

TELEVISION FORMATS—THE SEARCH FOR PROTECTION†

The rapid expansion of the broadcasting industry over the past half-century has given rise to many legal problems which cannot be resolved by resort to concepts developed in an earlier era. One especially perplexing problem centers around the legal status of radio and television formats, which do not fit into traditional definitions of literary property. This Comment traces the development of the law in this area, and suggests some new approaches for dealing with formats.

One of the unique by-products of the entertainment revolution which began with the advent of broadcasting some 50 years ago is that backbone of the industry, the series. This is the radio or television program with which we are all familiar—the same characters, in a relatively fixed setting, being involved in a different story each week.¹ To many, doubtless, a series is one of the less appealing features of the so-called television “wasteland.” Whatever the validity of these criticisms, series have proven a fertile source of litigation, from 1938² to the present day.

Much of this litigation has centered around series “formats.” In the typical suit, a writer has created what he considers a saleable format, or general outline, for a series and has presented it to a producer, who refuses to purchase it. The producer later assembles a series with the same elements and the writer promptly instructs his attorney to bring suit for the theft.³ Such a suit, however, will present some rather difficult legal problems; for even assuming that the producer did deliberately make use of the writer’s format, it still remains to be seen precisely

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1. “Series” generally means this sort of program, but for purposes of this Comment it may also be taken to include other shows of a periodic nature, such as game shows or anthologies.

2. *Midwest Recordings, Inc. v. Mid-Continent Petroleum Co.* (D. Minn. 1938) (unreported), summarized in Logan, *Legal Protection of Ideas*, 4 Mo. L. Rev. 239, 246 (1939). The case concerns a radio show, but the differences between radio and television series have no bearing on the legal issues discussed in this Comment.

3. The series of events leading from creation of the format to its purchase is somewhat more involved. A good description may be found in Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 U.C.L.A.L. Rev. 735, 756-57 (1967). See also R. WINCOR, *LITERARY PROPERTY* 31-47 (1967). “Producer” is used in this Comment as a generic term meaning any person other than the writer who would be interested in utilizing the contents of a format for either sale or production.

what the producer has taken and whether this taking constitutes an actionable wrong. The resolution of these problems necessarily turns on the legal status accorded to formats—and it is on this very point that the law is most confused. This Comment will discuss the need for legal protection of formats and the protection currently available, and will suggest a new approach to protection which conforms to present commercial realities.

I

THE NEED FOR PROTECTION

The most comprehensive definition of a "format" appears to be that used by the entertainment industry itself:

The term "Format" means a written presentation which sets forth the framework of the serial or episodic series within which the central running characters will operate and which framework is intended to be repeated in each episode, the setting, theme, premise or general story line of the proposed serial or episodic series and the central running characters which are distinct and identifiable including detailed characterizations and the interplay of such characters. It may also include one or more suggested story lines for individual episodes.⁴

Formats are thus an unusual sort of literary creation. Unlike books, they are not meant for reading. Unlike plays, they are not capable of being performed. Unlike synopses, their use entails more than the expansion of a story outline into a script. Their unique function is to provide the unifying element which makes a series attractive—if not addictive—to its viewers.⁵

That formats are of great importance in the television industry can hardly be doubted. The fact is reflected in the industry's minimum Basic Agreement⁶ itself, which not only fixes a minimum price of 1,120 dollars for a format,⁷ but also sets out an elaborate arbitration proce-

4. Writers Guild of America, 1960 Television Film Basic Agreement (as modified by memorandum of June 15, 1966, *re*: 1966 WGA TV Film Negotiations, art. 1(i)(aa)) [hereinafter cited as MBA (Minimum Basic Agreement)]. This agreement is in force throughout the television-film industry. The 1966 MBA's definition of format superseded an earlier one which consisted of only the first phase of the current definition. 1960 MBA, art. I-r. In June, 1970, the MBA was renegotiated, but no change was made in the definition of "format." It should be noted that earlier definitions of "format" were not so elaborate.

5. It has been observed that "the literary content of a particular program is perhaps no more important than the format or mode of presentation from which the series derives its basic structure." Gershon, *Contractual Protection for Literary or Dramatic Material: When, Where and How Much*, 27 S. CAL. L. REV. 290, 306 (1954).

6. See note 4 *supra* and accompanying text.

7. Writers Guild of America, 1966 Television Film Basic Agreement Rate Schedule (second period rates effective June 16, 1968). This is almost the price of a

ture for determining the persons entitled to credit for it.⁸ The number of new series produced each year and the amount spent on them also indicate that formats are, indeed, a vital link in the chain of production.⁹ Formats may involve months of research and writing; they "are often fifty to a hundred typewritten pages long and contain writing of considerable intellectual effort and at least putative creative originality."¹⁰ Formats are, in short, as valuable commodities in the entertainment marketplace as other types of literary creation; and in the industry market, one who uses a format is expected to pay for it. Now the fact that a certain market practice exists is not in itself sufficient to warrant giving that practice the force of law by providing legal remedies for its abuse. Formats, however, are very much akin to other literary creations,¹¹ the right to legal protection of which has never been doubted. When this kinship is acknowledged, along with the writer's legitimate need to secure for himself the fruits of his labor, there is a strong argument for according legal protection to formats.¹²

full script for a half-hour show. See *id.*; Libott, *supra* note 3, at 757. Formats also customarily command high option prices [Rate Schedule, *supra*], a significant feature of format market practice in that it indicates, first, that the purchase price of a format is paid mainly for the format *itself*, not for the labor involved in writing it, and, second, that the writer may retain, or more properly, reacquire the right to use his format despite its having been communicated to someone else. These practices are characteristic of dealings in *property*. See discussion of the property theory of protection at notes 122-49 *infra* and accompanying text.

8. Writers Guild of America, memorandum of Apr. 26, 1967, *re*: Arbitration for Separated Rights.

9. See, e.g., Libott, *supra* note 3, at 757. Libott estimates that 40 to 50 new series are aired each fall. *Id.* at 756. A television specialist for the trade paper *Daily Variety* estimates that 30 new series were aired in the Fall of 1969. Letter from Dave Kaufman to author, Feb. 18, 1970, on file with the *California Law Review*. Many more are produced as "pilots"; Libott estimates as many as 200, [Libott, *supra* at 757], although Kaufman estimates that only 50 to 60 were made for the 1969-70 season. The number of submissions of formats and "ideas" may reach a yearly figure of 800, according to Kaufman. As early as 1958, an attorney for NBC speculated that the network received 30,000 to 40,000 "suggestions" each year, of which "[f]rom 2,000 to 3,000 get some serious study." Olsson, *Dreams for Sale: Some Observations on the Law of Idea Submissions and Problems Arising Therefrom*, 23 LAW & CONTEMP. PROB. 34, 35 (1958). Accurate statistics in this area are generally not available. See Kaufman letter, *supra*.

10. Libott, *supra* note 3, at 759. This length is probably high, but formats of 20-30 pages are not unusual. Compare the length of a half-hour television script (28-30 pages).

11. See notes 25-28 *infra* and accompanying text.

12. As to a writer's need for protection in general, see *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 796-97, 256 P.2d 947, 960 (1953) (Carter, J., dissenting); *Kurlan v. CBS*, 40 Cal. 2d 799, 256 P.2d 962 (1955) (format case). "[I]f [California's] laws are inadequate for the protection of the individual creative writer who must find a market for his work, then those laws must be amended." *Id.* at 819-20, 256 P.2d at 975 (Carter, J., dissenting). Katz, *The Publication of Intellectual Productions—A Common Sense Approach*, 30 S. CAL. L. REV. 48, 63, *passim* (1956); Libott, *supra* note 3, at 759; Comment, 24 S. CAL. L. REV. 65, 74 (1950); cf. *International News*

Only the law's traditional reluctance to grant property status to mere ideas¹³ appears to stand in the way. What is ultimately at issue is whether a fair and workable method exists which will allow format protection and at the same time preserve the free use of "mere" ideas.¹⁴

II

THE IMPACT OF FEDERAL COPYRIGHT LAW

The logical place to begin the search for legal protection of literary works is the Federal Copyright Act.¹⁵ An examination of federal copyright law will necessarily involve a consideration of both the protection which is now or may become available and the extent to which federal law precludes other modes of protection.

A. *The Prospects for Federal Protection*

Attempts to claim copyright of a format by registration of a script embodying the format have been unsuccessful.¹⁶ In two of the three decisions dealing with the problem, the courts looked solely to the script as the object of infringement;¹⁷ in the third case the court reserved decision, and the matter was dropped on appeal.¹⁸ The current position of the Register of Copyrights is that "it is not possible to register a claim to copyright in the idea for a motion picture, television program, or any

Serv. v. The Associated Press, 248 U.S. 215, 247-48 (1918) (opinion of Holmes, J.). An early statement of the writer's case may be found in Brief for Screen Writers Guild as Amicus Curiae at 12-14, *Weitzenkorn v. Lesser*, *supra* (stressing the need for contractual protection).

13. See notes 21-24 *infra*, and accompanying text.

14. Nothing in this Comment should be understood to condone "strike" or "nuisance" suits, based on claims which are "the product of nothing but the hope that, to avoid the expense and irritation of litigation, the owner of a successful [work will] buy his peace." *Millstein v. Leland Hayward, Inc.*, 10 F.R.D. 198, 200 (S.D.N.Y. 1950). The fear of such suits is commonly expressed by defendants in "idea" cases, and it must be conceded that it is hardly groundless. However, judges are not so unperceptive, nor defense counsel so inept, as to be totally unable to thwart many of these attempts early in the game. Judges have shown little patience with patently frivolous claims. *E.g.*, *Christie v. Cohan*, 154 F.2d 827, 828 (2d Cir. 1946); *Rose v. Connelly*, 38 F. Supp. 54, 55 (S.D.N.Y. 1941); *Lewys v. O'Neill*, 49 F.2d 603 (S.D.N.Y. 1931). Besides, the "nuisance value" of such suits "is hardly a good reason for denying to the legitimate creator the fruits of his intellectual labor and inspiration." *Libott*, *supra* note 3, at 771.

