

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2011

5 (Argued: November 14, 2011 Decided: June 26, 2012)

6 Docket No. 11-2011-cv

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8
9 FOREST PARK PICTURES, TOVE CHRISTENSEN, and HAYDEN
10 CHRISTENSEN,

11
12 Plaintiffs-Appellants,

13
14 -- v. --

15
16 UNIVERSAL TELEVISION NETWORK, INC.,

17
18 Defendant-Appellee.

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20
21 -----x

22
23 B e f o r e : WALKER, RAGGI and LIVINGSTON, Circuit Judges.

24 Plaintiffs-Appellants Forest Park Pictures, Tove

25 Christensen, and Hayden Christensen appeal from an order of the

26 United States District Court for the Southern District of New

27 York (Colleen McMahon, Judge) granting Defendant-Appellee

28 Universal Television Network's motion to dismiss on the grounds

29 that this breach of contract action is preempted by the Copyright

30 Act. We reach a different conclusion. Plaintiffs-Appellants

31 adequately alleged a contract that includes an implied promise to

1 pay. Because this claim is based on rights that are not the
2 equivalent of those protected by the Copyright Act, it is not
3 preempted. VACATED and REMANDED.

4 DAVID MAREK (John R. Halter, on the
5 brief), Liddle & Robinson, L.L.P.,
6 New York, New York, for Plaintiffs-
7 Appellants.

8
9 SUSAN WEINER, NBCUniversal Media,
10 LLC, New York, New York (Robert
11 Penchina and Amanda M. Leith,
12 Levine Sullivan Koch & Schulz,
13 L.L.P., New York, New York, on the
14 brief), for Defendant-Appellee.

15
16 JOHN M. WALKER, JR., Circuit Judge:

17 This dispute over the concept for a television show presents
18 the question of the extent to which the Copyright Act, 17 U.S.C.
19 § 101 et seq., preempts contract claims involving copyrightable
20 property. Plaintiffs-Appellants Forest Park Pictures, Hayden
21 Christensen, and Tove Christensen (collectively, "Forest Park")
22 developed an idea for a television series and created a writing
23 that embodied it, known in the industry as a "series treatment."
24 Forest Park submitted its idea, first by mail and then in person,
25 to Defendant-Appellee USA Network, a division of Universal
26 Television Network, Inc. ("USA Network"). Forest Park alleges an
27 implied promise by USA Network to pay reasonable compensation if
28 the idea were used. The District Court for the Southern District
29 of New York (Colleen McMahon, Judge) held that the Copyright Act
30 preempted a breach of contract claim based on idea submission,

1 and granted USA Network's motion to dismiss. We reach a
2 different conclusion. Forest Park adequately alleged the breach
3 of a contract that included an implied promise to pay. Because
4 this claim is based on rights that are not the equivalent of
5 those protected by the Copyright Act, it is not preempted.

7 BACKGROUND

8 Facts

9 Because Forest Park appeals from an order dismissing the
10 complaint on the pleadings, we accept as true the facts alleged
11 in the Third Amended Complaint ("Complaint"). See Hutchison v.
12 Deutsche Bank Sec. Inc., 647 F.3d 479, 481 (2d Cir. 2011). In
13 2005, Forest Park formulated a concept for a television show
14 called "Housecall," in which a doctor, after being expelled from
15 the medical community for treating patients who could not pay,
16 moved to Malibu, California, and became a "concierge" doctor to
17 the rich and famous. Forest Park created a written series
18 treatment for the idea, including character biographies, themes,
19 and storylines. It mailed this written material to Alex Sepiol,
20 who worked for USA Network.

