

¹⁰⁹ *Id.* at 1705–12. In fashion, the trends for each season begin at the top, and rotate through the lower levels of the pyramid. *Id.* at 1705. Retailers such as H&M have made it their business to offer cheap imitations of expensive, ready-to-wear clothing. *Id.*

¹¹⁰ *Id.* at 1732. Here, since there is more copying from the different levels of the fashion pyramid, this drives the fashion cycle faster because designers are forced to respond with even more new ideas. *Id.* at 1721. In turn, this helps the designers by inducing rapid design turnover and additional sales. *Id.* Therefore, the existence and cyclical effect of the fashion design copying have allowed the industry to remain successful and creative, despite the lack of protection. *Id.* at 1733.

¹¹¹ *See generally* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1988) (discussing the copy cycle of boat hull designs).

¹¹² *See* McGovern, *supra* note 13, at 505 (noting that the most successful entertainment companies are those who can consistently provide "quality ideas" to produce quality film and TV products in this extremely competitive marketplace).

longer have to risk losing their work upon disclosure. One way to ensure that creativity continues to flourish in Hollywood is to legally proscribe the exploitation of pitch ideas with similar statutory design protection.¹¹³ And because Congress was willing to protect vessel hull designs in order to promote creativity and prevent exploitation in the industry,¹¹⁴ it seems logical that it could also offer design protection for writers' treatments—which are essentially designs for movies and television shows.

III. PROPOSAL

The most effective way to protect entertainment treatments is through statutory treatment protection. If structured properly, an amendment to chapter thirteen to include treatments could grant full protection to idea men for the disclosure of their ideas, while still ensuring the underlying policy rationale of copyright law remains intact.

A. The Proposed Amendment: Including Entertainment Treatments As A Category of Protectable Works

No current federal or state law presents a perfect fit for protecting the disclosure of ideas. For this reason, Congress should amend chapter thirteen to include protection for entertainment treatments. Currently, the only protected designs are vessel hulls.¹¹⁵ However, such an amendment to include treatments could easily be accomplished because chapter thirteen was written as a *general* design protection statute.¹¹⁶ Therefore, just as it did for vessel hull designs, Congress could simply define the new design receiving protection,¹¹⁷ here it would be entertainment treatments, and outline other specifications for protecting these designs.

The most obvious amendment would be the extension of design protection to entertainment treatments. Section 1301(a) would be amended to provide that treatments are subject to protection under this chapter,¹¹⁸ and section 1302(b) would be amended to include that treatments are “useful articles” subject to protection.¹¹⁹ An entertainment treatment would be defined as an outline, synopsis, or design for a movie, television show, or live-action performance, which includes an overview of characters, themes, and plot specifics. A treatment is a vehicle, which an idea man uses to help communicate his idea to a studio or producer during a pitch meeting,

¹¹³ *E.g.*, 17 U.S.C. §§ 1301–1332 (2006); see Fashion Hearing, *supra* note 51, at 199–200 (explaining that Congress enacted the design protection statute because they felt compelled to promote intellectual property rights: if manufacturers were not allowed to reap the benefits of all their research and creative work, they might not continue to invest in new and innovative designs).

¹¹⁴ Digital Millennium Copyright Act, Pub. Law. No. 105-304, 112 Stat. 2860, 2905–16 (1998) (codified as amended at title 13, United States Code (2006)).

¹¹⁵ 17 U.S.C. § 1301–1332.

¹¹⁶ See Fashion Hearing, *supra* note 51, at 201–202.

¹¹⁷ 17 U.S.C. § 1301(b)(3)–(4).

¹¹⁸ *Id.* § 1301(a).

¹¹⁹ *Id.* § 1302(b).

and to organize the components of his idea as a reference to build on for future development of a project. While it might prove difficult for courts to identify exactly what constitutes a treatment at first, they could develop common law guidelines to determine precise boundaries of protection over time.¹²⁰

There could also be several other changes to chapter thirteen in order to accommodate treatments. Unlike the commencement of protection for vessel hull designs,¹²¹ protection for entertainment treatments would begin once an idea is disclosed during a pitch meeting.¹²² Additionally, the term of protection for treatments should be reduced to two years, as opposed to the ten-year-term allotted for vessel hull designs.¹²³ This way, if producers do not respond positively to a writer's pitch, his idea is still protected for a short time thereafter while he attempts to shop his project around to other producers.¹²⁴ Lastly, Congress should amend the infringement provisions outlined for vessel hull designs.¹²⁵ While idea men do not seek the broad "protection against the world" like in copyright law,¹²⁶ they do deserve protection against more than just the original contracting parties offered by state law.¹²⁷ Essentially, these idea men need protection against anyone who had access to the idea, and produced an unauthorized work with substantial similarity to the treatment.¹²⁸ Idea men must ensure that even third parties who were not present at the time of disclosure are still liable for any unauthorized use of their ideas.

