Dog-Eat-Dog: The Paradox Between The Ninth Circuit’s Treatment of Idea Submission Cases and the Harsh Reality of Show Business

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Abstract:
Hollywood is much akin to an oligarchy, with most of its power concentrated in a few top studios. The creative sides of the entertainment industry—namely screenwriters—have become the unfortunate victims of this power imbalance. In an effort to recognize the woes of these screenwriters and mitigate the unfair nature of this unequal bargaining power, the Ninth Circuit has sought to safeguard the interests of screenwriters through its interpretation of implied-in-fact contracts. Despite the 1976 revisions to the Copyright Act, which now afford protection to these screenwriters, the Ninth Circuit continues to reaffirm the usage of implied-in-fact “Desny” claims as an answer to plaintiff-screenwriters’ idea submission cases. While the judiciary’s intent is noble, its approach is not functional for the following reasons: (1) it creates a circuit split with the approach taken by the Second Circuit; (2) breach of contract does not afford the appropriate remedies for the “idea-theft” suffered by the screenwriters; (3) the standard employed in Desny claims is unreasonably low; (4) this treatment will, inevitably, reaffirm the necessity of “connections” in the business for screenwriters to find success; (5) it allows for frivolous lawsuits and forum-shopping; (6) the court is contravening legislative intent. Employing the applicable copyright law to idea submission cases would serve as a cure-all for these problems. This would require the United States Supreme Court to definitively end the implied-in-fact contract approach to idea submission cases.

1 J.D. Candidate 2013, University of La Verne College of Law; B.A. Anthropology, 2010, San Francisco State University. The author would like to thank Professors Almas B. Khan and Marc L. Roark for their invaluable guidance and feedback in the writing of this paper. The author would like to further extend her gratitude to her “wife” Siobhan A. Kennedy for her consistent patience and support. The rest of this author’s friends and family, particularly Andrea M. Martinez, have proven a priceless emotional resource during the writing process. This paper is as much yours as it is mine.
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I. Introduction

“[Show business is] worse than dog-eat-dog. It’s dog-doesn’t-return-other-dog’s-phone-calls.”² Woody Allen said it best, and anyone who has ever ventured into the realm of entertainment would be much obliged to agree. Show business is renowned as one of the most difficult arenas in which to find success.³

Arguably, one of the most grueling careers in show business is that of the screenwriter.⁴ Screenwriting is an occupation centered around conceptualizing novel premises, drafting treatments, attending pitch meetings⁵ and—more often than not—facing rejection.⁶ The pressures of screenwriting would be insurmountable if these writers had to fear the possibility that studios would use the ideas they submitted in pitch meetings without holding to the implicit expectation that the screenwriters would properly be credited for the work. For this reason, the courts have sought to protect the efforts of screenwriters by affording them a specialized cause of action.

Those unfortunate situations in which networks and studios exploit screenwriters give rise to litigation known in the field as “idea submission” cases. The remedies afforded in such cases might be rooted in either property or contract law. A vociferous debate exists as to whether this scenario invokes a breach of

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² CRIMES AND MISDEMEANORS (Orion Pictures 1989).
⁴ Id.
⁵ A pitch meeting is an industry custom whereby a screenwriter meets with a producer or other studio executive to discuss the potential development of the writer’s screenplay or treatment. Slanguage Dictionary, VARIETY, http://www.variety.com/static-pages/slanguage-dictionary/#top (last visited Jan. 2, 2012).
⁶ See John Halasz, Screenplay Writing-- Story Structure, EZINE ARTICLES, http://ezinearticles.com/?Screenplay-Writing---Story-Structure&id=5925939 (last visited Nov. 11, 2011) (citing that “[i]t is believed that 98% of all the screenwriters fail”).
implied contract claim (the approach taken by the Ninth Circuit)\textsuperscript{7} or a claim under the federal Copyright Act\textsuperscript{8} (the approach taken by the Second Circuit).\textsuperscript{9}

Screenwriters commonly wish to bring their claims in the plaintiff-friendly state courts, thus asserting an implied contractual claim; whereas, defendant-studios often find more success in federal court and push for preemption under the Copyright Act which forces the plaintiff to prove a “substantial similarity”\textsuperscript{10}

element.

The question, then, arises as to how the courts should treat these cases. Should courts employ a generic implied contract theory, treating all idea submission cases identically—basically holding that an implied contract is formed any time when a screenwriter and studio executive conjoin for a pitch meeting? Or, should each idea submission case turn on its own facts—requiring each screenwriter to demonstrate that the studio’s product actually rises to the level of misappropriation?

The answer to this question ought to be found in the injury that the screenwriter is truly trying to cure. While plaintiff-screenwriters may wish to proceed with an implied contract claim because success under that cause of action is easier obtained, the true motivation behind the screenwriters’ suits is the feeling that they have been robbed. In most cases, a screenwriter’s project is her brainchild, and a studio’s misappropriation of that brainchild is a theft of the screenwriter’s blood,

\textsuperscript{7} See, e.g., Montz v. Pilgrim Films & Television, Inc., 2011 U.S. App. LEXIS 9099 (9th Cir. May 4, 2011); Grosso v. Miramax, 383 F.3d 965 (9th Cir. 2004); Desny v. Wilder, 46 Cal. 2d 715, 739 (1956).

\textsuperscript{8} See discussion infra Part III.


sweat and tears. Plaintiff-screenwriters are not usually suing because they feel wronged by the studios for breaching some unspoken agreement between the parties at a pitch meeting. Instead, they are seeking retribution for the loss of their time-consuming, laborious, emotional investment. In following with this, and the ensuing reasons, idea submission claims ought to be viewed in the light of property law rather than that of contract.

This comment seeks to demonstrate that, contrary to popular belief, the continuation of the current treatment of idea submission cases will have a deleterious impact on screenwriters. This comment contends that the judicial intent to support screenwriters is conversely harming new screenwriters by leaving studios wary of entertaining new ideas for fear of exposure to litigation.

