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Missouri Court Fashions New "Twist" on Athletes' Right of Publicity

By Steve McKelvey and John Grady

The evolving debate between the First Amendment freedom of speech and the right of publicity has taken on a new "twist" with the recent Missouri appeals court decision, which upheld a \$15 million jury verdict for former National Hockey League player Tony Twist.¹ The appeals court decision, heard on remand, affirmed a landmark ruling in which the Missouri Supreme Court became the first state to apply a "predominant use" test in distinguishing "between commercial exploitation and genuine expressive comment for purposes of determining whether speech is protected under the First Amendment."² While the Twist decision creates new law only in the state of Missouri, the court's opinion raises two important questions. First, could the Missouri court portend a trend toward further protection of the right of publicity for athletes and other celebrities? Second, is it a dangerous decision that threatens to chill free speech?³

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The Disappearance of the Great American Indian Athlete

By Brad M. Gallagher

What do ice hockey, the overhand swimming stroke and basketball all have in common? Each has their roots in the American Indian culture. American Indians invented the roots of ten Olympic sports and many non-Olympic sports, such as lacrosse.¹ According to Oren Lyons, Chief of Onondaga Nation to the Iroquois Confederacy, "while the rest of the 'civilized' world played war games [American Indians] were settling disputes playing team sports with long bats and lacrosse sticks."²

American Indians such as Jim Thorpe and Billy Mills have long been recognized as some of the greatest athletes of all time. Today, however, American Indians have virtually disappeared from the ranks of the athletes competing at the collegiate, Olympic and professional levels. Surely, American Indians are still playing sports. So where are they?

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"Idea Theft" Claims Post-Grosso Did Grosso Really Change Anything?

By Shannon M. Awsumb

Writers are increasingly asserting claims of "idea theft" against studios for the misappropriation of their ideas. In fact, in the past few years, such claims have been leveled at the producers and studios behind the popular television shows, "Lost," "Prison Break" and "Project Runway," and the successful movies, "The Last Samurai," "Wedding Crashers" and "Pirates of the Caribbean."

Claims for idea theft often involve an allegation by a screenwriter that a studio misappropriated an idea that the writer had pitched to the studio at a prior date. Since only the expression of an idea is copyrightable, while ideas themselves are generally not copyrightable under federal law, an idea theft claim is based on the writer's allegation that an implied contract was formed between the writer and the studio—a contract that is breached when a studio misappropriates a writer's ideas for its own use. For example, in a suit recently filed in California, four individuals filed suit against a television studio alleging that the reality television show "So You Think You Can Dance" was based on an idea that the individuals had conveyed to a studio executive dur-

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speech (i.e., "hearing" communication), this juror/lawyer communication gap is exponentially inflated. Recall the courtroom scene of a lawyer speaking, and now consider for a moment that only two of the twelve-person jury prefer to be spoken to as their primary means of learning.

Three practical steps for effective juror communications

We all hope that our communications are clearly understood, especially in the courtroom. What is a modern litigator to do if he or she desires the maximum clarity of communication with this new knowledge? The study results suggest that many lawyers must first become aware of their tendency to communicate mostly by speaking, and must adapt instead to the audience they are speaking to. Here are three practical tips that will aid in achieving maximum clarity in persuasive communications:

1. Speak to all three learning styles

One of the skills of best-selling authors is that they speak to all three communication styles. Read a few pages in a best-selling novel, and on the same page, it would not be uncommon read about the *sounds* of the forest, the *feel* of the damp heavy air and a color so green that it reminded him of what he had only *seen* before in the hills of Ireland. The example, of course, points out the use of language that one would typically associate with the three learning/communication styles. Modern best-selling authors and editors are intentionally adding such language to speak to the widest audience possible, and the courtroom environment should be no different. Use a combination of phrases like "I hope you can *see* where this leaves us?" "I hope you are *hearing* this message," and "can you imagine what that might *feel* like?"

2. Use visual and kinesthetic evidence

I recently watched a mock trial where a litigator presented limited visual evidence for a scientific fact in dispute. Later, I watched behind one-way glass as the mock jurors, clearly favoring the opposition, noted that "they had just *seen* more science" from opposing counsel. That litigator had "shown" the jury many more scientific exhibits using visual aids. Given that a majority of jurors are visual in nature, this reaction was not surprising. It is simply imperative to use visual evidence to communicate with jurors.

