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Idea Men Should Be Able to Enforce Their Contractual Rights: Considerations Rejecting Preemption of Idea-Submission Contract Claims

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I. Introduction

It is a long-standing and general rule that ideas are “free as the air,” as Justice Brandeis eloquently stated in the dissent to the seminal case *International News Service v. Associated Press*.¹ This axiom of copyright law expresses the idea that copyright does not protect ideas but only protects the expression of ideas in a work. The distinction between unprotected ideas and protected expression is often referred to as the idea-expression dichotomy.

The principle of the idea-expression dichotomy was initially stated in *Baker v. Selden*,² and later cases further

but later hires a writer to draft a screenplay based upon the disclosed idea. While the screenwriter, or more probably the studio that ordered the screenplay as a work-made-for-hire, will have protection under the copyright laws, the idea man is left with no federal copyright claim. Courts have, in light of this common situation, devised a body of rules, which some authors christened “idea law.”⁶ Idea law purports to protect the interests of the idea creator, under the typical circumstances where the idea is disclosed to a party who uses it without compensating the creator. Contract law is the legal ground that courts consistently recognize as being the most workable to compensate the idea creator and protect his literary or artistic idea.

Idea-submission contracts have been found to exist

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 - By Celine Michaud* and Gregory Tulquois**

articulated this principle, so that it has become one of the central tenets of copyright.³ This well-established rule was adopted in section 102(b) of the 1976 Copyright Act, which provides that “In no case does copyright protection ... extend to any idea ...”⁴ Ideas in the strictest sense thus live in the shadow of copyright law, which persistently refuses to award any exclusive right to anything but an original *expression* of ideas.

This absence of protection can be problematic in light of the fact that some ideas, though undeveloped, possess value independent from their future expression. Consider an “idea man”⁵ attending a “pitch meeting” with a movie studio executive, during which he discloses, either orally or through a succinct writing, a brilliant but barely developed sketch of a story line and some basic characters. The executive, after listening to the idea man disclose his idea for a new movie, says that he is not interested in the idea,

on both an express and on an implied basis. An express idea-submission contract typically provides for the disclosure of the pitched ideas and the amount and conditions for compensation.⁷ It should be noted, though, that express agreements of this kind are extremely rare, since idea recipients are generally quite reluctant to pay for the disclosed idea. Because idea-submission contracts are so rarely materialized into express contracts, courts must often find an implied-in-fact contract, *ex post*, when the idea man claims that the disclosure of the idea was actually made pursuant to a contract. Such a contract can be defined as an agreement whose existence and terms are evidenced by conduct, rather than by words.⁸

One problem with either contract-based theory is that it only binds the parties to the contract, meaning that the idea is not withdrawn from the public domain and anyone else is free to use it. Another problem is that some

Idea Men Should be Able to Enforce Their Contractual Rights

jurisdictions interpret contract law as applied to ideas in a very demanding fashion, requiring that the idea be novel and concrete. Others, however, have remained closer to the principle of parties' autonomy and contractual freedom, by enforcing an express or implied agreement to pay for the idea submitted, regardless of whether the idea is novel or concrete.

Thus, state contract law seems adequate to protect idea-creators where copyright law gives no protection. However, copyright law throws a wrench in the works with its preemption doctrine in section 301 of the 1976 Copyright Act, which extended federal copyright protection to all works fixed in a tangible medium of expression and eliminated state common law copyright protection for fixed, but unpublished works.⁹ Section 301 was an attempt by Congress to devise a uniform preemption approach that would produce clear and consistent results. The question then becomes: to what extent does section 301 apply to the remedies granted to an idea creator pursuant to an idea submission contract existing under state law?

In an attempt to answer this question, Part II of this article will present the different types of idea-submission contracts and the legal requirements placed on their enforcement, depending on the jurisdiction, arguing in favor of the broadest enforcement of idea-submission contracts. Part III will address the issue of express preemption, analyzing the interplay between idea-submission contracts and the requirements stated by Section 301. Part IV will turn to an examination of the probability of preemption of idea-submission contract claims under the broader ground of implied preemption, dictated by the Constitution's Supremacy Clause. The article will conclude that idea-submission contract claims are not expressly preempted pursuant to Section 301 nor are they impliedly preempted. It follows that contracts and copyright should not be viewed as rivals. Consequently, idea men, although logically deprived of any remedy on the ground of copyright infringement should nevertheless be able to obtain compensation for their idea submitted pursuant to a contract.

II. The Legal Treatment of Idea-Submission Contracts

The California and New York Courts, under whose jurisdictions a large part of literary and artistic idea litigation takes place, have differing conceptions of the extent to which contracts can indirectly protect ideas. The analysis of these

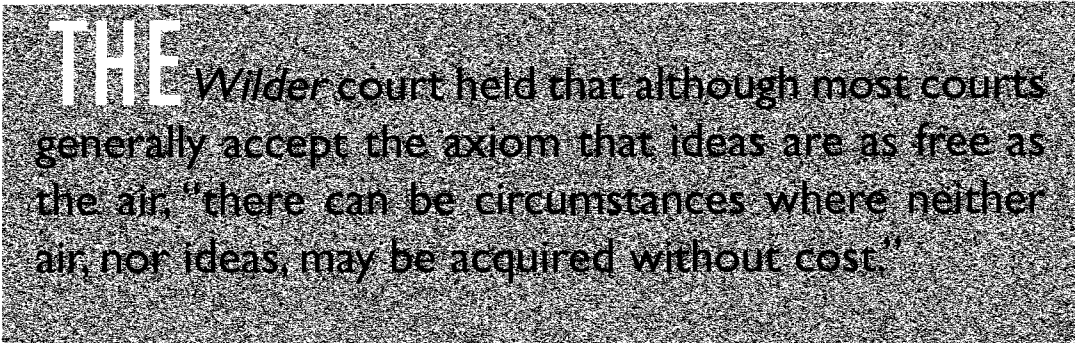
courts' requirements is necessary in order to perform a detailed study of the preemption risk, with respect to contract claims introduced pursuant to an idea submission.

A. The California Approach

(1) A Contract Recovery Theory

In *Desny v. Wilder*,¹⁰ the California Supreme Court developed standards in order to determine the validity of an idea-submission contract. This standard has proven to be successful, and California case law shows evidence of a continuing application of what is sometimes referred to as the "Wilder Test."¹¹ *Wilder* can be considered the first case that truly expanded idea protection via contract law.

In the *Wilder* case, Desny telephoned Wilder to reveal an idea for a film. Desny spoke to Wilder's secretary, who asked him to disclose the idea to her over the telephone.



THE *Wilder* court held that although most courts generally accept the axiom that ideas are as free as the air, "there can be circumstances where neither air, nor ideas, may be acquired without cost."

Wilder's secretary, who apparently liked the idea, wrote a summary of the proposed story. Desny made clear to the secretary that he was disclosing the idea with the understanding that he would be compensated, should Wilder decide to use it. Wilder subsequently produced a film that used an idea similar to the one pitched by Desny, without compensating Desny.¹²

In Desny's suit to recover damages for the use of his idea, the court rejected the existence of an express agreement despite the statement of the secretary that she understood that, by using Desny's idea, Wilder would be obligated to pay. In a very questionable manner, the court justified its position by holding that the parties never discussed whether novelty was a prerequisite to payment. The court applied its four-pronged test and first found Desny's idea valuable, which was evidenced by Wilder's production of a film based on the idea.¹³ This production also met the fourth prong of actual use of the idea. The court then concluded that Wilder, through his secretary, solicited Desny's idea, when Wilder's secretary asked Desny to disclose the idea to her over the telephone.¹⁴ Further, as Wilder's secretary and Desny both understood that payment was expected upon subsequent use, the court held that the third prong of the test was satisfied.¹⁵ The *Wilder* court thus suggested that an offeree might enter into a contract for ideas, regardless of their novelty or lack thereof.¹⁶

The *Wilder* court held that although most courts generally accept the axiom that ideas are as free as the air, "there can be circumstances where neither air, nor ideas, may be acquired without cost."¹⁷ The court concluded that someone who submits a valuable idea to a producer, who either solicited the idea or voluntarily accepts it knowing that it was tendered for a price, is entitled to recover the idea's reasonable value, in case of later use by the recipient.¹⁸ The Court devised a famous four-pronged test for recovery: (1) one must submit a valuable idea to a producer; (2) the producer must either have solicited or voluntarily accepted the idea disclosure; (3) the producer must know that the idea disclosure was made in the expectation of remuneration upon use; and (4) the producer must actually use the idea.¹⁹ An additional requirement was added by the California Court of Appeals in *Faris v. Enberg*,²⁰ that the idea-creator must also prove that he prepared the work, or that he was the idea-creator who came up with the idea.

