

**SAVING INGLOURIOUS BASTERDS: AN EXAMINATION OF THE ROLE OF
“SUBSTANTIAL SIMILARITY” IN IDEA SUBMISSION CASES**

By David Aronoff and Jeff Grant*

* David Aronoff is a partner and Jeff Grant is an associate at Lathrop & Gage LLP in Los Angeles.

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I. Introduction

Broadly speaking, a plaintiff asserting idea submission claims based on breach of implied-in-fact contract or breach of confidence legal theories must establish a direct contractual or confidential relationship with the defendant and the defendant’s “use” of the plaintiff’s idea in breach of the parties’ contract or confidence. However, the issue of “use” is often problematic in these cases. At what point does the defendant’s creation of a work embodying creative elements that are similar to the plaintiff’s idea cross the line so as to constitute a “use” of the plaintiff’s idea?

This problem can be illustrated by a hypothetical. Assume that three years ago you had a meeting with the well-known director and producer Quentin Tarantino at which you “pitched” to him – *i.e.*, submitted for his consideration – a detailed written treatment outlining your idea for filming a World War II drama very similar to “Saving Private Ryan.” To be frank, the treatment that you gave Tarantino was not just similar to “Saving Private Ryan,” it was essentially the same story minus the title. Doubtless, dazzled by Tarantino’s celebrity and the thought of meeting this famous film auteur, in drafting the treatment for your meeting with Tarantino you overlooked the similarities between your idea and Steven Spielberg’s earlier film.

Flash forward to the present. Tarantino has just released “Inglourious Basterds,” a World War II drama that, like “Saving Private Ryan,” features a small platoon of young American soldiers led by a charismatic older officer on a dangerous mission behind Nazi enemy lines in France, brutal scenes of soldiers killed by gunfire, explosions, and snipers, heroic instances of valor under dire circumstances, and the successful completion of the mission after virtually all of the American soldiers have been martyred. Of course, there are also material differences in the works: Your treatment, like “Saving Private Ryan,” told a fact-based story concerning a platoon’s valiant effort to track down a young soldier after his brothers had been killed in battle. In contrast, “Inglourious Basterds” is an entirely phantasmagorical account of a group of soldiers who participate in a successful plot to kill Hitler that bears no connection at all with the facts of WWII.

Notwithstanding the differences between your “Saving Private Ryan” idea and “Inglourious Basterds,” the release of Tarantino’s film has thrown you for a loop. Like most Hollywood writers, you suffer from “that obsessive conviction, so common among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.”¹ In light of this “obsessive conviction,” a number of questions immediately spring into your mind. Has Tarantino stolen your idea to produce a violent WWII drama concerning a dangerous mission in Vichy France? Could you prevail, or at least survive summary judgment, in an idea submission claim against Tarantino? What is the settlement value of your claim?

The answers to these questions turn, in large part, on a determination as to whether Tarantino “used” your idea. More specifically, is “Inglourious Basterds” sufficiently “similar” to your

¹ *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984) (citation omitted).

treatment to establish the “use” of your idea by Tarantino? This is an area of law that is not well delineated – especially in contrast to copyright law. Under the Copyright Act, a long line of authorities establishes that a claim of infringement can only be based on substantial similarities in original protectible *expression* after filtering out of the analysis any alleged similarities based on ideas (which are specifically excluded from copyright protection²), scenes-a-faire and other unprotected elements.³

After consulting with your lawyer, you realize that your potential copyright infringement claim against Tarantino is meritless because of, among other things, the significant differences between the works at issue – “Inglourious Basterds” is simply not substantially similar to any original copyright protected *expression* found in your treatment. However, as is discussed below, your potential idea submission claim against Tarantino might have more of a chance. After all, both your “Saving Private Ryan” treatment and “Inglourious Basterds” share many similar *ideas*. Among other things, they use the same setting and tell stories that similarly involve small platoons of U.S. soldiers successfully completing suicidal missions against Nazi troops during WWII.

II. The Elements of an Idea Submission Claim

“Generally speaking, ideas are as *free as the air*. . . . The general rule of law is that *the noblest of human productions – knowledge, truths ascertained, conceptions and ideas – become, after voluntary communication to others, free as the air to common use.*”⁴ Consequently, the law has developed that an idea is generally protected only if there exists an implied-in-fact contract or a relationship of confidence between a person who offers to disclose an otherwise unprotectible idea, and a willing recipient who agrees to the disclosure under conditions that he or she is specifically made aware of and accepts before the idea’s disclosure.⁵

To prevail on an idea submission claim based on a breach of implied-in-fact contract theory, the plaintiff bears the burden of proof to establish: (1) plaintiff submitted his or her idea to defendant; (2) before submitting his or her idea, plaintiff clearly conditioned the disclosure on defendant’s agreement to pay for the idea if used; (3) defendant knew or should have known about the condition before plaintiff disclosed the idea; (4) defendant voluntarily accepted the idea on plaintiff’s terms; (5) defendant actually *used* plaintiff’s idea; (6) plaintiff’s idea had value.⁶

Under a breach of confidence theory, the plaintiff must prove: (1) that the plaintiff conveyed

² 17 U.S.C. § 102(b).

³ *See, e.g., Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006); *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1172 (9th Cir. 2003); *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984); *Olson v. Nat’l Broadcasting Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988).

⁴ *Desny v. Wilder*, 46 Cal.2d 715, 731-32 (1956) (emphases added); *Rokos v. Peck*, 182 Cal. App. 3d 604, 613 (1986); *see* 17 U.S.C. § 102(b) (ideas not protected by copyright).

⁵ *Desny*, 46 Cal.2d at 737-739; *Faris v. Enberg*, 97 Cal. App. 3d 309, 318-23 (1979).

