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Cases of Note: Sometimes It's Not a Federal Action #2

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Cases of Note — Sometimes It’s Not a Federal Action #2

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Yes, it’s the old idea question. In 1956 and recognize an implied contractual right to compensation. Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257 (Cal. 1956). The “Desny claim” has remained alive for over fifty years. Grosso v. Miramax Film Corp., 383 F.3d 965 (9th Cir. 2004). Of course, it requires an expectation on both sides that compensation will flow if a concept is used. But it’s hardly likely the author intended it as a gift. And most importantly, it is not preempted by federal copyright law.

So, Let’s Go to the Facts of the Case

Yes, it’s the old paranormal field investigator shite! Is there nothing original in Hollywood?

Parapsychologist Larry Montz dreamed up a TV show that would follow his crack team on field investigations. You know, temperature drops in a room without reason. Photos of ghosts. Jack Nicholson smashes down hotel doors with an axe. Well, not that extreme. But you get the idea.

And they would have all kinds of cool gear. Magnetometers and infrared cameras. That kind of stuff to really add to the pseudo-scientific vibe.

From 1996 to 2003, Montz tirelessly pitched the idea to studios, producers and other suits. Took meetings. Held discussions. Included in this was NBC and the Sci-Fi Channel. Meh. No interest.

Then in 2006, Ghost Hunters appeared produced by a partnership of NBC and Craig Piligian as Pilgrim Films. Joseph Conrad Haines and his crack team, armed with cool gear, travel America on paranormal field investigations.

Montz understandably felt ripped off, and so he sued. And Montz’ lawyer had read up on Desny and specifically alleged breach of an implied-in-fact contract. Plus, the ideas were pitched with the understanding that they were confidential and would not be used or disclosed without compensation.

You can see where under copyright law there would be an issue of whether there was anything the least bit original about ghost hunters with cool gear.

Procedural fol-de-rol

Montz lost based on copyright law preempting state-law claims. He appealed and lost again before a three-judge panel. The Ninth Circuit ordered a rehearing en banc. Woo. All the black robes crowd in to consider the issue.

Getting on all Fours with the Industry

Writers pitch scripts to the movies and TV all the time. Ideas are not protected under copyright, but a studio can violate an implied contract to pay the writer. In Desny — a writer Victor Desny — entered into an implied contract with the famed director Billy Wilder (Sunset Boulevard, Witness for the Prosecution, The Lost Weekend). Wilder produced Ace in the Hole about a man trapped in a cave. The California Supreme Court held that Desny had sufficiently pled breach of an implied contract.

So how interesting is that as a plot? Not terribly. So Wilder made Kirk Douglas into an unscrupulous, drunken reporter who bribes a sheriff to go slow on the rescue to maintain a media feeding frenzy. And Douglas has an affair with the caveman’s wife, Jan Sterling, who wants out of their shabby trading post/cafe in the middle of Nowheresville, New Mexico, thus lending a film noir allure to it. The caveman dies due to laggardly rescue. Jan stabs Kirk to death with pair of scissors.

Yes, it was a flop. Wilder made $250,000. This was 1951, when the dollar bought something. Desny settled for $14,350.

Copyright Preemption

The Copyright Act of 1976 expressly preempts state claims if the work falls within the subject matter of copyright and state law provides rights that are equivalent. 17 U.S.C. § 301(a). But, of course, copyright does not apply to ideas not in a fixed medium. § 301(b). If the idea is in a fixed medium, then it’s preempted. See Nimmer, Nimmer on COPYRIGHT § 19D.03[A][3] (rev. ed. 2010).

To escape preemption, state law must provide rights that are qualitatively different from copyright. With implied-contract, there is an extra element — payment for use of an idea. See Rokos v. Peck, 182 Cal. App. 3d 604, 617 (1986). Further, copyright is a public monopoly while implied-in-fact contracts are between two parties. Rokos, 182 Cal. App. 3d at 617.

“The whole purpose of the contract was to protect Plaintiff’s rights to his ideas beyond those already protected by the Copyright Act,” Grosbort v. Spyglass Entm’t Group, No. CV 02-01803, 2002 U.S. Dist LEXIS 17769, 2002. And by golly, Nimmer expressly said this was a sound ruling because otherwise there would be a gap between copyright protection and industry custom.

Questions & Answers — Copyright Column

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QUESTION: What does the 11th Circuit ruling in the Georgia State University case mean for libraries?

ANSWER: The GSU case is not over but continues to work its way through the judicial continued on page 55