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The Cosby Show: Just Another Sitcom

Deborah A. Levine

THE COSBY SHOW: JUST ANOTHER SITCOM?

Submitting an idea to a television network that eventually becomes one of the hottest shows in television history may not be a bonanza for the submitter. Hwesu S. Murray, a submitter, filed a lawsuit to find out if he was entitled to any benefits from his concept. According to the court in *Murray v. National Broadcasting Co.*,[1] the network can use the idea without compensating or acknowledging the submitter if the idea is not sufficiently novel. However, prior cases applied a different standard to similar situations, denying protection only when an idea is "wholly lacking in novelty."[2]

I. STATEMENT OF FACTS

In 1979, Hwesu S. Murray was hired by National Broadcasting Company ("NBC") as a unit manager for its sports division. His duties included financial analysis, budget control and other activities pertaining to NBC sports programming. However, he was not responsible for submitting ideas for new television programs.[3]

In 1980, Murray had some ideas for television programs and discussed them with William Dannhauser, an NBC official. Pursuant to Dannhauser's instructions, Murray submitted his ideas as written proposals for five new television shows.[4] One of the proposals, "Father's Day," was a situation-comedy about a black middle-class family. The leading character would be the father, a 45-year-old attorney and a devoted family man.[5] On June 27, 1980, Murray submitted this idea to Dannhauser in the form of a one-page proposal with a cover letter.[6]

At the same time Murray submitted the proposals, he informed Dannhauser that if NBC wanted to produce any of his programs, Murray wanted to be the executive producer and packager of the program as well as receive proper credit and compensation as producer and creator.[7] Murray also told NBC he was submitting his proposals in confidence.[8]

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1. 844 F.2d 988 (2d Cir. 1988).
2. Graham Prod. v. National Broadcasting Co., 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (N.Y. Sup. Ct. 1973).
3. Murray v. National Broadcasting Co., 671 F. Supp. 236, 237-38 (S.D.N.Y. 1987).
4. *Id.*
5. *Id.* at 240.
6. *Id.* at 238.
7. *Id.*
8. *Murray*, 671 F. Supp. at 238.

Dannhauser asked Murray to expand some of the proposals, including "Father's Day," and submit them to Josh Kane, then an NBC vice president and one of two top entertainment programming officials for the network.[9] The proposal for "Father's Day" was expanded to two pages and included the suggestion that Bill Cosby play the father and Diahann Carroll play his wife. The proposal included other casting suggestions and discussed details of the show. The characters included a working wife and five children, with the eldest child away at college making only periodic visits home.[10] On November 1, 1980, Kane received the expanded two-page proposal. After submitting the proposal, Murray made an oral presentation to Kane to provide further ideas for the characters and story lines. On November 21, 1980, NBC returned the proposal to Murray, stating the network was not currently interested in his idea.[11]

On September 20, 1984, NBC aired *The Cosby Show,* a situation comedy starring Bill Cosby as the father of an upper middle-class black family. Cosby's character is a doctor and his television wife a lawyer.[12]

Murray claimed the show came directly from his proposal and brought suit against NBC; Brandon Tartikoff, president of NBC Entertainment; the Carsey-Werner Company ("Carsey-Werner"), the producers with whom NBC had an agreement for the development of the series;[13] and Marcia Carsey and Thomas Werner, the principals of Carsey-Werner (collectively "defendants").

Murray's complaint included allegations of race discrimination in violation of Title 42 U.S.C. sections 1981 and 1982.[14] Murray also alleged misappropriation, conversion, breach of implied contract, unjust enrichment and fraud.[15] Defendants moved for summary judgment to dismiss the complaint on the ground that Murray's idea lacked the novelty required to sustain a misappropriation action.[16]

After analyzing the facts, the United States District Court for the Southern District of New York granted summary judgment for the defendants in July 1987.[17] The court held that Murray's idea was not sufficiently novel to create a property interest.[18] In April 1988, the United

9. *Id.*
10. *Id.* at 240.
11. *Id.* at 238.
12. *Id.*
13. *Murray,* 671 F. Supp. at 237.
14. *Id.* at 238; 14 U.S.C. §§ 1981-1982 (1988).
15. *Id.* at 238-39.
16. *Id.* at 239.
17. *Id.*
18. *Murray,* 671 F. Supp. at 245.

