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## Idea Theft and Independent Creation: A Recipe for Evading Contractual Obligations

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## **IDEA THEFT AND INDEPENDENT CREATION: A RECIPE FOR EVADING CONTRACTUAL OBLIGATIONS**

*Jonathan Richard Sandler\**

*Ideas are valuable, especially in Hollywood, and those who rely on their ideas for income need protection. Because ideas are not protected by federal copyright law, the solution in California has been to protect idea disclosure with implied-in-fact contracts. A common defense to a claim of idea theft is the independent-creation defense. This defense permits an idea recipient to escape liability by showing that he did not use a plaintiff's idea but instead used an idea from an independent third party. The problem with this defense, however, is that it fails to recognize the possibility that an idea recipient could actually be using the idea from both the idea purveyor and the independent third party simultaneously. As a result, defendants can wrongfully evade one valid implied-in-fact contractual obligation by demonstrating that they simply have a second contract. This Note proposes a change to the analysis that courts currently apply in implied-in-fact contract claims, which will remedy this practice and ensure better protection of idea purveyors' rights.*

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## I. INTRODUCTION

Ideas have value. Every day hundreds, if not thousands, of people develop ideas and attempt to sell them to entertainment companies.<sup>1</sup> Such people are known as idea purveyors.<sup>2</sup> Given that idea purveyors rely on the sale of their ideas for their livelihood, the law affords them protection in the event that someone uses one of those ideas but refuses to pay for it.<sup>3</sup> Though not protected by copyright<sup>4</sup> or recognized as property<sup>5</sup> in California, ideas are protected through either express or implied-in-fact contracts.<sup>6</sup>

Disputes arise, however, when two independent parties contract with the same idea recipient<sup>7</sup> and disclose seemingly identical ideas. The logical assumption would be that one could determine which purveyor's idea was actually used—and which was discarded—thus establishing to whom payment is owed. Such logic is absent from the current body of California law, however.<sup>8</sup> California law affords protection to ideas but does not require novelty or concreteness;<sup>9</sup> therefore, two idea purveyors could conceivably contract with the same company for the sale of the “same” idea. Because the ideas are

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1. Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703, 714 (2006); see generally Glen L. Kulik, *The Idea Submission Case: When Is an Idea Protected Under California Law?*, 32 BEVERLY HILLS B. ASS'N J. 99 (1998) (discussing the different protections afforded idea purveyors in the entertainment industry).

2. See *Blaustein v. Burton*, 88 Cal. Rptr. 319, 333 (Ct. App. 1970); Aileen Brophy, *Whose Idea Is It Anyway? Protecting Idea Purveyors and Media Producers After Grosso v. Miramax*, 23 CARDOZO ARTS & ENT. L.J. 507 (2005).

3. Miller, *supra* note 1, at 711; see Jay Rubin, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 697 (2006).

4. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.01 (2011).

5. *Id.* § 19D.02; Camilla M. Jackson, “I’ve Got This Great Idea for a Movie!” *A Comparison of the Laws in California and New York that Protect Idea Submissions*, 21 COLUM.-VLA J.L. & ARTS 47, 52 (1996).

6. *Blaustein*, 88 Cal. Rptr. at 331.

7. “Idea recipient” is an industry term for a person to whom an idea purveyor pitches his idea. See, e.g., NIMMER & NIMMER, *supra* note 4, § 19D.06; Miller, *supra* note 1, at 724.

8. See *infra* text accompanying note 193.

9. *Blaustein*, 88 Cal. Rptr. at 334; *Minniear v. Tors*, 72 Cal. Rptr. 287, 293 (Ct. App. 1968); 43 CAL. JUR. 3D *Literary and Artistic Property* § 15 (2011); Kulik, *supra* note 1, at 105; 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, 77 (2003).

identical, there is no way for a finder of fact to consistently determine which idea was actually used to create the new work.

However, idea recipients have developed what appears to be an effective defense to claims of unlawful use—the independent-creation defense. This defense, in theory, enables an idea recipient to show that he has used one idea and not another.<sup>10</sup> The problem is that the independent-creation defense is misplaced in contract law, and even when it is applied correctly, it fails to acknowledge and uphold an idea purveyor's contractual rights.<sup>11</sup> Further, California courts have misapplied this defense in a way that threatens to undermine the law of ideas and deny purveyors any and all protection.<sup>12</sup> Simply put, the independent-creation defense permits an idea recipient to destroy one valid contract by merely showing that he has contracted with *another* party for the disclosure of the same idea.<sup>13</sup>

This Note summarizes the present state of California idea-protection law and attempts to resolve the inconsistencies that the independent-creation defense has created. Part II describes the state laws that protect ideas, as federal law offers no such protection. Part III explains the most common method of state protection for idea disclosure—the implied-in-fact contract—focusing on the element of actual use. Part IV analyzes the development of the independent-creation defense in the contract context and highlights the ways in which it has been both misinterpreted and misapplied. Part V offers two proposals to reshape the independent-creation defense so that it better protects idea recipients who have engaged in no misconduct and does not deny relief to purveyors deserving recovery. The first proposal suggests changes to the analysis that courts currently apply to implied-in-fact contract claims, while the second proposal, instead, recommends changes to the effect of the independent-creation defense and the remedies to which one is entitled. Finally, Part VI concludes that adopting the first proposed solution, alteration

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10. *See infra* text accompanying notes 44–51.

11. THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS § 15:6 (3d ed. 2011).

12. *See infra* Part IV. It is not only the idea purveyor whose rights are afforded inadequate protection by the independent-creation defense; idea recipients' rights are vulnerable as well.

13. *See infra* Part IV.

of the courts' analysis, will result in the best protection for all parties involved in idea-submission claims.

## II. STATE LAWS, NOT FEDERAL LAWS, PROTECT IDEAS

Generally, federal statutes protect products of the mind—for example, patent, trademark, copyright, trade secret, and unfair competition statutes.<sup>14</sup> Federal law does not, however, protect ideas.<sup>15</sup> Instead, state laws offer such protection.<sup>16</sup> Copyright, the standard federal protection for artistic works, explicitly denies ideas any protection.<sup>17</sup> However, courts have recognized that ideas fixed in a tangible medium are within the subject matter of copyright, despite not being protected by it.<sup>18</sup> Nevertheless, the Copyright Office has made it clear that the intent of federal Copyright Law is to *not* protect general ideas or outlines.<sup>19</sup> As a matter of policy, Congress has decided not to extend federal protection to ideas.<sup>20</sup> Thus, those seeking to recover in idea-submission disputes have historically relied on various state legal theories to protect their ideas.<sup>21</sup> In recent

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14. Jackson, *supra* note 5, at 47; Miller, *supra* note 1, at 717.

15. NIMMER & NIMMER, *supra* note 4, § 19D.01[A]; Miller, *supra* note 1, at 718; see Brian Casido, Benay v. Warner Bros. Entertainment, Inc.: *New Standard Needed for Determining Actual Use*, 41 GOLDEN GATE U. L. REV. 327, 335 (2011).

16. NIMMER & NIMMER, *supra* note 4, § 19D.01[A]; Miller, *supra* note 1, at 718; see Brian Casido, Benay v. Warner Bros. Entertainment, Inc.: *New Standard Needed for Determining Actual Use*, 41 GOLDEN GATE U. L. REV. 327, 335 (2011).

17. 17 U.S.C. § 102(b) (2010).

18. See *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011).

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

17 U.S.C. § 102(a).

19. Jackson, *supra* note 5, at 49.

20. NIMMER & NIMMER, *supra* note 4, § 19D.03[A][1].

21. See *id.* § 19D.02; Jackson, *supra* note 5, at 50; Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 21 (1994) (listing property, quasi-contract, express contract, implied-in-fact contract, and confidential relationship as formerly applied legal theories).

years contract law has emerged as the most “significant remaining state-law protection for literary or artistic ideas.”<sup>22</sup>

Further, recent Ninth Circuit opinions have made clear that the 1976 Copyright Act does not preempt state contract claims for the disclosure of ideas.<sup>23</sup> Thus, in California, idea submissions<sup>24</sup> are most often protected by contract.<sup>25</sup> The legal obligation to pay for an idea may be found in either an express or implied-in-fact contract.<sup>26</sup> The only difference between the two is the manner in which they are formed—the former is created in words, while the latter is created by the parties’ conduct.<sup>27</sup> Most often, claimants bring idea-submission claims based on the implied-in-fact contract theory.<sup>28</sup>

### III. *DESNY* CLAIMS: BREACH OF IMPLIED-IN-FACT CONTRACTS FOR THE DISCLOSURE OF IDEAS

The elements of a breach-of-implied-in-fact contract claim for idea disclosure, commonly referred to as a *Desny* claim,<sup>29</sup> are firmly established in California law. In order for a plaintiff to recover, he must show that (1) he had an idea, (2) he disclosed his idea for sale to the defendant, (3) the use of the idea was clearly conditioned on the obligation to pay the plaintiff, (4) the defendant voluntarily accepted the idea disclosure, (5) the defendant actually used the idea, and (6) the idea had value.<sup>30</sup> Although each of these elements

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22. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010); *Sobel*, *supra* note 21, at 21.

