

1ST CASE of Level 1 printed in FULL format.

ART BUCHWALD, et al., Plaintiffs, v. PARAMOUNT PICTURES, CORPORATION, etc., et al.,  
Defendants

No. C 706083

Appellate Department, Superior Court of California, Los Angeles

1990 Cal. App. LEXIS 634; 13 U.S.P.Q.2D (BNA) 1497

January 31, 1990

JUDGES: [\*1]

Harvey A. Schneider, Judge of the Superior Court.

OPINIONBY: SCHNEIDER

OPINION: STATEMENT OF DECISION  
(TENTATIVE DECISION WITH TYPOGRAPHICAL  
CORRECTIONS AND REVISED FINAL  
PARAGRAPH)

#### STATEMENTS OF FACTS

In early 1982 Art Buchwald (Buchwald), an internationally renowned writer and humorist, prepared an eight page screen treatment entitled "It's a Crude, Crude World." (Exhibit 500A) Buchwald testified that he wrote this treatment by himself without help from anyone. (RT 441; 464) The inspiration of the principal character came from Buchwald's observance of a state visit by the Shah of Iran. Alain Bernheim (Bernheim), a close friend of Buchwald and co-plaintiff in this action, or Louis Malle, a prominent film director, suggested that the principal character be made a black man. (RT 442)

In March 1982 Buchwald sent his treatment to Bernheim. (Exhibit 2) Bernheim registered the treatment with the Writers Guild of America. (Exhibits 3 and 4)

Subsequently, Bernheim suggested to Buchwald that the latter reduce his eight page treatment to a shorter version, which Buchwald did. (Exhibit 500B) The shorter treatment [\*2] is basically a condensed version of the eight page treatment, except for the ending.

In late 1982, Bernheim met with Jeff Katzenberg (Katzenberg), the head of motion picture production at Paramount Pictures Corporation (Paramount)(RT 96), for the purpose of "pitching" Buchwald's story to Paramount for development into a movie starring Eddie Murphy. Murphy was then under contract to Paramount. In fact, Bernheim apparently retyped Buchwald's three

page treatment and inserted Eddie Murphy's name after the name of the emperor. (Exhibit 6) Katzenberg read Buchwald's treatment and had a high regard for the concept as a movie. (RT 100; 106) Katzenberg described Buchwald's treatment as "a succinct, smart, straightforward idea with a lot of potential to it." (RT 106)

In late 1982 and early 1983 Paramount was extremely anxious to develop a project for Eddie Murphy. (Exhibits 11; 14) Buchwald's treatment, the title of which had by this time been changed to "King for a Day" by Paramount, was a project in which Paramount was interested. (Exhibit 15; RT 703-704) In fact, in January 1983 Paramount registered the title "King for a Day" with the MPAA. (Exhibit 16) Bernheim and Katzenberg remained [\*3] in communication and a search for a writer began. (Exhibit 17) During this period of time, there was no doubt Paramount considered "King for a Day" a possible project for Eddie Murphy. (Exhibit 18) In fact, Paramount's creative executives loved Buchwald's story and concept and thought it would be a terrific vehicle for Eddie Murphy. Paramount envisioned Murphy playing at least two roles in Buchwald's story. (RT 707)

On February 24, 1983, Paramount and Bernheim entered into an agreement pursuant to which Bernheim was to produce and be entitled to certain payments if Paramount entered into an agreement with Buchwald acquiring Buchwald's story idea. (Exhibit 507) After the Bernheim-Paramount agreement was executed, the search for a writer for "King for a Day" continued. (Exhibit 22) On March 22, 1983, Buchwald and Paramount entered into an agreement pursuant to which Paramount purchased the rights to Buchwald's story and concept entitled "King for a Day." (Exhibit 506) According to Paramount creative executive David Kirkpatrick (Kirkpatrick), in his ten years at Paramount, Buchwald's treatment was the only one optioned by Paramount. Paramount did, of course, frequently option screenplays. [\*4]

On March 28, 1983, Kirkpatrick and Ricardo Mestres (Mestres), another Paramount creative executive, sent a memorandum to Jeff Katzenberg. n1 In this memorandum it was indicated that a search for a writer for "King for a Day" was continuing. The same memorandum indicated that the project was being developed for Eddie Murphy "based on Art Buchwald." (Exhibit 25) On the same day "King for a Day" was listed as a project "potentially committed or active in development." (Exhibit 26) On April 2, 1983, in a handwritten note, Katzenberg indicated to Kirkpatrick and Mestres that he wanted a "full court press" on the "King for a Day" project. Several persons, including Buchwald himself, were being considered as potential screenplay writers. (Exhibits 27; 30; 31; 32; 33; 34; 35) Other persons were under consideration as possible directors. (Exhibit 28)

n1 It is important to note that Katzenberg had both a close professional and social relationship with Eddie Murphy. (RT 98)

In the spring of 1983, Kirkpatrick met at the Ma Maison [\*5] Restaurant with Eddie Murphy and others to discuss various potential movie development projects for Murphy. Katzenberg was present, as was Robert Wachs (Wachs), one of Murphy's managers. During this dinner meeting, ten or twelve potential movie projects were discussed. The Paramount executives went through the ten or twelve projects with Murphy and talked basically about characters or people involved. One of the stories that was discussed was Buchwald's "King For A Day." Murphy was positively responsive to the "King For A Day" presentation. At the same meeting Murphy indicated that he liked playing the African character in "Trading Places." (RT 552-555)

On March 23, 1983, Kirkpatrick sent a status report to Wachs, in which Wachs was advised that Paramount was still searching for a writer for the potential Eddie Murphy project "King for a Day." (Exhibit 36) Katzenberg testified that he spoke regularly with Wachs during 1983, both in person and on the telephone. They discussed projects that were in development for Murphy at Paramount. Katzenberg had similar conversations with Murphy's other manager, Richie Tienkin. (RT 122) On June 6, 1983, Kirkpatrick sent Wachs a short outline of [\*6] Buchwald's "King For A Day." (Exhibit 39)

