Using the Uniform Commercial Code to Protect the Ideas That Make the Movies

Kerry Ryan
USING THE UNIFORM COMMERCIAL CODE TO PROTECT THE "IDEAS" THAT MAKE THE MOVIES

Kerry Ryan*

I. INTRODUCTION

In the movie industry, screenwriters are currently unable to protect their ideas, circulated as screenplays, from wrongful appropriation by producers and studios. This trend may lead to a reduction in the number of screenplays disseminated and an eventual loss of the creative input which serves as the skeleton for all motion pictures. Consistent judicial application of contract protection for screenwriters and their screenplays would avoid this result. The courts have indicated their willingness to give contract protection, but have continued to use antiquated theories which fail to significantly help the screenwriter. This article proposes the use of modern contract theory, as embodied in the Uniform Commercial Code, as the means of offering equitable and consistent protection to screenwriters and their screenplays.

II. THE PROBLEM OF INADEQUATE PROTECTION

A copyright protects only the expression of an idea and not the idea itself. As the 1976 Copyright Act specifically provides, "[i]n no case does copyright protection . . . extend to any idea . . . concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied. . . ." This underlying principle is based on an unwillingness to grant a monopoly in ideas to one author and assures that ideas remain in the public domain, free for all members of society to use. However, this policy has also func-

* Mr. Ryan is an associate with Clark & Trevithick, Los Angeles, California. J.D., 1987, University of Florida; B.S., 1981, Indiana University. The author wishes to express his appreciation to Professor Jerome H. Reichman, currently at Vanderbilt University, for his advice and encouragement during his stay as a visiting professor at the University of Florida.

4. Id.
tioned to deny protection to screenwriters. Only the completed movie will actually be the true expression of the idea and protected by copyright. The screenplay, although usually copyrighted, remains unprotected.6

Recently, a number of cases have demonstrated the high risk of misappropriation that screenwriters are subject to under the present copyright law. In Midas Productions Inc. v. Baer,6 for example, Max Baer took a script from a failed movie project and shortly thereafter "conceived" of a movie that had many similarities to the original script.7 The owners of the original script then brought a copyright infringement suit against Baer.8

The plaintiff's expert witness testified that there was "substantial similarity as to plot, characters, setting and theme."9 The witness gave seven specific examples of plot similarity10 along with three examples of common scenes.11 Yet, the Midas court refused to protect what it termed "the borrowing of abstract ideas contained in the copyrighted work."12 Similarly, in Smith v. Weinstein,13 Ms. Weinstein reviewed several of Smith's scripts centering around a prison rodeo concept. Ms. Weinstein, a producer, discussed Smith's concept with Columbia Pictures.14 Columbia then hired another writer to write the movie "Stir Crazy," which involved a prison rodeo concept similar to that of Smith's. Smith brought a copyright

5. See infra notes 6-17 and accompanying text.
7. Id. at 1389.
8. Id.
9. Id.
10. 1. Three young people travel through The South. 2. While stopped at a service station, they are warned by a lawman to 'keep moving.' 3. Their vehicle becomes stranded after a breakdown. 4. They camp out. 5. A murder occurs, and circumstantial evidence suggests the trio to be guilty of the murder. 6. The trio is pursued. 7. One of the young people in [plaintiff's script] is murdered, and two of them in [defendant's movie] are murdered.
11. Id. The witness testified:
   In each script there was a romantic involvement between a female hitchhiker who joined them and one of the group, and that this relationship included a scene of nude frolicking in the water. . . . [Both] had a scene in a service station in which the service station operator's wife was depicted as a fat, coarse, country woman. Additionally, there was a scene common to both that took place in a diner in which the young travelers ripped off the cafe owner.
infringement claim against Weinstein and Columbia Pictures. The court stated: "[S]ome similarities exist, but at a level of expression either too general or too insignificant to be protectable." Thus, in both Midas and Weinstein the courts refused to give the original authors protection even though the later copyrighted scripts were apparently based on their original ideas. This willingness by courts to classify the unauthorized use of original screenplays as the mere borrowing of uncopyrightable ideas has led screenwriters to search for other theories to protect their ideas.

The theories under which screenwriters have attempted to protect their ideas include trademark law, misappropriation, quasi-contract, and breach of confidence. However, each of these theories has proved inadequate for consistent protection of their ideas.