Part Two of this comment gives a preliminary overview of the current standard applied to idea submission cases. This Part will explain the contract theory of recovery and the burden of proof required to prevail on an implied contract claim.

Parts Three and Four work in tandem to create a historical legal backdrop by outlining the relevant statutory authority and case law upon which idea submission cases are founded. Particular deference is paid to the most recent idea submission case, Montz v. Pilgrim Films & TV, Inc.—a case arising out of California and recently denied certiorari by the United States Supreme Court—to illustrate the flaws in the courts’ treatment of these claims.

Part Five will then offer suggestions to alleviate the currently foreboding condition of idea submission claims. This Part will elaborate on the complications created by the intersection of contract and copyright law. Further, this Part will
discuss the policies behind the two different theories of recovery and provide illumination as to why the property theory is better suited for idea submission cases.

Part Six concludes the comment. This part offers closing thoughts on the future of law where it intersects with entertainment. It also suggests measures to protect both studios and screenwriters in the interim until the uncertain future of idea submission cases comes to a resolution.

II. Overview of “Desny” Claims

The implied contract claims that plaintiff-screenwriters attempt to assert in these idea submission cases are known in the industry as ‘Desny’ claims. The contract in these cases arises out of conduct, rather than through words. For a court to recognize a valid Desny claim,

the plaintiff must show that the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.

Finally, the plaintiff must show that the claim arises out of “circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it was tendered.” If all of these requisite elements can be met, the

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12 NIMMER ON COPYRIGHT §19D.05[A][2], (2007).
13 Grosso, 383 F.3d at 967.
14 Desny, 46 Cal. 2d at 739.
California courts will generally hold that there was a valid implied-in-fact contract breached by the defendant upon which the plaintiff can recover.15

III. Relevant Statutory Authority

The United States Constitution expressly grants the federal government, namely Congress, the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”16 Pursuant to this power, Congress began regulating copyrights as early as 1790.17 Since that time, there have been several significant revisions to the Act. For the purposes of idea submission cases, the most notable revisions are those enacted in 1909 and 1976.

A. Copyright Act of 1909

As one of the first federal copyright statutes, the Copyright Act of 1909 served to protect works that were published and affixed with a notice of copyright.18 This provision had left unpublished works within state court jurisdiction.19 Each state, therefore, had the power to treat copyright in the manner it saw fit—leaving the copyright protection for unpublished works exposed to inconsistent state law regulation.20

B. Copyright Act of 1976

In 1976, Congress revised the Copyright Act to encompass its current ambit. The governance of the statute now extends to all “original works of authorship

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15 See generally Desny, 46 Cal. 2d 715; Grosso, 383 F.3d 965.
16 U.S. CONST. art. I, §8, cl. 8.
20 Id.
fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

This new language opened federal copyright protection to unpublished work—provided some physical manifestation of the intellectual property exists; mere utterances are at a speaker’s own risk. Copyright protection now also required a showing of substantial similarity between the plaintiff’s materials and the defendant’s output.

C. Preemption

Section 301(a) of the Copyright Act allows federal copyright law to preempt any state claims asserting the same rights as those protected by the statute. In authorizing federal preemption, Congress sought to “accomplish[] the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims.” This section gives exclusive jurisdiction to federal courts in cases that meet the “subject matter” and “general scope” requirements of the provision. The requisite subject matter for federal copyright preemption of state claims is simply that the work “come within the subject matter of copyright”—meaning, as discussed above, it must be in tangible form. The general scope prong, on the other hand, invites more litigation. To meet this requirement, the plaintiff’s claim must assert “legal and equitable rights that are equivalent to the exclusive rights within the general scope

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27 Id.
of copyright. This prong requires that the rights asserted by a plaintiff be qualitatively different from those protected by the Copyright Act in order to survive preemption. The ambiguity of the term “qualitatively different” has led to animated debates within the judicial system.

Generally, in cases involving Desny claims, the requisite “extra element” to survive preemption is the defendant’s promise to pay for the use of the plaintiff’s idea and the subsequent breach of that promise.

IV. Relevant Case Law

Originally, California sought to protect screenwriters in light of the decidedly absent protections of federal law for unpublished works. This section chronicles the development of California case law for idea submission cases from before the 1976 Copyright Act to modern-day. It also illustrates the difference in treatment of idea submission cases in New York in light of Section 301(a).

A. Desny v. Wilder

In 1956, the California Supreme Court made a decision that would unequivocally stand to change the legal realm of the entertainment industry. In the landmark case Desny v. Wilder, the court considered a case involving the film “Ace in the Hole,” which plaintiff claimed was a premise stolen from the proposed

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32 The element of the claim that would serve to make it “qualitatively different” from a copyright claim, thus taking it out of the general scope of copyright.
33 Grosso, 383 F.3d at 968.
34 Desny v. Wilder, 46 Cal. 2d 715 (1956).
treatment he offered to the studio’s secretary in expectation of compensation.\textsuperscript{35}

Plaintiff contended that he spoke with the secretary over the phone in anticipation of setting up a meeting to pitch his concept for a film based upon the story of Floyd Collins—an explorer who became trapped in a cave for days on end.\textsuperscript{36}

This case was decided before the Copyright Act of 1976 extended protection to published works, forcing the court to find that the plaintiff did not have a viable copyright claim. Instead, the court found a means to protect the plaintiff through contract law.\textsuperscript{37} Judge Schauer, writing for the majority, explained that an implied-in-fact contract existed between the parties, an agreement that centered upon the obligation to pay the purveyor for the implementation of the idea by the recipient.\textsuperscript{38}

When addressing claims arising from the entertainment industry, courts tend to view implied-in-fact contracts as “more accurately described as express contracts proved by circumstantial evidence.”\textsuperscript{39} To expand upon this view, the court in \textit{Desny} explained that “an idea can constitute valuable consideration and can be bargained for before it is disclosed to the proposed purchaser,”\textsuperscript{40} but upon disclosure, the idea becomes the property of the purchaser, who “may work with it and use it as he sees fit.”\textsuperscript{41}

\textbf{B. Grosso v. Miramax Film Corp.}

\textsuperscript{35} \textit{Id.} at 724.
\textsuperscript{36} \textit{Id.} at 747.
\textsuperscript{37} \textit{Id.} at 745.
\textsuperscript{38} See \textit{id.} at 734-35; see also Nimmer \textit{supra} note 12 at [a][i].
\textsuperscript{39} Desny v. Wilder, 46 Cal. 2d 715, 739 (1956).
\textsuperscript{40} \textit{Id.} at 737.
\textsuperscript{41} \textit{Id.} at 738.