21 After sending the written materials, Forest Park requested a
22 meeting between its representatives and Sepiol. Sepiol scheduled
23 the meeting "for the express purpose of hearing Plaintiffs pitch"
24 their show. Complaint ¶ 12. At the time, Sepiol and USA Network

1 knew "that writer-creat[ors] pitch creative ideas to prospective
2 purchasers with the object of selling those ideas for
3 compensation" and "that it was standard in the entertainment
4 industry for ideas to be pitched with the expectation of
5 compensation in the event of use." Id. ¶ 9. And, at the
6 meeting, "[i]t was understood that Plaintiffs were pitching those
7 ideas with the object of persuading USA Network to purchase those
8 ideas for commercial development." Id. ¶ 13. Sepiol said that
9 prior to hearing the idea for "Housecall," he had never heard of
10 "concierge" doctors, or doctors who make house calls for wealthy
11 patients, and "thought it was a fascinating concept for a
12 television show." Id. ¶ 15. Over the course of the following
13 week, Sepiol and Forest Park exchanged further communications;
14 however, discussions soon ceased and no further contact between
15 the parties ensued.

16 A little less than four years later, USA Network produced
17 and aired a television show called "Royal Pains," in which a
18 doctor, after being expelled from the medical community for
19 treating patients who could not pay, became a concierge doctor to
20 the rich and famous in the Hamptons. Forest Park had no prior
21 knowledge of "Royal Pains," did not consent to its production,
22 and received no compensation from USA Network for the use of its
23 idea for the show.

1 **Prior Proceedings**

2 Forest Park Pictures, located in California, and the
3 Christensens, residents of California and Toronto, Canada,
4 brought a diversity action against USA Network and Universal
5 Television Network, a New York corporation, for breach of
6 contract. USA Network moved under Federal Rule of Civil
7 Procedure 12(b)(6) to dismiss the Complaint on the grounds that
8 the Copyright Act preempted the claim and that the contract was
9 too vague to be enforced. The district court held the claim
10 preempted and dismissed the Complaint without addressing the
11 vagueness argument. Forest Park Pictures v. Universal Television
12 Network, Inc., No. 10 Civ. 5168(CM), 2011 WL 1792587, at * 3,
13 2011 U.S. Dist. LEXIS 50081, at *9 (S.D.N.Y. May 10, 2011).
14 Forest Park timely appealed the dismissal.

15
16 **DISCUSSION**

17 This appeal presents two questions: first, whether Forest
18 Park's breach of implied contract claim is preempted by the
19 Copyright Act; and second, if such a claim is not preempted,
20 whether Forest Park adequately pleaded a claim under state law.
21 We hold that Forest Park's claim is not preempted and that the
22 Complaint pleads an enforceable contract under state law that
23 survives a motion to dismiss.

1 We review de novo a district court's dismissal of a
2 complaint under Rule 12(b)(6), accepting all of the complaint's
3 factual allegations as true and drawing all reasonable inferences
4 in the plaintiffs' favor. Interpharm, Inc. v. Wells Fargo Bank,
5 Nat'l Ass'n, 655 F.3d 136, 141 (2d Cir. 2011). The complaint
6 must state a claim that is plausible on its face. Bell Atl.
7 Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial
8 plausibility when the plaintiff pleads factual content that
9 allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged." Ashcroft v.
11 Iqbal, 556 U.S. 662, 678 (2009).

12 **I. Preemption**

13 We first turn to USA Network's argument that Forest Park's
14 claim is preempted. Section 301 of the Copyright Act expressly
15 preempts a state law claim only if (i) the work at issue "come[s]
16 within the subject matter of copyright" and (ii) the right being
17 asserted is "equivalent to any of the exclusive rights within the
18 general scope of copyright." 17 U.S.C. § 301(b); see Barclays
19 Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 892 (2d
20 Cir. 2011).

