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In this issue

Cover Story

In an in-depth look at what happens when an “idea man” sues for payment and tries to avoid federal preemption under the Copyright Act.

Chair’s Column 2

A characteristically personal, idiosyncratic report, written on the trip home, about the Forum’s Annual Conference on Communications Law.

Does the Lady Protest

Too Much? 3

Much of the publicity about the Martha Stewart trial obscures a fundamental issue at the dangerous intersection of the First Amendment and securities laws.

Ollman v. Evans Redux? 13

Ollman’s emphasis on the “totality of the circumstances” appears to be making a comeback in some defamation cases.

Election 2004 and the First Amendment 9

A look at the impact of *McConnell* on the freedom of political speech. We may see more print and Internet ads and early advertising to avoid disclosure requirements.

Where Do the Candidates Stand? 3

A fascinating look at how the then-7 candidates viewed various components of the First Amendment.

Courtside 29

As three recent First Amendment cases demonstrate, sometimes the U.S. Supreme Court makes news by denying certiorari.

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The Whole Enchilada: *Wrench LLC v. Taco Bell Corp.* and Idea Submission Claims

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In June 2003, a jury in Grand Rapids, Michigan, awarded \$30.1 million to two cartoonists who had presented executives of the Taco Bell fast food chain with the idea of using a “Psycho Chihuahua” character in Taco Bell’s television advertisements.¹ The jury award, which culminated five years of litigation and appellate proceedings in *Wrench LLC v. Taco Bell Corp.*, surprised many observers, not only because of the magnitude of the damages award, but also because of the underlying theory of liability—namely, the alleged theft of an idea by Taco Bell, which has used “Psycho Chihuahua” with great success as the centerpiece of a nationwide advertising campaign. After all, many lawyers consider as basic tenets of intellectual property law the principles that there can be no property rights in an idea and that only the tangible expression of an idea can warrant legal protection.

With the proliferation of reality programming and other unscripted forms of entertainment, producers and broadcasters of television programming will continue to face claims based on the alleged misappropriation of ideas, concepts, or formats. *Wrench* is one of a line of cases, most of which are rooted in California law, holding that the

unauthorized use of a plaintiff’s ideas or concepts may form the basis of liability on a theory of breach of implied-in-fact contract, even if they are not sufficiently novel or concrete to warrant protection under copyright law.

In this article, we review *Wrench* against the backdrop of case law from California and elsewhere, considering claims that arise from the alleged unauthorized use of ideas for television programs, movies, and advertising campaigns. We also examine recent decisions addressing the question of whether federal law preempts these common law claims, which first were recognized and developed before the adoption of the federal Copyright Act of 1976 (Act). We conclude that the final scene of the idea submission story remains to be written. Despite recent activity in this area of the law, no bright-line nationwide tests have emerged to clarify when federal copyright law preempts common law claims for idea theft.

A *Wrench* in the Works?

In 1996, cartoonists Thomas Rinks and Joseph Shields, the owners of *Wrench LLC*, met with representatives of Taco Bell at a trade show in New York.² According to Rinks and Shields, that meeting led to additional conversations with Taco Bell representatives, in which the cartoonists suggested, among other things, that “in its television advertisements, Taco Bell should use a live dog, manipulated by computer graphic imaging, with the personality of Psycho Chihuahua and a love of Taco Bell food.”³ The parties allegedly “also

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Idea Submission

(Continued from page 1)

discussed what it would cost for Taco Bell to use [Wrench's] character, and although no specific numbers were mentioned, [it was] understood that if Taco Bell used the Psycho Chihuahua concept, it would have to pay [Wrench]."⁴

In December 1997, Taco Bell launched a series of commercials featuring Psycho Chihuahua, without involving or compensating Wrench or its principals.⁵ Wrench sued in January 1998, alleging breach of implied contract as well as various tort claims under Michigan and California law.⁶

In September 1999, the district court granted summary judgment in Taco Bell's favor.⁷ As discussed at greater length below, the court concluded that Wrench's claims were preempted by federal copyright law.⁸ As an additional ground for summary judgment, the court also held that the fact that Wrench's claims were based on an idea that was not "novel or unique" precluded the case from proceeding to trial.⁹

Wrench appealed the district court's entry of summary judgment, and the Sixth Circuit reversed. On the issue of novelty, the Sixth Circuit noted that "Michigan follows . . . the California cases which dispense with the requirement of novelty in actions based on implied-in-fact contracts."¹⁰

The "Idea Man" and Implied Contracts

The line of California cases referenced in *Wrench* stems from the California Supreme Court's decision in *Desny v. Wilder*,¹¹ which arose from plaintiff Victor Desny's submission of a written story synopsis to producer Billy Wilder and Paramount Pictures. In an initial telephone conversation with Wilder's secretary, Desny told her about this "fantastic unusual story," which he described to her in a few words as "the life story of Floyd Collins who was trapped and made sensational news for two weeks," and he told her the plot. Assessing that conversation, the court observed that

it does not appear that a contract to pay for conveyance of the abstract photoplay idea had been made, or that the basis for inferring such a contract from subsequent related acts of the defendants had been established, at the time plaintiff disclosed his basic idea to the secretary.

Defendants, consequently, were at that time and from then on free to use the abstract idea if they saw fit to engage in the necessary research and

develop it to the point of a usable script.¹²

Desny called back. In the second call, he read a written synopsis of his story ideas over the phone and instructed the secretary that Wilder and Paramount could use the story only if they paid him for "the reasonable value of it."¹³ This statement, the court found, gave rise to an implied obligation on Wilder's part to pay Desny for the use of his idea, even though the idea was not sufficiently concrete or developed to warrant copyright protection: "The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not properly subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed."¹⁴

The *Desny* court went on to hold that for this sort of implied contract to arise, the "idea purveyor" must clearly have conditioned his disclosure of the idea upon an obligation to pay for it if used "by the person to whom it was conveyed," and the idea recipient must have "know[n] the condition before he kn[ew] the idea" and must have "voluntarily accept[ed] its disclosure."¹⁵

Although recognizing a contractual right to compensation for disclosure of an idea, the *Desny* court also underscored that such a right does not arise when the submission of an idea is made without a clear and mutually understood expectation of payment if the idea is used:

The idea man who blurts out his idea without having first made his bargain has no one but himself to blame. . . . The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue.¹⁶

Contract Requirements Relaxed

In the years following *Desny*, the California courts arguably relaxed *Desny*'s prerequisites for the formation of a contract to pay for the use of an idea, opening the door for even "[t]he idea man who blurts out his idea" to assert a claim for compensation based on the allegation that an idea pitch led to the development of a successful film or television show. This trend was marked by holdings that, in light of the customs and practices of the entertainment industry, a contract may

be formed even when the idea man does not expressly communicate an expectation of payment before making his pitch:

The assent of the producer is manifested by his acceptance of the [submitted] idea or material [where] it is reasonably understood that a professional author expects payment of the reasonable value of the idea or the material, if used, so that the conduct of the producer in accepting it implies a promise to fulfill those reasonable expectations.¹⁷

Courts in more recent cases have allowed idea submission claims to proceed to trial even when a plaintiff's pitch is not expressly conditioned on payment in the event the idea is used. For example, in *Whitfield v. Lear*, the Second Circuit, applying California law, reversed summary judgment in favor of television producer Norman Lear, despite the fact that the parties never

"The idea man who blurts out his idea without having first made his bargain has no one but himself to blame."

discussed potential business terms: "[I]f a producer accepts a submitted idea with full knowledge that the offeror expects payment in the event of use, California courts impose liability under a theory of implied-in-fact contract."¹⁸

Similarly, in *Landsberg v. Scrabble Crossword Game Players, Inc.*, an author submitted a manuscript to the defendant publishing company, but the parties did not discuss the author's expectation of payment.¹⁹ After the publishing company allegedly used his ideas without compensating him, the author asserted a claim for breach of implied contract. Reversing the district's court's entry of summary judgment in the publishing company's favor, the Ninth Circuit concluded that despite the lack of evidence that the plaintiff ever expressly conveyed an expectation of payment, the parties' conduct was sufficient to establish that his pitch "may have been made in confidence." Therefore, the court held that the plaintiff "should not . . . be held to have lost the opportunity to be the beneficiary of an implied-in-fact contract."²⁰

The Novelty Factor

While arguably relaxing the prerequisites of contract formation, California courts in the years following *Desny* also

reiterated the principle, cited by the Sixth Circuit in *Wrench*, that an idea need not be novel or well developed to give rise to liability for its use. One such case, *Blaustein v. Burton*, arose from a pitch made to Richard Burton and Elizabeth Taylor regarding an idea for a motion picture version of Shakespeare's *The Taming of the Shrew*.²¹ As the threshold matter, the *Blaustein* court recognized that "there is nothing unique about the idea of making a motion picture entitled 'The Taming of the Shrew.'" ²² Nevertheless, the court reversed the trial court's entry of summary judgment for Taylor and Burton, finding that "[t]here is nothing unreasonable in the assumption that a producer would obligate himself to pay for the disclosure of an idea which he would otherwise be legally free to use, but which, in fact, he would [not have conceived of] but for the disclosure."²³

Until relatively recently, producers and broadcasters confronted with idea theft claims could find a safer haven under New York law, which required a showing that the plaintiff's idea was unique or novel. For example, in *Murray v. National Broadcasting Co.*, the Second Circuit, applying New York law, considered a claim that the plaintiff's pitch of an idea for a family-oriented situation comedy starring Bill Cosby formed the basis of *The Cosby Show*.²⁴ Although the NBC television network admittedly received the plaintiff's pitch before developing *The Cosby Show* and "encouraged [plaintiff] to 'flesh out' his proposal," the court affirmed summary judgment for NBC, holding that "under New York law, lack of novelty in an idea precludes plaintiff from maintaining a cause of action to prevent its unauthorized use."²⁵ Applying that principle to the plaintiff's claims, the court explained as follows:

We certainly do not dispute the fact that the portrayal of a nonstereotypical black family on television was indeed a breakthrough. Nevertheless, that breakthrough represents the achievement of what many black Americans, including Bill Cosby and plaintiff himself, have recognized for many years—namely, the need for a more positive, fair and realistic portrayal of blacks on television. While NBC's decision to broadcast "The Cosby Show" unquestionably was innovative in the sense that an intact, nonstereotypical black family had never been portrayed on television before, the mere fact that such a decision had not been made before does not necessarily mean that the idea for the program is itself novel.²⁶

More recent cases decided under New York law, however, have eliminated

novelty as a prerequisite to a claim for breach of implied contract, adopting a standard similar to that articulated by the California Court of Appeal in *Blaustein* and applied by the Sixth Circuit in *Wrench*, namely, that plaintiffs may recover damages on a breach of contract theory if the idea was new to the defendant at the time of the pitch, even if it is not unique or novel in a more general sense:

The lack of novelty, in and of itself, does not demonstrate a lack of value. To the contrary, the buyer may reap benefits from such a contract in a number of ways—for instance, by not having to expend resources pursuing the idea through other channels or by having a profit-making idea implemented sooner rather than later. The law of contracts would have to be substantially rewritten were we to allow buyers of fully disclosed ideas to disregard their obligation to pay simply because an idea could have been obtained from some other source or in some other way.²⁷

Applying this reasoning, the Second Circuit in *Nadel v. Play-By-Play Toys & Novelties* reversed a district court's grant of summary judgment against an idea man who had presented a toy manufacturer with a prototype of a plush toy that makes noise, sits upright, and spins.²⁸ Abrogating its holding in *Murray*, the court held that "[f]or contract-based claims in submission-of-idea cases, a showing of novelty to the buyer will supply sufficient consideration to support a contract."²⁹

Against this backdrop, the Sixth Circuit's reversal of summary judgment in *Wrench* and the jury's verdict in June 2003 appear to be less of an aberration or extension of liability than an application of established principles supporting the imposition of liability when an idea, new to the recipient, is submitted with the mutually understood expectation that the idea man will be compensated if the idea is exploited. As discussed below, *Wrench* also touched upon a more fluid question to which the courts have not yet provided a uniform answer: Can idea theft claims withstand preemption under federal copyright law, particularly when a plaintiff's submission to a defendant consists of a written screenplay, treatment, or other tangible embodiment?

