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Stolen from Stardust and Air: Idea Theft in the Entertainment Industry and a Proposal for a Concept Initiator Credit

Robert M. Winteringham*

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* A.B., with high honors, University of Michigan, 1991; J.D. candidate Indiana University School of Law–Bloomington, 1994. The Author wishes to thank his parents, R.A. and Margaret Winteringham, and a cast of thousands for their help and support during the creation of this Note. This Note is dedicated to the memory of Grace M. Strong.
"[I]n the movies you can’t have thieves as heroes."
—June Gudmundsdottir (Greta Scacchi) in The Player

INTRODUCTION

It has long been an axiom of copyright law that copyright does not protect ideas, but only the fixed expression of ideas.1 For the entertainment industry, this means that a motion picture, not the underlying idea for the movie, receives copyright protection. In Hollywood, the entire entertainment industry depends upon unprotectable ideas to create the finished product, which will attract audiences into theaters or viewers to television sets. To attract an audience (and thereby to make money), many other projects will frequently use the idea underlying a successful film in hope that the idea will work as well a second time. Others will then use the idea again and again until it stops working.2

Hollywood is supported by a small community that depends on that most precious of commodities: the original idea. To create entertainment, ideas must be developed until a finished, marketable product can emerge from an initial concept. This development occurs in a number of creative stages. The contributions of writers, directors, editors, producers, and actors all shape the final work. The unprotectable idea eventually develops into a fixed, copyrightable expression.

Copyright, for example, would protect the finished expression of a concept where a man named Joe (for the sake of argument played by Kevin Costner) meets and falls in love with a woman named Miriam (played by Sharon Stone) on a space station near Mars in the near future. Joe, of course, says something insensitive that hurts and alienates Miriam. As a result, Miriam begins a relationship with Joe’s evil step-brother Eddie (played by Tom Cruise). Eddie, as it turns out, wants to sell Miriam into interga-

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lactic space slavery and kidnaps her. After a few slick spacecraft fight sequences and nifty special effects, Miriam realizes that she loves Joe. Joe eventually defeats Eddie in battle. The movie ends with Joe and Miriam having a space wedding, and the credits roll.

Copyright protects many parts of this (albeit silly) example, including the actual film prints, the scripts, and the set designs. The tangible fixations of expression receive protection. Ideas underlying the film, however, cannot be copyrighted. For example, the generic underlying idea of boy meets girl, boy loses girl, boy eventually wins girl back will not be protected. After all, "Ideas are free as air." Copyright does not extend to protecting simple ideas such as boy meets girl.

Between the two extremes of a simple, unprotectable idea and a fully copyrightable expression, a film project goes through many stages where creative decisions are made that may not receive copyright protection. Unless the author tangibly expresses creative decisions, they cannot be copyrighted. Furthermore, ideas are not eligible for independent protection. Therefore, a gap in intellectual property law prevents an artist's creative endeavors from being fully protected. If, for instance, an author creates a synopsis of a proposed plot, copyright will protect the expression in the synopsis. The specific ideas underlying the summation cannot be copyrighted, and thus remain subject to theft.

An unethical writer or studio executive may steal the idea and make sufficient alterations to avoid copyright problems, thereby leaving the original writer without legal recourse. This practice of idea theft has given rise to an intellectual property tort centering around the "based upon" credit. The based upon credit tort allows an author to sue to receive credit for an original idea used in another work.

Courts recognized the importance of idea attribution in two recent cases: Buchwald v. Paramount Pictures Corp. and King

These cases require either acknowledgement of an idea contribution in a film, or the removal of a credit where an author has not substantially contributed to a film, and the use of the author's name in connection with the film would harm the author.

Unfortunately, there is no consensus as to what exactly "based upon" means regarding the protection of ideas. Neither the legal community nor the creative community has developed a standard meaning and test for the necessity of a based upon credit. In order to have legal significance, "based upon" needs to have a clear and precise meaning, or it will be ineffective in protecting the author from idea infringement.

This Note proposes the creation of a single legal standard for a based upon attribution called the "concept initiator" credit.

8. King, 976 F.2d 824.
10. See King, 976 F.2d 824.
11. Entertainment experts disagree about the definition of "based upon." Paramount creative executive David Kirkpatrick testified in the Buchwald trial that "based upon" has two aspects—access to the author's work and "that the antecedents were of a significant story nature to claim a based upon credit." Buchwald, 17 Media L. Rep. (BNA) at 1262. According to Kirkpatrick, a movie is based upon another work if it "was created out of significant elements from the underlying materials." Id. Kirkpatrick gave comparable characters, story similarities, and like plot structures as examples of "significant elements." Id. One Paramount attorney, Helene Hahn, testified that it meant that a movie "had been derived from and incorporated the elements of author's work," while another, Alexandra Denman, said Coming to America was based upon Buchwald's story if it were written "with the elements of Mr. Buchwald's story, I mean the specific elements of the story, which is the work." Id. According to writer David Rintels, "based upon" includes "intent" and a "similarity in spirit" that can be recognized from experience. Id. Although writer Edmond H. North said that similarity in plot, theme, and characters would be important to the determination, id., writer Lynn Roth would not consider plot, characters, or motivation, id. at 1263. These, she said, relate to "development of the project" rather than the basic theme. Id. According to Roth, "based upon" means "something came from something else." Id. at 1262.