In this case, plaintiff alleged that defendant Miramax used his concept and themes from his pitch for “The Shell Game” when defendant created “Rounders”—a high-stakes poker based screenplay.\footnote{Grosso, 383 F.3d 965, 965.} Upon this allegation, the plaintiff asserted a breach of implied contract claim against defendant accompanied by a copyright claim.\footnote{Id.}

While the plaintiff did not have a valid copyright infringement claim based on a failed “substantial similarity” test, he had a valid contract claim that was not preempted by the Copyright Act.\footnote{Id. at 968.} In order for the claim to survive preemption under the new Copyright provisions, the complaint needed to assert a claim that was “qualitatively different” from a standard copyright claim.\footnote{Id.} The court held that the expectation of compensation met the requisite “extra element” to satisfy the qualitatively different standard.\footnote{Id.} Thus, the appellate court reversed the district court’s judgment that the federal copyright statute preempted the plaintiff’s claim.\footnote{Id.} This gave new flame to the Desny claim in spite of the 1976 Copyright provisions which seemed to negate the need for these implied contract claims.

\footnote{Id.}
C. Montz v. Pilgrim Films & Television, Inc.

Recently, the Ninth Circuit had yet another opportunity to reconsider the fate of idea submission cases with Montz v. Pilgrim Films & Television, Inc.. This case arose out of a prospective parapsychology reality show conceived by plaintiff Montz. Montz began interacting with NBC Universal and the Sci-Fi Channel (since renamed ScyFy) in hopes of bringing the show into production. In the seven-year span between 1996 and 2003, Montz presented “screenplays, videos, and other materials” to representatives of the networks. Montz expressly sought to “partner…in the production, broadcast and distribution of the Concept.” In the end, the networks passed on the submission. Shortly thereafter, NBC Universal produced Ghost Hunters—a nearly identical show—for the Sci-Fi Channel, partnering instead with Craig Piligian and Pilgrim Films & Television, Inc. (“Pilgrim”).

Accordingly, Montz and Smoller filed suit against the two networks, Piligian, Pilgrim, and ten other defendants including NBC Universal. The causes of action alleged included both a federal copyright claim and various state law claims—including breach of implied agreement not to disclose, divulge or exploit the plaintiffs’ ideas and concepts without the express consent of the plaintiffs, and to share with the plaintiffs the profits and credit for their idea and concepts and breach of confidence. The court found that Montz had a valid federal copyright

49 Montz v. Pilgrim Films & Television, Inc., 606 F.3d 1153, 1155 (9th Cir. 2010).
50 Id.
51 Id.
52 Id. at 1155-56.
53 Id. at 1156.
54 Id.
55 Montz, 606 F.3d at 1156.
claim and that the existing state law claims were preempted by Section 301(a) of the Copyright Act, thus dismissing the state law claims. Eventually, plaintiffs voluntarily dismissed with prejudice the copyright claim, leaving the district court to enter judgment for defendants.

The plaintiffs appealed to the Ninth Circuit, resulting in a three-judge panel affirming the disposition of the district court. The panel held that Montz’s claims were devoid of the transformative “extra element” necessary to avoid federal copyright preemption. The court elaborated that the expectation of partnership was not to be likened to an expectation of compensation for the use of the material, since “[t]o state a viable Desny claim… the plaintiffs would have to allege that they offered their work for sale. But such an allegation would be contrary to the challenged complaint, which states that they made an offer only of partnership in the ‘production, broadcast and distribution of the Concept.’” The Ninth Circuit supported the actions of the district court, regardless of the lower court’s lack of written factual findings. The appellate court claimed that “no such findings were necessary because the court’s decision makes clear that no other allegation of other facts consistent with the complaint could possibly cure the deficiency [of a transformative ‘extra element’].

56 Id.; see also 17 U.S.C. § 301(a) (1976).
57 Montz, 606 F.3d at 1156.
58 Id.
59 Id. at 1160.
60 Id. at 1159.
61 Id. at 1159-60.
62 Id. at 1159.
63 Id.
Again, the plaintiffs appealed. This time, their case was heard by the Ninth Circuit en banc. Here, the plaintiffs finally found success. Judge Schroeder wrote for the majority, explaining that the claims in Montz could survive copyright preemption because the expectation for partnership met the transformative element necessary to avoid such a fate. Upon this decision, the majority found that the complaint was sufficient to make out a claim of breach of implied contract and a claim for breach of confidence.

The majority took pains to distinguish Desny claims from typical copyright violations, citing the longstanding tradition in California courts to appreciate the personal nature of idea submission cases and avoid lumping these cases into the “public monopoly” that copyright claims involve. The court explained that “[t]he whole purpose of the contract was to protect Plaintiff’s rights to his ideas beyond those already protected by the Copyright Act.” The court claimed that Desny claims are essential to maintaining a fair and judicious playing field for creative actors who are forced into litigation to protect their endeavors. In following with this line of logic, Schroeder elaborated that “[c]ontract law, whether through express or implied-in-fact contracts, is the most significant remaining state-law protection for literary and artistic ideas.”

