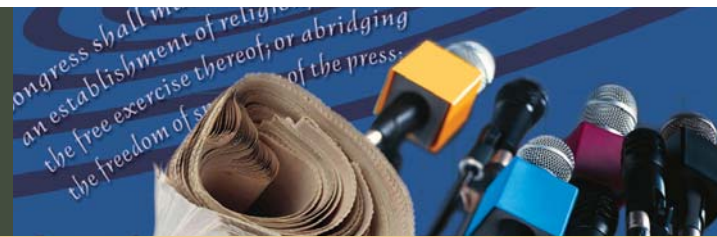


FIRST AMENDMENT
LAW LETTER

WINTER 2007

IDEA THEFT AFTER *GROSSO* –
THE PROLIFERATION OF
EXPENSIVE AND BURDENSOME
LAWSUITS

By Camilo Echavarria

A writer sets up a meeting with a development executive at a major studio to pitch the next great idea for a reality television show. The pitch meeting lasts approximately 10 minutes, during which the writer explains his concept for a reality show set in a hair salon in either New York or Los Angeles about the day-to-day operations of that salon from the perspective of the well-known stylist/owner. No pitch materials, proposed scripts, or other written materials are provided. At the end of the pitch, the executive is not impressed and informs the writer that the studio is going to pass. Afterward, the development executive—who is one of a dozen executives for the studio—goes on to the next pitch meeting, and the one after that, and the one after that. In all, that executive will hear hundreds of pitches during the course of a year, and the studio as a whole will hear thousands of pitches. In the next two years, the development executive is pitched a "salon" reality television show at least five times, if not more.

Then the development executive hears a "salon" pitch from an established reality television show producer. The established producer provides a written treatment for the idea, whose focus is on the owner and head stylist of a hair salon in Los Angeles. Given a variety of variables (including the reputation

[\(CONTINUED ON NEXT PAGE\)](#)SUPREME COURT SOURS ON
DISCOVERY RULE BUT NINTH
CIRCUIT DOESN'T FLINCH

By Nigel Avilez & Bruce E. H. Johnson

Copyright infringement claims are governed by a three-year statute of limitations. Because the Copyright Act does not define the point at which a claim begins to accrue, courts have held, alternatively, that a claim may accrue when the work is infringed (the "injury rule"), or when the plaintiff knows or has reason to know of the injury upon which the claim is based (the "discovery rule"). Federal courts historically have automatically applied the discovery rule except in those instances where Congress has explicitly adopted a different rule.

In 2001, however, in a decision described as "altering the landscape" and "shift[ing] the tectonic plates" of claim accrual determination, the United States Supreme Court explicitly rejected that view, and directed lower courts to look to the text and structure of a statute to determine what accrual rule should apply. See *TRW v. Andrews*, 534 U.S. 19, 151 L.Ed.2d 339, 122 S.Ct. 441; see also *Auscape v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 244

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IDEA THEFT AFTER *GROSSO*

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of the producer), there is interest at the studio, and the "salon" reality television show is green-lit and eventually airs. The first writer sees advertisements for the new salon reality show, and is convinced that his idea was stolen. The writer sues the studio for breach of an implied-in-fact contract under California law, otherwise known as idea theft.¹

Prior to August 2004, it was possible that this lawsuit would be dismissed at the pleading stage based on copyright preemption. That appears to have changed, however, in the aftermath of the Ninth Circuit decision of *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004), which held that copyright preemption did not apply to certain idea theft claims. As a result of *Grosso*, studios face the prospect of a lengthy and drawn-out lawsuit even in the most frivolous of actions.

The claim for idea theft—Hollywood style

The claim for breach of implied-in-fact contract, also known as idea theft, was first recognized in the seminal case of *Desny v. Wilder*, 46 Cal. 2d 715 (1956). There, plaintiff called studio executive Billy Wilder on the telephone, and told Wilder's secretary about his idea for a movie based on the story of a man who was trapped in a cave. During the call, plaintiff and Wilder's secretary agreed that plaintiff would be paid if his idea was used. Wilder later produced a movie that plaintiff asserted was based on his idea. Under these facts, the California Supreme Court held that an implied-in-fact contract was formed between plaintiff and Wilder, and that Wilder was obligated to pay plaintiff if he used plaintiff's ideas.

The newly created claim set forth in *Desny* has evolved only slightly since 1954. To state a claim for breach of an implied-in-fact contract in an idea submission case, the plaintiff must allege: (1) that he submitted his ideas to defendant; (2) that before plaintiff submitted his ideas to defendant, he conditioned their disclosure upon defendant's agreement to pay for those ideas if used; (3) that defendant knew, or should have known, the condition on which the disclosure was being made; (4) that defendant voluntarily accepted the submission on plaintiff's terms and thereby impliedly

agreed to pay plaintiff for any ideas used; (5) that defendant actually used plaintiff's ideas; and (6) that those ideas had value. *Mann v. Columbia Pictures, Inc.*, 128 Cal. App. 3d 628, 647 n.6 (1982); see also *Faris v. Enberg*, 97 Cal. App. 3d 309, 318 (1979) (plaintiff must show that "the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered").

In the context of a formal pitch meeting, the first four requirements generally are implied: A "pitch meeting" is the setting where a writer/producer discloses his idea, treatment, or script to an executive in the hope that the executive will like and use the idea for a show or movie in return for credit and compensation.² Thus, for networks, studios, and producers of content, in general, idea theft claims usually come down to whether the idea was used and whether it had value. (Of course, on the facts of any particular case, one of these four requirements could preclude a suit, even if there was some kind of pitch involved.)