3. Use visual evidence to emphasize critical points

An ABA study has found that juror memory retention is increased 650 percent when oral communications are combined with visual communications.² Today, litigators will almost always use visual evidence such as documents, photographs and exhibits for substantive portions of a case. The gap between these so-called old-style litigators and the new no longer lies in the use of evidence and technology, as most have embraced both to one degree or another—today's modern litigator, recognizing the need to combine oral and visual evidence, will also include creative exhibits in their presentation that "show" the jury key legal *arguments*, not just key *documents*. Always remember, a majority of the jury needs to *see* the information. Anytime the jury must remember the point, show them *and* tell them.

Conclusion

Educational psychology is quickly finding its way into the courtroom. To build a winning case, you must be understood. To be understood, you must cater to the learning styles of a jury. The new rule of litigation success may very well be that the most understood side wins. Using basic learning/communication psychology, one can rest assured that they are being understood—and remembered—to the maximum possible degree. ♦

Kenneth Lopez is President and CEO of Animators at Law. His e-mail is lopez@animators.com.

Endnotes

1. *The Animators at Law 2007 Attorney Communication Style Study*. More information on the study may be found at <http://www.animators.com/> or by contacting the author of this article at lopez@animators.com.

2. 1992 ABA Journal citing The Weiss McGrath Report.

"Idea Theft" Claims Post-Grosso Did Grosso Really Change Anything?

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ing a 2003 pitch meeting. The suit is based on the premise that the individuals had an implied contract with the studio to be reimbursed if and when the studio used their ideas—even though the individuals did not exchange a script with the studio, no contract was ever signed and nothing was copyrighted.

The noticeable proliferation of lawsuits involving similar implied contract idea theft claims in the past few years predictably follows the Ninth Circuit's watershed ruling in *Grosso v. Miramax Film Corporation* in September 2004, which essentially made it easier for plaintiffs to pursue such claims in state courts.¹ Specifically, in *Grosso*, the Ninth Circuit held that an implied contract claim was not subject to preemption under the federal Copyright Act (17 U.S.C. §§ 101 *et seq.*). Prior to the *Grosso* ruling, state law idea theft claims had little chance of success due to the difficulty in proving the claims and the common perception that such claims were preempted by the federal copyright act. The Ninth Circuit's holding in *Grosso*—that implied contract claims survived preemption—provided a clearer path to court for screenwriters, and has led to a noticeable influx of new idea theft cases in state courts, particularly those in New York and California.

While many heralded the *Grosso* decision as a power shift from studios to writers, others feared that the decision would open the floodgates to frivolous litigation and, as a result, limit writers' opportunities to pitch ideas to studios. This article examines the *Grosso* litigation and what effect the Ninth Circuit's decision has had on similar cases.

"Idea theft" claims based on an implied contract theory

The seminal idea theft case is *Desny v. Wilder*.² In *Desny*, the California Supreme Court explained that when one party furnishes an idea to another, a contract may

sometimes be implied even in the absence of an express promise to pay. This rule is "is justified on the theory that the bargain is not for the idea itself, but for the services of conveying that idea."³ To establish an implied breach of contract claim under *Desny*, a plaintiff must show that he or she prepared a work, disclosed that work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.⁴ The *Desny* court commented that such implied contracts are "more accurately described as express contracts proved by circumstantial evidence."⁵ Idea theft claims often involve fact intensive inquiries that turn on issues such as whether the agreement to disclose was clearly conditioned on payment and whether the submission of the idea was solicited or unsolicited.⁶

Grosso v. Miramax Film Corporation

Grosso involved a screenwriter and poker player, Jeff Grosso, who filed suit on August 30, 1999, in Los Angeles Superior Court against Miramax Film Corporation, and others. Grosso claimed the movie "Rounders" was developed directly from and based on his screenplay "The Shell Game" which he had submitted to some of the defendants or their agents at an earlier

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date. Specifically, Grosso alleged that the defendants had misappropriated his ideas, including, for example, the idea of setting the movie's protagonist in (what was at the time) the little known subculture of high stakes poker and poker clubs, and the idea of having a film revolve around the specific game of "Texas Hold'em."

