Further Remarks on Compensation for Ideas in California

Benjamin Kaplan*

On three separate occasions the California Supreme Court has dealt with the problem of compensation for submitted "ideas" as it arises in the motion picture and broadcast fields. In an earlier article in these pages I analyzed the relation of the second brace of supreme court cases to the first.1 The present paper will discuss the court's third pronouncement, its decision in the case of Desny v. Wilder.2 My previous article adopted a tone of cautious reserve and avoided prophecies about the future trend of California law. I fear that the present article will have to be no less circumspect.

I

The second group of cases, of which Weitzenkorn v. Lesser3 was the most important, sought to lay down a comprehensive set of rules for handling those difficult situations where an outsider submits an idea or a scenario or script in more or less detail, to a producer, and claims compensation for the producer's alleged subsequent use of it. This legal pattern was as follows. Quite apart from any claimed agreement between the parties, the outsider might charge the producer with plagiarism, asserting that the production was a prohibited copy of the submitted composition in the sense of the law of copyright. Copyright, said the court, does not protect an idea as such, it protects only expression or form; so it would be impossible on this basis to fasten liability on a producer for using a general theme suggested by an outsider, provided the producer took pains not to imitate any accompanying detail. The claim of plagiarism, sounding in tort, might be recast as one in strict quasi-contract, contract implied-in-law, if the pleader

---

chose to demand compensation to the extent of the producer's unjust enrichment by reason of the misappropriation; although the measure of damage on this basis might be different from that for tort proper, the test of liability would be the same. For it is essential to a finding of misappropriation that "property" be taken; and in the court's view an idea, as distinguished from its expression or form, is not property for this purpose. So ordinary copyright infringement must still be shown. But competent parties may make binding agreements, true contracts, on almost any subject matter. Accordingly, upon a showing of such an agreement, a producer could be held on a contract, express or implied-in-fact, to pay an agreed price or reasonable value for using even a raw, undeveloped, commonplace idea. The judges, however, appeared to be skeptical about whether agreements to pay for such disembodied figments were in fact made in the great Hollywood crucible. This emerges in a passage of Justice Edmonds' opinion in the Weitzenkorn case addressed to express contract but equally pertinent to contract implied-in-fact:

It is conceivable, even though improbable, that Weitzenkorn might be able to introduce evidence tending to show that the parties entered into an express contract whereby Lesser and Lesser Productions agreed to pay for her production regardless of its protectibility and no matter how slight or commonplace the portion which they used.

The definition of copyrightable matter and copyright infringement adopted in these 1953 decisions is the conventional one; the court was recanting some heretical holdings in prior cases. By insisting on the same showing for quasi-contract liability as for copyright infringement, the court

---


5 Weitzenkorn v. Lesser, 40 Cal. 2d 778, 795, 256 P.2d 947, 959 (1953). That this view of "property" is not inevitable, see Kaplan, Implied Contract and the Law of Literary Property, 42 Cal. L. Rev. 28, 33-34 (1954). In suggesting that quasi-contractual recovery would be denied for misappropriation of a mere idea, the court no doubt had in mind the case where the producer obtained access to the idea by voluntary disclosure on the part of the outsider or in some other lawful way, and then used it without permission. Would the court be prepared to hold that the producer was equally free of liability if he secured access to the idea by rifling another's desk drawer? Cf. Prince Albert v. Strange, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).

6 It remains to be seen how a "property" requirement will be formulated where it is a business scheme that is claimed to have been misappropriated. Cf. Glane v. General Mills, Inc., 298 P.2d 626 (Cal. App. 1956), hearing granted by supreme court, Aug. 8, 1956, appeal dismissed upon settlement.

