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ARTICLE

# Do Not Pass 'Go': *How a Board Game Decision Is Applicable to Idea Theft Disputes in the Advertising Industry*

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By David Halberstadter

At first blush, the recent lawsuit filed by a toy inventor against toy and game company, Hasbro, would seem to have little to do with the advertising industry. In fact, however, the decision by the Southern District of New York has *everything* to do with advertising. The court's discussion of the circumstances under which a board game inventor could become entitled to royalties from the company to whom he pitched his ideas is highly relevant to the relationship between advertising agencies and advertisers, as well. This article offers a roadmap for how both agencies and advertisers can minimize disputes and examines the potential for subsequent claims of idea theft.

In *Wexler v. Hasbro Inc.*,[i] toy and game inventor David Wexler alleged that Hasbro unlawfully used two of his ideas without paying him royalties. Wexler asserted claims for breach of contract, misappropriation, unfair competition, and unjust enrichment. As the allegations underlying Wexler's complaint are described below, readers familiar with the process by which advertising agencies submit marketing ideas to advertisers will immediately see the parallels.

### The Pitch

Many professional toy inventors, including Wexler, pitch ideas to toy companies in the hopes that a company will license and develop their proposal in return for royalties. Hasbro, a global toy and game company, regularly meets with outside inventors who present their ideas to representatives from Hasbro's "Products Acquisitions" department.

In a series of meetings between 2007 and 2015, Wexler pitched various toy and game ideas to Hasbro. One of the ideas was "a branded collection of combined games, each of which is controlled by Hasbro, and uses combined play pattern of the original games and the games' names together as the name of the new product." At each of the meetings, Wexler presented illustrative examples of games that could be included in the collection (for example, Monopoly combined with Trouble, Jenga combined with Twister, and a Candy Land/Chutes and Ladders mash-up). In one meeting, Wexler specifically pitched a mash-up of Connect 4 and Nerf.[ii] Hasbro ultimately passed on the mash-up idea generally and each of the pitched examples.

However, from 2019 to 2020, Hasbro sold at Target stores a line of products under the name "game mash+ups." The products included combinations of Monopoly and Jenga, Taboo and Speak Out, Guess Who? and Clue, Candy Land and Connect 4, and Twister and Scrabble.[iii] In 2019, Hasbro also began selling a game called "Connect 4 Blast!," the stated goal of which was "to dislodge discs from a stand-alone Connect 4 grid by blasting Nerf projectiles at it.[iv]"

Wexler claimed that Hasbro had made use of both his general "mash-up" idea in connection with the products marketed under the "game mash+ups" line and the specific combination of Connect 4 and Nerf that he had pitched during one meeting. Following discovery, Hasbro moved for summary judgment on all of Wexler's claims, and the court granted the motion.

### The Applicable Law

The court observed that, while each of Wexler's claims comprised a number of different critical elements, two elements were common to all four of them: a showing that Wexler's ideas were "novel" and that the defendant actually used *his* ideas, rather than similar ideas pitched by another person or developed independently by Hasbro.[v] And for those claims to survive summary judgment, Wexler was required to demonstrate the existence of a genuine dispute of material fact as to both "novelty" and "use."[vi]

For example, the court observed that under New York law, an implied contract claim based upon the submission of an idea requires a showing of both novelty of the idea and the defendant's use of that idea.[vii] Similarly, the tort of misappropriation of ideas requires proof of a legal relationship between the parties, an idea that is novel and concrete, and the defendant's use of it.[viii] Given that "unfair competition encompasses the principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor," the court continued, "misappropriation is considered the 'cornerstone' of an unfair competition claim" and "courts often treat an unfair competition claim as part and parcel of a plaintiff's misappropriation claim."[ix]

Finally, to prove unjust enrichment under New York law, the court concluded, a plaintiff must establish that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover."[x] Because the basis for Wexler's unjust enrichment claim was that Hasbro used and exploited his ideas and that it would be unjust for Hasbro "to retain the value of Plaintiff's novel and creative general and specific

Mash-Up ideas and applications without compensating Plaintiff," the court reasoned that, if his ideas were not novel, or if Hasbro did not use them, Wexler would have no claim for unjust enrichment.[xi]

### The District Court's Rulings

Having identified "novelty" and "use" as the lynchpins of all of Wexler's claims, the court had little difficulty concluding that Wexler's mash-up idea was not novel. First, the court found that Wexler's basic idea to combine elements of two Hasbro games was generic. Although Wexler had proposed specific combinations of games, Hasbro did not use any of those specific combinations, except for the Connect 4 Blast! Product, which the court discussed separately.[xii]

