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# JAMS VIRTUAL ROUNDTABLE: COPYRIGHT DISPUTE RESOLUTION

MODERATOR: *Richard E. Posell, Esq., JAMS Mediator/Arbitrator*

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## Panelists

**Lincoln D. Bandlow, Esq.,** *Lathrop & Gage LLP*

**Howard Meyers,** *Focus Features*

**Aaron J. Moss,** *Greenberg, Glusker, Fields, Claman & Machtinger LLP*

**POSELL:** This is a rare opportunity to bring together copyright lawyers and a studio business affairs executive to talk about copyright and idea theft disputes, how they can be resolved, and how they are being affected by currents and changes in copyright law. Copyright law is often technical, counterintuitive and intertwined with notions of idea theft. I want to first discuss dispute resolution in these cases, and then talk about some recent decisions and their practical impact on copyright practices.

Has it been your experience that when dealing with idea theft/copyright infringement claims, mediation and settlement discussions are often hampered by the technical inexperience of plaintiffs in the field of copyright and copyright pre-emption? If so, how do you deal with it and how can a mediator help?

**BANDLOW:** I have not found that a lack of knowledge of copyright principles impedes the mediation process, but only because by the time the parties have progressed to the point of conducting a mediation, one of two things has typically taken place: (1) counsel for the claimant has been sufficiently educated on the important principles of copyright that would drive a settlement (either through the exchange of letters or in the mediation briefing process) or (2) the plaintiff/claimant enlists the help of a lawyer who knows what he or she is talking about when it comes to copyright law.

So by the time a mediation is conducted, this is typically not a problem, but certainly the early period of dealing with a case can be hampered by the fact that counsel for the plaintiff does not have sufficient knowledge of copyright law to help in the process of getting the matter resolved. For example, I had a matter where the claimant was suing over the use of a song in a documentary and my client had authorization from the other joint author of the song to use it. Claimant's counsel, who did not regularly practice copyright law, stated to me that this other permission was not important because "you need permission from all of the author's to use a work" which, of course, is just dead wrong under

copyright law. I have also encountered a number of lawyers who did not know that if the work at issue was not registered prior to the alleged act of infringement, then the plaintiff could not recover attorneys' fees or statutory damages. The big problem in resolving matters that stems from these kind of examples is what I call "the oversell." That is, the lawyer who does not understand copyright law often oversells the claim/case to his client, leading the client to believe that he or she has a rock solid, big bucks case, only to be disabused of that notion by a little education on copyright law. The uninformed lawyer then has to unwind or try to reign in the client's expectations at a mediation and that can be difficult.

The best way a mediator can help, of course, is to be well-versed in copyright law and be able to impress upon the less-informed counsel the serious problems some of these copyright principles present for the case. Another suggestion might be for mediators to request that counsel set forth in their confidential mediation briefs any areas of the law that the mediator suspects that one side is not grasping, so there can be some focus on that area during the mediation.

**MOSS:** I've found that the biggest challenge in these types of cases, regardless of which side I'm representing, is that plaintiffs tend to have a very strong emotional connection to their creations. Occasionally you'll see plaintiffs who are opportunists, but for the most part, they truly believe in their heart of hearts that the defendant has stolen their work, and they have an almost parental instinct about protecting it. As lawyers who deal with these issues frequently, we have a tendency to be dispassionate and clinical about the rules that apply -- that ideas are not protected by copyright, that an implied contract requires mutual assent, etc. But plaintiffs focus much more on their own sense of what's right and wrong, fair or unfair. I've found that the best types of mediators in these cases are those who are able to explain the law and the risks inherent in litigation, and those who can be empathetic to what the plaintiff is feeling as well. I've seen mediators run sessions which have proven very cathartic for plaintiffs -- a substitute for the "day in court" they'd hoped to get -- and this can pave the way for a settlement.

**BANDLOW:** I agree with Aaron. I have also found that plaintiffs often put a lot of stock in the belief that "ideas" are incredibly important and are a very valu-



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### JAMS Mediator/ Arbitrator

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able commodity, whereas successful producers may not agree. Plaintiffs think that supposedly giving you that “a-ha” moment was the driving force behind everything, while producers believe that it was the blood, sweat and tears put into actually pounding out a script, creating detailed characters and plots, making that into an actual film/show, etc. - this is the stuff that really counts. Both sides need to air out these views.

**MEYERS:** There are a lot of misconceptions held by the general public (as well as a large portion of the Hollywood creative community) as to what legally constitutes an infringement and what is protectable. These misconceptions are often reinforced by the way the media reports on these kind of cases. I think a mediator who has expertise in the areas of copyright and entertainment law and is willing to share his/her thoughts about the likely outcome of a trial (after giving the plaintiff the chance to air their feelings), rather than simply facilitate, can be very helpful in moving the dispute toward settlement.