was evidently striving to prevent casual depreciation of the copyright standard; and by marking quasi-contract off from "true" contract it may have hoped to compel careful appraisal of any claimed elements of actual agreement between the parties. But it was evident that the entire 1953 formulation was not a more certain guide to future decision than other familiar statements or restatements of law, and was probably a less certain guide than most. The line between idea and expression or form is hard to maintain, as modern copyright decisions amply show. Then there are the well-known difficulties in keeping a category of true contract distinct from a category of contract implied-in-law. One could anticipate trouble in assessing the meaning and weight of any consensual elements in a transaction between producer and outsider. Submissions are almost always made with a view to compensation. The implications of a promise on the part of the producer to pay reasonable compensation in case of use are therefore near at hand. They are indeed all too near at hand, and it would take a nice discrimination to avoid thrusting a liability on the producer in circumstances really barren of the ordinary prerequisites to contract formation. Take a case where an outsider discloses an idea to a producer without prearrangement, and ask whether it is fair to imply a promise by the producer and, if so, on what terms. Consider, too, whether a jury is likely to make the necessary discriminations under even the best instructions. The 1953 decisions did not undertake to set out the inferences as to existence or absence of agreement which would be permissible or compelled in standard situations likely to arise for decision; the matter was left at large except for those slanting, skeptical observations which have been quoted. One could anticipate trouble, too, in determining whether or to what extent a producer had in fact embodied a particular submission in his production: such use was apparently conceived to be a condition of liability, but as a raw idea underwent transformation on the long road to the finished motion picture or radio or television show it would be hard to say whether its identity was preserved or lost. These and other difficulties were touched on in my earlier article; and from the vantage point of counsel experienced in Hollywood modes of dealing, Mr. Harry L. Gershon wrote elsewhere of the evidentiary problems that were likely to arise under the Weitzenkorn dispensation.


9 See *Id.* at 35.

10 Dean Havighurst, reviewing "idea" cases mostly in the business—as distinguished from the literary—field, indeed concludes that "true implied in fact promises to pay for ideas are rare." Havighurst, *The Right to Compensation for an Idea*, 49 Nw. U. L. Rev. 295, 311 (1954).

11 Following the Weitzenkorn theory, could not the court go further on suitable facts and raise an implied promise to pay for experimental use of a submission even if the producer ultimately discarded it and gave it no place in the production? See Kaplan, *Implied Contract and the Law of Literary Property*, 42 Calif. L. Rev. 28, 38 (1954).

Desny v. Wilder, which put the Weitzenkorn formula to its first test in the supreme court, involved the submission of an idea and synopsis for a motion picture. Desny's amended complaint relied on an alleged agreement in its first count, and on misappropriation in its second and third counts. The action was pending in the superior court at the time of the 1953 decisions. Taking heart from what appeared to be a more sympathetic understanding by the supreme court of producers' problems than the court had exhibited in prior decisions, and anxious, we may guess, to steer clear of the jury if that was at all possible, the defendants moved for summary judgment on affidavits and a deposition of the plaintiff Desny (viewed as the equivalent of an affidavit in opposition to the motion). The superior court granted the motion and dismissed the action. On review the district court of appeal voted to reverse with respect to the first count. After granting a hearing, the supreme court ruled to the same effect, with the result that the case was remanded for trial on the first count. It is a cruel disappointment to scholars, if not to the parties, that the case was settled before it reached trial.

Being ignorant of what exactly the defendants believed they could establish at full trial, we can hardly be critical of their tactic in pressing for summary judgment. Still we may note preliminarily that on this basis they had to grant that the plaintiff's pat statement about the facts of the submission was true. They had in effect to concede use of the plaintiff's submission except as that might be disproved on the face of things by comparison of the submission with the defendants' production. And they could not convincingly exploit arguments about the lack of authority of the de-

---


14 In memorandum opinion granting the motion the superior court expressed "serious misgivings over the wisdom of the present state of the law," that a "mere idea may not be safeguarded" in the absence of agreement, but felt bound by the Weitzenkorn, Kurlan and Burris cases.


17 Variety, Aug. 21, 1957, p. 20, reported that $14,350 was paid the plaintiff in settlement of the action.

18 Note especially the plaintiff's testimony, set forth in the text below, that he discussed compensation in a conversation with the defendant Wilder's secretary.
fendant Wilder’s secretary—who alone dealt with the plaintiff Desny—to act for the defendants.19

Here is Desny's account of the facts. (If I quote at undue length from the record, the reader may excuse it as a contribution to the literature of Hollywood folkways). In November 1949 Desny called the office of the defendant Billy Wilder, a writer-producer-director for the defendant Paramount. Wilder's secretary answered the telephone. On hearing that Desny wanted to see Wilder, she naturally sought to insulate her boss.

She said, “He doesn't see strangers and he is very busy... What is it about? I have to know the nature.”

Thereupon Desny told her “the nature”:

I told her that it was the life story of Floyd Collins who was trapped and made sensational news for two weeks, headlines, front-page right-hand corner, all over the country, and I told her the plot.

I described to her the entrapment and the death, in ten minutes, probably.