On July 9, 1983, a meeting was held at Paramount's office. Present were Kirkpatrick, Katzenberg, Mestres, Bernheim and Tab Murphy who ultimately wrote the first screenplay for "King for a Day." After receiving a syn-

opsis of Buchwald's treatment, Katzenberg suggested a number of changes. These changes included making the Eddie Murphy character more likable, having the Murphy character change in a cultural, rather than financial way, and having Murphy play a number of different roles. (Exhibit 41) On June 13, 1983, Kirkpatrick reported that the first draft of "King For A Day" was due on July 22, 1983. (Exhibit 42) Four days later, in a memorandum, "King For A Day" was described as the "Art Buchwald idea" that Paramount was "now developing for Murphy." (Exhibit 46) In late June the "Eddie Murphy picture" "King For A Day" was described as a possible project for direction by John Landis. (Exhibit 48) On July 1, 1983, Kirkpatrick wrote a letter to Landis which was accompanied by a description of a number of projects that were being proffered by Paramount for consideration by Landis. The description for "King For a Day" stated in pertinent part:

"KING [\*7] FOR A DAY is high-styled political satire inspired by Art Buchwald. The movie is intended for Eddie Murphy, who is familiar with the idea and likes it very much. If necessary, however, I believe anyone of several comedy stars could be excellent in the role. The writer is Tab Murphy, who has proven in another project that he has a terrific sense for Eddie Murphy's style. We expect a first draft in about four weeks." (Exhibit 49; RT 120-121; 556)

In a memorandum dated July 12, 1983, the budget for "King For A Day" was estimated to be in the ten to twelve million dollar range by Mestres and Kirkpatrick. (Exhibit 51) In late July, 1983, an agreement was reached between Paramount and Tab Murphy, pursuant to which the latter was hired to do the first screenplay for "King for a Day." (Exhibit 53)

In August 1983, "King for a Day" was still being considered by Paramount as a possible project for Landis. (Exhibits 55; 56) As of August 19, 1983, it was anticipated by Kirkpatrick that Tab Murphy's first draft would be ready on September 2, 1983. (Exhibit 57) This date was later changed to September 23, 1983. (Exhibit 59) In mid September 1983 the budget for "King for a Day" was still estimated [\*8] at ten million dollars. (Exhibit 60) The date for submission of the first draft of "King for a Day" was later extended to September 30, 1983. At this time "King for a Day" was still identified among "potential Eddie Murphy projects." (Exhibit 62)

On September 30, 1983, Tab Murphy submitted his first draft of "King For A Day." (Exhibits 63; 64) The script was not well received by Paramount, Bernheim or, apparently, anyone else. (RT 599-600) As a result, the search for a writer for "King for a Day" continued. (Exhibits 66; 68) In the meantime, Paramount paid \$

2500 to Buchwald to extend its option on "King for a Day." (Exhibit 67)

In late October 1983 the search for a writer focused on the French writer and director, Francis Veber. (Exhibits 69; 70; 71; RT 601) At the same time, "King for a Day" was still being thought of by Paramount as a possible project for John Landis. (Exhibit 72) Additionally, Paramount was still referring to "King For A Day" as a high-styled political satire inspired by Art Buchwald. (Exhibit 73) On December 6, 1983, Kirkpatrick reported that Paramount was negotiating with Veber to write the script for "King For A Day" and that the deal might close that day. [\*9] A copy of this memorandum was sent to Wachs, Murphy's manager. (Exhibits 75; 77) In December, Paramount indicated that a screenplay draft was expected by March 16, 1984 and that "King for a Day" was targeted for release in the summer of 1985. (Exhibit 76) On December 8, 1983, Wachs was sent a review of one of Veber's movies. (Exhibit 80) On December 12, 1983, Katzenberg sent a letter to Brandon Tartikoff, President of NBC Entertainment. In this letter, "King for a Day" was identified as a "priority development" that "Eddie Murphy will star in." (Exhibit 81; RT 128)

On January 4, 1984, Kirkpatrick reported that negotiations with Veber were still ongoing with respect to "King for a Day" -- a potential Eddie Murphy project. A copy of this report was sent to Wachs and Murphy's agent, Hildy Gottlieb. (Exhibit 83) On January 17, 1984 "King for a Day" was still listed as an "active" project. (Exhibit 84) Negotiations with Veber were still ongoing as of January 23, 1984. (Exhibit 85) On January 24, 1984, Katzenberg was notified that the title "King for a Day" had been cleared for use by Paramount. (Exhibit 86) In late January, Paramount's financial agreement with Bernheim was amended. (Exhibit [\*10] 87) At the same time it was again reported that the deal with Veber was nearly closed. (Exhibit 88) On February 14, 1984, it was reported at Paramount that a draft for "King For A Day" was due to be submitted by Veber by May 30, 1984. (Exhibit 92) In a February 17, 1984, memorandum relating to "Eddie Murphy projects," "King for a Day" was described as a "political satire inspired by Art Buchwald" that was an excellent candidate for release in summer 1985. (Exhibit 93; see also Exhibit 99)

Sometime in 1984, Veber went to Washington, D.C., where he was shown around the ghetto by Bernheim and Buchwald.

