

Montz v. Pilgrim Films & Television, Inc.: Copyright Preemption and Idea Submission Cases

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At some point in his or her life, almost everyone has an idea for a television show or movie. In Los Angeles in particular, it often seems that everyone—from the waiter to the lawyer to the personal trainer—is writing a screenplay or treatment of some sort. These authors are not laboring over their ideas for nothing; they obviously hope to sell them. To do so, authors typically pitch their ideas, often embodied in a written treatment, to studios, networks, production companies, and others (collectively, producers).

The vast majority of these pitch meetings are unremarkable: the producer listens for thirty minutes, reviews a short written treatment, and eventually passes on the author's idea. On rare occasions, the producer may make a deal with the author to develop her idea. And then there are the pitch meetings that lead to litigation, where the producer "passes" on the author's pitch and later develops a television series or motion picture that the author believes is based on or incorporates some of her ideas.

Copyright law may not be of much help to the author in this circumstance. Although it protects any material that the author disclosed that was fixed in a tangible medium, it does not protect the author's ideas, and the burdens on a plaintiff in a copyright action are onerous. For more than fifty years,¹ however, California law has recognized a "custom and practice" in the entertainment industry that the producer and the author go into these pitch meetings with the mutual understanding that the author will be compensated and credited if the producer uses her ideas. This purported

mutual understanding is the basis of the implied-in-fact contracts that form the foundation of most idea submission claims in California.

The intersection of copyright law and implied contracts can be difficult to navigate. If a producer passes on a pitch but later creates a show that contains similar ideas to what was pitched, does the author have any recourse? Alternatively, if a network hears twenty pitches for, say, an elimination-style, singing-competition reality show, how (absent a submission release) does the network avoid being sued (perhaps by several different plaintiffs) when it later approves a more compelling or commercially viable elimination-style, singing-competition reality show?

Implied Contract Cases and Venue Selection

In California, these fact patterns most often give rise to breach of implied-in-fact contract claims rather than copyright infringement claims, presumably because these state law claims impose lesser burdens on the plaintiff. For more than thirty years, courts have grappled with whether the Copyright Act preempts these implied contract claims. After a recent opinion from a divided en banc panel in *Montz v. Pilgrim Films & Television, Inc.*, the answer, in the Ninth Circuit at least, again appears to be "no."²

Montz involved a parapsychologist and his partner who pitched a concept for a reality television show that would follow paranormal investigators searching for evidence of ghosts. After NBC Universal (NBC) and its Sci Fi Channel passed on the project, Sci Fi Channel launched a television show entitled *Ghost Hunters*, which followed a team of investigators of paranormal activity. Plaintiffs sued, alleging state law claims for breach of implied contract and breach of confidence. After the district court dismissed and the Ninth Circuit affirmed, breathing new

life into copyright preemption as a defense to idea submission claims under California law, the Ninth Circuit took it up en banc. Last month, an en banc panel reinstated plaintiffs' claims and reaffirmed the rule that most breach of implied contract claims will survive a preemption challenge in California. The en banc opinion does not substantially change the law in the Ninth Circuit but arguably expands the range of claims that may withstand preemption.

The majority opinion in *Montz* also signals a further divergence in the law between the Second and Ninth Circuits. Only a few days after the Ninth Circuit declined to find preemption, the U.S. District Court for the Southern District of New York reached the opposite conclusion in a similar idea submission case.³ There, plaintiffs Forest Park Pictures, Tove Christensen, and Hayden Christensen pitched an idea to USA Networks for a television series entitled *Housecall*, in which the main character is a doctor who is "expelled from the conventional medical community for treating patients" who were unable to pay. The doctor then becomes a concierge doctor to the rich and famous in Malibu. USA Networks passed on the idea but later began airing a television show entitled *Royal Pains*, in which a doctor is "expelled from the conventional medical community for treating patients . . . unable to pay" and ends up as a concierge doctor to the rich and famous in the Hamptons.⁴ Although plaintiffs alleged a claim styled after *Desny v. Wilder*,⁵ the court held that Second Circuit law governed the issue of whether the claim was preempted. Following the Second Circuit's recent decision in *Muller v. Twentieth Century Fox Film*,⁶ the district court held that plaintiffs' implied contract claim was equivalent to the exclusive rights protected by copyright law and thus was preempted.

