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## Ideas, a Dime a Dozen, or Worth Protection

**IDEAS, A DIME A DOZEN, OR WORTH PROTECTION?**

By: *Elliot Axelrod*<sup>1</sup>

**INTRODUCTION**

While many projects, particularly in the entertainment field, begin with a creative idea, ideas by themselves are generally agreed to be a “dime a dozen.”<sup>2</sup> The law is ambivalent about the protection of ideas. Part of this ambivalence stems from the law’s efforts to balance competing interests.<sup>3</sup> While some protection is provided to those who submit ideas to others, and to those who receive idea submissions, the distinction between expression and ideas, and the degree of protection afforded, is often far from clear. This paper explores the reasons for the law’s ambivalence about idea protection and discusses the pragmatic current state of protection afforded to those who conceive ideas.

At one time, the law provided no protection whatsoever against unauthorized dramatizations of copyright protected literary works, let alone against the unauthorized use of mere ideas.<sup>4</sup> When copyright law was amended in 1891 to create a right to dramatize copyright

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<sup>2</sup> See, e.g., Lisa Pearson, *Navigating the Bramble Bush in Idea Submission Cases*, 4 J. MARSHALL REV. INTELL. PROP. L. 36, 38 (Fall 2004). The value of ideas is much debated in the entertainment industry. Many books have been written about selling ideas. See, e.g., ROBERT KOSBERG & MIM EICHLER, *HOW TO SELL YOUR IDEA TO HOLLYWOOD* (Harper Perennial ed., 1991) (discussing the potential, principles and importance of selling and finding ideas in the film industry); CARLOS DE ABREU & HOWARD JAY SMITH, *OPENING THE DOORS TO HOLLYWOOD: HOW TO SELL YOUR IDEA, STORY, BOOK, SCREENPLAY, MANUSCRIPT* (Custos Morum Publishers, 1995). The contrary view is that the idea is of one of Hollywood’s most overrated commodities. See RICHARD WALTER, *SCREENWRITING: THE ART, CRAFT AND BUSINESS OF FILM AND TELEVISION WRITING* (Plume, 1998).

<sup>3</sup> *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 85-86 (Cal. 1950) (quoting *Sayre v. Moore*, 1 East 361, 101 Eng. Rep. 140) (Traynor, J., dissenting) (“We must take care to guard against two extremes equally prejudicial: The one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”).

<sup>4</sup> See, e.g., Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, n.110 (Winter 1990).

protected literary works, Congress made it clear that it was only protecting “expression,” not “ideas.”<sup>5</sup>

This differentiation between ideas and expression has specific efficacy dating back to 1879.<sup>6</sup> It should be noted that copyright can protect embellishments upon ideas in instances. While a single word cannot be copyrighted, the particular manner in which a writer organizes words (i.e. his approach), can be protected.<sup>7</sup> Still, others remain free to create work on the same topic, theme, or idea, as long as they do not copy the particular expression of the first writer.<sup>8</sup> However, since the distinction between expression and ideas is not always clear, we typically encounter the problem of quantifying how much similarity is necessary for copyright infringement. Therefore, since one cannot protect an idea under copyright law, one who “pitches” a story idea to another is clearly vulnerable to theft.

Since the 1950s, courts have been confronted with cases in which ideas were used without authorization, or at least without compensation, under circumstances that seemed unfair, even though no copyrights had been infringed.<sup>9</sup> Some courts, particularly those in California, embarked upon a search for legal doctrines other than copyright that would provide protection for ideas.<sup>10</sup> This search led courts to conclude that ideas could be protected, under certain circumstances, by contract and confidential relationship law.<sup>11</sup>

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<sup>5</sup> See Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 14-15 (1994).

<sup>6</sup> See *Baber v. Selden*, 101 U.S. 99, 101-02 (1879); 17 U.S.C. § 102(b) (1976).

<sup>7</sup> See *Salinger v. Random House*, 811 F.2d 90, 98 (2d Cir. 1987).

<sup>8</sup> See generally *Blaustein v. Burton*, 9 Cal. Rptr. 3d 161, 183-84 (Cal. Ct. App. 1970); *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 993-94 (2d Cir. 1988).

<sup>9</sup> See *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956); *Thurman v. Whitfield*, 751 F.2d 90 (2d Cir. 1984).

<sup>10</sup> See generally *Rokos v. Peck*, 182 Cal. App. 3d 604, 614 (Cal. Ct. App. 1986).