States Court of Appeals for the Second Circuit affirmed the district court's decision.[19]

II. THE COURT'S REASONING

The district court noted that the two elements which must be present before a property right in an idea can exist are novelty and originality.[20] The court then determined that the threshold issue was the novelty of Murray's idea.[21]

Both parties stipulated that New York law would govern.[22] Under New York case law: "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. Even if it be assumed that defendant had utilized plaintiff's idea, plaintiff may not recover if the idea was unoriginal."[23]

The court concluded that Murray's idea was not sufficiently novel for several reasons. First, Murray himself described "Father's Day" as resembling *Father Knows Best* and *The Dick Van Dyke Show.*[24] The court stated that an idea for a family situation comedy with a white family would not be novel since the networks have run many variations of this theme.[25] Therefore, Murray's novelty claim rested on the variation of using a black family.[26]

The court failed to uphold Murray's assertion because Murray's idea simply combined two common ideas which had been used before—the family situation comedy and the use of black actors in a nonstereotypical manner.[27] The court also noted that in a 1965 interview, Bill Cosby told a reporter he wanted to make a situation comedy similar to *The Dick Van Dyke Show,* but with black actors.[28] In addition, the court concluded that *The Cosby Show* was merely a continuation of Cosby's humor and style.[29] Therefore, since the concept of a nonstereotypical

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

20. *Murray,* 671 F. Supp. at 239 (citing Downey v. General Foods Corp., 31 N.Y.2d 56, 286 N.E.2d 257, 334 N.Y.S.2d 874 (1972)).

21. *Murray,* 671 F. Supp. at 239-40.

22. *Id.* at 239.

23. *Id.* (footnote omitted) (quoting Graham Prod. v. National Broadcasting Co., 75 Misc. 2d 334, 347 N.Y.S.2d 766 (N.Y. Sup. Ct. 1973)).

24. *Murray,* 671 F. Supp. at 241.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 244.

29. *Id.*

black family on television had been used previously,[30] and concluding that a variation on a basic theme cannot be considered novel,[31] the court held that Murray had no legally protectable interest in "Father's Day"[32] and granted NBC's motion for summary judgment.[33] In addition, the court dismissed the entire complaint because Murray could not prove novelty, an essential element of all his claims.[34]

On appeal, the court of appeals limited its consideration to whether the district court had properly concluded that defendants were entitled to summary judgment.[35] The court of appeals affirmed the lower court's decision, agreeing that Murray had no protectable interest because his idea lacked novelty.[36]

The court recognized that the idea of portraying blacks in a nonstereotypical manner had existed for decades. Therefore, Murray's contention that his idea represented a breakthrough in television programming which was entitled to protection did not support a finding of novelty as a matter of law.[37] The court acknowledged that *The Cosby Show* was a breakthrough, but concluded this was merely the achievement of a more positive, fair and realistic portrayal of blacks, a need which many black Americans, including Cosby, had recognized for many years.[38]

However, the dissent rejected the majority's findings and disagreed that the idea for one of the most successful situation comedies in television history could be considered so unoriginal that the person who conceived it was not entitled to protection.[39] The dissent stated that although there was evidence that Murray's idea was not novel, there was also contrary evidence, thus raising a genuine issue of material fact to be decided by a trier of fact.[40] Therefore, the dissent concluded the district court improperly granted summary judgment.[41]

The dissent relied on such evidence as the agreement between NBC and Carsey-Werner. In that agreement, NBC referred to the series as "unique, intellectual property"[42] which the dissent viewed as indicating

30. *Murray*, 671 F. Supp. at 241-43.
31. *Id.* at 243.
32. *Id.* at 245.
33. *Id.* at 239.
34. *Id.* at 246.
35. *Murray*, 844 F.2d at 990.
36. *Id.*
37. *Id.* at 992.
38. *Id.*
39. *Id.* at 995-96.
40. *Murray*, 844 F.2d at 996.
41. *Id.*
42. *Id.*

that NBC considered the idea novel and having value.[43] The dissent also found that the placement of this language in the remedies section of the agreement added weight to the value NBC placed on the concept because this section gave NBC the right to prevent the loss of its "unique, intellectual property" if Carsey-Werner failed to perform.[44] If Carsey-Werner did not perform, the only property protected was the program's underlying idea. Thus, NBC was protecting a novel idea.[45] The dissent concluded that, since the district court assumed that NBC got the idea from Murray, the Carsey-Werner agreement was admissible evidence making the novelty issue a question of fact for a jury to decide.[46]

