

# Entertainment Law

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## Idea Protection

If the screenwriter has not yet written the screenplay she has in mind, she is unable to rely on copyright law to protect her idea. But she wants to tell a producer about her idea in case the producer wants to hire her to write it. How can you prevent the producer from stealing the idea and developing it with someone else?

### *Desny v. Wilder*, (CA. 1956).

- [Case at Google Scholar](#)
- [Case in Westlaw](#)
- [A Good Summary](#)

Writer Victor Desny called director-producer Billy Wilder to set up an appointment to meet Wilder and pitch his story idea for a movie. Wilder's secretary told Desny to write a synopsis describing the idea. Two days later, Desny called back and dictated the synopsis to the secretary. Desny told the secretary that he expected compensation if the idea was used, and she assured him that he would be paid if his idea were used. Wilder stole Desny's idea and made a movie called *Ace In The Hole*.

Desny sued and won because he made a deal that he would be paid if his idea were used. Otherwise, as the court observes, "ideas are as free as the air."

### Excerpts From *Desny v. Wilder*

California Supreme Court (1956)

SCHAUER, J.

[Desny completed an untitled dramatic composition based on the life of Floyd Collins. Desny called Wilder's office at Paramount and spoke to his secretary, stating that he wished to see Wilder. The secretary asked that he explain his purpose and he "told her about this fantastic unusual story," describing a story about a boy trapped in a cave. Desny asked if he could send a copy of his story to Wilder, but the secretary stated it would need to be edited down to a synopsis by the script department first. Desny told the secretary he would abbreviate it himself. Two days later, Desny called Wilder's office to inform her the synopsis was ready. The secretary asked that he read it to her over the phone so she could take it down in shorthand and Desny did so. The secretary stated she would talk it over with Wilder and get back to Desny. Desny told her Wilder could use the story only if they paid him "the reasonable value of it..." The secretary said that if Wilder used the story, "naturally we will pay you for it." Desny only spoke to Wilder's office again in 1950 to protest the alleged use of his composition and idea in the movie *Ace in the Hole* made by Wilder. *Ace in the Hole* closely parallels both Desny's synopsis and the history and life of Floyd Collins. It also contains a fictional incident which appears in Desny's synopsis and which he claims is his creation.]

\* \* \*

It may be that plaintiff's concessions and arguments, in the light of the pleadings and evidence, are intended to suggest that there is some nebulous middle area between an abstract idea and a literary composition, wherein the idea has been cast in "concrete" form but not "concrete" enough to constitute a literary property...

However, for the purposes of this case at least, we find it unnecessary and undesirable to recognize any such hybrid, although we are aware that the Supreme Court of the United States has spoken of a "quasi property" right in news gathered and disseminated by a news service agency. The plaintiff here, we conclude, must stand or fall, and this case will be resolved, on rules applicable to ideas on the one hand or literary property on the other.

\* \* \*

Generally speaking, ideas are as free as the air... But there can be circumstances when neither air nor ideas may be acquired without cost... The producer may think up the idea himself, dress it and portray it; or he may purchase either the conveyance of the idea alone or a manuscript embodying the idea in the author's concept of a literary vehicle giving it form, adaptation and expression. It cannot be doubted that some ideas are of value to a producer.

An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons...

\* \* \*

[W]e conclude that conveyance of an idea can constitute valuable consideration and can be bargained for before it is disclosed to the proposed purchaser ... But, assuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as "implied" or "implied-in-fact." ... Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered ... Unless the offeree has opportunity to reject he cannot be said to accept.

\* \* \*

It is not essential to recovery that plaintiff's story or synopsis possess the elements of copyright protectibility if the fact of consensual contract be found ... Neither can we hold, on the state of the record, that plaintiff's synopsis is devoid of the elements necessary to give it some measure of such protectibility. While the trial court, or an appellate court on a sufficient record, may determine the specific extent of an author's property right in any particular work ... it is unnecessary on this appeal to define the limits more exactly than has already been done.