On March 20, 1984, Paramount exercised its second option on Buchwald's work. (Exhibit 98)

In a memorandum dated May 14, 1983, Katzenberg

informed Frank Mancuso, the head of Paramount, that "King for a Day" was one of the top three projects under development for Eddie Murphy at the time. Katzenberg stated: "Francis Veber, who is set to direct, will deliver his script [on "King For A Day"] mid-June. This is an excellent idea, and the marriage of Murphy and Veber could be something very special." (Exhibit 103)

On June 20, 1984, Kirkpatrick reported to Katzenberg that Veber's script should [\*11] be ready by mid-August and that Veber would like "to shoot in the spring." n2 Wachs is shown as receiving a copy of this memorandum. (Exhibit 105)

n2 Veber was paid \$ 300,000 by Paramount to write the script for "King For A Day". This was a large sum of money for such a script. (RT 148-149)

On July 30, 1984, Katzenberg informed Kirkpatrick that Paramount should obtain a one-year extension on its option from Buchwald "for cheap money." (Exhibit 107)

On August 1, 1984, Bernheim reported to Katzenberg that Veber had read his script to him (Bernheim) and that Bernheim was very impressed. Bernheim stated that Veber had "captured" Buchwald's idea and that "Eddie is, I believe, in for a treat." (Exhibit 108)

In a memorandum dated August 3, 1984, Darlene Chan of Paramount reported "King For A Day" was scheduled for a summer 1985 release. (Exhibit 109) On August 15, 1984, the Paramount-Buchwald agreement was amended to provide for a third option. (Exhibit 110)

On October 1, 1984, Katzenberg was informed by Michael Besman, a [\*12] member of Paramount's creative group, that Veber had "unofficially submitted the first draft of his screenplay." Besman reported that the "feeling was that the material was good, but it was hard to digest because of the format of the script." (Exhibit 114)

On October 3, 1984, Katzenberg informed Mancuso that Kirkpatrick had read the first third of Veber's screenplay, that Veber was coming to America the end of November and that there was a deal in place for Veber to direct "King for a Day." (Exhibit 115)

On October 10, 1984, Bernheim wrote Mancuso and informed him that he (Bernheim) had "been working with Francis Veber on our Eddie Murphy project (King for a Day)." Bernheim stated that he hoped Veber would arrive in Los Angeles by the end of November with tee completed script. (Exhibit 116)

On October 16, 1984, Paramount exercised its third option on Buchwald's work. (Exhibit 117) On October 19, 1984, Ned Tanen, who by this time had taken over as President of Paramount, authorized payment of an additional \$ 10,000 to Bernheim by reason of the latter's efforts in holding the "King for a Day" project together. (Exhibits 118; 119; RT 869)

In mid-November Veber's first draft screenplay [\*13] was submitted.

On January 1, 1985, Kirkpatrick directed a memorandum to Eddie Murphy's agents and managers -- Gottlieb, Tienkin and Wachs. "King For A Day" was identified as one of the two strong development projects that would be "coming down the pike at the end of the month." In his memorandum Kirkpatrick reported that Veber was unhappy with his first script and wanted to revise it before it was shown to "Eddie's people." (Exhibit 123) Veber produced his revised draft in January 1985. (Exhibit 627) On February 1, 1985, it was reported that May 1, 1985, was the final date for Paramount to exercise its option on "King for a Day." (Exhibit 125) On the same date Bernheim wrote Tanen and inquired whether "Eddie [was] still interested in the basic Buchwald premise." Bernheim noted that he had been told that "Eddie and his associates were very high on the idea." (Exhibit 126)

On February 7, 1985, Bernheim again wrote Tanen. Bernheim indicated he had had a recent telephone conversation with Kirkpatrick in which the latter hung up on him. Bernheim also referred to the fact that they were "on the verge of signing a new writer (John See)." (Exhibit 128; see also Exhibit 127)

On February [\*14] 20, 1985, Richard Fowkes of Paramount reported that a deal had been made with the writing team of Mierson and Krikes to do a rewrite on "King for a Day." (Exhibit 129; see also Exhibit 131) However, one week later it was reported that the deal with Mierson and Krikes "has been aborted." (Exhibit 132)

On March 6, 1985, Kirkpatrick sent a copy of the "King for a Day" script to Wachs, with copies to Gottlieb and Tamara Rawitt (of Eddie Murphy Productions). (Exhibit 134; RT 636) Wachs received the script and read at least part of it. (RT 766)

On March 29, 1985, Bernheim was informed that Paramount was abandoning "King for a Day." (Exhibit 135) On April 18, 1985, Paramount confirmed that "King for a Day" was "in turnaround." n3 (Exhibit 136) On April 3, 1985, Virginia Briggs of Paramount confirmed that "King for a Day" had been abandoned as of March 29, 1985. "King for a Day" was described as: "First draft screenplay by Tab Murphy; first draft

and set of revisions by Francis Veber; both based upon original story and concept by Art Buchwald." (Exhibit 137) However, on May 5, 1985, in a report identifying the "state of potential Eddie Murphy projects," "King for a Day" was listed as one of [\*15] the "projects in abeyance/on hold." (Exhibit 138) This memorandum was sent to Wachs, Tienkin, Rawitt and Gottlieb. (RT 787-788)

n3 The term "turnaround" means that a producer is given the right to "take the project, call it his own, and try to set it up at another studio or third party financing." (RT 639)

On August 14, 1985, a "coverage" n4 was written for the title "Ambassador At Large." The person who prepared this coverage likened "Ambassador At Large" to a story that Paramount had optioned from Art Buchwald. (Exhibit 139)

n4 A "coverage" is a document in which the story is broken down, synopsized and explained. This document permits a reader to obtain a quick understanding of the story being synopsized. (RT 877)

After Paramount abandoned "King for a Day," Bernheim became interested in finding another production company for the project. He was informed [\*16] that Paramount had invested in excess of \$ 418,000 in developing "King for a Day." (Exhibit 140) Although Bernheim attempted to purchase an option on the screenplay from Paramount (Exhibit 141), he was unsuccessful. (Exhibit 142; RT 882-883)

In May 1986, Buchwald optioned his treatment "King for a Day" to Warner Brothers. (Exhibits 144; 146) Bernheim also entered into an agreement with Warner Brothers on the same project. (Exhibit 145)

