CONTRACT LAW, THE MISSING INGREDIENT IN MANY "COPYRIGHT" DECISIONS

A Faculty Advised Project
Submitted in partial fulfillment
of the requirements for the
Master of Intellectual Property Law Degree
at Franklin Pierce Law Center

Christine M. Wilkes
Christine M. Wilkes

Date: _____

Approved: Thomas G. Field, Jr. 4/19/94
Professor Thomas G. Field, Jr.
Faculty Project Advisor

C. E. Blank 4.20.94 with the good faith conditions of minor changes. CEB 5.9.94
Professor Christopher Blank
Faculty Project Co-Advisor

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JUL 18 1997

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I. Introduction

This note contains an overview of the implied covenant of good faith and fair dealing as it specifically relates to intellectual property law. Special emphasis is placed on certain "copyright cases" in which this theory was not addressed, but perhaps should have been. The jurisdictions recognizing this concept as a cause of action and the areas of law which it is frequently applied to will be analyzed in general. Several intellectual property law cases will be thoroughly discussed first as they were decided by the court and then under the theory of implied covenant of good faith and fair dealing. Rationale will be given to justify (or not justify) a cause of action for a breach of the implied covenant, including an analysis as to whether it was appropriate to decide the case under this theory. The cases will be compared and contrasted. Conclusions will then be drawn which include a focus on remedies. These conclusions will also include a discussion on the lack of use of this theory in intellectual property law cases and the resulting ramifications. Breach of an implied covenant of good faith and fair dealing should be applied more frequently in intellectual property law cases, specifically copyright infringement cases.

II. Defining an implied covenant of good faith and fair dealing

"Good faith" is a seemingly nebulous concept which courts over

the years have tried to apply in many different contexts. The Uniform Commercial Code (U.C.C.), although limited in scope, has shed some light on its meaning by requiring an obligation of good faith in the performance or enforcement of every contract or duty under the Act.[1] In the case of a merchant, the U.C.C. expressly defines good faith to mean observance of reasonable commercial standards of fair dealing in the trade.[2] Even prior to enactment of the U.C.C., this concept was recognized. For example, in the classic case of Lucy, Lady Duff-Gordon,[3] Judge Cardozo read into a contract an implied promise to use reasonable efforts to bring profits and revenues into existence.[4] The Restatement (Second) of Contracts similarly includes the concept of good faith and is broader than the U.C.C. definition.[5]

Interpreters of the implied covenant of good faith and fair dealing, however, differ in their opinions as to what the concept actually means.[6] Their understanding of its application varies from first identifying the bad faith a judge would intend to rule out ("excluder" type definition) to a case by case, factual

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[1] U.C.C. Section 1-203 (1989).

[2] U.C.C. Section 2-103 (1989).

[3] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

[4] Monique C. Lillard, Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context, 57 Mo. L. Rev. 1233, 1234 (1992), citing 118 N.E. 214, 215 (N.Y. 1917).

[5] Restatement (Second) of Contracts Section 205 (1981).

[6] Lillard, supra note 4, at 1239.

analysis.[7] For example, under the "excluder" definition, Robert Summers has suggested that to determine the meaning of good faith, one should ask,

> What, in the actual or hypothetical situation, does the judge intend to rule out by his use of this phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an "opposite" for the species of bad faith being ruled out.[8]

Incidently, Summers views the U.C.C.'s definition as "unduly narrow" and claims that merchants understand the concept of good faith and fair dealing to mean more than honesty in fact.[9] Conversely, Eric Holmes viewed good faith through a single mode of analysis which comprises factual considerations such as the nature of the contract, the nature of undisclosed facts and accessibility of knowledge.[10]

Additionally, one interpreter of the implied covenant added a moral element to the definition[11] while another interpreter suggested an adherence to the parties expectation of the bargain.[12] What is not disputed, however, is that the implied

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[7] Id. at 1237, 1238.

[8] Id. at 1237.

[9] Id. at 1237.

[10] Id. at 1238.

[11] Id. Russell Eisenberg rejects attempts to define good faith and relies on its purpose and implication for business. He suggests that the business community must conduct itself in a righteous and just manner.

