

Appeal No. B193872

IN THE COURT OF APPEAL STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION FIVE

---

Jeff Grosso  
*Plaintiff and Appellant*

vs.

Miramax Film Corp. *et al.*  
*Defendants and Respondents*

---

---

**On Appeal From**  
**Superior Court of the County of Los Angeles**  
**The Honorable Edward A. Ferns, Judge Presiding**  
**Los Angeles Superior Court Case No. BC 215947**

---

**REQUEST FOR LEAVE TO FILE AMICUS BRIEF;  
AMICUS BRIEF OF THE MOTION PICTURE ASSOCIATION OF  
AMERICA, INC. IN SUPPORT OF RESPONDENTS**

---

**McDERMOTT WILL & EMERY LLP**

Robert H. Rotstein

2049 Century Park East

38th Floor

Los Angeles, CA 90067-3218

Telephone: 310-277-4110

Facsimile: 310-277-4730

Attorneys for Amicus Curiae

**THE MOTION PICTURE ASSOCIATION  
OF AMERICA, INC.**

**CERTIFICATE OF INTERESTED ENTITIES**

Pursuant to Rule 8.208 of the California Rules of Court,  
Amicus the Motion Picture Association of America, Inc. is a not-for-profit  
trade association founded in 1922 to address issues of concern to the United  
States motion picture industry. The members of the MPAA include Buena  
Vista Pictures Distribution (an affiliate of The Walt Disney Company),<sup>1</sup>  
Paramount Pictures Corporation, Sony Pictures Entertainment Inc.,  
Twentieth Century Fox Film Corporation, Universal City Studios, Inc., and  
Warner Bros.

Dated: May 11, 2007

Respectfully submitted,

McDermott Will & Emery LLP  
ROBERT H. ROTSTEIN

By: \_\_\_\_\_

Robert H. Rotstein  
Attorneys for Amicus Curiae  
THE MOTION PICTURE  
ASSOCIATION OF AMERICA, INC.

---

<sup>1</sup> Respondent Miramax Film Corp. is an affiliate of The Walt Disney Company.

## APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Rule 29.1(f) of the California Rules of Court, amicus the Motion Picture Association of America, Inc. (“Amicus” or “MPAA”) hereby requests leave to file the accompanying amicus brief in support of Respondents Miramax Film Corp. *et al.* (collectively, “Miramax”).

Amicus is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The members of the MPAA include Buena Vista Pictures Distribution (an affiliate of The Walt Disney Company),<sup>2</sup> Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios, Inc., and Warner Bros. Amicus’ members produce and distribute the vast majority of entertainment in the worldwide theatrical market and the domestic television and home video markets. Amicus’ members therefore have a substantial interest in any case in which a party attempts to hold a producer or distributor of motion pictures liable for use of an idea. The interest is particularly compelling where, as here, the studio never had contact with plaintiff.

Amicus is familiar with the questions involved in this case and believes that there is a need for additional arguments on the points specified below. In particular, Amicus discusses the nature of “first-look”

---

<sup>2</sup> Respondent Miramax is an affiliate of The Walt Disney Company.

deals, by virtue of which Plaintiff/Appellant seeks to impose contractual liability on Miramax under a purported agency arrangement. Amicus discusses how the structure of “first-look deals” is antithetical to the existence of an agency relationship, either actual or ostensible, and how imposing liability under an agency theory in a case like this could actually deprive the general public of access to a broad range of expressive works. In addition, imposing liability on Miramax would inhibit, rather than foster, the ability of fledgling writers to have their scripts and motion picture projects considered for development and production.

For these reasons, Amicus submits this brief in support of Respondents and asks this Court to affirm that first-look deals create neither an agency relationship between studio and production company nor make a writer who deals only with the production company a third-party beneficiary. This brief includes references to and discussions of arguments and authority not found in the briefs that have been submitted by the parties.

Dated: May 11, 2007

Respectfully submitted,

McDermott Will & Emery LLP  
ROBERT H. ROTSTEIN

By: \_\_\_\_\_

Robert H. Rotstein  
Attorneys for Amicus Curiae  
THE MOTION PICTURE  
ASSOCIATION OF AMERICA, INC.

## PRELIMINARY STATEMENT

The United States Supreme Court recognized long ago that motion pictures and television programs function as important channels of free expression and thus receive full protection under the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures fall within the ambit of the First Amendment). Any attempt to hold a person liable as a result of the production and dissemination of a motion picture necessarily raises free speech issues. This is especially true where, as here, a plaintiff tries to hold a person liable merely for disseminating a particular idea. The free dissemination of ideas is critical to advancing significant free speech interests. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Thus, as a general rule, the law will not protect an idea from copying or use by another. *Id.*

A narrow exception to the rule that one cannot be liable for using another's idea arises where two parties enter into a contract in which the recipient promises to pay for use of the idea. *Desny v. Wilder*, 46 Cal. 2d 715 (1956). Whether the claim is for breach of an express contract or of an implied-in-fact contract, liability in these cases is strictly limited to situations where the parties are in privity of contract. 3 *Nimmer on Copyright* § 16.07 at 16.50.