15. Smith also alleged unfair competition, breach of express and implied contract and breach of a confidential relationship. Id. at 1299. The court granted defendant's motion for summary judgment concerning the copyright and unfair competition claims. The court dismissed the contract and confidential relationship claims without prejudice to later assertion in state court. Id. at 1308.
16. Id. at 1302.
19. See Capital Films Corp. v. Charles Fries Prods. Inc., 628 F.2d 387 (5th Cir. 1980), involving the alleged misappropriation of the idea of the film entitled "[t]he Trial of Lee Harvey Oswald." The court held that "under certain circumstances, the practice of screening movies can support a jury's finding of 'confidential relationship.'" Id. at 395. The court looked to the custom of screening in the movie industry as a justification for finding a confidential relationship. Id. The court's use of custom as a basis for confidentiality could be analogized to the custom of reviewing screenplays by the movie industry. Under the reasoning of Capital Films, this custom could serve as the basis for a confidential relation between the screenwriter and the producer. Thus, under misappropriation theory a screenwriter could protect his basic ideas submitted to a producer. But see Walker, 615 F. Supp. 430 (S.D.N.Y. 1981) (holding misappropriation claims are preempted by The Federal Copyright Act, 17 U.S.C. § 301(a) (1976)).
20. See Werlin, 528 F. Supp. 451 (S.D.N.Y. 1981). In allowing a quasi-contract claim, the court stated, "where the defendant has benefited from its use of an idea generated by the plaintiff, a court will allow recovery in quasi-contract if the circumstances make it inequitable for the defendant to profit from the use of plaintiff's idea or material." Id. at 465. But see Mann v. Columbia Pictures, 128 Cal. App. 3d 628, 634, 180 Cal. Rptr. 522, 526 (1982) (not allowing a quasi-contract claim for use of mere "ideas").
21. See Faris v. Enberg, 97 Cal. App. 3d 309, 158 Cal. Rptr. 704 (1979). In recognition of the breach of confidence doctrine the court stated: an actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission. Id. at 323, 158 Cal. Rptr. at 712.
Trademark law is usually inapplicable to the screenwriter's claim of idea appropriation. Misappropriation has become an uncertain doctrine because of its possible preemption under the 1976 Copyright Act. The willingness of courts to extend quasi-contract theory beyond its traditional moorings is uncertain at best, and may not be advisable given the more refined doctrinal tools available in modern contract law. Lastly, breach of confidence is a relatively new doctrine whose contours of protection are not yet known. Thus, the components of intellectual property law have failed to protect the screenwriter who believes himself to be the victim of misappropriation.

III. THE LIMITS OF TRADITIONAL CONTRACT THEORY

Contract law is the one doctrine which has consistently protected screenwriter's projects. As the Smith court stated, "[r]ights under [a contract] agreement are qualitatively different from copyright claims, and their recognition creates no monopoly in the ideas

22. In Walker, 615 F. Supp. 430 (S.D.N.Y. 1981), the plaintiff alleged a claim under section 1125(a) of the Lanham Act (commonly referred to as section 43(a)), which prohibits false designation of origin or title. Id. at 439.

The plaintiff wrote a book entitled FORT APACHE and defendants released a motion picture entitled "Fort Apache, the Bronx." Id. at 433. The plaintiff claimed that the defendants stole his ideas from his then unpublished book. The court dismissed the plaintiff's claim because of a lack of public confusion. Id. at 440. The court entered their ruling despite the plaintiff's offer of three newspaper articles which credited plaintiff as the author of both the book and the film. Id.

Walker illustrates the difficulty involved in proving "likelihood of confusion" necessary for a section 43(a) claim. In the usual screenwriter case, it would be unlikely that the original author could prove that the public believes him to be the author of the completed motion picture. More likely, the public would simply not realize that the original author existed. Thus, a section 43(a) claim would seem inapplicable to the usual screenwriter-producer misappropriation lawsuit.


25. Smith, 578 F. Supp. at 1306. See also Rokus v. Peck, 182 Cal. App. 3d 604, 227 Cal. Rptr. 480 (1986) The court stated: "We must respectfully point out that our colleagues have not been too precise in describing the nature of the cause of action." Id. at 618, 227 Cal. Rptr. at 489.

involved." To the extent that contract law is available, its effectiveness depends on the ability and willingness of the courts to apply the supple principles of article 2 of the Uniform Commercial Code, and the recent Second Restatement of Contracts, to the fact patterns found in the screenwriter cases. Judicial recognition will depend, in turn, upon the willingness of the courts to break from traditional contract theory and accept emerging contract principles. Courts have hesitated to do this, and no workable legal guidelines have been established.

A. *Express Contract*

Referring to traditional contract theory, Professor Nimmer stated, "under the prevailing view an enforceable express contract arises if the person to whom an idea is submitted . . . has expressly promised to pay for it in the event of its use." If an express contract is found between the writer and producer, the writer should prevail against the producer for any idea appropriated. The courts do not require that an idea be novel in order to be the subject of a contract, nor do they view express contract theory as interfering with the policy of unrestrained circulation of ideas. "This is because a contract creates no monopoly; it is effective only between the contracting parties; it does not withdraw the idea from general circulation or place a restraint on progress in art." Express contracts could therefore adequately protect screenwriters, if they had the bargaining power to demand them.

Unfortunately, due to the small number of major movie studios, there are only a limited number of buyers for a screenplay. A large number of writers and other creative people wish to sell ideas to these limited buyers. Thus, the typical "writer dealing with a major independent producer does not do so on an equal footing." Because of their greater bargaining power, buyers of screenplays will

27. 578 F. Supp. at 1307. Judicial recognition of contract claims as a distinct entity from copyright law would preclude any preemption problems under section 301 of the 1976 Copyright Act.
28. Conversations with Professor Jerome H. Reichman, at the University of Florida (Spring 1986).
29. 3 M. NIMMER, supra note 3, § 16.04, at 16, 17.
30. Fink, 9 Cal. App. 3d at 996, 88 Cal. Rptr. at 679.
31. Id. at 1008, 88 Cal. Rptr. at 689.
33. Id. at 102.
rarely "expressly" agree to anything. Express contract theory is therefore of little practical value.