I described the central idea. The main emphasis was the central idea, which was the entrapment, this boy who was trapped in a cave eighty-some feet deep. I also told her the picture had never been made with a cave background before.

Wilder’s secretary “seemed very much interested and she liked it”; but when Desny said he wanted to send her a copy of his story, more than sixty pages long, she said:

“Oh, no. Billy Wilder won’t read it... If you sent it as you want to send it Billy Wilder will not accept it. It has to be sent to the script department, and the script department, in case they think it is fantastic and wonderful, they will abbreviate it and condense it in about three or four pages, and the producers and directors get to see it.”

Desny said he didn’t want his story to be thus “hacked,” and proposed that he outline it himself. “She said, ‘Why don’t you do that?’” Desny “wrote an outline of about three or four pages in handwriting,” and telephoned two days later. On this occasion Desny read his outline to Wilder’s secretary, who took it down in shorthand. “‘Well,’ she said, ‘It seems interesting.’... She said that she would talk it over with Billy Wilder and she would let me know...”

Under examination by defendant’s counsel, Desny testified to some talk about compensation during this second telephone conversation, but it does

---

not appear whether this talk occurred before or after the dictation of the synopsis:

Q. Mr. Desny, did you make any statement at all to this secretary of Billy Wilder, in that second telephone call which you say occurred in November 1949, to the effect that you were reading her the outline or telling her about your synopsis for the purpose of selling it to Billy Wilder and Paramount Pictures, and that they could use it only if they paid you the reasonable value of it?
A. Yes, definitely. I made it clear to her that I wrote the story and that I wanted to sell it.

I naturally mentioned again [sic] that this story was my story which has taken me so much effort and research and time, and therefore if anybody used it they will have to pay for it, because I made it clear to her that I didn’t write the story for pleasure.
Q. What did she say?
A. She said that if Billy Wilder of Paramount uses the story, “naturally we will pay you for it.”

Desny left his telephone number but no one called him. By July 1950 Paramount was making the accused picture. Desny lodged a protest at that time. The picture appeared in July 1951 under the title of “Ace in the Hole” or “The Big Carnival,” with Wilder receiving credit as co-author, producer and director. The lawsuit was begun a year later, claiming damages of $150,000.20

With respect to the content of the plaintiff’s submission and the defendants’ picture: Desny’s outline or synopsis was faithful to the historical facts of the well-known Floyd Collins episode.21 It described the role of the first reporter on the scene—who was subsequently awarded a Pulitzer prize—and seemingly attributed the tragic outcome of the affair to tumult and disorganization generated by the glaring publicity that beat on the Kentucky scene. One fictional element did appear in the synopsis:

F. [Collins, already trapped] told the reporter of a horrifying dream he had had, and he feared the curse of the dead Indians for having disturbed their grave . . . .

The Paramount picture reminds the audience of the Collins tragedy, but takes as its theme “what might have happened to a group of . . . fictional characters in 1950 if they had come into contact with a situation similar to the Floyd Collins incident of 1925.”22 The mis-en-scène is New Mexico. The chief character is Tatum, a reporter down on his luck who learns by

20 An accounting of profits was also sought.
21 This appears from a comparison of Desny’s synopsis with material in the New York Times and American Mercury which he testified he had used in research.
22 46 Cal. 2d at 747 n.11, 299 P.2d at 275 n.11.
chance that a man is trapped in an old Indian cliff dwelling. With the Collins incident in mind, he exploits his windfall, prolonging the rescue while building up a carnival of publicity and enjoying the profits of his exclusive interviews. When the trapped man dies, Tatum realizes that he is a “murderer.” He falls out with the local sheriff and the victim’s wife, his confederates, and is himself killed. Various elements of the Floyd Collins story appear in the picture—the pinning of the victim by a rock wedge or slab, the means of the proposed rescue, the discord between the natives and the rescue crew, the excursion trains running to the grisly scene, the suspicion that the rescue was a hoax, etc. The victim’s fear of the dead Indians’ curse also appears.

III

This array of facts does not automatically classify itself under the Weitzenkorn rules, and it is understandable that Justice Schauer’s opinion in the Desny case—Justice Carter concurring only in the result and writing a separate opinion—is lengthy and rather irresolute. As only a question of summary judgment was at bar, the court was able to dispose of the case by discussing the principles which in its view had some bearing, without facing up as carefully as it might otherwise have had to do to the specific issues of fact and law vehemently urged by the defendants. Thus the relation of the court’s general observations to the defendants’ particular contentions sometimes remains conjectural.