Here, as conceded by defendants for purposes of their summary judgment motion, plaintiff, in accordance with his testimony, submitted his synopsis to them through defendant Wilder's secretary and such submission included a declaration by both plaintiff and the secretary that defendants were to pay for his story if they used it. The mere fact that at the time of plaintiff's first telephone call to Wilder's office he described the central idea of the story to the secretary in response to her insistence that he explain the purpose of his call would not as a matter of law deprive plaintiff of the right to payment for the story as discussed by him and the secretary when he again spoke with her two days later and at her request read his synopsis to her, for her to take down in shorthand for defendants' consideration; the two conversations appear to have been parts of a single transaction and must be construed as such....

### ***Montz v. Pilgrim Films & Television, Inc.***

United States Courts of Appeal Ninth Circuit (2011)

- [case on Google Scholar](#)

SCHROEDER, Circuit Judge:

In Hollywood, writers commonly submit copyrighted scripts to producers with the understanding that if the script is used, the producer must compensate the writer for the use of the copyrighted material. But what happens when the producer uses the idea or concept embodied in the script, but doesn't pay? The Supreme Court of California, in 1956, answered this question by recognizing an implied contractual right to compensation when a writer submits material to a producer with the understanding that the writer will be paid if the producer uses the concept. *Desny v. Wilder* (S.Ct. 1956).

A so-called "*Desny* claim" has remained viable under California law for over fifty years. This court applied that California law in *Grosso v. Miramax Film Corp.* (9th Cir. 2004), where we held that such an implied contractual claim is not preempted by federal copyright law. We explained that the contractual claim requires that there be an expectation on both sides that use of the idea requires compensation, and that such bilateral understanding of payment constitutes an additional element that transforms a claim from one asserting a right exclusively protected by federal copyright law, to a contractual claim that is not preempted by copyright law. *Grosso* has firm roots in our federal law as well as in the California law. Earlier, we recognized that a claim for unjust enrichment is essentially equivalent to a claim of copyright infringement and is therefore preempted. Yet we had also recognized a claim for breach of contract that was not preempted where the plaintiff establishes he had a reasonable expectation of payment for use. *Landsberg v. Scrabble Crossword Game Players, Inc.*, (9th Cir. 1986).

We recently followed *Grosso* in *Benay v. Warner Bros. Entm't, Inc.*, (9th Cir. 2010), and held a contractual claim was not preempted. We said that "[c]ontract law, whether through express or implied-in-fact contracts, is the most significant remaining state-law protection for literary or artistic ideas." *Id.* at 629. The three judge panel in this case, however, found a similar claim preempted.

We again hold that copyright law does not preempt a contract claim where plaintiff alleges a bilateral expectation that he would be compensated for use of the idea, the essential element of a *Desny* claim that separates it from preempted claims for the use of copyrighted material. We see no meaningful difference between the conditioning of use on payment in *Grosso* and conditioning use in this case on the granting of a partnership interest in the proceeds of the production. Montz, as did the plaintiffs in *Desny* and *Grosso*, has alleged he revealed his concept to defendants reasonably expecting to be compensated, if his concept was used. We conclude that the district court's judgment dismissing the contractual claim as preempted must be reversed.

Plaintiffs' complaint also alleged a claim under California law for breach of confidence. The district court dismissed it as preempted, as well, and the panel

affirmed. We also reverse the judgment dismissing that claim and remand both for further proceedings.

### **I. Factual Background**

In 1981, Plaintiff Larry Montz, a parapsychologist, conceived of an idea for a television show that would follow a team of paranormal investigators conducting field investigations. As envisioned, each episode would follow the team to different real-world locations, where they would use magnetometers, infrared cameras, and other devices to investigate reports of paranormal activity. According to the complaint, from 1996 to 2003, Montz and Plaintiff Daena Smoller, a publicist and a producer, pitched Montz's idea to television studios, producers, and their representatives, including representatives of NBC and the Sci-Fi channel. A number of meetings and discussions took place, and Montz and Smoller presented screenplays, videos, and other materials relating to their proposed show. Ultimately, the studios indicated that they were not interested.