In 1999, the action was removed to the Central District of California where the district court, among other things, granted Miramax's motion to dismiss Grosso's state law breach of implied contract claim as preempted by the Copyright Act and granted Miramax's motion for summary judgment on the copyright claim on the grounds that the two works were not substantially similar. With regard to the state law implied contract claim, the district court found that the claim was completely preempted by the federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*, which provides original and exclusive jurisdiction over civil actions for copyright infringement. The district court determined

that the implied contract claim was preempted because (1) the work at issue—the screenplay—came within the subject matter of the Copyright Act and (2) the implied contract claim merely constituted an allegation of a violation of his rights as an author, thus the claim did not contain an "extra element" which would place it beyond the scope of current copyright law protection.⁷

On appeal, the Ninth Circuit affirmed the district court's dismissal of the copyright claim, but reversed dismissal of the implied contract claim on preemption grounds.⁸ The Ninth Circuit explained that the implied contract claim, which sought compensation not for the actual written script, but for the ideas embodied in the script that was shared with Miramax, protected rights that were qualitatively different from the rights protected by copyright. In other words, the implied contract claim alleged an "extra element"—the implied promise to pay Grosso for use of his ideas—which, for preemption purposes, transformed the claim from a copyright claim into one sounding in contract. The Ninth Circuit remanded the implied contract claim to the district court for further proceedings.

On April 20, 2005, the district court declined to exercise jurisdiction over the only remaining claim in the action—the implied contract claim—and remanded the case to the Los Angeles Superior Court for further proceedings. In July 2006, on a motion for summary judgment, the state court disposed of Grosso's implied contract claim, finding that he had failed to establish any implied contract had existed between himself and Miramax.⁹ The state court explained that Grosso had failed to establish an evidentiary link between the studio's acceptance of his script for review and an enforceable promise by any of the named defendants. The court explained that Grosso's entire premise for the claim was "based upon the speculation as to the evolution of an idea, and not upon an agreement made by any defendant in this action[.]"¹⁰ Grosso has indicated that he will appeal the state court's ruling.

"Idea theft claims" post-Grosso

When the *Grosso* decision was first issued in 2004, it caused a frenzy in entertainment and legal circles as commentators tried to predict what effect the decision would have on the relationship between screenwriters and studios. Some feared that studios would refuse to hear any unsolicited ideas, making it difficult for writers to earn a living. Others speculated that a flood of worthless idea theft claims would detract from valid claims of misappropriation.

While the long-term effects of *Grosso* and its progeny are still unclear, it is apparent that many courts, particularly in California and New York, received a dramatic spike in the number of idea theft claims filed after *Grosso*. It is also undeniable that *Grosso* has complicated the relationship between writers and studios, further limiting the willingness of studios to consider unsolicited ideas or pitches out of fear that the studio could unintentionally enter into an implied contract with the screenwriter. As one commentator warned,

"[c]ompanies engaged in the development of entertainment programs may well find it necessary to refuse all contact or submissions from unknown writers – chilling the exchange of ideas, limiting the career prospects of many aspiring authors and potentially depriving the public of the production of new programs[.]"¹¹ Indeed, since *Grosso*, studios have become more vigilant in requiring screenwriters offering unsolicited pitch ideas to sign liability waivers and agreements acknowledging that the producers will not pay the individuals for generic ideas. It remains to be seen whether the spike of new cases post-*Grosso* will gradually recede as studios and production companies become savvy to eliminating any situations in which implied contracts could be construed.

For now, it appears that *Grosso* was a win for screenwriters and other creative individuals. One commentator has characterized *Grosso* as allowing a plaintiff to "take 'two bites of the apple' when portions of a pitched script are used without compensation[.]" because the plaintiff can assert a copyright infringement claim if the two works are substantially similar, and also an implied contract claim due to the use of the ideas contained in the written script.¹²

Indeed, *Grosso* has effectively made litigation a more viable option for screenwriters and creators with legitimate misappropriation claims since courts are more accessible than before. Prior to *Grosso*, idea theft cases were very costly for plaintiffs and their lawyers because of the need to brief various procedural issues tied up with copyright preemption issues. Many lawyers even refused to take such cases due to the fact that they were "too burdensome, expensive and uncertain."¹³ Now, with the preemption issue resolved (at least in the Ninth Circuit and those courts that follow its reasoning in *Grosso*), the road to pursuing such claims is initially less costly and more lawyers, including those inexperienced in copyright issues, are willing to dabble in the prosecution of the implied contract idea theft claims. The litigation path of these cases has also changed, as studios and producers are now often forced to prosecute these claims in state court since the *Grosso* ruling precluded the possibility of removing an idea theft claim to federal court for an early dismissal on preemption grounds.