Here, Plaintiff/Appellant Jeff Grosso ("Grosso" or "Plaintiff") submitted his work only to third-party Gotham Entertainment Group

("Gotham"), an independent production company, and not to Defendant/Appellee Miramax Film Corp. ("Miramax"). Because no privity of contract existed between Grosso and Miramax, the trial court properly granted summary judgment for Miramax.

On appeal, Grosso asks this Court to hold that Miramax can be held liable to him for breach of contract on the theory that, by virtue of a "first-look deal" between Gotham and Miramax, Gotham was Miramax's agent. Alternatively, Grosso argues that he was a third-party beneficiary of the first-look deal. Grosso goes so far as to suggest that, unless Gotham is found to be Miramax's agent or unless he is found to be a third-party beneficiary, first-look deals could be set up as shams to enable companies like Miramax to steal scripts while avoiding liability for breaches of contract.

Grosso's argument bespeaks a fundamental misunderstanding of the structure and purpose of first-look deals in the motion picture industry. Amicus submits this brief to correct that misunderstanding. Below, Amicus describes how first-look deals operate, demonstrating that they do *not* create an agency relationship. On the contrary, first-look deals reaffirm the independence of the parties to the agreement. Neither do first-look deals make unrelated persons third-party beneficiaries. Amicus finally discusses how Grosso's misguided approach would result in an unprecedented expansion of liability for use of an idea that would

negatively impact on the development and production of expressive works, all to the detriment of the general public.

**RATHER THAN CREATING AN AGENCY OR THIRD-PARTY  
BENEFICIARY RELATIONSHIP, FIRST-LOOK DEALS CREATE  
AN INDEPENDENT ARM'S-LENGTH RELATIONSHIP BETWEEN  
PRODUCER AND STUDIO**

The law governing when a party can be held liable for breach of implied-in-fact contract resulting out of the use of an idea is discussed in detail in Miramax's brief. To summarize, an implied-in-fact contract exists only where the conduct of the parties or the attendant circumstances establish an actual agreement -- *i.e.*, offer, acceptance, and consideration. *Desny*, 46 Cal.2d at 739. The plaintiff "can hold liable only those persons using the idea with whom he is in privity of contract . . . . Thus, a contract action will fail if the person to whom the plaintiff submitted the idea was not authorized (or apparently authorized) to contract on behalf of the defendant." 3 *Nimmer on Copyright* § 16.07 at 16.50, *citing Curtis v. United States*, 168 F. Supp. 213 (Ct. Cl. 1958), *cert. denied*, 361 U.S. 843 (1959) ; *see also Rokos v. Peck*, 182 Cal. App. 3d 604, 617-618 (1986) (writer purportedly submitted script to defendant and later entered into an agreement with plaintiff to promote and produce writer's script; *held*, because plaintiff had no contact with the defendant, plaintiff had no cause of action for breach of implied-in-fact contract arising out of defendant's alleged use of the writer's idea).

According to Grosso, because Gotham and Miramax entered into a first-look deal, Gotham became Miramax's agent, with authority to contract on Miramax's behalf. Alternatively, Grosso asserts that though he dealt exclusively with Gotham, he was a third-party beneficiary of the first-look agreement. These arguments fly in the face of the fact that first-look deals by their express terms contemplate an arm's-length relationship between studio and producer.

*Mann v. Columbia Pictures, Inc.*, 128 Cal. App. 3d 628 (1982), settled the question whether an agency relationship exists merely by virtue of a financial arrangement between a studio and an independent production company. In *Mann*, plaintiff submitted a story outline to an employee of Filmmakers, a company producing a film to be financed by Columbia. Plaintiff claimed that the employee, whose salary was paid by Columbia, was acting for Columbia in receiving the submission. The trial court granted defendant's motion for judgment notwithstanding the verdict, which was affirmed on appeal. The Court held that defendant Columbia had no contractual relationship with plaintiff, since if plaintiff had submitted her idea at all, it was to an employee of an independent production company who had no authority to bind either Columbia or the writers of defendant's work. This was so even though Columbia had agreed to finance one of the third-party producer's films and even though Columbia paid the salary of the third-party employee to whom the

plaintiff's work was submitted. Thus, an independent production company does not have authority to bind a studio contractually simply because the two entities have a financial relationship.