15. 17 U.S.C. §§ 1-216 (1964).

16. See notes 17 & 18 *infra*.

17. *Dngan v. ABC*, 216 F. Supp. 763, 766 (S.D. Cal. 1963); *Richards v. CBS*, 161 F. Supp. 516, 519 (D.D.C. 1958). In both of these cases, the writer complained of infringement of his format for a television game show, claiming ownership of the format by virtue of a copyright on the script for a single show.

18. *ABC v. Wahl*, 36 F. Supp. 167 (S.D.N.Y. 1940), *modified*, 121 F.2d 412 (2d Cir. 1941) (copyright of a radio quiz show alleged).

other kind of work."¹⁹ This position, however, is not compelled by authority. The Copyright Act itself contains no such limitations, and the decisions are filled with language sympathetic to a theory of protection such as that propounded herein.²⁰

1. "Ideas" and "Expression"

The primary obstacle to federal protection for formats is the idea-expression dichotomy. By now it is hornbook law that while "[t]here may be literary property in a particular combination of ideas or in the form in which the ideas are embodied[, t]here can be none in the ideas."²¹ This proposition was refined by the Court of Appeals for the Second Circuit in four leading cases²² to read: ". . . only in the 'expression' of a copyrighted work does any monopoly inhere; the 'theme,' the 'plot,' the 'ideas' may always be freely borrowed."²³ Closely tied to "expression" is "concreteness," in that "the courts extend protection *not* to ideas, but to the concrete forms in which they are embodied."²⁴ The reason for this policy is self-evident. Ideas, in the broadest sense, are simply thoughts and abstractions; were they to be protected, the field of permissible literary endeavor would rapidly become intolerably restricted as more and more ideas came under the ownership of individuals, and hence unusable by all others.

While no one would contest the general principle, in practice it has given rise to considerable confusion, for it is not at all clear that everything which might conceivably be called an idea is unprotectible. Copyright protection has never been limited to the mere tracking of words, and as a result courts have actually been protecting ideas—although under other labels—for many years. In this manner, courts have protected not only plots²⁵ and characters,²⁶ but also gags and stage busi-

19. See Krasilovsky, *The Copyright Dilemma*, VII TELEVISION Q. No. 4, at 33, 34 (1968); Libott, *supra* note 3, at 759. It seems clear that by "idea . . . for a television program" the Register can only be referring to formats or some similar development of a general, abstract idea.

20. See pt. IV *infra*.

21. Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56, 58 (1930).

22. Dellar v. Samuel Goldwyn, Inc., 150 F.2d 612 (2d Cir. 1945); Shipman v. RKO Pictures, Inc., 100 F.2d 533 (2d Cir. 1938); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

23. Dellar v. Samuel Goldwyn, Inc., 150 F.2d 612 (2d Cir. 1945).

24. Yankwich, *The Development of the Law of Intellectual Property and Creative Arts in the Western States*, 7 HAST. L.J. 123, 124 (1956). See, e.g., National Comics Publication v. Fawcett Publications, 191 F.2d 594, 600 (2d Cir. 1951).

25. E.g., Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936). "Surely the sequence of these details [i.e., the plot] is pro tanto the very web of the author's expression" *Id.* at 55. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930). "[W]e do not doubt that two plays may correspond in plot closely

ness²⁷ and even the action of a single scene.²⁸

The ease with which the necessary characterization of "ideas" and "expression" are made in such cases indicates that there is nothing inherent in the rule against protecting ideas which would prevent extending statutory protection to formats, since formats are not so markedly different from other elements already protected. Consider, for instance, a plot: To be sure, it is a single dramatic unit, whereas a format may be used as the basis for many plots. But both are essentially parts of a dramatic skeleton whose main function is to support the flesh and blood of a final product. That a format emphasizes details of character and setting rather than story line should make no substantive difference. Neither plots nor formats are complete in themselves, but both are necessary ingredients of the final television script. Classifying them arbitrarily as either "ideas" or "expression" overlooks the import of the idea-expression doctrine. The separation between the two categories is not a sharp line, but rather a continuum running from the initial abstract conception in the writer's mind to an ultimate concrete product such as a final script. As Judge Learned Hand observed in *Nichols v. Universal Pictures Corp.*:²⁹

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [B]ut there is a point in this series of abstractions where they are no longer protected

However, only one case to date has explicitly undertaken a continuum analysis in the area of formats. In *Hamilton National Bank v. Belt*,³⁰ common-law protection of a radio format was claimed, and the

enough for infringement." *Id.* at 121. See generally *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926); *London v. Biograph Corp.*, 231 F. 696, 699 (2d Cir. 1916); cases cited note 22 *supra*; Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457 (1952). More recently, see *Bradbury v. CBS*, 287 F.2d 478 (9th Cir. 1961). One early court even said that "[i]t is enough if the essence of a play is taken from an original . . . production" *Dam v. Kirk LaShelle Co.*, 166 F. 589, 592 (S.D. N.Y. 1908), *aff'd*, 175 F. 902 (2d Cir. 1910).

26. *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 97 (1955); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Maurel v. Smith*, 220 F. 195 (S.D.N.Y. 1915).

27. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) (sequence of 57 comedy scenes).

28. *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (No. 3,552) (S.D.N.Y. 1868). The scene involved the rescue of the heroine tied to the railroad tracks, and once it became popular the protection was curtailed. *Daly v. Webster*, 56 F. 483 (2d Cir. 1892). But see *Rush v. Oursler*, 39 F.2d 468, 473 (S.D.N.Y. 1930).

29. 45 F.2d 119, 121 (2d Cir. 1930) (emphasis added). See *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 151 P.2d 906 (2d Dist. 1944). "Whether an idea is expressed in concrete form is a matter of degree." *Id.* at 159, 151 P.2d at 911. "Concrete," of course, does not merely mean "written"; any "abstract idea" can be put in writing. Rather, it refers to the fullness of (written) development.

30. 210 F.2d 706 (D.C. Cir. 1953). Plaintiff had submitted to defendant

court concluded:

We think . . . that in the field of radio broadcasting concreteness may be between the boundaries of mere generality on one hand and, on the other, a full script containing the words to be uttered and delineating the action to be portrayed.

. . . These details [in the format being sued on] when added to the basic general idea, which, alone, would be too abstract, give sufficient concreteness.³¹

However, the Register's position that formats cannot be protected generally prevails today, despite the fact that there appears to be nothing in the idea-expression doctrine precluding an analysis such as that in *Belt*.

2. *Combinations of Ideas*

An even stronger basis for statutory protection may be found in a "combination of ideas" approach. Courts reluctant to grant copyright protection to "ideas" as such have been more inclined to protect "a particular combination of ideas where the idea is reduced to concrete form."³² Judge Yankwich has drawn such a distinction with respect

bank a rather detailed outline for a radio talent show. They entered into a contract, but it was subsequently cancelled. When defendant went ahead and produced the series with a third party, plaintiff sued for infringement of his common-law copyright in his outline.

31. *Id.* at 709. Libott hails this case as "a lonely beacon in recent legal bibliography for a property . . . theory of recovery" [Libott, *supra* note 3, at 761], but says that it "appears to be a maverick which has not been followed, even in its own jurisdiction." *Id.* at 758. In a vituperative article criticizing virtually all "idea" recoveries, an attorney for NBC criticizes the *Belt* reasoning as superficial. Olsson, *supra* note 9, at 41-42. The court unnecessarily injected contract doctrine into its decision, leading Professor Nimmer to categorize it as a contract case. M. NIMMER, NIMMER ON COPYRIGHT 719 (1969). The court also posited a requirement of novelty. See *Noble v. CBS*, 270 F.2d 938, 939 (D.C. Cir. 1959), distinguishing *Belt* on this ground. A full reading of *Belt* is recommended.

32. *Gordon v. Weir*, 111 F. Supp. 117, 122 (E.D. Mich. 1953). See, e.g., *Eisen-schimi v. Fawcett Publications*, 246 F.2d 598, 603 (7th Cir. 1957); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947); *Edwards & Deutsch Lithographing Co. v. Boorinan*, 15 F.2d 35 (7th Cir. 1927); *Costello v. Loew's Inc.*, 159 F. Supp. 782, 784 (D.D.C. 1958); *O'Rourke v. RKO Radio Pictures*, 44 F. Supp. 480, 483 (D. Mass. 1942); *Lowenfels v. Nathan*, 2 F. Supp. 73, 80 (S.D.N.Y. 1932); *Simonton v. Gordon*, 12 F.2d 116, 120 (S.D.N.Y. 1925). See also the early cases of *Lawrence v. Dana*, 15 F. Cas. 27, 57-58 (No. 8,136) (D. Mass. 1869); *Greene v. Bishop*, 10 F. Cas. 1128, 1134 (No. 5,763) (D. Mass. 1858); *Emerson v. Davies*, 8 F. Cas. 615, 618-19 (No. 4,436) (D. Mass. 1845).