In cases decided since *Desny*, courts have ruled that implied-in-fact contracts could also be found under certain circumstances. In *Chandler v. Roach*,²¹ the court found there was an implied-in-fact contract where the plaintiff, a professional writer, was represented by a literary agent who met with the defendant (a television producer) and submitted the plaintiff's idea for a television program. During meetings, the agent entered into an agreement with respect to the idea. The court reasoned that "if a producer obligates himself to pay for the disclosure of an idea, whether it is for protectible or unprotectible material, in return for disclosure thereof, he should be compelled to hold his promise."²² The *Chandler* court took an interesting and sound position when it held that to require novelty or concreteness would be to apply the law of copyright erroneously.²³

The remarkable contribution of *Chandler* is that the court totally suppressed the novelty standard, willingly departing from the doctrine applicable to technical ideas, the protection of which requires a certain amount of novelty in patent law. Moreover, while other courts had already considerably lowered the traditional novelty threshold in cases involving undeveloped ideas protected by express agreements, the *Chandler* court did so while acknowledging the existence of an implied-in-fact contract. This is especially remarkable, since requirements for the validity of an implied-in-fact idea submission contract are traditionally more stringent than for express contracts.²⁴

The suppression of the novelty requirement can also be found in a later landmark case: *Donahue v. Ziv Television-Programs, Incorporated*.²⁵ In this case, the court reasoned that since individuals can expressly contract for non-novel ideas, reading a novelty requirement into an implied-in-fact contract could not be justified.²⁶ The court added that the use of an idea, subsequent to its disclosure, indicates that the offeree sought the idea, regardless of novelty.²⁷

The California approach to idea submission contracts

is creator-oriented. It admits that implied contracts can be formed even if the submitted idea is not necessarily novel, which expands protection for idea creators. In addition, the California approach seems to be protective of idea creators, to the extent that the *Wilder* test and subsequent case law have stated broad principles encompassing a wide range of circumstances in which an agreement can be found.

(2) Comments on the California Approach

The most problematic issue with respect to the California approach is the difficulty of proving the existence of an implied-in-fact contract. The *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. Besides, in the event that an idea creator did not obtain such promise, the *Wilder* test does not allow for implying a promise to pay for an idea simply from facts showing that the idea was conveyed with the hope or expectation that some obligation will ensue, even if the idea is valuable and has been used for profit.²⁸ Idea men are therefore left with a very difficult element to prove in order to succeed on an implied contract claim.

The California approach could also be criticized from a strictly legal standpoint, for what seems to amount to confusion between legal doctrines of contract and copyright law. The California approach sometimes led courts to introduce strictly copyright-related concepts in the analysis of the implied-in-fact contract doctrine, such as the concepts of "access" and "substantial similarity."²⁹ The determinations to be made in a copyright context, where the proof of copying is essential, should be different from determinations in idea submission cases.

However, some could argue that the use of copyright law concepts like access and substantial similarity may be useful in implied-in-fact contract cases, where the formation of the contract is difficult to prove, and these concepts can show that an idea was disclosed and used. It should, nevertheless, be noted that the *Wilder* test utilizes contract law concepts that seem sufficient to prove the formation of an idea-submission contract which triggers an obligation to pay.

B. The New York Approach

While the California protection level for ideas is quite high, New York provides a rather minimal amount of protection. The New York Courts rely on confusing, arbitrary and inconsistent standards, and the lack of protection afforded by the New York courts is worsened by the extreme stringency of the courts' standards, which require both concreteness and novelty of the idea before they will protect it.³⁰

Idea Men Should be Able to Enforce Their Contractual Rights

(I) New York Courts' Standards: Concreteness and Novelty

CONCRETENESS

Property ideas are the basis for idea protection in New York. Thus, New York courts require that an idea must be sufficiently concrete before it is considered "property," entitling the creator to protection.³¹ New York courts required concreteness³² in addition to the requirement that the idea be reduced to a tangible form.³³ They also required concreteness as signifying a tangible form.³⁴ The courts' rationale is that only the form of an idea deserves protection, and not the idea itself.³⁵ In *O'Brien v. RKO Radio Pictures*,³⁶ the plaintiff claimed that his idea had been improperly used by the defendant to create a movie. The court held that the story was too abstract and general to sustain a claim of literary property, and therefore it did not meet the concreteness requirement.

The New York courts have actually used two different definitions for concreteness in the development of an idea,³⁷ and it is difficult to identify what level precisely applies in any given case. The first is the "immediate use" theory, which considers that concreteness means that an idea "has been developed to the point where it is ready for immediate use without embellishment."³⁸ A second, alternative, interpretation of the concreteness requirement is based on the "elaborated idea" standard.³⁹ According to this theory, the inquiry is whether the idea-recipient could have produced the finished work if the idea-creator had not produced the elaborated idea. This approach is used by only a few courts,⁴⁰ and need not be analyzed in depth here.

NOVELTY

The additional requirement developed by New York courts pertains to the novelty of the idea. These courts consider this novelty to be the idea's value, which supplies consideration in an idea-submission contract. It seems that the New York approach enforces only contracts bearing on ideas that are original enough to be copyrightable elements.

The seminal New York case, *Soule v. Bon Ami Co.*,⁴¹ held that an idea that was not "novel" could not have any value and was therefore not consideration to a contract. In *Soule*, in consideration of the plaintiff's agreement to impart certain valuable information that would increase the defendant's profits, the defendant promised to pay the plaintiff one half of any increased profits.⁴² The plaintiff's idea was that if the defendant would increase the selling prices of its

product, its profits would be increased.⁴³ The defendant did increase the selling price of his products shortly after the plaintiff gave him the idea.⁴⁴ The court held that the contract was lacking consideration since the alleged information was neither new nor original and could not be deemed to be valuable, being merely a matter of common knowledge.⁴⁵

Numerous cases have made the enforceability of the idea-submission contract contingent upon the existence of

PROPERTY ideas are the basis for idea protection in New York. Thus, New York Courts require that an idea must be sufficiently concrete before it is considered "property," entitling the creator to protection. . . . The courts' rationale is that only the form of an idea deserves protection, and not the idea itself.

a proprietary interest in the idea on the part of the plaintiff.⁴⁶ A novelty requirement follows this by rendering the idea a property of the idea creator and allowing the idea to become a valid consideration.

(2) Critique of the New York Approach

CRITIQUE OF THE CONCRETENESS REQUIREMENT

The concreteness standard is, at best, inherently vague and most certainly a misplaced requirement. Very few cases have devised a practical definition of the notion of concreteness.⁴⁷ Courts seem to waver between concreteness as a level of conceptual development and concreteness as the state of an idea once expressed, thereby wrongly using a copyright law concept.⁴⁸ It has been stated that "the critical elements of concreteness are matters dependant largely upon the eye of the Court,"⁴⁹ which fosters legal uncertainty.

However, Professor Nimmer rightly comments that "if we think of an idea as conception, . . . a preliminary plan, then, surely, to speak of an idea developed to the point where it is ready for use, presents a contradiction in terms, since, if an idea is so developed, it ceases to be merely an idea."⁵⁰ New York's concreteness requirement is therefore a fallacy: such a concreteness requirement implies a very high level of detail and development. It follows that a "concrete" idea, understood in the sense defined by several New York courts, would probably be copyrightable in and of itself, since a high level of development often entails the presence of originality

and expression in a tangible medium, the basic requirements for copyright protection.⁵¹ This conception might have a tremendous influence on Federal preemption analysis, since a conflict between copyright and contract law might arise from the requirement that submitted ideas be elaborated for a contract claim to be valid.

CRITIQUE OF THE NOVELTY REQUIREMENT

The New York novelty requirement is similarly inappropriate, in that it uses the fiction of the property interest in an idea as an erroneous legal ground thus rendering any court denying contractual protection to an undeveloped idea less prone to criticism. Additionally, the burden of proving novelty can be claim killing.⁵² Peter Swarth rightly points out that the New York approach creates a lower status for (artistic) idea vendors, as opposed to purveyors of any other type of product, noting that “[n]ovelty is not an implied requirement in a contract for any other type of service or product.”⁵³

In addition, requiring that ideas should be considered property in order to constitute sufficient consideration is rather offensive to the canons of copyright law. We have restated that ideas are by essence “free as the air to common use.”⁵⁴ It seems impossible to justify a requirement that an idea constitute property when an undeveloped idea

was actually the idea submitted by the plaintiff.⁵⁶ This requirement is an important function, because if the defendant independently conceived the idea it used, or obtained it from another source, the defendant should not be held liable.⁵⁷

III. Idea Submission Contracts and Express Preemption

Idea-submission contracts, as protected by state laws, should not fall within the express prohibitions of the Copyright Act. Section 301 of the Copyright Act states three requirements for a state right to be preempted: (1) the right must bear on a fixed work of authorship, (2) within the subject matter of copyright, and (3) the right must be equivalent to any exclusive right within the scope of copyright.⁵⁸ The fixation, subject matter, and equivalence requirements will successively be examined, and we will prove that none applies to idea-submission contract claims, and therefore the federal copyright act does not preempt state law protection for ideas.

A. The “Fixation” Requirement

Section 301 states as a condition to preemption that the state right must pertain to “works of authorship that are fixed in a tangible medium of expression.” This condition is based on the limit built into the Copyright Act that federal copyright protection does not extend to works that have not been fixed in a tangible medium of expression. By its own terms, therefore, section 301 does not bar states from protecting unfixed works. The House Report on the 1976 Copyright Act lists examples of unfixed works: “Choreography that has never been

filmed or notated, extemporaneous speech, original works of authorship communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down.”⁵⁹

Preemption is thus expressly excluded when an idea is merely disclosed orally to a recipient because it is not fixed in a tangible medium of expression. However, this case for excluding idea-contracts from preemption may not be a complete argument against preemption, since most disclosed ideas are either revealed in writing, or, if submitted orally, subsequently reduced to writing by the recipient, to keep a trace and a record of the idea. This argument against preemption could therefore be insignificant.