Justice Schauer concludes that Desny had a triable case on a theory of “implied (inferred-in-fact) contract.” We are told along the way that Justice Edmonds’ Weitzenkorn opinion was not actually a majority opinion, having been fully concurred in by only two other justices. On the other hand, “any portions of the Weitzenkorn opinion quoted herein as holdings of the court, or cited with approval, are to be understood as now having the concurrence of a majority of the court.” At no point does the Desny opinion expressly disapprove of anything that was said by Justice Edmonds in the Weitzenkorn case, and the analysis seems to follow generally similar lines. The Desny opinion is apparently intended to be a kind of restatement of Weitzenkorn with greater elaboration of doctrine, the remark just quoted serving as a caution that Desny may somewhere diverge from Weitzenkorn, but whether it does the court chooses not to say, or at least not to say distinctly.

As we have seen, Desny originally relied on misappropriation as well

---

23 Id. at 750, 299 P.2d at 277. See also notes 25 and 48 infra.
24 Id. at 732 n.7, 299 P.2d at 266 n.7.
25 But one senses a livelier realization in the later decision that the boundary between contracts implied-in-fact and implied-in-law is a shadowy one. See Id. at 734-40, 299 P.2d at 267-71.
as agreement. Perhaps because it appeared on plaintiff's deposition that he had not in fact submitted his sixty-page treatment, but only the bare-bones three-page outline or synopsis, plaintiff's counsel "conceded for purposes of argument that the synopsis submitted by plaintiff to defendants was not sufficiently unique or original to be the basis for recovery under the law of plagiarism or infringement."\textsuperscript{25}

The court deals with this concession in a gingerly way. It says that it is "not bound to accept concessions of parties as establishing the law applicable to a case,"\textsuperscript{27} and it notes that the concession was made merely\textit{ arguendo}. The court accepts plaintiff's statement that he is not pressing the theory of misappropriation, and upholds the summary judgment in favor of the defendants on the second and third counts. But it refuses to disregard a "possible property right interest in the literary composition \textit{as a subject of contract, express or implied, which could afford a basis of recovery}"\textsuperscript{28}—the italics are the court's—and in that connection it says that it is not prepared to hold on the state of the record "that plaintiff's synopsis is devoid of the elements necessary to give it some measure of \ldots protectibility" in a copyright sense.\textsuperscript{29}

Thus the court appears almost regretful that the plaintiff did not push his claim of misappropriation. It goes on to mention the theory that there may be "some nebulous middle area" of an idea cast in "concrete" form but not concrete enough to constitute a "literary property."\textsuperscript{30} Here the court appears to be toying with the notion that there may be a claim of misappropriation even where plagiarism in a copyright sense is not made out. This notion is put to one side, but is not altogether scouted. It is "unnecessary and undesirable to recognize any such hybrid," "for the purposes of this case at least";\textsuperscript{31} yet the\textit{ International News Service} case\textsuperscript{32} is cited for its recognition of one form of "quasi property," a property in news.

The conventional line between idea and expression is hard to hold, as I have already said. Would the creation of a \textit{tertium quid} amount merely to a reshuffling of categories without real effect on decision? It might ease the way to recovery for misappropriation by affording a means of circumventing the more stringent language in the cases defining copyright infringement. In any event, without the aid of any new category and rather by reference to what it apparently takes to be conventional copyright law,

\begin{itemize}
\item [\textsuperscript{25}] Id. at 728, 299 P.2d at 263.
\item [\textsuperscript{27}] Id. at 729, 299 P.2d at 263.
\item [\textsuperscript{28}] Id. at 729, 299 P.2d at 264.
\item [\textsuperscript{29}] Id. at 744, 299 P.2d at 273.
\item [\textsuperscript{30}] Id. at 728, 299 P.2d at 263, referring to Nimmer,\textit{ The Law of Ideas}, 27 So. Cal. L. Rev. 119, 140-44 (1954); cf. note 55 infra.
\item [\textsuperscript{31}] Cal. 2d at 728-29, 299 P.2d at 263.
\end{itemize}
the court in the Desny case was able to intimate that there were protectible elements in the synopsis.