Some courts have set out a list of items which alone are not protectible: "(a) The title; (b) The theme; (c) The locale and settings; (d) The 'situations'; (e) Ordinarily the characters; (f) The ideas; (g) Bare basic plots." *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 353 (S.D. Cal. 1955) (citations omitted), followed in *Gethers v. Blatty*, 283 F. Supp. 303, 305 (C.D. Cal. 1968). See *Tralins v. Kaiser Alum. & Chem. Corp.*, 160 F. Supp. 511, 516-17 (D. Md. 1958). It may be supposed that at some point a combination of these elements might be granted protection.

to originality, a prerequisite to any protection:³³ "Originality in dramatic composition does not attach to ideas. But it may attach to 'combinations' of ideas"³⁴ If the courts are willing to go this far, it is but a short step to recognition of the fact that if any "combination of ideas" merits protection, it is a format. A complete format, after all, is a complex affair. The characters are sketched in great detail, their backgrounds, behavior, personalities, and motivations explored in depth; the setting is pieced together as carefully as it might be in a full-length book; and the whole is often brought alive by as many as a dozen story ideas. This is no mere abstraction. If a synopsis for a play were sketched in such detail, a court would be hard-put to find a way around protecting it;³⁵ the same should be true in the case of a format.

B. *The Problem of Preemption*

Before discussing another possible source of protection, common-law copyright under state law, it is important to consider the possibility that such protection has been precluded through federal preemption.

1. *The Sears and Compco Cases*

The spectre of preemption was raised in 1964 by two decisions, *Sears, Roebuck & Co. v. Stiffel Co.*³⁶ and *Compco Corp. v. Day-Brite Lighting, Inc.*³⁷ In both cases, the defendant marketed lighting fixtures which allegedly infringed the plaintiff's design patent. Although holding the patents invalid, the lower courts nevertheless had given judgment for the plaintiff on an unfair competition theory. The United States Supreme Court reversed, stating in *Compco* that "when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article."³⁸ The intended effect of this statement on the common law of copyright is unclear, a fact reflected in subsequent decisions of state and lower federal courts.³⁹ One thing is certain—the Court did not, and could not, entirely abolish the common-law right on preemption grounds. The express wording of the Copyright Act permits the state to protect the author's right in his "unpublished work,"⁴⁰ as do the holdings in a long and respected line

33. Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457 (1952). See notes 62-63 *infra* and accompanying text.

34. Yankwich, *supra* note 33, at 469.

35. See cases cited note 22 *supra*.

36. 376 U.S. 225 (1964).

37. 376 U.S. 234 (1964).

38. *Id.* at 237.

39. See cases cited note 43 *infra*.

40. 17 U.S.C. § 2 (1964); *cf.* notes 44-46 *infra* and accompanying text.

of cases dating back to 1834.⁴¹ In the absence of a more explicit statement, such far-reaching consequences are not to be inferred—especially since *Sears* and *Compco* were concerned with the law of patents, and the language concerning copyright is dicta. Only one subsequent decision seems to read the Court's language at it broadest, using preemption to disallow state protection of a dramatic character.⁴² Other subsequent cases simply reaffirm the common-law right.⁴³ The problem lies in determining the scope of the Court's phrase "unprotected by a . . . copyright." It need not include both "uncopyrighted" and "uncopyrightable" works. A better construction would have the phrase include only those items which *could* have been copyrighted but which, in fact, *were not*.⁴⁴ For example, a book cannot be protected by federal copyright until it has been published.⁴⁵ Works not reproduced for sale, on the other hand, may be copyrighted prior to publication, and hence may always be protected by federal copyright.⁴⁶ State protection of a book published without notice would be preempted under *Sears* and *Compco*; since it could have been copyrighted, the state is precluded from protecting that which the federal laws leave unprotected. Formats, were they registrable, would be considered "not reproduced for sale." For the present, however, they are "not copyrightable," and thus remain outside the scope of *Sears-Compco* as interpreted here. This analysis—which finds some broad support in the writers who have dealt with the subject⁴⁷—is consistent with the overall philoso-

41. *E.g.*, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834) (the first United States case to recognize the author's absolute right, at common law, to his unpublished manuscript).

42. *CBS v. DeCosta*, 377 F.2d 315 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967). There is, however, no indication that state protection was actually available.

43. *Cable Vision, Inc. v. KUTV*, 335 F.2d 348, 351 (9th Cir. 1964); *Pottstown Daily News Pub. Co. v. Pottstown Broadcasting Co.*, 247 F. Supp. 578, 581 (E.D. Pa. 1965); *Edgar H. Wood Assoc. v. Skene*, 347 Mass. 351, 197 N.E.2d 886, 890 (1964); *CBS v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723 & 726, 248 N.Y.S.2d 809 & 812 (Sup. Ct. 1964). *See Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968); *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 252 N.Y.S.2d 553 (Sup. Ct. 1964); *cf. T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964), in which Judge Friendly attempts to set up standards for federal jurisdiction over copyright claims, defining when a claim "arises under" the Copyright Act. One case has ignored *Sears-Compco* completely in granting protection to a format. *Silver Television City, Inc.*, 207 Pa. Super. 150, 215 A.2d 335 (1965).

44. *Sears-Compco* denied state patent-type protection to unpatentable items. But patentability is, broadly speaking, based on an item's worthiness of protection in terms of its novelty. There is no such standard for copyrightability in the first instance, although one might be used in determining the extent of protection. *But cf. Cable Vision, Inc. v. KUTV*, 335 F.2d 348, 350 (9th Cir. 1964).

45. 17 U.S.C. § 10 (1964).

46. *Id.* § 11.

47. "[T]he pre-emption principles expounded in *Sears* and *Compco* were not

phy of the *Sears-Compco* decisions, which appear to be primarily intended to eliminate state protection which is *inconsistent* with—as opposed to *separate* from—federal protection. For the present, however, the issue remains unresolved pending further clarification of *Sears-Compco* by the Supreme Court.

2. The Revision Bill

A more difficult pre-emption problem may arise if the proposed revision of the copyright law⁴⁸ is enacted. Section 301 of the revision would abolish common-law copyright in favor of a uniform federal law.⁴⁹ It is uncertain, however, how this would affect state protection of formats, since section 301(b)(1) expressly reserves to the states the right to protect “unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103.”⁵⁰ While section 102 is very broad,⁵¹ a report from the Committee on the Judiciary accompanying and explaining the bill states that

intended to resolve problems peculiar to the copyright law.” Kestenbaum, *The Sears and Compco Cases*, 51 A.B.A.J. 935, 938 (1965). See Bricker, *Thirty Months After Sears and Compco*, 14 BULL. COPYRIGHT SOC'Y 293 (1967); Gamboni, *Unfair Competition After Sears and Compco*, 15 ASCAP COPYRIGHT LAW SYMPOSIUM 1, 56, 61 (1967). But cf. Libott, *supra* note 3, at 766 n.152.

48. S. 597, 90th Cong., 1st Sess. (1967).

49. *Id.* § 301. In its entirety, the section reads:

(a) On and after January 1, 1969, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1969;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

50. *Id.* § 301(b)(1).

51. In relevant part, this section provides:

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

. . . .

(3) dramatic works, including any accompanying music

Id. § 102.

it does not propose to protect "formats and synopses of television series and the like," adding that "any protection for them as separate copy-rightable works is not here intended and will require action by a future Congress."⁵² Formats thus would not "come within" section 102, and state protection would be permissible.⁵³ Inclusion of formats under section 102 would probably be the most desirable solution, having at least the much-needed virtue of certainty. However, their omission should not result in the loss of whatever state protection they may be entitled to.

III

PROTECTION UNDER STATE LAW

Since federal copyright protection does not appear to be forthcoming, format protection must be sought under state law, to the extent that it has not been preempted in this area.⁵⁴

A. By Contract

In the absence of other protection, writers today generally seek to protect their interest in formats by contracts. In fact, in the past decade only one format case has reached an appellate court on exclusively non-contract grounds.⁵⁵ The mechanics of this aspect of literary protection have been amply discussed elsewhere,⁵⁶ and the focus here is primarily upon the broad outlines and effects of contract protection. For purposes of this discussion, it will be convenient to distinguish between "literary ideas," meaning ideas intended to be developed into some species of literature—such as formats, story outlines, and synopses, and "commercial ideas," meaning ideas intended primarily for business use in a commercial, non-literary manner—such as trade secrets, inventions, and organizational or marketing plans.⁵⁷

52. H.R. REP. NO. 83, 90th Cong., 1st Sess. 15 n.1 (1967).

53. But see Professor Goldstein's thoughtful discussion of the overall effect of the bill. The author takes the bill to task for its blanket abolition of the common law of copyright: "[u]nity cannot be so facilely achieved as . . . [in countries unhampered by a federal system], and it is surprising to find the Revision and its supporters so incautious about a scheme which cannot help but have unnecessary—and perhaps unconstitutional—consequences for the federal system." Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 55 (1969).

54. See notes 36-53 *supra* and accompanying text.

55. *Silver v. Television City, Inc.*, 207 Pa. Super. 150, 215 A.2d 335 (1965) (common-law copyright); *cf.* *Dugan v. ABC*, 216 F. Supp. 763 (S.D. Cal. 1963) (federal copyright).

56. The most comprehensive and up-to-date discussion is in M. NIMMER, *supra* note 31, at 720-44.

57. See Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119, 123 (1954), making a similar distinction on the basis of ultimate copyrightability.