<sup>11</sup> See *Desny v. Wilder*, 299 P.2d 257, 268 (Cal. 1956); *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522, 525-26 (Cal. Ct. App. 1982); *Faris v. Enberg*, 158 Cal. Rptr. 704, 709-12 (Cal. Ct. App. 1979).

**COPYRIGHT**

Inasmuch as copyright law is the place where legal protection for literary and dramatic works is found, this is the first place plaintiffs look for protection when their ideas are used without authorization, especially if those ideas were embedded in a copyright protected book, play, or movie. As noted before, however, copyright law does not protect “naked” ideas.<sup>12</sup> When relying on copyright law, it is necessary for a plaintiff to show that copyright protected “expression” was used by the defendant. While it is essential to any protection of literary property, whether at common law or under statute, that the right cannot be limited to the text, literally,<sup>13</sup> there is a point at which protection must cease. The court in *Nicholas v. Universal Pictures Corp.*,<sup>14</sup> referring to this concept, said that:

Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work; but the analogy is not a good one, because, though the skeleton is part of the body, it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed. As respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance.<sup>15</sup>

In the *Nicholas* case, the plaintiff was the author of the play, “Abie’s Irish Rose,” which depicted a Jewish family living in New York where the son became involved with an Irish Catholic girl. The defendant, on the other hand, produced, publicly, the motion picture “The Cohens and the Kellys,” which depicted two families, Jewish and Irish, living side-by-side in New York, where the Jewish daughter and Irish son become involved. The plaintiff contended that the defendant’s movie was taken from the plaintiff’s play. Although the story lines were

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<sup>12</sup> See 17 U.S.C. § 102(b) (2011) (“In no case does copyright protection for an original work of authorship extend to any idea[.]”).

<sup>13</sup> If this were the case, a plagiarist could escape liability by mere immaterial variations.

<sup>14</sup> *Nichols v. Universal Picture Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>15</sup> *Id.* at 121.

different, common to both was a conflict between a Jewish man and an Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation. In holding for the defendant, the court said, “A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.”<sup>16</sup>

Although the question of whether two works are substantially similar usually presents a factual issue that generally does not lend itself to summary judgment, courts have recognized the appropriateness of summary judgment in some copyright cases for the purpose of putting a swift end to meritless litigation and to avoid lengthy and costly trials.<sup>17</sup> “[S]ummary judgment is appropriate where...the Court concludes either that any similarity between the works concerns only non-copyrightable elements or that no reasonable jury, properly instructed, could find the works substantially similar.”<sup>18</sup> The test is, “[W]hether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”<sup>19</sup>

Copyright affords no protection to so-called “scenes a faire” (i.e. characters and settings or events which necessarily follow from the theme or plot situations).<sup>20</sup> In denying plaintiff’s claim for copyright infringement in *Zambito v. Paramount Pictures Corp.*,<sup>21</sup> the court said that the alleged similarity of characters “exist[ed] only at a level of abstraction too basic to permit

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<sup>16</sup> *Id.* at 122 (“[T]here is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her ‘ideas’[.] The defendant has not taken from [plaintiff] more than [the characters’] prototypes have contained for many decades. If so, obviously so to generalize [plaintiff’s] copyright, would allow her to cover what was not original with her.”).

<sup>17</sup> *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1110 (E.D.N.Y. 1985) (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980), *aff’d*, 788 F.2d 2 (2d Cir. 1985)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1110-11.

<sup>21</sup> *Id.*

any inference that [the] defendant wrongfully appropriated any ‘expression’ of plaintiff’s ideas.”<sup>22</sup>

In *Universal City Studios, Inc. v. Film Ventures International, Inc.*,<sup>23</sup> the opposite result occurred.<sup>24</sup> The plaintiff contended that there was sufficient similarity of expression to find infringement because there was substantial similarity between the basic story points of their copyrighted motion pictures, “Jaws” and “Jaws 2,” and the defendant’s motion picture, “Great White.”<sup>25</sup> The defendants argued, as in *Zambito*, that neither the basic idea nor the scenes a faire in the plaintiff’s motion picture were protected, as they were elements that did not constitute expression of ideas but were merely general ideas.<sup>26</sup> The court rejected the defendant’s “overly expansive” view of the unprotected sphere of general ideas and scenes a faire and succinctly stated that the defendant had captured the “total concept and feel” of plaintiff’s motion picture, “Jaws.”<sup>27</sup>