[12] Id. at 1238, 1239. A decade after Holmes, Clayton Gillette suggested this approach. It was coined the "contemplation standard" by Steven Burton.

covenant requires parties to a contract to do everything necessary to complete the contract, not to intentionally and purposefully prevent performance by the other party, and not to injure the other party's right to receive the fruits of the contract.[13]

III. Jurisdiction

In most jurisdictions, an implied covenant of good faith and fair dealing applies to all contracts.[14] Several jurisdictions, however, also allow relief in tort as well as contract for a breach of this covenant, particularly in insurance cases.[15] The rationale for allowing relief in tort is that a special relationship between the parties may render the need for tort remedies which are otherwise unobtainable in a contract action.[16]

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[13] 17A Am. Jur. 2d Contracts Section 380 (1991).

[14] Glenn Edward Tremper, Commercial Bad Faith: Tort Recovery for Breach of the Implied Covenant in Ordinary Commercial Contracts, 48 Mont. L. Rev. 349, 350 (1987). Montana, however, is one of the few jurisdictions refusing to hold that all contracts include this implied covenant. Tremper's comment analyzes tort damage recovery for breach of this implied covenant in ordinary commercial contracts. He also recommends the employment of alternative means for deterring bad faith conduct in commercial contracts.

[15] Jeffrey M. Judd, The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties, 39 Hastings L.J. 483 (1988). In this review of the covenant of good faith and fair dealing, Judd thoroughly analyzes its application in the employment context. He argues that a court might hold an employee liable for tortious breach of the implied covenant of good faith and fair dealing implied in an employment contract if the employee abuses a special position of trust and confidence. No court, however, has yet applied the implied covenant in this manner.

[16] Id. citing Seaman's Direct Buying Serv. v. Standard Oil Co., 686 P.2d 1158, 1166, 1173 (Cal. 1984); Wallis v. Superior Court (Kroehler Mfg. Co.), 207 Cal. Rptr. 123, 128-29 (Cal. Ct.

For example, factors courts may consider include the bargaining power of each of the parties and the public interest that parties conduct themselves in a particular way.[17]

IV. Application of the Implied Covenant

The implied covenant of good faith and fair dealing is inherently fact sensitive. Its application hinges on the particular circumstance and actions of the parties in each case. As indicated above, courts traditionally treated a breach of this covenant as a breach of contract. A mere breach of a contractual duty itself cannot trigger a valid assertion of a breach of this theory; a deliberate and conscious act which unfairly frustrates the purpose of the contract and disappoints the reasonable expectations of one party is necessary.[18]

V. Intellectual Property Law Cases Using this Implied Covenant

Implied covenants of good faith and fair dealing are a

App. 1984). For example, the Seaman's decision involved a non-insurance, commercial contract between an oil company and a ship equipment/supply dealer. No "special relationship" was found. Similarly, no "special relationship" was found in the Wallis decision which involved an employee termination/compensation issue.

[17] Careau & Co. v. Security Pacific, 272 Cal. Rptr. 387, 403 (Cal. Ct. App. 1990) citing Mitsui v. Manufacturers Bank, 260 Cal. Rptr. 793, 726, 733 (Cal. Ct. App. 1989). In Mitsui, however, the court declined to find a "special relationship" between a commercial borrower and lender to warrant a tort claim.

[18] Id. at 399-400. See also Dayan v. McDonald's Corp., 466 N.E.2d 958 (Ill. App. 1 Dist. 1984).

powerful theory in intellectual property law related cases. For example, in Uproar Co. v. National Broadcasting Co., a large dealer in gasoline and related products contracted with Ed Wynn, a well-known actor and comedian, to give a series of radio broadcasts to advertise the dealer's goods.[19] Wynn's jokes were a success and thus, he desired to make a profit by publishing the programs in pamphlets after the program was aired on the radio.[20] The dealer objected to this, claiming that it owned the copyright in the broadcast and that the publication of the pamphlets would injure the advertising value of the broadcast.[21] The court found that notwithstanding the contract between comedian, Wynn, and the dealer, the literary property in the scripts belonged to Wynn and Wynn had a restricted right to publish them.[22] The court recognized the principle that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means, according to the court, that every contract contains an implied covenant of good faith and fair dealing.[23] Specifically, the court noted that the transferor of copyrights, like the transferee, has an obligation of

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[19] 81 F.2d 373 (1st. Cir. 1936) at 375; cert. denied 56 S.Ct. _, 80 L. Ed. __.