23. *See, e.g., Montz*, 649 F.3d at 979 (9th Cir. 2011); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004).

24. “Idea Submission” is a term of art, referring to the disclosure of an idea for a television show, movie, or product for sale in a commercial context. *Jackson*, *supra* note 5, at 47 n.1.

25. *See Michaud & Tulquois*, *supra* note 9, at 75.

26. *NIMMER & NIMMER*, *supra* note 4, § 19D.05.

27. *See CAL. CIV. CODE* § 1621 (West 2011); *Firchau v. Diamond Nat’l Corp.*, 345 F.2d 269, 274 (9th Cir. 1965); *Chandler v. Roach*, 319 P.2d 776, 778–79 (Cal. Ct. App. 1957); *Kulik*, *supra* note 1, at 106; Glen L. Kulik & Craig S. Berman, *Implied-in-Fact Contracts in the Entertainment Industry*, L.A. LAW., Jan. 2006, at 10; *Rubin*, *supra* note 3, at 682; CAL. CIV. JURY INSTRUCTIONS § 305 (2010).

28. *Kulik & Berman*, *supra* note 27, at 10.

29. A *Desny* claim is the name courts frequently use when referring to a claim for breach of implied-in-fact contract for the disclosure of an idea. Allison S. Brehm, *Creative Defense*, L.A. LAW., Sept. 2010, at 28; *see, e.g., Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004); *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956).

30. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010); *see also Grosso*, 383 F.3d at 967 (listing the elements of a *Desny* claim); *Desny*, 299 P.2d at 270 (same);

deserves in-depth discussion, this Note will focus only on the element of actual use, for this is the element the independent-creation defense addresses.

Actual use of an idea without payment to the idea purveyor functions as the breach of contract in a *Desny* claim.<sup>31</sup> It has consistently been the most difficult element to prove in idea-submission cases.<sup>32</sup> This is largely because the plaintiff will rarely have access to direct evidence of use and must therefore rely on circumstantial evidence.<sup>33</sup> In such cases, a plaintiff may establish an inference of use by presenting evidence of (1) a similarity between his work and the infringing work and (2) the defendant's access to the plaintiff's work.<sup>34</sup> This principle emanates directly from copyright law, and a defendant may rebut this presumption by presenting contradictory evidence, just as in the realm of copyright.<sup>35</sup>

If two works are so similar as to reach the standard of "striking" similarity,<sup>36</sup> then courts do not require a showing of access and instead infer both access and actual use from the similarity of the works.<sup>37</sup> The inverse is not true, however. Notably, access alone cannot give rise to an inference of use; some degree of similarity is required.<sup>38</sup> The degree of similarity between an allegedly stolen idea and an allegedly infringing work is a question of fact for the jury to determine.<sup>39</sup>

However, there is no requisite amount of similarity and access that a plaintiff must demonstrate to gain an inference of actual use. Jurisprudence has recognized that a substantial showing of evidence

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*Kightlinger v. White*, No. B210802, 2009 WL 4022193, at \*2 (Cal. Ct. App. Nov. 23, 2009) (same); *Klekas v. EMI Films, Inc.*, 198 Cal. Rptr. 296, 304 (Ct. App. 1984) (same); *Blaustein v. Burton*, 88 Cal. Rptr. 319, 333 (Ct. App. 1970) (same); *Literary and Artistic Property*, *supra* note 9, § 15 (same); *SELZ ET AL.*, *supra* note 11, § 15:6 (same); *Kulik & Berman*, *supra* note 27, at 10 (same).

31. *Reginald v. New Line Cinema Corp.*, No. B190025, 2008 WL 588932, at \*4 (Cal. Ct. App. Mar. 5, 2008); *SELZ ET AL.*, *supra* note 11, § 15:6; *Casido*, *supra* note 15, at 336.

32. *Casido*, *supra* note 15, at 338.

33. *Kulik*, *supra* note 1, at 107.

34. *Reginald*, 2008 WL 588932, at \*4; *Kulik*, *supra* note 1, at 100.

35. *Benay*, 607 F.3d at 630; *NIMMER & NIMMER*, *supra* note 4, § 19D.07.

36. "'Striking' similarities . . . are similarities of the kind that cannot be explained, in the normal course of human events, by the possibilities of independent creation, coincidence or prior common source." *NIMMER & NIMMER*, *supra* note 4, § 19D.07[C][1][d].

37. *Benay*, 607 F.3d at 630; *NIMMER & NIMMER*, *supra* note 4, § 19D.07[C][1][d].

38. *NIMMER & NIMMER*, *supra* note 4, § 19D.07[C][1][b].

39. *Kurlan v. Columbia Broad. Sys.*, 256 P.2d 962, 968 (Cal. 1953).



for one of these elements may compensate for a lack of evidence of the other.<sup>40</sup> This principle is referred to as the “inverse ratio rule.”<sup>41</sup> It should be noted that the inverse ratio rule does not determine liability; its role is limited to establishing the inference of actual use.<sup>42</sup> In both the contract and copyright context, actual use does not instantly give rise to liability: the works must be substantially similar to each other such that the amount of actual use is legally actionable, rather than simply factual.<sup>43</sup> Stated differently, one can use another’s idea to a certain extent without incurring liability, but once the works pass the threshold of being substantially similar, the author has “used” another’s idea in an impermissible way.

#### IV. THE INDEPENDENT-CREATION DEFENSE

The independent-creation defense has become one of the primary defenses against idea-submission claims.<sup>44</sup> The defense allows a defendant to overcome a claim, notwithstanding that the plaintiff has made a showing of access and similarity, by affirmatively proving that the similarity is coincidental and that no actual use of the plaintiff’s idea has occurred because the defendant’s project was independently created.<sup>45</sup> Courts have recognized this defense as a complete shield from liability.<sup>46</sup> The rationale behind this defense is that unlawful use is not possible “when the alleged[ly] offending work was conceived independently of a plaintiff’s idea.”<sup>47</sup> When mounting an independent-creation defense, the defendant faces the burden of presenting evidence that is “clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved.”<sup>48</sup> However, this is an ambiguous standard. As one court

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40. NIMMER & NIMMER, *supra* note 4, § 19D.07[C][1][c].

41. *Id.*; Lee S. Brenner, *The Very Idea*, L.A. LAW., May 2008, at 33, 37.

42. Sobel, *supra* note 21, at 70.

43. NIMMER & NIMMER, *supra* note 4, § 19D.07[C][1][c]; Sobel, *supra* note 21, at 70–71. This, of course, assumes that the parties contracted for substantial similarity to trigger liability in the first place, given that each contract’s terms are unique. Brenner, *supra* note 41, at 38.

44. Kulik, *supra* note 1, at 108; *see* Brehm, *supra* note 29, at 30.

45. Kulik, *supra* note 1, at 108.

46. *Id.*

47. Brehm, *supra* note 29, at 30.

48. *Teich v. Gen. Mills, Inc.*, 339 P.2d 627, 632 (Cal. Ct. App. 1959); *see* *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279, 292 (Ct. App. 2007) (citing *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522, 534, 536 (Ct. App. 1982); NIMMER & NIMMER, *supra* note 4, § 19D.07[C][2]; Kulik, *supra* note 1, at 108.

stated, “whether such evidence [of independent creation] rises to the level of being clear, positive and uncontradicted is itself a question to be decided on a case-by-case basis.”<sup>49</sup> California courts have increasingly granted summary judgment in favor of a defendant that meets this standard, finding there was no lawful use as a matter of law.<sup>50</sup> This approach severely increases the burden placed on the plaintiff to establish his *prima facie* case.<sup>51</sup>

This is so because the application of the independent-creation defense at the summary judgment stage of litigation is wholly misplaced. There are multiple factual inquiries that would require a jury’s determination before such a defense would even become relevant.<sup>52</sup> This defense does not become relevant or necessary until after the court analyzes the plaintiff’s *prima facie* case.<sup>53</sup> Within this primary analysis, the court must find the existence of the implied-in-fact contract, its terms, and a breach resulting from uncompensated use of the plaintiff’s idea. If the factual findings show that the plaintiff did, in fact, have a valid contract and that it was breached, this would create an issue as to the actual use of the plaintiff’s idea—a factual question for the jury—rendering summary judgment inappropriate.<sup>54</sup> If one were to ignore this necessary analysis and award summary judgment in favor of the defendant, the court would essentially be holding that a defendant could exculpate himself by simply telling an alternative story of creation for his work while

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49. Kulik, *supra* note 1, at 108 (citing *Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130, 133 (Ct. App. 1966)).

50. Brehm, *supra* note 29, at 30.

51. *Id.* at 32.