It is important to note that unlike in a copyright context, in California, the idea theft plaintiff may not be required to show that his idea was "novel" or "unique" in order to state a claim for idea theft. *Desny*, 46 Cal. 2d at 733-34 ("[e]ven though the idea disclosed may be 'widely known and generally understood' [citation] it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty"); cf. *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 104 Cal. App. 4th 27, 35 (2002) ("Mattel acknowledges on appeal that an agreement to disclose an abstract idea may be compensable, even though it lacks novelty"). Therefore, with respect to the writer who submits an idea for a "salon" reality show, the studio cannot simply argue that the idea was not novel, even if four other writers submitted salon reality show ideas to the executive and similar reality shows already had aired on numerous networks prior to the writer's pitch.³

But that does not mean that lack of novelty is irrelevant in defending idea theft claims. To the contrary, lack of novelty can be important to demonstrate that plaintiff's idea was not used. For instance, when comparing plaintiff's ideas with the actual show, defendant can convince the court that "generic ideas" that exist in both the show and plaintiff's pitch

simply should be disregarded. Lack of novelty also bolsters the credibility of the defense's claim that plaintiff's idea was not used. Finally, in the most generic of situations, lack of novelty can be used to argue that plaintiff's ideas had no value, the last factor the plaintiff needs to prove in an idea theft case.

Copyright preemption before *Grosso*—A defendant's trump card

Before the Ninth Circuit decision in *Grosso*, studios and networks had a reasonably good chance of disposing of idea-theft cases during the pleading stages of the litigation, based on copyright preemption. The Federal Copyright Act, 17 U.S.C. § 301(a), expressly preempts all state law claims that assert "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 ... and come within the subject matter of copyright as specified by sections 102 and 103." The Copyright Act preempts a state law claim when "(1) the work on which the state claim is based is within the subject matter of copyright; and (2) the state cause of action protects rights that are qualitatively equivalent to copyright protection." *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 821 (C.D. Cal. 1997).

Applying this test, courts in the Central District of California repeatedly found idea-theft claims to be preempted. Under the first prong, courts found that ideas fell within the purview of copyright, but were not protected because copyright law only protects the written expression of ideas and not the ideas themselves. Under the second prong, courts found that the idea-theft claim protected rights equivalent to copyright, namely the right to protect and be paid for the use of one's copyrightable work. See *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1190 (C.D. Cal. 2001) (holding that idea-theft claim based on alleged use of plaintiff's ideas and materials for movie was preempted by Copyright Act); *Entous v. Viacom Int'l, Inc.*, 151 F. Supp. 2d 1150, 1160 (C.D. Cal. 2001) (same for television series); *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061 (C.D. Cal. 2000) (same for movie); *Metrano v. Fox Broadcasting Co.*, 2000 WL 979664, at *3 (C.D. Cal. 2000) (same for television series); *Endemol Entertainment B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524, 1528 (C.D. Cal. 1998)

(same for television series); *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 822 (C.D. Cal. 1996) (same for movie).⁴

Before *Grosso*, this line of cases affected idea-theft litigation in two ways. First, these cases enabled defendants to defeat idea-theft claims at the onset of a case, before having to go through the burden and expense of discovery, motion practice, and trial. Second, as important as having the ability to get cases dismissed at the onset of litigation was the reciprocal "chilling" effect on plaintiffs' attorneys. Because removal and motion practice involved with copyright preemption required significant resources and time, and the defense was successful in certain situations, plaintiffs' counsel were more hesitant to bring these claims. See Glen L. Kulik, *Copyright Preemption: Is this the End of Desny v. Wilder?*, 21 Loy. L.A. Ent. L. Rev. 1 (2000).

***Grosso v. Miramax Film Corp.*—The end of preemption**

In 1999, writer Jeff Grosso sued Miramax, claiming that Miramax improperly used his script and ideas in the movie *Rounders*. Grosso sued for both copyright infringement and idea theft. The district court granted Miramax's motion for summary judgment on all claims. The court found that because the two works at issue—Grosso's screenplay and the movie *Rounders*—were not substantially similar, plaintiff's copyright claim failed as a matter of law. The court found the idea-theft claim was preempted. The Ninth Circuit, in a twelve-paragraph decision, affirmed the granting of summary judgment with respect to the copyright claim, but reversed on the idea-theft claim. *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (2004). Without discussing or even citing to the numerous cases that had found idea theft claims to be preempted, the Ninth Circuit held simply that the implied-promise-to-pay element of an idea-theft claim was an "extra element," such that the rights being protected were not "qualitatively equivalent" to the rights protected by copyright. *Id.* at 968.

Grosso's impact—The proliferation of expensive and burdensome lawsuits

The impact of the *Grosso* decision has been immediate and significant as idea-theft claims have proliferated. The *Grosso* decision was a two-part whammy to networks and studios: not only did the *Grosso* decision make idea-theft cases more costly to defend by foreclosing a defendant's ability to get a case dismissed at the pleading stage, it also emboldened plaintiffs' counsel to bring more of them.

First, the expense and burden of defending idea-theft cases cannot be overlooked. Idea-theft cases are typically fact-intensive. And, in the situation where there are little to no written records of the "idea" that purportedly was taken, factual disputes necessarily abound as to what was said at the purported pitch meeting. Needless to say, the fewer the documents, the more a plaintiff may exaggerate or simply not remember correctly the details of the idea he presented at the pitch meeting. On the studio side, given the number of pitches an executive hears every year and the fact that pitches often last no more than ten minutes, it should come as no surprise that executives may have little recollection about a plaintiff's pitch. At bottom, idea-theft cases are fact-intensive, making summary judgment more difficult and defense of the action more time-consuming and burdensome.

The difficulty in defending an idea-theft claim versus a copyright claim was apparent in a recent case involving *The Apprentice*. *Mark Bethea et al. v. Mark Burnett et al.*, No. CV04-7690 JFW (PLAx) (C.D. Cal.). There, the plaintiff sued in federal court for copyright infringement and filed a separate action in state court for idea theft. The state court case was stayed pending resolution of the federal court case. Defendants Mark Burnett and others obtained summary adjudication in federal court over the plaintiff's copyright claim. The district court found that plaintiff's idea was not substantially similar to *The Apprentice* and, in dicta, intimated that *The Apprentice* was independently created. After dismissal of the federal court action, the state court action proceeded. Despite winning in federal court, defendants did not obtain summary judgment, which led to an eventual settlement of the action shortly before trial was set to commence.⁵

Second, because of the relative ease by which a plaintiff can assert an idea-theft claim after the *Grosso* decision, plaintiffs' counsel appear to be more willing to file these claims in general. Indeed, in many instances, idea theft claims are being asserted instead of copyright claims. Unlike infringement claims, where a victorious defendant (or plaintiff for that matter) may be entitled to recover its attorneys' fees, there is no such recovery available in idea-theft suits. Likewise, copyright claims are much harder to plead and prove, especially when one considers the fact that idea-theft claims may not require novelty.