"This Program Is Preempted by . . ." *Desny* and several other leading cases involving entertainment-related idea submission claims were decided in the 1950s, 1960s, and early 1970s—before the enactment of the Copyright Act of

1976 with its broad preemption of state law claims falling within its subject matter. This raises the question of whether state law claims arising from the alleged misappropriation of ideas for films or television programs remain viable in light of the Act's preemptive effect. After all, many entertainment-related pitches include some tangibly fixed component, such as a written outline or treatment or an audiovisual representation of an idea or concept.

The district court's grant of summary judgment in *Wrench*, which the Sixth Circuit later reversed, was based not only on a requirement of novelty in idea submission claims but also on the finding that the Act preempted *Wrench*'s common law claims. Notably, the district court recognized that no bright-line rule governed its preemption analysis: "Sometimes implied-in-fact contracts are preempted, and sometimes implied-in-fact contracts are not preempted."³⁰ After reviewing cases on both sides of the preemption issue, the district court held 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. . . . Here, Taco Bell's alleged promise not to use Plaintiffs' ideas and concepts does not differ from the Copyright Act's prohibition against preparing derivative works from or displaying copyrighted works.³¹

The Sixth Circuit disagreed. In its reversal of summary judgment, the court emphasized that the alleged implied-in-fact contract at issue in *Wrench*, which entailed the expectation that the creators of *Psycho Chihuahua* would be compensated if Taco Bell used their ideas, gave rise to the extra element required to remove an idea theft claim from the purview of copyright preemption:

The gist of appellants' state law implied-in-fact contract claim is breach of an actual promise to pay for appellants' creative work. It is not the use of the work alone but the failure to pay for it that violates the contract and gives rise to the right to recover damages. Thus, the state law right is not abridged by an act which in and of itself would infringe one of the exclusive rights granted by § 106, since the right to be paid for the use of the work is not one of those rights.³²

An examination of the broader body of case law reveals that a categorical rule for or against preemption of implied-in-fact contract claims based on the submission of ideas has not yet been articulated. Courts have suggested that a more sensible approach requires examination of "the

specific contractual rights at issue to determine whether they [are] equivalent to exclusive rights under the Copyright Act.”³³ Accordingly, at least for the time being, the outcome depends on “the precise contract right being asserted.”³⁴

Federal Copyright Preemption

Before the enactment of the Copyright Act of 1976, works of authorship were protected by either common law copyright for unpublished works or statutory copyright for published works.³⁵ Through the Act, Congress dramatically altered that regime by creating a single federal system of copyright protection.³⁶

The congressional mandate for federal protection of copyright is explicit and far-reaching,³⁷ as reflected in the Judiciary Committee’s report:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. . . . [S]ection 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.³⁸

The Act exclusively governs all state claims that fall within the subject matter of copyright and that present “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression.”³⁹ Works of authorship include literary works, musical works, dramatic works, and motion pictures, among others.⁴⁰ Further, a work is “fixed” in a tangible medium of expression when “its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.”⁴¹

Consistent with the Act, many jurisdictions employ a two-part test, similar to that applied by the Sixth Circuit in *Wrench*, preempting rights granted under state law if (1) the subject matter of the claim comes within the “subject matter of copyright,” as defined in sections 102 and 103 of the Act, and (2) the rights granted under state law are “equivalent” to any of the exclusive rights within the general scope of copyright as defined in section 106 of the Act (or, put differently, the rights lack

an extra element beyond mere reproduction or distribution rights).⁴²

Can Ideas Satisfy the First Prong?

The Copyright Act denies copyright protection to ideas⁴³ but grants protection to the expression of those ideas.⁴⁴ Apparently mindful of this gap, plaintiffs in idea submission cases often craft their pleadings to sidestep the first prong of the preemption analysis by placing their claims outside the Act’s subject matter. To that end, they often describe their creative work as no more than an “idea.”⁴⁵

This tactic has failed in most jurisdictions. For preemption purposes, courts have held that the subject matter element cannot be circumvented by asserting that the cause of action at issue is based on ideas, not on the expression of those ideas. Thus, the Sixth Circuit in *Wrench*, although finding for the plaintiffs on the second prong of the preemption analysis, held that the idea for *Psycho Chihuahua* fell within the subject matter of the Copyright Act.⁴⁶ In other cases, ideas for a television series, an animated children’s program, an ad slogan, and a children’s educational concept all were found to fall within the subject matter of copyright, satisfying the first prong of the test for preemption.⁴⁷ Courts reason that ideas fall within the Act’s subject matter because the “shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”⁴⁸ These holdings are rooted in Congress’s statement that

[a]s long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.⁴⁹

In keeping with the breadth of the Act, when a plaintiff alleges that a defendant used materials that contain both protectable expressions of ideas as well as the ideas themselves, courts have held that the Act preempts state law claims. For example, in the Second Circuit decision *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵⁰ the plaintiff claimed that the defendant’s publication of material from President Gerald Ford’s manuscript interfered with the plaintiff’s contract to publish excerpts from the manuscript. In rejecting the notion that uncopy-

rightable material takes a work out of the subject matter of copyright, the *Harper & Row* court reasoned thus:

The fact that portions of the [work] may consist of uncopyrightable material . . . does not take the work as a whole outside the subject matter protected by the Act. . . . That interpretation would run directly afoul of one of the Act’s central purposes, to avoid the development of any vague borderline areas between State and Federal protection.⁵¹

More recently, in *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, the Fourth Circuit specifically held that a claim based upon the exploitation of a work containing both protectable material as well as unprotectable ideas is completely preempted.⁵² In *Berge*, the Fourth Circuit found that the Act preempted a state law action for conversion of a doctoral dissertation.⁵³ Responding to the author’s argument that her “ideas and methods” were excluded from the scope of copyright protections, the court concluded that she suggested a “fallacious interpretation of the Copyright Act. . . .” According to the court, the plaintiff

***Wrench* appears to be less of an aberration or extension of liability than an application of established principle.**

wanted “to argue that ideas embodied in a work covered by the Copyright Act do not fall within the scope of the Act because the Act specifically excludes them from protection. But scope and protection are not synonyms.”⁵⁴