⁶ *Mann v. Columbia Pictures, Inc.*, 128 Cal. App. 3d 628, 647 n.6 (1982); *Faris v. Enberg*, 97 Cal. App. 3d 309, 318 (1979); *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (1984).

new and novel information to the defendant in confidence; (2) that both parties understood that the information was being conveyed in confidence before it was actually disclosed; (3) that before plaintiff gave the information to defendant, the defendant had a chance to reject receipt of the information on a confidential basis; (4) that the defendant accepted the information with the understanding that he or she would keep the information confidential; (5) that the defendant *used* the information without the plaintiff's consent; and (6) that the plaintiff was damaged as a result.⁷

Under *both* of these legal theories, proof of “use” – element (5) in each of the causes of action outlined above – is essential. Without a defendant's “use” of the plaintiff's idea in breach of an implied contract or a relationship of confidence, no violation of a plaintiff's rights can occur. Importantly, this issue of “use” itself has two separate prongs, and a plaintiff must satisfy the first *and* second prongs to prevail. Initially, the plaintiff must prove “derivation” – that his or her idea was actually utilized and relied on in the defendant's creative process.⁸ Second, the plaintiff must prove that the ideas contained in the defendant's finished work are “substantially similar” to the plaintiff's submission.⁹ To survive summary judgment, a plaintiff must raise genuine issues for trial under *both* prongs because neither an independently-derived duplicate¹⁰ nor a work inspired by the plaintiff's submission that nonetheless lacks any “substantial similarity” with plaintiff's creation¹¹ constitutes “use” of the plaintiff's idea.

This “substantial similarity” requirement in idea submission cases has been said to “align[] this field with copyright infringement” and “[i]t also means that copying less than substantial material is non-actionable.”¹² In order to make such a “substantial similarity” showing, a plaintiff must demonstrate that the *ideas* contained in the works at issue are substantially similar as to specific identifiable elements, such as characters, settings, subject matter, themes, storyline, sequence of events, dramatic gimmicks, and plot ideas.¹³ This comparison of the ideas contained

⁷ *Tele-Count Eng'rs, Inc. v. Pac. Tel. & Tel. Co.*, 168 Cal. App. 3d 455, 46 (1985); *see also Faris*, 97 Cal. App. 3d at 320-23.

⁸ *See, e.g., Hollywood Screentest of America Inc. v. NBC Universal*, 151 Cal. App. 4th 631, 648 (2007) (“[b]ecause [defendant] has presented undisputed evidence of independent creation, thus preventing a finding of *use*, none of [plaintiff's] causes of action can survive”) (emphasis added).

⁹ *See, e.g., Kurlan v. Columbia Broadcasting Sys.*, 40 Cal. 2d 799, 809 (1953) (holding that the works at issue must share “some substantial similarity” to create a jury issue); *Stanley v. Columbia Broadcasting Sys.*, 35 Cal. 2d 653, 660 (1950); *Klekas*, 150 Cal. App. 3d at 1114; *Donahue v. United Artists Corp.*, 2 Cal. App. 3d 794, 807-08 n.5 (1969) (approving jury instruction requiring plaintiff to show that defendant used “substantial portion” of plaintiff's submission); *Henried v. Four Star Television*, 266 Cal. App. 2d 435, 437 (1968); *Sutton v. Walt Disney Productions*, 118 Cal. App. 2d 598, 603 (1953); *see also Whitfield v. Lear*, 751 F.2d 90, 93-94 (2d Cir. 1984) (applying California law); *A Slice of Pie Productions, LLC v. Wayans Brothers Entertainment*, 487 F. Supp. 2d 41, 52 (D. Conn. 2007) (applying California law); *Bergman v. Electrolux Corp.*, 558 F. Supp. 1351, 1353 (D. Nev. 1983) (applying California law).

¹⁰ *Hollywood Screentest*, 151 Cal. App. 4th at 648.

¹¹ *Kurlan*, 40 Cal. 2d at 809.

¹² 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.08[A] at 19D-98 (2009) (emphases added); accord Lionel S. Sobel, “The Law of Ideas Revisited,” 1 UCLA ENT. L. REV. 9, 77 (1994) (“[t]he weight of California authority is that there must be ‘substantial similarity’ between the plaintiff's submission and the defendant's production in order for the defendant to be liable”).

¹³ *See, e.g., Desny*, 46 Cal. 2d at 746-49 (reversing summary judgment where the works shared numerous common elements, including similar storylines, settings, characters, sequences of events); *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 601 (1966) (finding “enough similarities in basic plot ideas, themes,

in two works to determine whether a jury issue exists as to “substantial similarity” can often be conducted by the court as a matter of law.¹⁴ However, the fact that “substantial similarity” is a required element in idea submission claims in no way answers the ultimate question of how *much* similarity is necessary for it to be *substantial*. To put it another way, in the context of our hypothetical, is Tarantino’s “Inglourious Basterds” *substantially* similar to your “Saving Private Ryan” treatment? A review of the idea submission cases in which the substantial similarity requirement was developed may assist our evaluation of this question.

III. The Case Law Addressing Substantial Similarity in Idea Cases

One of the first cases considering the degree of similarity required to maintain an idea submission claim was the California Supreme Court’s 1950 decision in *Stanley v. Columbia Broadcasting System, Inc.*¹⁵ In *Stanley*, the plaintiff had prevailed at trial on claims for breach of express and implied contract pertaining to the sale of an idea for a proposed radio show entitled “Hollywood Preview,” in which motion picture executives would describe proposed ideas for movie productions and the at-home audience was encouraged to submit written comments. The defendant, after receiving plaintiff’s proposed script, format and demo recording, had launched a similar radio show also entitled “Hollywood Preview.” However, the defendant’s program had a somewhat different format. Unlike plaintiff’s proposed show, defendant’s production did not include a panel of “experts” who gave their opinions on potential movie productions and only the studio audience was asked to submit written comments. Citing these differences, on appeal the defendant contended that the parties’ respective radio shows were not sufficiently similar as a matter of law. The Supreme Court rejected this argument, strongly suggesting that the issue of similarity is generally a jury question:

The problem of similarity between two compositions, whether literary, musical or dramatic is a *question of fact* to be determined ultimately by a comparison of the two works upon the basis of *the opinion of the average individual* possessing a practical understanding of the subject.¹⁶

Applying this standard, the Court concluded that the jury’s verdict for plaintiff reflected the opinions of an “average, reasonable man” and deserved deference.¹⁷ Despite the format differences between the parties’ works, the Court affirmed the judgment – holding that “[t]he evidence, in the form of the two programs alone, shows that there is substantial similarity to

sequences and dramatic ‘gimmicks’” to create a jury issue); *Henried*, 266 Cal. App. 2d at 436-37 (affirming order sustaining demurrer because, after comparing characters, themes and storylines, only a single similarity could be found – which is “grossly inadequate to sustain a claim of substantial similarity”); *A Slice of Pie*, 487 F. Supp. 2d at 52 (granting summary judgment after assessing “[the] lack of substantial similarity between the works with respect to, *inter alia*, their respective plots, elements and themes”).

¹⁴ See *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (1984) (affirming summary judgment); *Kurlan*, 40 Cal. 2d at 809 (holding on demurrer, where the works are before the court, “the court may determine whether there is substantial similarity”); *Henried*, 266 Cal. App. 2d at 436-37 (affirming order sustaining demurrer); *Sutton*, 118 Cal. App. 2d at 603-04 (same); *A Slice of Pie*, 487 F. Supp. 2d at 52 (granting summary judgment).

¹⁵ 35 Cal. 2d 653, 660 (1950).

¹⁶ *Id.* (emphases added).

¹⁷ *Id.* at 662.

support the verdict.”¹⁸

Three years later, the California Supreme Court issued companion decisions likewise addressing the issue of substantial similarity in the context of idea submission cases – *Weitzenkorn v. Lesser*¹⁹ and *Kurlan v. Columbia Broadcasting System, Inc.*²⁰ In *Weitzenkorn*, both the plaintiff’s written synopsis, entitled “Tarzan in the Land of Eternal Youth,” and the defendants’ motion picture, “Tarzan’s Magic Fountain,” featured the well-known fictional character Tarzan and his cohorts, Jane and Cheeta, as well as the myth of the fountain of youth. The trial court had held that the parties’ works – which had been incorporated by reference into plaintiff’s complaint and thus were subject to judicial review on demurrer – were not sufficiently similar. Accordingly, the trial court had sustained the defendants’ demurrer to plaintiff’s common law copyright,²¹ express contract and implied contract claims counts without leave to amend. On appeal, the Supreme Court held that the demurrer had been properly sustained as to the common law copyright claim because the parties’ works were not similar in original *protectible* expression.²² However, the California Supreme Court reversed the judgment for defendant on plaintiff’s breach of express and implied contract causes of action because of the similarities in *unprotectible* elements – such as “the combination of characters, locale, and myth.”²³ The Court further held that it was “conceivable” that the parties entered into an agreement in which the defendants “agreed to pay for [plaintiff’s] production regardless of its protectibility and *no matter how slight or commonplace the portion which they used.*”²⁴

In *Kurlan*, the plaintiff alleged the theft of his idea to create a radio program adaptation of the popular stage play and motion picture “My Sister Eileen,” a comedy concerning two sisters (one smart, the other not) sharing an apartment in New York. The trial court, as in *Weitzenkorn*, had sustained the defendants’ demurrer to, among other causes of action, plaintiff’s breach of express and implied contract counts after comparing the parties’ works (which had been incorporated by reference in plaintiff’s complaint) and finding that they were not sufficiently similar. The Supreme Court reversed the judgment entered by the trial court, as in *Weitzenkorn*, holding that:

although there is *no* similarity between protectible portions of the literary content of [plaintiff’s] program and the defendants’ broadcasts, *there is the possibility of finding some similarity in the use by each production of a ‘dumb’ character who produces difficult situations for a ‘smart’ character, both being girls who share an apartment in New York City.*²⁵

¹⁸ *Id.* at 663.

¹⁹ 40 Cal. 2d 778 (1953).

²⁰ 40 Cal. 2d 799 (1953).

²¹ Because *Weitzenkorn* and many of the other cases cited in this paper were decided under the law in effect before January 1, 1978, the effective date of the Copyright Act of 1976, there was no federal preemption of copyright claims under 17 U.S.C. § 301 and thus common law copyright infringement and plagiarism claims could be asserted in state court without concern for Copyright Act preemption.

²² 40 Cal. 2d at 791 (“[a] careful comparison of [plaintiff’s] composition and the motion picture shows no similarity between them as to form and manner of expression [although] [i]t is true that a portion of the ‘basic dramatic core’ might be found similar”).

²³ *Id.* at 792.

²⁴ *Id.* (emphasis added).

²⁵ 40 Cal. 2d. at 810 (emphases added).

Thus, echoing its companion decision in *Weitzenkorn*, the Court concluded that: “The terms of the contract and the content of the programs present questions of fact for the jury as to the contractual provisions, access, similarity, and copying.”²⁶

In the same year that *Weitzenkorn* and *Kurlan* were decided, the Court of Appeal decision in *Sutton v. Walt Disney Productions* adopted a somewhat more stringent approach to determining “use” of an idea.²⁷ In *Sutton*, the plaintiff had authored a book entitled “Circus in Nightland” – a fantasy featuring a child named Nancy who cannot attend the circus because of a foot injury. After hearing a friend describe the circus, Nancy dreams of being escorted into the woods by a fairy to attend a “nightland circus” – which is performed by a group of small animals “endowed with intellectual attributes.”²⁸ In contrast, the defendant’s work was a live action nature documentary featuring wildlife common in Minnesota and Montana.²⁹ The trial court had sustained defendant’s demurrer without leave to amend on the grounds that the works lacked substantial similarity, and the Court of Appeal affirmed, holding that:

A comparison of the two works *leaves no suspicion that the film is a reproduction of the book*. The only ground of similarity is that both relate to animals. The book is a fantasy of animals, reptiles, amphibians and insects endowed with intellectual attributes; the film is a real-life portrayal of animals in the wilds with no particular order or story except the loose thread of a young beaver’s adventures in establishing his own dam. Accordingly, the holding of the trial court that the two finished products have no substantial similarity to each other . . . was correct.³⁰

The Court concluded that “the lack of substantial similarity between the book and the motion picture precludes appellant from stating a cause of action whether specifically pleaded as an express contract or generally as an implied-in-fact contract.”³¹

In 1956, three years after *Weitzenkorn*, *Kurlan* and *Sutton*, the California Supreme Court issued its seminal decision in *Desny v. Wilder*, an ambitious (if unnecessarily convoluted) attempt to clarify the law of implied-in-fact contracts for the use of ideas.³² The plaintiff’s idea in *Desny* was based on a dramatization of the real life story of a man whose entrapment in a cave briefly grabbed national attention.³³ The plaintiff conveyed his idea for a motion picture based on this story to an assistant working for defendant Billy Wilder, the famous director, in two telephone conversations. In the first phone call with Wilder’s assistant, plaintiff “blurted” the basic outline of his idea; however, during the second phone call he first conditioned his verbal disclosure of a

²⁶ *Id.* at 810.

²⁷ *Sutton v. Walt Disney Productions*, 118 Cal. App. 2d 598 (1953).

²⁸ *Id.* at 600, 603.

²⁹ *Id.* at 603.

³⁰ *Id.* at 602.

³¹ *Id.* at 603.

³² *Desny v. Wilder*, 46 Cal. 2d 715, 733 (1956) (distinguishing *Stanley*, which held that the plaintiff’s idea must be original or novel).

³³ *Id.* at 746-48.

detailed written synopsis on payment. Although the trial court had granted summary judgment for defendants, the California Supreme Court reversed in part – ruling that plaintiff’s claim for breach of implied-in-fact contract raised triable issues for the jury based on the plaintiff’s second submission to Wilder’s assistant. Although the Court did not detail any specific test or criteria for determining “substantial similarity,” it ruled that a triable issue existed as to this issue, holding that defendants’ motion picture “obviously does bear a remarkable similarity to plaintiff’s story both in respect to the historical data and the fictional material originated by plaintiff.”³⁴ The Court also strongly emphasized that under California law that ideas are generally “free as the air” unless they are disclosed pursuant to a contract under which the recipient of the idea had an opportunity to reject the submission prior to disclosure with knowledge of the offeror’s terms.³⁵

In 1966, a decade after *Desny*, the Court of Appeal addressed the substantial similarity issue in *Donahue v. Ziv Television Programs, Inc.*³⁶ The Court in *Donahue* reversed the trial court’s entry of judgment notwithstanding the verdict in favor of the defendants, holding that a triable issue existed on the issue of substantial similarity. In *Donahue*, the plaintiff’s submission – which consisted of a written format, 12 story outlines, one screenplay, and a production budget – for a television show entitled “Underwater Legion” and the defendants’ program, “Sea Hunt,” both featured scuba-diving crime fighters.³⁷ The *Donahue* court held that a breach of contract claim, unlike a copyright claim, could be maintained for the use of unoriginal creative elements, and that a jury could “easily” find the two works were “quite similar.”³⁸ Without exhausting the list of similarities,³⁹ or outlining any criteria, methodology, or test for determining substantial similarity, the court ruled that both works featured “[a] strong similarity in the basic dramatic core,” “[s]imilarities in basic theme and dramatic situations,” “similarities in basic plot ideas, themes, sequences and dramatic gimmicks,” and similarities in “the use of various types of equipment for operating under water [and] the extensive use of underwater photography.” Indeed, the Court noted that “[t]he list of differences is shorter than that of the similarities,” and ultimately concluded that “Defendants’ television series follows the [plaintiff’s] format in most of its important facets....”⁴⁰

One year later, however, the Court of Appeal in *Ware v. Columbia Broadcasting System, Inc.*⁴¹ adopted an even more stringent approach to the determination of substantial similarity – adopting a copyright-like standard under the facts of that case. In *Ware*, the plaintiff submitted a 35-page teleplay to defendants, who thereafter produced an allegedly similar work as an episode of the TV series “Twilight Zone” without crediting plaintiff. The plaintiff sued defendants for common law copyright infringement and breach of implied contract. The trial court granted defendants’ motion for summary judgment and the Court of Appeal affirmed.

³⁴ *Id.* at 749.

³⁵ *Id.* at 731-32; *see also supra* text accompanying note 5.

³⁶ 245 Cal. App. 2d 593 (1966).

³⁷ *Id.* at 599-601.

³⁸ *Id.* at 600-602.

³⁹ *Id.* at 601 (“Only length, but little else, would be added to this opinion were we to set down in detail what these similarities are. Those concerned know what we refer to.”).

⁴⁰ *Id.* at 600-601.

⁴¹ 253 Cal. App. 2d 489 (1967).

The *Ware* court dispensed of the common law copyright infringement claim by holding that the two works lacked substantial similarity in protectable expression. The plaintiff's teleplay featured a gentle old man who worked as a night watchman at a department store. The man is depicted befriending and conversing with the store mannequins. Eventually, when the man's body is found dead, a mannequin closely resembling him mysteriously is placed with the mannequins that the man had befriended. In contrast, the defendants' "Twilight Zone" episode featured a bitter 35-year old man who, while visiting a museum, views a glass display case containing a miniature model of a 1890's town house that is inhabited by the figurine of a beautiful miniature woman – who appears alive to the man. After he sees the woman being assaulted, the man breaks the glass case, is forcibly removed from the museum and forced to seek mental health treatment. The "Twilight Zone" episode ends when a museum guard sees a miniature figurine of the man seated next to the miniature woman within the display case. The *Ware* court noted that the two works shared only a common theme – a man who "finds happiness with an inanimate figure, whom he treats as a real person" – that is as at least as old as ancient Greek myths. The court noted that the "characterizations, character relationships, scenes, incidents and dialogue are all markedly different."⁴² Thus, the Court affirmed the dismissal of the plaintiff's common law copyright claim, concluding that there was no substantial similarity between the "Twilight Zone" episode and the protectable elements of the plaintiff's teleplay.⁴³