The King court summarized the testimony of John Breglio, an attorney specializing in entertainment law:

[T]he industry standard for determining the meaning of a "based upon" movie credit is very similar to that used by copyright lawyers in examining issues of copyright infringement. Breglio further explained that this standard involved looking "at the work as a whole and how much protected material from the underlying work appears in the derivative work." King, 976 F.2d at 829 (emphasis in original).
Unlike copyright law, which protects only fixed expressions, the concept initiator credit would protect certain ideas.

This Note defines a three-part test for courts to use when deciding whether a concept initiator credit is needed in an entertainment product. First, the idea is eligible for the concept initiator credit if it qualifies as a "narrative crux." A narrative crux is an idea that is so original and highly specific that the idea's expression would receive copyright protection without being invalidated by the merger doctrine. In a narrative crux, the idea underlying the expression does not extend beyond the expression itself. Second, the idea must be used qualitatively and quantitatively in a second work. Finally, the concept initiator credit will not be required unless the idea was knowingly used in another work.

To avoid confusion, this Note uses the term "concept initiator" instead of the phrase "based upon" in order to differentiate the new standard, which deals exclusively with ideas, from copyright law, which concerns already fixed expressions. This Note uses the "based upon" phrasing when discussing previous case law because the courts have used the "based upon" language.

Part I examines the existing groundwork for the creation of a single concept initiator standard, bearing in mind that existing copyright law has already been expanded to protect some ideas that are fixed in expressions. Since courts have ruled that copyright and based upon actions are similar enough to justify a common test, copyright is relevant to explain the creation of the concept initiator standard. Part II defines the concept initiator test. Part III analyzes the effect of such a credit on the legal and artistic communities. Although Hollywood has already been called "lawsuit happy," this new credit will not significantly increase litigation. If the standard is drawn narrowly, it should further protect the creative community without causing a new flood of lawsuits. Finally, this Note concludes that the concept initiator credit will protect against idea theft.

12. See King, 976 F.2d at 829.
I. CREATION OF THE CONCEPT INITIATOR STANDARD

The concept initiator standard is a legally cognizable extension of existing copyright and contract law. Although the individual original ideas or concepts are not copyrightable,14 copyright law provides the most closely analogous system for protecting an author’s creative work.

A. Recent Case Law Supporting the Creation of an Independent Concept Initiator Credit Standard

Two recent cases, Buchwald v. Paramount Pictures Corp.15 and King v. Innovation Books,16 lay a foundation for a concept initiator credit.

Buchwald dealt with an eight-page screen treatment entitled “It’s a Crude, Crude World” by the famous humorist Art Buchwald, and the movie Coming to America.17 In early 1982 Art Buchwald prepared “It’s a Crude, Crude World,” concerning a third-world prince who came to America for “a state visit.”18 The screen treatment described the story line in some detail,19 and Buchwald gave a condensed, two-page treatment of the plot to Paramount Pictures. Paramount subsequently entered into a contract with Buchwald whereby Paramount bought the rights to Buchwald’s story and concept.20 Paramount wanted to base a movie, starring Eddie Murphy, on Buchwald’s story, to be called “King for a Day.”21 Another person would write the actual script, but “King for a Day” was to be based on “It’s a Crude, Crude World.”22

The production team found hiring both a director and a writer for the “King for a Day” project problematic, but Paramount

18. Id. at 1264.
19. Id. at 1264-65.
20. Id. at 1258.
21. Id.
22. Id.
finally assembled a creative team. No one, however, created a satisfactory script, and Paramount officially abandoned the project in March 1985. In May 1986, Buchwald optioned “It’s a Crude, Crude World” to the Warner Brothers Studio.

In the summer of 1987, Paramount began development of a similar script by Eddie Murphy. In this movie (eventually called Coming to America), Murphy would play an African prince who comes to America to find a bride. The development of Coming to America caused Warner Brothers to cancel further development of Buchwald’s story. Buchwald subsequently filed suit against Paramount.

The court viewed this case as a breach of contract claim. Under contract, Buchwald transferred all rights to his original story concepts to Paramount in return for payment for any future motion picture produced from Buchwald’s ideas. The breach of contract claim turned on whether Coming to America was based upon Buchwald’s story treatment. The court found that “based upon” had no standard definition in the entertainment industry, even though many experts testified as to their understanding of the term. Therefore, the court applied an analysis similar to that used in copyright to find a standard for a based upon credit, although the court admitted that Buchwald was not an infringement case and that copyright had no real application to ideas.

23. The film production team went through at least two writers and two directors before work even began on the project. For a fully detailed description of the troublesome search for creative talent to work on “King for a Day,” see the factual synopsis in Buchwald, id. at 1257-61.