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64 Montz, 2011 U.S. App. LEXIS 9099 at *17.
65 Id. at *16.
66 Id. at *17.
67 Id. at *13-14.
69 Id. at *15-16.
70 Montz, 2011 U.S. App. LEXIS 9099 at *16 (citing Benay v. Warner Bros. Entm’t, Inc., 607 F. 3d 620, 629 (9th Cir. 2010)).
Judge O’Scannlain, joined by Judges Gould, Tallman and Bea, authored a dissenting opinion in which he expressed his belief that Montz’s claims sought to protect the same rights as that of the Copyright Act. O’Scannlain seemed to echo the sentiments expressed in *Forest Park*—harping on the practicality of finding idea submission cases preempted by federal copyright law. He elaborated that a breach-of-confidence claim, such as the one in this case, is not qualitatively different from the average copyright claim. The dissenters sought to distinguish the scenario set forth in *Montz* from that in *Grosso*. However, the focus of O’Scannlain’s dissent rested primarily upon Montz’s allegation that he refused to authorize the use of his ideas by Pilgrim. Here, the dissent determined that Montz’s ideas were expressly not offered for sale, leaving O’Scannlain to liken the claims asserted in *Montz* to standard copyright violations rather than a typical *Desny* claim. O’Scannlain also expressed concern that recognizing claims like those asserted by Montz as state contract claims would be discordant with the legislative purpose underlying the Copyright Act. O’Scannlain feared that plaintiffs would receive too much protection, thus disorienting the delicate balance that the Copyright Act has struck between intellectual property owners and the outside world.

While Judge Gould joined O’Scannlain’s dissent, he also opted to author his own brief opinion. Gould expressed concern that the variance between state and

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71 *Id.* at *18.
72 *See* discussion *infra* Part IV.E.
74 *Id.* at *24 (O’Scannlain, J., dissenting).
75 *Id.* at *23 (O’Scannlain, J., dissenting).
76 *Id.* at *25 (O’Scannlain, J., dissenting).
78 *Id.* at *29 (O’Scannlain, J., dissenting).
federal law is prejudicial to California networks and studios. Gould also feared that affirming this state law protection without upholding the same standards as federal copyright law requires would result in a floodgate of frivolous litigation.

D. Petition for Certiorari for Supreme Court Review of Montz v. Pilgrim Films & Television, Inc.

On August 2, 2011, defendants filed a certiorari petition with the United States Supreme Court. The defendants sought Supreme Court review claiming that the Ninth Circuit en banc decision was “incorrect as a matter of statutory interpretation and further deepens a longstanding circuit split on the scope of copyright preemption” that requires clarification and lesser nebulous guidelines. The petition also raised the need for legal uniformity across the jurisdictions as to the treatment of idea submission cases and copyright law. Defendants raised the concern that other circuits—including the Second Circuit with Forest Park—have treated scenarios much like the one presented in Montz as validly preempted by the federal copyright provisions. However, in spite of the well-drafted petition, the Supreme Court denied certiorari on November 7, 2011.

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79 Id. at *31 (Gould, J., dissenting).
80 Id. (Gould, J., dissenting).
82 Id. at 11.
83 Id.
84 Id. at 30.
85 See discussion infra Part IV.E.
86 See supra note 81 at 11.

The Second Circuit has taken a drastically different approach to show business idea submission cases—finding that claims which California and the Ninth Circuit would consider valid under Desny are preempted by the federal copyright law.88 In the 2011 Forest Park case, plaintiffs asserted that they pitched a television series idea about an exiled doctor who makes ‘concierge’ house calls for wealthy clients to defendant USA Network.89 Plaintiffs contended that it was understood that they would be paid if the series was to be produced by USA Network. Defendant passed on the idea submission but later created “Royal Pains”—a show with an almost identical premise.90

The Second Circuit court dismissed the plaintiffs’ breach of implied contract claim, stating that federal copyright law preempted it. The court explicitly stated that the right of compensation for the use of the plaintiffs’ material was “equivalent to the exclusive rights protected by the copyright law and is therefore preempted by the Copyright Act,”91 thus creating a circuit split as to how these types of claims should be evaluated by the courts.

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89 Id. at *1.
90 Id. at *2.
91 Id. at *3.
V. Analysis

The differing modi operandi employed by the Second and Ninth Circuit to decide idea submission cases in light of the 1976 Copyright Act are highly problematic. This section will demonstrate the differences between contract and copyright approaches, including the varying standards and remedies associated with each. The section will further discuss the benefits and burdens of each approach on a macro-level in light of public policy concerns. The section will ultimately conclude with a plea to the Supreme Court to settle this dispute.

A. The Intersection of Contract and Copyright Law

Idea submission cases are hardly the only instance in which complications arise between the application of copyright and contract law. In fact, a parallel quandary is demonstrated in the realm of licensing—particularly in documentary films. Take, for example, PBS’s seminal civil rights documentary series “Eyes on the Prize.” In the late 1980s, Henry Hampton sought to create a telling series for PBS that chronicled the social movements of the 1960s using contemporaneous archival footage.92

Since the Fair Use Doctrine of the Copyright Act allows for the reproduction of otherwise copyrighted material for nonprofit educational purposes,93 all of Hampton’s use of the footage would have been permitted under copyright law. However, Hampton and his production crew actively sought licensing agreements from the various copyright holders for the footage they wished to incorporate into

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their documentary. Due to the high volume of footage and multiple sources from whom the footage was to be gathered, the licenses were debilitatingly expensive for the publicly-funded budget. In an attempt to subsidize the costs, the filmmakers resigned to purchasing short-term clearance contracts. Initially, this was a satisfactory option, as the original airdate was within the time parameter of the shortest clearance agreement. Problems started to arise, however, when the licenses began expiring five years after they were granted. Once the first license expired, the series could no longer be broadcast or commercially distributed by PBS, completely inhibiting the educational value of the project. Had Hampton and his team proceeded with their project without affording any of the archival footage owners any notice of their intended usage of the footage, any claim that the owners could have brought would quickly have been dismissed under the Fair Use Doctrine. Unfortunately, however, the production crew decided to proceed under licensing standards, thus bringing their relationships with the owners into a contractual setting. The series was, then, bound by the oppressive terms of the contract.