#### CONTRACT AND CONFIDENTIAL RELATIONSHIP

As mentioned earlier, the alternative method of protection for idea submission is by contract and, under certain circumstances, by confidential relationship law. Idea submission cases involve two types of legal issues.<sup>28</sup> The first concerns the circumstances that must exist in

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<sup>22</sup> *Id.* at 1112 (quoting *Giagrasso v. CBS, Inc.*, 534 F. Supp. 472, 478 [E.D.N.Y. 1982]). As examples, the fact that a character is a Nazi, has a sexual encounter or that sunlight is utilized to locate a hidden treasure do not represent infringement. The court said “no character infringement claim can succeed unless plaintiff’s original conception sufficiently developed the character, and defendants have copied this development and not merely the broader outlines.”

<sup>23</sup> *Universal City Studios, Inc. v. Film Ventures Int’l, Inc.*, 543 F. Supp. 1134, 1141-42 (C.D. Cal. 1982).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1141.

<sup>26</sup> *Id.* (both “Jaws” [1 and 2] and “Great White” are fictional stories about a great white shark that terrorizes the inhabitants of a coastal town on the Atlantic seaboard).

<sup>27</sup> *Id.* (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977)).

<sup>28</sup> *See, e.g.*, *Thurman v. Whitfield*, 751 F.2d 90, 92-93 (2d Cir. 1984) (analysis of the relationship between the parties to determine whether a claim may be supported); Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 691-701 (review of the relevant elements of the ideas in submission-of-idea cases).

order for a contract or confidential relationship to exist between the party who submits an idea and the party to whom it is submitted.<sup>29</sup> The second concerns the characteristics an idea must have in order for it to be protected (assuming a contract or confidential relationship is found).<sup>30</sup>

While an idea is usually not regarded as property, ideas may, indeed, be the subject of a contract. In a leading 1950 case,<sup>31</sup> it was said:

The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay...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.<sup>32</sup>

Further expression of the theory allows the contract to be either express or implied.<sup>33</sup> Interestingly, notwithstanding the technical subtleties of distinction between an express and implied contract, the court in *Desney v. Wilder*,<sup>34</sup> the leading California case on this subject, stated that, "If it were not for precedent, we should hesitate to speak of an implied-in-fact contract. If made in fact, contracts may be established by direct evidence or they may be inferred from circumstantial evidence. The only difference is in the method of proof. In either case they would appear to be express contracts."<sup>35</sup>

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<sup>29</sup> See *Thurman v. Whitfield*, 751 F.2d 90, 92-93 (2d Cir. 1984).

<sup>30</sup> See Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 691-701 (2006).

<sup>31</sup> *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 85 (Cal. 1950) (although the quotation is from Justice Traynor's dissenting opinion, the view has been widely applied). See also, Kelly Rem, *Idea Protection in California: Are Writers Too Readily Compensated for Their Screenplays?*, 28 HASTINGS COMM. & ENT. L.J. 333, 340 (Winter 2006).

<sup>32</sup> *Id.* at 85 (Traynor, J., dissenting).

<sup>33</sup> CAL. CIV. CODE §§ 1584, 1589, 1605-06, 1619-21 (2012).

<sup>34</sup> See *Desney v. Wilder*, 299 P.2d 257, 268 (Cal. 1956).

<sup>35</sup> *Id.*



In *Desny*, the plaintiff had submitted to the defendant a synopsis of a story that, ultimately, as alleged by the plaintiff, was used in a motion picture produced by the defendant.<sup>36</sup> While the plaintiff conceded that the synopsis was not original or sufficiently unique to be the basis for recovery under the law of plagiarism or copyright infringement,<sup>37</sup> the plaintiff contended that the lower court erred in granting summary judgment to the defendant because it had the effect of denying the plaintiff the right to prove that the plaintiff's idea or synopsis was the subject of a contract in which the defendant promised to pay the plaintiff for it if the defendant used it.<sup>38</sup> The appellate court agreed.<sup>39</sup>

While the defendant conceded that the act of disclosing an unprotectable idea (if that act is in fact the bargained-for exchange for a promise) may be consideration to support the promise, the defendant contended that once the idea is disclosed without the protection of a contract, anyone is free to use it notwithstanding subsequent promises of payment.<sup>40</sup> The court, however, pointed out that:

[W]here an idea has been conveyed with the expectation by the purveyor that compensation will be paid if the idea is used, there is no reason why the producer who has been the beneficiary of the conveyance of such an idea, and who finds it valuable and is profiting by it, may not then for the first time, although he is not at that time under any legal obligation to do so, promise to pay a reasonable compensation for that idea - that is, for the past service of furnishing it to him- and thus create a valid obligation[.]<sup>41</sup>

“[A]ssuming legality of the consideration, the idea purveyor cannot prevail in an action to recover compensation...unless (a) before or after disclosure he has obtained an express

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 263 (“It is conceded that plaintiff first obtained the central idea or theme of his story, which involved the entrapment of a man in an underground cave and the national interest promoted by the attempt to rescue him, from the Floyd Collins incident which occurred in the 1920’s.”).

<sup>38</sup> *Id.*

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 264.

<sup>41</sup> *Id.* at 269.

promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise.”<sup>42</sup> Such an [implied] promise, if it is to be found at all, must be based on circumstances which were known to the offeree at, and preceding, the time of disclosure of the idea and be voluntarily accepted by the offeree, knowing the conditions on which it was tendered.<sup>43</sup> Several propositions follow naturally. The law will not, from demands stated subsequent to an unconditional disclosure of an idea, imply a promise to pay for the idea, for its use, or for its prior disclosure. Nor will the law imply a promise to pay from the mere facts that the idea has been conveyed, is valuable and has been used for profit. This is so even if the conveyance of the idea was made with the conveyor’s hope or expectation that some obligation would ensue.

It must be stressed again that for recovery based on contract, the plaintiff’s story need not be capable of copyright. Any synopsis or idea may possess value in someone’s estimation and therefore may be the subject of a contract. In *Desny*,<sup>44</sup> the defendant clearly had the right to do its own research into the subject historical event in the public domain and prepare a story based on that research and translate it into a script. However, the defendant had no right, assuming all of the requisite circumstances discussed above were met, to acquire and use the synopsis prepared by the plaintiff, except by purchase on the terms offered by the plaintiff.<sup>45</sup>

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<sup>42</sup> *Id.* at 270 (citing *Weitzenkom v. Lesser* 256 P.2d 947 (Cal. 1953); *Elfenbein v. Luckenback Terminals*, 166 A. 91, 93-94 (N.J. 1933)).

<sup>43</sup> *Id.*; *see generally* CAL. CIV. CODE. § 1584 (2012) (“[T]he acceptance of the consideration offered with a proposal, is an acceptance of the proposal” can have no application unless the offeree has an opportunity to reject the consideration-the proffered conveyance of the idea before it is conveyed. Unless the offeree has opportunity to reject, he cannot be said to accept.).

<sup>44</sup> *Desny v. Wilder*, 299 P.2d 257, 272 (Cal. 1956).

<sup>45</sup> *Id.* at 272-73. It should be noted that both plaintiff’s and defendant’s stories were taken from the same public domain material and the mere fact that plaintiff submitted and offered to sell plaintiff’s story to the defendant and that thereafter the defendant used the same public domain material, does not support an inference that the defendant promised to pay for the idea of using public domain material. On the other hand, the fact that the plaintiff used the public domain material in writing his story and synopsis would afford no justification for the defendant to appropriate the plaintiff’s work and use it in the production of a movie without compensating the plaintiff for the value of his story.

The case of *Mann v. Columbia Pictures, Inc.*<sup>46</sup> presents a good example of the required circumstances for a contract claim and how they are typically incorporated into jury instructions. The plaintiff had written “Women Plus,” a brief description of six characters in a beauty salon with a short narration of a number of scenes and had submitted it to the defendants with the expectation of being paid if her work was used. Four years later, the defendants released the movie “Shampoo” and the plaintiff, recognizing several similarities, brought suit claiming an implied-in-fact contract with the defendant. The trial court’s instructions to the jury were as follows:

In her action against the defendants for breach of an implied contract, plaintiff Bernice Mann has the burden of establishing, by a preponderance of the evidence, all of the facts necessary to prove each of the following issues:

1. That plaintiff submitted her ideas to the defendants and that the defendants received them.
2. That before plaintiff submitted her ideas to the defendants; she clearly conditioned her disclosure upon defendants’ agreement to pay for those ideas of plaintiffs which the defendants used, if any.
3. That defendants knew, or should have known, the condition upon which the disclosure was being made before the disclosure was made.
4. That the defendants voluntarily accepted the submission on plaintiff’s terms and thereby impliedly agreed to pay plaintiff for any of her ideas which it might use.
5. That in writing the script for the motion picture ‘Shampoo’, the defendants actually used plaintiff’s ideas, that is, that the defendants based the motion picture ‘Shampoo’ substantially upon plaintiff’s ideas rather than on their own ideas or ideas from other sources.
6. That the ideas of plaintiff which were used, if any, had value.