[20] Id.

[21] Id.

[22] Id. at 376.

[23] Id. at 376, 377.

good faith and fair dealing. The pamphlets produced by Wynn, however, were "cheap and flashy" and tended to cause confusion in the minds of the public with respect to the relationship between the parties.[24] The court modified the injunction to prevent publication of the pamphlets in any way which injures or interferes with the benefits the dealer might derive from its advertising under its contracts with Wynn.[25]

Looking to the relationship between the parties, the court correctly decided this case under contract law. No copyright infringement occurred because the literary property belonged to Wynn who had a restricted right to publish the pamphlets. This restricted publication was not a fair use in the copyright sense, but an implied obligation under contract law not to injure the dealer.

In H/R Stone, Inc. v. Phoenix Business Systems, Inc,[26] the court determined that the defendants, Phoenix Business Systems and Ultimate Corporation breached the May 9, 1980 contract with plaintiff, H/R Stone, by failing to provided plaintiff with the required source code and research software.[27] The plaintiff, however, breached an implied covenant of good faith by failing to pay $52,000 owed under the software development contract and

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[24] Id. at 377.

[25] Id.

[26] 1988 WL 96170 (S.D.N.Y. August 26, 1988). This case is not reported in the Federal Supplement.

[27] Id. at 1.

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failing to approve necessary specifications without delay.[28] Defendants were required to complete all the software within 150 days or else forfeit a percentage of the software price.[29] Thus, failure to provide defendants with the necessary specifications without delay unreasonably interfered with defendants' expectations under the contract.

In County of Ventura v. O.V. Blackburn,[30] the plaintiff spent a considerable amount of time compiling, collating, and assembling information depicted in his copyrighted map of Ventura County. The plaintiff entered into a contract with the County conveying the right to trace the map and reproduce it for use by the County Surveyor and sale to the public.[31] Each map furnished by the plaintiff for tracing contained a copyright notice, but the resulting traced maps did not. The court found that the contract contained an implied covenant implicitly requiring the County to exercise good faith in performance and to do nothing that would destroy the value of the copyright.[32] The breach of this implied covenant to affix copyright notices constituted an infringement of plaintiff's copyright.[33]

Violation of the implied duty of good faith and fair dealing

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[28] Id.

[29] Id.

[30] 362 F.2d. 515, 516 (9th Cir. 1966).

[31] Id. at 517.

[32] Id. at 518.

[33] Id.

under a performance contract was unsuccessfully asserted in Brant v. Lockheed Missiles & Space Co., Inc.,[34] Plaintiffs were hired by defendant Lockheed as professional engineers and were valued employees.[35] They were assigned to the Space System Division to perfect a device to cause the separation of parts and stages of rockets and missiles in space, which they eventually did.[36] A patent application was subsequently filed.[37] The written Lockheed Patent Plan stated that if an employee's invention was deemed of sufficient value to apply for a patent, all expenses therefor were paid by the company, and the employee, in all cases, would receive $100 upon the application's filing, and $500 if and when a patent was finally granted.[38] Additionally, a Special Invention Awards provision of the Patent Plan provided that the Invention Awards Committee will consider whether or not a Special Invention Award shall be made to the inventor-employee. Upon consideration of such request the Committee may, but is not obligated to, grant to the inventor-employee a Special Invention Award.[39] This award must be requested within the period of two years. The range of awards under this provision was between $250 to $20,000.[40] Plaintiffs

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[34] 201 Cal. Rptr. 746 (Cal. Ct. App. 1984).

[35] Id. at 747.

[36] Id. at 747, 748.

[37] Id. at 748.

[38] Id.

[39] Id.

[40] Id.

were paid the above-mentioned $100 and $500, but not until after the two year period, did they apply for the discretionary Special Inventor's Award.[41] The untimeliness of their request was waived, and pursuant to this, plaintiffs received $2,500 each.[42] They deemed this insufficient and claimed that Lockheed had violated the Plan's implied duty[43] of good faith and fair dealing.[44] The court held that the duty is dependent upon the nature of the bargain struck and legitimate expectations of the parties.[45] If the language of the contract is clear and explicit, that language is to govern its interpretation.[46] The Patent Plan specifically stated that the Invention's Award Committee, may, but is not obligated to, grant a special award and that their decision was final and conclusive.[47] Lockeed fully respected the plan and thus did not violate a duty of good faith and fair dealing[48] regardless of the great financial success that the patent enabled Lockheed to reap.