Three years later, in November 2006, Montz and Smoller filed a complaint against Pilgrim Films & Television, Inc., NBC Universal Inc., Craig Piligian, Jason Conrad Hawes, and ten unknown defendants in federal district court, alleging copyright infringement, breach of implied contract, breach of confidence, and several other causes of action. According to the complaint, after the meetings with Montz and Smoller, NBC partnered with Piligian and Pilgrim to produce a series on the Sci-Fi Channel based on the plaintiffs' materials. The show, called *Ghost Hunters*, starred Hawes as the leader of a team of investigators who travel across the country to study paranormal activity.

Plaintiffs' complaint specifically alleged that defendants breached an implied-in-fact contract. The complaint described the terms of the agreement:

Plaintiffs communicated their ideas and creative concepts for the "Ghost Hunters" Concept to the Defendants, pursuant to the standard custom and practice in the industry with respect to the exchange of creative ideas, under the following terms:

- a. that Plaintiffs' disclosure of their ideas and concepts was strictly confidential;
- b. that the Defendants would not disclose, divulge or exploit the Plaintiffs' ideas and concepts without compensation and without obtaining the Plaintiffs' consent; and
- c. that, by accepting the Plaintiffs' disclosure of its concept, the Defendants accepted and agreed to abide by the foregoing terms.

The complaint further alleged that plaintiffs presented the concept on the express condition that they made the presentation as an offer to partner with the defendants and that plaintiffs justifiably expected to receive a share of the profits derived from any use of the idea:

The Plaintiffs presented their ideas for the “Ghost Hunter” Concept to the Defendants’ [sic] in confidence, pursuant to the custom and practice of the entertainment industry, for the express purpose of offering to partner with the Defendants in the production, broadcast and distribution of the Concept. Accordingly, the Plaintiffs justifiably expected to receive a share of any profits and credit that might be derived from the exploitation of its ideas and concepts for the Concept.

The dissent appears to overlook these clear allegations that compensation was expected in accord with industry practice.

Plaintiffs also alleged that defendants breached their confidential relationship “by taking Plaintiffs’ novel ideas and concepts, exploiting those ideas and concepts, and profiting therefrom to the Plaintiffs’ exclusion...” The complaint therefore alleged a claim under California law of breach of confidence.

## **II. Procedural Background**

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) ... The district court granted in part and denied in part the defendants’ motion. The court concluded that the complaint alleged facts sufficient to state a federal copyright claim, but that federal copyright law preempted the plaintiffs’ state-law claims. The court dismissed the state-law claims with prejudice and without leave to amend.

Plaintiffs amended their copyright claim and added Universal Television Networks as a defendant. Subsequently, the parties stipulated to the voluntary dismissal of the amended copyright claim with prejudice. With no remaining claims to be adjudicated, the district court entered final judgment in favor of the defendants. The plaintiffs timely appealed the dismissal of their breach of implied contract and breach of confidence claims.

On June 3, 2010, the three-judge panel affirmed, holding both claims preempted by federal copyright law. *Montz v. Pilgrim Films & Television, Inc.*, (9th Cir. 2010). We ordered a rehearing of this case en banc pursuant to a vote of the majority of active judges.

### III. California Implied-in-Fact Contract Law

Writers in the Hollywood film industry often submit scripts to producers, or set up meetings with them, in the hope of selling them scripts and concepts for movies. The practice has carried over into television. Since the writer is looking for someone to turn the written work into an entertainment production, writers often pitch scripts or concepts to producers with the understanding that the writer will be paid if the material is used. Since an idea cannot be copyrighted, a concept for a film or television show cannot be protected by a copyright. But the concept can still be stolen if the studio violates an implied contract to pay the writer for using it.