24. Id. at 1260.

25. Id. at 1261.

26. Id.

27. Id.

28. Id. at 1262.

29. Id. at 1262-63; see also supra note 11.

30. The court here quoted Nimmer on Copyright: “However, the copyright requirements that similarity between plaintiff’s and defendant’s work be ‘substantial’ . . . is not applicable in idea cases. If the only similarity is as to an idea then by definition such similarity is not substantial in the copyright sense. . . . If there is a contractual or other obligation to pay for an idea, the defendant cannot avoid such liability by reason of the fact he did not copy more than the abstract or basis idea of
The court based its analysis on past California cases that used a copyright-like approach to breach of contract cases involving idea theft.\textsuperscript{31}

The court noted that the property conferred in the Paramount contract was Buchwald’s idea.\textsuperscript{32} The court applied a two-pronged test to determine whether Paramount used Buchwald’s idea.\textsuperscript{33} This two-part inquiry used the copyright tests of access and substantial similarity to determine the need for a based upon credit.\textsuperscript{34} The court stated that access would be determined by the adapter’s knowledge of the original author’s ideas.\textsuperscript{35} It was undisputed that Paramount creative executives discussed Buchwald’s idea with Eddie Murphy and his manager.\textsuperscript{36} Because it found there was “no real issue concerning access,” the court went on to compare Buchwald’s story and \textit{Coming to America}.\textsuperscript{38}

The court stated that an idea may change from its initial adaptation to its expression in the final work. The court, however, found enough similarities to establish an infringement of Buchwald’s idea and, thus, a breach of contract by Paramount.\textsuperscript{39}

The second case that helps set the framework for a concept initiator standard involves an author who sued under “false light” and “right to publicity” theories in order to remove a based upon credit from a movie supposedly adapted from one of his short stories.\textsuperscript{40} In \textit{King v. Innovation Books}, author Stephen King sold the movie rights for his short story “The Lawnmower Man” to

\begin{flushright}
\textit{plaintiff’s work.”}
\end{flushright}

\textit{Buchwald}, 17 Media L. Rep. (BNA) at 1263-64 (Buchwald’s emphasis) (citations omitted) (quoting 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 16.08[B] at 16-64 to 16-65 n.58).

32. \textit{See id.} at 1267.
33. \textit{Id.} at 1263.
34. \textit{Id.}
35. \textit{Id.}
36. \textit{Id.}
37. \textit{Id.}
38. \textit{Id.} at 1264.
39. \textit{Id.} at 1268.
The Great Fantastic Picture Corporation. The Great Fantastic Picture Corporation then assigned the movie rights to "The Lawnmower Man" to various entities, with New Line Films eventually having the film’s American distribution rights. The movie differed significantly from the short story. The title of the film, however, was Stephen King’s The Lawnmower Man, and the credits included the acknowledgement "based upon a short

41. Id. at 826.
42. Id. at 827.
43. The court describes the short story:
The Short Story... involves Harold Parkette, a homeowner in the suburbs. Parkette begins to neglect his lawn after an incident in which the boy who usually mows his lawn mows over a cat. By the time Parkette focuses his attention again on his overgrown lawn, the boy has gone away to college. Parkette therefore hires a new man to mow his lawn. The lawnmower man turns out to be a cleft-footed, obese and vile agent of the pagan god Pan. The lawnmower man also is able to move the lawnmower psychokinetically—that is, by sheer force of mind.

After starting the lawnmower, the lawnmower man removes his clothing and crawls after the running mower on his hands and knees, eating both grass and a mole that the mower has run over. Parkette, who is watching in horror, phones the police. Using his psychokinetic powers, however, the lawnmower man directs the lawnmower after Parkette, who is chopped up by the lawnmower’s blades after being chased through his house. The Short Story ends with the discovery by the police of Parkette’s entrails in the birdbath behind the home.

Id. at 826.
The court then describes the movie:
The protagonist of the two hour movie is Dr. Lawrence Angelo. Experimenting with chimpanzees, Dr. Angelo develops a technology, based on computer simulation, known as “Virtual Reality,” which allows a chimp to enter a three-dimensional computer environment simulating various action scenarios. Dr. Angelo hopes to adapt the technology for human use, with the ultimate goal of accelerating and improving human intelligence.

Eventually, Dr. Angelo begins experimenting with his technology on Jobe, who mows lawns in Dr. Angelo’s neighborhood and is referred to as "the lawnmower man." Jobe, a normal-looking young man, is simple and possesses a childlike mentality. Dr. Angelo is able greatly to increase Jobe’s intellect with Virtual Reality technology. However, the experiment spins out of control, with Jobe becoming hostile and violent as his intelligence and mental abilities become super-human. In the build-up to the movie’s climax, Jobe employs his newly acquired psychokinetic powers to chase Dr. Angelo’s neighbor (a man named Harold Parkette) through his house with a running lawnmower, and to kill him. The police discover the dead man’s remains in the birdbath behind his home, and, in the climax of the movie, Dr. Angelo destroys Jobe.