The dissent also evaluated statements by NBC, Cosby and Tartikoff. For example, in 1985, NBC admitted Murray had rights in his idea.[47] NBC also admitted the reason rejected proposals were usually returned was because the material belonged to the submitter, implying NBC recognized that the idea belonged to Murray.[48] At trial, both Cosby and Tartikoff stated they thought *The Cosby Show* was novel and unique, contradicting the lack of novelty defense raised by NBC and Tartikoff.[49] The dissent also noted that novelty is highly subjective and that a question exists as to whether an idea is novel to the defendant or to the world in general. Thus, even an idea in the public domain is novel to the defendant if the defendant was unaware of it until proposed by the plaintiff.[50] The dissent concluded that since sufficient evidence existed to raise a triable issue of fact, summary judgment was inappropriate.[51]

III. HISTORICAL DEVELOPMENT

A. Those Radio Days

A creator's rights in program ideas was first raised in cases involving radio programs.[52] The early radio cases were mainly decided under California case law, stating that the right to recover depends on whether or not an idea was novel and reduced to concrete form prior to

43. *Id.*
44. *Id.*
45. *Murray,* 844 F.2d at 996.
46. *Id.*
47. *Id.*
48. *Id.* at 996-97.
49. *Id.* at 996.
50. *Murray,* 844 F.2d at 997.
51. *Id.*
52. *See generally* Stanley v. Columbia Broadcasting Sys., 35 Cal. 2d 653, 221 P.2d 73 (1950); Kovacs v. Mutual Broadcasting Sys., 99 Cal. App. 2d 56, 221 P.2d 108 (1950); Kurlan v. Columbia Broadcasting Sys., 40 Cal. 2d 799, 256 P.2d 962 (1953).

appropriation.[53]

For example, in *Kovacs v. Mutual Broadcasting System,*[54] the plaintiff created a radio program called "Your Heart's Desire." Program listeners wrote to the station expressing their desires and the winning letters were read on the air. The winners then had their wishes granted.[55] The plaintiff had sent a recording of a sample broadcast to the defendants approximately two years prior to the defendants' broadcast of *Heart's Desire,* a program very similar to the plaintiff's program.[56]

The plaintiff's cause of action was based on the appropriation of his idea by the defendants.[57] The defendants in *Kovacs* contended that the plaintiff had no protectable interest because his idea lacked originality and novelty.[58] The court held that the individual elements of the program, such as soliciting and using letters from the public as the basis of the program, having a contest to select the winners, granting the desires of the winners and allowing audience participation were not novel. However, the combination of these elements was, in fact, original and novel.[59]

Another radio case, *Stanley v. Columbia Broadcasting System,*[60] raised the issue of novelty. In *Stanley,* the plaintiff submitted a recording of a radio program that was similar to one the defendant later broadcast. The plaintiff's program format was entitled "Hollywood Preview," which presented a story likely to become a movie.[61] The listeners were asked to send their opinion of the story and suggestions for casting. The best letters received cash prizes.[62] The defendant's radio show was also called *Hollywood Preview* and involved the performance of a radio version of a story being made into a movie. The theatre audience filled out cards giving their opinions and casting suggestions.[63]

Defendant's principal witness in *Stanley,* who had a background in radio, testified that the combination of ideas in the plaintiff's program was novel.[64] The court held that although the individual elements of the program were not new to radio, it was the combination that was new and

53. *Stanley,* 35 Cal. 2d at 656, 221 P.2d at 75.
54. 99 Cal. App. 2d 56, 221 P.2d 108 (1950).
55. *Id.* at 59-60, 221 P.2d at 110-11.
56. *Id.* at 58, 221 P.2d at 109.
57. *Id.* at 57, 221 P.2d at 109.
58. *Id.* at 61, 221 P.2d at 112.
59. *Kovacs,* 99 Cal. App. 2d at 63, 221 P.2d at 113.
60. 35 Cal. 2d 653, 221 P.2d 73 (1950).
61. *Id.* at 656-57, 221 P.2d at 74-75.
62. *Id.* at 657, 221 P.2d at 75.
63. *Id.* at 659-60, 221 P.2d at 76-77.
64. *Id.* at 665, 221 P.2d at 80.

novel.[65] The court stated that selecting, arranging and combining old ideas into new ideas required skill, discretion and creative effort.[66] Thus, the court concluded that the plaintiff had a right to protection for his program idea.[67]