B. *Implied Contract*

An implied contract is very similar to an express contract except that the consent of the parties is shown by conduct rather than words. The elements of an implied-in-fact contract are that: (1) the writer prepared the work; (2) the writer disclosed the work to a buyer for sale; (3) under all circumstances attending disclosure, it can be concluded that the buyer voluntarily accepted the disclosure knowing the conditions on which it was offered (i.e., the buyer must have the opportunity to reject the attempted disclosure if the conditions are unacceptable); and (4) the writer must show the reasonable value of the work. In applying the implied contract doctrine, some courts have inappropriately infused copyright concepts into their analysis. One court extensively discussed "access" and implied that the defendant must "substantially" base his movie on plaintiff's ideas. The copyright concerns of access and substantial similarity should not be indiscriminately grafted onto contract law since the doctrines are "qualitatively different." Instead, the elements of an implied contract should remain anchored in contract law. The elements of an implied contract, stated above, are more easily understood in contract

34. See infra notes 97-101 and accompanying text discussing release forms which indicate the studios' express disclaimer that any agreements have taken place.
35. See Note, supra note 32, at 103.
38. Whitfield v. Lear, 751 F.2d 90, 93 (2d Cir. 1984) (requiring "access" and "some substantial similarity" to recover under an implied-in-fact contract); Mann, 128 Cal. App. 3d at 635, 180 Cal. Rptr. at 527.
40. Cf. Whitfield v. Lear, 582 F. Supp. 1186 (E.D.N.Y. 1984) (lower court's opinion). The case involved the alleged appropriation of a television format. Id. at 1187. One of plaintiff's claims was that the defendant had breached an implied contract. Id. at 1191. The defendant argued that the cause of action should be dismissed because the format and the defendant's series were not "substantially similar." Id. at 1188. The court stated that, "defendants may be overstating their case, however, in their assumption that the copyright requirement of 'substantial similarity' is applicable here." Id. at 1191. But on appeal, the court appeared to accept the defendant's infusion of copyright principles into the case when it stated, "to support recovery on an implied-in-fact contract [the plaintiff] must show not only access but also that the [defendants] actually used his ideas by demonstrating 'some substantial similarity' between the ideas and themes of the two programs." Id. at 1193-94.
41. Smith, 578 F. Supp. at 1307.
terms. The requirement that "the writer disclosed . . . for sale" is merely the contract element of "offer." Likewise, the rest of the elements seem to actually require "acceptance," "terms" upon which the contract is based, and a "remedy."

C. Old vs. New Contract Law

The courts' acceptance of contract law in screenwriter-producer appropriation suits can afford protection for the screenwriter's projects. However, the law of contracts has changed in recent years, and the courts have not fully recognized its development. The Second Restatement of Contracts was adopted in 1979. The Restatement obviates the need to differentiate between express and implied contracts by stating that "[t]he distinction involves . . . no difference in legal effect. . . ."42 The Restatement thus approves and extends the principle as established by article 2 of the Uniform Commercial Code43 enacted in most states during the 1970's.44 Continued judicial resort to pre-1970's doctrines45 and theories reflects an attachment to "old" contract law analysis. The courts should instead look to the "new" contract law, as embodied in the Second Restatement and the Uniform Commercial Code, when evaluating screenwriter contract claims.

IV. Uniform Commercial Code and the Second Restatement of the Law of Contracts

A. Purposes

The Uniform Commercial Code46 was enacted "to simplify, clarify and modernize the law governing commercial transactions."47 Additionally, the UCC was "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties,"48 and "to make uniform the law among the various juris-

42. RESTATEMENT (SECOND) OF CONTRACTS § 4, comment a (1981).
44. The Uniform Commercial Code has been enacted in all states (except Louisiana), the District of Columbia and the Virgin Islands. WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE COMMERCIAL CODE 1 (2d ed. 1980) [hereinafter WHITE & SUMMERS].
45. See, e.g., Landsberg, 736 F.2d at 490; Mann, 128 Cal. App. 3d 628 (1982), 180 Cal. Rptr. 522; Faris, 97 Cal. App. 3d 309, 158 Cal. Rptr. 704 (1979); Fink, 9 Cal. App. 3d 996, 80 Cal. Rptr. 679 (1970); see also 3 M. NIMMER, supra note 3, §§ 16.04, 16.05; Note, supra note 32, at 99-104.
46. [hereinafter the UCC].
48. Id. at § 1-102(2)(b).
dictions. These goals address the problems inherent in current contract analysis of screenwriter idea misappropriation claims. As previously discussed, courts have not dealt with this form of idea protection in any simple, clear or modern manner. Because screenwriters are involved in the commercial practice of selling ideas, their contractual relationship should be treated consistently throughout the various jurisdictions. The UCC provides a framework for bringing simple, reasonable and consistent results to the contract problems faced by screenwriters.

The First Restatement of Contracts was intended to be a compilation of the law of contracts. It was "a legendary success, exercising enormous influence as an authoritative exposition of the subject." The Second Restatement of Contracts updates the original Restatement. The Second Restatement, like the First, should strongly influence the law of contracts. Thus, the courts should look to the Second Restatement for guidance in evaluating screenwriter idea appropriation claims. The Second Restatement, in its substantive aspects, closely parallels the UCC.