In the summer of 1987, Paramount began the development process of a property called "The Quest," which was reported to be based upon a story by Eddie Murphy. (Exhibits 156; 508) The director selected for this project was John Landis. (Exhibits 157; 162) Barry Blaustein and David Sheffield were chosen to collaborate on the screenplay with Eddie Murphy and Arsenio Hall. (Exhibit 158) The shooting script for "Coming To America," the subsequent title for "The Quest," is dated October 21, 1987. (Exhibit 171) In the meantime, Warner Brothers was still involved in developing the Buchwald treatment. (Exhibit 172) A script entitled "King Jomo" by Allen Katz was ready in revised form in November 1987. (Exhibit 173)

In early November 1987, after Bernheim learned [\*17] that Paramount was going to begin shooting a movie in which Eddie Murphy was to play a black prince who comes to America to find a wife, Bernheim and Tanen met for lunch. Tanen became angry when Bernheim suggested that Paramount's movie was based on a character close to the one suggested by Buchwald. Tanen insisted Paramount's film had nothing to do with Buchwald's story. (Exhibit 605)

In January 1988, Warner Brothers cancelled the "King For A Day" project. Warner Brothers executive Bruce Berman made it clear that the cancelation was due, at least in part, to Warner's discovery of the fact that Paramount was shooting "Coming To America" starring Eddie Murphy. (RT 726-728; 732-736)

When "Coming To America" was released, the screenplay credit was given to Sheffield and Blaustein and Eddie Murphy received the story credit. (Exhibits 180; 183)

On June 29, 1988, Michael Bataggia of Paramount reported on "Coming To America" field publicity and promotions. One of the promotions was the use of a "King for a Day" concept, where a prize winner was afforded the opportunity to go on a shopping spree. (Exhibit 184)

## DISCUSSION

### Introduction

At the outset the Court desires to indicate what [\*18] this case is and is not about. It is not about whether Art Buchwald or Eddie Murphy is more creative. It is clear to the Court that each of these men is a creative genius in his own field and each is an uniquely American institution. This case is also not about whether Eddie Murphy made substantial contributions to the film "Coming to America." The Court is convinced he did. Finally, this case is not about whether Eddie Murphy "stole" Art Buchwald's concept "King for a Day." Rather, this case is primarily a breach of contract case between Buchwald and Paramount (not Murphy) which must be decided by reference to the agreement between the parties and the rules of contract construction, as well as the principals of law enunciated in the applicable legal authorities.

### The Contract Between Buchwald and Paramount

As indicated, the starting point for the analysis of this case is the contract between Buchwald and Paramount.  
n5

n5 Although the Court intends to focus on the agreement between Buchwald and Paramount, there appears to be no dispute between the parties that co-

plaintiff Bernheim's entitlement to damages under his agreement with Paramount (Exhibit 507) is dependent upon the outcome of the dispute between Buchwald and Paramount.

[\*19]

Pursuant to this agreement (Exhibit 507) Buchwald transferred to Paramount "the sole and exclusive motion picture and other rights" to the "original story and concept written by Art Buchwald . . . tentatively entitled "KING FOR A DAY", also known as "It's a Crude, Crude World" (which material, as defined in said Standard Terms is hereinafter called the 'Work')." (Exhibit 506, p.1) In the agreement Buchwald warranted "[t]hat the Work is original with Author; that neither the Work nor any part thereof are taken from or based upon any other material or any motion picture. . . ." (Exhibit 506, p. 3) As is pertinent to the present case, the agreement provided that:

"'Work' means the aforementioned Material and includes all prior, present and future versions, adaptations and translations thereof (whether written by Author or by others), its theme, story, plot, characters and their names, its title or titles and subtitles, if any, . . . , and each and every part of all thereof. 'Work' does not include the material referred to in paragraph 2 (f) above, written or prepared by Purchaser or under Purchaser's Authority." (Id. at 15)

Finally, the agreement entitled Buchwald to certain "contingent [\*20] consideration" "[f]or the first theatrical motion picture (the 'Picture'): If, but only if, a feature length theatrical motion picture shall be produced based upon Author's Work." (Emphasis added.) (Exhibit 506, p. 18)

### The Meaning of "Based Upon"

Since the agreement provided Buchwald was entitled to payment only if Paramount produced "a feature length theatrical motion picture" "based upon Author's Work," the threshold inquiry in this case is what is meant by the term "based upon." Because the term is not defined in the contract, it was the Court's hope that the term had a specific meaning in the entertainment industry and that the experts who testified would so indicate. Unfortunately, there was as little agreement among the experts concerning the meaning of this term as there was between plaintiffs and Paramount concerning whether "Coming to America" is based upon Buchwald's treatment. For example, David Kirkpatrick testified that his understanding of "based upon," as used in the entertainment industry, is that "there exists some underlying antecedents that triggered the realization of the story in a screenplay."

(RT 515) Kirkpatrick amplified his answer to state that "based [\*21] upon" has two aspects -- "the studio or production company had purchased or had access to [the author's work]. And two, that the antecedents were of a significant story nature to claim a based upon credit." (RT 646) In other words, Kirkpatrick opined that a movie is based upon a writer's work if it "was created out of significant elements from the underlying materials." By significant elements, Kirkpatrick meant "that there were character similarities, story similarities as it relates to the Act One, to (sic) Two, Three structure." (RT 647)

Helene Hahn, a Paramount attorney, testified (by way of deposition) that, in her opinion, "based upon" meant that the "screenplay of the motion picture had been derived from and incorporated the elements of author's work as herein defined." (Depo. Tr., p. 32) Alexandra Denman, another Paramount attorney, testified (by way of deposition) that "based upon" meant that the screenplay was written "with the elements of Mr. Buchwald's story, I mean the specific elements of the story, which is the work." (Depo. Tr., p. 50)

