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Montz v. Pilgrim Films & Television, Inc., et al.: Ninth Circuit Distinguishes *Grosso v. Miramax Film Corp.* and Holds That Certain Claims for Breach of Implied Contract and Confidence Are Preempted by Federal Copyright Law

The Ninth Circuit last week issued its first published opinion regarding the scope of copyright preemption of implied contract and confidence claims since its controversial 2004 decision in *Grosso v. Miramax Film Corp.*, 383 F.3d 965. In *Montz v. Pilgrim Films & Television, Inc., et al.*, --- F.3d ----, 2010 WL 2197421, C.A.9 (Cal.), June 3, 2010, the Ninth Circuit held that claims alleging breach of implied contract and confidence based on the "pitch" of an idea in order to partner in a television show based on the idea—in contrast to the alleged promise to pay for the use of an idea addressed in *Grosso*—were preempted by the federal Copyright Act.

In 2006, Larry Montz, a parapsychologist, and Daena Smoller, a publicist, filed a lawsuit against NBC Universal, producer Pilgrim Films & Television and others, claiming the two plaintiffs had conceived the idea for SyFy's successful reality television series *Ghost Hunters*. Montz and Smoller alleged that they had presented screenplays, videos and other materials relating to their concept of a show about a team of paranormal investigators who visit haunted locations to NBC executives "for the express purpose of offering to partner...in the production, broadcast and distribution of the Concept" and that the *Ghost Hunters* series was subsequently made without them.

Originally, Montz and Smoller asserted claims for copyright infringement, breach of implied contract and breach of confidence, among others. Early in the case, the district court dismissed Montz and Smoller's state law claims for breach of implied contract and breach of confidence as preempted by the Copyright Act, 17 U.SC. § 301(a), et seq. Their remaining claims were later dismissed for unrelated reasons. Montz and Smoller appealed from the district court's ruling on their state law claims for breach of implied contract and confidence only.

The Ninth Circuit affirmed the district court's decision in toto, noting that the only issue presented was whether Montz and Smoller's rights under their state law claims were equivalent to their exclusive rights as copyright owners: "The gravamen of the claim is that the defendants used the plaintiffs' work, without authorization, to create (and then profit from) a new television program. The rights asserted by the plaintiffs under the implied contract are thus equivalent to the rights of copyright owners under § 106." The Ninth Circuit rejected Montz and Smoller's argument that their right to receive a share of profits and credit for the show's concept was an "extra element" that distinguished their breach of implied contract and confidence claims from a copyright claim.

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Prior to *Montz*, the 2004 *Grosso* opinion had provided the Ninth Circuit's only guidance as to the types of breach of implied contract claims that were not preempted by federal copyright law. In *Grosso* the plaintiff, a screenwriter, claimed Miramax had breached an implied contract by using ideas from his screenplay in Miramax's movie *Rounders*. The Ninth Circuit noted that the California Supreme Court in *Desny v. Wilder*, 299 P.2d 257 (1956) had found circumstances such as those alleged by Grosso to state a breach of implied contract claim and that Miramax's alleged implied promise to pay for the use of Grosso's movie idea constituted an "extra element" that placed Grosso's claim outside the ambit of preemption.

In *Montz*, the Ninth Circuit distinguished *Grosso* and the *Ghost Hunters* case as follows: "Whereas the breach of the alleged agreement in Grosso violated the plaintiff's right to payment on a sale, the breach of the alleged agreement in this case violated plaintiffs' exclusive rights to use and authorize use of their work—rights equivalent to those of copyright owners under Section 106." The Ninth Circuit further explained that: "[T]he plaintiffs' expectation of profits and credit was premised on the fact that they would retain control over their work, whether in partnership with the defendants or not. The plaintiffs' right to receive a share of the profits and credit is thus merely derivative of the rights fundamentally at issue: the plaintiffs' exclusive rights to use and to authorize use of their work." Thus, the defendants allegedly violated the exclusive right to use the work of Montz and Smoller—which makes it a copyright claim, not distinguishable enough to create a non-preempted implied contract claim.