The conflicting outcomes in the two circuits highlight the importance of

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venue selection and choice of law in these cases (and explains why plaintiffs inevitably seek to have California law apply and why defendants look for any way to have New York law apply). This conflict also raises the possibility that the U.S. Supreme Court may eventually address the issue. So how did these courts end up with two very different results?

Protection of Works Under the Copyright Act

To begin with, the first and most obvious line of protection for a work of authorship is the Copyright Act. The Copyright Clause (and the Copyright Act) grants authors a series of exclusive rights to their writings. Subject to certain limitations, § 106 of the Copyright Act grants to the owner of the copyright

the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.⁷

These rights extend specifically to any “writing,” that is, a work fixed in a tangible form. In an effort to square First Amendment concerns with the constitutional protection afforded to authors under the Copyright Clause,⁸ the Copyright Act explicitly extends only to this fixed expression. In fact, the Copyright Act explicitly provides that “[i]n no case does copyright protection of an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is

described, explained, illustrated, or embodied in such work.”⁹ This “idea/expression dichotomy” prevents the protection of facts or ideas while still providing security for the work as expressed in the writing.¹⁰

Under such circumstances, however, the Copyright Act gives little protection in the context of a pitch meeting in which an idea is expressed and then later utilized by the recipient without compensation. And even where the pitch includes a written treatment or a DVD, a plaintiff has a high burden of showing that the protectable portions of a copyrighted work have been copied and that the defendant’s allegedly infringing work is substantially similar to the copyrighted work.¹¹

In the Ninth Circuit, substantial similarity is determined by applying both an “extrinsic” and an “intrinsic” test. The extrinsic test focuses on “articulable similarities between plot, themes, dialogue, mood, setting, pace, characters, and sequence of events”¹² while disregarding nonprotectable facts and “scènes à faire that flow naturally” from the plot.¹³ The intrinsic test, on the other hand, “examines an ordinary person’s subjective comparisons of the similarities between two works” and is only to be applied by the jury after the plaintiff has survived the extrinsic test.¹⁴

Despite this rule, in an overwhelming number of cases where a plaintiff alleges access on the basis of a pitch meeting or other submission (e.g., a treatment, screenplay, one-sheet, or other fixed form), courts do not find substantial similarity between the works.¹⁵ Even with proof of access through such meetings, the courts require the similarity to be focused on what is expressed in the work rather than the ideas embodied in the expression, a high hurdle when comparing a one-sheet or treatment to a completed film or television series. So how can authors protect their ideas while still being able to disclose the work to those who can produce it?

Copyright Preemption

The *Montz* case illustrates this gap between copyright law and state law protection for an author’s work. At one time, federal and state law protection coexisted for works of authorship. In 1976, however, Congress amended the Copyright Act to provide for a

uniform system of copyright application. Section 301(a) of the Copyright Act provides that

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103 . . . are governed exclusively by this title[.]¹⁶

Consequently, “no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”¹⁷ State and federal courts have frequently used this provision to dismiss claims that do nothing more than mimic a copyright claim.¹⁸ To determine whether a claim is preempted, courts apply a two-prong test: (1) Does the state claim involve a “work of authorship . . . fixed in a tangible medium of expression?”¹⁹; and (2) Does the state claim assert “legal or equitable rights within the general scope of copyright as specified by Section 106?”²⁰

In the case of an author pitching his work, the first prong is frequently met by the written or visual materials that he provides. Thus, the focus is on the second prong, or whether there is any “extra element” alleged that would take the claim outside of the scope of copyright.²¹ If the state law claim requires something that is qualitatively different from the rights protected under § 106, it is not preempted.

Do Idea Submission Claims Qualitatively Differ from Copyright Claims?