**POSELL:** Altering misconceptions is always a tricky business for a mediator because it requires significant trust on the part of people who probably have never even met the mediator prior to the mediation. The problem is even more difficult in the area of protected ideas and expressions, because the law is often counterintuitive. Several of you have talked about first allowing a claimant to air the issues or engage in a substitute “day in court.” Aaron, how does this “day in court” work, mechanically?

**MOSS:** Different mediators use different approaches, but I think that the most effective mediators are willing to adjust their approach to meet the needs of a particular case. For example, sometimes a joint session between the parties at the start of the mediation is helpful. Counsel can give mini “opening statements” and the parties can see how the case would be pitched to a jury. Other times, having this type of joint session right off the bat will only heighten animosity, which can prevent progress. The mediator should hold a pre-mediation conference call with counsel to discuss which approach would work best depending upon the personalities involved. One interesting approach that I’ve seen entails having the claimant present her case, in her own words, to the defendant, rather than through the lawyers. If the defendant is a studio or other “faceless” company, it should choose an empathetic representative to attend the mediation to hear the claimant out. Even better in copyright or idea theft cases is to have the screenwriter or producer of the defendant’s project attend to personally describe the creative process that led to the project, so that plaintiff begins to see the company as a group of individuals rather than as a monolithic entity. The mediator can then ask questions of each side, both to obtain information and to highlight the potential weaknesses in each side’s case. If the lawyers are able to restrain themselves during this part of process, it can be effective in a way that the traditional chest pounding may not be. The parties then retreat to their separate corners where the mediator and lawyers can attempt to resolve the matter.

**POSELL:** Some great suggestions there. We think the benefits of joint sessions are underrated, and that the current trend away from them is not well grounded. But Lincoln, how do you deal with a case where the claim is real, or at least colorable, and the risk of an award is substantial? For example, how would you approach a matter like the recent J. D. Salinger Catcher in the Rye case<sup>1</sup> or the older Twelve Monkeys case<sup>2</sup> (where an art director simply copied the design of a chair from a design book)? In other words, are Aaron’s methods going to work where the claimant isn’t ill-informed or delusional about his or her case?

**BANDLOW:** I agree that, of course, this all must be considered on a case-by-case basis. As for the value of a joint session to start the mediation process, I can’t agree more with Aaron’s observation that the key is getting the lawyers to restrain themselves! I have seen joint sessions be very effective or prove to be entirely counter-productive, based entirely on the conduct of counsel. For example, I defended a case where a newly retained lawyer insisted on having a joint session and making opening statements. He proceeded to launch into a fire and brimstone statement, often times having numerous facts wrong because he was new to the case, and dressed down my clients about what a beating they were going to take a trial. My clients, who were prepared to try to resolve the matter, were enraged by this wholly unnecessary speech. It destroyed the mediation within an hour and the parties left the process literally screaming at each other. We did another mediation months later without that lawyer and settled in two hours.

An example on the other end of the spectrum involves our fellow panelist and my good friend Aaron. I’ve had the pleasure of working on the opposite side of the table from Aaron on a number of occasions. We recently were involved in a mediation involving a copyright and trademark dispute. In that mediation, the parties conducted a joint session and Aaron put on a very effective presentation of what he believed the evidence would show at a trial and about the value of the case. To his credit, he was professional and courteous, avoided the fire and brimstone, yet gave a persuasive presentation. It helped give my client an overview of how the case might play out and to be reasonable about the possible exposure. Which leads to an important point: we have talked about the problem of the “plaintiff who just doesn’t get it that he has no case” but there can often times be an equal problem of dealing with the “how dare you say I ever did something wrong” defendant. For those latter clients, a joint session may be helpful to get them to see that the matter needs to be seriously addressed and considered.

Overall, I think the most important thing for the mediator to do is reach out to the parties before the mediation and see if they believe a joint session would be helpful and otherwise see where the parties are in the settlement process. Moreover, the mediator should determine if the main players have already been deposed. If so, that may also be a factor that argues against holding a joint session because the parties are not going to need to see “how is this guy going to look on the stand” because they will have seen it already.

Overall, it is this pre-screening that I think is often lacking in the mediation process. Most mediators simply require some written briefing, then everyone gets together in a room and they play it by ear. I think that is a bad approach; the mediator should reach out to the lawyers before the mediation begins and say “although I reserve the right to conduct the mediation in whatever way I think would be best, I’m calling to ask one question: what do you think would be the best approach to conducting this mediation?” If that is done with both sides, I think it would improve the mediation process and significantly increase the odds of the process proving to be successful in resolving a case.