David Rintels, a writer, testified (by way of deposition) that "based upon" means "intent." (Depo. Tr., p. 115) Mr. Rintels further [\*22] testified: "Before you get into plot you'll be able to see, just because you've been doing it for 30 years yourself, or I'll be able to see that -- if I think that there is a similarity in spirit over -- regardless of details, I think that's a factor, for something to be based on." (Depo. Tr., p. 127)

Edmond H. North, another writer, testified (by way of deposition) that he believed the focus in making the "based upon" determination should be whether there is an overriding similarity to plot, theme and characters. (Depo. Tr., pp. 91-92) Lynn Roth, another writer, defined "based upon" as meaning "something came from something else." Miss Roth conceded that "because we're dealing with so many kinds of material, you could not put it into a specific or as neat a definition as you can other credits in the industry, because we are dealing with, as I said before, different things. . . ." (Depo. Tr. p. 69) In determining whether one work came from an earlier work, according to Miss Roth, one looks at the essence of the material, i.e., "the basic theme" (Depo. Tr. p. 69) but not plot, characters and motivation because these relate to the "development of the project," not its theme (i.e., nucleus). [\*23] (Dep. Tr., p. 71).

Since the Court found the testimony of the entertainment experts, both individually and collectively, to be of little value with respect to the "based upon" issue, the Court turned to the appellate decisions of this State for guidance. Fortunately, that guidance existed. Indeed,

as will be discussed more fully below, the Court believes these decisions provide a road map through the "based upon" mine field.

#### Access and Similarity

In cases involving infringement, which this case is not, it has been held that an inference of copying may arise where there is proof of access to the material with a showing of similarity. *Golding v. R.K.O. Pictures, Inc.*, 35 Cal.2d 690, 695 (1950). "Where there is strong evidence of access, less proof of similarity may suffice." (Id.) These same rules have been applied in a case involving a cause of action alleging breach of an express contract. *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal.App.3d 996, 1013, (1970).

#### Access

In the present case, there is no real issue concerning Eddie Murphy's access to Buchwald's concept. Indeed, the evidence is that Murphy knew about Buchwald's concept. Specifically, it is [\*24] undisputed that in the spring of 1983, Paramount creative executives Kirkpatrick and Katzenberg met with Murphy and his manager, Robert Wachs, at the Ma Maison Restaurant and discussed Buchwald's concept with them. In fact, it was reported that Murphy was positively responsive to the "King for a Day" presentation and indicated that he liked playing the African character in the movie "Trading Places." Murphy himself testified (by way of deposition) that he had "a very vague recollection, maybe of Jeff [Katzenberg] going into the "King for a Day" thing. 'You'd be great in it.'" (Depo. Tr., p. 91) Murphy further testified that Katzenberg "liked the idea of it, I guess, 'cause I remember." (Id.)

There is other, persuasive evidence on the issue of access. For example, on June 6, 1983, Kirkpatrick sent Wachs a short outline of Buchwald's "King for a Day." (Exhibit 39) Wachs admitted that he read at least part of the Buchwald's treatment. (RT 768)

Finally, there is evidence that Kirkpatrick discussed "King for a Day" with Eddie Murphy on at least three occasions subsequent to the meeting at the Ma Maison Restaurant in the spring of 1983. (RT 556-558)

#### Similarity

Since there is no real [\*25] issue concerning access, the focus must then be on the question of similarity. Similarity is, of course, a question of fact for the trier of fact to determine. *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 660 (1950).

The parties have directed a substantial amount of their attention to the issue of similarity. Paramount con-

tends that there must be substantial similarity between Buchwald's treatment and "Coming to America" in order for Buchwald to succeed in this case. n6

n6 In Paramount's Trial Brief it is stated: "In order to sustain a finding of breach of contract under the contention that Coming to America was 'based upon' It's a Crude, Crude World, there must be a finding of significant or substantial similarity between the two works." (At 3)

Paramount also relies on *Teich v. General Mills, Inc.*, 170 Cal.App.2d 791 (1959), *Henried v. Four Star Television*, 266 Cal.App.2d 435 (1968) and *Whitfield v. Lear*, 582 F.Supp. 1186 (E.D.N.Y. 1984), rev'd, 751 F.2d 90 (2nd Cir. [\*26] 1984).

The Court believes Paramount's reliance on the cases cited above is misplaced because none of these cases involves an express contract with language similar to that involved in the Buchwald-Paramount contract. This point is cogently made by Nimmer in his classic work "Nimmer on Copyright":

"However, the copyright requirement that similarity between plaintiff's and defendant's work be 'substantial' . . . is not applicable in idea cases. If the only similarity is as to an idea then by definition such similarity is not substantial in the copyright sense. *Whitfield v. Lear*, 582 F.Supp. 1186 (E.D.N.Y. 1984) (Treatise quoted), rev'd, 751 F.2d 90 (2nd Cir.) (1984). (Although the appellate decision in *Whitfield* refers to a requirement of 'some substantial similarity' the holding is that the district court's finding of 'no similarities' is unsupported in the record on appeal. 751 F.2d at 93-94.) If there is a contractual or other obligation to pay for an idea, the defendant cannot avoid such liability by reason of the fact he did not copy more than the abstract or basic idea of plaintiff's work. (Citations omitted.) Contra: *Henried v. Four Star Television*, [\*27] 72 Cal.Rptr. 223 (Cal.App. 1968). The result in the *Henried* case may be justified on the ground that the only element of similarity between the plaintiff's and defendant's works ('both heroes travel in chauffeur-driven Rolls Royces') was so well known as to preclude a trier of fact from concluding that defendant copied this element from plaintiff . . . the *Henried* court appears to be in error in affirming the sustaining of defendant's demurrer to plaintiff's implied contract count on the ground that the similarity between the two works was not 'substantial.' This principle of law would be equally applicable even if a non-substantial element of similarity were clearly copied by defendant from plaintiff, thus doing violence to the principles of contract law discussed above . . . and articulated in

*Weitzenkorn v. Lesser*, 40 Cal.2d 778 (1953). . . ." (Emphasis added) (Vol.3, § 16.08[B], pp.16-64, 65, fn. 58)

Although the Court believes the cases relied upon by Paramount are inapplicable to the issue of the extent of similarity that is required in this case, the Court has concluded the two controlling cases with respect to this issue are *Fink supra*, and *Weitzenkorn*, [\*28] *supra*.