The Court in *Ware* also granted summary judgment on plaintiff's breach of implied contract claim on the same grounds – *i.e.*, lack of substantial similarity between the works. The Court noted that plaintiff's complaint alleged the breach of an implied agreement pertaining to the use of not mere ideas, but "literary property." The complaint alleged that the defendants agreed to compensate plaintiff should they use this "literary property," and that the defendants' "Twilight Zone" episode constituted such use. The *Ware* court found that this fact distinguished the case from *Desny*, which involved the alleged use of only "ideas":

The record here is significantly different from the *Desny* record. Plaintiff here attached to his complaint not a mere synopsis but *a complete dramatic work*. The complaint alleges that he submitted it to defendants 'with the express oral understanding and agreement that in the event plaintiff's said literary property was thereafter used or telecast by said defendants, or any of them, in whole or in part, defendants would pay plaintiff the reasonable value of such use or telecast.' Each of the other contract counts alleges similarly that the matter offered was plaintiff's 'literary property.' *Plaintiff does not allege that the parties contracted with respect to any idea, synopsis, or format. Literary property is what plaintiff had for sale; that is what he submitted to defendants, and that is the subject matter of his complaint.* The consistent use of the term 'literary property' in the complaint does not appear to have been an inadvertence of the pleader. There is nothing in the record to suggest that plaintiff was, like *Desny*, offering to sell a

⁴² *Id.* at 492.

⁴³ *Id.* at 493-94.

public domain story idea.⁴⁴

The Court in *Ware* concluded that when a breach of implied contract claim is predicated on the submission of such “literary property,” a copyright-like standard must be applied in determining the issue of substantial similarity:

*It would have been fatuous for plaintiff to have alleged that when his story was submitted defendants agreed, by implication, to pay him if they ever in the future made a picture embodying any stock situation which plaintiff had drawn upon in constructing his play. Plaintiff has not so alleged, and we therefore need not decide whether such a claim could be maintained under the *Desny* rationale.⁴⁵*

Accordingly, the Court of Appeal affirmed the entry of summary judgment on the breach of implied contract claim, holding that “plaintiff submitted *literary property* to defendants, but an examination of the plaintiff’s work and the defendants’ telecast establishes as a matter of law that defendants did not use plaintiff’s *property*.”⁴⁶

The copyright-like approach to substantial similarity in *Ware* was seemingly extended by the Court of Appeal holding in *Henried v. Four Star Television*,⁴⁷ issued the following year. In *Henried*, the plaintiff alleged that he had entered into an implied contract with the defendant arising from his submission of a 7-page synopsis for a proposed TV program to be entitled “The Two Manhattans.” The complaint alleged that this implied contract was breached when the defendant subsequently produced a television series, entitled “Burke’s Law,” that was based on the synopsis. Plaintiff’s “The Two Manhattans” turned on the adventures of a wealthy father-son international crime-fighting duo. The defendant’s show “Burke’s Law” featured a wealthy bachelor homicide detective. Although both works featured rich crime fighters, the trial court sustained defendant’s demurrer on the grounds that the two works were not substantially similar and the Court of Appeal affirmed:

The only point of similarity, a point to which plaintiff desperately clings, is that both heroes travel in chauffeur-driven Rolls Royces. In this respect art imitates life, and follows the tracks of Ian Fleming and countless others who, after coming into money, favored the same automobile manufacturer with their patronage. But a resemblance based solely on the use of a well-publicized, even bromidic, symbol for wealth and luxury seems grossly inadequate to sustain a claim of substantial or material similarity between elements of the two properties.⁴⁸

⁴⁴ *Id.* at 494-95 (emphases added).

⁴⁵ *Id.* (emphases added).

⁴⁶ *Id.* at 495-96 (emphases added).

⁴⁷ 266 Cal. App. 2d 435, 436 (1968).

⁴⁸ *Id.* at 437 (emphasis added).

In other words, the Court’s holding in *Henried* is to the effect that wealthy crime fighters driving about in chauffeured Rolls Royces is a “stock element” that cannot be protected under an implied contract. As such, the decision echoes *Ware* without citing that case.

However, in *Fink v. Goodson-Todman Enterprises, Ltd.*,⁴⁹ two years later, the Court of Appeal – in reversing the trial court’s order sustaining defendants’ demurrer without leave to amend – chose not to follow the copyright-like standard for determining substantial similarity utilized in *Ware* and *Henried*. In *Fink*, the plaintiff had submitted to defendants various materials pertaining to a proposed TV show to be entitled “The Coward,” including a full script for the pilot episode and a detailed written presentation that included plot summaries of 15 episodes. “The Coward” told the story of a brave 1960’s New York police officer who is driven to court danger by the shame of his service as an army officer during WWII, when he was court-martialed for surrendering – in violation of his orders – in a futile effort to save the men under his command. Plaintiff alleged that his implied contract with defendants had been breached by their production of “Branded” – a TV show concerning a brave itinerant cowhand in the American West of the 1850’s who is motivated by the public disgrace of his prior service as an army officer at a time when U.S. troops were battling American Indians, when he was wrongfully court-martialed for supposedly fleeing the field of battle. Based on the “structural spine” of the two stories, the Court of Appeal held that the plaintiff had stated a viable cause of action for breach of implied contract in light of the similarities in the themes, back stories, and portrayal devices to be utilized in the two works – despite the pervasive differences in the characters, settings, time periods, and other concrete expressive elements of the works.⁵⁰ Interestingly, the Court candidly acknowledged that determining substantial similarity in idea submission cases is a “zig-zag frontier” in which “[d]ecisions must ... inevitably be *ad hoc*.”⁵¹