I confess that I find the court's discussion of this question unsatisfying. The court's method is to show that the synopsis had some minimal originality. Later it compares gross features of the synopsis with features of the defendants' scenario, and while this comparison is nominally directed to a somewhat different problem,\(^{35}\) the court may have come away satisfied that the motion picture presumptively plagiarized the synopsis.

Desny's three-page synopsis was original in the sense that the words in their particular sequence were a product of Desny's mind. But we are surely right in assuming that the defendants' motion picture did not track Desny's word order.\(^{34}\) Desny could have made an original contribution by imaginatively reordering and reconstructing the Floyd Collins story, just as the playwright impressed his own thought and imagination on the historical facts and personages of the Madeleine Smith story in the well-known case of Sheldon v. Metro-Goldwyn Pictures Corp.;\(^{35}\) the defendants would then have been chargeable with infringement if they had copied the sequence of incidents or the lineaments of the characters as freshly depicted by Desny.\(^{36}\) But Desny recounted the Floyd Collins story as it occurred, describing the actors and the course of events as he found them in the contemporary chronicle. Was he not a copyist with respect to these features of his synopsis which alone could have been borrowed in the motion picture?\(^{37}\) There is indeed room for a qualm about the Indian curse. But this seems a small peg on which to hang judgment, even if we do not go along with the defendants' explanation that once the scene was changed to New

\(^{33}\) The comparison (46 Cal. 2d at 746–50, 299 P.2d at 274–77) was made to determine whether a triable issue existed on the defendants' use of the plaintiff's synopsis in the sense of the defendants' implied promise to compensate the plaintiff in case of use. In the court's view it may be that this "use" need not encompass the kind of imitation ordinarily required for copyright infringement.

\(^{34}\) The court rejected the defendants' suggestion that it view the motion picture. (Both the superior court and the district court of appeal had seen the picture.) Said the court: "The scope of the implications in that suggestion is persuasive to us that the issues here are not for summary disposition . . . . [I]t appears that viewing the photoplay would relate merely to the weight of the evidence." 46 Cal. 2d at 749, 299 P.2d at 277.

\(^{35}\) 81 F.2d 49 (2d Cir. 1936).

\(^{36}\) Ibid.; Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), both by L. Hand, C.J.

\(^{37}\) This is merely another way of saying that historical events lie in the public domain for common use; a historian may resort to other history books in writing his own if he does not imitate the other historians' modes of expression.

Conceivably an author who arduously digs out obscure historical happenings and compiles them in a work of research can secure protection against another who borrows copiously from the work while avoiding imitation of the form in which the work is cast. Cf. Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir. 1957). Desny's synopsis hardly qualifies as such a work of research.
Mexico, an Indian curse more or less automatically attached itself to the plot as a scène à faire.

To find that Desny's synopsis had protectible elements is not to advance the analysis very far in a copyright view. The question is on the extent of those elements, and again on the degree to which the accused work used them. When we ask these questions in the *Desny* case we can understand why the plaintiff in effect conceded absence of copyright infringement, and we are left to wonder why the court refused to accept this concession at full face value. Our wonderment may be somewhat dispelled as we follow the analysis of the supposed agreement between the parties.

IV

According to the defendants, all that Desny ever submitted was the veridical Floyd Collins story; the question was whether a triable issue was presented on the making of an enforceable agreement to pay for the use of this historical episode or any part of it in a motion picture—for the use, that is to say, of material unprotectible in a copyright sense, since the picture did not borrow anything, or anything substantial, which originated with Desny. The defendants laid emphasis on Justice Edmonds' remarks about the "improbability" that such an agreement would be made. They pointed out that if agreements of this sort were lightly imputed, producers' access to working themes would be cruelly obstructed by threats of action for breach of contract. And they made much of the fact that in the particular case the idea was already disclosed at the threshold of the first conversation, as it were, against the will, or at least without the acquiescence of the defendants, before any contractual arrangement was or could have been made.

With rather exceptional decisiveness the court states that no relationship of contract sprang from the first conversation. Desny was not initially invited to submit anything; and he failed to exact terms before he "conveyed" his idea. So his original disclosure was gratuitous if not officious:

> The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for his loss of bargaining power....