In *Fink*, as in the present case, the contract between the parties obligated the defendant to compensate the plaintiff if the defendant created a series "based on Plaintiff's Program or any material element contained in [it]." (9 Cal.App.3d at 1002) n7 The Court stated that a "[m]aterial element" could range from a mere basic theme up to an extensively elaborated idea, depending upon what might be proved as the concept of the parties." (*Id.* at 1008, fn. 15) With respect to the contract cause of action, the Court framed the issue: "[W]hether . . . defendants have based their series on a material element of plaintiff's program." (*Id.* at 1007) (Emphasis added.) The Court noted that its "based on any material element" test was "quite close to the concept of 'inspiration for' which was the key to the upholding of an implied contract count in *Minniear v. Tors*, 266 Cal.App.2d 495, 505 [72 Cal.Rptr.287]." (*Id.* at 1008)

n7 This contract language appears to be virtually identical to the language in the Buchwald-Paramount contract which requires Paramount to compensate Buchwald if it produced a motion picture based upon Buchwald's work, which is defined as "its theme, story, plot, characters and their names . . . , and each and every part of all thereof."

[\*29]

Similarly, in *Weitzenkorn, supra*, the contract obligated the defendants to pay for plaintiffs' composition "if they used it or any portion of it, regardless of its originality." (40 Cal.2d at 791)

Based on the decisions in *Fink* and *Weitzenkorn*, and the contract involved in this case, the Court concludes that Paramount's obligation to pay Buchwald arose if "Coming to America" is based upon a material element of or was inspired by Buchwald's treatment. As the Court in *Fink* noted, this determination is to be made by searching for "points of similarity" both quantitatively and qualitatively. (9 Cal.App.3d at 1010) It is to this search that the Court now turns.

The Comparison of Buchwald's Treatment and "Coming To America"

Before engaging in a comparison of "King for a Day" and "Coming to America," the Court wishes to state the obvious. Specifically, plaintiff has the burden of proving similarity by a preponderance of the evidence. "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it." (BAJI 2.60)

In Buchwald's treatment, a rich, educated, arrogant, extravagant, despotic African potentate comes to America for a state [\*30] visit. After being taken on a grand tour of the United States, the potentate arrives at the White House. A gaffe in remarks made by the President infuriates the African leader. His sexual desires are rebuffed by a black woman State Department officer assigned to him. She is requested by the President to continue to serve as the potentate's United States escort. While in the United States, the potentate is deposed, deserted by his entourage and left destitute. He ends up in the Washington ghetto, is stripped of his clothes, and befriended by a black lady. The potentate experiences a number of incidents in the ghetto, and obtains employment as a waiter. In order to avoid extradition, he marries the black lady who befriended him, becomes the emperor of the ghetto and lives happily ever after.

In "Coming to America" the pampered prince of a mythical African kingdom (Zamunda) wakes up on his 21st birthday to find that the day for his prearranged marriage has arrived. Discovering his bride to be very subservient and being unhappy about that fact, he convinces his father to permit him to go to America for the ostensible purpose of sowing his "royal oats." In fact, the prince intends to go [\*31] to America to find an independent woman to marry. The prince and his friend go to Queens, New York, where their property is stolen and they begin living in a slum area. The prince discovers his true love, Lisa, whose father -- McDowell -- operates a fast-food restaurant for whom the prince and his friend begin to work. The prince and Lisa fall in love, but when the King and Queen come to New York and it is disclosed who the prince is, Lisa rejects the prince's marriage invitation. The film ends with Lisa appearing in Zamunda, marrying the prince and apparently living happily ever after.

There are, to be sure, differences between Buchwald's "King for a Day" and "Coming to America." However, as noted above, where, as here, the evidence of access is overwhelming, less similarity is required. Moreover, "[E]ven if the similar material is quantitatively small, if it is qualitatively important . . . the trier of fact . . . may properly find substantial similarity." (*Fink, supra*, at 1013)

In his opening statement, counsel for plaintiffs made the following comparison of "King for a Day" and "Coming to America":

"Both are modern day comedies. The protagonist is a young black member of [\*32] royalty from a mythical African kingdom, pampered and extremely wealthy, well-educated. They both come to a large city on the American East Coast. And they arrive as a fish out of water from this foreign kingdom.

Abruptly, finding themselves without royal trappings of money and power, they end up in the black, urban American ghetto, about as far culturally as they could ever hope to be from their pampered, royal status in their mythical kingdom. Each character abandons his regal attitudes. Both live in the ghetto as poor blacks experiencing the realities of ghetto life.

Each takes a menial job as (sic) a series of harrowing and comedic adventures in the ghetto, is humanized and enriched by his experiences. Love always triumphing over all, each meets and falls in love with a beautiful young American woman whom he will marry and make his Queen and live happily ever after in his mythical African kingdom." (RT 45)

The Court agrees with this comparison. In fact, the Court believes that these similarities alone, given the language of the contract involved in this case and the law that liability in a contract case can arise even if a non-substantial element is copied, might well be sufficient [\*33] to impose contract liability on Paramount. *Fink, supra*; *Weitzenkorn, supra*; *Minniear, supra*. The fact is, however, that other compelling evidence of similarity exists.