Subsequently, however, the Court of Appeal in *Klekas v. EMI Films, Inc.* followed *Ware* – ignoring the approach taken in *Fink* – in affirming the trial court’s grant of summary judgment for defendants.⁵² In *Klekas*, the plaintiff had claimed that the motion picture “The Deer Hunter” had infringed plaintiff’s common law copyright and had copied plaintiff’s ideas in breach of an implied contract. The plaintiff in *Klekas*, like the plaintiff in *Ware*, claimed that he had submitted literary property to the defendants – specifically, a novel entitled “The Fields of Discontent.” Both the plaintiff’s novel and the defendants’ motion picture concerned military veterans who returned to the U.S. following their tours of duty overseas and “both works deal generally with the subjects of friendship, courage, honor and the effects of war on the human spirit.”⁵³ Nonetheless, the trial court granted summary judgment for defendants, finding that there had been no use of “The Fields of Discontent” in the creation “The Deer Hunter.” The Court of Appeal affirmed, holding that “[a]fter a thorough review of both literary works, we can only conclude that there are substantial differences between them, especially in the use of

⁴⁹ 9 Cal. App. 3d 996 (1970).

⁵⁰ The Court in *Fink* essentially cherry-picked the similarities between the works at a high level of abstraction, not merely ignoring the differences between the works, but citing them as possible evidence of the defendants’ alleged culpability – holding that “the variations are such as might be deliberately contrived to disguise piracy.” *Fink*, 9 Cal. App. 3d at 1012. However, a more appropriate approach to such variations would have been that “[c]opying deleted or so disguised as to be unrecognizable is not copying.” See *v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983).

⁵¹ *Fink*, 9 Cal. App. 3d at 1013 (citations omitted).

⁵² *Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102, 1114 (1984).

⁵³ *Id.* at 1112-13.

contexts, characters and language through which the themes are expressed.”⁵⁴ Citing *Ware*, the Court in *Klekas* concluded that the undisputed evidence established that “the screenplay of ‘The Deer Hunter,’ is, as a matter of law, substantially *dissimilar* to plaintiff’s novel,” establishing as a matter of law that “there is nothing in the record to establish the use of [plaintiff’s] work.”⁵⁵

Similarly, in *A Slice of Pie v. Wayans Brothers Entertainment*, the District Court of Connecticut, applying California law, recently held that the plaintiff failed to raise a triable issue as to substantial similarity on either its copyright infringement or its state law breach of implied contract claims.⁵⁶ In *A Slice of Pie*, the plaintiff claimed that the defendant’s motion picture “White Chicks” was based on plaintiff’s screenplay “Johnny Bronx.” Both works involved African American law enforcement officers who disguised themselves as Caucasians to go undercover and foil a crime. The Court first granted summary judgment on the copyright infringement claim, holding that, after reviewing the expressive elements of each work, “the premise, plot and scenes depicted in each work is so dissimilar that no reasonable juror could find them to be substantially similar to support a conclusion of unlawful appropriation.”⁵⁷ The Court likewise granted summary judgment on plaintiff’s implied contract claim, following the same reasoning adopted in *Ware*, *Henried* and *Klekas* in ruling that:

[G]iven the Court’s assessment of *lack of substantial similarity between the works with respect to, inter alia, their respective plots, elements, and themes* [in affirming summary judgment as to the copyright count], which assessment is used to infer *use*, plaintiff has *insufficient evidence of use by defendants of plaintiff’s screenplay and/or the ideas therein*.⁵⁸

In 2008, the Court of Appeal issued (but did not publish) its decision in *Reginald v. New Line Cinema Corp.*,⁵⁹ which also applied a high standard for determining substantial similarity.⁶⁰ In *Reginald*, the plaintiff alleged that defendants’ movie, “Wedding Crashers,” was based on his unpublished work, “The Party Crasher’s Handbook,” which he had submitted to defendants. The trial court granted summary judgment on the grounds that no triable issue existed as to substantial similarity and the Court of Appeal affirmed. On appeal, the Court surveyed the pertinent cases, including the *Weitzenkorn*, *Desny*, *Donahue*, *Klekas* and *Henried* decisions, and concluded that “the degree of similarity required to meet the substantial similarity standard is high in the idea submission context.”⁶¹ The Court held that substantial similarity requires the plaintiff to establish that the defendant based his or her work “on a *material* element” of plaintiff’s work⁶² using a standard similar to that used in copyright cases save that, in contract

⁵⁴ *Id.* at 1113.

⁵⁵ *Id.* at 1115.

⁵⁶ *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t*, 487 F.Supp.2d 41 (D. Conn. 2007).

⁵⁷ *Id.* at 50-51.

⁵⁸ *Id.* at 52 (emphases added).

⁵⁹ 2008 WL 588932 (Cal. App. Mar. 5, 2008). Under California Rule of Court 8.1115(a), unpublished opinions may not be cited.

⁶⁰ *Id.* at * 4 n. 5, * 8 n. 7.

⁶¹ *Id.* at * 5.