As a result, it is not uncommon today for networks, studios and producers to be sued by several different individuals in different lawsuits and jurisdictions over the same show. And, in each case, plaintiff asserts that she came up with the idea for the show and that her ideas were stolen. For instance, the producers of *The Apprentice* have had to defend three separately filed lawsuits from individuals claiming they came up with the premise for the show. Likewise, Fox was sued in two different lawsuits related to Fox's reality television show *The Next Great Champ*.

It is important to note that the proliferation of idea-theft claims also stems from the pitch process itself and the advent of reality television. As discussed in the introduction, networks and studios receive literally thousands of pitches for television shows and movies each year. Couple that fact with the existence of reality television, where even the most mundane and simple idea can lead to a successful show. Theoretically, all someone would have to say at a pitch meeting to an executive is "singing competition," "talent search," "search for the next big thing," "competition for a good job," "race around the country/world," "real lives of celebrities" or "dating show" for that person to assert that his idea was taken when a similar show is produced. And, because numerous shows based on such basic concepts have been produced and aired by all the major networks and cable channels, there are most assuredly hundreds of individuals who could assert that their ideas were taken.⁶ It is simply inescapable that because ideas for reality shows are rather simple and have similar formats, executives are inundated with the same ideas all the time.

Even the most obvious and generic of ideas have led to lawsuits. For example, the fourth season of *Average Joe*—a dating show where "average"-looking men try to get the affection of a beautiful woman—involved doing a makeover of these men to make them appear more attractive. This premise was obvious and generic given the number of shows that had done similar things, such as *Extreme Makeover*, *The Swan*, *Fashion Emergency*, and *Queer Eye for the Straight Guy*. Regardless, the fourth season of *Average Joe* led to a lawsuit by a former contestant claiming he had come up with the idea. *Costaras v. NBC Universal*, No. 2:06-cv-00402-RSWL-MAN (C.D. Cal.).

In the end, virtually any successful show, and even a not-so-successful show, is likely to encounter claims from individuals who submitted similar ideas in the past. A successful series will necessarily catch the attention of any writer or producer who may have submitted a "similar" idea, even in the distant past. Indeed, ABC was recently sued in Los Angeles Superior Court by a writer who claims to have submitted a script in the late 1970s—nearly 30 years ago—that allegedly was used to create the hit show *Lost*. Anyone familiar with the script review process or the turnover of development executives at major networks will understand the absurdity of this claim. Other movies and television shows that plaintiffs have alleged were stolen since *Grosso* include *Wedding Crashers*, *The Last Samurai*, *Broken Flowers*, *World Vision: An American Anthem*, *Nitido*, *Average Joe 4*, *Hell's Kitchen*, *Million Dollar Idea*, *Project Runway*, *So You Think You Can Dance*, and *Ghost Hunters*—just to name a few.

NOTES

1. The hypothetical in this article is fiction and any similarity to an actual case is purely coincidental.

2. In the case of unsolicited submissions and other non-formal pitches, however, these four requirements represent a significant hurdle to plaintiffs. If there is no pre-disclosure understanding that the writer/producer is disclosing an idea on the condition of payment for use, then there is no recourse or cause of action. California law requires a clear and mutually understood expectation of payment for the idea before imposing liability: "The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power." *Desny*, 46 Cal. 2d at 739.

3. In the case of the hypothetical, there are several reality shows that follow the head of a business. For example, *The Restaurant* and *Hell's Kitchen* followed head chefs in major cities, and *Opening Soon* is about opening high-end retail stores in major cities.

4. Indeed, just two months before *Grosso* was decided, the author of this article successfully moved to dismiss an idea theft case involving the television show *Scout's Safari*. *Order Denying Plaintiffs' Motion to Remand and Granting Defendants' Motion to Dismiss*, *Suser v. National Broadcasting Company*, No. CV04-2866 CBM (Mx) (C.D. Cal. June 30, 2004).

5. Ironically, the result in *Grosso* was different. After the Ninth Circuit remanded the case, Miramax was successful on summary judgment on the merits of the idea-theft claim.

6. Basic concepts for reality television shows have produced literally dozens of similar shows:

Singing Competition: six seasons of *American Idol*, four seasons of *Nashville Star*, and two seasons of *Rock Star* and *Making the Band*.

Talent Search: the singing competition shows *Star Search* and *Fame*, and two seasons of *So You Think You Can Dance*, *The Search for the Most Talented Kid in America* and *America's Got Talent*.

Search for the Next Big Thing: seven seasons of *America's Next Top Model* (model), six seasons of *American Idol* (pop star), four seasons of *Last Comic Standing* (comedian), *Next Action Star* (action star actor), *Sports Illustrated Swimsuit Model Search* (swimsuit model) and *Nashville Star* (country singer), three seasons of *Project Runway* (fashion designer), and two seasons of *Rock Star* (lead singer for band), *HGTV Design Star* (home designer), *The Contender* (boxing) and *The Next Great Champ* (boxing).

Competition for a Good Job: five seasons of *The Apprentice*, two seasons of *Hell's Kitchen* and *Top Chef*, and one season of *The Apprentice: Martha Stewart*, *The Benefactor* and *The Rebel Billionaire*.

Race Around the Country/World: ten seasons of *The Amazing Race* and *Treasure Hunters*, and two seasons of *Beg, Borrow & Deal* and *The Mole*.