In the original script written by Tab Murphy that was indisputably based upon Buchwald's treatment, the king ends up as an employee of a fast food restaurant where he ultimately foils a robbery attempt by use of a mop. In "Coming to America" the prince is also employed by a fast food restaurant and foils a robbery attempt by use of a mop. These similar "gimmicks" provide compelling evidence that the evolution of plaintiffs' idea provided an inspiration for "Coming to America." (*Minniear v. Tors, supra*, at 505) n8

n8 During the trial of this case, an issue arose concerning whether the similarity comparison must be made between Buchwald's treatment and "Coming to America" or Buchwald's treatment as it evolved in the Tab Murphy and Veber's scripts and "Coming to America." The Court believes it is the latter comparison that must be made for several reasons. First, the contract between Buchwald and Paramount specifi-

cally authorized Paramount to "adapt, use, dramatize, arrange, change, vary, modify, alter, transpose . . . the Work and any parts thereof." (Exhibit 506, p.4) Second, it is not just Buchwald's treatment, but the subsequent Tab Murphy and Veber's scripts, to which Murphy had access. Third, even though the contract provided that "'Work' does not include the material referred to in paragraph 2 (f) above, written or prepared by Purchaser or under Purchaser's Authority" (Exhibit 506, p.15), that provision simply means that the subsequent adaptations of Buchwald's treatment became the property of Paramount. It does not mean that Buchwald was not entitled to "based upon" compensation if the evolution of his treatment resulted in a motion picture produced by Paramount.

[\*34]

The Court has found an item of documentary evidence significant with respect to the similarity issue. In early September, 1984, a writer by the name of Jim Harrison sent a treatment to Robert Wachs, Murphy's manager, which he suggested was "closely aligned with Murphy's talents." (Exhibit 111) This treatment envisioned Eddie Murphy playing an aide to a powerful Southern senator. The aide ultimately becomes the King of Somaili. (Exhibit 112) In rejecting this idea, Wachs wrote Harrison in pertinent part as follows:

"Unfortunately, there is a project under development at Paramount for Eddie entitled "King for a Day", based on an unpublished Art Buchwald story, which is fairly close to your story line, hence I really can't give you a go-ahead on this one." (Exhibit 113; RT 794-796)

When asked what he meant by "fairly close," Wachs replied "that an ordinary person would find that any two items had more similarities than dissimilarities." (RT 799) If Murphy's manager thought that the Harrison treatment had more similarities than differences to Buchwald's treatment, it seems to the Court that a substantially stronger case can be made with respect to the similarities between Buchwald's treatment [\*35] and "Coming to America." n9

n9 Much the same may be said of the review of a work entitled "Ambassador at Large" which was prepared by a Paramount employee in August, 1985. (Exhibit 139)

There are other factors that are present in this case that strongly support plaintiffs' position that

Buchwald's original concept and its subsequent development at Paramount was the inspiration for "Coming to America". For example, the evidence is overwhelming that for two years Paramount considered "King for a Day" to be a project that was being developed for Eddie Murphy. In fact, when "Coming to America" was made, its star was Eddie Murphy. Additionally, during the development of "King for a Day" it was contemplated Murphy would portray multiple characters. In "Coming to America" he did.

Moreover, when "King for a Day" was under development, Paramount sought to interest John Landis in directing the movie. On July 1, 1983, David Kirkpatrick of Paramount sent to Landis a description of "King for a Day." In fact, Landis directed "Coming [\*36] to America". The fact that Landis was aware of Buchwald's concept for "King for a Day" is important. Since the evidence revealed that Landis had creative input into "Coming to America," it is his access and knowledge, in addition to Eddie Murphy's, that it is relevant to the issue of similarity.

It is also important to observe that one of the promotional ideas utilized in connection with "Coming to America" was a "King for a Day" concept where a prize winner was afforded the opportunity to go on a shopping spree. (Exhibit 184)

As indicated above, there are differences between Buchwald's treatment and "Coming to America." One of the principal differences is that the king in Buchwald's original treatment was despotic, while the prince in "Coming to America" is kind and naive. The fact is, however, that early in the development process Paramount desired to make Buchwald's king more likable. (Exhibit 41) Indeed, by the time Francis Veber submitted his second script, which was clearly based upon Buchwald's original treatment, the king had none of his despotic characteristics. As indicated above (fn. 8), the Court believes that "Coming to America" must be compared with the Buchwald treatment [\*37] as it was developed in the Tab Murphy and Veber scripts.

The other significant difference between Buchwald's treatment and "Coming to America" is the motivation that brought the principal character to America. In Buchwald's treatment the motivation was to obtain military weapons from the United States. In "Coming to America" it was to find an independent wife. This dissimilarity does not, however, require a finding that "Coming to America" is not "based upon" Buchwald's work.

In many ways, the decision in *Weitzenkorn, supra*, is similar to the present case. *Weitzenkorn* was a

breach of contract case in which the plaintiff sued to recover damages by reason of the defendant's use of her Tarzan/Fountain of Youth idea. Although both plaintiff's idea and the defendant's movie involved Tarzan, there were striking dissimilarities between the two. In plaintiff's story, Tarzan entered the area where the Fountain of Youth was located because he was captured by the evil persons who dwelled in the area. By contrast, in the defendant's version Tarzan voluntarily entered the area which was occupied by a king who was a friend of Tarzan. In plaintiff's version, Tarzan undertook his journey [\*38] to rescue Boy. In defendant's version, Tarzan was on a mission of mercy to find a missing aviatrix. In plaintiff's version, the evil queen and her subjects disintegrated when Tarzan destroyed the Fountain of Youth. In defendant's version, the ending was totally different.

In Weitzenkorn the Court found no similarity as to form and manner of expression between plaintiff's composition and defendant's movie. Although both works included the same characters in Africa being involved with a mythical Fountain of Youth, the moral of each was entirely different. Specifically, the moral of plaintiff's work was that eternal youth was not a blessing. The moral of defendant's work was that eternal youth was a reward for good.