52. First, the very existence of the contract is a factual inquiry, wherein a jury must decide whether the plaintiff presented circumstances that qualify as those that form the implied-in-fact contract. *See Scott v. Pac. Gas & Elec. Co.*, 904 P.2d 834, 839 (Cal. 1995); *Desny v. Wilder*, 299 P.2d 257, 273–74 (Cal. 1956). Second, identifying the terms of the contract is also a factual inquiry, wherein the jury must decide what degree of use the parties contracted for and whether the contract required novelty. *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 650 (Ct. App. 2007); *see Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 86 (Cal. 1950) (Traynor, J., dissenting) (“If the idea is not novel, the evidence must establish that the promisor agreed expressly or impliedly to pay for the idea whether or not it was novel.”). Third, determining when and if a breach of the contract occurred is also a fact-based inquiry best left to a jury. *See Kurlan v. Columbia Broad. Sys.*, 256 P.2d 962, 968 (Cal. 1953).

53. *See infra* Part IV.B.2.

54. *See infra* Part IV.B.2, IV.B.4.

under oath.<sup>55</sup> Thus, this defense is neither as logically sound nor as legally strong as it may appear to be at first blush.

*A. The Development of the  
Independent-Creation Defense*

The seminal case in the development of the independent-creation defense was *Teich v. General Mills*.<sup>56</sup> There, Jules Teich filed suit for breach of an implied-in-fact contract when the defendant allegedly stole his idea for a premium—a toy camera—in a cereal box.<sup>57</sup> The plaintiff's idea was not novel—it was a kit for making “sun pictures,” which was a common activity for children at that time.<sup>58</sup> The plaintiff contacted the defendant, General Mills, at its Los Angeles Office seeking to sell his idea, which then directed him to Otis Young of the San Francisco based Sperry Operations, a division of General Mills.<sup>59</sup> The plaintiff commenced communication with Young on July 6, 1955, via written correspondence, following up with a telephone call.<sup>60</sup> Eventually, the plaintiff visited Young's office, where he “clearly conditioned” his disclosure of his idea on receiving payment, and subsequently disclosed the idea to Young and two other employees of General Mills who were present in the meeting.<sup>61</sup> At General Mills's request, the plaintiff left some samples at the office.<sup>62</sup> From that day forward, however, Young completely ignored the plaintiff.<sup>63</sup> In January of 1956, the plaintiff saw a package of the General Mills cereal “Trix” containing a “Magic Sun Picture” premium inside and filed suit.<sup>64</sup>

General Mills's story for the creation of its “Magic Sun Picture” toy differed dramatically from the plaintiff's narrative.<sup>65</sup> General Mills claimed that Herbert Valentine and Earl Radford of Valentine-

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55. *Barsha v. Metro-Goldwyn-Mayer*, 90 P.2d 371, 374 (Cal. Ct. App. 1939); NIMMER & NIMMER, *supra* note 4, § 19D.07[C][2].

56. 339 P.2d 627 (Cal. Ct. App. 1959).

57. *Id.* at 629.

58. *Id.*

59. *Id.* Young was responsible for procuring premiums (toys) for Sperry products and claimed he had no duty to report his activities to General Mills' headquarters in Minneapolis. *Id.*

60. *Id.* at 630.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 632–33.

Radford, a Kansas City advertising agency, had developed the toy and had first written to James Street at General Mills's *Minneapolis* office with the idea on May 27, 1955.<sup>66</sup> Thereafter, they corresponded via mail, culminating with an offer to option Valentine's "Sun Pix" premium in a letter dated August 19, 1955.<sup>67</sup> On January 16, 1956, General Mills purchased 6,250,000 "Sun Pix" from Valentine.<sup>68</sup>

General Mills supported its story with the letters that it had exchanged with Valentine, along with uncontradicted testimony from Lowry Crites, the advertising manager for General Mills in the Minneapolis office; James Street, the premium manager for General Mills out of the Minneapolis office throughout 1955; and Herbert Valentine, one of the independent creators of the toy who sold the idea to General Mills.<sup>69</sup> Additionally, the defendant offered six letters that Valentine had written to other independent companies during his development of his "Sun Pix" premium.<sup>70</sup> It was clear that the defendant firmly established a history for Valentine's idea.

The jury awarded the plaintiff \$35,000, but the judge granted the defendant's motion for judgment notwithstanding the verdict,<sup>71</sup> which the plaintiff appealed.<sup>72</sup> The appellate court began its analysis by stating that proof "of access and similarity raises an inference of copying."<sup>73</sup> It went on to state explicitly that "[t]he weight to be given the inference [of copying] as against direct evidence of nonaccess and noncopying is a question for the trier of fact," and that

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66. *Id.* at 632.

67. *Id.* at 633.

68. *Id.*

69. *Id.* at 632–33.

70. *Id.* at 633–34. The first letter, dated June 1, 1955, was sent from Valentine to Walt Disney Enterprises, inquiring about the use of Disney characters on their packaging; the second, also dated June 1, 1955, was sent from Valentine to Holiday Plastics, Inc., inquiring about acetate pricing; the third, dated June 9, 1955, was sent from Eastman Kodak Company to Valentine, regarding a question Valentine had posed about packaging proof paper with a negative; the fourth letter, dated June 13, 1955, advised Valentine that the trademark "Sun Pix" was available for use; the fifth letter, dated June 22, 1955, was sent from Valentine to Highland Supply Company, inquiring about printing on acetate photos; and the sixth letter, dated July 7, 1955, was sent from Milprint, Inc. to Valentine, responding to a request for printing quotes on packaging materials. *Id.*

71. A judgment notwithstanding the verdict is "[a] judgment entered for one party even though a jury verdict has been rendered for the opposing party." BLACK'S LAW DICTIONARY 919–20 (9th ed. 2009).

72. *Teich*, 339 P.2d at 629.

73. *Id.* at 631.

“[t]he implied finding of the jury of similarity is binding upon a reviewing court if supported by substantial evidence.”<sup>74</sup> The court held that any differences between the plaintiff’s toy and the Trix premium were insignificant,<sup>75</sup> and neither side disputed the issue of access.<sup>76</sup> Therefore, the plaintiff had gained the inference of unlawful use and had proven the breach of his implied-in-fact contract.<sup>77</sup>

However, the court did not stop its analysis there. It then reasoned that the jury could not reject the defendant’s uncontradicted testimony of independent creation.<sup>78</sup> Upholding the lower court’s judgment notwithstanding the verdict, the court held that while the trier of fact was empowered to reject the testimony of a witness, even though uncontradicted, there was an exception that prevented the jury from “running away with the case.”<sup>79</sup> The court explained that the jury could not “indulge in [an] inference when that inference [was] rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men,” and that “[t]he trier of the facts [could] not believe impossibilities.”<sup>80</sup>

The court then directly recognized the independent-creation defense, asking whether “proof that there was no copying of [the] plaintiff’s product [created] a complete defense, although the thing actually used by [the] defendant was closely similar to the one which [the] plaintiff had presented to it.”<sup>81</sup> Based on the weight of authority, the court held that the answer must be yes.<sup>82</sup> The court closed with a quote from *Barsha v. Metro-Goldwyn-Meyer*,<sup>83</sup> stating that the jury “would have been more than stupid if [it] believed that [it] could return a verdict for plaintiffs without a finding on [its] part that appellants had used plaintiffs’ composition . . . .”<sup>84</sup>

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74. *Id.* (quoting *Kovacs v. Mut. Broad. Sys.*, 221 P.2d 108, 114 (Cal. Ct. App. 1950)).

75. *Id.* at 633.

76. *See id.* at 631–32.

77. *See id.* at 633.

78. *Id.* at 632.

79. *Id.*

80. *Id.* at 633.

81. *Id.* at 634.

82. *Id.*

83. 90 P.2d 371 (Cal. Ct. App. 1939).

84. *Teich*, 339 P.2d at 635 (quoting *Barsha*, 90 P.2d at 376).

On the surface, the *Teich* court's reasoning seemed just, since it concluded that the defendant did not use the *plaintiff's* idea and, therefore, owed him no payment.<sup>85</sup> However, the court relied on a lofty assumption in concluding as it did—that the defendant could not have used *both* parties' ideas.<sup>86</sup> The court completely disregarded the possibility that the defendant owed compensation to both the plaintiff and the third-party creator, Valentine.<sup>87</sup> Both parties presented credible, well-supported stories of the creation of their ideas and evidence sufficient to establish the formation of contracts with General Mills.<sup>88</sup> The court explicitly stated that the plaintiff had successfully entered into an implied-in-fact contract with General Mills, yet it then denied him his deserved contractual recovery when the defendant presented a second source for the same idea.<sup>89</sup>

If a party is able to avoid its contractual obligation to pay someone for a service by simply contracting with a third party for that same service, how does that enable a person to rely on his contract? It doesn't. The *Teich* opinion runs counter to the strong policy in favor of freedom of contract, which is aimed at encouraging parties to engage in business more efficiently and to stimulate the economy.<sup>90</sup> Consider the following hypothetical: Dan is looking for the best seeds to plant on his farm. Alan, a seed vendor anxious to make a sale, promises to give Dan one hundred seeds in exchange for Dan's promise to pay him \$9 for the seeds if Dan plants them. Bob, another a seed vendor anxious to make a sale, promises to give Dan one hundred of the same seeds in exchange for Dan's promise to pay him \$10 for his seeds if Dan plants them. Two contracts have been formed—the Dan-Alan contract and the Dan-Bob contract. Both Alan and Bob give Dan their seeds, and Dan mixes all of the seeds together in the same bucket. He then plants half of them and cannot possibly determine whose seeds were planted. Dan then pays only Alan and refuses to pay Bob for his seeds. The *Teich* opinion would

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85. *See id.* at 634.