1. *Early Stirrings*

Early idea-protection cases all concerned commercial ideas, and there is a long line of decisions setting out the applicable doctrine.⁵⁸ Generally, it may be summarized as follows: First, any idea may be protected by an express contract (or its equivalent, a contract implied-in-fact⁵⁹), even if the idea is "abstract";⁶⁰ and second, an idea which qualifies as property may be protected under a quasi-contract theory. For an idea to constitute property, it must be "new and useful," and often must also be expressed in concrete form, disclosed in confidence, or both.⁶¹

The rise of the modern entertainment industry brought with it the new genre of *literary* ideas, and courts and litigants turned for guidance to the contract law of commercial ideas. In *Cole v. Phillips H. Lord, Inc.*,⁶² for example, the plaintiff submitted a radio format to the defendant, who allegedly used the format without paying for it. The plaintiff sued for the breach of various express and implied contracts. His complaint was dismissed for failure to establish either the elements of an express contract or the novelty and originality of the format. On appeal, however, the court found sufficient evidence to establish both a quasi-contractual property right and a *prima facie* express contract

58. It begins with *Bristol v. Equitable Life Assur. Soc'y*, 132 N.Y. 264, 30 N.E. 506 (1892). Among many important cases, see generally *Lueddecke v. Chevrolet Motor Co.*, 70 F.2d 345 (8th Cir. 1934); *Schonwald v. F. Burkart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7 (1947); *Healey v. R.H. Macy & Co.*, 251 App. Div. 440, 297 N.Y.S. 165 (1937), *aff'd*, 277 N.Y. 681, 14 N.E.2d 388 (1938); *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y.S. 892 (Sup. Ct. 1940). More recently, *Wilkin v. Sunbeam Corp.*, 377 F.2d 344 (10th Cir. 1967); *Davies v. Carnation Co.*, 352 F.2d 393 (9th Cir. 1965); *Puente v. President & Fellows of Harvard College*, 248 F.2d 799 (1st Cir. 1957); *Thomson Mach. Co. v. La Rose*, 306 F. Supp. 681 (E.D. La. 1969); *Flemming v. Ronson Corp.*, 107 N.J. Super. 311, 258 A.2d 153 (1969).

59. See note 76 *infra*.

60. See cases cited note 58 *supra*. Although *Soule v. Bon Ami Co.*, 201 App. Div. 794, 195 N.Y.S. 574 (1922), can be cited for the proposition that the disclosure of an obvious idea will not provide sufficient consideration to support a contract, four of six court of appeals justices concurred in the *per curiam* affirmance "on ground plaintiff failed to prove profits resulting from change of plans." 235 N.Y. 609, 610, 139 N.E. 754, 755 (1923).

61. *Davies v. Carnation Co.*, 352 F.2d 393, 396 (9th Cir. 1965) (novelty); *Lueddecke v. Chevrolet Motor Co.*, 70 F.2d 345, 348 (8th Cir. 1934) ("novel and useful"); *Moore v. Ford Motor Co.*, 43 F.2d 685, 686 (2d Cir. 1930) (novelty); *Trenton Indus. v. A.E. Peterson Mfg. Co.*, 165 F. Supp. 523, 532 (S.D. Cal. 1958) (novelty; no confidence required); *Flemming v. Ronson Corp.*, 107 N.J. Super. 311, 258 A.2d 153, 157 (Ch. 1969) (novelty and disclosure in confidence); *Healey v. R.H. Macy & Co.*, 251 App. Div. 440, 297 N.Y.S. 165 (1937), *aff'd*, 277 N.Y. 681, 14 N.E.2d 388 (1938); *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y.S.2d 892, 894 (Sup. Ct. 1940) (concreteness); *Bailey v. Haberle Congress Brewing Co.*, 193 Misc. 723, 85 N.Y.S.2d 51, 52 (Mun. Ct. 1948) (concreteness).

62. 262 App. Div. 116, 28 N.Y.S.2d 404 (1941).

which could afford plaintiff protection "even as to his mere idea."⁶³ And in *Grombach Productions, Inc., v. Waring*,⁶⁴ the court considered a claim that a contract for the sale of a radio format could be implied by the trade custom of either paying for an idea or refraining from using it. Where the plaintiff's disclosure of his idea was unsolicited, the court held that "[s]uch a custom ' . . . cannot create a contract where there has been no agreement by the parties and none is implied by law.' "⁶⁵ In neither of these cases did the courts look beyond the law of commercial ideas, nor did they ever discuss the literary aspect of the formats involved.

The California supreme court did not address the problem until 1950, when it decided *Stanley v. CBS*.⁶⁶ After the plaintiff had unsuccessfully submitted his radio format to the defendant, the latter produced a very similar program of his own. The court allowed recovery in quasi-contract, holding that the novelty of the format gave rise to a property interest.⁶⁷ Observing that the individual elements of the format were not new, the court nevertheless concluded: "But when all of these elements are joined to make one idea for a radio program, it is the *combination* which is new and novel."⁶⁸ *Stanley's* primary contribution to the development of the California doctrine of contract protection, however, was in Justice Traynor's dissent. While rejecting the claim of a property interest in the format, and hence the plaintiff's right to quasi-contractual recovery, he observed: "The policy that precludes protection of an abstract idea by copyright *does not prevent its protection by contract*," and this regardless of the lack of novelty.⁶⁹

The next development came in *Weitzenkorn v. Lesser*.⁷⁰ This case involved the submission of a movie script to the defendants and their alleged use of its basic dramatic core. In disallowing the plaintiff's

63. *Id.* at 121, 28 N.Y.S.2d at 409, citing *Bristol v. Equitable Life Assur. Soc'y*, 132 N.Y. 264, 30 N.E. 506 (1892); *Healey v. R.H. Macy & Co.*, 251 App. Div. 440, 297 N.Y.S. 165 (1937), *aff'd*, 277 N.Y. 681, 14 N.E.2d 388 (1938).

64. 293 N.Y. 609, 59 N.E.2d 425 (1944).

65. *Id.* at 616, 59 N.E.2d at 428. Professor Nimmer criticizes this conclusion, saying that "certainly custom is relevant on the issue of whether or not the enrichment of the defendant was unjust." M. NIMMER, *supra* note 31, at 723.

66. 35 Cal. 2d 653, 221 P.2d 73 (1950), discussed in Annot. 23 A.L.R.2d 216 (1952). In a companion case, *Golding v. RKO Pictures, Inc.*, 35 Cal. 2d 690, 221 P.2d 95 (1950), plaintiff claimed that defendant's movie infringed his play in that it incorporated the play's "basic dramatic core." The court held in favor of the plaintiff but this holding was later disapproved. *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 256 P.2d 947 (1953). See note 100 *infra* and accompanying text.

67. 35 Cal. 2d at 664, 221 P.2d at 79.

68. *Id.* As to the continued vitality of this approach, see notes 92-110 *infra* and accompanying text.

69. 35 Cal. 2d at 674, 221 P.2d at 85 (emphasis added).

70. 40 Cal. 2d 778, 256 P.2d 947 (1953).

claim of infringement, the court stated that property rights no longer existed in the "basic dramatic core" of a play.⁷¹ More importantly, the court expressly equated the property interest required for recovery in quasi-contract with that required to maintain a tort action for plagiarism.⁷² As a result, if the format plaintiff cannot establish an express or implied-in-fact contract he has no effective remedy at all, because of the courts' reluctance to recognize such a property interest in formats.

2. *Desny v. Wilder and its Progeny*

Finally, in *Desny v. Wilder*,⁷³ the California supreme court articulated an explicit legal theory for dealing with literary ideas. The plaintiff had dictated a story outline over the telephone to Billy Wilder's secretary. When Wilder subsequently produced the movie "Ace in the Hole," plaintiff brought a contract action for the use of his story. The summary judgment against him was reversed by the supreme court, which held that he had established a sufficient basis for an implied-in-fact contract. After stating flatly that "California does not now accord individual property type protection to abstract ideas,"⁷⁴ the court, building upon Justice Traynor's *Stanley* dissent,⁷⁵ concluded that enforceable contracts for literary ideas must be either express or implied-in-fact.⁷⁶

the idea purveyor cannot prevail in an action to recover compensation . . . unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as "implied" or "implied-in-fact."⁷⁷

This doctrine has been further explicated by decisions in the California district courts of appeal.⁷⁸

71. *Id.* at 789, 256 P.2d at 956 (1953). This statement was ostensibly made on the basis of a revision in CAL. CIV. CODE § 980 (West 1954). See note 95 *infra* and accompanying text.

72. 40 Cal. 2d at 795, 256 P.2d at 959.

73. 46 Cal. 2d 715, 299 P.2d 257 (1956).

74. *Id.* at 732, 299 P.2d at 265.

75. See note 69 *supra* and accompanying text.

76. 46 Cal. 2d at 738, 299 P.2d at 270. The court emphasized that the two are really legal equivalents and wholly distinct from a quasi-contractual obligation imposed by law upon the parties. While expressing dissatisfaction with the term, the court deferred to precedent in retaining "implied-in-fact," noting that such contracts are "more accurately described as express contracts proved by circumstantial evidence." *Id.* at 738 n.9, 299 P.2d at 270 n.9.

77. *Id.* at 738, 299 P.2d at 270.

78. See, e.g., *Davies v. Krasna*, 245 Cal. App. 2d 535, 54 Cal. Rptr. 37 (2d Dist. 1966); *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 54 Cal. Rptr. 130 (2d Dist. 1966) (setting out in detail the requirements as established by *Desny*);

3. *The Problem with Desny*

In the right circumstances, then, *Desny* can provide adequate relief for the format writer. But the search for protection is not yet at an end, for *Desny*'s emphasis on contractual recovery gives rise to several new problems. First, *Desny* does not offer protection in all situations in which a format has clearly been taken. The producer, for instance, may be able to demonstrate that he evidenced no intention to pay for the writer's format, no matter how much of it he used, and that hence there is no showing of the objective understanding necessary for an implied-in-fact contract.⁷⁹ If an implied-in-fact contract is really no more than a true agreement proved by circumstantial evidence,⁸⁰ recovery would probably have to be denied under anything but the forbidden doctrine of quasi-contract.⁸¹ Greater difficulties would arise where there was no submission at all.⁸² Suppose, for instance, the producer manages to obtain a copy of the writer's materials without his knowledge or permission—whether by physical theft or more subtle means. Hollywood is too filled with such stories for this to be entirely improbable. But if all a writer has to rely on is implied-in-fact contract,⁸³ he will indeed be hard-pressed to recover when the thief uses his ideas.