Montz began like many idea submission claims. Decades ago, parapsychologist Larry Montz came up with the idea for a television show that would follow a team of paranormal investigators searching for evidence of ghosts.²² By 1996, Montz and publicist Daena Smoller began to pitch the idea to several television studios, producers, and their representatives.²³ Between 1996 and 2003, Montz and Smoller developed screenplays, videos, and other materials, using these to pitch the show to various entities, including representatives of Sci Fi Channel and NBC (parent to Sci Fi Channel).²⁴

Despite “a number of meetings and discussions,” NBC and Sci Fi Channel passed on the project.²⁵

Several years later, Sci Fi Channel began airing *Ghost Hunters*. As its title suggests, the show tracks a team of investigators who travel across the country seeking out and studying paranormal activity.²⁶ The show was produced by Pilgrim Films & Television, Inc. and distributed by NBC. Montz and Smoller sued Pilgrim and NBC, along with individual defendants, alleging

... the courts require the similarity to be focused on what is expressed in the work rather than the ideas. . .

copyright infringement, breach of implied contract, and breach of confidence, among other causes of action. Specifically, they claimed that:

Plaintiffs communicated their ideas and creative concepts for the “Ghost Hunters” Concept to the Defendants, pursuant to the standard custom and practice in the industry with respect to the exchange of creative ideas, under the following terms: (a) that Plaintiffs’ disclosure of their ideas and concepts was strictly confidential; (b) that the Defendants would not disclose, divulge or exploit the Plaintiffs’ ideas and concepts without compensation and without obtaining the Plaintiffs’ consent; and (c) that, by accepting the Plaintiffs’ disclosure of its concept, the Defendants accepted and agreed to abide by the foregoing terms.²⁷

Montz and Smoller also alleged that they expressly conditioned the presentation of their concepts as an offer to partner with defendants, with the expectation that they would receive a share of the profits derived from any use of the idea.²⁸ Plaintiffs alleged that their confidential relationship was breached by defendants taking and exploiting their ideas and concepts, profiting from them to the exclusion

of plaintiffs.²⁹ After some procedural wrangling in which plaintiffs voluntarily dismissed their copyright claim, the district court dismissed the state law claims on the grounds that they were preempted by the Copyright Act.³⁰

On June 3, 2010, a three-judge panel of the Ninth Circuit affirmed, with Judge Diarmuid O’Scannlain authoring the opinion holding that both the implied contract and breach of confidence claims were preempted.³¹ The court focused on the second prong of the preemption test—specifically, whether the implied-in-fact contract claim “protect[ed] rights which are qualitatively different from the copyright rights.”³² The court noted that the “gravamen of the claim is that defendants used the plaintiffs’ work, without authorization, to create (and then profit from) a new television program.”³³ Consequently, the court held that “the rights asserted by the plaintiffs under the implied contract are thus equivalent to the rights of copyright owners under § 106—namely, the exclusive rights to use and to authorize use of their work.”³⁴ On that basis, the court affirmed the district court’s order granting defendants’ motion to dismiss the implied-in-fact contract claim.³⁵ But that was not the end of it. Shortly thereafter, the Ninth Circuit sua sponte ordered a rehearing of the case en banc.³⁶

This, of course, was not the first time that the Ninth Circuit considered whether the Copyright Act preempts implied contract claims under California law. In 2004, the court issued a brief opinion in *Grosso v. Miramax Film*, in which plaintiff Jeff Grosso claimed that defendants infringed his copyright and breached an implied contract regarding his screenplay *The Shell Game*, which they allegedly used to create the movie *Rounders*.³⁷ The district court granted summary judgment on the copyright claim and dismissed the implied contract claim on the basis that it was preempted by the Copyright Act.³⁸ With Judge Mary Schroeder writing the opinion, a three-judge panel of the Ninth Circuit affirmed summary judgment on the copyright claim, finding that the works were not substantially similar. Despite the lack of similarity, however, the court reversed the order dismissing the implied contract claim.³⁹