86. *See id.*

87. *See id.*

88. *See supra* text accompanying notes 56–70.

89. *Teich*, 339 P.2d at 630, 636.

90. *See* 1 B.E. WITKIN ET AL., SUMMARY OF CALIFORNIA LAW § 323, at 351 (10th ed. 2005) (“[B]argaining and equality of bargaining . . . are the theoretical parents of the American law of contracts.”).

condone Dan's actions because it stands for the proposition that Dan could not possibly have contracted with two people for the same seeds. This is both logically unsound and unjust, and Dan must fulfill his contractual obligation to both parties or pay damages for breaching the agreement between them. Simply proving the existence of a duplicative contractual agreement does not negate the validity of another; therefore, the independent-creation defense has been misplaced in contract law since its very inception.

*B. The Misapplication of the  
Independent-Creation Defense*

In addition to the policy and logic problems courts have created by permitting such a defense to be used in the contract context, courts have consistently misanalyzed idea-submission claims in its wake. What follows is a detailed discussion of four cases on which courts and scholars have relied to more firmly establish the independent-creation defense. When closely scrutinized, however, it becomes apparent that these cases actually misapply the law of ideas and exacerbate the confusion surrounding contract rights in the context of idea submission.

1. *Mann v. Columbia Pictures, Inc.*

First, in *Mann v. Columbia Pictures, Inc.*,<sup>91</sup> Bernice Mann filed suit for breach of an implied-in-fact contract, alleging that Columbia Pictures stole her idea for a film titled "Women Plus" and used it in its film *Shampoo*.<sup>92</sup> Mann submitted her twenty-nine-page outline of "Women Plus" in a sealed envelope to Caplan, an employee at Columbia, through a mutual friend.<sup>93</sup> The plaintiff never had any direct contact with the Columbia employee, however.<sup>94</sup> Further, Caplan never delivered the outline to Columbia, but instead submitted it to his own company, Filmmakers.<sup>95</sup> Filmmakers sent Mann a rejection letter for another manuscript but notably never

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91. *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522 (Ct. App. 1982).

92. *Id.* at 524.

93. *Id.* at 527.

94. *Id.*

95. *Id.* at 528.

returned “Women Plus” and had no record of ever having received it.<sup>96</sup>

Columbia mounted an independent-creation defense, asserting that two independent writers, Beatty and Towne, had written *Shampoo* in 1974 and submitted it to Columbia.<sup>97</sup> It supported this assertion with extensive evidence at trial showing that Towne created the 161-page *Shampoo* screenplay in 1970 and had been working on it since 1965.<sup>98</sup> In order to support its nonreceipt of Mann’s screenplay, Columbia juxtaposed the fact that its submission records contained submission cards, author cards, title cards, and synopses for *Shampoo* with the fact that it had no such cards for “Women Plus.”<sup>99</sup>

At trial, the jury awarded Mann \$185,000, but the defendants successfully moved for a judgment notwithstanding the verdict.<sup>100</sup> Upholding this ruling, the appellate court initially stated that any similarities that Mann presented between her work and *Shampoo* were without legal significance because “the trial record show[ed] only that Towne and Beatty independently wrote the ‘Shampoo’ screenplay and script changes.”<sup>101</sup> Further, it stated that although it was possible that the jury inferred access and use from the similarities between “Women Plus” and *Shampoo*, such an inference “was rebutted by clear, positive and uncontradicted evidence.”<sup>102</sup>

Completing its analysis, the appellate court held that because Caplan never delivered the plaintiff’s outline to Columbia—as no evidence supported such an allegation—the plaintiff failed to establish access to her work.<sup>103</sup> The court bluntly explained in its holding that “[s]ince there was neither a submission of ‘Women Plus’ to Columbia, nor any contact between the screenplay authors and the people alleged to have possessed [the] plaintiff’s treatment, there is no substantial evidence to support the jury verdict.”<sup>104</sup> The

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96. *Id.* In addition to the rejection letter, he also returned a *second* script that Mann had submitted along with “Women Plus” to Mann. *Id.*

97. *Id.* at 531.

98. *Id.* at 532.

99. *Id.* at 531–32.

100. *Id.* at 524.

101. *Id.* at 527.

102. *Id.* at 534.

103. *Id.* at 530, 532.

104. *Id.* at 535.



plaintiff could not establish access based on “mere possibilities” of submission.<sup>105</sup> Additionally, the plaintiff had not established that the independent creators, Beatty and Towne, had access to the plaintiff’s work; therefore, the court concluded that a jury could not infer that *they* used the plaintiff’s idea.<sup>106</sup> Finally, the court refused to permit an inference of both access and use based on the amount of similarity that Mann had presented.<sup>107</sup>

The issue with the *Mann* opinion is that the court engaged in an inverted analysis, which has caused the case to appear to stand for much more than it actually does. Both Courts and commentators have interpreted *Mann* as showing that evidence of independent creation defeats a valid implied-in-fact contract claim.<sup>108</sup> This interpretation is erroneous, however, for all that the opinion truly stands for is that when there is no showing of *access*, a plaintiff cannot gain an inference of actual use.<sup>109</sup> Therefore, there has been no contractual breach, and the plaintiff cannot recover.<sup>110</sup> All of the analysis pertaining to the independent-creation defense in *Mann* is irrelevant and would be more properly treated as dicta given the plaintiff’s failure to establish an element of her prima facie case—actual use.<sup>111</sup> Because the court engaged in the independent-creation defense analysis *before* addressing the validity of the plaintiff’s initial claim, it performed an analysis that was unnecessary and has since misled litigants, commentators, and judges who rely on this case as law.<sup>112</sup>

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105. *Id.* at 536.

106. *Id.* at 527.

107. *Id.* at 532 (“The access of Towne and Beatty to ‘Women Plus’ may only be inferred from the similarities between plaintiff’s treatment and the motion picture ‘Shampoo.’ Apart from these similarities, Mann’s evidence is insufficient to infer defendants’ access to ‘Women Plus,’ as plaintiff offers only speculation and the mere possibility that Caplan or Crutcher submitted the missing treatment to Columbia’s story department.”).

108. Brehm, *supra* note 29, at 31.

109. *See Mann*, 180 Cal. Rptr. at 535–36.

110. *See id.*

111. *See id.* at 532.

112. *See, e.g., Kightlinger v. White*, No. B210802, 2009 WL 4022193 (Cal. Ct. App. Nov. 23, 2009); *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279 (Ct. App. 2007); Brehm, *supra* note 29, at 31–32.

2. *Hollywood Screentest of America v. NBC Universal, Inc.*

A subsequent case in which a court misapplied the independent-creation defense was *Hollywood Screentest of America v. NBC Universal, Inc.*<sup>113</sup> There, James Pascucci, who had contacted Jeff Zucker at NBC to pitch his idea for a show called “Hollywood Screentest,” filed a breach-of-contract suit, claiming that NBC, in conjunction with Silver Pictures, had unlawfully used his ideas in its new show *Next Action Star*.<sup>114</sup> Before disclosing his ideas, the plaintiff obtained a signed confidentiality agreement from Zucker stating that the plaintiff owned every idea he was going to disclose except for those that were “generally available to the public.”<sup>115</sup> After the plaintiff pitched a series of show ideas and marketing concepts to NBC and spoke with various executives over the course of several months, NBC ultimately rejected the plaintiff’s idea.<sup>116</sup> NBC subsequently issued a press release for its new show, *Next Action Star*, at which point the plaintiff filed suit, believing NBC had stolen his idea.<sup>117</sup>

In its defense, NBC presented evidence that *Next Action Star* had been independently created.<sup>118</sup> This evidence established that three different companies had together created *Next Action Star* over the course of a year before they ever pitched it to NBC.<sup>119</sup> The court noted that the plaintiff provided no evidence to contradict the testimony of the employees of the three companies who allegedly created the show independently.<sup>120</sup>

The trial court granted the defendant’s motion for summary judgment, and the plaintiff appealed.<sup>121</sup> The appellate court began its analysis by focusing on NBC’s independent-creation defense.<sup>122</sup> It explained that it had “found that NBC ha[d] successfully shown undisputed evidence of independent creation by entities unrelated to

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113. 60 Cal. Rptr. 3d 279 (Ct. App. 2007).