21 **A. Subject Matter Requirement**

22 In order to be preempted, a claim must involve a work
23 "within the subject matter of copyright." 17 U.S.C. § 301(a).
24 Copyright protection exists for "original works of authorship

1 fixed in any tangible medium of expression," but does not extend
2 to an "idea, . . . regardless of the form in which it is
3 described, explained, illustrated, or embodied." 17 U.S.C.
4 § 102(a), (b). We have held, however, that works may fall within
5 the subject matter of copyright, and thus be subject to
6 preemption, even if they contain material that is uncopyrightable
7 under section 102. See Barclays Capital, 650 F.3d at 892; Nat'l
8 Basketball Ass'n v. Motorola, Inc. ("NBA"), 105 F.3d 841, 849 (2d
9 Cir. 1997); Harper & Row, Publishers, Inc. v. Nation Enters., 723
10 F.2d 195, 200 (2d Cir. 1983), rev'd on other grounds, 471 U.S.
11 539 (1985). See generally 4 Melville B. Nimmer & David Nimmer,
12 Nimmer on Copyright § 19D.03[A][2][b] (2011). In Harper & Row,
13 for example, the work at issue, President Ford's memoirs,
14 contained uncopyrightable facts. 723 F.2d at 200. Nevertheless,
15 we held that the factual content of the book did not remove the
16 work as a whole (indisputably a literary work of authorship, see
17 § 102(a)(1)) from the subject matter of copyright. Harper & Row,
18 723 F.2d at 200; see also Barclays Capital, 650 F.3d at 892, 902.
19 Similarly, in Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d
20 296 (2d Cir. 2004), we held that a novel fell within "the broad
21 ambit of the subject matter categories" listed in section 102(a)
22 despite containing uncopyrightable ideas. Id. at 306. The scope
23 of copyright for preemption purposes, then, extends beyond the
24 scope of available copyright protection.

1 The reason for our broad interpretation of the scope of
2 copyright preemption is that Congress, in enacting section 301,
3 created a regime in which some types of works are copyrightable
4 and others fall into the public domain. See NBA, 105 F.3d at
5 849. In preempting certain state causes of action, Congress
6 deprived the states of the power to "vest exclusive rights in
7 material that Congress intended to be in the public domain."
8 Id.; see also Harper & Row, 723 F.2d at 200 (recognizing that it
9 would "run directly afoul of one of the Act's central purposes"
10 to allow the states to expand copyright protection to works
11 Congress deemed uncopyrightable). Section 301's preemption
12 scheme functions properly only if the "'subject matter of
13 copyright' includes all works of a type covered by sections 102
14 and 103, even if federal law does not afford protection to them."
15 NBA, 105 F.3d at 850 (quoting ProCD, Inc. v. Zeidenberg, 86 F.3d
16 1447, 1453 (7th Cir. 1996)).

17 The work at issue in this case is Forest Park's idea for
18 "Housecall," manifested in the series treatment (comprising
19 character biographies, themes, and storylines). This treatment
20 and associated written materials are "works of authorship that
21 are fixed in a tangible medium." 17 U.S.C. § 301(a). Although
22 Forest Park's Complaint does not allege that USA Network took its
23 actual scripts or biographies, the subject matter requirement is
24 met because the Complaint alleges that USA Network used the ideas

1 embodied in those written works. That the work contains within
2 it some uncopyrightable ideas does not remove it from the subject
3 matter of copyright. See Briarpatch, 373 F.3d at 305. Moreover,
4 because the ideas that are the subject of the claim were fixed in
5 writing—whether or not the writing itself is at issue—the claim
6 is within the subject matter of copyright. See NBA, 105 F.3d at
7 849; see also Montz v. Pilgrim Films & Television, Inc., 649 F.3d
8 975, 979 (9th Cir. 2011) (en banc) (holding that an idea for a
9 television show, once fixed in a tangible medium, fell within the
10 subject matter of copyright); Wrench LLC v. Taco Bell Corp., 256
11 F.3d 446, 455 (6th Cir. 2001) (holding that an idea for a
12 character, conveyed in storyboards, scripts, and drawings, was
13 within the subject matter of copyright). Therefore, the first
14 requirement for preemption is met.