Preemption Analysis: Part II

Because ideas often satisfy the first part of preemption analysis, many idea submission cases turn on the second prong, i.e., whether state law creates rights equivalent to those protected by the Copyright Act. Section 106 of the Act provides that an owner of a copyright has exclusive rights to undertake and to authorize the reproduction of copyrighted works in copies, the preparation of derivative works, the distribution of copies of the copyrighted work by sale or by transfer of ownership, the performance of the copyrighted work, and the public display of the

copyrighted work.⁵⁵ To survive preemption, a state law cause of action arising from the submission of an idea must include an “extra element” (in addition to or instead of the acts of reproduction, performance, distribution, or display) that changes the nature of the action so that it is qualitatively different from a copyright infringement claim.⁵⁶

As discussed below, for this second prong of preemption analysis, courts have refrained from adopting a bright-line rule and instead employ a fact-specific approach.⁵⁷

Several courts have held that the Copyright Act preempts claims based on the submission of an idea.⁵⁸ A review of these decisions shows that courts look to substance over form, thus preventing plaintiffs from disguising a federal claim as a state law claim. Federal district courts in California, Maryland, and New York have held that when the purportedly unlawful acts effectively amount to no

Many idea submission cases turn on the second prong, i.e., whether state law creates rights equivalent to those protected by the Copyright Act.

more than a promise not to accept the benefit of the creative work by unlawfully reproducing or distributing it, the state law claims are preempted.

Selby v. New Line Cinema

In *Selby v. New Line Cinema*, William Selby alleged breach of implied contract based on the defendants’ promise to compensate him and give him appropriate screen credit if his ideas were used to produce a motion picture.⁵⁹ Selby had “conceived of an idea for a theatrical motion picture and written a screenplay based upon that idea entitled ‘Doubletime,’” which he registered with the Writer’s Guild of America and for which he obtained a federal copyright registration.⁶⁰ Selby’s agents submitted the *Doubletime* screenplay and his ideas for the screenplay to New Line for review and consideration. New Line informed Selby that although it was reluctant to produce the project at that time, it was interested in reviewing subsequent drafts of *Doubletime*.

New Line later purchased for \$1 million a similar screenplay, written by defendant Toby Emmerich, entitled *Frequency* and produced a film based on this screenplay. Selby argued that New Line “copied the expression of ‘Doubletime’ . . . in developing and producing the film based on ‘Frequency.’”⁶¹ Selby contended that based on the presentation of *Doubletime* by Selby’s agents, an implied contract arose, which New Line breached by using Selby’s ideas without compensation or screen credit.

The U.S. District Court for the Central District of California relied on the Fourth Circuit’s decision in *Berge* in finding that “plaintiff’s ideas fall within the subject matter of copyright.”⁶² The *Selby* court further held that plaintiff’s implied contract claim was preempted, reasoning that “[d]efendants’ alleged promise not to ‘use’ plaintiff’s ideas does not prohibit any conduct beyond that prohibited by the

Copyright Act.”⁶³ Central to the court’s analysis was the lack of an extra element in the alleged implied-in-fact contract between the parties, i.e., the implied contract failed to regulate the parties’ conduct beyond the mere use of the plaintiff’s ideas.⁶⁴

Metrano v. Fox Broadcasting

The recent decision in *Metrano v. Fox Broadcasting Co., Inc.*,⁶⁵ reinforces the willingness demonstrated in *Selby*, at least in the Central District of California, to find preemption of common law idea submission claims. Unable to continue his career as an actor following an accident that left him paralyzed, plaintiff Art Metrano conceived of an idea for a television series based on his life experience.⁶⁶ Metrano registered a treatment for a television series with the Writers’ Guild of America describing a show entitled *Beyond Belief*, which featured human interest stories about people with extraordinary medical conditions and about people who can perform incredible feats.⁶⁷

After conversations between Metrano and Katie Face Productions, Metrano and a representative and agent of Katie Face met with Fox Broadcasting.⁶⁸ During the meeting, the plaintiff orally pitched his ideas and presented Fox with his treatment in the form of index cards detail-

ing seventeen people and stories that could be featured on the show, tapes of possible subjects, and other possible source materials, including the *Guinness Book of World Records*.⁶⁹

After the meeting, Fox informed the plaintiff that it was not interested in *Beyond Belief*.⁷⁰ However, Metrano later discovered that Fox Broadcasting had produced *Guinness World Records: Prime Time*, a show that featured stories and people similar to those he proposed and that allegedly utilized the same formats as those detailed in the *Beyond Belief* treatment.⁷¹

Metrano alleged that Fox, in accordance with industry custom and practice, had implicitly agreed to compensate or credit him for the use or disclosure of his treatment and, thus, breached the implied contract when it used his ideas.⁷² Metrano further contended that federal law did not preempt his state law claim for breach of implied contract because he had “verbally pitched ideas not included in his treatment” and the “treatment he presented was only a rudimentary general outline of his ideas.”⁷³

The *Metrano* court disagreed: [The *Selby*] court held that it was sufficient that plaintiff’s ideas for his screenplay were embodied in a work covered by the Copyright Act for the ideas to fall within the subject matter of copyright. . . . This Court adopts the reasoning expressed in *Selby* and finds that because plaintiff’s ideas are embodied in works covered by the Copyright Act, his ideas fall within the subject matter of copyright law.⁷⁴

Having found that the creative work at issue fell within the Act’s subject matter, the *Metrano* court held that those rights conferred by the alleged contract between Metrano and Fox were equivalent to the rights protected under the Act and, thus, Metrano’s claim for breach of implied-in-fact contract was preempted: “[A] suit for breach of a promise not to use plaintiff’s ideas without compensation does not require proof of any element that is not required by the Copyright Act.”⁷⁵

Fischer v. Viacom

In *Fischer v. Viacom International, Inc.*,⁷⁶ plaintiff Steven Fischer had created an animated character team comprised of “a guy named ‘Steve’ and his blue dog named ‘Bluey.’” This character team served as the basis for numerous copy-

righted works, including an unpublished manuscript, *Bluey and His Friend the Bluester*, and a published collection of comic strips titled *There's a Blue Dog Under My Bed*.⁷⁷ Fischer incorporated Blue Dog Productions, Inc., to publish Steve & Bluey stories, and the following year he created a television show for Blue Dog Productions to produce. Over the next three years, Blue Dog Productions searched for production partners and financing.⁷⁸

Viacom and Fischer exchanged correspondence and telephone calls.⁷⁹ Viacom allegedly expressed interest in Fischer's idea and encouraged him to develop it. Subsequent to these communications with Viacom and after hearing about what a family member saw and believed to be his program, Fischer alleged that Viacom (and related entity MTV Networks) unlawfully appropriated his ideas to develop the highly successful *Blue's Clues* program and falsely took credit for the creation of the characters on that show.⁸⁰ Moreover, Fischer claimed that Viacom's actions amounted to a breach of implied contract, breach of confidence, and a violation of the Lanham Act.