Here the court vaults lightly over some difficulties. The facts could be read in a different way. Could not a trier find that Desny sought and expected payment from the outset and that the secretary, viewed as a stand-in for the defendants, knew this from the beginning? Unless, then, it be assumed that she could not have cut Desny off before he made his disclosure—"conveyed" his idea—the elements of agreement might be thought to be already in the air when Desny mentioned Floyd Collins. The pinch comes

88 46 Cal. 2d at 739, 299 P.2d at 270.
COMPENSATION FOR IDEAS IN CALIFORNIA

in postulating what the terms of such an implied agreement would be. Shall we take it as part of the agreement that the idea must be novel or original in some sense? (Desny said that a story "with a cave background" had never been filmed before.) One might even ask whether Desny would be understood as offering to sell his idea, or something else. He called to see Wilder about his sixty-page "treatment"; perhaps he looked to payment only if the treatment was used, and threw out the idea gratuitously, as a bait. On the other hand, is the novelty or originality of an idea invariably the understood index of its value in the Hollywood market? And since we may imagine that an outsider's treatment does not often survive into the stage of production, are we not to infer that Desny was really seeking to sell the basic idea rather than the treatment?

The court declines to let the trier speculate on these matters. Insisting repeatedly that Desny's idea as "blurted out" was "abstract," it holds that he must previously have made his bargain, presumably a quite definite one; otherwise he cannot recover for use of the idea alone. That an outsider can make such a treaty with the producer before showing his hand is at least unlikely, as the concurring judge says. The ruling on the first conversation thus has an appearance of being hard on the outsider. We may find in it an echo, although somewhat muted, of Justice Edmonds' remarks about the improbability of bargains for the use of unprotectible material; but there is no specific reference in the Desny opinion to Justice Edmonds' statement, and the Desny opinion duly harks back to the Weitzenkorn formulation that enforceable agreements covering the submission of raw ideas are theoretically possible.

We come next to the synopsis dictated during the second conversation. This was more or less invited at the close of the first telephone conversation. And taking the facts with the usual resolution of dubious points in favor of the party resisting summary judgment, the secretary's statement about payment for use could be taken to have been made before the synopsis was read. Still we must meet the argument that the synopsis added nothing of consequence to the original submission; thus "present" consideration would be hard to find.

At one stage the court appears to merge the first conversation with the

89 Id., at 754, 299 P.2d at 280.
90 See the opinion of the district court of appeal, 286 P.2d 55, 61 (1955).
second: "the two conversations appear to have been parts of a single transaction and must be construed as such." But the court shrinks from saying that an agreement is on this account to be transposed to the start of the first conversation. At another point a highly tendentious doctrine is referred to, but again nothing definite is made of it. We are reminded that section 1606 of the California Civil Code provides in part that "a moral obligation originating in some benefit conferred upon the promisor . . . is . . . a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." Under this section the search for garden variety consideration could be abandoned, but whether the section is at all applicable to the present case is very doubtful. Does not the "promise" of section 1606 have to be express? May the secretary's statement about compensation be construed as the required promise? Can the "benefit" be said to have been conferred before the defendants actually used the plaintiff's idea or synopsis in their picture?

Without meeting head-on the question of "present" consideration, the court dwells at length on supposed differences between the first submission and the synopsis, stressing that the former was a bare idea while the latter was a "composition," a result of research marked in some degree with the stamp of Desny's own creativity. To heighten the contrast the court suggests, as has been noted, that the synopsis may have had protectible elements in a copyright sense. Here, apparently, is the court's strategic reason for rejecting the plaintiff's concession. The court then raises an implied or inferred-in-fact promise to pay for the use of the synopsis as distinguished from the idea. Although the defendants were free after the "conveyance" of the idea to prepare their own scenario based on the "public domain" episode, they might not use the plaintiff's synopsis without compensating him. That they did use it is thought to be adequately shown, for purposes of averting summary judgment in favor of the defendants, by comparing the synopsis—all of it, not merely what it supposedly added to the prior oral disclosure—with an outline of the scenario. So on the one side we have the Floyd Collins story simpliciter—plus the Indian curse; and on the other side various features of this episode, although at a fictional remove—and again the Indian curse. Finally we are left in some doubt about the

---

42 Cal. 2d at 745, 299 P.2d at 273.
43 Id. at 737–39, 299 P.2d at 269–70.
45 Cal. 2d at 741–43, 299 P.2d at 271–72.
46 The court does not go the length of saying that the stenographer's statement about payment can alone be taken as an express promise on which the defendants can be charged. The court follows Weitzenkorn in minimizing any distinction between words and other acts in their character as manifestations of assent.
nature of the use which under the terms of the inferred agreement calls for payment to Desny, and correspondingly there is doubt about how the damages were to be measured if Desny succeeded on the trial. Consider what meaning is to be attached to the words "value of his story," "manuscript," and "implemented idea" in the following passage of the opinion instructing the lower court on how it should manage the case on remand:

[T]he fact that plaintiff used the public domain material in constructing his story and synopsis would afford no justification whatsoever for defendants to appropriate plaintiff's composition and use it or any part of it in the production of a photoplay—and this, of course, includes the writing of a scenario for it—without compensating plaintiff for the value of his story. And the further fact, if it be a fact, that the basic idea for the photoplay had been conveyed to the defendants before they saw plaintiff's synopsis, would not preclude the finding of an implied (inferred-in-fact) contract to pay for the manuscript, including its implemented idea, if they used such manuscript.

When the differences between the original submission and the synopsis are washed in a moderate amount of cynical acid, do they not dissolve and disappear? True, the synopsis when dictated and transcribed could be conveniently shown to others and the reduction to writing was desired; but to attribute other virtues to the synopsis seems artificial. Again, when we ask what exactly are the terms of the promise which may be inferred in fact—for example, what "use" must have been made of the synopsis in order to justify a recovery—the opinion does not give us much to go on.

The effect of the Desny case is not to do away with the Weitzenkorn formula—the verbal structure still stands. But the lines of the formula, imprecise to begin with, are further blurred. In fairness it must be said that the Desny case is not a sure test of the court's attitude, since it had only to find on an incomplete record whether there were triable issues. Yet the case seems to trivialize the copyright standard. It shows also that in the end there are no hard limits on what the court is willing to impute to the parties as their agreement where the transaction is ill-defined, as it is likely to be. Thus contract implied-in-fact begins to look suspiciously like another name for contract implied-in-law despite the attempt in Weitzenkorn to keep them really and truly apart.48 The whole teaching of Desny may indeed be that if you have a rule that requires a showing of copyright infringement as a condition of quasi-contractual recovery, then in cases which engage the court's sympathy for the plaintiff you are likely to get mere lip service.

47 46 Cal. 2d at 750, 299 P.2d at 277.
48 I confess to a lingering doubt about the category to which the court would finally assign the case. See note 25 supra. If it remains for the trial court to say whether the synopsis had protectible elements, then, putting possible pleading difficulties to one side, an implied-in-law liability is still possible even under a strict reading of Weitzenkorn, provided imitation of those protectible elements is shown. Yet dismissal of the second and third counts is affirmed; and at the more critical places in the opinion it is contract implied-in-fact that the court seems to stress.
to the copyright standard or freehand interpretation of the transaction to find somehow an enforceable agreement implied-in-fact. In all events the mélange of propositions in the Desny opinion about agreement and misappropriation renders predictability even more of an illusion than it was after the decision of the Weitztenkorn case.

It remains to say that the few decisions of intermediate appellate courts since Desny have not explored the more recondite passages of that opinion. Thompson v. California Brewing Co.\(^4\) shows how easy it is to plead in general terms a count in express or implied-in-fact contract that will withstand demurrer, even where the idea is the rudimentary one of promoting two lines of beer, one for the female trade.\(^5\) On the other hand, where, as in Heckenkamp v. Ziv Television Programs, Inc.,\(^6\) the pleader cannot make even a plausible noise about agreement and relies on misappropriation, the copyright test may still cut him down at the start. Without going into any refinements, the trial court briskly said that the notion of a program based on files of the highway patrol was "completely in the public domain,"\(^7\) and the appellate court seemed to agree. Unlike the two cases just cited, Chandler v. Roach\(^8\) had proceeded to trial. Judgment for the defendant upon a jury verdict was set aside on the ground that the trial judge had by his instructions insisted that an idea must be "concrete" and "novel" to warrant recovery on a basis of contract implied-in-fact. One can only speculate whether the court would not have found another ground for reversal if the trial judge had been more circumspect: if, for example, he had used the "conceivable, even though improbable" language of Justice Edmonds. After the plaintiff had initially disclosed his idea for a serial program featuring a public defender's office, he worked along with the defendant producer, and negotiations between them had gone to the point of a draft agreement when the defendant withdrew on the stated ground that the idea was "too good"; thereafter the defendant produced a public defender program. The element of direct association or collaboration not only stirs sympathy for the plaintiff but suggests some inchoate agreement for compensation even though an explicit contract was not executed.