B. Application

Since article 2 of the UCC applies to "transactions in goods," it must be determined whether screenplays are "goods" and, if so, whether the dealings between a writer and a studio or producer are "transactions" within the meaning of section 2-102. No court has directly held that screenplays are goods, although the question is acknowledged in at least two cases. Since there is no judicial decision

49. Id. at § 1-102(2)(c).
50. See supra notes 19-25, 38-45 and accompanying text.
51. For examples of the lack of consistency see supra notes 22-25, 38-40 and accompanying text.
52. J. Calamari & J. Perillo, The Law of Contracts 13 (3d ed. 1987). However, it must be remembered that the Restatement was issued by a private organization (the American Law Institute) and thus does not have the force of law. Id.
56. For purposes of this paper, the UCC will be primarily discussed and the Second Restatement will only be discussed or cited when relevant.
58. Kurlan v. Columbia Broadcasting Sys., 40 Cal. 2d 799, 256 P.2d 962 (1953). In Sawyer v. Sickinger, 47 A.D.2d 291, 366 N.Y.S.2d 435 (N.Y. App. Div. 1975), while discussing a contract for a screenplay and movie option rights, the court stated, "it is unnecessary to decide the merits . . . based on failure to comply with the provisions of the Uniform Commer-
directly on point, it is helpful to analogize to similar situations.

In *Triangle Underwriters Inc. v. Honeywell Inc.*, the court held computer programs to be "goods." The court went on to hold that "intangibles may be 'goods.'" Another court determined that a contract for compiling, editing and publishing certain pamphlets and other printed materials amounted to a contract for the sale of "goods." In the criminal context, one court has held that copies of copyrighted motion pictures were "goods, wares or merchandise." Therefore, there is a strong argument that screenplays are "goods" within the meaning of the UCC, especially if courts resist the temptation to impose an artificially distinct category for intellectual property.

Are the relations between a writer and movie studio or producer "transactions"? The UCC does not define "transactions," which have been judicially construed to primarily encompass sales. The writer usually discloses his screenplay idea in soliciting a sale. The studio or producer's purchase or use of the screenplay is the act necessary to conclude the "transaction." Thus, the writer and studio
or producer should be viewed as engaged in sales "transactions." This is consistent with the policy of the UCC and the Second Restatement regarding contract formation.68

A writer's commercial transactions regarding a screenplay should be directly governed by the UCC. However, even if a court is unwilling to apply the UCC directly, "arguments by analogy to the UCC should always be given great weight."69 The Second Restatement does not have the limitations of applying only to transactions in goods. The Second Restatement applies to all contracts.70 Thus the Second Restatement, and its underlying UCC-improved provisions, should be applied to writer-producer dealings when the subject matter of the contract involves intellectual property.

C. Contract Formation

Application of the UCC simplifies the evaluation of contract formation. The UCC does not differentiate between express and implied contracts.72 Instead, the UCC provides that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."73 If a producer used a screenwriter's screenplay and the writer reasonably expected payment, a court should recognize a contract under section 2-204(1).74 This section of the UCC gives a court greater flexibility to find contracts in writer-producer relations.75

68. See infra notes 76-86.
69. 1 R. ALDERMAN, supra note 66, at 4. See also J. CALAMARI & J. PERILLO, supra note 52, at 17.
70. Murray, supra note 53, at § 3; J. CALAMARI & J. PERILLO, supra note 52, at 13.
71. This paper assumes that the defendant is the producer of the alleged infringing movie. However, the defendant could of course be the movie studio executive, the director or one of many others.
72. For a similar position in RESTATEMENT (SECOND) OF CONTRACTS see text accompanying note 42.
73. U.C.C. § 2-204(1) (1978). See also RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1981) stating, "[a] manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined." Id. See also id. § 22(2)(b) (assent by course of conduct).
74. U.C.C. § 2-204(1) (1978) states, "[f]ormation in General. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Id.
75. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 362, comment a (1981). Section 362, comment a appears to give great flexibility to the courts by providing:
   a. Reason for requirement. One of the fundamental requirements for the enforceability of a contract is that its terms be certain enough to provide the basis for giving an appropriate remedy. [citation omitted]. If this minimum standard
Another UCC simplification allows contract formation even though a price has not been fixed. Also, the UCC establishes that a buyer "accepts" goods by performing any act inconsistent with the seller's ownership. The buyer's acceptance triggers a duty to pay for the goods.

These UCC provisions simplify the writer's task of proving a contract in the typical misappropriation case. The producer, as buyer, usually reads the writer's screenplay. This is not just a literary exercise, but rather a commercial transaction with expectations on both sides. As is customary in the trade, the writer will be paid if the producer receives and wishes to use the screenplay. A producer who uses the screenplay idea without compensating the writer acts inconsistently with the writer's ownership. Under section 2-606(1)(c) of the UCC, this inconsistent act triggers the producer's acceptance of the writer's goods. Acceptance of the goods is sufficient to show agreement under UCC section 2-204(1). A contract formed in this way obligates a producer to pay for the "goods" (the use of the project conveyed in the written submission). The contract price is a good faith amount fixed by the producer or a reasonable price as determined by the court.

of certainty is not met, there is no contract at all. It may be, however, that the terms are certain enough to provide the basis for the calculation of damages but not certain enough to permit the court to frame an order of specific performance or an injunction and to determine whether the resulting performance is in accord with what has been ordered. In that case there is a contract but it is not enforceable by specific performance or an injunction.