94 Eyes on the Fair Use of the Prize, DIAGONAL THOUGHTS (Feb. 12, 2008), http://www.diagonalthoughts.com/?p=75 [hereinafter Eyes].
95 Id.; Margret Henefeld, Fair Use in Independent Documentary Filmmaking, CUREJ: C. UNDERGRADUATE RES. ELECTRONIC J., 1, 8 (2006), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1032&context=curej&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dlicensing%2520fair%2520use%2520eyes%2520on%2520the%2520prize%26source%3Dweb%26cd%3D4%26ved%3D0CC8QFjAD%26url%3Dhttp%253A%252F%252Frepository.upenn.edu%252Fcit%252Fviewcontent.cgi%3Farticle%3D253&context%3Dcurej%26ei%3DDQIq8Tt65KqGOIAhNSJAw%26usg%3DAFQjCNFOV_o8I08Adz5IhwCGRDjCxn6uNQ%26cad%3Drja#search=%22licensing%20fair%20use%20eyes%20on%22.
96 Eyes, supra note 92.
97 Id.
98 Henefeld, supra note 95, at 8.
Here, the benefits and burdens arising from the unequal rights afforded by contract and copyright law are reversed compared to idea submission cases. That is, in licensing cases, contract law imposes a stricter standard for the artist; whereas, in idea submission cases, contract law is the preferred forum for the artist due to the general ease by which the standard can be met. The analogy, however, is not too attenuated as to disrupt an illustration of the complexities created by the intersection of contract and copyright law.

Truly, contract and copyright law are not diametrically opposed incentives. In an ideal world, the two theories of recovery would work in concert to afford the optimal protections and remedies to parties whose claims arise from the juncture of contract and copyright. Unfortunately, however, the current locus of the “law of ideas” has not occasioned such an end. This, perhaps, is not the fault of the judiciary, as such a fate could not be realized without an act by the legislature. It seems as though this may have been the intent underlying the creation of licenses in intellectual property; but, for the foregoing reasons, it may not have been as effective as one would have hoped. For now, and, inevitably until an adequate revision is enacted, protections and remedies may be afforded solely through one of the two theories of recovery—thus, spawning the debate as to which theory is best equipped to afford the necessary protections to both sides of the litigation.

B. An Elaboration on the Inconsistent Standards Between Contract and Copyright Approaches to Idea Submission Claims

The variance in standards to which a plaintiff is held is one of the most significant reasons that courts must determine whether to approach idea submission cases as either contract or property claims. Judge Gould, in his Montz
dissent, discussed the “chaotic prospect” of trying to reconcile these two standards.\(^9^9\) While his concern may appear melodramatic, it is hardly unfounded. In reality, the requisite standards to which contract and copyright claims are held are completely inconsistent.

To state a viable implied-in-fact contract claim, the plaintiff need only assert facts sufficient to show that an implied contract exists—“the author condition[ed] the disclosure of an idea upon an obligation to pay for it if used, and the buyer voluntarily accept[ed] the disclosure knowing the reasonable value of the work and the condition on which it was tended”\(^1^0^0\)—and this contract was breached—through “actual use” by defendant without the appropriate compensation to plaintiff.\(^1^0^1\) Contrastingly, a successful copyright claim imposes a more onerous burden on the plaintiff, including proof

that he or she owned a copyright, and that the defendant copied original elements of the copyrighted work. To establish the latter, the plaintiff must prove that the defendant had access to the copyrighted work, and that there is substantial similarity between the copyrighted work and the alleged infringing work under two tests: the intrinsic test and the extrinsic test.\(^1^0^2\)

The intrinsic test looks to the overall “feeling” of the two works and seeks to determine “‘whether the ordinary, reasonable audience’ would find the works substantially similar to the ‘total concept and feel of the works.’”\(^1^0^3\)

The extrinsic test, on the other hand, looks to similarities between specific

\(^1^0^1\) Id. at 338.
\(^1^0^2\) Id. at 331 (emphasis added).
\(^1^0^3\) Benay v. Warner Bros. Entm’t, Inc., 607 F.3d 620, 624 (9th Cir. 2010) (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)).
protectable elements of the works (including “plot, themes, dialogue, mood, setting, pace, characters, and sequence of events”). To successfully demonstrate a copyright infringement, a plaintiff-screenwriter must prove substantial similarity under both tests.

*Benay v. Warner Bros. Entertainment, Inc.* serves as the perfect case to illustrate the differences in the two standards. In *Benay*, plaintiffs sued the defendant-studio, alleging that the studio had copied from their “The Last Samurai” screenplay without permission or compensation. Plaintiffs asserted claims for copyright infringement and breach of implied-in-fact contract, i.e., a *Desny* claim. Defendant, on the other hand, contended that it had rejected the screenplay because the studio was already developing a similar project.

Ultimately, the Ninth Circuit found that the plaintiffs did not have a viable copyright infringement claim because, while the two works demonstrated substantial similarity when applying the intrinsic test, the works failed for substantial similarity in their individual protectable elements. However, the court still upheld the plaintiffs’ breach of implied-in-fact contract claim on the basis that to demonstrate defendant’s “actual use” of the material, the court could consider elements that are not afforded protection under copyright law.