The court also stated that "the question of originality of plaintiff's program is not one of law to be determined by the court but is one of *fact* for the jury's determination."[68] The court reasoned that the originator of an idea can recover if the idea was novel and it was reduced to concrete form prior to appropriation by another.[69] For this reason, the court upheld the jury's verdict for the plaintiff.[70]

Although the dissent in *Stanley* did not agree that the combination of elements in plaintiff's program 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."[71] Thus, the dissent questioned the extent that a variation on a preexisting idea becomes substantial enough to warrant a claim of novelty.[72] The dissent also said 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."[73] The problem was one of property rights, not the passing of judgment on the public's taste.[74] Thus, even an idea lacking in creativity may still be marketable and have value if it wins the public's attention.[75]

B. The Age of Television

Television programs are created in a manner similar to radio programs and therefore similar suits have been brought in the television industry. For example, in *Ed Graham Productions v. National Broadcasting Company,*[76] the plaintiff, a firm that developed and produced children's cartoons, submitted a proposal for a cartoon series entitled "Birdman and the Sparrow."[77] The defendant rejected the proposal but later broadcast a cartoon based on a different idea, entitled *Bird-*

65. *Stanley,* 35 Cal. 2d at 664, 221 P.2d at 79.
66. *Id.*
67. *Id.*
68. *Id.* at 665, 221 P.2d at 80.
69. *Id.* at 656, 221 P.2d at 75.
70. *Stanley,* 35 Cal. 2d at 668, 221 P.2d at 82.
71. *Id.* at 680-81, 221 P.2d at 89.
72. *Id.* at 681, 221 P.2d at 90.
73. *Id.*
74. *Id.*
75. *Stanley,* 35 Cal. 2d at 681, 221 P.2d at 90.
76. 75 Misc. 2d 334, 347 N.Y.S.2d 766 (N.Y. Sup. Ct. 1973).
77. *Id.* at 336, 347 N.Y.S.2d at 767.

man.[78] The plaintiff sued for misappropriation of his idea, alleging his proposal generated and inspired the defendant's series.[79]

The defendant moved for summary judgment on the grounds that the plaintiff's idea was not novel or original, and that the two programs had little in common.[80] The court found that the plaintiff's program resembled the comic strip characters "Batman" and "Robin" while the defendant's character was based on the Egyptian Sun God "Ra."[81] The court held that because the characters were dissimilar, no evidence existed that the defendant used the plaintiff's idea.[82] In addition the court held that even if the characters had been similar, the plaintiff had no claim because his character was admittedly a parody of the "Batman" adventures.[83] Therefore, even assuming that the defendant had used the plaintiff's idea, the plaintiff could not recover because without novelty, the plaintiff had no cause of action.

The New York case of *McGhan v. Ebersol*[84] also involved an idea for a television program format. In *McGhan,* the plaintiff claimed the producer of a late night music video program, *Friday Night Videos,* used several of plaintiff's ideas. The plaintiff alleged that the ideas used included giving video awards, interviewing rock stars of yesteryear, airing private footage of rock groups, stereo simulcast on a continuing basis, and making tributes to classic performers.[85] The court applied the novel and concrete requirements established in the radio cases and held that the plaintiff failed to produce any evidence that these specific components of the program were not already in use in the industry or used previously by the defendant. Therefore, the court concluded that the plaintiff could not claim his ideas were novel.[86]

As these cases show, a person who has a novel program idea has rights in that idea and is entitled to legal protection. Moreover, although the individual elements of the idea may not be original, if the combination is novel, then the creator has an interest in the overall concept.

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Graham,* 75 Misc. 2d at 335-36, 347 N.Y.S.2d at 767-68.
82. *Id.* at 336, 347 N.Y.S.2d at 768.
83. *Id.*
84. 608 F. Supp. 277 (S.D.N.Y. 1985).
85. *Id.* at 285.
86. *Id.* at 287.