Id. at 827.
story by Stephen King."44 King sued to have his name removed from the film.45

As in Buchwald, the King court found it difficult to determine what exactly “based upon” meant46 and also confronted the problem of how to test the propriety of a based upon credit. This federal court, like the California court in Buchwald, decided to use a standard similar to copyright infringement to determine the suitability of a based upon credit in the film.47 The court decided that if the film drew “in material respects from a literary work, both quantitatively and qualitatively, a ‘based upon’ credit should not be viewed as misleading.”48

The court concluded that material resemblances existed between the film and King’s short story.49 The court, therefore, held that a based upon credit was appropriate.50

If an author has a contract with a film studio, some courts have provided a right of attribution (or lack thereof) for the author’s ideas used in a film. Buchwald and King, however, indicate that ideas (created under contract or not) can be explicit enough to warrant protection. By applying elements of copyright and contract law to idea misappropriation, courts have developed the basis for creation of a concept initiator credit.

44. Id. at 826.
45. Id. at 828.
46. See id. at 829-30.
47. Id. at 829-30.
48. Id. at 830.
49. The court stated:
As King himself described it, “the core of my story, such as it is, is in the movie.”...

We recognize that several important and entertaining aspects of the Short Story were not used in the film, and that conversely the film contains a number of elements not to be found in the Short Story. However, when the resemblances between the Short Story and the motion picture at issue here are considered together, they establish to our satisfaction that the movie draws in sufficiently material respects on the Short Story in both qualitative and quantitative aspects.

Id.
50. Id. at 830-31.
B. Elements of Existing Copyright Case Law Support the Concept Initiator Standard

The Copyrights Act of 1976 explicitly protects only fixed expression. The courts, however, have historically recognized that certain elements outside the specific expression were protectable. In Sheldon v. Metro-Goldwyn Pictures Corp., Judge Learned Hand stated that an expression's copyrightable elements extended beyond speech to gestures, scenery, costumes, and even the actor's appearance. Examples of such elements from other cases include "total concept and feel" of a work, and character protection.

1. Copyright Protection of Ideas Underlying Expression

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. illustrates the movement of copyright law to protect concepts underlying expression. Krofft presented a two-part test for determining similarity between a copyrighted work and an allegedly infringing work. The test component compared identifiable factors such as plot, setting, artwork, and material used in the expression. The court called this an extrinsic test. The second, or intrinsic, test compared whether an ordinary reasonable person

52. See, e.g., Sid & Marty Krofft TV Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669 (1936); see also Edward Samuels, The Idea-Expression Dichotomy in Copyright Law, 56 Tenn. L. Rev. 321, 353 (1989) (recognizing that the Krofft decision borders on allowing the infringement of ideas alone to constitute a case for copyright infringement).
53. Sheldon, 81 F.2d 49.
54. Id. at 55.
55. See Krofft, 562 F.2d at 1167.
56. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940); King Features v. Fleischer, 299 F.2d 533 (2d Cir. 1924); Hill v. Whalen & Martell, 220 F. 359 (S.D.N.Y. 1914).
57. See Krofft, 562 F.2d at 1167.
58. Id. at 1164.
would believe that a substantial similarity exists between the two works.\textsuperscript{59}

Applying the test, the court held that McDonald's "McDonaldland" commercials infringed Krofft's \textit{H.R. Pufnstuf} television show because McDonaldland "captured the 'total concept and feel' of the Pufnstuf show."\textsuperscript{60} Both the imaginary land in Pufnstuf and McDonaldland had caves, ponds, roads, castles, and human faces on inanimate objects.\textsuperscript{61} The court said that these similarities went beyond idea similarity and into expression infringement.\textsuperscript{62}

Despite the court's claim that it was only shielding expression,\textsuperscript{63} a closer analysis shows that the court in \textit{Krofft} was actually protecting ideas.\textsuperscript{64} A land with roads, ponds, castles, and talking trees hardly seems to be expression-specific.\textsuperscript{65} The court essentially admits that it is protecting ideas by saying that McDonaldland captured the "total concept" of the land in Pufnstuf.\textsuperscript{66}

2. Copyright Protection for Character Ideas

Ideas for characters also currently receive protection. In its discussion of the extrinsic test, the court in \textit{Shaw v. Lindheim}\textsuperscript{67} used similar plots, characters, and general theme traits as evidence to show that one television show infringed upon another show.\textsuperscript{68} The court used abstract traits such as the main character being well-educated, wealthy, self-assured, and faithful as an example of

\begin{itemize}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 1167 (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)).
\item \textsuperscript{61} \textit{Id.} n.9.
\item \textsuperscript{62} \textit{Id.} at 1167.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} See Samuels, \textit{supra} note 52, at 353.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} See \textit{Krofft}, 562 F.2d at 1167.
\item \textsuperscript{67} \textit{Shaw}, 919 F.2d 1353 (9th Cir. 1990).
\item \textsuperscript{68} \textit{Id.} at 1357-58 (comparing a series pilot with the show \textit{The Equalizer}, which allegedly infringed upon the pilot).
\end{itemize}
similar attributes, although such themes are not expression-specific and should not be copyrightable.