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104 Id.; Casido, *supra* note 100, at 332.
105 Casido, *supra* note 100, at 332.
106 *Benay*, 607 F.3d at 624.
107 Id. at 622.
108 Id.
109 Id. at 623.
110 Id. at 625-29.
111 Casido, *supra* note 100, at 342; *See also Benay*, 607 F.3d. 620.
including “unprotectable elements that flowed naturally from their shared premise and were therefore disregarded for purposes of federal copyright infringement.”

Based on the logic of the Ninth Circuit in Benay, a plaintiff-screenwriter can succeed without demonstrating a truly “stolen” idea. That is, a plaintiff can succeed on an implied-in-fact contract claim even in a situation where the defendant-studio was already developing a similar project and the plaintiff cannot even demonstrate a substantial similarity between the protected elements of her work in comparison to the defendant’s output. Thus, the Ninth Circuit is saying that anytime a pitch meeting occurs, an implied contract is formed. And, anytime after that pitch meeting, if a defendant-studio produces a work that is vaguely similar but hardly identical to the plaintiff-screenwriter’s work, that implied contract has been breached and the plaintiff ought to be compensated.

C. The Irrationality of Affording Contract Remedies to Idea Submission Cases

Those who support contract causes of action in idea submission cases are ignorant to the true injury that screenwriters feel they have suffered by the misappropriation of their ideas. These legal critics spend far too much breath mauling about the “personal nature of the relationship formed in idea submission cases.” In fact, any breath wasted on this matter would be too much, as it is a completely irrelevant point.

Desny claims find support upon the belief that the desired protection of the author and her idea, in idea submission cases, is strictly against the studio or

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112 Id. at 343.
network; whereas, in copyright cases, the protection is against the entire world.\textsuperscript{114} Perhaps on some level, this is true; however, a screenwriter would bring suit against \textit{anyone} who financially benefited from the use of her idea without her consent or compensation. The pitch meetings from which idea submission cases derive are only one method by which someone could gain knowledge of the screenwriter’s idea and later misappropriate it. If a fellow train rider were to read the screenwriter’s treatment over her shoulder on the way to work and then later “stole” the idea, claiming it as his own, the screenwriter would proceed against the train rider via copyright law. Why, then, should idea submission cases be treated differently when the screenwriter’s complaint is nearly identical?

D. The Dissonance Between the Objective of \textit{Desny} Claims and the Harsh Reality of the Business

The \textit{Montz} decision instigated a lively conversation in the legal community.\textsuperscript{115} Many pro-screenwriter legal critics have commended the Ninth Circuit for its

\begin{footnotesize}
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\item\textsuperscript{114} \textit{Id.}
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decision in Montz.\textsuperscript{116} Those in favor of the decision seem to believe that this precedent fosters artistic endeavors by favoring the plaintiff-screenwriter and affording him more protection under the state law standards.\textsuperscript{117} This logic may seem sound without a deeper understanding of the dog-eat-dog nature of show business.\textsuperscript{118}

Facially, the decision is in the best interest of the screenwriter; realistically, however, Montz (and its predecessor, Grosso) has dramatically hindered the likelihood of success for screenwriters—particularly those new to the business—to have their pitches entertained by studios. While Judge Gould may have been a bit hyperbolic in his premonition that “film production and network companies [will] face the chaotic prospect of having to meet conflicting federal and state standards”\textsuperscript{119} in response to the Montz decision, his concerns are far from misguided.

The reality, simply put, is that these varying standards create such an aggravation and annoyance for the studios that the studios will likely just cease to entertain ideas from screenwriters. The only writers who will actually benefit from this decision are those already contracted by the various studios or those represented by an agent who maintains a you-scratch-my-back-I’ll-scratch-yours relationship with the studios. Such relationships are highly common in Hollywood and already pose one of the biggest roadblocks for writers new to the arena.\textsuperscript{120}

\begin{footnotes}
\item[116] The Ninth Circuit Again, supra note 115.
\item[117] Id.
\item[118] See supra note 2.
\item[120] Brian Konradt, How to Achieve Success as a Screenwriter, WRITINGCAREER.COM, http://www.writingcareer.com/articles/success_as_a_screenwriter.php (last visited Nov. 17, 2011) (“[W]hen a script arrives with a cover letter of recommendation from an executive’s old
With the Montz decision, the Ninth Circuit has further cemented the necessity of those relationships for the studios and the result will be a force field nearly impossible to penetrate for new writers. Upon the decision in Grosso, other legal critics foresaw—and feared—a similar fate:

Faced with the possibility that [studios might now be exposed] to liability for contracts by which they never intended to be bound, producers will give themselves even more of an “opportunity to reject” via more stringent legal releases and other hurdles that idea purveyors will have to surmount before an idea or treatment is even considered. These releases are likely to include an arbitration provision, thus waiving the right to go to court, providing a shorter period of time in which to bring dispute to arbitration and providing a limitation on damages which is determined before the idea is even disclosed. Rather than leveling the playing field between producers and idea purveyors, these provisions all serve to reduce the idea purveyor’s bargaining power by limiting both remedies and damages for idea theft.121

The sad fact of the matter is that Hollywood is more or less an oligarchy led by the major networks and studios—the overwhelming majority of the power rests in the hands of an elite few. Much akin to the distribution of the world’s wealth,122 nearly ninety-percent of the wealth in the entertainment industry rests in the hands of the top studios123—these studios, known as “The Big Six,” are comprised of

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122 Steven Diebold, 90% of the World’s Wealth is Held by 1% of the Population, THE BUSINESS MODEL REVIEW: SYSTEMATICALLY UNDERSTAND, INNOVATE AND DIFFERENTIATE YOUR BUSINESS MODEL (Oct. 4, 2010), http://stevendiebold.com/90-of-the-worlds-wealth-is-held-by-1-of-the-population/.
Paramount Pictures, Warner Bros., Walt Disney Pictures, Sony Pictures, Universal Pictures, and Twentieth Century Fox.\textsuperscript{124}

Screenwriters, along with the rest of the creative side of the entertainment industry, are the unfortunate casualties of this circumstance. New or otherwise unemployed screenwriters are further disadvantaged by their inability to enjoy the fruits of collective bargaining; while a writers’ union exists, those who have not yet reaped success in the field are ineligible for membership.\textsuperscript{125}

Without this bargaining power, new screenwriters are left to rely on the studios’ interest in novelty—a situation that suffices for now but is continually threatened by the studios’ inevitably dwindling patience for exposure to litigation against them, particularly litigation likely to succeed due to the unreasonably low standards\textsuperscript{126} necessary to assert a Desny claim. If indeed that patience does run dry, the studios are in a position to meet their need for new works strictly through the commission of the already well-connected screenwriters in Hollywood, thus icing out the employment of anyone new to the spectrum.