IV. ANALYSIS

A. Non-Original Elements Can Form a Novel Idea

As the radio and television cases demonstrate, the creator of a program format can have a legally protectable interest in that idea. If the idea's originator can establish that the overall idea contains the essential novelty and concreteness elements, the combination may be protectable even if the separate components are not novel. However, if the idea lacks the requisite novelty, the creator has no claim.[87]

The courts have analyzed how the combination of individual, non-original elements can form a novel idea. Some writers believe that the number of original ideas is finite.[88] Therefore, the overall combination of the separate elements of an idea must be considered when evaluating the novelty of the idea. The standard applied by the majority in *Stanley* and articulated by the dissent in *Stanley* is suited for this purpose and is applicable to television as well as to radio programs. As previously mentioned, the dissent in *Stanley* proposed that a new twist on an old idea can be considered an entirely new idea.[89] Thus, under the *Stanley* test, Murray's combination of the family situation comedy and casting black actors in nonstereotypical roles should be considered a new twist on an old idea entitled to credit as a new idea. This is supported by the fact that Murray's creation, *The Cosby Show,* has been described by the press as a breakthrough in the industry.[90]

B. When Is An Idea Novel

In determining the novelty of an idea, one concern is whether the idea should be considered novel because it was novel to the party accused of misappropriating it, or because it was novel to the world in general. Professor Nimmer, in his treatise on copyright law, noted that one ap-

87. To get around the novelty requirement, an implied contract theory is often used. *See generally* Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947 (1953) (plaintiff claimed defendant used literary composition to produce motion picture *Tarzan's Magic Fountain* without compensation); Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257 (1956) (plaintiff claimed defendants used proposal to produce *Ace in the Hole*); Chandler v. Roach, 156 Cal. App. 2d 435, 319 P.2d 776 (1957) (plaintiff conceived television series about public defender's office that defendant never paid for, but produced similar series); Minniear v. Tors, 266 Cal. App. 2d 495, 72 Cal. Rptr. 287 (1968) (plaintiff filmed pilot film *Sea Divers,* defendant later produced *Sea Hunt*); Blaustein v. Burton, 9 Cal. App. 3d 161, 88 Cal. Rptr. 319 (1970) (plaintiff conceived package for motion picture based on Shakespeare's *Taming of the Shrew*).

88. Gershon, *Contractual Protection for Literary or Dramatic Material: When, Where and How Much?,* 27 S. CAL. L. REV. 290 (1954).

89. *Stanley,* 35 Cal. 2d at 680-81, 221 P.2d at 90.

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

proach to the novelty issue is to decide whether or not an idea is novel in reference to the defendant.[91] That is, although an idea may not be novel to the world at large because others may have the same idea, from the defendant's perspective, an idea is novel if the defendant has never heard it.[92] This concept is based on the theory that if the defendant first learns of the idea from the plaintiff, even if it was not originated by the plaintiff, the idea is sufficiently novel to the defendant to allow the plaintiff to recover.[93]

In *Murray,* the court found that a major obstacle that prevented a finding of novelty was Bill Cosby's 1965 interview expressing Cosby's interest in doing a series similar in style to what Murray later proposed.[94] However, no evidence was presented that NBC was aware of either the Cosby interview or that Cosby had such interests.[95] Thus, under the theory expressed by Nimmer, Cosby's proposal should have had no bearing on the court's determination whether the idea was novel to NBC because they apparently were unaware of Cosby's intentions.

C. Elaborated Idea Test

An alternative method of determining whether a plaintiff has a protectable interest in an idea is the "elaborated idea" test.[96] This test asks whether the defendant could have produced the finished product if the plaintiff had not produced the elaborated idea or format.[97] If the answer is no, then the plaintiff has a right in the elaborated idea and is entitled to protection.[98] The television format is necessary for the development of a new series because it sets out the framework for the show[99] without which the individual episodes could not be produced.[100] NBC failed to introduce any evidence that it would have produced *The Cosby Show* without Murray's proposal.[101] This implies not only that Murray's idea was novel to NBC, but also, that without Murray's elaborations NBC probably could not have produced *The Cosby Show.* In *Murray,* the elab-

91. 3 M. NIMMER, NIMMER ON COPYRIGHT § 16.08[B], at 16-62 (1988).
92. *Id.* at 16-62 to 16-63.
93. *Id.* at 16-63.
94. *Murray,* 671 F. Supp. at 244.
95. *Murray,* 844 F.2d at 997.
96. Rubenstein, *Copyright Protection for "Elaborated Ideas,"* Law Times, Dec. 6, 1957, at 296, col. 1.
97. *Id.*
98. *Id.* at 296-97.
99. Fine, *A Case for the Federal Protection of Television Formats: Testing the Limit of Expression,* 17 PAC. L.J. 49, 51 (1985).
100. *Id.* at 63.
101. *Murray,* 844 F.2d at 997.

orated idea test may not even be necessary because NBC admitted that it used Murray's idea in the development of *The Cosby Show.*[102] Therefore, Murray should be entitled to protection under the elaborated idea test.

