

Calif. High Court Should Review Pure Flix Idea Theft Case

By **Peter Shimamoto** (January 24, 2019, 2:04 PM EST)

A California Court of Appeal's November 2018 decision in an idea submission case, *Sullivan v. Pure Flix Entertainment LLC*,^[1] misstates the applicable law and creates unwarranted potential exposure for studios. Under the reasoning set forth in *Pure Flix*, a studio could be liable to a party who pitched an idea for a motion picture to the studio, if the studio subsequently produces a motion picture that contains "core concepts" similar to those in the pitch, even though the studio was already aware of those concepts before the pitch, and even if the plot, themes, dialogue, mood, setting, pace, characters and sequence of events of the two works are significantly different. The *Pure Flix* decision is misguided and contrary to established law.



Peter Shimamoto

The Facts

The primary plaintiff in *Pure Flix* was an actor and writer who pitched an idea for a feature film to the defendants. The court described the idea as follows: "The proffered idea was to develop a film titled *Proof* regarding apologetics on a college campus and culminating in a debate about science and God between the protagonist, a Christian professor with his academic career on the line, and an atheist professor who is driven by a mission to force his students to disavow their faith."^[2]

Defendant *Pure Flix* is a studio that specializes in Christian-themed films. The defendant was already familiar with the concepts of apologetics in an academic setting and a Christian being placed in a situation in which he or she has to defend his or her faith or risk losing something important. The defendant's managing partner had previously acted in a film about a Christian college student who presented a defense of God's existence in a philosophy club and was ridiculed by atheist students. The defendants also had a treatment about a Christian high school teacher who moves to a town of nonbelievers and risks dismissal if she strays from the science curriculum and teaches creationism. The defendants sent the treatment to the plaintiff, suggesting a movie in the vein of "*Dead Poets Society*," and suggesting that plaintiff use the treatment as a platform from which to jump.

The plaintiff subsequently sent a first draft of a treatment to the defendants. The treatment stated that it was in the spirit of "*Dead Poets Society*," "*Good Will Hunting*" and "*Patch Adams*." The primary character was a young Christian professor who encounters a religious studies class at his university in which the professor openly mocks God and emphasizes science over religion. The two professors engage in an impromptu debate, and agree to have a more formal debate the following semester. That debate takes place in front of students, faculty and members of the community. The Christian professor prevails.

The defendant subsequently hired screenwriters who made certain changes to the treatment and wrote a screenplay. The defendant included "Proof" on its list of prospective films, but was unable to secure financing.

The defendant was subsequently contacted by two other people about a proposed film involving apologetics. The premise was that it would be titled "God's Not Dead," involve apologetics on a college campus, incorporate a recent popular Christian song titled "God's Not Dead," and contain multiple storylines, similar to "Love Actually."

Pure Flix was interested and ultimately produced the film. The primary storyline involved a Christian college freshman and an atheist philosophy professor. The professor tells his students to write "God is dead" on a piece of paper to eliminate any discussion of God's existence. The Christian student refuses. The professor gives the student the option of dropping the class, changing his mind, or delivering an argument in class to try to persuade the other students. The student elects to deliver an argument to the class and ultimately prevails.

The film contained multiple additional storylines, including plots involving the professor's relationship with his Christian girlfriend, her atheist brother and their mother, a local pastor who is hosting a pastor from Africa, a female student whose Muslim father bans her from the house when he learns that she's studying Christianity, a Chinese student who's interested in Christianity, and a liberal atheist journalist who learns that she has cancer.

The film was released in March 2014 and earned more than \$60 million.

The Courts' Decisions

The plaintiffs filed a lawsuit alleging that "God's Not Dead" was based on "Proof." The plaintiffs asserted multiple claims, including breach of implied and express contract. The defendants moved for summary judgment. The trial court granted the defendants' motion.

On appeal, the court reversed the trial court's decision with respect to the contract claims. Among other things, the court found that there were material issues of fact as to whether "God's Not Dead" was substantially similar to "Proof," stating that the "core concepts of the main storylines are similar." The court stated: "Both films were set on a college campus and centered around a debate in which the Christian protagonist would risk losing something of importance (either tenure or an important grade) if he could not successfully present a reasoned defense of Christian beliefs against an atheist opponent." The court therefore concluded that a jury should determine whether the works were substantially similar.

The court's decision was erroneous for a number of reasons. This article addresses two specific errors in the court's analysis of substantial similarity.

The Court Erred in Failing to Consider Defendants' Prior Knowledge of the "Core Concepts"

One of the errors in the court's substantial similarity analysis was its refusal to filter out concepts that Pure Flix was already aware of prior to the plaintiffs' pitch. The court noted that, unlike copyright infringement cases, a plaintiff in an idea submission case need not establish that the idea at issue was novel or concrete. From that premise, the court concluded that scenes a faire (scenes or incidents that follow naturally from a basic plot premise) and pre-existing ideas should not be filtered out when evaluating substantial similarity.

The court failed to cite any authority for its novel decision to include in the substantial similarity analysis ideas or elements of which the defendant was already aware. The court acknowledged that in a prior idea submission case, *Ryder v. Lightstorm Entertainment Inc.*,^[3] the court had filtered out elements contained in defendant's pre-existing work when assessing substantial similarity. The *Pure Flix* court attempted to distinguish *Ryder* on the ground that the pre-existing material in *Ryder* was a detailed 102-page "scriptment" (hybrid of a script and a treatment), while the pre-existing material in *Pure Flix* was "general ideas."