15 **B. Equivalency Requirement**

16 In order to establish preemption, USA Network must also
17 demonstrate that the Complaint seeks to vindicate a “legal or
18 equitable right[] that [is] equivalent to any of the exclusive
19 rights within the general scope of copyright as specified by
20 section 106.” 17 U.S.C. § 301(a). Section 106 gives copyright
21 owners the exclusive rights, among other things, to reproduce a
22 copyrighted work, to prepare derivative works, to distribute
23 copies of the work to the public, and to display the work
24 publicly. 17 U.S.C. § 106. A state law right is equivalent to

1 one of the exclusive rights of copyright if it "may be abridged
2 by an act which, in and of itself, would infringe one of the
3 exclusive rights." Harper & Row, 723 F.2d at 200. "But if an
4 extra element is required instead of or in addition to the acts
5 of reproduction, performance, distribution or display, in order
6 to constitute a state-created cause of action," there is no
7 preemption. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982
8 F.2d 693, 716 (2d Cir. 1992) (internal quotation marks omitted).

9 Applying this "extra element" test, we have held numerous
10 categories of claims to be not preempted, including trade secret
11 claims, in which the plaintiff must show the defendant breached a
12 duty of trust through improper disclosure of confidential
13 material, id. at 717; certain "hot news" misappropriation claims,
14 because the plaintiff must show time-sensitive factual
15 information, free-riding by the defendant, and a threat to the
16 very existence of the plaintiff's product, NBA, 105 F.3d at 853;
17 and breach of confidential relationship, in which the plaintiff
18 must show an obligation not to disclose ideas revealed in
19 confidence, Smith v. Weinstein, 578 F. Supp. 1297, 1307 (S.D.N.Y.
20 1984), aff'd without opinion, 738 F.2d 419 (2d Cir. 1984). See
21 also Harper & Row, 723 F.2d at 201 (in dictum, suggesting that
22 conversion based on physical possession and control of a
23 copyrighted work may not be preempted because such a tort
24 involves "acts . . . qualitatively different from those

1 proscribed by copyright law"). By contrast, we have found a
2 state law claim preempted when the extra element changes the
3 scope but not the fundamental nature of the right. See, e.g.,
4 Briarpatch, 373 F.3d at 306-07 (holding an unjust enrichment
5 claim preempted because, although plaintiff must prove
6 "enrichment," the essential nature of the claim remained the
7 unauthorized use of a work); Fin. Info., Inc. v. Moody's
8 Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986) (holding
9 that a misappropriation claim was preempted because the element
10 of commercial immorality did not change qualitative nature of the
11 right); Harper & Row, 723 F.2d at 201 (holding that a claim of
12 conversion based on unauthorized publication of a work was
13 preempted because it is "coextensive with an exclusive right
14 already safeguarded by the Act").

15 In this case, the issue is whether a particular breach of
16 contract claim survives preemption. More specifically, Forest
17 Park alleges that it entered into an implied-in-fact agreement
18 with USA Network that required USA Network to pay Forest Park for
19 the use of its idea. See Complaint ¶¶ 24-26. There are several
20 qualitative differences between such a contract claim and a
21 copyright violation claim. First, the Copyright Act does not
22 provide an express right for the copyright owner to receive
23 payment for the use of a work. It simply gives the copyright
24 owner the right to prevent distribution, copying, or the creation

1 of derivative works (though, of course, the copyright owner may
2 cede or all part of these rights for payment). See 17 U.S.C.
3 § 106. Second, a plaintiff suing for failure to pay under a
4 contract must prove extra elements beyond use or copying,
5 including mutual assent and valid consideration. Third, a breach
6 of contract claim asserts rights only against the contractual
7 counterparty, not the public at large. As the Seventh Circuit
8 explained in ProCD, "A copyright is a right against the world.
9 Contracts, by contrast, generally affect only their parties;
10 strangers may do as they please, so contracts do not create
11 'exclusive rights.'" 86 F.3d at 1454.