⁶² *Id.* at * 6 (quoting *Fink*, 9 Cal. App. 3d at 1007 (emphasis in *Reginald*)).

cases, unprotectable elements are not filtered out prior to comparing the works.⁶³ Although the plaintiff had identified 14 purported similarities between the parties' works, including the titles, the "basic storyline," and the fact that both works featured a male duo who crash weddings to meet women,⁶⁴ the court held that none of the similarities pertained to "material elements" – *e.g.*, "characters, character motivations, settings, basic dramatic core and themes, storylines, plot ideas, the dramatic sequence and dramatic gimmicks"⁶⁵ – because they "would be common to any two works that included a wedding crashing sequence."⁶⁶ The Court ruled, as a matter of law, that the two works were not substantially similar and affirmed the entry of summary judgment.⁶⁷

Finally, in 2009, the Court of Appeal decided *Kightlinger v. White*, yet another idea submission case applying a high standard for determining substantial similarity *that was not published by the Court*.⁶⁸ The plaintiff in *Kightlinger* contended that her screenplay "We're All Animals," which she had given to the defendant, was the basis for his later motion picture, "Year of the Dog." The trial court granted summary judgment on the grounds that, among other things, "there are no material similarities between Plaintiff's work and Defendant's work that could give rise to a reasonable inference that Defendant copied Plaintiff's ideas."⁶⁹ The Court of Appeal affirmed on the same grounds, citing *Donahue* and *Henried* for the propositions that "the similarities must be material and . . . the degree of similarity required is high."⁷⁰ The Court recognized that there is no bright line test in idea submission cases for determining whether two works are substantially similar. Instead, the Court held that similarity is determined by an examination of "a combination of various aspects of the works at issue, including plot, themes, subject matter, sequences, characterization, motivation, milieu and dramatic gimmicks."⁷¹ Importantly, it was undisputed that, at a high level of generalization, "We're All Animals" and "Year of the Dog" shared numerous "similarities" – they both involved female protagonists who loved animals and sought to free them from harm, and utilized scenes involving animal rescue, animal sanctuaries, and veterinarian offices.⁷² In both works, the protagonist is fired from her job because of her devotion to animals.⁷³ Nonetheless, the Court relied on *Ware* in determining that many of these "similarities" were merely *scenes a faire* and "stock" elements that "cannot and do not form a basis for finding substantial similarity."⁷⁴ Accordingly, the Court held because no reasonable juror could find that the defendant used a "substantial portion" of plaintiff's material and the plaintiff could not satisfy the "high standard" of substantial similarity, no triable issue existed.⁷⁵

⁶³ *Id.* at * 8 n. 7.

⁶⁴ *Id.* at * 6-7.

⁶⁵ *Id.* at * 7.

⁶⁶ *Id.* at * 8.

⁶⁷ *Id.* at * 9.

⁶⁸ 2009 WL 4022193 (Cal. App. Nov. 23, 2009).

⁶⁹ *Id.* at * 2.

⁷⁰ *Id.* at * 3.

⁷¹ *Id.*

⁷² *Id.* at * 4.

⁷³ *Id.* at * 5.

⁷⁴ *Id.* at * 6.

⁷⁵ *Id.* at * 9.

IV. The So-Called Inverse Ratio Rule

Some cases have suggested that the determination of “substantial similarity” in an idea submission case may be affected by the so-called “inverse ratio rule” – a “rule” that is equally applicable to the determination of copying in a copyright infringement case.⁷⁶ Under this purported “rule,” if the defendant has a high level of access to the plaintiff’s work, a lower level of similarity may be sufficient for the plaintiff to prevail.⁷⁷

For example, in *Golding v. R.K.O. Pictures*, a 1950 common law copyright case in which the plaintiff alleged that his stage play “The Man and His Shadow” had been infringed by the motion picture “Ghost Ship,” the court held that “[w]here there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown. . . .”⁷⁸

However, this reasoning is suspect. It does not logically follow that “more” access to the plaintiff’s work increases the likelihood that the defendant “used” it. Moreover, even if heightened access is deemed to increase the likelihood of use, it does not logically follow that the quantum of substantial similarity required to prove such use should therefore be reduced by a “ratio” or any other amount. Thus, it has been observed: “While it is true that one cannot copy something to which one does not have access, it is also true that one can have complete access to a [creative] work . . . but not copy that work. No degree of access necessarily leads to any degree of copying.”⁷⁹

Because of its logical weaknesses, the inverse ratio rule is frequently cited by the courts only as a makeweight argument that “can apply only to justify a result after a showing of similarity has been made.”⁸⁰ Thus, the inverse ratio rule should not be accorded significant weight in the analysis of substantial similarity.⁸¹

V. The Question of Intent

The level of “substantial similarity” that must be proved by the plaintiff under a breach of implied-in-fact contract legal theory may also be affected by the intent of the parties. Thus, in *Weitzenkorn*, the court noted that while “improbable” it was nonetheless possible that the plaintiff could show that the defendants had agreed to pay plaintiff “no matter how slight or commonplace the portion which they used.”⁸²

⁷⁶ *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987).

⁷⁷ *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 1007 n. 14 (1970) (“[T]here is ample similarity, given the unlimited access pleaded, to take the case beyond the demurrer stage. . . . Less similarity is required where access is strong”).

⁷⁸ *Golding v. R.K.O. Pictures*, 35 Cal. 2d 690, 695 (1950); *see also Fink*, 9 Cal. App.3d at 1007 n. 14 (“Less similarity is required where access is strong”).

⁷⁹ 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 9:91 at 9-237 (West 2007) (concluding that “[i]t is time the inverse ratio ‘theory’ be killed off permanently”).

⁸⁰ *Arc Music Corp. v. Lee*, 296 F.2d 186 (2d Cir. 1961).

⁸¹ *Aliotti*, 831 F.2d at 902; *see also* D. Aronoff, “Exploding the Inverse Ratio Rule,” 55 JOURNAL OF THE COPYRIGHT SOC’Y OF THE USA 125 (2008) (analogizing the inverse ratio rule to such pseudo-scientific beliefs as crop circles, astrology and phrenology).

⁸² 40 Cal. 2d at 792 (emphasis added); *see also Chandler v. Roach*, 156 Cal. App. 2d 435, 442-43 (1957).