**POSELL:** Shifting our discussion a bit, I am curious whether the pendulum swing between *Grosso v Miramax*<sup>3</sup> and the recent decision in *Montz v Pilgrim*<sup>4</sup> (which is now being reheard en banc by the Ninth Circuit) has made any difference in the nature or quantity of idea theft/copyright claims you are seeing. Howard, from the studio perspective, are these cases making any difference in claims? If it is too soon to tell as to *Montz*, which seems to either reverse or limit *Grosso*, can you speculate on what, if anything, may change in this area?

**MEYERS:** Since *Montz v Pilgrim* came out only a few months ago, I think it is too soon to tell its effect. However, I don’t foresee any major changes in this area because I don’t think *Grosso v Miramax* ultimately had the tremendous effect that some predicted at the time that decision came down. My experience is that post-*Grosso* idea theft cases are very often disposed of on grounds other than copyright preemption. As a practical matter, *Grosso v Miramax* has not changed the way we do business. My company, like all other studios and many production companies, has had a very strict submission policy in place for as long as I can remember. We will only accept submissions, such as “spec” screenplays, from established producers and directors with whom we have or desire a relationship with or writers who are represented by agents or entertainment lawyers who we regularly do business with. I believe this policy is extremely helpful in fighting idea theft/copyright claims, as well as reducing the number of such claims brought in the first place.

**POSELL:** My experience is that copyright preemption can substantially change the outcome of idea theft cases, and alter the settlement equation, but perhaps these cases are getting to dispute resolution more often in other contexts, where the submission policies are less restrictive such as in reality TV. Aaron and Lincoln, does your post-*Grosso* experience comport with Howard’s, i.e. lots of smoke but little fire?

**BANDLOW:** I don’t believe that *Grosso* resulted in a flood of idea submission cases and I think the numbers are about the same. The only difference for me is that we might be somewhat less inclined to try to get rid of the claims on preemption arguments but more likely to simply deal with the claim based on the merits. That being said, I am certainly more than a little curious to

see what the Ninth Circuit does after the en banc review of the *Montz* case.

**MOSS:** The irony of *Grosso* is that, while the plaintiff prevailed in the 9th Circuit on preemption grounds (resulting in a widely reported and discussed opinion), *Grosso*’s own lawsuit against Miramax and others was quietly thrown out in an unpublished California Court of Appeal opinion that received no publicity. The court found that *Grosso* could not establish an implied contract, having had no direct contact with the defendants, and having no evidence that he had conditioned his disclosure on any obligation to pay for his ideas if they were used.

We also know from this summer’s *Benay*<sup>5</sup> decision in the Ninth Circuit that even if a plaintiff can establish the existence of an implied contract, it is not enough to show just any amount of similarity between his ideas and the defendant’s work. There must be substantial similarity. It’s obviously not required, post-*Grosso*, that the plaintiff prove substantial similarity of copyright-protected expression, but generic, insignificant similarities won’t cut it either.

The bottom line: there are many ways for plaintiffs to lose these cases, and most plaintiffs manage to do so if they push their matters to judicial resolution. I’ve represented plaintiffs in these cases before, but only in matters in which the plaintiff had a direct line of access to the defendant, and the defendant’s work shared a number of significant “high-concept” similarities with the plaintiff’s. *Grosso* remains helpful for plaintiffs in these types of cases, because they don’t need to prove substantial similarity of expression, even when their ideas are embodied in a written script or treatment.

**POSELL:** *Benay* may be the textbook case of a sole practitioner whose instinct did not match the law on the subject of idea theft and copyright. Still, plaintiff was able to get back to the District Court on contract issues. This leads me to the question of risk. Conventional wisdom states that juries tend to believe that studios are dishonest and will steal ideas, material (and, yes, money). If a Plaintiff gets beyond summary judgment and does not opt for statutory damages, says this learning, the studio can get hit. Howard, is there an element of risk aversion the drives settlements on the studio side, or at least the perception, erroneous or not, that the studio is risk averse?

**MEYERS:** I wouldn’t say risk aversion -- or a perception if one exists that studios are risk adverse -- drives studios to settle cases. I’d be surprised if our industry looks at settlement much differently than other industries. In my experience, studios consider the merits of the case at hand, possibility of a defense verdict, and potential costs. I think it is fair to say this analysis often includes consideration of whether a case is likely to be disposed of on summary judgment or tried to a jury.

**POSELL:** Lincoln and Aaron, since you do both plaintiff’s and defendant’s work in this area, do you find yourself using the argument that I mentioned (i.e., the perceived vulnerability of studios to jury suspicion) to



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**HOWARD MEYERS**

**Executive VP/Business Affairs, Focus Features**

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settle cases, or do you think that's an overrated argument?