12 A number of our sister circuits have accordingly concluded
13 that at least some contract claims involving the subject matter
14 of copyright do not contest rights that are the equivalent of
15 rights under the Copyright Act, and thus are not preempted. See
16 Montz, 649 F.3d at 980-81 (implied-in-fact contract); Utopia
17 Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C., 596 F.3d
18 1313, 1326-27 (11th Cir. 2010) (express contract); Bowers v.
19 Baystate Techs., Inc., 320 F.3d 1317, 1324-26 (Fed. Cir. 2003)
20 (applying First Circuit law to an express contract in a software
21 license); Wrench, 256 F.3d at 456 (implied-in-fact contract);
22 ProCD, 86 F.3d at 1454-55 (express contract in a software
23 license); Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l,
24 Inc., 991 F.2d 426, 431 (8th Cir. 1993) (express licensing

1 agreement); Taguino v. Teledyne Monarch Rubber, 893 F.2d 1488,
2 1490, 1501 (5th Cir. 1990) (express contract); Acorn Structures,
3 Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988) (per curiam)
4 (express contract); see also 4 Nimmer § 19D.03[C][2] (“As a
5 general rule, contract claims require proof of a significant
6 ‘extra element’: the existence of an actual agreement between
7 plaintiff and defendant involving a promise to pay for use of
8 disclosed ideas. That conclusion is the same, regardless of
9 whether the particular claim at issue is labeled express contract
10 [or] implied-in-fact contract” (footnotes omitted)). Of
11 course, preemption cannot be avoided simply by labeling a claim
12 “breach of contract.” A plaintiff must actually allege the
13 elements of an enforceable contract (whether express or implied-
14 in-fact), including offer, acceptance, and consideration, in
15 addition to adequately alleging the defendant’s breach of the
16 contract.

17 As long as the elements of a contract are properly pleaded,
18 there is no difference for preemption purposes between an express
19 contract and an implied-in-fact contract. See, e.g., Leibowitz
20 v. Cornell Univ., 584 F.3d 487, 507 (2d Cir. 2009) (under New
21 York law, proof of an implied-in-fact contract requires proof of
22 the same elements as an express contract); Warner Bros. Int’l
23 Television Distribution v. Golden Channels & Co., 522 F.3d 1060,
24 1069 (9th Cir. 2008) (same under California law). There is,

1 however, a significant difference for preemption purposes between
2 contracts implied-in-fact and contracts implied-in-law. Theories
3 of implied-in-law contract, quasi-contract, or unjust enrichment
4 differ significantly from breach of contract because the
5 plaintiff need not allege the existence of an actual agreement
6 between the parties. See 1-1 Corbin on Contracts § 1.20 ("A
7 contract 'implied in law' is a fictitious contract. . . . A
8 contract 'implied in fact' is a true contract that arises from
9 the tacit agreement of the parties."). Under these quasi-
10 contractual theories, the plaintiff need only prove that the
11 defendant was unjustly enriched through the use of her idea or
12 work. Such a claim is not materially different from a claim for
13 copyright infringement that requires a plaintiff to prove that
14 the defendant used, reproduced, copied, or displayed a
15 copyrighted work. See Briarpatch, 373 F.3d at 306 (finding no
16 extra element in an unjust enrichment claim); see also Wrench,
17 256 F.3d at 459 (noting that there is "a crucial difference"
18 between implied-in-fact contracts and implied-in-law contracts
19 because the latter "depend[] on nothing more than the
20 unauthorized use of the work"); 4 Nimmer §§ 19D.03[B][6], [7]
21 (unjust enrichment and quasi-contract preempted).

22 In this case, we need not address whether preemption is
23 precluded whenever there is a contract claim, or only when the
24 contract claim includes a promise to pay. Compare Montz, 649