The above cases demonstrate several intellectual property law related fields in which the implied covenants of good faith and

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[41] Id.

[42] Id.

[43] The analysis assumes that covenant of good faith and fair dealing is equivalent to duty of good faith and fair dealing.

[44] 201 Cal. Rptr. 747, 748 (Cal. Ct. App. 1984).

[45] Id. at 749.

[46] Id.

[47] Id at 748.

[48] Id. at 749.

fair dealing was asserted. Application of this powerful concept in intellectual property law related cases, however, is under-used. The troubling result is that in some intellectual property law cases, the correct party wins, but arguably under the wrong theory.

VI. Case Illustrations In Which The Theory Of Implied Covenants Of Good Faith And Fair Dealing Could Have Been Raised

In Gross v. Seligman[49] an artist posed a prepubescent model in the nude and produced a copyrighted photograph which he called the 'Grace of Youth.'[50] The artist sold and assigned all rights to complainants.[51] Two years later, the same artist photographed the same model in a similar pose, wherein the only difference was that the woman was smiling and holding a cherry stem between her teeth.[52] This photograph was called 'Cherry Ripe' and was published by the defendants.[53] The court enjoined defendant's publication of 'Cherry Ripe' as an infringement of complainant's copyright.[54]

However, that case seems to be fundamentally a contract case. The defendants were clearly making fun of plaintiff's picture. The court should have looked to the contracts between the artist and

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[49] 212 F.930 (2nd. Cir. 1914).

[50] Id.

[51] Id.

[52] Id.

[53] Id.

[54] Id.

the complainant and between the artist and the model. Looking to the relationship between the parties, the court then would have discovered a breach of the implied covenant by the artist and the model. As discussed previously, in every contract there is an implied covenant of good faith and fair dealing. This covenant requires parties to a contract not to injure the other party's right to receive the fruits of the contract.[55] The artist breached this covenant by photographing the same model in essentially the same pose. Similarly, the model breached this covenant by posing in this photograph. Arguably, this photograph adversely affected the sales of the original 'Grace of Youth.' Purchasers may have been more inclined to buy a photograph of an older, more developed model, given a choice between the two similar photographs. Thus, plaintiff's right to receive the fruits of the original contract was injured.

A case decided similarly to above is Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.[56] In 1977, five Dallas Cowboy Cheerleaders posed for a poster.[57] The copyrighted showed the women in their official team outfits in front of a glittering backdrop.[58] The words "Dallas Cowboy Cheerleaders" appeared at the bottom of the poster.[59] Over three quarter of a

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[55] 17A Am. Jur. 2d Contracts Section 380 (1991).

[56] 66 F.2d 1184 (5th Cir. 1979).

[57] Id. at 1185.

[58] Id.

[59] Id.

million copies of the poster were sold as of December 1978.[60] Later, former members of the Dallas Cowboy Cheerleaders, now calling themselves the Texas Cowgirls, posed for a poster which was a takeoff of the original Dallas Cowboy Cheerleaders poster. In the Cowgirl poster, the women's uniforms are very similar to those in the Dallas Cowboy Cheerleaders poster as was their pose in front of a similar backdrop.[61] The words "Ex-Dallas Cheerleaders" appeared at the bottom of the poster.[62] The most disturbing feature in this poster, which was offered for public sale, however, is the fact that the Cowgirls' halter tops are unbuttoned, thus exposing the women's breasts.[63] Plaintiffs alleged copyright infringement, service mark infringement and unfair competition against the corporate manufacturer and distributor of the Cowgirls poster, and against the promoter and the copyright owner of the allegedly infringing poster.[64]

The Court held that the District Court did not abuse its discretion in issuing a preliminary injunction to restrain distribution of defendants' poster due to plaintiff's substantial likelihood of success on the merits.[65]

As in Gross v. Seligman, the court failed to address the

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[60] Id.

[61] Id.

[62] Id.

[63] Id.

[64] Id.