In order to find for the plaintiff, you must find that she established, by a preponderance of the evidence, each and every one of the

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<sup>46</sup> See 180 Cal. Rptr. 522, 533 (Cal. Ct. App. 1982).

foregoing described issues; otherwise, you must find for the defendants.<sup>47</sup>

The appellate court held that these instructions were proper and that the trial court was correct in granting judgment n.o.v. to the defendants.<sup>48</sup>

In an earlier case, *Blaustein v. Burton*,<sup>49</sup> involving major movie personalities, the appellate court had to directly address the question of whether an implied contract may be created from the fact of disclosure and discussion of a story idea. The plaintiff had been in the movie business for over thirty years and had produced close to twenty movies, many of which have been very successful.<sup>50</sup>

In 1964, the plaintiff conceived an idea for a movie based on Shakespeare's play, "The Taming of the Shrew," which would star two major movie personalities of the modern day, Richard Burton and Elizabeth Taylor, and be directed by Franco Zeffirelli.<sup>51</sup> The idea was presented to Burton's agent and then to Zeffirelli, both of whom responded enthusiastically.<sup>52</sup> As contract negotiations ensued, the plaintiff learned that his position as producer of the movie was in jeopardy.<sup>53</sup> He was subsequently told, however, by Burton and Taylor's attorney, that even if another producer was engaged, he would nevertheless be recognized and compensated for his contributions to the project.<sup>54</sup> Thereafter, a movie was produced and released by Columbia

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<sup>47</sup> *Id.* at 526. Quasi-contract was a side issue in this case, but the court held that the material allegedly used by the defendant had to also constitute protectable property for the plaintiff to succeed under this theory. The court determined that there was no substantial similarity between "Shampoo" and the plaintiff's outline as to form and manner of expression; therefore no use of "property" belonging to the plaintiff; *see also* Weitzenkorn, 256 P.2d at 947.

<sup>48</sup> *Id.* at 535. The trial court held that the jury disregarded the lack of direct evidence to connect the submitted material to the defendants.

<sup>49</sup> 88 Cal. Rptr. 3d 319, 328-29 (Cal. Ct. App. 1970).

<sup>50</sup> The successful films included "Broken Arrow," "Mr. 880," "Half Angel," "The Day The Earth Stood Still," "Desiree," "Storm Centers," "Bell, Book and Candle," and "The Four Horsemen of the Apocalypse."

<sup>51</sup> *Blaustein*, 88 Cal. Rptr. 3d at 322.

<sup>52</sup> *Id.* at 323.

<sup>53</sup> *Id.* at 325.

<sup>54</sup> *Id.*

Pictures called, “The Taming of the Shrew.”<sup>55</sup> The film, incorporating many of plaintiff’s ideas, starred Burton and Taylor, with Zeffirelli as the director.<sup>56</sup> A key element in the movie was the elimination of the play within a play device found in the original Shakespearean play as well as the enactment of two important scenes that occur off stage in the original work, both of which were plaintiff’s ideas.<sup>57</sup> Plaintiff was given neither credit nor compensation for his contribution to the project. Summary judgment was granted for defendant by the trial judge.<sup>58</sup>

The appeals court found that the plaintiff did have a viable contract claim for disclosure of an idea that, while perhaps not “novel,” was valuable and that there were indeed triable issues of fact.<sup>59</sup> The court said:

We are of the opinion that appellant’s idea of the filming of Shakespeare’s play “The Taming of the Shrew” is one which may be protected by contract. Express or implied contracts both are based upon the intention of the parties and are distinguishable only in the manifestation of assent. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. Whether or not the appellant and respondents here, by their oral declarations and conduct, as shown by the depositions and affidavits, entered into a contract whereby respondents agreed to compensate appellant in the event respondents used appellant’s idea, is a question of fact which may not be properly resolved in a summary judgment proceeding, but must be resolved upon a trial of the issue.<sup>60</sup>

It is interesting to note that, in addition to the contract issues raised, another claim was that the defendants breached a duty of confidence owed to the plaintiff.<sup>61</sup> This duty, the plaintiff

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 326.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 322.