On the first prong of the preemption test, the U.S. District Court for the District of Maryland, applying New York law, found that Fischer's asserted idea for an animated children's program was indistinguishable from the copyrightable "written proposal for a children's animated television series featuring 'Steve and Bluey'" and the detailed written description of the program he submitted to Nickelodeon.⁸¹

Consequently, the court determined that Fischer's "idea falls within the scope of the subject matter of copyright, even if the idea itself would not be protected by the Copyright Act."⁸²

The court then dismissed Fischer's implied contract claim based on the finding that the second prong of the preemption test was also satisfied, i.e., that his claim did not present the extra element necessary to withstand preemption: "Because this alleged contract did not regulate the parties' conduct beyond the mere use of Fischer's ideas, the rights protected by the implied contract are equivalent to the exclusive rights protected by the Copyright Act."⁸³

Panizza v. Mattel, Inc.

Plaintiff Janis Panizza sought damages for breach of quasi-contract when she

provided certain ideas for two computer programs to The Learning Company (TLC, which was subsequently purchased by defendant Mattel) on a confidential basis.⁸⁴ These ideas were allegedly accompanied by written and graphic materials, including a videotape of how the program would appear once fully developed.⁸⁵ Panizza claimed that the ideas were presented with the understanding that if TLC were interested in the program, it would underwrite further development and enter into an agreement with the plaintiff under which TLC would manufacture and sell the programs and compensate her on a royalty basis.⁸⁶

In an effort to avoid preemption, Panizza argued that her submission was an uncopyrightable idea. The District Court for the Southern District of New York was not persuaded, stating that "a plaintiff may not employ artful pleading to 'cloth[e] a federal claim in state garb'" and finding that for purposes of preemption, the Act applies with equal force to ideas.⁸⁷

Turning to the extra element test, the court found that Panizza's unjust enrichment theory "solely concern[ed] the benefit defendant allegedly received by using plaintiff's ideas and related materials without her permission or authorization to do so. 'The overwhelming majority of courts in this circuit have held that an unjust enrichment claim based upon the copying of subject matter within the scope of the Copyright Act is preempted.'"⁸⁸ Accordingly, the court found that Panizza's claim lacked the requisite extra element and was preempted.⁸⁹

A Stricter Approach to Preemption

Notwithstanding the liberal construction of the Copyright Act applied by the federal district courts in the cases surveyed above, all of which turned on the substance of the allegations, other courts have adopted a more literal application of the Act. Like the Sixth Circuit in *Wrench*, they have found that the Act does not preempt claims based on allegations setting forth key elements of breach of implied-in-fact contract. Although these courts still find that the ideas at issue fall within the subject matter of the Act, the analysis turns on the equivalence of the rights asserted to the exclusive rights under the Act.

As a preliminary matter, some courts addressing breach of contract actions generally have concluded that they are never

preempted because the promise to perform the contract in itself constitutes the extra element to make the action qualitatively different from a copyright infringement action.⁹⁰ In the more specific context of breach of implied contracts arising from the submission of ideas, however, courts have not applied a categorical rule and, instead, have followed a fact-specific approach. Even with the case-by-case approach adopted by courts, the decisions discussed below show the salience of certain allegations. Notably, numerous federal district courts, like the Sixth Circuit in *Wrench*, have held that when a party alleges the idea was shared in exchange for compensation, the preemption challenge fails.

Chesler/Perlmutter Productions, Inc. v. Fireworks Entertainment, Inc.

Chesler/Perlmutter Productions, Inc. v. Fireworks Entertainment, Inc.,⁹¹ concerned a production company that created a potential television series, *Gitana*, set in the 1500s and featuring an imprisoned princess who doubles as an action heroine.⁹² When Fireworks Entertainment produced *Queen of the Swords*, allegedly based on similar ideas, plots, and scenes, Chesler/Perlmutter Productions filed a complaint in state court alleging breach of express and implied contract as well as unjust enrichment.⁹³ Fireworks Entertainment successfully removed the case to federal court by alleging the causes of action were preempted.

Chesler alleged it pitched the series to Fireworks Entertainment, at which time the latter asked for Chesler's written treatment for *Gitana*. Further allegations included ongoing discussions concerning development, production, financing, and compensation, as well as the exchange of proposed budgets. Chesler ultimately sent Fireworks Entertainment a draft contract, contemplating a producer's fee, shared profits, hiring of writers, as well as scripts for the series.⁹⁴ This draft, Chesler claimed, was memorialized in a written contract whereby compensation to the plaintiff was agreed. Shortly thereafter, Fireworks Entertainment produced the allegedly infringing work.

Based on these allegations, the U.S. District Court for the Central District of California found the claims for breach of express contract and breach of a partially written and partially oral contract were not preempted because the alleged

terms, e.g., specific amounts and times of payment, selection of Chesler's writer, employment of Chesler's employee as producer, and Chesler's right of consultation, "go beyond a 'promise not to accept the benefit of a copyright work.'"⁹⁵

Although the court acknowledged that the claim for breach of implied contract was a "closer question," the court ultimately found dispositive the allegations that the parties reached an actual agreement and that the relationship between the parties continued thereafter. These allegations satisfied the "extra element" requirement such that the claim exceeded the exclusive rights protected by the Act. Similarly, the allegation that Fireworks Entertainment breached an explicit promise to pay certain sums of money and, in turn, was unjustly enriched by retaining those specific sums was held to be sufficient to provide the requisite "extra element."⁹⁶

Groubert v. Spyglass Entertainment Group LP

Not unlike the plaintiff in *Chesler*, plaintiff Mark Groubert pitched an idea for a story and presented copies of a written treatment to defendants Disney and Touchstone.⁹⁷ When Disney and Touchstone produced a motion picture entitled *The Farm*, purportedly based on Groubert's idea, pitch, and treatment, without compensating him, he initiated an action for breach of implied-in-fact contract, among other claims.