In spite of the significant differences between plaintiff's and defendant's work, the Court concluded that the trial court had erroneously sustained the demurrers of the defendants without leave to amend. Because the defendants had expressly agreed to compensate the plaintiff if they used plaintiff's composition, or any portion of it, the Court concluded that plaintiff's complaint stated a cause of action "no matter how slight or commonplace the portion which" the defendants [\*39] used. (40 Cal.2d at 792)

Finally, *Blaustein v. Burton*, 9 Cal.App.3d 961 (1970) is also instructive. In this case plaintiff's idea of using Richard Burton and Elizabeth Taylor as the stars of "Taming of the Shrew," together with several ideas with respect to how and where the movie should be made, was held to give rise to contract liability.

Based upon the authorities discussed above and the provisions of the contract involved in this case, the Court concludes that "Coming to America" is a movie that was "based upon" Buchwald's treatment "King for a Day."

n10 "Bearing in mind the unlimited access . . . [proved] in this case and the rule that the stronger the access the less striking and numerous the similarities need be, . . . [the Court concludes that Paramount has] appropriated and used a qualitatively important part of plaintiff's material in such a way that features discernible in . . . [Paramount's] work are substantially similar thereto.

(*Fink, supra*, at 1013) n11

n10 The Court wishes to add that to the extent there is an ambiguity with respect to interpreting the "based upon" provision of the contract, that ambiguity must be resolved against Paramount as the drafter of the agreement. (Civ.Code § 1654; *Glenn v. Bacon*, 86 Cal.App. 58 (1927)

[\*40]

n11 The statement by Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*, 293 F.145 (1924) is appropriate to quote at this point. Judge Hand stated: "Everything registers somewhere in our memories, and no one can tell what may evoke it." Eddie Murphy, with commendable candor, admitted as much when he testified (by way of deposition) that he did not know "what triggers my subconscious." (Depo. Tr., p. 92)

Finally, the Court wishes again to emphasize that its decision is in no way intended to disparage the creative talent of Eddie Murphy. It was Paramount and not Murphy who prepared the agreement in question. It is Paramount and not Murphy that obligated itself to compensate Buchwald if any material element of Buchwald's treatment was utilized in or inspired a film produced by Paramount. "Coming to America" is no less the product of Eddie Murphy's creativity because of the Court's decision than it was before this decision was rendered.

#### The Issue of the Originality of Buchwald's Treatment

As indicated, in the agreement between Buchwald and Paramount, the former sold to Paramount his [\*41] "original story and concept" and warranted that his work was original and not taken from or based upon any other material or motion picture. During the trial, Paramount was permitted to introduce into evidence a movie made in the 1950's by Charlie Chaplin entitled "A King in New York." Although the Court understood it to be Paramount's position during trial that Buchwald's treatment was not original in that it was based upon "A King in New York," it appears that this position was abandoned by Paramount during oral argument. Paramount's present position, as the Court understands it, is that if the Court concludes "Coming To America" is based upon Buchwald's treatment, it must similarly conclude that Buchwald's treatment is based upon "A King in New York" since the same degree of similarity exists between Buchwald's treatment and each of the two movies. The Court does not agree.

It is true that Buchwald testified that he saw "A King in New York" in Paris in the 1950's and wrote a col-

umn concerning his review of the movie after seeing it. Besides these facts, there is not a scintilla of evidence that Buchwald's treatment was in any way based on "A King in New York." Indeed Buchwald testified [\*42] that his treatment was an original document and that he could not remember anything about the Chaplin movie. Moreover, the Court has viewed "A King in New York." Besides the fact that this movie involves a king who comes to America, there is not the slightest resemblance between "A King in New York" and "King for a Day." In Chaplin's movie the king is an elderly caucasian who is already married and deposed by the time he comes to America. Although he loses his fortune, he spends the entire movie living in luxury at the Ritz Hotel. Moreover, and most significantly, the movie is a satirical look at the McCarthy era and the American mentality during that period of time.

In sum, to the extent Paramount still intends to advance the argument, the Court rejects the contention that Buchwald's treatment was not original and that it was in any way based upon "A King in New York." Stated another way, while plaintiffs have proved by a preponderance that "Coming to America" is "based upon" "King for a Day," plaintiffs have also proved by a preponderance of the evidence that "King for a Day" is not "based upon" "A King in New York."

#### Plaintiffs' Tort Claims

In addition to their contract claims, [\*43] plaintiffs have advanced several tort theories of recovery, namely, bad faith denial of existence of contracts, bad faith denial of liability on their contracts, tortious breach of the

implied covenant of good faith and fair dealing, breach of fiduciary duty, fraudulent concealment by a fiduciary and constructive trust. The obvious reason plaintiffs have asserted tort causes of action is to recover punitive damages since, absent such damages, the Court is able to discern no difference between any tort damages plaintiffs might recover and their contract damages.

The Court has concluded, as indicated, that "Coming to America" was based upon Buchwald's treatment. The Court is unable to find, however, any tortious conduct on the part of Paramount or any of its representatives. In order to award punitive damages to plaintiffs' the Court would be required to find by clear and convincing evidence that defendant was guilty of fraud, oppression or malice, as those terms are defined in Civil Code Section 3294. While the Court rejects Paramount's contention that "Coming to America" is not "based upon" "King for a Day," the Court is unable to conclude that Paramount's conduct was in bad faith, [\*44] let alone fraudulent, oppressive or malicious. Accordingly, while plaintiffs are entitled to recovery on their breach of contract claims, the Court finds the defendant is entitled to judgment on plaintiffs' tort claims.

Since neither party has requested a Statement of Decision, the Tentative Decision (as corrected herein) shall constitute the Statement of Decision. The Court understands there will now be an accounting phase of this case. The Court desires to make it clear that, depending on the evidence adduced during the accounting phase, the possibility exists that Paramount's accounting practices may make the imposition of tort damages appropriate.