114. *Id.* at 281–83.

115. *Id.* at 281–82.

116. *Id.* at 282–83.

117. *Id.* at 283.

118. *Id.*

119. *Id.*

120. *Id.* at 284.

121. *Id.* at 281.

122. *Id.* at 290–91.

NBC and unassisted by NBC.”<sup>123</sup> The court then “look[ed] carefully at [the] appellants’ evidence to determine whether they ha[d] provided any evidence that call[ed] into question the evidence supporting independent creation” and found that “they ha[d] not.”<sup>124</sup> The court then briefly addressed the actual-use element of the plaintiff’s claim, stating that the “[a]ppellants point[ed] to no evidence that NBC actually used their ideas” but that they “ask[ed] that [the court] draw inferences based on general similarities and timing.”<sup>125</sup> Such speculation was not sufficient to create a disputed issue of fact.<sup>126</sup>

Upholding the trial court’s grant of summary judgment, the court held that because NBC had presented undisputed evidence of independent creation, the plaintiff’s causes of action could not survive.<sup>127</sup> Significantly, the court went one step further, stating that the “[a]ppellants’ cause of action for an implied-in-fact contract for payment in exchange for the use of ideas necessarily require[d] a finding that NBC actually used [the] appellants’ ideas.”<sup>128</sup> However, “that element [wa]s negated by the uncontradicted evidence of the independent creation of Next Action Star.”<sup>129</sup> Accordingly, “the cause of action for breach of implied-in-fact contract . . . fail[ed] as a matter of law.”<sup>130</sup>

In *Hollywood Screentest*, the court erred twice in its analysis, further confusing the validity and efficacy of the independent-creation defense. First, like in *Mann*, the court focused its initial inquiry on the independent-creation defense, rather than focusing on the strength of the plaintiff’s underlying claim.<sup>131</sup> As the court held later in the opinion, the plaintiff had failed to ever establish *actual use* of his idea.<sup>132</sup> This means that he never had a valid claim, and the issue of independent creation was superfluous. Second, the court omitted any real analysis of substantial similarity, presumably

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123. *Id.* at 291.

124. *Id.* at 291–92.

125. *Id.* at 292.

126. *Id.*

127. *Id.*

128. *Id.* at 293.

129. *Id.*

130. *Id.*

131. *See id.* at 290–91.

132. *See id.* at 292.

because the evidence of similarity was so weak that the court did not find it worth examining.

The problem with this approach is that the court needlessly focused all of its attention on the defendant's independent-creation defense. Moreover, the court overstated its holding when it wrote that "[use] is negated by the uncontradicted evidence of the independent creation of Next Action Star."<sup>133</sup> This case should not be interpreted to stand for this proposition. Rather, it should be read to mean that, in the absence of an inference of actual use, there can be no recovery under an implied-in-fact contract since the plaintiff cannot prove any breach. The issue of independent creation is, therefore, irrelevant in this context. The plaintiff's claim failed as a matter of law for only one true reason—he failed to state a prima facie case.<sup>134</sup> Had the plaintiff successfully established an inference of use, he would have created a disputed issue of fact as to that element and survived summary judgment.<sup>135</sup>

Unfortunately, there is additional language in this opinion that is potentially subject to inaccurate interpretation. Specifically, the court stated that "[b]ecause NBC ha[d] presented undisputed evidence of independent creation, thus *preventing* a finding of use, none of [the] appellants' causes of action [could] survive."<sup>136</sup> This statement is precariously open to misinterpretation. This language should stand only for the proposition that, in the absence of an inference of actual use, a defendant's evidence of independent creation is undisputed. Unfortunately, this language, taken at face value, seems to require plaintiffs to create issues of disputed facts in the underlying facts of the defendant's independent-creation defense, which is an unfair burden. Such language suggests that a court should require the plaintiff not only to prove his claim but also to *disprove* the defendant's independent-creation theory, which is not an element of an implied-in-fact contract claim.<sup>137</sup> Stated differently, if a plaintiff makes a prima facie showing of his claim, the burden should shift to the defendant to prove its affirmative defense. If the defendant fails

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133. *See id.* at 293.

134. *See id.* at 292.

135. *See id.*

136. *Id.* (emphasis added).

137. *See supra* text accompanying note 30.

to do so, then it loses. A plaintiff should not be required to disprove the affirmative defense of independent creation, as this places the burden on the wrong party. Thus, it should not function as a bar to a plaintiff reaching a jury.

### 3. *Kightlinger v. White*

A California court recently applied the erroneous reasoning from *Hollywood Screentest* in an unpublished opinion when it upheld summary judgment for the defendant in *Kightlinger v. White*.<sup>138</sup> There, Laura Kightlinger filed suit for breach of an implied-in-fact contract against Mike White for using the ideas contained in her screenplay, “We’re All Animals,” in his own screenplay, “The Year of the Dog.”<sup>139</sup> In late 2002 or early 2003, Kightlinger gave White a copy of her screenplay, which he admitted to having read.<sup>140</sup> In late 2005, White wrote a similar screenplay.<sup>141</sup> The defendant asserted that he had not copied the plaintiff’s work but had instead used his own life experiences as source material for his work.<sup>142</sup>

In analyzing the claim, the court first stated that the plaintiff could establish an interference of use by showing that the defendant had access to the idea and copied it.<sup>143</sup> The court then stated that if the plaintiff could show substantial similarity between the works, she could establish an inference of use.<sup>144</sup> The court did not analyze access, because the defendant admitted to having read and retained the plaintiff’s work.<sup>145</sup> The court then explained that, when examining the similarity prong, “[t]here is no bright line test for determining whether two works are substantially similar.”<sup>146</sup> The court stated that its role was to assess whether a reasonable juror could find the works substantially similar, and it concluded that a

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138. *Kightlinger v. White*, No. B210802, 2009 WL 4022193, at \*1 (Cal. Ct. App. Nov. 23, 2009). Although the opinion is unpublished and therefore is not binding, it is indicative of the issues materializing in the wake of *Hollywood Screentest*.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at \*10.

143. *Id.* at \*3, \*9.

144. *Id.*

145. *Id.*

146. *Id.*

reasonable juror could not.<sup>147</sup> After determining that there was no substantial similarity between the works,<sup>148</sup> the court took one final step, holding that the defendant had demonstrated through “uncontradicted evidence” that he independently created his work.<sup>149</sup> Quoting *Hollywood Screentest*, the court held that the “defendant’s evidence of independent creation [was] ‘clear, positive, uncontradicted and of such a nature that it [could not] rationally be disbelieved’ and, therefore, rebut[ted] an inference of use.”<sup>150</sup>

The court in *Kightlinger* erred in two respects in its analysis.<sup>151</sup> First, it misstated the law when defining how one established an inference of actual use.<sup>152</sup> But more importantly, the court indulged in an unnecessary review of the independent-creation defense and misapplied it while doing so. Having concluded that there was no substantial similarity between the two works—albeit through a flawed analysis—the court refused to grant the plaintiff an inference of actual use. Therefore, she failed to establish her prima facie case, and the court should have upheld summary judgment for the defendant on those grounds alone.

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147. *Id.*

148. *Id.* at \*6.

149. *Id.* at \*9.

150. *Id.* at \*10 (quoting *Teich v. Gen. Mills*, 339 P.2d 627,632 (Cal. Ct. App. 1959)).

151. It should be noted that the court also erred in a third way. The court, commenting on the *scènes à faire* that were common to both works, stated that the “defendant most likely gathered such ideas from the public domain . . . [and] conclude[d] [that] such scenes and references [could not] and [did] not form a basis for finding substantial similarity.” *Id.* at \*6. This conclusion that non-novel *scene-a-faires* could not be used when comparing the two works’ similarities was inaccurate. There is no requirement in California contract law that the ideas for which one seeks recovery be novel; therefore, the court erroneously excluded them as evidence of substantial similarity. *See Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010); *Blaustein v. Burton*, 88 Cal. Rptr. 319, 334 (Ct. App. 1970) (“An idea which can be the subject matter of a contract need not be novel or concrete.”); *Minnear v. Tors*, 72 Cal. Rptr. 287, 293 (Ct. App. 1968); *Chandler v. Roach*, 319 P.2d 776, 781–82 (Cal. Ct. App. 1958) (“We see no necessity to add the elements of novelty and concreteness to implied-in-fact contracts with reference to authors. Their status should be identically the same as that of any other person in any other implied-in-fact contract situation.”); *NIMMER & NIMMER*, *supra* note 4, § 19D.06[B][2][b] (“However, in 1957, the California Court of Appeal held that novelty is not a necessary element in implied-in-fact contract cases.”).