Moreover, the elements comprising Wexler's mash-up idea – *i.e.*, that (i) each game would combine elements of two preexisting games, (ii) the two preexisting games are "Hasbro classics," (iii) the name of the new product would utilize the names of its two component games and (iv) the collection would be a line of products – were "so common and commercially available in the toy and game industry that a reasonable jury would have to conclude that the idea is not unique and is 'nothing more than a variation on a basic theme.'"[xiii] Having determined that Wexler's mash-up idea was not novel, the court found it unnecessary to consider whether Hasbro used it.[xiv]

With respect to Wexler's Connect 4/Nerf idea, the court instead focused on whether a material factual dispute existed as to whether Hasbro had used it. Hasbro offered in support of summary judgment evidence of its independent development of its own Connect 4 Blast! Product by an in-house developer who had never seen and was completely unaware of any inventor submissions by Wexler.[xv]

Wexler was unable to refute Hasbro's independent development evidence, resulting in the summary disposition of this claim. Having found that Hasbro did not use Wexler's idea, the court found it unnecessary to address whether his Connect 4/Nerf idea was novel.[xvi]

### The Application to the Advertising Industry

It is routine in the advertising industry for advertisers to solicit marketing ideas from advertising agencies and for agencies to prepare elaborate presentations of their proposed marketing campaigns in an effort to secure an exclusive agency representation agreement. Certainly (and ideally), many of the marketing ideas agencies pitch to potential advertisers are highly creative and novel; but their presentations may also include more generic advertising techniques and strategies, concepts that are common to the advertiser's particular industry or market, or ideas that derive from the unique characteristics and qualities of the advertiser's own goods or services. Advertisers frequently provide specific objectives and campaign themes to the agencies whose pitches they solicit. In addition, advertisers of goods and services often solicit marketing proposals and presentations from multiple, competing agencies, as well as develop their own concepts in-house.

It is not surprising, therefore, that advertising agencies that receive a "pass" from the advertisers to whom they pitched their ideas may come to believe their ideas were wrongfully used without compensation when the advertiser subsequently launches a marketing campaign that bears similarities to what the agency pitched. In fact, in the view of many advertising agencies and industry groups, it is not uncommon for an advertiser to have one agency implement ideas pitched by another.[xvii] And, of course, advertisers do not want to be subjected to potential litigation simply because they engaged a different agency that presented similar marketing ideas.

So how can advertising agencies and advertisers reduce the risks of such disputes?

First, it is essential that agencies who make pitches and advertisers who solicit them carefully document and maintain records of the pitches they make and take. When the pitch occurred, who was present for it, what ideas were actually pitched and what materials were left with the advertiser, if any, is critical information to have in the event of a future claim. If the advertiser provided the agency with any information in advance of the pitch, this should be carefully documented as well.[xviii]

Second, advertisers and agencies should retain records evidencing the development history of the advertising campaigns they eventually produce. If the campaign is the result of one agency's pitch in a competitive situation in which other proposals were rejected, it will be important to both the advertiser and the agency that was hired to be able to later demonstrate what concepts the retained agency initially pitched, how the campaign was revised and embellished over the course of its development, and who at the advertiser provided creative input (and what input he or she provided). If elements of the campaign were developed in-house, it is also important to be able to identify who originally suggested the idea, what inspired that person to come up with his or her concept, what, if any, source materials he or she relied on, and whether he or she had exposure to other agency presentations prior to conceiving of his or her idea.

Third, agencies and advertisers both should consider entering into submission agreements when possible.[xix] The document does not need to be the Magna Carta. Even a brief but thorough submission agreement can, among other things:

- Establish the ownership of both the ideas that the advertiser may have provided to the agency in anticipation of the pitch and the ideas that the agency pitches;
- Express the parties' agreement that neither of them will make use of the other's novel ideas;[xx]

- Have the agency making the pitch acknowledge that the advertiser will be receiving pitches from other agencies and that it generates many marketing ideas in-house; and have the agency agree that the advertiser is free to use similar ideas that are pitched by other agencies or independently generated in-house, without any obligation to the pitching agency;
- Have the advertiser receiving the pitch acknowledge that the agency makes pitches to many advertisers and that, unless the agency is engaged exclusively by the advertiser, it is free to incorporate its own creative ideas into pitches for other potential clients; and
- Have the agency making the pitch represent and warrant that the ideas and materials it is submitting are original to the agency and/or do not infringe upon the rights of any third parties.