Judge Schroeder explained that the implied contract claim, modeled after

Desny, survived a motion to dismiss because the contract was not a bargain for the idea itself “but for the services of conveying that idea.”⁴⁰ The court held that Grosso had alleged the extra element to take the claim outside of preemption because he asserted that “the idea was submitted by Plaintiff to Defendants with the understanding and expectation, fully and clearly understood by Defendants that Plaintiffs would be reasonably compensated for its use by Defendants.”⁴¹ Notably, the opinion in *Grosso* neither explains how that submission was made nor identifies any specific facts alleged in the complaint. In its amended opinion, the court makes clear that it was “compelled by the procedural posture” to reverse the implied contract decision, holding “only that the First Amended Complaint states a *Desny* claim.”⁴²

Given that *Grosso* reflected the state of the law in the Ninth Circuit, how did the three-judge *Montz* panel come to a contrary conclusion? It did not criticize *Grosso* but instead distinguished that opinion by pointing out that plaintiffs in *Montz* alleged that they conditioned their disclosure of their idea on entry into a partnership with NBC to develop the show and share in its profits rather than offering the concept for sale as in *Grosso* (or in *Desny*).⁴³ Judge O’Scannlain wrote that this partnership allegation was inconsistent with a *Desny* claim and that plaintiffs would not be able to amend to allege differently.⁴⁴

Judge Schroeder authored the seven-to-four majority opinion that reversed the district court’s order in *Montz* and reaffirmed her opinion in *Grosso*. With more detail and analysis than the three-page decision in *Grosso*, the majority held that where there is an expectation of compensation, the claim contains the extra element that defeats preemption: “The extra element, the implied agreement of payment for use of a concept, is a personal one, between the parties.”⁴⁵ The court assumed (as had been alleged) that the standard custom and practice in the industry created a bilateral expectation that a writer will be compensated for use of his idea.⁴⁶ Noting that this approach “recognizes the gap that would otherwise exist between state contract law and copyright law in the entertainment industry,”⁴⁷ the majority

explained that its holding would offer some protection for those who create concepts and ideas that cannot be protected by copyright. The court also held that plaintiffs' breach of confidence claim contained an extra element, specifically, the duty of trust or confidential relationship between the parties, making it qualitatively different from a copyright claim.⁴⁸

By allowing a so-called *Desny* claim to survive a motion to dismiss, the court "offered some protection for those who wish to find an outlet for creative concepts and ideas with the understanding that they are not being given away for free."⁴⁹ Citing Woody Allen's film, *Crimes and Misdemeanors* (Orion Pictures, 1989), the court posited that this protection was needed to protect "valuable creative sources" "in a dog-eat-dog business."⁵⁰ As the court had previously noted in *Benay v. Warner Bros. Entertainment, Inc.*, "[c]ontract law, whether through express or implied-in-fact contracts, is the most significant remaining state-law protection for literary or artistic ideas."⁵¹

Judge O'Scannlain dissented, focusing on plaintiffs' allegation that they expected to partner with defendants to develop and produce the program (and presumably to retain some creative control). "Where a copyright owner authorizes the use of his work, but does not receive the consideration he was promised"—in other words, payment for the use of his work—"he has a contract claim." But "where a copyright owner does not authorize the use of his work, but, nonetheless, someone uses it to produce a substantially similar work, he has a copyright claim."⁵² In Judge O'Scannlain's view, plaintiffs did not authorize defendants' use of their concept and thus had a copyright claim, not a contract claim. Judge O'Scannlain cautioned that the majority ruling effectively grants broader rights than those under the Copyright Act because "California implied contract law does not require as strict a showing of substantial similarity as federal copyright law."⁵³

In a separate dissent, Judge Ronald Gould observed that

[t]here is no virtue in permitting a supplemental state law jurisdiction that in substance expands federal copyright law. Studios and

network ventures need stable law that does not unsettle expectations. The majority's decision, however, will lead to uncertainty by making state law—with its ambiguity, variability, and volatility—available to litigants who bring nebulous state law claims that in substance assert rights in the nature of copyright.⁵⁴