It is also unclear as of yet whether the idea theft claim's smoother path to court encourages the introduction of the implied contract concept into other areas of commercial and creative endeavors. While studios and production companies may have become more attuned post-*Grosso* to avoiding situations in which implied contracts could be formed, others in business or similar settings might not be aware of the risks their actions could create. The media attention idea theft claims have gotten after the *Grosso* decision, particularly when the lawsuits involve hugely successful films and television shows, could be the encouragement creators in different fields need to assert claims of their own.

Regardless, even though *Grosso* eased the initial litigation burden on screenwriters, it did not alter the fact that idea theft claims remain extremely difficult

to prove—a reality highlighted by the recent dismissal of Jeff Grosso's claims by a California state court after his short-lived victory in his case in the Ninth Circuit. Plaintiffs face real difficulties withstanding summary judgment in these cases, as it is very difficult to come forward with facts supporting the claim, particularly in cases in which a work is not similar enough to warrant copyright protection, but yet similar enough for a plaintiff to claim theft of his or her ideas.

In any event, some don't think *Grosso* has made any practical difference one way or the other. The lawyer currently representing Warner Brothers in the "The Last Samurai" case commented, *Grosso* has "made things incrementally worse, but things were bad to begin with[.]"¹⁴ As he sees it, the *Grosso* ruling did not revolutionize entertainment law as much as it gave unfortunate encouragement to people who come out of the woodwork claiming theft after any major film release.¹⁵

Grosso's effects will be easier to discern in the next few years as the multitude of idea theft cases that were filed in its wake slowly seep through the state trial and appellate courts. Until then, studios and production companies would be wise to explicitly communicate their intentions in writing prior to accepting the ideas of writers in order to establish a clear understanding of what compensation, if any, is being offered for the sharing of ideas, hopefully avoiding the possibility of an idea theft claim from a jilted writer at a later date. ♦

Shannon M. Awsumb practices at the firm of Anthony, Ostlund & Baer, in Minneapolis, MN. She practices in all areas of litigation. Her e-mail is sawsumb@aoblaw.com.

Endnotes

1. *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004).
2. *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (Cal. 1956).
3. *Grosso*, 383 F.3d at 967.
4. *Id.* (discussing *Desny*).
5. *Desny*, 46 Cal.2d at 739 n. 9.
6. See, e.g., *Mann v. Columbia Pictures, Inc.*, 128 Cal.App.3d 628, 646-47 (Cal. Ct. App. 1982), *Chandler v. Roach*, 156 Cal.App.2d 435, 440-42 (Cal. Ct. App. 1958), and *Desny*, 46 Cal.2d at 739-40.
7. Order Denying Plaintiff's Motion to Remand and Retaining Jurisdiction, *Grosso v. Miramax Film Corp.*, No. CV 99-10930 (C.D. Cal May 2, 2000).
8. *Grosso*, 383 F.3d at 968.
9. Leslie Simmons, "Judge Dismisses Grosso Implied Contract Claim," *The Hollywood Reporter, Esq.*, July 17, 2006.
10. *Id.*
11. Allison Hope Weiner, "Lawyer Is Upping the Ante in Claims of Idea Theft in Hollywood," *N.Y. Times*, July 7, 2006.
12. Aaron J. Moss and Gregory Gabriel, "The Enforcement of Implied Contracts after *Grosso v. Miramax*," 29 *L.A. Law*, Mar. 2006, at 19.
13. Amanda Bronstad, "Save a Cocktail Napkin, Win a Lawsuit," *The Nat'l Law J.*, July 31, 2006.
14. Peter Lattman, "Hollywood's 'Idea Theft' Litigation King John Marden," *The Wall Street J.*, July 27, 2006, available at <http://blogs.wsj.com/law/2006/07/>.
15. *Id.*