**BANDLOW:** I think it is an overrated argument for the most part. I think all defendants are suspicious of juries to some extent, so I don't think it is a studio-specific issue. I think all plaintiffs play the "you never know what a jury is going to do" card in settlement discussions, but my experience is that each defendant is simply carefully determining the merits of its defenses, strength of its witnesses, etc., prior to settling or proceeding to trial. For example, in the *Metcalf v Bochco* case, that lawsuit was against Stephen Bochco, his studio, CBS and others involved in the show at issue, but the defendants didn't feel any added pressure to settle because it was studio defendants. The defendants and trial counsel (which included myself) were very confident that the facts were on our side and that our witnesses were terrific, so that is what motivated the settlement dynamic and ultimately allowed defendants to prevail at trial. I also think that you can weed out of the jury any anti-studio bias (if any - the concept may be a myth), so my experience is that it is not a factor.

**MOSS:** I agree with Lincoln that it's an overrated argument. And even if it were true (that studios view juries with suspicion), I don't think it helps a plaintiff's lawyer to remind defense counsel of that fact. It's something that the studio either believes or it doesn't. It's better to explain why the facts and law line up on your side, and let the studio's lawyers draw their own conclusions about what a jury will do if it believes the plaintiff.

**POSELL:** One final issue I want to raise: The effect and policy of *Viacom v YouTube*<sup>6</sup>. Many commentators have concluded that the "red flag" provisions of Section 512 of the DMCA<sup>7</sup> are essentially eliminated by the trial court's decision, and that only a facially correct take down notice will shift liability to providers. My question is whether this decision has affected the behavior of your clients and whether you think the decision will stand?

**BANDLOW:** I saw the decision as an endorsement of the view of the 9th Circuit in the *Perfect 10 v CC Bill*<sup>8</sup> decision. I believe that although the red flags are not eliminated, they have to be really over the top, "screaming" red flags, and I think that specific take down notices will almost always be the norm now. I think most com-

panies are now familiar with the notice and take down regime under the DMCA and try hard to comply, but the reality is that it is simply more efficient to put the burden of enforcement on the copyright holders. I believe the decision will stand.

**MOSS:** I also have the sense that District Court's opinion will be affirmed, but hopefully the 2nd Circuit will take the opportunity to conduct a more in-depth analysis of the issues than District Judge Stanton (who heard no oral argument and issued a relatively brief opinion shortly after the parties' papers were filed). There are still unanswered questions. For example, the district court essentially dismissed Viacom's "inducement" theory out-of-hand on the ground that Grokster (the Supreme Court decision that first recognized inducement as a basis for liability)<sup>9</sup> was not a DMCA case. Well, that's true, but it doesn't analyze whether the theory could or should nevertheless apply based on an appropriate set of facts. Could an ISP that affirmatively induces users to upload infringing content still take advantage of the safe harbor under the DMCA? Is it red flag infringement if an ISP induces infringement generally, but doesn't have knowledge of a specific infringement that occurs as a result of the inducement? These are difficult issue worthy of discussion by the 2nd Circuit.

Somewhat ironically, the parties in *Viacom v YouTube* are not fighting about any allegedly infringing conduct after 2008, when YouTube began to more aggressively filter Viacom's content. In addition, the ISPs seem to be getting better about using fingerprinting, "content ID" and other technologies to prevent unauthorized uploading, whether or not they are affirmatively required to do so under the DMCA. Nevertheless, most of our content-owner clients have continued to accept the burden to be proactive about sending DMCA take down notices when appropriate.

**POSELL:** Thanks to all of you for participating in this virtual roundtable. Each of you has contributed a great deal to our conversation; we would have been hard pressed to find a more experienced and thoughtful group. I think there is a little something for everyone here who has to find solutions to these disputes and be aware of the latest trends in a constantly changing universe. I know for me and for many of our readers, the intersection of creativity and the law is an interesting place to hang one's hat.

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1. *Salinger v Colting*, 607 F.3d 68 (2d Cir. 2010)  
 2. *Woods v. Universal City Studios*, 920 F. Supp. 62 (S.D.N.Y. 1996)  
 3. *Grosso v Miramax*, 383 F.3d 965 (9th Cir. 2004)  
 4. *Montz v. Pilgrim*, 606 F.3d 1153 (9th Cir. 2010) ordered re heard en banc 2010 WL (9th Cir. September 30, 2010)  
 5. *Benay v. Warner Bros. Entertainment*, 607 F. 3d 620 (9th Cir. 2010)  
 6. *Viacom International, Inc. v YouTube, International, Inc.*, 718 F. Supp. 2d 514 (S.D.N. Y. 2010)  
 7. *The Digital Millennium Copyright Act*, 17 U.S.C. § 512(c), amends various provisions of the United States Copyright Act to address copyright issues with digitally formatted intellectual property  
 8. *Perfect 10, Inc. v CC Bill, LLC*, 488 F. 3d 1102 (9th Cir. 2007)  
 9. *MGM Studios v. Grokster, Ltd.* 545 U.S. 913 (2005)