[65] Id. at 1188.

contracts between the parties, specifically the contract between the Cowgirls, who were ex-Dallas Cowboy Cheerleaders and the Dallas Cowboy Cheerleaders Corporation. A clear breach by the Cowgirls would probably have been evident by the implied terms of the contract. The Cowgirls clearly breached the implied covenant of good faith by posing in a similar poster which taints the image of the Dallas Cowboy Cheerleaders. This poster, arguably hindered the sales of the Dallas Cowboy Cheerleaders' poster. Fans enjoying the wholesome image of the Dallas Cowboy Cheerleaders may have been detracted from buying the first poster upon seeing other "Dallas Cowboy Cheerleaders" in a less wholesome pose. In addition, fans desiring to see bare breasted Dallas Cowboy Cheerleaders would arguably purchase the Texas Cowgirl poster over the original poster. Either way, sales of the original poster were adversely affected and the Dallas Cowboy Cheerleaders Corporation's rights to receive the benefit of the original contract was injured. Even if the sales of the original poster somehow increased, the Corporation would still have been injured. For example, their desired public image was unfairly tainted.

Plaintiffs probably did not allege trademark infringement because of the arguably lack of likelihood of confusion as to the source of each poster. Due to the Dallas Cowboy Cheerleaders reputation for promoting team spirit and their association with dancing and cheering at football games, the public probably did not believe that the Dallas Cowboy Cheerleaders Corporation was the source of sponsorship of the Texas Cowgirls' poster. In addition,

the words "Ex-Dallas Cheerleaders" appeared at the bottom of the poster.

Thus, the Cowgirls version of the original poster is not a copyright infringement, but a breach of the implied covenant of good faith and fair dealing which is inherent in every contract. Application of this theory is suggested for this case even thought the contract involved ex-employees. As mentioned previously, application of this theory is fact sensitive. It is not meant to stifle competition. Among other objectives, this theory prevents one party from injuring another party's right to receive the fruits of the original contract. Limitations in the application of this theory, however, due to factors such as right of employment, must not be overlooked.

In another "copyright case," Whelan Associates, Inc. v Jaslow Dental Laboratory, Inc.,[66] a developer of a custom computer program for dental laboratory record keeping alleged copyright infringement against the dental laboratory for whose benefit the program was developed.[67] The defendant developed another program with a similar purpose, but in a different computer language, and distributed both programs.[68] The Court of Appeals in this case agreed with the lower court's holding that the copyright law

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[66] 797 F.2d 1222 (3rd. Cir. 1986).

[67] Id.

[68] Id.

extends to non-literal elements of a computer program.[69] The Court of Appeals also found that there was sufficient evidence of substantial similarity between the two programs' structures to uphold the lower court's finding of copyright infringement.[70]

As in the above two cases, breach of the implied covenant of good faith and fair dealing should have been raised. Arguably, this theory would have prevailed. The defendant clearly breached this covenant by developing a substantially similar program, the sale of which injured plaintiff's right to receive the benefit of the original agreement. Defendant even advertised the substantially similar program as a new version of plaintiff's Dentalab computer system.[71]

In the above cases, the plaintiffs were the prevailing party. The theory of implied covenants of good faith and fair dealing were not discussed, and thus the cases were decided under the copyright law.

VII. IMPORTANT DISTINCTIONS BETWEEN COPYRIGHT LAW AND CONTRACT LAW

The following two cases may be distinguished from Gross & Dallas Cowboys Cheerleaders. In the following two "copyright" cases, the plaintiffs did not prevail; the defendants successfully challenged the copyright infringement allegations. It will be

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[69] Id. at 1224, 1225.

[70] Id. at 1225.

[71] Id. at 1226.

shown that these cases were properly decided under the copyright laws. In the first case, defendant did not copy plaintiff's work, he went back to the original source. In the second case, defendant did in deed copy plaintiff's work, but the subject matter copied was unprotected! There was no breach of the duty of loyalty by the defendants in either case and thus, the theory of breach of the implied covenant of good faith and fair dealing was inapplicable. The only possible way plaintiff could have prevailed under a contract theory is by establishing the elements of a contract and a breach by the defendant.