1 F.3d at 980-81 (holding that the element of mutual assent in a
2 contract claim can by itself provide the "extra element"), with
3 Wrench, 256 F.3d at 457-58 (holding that the promise of payment
4 in a contract claim provides the "extra element"). See also 4
5 Nimmer § 19D.03[C][2] (suggesting that a contract that "does not
6 purport to give [the plaintiff] any protection beyond that
7 provided . . . by copyright law itself" would be preempted).
8 Here the Complaint specifically alleges that the contract
9 includes by implication a promise to pay for the use of Forest
10 Park's idea. See Complaint ¶ 11 (alleging that it was understood
11 when Forest Park met with Sepiol they were "pitching . . . ideas
12 with the object of persuading USA Network to purchase those ideas
13 for commercial development) (emphasis added); id. ¶ 25 ("USA
14 Network voluntarily accepted Plaintiffs' ideas knowing full well
15 that Plaintiffs had submitted those ideas in confidence and for
16 economic gain, and with the clear expectation of payment in the
17 event those ideas were utilized by USA Network. . . .") (emphasis
18 added). The alleged contract does not simply require USA Network
19 to honor Forest Park's exclusive rights under the Copyright Act
20 (assuming the material at issue to be copyrightable); it requires
21 USA Network to pay for the use of Forest Park's ideas. A claim
22 for breach of a contract including a promise to pay is

1 qualitatively different from a suit to vindicate a right included
2 in the Copyright Act and is not subject to preemption.¹

3 **II. Breach of Contract**

4 The next question we must consider is whether the Complaint
5 actually pleads an enforceable implied-in-fact contract
6 containing a promise to pay. USA Network argues that the
7 Complaint falls short because there was no meeting of the minds
8 over the price term. The district court decided (erroneously, in
9 our view) that contract claims based on the submission of works
10 or ideas were preempted, and thus it did not reach this issue.
11 See Forest Park Pictures, 2011 WL 1792587, at *3, 2011 U.S. Dist.
12 LEXIS 50081, at *5.

13 **A. Choice of Law**

14 Determining whether Forest Park pleaded an enforceable
15 implied-in-fact contract requires us to examine state law and,
16 because it matters, we must decide which state's law applies.
17 Forest Park contends that California law governs the contract;
18 USA Network argues for New York law. Neither party suggests that
19 the choice of law can be determined from the implied contract
20 itself.

¹We need not here consider whether even a promise to pay may be insufficient to avoid preemption in circumstances where, through contracts of adhesion or similar instruments, a plaintiff uses such promises to create a de facto monopoly at odds with federal copyright policy. See Arthur R. Miller, Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come, 119 Harv. L. Rev. 703, 768-74 (2006). That is not this case.

1 A federal court sitting in diversity jurisdiction applies
2 the choice of law rules of the forum state. See Klaxon Co. v.
3 Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); GlobalNet
4 Financial.com, Inc. v. Frank Crystal & Co., 449 F.3d 377, 382 (2d
5 Cir. 2006). Under the law of New York, the forum state, the
6 first step in a choice of law analysis is to determine whether an
7 actual conflict exists between the laws of the jurisdictions
8 involved. In re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 223
9 (1993); see also GlobalNet Financial.com, 449 F.3d at 382. If
10 there is such a conflict, New York law looks to the "center of
11 gravity" of a contract to determine choice of law. Stolarz, 81
12 N.Y.2d at 226. Under the "center of gravity" approach, a court
13 may consider a number of significant contacts, including the
14 place of contracting, the place of performance, the physical
15 location of property that is the subject matter of the contract,
16 and the domiciles or places of business of the contracting
17 parties. Id. at 227; see also Lazard Freres & Co. v. Protective
18 Life Ins. Co., 108 F.3d 1531, 1539 (2d Cir. 1997). The place of
19 contracting and place of performance are given the greatest
20 weight. Stolarz, 81 N.Y.2d at 226.