However, section 301 requires fixation not of all material, but only of a “work of authorship.” By definition, ideas are not developed enough to be works of authorship.

IDEA-SUBMISSION contracts, as protected by state laws, should not fall within the express prohibitions of the Copyright Act

inherently is not protected by copyright, which protects literary and artistic *property*. While it might be argued that an idea-submission contract may only be validly formed to the extent that the idea-creator conveys a valuable “property” in consideration for the others’ payment, the Nimmer treatise proposes that the consideration is the service of disclosure of the idea, rather than the idea itself;⁵⁵ and that, therefore, the idea itself need not have any particular characteristics. Perhaps, however, the greatest problem with a novelty requirement is that the characteristics of a novel idea closely resemble those of copyrightable material, thus rendering the contract claim prone to federal preemption.

It is worthwhile to note that, despite its problems, the novelty requirement might have a practical, procedural function that may counterbalance the fact that it is otherwise questionable. Professor Sobel considers that requiring novelty is useful to prove that the idea used by the defendant

Idea Men Should be Able to Enforce Their Contractual Rights

Thus, even if fixed for the convenience of their communication, ideas do not come under the scope of the “fixation” requirement because they are not works of authorship.

B. The Subject Matter Requirement

Section 301 provides that “rights ... that ... come within the subject matter of copyright, as specified by Sections 102 and 103 are to be preempted.”⁶⁰ Section 102, defines which works are granted copyright protection, saying that copyright protection is afforded to:

original works of authorship fixed in any tangible medium of expression ... includ[ing] the following categories: literary works; musical works...; dramatic works ...; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.⁶¹

Section 102(b) also explicitly excludes copyright protection of “any idea.” Section 103 extends protection to compilations and derivative works. However, these two sections do not sufficiently define the “subject matter of copyright,” nor does any other section of the Copyright Act. This lack of any proper definition of the subject matter to be addressed by the Copyright Act is problematic.⁶²

As far as ideas are concerned, a very difficult legal question arises: does Section 102(b) signify that ideas are not within the subject matter of copyright, because it expressly excludes them from copyright protection, or can they nevertheless be considered as being in the subject matter of copyright, precisely because they are the subject of an express provision (albeit one that gives them no protection)? The only reasonable interpretation, supported by a strict construction of the terms of the Copyright Act, as well as case law, is that ideas cannot be deemed to be included in the subject matter of copyright.

(I) Arguments in Favor of the Inclusion of Ideas in the Subject Matter of Copyright

Two arguments can be made in favor of the inclusion of ideas in the subject matter of copyright. First, legislative history and textual analysis could give reason for a certain reading of the Copyright Act to justify the inclusion. Second, courts addressing this question, relying on either erroneous grounds or on facts that can be distinguished from a true idea-submission contract, have recently held that ideas were included in the subject matter of copyright.⁶³

An analysis of legislative history and of the text of the Copyright Act can be read to support the inclusion of ideas in the subject matter of copyright. Section 102(b) of the Copyright Act explicitly denies copyright protection to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. According to Professor

Goldstein,⁶⁴ the Copyright Act can be read to embody a Congressional intent to include the elements listed in Section 102(b) as part of the subject matter of copyright.⁶⁵ The key to this analysis lies in the use, in Section 102(a), of the phrase “Work of Authorship” to define what does get protection. In Section 102(b), the phrase “works of authorship” is also used. This drafting could suggest that ideas are “original works of authorship,” and are, therefore, included in the subject matter of copyright, but excluded from protection. The legal implication of this interpretation is to increase the probability that ideas are removed from the scope of possible state regulation because they fulfill the subject matter conditions of federal copyright preemption. However, several arguments will be raised to refute this position.⁶⁶

There are also several cases which have held that ideas are within the subject matter of copyright. In *Berge v. Board of Trustees of the University of Alabama*,⁶⁷ the Fourth Circuit Court of Appeals examined whether an idea-submission claim could be deemed to be within the subject matter of copyright.⁶⁸ The *Berge* court ultimately held that “ideas embodied in a work covered by the Copyright Act fall within the subject matter of the Act, because ... scope and protection are not synonymous.”⁶⁹ Moreover, the court stated that: “the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”⁷⁰ The *Berge* decision was later followed by the Ninth Circuit in *Metrano v. Fox Broadcasting*, which similarly held that the idea-submission claim was preempted because ideas are in the scope of copyright, even though they are granted no protection by it.⁷¹

It should also be noted that the jurisprudential trend leans towards holding that ideas fixed in a tangible medium of expression are within the subject matter of copyright, for the purposes of preemption. In *Selby v. New Line Cinema Corporation*,⁷² a California Federal District Court found that ideas for a movie were within the subject matter of copyright for preemption purposes.⁷³ Likewise, the Sixth Circuit affirmed a case from the Western District of Michigan, *Wrench LLC v. Taco Bell Corporation*, in which the court held that plaintiff’s breach of contract claim pertaining to an idea for a Chihuahua in a televised advertisement fell within the subject matter of copyright for preemption purposes.⁷⁴ Another case⁷⁵ held that “even though the ideas embodied in a work covered by the Copyright Act fall outside copyright protection, this does not mean that they fall outside the Act’s scope, regarding its subject matter...”.⁷⁶ These cases show that courts have been creating a distinction between copyright protection, from which ideas are excluded, and the subject matter of copyright, in which ideas would be included.

However, the reasoning in cases supporting the inclusion of ideas in the subject matter of copyright takes into consideration the degree of detail of the ideas submitted. Some ideas are so detailed that they constitute an actual

work of authorship. In *Endemol Entertainment B.V. v. Twentieth Television, Incorporated*, the facts concerned a contract providing compensation for use of the ideas contained in a new television format.⁷⁷ Even though commentators include *Endemol* in “idea cases,”⁷⁸ close examination reveals that it is not really an idea case. The opinion mentions that the Defendant developed a show based on the “format, expression and concepts of” the plaintiff’s program.⁷⁹ It can be inferred that the format submitted was “expressed,” within the meaning of Section 102 (a) of the Copyright Act. Also, the television program is said to have been “new.” Although novelty and originality are entirely different concepts belonging to the completely different legal spheres of patent and copyright, the fact that the program was new could induce the existence of at least the minimal degree of creativity required by *Feist*,⁸⁰ in order to find originality. Thus, the format in contention could probably be considered an original work of authorship expressed in a tangible medium of expression, not simply an idea. Moreover, the fact that the *Endemol* court found that the “expression”⁸¹ had been copied is evidence that the issue at stake was more than a mere idea, and that the inclusion of the copied material in the subject matter of the Copyright Act was justified.

A similar argument can be made about *Selby*⁸² in which the plaintiff had written a screenplay and submitted it to the defendant.⁸³ The codefendant copied the “ideas and expression” of the plaintiff’s work.⁸⁴ The copied work was an actual screenplay, i.e., a copyrightable property, and was copied in its expression. It implies that the submitted screenplay was within the subject matter of copyright, not just an idea. These cases should therefore be limited to their own facts and not extended to contract claims deriving from the submission of actual literary or artistic ideas.

More recently, in *Chesler/Perlmutter Products, Incorporated v. Fireworks Entertainment, Incorporated*,⁸⁵ a production company that allegedly created an idea for a television program brought an action against a competitor that produced an allegedly similar show, claiming breach of express and implied contract and unjust enrichment. The court held that since the concept at issue had been converted to a written treatment it was in “copyrightable form,” and therefore included in the subject matter of copyright.⁸⁶

(2) Support for the Exclusion of Ideas from the Subject Matter of Copyright

HOUSE REPORT

Thus, although many cases have held ideas to be in the subject matter of copyright, upon closer inspection of the facts, the “ideas” in these cases were developed enough to be original works of authorship which would clearly be within the subject matter of copyright, not mere “ideas.”

Professor Goldstein⁸⁷ cites to the House Committee Report to the 1976 Copyright Act, which emphasizes that

“Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single federal system of copyright, that the basic dichotomy between expression and ideas, remains unchanged.”⁸⁸ Since ideas have been the subject of a long admitted exclusionary treatment, depriving them from any protection by copyright,⁸⁹ the *status quo* announced in the House Report means that Section 102(b) does not modify the exclusionary treatment of ideas.

Advocating against preemption, it should be noted that there is a logical, if not obviously statutory, nexus between an absence of protection and an exclusion from the subject matter of copyright. The subject matter of copyright characterizes the elements to which copyright applies. When copyright applies to a given element, it is protected by copyright. The assertion that an element which is not protected by copyright is included in the subject matter of copyright is completely illogical.

Some might argue that the House Report is not helpful in determining whether ideas are within the subject matter of copyright, because it merely calls for speculation as to the nexus between absence of protection by copyright and exclusion from its subject matter, based upon the fact that the House Report only states that the idea-expression dichotomy is unchanged, which does not signify that non-protection amounts to non-inclusion in the subject matter of copyright. However, a strict interpretation of the Copyright Act itself sheds light on the unclear subject matter requirement, in such a clear and unequivocal way that the exclusion of ideas from the subject matter of copyright should be difficult to challenge.