To understand why first-look deals do not contractually bind a company in Miramax's position, it is useful to contrast such arrangements with development by the studio "in-house," where studios employ their own in-house creative executives, who are responsible for locating and developing motion picture projects. John W. Cones, *43 Ways to Finance Your Feature Film*, 3 (1998). When a project is developed in-house, the studio contracts and works directly with the writer.

By contrast, studios often eschew in-house development and enter into a "first-look" arrangement with an independent producer. In a first-look arrangement, the studio pays value -- typically office space, but sometimes other consideration -- to an independent producer in exchange for a "first-look" at whatever projects the producer develops. *Id.* at 17. The independent production company's revenues may be supplemented by additional outside financing. The "first-look" is usually in the form of a right of first refusal, often coupled with a right of last refusal. Donald G. Farber, *Entertainment Industry Contracts*, 9-95 (2005). Under a first-look deal, the studio has -- to the exclusion of its competitors -- the first opportunity to consider a particular project and to enter into negotiations for it. The studio has a certain time in which to decide whether to proceed

with a project presented to it. If, after its first look, the studio decides not to proceed with a project, *i.e.*, “passes” on the project, then the producer is free to negotiate with third parties who might want to acquire the project.<sup>3</sup> In fact, projects are often produced by studios other than the one that has the first-look deal.<sup>4</sup> Where the studio also has a last matching right -- also called a right of last refusal -- it may still acquire the project by matching any third-party offers that have been made.

Thus, first-look arrangements are at core arm’s-length agreements that contemplate potential, but not inevitable, negotiations in which the parties have adverse interests. They hinge on the ability of the producer in finding and developing projects and scripts. The independent production company, not the studio, finds the projects. The studio does not operate the production company. In short, first-look arrangements have none of the legal indicia of an agency relationship.

The Gotham-Miramax deal is typical. Gotham developed projects for its own account. Under the agreement, if Gotham was interested in developing a project, it had to give Miramax a “first look.” Miramax had thirty days to accept or reject a project. If the project was

---

<sup>3</sup> In these situations, the producer actually becomes the studio’s competitor. In certain cases, the producer and studio become direct competitors where the studio has passed on the project because it is already developing a project with a similar subject matter.

<sup>4</sup> One of Amicus’ members calculates that, in the past year, one-quarter of all motion pictures produced by independent producers with whom it had a first-look deal were through another studio.

accepted, the parties still did not have an agreement, but were required to enter into good faith negotiations. If Miramax rejected the project, Gotham was free to take it elsewhere, subject to Miramax's right to match any offer from a third party.

Nowhere does the Gotham-Miramax first-look agreement contain language giving Gotham authority to bind Miramax contractually to a third party with whom Miramax might never have had contact. Under the Gotham-Miramax agreement, the only consideration to Gotham is that Miramax provided Gotham with the use of three computers. Miramax has absolutely no right to control any of Gotham's business operations. To the contrary, the deal contemplated that Gotham would own, control, or represent projects for its own account. Yet, under Grosso's theory, Miramax could be potentially liable for acts completely beyond its control.

Thus, first-look deals do *not*, and were never intended to, create an agency relationship between the producer and the studio. Actual agency exists only where the agent is really employed by the principal to act. Cal. Civil Code § 2299. First-look deals do not typically give the independent producer the right to enter into a binding contract on the studio's behalf. The Gotham-Miramax deal is no exception. Neither do first-look deals somehow make multiple unknown individuals who might forge a future relationship with the production company third-party beneficiaries.

Producers under first-look deals do not conduct themselves as agents in actual practice. Often, these deals involve former studio executives who have left the company for one reason or another and who have decided to become independent producers. In these situations, it is the manifest intent of such deals that these former employees can no longer bind their former employer contractually. To the contrary, the purpose of these deals is, in part, to end such authority.

Alternatively, studios might enter into first-look deals with highly prominent producers and directors who function as virtually independent "studios" themselves. For example, at one time, Francis Ford Coppola had a first-look deal with Paramount. His independent production company essentially functioned as a mini-studio, acquiring projects for its own account and not as the studio's agent.

Finally, as in this case, studios enter into deals with smaller producers for relatively low consideration (here, such consideration being the use of computers). In these situations, studios seek the opportunity to gain exposure to potential projects and to have access to the services of a talented production team. The studios do not undertake any conduct that is intended to make writers or rights-holders of whom they have no knowledge third-party beneficiaries. Rather, the agreements are clearly for the sole benefit of the studios and producers.

All of this demonstrates that, contrary to Grosso's suggestion, first-look deals are not shams to avoid contractual liability to writers. Neither would such a purported sham even work in practice, because the ability of the independent producer to pitch a project elsewhere if the studio with the first-look declines would be totally inconsistent with the attempted sham.