Modern trends in the film industry are already beginning to indicate that this shift is imminent. In 2011, Metacritic.com—a leading entertainment industry review collation website\textsuperscript{127}—conducted a survey comparing original movies and

\begin{itemize}
\item \textsuperscript{124}Major Film Studio, WIKIPEDIA: THE FREE ENCYCLOPEDIA (last updated Nov. 8, 2011), http://en.wikipedia.org/wiki/Major_filmstudio#Today's_Big_Six.
\item \textsuperscript{125}See How to Become a Member, WRITERS GUILD OF AMERICA, WEST (Jun. 21, 2006), http://www.wga.org/content/default.aspx?id=84 (stating that membership requires a minimum of twenty-four “units” which may be obtained through weeks of employment, successful sale of a treatment, and other factors).
\item \textsuperscript{126}See discussion infra Part V.E.
\end{itemize}
derivative works. The study demonstrates that “over the past five years, only 43% of all wide release films have been based on original ideas -- meaning that 57% of releases were sequels, remakes, and adaptations.” Another survey asserts that “[s]equels (including prequels and spin-offs) comprise over a fifth of the currently scheduled nationwide releases [for 2011], tallying 27,” a record-breaking number. These numbers are already alarming for the fate of new screenwriters; and, they are likely only to worsen with studios’ increased exposure to litigation.

E. The Burden on the Court

There is little argument that the California state law standard benefits screenwriters involved in idea submission litigation. The problem with this standard is that it is unreasonably low. It is not too much to ask that a screenwriter be able to demonstrate a “substantial similarity” between her idea and the product put forth by the studio that the Copyright Act requires. Instead, however, California currently requires that a plaintiff-screenwriter need only show: (1) she prepared the work; (2) she offered the work for sale; and (3) the studio-offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered—in expectation of compensation or otherwise—and the reasonable value

129 Id.  
131 Brophy, supra note 121.  
132 But see Celine Michaud & Gregory Tulquois, Idea Men Should be Able to Enforce Their Contractual Rights: Considerations Rejecting Preemption of Idea-Submission Contract Claims, 6 VAND. J. ENT. L & PRAC. 75, 77 (2003) (claiming “[t]he Wilder test may appear quite generous to idea creators, but it should be kept in mind that the test requires proof of a promise to pay for an idea, which might very well be a claim-killing burden”).
of the work. This rather weak standard potentially opens the door for screenwriters to assert a valid Desny claim—and find success therewith—without a strong showing of a truly “stolen” idea. That is, if a studio or network were to use some of the concepts discussed in a pitch meeting for another project, whether contemporaneously or in the future, without actually plagiarizing a notable portion of the screenwriter’s original idea, the studio or network may still be subject to liability.

Allowing a plaintiff-screenwriter to bring such a claim in a state court even though she bears no hope for success in a federal court under copyright law opens the California courtroom doors for frivolous lawsuits. In light of both the varying state and federal standards and the diverse treatment of these cases between circuits, allowing these claims also promotes forum-shopping among litigants—a practice strongly discouraged in the judicial system. Therefore, the California state law standard originating in Desny and upheld in Montz undercuts civil procedure principles intended to promote public policy and administrative ease.

F. The Necessary End of the Desny Claim

Desny claims served a relevant—nay, important—function prior to the induction of the 1976 revisions to the Copyright Act. These claims sought to protect screenwriters when they were clearly wronged by unequal bargaining power. The treatment of Desny claims as a cause of action outside of the grasp of

133 Grosso v. Miramax, 383 F.3d 965, 967 (9th Cir. 2004).
134 See discussion supra Part V.B.
135 See Irigarri v. United Technologies Corp., 274 F.3d 65, 72 (2d Cir. 2001) (“[T]he more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff’s case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff’s choice commands.”).
copyright law cured a unique situation in which uniform federal legislation did not afford apt protection to remedy the injuries suffered by screenwriters.

Nowadays, however, these claims seem to be rather moot. The benefits of Desny claims are largely nonexistent other than affording screenwriters an amplified protection inconsistent with congressional expectations and federal standards. The continued separation of Desny claims from standard copyright claims poses a multitude of problems, including creating inconsistent standards, neglecting legislative intent, and hindering the entire artistic and literary endeavor, which, ironically, the claim originally sought to foster.

G. The Supreme Court’s Mistake in Denying Certiorari to Montz

Supreme Court Rule 10 governs the Supreme Court’s ability to grant certiorari. The rule instructs the Court to only afford review in light of a “compelling reason.” This rule expressly states that “a United States court of appeals [entering] a decision in conflict with the decision of another United States court of appeals on the same important matter” is characteristic of a “compelling reason” worthy of Supreme Court review. Thus, circuit splits, though not determinative, are indicative of a conflict that merits a high court hearing. If but

136 See Montz v. Pilgrim Films & Television, Inc., 2011 U.S. App. LEXIS 9099 at *31 (9th Cir. May 4, 2011) (O’Scannlain, J., dissenting) (“If… ‘the point’ is to provide greater protection against the unauthorized use of copyrighted material than is afforded under the Copyright Act, then it is a point I am glad to miss, as it is inconsistent with the objectives of Congress.”).
140 Id.
141 Sup. Ct. R. 10(a).
143 Id.
for no other reason, Montz has demonstrated a cursory worthiness of certiorari by simply satisfying the circuit-split criterion of Rule 10.