¹²⁰ See generally *Metro-Goldwyn-Mayer v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (describing how the court ruled on this particular case by examining and tweaking past precedent on similar matters).

¹²¹ 17 U.S.C. § 1304 (describing how protection for this design commences upon the earlier of the date of registration or the date the design is first made public, such as by offering the model for sale or display).

¹²² See *Chandler v. Roach*, 319 P.2d 776, 782 (Cal. Dist. Ct. App. 1957) (explaining that disclosure of the idea can be of substantial benefit to the person to whom it is disclosed). There is no protection problem when the idea man thinks of an underdeveloped idea in his head. *Michaud & Tulquois*, *supra* note 38, at 75. Rather, problems can arise when those ideas are disclosed to a studio executive during a pitch meeting. *Id.* It is at that time, once the writer communicates the idea either orally or through a succinct writing, that there is the potential for idea theft to occur. *Id.*

¹²³ See 17 U.S.C. § 1305.

¹²⁴ See *Michaud & Tulquois*, *supra* note 38, at 75 (noting that there must be sufficient protection to prevent a studio executive from saying he is not interested in the idea, only to turn around and hire another writer to draft a screenplay based upon the disclosed idea).

¹²⁵ 17 U.S.C. § 1309. The statute considers acts of infringement to be the making, selling, or distributing of any design without consent of the owner of the design. *Id.* It is not considered infringement, however, if any article was created without actual knowledge that the design was protected. *Id.*

¹²⁶ See 17 U.S.C. § 302 (detailing how the copyright monopoly lasts for the life of the author, plus seventy years); *Chandler*, 319 P.2d 776 at 782 (noting that common law copyright was meant to create a remedy good against the world).

¹²⁷ See *Chandler*, 156 319 P.2d 776 at 782. Unlike copyright law, state contract law creates no monopoly against the world. *Id.* Rather, the contract is effective only between the two contracting parties. *Id.* Any person not a party to the contract is free to use the idea without restriction. *Id.*

¹²⁸ See *Buchwald v. Paramount Pictures Corp.*, 13 U.S.P.Q.2D (BNA) 1497, *1502-06 (Cal. App. Dep't Super. Ct. Jan. 8, 1990). Infringement can arise when there is proof of access to the material with a showing of similarity. *Id.* at 1502. Access can be knowledge about the concept or discussion about the concept; but there is no requirement that the infringer gain access from the idea purveyor directly. *Id.* at 1503. In order to find similarity, the copied work must be based upon a material element of the original work, or be inspired by the original work. *Id.* at 1503-04.

B. How Granting Design Protection to Entertainment Treatments Will Help Promote the Underlying Policies of Copyright

Affording these entertainment treatments protection under chapter thirteen reduces the risk of granting a monopoly over these ideas. The amended design statute would not allow writers to protect their ideas against the world, thereby removing the idea from use by other authors.¹²⁹ Rather, writers would only be protected against those individuals who might have had access to their ideas.¹³⁰ This would guarantee no threat of this monopoly over ideas—a major reason for enacting the Copyright Act—and Hollywood writers would be able to obtain protection for their work while still upholding a major purpose of the Act.¹³¹

Additionally, if writers had this specific niche of protection, they would feel more comfortable disclosing their ideas without fear of idea theft by producers and studios.¹³² With writers having assurance of legal recourse against any exploitation of their idea, this amendment would ultimately encourage idea-sharing, and more importantly, creativity in the industry which is a core objective of the Copyright Act.¹³³

Lastly, this would create a clear-cut process for Hollywood writers to bring their claims through a design protection statute. There would be no threat of violating the Act's policy of uniform regulation by attempts to challenge the preemption doctrine.¹³⁴ Idea men could continue to uphold the congressional mandate to litigate these claims under federal law, as opposed to attempting an “end run” around federal law by filing their claims under state contract law.¹³⁵

C. Amending the Statute to Include Treatments Will Offer More Comprehensive Protection

If Congress amended chapter thirteen to protect treatments, idea men would have more confidence in sharing their ideas in pitch meetings. Recall that under state contract law, writers are only protected against those parties involved in the original contract.¹³⁶ However, with this design protection, Hollywood writers could

¹²⁹ See *supra* note 126 and accompanying text.