152. *See Kightlinger*, 2009 WL 4022193, at \*3. The court improperly asserted that a showing of substantial similarity would establish both access and copying. *See id.* Rather, it is similarity and access that together establish an inference of use. *Reginald v. New Line Cinema Corp.*, No. B190025, 2008 WL 588932, at \*4 (Cal. Ct. App. Mar. 5, 2008); *Kulik*, *supra* note 1, at 100.

However, the court also went on to state that the defendant's evidence of independent creation was "uncontradicted."<sup>153</sup> If the court based its conclusion on a finding that there was no inference of actual use, then such a statement would have been appropriate.<sup>154</sup> Instead, this holding was based on the proposition that the plaintiff had not disputed any of the defendant's underlying facts for his defense.<sup>155</sup> In this regard, not only did the court assign an improper burden to the plaintiff, but the facts of the case did not support the conclusion itself. First, in all past instances where the independent-creation defense had been successful, the defendant had shown that he acquired the offending work from an independent third party.<sup>156</sup> Here, the defendant allegedly created the screenplay *himself*.<sup>157</sup> Therefore, as a matter of legal theory, the independent-creation defense was entirely misplaced.<sup>158</sup> Further, the plaintiff's evidence showed that the defendant had access to her work.<sup>159</sup> All prior assertions of successful independent-creation defenses succeeded precisely because the independent creator proved that he had no access to the plaintiff's work.<sup>160</sup> Thus, because of this misguided application of the defense, this case displays how reliance on *Hollywood Screentest* will further occlude the true meaning and effect of the independent-creation defense.

#### 4. *Scottish American Media v. NBC Universal*

A final example of the misapplication of the independent-creation defense occurred in *Scottish American Media v. NBC*

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153. *Kightlinger*, 2009 WL 4022193, at \*10.

154. *See id.* ("Defendant's evidence demonstrates that, in significant and material respects, YOTD is based on events in his life and not on ideas in plaintiff's screenplay.")

155. *See id.* at \*9 ("We hold that, under the particular facts of this case, defendant demonstrated through uncontradicted evidence that he wrote and created ["The Year of the Dog"] independent[ly].")

156. *See, e.g.*, *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279 (Ct. App. 2007); *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522 (Ct. App. 1982); *Teich v. Gen. Mills, Inc.*, 339 P.2d 627 (Cal. Ct. App. 1959).

157. *Kightlinger*, 2009 WL 4022193, at \*9.

158. *See, e.g.*, *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279 (Ct. App. 2007); *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522 (Ct. App. 1982); *Teich v. Gen. Mills, Inc.*, 339 P.2d 627 (Cal. Ct. App. 1959).

159. *See Kightlinger*, 2009 WL 4022193, at \*1.

160. *See supra* Part IV.

*Universal*.<sup>161</sup> There, Maurice Fraser, who had no prior experience in the entertainment industry,<sup>162</sup> wrote a treatment for a song competition titled “Battle of the States.”<sup>163</sup> In June 2004, the plaintiff pitched his idea to a man named Plestis via telephone, but was unsuccessful.<sup>164</sup> The plaintiff then contacted Silverman,<sup>165</sup> who met with the plaintiff.<sup>166</sup> In this meeting, the plaintiff pitched his idea, and Silverman pointed out that his idea was just like *Eurovision*, a European television song competition.<sup>167</sup> Silverman subsequently rejected the plaintiff’s idea via e-mail, at which point the plaintiff went to NBC in person and allegedly gave a copy of his treatment to a new trainee, who allegedly promised to give it to Plestis.<sup>168</sup> Later, NBC and Reveille began developing a show called “American Anthem,” prompting the plaintiff to file suit, believing it to be an unlawful use of his idea.<sup>169</sup>

Not surprisingly, the defendants mounted an independent-creation defense in their motion for summary judgment.<sup>170</sup> They claimed that Silverman had come up with the idea to create an American version of *Eurovision* in 2005, which he pitched to NBC executive Jeff Zucker in June of that year.<sup>171</sup> In order to avoid rights issues, however, Silverman wanted to use the plaintiff’s treatment in place of *Eurovision*.<sup>172</sup> Silverman e-mailed NBC urging them to use the plaintiff’s idea, but NBC responded that it preferred *Eurovision*, at which point Silverman dropped the plaintiff’s concept.<sup>173</sup> Silverman’s company then acquired the rights to *Eurovision* and

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161. *Scottish Am. Media, LLC v. NBC Universal, Inc.*, No. B205344, 2009 WL 1124942 (Cal. Ct. App. Apr. 28, 2009). Although unpublished, this case demonstrates the improper development of the independent-creation defense in California courts.

162. *Id.*

163. *Id.* at \*2.

164. *Id.* at \*3.

165. Ben Silverman also does business as “Ben Silverman Productions LLC doing business as Reveille 1 and Reveille 2,” and is a television producer for domestic and foreign markets. *Id.* at \*1.

166. *Id.* at \*3.

167. *Id.*

168. *Id.* Neither the trainee nor Plestis had any recollection of the plaintiff’s treatment. *Id.*

169. *Id.* at \*5.

170. *Id.* at \*6.

171. *Id.* at \*4.

172. *Id.*

173. *Id.*



began working with NBC on the show.<sup>174</sup> Ultimately, NBC decided not to move forward with the project, and the show was never produced, despite Silverman's attempt to pitch it to other networks.<sup>175</sup>

The court relied on *Hollywood Screentest* as guiding precedent.<sup>176</sup> It began its opinion by acknowledging the independent-creation defense, stating that because NBC obtained the rights to *Eurovision* and put together a team, which developed the idea without using the plaintiff's work, the defendants did not use the plaintiff's treatment.<sup>177</sup> The court then stated the following rule: "Where [a] plaintiff conveys an idea to [a] defendant, and [the] defendant produces a product similar to [the] plaintiff's idea, an inference arises that [the] defendant used [the] plaintiff's idea. The inference may be dispelled by evidence of independent creation of defendant's product."<sup>178</sup> The court then pointed out that the plaintiff's argument of unlawful use was based on similarities between the two programs instead of on "evidence controverting [the] defendants' evidence of independent creation."<sup>179</sup> The court further inferred that the plaintiff had developed his idea based on *Eurovision*, and the court relied on copyright principles, holding that "protection [did] not extend to . . . material traceable to common sources."<sup>180</sup> In summation, the court relied on *Hollywood Screentest*, holding:

[The] plaintiffs presented evidence of similarity sufficient to raise an inference that [the] defendants used [the] plaintiff's idea. [The d]efendants dispelled the inference by presenting evidence of independent creation of [the] defendant's show. [The p]laintiffs failed to provide any evidence that call[ed] into question the evidence supporting independent creation. The trial court therefore properly

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174. *Id.* at \*5.

175. *Id.* at \*6.

176. *Id.* at \*8.

177. *Id.* at \*10.

178. *Id.* at \*8 (citations omitted) (citing *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279, 290–91 (Ct. App. 2007)).

179. *Id.* at \*10.

180. *Id.* (quoting *Chase-Ribound v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997)).

adjudicated summarily [the] plaintiffs' cause of action for breach of implied contract.<sup>181</sup>

The court, relying on the overbroad language from the *Hollywood Screentest* decision, misapplied both the law of ideas and the independent-creation defense. First, the court mistakenly began by analyzing the affirmative defense rather than the plaintiff's prima facie case.<sup>182</sup> Had the court done its analysis properly, it would have performed the requisite analysis of both substantial similarity and access, which are absent from the opinion.<sup>183</sup> Second, the court imposed the concept of novelty, necessary in copyright, but unnecessary in an implied-in-fact contract, to hold that any similarities between the works were not due to the defendant's use of the plaintiff's work but were instead due to both parties having used common source material.<sup>184</sup>

Third, the court criticized the plaintiff's evidentiary offering as inadequate because he had done nothing to dispute the underlying facts of the defendants' affirmative defense, and it awarded summary judgment for the defendant.<sup>185</sup> Such reasoning was erroneous because the court imposed a burden on the plaintiff not only to prove his prima facie case but also to *disprove* the defendants' affirmative defense before ever reaching a jury.<sup>186</sup> The potential misinterpretation of the *Hollywood Screentest* holding described above was realized in this opinion, for the court imposed on the plaintiff the additional burden of disproving independent creation in order to survive summary judgment.<sup>187</sup> Here, actual use was a disputed issue of fact. The plaintiff had presented evidence sufficient to establish an inference of actual use,<sup>188</sup> which when met with the defendants' independent-creation defense, created a disputed issue that should have gone to the jury for resolution. Instead, the court ignored this conflict and ruled that the plaintiff needed to provide

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181. *Id.* at \*11 (internal citations and quotations omitted) (citing *Hollywood Screentest*, 60 Cal. Rptr. 3d at 290–92).

182. *See id.* at \*10.

183. *See supra* text accompanying notes 31–43.

184. *See Scottish Am. Media*, 2009 WL 1124942, at \*10.

185. *Id.* at \*11.

186. *See supra* Part IV.A.2.