The use of the word “improbable” in *Weitzenkorn*, however, was a gross understatement. As a practical matter, it is virtually impossible that any plaintiff could introduce evidence of a contract to pay for “slight or commonplace” ideas of the kind postulated in *Weitzenkorn*. For obvious reasons, no defendant in a breach of implied contract action would expressly admit to such intent, and it is highly unlikely that any entertainment industry custom or practice could impliedly support such an intent to pay for slight or commonplace ideas. To the contrary, the entertainment industry’s custom and practice is quite the opposite – as one commentator has observed:

It is of course industry custom to pay for movie and television rights to copyright-protected expression, because federal copyright law requires that permission be obtained to film, distribute and perform such expression. *But the existence of an industry custom to pay for copyright-protected expression does not amount to a custom to pay for mere ideas; and thus evidence of one does not prove the existence of the other.*⁸³

Thus, a plaintiff testifying as suggested in *Weitzenkorn* that his or her own intent was to create a contract under which payment was required for any use of ideas no matter how “slight or commonplace” would run the risk of negating the existence of any contract at all by establishing the lack of any “meeting of the minds” as to an essential term.

Although implied contracts of the kind suggested in *Weitzenkorn* are thus highly unlikely to exist, it is much more likely for parties impliedly to agree to application of a higher copyright-like standard of substantial similarity. Indeed, such an understanding would be in keeping with “industry custom to pay for movie and television rights to copyright-protected expression.”⁸⁴ Accordingly, whenever a plaintiff’s submission to the defendant is a written “literary property,” it is a fair assumption that the parties’ intent was that “use” of such property – *i.e.*, a copyright standard of substantial similarity – would be required to trigger an obligation to pay. Indeed, it is precisely this assumption that animated the Court of Appeal’s decision in *Ware*.⁸⁵

VI. Conclusion: Can You Defeat Tarantino?

After examining the case law, it is apparent that the Court of Appeal’s decision in *Fink* was correct at least in its observation that the issue of substantial similarity in idea submission cases is a “zig-zag frontier” in which “[d]ecisions must ... inevitably be *ad hoc*.”⁸⁶ Nonetheless, we are still left with the fundamental question posed by our hypothetical: Could you successfully pursue an idea submission claim against Tarantino? Or, to put it more delicately, could you at least raise a triable issue as to the “use” of your idea by Tarantino through proof that “Inglourious Basterds” is substantially similar to your “Saving Private Ryan” treatment?

⁸³ Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 45 (1994).

⁸⁴ *Id.*

⁸⁵ *Ware v. Columbia Broadcasting System, Inc.*, 253 Cal. App. 2d 494-96 (1967).

⁸⁶ *Fink*, 9 Cal. App. 3d at 1013 (citations omitted).

Clearly, under several submission cases, including *Weitzenkorn*, *Kurlan* and *Fink*, your claim may have a chance of surviving summary judgment. Specifically, these cases focused on the existence of similar ideas at a high level of abstraction, without taking into account divergent expressive details. Under these cases, a triable issue may exist as to substantial similarity based on the facts that both your treatment and Tarantino’s film each feature a small platoon of young American soldiers led by a charismatic older officer on a dangerous mission behind Nazi enemy lines in France; brutal scenes of soldiers killed by gunfire, explosions, and snipers; heroic instances of valor under dire circumstances; and the successful completion of the mission after virtually all of the American soldiers have been martyred. In other words, it could be concluded, at a very high level of abstraction, that the “spine” of these stories is substantially similar.⁸⁷

The more recent trend, however, as reflected by such cases as *Ware*, *Klekas*, *A Slice of Pie*, *Reginald*, and *Kightlinger*, takes an approach that is more akin to copyright law, by analyzing the works in closer detail, and not at a high level of abstraction. These cases, especially *Ware*, sometimes implicitly take into account the fact that a plaintiff’s submission of “literary property” – for example, a detailed treatment or screenplay – is indicative of the parties’ intent that a copyright-like standard of substantial similarity is necessary to trigger any contractual obligations by the defendant. Under these authorities, your claim against Tarantino is likely to be defeated since any detailed objective review of the works reveals that the idea of a fact-based WWII work concerning a platoon’s efforts to save a young soldier after his brothers have been killed is in no way similar to the idea of a fantasy-based WWII work about a platoon’s successful scheme to kill Hitler.

Unfortunately, given the “zig-zag frontier” created by the case law in this area, there exists no guarantee that any particular court will adopt the approach favored in such cases as *Ware* and *Klekas* over the approach taken in decisions like *Kurlan* and *Fink*. One key determinant is whether the submission was made in the form of a screenplay or other detailed writing, as in our hypothetical. If so, a much stronger argument exists under *Ware* that the submission was a “literary property” to which a copyright-like standard of substantial similarity should be applied.⁸⁸ However, regardless of whether a particular submission was made in writing, it can additionally be argued that a high standard for substantial similarity is mandated by the strong public policy recognized in *Desny* that ideas are generally “free as the air,” because a contrary rule, under which a motion picture studio could be blocked from using ideas that are only remotely similar to a plaintiff’s submission, would have an unwarranted chilling effect on free expression and the open exchange of ideas.⁸⁹ Indeed, the Courts of Appeals in both *Reginald* and *Kightlinger* expressly concluded that “the degree of similarity required to meet the substantial similarity standard is ‘high’ in the idea submission context.”⁹⁰

⁸⁷ *Id.* at 1010-11 (focusing on the “spine” of the works).

⁸⁸ *Ware*, 253 Cal. App. 2d at 494-96.

⁸⁹ *Desny*, 46 Cal. 2d at 731 (“An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons”).

⁹⁰ *Reginald v. New Line Cinema Corp.*, 2008 WL 588932 at * 5 (Cal. App. Mar. 5, 2008); *Kightlinger v. White*, 2009 WL 4022193 at * 3 (Cal. App. Nov. 23, 2009).

In short, under the recent trend of relevant authorities, it is very likely that your claim against Tarantino ultimately will be knocked out for lack of substantial similarity. However, if you nonetheless are fixed to take on Tarantino, you can take cold comfort from the fact that, somewhat like the down-on-his-luck boxer portrayed by Bruce Willis in Tarantino's film "Pulp Fiction," you will at least have a puncher's chance of surviving summary judgment under such cases as *Weitzenkorn*, *Kurlan* and *Fink*.