In *Desny*, the California Supreme Court recognized that a writer and producer form an implied contract under circumstances where both understand that the writer is disclosing his idea on the condition that he will be compensated if it is used. *Desny*. There, defendant Billy Wilder, famed director of *Sunset Boulevard* and *Witness for the Prosecution*, allegedly entered into an implied contractual arrangement that was initiated when the plaintiff telephoned Wilder's office and pitched a movie idea to Wilder's secretary who, along with Wilder, understood Wilder was to pay if he used the story. *Id.* at 273-74. Wilder produced a film, *Ace in the Hole*, allegedly based on the idea plaintiff had pitched for a movie inspired by the "life story of Floyd Collins who was trapped [in a cave] and made sensational news for two weeks." *Id.* at 262. Wilder allegedly failed to compensate the plaintiff, and the California Supreme Court held that, given the entertainment industry norms, the plaintiff had sufficiently pled the breach of an implied contract to pay for use of his idea. The issue here is whether copyright law now preempts such claims.

### IV. Copyright Preemption

The Copyright Act of 1976 expressly preempts state claims where the plaintiff's work "come[s] within the subject matter of copyright" and the state law grants "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright." ... [T]he scope of copyright subject matter does not extend to ideas that are not within a fixed medium. Section 301(b) specifically excludes non-fixed ideas from the Copyright Act's scope; the statute describes "works of authorship not fixed in any tangible medium of expression" as "subject matter that does not come within the subject matter of copyright." 17 U.S.C. 301(b). Ideas that are still purely airborne are thus not even within the subject matter of copyright. Once an idea has been written down or otherwise recorded, however, we have recognized that it satisfies the Copyright Act's writing requirement because it is fixed in a tangible medium.

For preemption purposes, ideas and concepts that are fixed in a tangible medium fall within the scope of copyright. ...[F]ixed ideas falls within the subject matter of copyright and thus satisfies the first prong of the statutory preemption test, despite the exclusion of fixed ideas from the scope of actual federal copyright protection.

Accordingly, the major focus of litigation has been on the second prong of the preemption test: whether the asserted state right is equivalent to any of the exclusive rights within the general scope of copyright. To survive preemption, a state cause of action must assert rights that are qualitatively different from the rights protected by copyright. In *Grosso*, we held that the rights created under California law emanating from *Desny* were qualitatively different from the rights protected by federal copyright law because a *Desny* claim includes an added element: an agreement to pay for use of the disclosed ideas. Contract claims generally survive preemption because they require proof of such an extra element.

The California Courts of Appeal have uniformly concluded that *Desny* claims are not preempted because they flow from agreements and understandings different from the monopoly protection of copyright law. The California decisions focus on the personal nature of the relationship formed in idea submission cases: “The creation of an implied-in-fact contract between an author, on the one hand, and an agent, producer, or director, on the other hand, is of such a personal nature that it is effective only between the contracting parties.” *Rokos*, 182 Cal.App.3d at 617, 227 Cal.Rptr. 480 (citing *Chandler v. Roach*, 156 Cal.App.2d 435, 441, 319 P.2d 776 (1957)). Thus, it is unlike a copyright that is a public monopoly. The rights protected under federal copyright law are not the same as the rights asserted in a *Desny* claim, and the California state courts have recognized this consistently over the decades.

In recent years, litigation has, not surprisingly, moved to the federal courts where defendants have hoped for greater success in pressing for copyright preemption...

In a later case, however, a district court held that an implied-in-fact contract claim survived Copyright Act preemption because it was substantively different from a copyright claim: “[T]he whole purpose of the contract was to protect Plaintiff’s rights to his ideas beyond those already protected by the Copyright Act. . . .” *Groubert v. Spyglass Entm’t Group*, (C.D.Cal. July 23, 2002). Nimmer expressly approved this decision. We agreed with this assessment when we decided in *Grosso* that copyright law does not preempt an implied contractual claim to compensation for use of a submitted idea. We reaffirm that rule today.

\* \* \*

Plaintiffs’ claim for breach of confidence also survives copyright preemption. The claim protects the duty of trust or confidential relationship between the



parties, an extra element that makes it qualitatively different from a copyright claim.

## **V. Sufficiency of the Complaint as to the Breach of Implied Contract and Breach of Confidence Claims**

Defendants argue that the complaint fails to allege sufficient facts to make out a claim for breach of implied contract. They assert that it lacks any allegation (1) that Montz and Smoller disclosed their idea for sale, (2) that they expected to be reasonably compensated for the idea, and (3) that defendants knew the conditions on which it was offered. Yet the complaint makes all three allegations and closely tracks the complaint we found sufficient in *Grosso*.