Groubert alleged that the pitch included an implied agreement that if Disney or Touchstone created a motion picture based on the idea, treatment, and/or pitch, he would be fairly compensated.⁹⁸ Acknowledging the fact-specific approach applied in *Fischer* and *Selby*, the U.S. District Court for the Central District of California focused on the rights created by the alleged contract and whether any of those rights differed from the rights protected under the Act.⁹⁹ Groubert's allegation that he met and shared with Disney and Touchstone his idea with the implicit understanding that he would be compensated for any movie flowing from the idea was dispositive for the court.¹⁰⁰ This, the court ruled, was not equivalent to copyright law: Disney and Touchstone may use Groubert's idea under the Act without paying Groubert, but since Groubert allegedly disclosed the idea on the condition that he would be compensated, the "promise in the formation of this implied

contract contains an 'additional element' not covered under copyright law."¹⁰¹

Katz Dochrermann & Epstein, Inc. v. HBO

In *Katz Dochrermann & Epstein, Inc. v. Home Box Office*, an advertising agency pitched an idea to HBO as part of an advertising campaign: "It's Not TV, It's HBO."¹⁰² Many meetings allegedly were held between the agency and HBO, during which HBO expressed an interest in the idea, but HBO never affirmatively stated that it accepted the agency's campaign. The agency initiated an action for breach of implied-in-fact contract, among other claims, against HBO when HBO began running an "It's Not TV, It's HBO" campaign.¹⁰³

The agency alleged that it was solicited by HBO and that "implicit in this request was a promise to compensate [the agency] for its time, talent and effort" if the agency's idea was used.¹⁰⁴ Rejecting HBO's preemption argument, the U.S. District Court for the Southern District of New York emphasized the plaintiff's allegation that "HBO made an implied promise to pay for [the agency's] idea" and found that promise to comprise the necessary extra element "separate and apart from any claim for copyright infringement involving the literary work."

Conclusion

The survey of recent decisions in numerous federal courts across the country shows that the only categorical rule in preemption analysis (and even that characterization is extreme) that emerges is that ideas are broadly construed to be subject to preemption based on the expansive view of the subject matter of the Copyright Act, which is the first prong of the preemption analysis. This is a partial victory for the defendant asserting preemption, leaving the equivalent rights or extra element test to be satisfied.

On that second prong, the courts have failed to provide a clear road map for litigants involved in claims asserting state law rights based on the submission of ideas. The district courts that apply a liberal view of the Act treat allegations concerning a promise to pay for the ideas at issue as thinly veiled allegations of a promise not to reproduce the idea—allegations that are equivalent to the rights protected under the Act. Thus, although the plaintiffs in *Selby*, *Metrano*, and *Fischer* alleged that an implied contract arose based on their submission or disclo-

sure of a treatment, screenplay, or idea in exchange for compensation or credit, the courts nevertheless found the asserted rights were effectively equivalent to those protected by the Act. Strikingly, the allegations dispositive for *Selby*, *Metrano*, and *Fischer* were equally dispositive for the courts applying a strict view of the Act, thereby rejecting the preemption challenges. Indeed, the *Chesler*, *Groubert*, *Katz*, and *Wrench* courts all found that allegations of an implied agreement for compensation in exchange for use of an idea presented the extra element sufficient to survive preemption.

At first glance, it seems that no meaningful distinction between *Selby*, *Metrano*, *Fischer*, and *Panizza*, on the one hand, and *Chesler*, *Groubert*, *Katz*, and *Wrench*, on the other, exists. Some common themes can be drawn from the factual context of these cases, however. The cases in which the courts allowed the state law contract claims to go forward, *Chesler*, *Groubert*, *Katz*, and *Wrench*, share a common element of alleged solicitation and acceptance by a defendant, whereby the defendant invites the pitch of the idea, the plaintiff prepares and pitches the idea, the defendant expresses some form of approval, and then the parties engage in at least some discussion of payment.

For example, in *Chesler*, ongoing discussions concerning development of the plaintiff's pitch went so far that a draft contract was prepared. The *Groubert* plaintiff allegedly disclosed his ideas at a pitch meeting under the express condition that he expected compensation, a condition that the defendant accepted by using his idea. In *Katz*, it was alleged that HBO actually solicited the plaintiff advertising agency and affirmatively expressed interest in the idea before launching an advertising campaign. Likewise, in *Wrench*, the plaintiffs spent over a year pitching Taco Bell with their Chihuahua idea and negotiated an actual licensing agreement that was never finalized.

Thus, if a plaintiff can convince a judge that the defendant went further than merely attending a pitch meeting and affirmatively took steps toward accepting the offered work or forming a written agreement, the plaintiff's claim seems to have a better chance of surviving a preemption challenge. When actual elements of a contract, and acceptance specifically, can be gleaned from the pleadings, courts more readily find the necessary extra

elements that bring these claims within the rubric of state contract law.

Alternatively, a defendant is well served in challenging a state law idea submission claim when the plaintiff's submission was unsolicited or the defendant affirmatively rejected the plaintiff's work, as seen in *Selby*, *Metrano*, *Fischer*, and *Panizza*. In *Selby*, defendant New Line stated that it was not interested in the project as submitted by the plaintiff, apparently suggesting that the plaintiff prepare subsequent drafts on a "don't call me, I'll call you" basis. In *Metrano* and *Fischer*, conversations and discussions between the plaintiff idea men and defendant television and motion picture studios ultimately led nowhere. In *Metrano*, defendant Fox Broadcasting rejected the plaintiff's submission outright. Finally, in *Panizza*, the defendant never manifested assent to the plaintiff's offer in the form of an unsolicited idea submission.

The body of case law as a whole presents a spectrum of claims, ranging from completely unsolicited submissions where no contract discussions resulted, to situations where the parties neared an actual bargain and took steps toward finalizing it. The closer the parties come to reaching agreement on the terms of an express contract, the more likely it is that the idea submission claims will survive a preemption challenge. The Sixth Circuit's reasoning in *Wrench* is illustrative of this point: the factual context involving (1) the defendant actively soliciting the idea, (2) the parties engaging in ongoing negotiations, and (3) the allegation that the defendant understood that the "Psycho Chihuahua" idea came at a price satisfied the court that the implied-in-fact contract claim presented an extra element beyond the rights protected by the Act.