Real Lives of Celebrities: four seasons of *The Osbournes*, two seasons of *The Anna Nicole Show*, *The Ashlee Simpson Show* and *Kathy Griffin: My Life on the D-List*, and one season of *Being Bobby Brown*, *Britney and Kevin: Chaotic*, *Newlyweds: Nick & Jessica* and *Tommy Lee Goes To College*.

Dating Show: seven seasons of *The Bachelor*, four seasons of *Average Joe* and *For Love Or Money*, three seasons of *The Bachelorette*, and two seasons of *Joe Millionaire* and *Cupid*.

SUPREME COURT SOURS ON DISCOVERY RULE

(CONTINUED FROM PAGE ONE)

(S.D.N.Y. 2004) (*TRW* is landscape-altering); *Roberts v. Keith*, 2006 U.S. Dist. LEXIS 8659, 9 (S.D.N.Y. 2006) (*TRW* shifted tectonic plates of claim accrual). But as much as *TRW* altered and shook, the Ninth Circuit has carried on unaffected by the decision, content to rely on its prior copyright statute of limitations cases and their summary adoption of the discovery rule. *E.g.*, *Kourtis v. Cameron*, 419 F.3d 989, 999 (9th Cir. 2005) (citing *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994)). Given the import of the Supreme Court decision, the Ninth Circuit should be asked to either distinguish *TRW*, or to change course and adopt the injury rule, which legislative history shows was intended by the Copyright Act.

The decision triggering review

Supreme Court review of the federal statute of limitations calculus was triggered by a Ninth Circuit decision, *Andrews v. TRW Inc.*, 225 F.3d 1063 (9th Cir. 2000), reversing a lower court ruling barring consumer claims under the Fair Credit Reporting Act (FCRA). In *TRW*, Plaintiff Adelaide Andrews, whose credit information had been stolen and subsequently used by an imposter, sued credit reporting agency *TRW* under the FCRA for disclosing her credit information without reasonable grounds for believing that a legitimate consumer was involved in the request. *Id.* at 1065. Under the injury rule applied by the district court, two of plaintiff's claims were barred by the FCRA's two-year statute of limitations. *Id.* at 1066. The Ninth Circuit, however, reversed the district court, holding that a general discovery rule controlled the case. The Court rested its decision on what it considered to be a presumption that all federal statutes of limitations, regardless of context, incorporate a general discovery rule, "unless Congress expressly legislated otherwise." *Id.* at 1067.

Supreme Court rejects general federal discovery rule

The Supreme Court in *TRW* refused to endorse the Ninth Circuit's position, holding instead that federal courts should determine claim accrual by looking to congressional intent in enacting a statute—such intent as is derived from the statute's text, structure and legislative history. 534 U.S. at 27-28. The Court went on to conclude that neither the text, nor structure, nor other evidence of congressional intent supported a finding that consumer claims under the FCRA are governed by a general discovery rule.

While the *TRW* analysis of course focused on the FCRA, by its terms, its guidance is general. It is as applicable to the Copyright Act—and other federal statutes—as it is to the FCRA. Applying this guidance to the Copyright Act, it becomes "strikingly clear," as one federal court concluded, that Congress intended the Act to be governed by an injury rule. *Auscape*, 409 F. Supp. 2d at 20.

Copyright Act intended an injury rule

Unlike the FCRA, the text and structure of Section 507(b) provide no hint of Congress' intent. Section 507(b) states only that a civil copyright infringement claim must be brought "within three years after the claim accrued." Thus, in determining the claim accrual date as intended by Congress, a court must necessarily look beyond the text of the Copyright Act to its legislative history. *E.g.*, *Blum v. Stevenson*, 465 U.S. 886, 896, 79 L.Ed.2d. 891, 104 S.Ct. 1541 (1984).

Until 1957, the Copyright Act prescribed a statute of limitations only for criminal actions; consequently, federal courts looked to state statutes of limitations to determine timeliness of civil claims. 3 *Nimmer on Copyright* § 12.05(A) at 12-131 (2005). This practice, however, was confusing and fraught with uncertainty, since different periods of limitations and different rules of accrual applied depending on where a claim was brought. S. Rep No. 85-1014, at 2 (1957), reprinted in 1957 U.S.C.C.A.N. 1961, 1962. Faced with these concerns, Congress began examining the problem in 1955, with the House Judiciary Committee holding hearings on a bill to enact a civil statute of limitations.

Id. at 1962. The hearings made clear that there was general dissatisfaction with the uncertainty caused by reliance on state statutes of limitations where, for example, an infringer could face a statute of limitations as long as eight years, or as short as one year, depending on where the infringement occurred. In addition, lawyers testified that they found the situation "quite confusing," stating that users of intellectual property would be "interested in a fixed statute of limitations to know when they [would] be liable." See *Auscape*, 409 F. Supp. 2d at 245 (citing *Copyrights—Statute of Limitations: Hearing on H.R. 781 Before the House Comm. on the Judiciary, Subcomm. 3, 84th Cong. 40 (1955)* (statement of Fulton Brylawski, Association of American Motion Pictures)).

In its Senate Report, the Senate Judiciary Committee noted that it was "highly desirable" to provide a uniform statutory period throughout the United States, and it settled on a three-year statute of limitations that commenced at the time of injury. S. Rep. No. 85-1014, at 2 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961, 1962. The Report states:

All of [the] witnesses ... agreed to a 3-year period, feeling that this represents the best balance attainable to this type of action. It was pointed out that due to the nature of publication of works of art that generally the person injured receives reasonably prompt notice, or can easily ascertain any infringement of his rights. The committee agrees that 3 years is an appropriate period for a uniform statute of limitations for civil copyright claims and that it would provide an adequate opportunity for the injured party to commence his action.

In *Auscape*, Judge Lewis Kaplan thoroughly examined the Senate Report and the Act's relevant legislative history to determine whether *TRW* dictated a Copyright Act accrual date based on injury, rather than discovery. The court noted two major conclusions arising from the legislative history. 409 F. Supp. 2d at 245. First, the court stated that where the goal of the uniform three-year statute of limitations was to remove uncertainty as to the timeliness of copyright infringement

claims, it is unlikely that Congress would intend an accrual rule—such as the discovery rule—that depends on something as uncertain and indefinite as when the copyright owner happened to learn of the infringement. *Id.* This is an entirely accurate observation. Indeed, because in most instances the only proof of plaintiff's knowledge will be plaintiff's own subjective, self-serving testimony, the discovery rule re-introduces into the copyright scheme precisely the kind of floating, amorphous limitations period that Congress intended to eliminate in Section 507(b).