STRICT INTERPRETATION OF THE COPYRIGHT ACT

The provision of Section 301 pertaining to subject matter is entitled, aptly enough, “Subject matter of copyright.”⁹⁰ Section 102(b) expressly provides that copyright protection cannot be awarded to an idea, that is, there is no copyright in an idea. There is no doubt that copyright protection and “copyright,” as used in Section 301, refer to the same concept. It can thus be argued that section 102(a) simply provides a positive definition of the subject matter of copyright, and 102(b) states a negative definition, by listing elements that are not in the subject matter. Therefore, under strict textual analysis, those elements specifically excluded from copyright protection are not within the subject matter of copyright and are therefore not preempted by the federal copyright statute.

Moreover, if Section 102(b) denies copyright protection to ideas *that appear in federally protected works of authorship*,⁹¹ it does not necessarily follow that ideas are, in and of themselves, works of authorship. On the contrary, this section implicitly denies copyright protection to ideas that appear independently from any copyrightable, tangible

Idea Men Should be Able to Enforce Their Contractual Rights

work.⁹²

The *Endemol* court clearly misinterpreted Section 301, by stating that “even though the ideas embodied in a work covered by the Copyright Act fall outside copyright protection, this does not mean that they fall outside the Act’s scope, regarding its subject matter.”⁹³ The subject matter referred to in Section 301 is the subject matter of *copyright*, not of the Copyright Act.⁹⁴ It is true that, had Section 301 included the terms “*subject matter of the Copyright Act*”, since ideas are referred to in the Copyright Act, although given an exclusionary treatment, they could have been preempted. But since ideas are excluded from copyright protection, they are excluded from the subject matter of copyright, and thus state laws protecting them are not preempted. This interpretation is much more convincing because it takes into account the actual drafting of the statute, to which it is indispensable to turn in order to reach a sound and logical conclusion.

The practical consequence of the exclusion of ideas from the subject matter of copyright is to shelter idea-submission contracts

claims from federal preemption, on the grounds that there is no conflict between federal copyright and contracts. Federal copyright is granted to truly copyrightable matters and applies to all copyrightable materials through preemption, while idea submission contracts concern mere ideas, which do not fall within the subject matter of copyright.

C. The “Equivalent Rights” Requirement

Section 301(a) requires, as the third condition for preemption,⁹⁵ that the state right in question be a “legal or equitable” right that is “equivalent to any of the exclusive rights, within the general scope of copyright, as specified by Section 106.”⁹⁶ This provision is very similar to the requirement developed by case law prior to the Copyright Act. In *Sears, Roebuck & Co. v. Stiffel Co.*,⁹⁷ and *Compco Corp. v. Day Brite Lightning, Incorporated*,⁹⁸ both decided prior to the 1976 Copyright Act, the Supreme Court stated a preemption formula that precisely focused on the nature of the state right granted. Thus, a state doctrine would only be voided⁹⁹ if it offered protection similar to the one given by the federal patent or copyright laws.¹⁰⁰ Therefore, in order to determine whether state idea-submission contract claims are equivalent to exclusive rights within the scope of copyright, it is first

necessary to define the notion of the general scope of copyright before an assessment can be made of the concept of equivalent rights.

(I) The “General Scope” Condition

NOTION OF “GENERAL SCOPE OF COPYRIGHT”

Courts generally hold that the notion of “general scope of copyright” concerns conduct coming within the scope of one or more of Section 106’s exclusive rights, which include reproduction, derivative works, distribution, performance, and display.¹⁰¹ The House Report on the 1976 Copyright Act sheds light on the meaning of “general scope” and implies that the equivalence in the preemption analysis has to be assessed not against Section 106’s expressly

provided rights, but against “the exclusive rights within the general scope of copyright, as specified by Section 106.”¹⁰² Professor Goldstein interprets the House Report as indicating that section 106 only states some exclusive rights

THE practical consequence of the exclusion of ideas from the subject matter of copyright is to shelter idea-submission contracts claims from federal preemption on the grounds that there is no conflict between federal copyright and contract.

among all those that may possibly exist in the scope of copyright. According to Professor Goldstein, the general scope of copyright means the full scope that Congress could have described for any particular right.¹⁰³ The Report more specifically states that “... the Preemption of Rights under State Law is complete with respect to any work coming within the scope of the Bill, even though the scope of exclusive rights given the work under the Bill is narrower than the scope of Common Law rights might have been.”¹⁰⁴ In addition, the wording of section 301 itself seems to indicate that the exclusive rights the equivalence of which must be analyzed, are those “within the scope of copyright” (not of the Copyright Act), “as specified” (not as “provided”) by Section 106. The general scope of copyright therefore appears to be broader than the exclusive rights set forth at Section 106 of the Copyright Act, which might imply that contract claims could be deemed to be a form of exclusive right within the scope of copyright.

DIRECT APPLICATION OF THE “GENERAL SCOPE” NOTION

Professor Goldstein tried to explain the notion of “general scope” of copyright by comparing it to exclusive rights in the strictest sense. He considers that even if a

state exclusive right is broader than a statutory exclusive right, such state right is preempted. He explains that, for instance, although Section 106(4) limits the performance right to *public* performances, a state law prohibiting *private* performances would nevertheless come within the general scope of the right.

Beyond a mere literal interpretation of the Copyright Act, the determination of the meaning of "general scope" requires that we refer to "L'esprit de la loi,"¹⁰⁵ to use a French legal term. Since a right to ideas is not mentioned at all in Section 106, and since ideas have always been excluded from the benefit of exclusive rights, the use of ideas is certainly not covered by any exclusive right, either expressly provided by Section 106, or in the general "spirit" of the Copyright Act.

Nevertheless, it could be argued that since a typical idea-submission contract forbids the use of an idea without compensation, the notion of use is here analogous to the copyright reproduction right or the right to prepare derivative works. These rights are expressly reserved to the copyright holder by Section 106, thus, idea rights could be included in the general scope of copyright.¹⁰⁶ However, even if the state right pursuant to the idea-submission contract can be deemed to be within the general scope of the representation right, a preemption claim will, nevertheless, fail to pass muster under Section 301, if we agree, as argued in the previous section, that ideas are not in the subject matter of copyright. In addition, the next section of this article will argue¹⁰⁷ that rights awarded to the idea creators pursuant to contract claims are not equivalent to copyright-like rights.

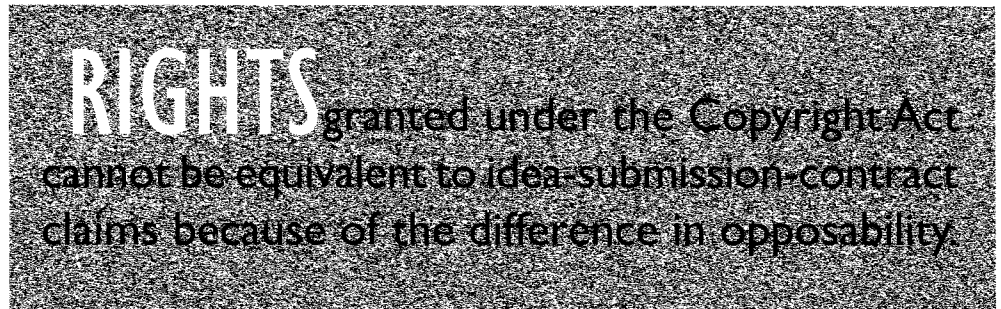
(2) The Assessment of the Notion of "Equivalent Right"

THE NOTION OF EQUIVALENCE IN THE LEGISLATIVE HISTORY

The meaning of an "equivalent right" is not defined in the Copyright Act. Commentators have considered that Congress may have wanted to preempt state rights that are equivalent, *in their purpose*, to copyright.¹⁰⁸ Professor Goldstein argues, however, that this interpretation "cuts too narrowly" because it is relatively simple for a party challenging preemption to assert that the purpose of the state doctrine was independent from any copyright-related purpose.¹⁰⁹ If, on the other hand, one considers that the intent of Congress was to preempt state rights, the *effects of which* are equivalent to copyright, Section 301 is too broad and implies preemption of several well-established state rights, such as trade secrets, unfair competition, and right of publicity.¹¹⁰

Since the Copyright Act lacks clarity on this subject,

it is useful, once again, to examine the House Report. The latter appears to explain that contract rights are not equivalent rights: "Nothing in the Bill derogates from the right of the parties to contract with each other, and to sue for breach of contract."¹¹¹ But this formulation still does



not expressly concede that a contract claim is not equivalent to a copyright infringement claim.

A look at the original drafting of section 301(b)(3) is enlightening. This section initially provided that misappropriation, breach of contract, breach of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices should not be preempted.¹¹² Meeting the opposition of the Justice Department, the House of Representatives adopted a last minute amendment, deleting the list of examples of state doctrines that were not to be considered as equivalent to copyright.¹¹³ It is, however, a tenuous argument to use this deletion in favor of preemption of contract claims because there is evidence to suggest that misappropriation, not the other contents of the list, was the target of the Justice Department.¹¹⁴ By deleting all causes of actions specifically listed, it is suggested that Congress transferred the rulemaking process to courts, by calling for an *ad hoc* interpretation of the preemption clause, in light of the actual potential equivalence of state doctrines. Congress apparently did not intend to restrain the courts' interpretative power of the Copyright Act by expressly enumerating restrictions to the scope of Section 301.