Franklin Mint Corporation v. National Wildlife Art Exchange, Inc.[72] involved the issue of whether an artist infringed a copyright, which he once owned, by painting another work portraying the same general subject matter.[73] The original painting, entitled "Cardinals on Apple Blossom," was a water color painting of cardinals, painted for the National Wildlife Exchange. Ralph Stewart, who incorporated National Wildlife, gave the artist a $1,500 check, bearing on its back the notation, "For Cardinal painting 20x24 including all rights reproduction, etc."[74] The check was later endorsed and cashed by the artist. The artist and National were subsequently unable to come to terms on previously discussed business ventures.[75] Thus, in January, 1975, the artist

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[72] 575 F.2d 62 (3rd. Cir. 1978).

[73] Id. at 63.

[74] Id.

[75] Id.

agreed to paint a series of four water color bird life pictures, including one of cardinals, for the Franklin Mint Corporation.[76] In the painting, "The Cardinal," the artist used some of the same source material that he had used in painting "Cardinals on Apple Blossom."[77] The Court, however, held that although the ideas in the two paintings were similar, the expressions were not, and thus there could be no copyright infringement.[78]

In this case there was no breach of the implied covenant of good faith and fair dealing. The artist's painting "The Cardinal" was not a scandalous take off of "Cardinals on Apple Blossom" for the purpose of reaping the good will of the original works as arguably were the subsequent posters in Gross and Dallas Cowboy Cheerleaders. A difference in the relationship between the parties in Gross and Dallas Cowboy Cheerleaders and the present case is also readily apparent. It is important to determine the extent of the relationship between the parties in a "copyright infringement" case. Arguably, this often cannot be done without a discussion of any contracts between them.

Similarly, in Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.,[79] no copyright infringement was found. In this case, Dashiell Hammett wrote a mystery/detective story

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[76] Id. at 64.

[77] Id.

[78] Id. at 62.

[79] 216 F.2d 945 (9th. Cir. 1954).

which he entitled "The Maltese Falcon."[80] Warner Brothers subsequently acquired certain detailed exclusive rights to use "The Maltese Falcon" from Hammett and publisher, Knopf.[81] Warner Brothers sued Hammett when he used characters from the "The Maltese Falcon" in later works. The court held that even if the Owners assigned complete rights in the copyright to the Falcon, the assignment did not prevent the author from using the characters in other stories.[82] The court additionally stated that the characters were vehicles for the story told, which did not go with the sale of the story.[83] In addressing the copyright infringement issue specifically, the court held that the two stories at issue did no go to the degree of constituting practically the same story; there was no textual copying.[84]

As in the previous case, there was no breach of the implied covenant of good faith and fair dealing. Hammett's use of similar characters was not prohibited. If Congress had intended characters to pass unquestionably with the sale of the story, it would have specifically provided for that in the statute.[85]

IX. REMEDIES

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[80] Id. at 946.

[81] Id. at 946-948.

[82] Id. at 950.

[83] Id.

[84] Id. at 951.

[85] Id. at 950.

A plaintiff with a registered copyright is motivated to allege copyright infringement because the remedies under a successful suit are vastly better than mere contractual remedies. For example, remedies under Section 504 of the 1976 Copyright Act allow recovery of either actual damages and any of defendant's additional profits; or statutory damages. Statutory damages, however, are not available if the plaintiff did not register under Section 412 of the above Act. Additionally, in the case of willful infringement, criminal penalties may be available.

A breach of the implied covenant of good faith and fair dealing, however, results in an award of contractual remedies for the prevailing plaintiff. These remedies may include compensatory damages to place the plaintiff in the position as if the contract had been performed. Nominal damages may also be available, although probably not desirable to the plaintiff. Liquidated damages are also another option, however, these must be previously agreed upon by the parties and may not adequacy compensate the plaintiff. Punitive damages appear to be the most advantageous contractual remedy for the plaintiff. These damages, however, are only be available in limited circumstances.

X. CONCLUSION

Although remedies under copyright infringement may be more advantageous than contractual remedies, that cause of action should not prevail when there was, in fact, no copyright infringement. Copyright infringement is often alleged when there was, in fact, no

copying. Thus, the reader, as well as future courts addressing the same or similar issues, must struggle to understand the court's decision. As was seen in the previously analyzed cases, these two causes of action are arguably frequently misapplied by the courts; the result of this misapplication is that the correct party wins, but for perhaps the wrong reason.