'Lost' idea-theft claim goes down the hatch

By Jens B. Koepke

Much has been written about the rising tide of idea-theft claims in Hollywood. These tsunami warnings became more shrill after the 9th U.S. Circuit Court of Appeals ruled en banc (in *Montz v. Pilgrim Films & Television Inc.*, 649 F.3d 975, 976 (9th Cir. 2011)) that idea theft claims are not necessarily preempted by federal copyright law.

However, a recent California appellate court decision illustrates how hard it actually is to maintain and win an idea-theft claim. Whether the tide now recedes remains to be seen.

While idea-theft claims remain viable, plaintiffs should take stock of the strength of their evidence, because this case shows that these suits can still be dismissed as a matter of law, even if they are not preempted. And while defendants can take heart from this decision, it shows they must marshal good documentary evidence establishing their independent creation of the work, as well as have strong evidence negating any real access to plaintiff's work.

In *Spinner v. American Broadcasting Companies, Inc.*, 2013 DJDAR 4477 (Cal. App. 2nd Dist. April 5, 2013), experienced television producer, writer and former studio executive Anthony Spinner sued ABC, claiming it had stolen his ideas in developing the TV series "Lost." In late 1976, ABC had hired Spinner (through a production company) to write a two-hour pilot tentatively entitled "L.O.S.T." After developing an outline and synopsis and meeting with ABC, Spinner then wrote a full-length script and a second draft. The script involved a group of eight plane-crash survivors in the Himalayas who go through a mysterious tunnel in the mountain and emerge in a strange prehistoric world — a "lost world." ABC ultimately decided to pass on the project in 1977. The ABC executives involved left the network a few years later.

Fourteen years later, in 1991, Spinner again verbally pitched his script idea to a new ABC executive. At her behest, Spinner reworked the idea to be a futuristic story concerning a spaceship crash and survivors in outer space. Once again, ABC passed on the project. In 1994, Spinner resubmitted the outer space treatment to a different ABC executive, but that also went nowhere. Those two ABC executives also departed the network a few years later.

According to ABC, the television series "Lost" did not get developed until 2003. An ABC executive hatched the basic idea on a beach in Hawaii and then ultimately hired various writers to flesh it out. He saw it as a fusion of "Cast Away," "Survivor" and "Gilligan's Island." Once the pilot was given the green light, the writers further developed the script and the characters, modifying them as the actors were cast. The script involved a plane crash and a group of survivors, but the cast also included some mysterious characters already on the island, as well as some mysterious characteristics of the island itself. ABC produced documents memorializing these development and creative brainstorming meetings in 2003. All the writers and the ABC executive declared that they had never spoken to the previous ABC executives, nor seen the 1977 script, nor spoken to Spinner. Although ABC's policy was to hold onto submitted scripts in a script library, a search had not turned up the 1977 script in that library, but did reveal the 1991 outer-space treatment.

Associated Press

Damon Lindelof, right, co-creator and executive producer of the television series "Lost," participates in a panel discussion on the show alongside cast members Josh Holloway, left, and Evangeline Lilly, in 2010.

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"Lost" premiered in September 2004 and ran for six seasons.

Spinner sued for breach of an implied-in-fact contract, alleging that a contract arose when ABC solicited his 1977 script, he submitted it expecting payment if ABC used it, ABC accepted it knowing payment was expected, and then ABC used it without paying him. This so-called *Desny* claim has its roots in the state Supreme Court decision in *Desny v. Wilder*, 46 Cal. 2d 715 (1956). But ABC won at summary judgment, because it had shown that it lacked access to the 1977 script and had proven "Lost" was created independently. The Court of Appeal affirmed.

The court explained that an inference of the defendant's use of the plaintiff's idea or work may arise by showing the defendant had access to the idea and that the works are substantially similar. However, the defendant can dispel that inference with evidence that it independently created the work. As a result, a factual issue on substantial similarity may not be enough to overcome summary judgment when independent creation is established.

In affirming, the Court of Appeal first held that the plaintiff's proof of access was inadequate as a matter of law. Access means that the defendant had an opportunity to view or copy the plaintiff's work, but more than a "bare possibility" of access is required — mere "corporate receipt" of the work may not be enough. There has to be a sufficiently strong nexus between the intermediary who received the plaintiff's work and the creators of the offending work, that nexus being more than sharing a common employer. The court gave examples:

"For instance, the nexus may be sufficiently strong when the intermediary was in a position to transmit the plaintiffs' work to the creator, was a supervisor with responsibility for the creator's work, was part of the same work unit, was a contributor of creative ideas or material to the creator's work, or was otherwise in contact with the creator regarding some subject matter that overlapped with the plaintiffs' work."

None of these existed in Spinner's case. Instead, Spinner's main argument was that since ABC had a policy of putting all submitted scripts in a script library, the 2003 development team could have had access to the script. "This is guess work," said the court, particularly since the library was not centralized or searchable. And any such assumption is even more implausible, since there was no nexus between the ABC executives Spinner submitted his scripts to (long gone from ABC) and the creative team at ABC that ultimately developed "Lost." "In sum, Spinner has shown only a bare possibility of access based on speculation, supposition, and guess work."

Second, the court held that since no inference of use could arise from access, it would have to be based on substantial similarity, but that any such similarity was rebutted by ABC's uncontradicted evidence that it independently created "Lost." That evidence consisted of documents memorializing the original brainstorming session ABC executives had about the "Lost" idea, as well as "evolution of the LOST pilot from six pages of notes to a 90-plus page script, over the course of approximately three months." Moreover, all the key players submitted declarations that they had never seen Spinner's 1977 script, nor that anyone had ever mentioned any of Spinner's scripts or treatments to them. And, of course, all the ABC executives who had received Spinner's work had left ABC before the "Lost" creative team got there. Spinner presented no evidence to contradict, instead argued that the declarations were "self-serving" statements by interested witnesses. The court's response: "This argument fails to persuade. ... We may not deny summary judgment on grounds of credibility when ABC has established the independent creation defense thusly."

What lessons can we draw from *Spinner*? Here are a few:

- Plaintiffs cannot rely solely on an inference of improper use simply because the defendant's employer had access to the work.
- The weakness in relying on access alone is even more potent if the plaintiff's work was submitted many years ago and the recipients are no longer employed by the defendant.
- Likewise, plaintiffs cannot rely on the substantial similarity between the works alone to establish that inference of use.
- Substantial similarity can be negated or neutralized if the defendant can establish the independent creation defense.
- And maybe most important for plaintiffs in the post-*Montz* world is that the factual nature of the issues of access, substantial similarity and independent creation does not ensure that summary judgment won't happen. It can happen.
- Defendants can, of course, be buoyed by this decision. It shows that even if one can't knock a case out on preemption, it can still be disposed of as a matter of law.
- The key to proving independent creation (and thus refuting substantial similarity) appears to be having a clear and persuasive documentary and declarative trail that leads the court from the genesis of the idea to the completion of the allegedly improper work.
- The key to refuting access is to sever any links between the intermediary who received the plaintiff's work and the defendant's representatives who ultimately created the work.

Whether *Spinner* rubs the perfume off the rose of idea-theft claims is not clear. At a minimum, it should be a wake-up call to any plaintiff's lawyer looking to prosecute such a claim, and a road map to any defense counsel seeking to dispose of such a claim.

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