

District Court of Colorado Adopts *Meta-Film*'s "Access Through an Intermediary" Test in Copyright Case

By David Aronoff, Michael Beylkin, and Joshua Bornstein

In a Colorado copyright infringement lawsuit against defendant High Noon Productions LLC ("HNP") alleging that its popular HGTV home renovation series, "Good Bones" was copied from a pitch-reel ("Teaser") submitted by plaintiff Melanie Tolbert ("Tolbert"), an alleged stunt-double for Angelina Jolie and would-be home renovation TV series host, the District Court of Colorado recently granted summary judgment for defendant HNP on the grounds of lack of access. [Tolbert v. High Noon Prods. LLC](#), No. 1:20-CV-01734, 2021 WL 2661649, at *1 (D. Colo. June 29, 2021).

The decision is noteworthy for two reasons. First, the decision is the first case in the Tenth Circuit to adopt the "access through an intermediary" test of the highly influential and widely-cited decision *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346 (C.D. Cal. 1984), which requires a plaintiff seeking to raise a genuine issue as to copying-in-fact in a copyright infringement action based on alleged access through an intermediary to show that the intermediary was (a) a supervisor of the defendant's project, (b) part of the same work unit as the copier, or (c) someone who contributed creative ideas or materials to defendant's work. Second, the decision illustrates that lack of "access" – *i.e.*, a reasonable opportunity to copy the plaintiff's allegedly infringed work – remains an important defense to copyright infringement claims arising from allegedly infringing film and TV works, even though lack of substantial similarity in protectable expression has been the most frequent grounds on which summary judgments are granted for defendants such cases.

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Meta-Film's "Access Through an Intermediary" Test

In the seminal case *Meta-Film*, the owner of an unpublished screenplay entitled "Frat Rats" sued the producers of the film, "Animal House" claiming that the defendants had access to the screenplay because it was submitted to a director working at the same studio lot. *Meta-Film Assocs., Inc.*, 586 F. Supp. at 1349-52. On summary judgment, the court rejected the plaintiff's "bare corporate receipt" access argument and held that the plaintiff was required to show a nexus between the plaintiff's work and an intermediary "in a position to transmit it to the copier" such as a supervisor of the defendant's project, someone part of the same work unit, or someone who contributed creative ideas or materials to the defendant's work. *Id.* at 1355-56.

The “nexus” requirement of *Meta-Film* has since been widely followed across many circuits. See e.g., *Loomis v. Cornish*, 836 F.3d 991 (9th Cir. 2016) (applying *Meta-Film*); *Jorgensen v. Epic/Sony Recs.*, 351 F.3d 46 (2d Cir. 2003) (same); *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939 (8th Cir. 1992) (same); *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996) (same).

“Good Bones” Case Background

In November 2013, the future stars of the show “Good Bones” – i.e., the mother-daughter duo Karen Laine and Mina Starsiak – armed with two digital flip-cameras provided to them by HNP, recorded themselves engaged in home renovation work. By February 2014, that footage was edited into a “sizzle reel,” and was used by HNP to successfully pitch and sell the mother-daughter renovation team concept to HGTV. But production of the pilot episode took considerable time, and it was not aired on HGTV until May 2015.

In the meantime, unbeknownst to HNP, HGTV, or the stars of “Good Bones,” Tolbert alleges that during July 2014 she independently created her Teaser as a pitch-reel for her own idea for a TV show featuring a mother-daughter home renovation team, which she titled “Like Mother, Like Daughter.” During the summer of 2014, Tolbert allegedly submitted her Teaser to twenty producers purportedly associated with HGTV and Scripps Network (HGTV’s then parent company). None of those producers expressed any interest in Tolbert’s pitch.

In 2016, HGTV began airing the first season of “Good Bones.” Tolbert claims she first learned of the series sometime in 2017, and upon viewing it, believed it copied her idea expressed in the Teaser. Tolbert then registered her Teaser with the United States Copyright Office and, in June 2020, filed suit against HNP in the District Court of Colorado. (Initially, Tolbert sued both HNP and Discovery in the Northern District of Alabama. HNP was subsequently dismissed from that action for lack of personal jurisdiction, and Tolbert re-filed her suit against HNP in Colorado. The Alabama action against Discovery is still pending.)