The Court is careful to warn that “review ‘is not a matter of right, but of judicial discretion,’ and cautions that the criteria articulated in Rule 10 are ‘neither controlling nor fully measuring [of] the Court's discretion.’”\(^{144}\) Some legal critics argue that a circuit split is not nearly enough to be deemed “certworthy.”\(^{145}\) These critics expect the petitioner to demonstrate a considerable national importance in addition to the circuit split.\(^{146}\) Based on the Supreme Court’s habit of denying certiorari in the presence of a circuit split,\(^{147}\) it seems the Supreme Court tends to agree with these critics. Former Justice Byron White, in an attempt to understand the sentiments of his fellow Justices, once hypothesized that “certiorari is denied because the conflict is ‘tolerable’ or ‘narrow,’ or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason.”\(^{148}\)

Even held to this heightened standard, Montz was worthy of Supreme Court review. It is suggested that “[t]he best way to meet this burden is to show that the decision below has a significant impact not just on the petitioner but on a whole


\(^{146}\) See id.

\(^{147}\) See Beaulieu v. United States, 497 U.S. 1038, 1039 (1990) (White, J., dissenting) (citing that, on forty-eight occasions that term, Justice White dissented to the denial of certiorari for cases that demonstrated circuit splits).

\(^{148}\) Id.
industry or large segment of the population.”149 As previously explained, the Montz decision—and its split with the Forest Park decision in the Second Circuit—has an egregious impact on the entertainment industry as a whole. While only the Second Circuit and Ninth Circuit have had the opportunity to decide on an approach to idea submission cases, the Supreme Court should not hold off certiorari to allow “other courts of appeals . . . the opportunity to weigh in on one side or another of the unsettled issue”150 because these circuits will likely never be presented with an idea submission case. Idea submission cases and Desny claims are unique to the entertainment industry. Given that nearly all entertainment transactions take place in either New York or California,151 the Second Circuit (with jurisdiction over New York) and the Ninth Circuit (with jurisdiction over California) are almost definitely the only circuits that will ever entertain these specialty cases. To wait for other circuits to speak on the matter is to indefinitely delay the need for Supreme Court regulation.

Further, the fact that the only two circuits presiding over film and television disputes have taken antithetical approaches to the matter demonstrates a need for a dispositive national policy. The coasts are split in a complete fifty-fifty stalemate in a circumstance where the middle-states will likely never weigh in on the matter. Without a determination by the Supreme Court creating a uniform approach to idea submission cases, the coasts will remain polarized, and litigants will continue

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149 See Bishop & Sarles, supra note 145.
150 Beaulieu, 497 U.S. at 1039 (White, J., dissenting).
forum-shopping\textsuperscript{152} and conducting business on the coast most favorable to their position. The Court’s best opportunity to resolve this matter in a timely fashion was to hear the \textit{Montz} case and decisively determine the legitimacy of \textit{Desny} claims. But, alas, the Court mistakenly denied certiorari and the \textit{Desny} claim lives to see another day.

\textbf{H. Call to Action}

Despite the denial of certiorari to \textit{Montz}, the fate of the \textit{Desny} claim still ultimately rests in the hands of the United States Supreme Court. The granting of certiorari to an idea submission case in the near future is essential in the interest of: remedying a stark circuit split,\textsuperscript{153} alleviating confusion in the courts, and eliminating the potential for further superfluous litigation in this area.\textsuperscript{154} Since idea-theft is, sadly, all too common in Hollywood, these types of cases are inevitable. Without a definitive decision by the Court, the lower courts will continue to struggle aimlessly to reconcile the inconsistencies in treatment of idea submission cases.

As a matter of public policy, these \textit{Desny} claims should be abolished, leaving the Copyright Act as the sole basis of relief for screenwriters in idea submission cases. This decision would not hinder screenwriters—at least, not those with credible, well-founded claims. Expecting that a screenwriter be able to show substantial similarity between her composition and the defendant’s work is hardly

\textsuperscript{152} \textit{See} discussion \textit{supra} Part V.E.
\textsuperscript{154} \textit{See} discussion \textit{supra} Part V.E. (discussing potential of frivolous litigation in light of \textit{Montz} decision).
an unattainable standard. Accordingly, the Supreme Court, upon its next opportunity to hear an idea submission case, should grant certiorari and hold that Desny claims no longer have a place in American jurisprudence.

VI. Conclusion

In closing, it is worth noting that this problem will not simply disappear now that the United States Supreme Court has refused to grant certiorari to Montz. Instead, cases will accumulate until the Court finally concedes to hear an idea submission case and resolve the wanton ambiguities that the varying standards introduce to litigation. In the interest of judicial economy, it is best for the Court to grant certiorari now, rather than delay the inevitable.

In the interim, until an idea submission case finds luck in the certiorari process, both screenwriters and studios ought to proceed with caution. Some scholars have suggested waivers. This is likely the best solution for the current circumstance. However, when employing such waivers, the studios should rely on legal counsel to draft a form in no uncertain terms indicating that the pitch meetings are not intended to create any implied agreement between the parties and the only obligations between the parties will be express and memorialized in writing. The screenwriter, too, must act prudently when faced with such a waiver—ensuring that she unequivocally understands every term of the agreement and consents to each in suit. She must also be cautious not to reveal anything to the studio that she does not wish to be bound by the waiver arrangement. These waivers are hardly ideal; but, hopefully, the need for this measure will be short-lived, as the United

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155 See Brophy, supra note 121.
States Supreme Court will soon find an idea submission case worthy of granting certiorari, and the Court will decidedly extinguish the now-ineffectual existence of *Desny* claims in California state courts.