The court's reasoning was flawed for several reasons. First, the court failed to cite any cases holding that ideas the defendant was already aware of should be included in the substantial similarity analysis. Second, the court's explanation is internally inconsistent, because it found that abstract ideas were sufficiently tangible to form the basis for a finding of substantial similarity, while simultaneously ruling that they were insufficiently concrete to be filtered out of a substantial similarity analysis. Third, a contract cannot be based upon the provision of an idea the defendant was already aware of, because there would be an absence of consideration.^[4] The court's refusal to filter out core concepts of which *Pure Flix* was already aware was therefore erroneous.

The Court Erred in Finding That "Core Concepts" Alone Can Support a Finding of Substantial Similarity

The court's analysis of substantial similarity was also flawed because "core concepts" standing alone cannot form the basis for a finding of substantial similarity. The court stated that a jury could conclude that "Proof" and "God's Not Dead" were substantially similar because they contained similar "core concepts." The court did not cite any authority for the proposition that substantial similarity can be based solely on "core concepts." In fact, none of the idea submission cases the court cited that involved feature films or television shows stated that a finding of substantial similarity can be based on "core concepts." To the contrary, those cases explicitly stated that there must be articulable similarities between specific elements, such as plot, themes, dialogue, mood, setting, pace, characters and sequence of events.^[5]

Indeed, similarity of core concepts should never be sufficient in themselves to support a finding of substantial similarity in cases involving original fictional feature films. Many films share similar "core concepts" and yet are markedly different. In the seminal idea submission case *Desny v. Wilder*, the California Supreme Court noted that, "[t]here are only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama."^[6] The following are just a few examples of significantly different films that share similar core concepts:

- Young man leading an ordinary life becomes the student of an older man who wears a brown robe. The mentor teaches the hero how to fight using an ancient, spiritual discipline. The hero subsequently fights the mentor's former pupil, who has become evil. The hero's discovery of the identity of his biological father is an enormous surprise. ("Star Wars"; "Kung Fu Panda.")
- A bitter Caucasian widower in changing times reluctantly befriends his young Asian neighbor, who helps him overcome his cynicism and dislike of people. ("Gran Torino"; "Up.")
- College students who are misfits and bullied regularly fight back and regain their self-respect. ("Revenge of the Nerds"; "Monsters University.")
- Humans encounter an unspoiled world where the natives live in harmony with nature. The humans invade the area so they can exploit its natural resources. The human hero who has

infiltrated the indigenous society develops a relationship with an indigenous female and helps the tribe repel the human invaders. ("Avatar"; "FernGully: The Last Rainforest.")

There are innumerable other examples. The nature of a feature film derives from the specific manner in which its core ideas are developed (e.g., its characters, sequence of events, scenes, mood, dialogue). The Pure Flix court's holding that a finding of substantial similarity can be based solely on "core concepts" — without analyzing the works' specific elements — was therefore erroneous.

In sum, the Pure Flix decision misapplied the applicable law. Under the court's reasoning, once the plaintiff pitched his idea to Pure Flix, the studio could never produce a movie involving apologetics in an academic setting without being required to compensate plaintiff, even though Pure Flix (which specializes in Christian-themed films) was already familiar with that concept before the plaintiff's pitch, and even if the resulting film was significantly different from the plaintiff's treatment.

The defendants have filed a petition for review with the California Supreme Court. The court should grant the petition and reverse the decision.

Peter Shimamoto is the managing attorney at Insignis Law.

Disclosure: The author worked on an idea submission case involving the motion picture "Avatar," in which he represented the plaintiff, Gerald Morawski. That case was unrelated to Ryder v. Lightstorm Entertainment, which also involved "Avatar."

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Sullivan v. Pure Flix Entertainment LLC, 2018 WL 5993817 (Cal. Ct. App. Nov. 15, 2018).

[2] "Apologetics" refers to a reasoned defense of Christianity.

[3] Ryder v. Lightstorm Entertainment, Inc., 246 Cal.App.4th 1064 (2016).

[4] This is demonstrated by the fact that defendants did not send the emails that plaintiffs alleged constituted evidence of an express contract when plaintiffs pitched the basic idea for Proof. Instead, defendants waited until after plaintiffs provided a five-page treatment that developed the idea before sending the emails, thereby demonstrating that the idea standing alone did not have value to defendants.

[5] Benay v. Warner Bros. Entertainment, Inc., 607 F.3d 620, 624 (9th Cir. 2010) (analysis of substantial similarity requires comparison of the works' plot, themes, dialogue, mood, setting, pace, characters and sequence of events); Ryder, 246 Cal.App.4th at 1077-1078 (comparing the twelve specific elements that plaintiff alleged were similar); Fink v. Goodson-Todman Enterprises, Ltd., 9 Cal.App.3d 996, 1010-1015 (1970) (comparing the works' basic themes, detailed exposition of the protagonist's back story, plots for fifteen of the television series' episodes, introducing the back story through a dream sequence and revisiting it through flashbacks in subsequent episodes, using signature and talisman devices to remind the viewer of the show's central theme, tying the plots of the individual episodes into the back story,

and making music a significant aspect of the series); *Minnear v. Tors*, 266 Cal.App.2d 495, 505 (1968) (stating that there were enough similarities in the works' basic plot ideas, themes, sequences, and dramatic gimmicks that a jury could find that defendant's show was based on plaintiff's submission).

[6] *Desny v. Wilder*, 46 Cal.2d 715, 741 (1956).