<sup>59</sup> *Id.* at 326-27. Regarding “novelty,” plaintiff had admitted that there was nothing novel in casting stars to adapt a Shakespearean play to the screen. In fact, about twenty years earlier, a film version of “The Taming of the Shrew” had been made with two leading stars (Douglas Fairbanks and Mary Pickford) and that version had also eliminated the play within a play device and visually depicted the two scenes that are only described in narrative in the original play.

<sup>60</sup> *Id.* at 334-35.

<sup>61</sup> *Id.* at 328.

contended, was based upon the parties' dealings and the trust and confidence plaintiff placed in the defendants.<sup>62</sup> The court likewise ruled that a verdict on this claim was inappropriate for summary judgment.<sup>63</sup>

With further regard to the concept of "novelty," traditionally, to be protected, an idea has to show both "genuine novelty and invention."<sup>64</sup> However, courts have not traditionally been clear as to how novelty or originality should be assessed. Some courts elicit distinct meanings for novelty and originality<sup>65</sup> while others use the words "original" and "novel" interchangeably.<sup>66</sup> Essentially, general novelty has ceased to be a requirement for the protection of ideas,<sup>67</sup> and novelty in the context of a contract claim has taken on an evidentiary function, meaning evidence of a valuable consideration rather than a necessary element of a claim.<sup>68</sup> While an idea may not be novel, parties have the right by contract to prevent disclosure of any materials, even though they are not secret or confidential and may even be a matter of public knowledge.<sup>69</sup> A producer may claim that a particular public domain subject is available to him at any time and for whatever reason he thinks of it; however, this may not be a good defense, as pointed out in *Chandler v. Roach*:<sup>70</sup>

The producer and the writer should be free to make any contract they desire to make with reference to the buying of the ideas of the writer; the fact that the producer may later determine, with a little thinking, that he could have had the same ideas and could thereby have saved considerable money for himself, is no defense against

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<sup>62</sup> *Id.* at 336.

<sup>63</sup> *Id.* at 336-37.

<sup>64</sup> See *Educ. Sales Programs, Inc. v. Dreyfus Corp.*, 317 N.Y.S.2d 840, 844 (N.Y. Sup. Ct. 1970); see also *Downey v. Gen. Foods Corp.* 286 N.E.2d 257, 259 (N.Y. 1972) (explaining that the property right in an idea is based upon two elements: novelty and originality).

<sup>65</sup> See generally *AEB and Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724, 734 (S.D.N.Y. 1994).

<sup>66</sup> See *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 374 (2d Cir. 2000).

<sup>67</sup> See *Desny v. Wilder*, 299 P.2d 257, 266; see also *Chandler v. Roach*, 319 P.2d 776, 781-82 (Cal. Dist. Ct. App. 1957).

<sup>68</sup> See generally *Mary LaFrance, Something Borrowed, Something New: The changing Role of Novelty in Idea Protection Law*, 34 SETON HALL L. REV. 485, 498 (2004).

<sup>69</sup> See *Krisel v. Duran*, 258 F. Supp. 845, 860 (S.D.N.Y. 1966).

<sup>70</sup> *Chandler v. Roach*, 319 P.2d 776, 781 (Cal. Dist. Ct. App. 1957).

the claim of the writer. This is so even though the material to be purchased is abstract and unprotected material.<sup>71</sup>

Independent creation<sup>72</sup> can be a forceful defense in misappropriated story ideas cases.<sup>73</sup> Even if the plaintiff convincingly demonstrates similarity between two works, the defendant can introduce evidence of its independent creation of the allegedly misappropriated story idea.<sup>74</sup> In *Mann v. Columbia Picture, Inc.*,<sup>75</sup> the plaintiff contended that the defendant had misappropriated plaintiff's idea in its development of the successful movie "Shampoo." Plaintiff presented evidence of submission of plaintiff's treatment to a friend who gave it to her neighbor who was a production manager for an independent filmmaker located on defendant's move lot.<sup>76</sup> While the court acknowledged that some of defendant's staff may have had access to plaintiff's work, it importantly noted that the specific "Shampoo" screenwriters did not actually have access to plaintiff's scripts.<sup>77</sup> The court accordingly held, "The 'independent effort' of Towne and Beatty [the two screenplay writers] in developing the "Shampoo" script provides Columbia [defendant] with a complete defense against the contractual obligation alleged therein."<sup>78</sup>

It is clear from this case that, while proof of substantial similarity gives rise to an inference of both access and copying, the weight to be given the inference as against direct evidence of non-access and non-copying is a question for the trier of fact.<sup>79</sup> However, evidence of independent creation must be strong enough to satisfy a clear, positive, and unconditional

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<sup>71</sup> *Id.*

<sup>72</sup> Also sometimes referred to as "independent effort." See *Mann v. Columbia Pictures, Inc.*, 180 Cal. Rptr. 522, 535 (1982).