187. *See Scottish Am. Media*, 2009 WL 1124942, at \*11.

188. *Id.* at \*10.

evidence that called into question the defendants' affirmative defense in order to survive summary judgment.<sup>189</sup>

### 5. The Current Effect of the Independent-Creation Defense

The above examples illustrate that California courts have misapplied the independent-creation defense. Through their unstructured analyses and overbroad language, courts have seemingly stretched the defense far beyond its appropriate use. Additionally, the very logic underlying the defense is inapposite to basic principles of contract law.<sup>190</sup> The *Teich* court, in recognizing the independent-creation defense, sought to relieve idea recipients of liability upon a showing that they did not actually use a plaintiff's idea.<sup>191</sup> The effect of the defense, however, has been to impermissibly allow defendants to escape valid contractual obligations.<sup>192</sup> As explained above, the existence of two contractual obligations for the same service does not render one of those contracts invalid by default.

Although the unsuitability of the independent-creation defense highlights the problem, the defense itself is only part of a larger problem—the inadministrable body of California idea law. As it stands, California law not only potentially denies relief to deserving idea purveyors, but it also stands to wrongfully punish innocent idea recipients. This is so for one reason: when protection is afforded to ideas that arguably have no distinguishable characteristics,<sup>193</sup> there is no clear method for determining if actual use of an idea has occurred. This does not mean that purveyors of nonnovel and nonconcrete

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189. *Id.* at \*11.

190. See SELZ ET AL., *supra* note 11, § 15:6.

191. See *Teich v. Gen. Mills, Inc.*, 339 P.2d 627, 634–35 (Cal. Ct. App. 1959).

192. See *supra* Part IV.

193. See *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010); *Blaustein v. Burton*, 88 Cal. Rptr. 319, 334 (Ct. App. 1970) (“An idea which can be the subject matter of a contract need not be novel or concrete.”); *Minniear v. Tors*, 72 Cal. Rptr. 287, 293 (Ct. App. 1968); *Chandler v. Roach*, 319 P.2d 776, 781–82 (Cal. Ct. App. 1957) (“We see no necessity to add the elements of novelty and concreteness to implied-in-fact contracts with reference to authors. Their status should be identically the same as that of any other person in any other implied-in-fact contract situation.”); NIMMER & NIMMER, *supra* note 4, § 19D.06[B][2][b] (“However, in 1957, the California Court of Appeal held that novelty is not a necessary element in implied-in-fact contract cases.”). An idea that is neither novel nor concrete is arguably indistinct from other similar ideas.

ideas are not worthy of legal protection for their service of disclosure, but rather that affording them such protection raises a serious issue of administrability.

If proponents of the independent-creation defense wish for it to be reliable, then the law must provide a jury with the tools necessary to distinguish whether a work's source was one distinct idea or another.<sup>194</sup> However, in California, where courts afford ideas protection regardless of novelty and concreteness,<sup>195</sup> there is no guarantee that an idea will be uniquely identifiable within a potentially infringing work. Stated differently, two seemingly identical ideas from two different purveyors are currently presented to a jury (1) as a plaintiff's story of the creation and submission of her idea—the implied-in-fact contract claim—and (2) as the defendant's equally compelling story of the creation of the work from another idea—the independent-creation defense.<sup>196</sup> The two ideas—or single idea with two sources—likely appear interchangeable in the eyes of a jury, rendering the independent-creation defense useless to negate the element of actual use and leading to both juror confusion and unpredictable verdicts.

## V. PROPOSED SOLUTIONS

All hope is not lost, however. Two possible solutions can resolve the conflicts between the independent-creation defense and contract policies<sup>197</sup> and can mitigate the uncertainty and inadministrability created by the current inconsistencies in the law of ideas. The first solution proposes a reform of the analysis that courts currently (ideally) apply to *Desny* claims. The second solution leaves the current body of law intact but instead suggests alterations to the effect of the independent-creation defense and the remedies to which one is entitled. While both proposals offer relief, ultimately this Note argues that the former is preferred in order to remedy the theoretical inconsistencies in the current body of law.

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194. See Casido, *supra* note 15, at 338; Kulik, *supra* note 1, at 107 (“In a number of appellate decisions it has been recognized that actual use will rarely, if ever, be susceptible of proof by direct evidence. Instead, ‘use’ of the idea by the defendant is almost always proven circumstantially.”).

195. *Benay*, 607 F.3d at 629; *Blaustein*, 88 Cal. Rptr. at 334.

196. See *supra* text accompanying notes 44–51.

197. *Michaud & Tulquois*, *supra* note 9, at 77.

A. *Novelty as to the Recipient*

The first proposed solution alters the idea-disclosure analysis performed in implied-in-fact contract disputes. Stated plainly, California courts should presume that the parties negotiated the implied-in-fact contract on the following terms: the idea purveyor promised to disclose an idea that was *novel as to the recipient* in exchange for payment from the recipient in the event of actual use. The additional presumption of “novelty as to the recipient” better protects idea recipients from multiple lawsuits for the same idea submission, while still protecting the idea purveyors’ right to enforce a specifically negotiated contract for the disclosure of an idea that was not novel.

“Novelty as to the recipient” is not to be confused with unqualified novelty.<sup>198</sup> This proposed standard would establish that a common and unoriginal idea, as long as it was unknown to the idea recipient prior to disclosure, would satisfy the terms of the implied-in-fact contract.<sup>199</sup> The functional result of this standard would be to protect an idea recipient from accumulating contractual obligations with every party who pitched him the “same” idea. He or she would, therefore, be bound only to compensate the first idea purveyor in the event of actual use, for that purveyor would have been the only one who satisfied the contractual term of novelty as to the recipient.

It is also important to note that this proposed term is merely a rebuttable presumption; it is malleable depending on the factual circumstances and will not stand as a complete bar to a plaintiff’s recovery. Unlike a required element that ideas be novel as to the world before one can even establish his or her prima facie case,<sup>200</sup> a presumption just shifts the burden of proof to the plaintiff to overcome the presumed term of novelty as to the recipient. Therefore, it is a lesser burden on the plaintiff in two respects: (1) either novelty must only be shown as to *one* person instead of the whole world or (2) the nonnovelty contractual term must be

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198. Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119, 147 (1954).

199. *Id.*

200. Kulik, *supra* note 1, at 102 (“[T]he notion that novelty is not a prerequisite is a major distinction between California law and New York law, which continues to require novelty and originality.”); *see also* Miller, *supra* note 1, at 727 (“[A]rticulations of the novelty requirement establish a threshold barrier demonstrating a longstanding unwillingness to allow the factfinding function of an actual trial to take place.”).

established, rather than not even being an option. Further, this proposed presumption merely acts as a tool for better administering legal relief as a tribunal attempts to identify the terms of a contract, rather than as an inappropriate inquiry into the adequacy of the consideration between contracting parties.<sup>201</sup>

As one court stated, “There is nothing unreasonable in the assumption that a producer would obligate himself to pay for the disclosure of an idea which he would otherwise be legally free to use, but which in fact, he would be unable to use but for the disclosure.”<sup>202</sup> The alternate view presented here is that there is similarly nothing unreasonable in the assumption that a producer would obligate himself to pay only for the disclosure of an idea with which he was not already familiar.<sup>203</sup> Further, upon an adequate evidentiary showing, a plaintiff could still rebut the presumption and establish that the contract was for the disclosure of an idea not novel to the recipient. The idea of a presumed term, rather than an absolute term, acknowledges and respects that where there is a contract for an idea, which does not by its terms require novelty, there is no justification for imposing such a term.<sup>204</sup>

If California courts adopt this presumed term into the analytical framework of a *Desny* claim, the independent-creation defense will become logically sound. Whichever idea purveyor contracts with the recipient first—i.e., discloses his idea to the recipient first—will be the only party to whom the recipient owes compensation in the event of actual use, for only the first party will have satisfied the term of novelty as to the recipient. Such an idea hearkens back to the common law protection afforded to land owners in a real property dispute, in that “first in time is first in right.”<sup>205</sup>

Of course, the concern of idea purveyors will be that such a presumption will be impossible to overcome. Arguably, any idea

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201. In California, it is well settled that the conveyance of an idea can serve as valid consideration, regardless of novelty or concreteness. *Literary and Artistic Property*, *supra* note 9, § 16; *see also* *Desny v. Wilder*, 299 P.2d 257, 273 (Cal. 1956) (“It is not essential to recovery that plaintiff’s story or synopsis possess the elements of copyright protectibility [sic] if the fact of consensual contract be found.”).

202. *Blaustein v. Burton*, 88 Cal. Rptr. 319, 334 (Ct. App. 1970).

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

204. *See Nimmer*, *supra* note 198, at 145.