Moreover, Professor O'Rourke commented that the original inclusion of breach of contract as an example of a cause of action that would survive preemption suggests that Congress did not intend, as a general rule, to preempt breach of contract actions, under the Act.¹¹⁵ The result of this analysis is that the study of legislative history alone is not enough to clarify the equivalence clause.

JUDICIAL INTERPRETATION OF THE NOTION OF EQUIVALENCE

Interpretation Centered on the Opposability of Equivalent Rights

The term opposability refers to the possibility for the plaintiff to assert a right against another person. Exclusive rights derived from copyright are absolute and exist as opposed to the world, while contractual rights only bind

Idea Men Should be Able to Enforce Their Contractual Rights

contracting parties. Thus, rights granted under the Copyright Act cannot be equivalent to idea-submission-contract claims because of the difference in opposability. Judge Easterbrook addressed this issue of opposability in the Seventh Circuit case of *Pro CD v. Zeidenberg*,¹¹⁶ saying that:

Copyright law forbids duplication [and] public performance ... unless the person wishing to copy or perform the work obtains permission, silence means a ban on copying. A copyright is a right against the World. Contracts, by contrast, generally affect only their parties, strangers may do as they please, so contracts do not create "exclusive rights."¹¹⁷

The comparison of opposability of contract rights to that of copyright rights thus allows readers to deduce not that contracts do not create exclusive rights at all, because they do, to a certain extent, but rather that contract rights are not equivalent to copyright-derived rights because of their fundamentally reduced scope of opposability.

That being said, although this approach relies on a literal interpretation of Section 301, it seems quite satisfactory. It accurately contemplates the opposability of rights, to different levels of players: copyright is universally opposable, whereas contract rights are only opposable to the party or the parties who entered into the agreement, that is, in a typical idea case, the idea recipient and the idea creator.

Interpretation Centered on the Formation of the Right: Identification of an "Extra Element"

Some commentators consider that the opposability approach articulated by Judge Easterbrook in *Pro CD* is the corollary of the very popular interpretation that the promise involved in a contractual relationship is, itself, an "extra element." It is, therefore, this extra element that differentiates the formation of a contractual right from the birth of a copyright-derived exclusive right, regardless of whether the defendant breaches the contract by performing an act that Section 106 reserves exclusively to copyright owners.¹¹⁸ While the extra element is undeniably very powerful and consistently useful in cases addressing idea-submission contract claims, this criterion is not very accurate and does not take into account on the one hand the reality of the relations between idea-creators and idea-recipients, and on the other, the very provisions of Section 301.

(i) The Extra Element Analysis as an Anti-Preemption Argument

Recent cases restated quite clearly the importance of the extra element approach.¹¹⁹ In *Lennon v. Seaman*, the Court held that:

[S]ome cases stand for the broad proposition that it is the promise inherent in contract arrangements that saves contract claims from

preemption. Under this theory, a breach of contract clause is not preempted ... because, unlike claims for copyright infringement, claims based on a contract will involve the extra element of a promise by one party to another.¹²⁰

In *Brown v. Mojo Records*,¹²¹ the court found that a contract claim has an "extra element" that makes it different from copyright infringement.¹²² The extra element consists of proof of the alleged contractual relationship, its terms, and the conduct that allegedly violated those terms.¹²³

Legal scholars have also lent support to the notion that contract claims require proof of an extra element that should allow them to escape copyright preemption. The Nimmer treatise, for instance, points out that:

A breach of contract action, whether such contract involves a mere idea or a fully developed literary work, is not predicated upon a right that is equivalent to any of the exclusive rights within the general scope of copyright... This [sic], for the reason that a contract right may not be claimed unless there exists an element in addition to the mere acts of reproduction, performance, distribution or display. The additional element is a promise—express or implied—on the part of the Defendant.¹²⁴

Other commentators have argued that preemption of idea-submission contract claims is systematically excluded, because of the "ease with which a Court can find the extra element needed for the state law to survive preemption."¹²⁵ Moreover, one can argue that the extra element approach can be something of a fallacy, since a tremendous percentage of idea-submission contracts are either implied-in-fact contracts¹²⁶ or express contracts that the idea-creator has not been able to negotiate, by lack of bargaining power *vis à vis* the idea-recipient. Under such circumstances, there is practically an absence of express, bargained-for, promise, and thus, no extra element.

In any event, these practical objections do not suffice to question the legal validity of the extra element approach, but show the practical limits of this argument. However, these limits do not have very strong foundations: a recent case proved that implied promises were not to be treated differently from express promises. In *Katz Dochterman & Epstein, Incorporated v. Home Box Office*,¹²⁷ the court held that a claim for breach of implied-in-fact contract was not preempted because an "implied promise to pay for its idea is entirely separate from any claim for copyright infringement of a literary work."¹²⁸

The extra element approach as an anti-preemption argument does reach a correct conclusion: a contract action and a copyright infringement claim are qualitatively different and fail to meet the equivalence condition required by Section 301. Also, in order to differentiate contract claims from copyright actions, the analysis performed by courts actually

takes into consideration the formation conditions: a contract right arises when promises are exchanged, whereas copyright arises by the mere act of fixation in a tangible form of expression of an original work of authorship. This reading of the equivalence requirement is legally correct. It adds to the certainty that contracts claims do not award “equivalent” rights. In *Chesler/Perlmutter Products, Incorporated v. Fireworks Entertainment, Incorporated*,¹²⁹ for instance, the court took into consideration the content of the promise. Focusing on the fact that the promise addressed a payment schedule and

reserved act.¹³³

For example, in *Endemol Entertainment B.V. v. Twentieth Television Incorporated*,¹³⁴ the implied-in-fact contract resulted from the fact that “at all times it was understood that disclosure of the format was made in confidence, and that the Plaintiff would be compensated for any subsequent use of the ideas.”¹³⁵ The court held that the contract at issue created “no additional rights other than promising not to benefit from the copyrighted work”¹³⁶ and that the plaintiff’s claim asserted “no violation of rights separate from those copyright law was designed to protect and thus the claim was preempted.”¹³⁷

Another example comes from *Wrench LLC v. Taco Bell Corp.*,¹³⁸ in which the parties had a basic understanding that if Taco Bell used the idea of a psychotic Chihuahua created by Wrench, Taco Bell would compensate Wrench for the fair value

of such use.¹³⁹ The Court held that there was no *per se* rule against preemption of contract claims under Section 301¹⁴⁰ and decided that the “rights plaintiffs are asserting are equivalent to rights under the Copyright Act because they are based upon Taco Bell’s reproduction or use of the plaintiff’s idea, for creation of derivative works.”¹⁴¹ The court continued its analysis by considering that “a promise not to use another’s ideas and concepts without paying for them is equivalent to the protection provided by Section 106 of the Copyright Act.”¹⁴²

Finally, in *Selby v. New Line Cinema Corp.*,¹⁴³ the court considered that the alleged implied-in-fact contract did not regulate the parties’ conduct beyond mere use of the plaintiff’s ideas, and that, for this reason, the rights protected by that contract were equivalent to the exclusive rights protected by the Act, and preempted.¹⁴⁴ The court added that the parties could enter into an idea-submission contract which could create rights that are qualitatively different from the rights created by the Copyright Act, if they inserted a confidentiality provision.¹⁴⁵

While the approach used by these cases to find contract rights preempted is somewhat seductive, this approach is based on incorrect premises. *Endemol* and *Wrench* are based on the argument that a promise not to use an idea without compensation is equivalent to a copyright-like right.¹⁴⁶ The *Wrench* court, however, relied on the reasoning developed by the Court of Appeals for the Ninth Circuit in *Del Madera Props. v. Rhodes & Gardner, Incorporated*.¹⁴⁷ In *Del Madera*, the court found that an implied-in-law promise was preempted, even though it was an unjust enrichment claim,

ENFORCEMENT of idea-submission contract claims neither conflicts with the objectives of Congress, nor undermines the fundamental underpinning of copyright, according to which ideas are free as the air.

the benefits that were to be received as a result of the payments, as well as details regarding the hiring of writer and executive producer, the court found that “these written terms, which go beyond a promise not to accept the benefit of a copyright [sic] work, provide the necessary extra-element.”¹³⁰

In conclusion, while the extra element-based preemption argument is somewhat persuasive, the alternative argument based on the opposability of rights seems more straightforward and more adequate. Rights stemming from a contract (that is only enforceable against contracting parties) are “simply not equivalent” to rights granted under the Copyright Act.¹³¹

(ii) The Analysis of the Defendant’s Conduct

The concept of this extra element can alternatively focus on the defendant’s act that triggers the claim for breach of contract. This focus is a diverging interpretation of the extra element approach that consists of taking into consideration neither the beginning of the legal continuum, i.e., the formation of the right, nor its middle portion, i.e., its opposability, but merely its breach, which could be considered as the end of the said continuum. Following this approach, some courts have developed a test examining the conduct of the defendant who was a party to an idea-submission contract. If the defendant’s behavior consists of one or several of the prerogatives provided by Section 106 of the Copyright Act,¹³² the contract claim is preempted. However, it is not preempted if the defendant performed an act other than a

Idea Men Should be Able to Enforce Their Contractual Rights

in the realm of quasi-contracts. The precedent used by the *Wrench* court was, therefore erroneous to the extent that it did not apply to contracts, and thus *Wrench* should not be given much weight.¹⁴⁸

Some commentators nevertheless have tried to reconcile cases clearly excluding preemption of contract claims, like *Pro CD*,¹⁴⁹ and cases tending to sustain preemption of such claims, like *Endemol* and *Wrench*. Professor Nimmer wrote that the latter cases are consistent with the first, insofar as they hold that while most contract claims should not be preempted, preemption is appropriate in certain circumstances where the contract “merely forbids reproduction or display.”¹⁵⁰ Thus, treating a contract as providing rights equivalent to copyright rights could be justified in circumstances where the contract actually restricts conduct, by providing types of rights provided by section 106.