The court in *Shaw* stated further that satisfaction of the extrinsic test (comparing among other things, plot and settings) alone created a triable issue of fact for copyright infringement. The court admitted that "a man who will equalize the odds, a lone man working outside the system" is an idea and unprotectable by copyright. Nevertheless, when general traits such as wealth and education are added to the idea of a lone equalizer, the court stated that the idea becomes an expression. An educated, rich, cocky, faithful man who works outside the law for the forces of good, however, does not describe an expression-specific character.

*Shaw* is only one example in a long line of federal cases offering copyright protection to ideas for characters. In 1954, in *Warner Bros. Pictures v. CBS, Inc.*, the Ninth Circuit implied that characters who constituted the basis of a story could be copyrighted separately from the expression that contains the character. Conversely, incidental characters, "chessm[e]n in the game of telling the story," cannot receive independent copyrights. The court, however, stated that the characters of an author's imagination are bound to fall into a "limited pattern." Therefore, by protecting the character, the court actually protects

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69. *Id.* at 1358.
71. *See Shaw*, 919 F.2d at 1357.
72. *Id.*
73. *Id.* at 1358.
75. *See id.* at 950.
76. *See id.*
77. *Id.*
78. *Id.* The court then quotes Holmes:

"He must be a poor creature that does not often repeat himself... Why, the truths a man carries about with him are his tools; and do you think a carpenter is bound to use the same plane but once to smooth a knotty board with, or to hang up his hammer after it has driven its first nail? I shall never repeat a conversation, but an idea, often."

*Id.* n.5 (quoting O.W. HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE 9 (reprint of the original edition)).
the idea underlying the character, which can be used in more than one work by different authors.

In 1983 the court in *Warner Bros. v. ABC* 79 continued to afford copyright protection without regard to any specific expression. The court went so far as to say that the fact that a character may be an idea does not diminish the expressive aspect of the combination [of particular traits]. But just as similarity cannot be rejected by isolating as an idea each characteristic the characters have in common, it cannot be found when the total perception of all the ideas as expressed in each character is fundamentally different. 80

Thus an amalgamation of ideas can acquire copyright protection regardless of the surrounding expression. 81

Characters are therefore taking on copyrightable lives of their own and are no longer bound to a singular expression. A fictional character can be an idea or a general concept. 82 As long as the court can recognize a personality trait, or a character type, the court can find copyright and infringement. 83

C. The Coexistence of the Concept Initiator Credit and Copyright Principles

Not only does current copyright law support the concept initiator credit, the proposed credit also does not contradict

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80. *Id.* at 243.
81. *Id.* at 242.
83. *Id.* at 631.

Fully realized characters in literature are little different from fully defined personalities in daily life, and it is no surprise that the test of protectibility that courts apply [or should be applying] to literary characters is closely akin to the criterion that individuals apply in daily life to determine whether they in truth know someone. A literary character can be said to have a distinctive personality, and thus to be protectible, when it has been delineated to the point at which its behavior is relatively predictable so that, when placed in a new plot situation, it will react in ways that are at once distinctive and unsurprising.

established copyright principles. For example, the merger doctrine, which keeps a work from being copyrighted if the expression and the larger idea underlying the expression are inseparable, is not at odds with the proposed standard. The narrow definition of the concept initiator credit's narrative crux ensures that a more general idea does not extend beyond the expression. It is not similar to the boy meets girl theme, which can be expressed in an infinite number of ways. The idea expressed in a plot synopsis, like the Joe and Miriam story, extends only as far as the expression that evolves from the idea. In the same way, the concept initiator credit covers only the original material elements underlying one finished product.

Moreover, the concept initiator credit is analogous to the derivative works doctrine. Creators of copyrighted works can grant to other authors the right to create derivative works from the original expression. Derivative works do not directly apply to

84. In the merger context, protecting the expression would also confer a monopoly on the underlying idea. Baker v. Selden, 101 U.S. 99, 103 (1879); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 741 (9th Cir. 1971); Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Crume v. Pacific Mut. Life Ins. Co., 140 F.2d 182, 184 (7th Cir.), cert. denied, 322 U.S. 755 (1944); see also Continental Casualty Co. v. Beardsley, 253 F.2d 702, 705-06 (2d Cir. 1955), cert. denied, 358 U.S. 816 (1958). The theory behind the merger doctrine holds that if the expression cannot be copyrighted without also copyrighting the idea underlying the expression, then copyright will not attach. See Baker, 101 U.S. at 103. The merger doctrine exists to prevent the protection of ideas when the idea is so intertwined with the expression that the expression cannot be created without also using the particular idea. See, e.g., id.; Herbert Rosenthal Jewelry Corp., 446 F.2d at 742; Morrissey, 379 F.2d at 678-79; Crume, 140 F.2d at 189. The merger doctrine keeps ideas in the public domain for the use of all authors and artists. To do otherwise would risk idea monopolization and severely limit the number of concepts that could be expressed without infringement. Jessica Litman, The Public Domain, 39 EMORY L.J. 965, 966-67 (1990).