A second difficulty with *Desny* is that, despite the supreme court's care in separating contracts implied-in-fact from those implied by law, the two may be functionally indistinguishable where formats are concerned.⁸⁴ The nature of the entertainment market is such that the writer's expectation of payment and the producer's recognition of such

Donahue v. United Artists Corp., 2 Cal. App. 3d 794, 808, 83 Cal. Rptr. 131, 138 (2d Dist. 1969) (second appeal of *Donahue v. Ziv*); Chandler v. Roach, 156 Cal. App. 2d 435, 319 P.2d 776 (2d Dist. 1957). See also Note, 26 S. CAL. L. REV. 459, 460 (1953).

79. This appears to have been the situation in *Robbins v. Frank Cooper Assoc.*, 14 N.Y.2d 913, 200 N.E.2d 860, 252 N.Y.S.2d 318 (1964), *rev'g per curiam* 19 App. Div. 242, 241 N.Y.S.2d 259 (1963), in which negotiations had been broken off before an agreement was reached: "Since the property was thereafter taken and made valueless for its owner, the law imposes an obligation to pay its reasonable value where the parties dealt with each other in the context of an intention of payment for its use." 14 N.Y.2d at 915, 200 N.E.2d at 861, 252 N.Y.S.2d at 319 (emphasis added). Despite the last phrase, the facts do not properly bring the case within *Desny*, and the court's language clearly reflects quasi-contractual theory.

80. See note 76 *supra*.

81. One solution might be to follow the circuitous route of implying an obligation of confidence on the producer and suing for a breach of it. Such an approach would in effect imply the only questionably coherent *Desny* doctrine out of all meaningful existence, and would hardly contribute to simplification.

82. See Libott, *supra* note 3, at 764.

83. And such may be the case. See Chandler v. Roach, 156 Cal. App. 2d 435, 443, 319 P.2d 776, 781 (2d Dist. 1957).

84. See Kaplan, *Further Remarks on Compensation for Ideas in California*, 46 CALIF. L. REV. 699, 711-12 (1958); Case Note, 4 U.C.L.A.L. REV. 296 (1957).

expectation can almost always be presumed.⁸⁵ And as a result, little more than submission of the format need be shown to establish an implied-in-fact contract. The tenuous nature of the contractual relationship in the *Desny* case itself bears witness to the fact that a court may find an implied-in-fact contract with little regard to the "objective" theory.⁸⁶ While such a prospect clearly benefits the writer, it may work too strongly against the producer. Since the protection is contractual, a producer could conceivably be held for using any part of any submission, despite the absence of any resemblance to a true contract.

Finally, it appears that despite their ostensible rejection of literary property standards,⁸⁷ the courts have been unable to decide implied-contract cases without them. At some point the court must determine whether the defendant has in fact used the plaintiff's material, and this is generally done by judging the similarity of the two works.⁸⁸ The plaintiff will generally show *some* similarity, and under a pure contract theory the defendant would have to pay for anything actually taken, no matter how trivial. But the courts have not been willing to go so far. Instead, under the rubric of insufficient similarity, they make a finding that the plaintiff's creation—or what was taken of it—was not *worthy* of protection.

A recent example of this technique is *Henried v. Four Star Television*,⁸⁹ in which the plaintiff claimed that the defendant had utilized his format in producing the television series, *Burke's Law*. The court found similarity between the two only in that both concerned a detective-hero who used a chauffeur-driven Rolls Royce.⁹⁰ Under a strict interpretation of *Desny*, the plaintiff could recover simply by meeting the minimal burden of showing an implied-in-fact contract. But rather than allow recovery the court, in effect, narrowed the scope of protection, stating that "[i]n plot, motivation, subject matter, milieu, and characterization we find nothing in common between the two properties."⁹¹ This scrutiny for similarity is the same as that required under a property analysis. And unless the courts are willing to require that the *whole* format be taken before there is a breach of the express or implied-in-fact contract—a requirement that no court has yet imposed—the

85. See *Desny v. Wilder*, 46 Cal. 2d 715, 755-56, 299 P.2d 257, 280-81 (Carter, J., concurring).

86. See text accompanying notes 73 & 74 *supra*.

87. E.g., *Chandler v. Roach*, 156 Cal. App. 2d 435, 444, 319 P.2d 776, 782-83 (2d Dist. 1957).

88. In California the determination may be made on demurrer under CAL. CODE CIV. PRO. § 426(3) (West 1954). See *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 256 P.2d 947 (1953), the first case detailing the use of the procedure.

89. 266 Cal. App. 2d 435, 72 Cal. Rptr. 223 (2d Dist. 1968).

90. *Id.* at 437, 72 Cal. Rptr. at 224.

91. *Id.* at 436-37, 72 Cal. Rptr. at 223-24.

scrutiny will be required in all cases in order to draw the line between breach and non-breach. It is submitted that this is a line which *cannot* be properly drawn without an evaluation of the underlying literary material. Contract analysis, then, appears to add an unnecessary step which could be more profitably eliminated in favor of an enlightened use of the concept of literary property.

B. *As Property*

The difficulty with seeking property protection for formats under common-law copyright is that the state of the law with respect to formats is rather confused. However, no court has yet flatly denied protection to formats.

1. *The Law of California*

*Stanley v. CBS*⁹² and *Kovacs v. Mutual Broadcasting System*⁹³ established that "[i]f a format for a radio program is original and novel, it may constitute a protectible 'product of the mind.'"⁹⁴ There is a question, however, whether the 1947 amendment of section 980 of the California Civil Code⁹⁵ or subsequent decisions of the courts have eroded this property right.

California courts and commentators have construed the revised Section 980 as having no such effect. Justice Traynor, for instance, stated that both the original and amended sections only codified the common law, the amendment being merely a clarification—adding that "if the *Golding* and *Stanley* cases were correctly decided, protection could be extended to the basic dramatic core of a play or the plan of a

92. 35 Cal. 2d 653, 221 P.2d 73 (1950); see notes 66-68 *supra* and accompanying text.

93. Cal. App. 2d 56, 221 P.2d (2d Dist. 1950).

94. *Id.* at 62, 221 P.2d at 112; see *Stanley v. CBS*, 35 Cal. 2d 653, 664, 221 P.2d 73, 79 (1950).

95. CAL. CIV. CODE § 980(a) (West 1954). As originally enacted in 1872, section 980 read:

The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

In 1947 this was revised to read:

The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition.

Id. The elimination of the phrase "product of the mind" has apparently caused confusion. See notes 96-110 *infra* and accompanying text. Both *Stanley* and *Kovacs* were decided under the earlier wording.

radio program under the present statute just as it was in those cases under the former."⁹⁶ However, even assuming that this analysis is correct, there may be reason to question the continued vitality of *Stanley*, since several subsequent cases raise the possibility that *Stanley* has been overruled.⁹⁷

The first of these cases is *Weitzenkorn v. Lesser*,⁹⁸ in which the plaintiff sued for use of her outline for a Tarzan movie. The supreme court reversed the sustaining of demurrers to two contract counts, but upheld the demurrer to a count based on infringement. In so doing, the court stated that the protection given to the "basic dramatic core" of a story in *Golding*⁹⁹ was beyond the protection normally afforded by common law copyright, and indicated that the same was true of the protection given formats in *Stanley*:

The judgment in favor of Stanley was affirmed upon the ground that his idea was the new and novel combination of elements for a radio program. In the *Golding* case the court, relying upon the former wording of § 980, held that the "product of the writer's creative mind" is protectible and it extended that protection to his idea, the "basic dramatic core" of his play. Such extension of protection to an idea transcends the normal bounds of common law copyright in which

96. *Kurlan v. CBS*, 40 Cal. 2d 799, 815, 256 P.2d 962, 972 (1953) (dissenting opinion). Of course, he did not agree that the cases were correctly decided under applicable common-law principles. See note 69 *supra* and accompanying text. *Contra*, Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 469-70 n.29 (1952). Although the amendment can be construed as having eliminated protection for "abstract" ideas, it is not likely that they were ever really protected anyway. At any rate, there is no reason for construing the amendment as going any farther. Clarification was its main thrust. See Fendler, *The Present Status of Common Law Intellectual Property in California*, 13 FED. COMM. B.J. 114 (1953). Mr. Fendler was the plaintiff's attorney in all the supreme court cases except *Desny* and participated in the hearings on the revision. He contends that as of 1953 a majority of the court believed that the law had not been changed. *Id.* at 115 *et seq.*

97. Two observations must be made of the *Stanley* case. First, although none of the individual elements of Stanley's format was new to radio, the court granted protection to the combination of the ideas, on the basis that the combination was new and novel and had been reduced to concrete form. 35 Cal. 2d 653, 663-64, 221 P.2d 73, 79 (1950). See note 68 *supra* and accompanying text. Second, Justice Traynor's dissenting opinion is not really as divergent from the court's as it might seem. He observed that although "[a]bstract ideas are common property freely available to all, [w]hat men forge out of these ideas with skill, industry, and imagination, into concrete forms uniquely their own, the law protects as private property." *Id.* at 673, 221 P.2d at 84 (emphasis added). Since Justice Traynor never defines "abstract idea," nor deals with the court's "combination of ideas" language, it would not be difficult to harmonize the opinions under a proper definition of a format. In sum, refusing to protect "abstract ideas" under *Weitzenkorn* is not necessarily inconsistent with protecting formats under *Stanley*.