In a similar case, *Fink v. Goodson-Todman Enterprises,*[103] the plaintiff proposed a program entitled "The Coward" to the defendants.[104] The basic idea was that a person whose courage has been challenged will purposely place himself in circumstances that repeatedly test his courage. At defendants' request, the plaintiff submitted his written presentation and later a pilot script.[105]

Approximately five years after plaintiff submitted his idea, defendant aired a show called *Branded* having the same basic theme as that proposed by the plaintiff.[106] The court noted that the plaintiff's presentation, although not the final product ready to be aired, 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."[107] The court also noted that a significant portion 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, method for flashing back on the background story and various portrayal techniques.[108] The court stated that it was "not likely the defendants would have produced their end product if plaintiff had not authored and supplied his elaborated idea."[109]

As in *Fink,* Murray submitted an expanded proposal for "Father's Day" at NBC's request.[110] The expanded proposal included the suggestion of Bill Cosby as the father, Diahann Carroll as the mother and several other casting suggestions and other details for the show. Following this second submission, Murray also orally presented additional ideas for the characters and story lines.[111] NBC admitted that they used Murray's proposal. Also, like *Fink,* Murray submitted more than a mere idea. Besides recommending Bill Cosby for the lead role and suggesting a working mother and five children, Murray proposed the combination of humor with serious situations. *The Cosby Show* has these elements.

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102. *Id.* at 996.
103. 9 Cal. App. 3d 996, 88 Cal. Rptr. 679 (1970).
104. *Id.* at 1000, 88 Cal. Rptr. at 683.
105. A pilot script is the script for the initial episode of a possible new series.
106. *Fink,* 9 Cal. App. 3d at 1001, 88 Cal. Rptr. at 684.
107. *Id.* at 1006, 88 Cal. Rptr. at 687.
108. *Id.* at 1014, 88 Cal. Rptr. at 693.
109. *Id.*
110. *Murray,* 671 F. Supp. at 238.
111. *Id.*

It also is interesting to note that in the original episodes, the family consisted of four children. Later a fifth child was added who, according to the story, was away attending Princeton University.[112] Murray's proposal and description of the family included five children. Also, as in *Fink*, Murray's proposal was a substantial development toward a complete television show with a clear insight to the finished article. Therefore, Murray's idea was novel to NBC because without his proposal, and by NBC's own admission, it is unlikely that NBC would have produced *The Cosby Show*.

D. The Property Theory

The property theory gives an idea originator a property right in that idea provided that the idea is 1) novel and original, 2) concrete and 3) used by another without authority.[113]

First, the novelty element is required in order to obtain legal protection for an idea. The novelty element is satisfied when the originator of the idea has shown the idea has not been copied and deserves protection.[114]

Second, the concreteness requirement of the property theory refers to the nature of the proposal. Courts require that the idea be developed into a tangible form.[115]

The third element, unauthorized use, is satisfied when the originator has shown that the idea submitted was used by those to whom it was submitted without authorization. The originator must show that the production by the unauthorized user came from the submitted idea.[116]

All three elements are satisfied in *Murray*. First, the idea is original. Murray based his idea on his own life and family[117] and he intended to create a show that was unique in its portrayal of a black family, not previously presented on television.[118] An idea based on one's own life could not have been copied and an idea that has been described as a breakthrough in its portrayal of blacks[119] merits protection because of its precedent setting value.

Secondly, Murray's idea was concrete. Murray's proposal began as

112. Linderman, *Playboy Interview: Bill Cosby*, PLAYBOY, Dec. 1985 at 75, 80.

113. M. EPSTEIN, MODERN INTELLECTUAL PROPERTY 151-152 (1988). *See also* M. NIMMER, NIMMER ON COPYRIGHT § 16.02 (1988).

114. M. EPSTEIN, MODERN INTELLECTUAL PROPERTY at 152 (1988).

115. *Id.* at 153.

116. *Id.* at 154.

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

118. *Id.* at 241.

119. *Id.* at 238.

an orally presented idea, progressed to a single written page and later expanded to two pages after a period of research. Murray also elaborated further through an oral presentation.[120] Therefore, Murray's novel idea was given to NBC in a tangible, concrete form.