85. See infra part II.

86. Cf. Herbert Rosenthal Jewelry Corp., 446 F.2d at 740-42 (using idea-expression dichotomy concept to declare jeweled bee pin an idea not capable of receiving copyright protection).

87. Stewart v. Abend, 495 U.S. 207, 226-27 (1990). The Copyrights Act of 1976 grants to copyright owners the right to create derivative works. 17 U.S.C. § 106(2) (1988). The derivative author, however, has only a copyright in the new things that he or she adds to the underlying work. Durham Indus., Inc. v. Toomy Corp., 630 F.2d 905, 909 (2d Cir. 1980); L. Battin & Son v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976). The derivative work concept exists to strike a "balance between the artist's right to control the work . . . and the public's need for access to creative
the concept initiator credit tort because the derivative work doctrine only applies to copyrighted works. As with copyrightable derivative works, concept initiator works take some preexisting material and add to or change the underlying narrative crux. "Concept initiator," like the derivative work doctrine, allows the adapter to have access to the conceptualized idea while at the same time allowing the creator of the idea to control, or at least receive credit for, the underlying work.

Past and current case law shows that all of the necessary elements for a concept initiator credit already exist. Unique and exact ideas, which warrant protection when fixed in an expression, should be treated as protectable property before they are fixed in expression, regardless of whether the idea was created while under contract.88

II. A PROPOSAL FOR THE CONCEPT INITIATOR CREDIT STANDARD

The definition of "concept initiator" includes three inquiries: first, whether the idea is a narrative crux; second, whether the narrative crux was used quantitatively and qualitatively in a second work; and third, whether the adapter knowingly used the narrative crux. If all three inquiries are answered affirmatively, the second work should include the concept initiator credit.

The first part of the concept initiator credit involves deciding whether an idea is an independently created narrative crux. The definition of narrative crux refers to well-defined ideas that, if fixed in an expression, would be sufficiently original to warrant copyright, without being invalidated by the merger doctrine. The content of a narrative crux does not extend beyond the sole expression of the idea itself. If the idea can be fixed in more than one expression, the narrative crux criteria is not met. Under this definition, a plot-line synopsis like the Joe and Miriam example is a narrative crux. A general theme such as boy meets girl,

works." Stewart, 495 U.S. at 228.
however, does not meet the definition because it can be fixed in more than one expression.

Part two of the definition looks to the quantitative and qualitative use of the narrative crux in the creation of a second work. As with copyright infringement, exact copying is not needed for concept initiator infringement to occur. The author of the second work must only use the original idea “quantitatively and qualitatively” in the adaptive expression.

_Fink v. Goodson-Todman Enterprises, Ltd._ recognized that similarities do not have to be as pronounced in a case that involves adaption of an idea as they do in a case that compares two fixed expressions. To determine whether or not a based upon credit was needed, the _Fink_ court used the same quantitative and qualitative infringement test that is used to determine copyright infringement. The court said that this test was appropriate even when the similarity is quantitatively insignificant in the second work. In applying the test, the court asked whether there was a “structural spine” in the alleged adaptation’s work that had the same “structural dimensions” as the originator’s idea. The court ignored inconsequential modifications such as changes in setting. In essence, this meant that a based upon credit was appropriate despite the fact that a second work merely used the original author’s idea and not the original expression.

89. _Cf._ King v. Innovation Books, 976 F.2d 824, 830 (2d Cir. 1992).
90. _See_ Runge v. Lee, 441 F.2d 579, 582 (9th Cir.), _cert. denied_, 404 U.S. 887 (1971); Williams v. Kaag Mfrs., 338 F.2d 949, 951 (9th Cir. 1964); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947).
91. _Cf._ Sid & Marty Krofft TV Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).
93. _Id._ at 689.
94. _Id._ at 690-91.
95. _Id._ at 693.
96. _Id._
97. _Id._ at 692.
98. _See generally id._ For instance, incidental points and scenes that result from a common genre, like spaceships in a science fiction movie, do not qualify as appropriate similarity comparisons because they are not essential to the author’s idea. Olson v. NBC, 855 F.2d 1446, 1451 (9th Cir. 1988).
Finally, under the definition of the concept initiator standard, adaptive creators must be aware that they are using the original author’s narrative crux as the basis for the adaptation. This requirement addresses the issue of access.\textsuperscript{99} Access in the concept initiator context is proven by evidence such as a contract, documentation, or striking similarity. To accommodate the new standard, the traditional meaning of access must be broadened to include situations such as overhearing a narrative crux and taking the fully developed idea, or stealing the idea from a short synopsis or screen treatment.