Defendants similarly argue that Montz and Smoller failed to allege sufficient facts to make out their claim for breach of confidence. They argue that there is no allegation (1) that plaintiffs disclosed “confidential and novel information,” and (2) that defendants knew it was supposed to be kept confidential. But the complaint clearly contains these allegations as well.

## **VI. Conclusion**

The judgment of the district court is REVERSED and the matter REMANDED for further proceedings on plaintiffs’ remaining claims.

### **Montz Dissents**

O’SCANNLAIN, Circuit Judge, Joined by GOULD, TALLMAN and BEA, Circuit Judges, dissenting:

Montz does not claim to have sold his rights as a copyright owner. To the contrary, he alleges that he retained those rights, and that Pilgrim implicitly promised *not* to use or to disclose his ideas *without his consent*. As the district court properly held, an action to enforce a promise not to use or to disclose ideas embodied in copyrighted material without authorization asserts rights equivalent to those protected by the Copyright Act. Accordingly, the district court’s determination that the Copyright Act preempts Montz’s claims should be affirmed. I respectfully dissent from the Court’s opinion to the contrary.

### **I**

...

I shall address only the second prong [of the preemption analysis]: whether Montz’s claims are “equivalent” to the exclusive rights afforded to copyright owners by section 106.

## A

Montz's breach-of-implied-contract claim consists of the following allegations: (1) "[t]he Plaintiffs presented their ideas for the 'Ghost Hunter' Concept to the Defendant in confidence, pursuant to the custom and practice of the entertainment industry, for the express purpose of offering to partner with the Defendants in the production, broadcast and distribution of the Concept," (2) "by accepting the Plaintiffs' disclosure of its concept," the defendants agreed that they "would *not* disclose, divulge or exploit the Plaintiffs' ideas and concepts without compensation and *without obtaining the Plaintiffs' consent*," (3) "the Plaintiffs justifiably expected to receive a share of any profits and credit that might be derived from the exploitation of [their] ideas and concepts," and (4) "by producing and broadcasting the Concept," "[t]he Defendants breached their implied agreement not to disclose, divulge or exploit the Plaintiffs' ideas and concepts *without the express consent of the Plaintiffs*, and to share with the Plaintiffs . . . the profits and credit for their idea and concepts." (emphasis added).

To distinguish itself from a copyright claim, a state law claim "must protect rights which are qualitatively different from the copyright rights." [Laws at 1143](#) (internal quotation marks omitted). This requires that the state claim have an "extra element which transforms the nature of the action." *Id.* (internal quotation marks omitted). Montz's breach-of-implied-contract claim fails this test.

Under section 106, a copyright owner has the exclusive rights to reproduce, to distribute, and to display the copyrighted work, as well as to prepare derivative works based on the copyrighted work. 17 U.S.C. 106. Section 106 also provides a copyright owner with the exclusive rights to authorize such reproduction, distribution, display, and preparation. *Id.* Montz alleges that "by producing and broadcasting" *Ghost Hunters*, "[t]he Defendants breached their implied agreement not to disclose, divulge or exploit the Plaintiffs' ideas and concepts without the[ir] express consent." In other words, Montz asserts that Pilgrim produced and broadcast a television program derived from Montz's screenplays, video, and other materials *without authorization*. These rights are equivalent to the rights of copyright owners under section 106—namely, the exclusive rights to authorize reproduction, distribution, and display of original works, and to authorize preparation of derivative works.

## B

With respect, I suggest the majority does not appreciate the significance of Montz's refusal to authorize Pilgrim to use the ideas embodied in his materials. This is not the same as authorizing Pilgrim to use his ideas so long as it pays him. A copyright is not just the right to receive money upon the use of a work; it

is “the right to control the work, including the decision to make the work available to or withhold it from the public.” [Laws at 1137](#). Indeed, because a copyright gives its owner a property right—not merely a liability right—injunctive relief for copyright infringement is provided for by Congress, and is routinely granted by courts.