Second, the *Auscape* court observed that the Senate Report also makes clear that the Senate Committee considered a three-year period as "adequate opportunity" for the copyright owner to commence his or her cause of action. *Id.* Quoting the Committee's statement that "due to the nature of the publication of works of art ... the person injured [generally] receives reasonably prompt notice or can easily ascertain any infringement of his rights," Judge Kaplan determined that Congress was not concerned that some copyright owners would not know or even have reason to know of an infringement action within three years after its occurrence. *Id.* at 246. Where Congress clearly recognized but disclaimed concern about the risks that not every copyright holder might discover potential infringements, a discovery accrual rule could not have been its intention.

Judge Kaplan offered additional legislative history analysis supporting these conclusions. First he pointed to an exchange between a Congressman and a motion picture representative which indicates that Congress was aware that situations would arise in which a copyright owner would not discover the infringement within three years, but nonetheless considered the owner's awareness (or lack thereof)—the very crux of the discovery rule—to be irrelevant. *Id.* at 245-246. In the exchange, the Congressman asked what would occur if a movie were shown to a small audience in a small town and then not shown again for three years. The representative noted that "every performance of every moving picture is a separate infringement That [each claim based on a performance/ infringement] would be *barred in three years*." *Id.* at 246 (emphasis added). The exchange, the

court noted, indicates that the statute of limitations was intended to expire three years after the movie was disseminated, regardless of when the actual copyright owner learned of the exhibition; thus, the owner's awareness of the exhibition was irrelevant. *Id.*

Next, Judge Kaplan found the commencement of the pre-existing state statutes of limitations to be instructive because Congress was aware that the states themselves generally used an injury rule, yet made no attempt in the hearing to suggest that a different rule was intended. *Id.* Finally, Judge Kaplan found it significant that Congress spent considerable time focusing on whether to enact a special fraudulent concealment exception or other equitable doctrine ameliorating the (possibly harsh) effects of the statute of limitations. *Id.* at 246-247. The conclusion the court arrived at was simple: those involved in the enactment of the Copyright Act statute of limitations could not have intended a general discovery rule since the specific statutory exceptions they were contemplating would have been entirely superfluous.

Besides legislative history, there are other considerations favoring application of an injury rule.

1. Injury rule is consistent with the standard rule.

An injury rule is consistent with the standard rule for commencement of the statute of limitations, and unless Congress says otherwise, the standard rule should apply. The standard or traditional accrual rule is that all statutes of limitations begin to run when the right of action is complete, *i.e.*, when the plaintiff has the right to apply to a court for relief and commence proceedings to enforce his rights. See *Bay Areas Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201, 139 L.Ed.2d 553, 118 S.Ct. 542 (1997). Under the standard rule, a plaintiff's inability to discover his injury or other facts supporting his action is irrelevant to the commencement date. Adam Bain and Ugo Collela, *Interpreting Federal Statutes of Limitations*, 37 Creighton L. Rev. 493, 511-512 (2004). In the copyright infringement context, where the right to sue ripens at the time of the infringement, and where Congress has not enacted or recognized an exception, the standard rule should apply.

2. Supreme Court decisions have not supported a generally applied discovery rule.

In *TRW*, the Supreme Court noted that it had never adopted the lower courts' practice of using a generally applied discovery rule. 534 U.S. at 28. Justice Antonin Scalia, in his concurrence, went further, calling the discovery rule applied by the Ninth Circuit a "bad wine of recent vintage," and pointing out that the Supreme Court had rarely deviated from the traditional injury rule. *TRW*, 534 U.S. at 37. While the Supreme Court has not evaluated the discovery rule in the context of copyright infringement, the fact that it continues—by design—to restrict the discovery rule to latent injury and medical malpractice cases indicates that it is highly unlikely that the Court would apply the rule to copyright infringement cases.

3. Few types of cases "cry out" for a discovery rule.

As indicated above, even when the Supreme Court has adopted a discovery rule, it has done so in only two contexts—latent disease and medical malpractice—"where the cry for [such a] rule is loudest." *TRW*, 534 U.S. at 27. As the Court has observed, latent injury cases are logical candidates for a discovery rule given that the very nature of the latent medical injury is that it does not manifest itself immediately. *United States v. Kubrick*, 444 U.S. 111, 122, 62 L.Ed.2d 259, 100 S.Ct. 352 (1979). Copyright infringement injury, however, by its very nature is not a secretive matter and does not often lead to extreme situations that would "cry out" for a discovery rule.

Conclusion

It is clear that the Ninth Circuit historically has adhered to the federal court practice of applying a general discovery rule unless Congress explicitly states otherwise. It is however unclear why, in light of *TRW*, the Ninth Circuit has not reconsidered its statute of limitations calculus, despite having the opportunity to do so. The answer may simply be that no one has as yet urged the court to do so. Whatever the reason, the Ninth Circuit continues to labor under a discovery rule that is irreconcilable with Supreme Court guidance and the Copyright Act's legislative history. The Ninth Circuit needs, at a minimum, to consider its statute of limitations calculus in light of *TRW*, and accordingly, to adopt the rule clearly intended by the Copyright Act.

THE RELEVANCE OF BAD FAITH TO FAIR USE ANALYSIS

By Kai B. Falkenberg

Your client, *Celebrity Weekly*, obtains an unauthorized copy of a bombshell *Lifestyle Magazine* exclusive interview with Angelina Jolie. The editor wants to know whether they can publish highlights of the interview before the *Lifestyle* issue hits the stands. *Lifestyle* had refused to provide *Celebrity Weekly* with an advance copy of the interview, but *Celebrity Weekly* managed to get it anyway. How does that play in the fair use analysis, you wonder. Can *Celebrity Weekly* still claim a fair use defense, even though they obtained the interview by unauthorized means?