V

The California Supreme Court has been urged to say, simply, that where an outsider submits an idea, and the producer thereafter comes out with a

\(^5\) See note 5 supra, second paragraph. The court in the Thompson case also upheld a count based on "violation of confidence." This seems little more than a variant of contract implied-in-fact.
\(^7\) Id. at 299, 321 P.2d at 141. The dismissed complaint contained a count in "unfair competition" as well as a count based on misappropriation, and referred to a "conspiracy" among the defendants and violation of confidential relation.
work embodying this idea or one reasonably close to it (especially if he does so within a short time following submission), and cannot show that he already had the idea in mind at the time of submission (or perhaps was already working on it), he is bound to pay reasonable value. This the court has refused to say. The proposed rule would eliminate all need for showing ordinary elements of agreement and would tend to bar producers from using even commonplace themes which outsiders choose to mention in unsolicited correspondence. The court might well fear the effect of the adoption of such a concept on impressionable juries. It will be said that, after Desny, the proposed rule for practical purposes is the law of California, and the concern of the court with nicer doctrines is merely wordplay. We can surmise that the court was impressed with the fact that the defendants appear on the record to have been stimulated to do a cave-entrailment story by the plaintiff's reminder about Floyd Collins. Nevertheless, the painful review and restatement of doctrine that we find in Desny is not merely an elaborate way of going around the barn to find the obvious, as the concurring judge suggests. The court insists on discriminations in the continued hope that unmeritorious cases may be screened out.

Again, the court could have resorted to the rule announced in many cases around the country, dealing mainly with "business" rather than literary ideas, that there is liability for use of a "novel" and "concrete" idea disclosed in circumstances indicating that compensation is expected. This rule the court did not adopt in the 1953 decisions and still resists. It has some administrative advantages but tends again to overlook the ordinary requirements for contract formation, besides barring the possibility of a bargain for an idea neither novel nor concrete.

If the Weitzenkorn formulation is in general to be accepted, producers' counsel would ask the court to narrow the range of uncertainty in its application by requiring, as a condition of a finding of agreement where only an idea is in question, that the submission shall have been made following and in response to a quite definite invitation or solicitation. Justice Traynor's dissenting opinion in Stanley v. Columbia Broadcasting System, Inc., much of which was adopted in Weitzenkorn, contains some suggestive language on this line:

---


57 See brief for Association of Motion Picture Producers, Inc., and others as amici curiae, Desny v. Wilder, 46 Cal. 2d 715, 399 P.2d 237 (1956).

The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay . . . .

Disclosure is stressed as the important thing. If disclosure precedes the producer's promise, ordinary consideration is absent, and subsequent use by the producer is said to be merely the exercise of a common right to utilize an idea not subject to copyright protection. The producer would remain free of liability even where disclosure was made concurrently with an express statement by the outsider that he expected compensation for use, provided the producer had no opportunity to shut his eyes to the proffered idea.

The Desny opinion can be read as consistent with this refinement, as witness the statement that no contract resulted from the first telephone conversation. But once we go so far as to admit that a producer's promise may be raised from circumstances other than his own words, the time as of which an inferred promise is taken to have been made becomes a quiddity.60

Obscure the Desny opinion certainly is, but one can sympathize with the court's reluctance or rather inability to draw sharp lines. Competing policies entangle the subject. On the one hand the law resists sanctioning any private preserve of ideas. On the other hand, it is bound to acknowledge that timely recognition or recall of even a well-worn idea, without detail or elaboration, may have commercial value, and therefore comports with commonly held notions of what ought to be paid for. Add to this a desire to reward initiative; a counter-desire to discourage or at least not to compel payment for mere meddlesomeness; a drive to see that an outsider, who has trouble enough making his way, shall not be treated unfairly by the producer, often a giant girded round by lawyers and release forms; a drive in the opposite direction to protect the producer against trumped-up Bardelian demands.61 One thing can be predicted: this welter of policies is likely to throw up decisions in California no more satisfying analytically than the Desny case.

In the end producers are driven to inventing rule-of-thumb administrative devices of one kind or another within their own organizations to hold idea merchants at bay.61 Whether these can really prevent Hollywood secretaries from mixing politeness with astringency over the telephone, or quiet contract-sounding talk at the Brown Derby, appears doubtful.

61 See the idea-submission form used by the National Broadcasting Co., set out in Olsson, Dreams for Sale, 23 Law & Contemp. Probs. 34, 56–58 (1958).