However, based on the foregoing analysis of section 301’s three prongs, section 301 does not expressly preempt idea-submission contract claims because a contractual right is not equivalent to a copyright-related right, and generally involves an idea, which is usually fixed, but not sufficiently developed to come within the subject matter of copyright.

IV. Idea Submission Contracts and Implied Preemption

Even if we agree that section 301 of the Copyright Act does not expressly preempt idea-submission-contract claims, the issue still exists as to whether or not a contract claim may be subject to implied preemption under the Constitution’s Supremacy Clause. Article VI, clause 2 of the Constitution states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.¹⁵¹

Pursuant to the Supremacy Clause, federal law is supreme and will preempt inconsistent state law, if the state contractual right is deemed to “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵² Constitutional preemption may be based on the complete exclusion by federal law of any state initiative in an area covered by federal law. The Copyright Act does not expressly forbid protection of ideas under state law. However, “conflict preemption,” in which federal law preempts state law if a state law conflicts with a federal law, may apply to idea-submission contracts. According to this legal concept, even in the absence of a complete

exclusion of state protection, some Common Law claims may conflict with superior principles at the federal level.

In order to determine whether idea submission contract claims are totally immune from any form of preemption, it is necessary to determine initially whether, in spite of the absence of express preemption, idea-submission contract claims could, nevertheless, be subject to an implied, conflict-preemption analysis, and if so, to perform this analysis pursuant to applicable case law.

A. Conflict Between Express and Implied Preemption

(1) Preemption May be Implied Even If the State Right is not Expressly Preempted by a Statute

As argued throughout Part III of this article, contract claims bearing on idea-submissions are immune from preemption under Section 301¹⁵³ because these claims are not equivalent to copyright rights, since they involve either an unfixable idea, or more often, a fixed idea that is not sufficiently developed to raise to the level of work of authorship whose expression contains originality.¹⁵⁴ Idea-submission contract claims are therefore, *de facto*, excluded from the subject matter of copyright.

However, even when there is no express preemption of a state right by federal law, the Supreme Court has supported the argument that a state right can be subject to implied preemption.¹⁵⁵ The Supreme Court held in *Freightliner Corp v. Myrick*¹⁵⁶ that “[t]he principles underlying this Court’s preemption doctrine... make clear that the express preemption provision imposes no unusual, special burden against [implied] preemption.”¹⁵⁷ In light of this, it can be said that the presence of an express preemption provision in the Copyright Act does not necessarily exhaust the possibilities for implied preemption. Express and implied preemption are, therefore, not exclusive of one another.

Moreover, protection of ideas may offend other Constitutional provisions, like the First Amendment’s guarantee of free speech, as incorporated in the fourteenth amendment to apply to state laws, thereby justifying its preemption.¹⁵⁸

(2) The Practical Presumption of Absence of Preemption

The interplay of Section 301 and the Supremacy Clause might create a presumption of an absence of preemption, since the test of implied preemption mirrors Section 301 express preemption clause. Of course, Section 301 was drafted following the confusing case law developments of the implied preemption jurisprudence, in order to clear up conflicting cases.¹⁵⁹ Thus, implied preemption analysis might bring a court to a different conclusion than it would reach under express preemption

under section 301.

THE PARALLELISM BETWEEN SECTION 301 AND THE IMPLIED PREEMPTION CRITERIA

In *Goldstein v. California*,¹⁶⁰ the Supreme Court decided that, absent a federal command, states are free to protect subject matter that is not protected by the Copyright Act.

Operating on the assumption, discussed earlier in this article, that ideas do not fall within the protection of the Copyright Act,¹⁶¹ *Goldstein* leads to the ultimate conclusion that protection of ideas under state law is not impliedly preempted by the Copyright Act. Therefore, the analysis of either type of

preemption, express or implied, should reach the same conclusion: ideas are not within the subject matter of copyright.¹⁶² Additionally, a validation of the state right under Section 301 indicates that an implied preemption analysis will result in the same finding of absence of preemption. Nevertheless, the influence of a negative finding under Section 301 is only conjecture or speculation. It remains necessary to perform an actual legal analysis of the potential implied preemption of idea-submission contract claims.

THE EXHAUSTIVE FORMULATION OF THE FEDERAL OBJECTIVES

It is clear that a contract claim may be subject to implied preemption if the contractual right is deemed to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁶³ Professor Goldstein looks to the fact that the Copyright Act, including Section 301, represents the exclusive formulation of federal objectives in the field.¹⁶⁴ He then concludes that a state protection that is not preempted under Section 301 presumably would not be preempted¹⁶⁵ under implied preemption because it would not constitute an obstacle to the execution of Congress' objectives.

B. Implied Preemption Analysis

(1) The Effect of the Nature of Ideas on Implied Preemption

The question then becomes to what extent ideas can be considered "unattended" by copyright, thus leaving states free to formulate a legal protection. An answer to this question is found in the analysis of *Goldstein*, the Supreme Court case that used this concept of "unattended area" to justify that this area can be the subject of a state statute providing for a property right.

Under this theory, the *Goldstein* court decided a

case involving a state statute prohibiting unauthorized duplication of recordings of musical performances, at a time when federal copyright protection was not available to sound recordings.¹⁶⁶ The issue at stake, though quite remote in its nature from an idea, was, however, similar to an idea in its legal implications, in that ideas are not now protected and sound recordings were not protected at the time of this case. The Court held that Congress had left unattended the

THE free marketplace of ideas and the necessity of a strong public domain also benefit from the contractual protection of idea-disclosers.

area of sound recordings, and that, therefore, state protection of sound recordings was not preempted by the Copyright Act.¹⁶⁷ Although Congress did not leave the area of ideas unattended since it expressly provided that federal copyright could not apply to ideas,¹⁶⁸ Congress in no way provided that ideas should not be protected by states. Ideas could therefore be considered unattended under this theory, and idea-submission contract claims could escape preemption because of the very nature of ideas. This argument can be upheld as long as states do not award any copyright on ideas.¹⁶⁹

However, the major obstacle faced by this argument is the position of the Supreme Court in *Goldstein* where the Court implied that Congress, by refusing protection to ideas, did not intend to leave them unattended, but rather to leave them in the public domain. We therefore reach an impasse under this fundamental case. The impasse can be resolved by taking into account not only the nature of the concept of idea, but also the entirety of the legal remedy afforded by States, in idea-submission contracts cases.

(2) The Legal Treatment of Idea-Submission Contracts Under the Implied Preemption Analysis

JURISPRUDENTIAL ANALYSIS

In *Aronson v. Quick Point Pencil Company*,¹⁷⁰ the Supreme Court held that a state's enforcement of an express contract to pay for a technical idea was not preempted by federal patent law. Although the facts of this case did not involve a literary or artistic idea, the principles of this case can still be applied to non-technical ideas.¹⁷¹ The court reviewed the effect of state law on the accomplishment of the three Congressional purposes of the federal patent system, which, once applied to culture and arts instead of technique, are perfectly in line with the goals of copyright.¹⁷²

Idea Men Should be Able to Enforce Their Contractual Rights

These purposes are providing incentive, encouraging disclosure, and keeping ideas in the public domain.¹⁷³ The court found that enforcement of the state contract law furthered the Congressional policy of encouraging disclosure, since the contract led to sale of products that revealed the idea.¹⁷⁴ Moreover, the court found that enforcement of contracts to pay for ideas would provide additional incentive to invent and would not withdraw information from the public domain. It should be noted that the factual basis for this conclusion was that the idea that was the subject matter of the contract had never been in the public domain prior to the contract to manufacture the product.¹⁷⁵ This consideration does not seem to forbid application of this case to literary and artistic ideas, which might have been in the public domain prior to the contract. In fact, the court emphasized that enforcement of the contract would not prevent third parties from copying the idea: in no way could the state doctrine be construed as awarding the creator of the idea copyright-like monopoly rights in it.¹⁷⁶

Thus, enforcement of idea-submission contract claims neither conflicts with the objectives of Congress, nor undermines the fundamental underpinning of copyright, according to which ideas are free as the air. On the contrary, strong theoretical arguments can be inferred from the *Aronson* case. All of them plead in favor of an absence of preemption of idea-submission contract claims.