Unfortunately, the case law is inconsistent and provides no clear answer to this question. The Supreme Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), appeared to inject the defendant's good or bad faith into its analysis of the fair use defense's first statutory factor (the purpose and character of the use). The Court mentioned the issue once again, nearly 10 years later, suggesting in a footnote in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), that the bad faith subfactor should not be central to the fair use analysis. However, the *Campbell* opinion failed to shed any further light on the appropriate role of bad faith in the fair use inquiry.

In light of the continued ambiguity, federal appellate courts have given differing weight to a defendant's bad faith conduct. The Federal Circuit, at one end of the spectrum, has interpreted *Harper & Row* as requiring "an individual [to] possess an authorized copy of a literary work" as a prerequisite to claiming fair use. *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992). The Second and Ninth Circuits, on the other hand, both have read *Harper & Row*, as clarified by *Campbell*, more narrowly—ruling that a defendant's bad faith is not dispositive of a fair use defense but merely a subfactor that weighs in plaintiff's favor. *NXIVM Corp. v. The Ross Institute*, 364 F.3d 471 (2d Cir. 2004); *Los Angeles News Svc. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

How much weight should courts place on a defendant's bad faith conduct when analyzing fair use?

Under Section 107 of the Copyright Act, four factors are relevant to determining whether a particular use is a fair use:

- (1) the purpose and character of the use of the copyrighted work;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

The debate over the role of bad faith in a fair use analysis found its genesis in the Supreme Court's decision in *Harper & Row*, 471 U.S. 539, which arose after an undisclosed source provided *The Nation* magazine with an unauthorized copy of President Ford's soon-to-be-published memoirs. Using excerpts from the manuscript, *The Nation* published a piece on President Ford's reasons for pardoning President Nixon, timing the piece to scoop an article scheduled to appear in *Time* magazine. As a result of *The Nation* article, *Time* canceled its agreement to license prepublication excerpts from the purloined manuscript. *Harper & Row*, Ford's publisher, then brought a copyright action against *The Nation*. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that *The Nation's* act was a legitimate "fair use" of the copyrighted material.

The Supreme Court reversed. In evaluating the character and purpose under the first fair use factor, the Court noted that it could not ignore *The Nation's* stated purpose of scooping the forthcoming book and *Time* excerpts. The Court explained that "The Nation's use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." 471 U.S. at 562. "Also relevant to the 'character' of the use," the Court continued, "is the propriety of the defendant's conduct." *Id.* at 562-63 (internal citations omitted). "Fair use presupposes good faith and fair dealing," the Court held, and it

therefore found that *The Nation's* knowing exploitation of a purloined manuscript weighed against *The Nation* (and a finding of fair use) on the first factor. *Id.* The Court continued its analysis of the remaining fair use factors, ultimately concluding that *The Nation's* publication of verbatim excerpts from the unpublished manuscript was not a fair use.

Federal Circuit finds bad faith precludes fair use defense

Relying on the discussion in *Harper & Row*, the Federal Circuit ruled that as a broad proposition, bad faith by a defendant forecloses a fair use defense. *Atari Games Corp.*, 975 F.2d 832. The court considered Atari's invocation of fair use in a claim arising out of Atari's reverse engineering of the Nintendo game system, but held that the fair use defense was unavailable because Atari had obtained a copy of Nintendo's source code from the U.S. Copyright office by lying about its reason for needing the code. "To invoke the fair use exception," the Federal Circuit ruled, citing *Harper & Row*, "an individual must possess an authorized copy of a literary work." *Id.* at 843. "Because Atari was not in authorized possession of the Copyright Office's copy of [Nintendo's source code], any copying [of that code]," the court held, "does not qualify as a fair use." *Id.*

Supreme Court revisits relevance of bad faith

Two years after the Federal Circuit's decision in *Atari*, the Supreme Court briefly revisited the bad faith issue in *Campbell*, 510 U.S. 569, a parody case involving the song "Pretty Woman." The defendants, the rap group 2 Live Crew, had sought permission to parody the classic Roy Orbison ballad. Denied permission, the defendants parodied the song anyway. The copyright holder sued, and the Supreme Court held that 2 Live Crew's parody could be a fair use and remanded the case for further factual findings. In a footnote to its discussion of the first fair use factor (the character and purpose of the use), the Court noted: "[R]egardless of the weight one might place on the alleged infringer's state of mind, we reject [plaintiff's] argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use." *Id.* at 585 n.18 (internal citations

omitted). "Even if good faith were central to fair use," the Court said, "being denied permission to use a work does not weigh against a finding of fair use." *Id.* (emphasis added).

Ninth and Second Circuits hold bad faith not dispositive of fair use

Some courts read the *Campbell* footnote as confirming that a finding of good faith is not central to fair use and cannot therefore be dispositive. Shortly after *Campbell* was decided, one district court refused to bar a defendant from claiming fair use, although it assumed he had obtained some of the works without authorization. *Religious Technology Center v. Netcom On-Line Communication Services*, 923 F. Supp. 1231 (N.D. Cal. 1995). Here, organizations affiliated with the Church of Scientology brought an infringement action against a former Scientologist who posted a large amount of the Church's copyrighted work on the Internet.