Unfortunately, this standard increases the possibility of frivolous suits. Currently, copyright law uses a flexible standard centered around a preponderance of the evidence to prove infringement.\textsuperscript{100} In order to discourage unmeritorious suits, yet still protect against idea theft, the burden of proof should be raised to a clear and convincing standard. Adoption of the clear and convincing standard would help protect narrative cruxes, yet keep general ideas in the public realm.

\textsuperscript{99} Access must be established to prove copyright infringement. Reyher v. Children’s TV Workshop, 533 F.2d 87, 90 (2d Cir. 1976).

\textsuperscript{100} As the court in \textit{Sid & Marty Krofft Television Productions v. McDonald’s Corp.}, stated:

\hspace{1em} No amount of access will suffice to show copying if there are no similarities. This is not to say, however, that where clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may not be lower than when access is shown merely by a preponderance of the evidence. As Professor Nimmer has observed: “[C]lear and convincing evidence of access will not avoid the necessity of also proving substantial similarity since access without similarity cannot create an inference of copying. However, this so-called ‘Inverse Ratio Rule’ . . . would seem to have some limited validity. That is, since a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof.” Krofft, 562 F.2d 1157, 1172 (9th Cir. 1977) (citations omitted) (quoting 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 143.4, at 634 (1976)); see also Buchwald v. Paramount Pictures Corp., 17 Media L. Rep. (BNA) 1257, 1264 (Cal. Ct. App. 1990) (“[P]laintiff has the burden of proving similarity by a preponderance of the evidence.”).
III. THE SIGNIFICANCE OF THE CONCEPT INITIATOR STANDARD

The concept initiator standard is needed not only in the area of entertainment law, but in other areas of creative endeavor as well. "Idea theft," says entertainment lawyer Pierce O'Donnell, "is a cancer in Hollywood. In an industry where imagination and creativity [are] the key[s] to success, idea theft is grand larceny. And it is prevalent."\(^{101}\)

Beyond Buchwald, many of Hollywood's latest hits and even major box office bombs have been the subjects of lawsuits for idea theft. Recently, Martha Raye sued producers over the movie For the Boys. Raye claimed the movie told her life story without giving her credit. A Canadian filmmaker claimed that Die Hard is "wholesale cinematic 'Xeroxing'" of his own movie entitled Kings and Desperate Men. People also sued over the plot of Home Alone. The storyline of a French movie, Père Noel, in which a boy left home alone on Christmas must defend his home from an intruder, does sound familiar. The director of Père Noel filed suit.\(^{102}\)

Idea theft occurs because of the current Hollywood business structure. Writers freely pitch oral ideas, and the line between a remake and a blatant infringement frequently blurs.\(^{103}\) Another root of the idea theft problem is the fact that Hollywood is such a small community. In essence, everyone works with everybody else.\(^{104}\) Plagiarism is said to be systemic.

New writers must openly promote their ideas in hope of landing their first contract. Unfortunately, studio executives may turn around and give the idea to a top (A-list) writer to develop, while the original writer receives nothing for his or her creation.\(^{105}\) The sometimes brazen attitude of the studio executives

\(^{101}\) Horowitz, supra note 13, at 1.
\(^{102}\) Id. at 22.
\(^{103}\) Id.
\(^{104}\) See id.
\(^{105}\) See id.
has been described as the "we can get away with it, so let's do it" mentality. 106

Studio executives sometimes even view idea theft as ethical. "There are people in this town [Hollywood]—everybody knows their names—who are wildly unethical in the way they do business, but you can't ignore them because they have proven they can make successful movies," says a producer who has worked both independently and as studio executive. "There's the attitude at the studios that if it's legal, it's ethical. Well, people are screwed legally in this town every day." 107

Many executives also have decided to let writers sue for a stolen idea because the suit will be settled later for less money than owed on the original contract. 108 Frequently, an idea theft settlement includes a confidentiality agreement so the public does not know anything about the idea theft. 109

The idea theft problem frequently becomes compounded by the popular idea and sequel phenomena. It has been suggested that there are only thirty-six different dramatic situations. 110 Hollywood productions regularly deal with approximately seven of the thirty-six situations. 111 Hollywood also experiences fads for the same theme. 112 In past years, two productions of Robin Hood, two productions of Dangerous Liaisons, 113 and two productions of Christopher Columbus were being filmed simultaneously in a race to be the first to reach the theaters. 114 These competing productions can spawn idea theft suits. 115

The entertainment industry also thrives on the sequel phenomenon. A sequel will usually earn money based upon the popularity and audience familiarity with the characters and

106. Id. at 23.
108. Id.
111. Johnston, supra note 3.
112. Id.
113. Id.
115. Id.
situations presented. Once a particular plot line or character proves to be successful, others will copy it in an effort to capitalize on the original product's popularity.\textsuperscript{116}

The creation of a concept initiator standard would help alleviate idea theft. Writers would benefit most directly. Currently, the only protection a writer can obtain for a fully developed original idea is to register the idea treatment with the Writer's Guild of America.\textsuperscript{117} This precaution, however, frequently falls short.\textsuperscript{118} Art Buchwald could successfully sue Paramount because his contract promised payment for any idea made into a movie, not because he registered his work with the Writer's Guild.\textsuperscript{119}

The concept initiator credit would at least force credit to be acknowledged where it is due. If fully conceptualized ideas can be the subject of a contract,\textsuperscript{120} they are sufficiently concrete and legitimate to give rise to an independent idea theft suit. Currently, if an idea not generated under contract gets stolen, others get the credit, notoriety, and profits from an adaptation.