Finally, the requirement of unauthorized use was also satisfied. Murray informed NBC through Dannhauser that if NBC was interested in any of his proposals he expected not only to be the executive producer and packager, but also to receive proper credits and compensation.[121] Also, Murray informed NBC that he was submitting the proposals in confidence.[122] Therefore, NBC's use of Murray's proposal was unauthorized. NBC had informed Murray it was not interested in developing the program. However, NBC later used and developed Murray's idea despite Murray's asserted conditions.[123] Therefore, because the three elements have been met, the property theory gave Murray a property right in his idea for "Father's Day" which entitled Murray to legal protection from the courts.

E. The Novelty Standard

As noted earlier, the *Murray* court stated that the standard for determining the novelty of Murray's idea is "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. Even if it be assumed that defendant utilized plaintiff's idea, plaintiff may not recover if the idea was unoriginal."[124] However, the district court then defined the sole issue as "whether the idea . . . was *sufficiently* novel to support a claim for its unlawful use."[125] The court held that Murray's idea was not sufficiently novel.[126] An idea not sufficiently novel implies some novelty and infers that Murray's idea was not *wholly* lacking in novelty. The question then becomes what standard should have been applied.[127]

In *Graham Productions v. National Broadcasting Co.*,[128] as discussed earlier, the court found the standard was "wholly lacking in novelty."[129]

120. *Id.*
121. *Id.*
122. *Murray*, 671 F.2d at 238.
123. *Id.*
124. *Murray*, 671 F.2d at 239 (emphasis added) (quoting Graham Prod., Inc. v. National Broadcasting Co., 75 Misc. 2d 334, 347 N.Y.S.2d 766 (N.Y. Sup. Ct. 1973)).
125. *Murray*, 671 F. Supp. at 239-40 (emphasis added).
126. *Id.* at 245.
127. Brief of Plaintiff-Appellant at 7, *Murray* (No. 87-7695).
128. 75 Misc. 2d 334, 347 N.Y.S.2d 766 (N.Y. Sup. Ct. 1973).
129. *Id.* at 337, 347 N.Y.S.2d at 769.

Under this standard, Murray's idea was arguably novel. Evidence suggested that *The Cosby Show* was considered by the media to be "unique" and "revolutionary."[130] In addition, both Cosby and Tartikoff testified they thought the show was novel and unique.[131] An idea that many people considered unique seems difficult to characterize as wholly lacking in novelty. Rather such evidence would seem to imply that the idea possessed some novelty. Thus, the court incorrectly defined the issue which resulted in the misapplication of the novelty standard to Murray's idea.

By stating the standard as not sufficiently novel, the court implied that Murray's idea had some elements of novelty. However, under the standard "wholly lacking in novelty" it appears that Murray's idea may be entitled to legal protection or at least a trial on the merits rather than summary judgment and dismissal because any element of novelty in Murray's idea would appear to satisfy this standard.

F. Fairness and Equity

Intuitively it seems wrong to allow a television network to use an idea which was elaborated at their request without compensating the creator. *The Cosby Show* is one of the most successful and profitable series in television history, yet the man who created the series received neither credit nor compensation for his work. Thus it seems only fair that Murray should receive both creative and financial recognition for his part in developing *The Cosby Show.*

G. Fall Out

The possible long-term effect of the *Murray* decision may be to remove incentive for potential creators of new ideas. The possibility that a creator will not be able to gain a legally protectable interest in his or her idea may have a chilling effect on potential creators in coming up with new ideas. The knowledge that someone else may benefit from their labor without any benefit to themselves may tend to inhibit the creative process. Public policy requires a contrary result to encourage ideas and reward their creators.

V. CONCLUSION

The court in *Murray* should have allowed the case to go to the jury rather than granting summary judgment because a triable issue of fact did exist that needed to be decided. Sufficient evidence was presented to

130. *Murray,* 844 F.2d at 992.
131. *Id.* at 996.

show that Murray's idea was novel entitling him to legal protection. The question of novelty should properly be determined as between Murray and NBC. The fact is that without Murray's proposal, NBC would not have produced *The Cosby Show,* one of its biggest successes.

In addition, for policy reasons, a network should not be allowed to use the fruits of another's labor to their benefit without due credit and compensation. Had the case gone to the jury, there is a strong possibility that a jury would have found in favor of Murray, not only because of the inherent unfairness, but also because his idea was entitled to legal protection.

Deborah A. Levine