

## Implied-in-Fact Contracts in the Entertainment Industry

**AFTER MONTHS OR YEARS SLAVING AWAY** on a screenplay, a writer is able to reach a well-known studio executive, who is far too busy to actually read the script but asks the writer to submit a summary, or treatment. After submitting the treatment, the writer is invited to meet with the executive to pitch the idea. The executive passes, but later the writer reads in a newspaper that this very idea is being developed into a motion picture. Did the submission of the treatment and the pitch create an implied-in-fact contract with the studio to pay the writer for the idea?

In cases like this, the most commonly used causes of action to protect writers' ideas in state courts are the breach of implied-in-fact contract and breach of confidence. Fifty years ago, the California Supreme Court recognized in *Desny v. Wilder*<sup>1</sup> that although an idea is not property subject to exclusive ownership "it may be of...value to the person to whom it is disclosed. An idea may constitute adequate consideration in...a binding contract even if the idea is not novel."<sup>2</sup> An idea may be valuable merely because it is pitched at an opportune time.<sup>3</sup> In 1975, the court acknowledged that California law also recognized breach of confidence.<sup>4</sup>

The primary means of selling ideas in the field of film and television is the pitch. Studios and networks have an enormous demand for new product, especially in television, where there has been a proliferation of networks in the past 20 years. As a consequence, film and television executives encourage writers to meet with them to pitch ideas. It is extremely rare for there to be a written contract in place at the time of a pitch.

To prove the formation and breach of this implied agreement, it must be shown that 1) the plaintiff possessed an idea, 2) it was disclosed to the offeree for sale, 3) under all the circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered, 4) the offeree accepted the disclosure and thereby impliedly agreed to pay for any concepts it might use from the idea, 5) the idea was actually used by the offeree, and 6) the idea had a reasonable value, which is to be calculated.<sup>5</sup> The first thing for an attorney to consider is what the specific idea was and how it was submitted. Examine the treatment, the screenplay, and how the treatment was sent to the studio executive. Under California law, the studio's actual use of an idea may be inferred if it can be shown that the pitched idea is sufficiently similar to the movie or show being produced.<sup>6</sup>

In California, "access" is proven if one is able to show the person credited with creating the movie "had an opportunity to view or to copy the plaintiff's work."<sup>7</sup> If the offeree is "an individual in a position to provide suggestions or comments...a supervisory employee," or an employee within the unit from which the defendant's work was developed, sufficient access is shown.<sup>8</sup> Thus, an attorney representing a writer who alleges idea theft will have to establish that an execu-

tive had access to the idea by receipt of the treatment or information conveyed during a pitch meeting.<sup>9</sup>

Once access is established, the next step is to prove that the studio's movie and the writer's idea are similar. Whether two works are similar is determined "upon the impression received by the average reasonable man."<sup>10</sup> The leading case in California on this subject is *Fink v. Goodson-Todman Enterprises, Ltd.* In *Fink*, the court made it clear that the requisite similarity is less than in a copyright case. The similarity must be as "to a material element or qualitatively important part."<sup>11</sup> The "material element could range from a mere basic

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theme up to an extensively elaborated idea."<sup>12</sup>

Finally, the writer will have to prove that the idea has value. However, it is not necessary to establish that compensation was ever discussed when the treatment was submitted.<sup>13</sup> Discussion of compensation may be relevant to a cause of action for breach of express contract, but it is not relevant when the claim is breach of implied-in-fact contract. The formation of such an agreement is determined by the conduct of the parties, not their words.<sup>14</sup>

If the writer establishes access and the requisite degree of similarity it is likely he or she can state a cause of action. However, studios fight these cases very aggressively and at great cost to the writer. Typically, no matter how strong the case may appear, settlements are rarely achieved at an early stage. ■

<sup>1</sup> *Desny v. Wilder*, 46 Cal. 2d 715 (1956).

<sup>2</sup> *Id.* at 733, 741-44. *Accord*, *Faris v. Enberg*, 97 Cal. App. 3d 309, 316 (1979).

<sup>3</sup> *Chandler v. Roach*, 156 Cal. App. 2d 435 (1957).

<sup>4</sup> *Davies v. Krasna*, 14 Cal. 3d 502, 549-50 (1975).

<sup>5</sup> *Gunther-Wahl Prods., Inc. v. Mattel*, 104 Cal. App. 4th, 27, 36-41 (2003).

<sup>6</sup> *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. 2d 690, 695 (1950); *Fink v. Goodson-Todman Enters., Ltd.*, 9 Cal. App. 3d 996, 1007 (1970).

<sup>7</sup> *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984).

<sup>8</sup> *Id.* at 1357.

<sup>9</sup> *Kamar Int'l Inc. v. Russ Berrie & Co.*, 657 F. 2d 1059, 1062 (9th Cir. 1981); *Meta-Film Assocs., Inc.*, 586 F. Supp. at 1355.

<sup>10</sup> *Kovacs v. Mutual Broad. Co.*, 99 Cal. App. 2d 56, 65 (1950).

<sup>11</sup> *Fink*, 9 Cal. App. 3d at 1008.

<sup>12</sup> *Id.* at 1008 n.15.

<sup>13</sup> *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 104 Cal. App. 4th 27, 42-43 (2002).

<sup>14</sup> CIV. CODE §1621.

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