Id. (emphasis in original).

76. U.C.C. § 2-305(1)(a) (1978). See id. § 2-305(2) and Restatement (Second) of Contracts § 204 comment d (1981).

77. Acceptance of the goods signifies the buyer's willingness to assume ownership of those goods. 1 R. Alderman, supra note 66, at 305.

78. U.C.C. § 2-606(1)(c) (1978) states: "(1) [A]cceptance of goods occurs when the buyer . . . (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him." Id. See also Restatement (Second) of Contracts § 380(3) comment b which states, "a party may manifest his intention to affirm by words or other conduct, including the exercise of dominion over what he has received in a manner inconsistent with avoidance of the contract." Id.

79. 1 R. Alderman, supra note 66, at 303. Cf. Chandler v. Roach, 156 Cal. App. 2d 435, 441, 319 P.2d 776, 780 (1957) (stating that "[i]t is reasonably understood that a professional author expects payment of the reasonable value of the idea or the material, if used, so that the conduct of the producer in accepting it implies a promise to fulfill those reasonable expectations." Id.).

81. U.C.C. § 2-204(1) as set forth supra note 74.

The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for
D. Statute of Frauds

A common stumbling block to enforcing a contract is the statute of frauds. The statute, as set forth in section 2-201 of the UCC, "requires that contracts for the 'sale of goods for the price of $500 or more' must satisfy minimal formal requirements before they are enforceable." The statute requires "some writing sufficient to indicate that a contract for sale has been made between the parties." The screenwriter, whose ideas have been appropriated, may not have a writing sufficient to satisfy the statute. However, the statute also states, "a contract which does not satisfy the requirements [of a writing] but which is valid in other respects is enforceable with respect to goods ... which have been received and accepted." Thus, the producer's "acceptance" of the goods, as earlier discussed, operates to satisfy the statute of frauds, making an oral contract enforceable.

E. Terms of the Contract

When the producer fails to pay the writer for the ideas appropriated, the writer usually files suit for breach of contract. The court then determines the contours of the parties' agreement. According to the UCC, "agreement" means "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of delivery if (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree."

\[\text{Id. UCC section 2-305(2) provides: "A price to be fixed by the seller ... means a price for him to fix in good faith." Id. See also Restatement (Second) of Contracts § 204, comment d (1981), which states that, "where there is a contract ... but nothing is said as to price the price is a reasonable price at the time for delivery." Id.}\]

83. I.R. Alderman, supra note 66, at 29 (quoting U.C.C. § 2-201). See also Restatement (Second) of Contracts § 110(2)(a) (1981), which provides, "(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code: (a) a contract for the sale of goods for the price of $500 or more (U.C.C. § 2-201)." Id.


85. Id. at § 2-201(3)(c). See also Restatement (Second) of Contracts § 375 (1981), which allows restitution under a contract even though the contract is unenforceable because of the operation of the statute of frauds. This would appear to ensure the same result as UCC section 2-201(3)(c).

86. See supra note 80.

87. The writer will of course also allege several other causes of action such as copyright infringement, unjust enrichment (quasi-contract) and breach of confidence. See supra notes 18-25 and accompanying text.

88. Here it is assumed that all other requirements for a valid contract have been met by the methods previously discussed.
To determine the terms of the writer and producer’s agreement, the court looks to express or implied terms and to trade usage. The express incorporation of trade usage into the contract should substantially help a writer in delineating the terms of this agreement. However, an offer of proof of trade custom was not allowed into evidence at the trial court level in *Davies v. Krasna*.

In *Davies*, the plaintiff offered proof of a custom in the motion picture industry whereby, “when stories . . . were submitted to producers, there was an understanding . . . that such submission was for a . . . confidential purpose and that use would not be made thereof unless there was appropriate payment by the producer.”

Under pre-UCC law, as exemplified by the First Restatement, evidence of this type of trade usage was allowed only if strict standards were met. Under the UCC, in contrast, this evidence of trade custom would have been admitted pursuant to section 1-205(5). The UCC recognizes the importance of this evidence in determining the parties’ agreement. The UCC’s express mandate allowing trade us-

---

89. U.C.C. § 1-201(3) (1978). See also Restatement (Second) of Contracts § 3 (1981), defining agreement as “a manifestation of mutual assent on the part of two or more persons,” and Restatement (Second) of Contracts § 202(5) (1981), which states, “[w]herever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.” *Id.* *But cf.* id. § 1-205(4).


92. The offer of proof was made after the court sustained defendant’s objection to the admission of the trade custom evidence. *Id.*

93. *Id.*

94. Restatement (First) of Contracts § 247 (1932), provides:

> WHEN USAGE IS OPERATIVE UPON PARTIES.

A usage is operative upon parties to a transaction where and only where (a) they manifest to each other an assent that the usage shall be operative, or (b) either party intends the effect of his words or other acts to be governed by the usage, and the other party knows or has reason to know this intention, or (c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage.

