Abstract

David M. McGovern, *What is Your Pitch?: Idea Protection is Nothing but Curveballs*, 15 LOY. L.A. ENT. L.J. 475 (1995).

In this article, David McGovern explores protections for the "idea-man." An idea-man is a person "who creates only an idea, not literary property, or who having created literary property finds that only his idea and not his 'expression' has been borrowed."[1] Ideas are not protected by copyright law when they are not fully developed scripts or treatments. This causes much concern for the person who pitches an idea to a movie or television producer, because the producer can appropriate this idea as long as she does not copy the expression of that idea. Although products of the mind generally are protected by intellectual property laws, ideas are generally considered to be as "free as the air" and the idea-man is left with sporadic and unpredictable protection. However, there is still hope for the idea-man. In this article, McGovern describes the other theories of the law where an idea-man can find protection. Those theories are property, quasi-contract or unjust enrichment, express contract, implied-in-fact contract, and confidential relationship.

The property theory for idea protection is the most tenuous of the possibilities. According to this theory, an idea would be a form of property and the idea-man would have the same rights to the idea as he would if he were the owner of physical property. Some courts believe this is the best way to protect an idea-man. However, these courts require that the idea

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[1] DAVID NIMMER, NIMMER ON COPYRIGHT 16.01 (1993).

be novel and concrete before it will grant property rights.

Satisfying the novelty requirement is quite a heavy burden for an idea-man. Novelty is more strict a requirement than originality in that a novel idea has never existed. Courts that adopt this standard promote the policy that once an idea is in the public domain, the public shall remain free to use it. Some courts adopt a kinder standard by combining novelty and originality, stating that the idea must not already exist or that the idea be original to the idea-man. The novelty requirement is therefore dependent on the jurisdiction.

The concreteness requirement of the test is unclear. Requiring an idea to be concrete can mean many different things. Concrete might mean that the idea is fixed in a tangible form, or it might mean that the idea can be reduced to a writing in a fixed period of time. This creates a problem. If an idea is fixed in a tangible form, it probably is protected by federal copyright law, which preempts other laws. Even describing the idea as able to be developed in a fixed period of time is not really more than requiring a copyrightable mode of expression. Hence, the concreteness requirement is vague and unpredictable.

In general, McGovern believes the property theory of protection for the idea man is unnecessary. The burdens it imposes rarely are satisfied and when they are, the idea often is protected under copyright or some other theory of protection. Consequently, the property theory of protection should be the last resort.

Another theory of protection is the quasi-contract or unjust enrichment theory. This theory relies on an obligation created by law for reasons of justice. This theory requires that (1) the defendant is enriched (2) at the plaintiff's expense, (3) under circumstances that, in equity and good conscience, call for an accounting by the wrong-doer, and (4) that the defendant knowingly and voluntarily accepts the plaintiff's services and

the concomitant benefit.[2] This type of protection usually requires that the relationship resemble a contractual one although the parties did not mutually assent to a contract.

Under the quasi-contract theory, many courts once again require novelty and concreteness. The burden of novelty and concreteness is often too stiff for the idea-man to satisfy and federal copyright law may preempt the quasi-contract theory as it may preempt the property theory. Mistakes often are made when courts deal with quasi-contract, as they sometimes require express or implied-in-fact contracts before allowing recovery. Courts also make the mistake of disallowing evidence of industry custom in determining if the defendant was unjustly enriched.

Finally, the concept of quasi-contract is linked with the concept of ideas as property. If an idea cannot be property, then the defendant cannot be unjustly enriched by taking an idea to which no one has a claim of exclusive ownership.

McGovern contends that the entertainment industry is the perfect forum for the use of the quasi-contract theory. The custom of developing pitched ideas leads idea-men to expect to be compensated for their ideas. When an idea-man pitches the idea to a producer who uses that idea without compensating the idea-man, the producer is definitely unjustly enriched by the pitcher's idea, and equity requires compensation. McGovern believes that the courts should be relying on this theory.

A third theory of protection exists in express contracts. An express contract occurs when a party agrees to pay for the use of an idea. This contract binds only those parties who made the agreement and others are free to use the idea. This theory is governed by the standards of contract law. The same problems arise in its novelty and concreteness requirements, as well as additional problems of consideration and the statute of

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[2] *See* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 19 (1963).

frauds.