98. 40 Cal. 2d 778, 256 P.2d 947 (1953).

99. *Golding v. RKO Pictures, Inc.*, 35 Cal. 2d 690, 221 P.2d 95 (1950). See note 66 *supra*.

ideas "are free as air."¹⁰⁰

However, the proposition is open to question for several reasons. First, the phrase "normal bounds of common law copyright" is not especially meaningful.¹⁰¹ Second, the *Weitzenkorn* decision dealt not with a format but with a single story.¹⁰² Thus, any language in *Weitzenkorn* referring to formats is not essential to the decision, inasmuch as the court was not called upon to overrule *Stanley*. Third, the main opinion in *Weitzenkorn* had the full concurrence of only two other justices.¹⁰³ Recognizing this fact, the court stated in *Desny*:

[A]ny portions of the *Weitzenkorn* opinion quoted herein as holdings of the court, or cited with approval, are to be understood as now having the concurrence of a majority of the court.¹⁰⁴

However, the only relevant use *Desny* made of *Weitzenkorn* was in support of the statement that "California does not now accord individual property type protection to abstract ideas."¹⁰⁵ This proposition is hardly revolutionary,¹⁰⁶ and in any event need not be taken to apply to formats. And again, *Desny* was concerned with a story, and any format language would be strictly obiter.

In *Kurlan v. CBS*,¹⁰⁷ the plaintiff alleged the submission and rejection of his format, and the production of a similar program by the defendant. Demurrers had been sustained, but the supreme court reversed. In discussing the need for extrinsic evidence to show "something novel in the way of program techniques and methods of presenta-

100. 40 Cal. 2d at 788-89, 256 P.2d at 955 (citations omitted).

101. The "normal bounds" with respect to literary ideas are not well defined in modern cases, nor is historical research of any help. Even a cursory examination of the early history of copyright law reveals that the terms "ideas," "expression," and "plots" played no significant role in the development of copyright law, which primarily involved printing rights. See, e.g., A. BIRRELL, *THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* (1899); L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); H. RANSOM, *THE FIRST COPYRIGHT STATUTE* (1956); T. SCRUTTON, *THE LAW OF COPYRIGHT* (3d ed. 1896). The early leading cases, *Millar v. Taylor*, 98 Eng. Rep. 201 (1769) and *Donaldson v. Beckett*, 98 Eng. Rep. 257 (1774), were not concerned with what was protected, but with how long protection lasted. No English case has been found dealing with anything even remotely related to formats. There being then no real historical limitation on this point, a modern court is free (outside of the possible effect of federal law [see discussion at notes 36-53 *supra*]) to fashion whatever relief it deems appropriate.

102. As to the fundamental difference between the two, see notes 146-48 *infra* and accompanying text.

103. See *Desny v. Wilder*, 46 Cal. 2d 715, 732 n.7, 299 P.2d 257, 266 n.7 (1956).

104. *Id.*

105. *Id.* at 732, 299 P.2d at 265 (citing the language of *Weitzenkorn* quoted in the text accompanying note 100 *supra*.)

106. See notes 21-24 *supra* and accompanying text.

107. 40 Cal. 2d 799, 256 P.2d 962 (1953). Like *Stanley*, *Kurlan* was decided on the basis of pre-1947 section 980, but this does not necessarily render the decision obsolete. See notes 95-96 *supra* and accompanying text.

tion,"¹⁰⁸ the court indicated that such proof could establish a property interest in the format:

This case is similar to [*Stanley and Kovacs*], where the claimed protectible property was a "radio program idea" rather than the traditional concept of literary property. Under the rules stated and applied in those cases, for Kurlan to have a protectible interest in his radio program, he must establish both originality and novelty.¹⁰⁹

The only firm conclusion which may be drawn from the above analysis is that the supreme court has not completely closed the door. Nor have any subsequent cases in the district courts of appeal closed it further.¹¹⁰ Thus, adoption of the theory here suggested need not involve any serious conflict with precedent.

2. *The Law of New York*

In New York, the other leading entertainment jurisdiction, only four format cases have been decided. Three of these, all contract cases, have been discussed.¹¹¹ The remaining case is *Herwitz v. NBC*,¹¹² brought in federal court. Plaintiff claimed that the defendant's television game show infringed his radio format. Although the court found no New York cases "holding that there may be a protectible prop-

108. 40 Cal. 2d at 808-09, 256 P.2d at 969.

109. *Id.* The court appears to mean commercial idea novelty. See notes 58-61 *supra* and accompanying text.

110. Format cases not already referred to include: *Television Adventure Films Corp. v. KCOP Television, Inc.*, 249 Cal. App. 2d 268, 277, 57 Cal. Rptr. 526, 531 (2d Dist. 1967) (trial court's function to determine whether defendants used material "in which [plaintiff] had a protectible property right, or only portrayed that which was in the public domain."); *Colvig v. KSFO*, 224 Cal. App. 2d 357, 367, 36 Cal. Rptr. 701, 707 (1st Dist. 1964) ("[California] does recognize literary property in a particular combination of ideas (which presupposes the expression thereof), or in the form in which the ideas are embodied"—citing *Desny*); *Borden & Barton Enterprises v. Warner Bros. Broadcasting Corp.*, 99 Cal. App. 2d 760, 763, 222 P.2d 463, 465 (2d Dist. 1950) (demurrer sustained; failure to allege, *inter alia*, a "novel idea 'reduced to concrete form'"); *Borden v. Andrews*, 139 U.S.P.Q. 557, 558 (L.A. Cty. Super. Ct. 1963) (similarities were of material "neither original nor protectible in any sense of the word"). See also *Minnear v. Tors*, 266 Cal. App. 2d 495, 72 Cal. Rptr. 287 (2d Dist. 1968). Professor Nimmer attributes the declaration that "there can be no property right 'in the idea for the TV series'" to this case. M. NIMMER, *supra* note 31, at 718 n.14, quoting 266 Cal. App. 2d at 505, 72 Cal. Rptr. at 294. This is misleading; taken in context, the phrase clearly comprehends "idea" only in a relatively "abstract" sense. Cf. *Cranford v. United States*, 143 U.S.P.Q. 313 (Ct. Cl. 1964) (radio program regarded as property for tax purposes).

111. *Cole v. Phillips H. Lord, Inc.*, 262 App. Div. 116, 28 N.Y.S.2d 404 (1941); see notes 62-63 *supra* and accompanying text; *Grombach Prod. v. Waring*, 293 N.Y. 609, 59 N.E.2d 425 (1944); see notes 64-65 *supra* and accompanying text; *Robbins v. Frank Cooper Assoc.*, 14 N.Y.2d 913, 200 N.E.2d 860, 252 N.Y.S.2d 318 (1964); see note 79 *supra*.

112. 210 F. Supp. 231 (S.D.N.Y. 1962).

erty interest in a mere combination of ideas for a program,"¹¹³ the matter might not really have been in issue. As the court observed:

[T]he single important element in his program was the dilemma of a contestant having to choose between a specific amount of cash and a prize of unknown value. Stated in this manner this is certainly nothing more than an abstract idea.¹¹⁴

But since the court had noted earlier that "there may be a protectible interest in an idea or combination of ideas which is reduced to 'concrete' form,"¹¹⁵ presumably some formats could qualify for protection.

3. Other Jurisdictions

The cases outside of New York and California are inconclusive. Apart from *Hamilton National Bank v. Belt*¹¹⁶ only the recent case of *Silver v. Television City*¹¹⁷ has expressly found a property interest in a format. This case was entirely based on infringement. Citing, *inter alia*, the *Stanley* case, the court said:

Radio and television programs may be such literary productions as are protected by the common law. However, they must evidence the exercise of skill, description and creative effort. It is no objection to the claim of a person doing so, that he takes existing material from sources common to all writers and arranges them so long as he creates a new form and gives them an application unknown before in a different manner and for a different purpose resulting in a real improvement over existing modes.¹¹⁸

Apparently to the contrary is an earlier case, *Bowen v. Yankee Network*.¹¹⁹ There the court said: "The plaintiff's plan for a 'Radio Presentation' was not a literary composition, but merely an idea or scheme. . . . There is no property right in mere ideas."¹²⁰ While this case might arguably be considered a denial of all format protection, it fails to define "idea," and may have been stressing the format's lack of detail rather than any inherent unprotectibility.

Again, the only common feature of these and the remaining state-law cases¹²¹ is that none of them flatly denies common law copyright

113. *Id.* at 236. Of course, there are also no cases to the contrary.

114. *Id.* The "dilemma" in this case is an example of what is commonly called the "hook" of a game show—the primary item of "dramatic" interest. It is questionable whether under the analysis set forth herein a game show format could ever be protected as property on the basis of the "hook" alone.

115. *Id.* at 235. The court also hinted at a need for novelty.

116. 210 F.2d 706 (D.C. Cir. 1953); see note 30 *supra* and accompanying text.

117. 207 Pa. Super. 150, 215 A.2d 335 (1965).

118. *Id.* at 154, 215 A.2d at 337.

119. 46 F. Supp. 62 (D. Mass. 1942).

120. *Id.* at 63.

121. *Nobel v. CBS*, 270 F.2d 938, 939 (D.C. Cir. 1959) (protection denied be-

protection to formats. If anything, they indicate that in the right circumstances protection should be allowed.

IV

PROPERTY PROTECTION: A SUGGESTED APPROACH

A. *Defining the Concept*

Queen: More matter, with less art.