Forest Park: Divergence from Montz

The recent *Forest Park* decision from the Southern District of New York (McMahon, J.) echoes Judge Gould's concern and offers a narrower view of implied contract claims than the majority opinion in *Montz*. The implied contract claim in *Forest Park* was similar to the claim in *Montz* and was even closer to the allegations in *Desny* in that it sought compensation for use of the pitched concept rather than a partnership.⁵⁵ Not surprisingly, plaintiffs in *Forest Park* sought to apply California law, but the district court held that because preemption is a federal question, a federal court must apply the law of the circuit in which it sits.⁵⁶

The claim was filed in the Southern District of New York, and so Second Circuit authority applied to the issue of preemption. Citing several lower court decisions finding preemption and a recent Second Circuit decision summarily dismissing an implied contract claim, the district court had little trouble finding preemption⁵⁷ and reminding us of the conflict between the two circuits that hear the greatest number of idea submission claims.

Why Montz Matters

As a threshold issue, and as pointed out by the dissenting judges, the Ninth Circuit's en banc opinion will make it more difficult for defendants to defeat idea submission claims on a demurrer or motion to dismiss and thus may encourage even more litigation. The opinion also may be read as the Ninth Circuit's endorsement of the underlying assumption in *Desny*, i.e., as the majority put it, "since the writer is looking for someone to turn [his] written work into an entertainment production, writers often pitch scripts or concepts to producers with the understanding that the writer will be paid if the material is used."⁵⁸

Because the appeal in *Montz* followed the grant of a motion to dismiss,

the majority did not have any evidence upon which to base this assumption. One may question whether the assumption is valid; there may be many reasons why an author pitches an idea to a producer (including to establish a relationship with the producer) and various reasons why a producer agrees to a meeting with an author (including to do a favor for a third party). Unfortunately, the combination of *Desny* and *Montz* may make it very difficult for any defendant to dispute this assumption. Finally, the opinion may open the door for other plaintiffs to allege that they disclosed their concepts with a mutual expectation of receiving something more than simply credit and compensation if their ideas were used; they, too, may allege that they expected to partner with the producer and receive a share of the show's profits. This possibility may set the stage for more frequent disputes over the appropriate scope of financial discovery in idea submission cases.

But *Montz* need not lead to the "chaotic prospects" predicted by Judge Gould in his dissent. Ultimately, the law in the Ninth Circuit remains largely the same that it was between 2004 and 2010. However, prudent producers, networks, studios, and others targeted by these claims may want to become more aggressive about requiring many individuals (and especially those who are not represented by a well-known agency or manager) to execute submission releases that expressly acknowledge that the pitch meeting does not create any implied agreement between the parties and that generally limit the individual to a copyright infringement claim.

These submission releases should be written in plain English, especially because they often will be presented to unsophisticated (and unrepresented) parties. To negate the purported industry custom and practice that the California Supreme Court recognized in *Desny*, the releases should succinctly spell out that the submission or pitch does not create any implied-in-fact agreement between the parties. To avoid the breach of confidence claims that frequently accompany implied contract claims, releases should require authors to acknowledge that their treatment or idea is not confidential or proprietary. But the release should not

be so onerous or one-sided that a court might deem it unenforceable. In particular, it should not purport to waive the author's ability to sue for copyright infringement should the producer use protectable elements of the author's work without permission. An effective submission release can achieve these goals in one or two pages.

Although the law in the Second Circuit is better at present than in the Ninth Circuit, New York-based producers may want to consider requiring authors to sign similar releases in the event that a particular plaintiff brings suit in California or convinces a court to apply California law or in the event that the U.S. Supreme Court someday sides with the Ninth Circuit on the preemption issue.