<sup>73</sup> *Id.*

<sup>74</sup> See *Taish v. General Mills, Inc.*, 339 P.2d 627, 635 (Cal. Dist. Ct. App. 1959).

<sup>75</sup> *Mann*, 180 Cal. Rptr. at 524.

<sup>76</sup> *Id.* at 527.

<sup>77</sup> *Id.* at 527-28. Defendants' presented uncontradicted evidence that neither screenplay writer had any contact with the production manager or story editor who had actual possession of plaintiff's materials.

<sup>78</sup> *Id.* at 535.

<sup>79</sup> See *Kovacs v. Mut. Broad. Sys.*, 221 P.2d 108, 114 (Cal. Ct. App. 1950).

standard used by the courts.<sup>80</sup> A good example of the application of this standard can be seen in *Donahue v. Ziv Television Programs*.<sup>81</sup> In this case, the plaintiffs claimed that the defendant and the producer of the television show, “Sea Hunt,” had misappropriated the plaintiff’s ideas and story outlines. The defendants denied the allegation and set forth what the court called “a fairly impressive case to the effect that the idea for ‘Sea Hunt’ was independently created by [the producer].”<sup>82</sup> Still, the court found that the defendants failed to satisfy the standard of independent creation because the producer’s alleged independent interest was uncorroborated.<sup>83</sup>

Another avenue to overcoming the independent creation defense is to show that the two works are so strikingly similar as to overcome the evidence of independent creation and then create an inference of actual use. This argument was used by plaintiff in *Kienzle v. Capital Cities/American Broadcasting Co.*<sup>84</sup> Plaintiff Kienzle alleged that defendant misappropriated his idea for a television series entitled “All Things,” about an inner city Catholic rectory run by a group of priests. In support of his contention, Kienzle focused on several undisputed pertinent facts: (1) the title “Have Faith” and the title of Kienzle’s proposed series, “All Things,” both of which contain two one-syllable words; (2) in promoting their series, both ABC and Kienzle referred to “Barney Miller”; (3) both series have a character who is a Polish priest; (4) Kienzle’s treatment and an ABC’s advance press release describe a priest who is well built; (5) both series accentuate the “interaction of priests and people” rather than the “interplay between priests”; and (6) both series are situation comedies set in an inner-city rectory.<sup>85</sup>

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<sup>80</sup> See, e.g., *Overman v. Loesser*, 205 F.2d 521, 523 (9th Cir. 1953).

<sup>81</sup> 54 Cal. Rptr. 130, 132-33 (Cal. Ct. App. 1996).

<sup>82</sup> *Id.* at 132.

<sup>83</sup> *Id.* at 133. The court also pointed out that in addition to the uncorroborated interest, some of the evidence which the producer used to prove his interest could have been gathered after he met with the plaintiffs to discuss plaintiff’s story idea.

<sup>84</sup> *Kienzle v. Capital Cities/Am. Broad. Co.*, 774 F. Supp. 432, 437 (E.D. Mich. 1991).

<sup>85</sup> *Id.*



Although plaintiff did not succeed in this case,<sup>86</sup> it is still a viable tactic to overcome a defendants' declaration of independent creation.<sup>87</sup>

In a cause of action for breach of confidence, copyright protectability of a literary work is not a necessary element of proof.<sup>88</sup> An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission.<sup>89</sup> The submission by itself of an idea will not automatically create a confidential relationship between the idea purveyor and the party to whom the idea is submitted. "There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred."<sup>90</sup>

In *Faris*,<sup>91</sup> it was contended by defendant that "a literary work has to be protectable under copyright law in order to be the basis for a breach of confidence action."<sup>92</sup> The court, as noted above, disagreed.<sup>93</sup> Of course, "There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred."<sup>94</sup> "Among the factors from which such an inference can be drawn are: proof that the

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<sup>86</sup> *Id.* at 437-38. The court noted that many television shows have titles containing only two one-syllable words, and several popular situation comedies feature regular interaction between key characters and the general public. Finally, the court reasoned that it was not an "unearthly" coincidence that two writers "intimately familiar with the priesthood independently thought of the same raw idea for a television series within a seven-year period."