*Id.*

95. U.C.C. § 1-205(5) (1978) provides, “[a]n applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.” *Id.* See also Restatement (Second) of Contracts § 222(3) (1981), which states, “[u]nless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.” *Id.*

96. Cf. McGhan v. Ebersol, 608 F. Supp. 277, 285 (S.D.N.Y. 1985) (an idea misappropriation case in which the court did not cite to the Code, but did state that, “[a]n implied-in-
age evidence would help the screenwriter prove the existence of an agreement with a producer.

F. Release Forms

When the writer proves a contract to the court's satisfaction, the producer can raise a potent affirmative defense predicated on a commonly used release form. The release form is a tool employed by producers and signed by the writer prior to screenplay submission.97 The form waives the writer's right to sue the producer.98 The standard form states, "I will not assert against you... any claim based on plagiarism, infringement, confidential relationship, implied contract, unfair competition or otherwise arising out of any alleged use by you of [my screenplay]."99 The same release then states, "notwithstanding my release... in the event a court... shall find that you have wrongfully appropriated [my screenplay] from me and that the [screenplay] is original with me... then I will suffer no damages in excess of $1000."100 In apparent overkill, this particular release limits the writer in two respects: (1) the writer releases his right to sue; and (2) if the writer brings suit, his damages are limited to $1000. Thus, the release form is a powerful tool in the producer's hands.

fact contract may be based upon industry custom or usage regarding submission and use of ideas." Id.

97. See supra note 32. For examples of earlier release forms see Olsson, Dreams for Sale, 23 LAW AND CONTEMPORARY PROBLEMS 34, 56-58 (1958).

98. See Note, supra note 32, at 102.


I hereby acknowledge the following understandings and conditions:

1. My submission of the Project to you is voluntary, not solicited by you, and not in confidence. There are no materials being submitted to you other than those described in the summary of the Project at the end of this letter.

2. There is no agreement between us, express or implied, relating to your use or failure to use the Project.

3. I will not assert against you, your affiliates, subsidiaries, licensees, assigns, officers, agents or employees any claim based on plagiarism, infringement, confidential relationship, implied contract, unfair competition or otherwise arising out of any alleged use by you of the Project.

4. If, notwithstanding my release contained above, I should hereafter claim that you have used the Project, or any portion thereof, without my consent or authorization, I specifically agree and understand that I will suffer no damages in excess of One Thousand Dollars ($1,000.00) and that such damages up to said limit shall be my sole remedy and shall be payable only in the event a court of competent jurisdiction shall find that you have wrongfully appropriated the Project from me and that the Project is original with me.

100. Id. at § 4.
The validity of releases has been questioned by commentators, but the continued use of the release forms evidences their value to producers. The screenwriter may employ three legal theories, including contract interpretation, public policy and unconscionability to circumvent the effect of release forms.

1. **Contract Interpretation**

Courts have used contract interpretation as a means to circumvent the effects of any undesirable waiver clause. For example, the recent case of *Burten v. Milton Bradley* dealt specifically with a release form in an idea disclosure situation. In *Burten*, the plaintiffs wished to sell a game to the defendant game company. As a prerequisite to submittal, the plaintiffs signed a release form. The defendant then rejected plaintiffs' game. Approximately one year later, the defendant introduced a game which was remarkably similar to the plaintiffs'. The case was submitted to the jury, which returned a verdict of over $700,000 for the plaintiffs. The district court stated that "the jury could well have inferred . . . that [defendant] plagiarized the plaintiffs' idea without so much as a by-your-leave." The district court granted defendant's motion for judgment notwithstanding the verdict because the plaintiffs had signed what appeared to be an iron clad release form.

The circuit court found the release form ambiguous and reversed the district court. The court stated, "We do not dispute Milton Bradley's assertion that its form may credibly be read to waive all relationships and obligations between the parties, including a confidential relationship." However, "the agreement . . . does not adequately apprise them of the rights and obligations of the parties upon Milton Bradley's affirmative use or appropriation of the

---

103. 763 F.2d 461 (1st Cir. 1985).
104. *Id.* at 462.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 467.
110. *Id.*
111. *Id.*
112. *Id.* at 465.
Thus, the court seemed to admit that the release could be interpreted as a complete waiver and yet inadequacies in the release were still found. The court indicated its disfavor with the release form when it stated: "We are hard pressed to understand why experienced and informed inventors would submit their ideas for consideration and thereby waive all rights to compensation for their labor." Burten illustrates a willingness to use contract interpretation as a means of avoiding the seemingly inequitable result of enforcing a one-sided release form.

A court reviewing the standard release could use an analysis similar to that in Burten. The clause, stating that "[t]here is no agreement between us, express or implied relating to your use or failure to use the [screenplay]," could be interpreted to relate only to the time of submission of the screenplay. Thus, if a producer misappropriated the idea of a screenplay after submission, the exculpatory clause could be interpreted as inapplicable. Similarly, the clause, stating that "I will not assert against you . . . any claim

113. Id.
114. Id.
115. The relevant sections of the release form are set forth below:

DISCLOSURE RECORD

Milton Bradley Company, Divisions and Subsidiaries

Gentlemen:

I wish to submit for your consideration, subject to all of the conditions below, the idea or item hereinafter described. I am the sole and exclusive owner (or authorized representative of , the owner) of said item or idea and am of legal age and free to make agreements relative to this idea or item.