To be sure, many copyright owners choose to sell the right to control their work. But a copyright holder may turn down money—or accept less money—in exchange for retaining more control over, and more involvement with, his work. For instance, Matt Damon and Ben Affleck famously refused to sell the rights to *Good Will Hunting* until they were promised starring roles in the film. Such is the case here: Montz did not offer to sell his idea to Pilgrim; he offered “to partner” with Pilgrim in the show’s “production and distribution.” And when that offer was refused, Montz received an implied promise that Pilgrim would not use the ideas embodied in his materials without his consent.

Thus, Montz does not claim to have sold the rights to the ideas embodied in his materials, as did the plaintiff in [Grosso v. Miramax Film Corp., \(9th Cir.2004\)](#). *Grosso* involved a particular type of breach-of-implied-contract claim, the elements of which the California Supreme Court elucidated in [Desny v. Wilder, \(1956\)](#). To state a *Desny* claim, the plaintiff must plead that he “prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” [Grosso, at 967](#).

“[M]irror[ing] the requirements of *Desny*,” the complaint in *Grosso* alleged the plaintiff had submitted a movie script to the defendants “with the understanding and expectation . . . that [he] would be reasonably compensated for its use by Defendants.” *Id.* (internal quotation marks omitted). We concluded that the defendants’ “implied promise to pay” for use of the idea embodied in the script constituted “an ‘extra element’ for preemption purposes.” *Id.* at 968. The subject of the implied contract, then, was the sale of the plaintiff’s idea. The plaintiff asserted that he had “disclosed [his] work to the offeree for sale,” and that, by using the ideas embodied in his work, the offeree had implicitly agreed to pay for it. *Id.* at 967.

By contrast, Montz alleges that he retained his rights as a copyright owner. Montz “presented [his] ideas for the ‘Ghost Hunter’ Concept to the Defendants[ ] . . . for the express purpose of offering to partner with the Defendants in the production, broadcast and distribution of the Concept.” Pilgrim rejected the offer but allegedly promised implicitly not to use Montz’s ideas “without [his] consent.” Therefore, according to the complaint, Pilgrim did not promise to pay for the use of Montz’s ideas. Rather, it promised (implicitly) to respect Montz’s rights to the production, distribution, and broadcast of his work. Put differently,

it promised to respect the rights afforded to Montz by the Copyright Act.

The majority asserts that there is “no meaningful difference between the conditioning of use on payment in *Grosso* and conditioning use in this case on the granting of a partnership interest in the proceeds of the production.” This was never the issue. The *Montz* panel did not rely on the difference between seeking compensation in the form of a lump sum versus a percentage of profits. Rather, it relied on the difference between authorizing the use of one’s work in exchange for money, and not authorizing the use of one’s work at all. I am mindful of Montz’s allegation that he expected to receive compensation and credit if his ideas were ever used. But this fact alone is not sufficient to “transform the nature of the action.” [Laws at 1144](#). Montz expected to receive compensation and credit for use of his work only because he also expected—as any copyright owner would—that his work would not be used without authorization. Far from being “transformative,” entitlement to compensation and credit under the implied contract was merely the result of the contract’s prohibition against unauthorized use of Montz’s work. There is thus nothing in the complaint that “qualitatively distinguish[es]” the breach-of-implied-contract claim from a copyright claim. *Id.*

## C

The majority insists that by limiting implied contract protection to those who authorize the use of their work in exchange for consideration, “the dissent misses the point.” But it is not clear just what point I am missing. If the point is to fill “the gap that would otherwise exist between state contract law and copyright law,” *id.* at 981, then I suggest that a focus on authorization is entirely appropriate. Where a copyright owner authorizes the use of his work, but does not receive the consideration he was promised, he has a contract claim; where a copyright owner does not authorize the use of his work, but, nonetheless, someone uses it to produce a substantially similar work, he has a copyright claim.