205. *See United States v. City of New Britain, Conn.*, 347 U.S. 81, 85 (1954).

recipient could escape a contractual obligation by simply claiming that he was already familiar with the idea, especially if it is a well-known idea. The effect of this presumed term is not intended, however, to allow an idea recipient to shield himself from all liability. Rather, it only protects the recipient from undeserved liability where he or she has not actually used the plaintiff's idea. As such, it is a method for shielding idea recipients from liability to multiple idea purveyors.

A plaintiff can simply rebut the idea recipient's claim of nonnovelty by pointing to the mere fact that the defendant chose to use the idea subsequent to disclosure.<sup>206</sup> This temporal element will evidence that the idea was novel as to the recipient, because he had not used it *before* disclosure.<sup>207</sup> As has been recognized in California courts, the timing of an idea disclosure can be the very element that imbues value on the underlying idea.<sup>208</sup> If a jury then refuses to recognize that a plaintiff's idea was novel to and actually used by the defendant, it seems only fitting that the plaintiff would not be entitled to recover in that instance. If a plaintiff lacks sufficient evidence to persuade a reasonable jury to find in his or her favor, a denial of relief would not be unjust.

### B. Fractional Damage Awards

The second proposed solution leaves the entirety of the California law of ideas intact but, instead, modifies the effect of the independent-creation defense. As it stands today, a successful defense is a complete bar to a plaintiff's recovery.<sup>209</sup> However, as established above, this unlawfully extinguishes some valid contractual claims.<sup>210</sup> The proposition here is that the effect of an independent-creation defense should be modeled after the tort concept of pure comparative negligence, which would offer

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206. See Nimmer, *supra* note 198, at 146.

207. An idea recipient might argue that such a "timing" model places an undue burden on the idea recipient to read all idea submissions to avoid possible liability if he independently developed a similar show subsequent to receipt. This is easily remedied, however, by requiring that idea purveyors sign industry-standard releases, relinquishing their rights and acknowledging that no implied-in-fact contract has been created by mere submission. NIMMER & NIMMER, *supra* note 4, § 19D.10; Brophy, *supra* note 2, at 526–27.

208. Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 134 (Ct. App. 1966).

209. Kulik, *supra* note 1, at 108.

210. See *supra* text accompanying notes 85–90.

proportional relief to both parties.<sup>211</sup> Although such a solution does not remedy the legal inconsistencies discussed in this Note and is therefore less effective, it at least equitably distributes the burdens imposed under the current state of the law.

If the plaintiff establishes the existence of his implied-in-fact contract and further gains the inference of actual use, it logically follows that he is entitled to recovery. If the defendant then establishes, via independent creation, that he has contracted with another party for the same idea, it logically follows that he could escape a proportion of his obligation to the plaintiff based on the amount that he actually used both his independent, third-party idea and the plaintiff's idea. The court would, of course, present this question to the jury to assess the degrees to which each idea was used in creating the final offending work.<sup>212</sup>

Implementing such a system would strike a compromise between the interests of both idea purveyors and idea recipients, for it affords the purveyor protection and protects the recipient from unreasonably paying multiple damages for the same conduct.<sup>213</sup> The frequent method for damage calculation in idea-submission claims is restitution.<sup>214</sup> If a court determines the amount that a plaintiff is entitled to recover by the amount that his idea enriched a defendant, then it is fitting that he should only be able to recover the precise amount that his idea actually enriched the defendant. It is not

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211. Under a system of pure comparative negligence, when calculating damages in a negligence action, responsibility and liability for damage are assigned in direct proportion to the amount of negligence of each of the parties. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975). The result of applying this system is that “the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering.” *Id.* An analogous system in implied-in-fact contract recovery would then award damages to a plaintiff in proportion to the amount of actual use of his idea that is attributable to the defendant, while relieving the defendant of any further liability to that party. The remaining “actual idea use” liability would be attributable to either the defendant's use of his own idea or his use of a third party's idea. For example, if one idea with three sources is used by one defendant, he will be held liable to each of the three idea purveyors in proportion to the amount he actually used each plaintiff's idea.

212. *See id.* at 1240.

213. “At issue in every idea submission case are the interests of two competing classes: those who conceive and submit ideas and those who receive and use them. Inevitably, decisions must chart a course that balances the rights and obligations of each class.” NIMMER & NIMMER, *supra* note 4, § 19D.07[A].

214. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 42 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 371 (2010); *see Kulik, supra* note 1, at 108.



necessary that recovery in these cases be an all-or-nothing proposition.

Idea recipients might be staunchly opposed to such a solution because they would have no way of truncating litigation—and litigation costs—by prevailing in a suit at the summary judgment phase. However, as mentioned above, there are standard industry practices that protect idea recipients from litigation in the first place—releases.<sup>215</sup> One cannot overlook that the only reason that there is room for a plaintiff to bring an idea theft claim is, generally, because a defendant did not take steps to protect himself in the first place. The answer to eliminating litigation costs for the idea recipients, who are the unwilling participants in such suits, is not to eliminate the idea purveyor's right to file suit, but rather to incentivize the idea recipient to (1) avoid unlawfully using a plaintiff's ideas and (2) take anticipatory steps to protect himself.

In addition, the idea purveyor is in no position to protect herself, for it is rare that a network executive would ever agree to sign a nondisclosure or confidentiality agreement.<sup>216</sup> The entertainment industry is already difficult enough to break into, and any network, when faced with resistance from an idea purveyor, would simply forego the submission and move on to the next of the thousand ideas coming across its desks.<sup>217</sup> As between the innocent idea purveyor and the network, the network is the party that has caused harm by using the idea without compensation, and thus it should incur the loss. To hold otherwise would unjustly enrich the defendant network for the value of the idea purveyor's services.

Economically speaking, imposing "comparative liability" for failure to pay contracted idea purveyors will have the positive effect of incentivizing networks to engage in negotiations and development with only those parties in whose ideas they have genuine interest. This will save many idea purveyors time and money, as they will be less likely to be misled by a network for years only to be met with rejection. Further, unless comparative liability is imposed on the networks, idea purveyors will be disincentivized from submitting ideas for fear of idea theft. There would be no recourse for breach of

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215. NIMMER & NIMMER, *supra* note 4, § 19D.10; Brophy, *supra* note 2, at 526–27.

216. See Rubin, *supra* note 3, at 697–98.

217. See *Desny v. Wilder*, 299 P.2d 257, 280 (Cal. 1956) (Carter, J., concurring).

their implied-in-fact contracts in the wake of an independent-creation defense. The entertainment industry would collapse without the constant influx of fresh ideas, for, as the defendants will certainly agree, they rely on the contributions of idea purveyors for their economic survival.<sup>218</sup>

Moreover, if there is no liability imposed for the breach of valid implied-in-fact contracts, the court would essentially be taxing a class of idea purveyors and forcing them to subsidize the idea recipients' pursuit of new and fresh media programming. It is not unreasonable to ask entertainment companies to pay for the ideas that purveyors present to them and that lead to television programs and films. It is, however, unreasonable to deny the unfortunate person with a valid implied-in-fact contract his compensation because the network previously or subsequently contracted with another party for an identical idea.<sup>219</sup> The law should not permit an idea recipient to simply choose which contractual obligations it will honor and which it will not. The court has a responsibility to uphold the freedom of contract and enforce an idea recipient's contractual obligations to idea purveyors.

## VI. CONCLUSION

If left unchanged, the protection that California courts afford to idea purveyors runs the risk of being both underinclusive and overinclusive due to its inconsistencies. Therefore, courts must adopt one of the above solutions. Only one of them seems to adequately protect the interests of both idea purveyors and recipients alike: novelty as to the recipient. The analytical framework of implied-in-fact contracts must itself be changed in order to remedy the theoretical inconsistencies between the independent-creation defense and California idea law. Only then will businesses be able to structure their future ventures in order to avoid liability. Only then

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218. See Brophy, *supra* note 2, at 508 (“[I]n the current media landscape dominated by reality television, a raw unscripted idea can have considerable value even before it is ever reduced to its final tangible expression.”); Miller, *supra* note 1, at 711–12.

219. See *Desny*, 299 P.2d at 267 (“The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover.”).

will future litigants be able to better strategize and predict the outcomes of their disputes.

While fractional damage awards might enable parties to avoid paying multiple damages, the present theoretical inconsistencies would still remain. Idea recipients would potentially be locked into nuisance suits, and idea purveyors would potentially be denied rightful recovery because of a misapplied independent-creation defense. Moreover, parties would get no relief from their litigation costs if courts adopt such a solution. While fractional damage awards may appear just, in practice, litigants would be paying for the same number of billable hours only to be awarded or penalized with reduced damage awards or liabilities.

In conclusion, through the incorporation of the presumed term of novelty as to the recipient, the independent-creation defense will gain theoretical validity in the context of California contract law. This solution will ensure that a defendant with a valid independent-creation defense from a previous idea disclosure presumably escapes undue liability, while upholding the basic principles of contract. Likewise, idea purveyors will benefit, for no longer will the improper application of the independent-creation defense render their valid implied-in-fact contracts valueless.