The court found that it was more likely than not that the defendant had received at least some of the copies in an improper manner. *Id.* at 1244-45. Nevertheless, the court ruled, the fact that the copies obtained were unauthorized did not preclude it from being a fair use. While it would weigh in plaintiff's favor when analyzing the first fair use factor, the court held that bad faith should merely be considered alongside the other factors. The court reasoned that "[n]othing in *Harper & Row* indicates that the defendant's bad faith was itself conclusive of the fair use question, or even of the first factor." *Id.* at 1244 n.14. "After *Campbell*," the court held, "it is clear that a finding of bad faith, or a finding on any one of the four factors, cannot be considered dispositive." Accordingly, the court decided to "treat bad faith as merely one aspect of the first factor." *Id.*

The Ninth Circuit endorsed this approach two years later in *Los Angeles News Svc. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997), a lawsuit involving the copyrighted video of the Reginald Denny beating. The Los Angeles News Service (LANS) sued television station KCAL after the station used LANS's footage of the beating without a license (which LANS had refused to grant KCAL). *Id.* at 1120. KCAL asserted a fair use defense and the Ninth Circuit, in analyzing the first fair use factor,

assessed whether defendant's conduct was in bad faith. *Id.* at 1122. Citing *Campbell*, the Ninth Circuit ruled that the fact that KCAL had requested a license but had been refused one was relevant, but not dispositive of its fair use defense. As the court reasoned, "'the propriety of the defendant's conduct' is relevant to the character of the use at least to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee." *Id.* (citations omitted). The court went on to consider all four factors, and then found that KCAL had not made a fair use of the videotape. The Ninth Circuit thus signaled that a defendant's improper conduct, while relevant to the first fair use factor, would not foreclose a fair use defense.

The Second Circuit reached the same conclusion in *NXIVM Corp. v. The Ross Institute*, 364 F.3d 471 (2d Cir. 2004), involving producers of business training seminars who brought an infringement action against individuals who posted NXIVM's copyrighted course materials on the Internet. The defendants, who ran nonprofit websites providing information to the public about controversial groups, had obtained NXIVM's course materials from a former participant in NXIVM's seminars. *Id.* at 475. The former participant provided the copyrighted information to the defendants despite having signed a non-disclosure agreement that precluded her from disseminating the materials to others. NXIVM moved for a preliminary injunction to require that its copyrighted information be removed from defendants' websites. *Id.* at 476. The district court denied the preliminary injunction, finding no likelihood of success on the merits because defendants' fair use defense was likely to succeed. *Id.*

On appeal, following its own review of the relevant fair use factors—including the propriety of the defendants' conduct—the Second Circuit also found that defendants' fair use defense was likely to defeat plaintiff's infringement claim. Turning to the first factor in the fair use analysis, the court recognized that the propriety of the defendants' conduct is "an integral part of the analysis under the first factor" which the district court had failed to consider. *Id.* at 478. "[T]o the extent [the defendants] knew [their] access to the

manuscript was unauthorized or was derived from a violation of law or breach of duty, this consideration weighs in favor of plaintiffs," the Second Circuit ruled. *Id.* Also relevant within this subfactor, the court found, was the fact that the defendants could have acquired the manuscripts legitimately by paying the requisite fees to enroll in NXIVM's seminars. *Id.*

Assuming the defendants had engaged in bad faith, the court went on to consider how much weight this subfactor should be afforded when assessing the first fair use factor. *Id.* The Second Circuit rejected the broad interpretation of *Harper & Row* set out in the Federal Circuit's *Atari* opinion, noting that "the rule enunciated in *Atari* would foreclose the fair use defense altogether based upon defendants' bad faith." *Id.* As the Second Circuit explained, "[b]ecause the *Harper & Row* Court did not end its analysis of the fair use defense after considering and ascertaining the defendants' bad faith there, we believe that the bad faith of a defendant is not dispositive of a fair use defense." *Id.* at 479. Agreeing with the *Religious Technology Center* court, the Second Circuit found that the Supreme Court's *Campbell* decision "further supports [the] conclusion that a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis." *Id.* at 479 n.2. According to the Second Circuit in *NXIVM*, *Campbell* recognized "the continued relevance of *Harper & Row*, but clarified that the bad faith factor can be de-emphasized and will not be dispositive of the first fair use factor." *Id.* Given the continued ambiguity, however, the Second Circuit noted it would "await from the Supreme Court a clearer renunciation than the *Campbell* footnote of bad faith's relevance (however attenuated) to the fair use inquiry." *Id.*

Even with the bad faith subfactor weighing in plaintiff's favor, the court found the first factor still favored defendants in light of the transformative nature of the secondary use as criticism. *Id.* at 479. If no statutory factor could be dispositive after *Campbell*, then neither could any single subfactor, the Second Circuit reasoned. *Id.*

Should bad faith be considered at all?

Concurring with the majority decision in *NXIVM*, Chief Judge Dennis Jacobs wrote separately to suggest that a finding of bad faith should not just be afforded little weight in the fair use analysis, but rather no weight whatsoever. Jacobs asserted that *Harper & Row's* bad faith analysis was unnecessary to the outcome in the case. "Rejection of the fair use defense," wrote Judge Jacobs, "was compelled by the essential statutory considerations." 364 F.3d at 483. The Supreme Court's consideration of fair use in *Campbell*, thus, "treated as an open question whether the secondary user's good or bad faith is pertinent to the fair use inquiry (contrary to its observation in *Harper & Row*)." *Id.* As Judge Jacobs points out, "*Campbell's* contrary-to-fact phrasing—'[e]ven if good faith were central to fair use'—rather suggests that it should not be." *Id.* at 484. Believing the issue as yet unresolved by the Supreme Court, Judge Jacobs offered his assessment "that a secondary user's good or bad faith in gaining access to the original copyrighted material ought to have no bearing on the availability of a fair use defense." *Id.* at 483. As Judge Jacobs went on to explain, the central objectives of copyright would be disserved if "the morality and good behavior of secondary users" formed part of the fair use analysis. *Id.* at 483-84 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1126-27 (1990)).