If, however, “the point” is to provide greater protection against the unauthorized use of copyrighted material than is afforded under the Copyright Act, then it is a point I am glad to miss, as it is inconsistent with the objectives of Congress. The Copyright Act strikes a balance between the property rights of copyright owners, and the expressive rights of the rest of the creative community, by permitting copyright suits only where “there is substantial similarity between the protected elements” of the two works. [Benay v. Warner Bros. Entm’t, Inc., \(9th Cir.2010\)](#). Here, Montz attempts to use an implied contract claim to do what the Copyright Act does (i.e., to protect the unauthorized use of copyrighted materials). The only difference is that Montz’s implied contract claim would protect

those rights more broadly because California implied contract law does not require as strict a showing of substantial similarity as federal copyright law. But the “fact that the state-created right is . . . broader . . . than its federal counterpart will not save it from pre-emption.”

## II

Montz’s breach-of-confidence claim also asserts rights equivalent to the rights protected by the Copyright Act. The complaint states that “the Plaintiffs’ disclosure of their ideas and concepts [was] strictly confidential,” and that “[b]y taking the Plaintiffs’ novel ideas and concepts, exploiting those ideas and concepts, and profiting therefrom to the Plaintiffs’ exclusion, the Defendants breached their confidential relationship with the Plaintiffs.” Such claim simply echoes the allegations of the breach-of-implied-contract claim. Indeed, the alleged breach-of-confidence stems from the alleged violation of the very rights contained in section 106—the exclusive rights of copyright owners to use and to authorize use of their work.

The majority relies on two elements to distinguish the rights asserted in Montz’s breach-of-confidence claim from the rights protected by the Copyright Act. First, the breach-of-confidence claim requires Montz to show that Pilgrim disclosed confidential material (i.e., the ideas embodied in Montz’s materials) to third parties. Maj. op. at 981-82. But a copyright affords its owner the same right: the right against unauthorized disclosure of copyrighted work. Second, the breach-of-confidence claim requires that Montz show Pilgrim breached a confidential relationship or entrustment. Maj. op. at 981-82. Yet a breach of a relationship of trust does not, by itself, transform the nature of an action. The breach-of-confidence claim still asserts rights protected by the Copyright Act; the only difference is that the rights are asserted against a particular person (i.e., someone with whom the copyright holder had a confidential relationship). But the right against unauthorized disclosure of copyrighted work already applies against everyone, regardless of whether one had a confidential relationship with the copyright holder.

Because Montz’s breach-of-confidence claim is not qualitatively different from a copyright claim, it is preempted.

## III

Montz does not allege that he sold the ideas embodied in his *Ghost Hunters* materials to Pilgrim and that Pilgrim simply failed to make good on its promise to pay. Instead, he alleges that Pilgrim used the ideas embodied in Montz’s copyrighted material without his permission. Because the Copyright Act protects such equivalent rights, I respectfully dissent.

GOULD, Circuit Judge, dissenting:

I join Judge O’Scannlain’s dissent. I emphasize my concern with the imprudent practical results that the majority decision will likely engender. The “extra element” argument is impractical for an “implied” claim like this. Although an express contract claim can proceed under state law, courts should be cautious about implying a contract claim in circumstances where the claim functionally looks like a copyright claim. There is no virtue in permitting a supplemental state law jurisdiction that in substance expands federal copyright law.

Under such a legal regime, film production and network companies face the chaotic prospect of having to meet conflicting federal and state standards on essentially the same question, a result the Copyright Act aimed to avoid. Studio and network ventures need stable law that does not unsettle expectations. The majority’s decision, however, will lead to uncertainty by making state law—with its ambiguity, variability, and volatility—available to litigants who bring nebulous state law claims that in substance assert rights in the nature of copyright. Hence, I respectfully dissent.

### **Totally Optional Reading & Viewing**

- [Pitch the idea? Or just write it and be done?](#)
- *Passman*, Chapter 18, Songwriter Deals, Creative Control & Moral Rights (pgs. 296-297).
- [Ninth Circuit Revives California Idea Submission Claims](#), by Anna R. Buono.