Finally, it is important to note that the *Hasbro* decision was based on New York law. While many of the court's legal conclusions would apply to the same claims under the laws of other states, including California, there is one critical distinction: In California, it is well-established that an idea *does not* have to be novel for it to be the basis of an implied contract.[xxi] So an advertising pitch that takes place in California can be based on completely banal, generic ideas and still potentially give rise to an implied obligation on the part of the recipient of the pitch to pay for those ideas if the recipient actually uses them. This is all the more reason for advertisers and agencies to enter into an express agreement, where their rights and obligations to each other are clearly defined.

A version of this article appeared first on *Law360*, "Entertainment Attys Can Learn From Hasbro Royalty Ruling," March 24, 2022

See related article, "Whose Idea Is 'Ballin?'"

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[i] Case No. 20-cv-1100 (S.D.N.Y. Filed February 7, 2020, Decided March 11, 2022).

[ii] For those unacquainted with Hasbro's product line, Connect 4 requires players to take turns placing discs in a grid, to achieve the ultimate goal of four discs in a row. "Nerf" refers to a type of soft foam rubber used to make a variety of toys, including projectiles that are shot from Nerf brand "blasters."

[iii] Wexler conceded that he never proposed to Hasbro any of the specific combinations in the line of products sold at Target, with the exception of the mash-up of Connect 4 and Nerf. Wexler, Docket No. 79 at *3.

[iv] Although Connect 4 Blast! also was sold at Target, it was not part of the "game mash+ups" product line.

[v] Wexler, Docket No. 79 at *5.

[vi] Id.; see generally Paul v. Haley, 183 A.D.2d 44, 52–53 (2d Dep't 1992) (lack of novelty in an idea is fatal to any cause of action for its unlawful use).

[vii] Id. at *5-6; see Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 376 (2d Cir. 2000).

[viii] Id. at *6-7; see Turner v. Temptu Inc., 586 F. App'x 718, 722 (2d Cir. 2014) (collecting cases).

[ix] Id. at *7; see also Stuart's, LLC v. Edelman, 196 A.D.3d 711, 714 (2d Dep't 2021); Ruder & Finn Inc. v. Seaboard Sur. Co., 52 N.Y.2d 663, 671 (1981); Nadel, 208 F.3d at 373 n.2; and Paul v. Haley, 183 A.D.2d 44, 52–53 (2d Dep't 1992).

[x] Id. at *8; see Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 306 (2d Cir. 2004).

[xi] Id.

[xii] Id. at *8.

[xiii] Id. at *9-15; see also AEB & Assocs. Design Grp., Inc. v. Tonka Corp., 853 F. Supp. 724, 734 (S.D.N.Y. 1994).

[xiv] Id. at *8.

[xv] Id. at *16.

[xvi] Id. at *15, n. 29.

[xvii] See, e.g., "Pitches and stolen riches: ad agencies reveal how clients have ripped them off," by John McCarthy, The Drum, February 25, 2022; "Half of PR agency leaders have encountered idea theft," Pitchmark, June 5, 2019; "Pitch or ditch: stolen ideas, fees and the dark side of pitching," Marketing, December 13, 2017.

[xviii] This first recommendation is intended for advertisers that are well-run, well-organized and genuinely do not intend to make use without compensation of the ideas that agencies pitch to them. It may, however, be a double-edged sword for less scrupulous and fast-moving advertisers whose employees may take lots of pitches without coordinating with one another or who tend to make quick or even spontaneous advertising decisions in reaction to recent events.

[xix] See sample advertising agency pitch letter/agreement; a discussion of agency-client nondisclosure agreements and another discussion of agency-client nondisclosure agreements.

[xx] Typically, the advertiser will want to ensure that an agency will not disclose the advertiser's information to one of its competitors or use that information in preparing a marketing campaign for a competitor. And an agency typically will want to ensure that the advertiser will not make use of any novel ideas that they agency presents without engaging that agency to implement its own ideas or, at least, without compensating the agency for its ideas.

[xxi] See Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 674 (1950) ("The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. . . . Even though the idea disclosed may be 'widely known and generally understood,' it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty.") (Traynor, J., dissenting), approved by Desny v. Wilder, 46 Cal.2d 715, 733 (1956) ("The principles enunciated in the above quotation from Justice Traynor's dissent are accepted as the law of California"); see also -Chandler v. Roach, 156 Cal.App.2d 435, 443 (1957) ("We see no necessity to add the elements of novelty and concreteness to implied-in-fact contracts with reference to authors."); Blaustein v. Burton, 9 Cal.App.3d 161, 183 (1970) ("An idea which can be the subject matter of a contract need not be novel or concrete.").

## CONTACTS

For more information, contact your Katten attorney or any of the following attorneys.

**David Halberstadter**
+1.310.788.4408
david.halberstadter@katten.com