Description of My Idea or Item

(Use attachments if necessary for fuller description. Accompany by photo or drawing. If your item or idea is patented, you may furnish us a copy of the patent since it defines your rights in the subject matter thereof.)

I submit my idea or item voluntarily and I understand that this submission by me and its acceptance by Company does not, in whole or in part, establish or create by implication or otherwise any relationship between Company and me not expressed herein. I further understand and agree that Company, in its own judgment, may accept or reject the idea or item submitted and shall not obligated to me in any way with respect to my idea or item until Company shall at its own election enter into a properly executed written agreement with me and then only, according to all of the terms of said agreement. If no agreement is concluded, I shall rely solely upon such rights as I may have under U.S. Patent laws.

I agree that Company may consider this idea or item within a reasonable time.

I further agree the Company may photograph, xerograph or otherwise reproduce for its records only any material submitted by me herewith or subsequently with respect to said idea or item whether accepted or rejected.

Date of Submission Signature

Taken from the lower court's opinion. Burten, 592 F. Supp. at 1021.

116. See supra note 99 and accompanying text.
based on plagiarism, infringement, . . . implied contract . . . or otherwise arising out of any alleged use by you of the [screenplay],”

An application of the UCC to these contracts would grant a court wide latitude in interpreting contracts because of the express recognition of the importance of trade usage. Under UCC section 2-202(a), trade usage may be used to explain or supplement a contract. The screenwriter could show the trade usage that when screenplays are submitted, no use will be made of them unless appropriate payment is made. This trade usage could then be used to reinterpret the clause, “there is no agreement between us” into a more equitable contract term. However, in the commercial context of screenplay submissions, reliance on ad hoc interpretations, such as those used by the Burten court, or as an application of the UCC would allow, are insufficient to consistently protect the screenwriter.

2. As Against Public Policy

Thousands of contracts have been invalidated for violating public policy. Indeed, the Second Restatement explicitly recognizes that a contract may be made unenforceable because of underlying public policy. This doctrine appears to help the screenwriter who has previously signed a release form but is suing a producer on a breach of contract theory. The writer could argue that the release

118. Id.
120. U.C.C. § 2-202 provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

121. See supra notes 89-96.
123. Corbin, Corbin on Contracts § 1375 (1964 & Supp. 1984). See also S. Deutch, supra note 102, at § 1.3.
124. Restatement (Second) of Contracts § 178 (1981); see infra note 131.
form contract is unenforceable as a matter of public policy. The writer could show evidence of public policy by reference to legislation or judicial decisions which appear contrary to enforcement of the disputed contract term. Also, the writer could point out any misconduct that has occurred which appears connected with the exculpatory clause. A court could then use this evidence to declare a contract term unenforceable. Under this theory, a screenwriter can circumvent a release form with a public policy argument.

Unfortunately, public policy arguments are inherently uncertain. As Professor Corbin states, "A decision or a rule that is believed to be in accord with the general welfare today may not accord with it tomorrow." This results from the focus of the public policy argument on general public welfare. The validity of the release form may actually be in furtherance of the general public's welfare and yet be devastating to the screenwriter. Also, even if the public's welfare coincides with the screenwriter's, the voiding of a contract through public policy is only to be applied infrequently. The court must first consider the public's interest in freedom of contracting, and then declare the contract unenforceable, only if the public interest is clearly outweighed by public policy against its enforcement.

125. In the Matter of the Arbitration between Cayuga Prods., Inc. and Clyde Ware, Cal. Superior Court No. 820062 (1963). Found in M. NIMMER, supra note 3, § 16.05(D), at 16-38.
126. See infra note 31 for the text of Restatement (Second) of Contracts § 178(3).
127. Id.
128. Id.
129. CORBIN, supra note 123, § 1375, at 12.
130. See Restatement (Second) of Contracts § 178 comments b & c (1981).
131. Restatement (Second) of Contracts § 178 (1981) provides:

When a term is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations,

(b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decision,

(b) the likelihood that a refusal to enforce the term will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.
Therefore, although a public policy argument may occasionally protect the screenwriter, its inherent focus on the general public's welfare lessens its effectiveness. Consequently, the screenwriter needs a more consistent and commercially reasonable doctrine to combat the effect of the standard release form.

3. Unconscionability

Section 2-302, which was designed to permit courts to police contracts against abuse,\textsuperscript{132} is one of the most controversial\textsuperscript{133} sections of article 2. That section provides, "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause. . . ."\textsuperscript{134} No definition of unconscionable is given, but the "test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable. . . ."\textsuperscript{135} The Second Restatement has adopted a section virtually identical to the UCC's unconscionability section.\textsuperscript{136} Thus, in UCC or non-UCC contexts, the contractual dealings between screenwriter and producer must not be unconscionable.

Section 2-302 provides the screenwriter with a solution to invalidate the one-sided release form. Under this section, the release form should be evaluated in light of the general commercial needs of the

\textsuperscript{132} R. ALDERMAN, supra note 66, at 60-61. See also U.C.C. § 2-302 comment (1) (1978).