The studios would also benefit from the creation of a concept initiator standard. The concept initiator credit would act as extra insurance that a competing studio would not use the same concept in a similar movie before copyright can attach. The studio would thus be better able to protect the ideas generated by its pool of writers.

Arguably, a potential problem with the creation of a concept initiator credit would be an increase in the number of suits. When the court decided \textit{Buchwald}, many commentators felt it would cause an increase in the number of lawsuits because of the public perception of receiving easy money.\textsuperscript{121} This increase in suits, however, would not result from the concept initiator standard.

\textsuperscript{116} Johnston, \textit{supra} note 3.
\textsuperscript{117} Horowitz, \textit{supra} note 13, at 23.
\textsuperscript{118} \textit{Id.}
\textsuperscript{120} \textit{See id.}
\textsuperscript{121} Horowitz, \textit{supra} note 13, at 22.
The proposed test for the concept initiator credit includes a safeguard to prevent an increase in suits. The use of current legal requirements for similarity and access would in effect preclude most concept initiator suits as the tests already do for copyright infringement cases. Most copyright infringement suits are not valid claims. The suits usually fail because they do not meet the basic legal standards required to prove a legitimate cause of action for infringement. In fact, studios label most copyright suits as nuisance suits. "If you write a hit movie, the odds are good you'll get sued," said Craig Jacobson, a Hollywood entertainment lawyer.

Infringement accusations may be easy to make, but the claims are difficult to prove and expensive to litigate. The cost and difficulty of litigating deters most people from suing. The proposed concept initiator credit requirement retains these same expense and difficulty factors.

In addition, the creation of a concept initiator standard will not cause further harm, such as bankrupting the entertainment industry. The studios already protect themselves from idea theft allegations through the use of insurance. Production companies regularly buy errors and omissions (E&O) insurance. Errors and omissions insurance protects against all infringement liabilities. Although E&O insurance, by itself, is not a reason to adopt a concept initiator standard, it shows that the concept initiator credit tort will not create insurmountable problems in the entertainment field.

Ideas from the creative community need and deserve protection from rampant idea theft. A combination of lack of effective writer protection, a closed community, and a premium

122. Id.
123. Id.
124. Id. at 1.
125. Id. at 22.
127. See Mathews, Voyage of Rediscovery, supra note 114.
128. Horowitz, supra note 13, at 1.
placed on a few popular ideas and sequels creates an atmosphere where unprotected ideas will continue to be taken without protection.\textsuperscript{129} Creating the concept initiator credit will at least partially remedy the situation without causing a significant increase in litigation or expense.

**CONCLUSION**

*Buchwald* and *King* lay a foundation to create a concept initiator credit, but provide no uniform definition for the term "based upon."\textsuperscript{130} Using the *Buchwald* and *King* cases as a springboard, the concept initiator credit cause of action can be created. The action for a concept initiator credit starts with a narrative crux, which is a highly developed, but not yet fixed, idea whose fixed expression would received copyright protection. If an adaptor knowingly uses a narrative crux quantitatively and qualitatively to adapt it into another expression, a concept initiator credit should appear.

The proposal for a mandatory concept initiator credit is not a legal anomaly without any basis in current law. The concept only slightly extends the similar existing copyright law, which has begun to protect the idea in an expression.\textsuperscript{131} Characters and other features that transcend a single expression already receive protection through copyright.\textsuperscript{132} Federal courts already recognize a based upon credit in other contexts as a legitimate claim,\textsuperscript{133} and California has ample case law permitting suits for idea misappropriation in a contract context.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{129} See Johnston, supra note 3.
\item \textsuperscript{130} See supra note 11.
\item \textsuperscript{131} See Sid & Marty Krofft TV Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).
\item \textsuperscript{132} See Warner Bros. v. ABC, 720 F.2d 231 (2d Cir. 1983); Warner Bros. Pictures, Inc. v. CBS, Inc., 216 F.2d 945 (9th Cir. 1954).
\item \textsuperscript{133} See King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992).
\end{itemize}
The creative community needs a concept initiator credit to protect against idea theft. This proposal provides a practical solution for a continuing problem in intellectual property law without contradicting established copyright doctrine.

It is time to create a uniform concept initiator credit standard to protect the author of a fully conceptualized, original, discrete idea that only needs fixation to complete its development. This small step will greatly help the entertainment, creative, and artistic communities. Authors should receive credit for their own unique ideas, but they often do not. Art Buchwald best summed up the idea theft problem for the unattributed writer after he saw *Coming to America*. He said, "It was an awful movie, but it was my awful movie."135