Endnotes

1. See *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956).
2. 2011 U.S. App. LEXIS 9099 (9th Cir. May 4, 2011).
3. *Forest Park Pictures v. Universal Television Network, Inc.*, 2011 WL 1792587 (S.D.N.Y. May 10, 2011).
4. *Id.* at *2.
5. 299 P.2d 257 (Cal. 1956).
6. 2011 WL 1330632 (S.D.N.Y. Mar. 30, 2011).
7. 17 U.S.C. § 106.
8. U.S. CONST., art. I, § 8, cl. 8.
9. 17 U.S.C. § 102(b).
10. See *Harper & Row v. Nation Enters.*, 471 U.S. 539, 556 (1985); see also *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).
11. *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006).
12. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).
13. *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002).
14. *Funky Films*, 462 F.3d at 1077.
15. See, e.g., *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990) ("We have frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity."); see also *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620 (9th Cir. 2010); *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004); *Funky Films*, 462 F.3d 1072; *Kouf*, 16 F.3d 1042; *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir. 1985); *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984); *Gable v. NBC*, 727 F. Supp. 2d 815 (C.D. Cal. 2010); *Bernal v. Paradigm Talent & Literary Agency*, 2010 U.S. Dist. LEXIS 142573 (C.D. Cal. Feb. 22, 2010); *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288 (C.D. Cal. 2008); *Thomas v. Walt Disney Co.*, 2008 U.S. Dist. LEXIS 14643 (N.D. Cal. Feb. 14, 2008); *Bethea v. Burnett*, 2005 U.S. Dist. LEXIS 46944 (C.D. Cal. June 28, 2005); *Merrill v. Paramount Pictures Corp.*, 2005 U.S. Dist. LEXIS 45401 (C.D. Cal. Dec. 19, 2005); *Green v. Schwarzenegger*, 1995 U.S. Dist. LEXIS 14031 (C.D. Cal. July 11, 1995).
16. 17 U.S.C. § 301(a).
17. *Id.*
18. See, e.g., *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000); *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Symantec Corp. v. McAfee Assocs., Inc.*, 1998 U.S. Dist. LEXIS 22591 (N.D. Cal. 1998); *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416 (C.D. Cal. 1994); *Fleet v. CBS*, 50 Cal. App. 4th 1911 (1996).
19. *Laws v. Sony Music Entm't, Inc.*, 488 F.3d 1134, 1139 (9th Cir. 2006).
20. *Fleet*, 50 Cal. App. 4th at 1919.
21. *Laws*, 448 F.3d at 1143; see also *Kabehie v. Zoland*, 102 Cal. App. 4th 513, 521 (2002).
22. *Montz v. Pilgrim Films & Television, Inc.*, 2011 U.S. App. LEXIS 9099, at *4-5 (9th Cir. May 4, 2011).
23. *Id.* at *5.
24. *Id.*
25. *Id.*
26. *Id.* at *5-6.
27. *Id.* at *6 (citing Complaint ¶ 46).
28. *Id.* at *6-7.
29. *Id.* at *7.
30. *Id.* at *7-8.
31. *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153, 1158 (9th Cir. 2010), *reversed en banc*, 2011 U.S. App. LEXIS 9099.
32. *Id.* at 1157.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Montz v. Pilgrim Films & Television, Inc.*, 623 F.3d 912 (9th Cir. 2010).
37. 383 F.3d 965, 967 (9th Cir. 2004).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Grosso v. Miramax*. 2004 U.S. App. LEXIS 28043, at *7 (9th Cir. Sept. 14, 2004).
43. *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153, 1158 (9th Cir. 2010).
44. *Id.* at 1159-60.
45. *Montz v. Pilgrim Films & Television, Inc.*, 2011 U.S. App. LEXIS 9099, at *13 (9th Cir. May 4, 2011).
46. *Id.* at *9.
47. *Id.* at *15.
48. *Id.* at *16.
49. *Id.* at *15-16.
50. *Id.* at *16.
51. 607 F.3d 620, 629 (9th Cir. 2010).
52. *Montz*, 2011 U.S. App. LEXIS 9099, at *28.
53. *Id.* at *29.
54. *Id.* at *32.
55. *Forest Park*, 2011 WL 1792587, at *1 (S.D.N.Y. May 10, 2011).
56. *Id.* at *2.
57. *Id.* at *3.
58. *Montz*, 2011 U.S. App. LEXIS 9099, at *7.