Polonius: Madam, I swear I use no art at all.¹²²

"An essential element of individual property," wrote Justice Brandeis in what has become an accepted standard, "is the legal right to exclude others from enjoying it."¹²³ From this it is generally argued that since ideas are "free as air,"¹²⁴ no such legal right can attach to them. It is evident, however, that the argument is conclusory. Property, after all, is entirely a "creation of law,"¹²⁵ and may be defined to include ideas or anything else if the ends of justice so require.

For present purposes, then, property can be taken to mean simply "protected interest," and "property protection" means the author's right to recover for the use of his format regardless of the existence of contractual circumstances.¹²⁶ We thus regard "property" as a term to be defined rather than as a premise from which to draw conclusions.

The current standard for property protection is based upon the idea-expression dichotomy.¹²⁷ There is no inherent reason why formats cannot be considered expression for common law copyright purposes,¹²⁸ though at present such treatment does not appear imminent. However, the idea-expression dichotomy itself has been questioned as

cause format "lacked the essential element of novelty"—distinguishing *Belt* on this ground); *Blish v. NBC*, 49 F. Supp. 346 (N.D. Ill. 1942) (dismissed; insufficient allegations of access); *Buckley v. Music Corp. of America*, 2 F.R.D. 328 (D. Del. 1942) (plaintiff held to have stated a cause of action in tort and quasi-contract).

122. W. SHAKESPEARE, *HAMLET*, act II, scene ii, lines 95-96.

123. *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion). See also Justice Holmes' formulation, *id.* at 246.

124. A. BIRRELL, *supra* note 101, at 167. The phrase crept into judicial usage in *Fendler v. Morosco*, 253 N.Y. 281, 287, 171 N.E. 56, 58 (1930).

125. *International News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Opinion of Holmes, J.). As one writer has said, "a property right is the conclusion from the fact protection is given." Case Note, 20 S. CAL. L. REV. 371, 373 n.24 (1947).

126. For purposes of discussion, it will be assumed that access is proven and that the format has been used virtually in toto. A comprehensive discussion of infringement standards is beyond the scope of this Comment. However, for one possible set of criteria, see Writer's Guild of America, memorandum of April 26, 1967, *re: Arbitration for Separated Rights*.

127. See notes 21-24 *supra* and accompanying text.

128. See notes 25-29 *supra* and accompanying text.

an analytical tool. One author has suggested that "it is a semantic and historic fallacy without any meaningful application to the creative process, [which] results at best in judicial anomaly and at worst in substantial injustice."¹²⁹ And even Judge Learned Hand finally admitted that "obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."¹³⁰

As a result, some writers have proposed approaches which avoid any use of an idea-expression categorization. Libott, for example, suggests extending copyrightability literally to "all writings."¹³¹ Infringement would then be determined by a standard of "fair use," which would "deny recovery where what has been taken by the defendant is only those general ideas that classify as super-objective ideas and therefore part of the public commons"¹³² Appealing though this simple approach may be, however, the need for classification brings us back full circle to considering the nature of the literary material itself.¹³³

Another view is that ideas *themselves* are a proper subject of property protection.¹³⁴ The objection usually raised to such protection is

129. Libott, *supra* note 3, at 736; see Case Note, *supra* note 125, at 373. One writer has suggested a modified version of possible constitutional significance, distinguishing between "writings" and "non-writings". Goldstein, *supra* note 53, at 81 *et seq.* Libott suggests using the Stanislavskian "spine" and "super-objective," referring respectively to "the continuing directional force or structure to which each of the sub (or sub-sub) components is connected, and from which they radiate," and to "an overall general truth or eternal verity which pervades the entire work." Libott, *supra* note 3, at 742. While the categories are somewhat more explicit, it is hard to see how this is any substantial improvement over "idea-expression."

130. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

131. Libott, *supra* note 3, at 769.

132. *Id.* See note 129 *supra*.

133. The need for such consideration is part of the present practice as well, and would be codified in the Revision Bill:

Notwithstanding the provisions of section 106 [exclusive rights of copyright owners], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

S. 597, 90th Cong., 1st Sess. § 107 (1967).

134. Callmann, *Unfair Competition in Ideas and Titles*, 42 CALIF. L. REV. 77, 88 (1954); Katz, *supra* note 12, at 63; Libott, *supra* note 3, *passim*; Rubenstein, *Copyright Protection for "Elaborated Ideas,"* 224 LAW TIMES 296 (1957); Comment, 24 S. CAL. L. REV. 65, 70-73 (1950); Note 40 ILL. L. REV. 130, 133 (1945); see Weitzen-

the difficulty of enforcing it.¹³⁵ But advocates of this view contend that the primary difficulty really lies in identifying the idea allegedly appropriated, and so would merely require the plaintiff to show "(1) . . . that the work was the result of his own efforts; (2) that it is identifiable; and (3) that the defendant appropriated the identifiable results of plaintiff's creative effort."¹³⁶ But this approach, too, requires an initial analysis of the underlying material, in order to "identify" the protected matter.

B. *Novelty and Completeness: Tools for Analysis*

A more constructive approach would begin by recognizing that the "idea-expression," "abstract-concrete" concepts—here collectively referred to as "thought" versus "exposition"—are not entirely without meaning. They represent the poles of a quantitative continuum¹³⁷ by means of which a court can grant fair protection to literary creations.

The thought-exposition continuum, however, is only the framework within which the court will work. Two specific guidelines are suggested for an in-depth assessment of property value: novelty and completeness. A simple example may assist in understanding their application: Suppose a writer has put together a format for a series about a western marshall who graduated from Harvard, and it appears that no one has thought of such a series before. The issue arises as to what the writer must show in order to win property protection for his format.

1. *Novelty*

The principle requirement for property protection has always been originality; indeed, "originality alone is the test of validity" of statutory copyright.¹³⁸ "Originality," however, is a term of art which does not mean novelty but merely independent creation,¹³⁹ and something more

korn v. Lesser, 40 Cal. 2d 778, 796-97, 256 P.2d 947, 960 (1953) (Carter, J., dissenting); Kurlan v. CBS, 40 Cal. 2d 799, 819-20, 256 P.2d 962, 975 (1953) (Carter, J., dissenting). *Contra, e.g.,* Olsson, *supra* note 9, at 36.

135. *E.g.,* Stone v. Liggett & Meyers Tobacco Co., 260 App. Div. 450, 451, 23 N.Y.S.2d 210, 212; *cf.* Goldstein, *supra* note 53, at 80.

136. Comment, *supra* note 134, at 73; *see* Callmann, *supra* note 134, at 87; Rubenstein, *supra* note 134, *passim*.

137. See notes 29-31 *supra* and accompanying text.

138. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 150 (S.D.N.Y. 1924) (L. Hand, J.).

139. See Judge Learned Hand's famous statement in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936):

[I]f by some magic a man who had never known it were compose anew Keats's [*sic*] Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's [*sic*].

Id. at 54. *See also* Desny v. Wilder, 46 Cal. 2d 715, 741, 299 P.2d 257, 271 (1956).

than this standard should be employed in testing protection for formats. In the peculiar area of formats, which of necessity have as their basis at least some fairly well-used "ideas," a well-tailored doctrine would require that a property interest be founded in part upon an element of *novelty*. This element, however, must be strictly limited if it is not to be confused with the higher standards needed for commercial ideas. A tentative definition might be: novelty is that element of a format which imbues it with a unique theatrical interest when compared with other efforts in the same area.¹⁴⁰

Some qualification may be desirable. Suppose that in our Harvard marshall case the defendant's attorney turns up an obscure book written in 1874 about a similar character. If this were to mean that the idea was no longer novel, the result would be manifestly unjust. There is probably little in the entertainment field which is entirely without precedent, but that fact alone certainly does not deprive an ostensibly novel format of its commercial value—which is, after all, to some extent a function of its novelty—and there is no reason why it should deprive it of any property protection to which it would otherwise be entitled. Novelty should be judged solely by the context in which the format is presented—that is, primarily with respect to prior efforts in television, radio, film, and relatively recent theater, plus any other sources to which a producer has ready access. The 1874 book is really irrelevant. In short, the standard should be one of what might be called contemporary novelty, limited by both time and medium.

A further possible limitation is *scènes à faire*, described by Judge Yankwich as "scenes which *must* follow a certain situation," or "similarities . . . which are inherent in a situation":¹⁴¹ "[I]n all dramatic works we find that situations which are identical call for scenes which are similar."¹⁴² That such developments of a situation are not to be considered part of the author's creation—at least insofar as determining similarity is concerned—is universally recognized in the decisions,¹⁴³

140. This approach is not entirely alien to the law of literary property. *See, e.g.*, *Rose v. Connelly*, 38 F. Supp. 54, 55 (S.D.N.Y. 1941) (plays found to differ "in substantially all points of reader or theater interest"); *Heckenkamp v. Ziv Television Programs, Inc.*, 157 Cal. App. 2d 293, 299, 321 P.2d 137, 141 (2d Dist. 1958) (property protection for a format denied because, *inter alia*, "[t]he idea of dramatizing the operations of peace officers is certainly not unique").

141. Yankwich, *supra* note 96, at 462.

142. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945) (Yankwich, J.).