Though these common themes are somewhat useful for practitioners in framing litigation strategies, they by no means yield consistently predictable results. For practitioners, the uncertainty in this area of the law impedes the process of case strategy. Attorneys representing plaintiffs will continue to struggle to sufficiently allege an actionable claim, one not susceptible to preemption, though the recent jury award in *Wrench* will likely be incentive enough for plaintiffs to take their chances. Likewise, the struggle for attorneys representing defendants lies in deciding whether to fashion a defense based at least in part on federal preemption of state law idea submission claims. If *Wrench* is an indi-

cation of the direction of the federal appellate courts, the defendants must carefully weigh the decision to pursue a vigorous defense of idea submission claims arising from active negotiation between the parties over the use of an idea. Once the federal courts reach more uniform standards for the preemption of idea submission claims, plaintiffs and defendants will be better able to evaluate the merits of such claims and to work toward more efficient and cost-effective resolution. □

Endnotes

1. *Wrench LLC v. Taco Bell Corp.*, 1:98 CV 45 (W.D. Mich. June 4, 2003). For coverage of the verdict in the popular press, see Shirley Leung, *Jury: Taco Bell Owes Chihuahua Creators \$30 Million*, WALL ST. J., June 5, 2003. On September 11, 2003, the district court in *Wrench* awarded an additional \$11.8 million in prejudgment interest, bringing the total award to more than \$42 million. The verdict and award currently are on appeal to the Sixth Circuit.
2. The facts underlying *Wrench* are set forth in the Sixth Circuit's opinion in *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001), which reversed the district court's entry of summary judgment and remanded the case for trial.
3. *Id.* at 450.
4. *Id.*
5. *Id.* at 251.
6. *Id.*
7. *Wrench LLC v. Taco Bell Corp.*, 51 F. Supp. 2d 840 (W.D. Mich. 1999), *rev'd*, 256 F.3d 446.
8. *Id.* at 853.
9. *Id.* at 858.
10. *Wrench*, 256 F.3d at 462.
11. 46 Cal. 2d 715 (Cal. 1956).
12. *Id.* at 740.
13. *Id.* at 727.
14. *Id.* at 733 (citations omitted).
15. Lionel Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 38 (1994) (quoting *Desny*, 46 Cal. 2d at 739).
16. *Desny*, 46 Cal. 2d at 739.
17. *Chandler v. Roach*, 156 Cal. App. 2d 435, 441 (Cal. Ct. App. 1958); see also *Kurlan v. Columbia Broad. Sys.*, 40 Cal. 2d 799, 811 (Cal. 1953) (reversing dismissal where plaintiff claimed compensation, based "upon a contract implied in fact from trade customs, practices and usages," for the use of an idea for a television program).
18. 751 F.2d 90, 92 (2d Cir. 1984).
19. 736 F.2d 485 (9th Cir. 1984).
20. *Id.* at 490.
21. 9 Cal. App. 3d 161 (Cal. Ct. App. 1970).
22. *Id.* at 173.
23. *Id.* at 183; see also *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 600 (1966) ("An idea which can be the

subject matter of a contract need not be novel or concrete.")

24. 844 F.2d 988 (2d Cir. 1988), *abrogated in Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 380 (2d Cir. 2000) (holding that idea need only have novelty to the buyer to support claim for breach of implied contract).
25. *Id.* at 990.
26. *Id.* at 992.
27. *Apfel v. Prudential-Bache Sec., Inc.*, 616 N.E. 2d 1095, 1098 (N.Y. 1993).
28. 208 F.3d at 371 (2d Cir. 2000).
29. *Id.* at 376.
30. 51 F. Supp. 2d 840, 853 (W.D. Mich. 1999).
31. *Id.* at 853.
32. *Wrench*, 256 F.3d 446, 456 (6th Cir. 2001).
33. See *Wrench*, 51 F. Supp. 2d at 852 (noting decisions of other circuits).
34. *Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535 (D. Md. 2000) (applying New York law).
35. H.R. REP. NO. 94-1476, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.
36. *Id.* at 5745.
37. *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992) (holding no preemption when violation of state right is predicated on act with elements beyond mere reproduction).
38. H.R. REP. NO. 94-1476, *supra* note 35, at 5745.
39. 17 U.S.C. § 301(a) (2003).
40. *Id.* § 102(a).
41. *Id.* § 101.
42. *E.g.*, *Sturza v. United Arab Emirates*, 281 F.3d 1287, 1304 (D.C. Cir. 2002); *Wrench*, 256 F.3d at 453; *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998); *Kregos v. Associated Press*, 3 F.3d 656, 665-66 (2d Cir. 1993).
43. 17 U.S.C. § 102(b) (2003).
44. *Mazer v. Stein*, 347 U.S. 201, 217 (1954).
45. *E.g.*, *Endemol Entm't B.V. v. Twentieth Television Inc.*, 48 U.S.P.Q. 2d 1524, 1526 (C.D. Cal. 1998); *Markogianis v. Burger King Corp.*, 42 U.S.P.Q. 2d 1862, 1863 (S.D.N.Y. 1997).
46. 256 F.3d 446, 455 (6th Cir. 2001).
47. *Entous v. Viacom Int'l*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001) (television series); *Katz Doehreremann & Epstein, Inc. v. Home Box Office, No. 97 CIV. 7763(TPG)*, 1999 WL 179603, at *3 (S.D.N.Y. Mar. 31, 1999) (advertising slogan); *Endemol Entm't B.V.*, 48 U.S.P.Q. 2d at 1526-27 (television series); *Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535 (D. Md. 2000) (animated children's program); *Markogianis*, 42 U.S.P.Q. 2d at 1863 (marketing concept).
48. *United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997); *accord Wrench*, 256

F.3d at 455 (“We join our sister circuits in holding that the scope of the Copyright Act’s subject matter is broader than the scope of the Act’s protections.”).

49. H.R. REP. NO. 94-1476, *supra* note 35, at 5747.

50. 723 F.2d 195 (2d Cir. 1983), *rev’d on other grounds*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

51. *Harper*, 723 F.2d at 200 (quoting H.R. REP. NO. 1476, *supra* note 35).