21 While neither New York nor California law is absolutely
22 clear, there does appear to be at least one conflict between the
23 two states that is relevant to Forest Park's claim: the question
24 of whether a contract can be enforced without a definite price

1 term. Under California law, an implied-in-fact contract can have
2 an open price term to be filled in by industry standards. See,
3 e.g., Whitfield v. Lear, 751 F.2d 90, 93 (2d Cir. 1984)
4 (declining to dismiss a claim under California law when the
5 plaintiff alleged that a television studio voluntarily accepted a
6 script and also that industry custom indicated a promise to pay);
7 Montz, 649 F.3d at 979. Whether New York law follows the same
8 rule is not clear. In Lapine v. Seinfeld, 918 N.Y.S.2d 313 (N.Y.
9 Sup. Ct. 2011), a New York court found a lack of mutual assent,
10 but also noted that “price is an essential element of a
11 contract.” Id. at 318; see also Marraccini v. Bertelsmann Music
12 Grp., Inc., 644 N.Y.S.2d 875, 877 (N.Y. App. Div. 3d Dep’t 1996)
13 (dismissing an implied-in-fact contract claim on the pleadings
14 because there were open-ended terms, and industry standards that
15 plaintiff claimed could fill them were not identified). But see
16 Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 376 &
17 n.5 (2d Cir. 2000) (noting that an implied-in-fact contract must
18 have mutual assent, but that it can be inferred from “the
19 specific conduct of the parties, industry custom, and course of
20 dealing”) (citing Maas v. Cornell Univ., 94 N.Y.2d 87, 94
21 (1999)).

22 Given the opacity of New York law, we cannot confidently say
23 that there is no divergence between California and New York law.
24 Therefore, we next must determine the “center of gravity” of the

1 contract. Here, almost all of the significant contacts are with
2 California: the sole face-to-face meeting between Forest Park and
3 USA Network was in California; at least part of the performance
4 (Forest Park's disclosure in writing and orally of its idea) took
5 place there; the written series treatment was physically located
6 there; two out of the three plaintiffs are California residents;
7 and, while Universal Television Network's principal place of
8 business is in New York, all of the activity related to this
9 contract took place in USA Network's California offices. See,
10 e.g., Tri-State Emp't Servs., Inc. v. Mountbatten Sur. Co., 295
11 F.3d 256, 261 (2d Cir. 2002) (applying New York law where the
12 parties were either incorporated in New York or had their
13 principal places of business there, where the oral contract was
14 negotiated in New York, and where performance took place in part
15 in New York); Twentieth Century Fox Film Corp. v. Marvel Enters.,
16 Inc., 155 F. Supp. 2d 1, 13 (S.D.N.Y. 2001) (applying California
17 law to a contract negotiated entirely in California, and
18 performed in both New York and California). We therefore hold
19 that California law applies. The remaining question before us
20 thus becomes whether Forest Park has alleged an enforceable
21 contract under California contract law.

22 **B. Implied-in-Fact Contract**

23 California has long recognized that an implied-in-fact
24 contract may be created where the plaintiff submits an idea (the

1 offer) that the defendant subsequently uses (the acceptance)
2 without compensating the plaintiff (the breach). In Desny v.
3 Wilder, 46 Cal. 2d 715 (1956) (en banc), the plaintiff, Desny,
4 telephoned Billy Wilder, then a producer and writer for Paramount
5 Pictures, and told Wilder's secretary that he had an idea for a
6 film. Id. at 726. At the secretary's request, Desny forwarded
7 to Wilder a brief synopsis of the movie idea and stated that, if
8 the idea were used, he expected to be paid. Id. at 726-27.

9 Faced with the enforceability of such an agreement, the
10 California Supreme Court held that a contract claim based on the
11 submission of an idea could succeed either if the plaintiff
12 received "an express promise to pay" or if "the circumstances
13 preceding and attending disclosure, together with the conduct of
14 the offeree acting with knowledge of the circumstances, show a
15 promise of the type usually referred to as 'implied' or 'implied-
16 in-fact.'" Id. at 738. For almost six decades following Desny,
17 California courts have continued to recognize contract claims
18 under the authority of that case. See Montz, 649 F.3d at 976-77.