THEORETICAL CONSIDERATIONS

Professor Nimmer wrote that the arguments developed in the *Aronson* case seemed to be equally applicable to literary ideas.¹⁷⁷ The strongest argument supporting the absence of implied preemption lies in the fact that idea-submission contracts promote the general circulation of and public access to ideas.¹⁷⁸ The recipient of an idea, pursuant to an idea-submission contract, is allowed to obtain an idea that she otherwise would not have created or for which she would have had to expend time and money to create on her own. The recipient thereafter often develops the idea and publishes the product of this development. Idea-submission contracts can thus be deemed to promote public access to the idea. Absent a contractual protection of the idea-creator, literary and artistic ideas would often remain undisclosed.¹⁷⁹ Public access to an optimal number of creations is therefore indirectly enhanced by idea-submission contracts.

Besides, the free marketplace of ideas and the necessity of a strong public domain¹⁸⁰ also benefit from the contractual protection of idea-disclosers. In the event the recipient should publish the idea without transforming it into a copyrightable material, the public would remain free to use the idea. In sum, far from being in conflict, idea-submission contract claims and copyright are genuinely complementary. This is certainly what Professor Cohen and her co-authors intended to signify, when they wrote that "it is important to view copyright as one of many options for providing

incentives for creation and dissemination of new works."¹⁸¹ Contracts should be considered to be another of these options.

V. Conclusion

Idea-submission contract claims should not be subject to preemption. Enforcement of these claims is widely accepted by courts. Even though some jurisdictions, such as New York, doggedly cling to property and copyright- and patent-like novelty and concreteness requirements,¹⁸² scholars and attorneys will, hopefully, manage to convince these courts that contractual freedom is paramount and that the debated preliminary requirements are misplaced, if not erroneous.

Idea-submission contract claims occupy a privileged position in the legal arsenal available to idea-creators. Ideas are indeed exterior to the subject matter of copyright,¹⁸³ and the rights they award are simply not equivalent to those granted by copyright.¹⁸⁴ Idea-submission contract claims therefore escape express preemption dictated by Section 301 of the Copyright Act.

As far as constitutionally dictated preemption is concerned, the implied preemption test must be conducted, even if express preemption was not found.¹⁸⁵ Idea contract claims also pass muster in this inquiry. In fact, relevant case law,¹⁸⁶ complemented by strong theoretical arguments,¹⁸⁷ rejects implied preemption here, since idea-submission contracts and copyright are absolutely not rivals. They can even legitimately be considered allies in the support of idea disclosure to the public, which plays an eminent role in the development of creation, culture and knowledge.

Contract claims may indeed provide a remedy to idea-men without being absorbed by federal law. Courts should therefore systematically disregard preemption when an actual contract for the submission of a true idea was entered into. It will be justice to idea-men, by providing them with an opportunity to be compensated for having supplied one of the rarest commodities in the entertainment industry: a good idea.

ENDNOTES

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¹ 248 U.S. 215, 250 (1918).

² 101 U.S. 99 (1879).

³ See *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231, 239 (2d Cir. 1983); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Universal Pictures Corp. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Dymow v. Bolton*, 11 F.2d 690, 691 (2d Cir. 1926).

⁴ 17 U.S.C. § 102 (b) (2003).

⁵ This term is defined by Professor Nimmer as “one who creates only an idea, not literary property, or, having created literary property, finds that only his idea and not his ‘expression’ has been borrowed.” MELVILLE B. NIMMER AND DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 16.01 (2001) [hereinafter NIMMER].

⁶ See, e.g., Harold C. Havighurst, *The Right to Compensation for an Idea*, 49 NW. U. L. REV. 295 (1954); Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119 (1954).

⁷ NIMMER, *supra* note 5, § 16.04 (stating, under the prevailing view, that an enforceable express contract arises if the person to whom the idea is submitted, has expressly promised to pay for it, in the event of its use).

⁸ See, e.g., CAL. CIV. CODE § 1621 (West 1994).

⁹ See Patrick McNamara, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 B.C. L. REV. 963 (1983).

¹⁰ 299 P.2d 257 (Cal. 1956) (en banc).

¹¹ See, e.g., *Klekas v. EMI Films, Inc.*, 198 Cal. Rptr. 296, 304 (Cal. Ct. App. 1984).

¹² *Wilder*, 299 P.2d at 261-62.

¹³ *Id.* at 273.

¹⁴ *Id.* at 274.

¹⁵ *Id.* at 262.

¹⁶ *Id.* at 273.

¹⁷ *Id.* at 265.

¹⁸ *Id.* at 270.

¹⁹ *Id.*

²⁰ 158 Cal. Rptr. 704, 709 (Cal. Ct. App. 1979).

²¹ 319 P.2d 776 (Cal. Ct. App. 1957).

²² *Id.* at 781.

²³ *Id.* at 782.

²⁴ See NIMMER, *supra* note 5, § 16.08[B] at 16-60.

²⁵ 54 Cal. Rptr. 130 (Cal. Dist. Ct. App. 1966).

²⁶ *Id.* at 142.

²⁷ *Id.* (quoting NIMMER, *supra* note 5, § 173.2).

²⁸ *Desny v. Wilder*, 299 P.2d 257, 264 (Cal. 1956) (en banc).

²⁹ See *Whitfield v. Lear*, 751 F.2d 90, 93 (9th Cir. 1984); see also *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522, 527 (Cal. Ct. App. 1982).

³⁰ Nory Miller, *Selection Processes: An Inadvertent Gap in Intellectual Property Law*, 87 COLUM. L. REV. 1009 (1987).

³¹ See, e.g., *McGhan v. Ebersol*, 608 F.Supp. 277, 284 (S.D.N.Y. 1985).

³² *Id.*

³³ *Fendler v. Morosco*, 171 N.E. 56 (N.Y. 1930) (“Concreteness” signifies that an idea is sufficiently developed, whereas “tangible form” means that the idea has been materialized into a form that can be apprehended by the senses).

³⁴ *Plus Promotions, Inc. v. RCA Mfg.*, 49 F.Supp. 116 (S.D.N.Y. 1943) (holding a well worked out, but oral, idea for producing records without artists’ names, distributing them via newspaper, and aiming them at low-income purchasers to be not sufficiently concrete).

³⁵ *O’Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946).

³⁶ *Id.*

³⁷ *Alberts v. Remington Round*, 23 N.Y.S.2d 892 (1940).

Idea Men Should be Able to Enforce Their Contractual Rights

³⁸ NIMMER, *supra* note 5, § 16.08[A], at 16-55.

³⁹ See Note, *Beyond the Realm of Copyright: Is There a Legal Sanctuary for the Merchant of Ideas*, 41 BROOK. L. REV. 284, 290 (1974).

⁴⁰ *Id.*

⁴¹ 195 N.Y.S. 574 (N.Y. App. Div. 1922).

⁴² *Id.* at 575.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Downey v. General Foods Corp.*, 286 N.E.2d 257 (N.Y. 1972); see also *Ed Graham Products v. National Broadcasting Co.*, 347 N.Y.S.2d 766 (N.Y. Sup. Ct. 1973); *Bailey v. Haberle Congress Brewing Co.*, N.Y.S.2d 51 (Syracuse Mun. Ct. 1948).

⁴⁷ See generally Peter Swarth, *The Law of Ideas: New York and California are More Than 3,000 Miles Apart*, 13 HASTINGS COMM. & ENT. L.J. 115 (1990).

⁴⁸ See, e.g., *Stone v. Marcus Loew Booking Agency*, 63 N.Y.S.2d 220 (N.Y. Sup. Ct. 1946); *Carneval v. William Morris Agency*, 124 N.Y.S.2d 319 (N.Y. Sup. Ct. 1953).

⁴⁹ See Miller, *supra* note 30, at 1018 n.65; Kim Radbell, *The Law of Idea Misappropriation in New York: An Argument for a Change*, 5 HOFSTRA PROP. L.J. 427, 433 (1993).

⁵⁰ NIMMER, *supra* note 5, at 16-53.

⁵¹ This is especially true since *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), defined originality as deriving from independent creation and the presence of at least a minimal level of creativity. The Court added that a small amount of creativity will suffice to constitute originality.

⁵² See *Murray v. National Broadcasting Corp.*, 671 F. Supp. 236, 238 (S.D.N.Y. 1987), *aff'd*, 844 F.2d 988 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 391 (1988) (holding that plaintiff's idea for a sitcom about a black family was not novel, but merely combined two existing ideas: the family sitcom and the casting of black actors in non-stereotypical roles).

⁵³ Swarth, *supra* note 47, at 127.

⁵⁴ *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

⁵⁵ NIMMER, *supra* note 5, §16.08[B] at 16.61-62.

⁵⁶ Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 U.C.L.A. ENT. L. REV. 9, 62 (1994).

⁵⁷ *Id.*

⁵⁸ See 17 U.S.C. § 301(a) (2003).

⁵⁹ H.R. REP. NO. 94-1476, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5747 [hereinafter House Report].

⁶⁰ 17 U.S.C. § 301(a).

⁶¹ 17 U.S.C. § 102(a).

⁶² Section 102 provides that "(a) Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression... (b) In no case does Copyright protection for an original work of authorship extend to any idea...."

⁶³ See, e.g., *Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997).

⁶⁴ Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107, 1119 (1977).

⁶⁵ However, Professor Goldstein categorically rejects this interpretation.

⁶⁶ See *infra* Part III B. 2.

⁶⁷ 104 F.3d at 1453.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ No. CV-00-02279 CAS (JWJx), 2000 U.S. Dist. LEXIS 7662, at *13 n.3 (C.D. Cal. Apr. 24, 2000).