52. 104 F.3d at 1463.

53. *Id.*

54. *Id.*

55. 17 U.S.C. § 106(1)–(5) (2003).

56. *See, e.g.*, Murray Hill Publ’ns, Inc. v. ABC Communications, Inc., 264 F.3d 622, 636 (6th Cir. 2001); Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 456 (6th Cir. 2001); Foley v. Luster, 249 F.3d 1281, 1285 (11th Cir. 2001); Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 229–30 (4th Cir. 1993); Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc., 991 F.2d 426, 431 (8th Cir. 1993); Trenton v. Infinity Broad. Corp., 865 F. Supp. 1416, 1428 (C.D. Cal. 1994).

57. *See, e.g.*, Selby v. New Line Cinema Corp., 96 F. Supp. 2d 1053, 1061–62 (C.D. Cal. 2000); Fischer v. Viacom Int’l, Inc., 115 F. Supp. 2d 535, 542 (D. Md. 2000).

58. *See, e.g.*, Endemol Entm’t B.V. v. Twentieth Television Inc., 48 U.S.P.Q. 2d 1524, 1528 (C.D. Cal. 1998) (breach of implied contract based upon submission of copyrightable materials as well as plaintiff’s ideas preempted); Worth v. Universal Pictures, Inc., 5 F. Supp. 2d 816, 822 (C.D. Cal. 1997) (“a breach of an implied contract is a species of quasi contract and is to be deemed an ‘equivalent right’ for determining preemption”); plaintiffs’ screenplays fell within the subject matter of copyright).

59. 96 F. Supp. 2d at 1055.

60. *Id.*

61. *Id.*

62. *Id.* at 1057–58.

63. *Id.* at 1061–62.

64. *Id.* at 1062.

65. No. CV-00-02279 CAS JWJX, 2000 WL 979664, at *1 (C.D. Cal. Apr. 24, 2000).

66. *Id.* at *1.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at *6.

73. *Id.* at *4.

74. *Id.* at *4 n.3.

75. *Id.* at *6.

76. 115 F. Supp. 2d 535, 537 (D. Md. 2000).

77. *Id.*

78. *Id.*

79. *Id.* at 538.

80. *Id.*

81. *Id.* at 540.

82. *Id.* at 541.

83. *Id.* at 542.

84. Panizza v. Mattel, Inc., 02 CV 7722(GBD), 2003 WL 22251317, at *1 (S.D.N.Y. Sept. 30, 2003).

85. *Id.*

86. *Id.*

87. *Id.* at **2–3 (citations omitted).

88. *Id.* at *4.

89. *Id.*

90. *See* Kabehie v. Zoland, 102 Cal. App. 4th 513, 524–26 (2002) (tracking decisions applying categorical rule); *accord* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 16.04[C] (1997).

91. 177 F. Supp. 2d 1050 (C.D. Cal. 2001).

92. *Id.* at 1054.

93. *Id.*

94. *Id.*

95. *Id.* at 1059 (citations omitted).

96. *Id.*

97. Groubert v. Spyglass Entm’t Group LP, 63 U.S.P.Q.2d 1764 (C.D. Cal. 2002).

98. *Id.* at 1765.

99. *Id.* at 1767.

100. *Id.*

101. *Id.*

102. No. 97 CIV. 7763(TPG), 1999 WL 179603, at *1.

103. *Id.* at *2.

104. *Id.*

McConnell v. Federal Election Commission

(Continued from page 16)

55. *Id.* at 25.

56. *Id.*

57. *See* slip op. of Stevens & O’Connor, JJ., at 35.

58. *Id.* at 36.

59. *Id.*

60. *Id.* at 40.

61. *Id.* at 41.

62. *See* 2 U.S.C.A. § 434(f)(3)(A) (Supp. 2003).

63. *See* slip op. of Stevens & O’Connor, JJ., at 101.

64. *See, e.g.*, 2 U.S.C. § 441b(c)(2) (Supp. 2003) (ban on corporate electioneering communications not applicable to communication by I.R.C. § 501(c)(4) organization or I.R.C. § 527 political organization); *but see id.* § 441i(d) (parties may not solicit funds for § 501(c)(4) or § 527 organizations) (discussed in slip op. of Stevens & O’Connor, JJ., at 66).

65. *See* Susan Davis, *Club for Growth Launches Anti-Dean, Anti-Dem Campaign*, NAT’L J. CONGRESS DAILY (Jan. 7, 2004).

66. *Id.*

67. *See id.*

68. *Id.*

69. *See* Eliza Newlin Carney, Peter H. Stone & James A. Barnes, *New Rules of the Game*, NAT’L J. (Dec. 20, 2003), *available at* www.lexis.com.

70. *See* Martin Schram, *A Loophole for*

Attack Ads, (Scripps Howard News Serv. Dec. 23, 2003, *available at* www.lexis.com. 71. *Id.*

72. *Id.*; *see also* 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb) (Supp. 2003) (“electioneering communications” subject to regulation include, inter alia, ads within thirty days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate).

73. *See* Schram, *supra* note 70.

74. *See* Davis, *supra* note 65 (quoting Benjamin Ginsberg, lawyer who represents Republican party committees).

75. *See* NAB President & CEO Edward O. Fritts, Statement on Supreme Court Decision on Campaign Finance Reform (Dec. 10, 2003), *at* www.nab.org/newsroom/pressrel/statements/S1803.htm.

76. *Id.*

Pure Opinion

(Continued from page 12)

50. *Id.*

51. 235 F.3d 617 (D.C. Cir. 2001).

52. *Id.* at 625.

53. *Id.*

54. *Id.* at 627.

55. *Id.* at 626.

56. 151 F.3d 180, 180 (4th Cir. 1998)

57. *Id.* at 184.

58. *Id.* at 185.

59. 201 F.3d 144 (2d Cir. 2000).

60. *Id.* at 147.

61. *Id.*

62. 223 F.3d 845, 853 (8th Cir. 2000).

63. Janklow v. Newsweek, Inc., 788

F.2d 1300, 1302–03 (8th Cir. 1998); *accord McClure*, 223 F.3d at 853 (citing *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995)).

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