The consideration requirement collapses into the novelty and concreteness requirement when courts insist that an idea must be akin to property to qualify as consideration. Some courts avoid this problem by allowing the service of disclosing the idea to qualify as consideration rather than the idea itself. This construction also runs into problems. When the party is required by another contract to disclose the idea, it cannot count as consideration. Furthermore, no past consideration will be valid consideration. However, many courts will find that the service of disclosing an idea is valid consideration.

The statute of frauds problems generally are circumvented by the courts. One exception to the statute of frauds is applicable when courts permit the transaction to be considered the sale of a service rather than a sale of goods. Furthermore, when one party has completely performed under an oral contract, such as rendering the service of giving an idea, the one-year completion requirement is inapplicable.

McGovern concludes that the idea-man most often relies on the express contract theory. He also states that it is the most equitable theory and that it most accurately reflects the intent of the parties. The main drawback is that the idea-man does not always have an express contract, usually because he lacks bargaining power or business sense.

A fourth theory of protection involves the implied-in-fact contract. The only difference between this and an express contract is the fact that the parties consent by conduct rather than words. The basis for this theory is that an idea-man would not have rendered the services of relaying an idea unless encouraged by the producer. The analysis is essentially the same as for the express contract, except that courts are more reluctant to provide relief in these cases since the contract is being inferred from conduct.

The main question in determining an implied-in-fact

contract asks when the parties have agreed. Courts generally will not imply a contract when (1) the producer appropriates the idea by some means other than an agreement with the idea man, (2) the idea-man gives his idea to the producer without first making an agreement. California courts interpret the second possibility more leniently because they regard inaction by the producer during the idea-man's pitch as a promise to pay, especially if the idea is used.

Courts vary widely when setting forth which facts are determinative of an implied contract, making the implied-in-fact contract theory more difficult to recover under than the express contract. However, once a court has implied a contract, McGovern asserts this theory offers adequate remedies to the idea man.

The fifth and final theory for protection in McGovern's article is the confidential relationship theory. This type of relationship is created when "one has gained the confidence of the other and purports to act or advise with the other's interests in mind."[3] Courts provide remedies for the idea-man by finding an express contract, an implied contract, a quasi-contract, or a breach of a confidential relationship.

McGovern contends that the confidential relationship theory is actually a hybrid of the other theories and the problems that occur with this theory are similar to the problems of the other theories.

McGovern goes on to discuss the law in the two primary jurisdictions for idea law and the entertainment industry: California and New York. California is more protective of the idea-man, but only recognizes the two contract theories of protection. An express contract depends on the words used, and the implied-in-fact contract will be found when a reasonable person would believe the party's actions indicate a contract is

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[3] Davies v. Krasna, 121 Cal. Rptr. 705, 713 (1975).

being formed. California does not require novelty or concreteness when determining if the consideration requirement has been met. However, the idea-man simply giving over an unsolicited idea will not create a unilateral contract. Finally, the recipient of the idea must actually use the idea, or the courts will not find a contract.

New York law is less protective of the idea man. New York also only recognizes the contract theories, but the courts are not consistent in asserting what is protected under these theories. It is unclear whether novel as well as non-novel ideas are protected under express contract and some courts do not protect non-novel ideas under the express contract theory. Furthermore, New York law requires novelty for protection under the implied-in-fact contract theory.

McGovern concludes his article by setting out what both the idea-man and the producer must do to avoid disparities. First of all, McGovern suggests that the easiest way to avoid litigation is to write a contract. In the absence of a written contract, the idea-man should be up front with his expectations. An idea-man should never disclose an idea without first securing an agreement. The only safe remedy for the idea-man is contract, so the idea-man should be careful to make a contract.

Moreover, the producer should also reveal her expectations to the idea-man at the outset of any discussion. The producer should always follow a set of policies regarding solicited ideas and unsolicited ideas. These policies should be in writing and followed any time there is any disclosure or potential disclosure of ideas.

Finally, McGovern suggests that a uniform law for the protection of the idea-man is the best way to ensure protection. He states that it is "hypocritical in a capitalistic society not to reward the idea-man who brings the valuable idea to the entertainment company." Many critics contend that ideas are

not protected by copyright laws because protecting ideas will create monopolies in particular ideas and thus stifle creativity. McGovern responds that it will not stifle creativity, but instead "aid progress and development" by wider dissemination of ideas and will allow further idea development by allowing "all would-be inventors the opportunity to see farther by standing on the shoulders of the idea-man."

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