19 A plaintiff in a Desny action can prevail by proving that an
20 idea was submitted with an understanding by the plaintiff
21 amounting to a condition that the plaintiff would be paid for use
22 of the idea and that the defendant knew or should have known of
23 the condition. See Benay v. Warner Bros. Entm't, Inc., 607 F.3d
24 620, 629 (9th Cir. 2010); see also Grosso v. Miramax Film Corp.,

1 383 F.3d 965, 967 (9th Cir. 2004) (a Desny claim requires that
2 the offeree voluntarily accepted the idea knowing that use was
3 conditioned on payment, looking to all the circumstances
4 attending disclosure). An express condition or promise of
5 payment is not required. See Gunther-Wahl Prods., Inc. v.
6 Mattel, Inc., 128 Cal. Rptr. 2d 50, 57-59, 63 (Cal. Ct. App.
7 2002). Industry custom may establish an implied promise by the
8 offeree to pay the offeror if the idea is used under the
9 circumstances of a particular transaction. Whitfield, 751 F.2d
10 at 93; Gunther-Wahl, 128 Cal. Rptr. 2d at 53-61.

11 Here, although Forest Park does not allege that it expressly
12 conditioned disclosure on a promise of payment, the Complaint
13 alleges facts that, if proven, would establish that USA Network
14 knew or should have known such a condition was implied. Forest
15 Park alleges that it pitched its ideas to USA Network "with the
16 object of persuading USA Network to purchase those ideas for
17 commercial development," and that USA Network and its agent
18 Sepiol "at all relevant times knew (a) that writer-creators pitch
19 creative ideas to prospective purchasers with the object of
20 selling those ideas for compensation; and (b) that it was
21 standard in the entertainment industry for ideas to be pitched
22 with the expectation of compensation in the event of use."
23 Complaint ¶¶ 9, 13. Moreover, the Complaint alleges that USA
24 Network accepted Forest Park's idea when it knew or should have

1 known of that condition by keeping the series treatment Forest
2 Park submitted, scheduling a meeting with Forest Park, allowing
3 Forest Park to pitch its idea uninterrupted, and communicating
4 with Forest Park after the meeting. See Whitfield, 752 F.2d at
5 93 (noting that, by opening and reviewing a submitted script, a
6 producer might implicitly promise to pay for ideas if he uses
7 them, assuming the existence of an industry custom of returning
8 unwanted submissions unopened); Gunther-Wahl, 128 Cal. Rptr. 2d
9 at 53-54 (describing plaintiff's evidence of industry custom to
10 cut off a pitch if the offeree meant to reject an idea). These
11 allegations are sufficient to plead a Desny claim under
12 California law.

13 USA Network argues that even if Forest Park did allege an
14 implied-in-fact agreement, the agreement would not be enforceable
15 because it lacks a definite price term. California courts,
16 however, enforce contracts without exact price terms as long as
17 the parties' intentions can be ascertained. See, e.g., Cal.
18 Lettuce Growers, Inc. v. Union Sugar Co., 45 Cal. 2d 474, 482
19 (1955) (en banc). And California permits custom and usage (among
20 other extrinsic evidence) to supply absent terms. Whitfield, 751
21 F.2d at 93; Cal. Lettuce Growers, 45 Cal. 2d at 482. In Desny
22 itself, an enforceable contract was found even though the
23 plaintiff stated he expected to be paid "the reasonable value" of
24 his idea. 46 Cal. 2d at 727.

1 Forest Park alleges that it agreed with USA Network to be
2 paid the industry standard for its idea, which is enough under
3 California law to survive a motion to dismiss. At trial, Forest
4 Park will have to prove that such an industry standard price
5 exists and that both parties implicitly agreed to it. That
6 Forest Park might fail to prove its claim, however, does not
7 render the contract unenforceable as a matter of law at the
8 pleading stage. Because Forest Park has alleged an enforceable
9 implied-in-fact contract including a promise of payment for the
10 disclosure of its idea, its claim is not preempted by the
11 Copyright Act and therefore the district court erred in
12 dismissing the Complaint.

13

14

CONCLUSION

15 For the foregoing reasons, we VACATE the district court's
16 judgment dismissing Forest Park's complaint and REMAND for
17 further proceedings.