The use of first-look arrangements has a tangible benefit to the public, in that a broader range of expressive works is available than if all film production were undertaken only by the major studios. Independent producers often have different creative sensibilities than creative executives at the studios. Producers who have first-look deals can, outside of the studio system, identify particular projects that a major studio might not do in the first instance, but later would be convinced by the producer to reconsider doing. Since the independent producer has the right to take the project elsewhere, it can still be produced by yet another company.

Conversely, the negative consequences of Grosso's position would arise, not only for producers and financiers of motion picture projects and the general public, but also, ironically, for aspiring screenwriters. Without question, as the result of threats of litigation arising out of idea submission claims, studios and production companies have instituted stringent standards. For example, many entertainment companies

refuse to accept unsolicited submissions of screenplays.<sup>5</sup> In this way, cases expanding liability in connection with idea submission claims actually tend to deprive less established writers of access to potential producers. Finding liability in this case might result in even more stringent standards that would further impede the ability of fledgling writers to have their work considered.

The risk of liability to unknown persons that flows out of Grosso's theory might even cause the studios to assume more development in-house, at the expense of independent producers. That is, the studio might reallocate their resources to in-house development rather than to outside production. The public benefit that derives from having projects considered by a broad and diverse range of independent producers would therefore be diminished.

As discussed in more detail in Miramax's brief, affirming the trial court's decision would not leave writers like Grosso without a remedy. Such writers would be free to pursue the production company for any

---

<sup>5</sup> Studios will often refuse to consider a particular project because they are already developing a similar project in-house. Moreover, production companies that have first-look deals with studios do not know what other projects the studios might be developing either in-house or with other producers. Conversely, the studio will probably not be aware of what projects the production company is considering. This is because the production company and the studio work independently in these areas. It would be manifestly unfair to hold the studio potentially liable where neither it nor the production company could evaluate whether the studio is producing a similar project. This independence is another example of why an agency relationship does not arise from a first-look deal.

perceived wrongful conduct. By contrast, the interests of both the general public and first time writers could be severely impaired if Grosso's position is adopted.

### CONCLUSION

For the reasons discussed, Amicus respectfully suggests that the Court hold that first-look deals create neither an agency relationship between studio and production company nor make a writer who deals only with the production company a third-party beneficiary.

Dated: May 11, 2007

Respectfully submitted,

McDermott Will & Emery LLP  
ROBERT H. ROTSTEIN

By: \_\_\_\_\_

Robert H. Rotstein  
Attorneys for Amicus Curiae  
THE MOTION PICTURE  
ASSOCIATION OF AMERICA, INC.

**CERTIFICATE OF LENGTH**

As required by Rule 8.204(c) of the California Rules of Court, I hereby certify that the Request for Leave to File Amicus Brief; Amicus Brief of the Motion Picture Association of America, Inc. In Support of Respondents, exclusive of the cover page, Table of Contents, Table of Authorities, and this Certificate, contains 2,874 words, including footnotes. The word count was generated by Microsoft Word, the computer program used to prepare the brief.

Dated: May 11, 2007

Respectfully submitted,

McDermott Will & Emery LLP  
ROBERT H. ROTSTEIN

By: \_\_\_\_\_

Robert H. Rotstein  
Attorneys for Amicus Curiae  
THE MOTION PICTURE  
ASSOCIATION OF AMERICA, INC.

**TABLE OF CONTENTS**

	<b>Page</b>
APPLICATION FOR LEAVE TO FILE AMICUS BRIEF.....	1
PRELIMINARY STATEMENT .....	4
RATHER THAN CREATING AN AGENCY OR THIRD-PARTY BENEFICIARY RELATIONSHIP, FIRST-LOOK DEALS CREATE AN INDEPENDENT ARM'S-LENGTH RELATIONSHIP BETWEEN PRODUCER AND STUDIO .....	6
CONCLUSION.....	14
CERTIFICATE OF LENGTH.....	15

## TABLE OF AUTHORITIES

Page

### FEDERAL CASES

<i>Curtis v. United States</i> , 168 F. Supp 213 (1958) , <i>cert. denied</i> , 361 U.S. 843 (1959) .....	4
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	4
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	4

### STATE CASES

<i>Desny v. Wilder</i> , 46 Cal. 2d 715 (1956) .....	4, 6
<i>Mann v. Columbia Pictures, Inc.</i> , 128 Cal. App. 3d 628 (1982) .....	7
<i>Rokos v. Peck</i> , 182 Cal. App. 3d 604 (1986) .....	6

### STATE STATUTES & RULES

Cal. Civil Code § 2299.....	10
Cal. Rule of Ct., Rule 29.1(f).....	1

### MISCELLANEOUS

3 <i>Nimmer on Copyright</i> § 16.07 at 16.50 .....	4, 6
Donald G. Farber, <i>Entertainment Industry Contracts</i> , 9-95 (2005) .....	8
John W. Cones, <i>43 Ways to Finance Your Feature Film</i> , 3 (1998) .....	8