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Cases of Note-Copyright vs. Implied-in-Fact Contract

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LEGAL ISSUES

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Cases of Note — Copyright v. Implied-in-Fact Contract

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FOREST PARK PICTURES, TOVE CHRISTENSEN, AND HAYDEN CHRISTENSEN V. UNIVERSAL TELEVISION NETWORK, INC., UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, 2012 U.S. App. LEXIS 13068.

Tove and Hayden (Forest Park) created a TV series idea and embodied it in a writing known in the trade as a “series treatment.” It was submitted by mail and then in person to **Universal TV**. The meeting included the usual “pitch” by **Forest Park**. It was standard at the time for writers to expect to be paid if an idea was used. See *Hutchinson v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 481 (2d Cir. 2011).

The concept show was called “Housecall,” in which a virtuous doctor who treats the poor for free is expelled from a medical community by venal doctors. He moves to Malibu and develops a “concierge” practice for the rich and famous.

Universal’s rep admitted he had never heard of concierge practices or doctors making house calls for the rich. He was fascinated. But not enough to buy it.

Four years later **Universal** aired “Royal Pains,” in which a virtuous doctor is expelled by a venal med community and becomes a concierge doctor to the rich and famous in the Hamptons.

See? It’s different.

Forest Park sued for breach of contract and **Universal** moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the *Copyright Act* preempted the claim and

the contract was too vague to be enforced. The district court agreed.

The Appeal — Preemption

The *Copyright Act* preempts state law only if (i) the work at issue “come[s] within the subject matter of copyright” and (ii) the right being asserted is “equivalent to any of the exclusive rights within the general scope of copyright.” 17 U.S.C. § 301(b).

Subj matter — As you know, copyright applies to original works fixed in a tangible medium but does not apply to ideas. 17 U.S.C. § 102(a)(b). See generally 4 **Melville B. Nimmer & David Nimmer**, *Nimmer on Copyright* § 19D.03[A][2][b] (2011).

The “Housecall” idea was manifested in the series treatment (character bios, themes and storylines). The Subject Matter requirement is met because **Universal** used the ideas fixed in the writing. The uncopyrightable “ideas” woven in it doesn’t take it out of the subject matter of copyright. *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004).

Equivalency — To win preemption, **Universal** must show **Forest Park** is trying to vindicate a legal right found in copyright. But if an extra element is required for the state cause of action, then no preemption. **Forest Park** says it engaged in an implied-in-fact contract that required **Universal** to pay if it used the ideas in “Housecall.”

The *Copyright Act* does not grant an express right to receive payment. It merely allows the owner to prevent distribution, copying, or the creative of

derivative works. The owner would then sell the right to do these things. 17 U.S.C. § 106.

Copyright is a right against the world. A contract dispute is between the parties in question. And in a breach of contract suit, **Forest Park** must show the extra elements of mutual assent and valid consideration. “As a general rule, contract claims require proof of a significant ‘extra element’: the existence of an actual agreement between plaintiff and defendant involving a promise to pay for use of disclosed ideas.” 4 **Nimmer** § 19D.03[C][2].

Here, the contract **Forest Park** alleges did not just require **Universal** to recognize copyright claims; it requires **Universal** to pay for use of the ideas.

Implied-in-fact Contract

California, home of the movies, has long held implied-in-fact contracts enforceable when a writer pitches an idea and a studio uses it without compensating writer. In *Desny v. Wilder*, 46 Cal. 2d 715 (1956), **Desny** told **Billy Wilder**, producer for **Paramount Pictures**, he had an idea for a film. **Wilder** asked him to send it over. **Desny** did just so, stating that if the idea were used he expected to get paid.

The California Supreme Court said a contract claim like this could succeed either if the artist received “an express promise to pay” or if “the circumstances preceding and attending disclosure ... show a promise of the type usually referred to as ‘implied’ or ‘implied-in-fact.’” Id. at 738. This has been law for six decades since. Here, both **Universal** and **Forest Park** understood what was going on with the pitch.

But **Universal** fell back on the absent price term. No meeting of the minds over contract price, therefore no enforceable contract. But California permits custom and usage along with other evidence to supply absent terms. **Forest Park** says it was agreed that **Universal** would pay the “industry standard.” At trial, **Forest Park** would have to prove that an industry standard price exists, and both parties agreed to it.

So back we go to the district court. The mills of the law grind slowly ...