\textsuperscript{134} U.C.C. § 2-302 (1978). However, section 2-302 has not been enacted in three states (including California). WHITE & SUMMERS, supra note 44, at 149. (However, California did adopt the full text and official comments to UCC section 2-302 in Civil Code section 1670.5. "The only significant difference is that § 1670.5 . . . applies to all contracts rather than being limited to those sales transactions governed by the Commercial Code." A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 485, 186 Cal. Rptr. 114, 121 (1982). Also, the Second Restatement's similar provision (section 208) should apply to all states. RESTATEMENT (SECOND) OF CONTRACTS section 208 (1981) provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

\textsuperscript{135} U.C.C. § 2-302 comment (1) (1978).

Although producers in the movie industry need protection against nonmeritorious claims, a broad, one-sided release form should not be allowed to serve this purpose. For example, the standard release states that “I will not assert against you . . . any claim based on plagiarism, infringement, confidential relationship, implied contract, unfair competition or otherwise. . . .” This clause, if given its stated effect, would allow a producer to misappropriate a writer’s screenplay and legally avoid accountability. Another section of the standard release limits the remedy for misappropriation to $1,000. Both of these clauses are an incentive for misappropriation on the producer’s part since they allow a producer to steal a screenplay for $1,000 or less. These clauses apparently meet the standard of being “so one-sided as to be unconscionable” and thus, under the UCC’s unconscionability policing section, should not be given effect.

An express term usually overrides any course of performance. However, some cases have allowed this usual system of priority to be reversed, which is consistent with other sections of the UCC. The courts therefore recognize that the terms of a contract, such as a release form, are not necessarily controlling. Thus, if a producer introduces a signed release form as a defense in a screenwriter-producer appropriation suit, the writer has several arguments. The writer can argue that the terms of the release form should be avoided through contract interpretation. The writer can claim that the release is void as against public policy. Finally, the writer can argue that the release form is unconscionable as a matter of law.

G. Remedies

A detailed analysis of remedies in the typical screenwriter misappropriation lawsuit is outside the scope of this paper. However, a brief overview is appropriate. The three remedies usually available

137. U.C.C. § 2-302 comment (1) (1978). See also Restatement (Second) of Contracts, § 208 comment (a) (determination to be made “in the light of its setting, purpose and effect”). Id.
139. Id.
141. U.C.C. §§ 1-205(4), 2-208(2) (1978); Restatement (Second) of Contracts § 203(b) (1981).
144. See supra notes 102-22.
145. See supra notes 123-31.
The UCC does not refer to its remedies in these terms. Instead, section 2-703 simply lists all the remedy options available to an "aggrieved seller." These remedies are to be "liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."

Of the many UCC remedies, an action for the price would be appropriate for the screenwriter. Section 2-709 provides that "when the buyer fails to pay the price as it becomes due the seller may recover . . . the price of goods accepted." Under this section, the screenwriter would then be able to recover the "price" of the screenplay from the producer. The only difficulty would be in determining the "price." A court should calculate the price based upon the amount the producer should have paid for the screenplay at acceptance. This amount could be determined from any course of dealing, course of performance or trade usage. These damages may be an approximation, but the UCC recognizes that "compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."

---

147. U.C.C. § 2-703 (1978) provides:

Seller's Remedies in General
Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
(a) withhold delivery of such goods;
(b) stop delivery by any bailee as hereafter provided (Section 2-705);
(c) proceed under the next section respecting goods still unidentified to the contract;
(d) resell and recover damages as hereafter provided (Section 2-706);
(e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
(f) cancel.

Id.

149. See 1 R. Alderman, supra note 66, § 1.78-10, at 413, which states: "the most obvious case in which the seller should have the right to collect the price of the goods from the buyer is when the buyer 'accepts' the goods and then refuses to pay for them." Id.
151. See supra note 79.
152. See supra notes 89-96 (discussing the incorporation of course of dealing, course of performance and trade usage into the parties' agreement).
tled to any incidental damages. Incidental damages would include all "commercially reasonable expenditures made by the seller."  

V. THE "NEW" AND APPROPRIATE CONTRACT ANALYSIS

The UCC was enacted to bring clarity, consistency and reasonableness to the law of contracts. Its doctrines apply to the problems of screenwriters either directly or by analogy. Even if the UCC is not applied, a court should still adopt the UCC's underlying principles through reliance on the Second Restatement. The UCC's ease of contract formation, incorporation of trade usage, specific adoption of unconscionability, and liberality of remedies all would further the protection of screenwriters from unlawful appropriation of their ideas.

The UCC provides a means of consistently protecting screenwriters from screenplay misappropriation. This modern contract protection would not deprive the public of a free flow of ideas since it would only operate in connection with an individual writer and producer. Also, the UCC would eliminate an embarrassing abuse of bargaining power from the motion picture industry. Ultimately, implementation of the UCC in writer-producer relations would encourage creation and dissemination of new ideas, which would in turn lead to the growth and prosperity of the industry.

154. Id. at § 2-709(1).
155. Id. at § 2-710.
156. WHITE & SUMMERS, supra note 44, at 15.