⁷² 96 F. Supp. 2d 1053 (C.D. Cal. 2000).

⁷³ *Id.* at 1058-59.

⁷⁴ 51 F. Supp. 2d 840, 849 (W.D. Mich. 1999), *aff'd* 256 F.3d 446 (6th Cir. 2001).

⁷⁵ *Endemol Entm't B.V. v. Twentieth Television Inc.*, 48 U.S.P.Q.2d 1524, 1526 (C.D. Cal. 1998).

FILM & TV

- ⁷⁶ *Id.*
- ⁷⁷ *Id.*
- ⁷⁸ See, e.g., Samuel M. Bayard, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, oh my!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603 (2001).
- ⁷⁹ *Id.* at 1525.
- ⁸⁰ See *Feist*, 499 U.S. at 340.
- ⁸¹ See *Endemol*, 48 U.S.P.Q. 2d at 1525.
- ⁸² See *Selby*, 96 F. Supp. 2d at 1053.
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ 177 F. Supp. 2d 1050 (C.D. Cal. 2001).
- ⁸⁶ *Id.* at 1057-58. However, in *Chesler*, the court did not decide in favor of preemption because it found that the claims based on express contract were not based on rights equivalent to copyright. *Id.* at 1059.
- ⁸⁷ See Goldstein, *supra* note 64.
- ⁸⁸ House Report, *supra* note 59, at 57.
- ⁸⁹ See *supra* notes 1 to 7, and related text.
- ⁹⁰ 17 U.S.C. § 301(a) (1996).
- ⁹¹ See PAUL GOLDSTEIN, COPYRIGHT § 15.2 (2d ed. 2001).
- ⁹² *Id.*
- ⁹³ *Endemol*, 48 U.S.P.Q.2d at 1526.
- ⁹⁴ 17 U.S.C. § 301.
- ⁹⁵ Although the formulation of Section 301 mentions as an initial requirement the equivalence condition, it is more logical to conclude the analysis of express preemption with the study of equivalence; a criterion that entails a discussion of the object of preempted rights, beyond their subject, which the article examined in III. A, and III. B.
- ⁹⁶ 17 U.S.C. § 301(a).
- ⁹⁷ 376 U.S. 225 (1964).
- ⁹⁸ 376 U.S. 234 (1964).
- ⁹⁹ See Goldstein, *supra* note 64.
- ¹⁰⁰ Additionally, a state doctrine would obviously be voided if it covered subject matter falling within the Congressional power under the Constitution's Intellectual Property Clause.
- ¹⁰¹ 17 U.S.C. § 106.
- ¹⁰² See Goldstein, *supra* note 91, § 15.2.1.1.
- ¹⁰³ *Id.*
- ¹⁰⁴ *Id.* (quoting H.R. Rep. no. 94-1476, at 131 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5747).
- ¹⁰⁵ The "spirit of the statute," its essence, the policy accounting for its enactment.
- ¹⁰⁶ 17 U.S.C. § 106(1), (2) (2003).
- ¹⁰⁷ See *infra* Part III.C.2.
- ¹⁰⁸ See Goldstein, *supra* note 64, at 1113.
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Id.*
- ¹¹¹ House Report, *supra* note 59, at 132.
- ¹¹² *Id.* at 24; see Goldstein, *supra* note 64, at 1113-14; see also NIMMER, *supra* note 5, § 1.01[B][1][f][i].
- ¹¹³ Goldstein, *supra* note 64, at 1117.
- ¹¹⁴ See NIMMER, *supra* note 5, § 1.01[B][1][f][i] n.177. "Although the Justice Department letter objected mainly to the reference to misappropriation, it also suggested deletion of the other listed causes of action in § 301 (b) (3), on the ground that they, too, may be construed to negate preemption." *Id.*
- ¹¹⁵ Maureen A. O'Rourke, *Drawing the Boundaries Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 518 (1995).
- ¹¹⁶ 86 F.3d 1447 (7th Cir. 1996).
- ¹¹⁷ *Id.* at 1454.
- ¹¹⁸ See, e.g., Bayard, *supra* note 78, at 618.

Idea Men Should be Able to Enforce Their Contractual Rights

¹¹⁹ See, e.g., *Lennon v. Seaman*, 63 F. Supp. 2d 428 (S.D.N.Y. 1999).

¹²⁰ *Id.* at 437; see also *Architectronics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425, 438-41 (S.D.N.Y. 1996) (holding that a promise in a contract case is an extra element that prevents breach of contract actions from copyright preemption).

¹²¹ *Brown v. Mojo Records, Inc.*, No. VC-00-286, 2000 U.S. Dist. LEXIS 9155 (D. Ore. June 6, 2000).

¹²² *Id.* at *12.

¹²³ *Id.*

¹²⁴ NIMMER, *supra* note 5, § 16.04[C] at 16-25.

¹²⁵ See *McNamara*, *supra* note 9, at 984.

¹²⁶ See *supra* Part II.A.1.

¹²⁷ 50 U.S.P.Q.2d 1957, 1959 (S.D.N.Y. 1999).

¹²⁸ *Id.*

¹²⁹ 177 F. Supp. 2d 1050 (C.D. Cal. 2001).

¹³⁰ *Id.* at 1059.

¹³¹ See NIMMER, *supra* note 124.

¹³² 17 U.S.C. 106 (2003).

¹³³ See *Bayard*, *supra* note 78, at 619.

¹³⁴ 48 U.S.P.Q.2d 1524 (C.D. Cal. 1998).

¹³⁵ *Id.* at 1525.

¹³⁶ *Id.* at 1528.

¹³⁷ *Id.*

¹³⁸ 51 F. Supp. 2d 840 (W.D. Mich. 1999), *rev'd*, 256 F.3d 446 (6th Cir. 2001).

¹³⁹ *Id.* at 847.

¹⁴⁰ *Id.* at 853.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 96 F. Supp. 2d 1053 (C.D. Cal. 2000).

¹⁴⁴ *Id.* at 1062.

¹⁴⁵ *Id.*

¹⁴⁶ See *Wrench*, 51 F. Supp. 2d at 840 (quoting *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987)).

¹⁴⁷ *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d at 977. In this case, a joint venture brought an action against subdivision developers for copyright infringement, unjust enrichment and unfair competition, alleging that developers misappropriated its time and effort, and used a copyrighted tentative map to develop property previously owned by the joint venture. Judge Thompson held that the unjust enrichment and unfair competition claims were preempted by federal copyright law. *Id.*

¹⁴⁸ *Accord Bayard*, *supra* note 78, at 630.

¹⁴⁹ See *ProCD, Inc. v. Zeiderberg*, 86 F.3d 1447 (7th Cir. 1996).

¹⁵⁰ David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 58 (1999).

¹⁵¹ U.S. CONST. art. VI, cl. 2.

¹⁵² *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁵³ See *supra* Part III.

¹⁵⁴ *Id.*

¹⁵⁵ *Freightliner Corp. v. Myrick*, 541 U.S. 280, 288 (1995).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 288.

¹⁵⁸ GOLDSTEIN, *supra* note 91, § 15.3.3.

¹⁵⁹ See *supra* Part I.

¹⁶⁰ 412 U.S. 546, 571 (1973).

¹⁶¹ See *supra* Part III. B. 2.

¹⁶² *Id.*

¹⁶³ *Hines*, 312 U.S. at 57.

¹⁶⁴ See GOLDSTEIN, *supra* note 91, § 15.9.2.

FILM & TV

¹⁶⁵ *Id.*

¹⁸³ *See supra* Part III. B. 2.

¹⁶⁶ *See* Goldstein v. California, 412 U.S. at 546 (1973).

¹⁸⁴ *See supra* Part III. C. 2.

¹⁶⁷ *Id.* at 571.

¹⁸⁵ *See supra* Part IV. A. 1.

¹⁶⁸ *See* 17 U.S.C. § 102(b) (2003).

¹⁸⁶ *See supra* Part IV. B. 2. a.

¹⁶⁹ All scholars and commentators agree that protection of ideas by a state property theory is undoubtedly preempted. *See, e.g.,* Margreth Barrett, *The "Law of Ideas" Reconsidered*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 691, 717 (1989); Sobel, *supra* note 56, at 27; David M. McGovern, *What is Your Pitch? Idea Protection is Nothing but Curveballs*, 15 LOY. L.A. ENT. L. REV. 475, 486-88 (1995).

¹⁸⁷ *See supra* Part IV. B. 2. b.

¹⁷⁰ 440 U.S. 257 (1979).

¹⁷¹ The United States Patent and Trademark office had refused a patent for the idea. The contract selling the idea for the new type of key holder was not contingent on the obtaining of a patent.

¹⁷² *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-81 (1974).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 262.

¹⁷⁵ The product was the manifestation of the idea. Neither the product nor the idea had been available to the public prior to the contract. *Id.* at 263.

¹⁷⁶ *Id.* at 264.

¹⁷⁷ NIMMER, *supra* note 5, § 16.04.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See* Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560, 560-61; *see also* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 992 (1990) ("Courts invoked the Public Domain when the breadth of plaintiff's asserted property rights threatened, as a practical matter, to prevent many other authors from pursuing their craft.").

¹⁸¹ JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (Fall 2002).

¹⁸² *See supra* Part II.