

9th Circuit settles questions about disputes over script ownership

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An appellate ruling involving the 2003 Tom Cruise movie *The Last Samurai* clarified for the first time in 40 years how a writer of a finished script with copyrightable elements can successfully bring a contract claim against a studio for stealing his or her idea.

The June 9 ruling by the U.S. Court of Appeals for the 9th Circuit applied existing case law dating to the 1960s, said Gregory Sater, a partner at Los Angeles-based Rutter, Hobbs & Davidoff, who frequently handles idea-submission claims and was not involved in the case.

"In copyright, you have to show access, which is really use, and a substantial similarity of protected expression. In idea submission, you need to show use, and the way you show use is by showing it was used. The way you show it is by substantial similarity. It sounds like the same as copyright, but it's not," he said. " This is very helpful to get a new case that flushes it out."

The case was brought by Aaron and Matthew Benay, who wrote and received a copyright for a screenplay called *The Last Samurai*. They sued Warner Bros. Entertainment Inc., a division of Time Warner Inc., among other defendants, claiming that the producers of the film copied their screenplay after meeting with them in 2000.

They cited two theories: copyright infringement and breach of an implied-in-fact contract under California law. The latter is used to bring idea-submission claims. A federal judge in Los Angeles granted summary judgment to Warner Bros. as to both claims, but the 9th Circuit reversed on the contract claim.

The court said that the script and the film had several differences that undermined a copyright claim, but had other similarities that aren't necessarily copyrightable. For instance, both involved an American war veteran who travels to Japan, where he trains the Imperial Army in modern warfare and fights against the samurai. Both stories were set during the Satsuma Rebellion of 1877, and both relied heavily on Saigo Takamori, the purported real-life "last samurai."

"Defendants argue that because the Benays submitted a completed screenplay we must analyze their contract claim in the same manner as their copyright claim," the court concluded. Relying on its own 2004

decision in *Grosso v. Miramax Film Corp.*, the court refuted that argument, concluding that "the analysis of similarity under an implied-in fact contract claim is different from the analysis of a copyright claim, even where the plaintiff has submitted a full copyright-protected script."

In *Grosso*, the 9th Circuit found that a writer who failed to prove that Miramax infringed on his copyrighted script could still press a state contract claim because federal copyright laws did not pre-empt it. The ruling opened the door for writers to bring idea-submission claims against the studios.

Sylvia Havens, a partner at Marder Havens & Saunders in Los Angeles, whose partner, John Marder, handled the *Grosso* case, represents the Benays. She said she was particularly pleased with the 9th Circuit's findings regarding the two-year statute of limitations on an implied-contract claim — an issue she has been fighting for decades. Studios have argued that the start of production triggers the statute of limitations, while writers insist the statute starts to run once the film gets released to the public. The 9th Circuit agreed with the writers. Had the court ruled otherwise, it would have had a devastating effect on writers hoping to sue, she said.

"The worst-case scenario is if a studio knows it can steal a writer's ideas, the studio announces it's going to do it, they put it in production, and then they wait for two years until they produce it," she said. "Once they release it to the public, they don't get sued because it's barred."

An attorney for Warner Bros., Jaime Marquart, a partner at Baker Marquart Crone & Hawxhurst in Los Angeles, referred calls to a Warner Bros. spokeswoman. The spokeswoman did not return a call for comment.