Tolbert’s Complaint demanded over \$100,000,000 in damages, and asserted claims for copyright infringement and several tag-along state law causes of action. The thrust of Tolbert’s Complaint alleged that HNP had access to the Teaser and had copied it to create “Good Bones” even though Tolbert did not pitch her show idea or submit her Teaser to either HNP or HGTV directly. Tolbert also suggested that the otherwise irrefutable evidence showing the prior in time creation of the sizzle reel for “Good Bones” had been fabricated by HNP.

During the lawsuit, Tolbert’s state law claims were dismissed on a Rule 12(b)(6) motion for failing to state cognizable claims for relief as well as under the copyright preemption doctrine.

The evidence showed that no one at HNP or HGTV who worked on the concept, development, or production of “Good Bones” ever received or viewed the Teaser prior to the lawsuit.

HNP also filed a motion for summary judgment arguing that Tolbert’s case was fatally flawed because: (1) HNP did not have access to her Teaser; (2) HNP had created and pitched its sizzle reel prior to and independently of Tolbert’s Teaser; and (3) that Plaintiff’s Teaser and HNP’s “Good Bones” content lacked substantial similarity in any protectable expression.

The “Good Bones” Summary Judgment Ruling

Tolbert’s access argument rested on her contention that she allegedly shared her Teaser with producers at third-party production companies who also produced shows for HGTV. According to Tolbert, since HNP had produced shows for HGTV in the past, and since these other third-party production companies also had relationships with HGTV, Tolbert contended there existed sufficient evidence of access to support an inference of copying-in-fact. Notably, however, the evidence showed that no one at HNP or HGTV who worked on the concept, development, or production of “Good Bones” ever received or viewed the Teaser prior to the lawsuit.



In attacking Tolbert’s infringement claims on summary judgment, HNP argued that Tolbert had failed to establish a nexus sufficient to raise a genuine issue for trial as to access under *Meta-Film* between the individuals with whom she allegedly shared her Teaser and any of the creators of “Good Bones.” HNP also provided evidence demonstrating its prior independent creation of “Good Bones” and argued that there was no substantial similarity between any original protectable elements in the Teaser and “Good Bones.”

In ruling on HNP’s summary judgment motion, U.S. District Judge Daniel D. Domenico adopted the “access through an intermediary” test expressed in *Meta-Film*, which held that in order to prove access through an intermediary, there must be a “nexus between the defendant and the individual possessing knowledge of the plaintiff’s work.” *Tedesco v. Pepe*, No. CV 11-6203-JFW, 2012 WL 13012419, at *11 (C.D. Cal. July 17, 2012) (relying on *Meta-Film Assocs., Inc.*, 586 F. Supp. at 1355-58). The Court, citing *Tedesco* and other cases adopting *Meta-Film*, found that Tolbert’s inability to establish that any third-party producer passed her idea to anyone at HGTV, let alone any HGTV executive who contributed to the development of “Good Bones,” was fatal to her claim of access.

Ms. Tolbert has not produced evidence that would support finding that nexus in this case. There is no evidence that any of the twenty producers who received the teaser, for example, “contributed creative ideas or materials to defendant’s work.” *Tedesco*, 2012 WL 13012419, at *11. Ms. Tolbert at best rests her case for access on a “devious chain of acquaintances.”

The Court further found that Tolbert’s apparent effort to establish access based on an ill-formed claim of alleged striking similarities between “Good Bones” and her Teaser failed to raise a genuine issue for trial as to access and attempted to improperly “collapse” the separate elements of substantial similarity and copying-in-fact. Thus, the Court held that Tolbert’s copyright infringement claim failed as a matter of law, finding it unnecessary to reach the alternative grounds for summary judgment urged by HNP. This is noteworthy because lack of substantial similarity in protectable expression has been the most frequent grounds on which summary judgment has been granted for defendants in similarly-situated copyright infringement cases in recent years. *See e.g., Benay v. Warner Bros. Ent. Inc.*, 607 F.3d 620 (9th Cir. 2010) (affirming summary judgment on grounds of lack of substantial similarity); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133 (10th Cir. 2016) (same); *Vallejo v. Narcos Prods. LLC*, 833 F. App’x 250 (11th Cir. 2020) (same); *Webb v. Stallone*, 555 F. App’x 31 (2d Cir. 2014) (same); *see also Murray Hill Pubs. v. Twentieth Century Fox*, 361 F.3d 312 (6th Cir. 2004) (reversing judgment for plaintiff and finding no substantial similarity as a matter of law).

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Following the dismissal of her lawsuit, Tolbert has filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit.

David Aronoff, Michael Beylkin and Joshua Bornstein of Fox Rothschild LLP represent HNP.