¹³⁰ See *Buchwald*, 13 U.S.P.Q.2D, at *1502–04. Here, the court found sufficient evidence for “access” to the idea because studio executives knew about the concept for the film and even met with Buchwald to discuss the concept with him. *Id.* at 1502–03. One executive even admitted to reading part of Buchwald's treatment. *Id.*

¹³¹ See U.S. CONST. art. 1, § 8, cl. 8.

¹³² See *e.g.* *Rokos v. Peck*, 182 Cal. App. 3d 604, 613 (Cal. Ct. App. 1986) (noting writers' fears of studios exploiting their ideas because of a lack of protection).

¹³³ See U.S. CONST. art. 1, § 8, cl. 8. (outlining Congress' authority to enact laws promoting the progress of science and useful arts); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582–87 (noting that the Copyright Act was implemented to help encourage creativity and support the free flow of ideas).

¹³⁴ See *supra* notes 87 and accompanying text.

¹³⁵ See *id.*

¹³⁶ See McGovern, *supra* note 13 at 491. Contract law creates a binding agreement only between the two contracting parties. *Id.* However there is no way to bind independent third parties to the agreement, so those parties are free to use the idea. *Id.*

file suit against any party who might have had access to the idea at any point, regardless of whether that party was present during the pitch meeting.¹³⁷ Also, the extension of this design statute to include treatments would assure Hollywood writers that they have definite and stable protection. These idea men would no longer be left in limbo between a lack of federal protection and limited and unpredictable state law protection.¹³⁸

CONCLUSION

Hollywood idea men play an integral part in driving the entertainment industry.¹³⁹ However, while their ideas may be crucial to the industry's success, the disclosure of their ideas is largely unprotected from unauthorized use by studios and producers.¹⁴⁰ Unfortunately, the very nature of the entertainment industry is largely to blame for this lack of idea protection.¹⁴¹ If idea men continue to fall victim to idea theft every time they pitch an idea, writers may eventually stop sharing their ideas.

It is essential for Congress to recognize the need for increased protection for entertainment ideas without running afoul of the Copyright Act. The most effective way to accomplish this is through an amendment to the design protection statute. Under the amended statute, idea men would be assured protection for their treatments against idea theft. However, if Congress fails to provide protection for these entertainment ideas, the result will likely be the continued denial of copyright protection for idea men, and eventually, the stifling of creativity in the industry. And how ironic it would be "if copyright law, designed to encourage creative activity, became the instrument of its destruction."¹⁴²

¹³⁷ See *supra* note 128 and accompanying text.

¹³⁸ See McGovern, *supra* note 14, at 478 (noting that with clear idea protection, writers would no longer be left in the uncomfortable position of trying to predict whether a state court would come out in their favor, or even take their case in the first place because of preemption issues).

¹³⁹ See *Desny*, 299 P.2d at 265 (discussing how ideas can be of great value to show-business producers); David M. McGovern, *What Is Your Pitch?: Idea Protection is Nothing but Curveballs*, 15 LOY. L.A. ENT. L.J. 475, 505 (1995) (discussing how over the past few decades, the demand for entertainment has steadily risen).

¹⁴⁰ See *e.g.*, *Rokos v. Peck*, 182 Cal. App. 3d 604, 613 (Cal. Ct. App. 1986).

¹⁴¹ *ATCHITY & WONG*, *supra* note 17, at 7. The industry mandates that writers pitch their ideas in the form of treatments, because it would be impractical to require writers to submit full scripts for a pitch, as most of their ideas will go unused, and many producers are too busy to read full scripts. *Id.* But these treatments are considered unprotectable subject matter under the current Copyright Act. See *e.g.*, *Rokos*, 182 Cal. App. 3d at 613 (describing how courts acknowledging the lack of protection for writers in submitting their ideas).

¹⁴² *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 85 (Cal. 1950) (Traynor, J., dissenting).