143. *E.g.*, *Funkhouser v. Loew's, Inc.*, 208 F.2d 185, 188 (8th Cir. 1953); *Sarkadi v. Wiman*, 135 F.2d 1002, 1003 (2d Cir. 1943); *Bein v. Warner Bros. Pictures, Inc.*, 105 F.2d 969, 970 (2d Cir. 1939); *Simonton v. Gordon*, 12 F.2d 116, 124 (S.D.N.Y. 1925) (the "White Cargo" case); *Hewitt v. Coward*, 180 Misc. 1065, 1066, 41 N.Y.S.2d 498, 500 (Sup. Ct. 1943).

and the concept may be put to an analogous use in judging the novelty of formats. Such an approach would not be without precedent. In *Minniear v. Tors*,¹⁴⁴ for example, the court found it appropriate to observe during its evaluation of similarity that "[a]n underwater sea adventure series, like a cowboy adventure series, has certain basic similarities which cannot be avoided."¹⁴⁵ The point is that unless the situation which gives rise to the concomitant elements is itself novel, the combination of concomitants can never be. However, an effort must be made to limit such analysis to those elements which are *necessarily* associated with a situation, or at least are so associated in common experience. These might include the cowboy's gun and horse, or the fact that he frequents a typical western town. They would probably not include Paladin's business card (a novel element in a western if there ever was one), or the Lone Ranger's mask and silver bullets. Our Harvard marshal's erudition and Boston accent, unusual in the typical town marshal, follow naturally from his Harvard education and so would not be novel elements in and of themselves. On the other hand, his ability to adapt a Harvard education to life in the West does not necessarily follow at all—the opposite would be more likely—and so it could be considered a separate novel characteristic. The value of the *scènes à faire* concept is that it allows a judge to simplify a complex format—the very complexity of which may give a strong semblance of novelty—thereby making more accurate his determination of novelty.

Finally, it should be observed that the novelty guideline brings into focus a misleading analogy between formats and the so-called "basic dramatic core."¹⁴⁶ Justice Schauer was fond of pointing out that there are only "thirty-six fundamental dramatic situations,"¹⁴⁷ and it is apparently on the basis of this sort of thinking that protection is now denied to the "basic dramatic core" of a story or play. That is, since all

144. 266 Cal. App. 2d 495, 72 Cal. Rptr. 287 (2d Dist. 1968). This is one of several cases concerning the television series "Sea Hunt." See also *Donahue v. United Artists Corp.*, 2 Cal. App. 3d 794, 83 Cal. Rptr. 131 (2d Dist. 1969); *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 54 Cal. Rptr. 130 (2d Dist. 1966) (first appeal of *Donahue v. United Artists Corp.*).

145. 266 Cal. App. 2d at 505, 72 Cal. Rptr. at 294.

146. The analogy is not uncommon. See, e.g., Justice Traynor's concurring and dissenting opinion in *Kurlan v. CBS*, 40 Cal. 2d 799, 812, 256 P.2d 962, 971 (1953). "The basic program plan adopted as the foundation for a radio serial is analogous to the [unprotectible] basic dramatic core of a play or movie. It consists only of the author's general ideas as distinct from his original treatment or development of them. Such general ideas are free and cannot constitute property." *Id.* at 813, 256 P.2d at 971. (This, even conceding that the format was novel and original.)

147. *Desny v. Wilder*, 46 Cal. 2d 715, 741, 299 P.2d 257, 271; *Goldiug v. RKO Pictures, Inc.*, 35 Cal. 2d 690, 710-13, 221 P.2d 95, 107-08 (dissenting opinion). This proposition seems to have been first recognized judicially in *International Film Serv. Co. v. Affiliated Distrib., Inc.*, 283 F. 229, 233 (S.D.N.Y. 1922). *Libott* disputes its validity. *Libott*, *supra* note 3, at 754.

of the dramatic situations are in the public domain, it follows that no author can possibly come up with anything original or "novel" on this basic level. *Ergo*, no protection. But this proposition does not really apply in the area of formats for a *series* of shows. To be saleable, a format must have more than dramatic potential. It must have special, unique elements—gimmicks, really—which in all likelihood will be totally unrelated to a given dramatic situation, except as a means for conveying it. They may come from anywhere within the vast reaches of imagination, and be combined in innumerable ways, limited only by the writer's own creativity. It can hardly be argued, then, that a format is "analogous" to a "basic dramatic core," considering the obvious limitations of the latter.¹⁴⁸ To return to our Harvard marshall, while on a very basic level he can only function in a given story as have countless characters before, the fact remains that he *himself* may still be a novel character. The same could be said for any other novel elements of a show; that is, no matter how common the plot, the framework of the show within which it is utilized may itself nevertheless be novel.

2. *Completeness*

A second guideline for evaluating the property interest in formats is *completeness*—meaning, broadly, the amount of detail put in by the writer. Properly speaking, the only complete work is a final script, which is pure exposition and obviously protected. A format is inherently unable to take such a form, but it may have its own sort of completeness in terms of how much the script-writer must add in order to produce the final product. Ideally, all he would need would be a general story idea or plot; the script, except for specific wording, should then "write itself" from the format. In order for this to happen, the format should set out in detail, among other things, the main character's personality and psychology, his background, his manner of approaching problems, the friends to whom he would turn, and so on, as well as physical description. Such a format will tell the script-writer how his characters will act, what they will think, what their motives will be, and all the other relevant information he will need to put the proper words in their mouths. To the extent that he must figure these things out for himself, the format is incomplete.

Consider again our Harvard marshall example, assuming that the format contains no more than we already know. One day a hawker of

148. It is significant that Justice Schauer recognized this distinction, and concurred in *Stanley* specifically on that ground: "The problem here is more difficult than in *Golding* because here we are in a newer field; all of its vistas have been by no means explored." 35 Cal. 2d at 668, 221 P.2d at 82. This is especially true in television, where the medium itself is flexible enough to offer additional means of "expression."

patent medicines drifts into town, and cheats some of the townspeople. What will the marshall do? As it now stands, the "format" gives the script-writer little aid. All he knows is that the marshall went to college—but what of it? Did he like college? What did he study? Did they teach him how to deal with quacks, or did he learn anything about it somewhere else? The script-writer must answer these and many other questions for himself, in effect being forced to create the character from scratch. On the other hand, if the format tells him that the marshall studied medicine, that he was once cheated by a quack, that he can talk circles around the best salesman that ever lived, that he is an expert at dealing with people by learning their game and then beating them at it—then the outlines of a story being to emerge. The script-writer knows what the character will be likely to do; he has only to make him do it.¹⁴⁹

As in the case of novelty, this guideline conforms to the commercial realities of the entertainment market. Sooner or later any proposed series will need a complete format, even if it develops as the series is produced, and obviously the producer would prefer to have it at the outset, for the initial format price. In other words, the more complete the format, the more valuable it is to both the producer and the writer.

It should be observed that "novelty" and "completeness" are entirely separate requirements. The Harvard marshall idea, for instance, may be novel, but it is clearly not complete. On the other hand, a detailed, in-depth analysis of a marshall who turned out to be a carbon copy of Matt Dillon might well be complete, but hardly novel. A realistic system for determining property interests in formats should embrace both requirements, since neither, standing alone, necessarily reflects either literary effort or commercial value sufficient to warrant

149. Similar to "completeness" is Rubenstein's concept of the "elaborated idea," which he describes as follows:

[I]f an author has a novel and original idea and decides to clothe it in a costume of his own fashioning (the fabric, the needle and thread, the thimble lie on his study table with a sketch showing what the rehabilitated idea will look like), surely only he should be allowed to elaborate the sketch and finish off the costume—a costume which, but for the author, would never have existed.

[S]urely the test will be: could the interpreter have produced the finished article, the end product, if the author had not produced the elaborated idea? Rubenstein, *supra* note 134, at 296. *Accord*, Libott, *supra* note 3, at 742. Olsson seems to approve of this concept generally, although it may be assumed that for him the "elaboration" would have to be pretty extensive. Olsson, *supra* note 9, at 34. *See* Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119, 123 (1954). There is some support in American decisions outside of *Hamilton Nat'l Bank v. Belt*, 210 F.2d 706 (D.C. Cir. 1953). *Cf.* *Dam v. Kirk La Shelle Co.*, 165 F. 589 (S.D.N.Y. 1908), *aff'd*, 175 F. 902 (2d Cir. 1910) (decided before the 1909 Copyright Act, finding that a play infringed a copyrighted book which "could, by appropriate dialogue, scenes, and stage business, be translated or expanded into a drama." *Id.* at 592).

protection. However, it may be desirable to balance them. It is impossible, for instance, to state flatly when a format will be absolutely "complete." But it seems fair to say that the stronger the element of novelty, the less critical the element of completeness should become, and conversely, a high degree of completeness might allow a decreased emphasis on novelty. The main effort should always be to grant protection to those formats which, by virtue of their content and the effort they reflect, would commonly be regarded as valuable property in the entertainment marketplace.

CONCLUSION

Viewing the current state of the law in this area, one is reminded of Prince Hamlet: despite its ability, in terms of resources and opportunity, to bring an end to the search for protection, it still seems unable to make up its mind. Fortunately, the consequences have not yet proven so deadly. The world will not collapse if format protection is deferred still longer. But in an area in which the doctrinal machinery is so readily available, and in which a definitive statement may so easily be made, it is a wonder the courts have not thought to do it. Perhaps when next we ask for "more matter, with less art," our plea will be answered.¹⁵⁰

Robin Meadow

150. After this Comment was submitted for publication, *Fink v. Goodson-Todman Enterprises*, 9 Cal. App. 3d 996, 88 Cal. Rptr. 679 (2d Dist. 1970) was decided in one of the California district courts of appeal. The decision incorporates a number of the ideas discussed in part IV of this Comment, and expressly recognizes that formats may be protected as property. See especially the discussion in 9 Cal. App. 3d at 1009-16, 88 Cal. Rptr. at 687-95. The case is especially noteworthy for its extensive discussion of the formats themselves, since there is some indication of the detail necessary for a format to be entitled to property protection.