Fair use, Judge Jacobs observed, is a statutory right, not "a privilege conferred on the well-intentioned." *Id.* at 485. Its purpose is to encourage the creation of original, transformative works. In considering the first fair use factor, two questions are critical: first, whether the secondary work copies the original with the same literary intention or rather with a new, transformative purpose; and second, whether the secondary work usurps some of the market for the first by serving as an alternate means of acquiring the quoted material. *Id.* at 485. Bad faith, the concurrence noted, is not relevant to either of those inquiries. If a person obtains an original work by improper means, that person likely will be subject to a host of civil and criminal charges. "[B]ut the question of fair use itself," Judge Jacobs concludes,

"should be decided on the basis of the transformative character and commercial effects of the secondary use. If the use satisfies the criteria of §107, it is fair because it advances the utilitarian goals of copyright." *Id.*

Thus, just as fair play is not a defense to infringement, Judge Jacobs contends that "bad faith should be no obstacle to fair use":

[A] hotelier who stocks each room with photocopies of a newly copyrighted translation of the Bible is not saved from infringement by his piety; similarly, a movie reviewer who critiques—and reveals—a surprise ending is not deprived of the fair use by his malice or spite. Nor should a book critic be denied the fair use protection because she gained access to a prepublication manuscript by deceit. Fair use is not a permitted infringement; it lies wholly outside the domain protected by the author's copyright.

Id. at 486. If bad faith is factored into the fair use analysis, Judge Jacobs opined, it likely will lead "to the suppression of transformative works that are valuable to the expansion of public knowledge." *Id.* Given that bad faith is a slippery concept, publishers may be unwilling "to risk liability on the basis of (unknown or unsuspected) tactics and morals of authors who produce transformative works." *Id.* This, Judge Jacobs lamented, would be a result contrary to the public good that copyright exists to promote. *Id.*

What is bad faith?

As Judge Jacobs' concurrence in *NXIVM* warns, the notion of what constitutes bad faith is difficult to define. Factoring bad faith into the fair use analysis makes predicting the outcome of a fair use claim even more complicated. For example, if a secondary user obtains the original work by deceit, will that always constitute bad faith? In *Atari Games Corp.*, Atari obtained Nintendo's source code by lying to the copyright office – clear evidence of bad faith, the Federal Circuit held. 975 F.2d at 843. But what if the conduct were not so egregious? What if the original work was obtained

from an anonymous source – must the recipient investigate whether the source's receipt of the work was authorized? And what about publishing a work after being denied permission? Does that alone constitute bad faith?

The Second Circuit opinion in *NXIVM* suggests that a finding of bad faith presupposes that the defendant "knew that his access to the [copyrighted works] was unauthorized or was derived from a violation of law or breach of duty." 364 F.3d at 478. Only then, the court held, would a defendant's conduct weigh against a finding of fair use. Following *NXIVM*, for example, a New York district court found that where the evidence was disputed as to whether defendants knew the underlying works had been stolen, summary judgment could not be granted against defendants on bad faith. *Shady Records v. Source Enterprises, Inc.*, 2005 WL 14920 (S.D.N.Y. Jan. 3, 2005).

As mentioned above, another factor courts have considered in evaluating bad faith is whether defendant copied the work despite having been denied permission to do so. In *Campbell*, the Supreme Court found that 2 Live Crew's use of the Roy Orbison song "Pretty Woman" after having been denied permission did not constitute bad faith. 510 U.S. at 585 n.18. The Court explained that the defendants' "actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid [] litigation." *Id.* According to the Court, if the use is otherwise fair, then permission is unnecessary. *Id.* Proceeding without permission does not therefore establish bad faith. *Id.*; accord *Bill Graham Archives v. Dorling Kindersley Ltd.*, 2006 WL 1236790, at *8 (2d Cir. May 9, 2006); *Gulfstream Aerospace Corp. v. Camp Systems Int'l, Inc.*, 2006 WL 1061890, at *11 n.5 (S.D. Ga. April 18, 2006).

In addition, several courts have found relevant the fact that the defendant knowingly exploited a work that could have been purchased for a fee. In *Los Angeles News Svc.*, for example, the court noted that KCAL had requested a license but was refused one. While it found

that this fact was not dispositive, it nevertheless held the defendant's conduct improper given that the defendant had "obtained a copy of the tape from another station, directly copied the original, superimposed its logo on [plaintiff's] footage, and used it for the same purpose for which it would have been used had it been paid for." 108 F.3d at 1121. In *NXIVM*, the Second Circuit similarly considered relevant the fact that the defendants could have paid the requisite fee to enroll in *NXIVM*'s seminars and obtain their materials legitimately. 364 F.3d at 478. The court assumed that defendants had engaged in bad faith conduct but nevertheless found defendants' republication of the seminar materials to be a fair use. *Id.* at 482.

Finally, a finding of bad faith also could be predicated on the violation of a contractual duty. In *NXIVM*, the plaintiff required its seminar participants to sign a non-disclosure agreement. Violation of that agreement, the Second Circuit noted, "would be a breach of a contractual duty but would not *ipso facto* be a copyright infringement." *Id.* at 478 n.1. However, the court continued, "such a violation of a contractual duty, would be relevant in assessing the bad faith subfactor within the first factor." *Id.*

How does the bad faith question impact your advice to clients?

Without further guidance from the Supreme Court on the relevance of bad faith to the fair use inquiry, advising clients on the viability of a fair use defense is difficult. Nevertheless, there are some lessons to be learned from those cases addressing the issue following *Harper & Row* and *Campbell*. Absent a clearer renunciation of the good faith principle, clients should be advised that their conduct in acquiring copyrighted materials likely will be considered at least as a subfactor within the first factor of a fair use analysis. Where clients receive the copyrighted material anonymously, courts may well assume that the clients' possession of such material is unauthorized, absent evidence to the contrary. Where clients have obtained the copyrighted material through their own deceptive or unauthorized means, a finding of bad faith is more certain

and likely to have a greater negative impact on a court's analysis of the first fair use factor. Following *Campbell*, clients need not fear that using copyrighted material after having been denied permission will automatically constitute bad faith conduct. 510 U.S. at 585 n.18. But if the material could have been lawfully obtained by simply paying a fee, that is a factor that courts may well take into account. Given the increasing competition among media outlets for market share and the premium associated with providing fresh and innovative content in an expedited manner in the Internet age, the question of defendants' bad faith conduct in using copyrighted material is likely to arise again and again in the context of fair use challenges. The trend appears to be to give less weight to a defendant's bad faith conduct. But it remains to be seen whether the well-reasoned view of Judge Jacobs—that such conduct should have no relevance at all—will prevail in the end.

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