<sup>87</sup> *See id.*

<sup>88</sup> *Faris v. Enberg*, 158 Cal. Rptr. 704, 712 (Ct. App. 1979).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 711.

<sup>93</sup> *Id.* at 712.

<sup>94</sup> *Id.*

material submitted was protected by reason of sufficient novelty; or proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller[.]”<sup>95</sup>

In many cases, for a court to find the existence of a confidential relationship between the idea creator and the recipient, the court would have to find either that the parties are in a recognized fiduciary relationship or that the idea creator reposed trust in the recipient, and that the recipient accepted that trust and purported to act with the creator’s best interests in mind.<sup>96</sup> There are clearly “limits as to how far established legal categories can or should be bent to accommodate all situations in which a recipient of an idea comes under a duty not to use or disclose ideas.”<sup>97</sup> Applying traditional confidential relationship law to idea submissions cases becomes problematic quickly.<sup>98</sup> The courts have therefore gravitated towards more expansive definition of a confidential relationship, such as in *Faris*,<sup>99</sup> which includes circumstances in which the idea submission is confidential even if the relationship is not more generally one of trust and confidence.<sup>100</sup> Also, many confidentiality agreements exclude certain types of information from the definition of confidential information. It is very important that the recipient include these exceptions in the confidentiality agreement:

Some commonly employed exceptions are information that the recipient can demonstrate that they had prior to receipt of information from the discloser, information that becomes known to the public through no fault of the recipient, information that becomes known to the recipient from a third party that has a lawful

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<sup>95</sup> *Id.*

<sup>96</sup> See Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 713 (2006).

<sup>97</sup> *Id.* at 714.

<sup>98</sup> See Restatement (Second) of Trusts § 2 (1959) (“A confidential relationship exists when one has gained the confidence of the other and purports to act or advise with the others intent in mind...it is particularly likely to exist where there is a family relationship or one of friendship or such other relation of confidence as that which arises between physician and patient or priest and penitent.”). This clearly has little application to the idea purveyor trying to sell his idea for pecuniary advantage.

<sup>99</sup> *Faris*, 158 Cal. Rptr. at 711.

<sup>100</sup> Katz, *supra* note 81, at 715 (“A good account of the source of the duty not to use or disclose another’s novel idea strives for internal coherence, fits with the core criteria of the positive law, and is also consistent with the idea of obligation implicit in other well-established areas of Anglo-American Law.”).

right to disclose the information, information that was public knowledge before the disclosure of the information to the recipient, and information independently created by the recipient.<sup>101</sup>

Also, standards for dealing with the subject matters of the agreement need to be spelled out with clarity.<sup>102</sup>

*Montz v. Pilgrim Films and TV, Inc.*<sup>103</sup> is one of the most recent cases to deal with the issue and discuss, in detail, preemption by federal copyright law. In 1981, Larry Montz, a parapsychologist, conceived an idea for a television show that would follow a team of paranormal investigators conducting field investigations.<sup>104</sup> From 1996 to 2003, the plaintiffs<sup>105</sup> presented the ideas to the television studios, producers, and their representatives, including representation of defendants.<sup>106</sup> In meetings and discussions with the defendants, the plaintiffs presented screenplays, videos, and other materials relating to their proposed show.<sup>107</sup> Ultimately, the defendants indicated that they were not interested.<sup>108</sup>

Three years later, defendants produced a television series on the sci-fi channel called “Ghost Hunters,”<sup>109</sup> which the plaintiffs claimed was based on their materials. The plaintiffs brought suit against the defendants alleging copyright infringement, breach of implied contract,

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<sup>101</sup> David V. Radack, *Understanding Confidentiality Agreements*, 46 (5) JOM 68, 68 (1994).

<sup>102</sup> *Id.* (“Usually, each party will treat the other’s confidential information in the same way that it treats its own. However, this treatment is acceptable only if the recipient has set standards for handling confidential information, such as limiting access to the information or other methods of preserving secrecy. Therefore, before signing a confidentiality agreement, it would be prudent to investigate the recipient’s practices regarding maintaining secrecy of its own information. If those practices are substandard or even nonexistent, the confidentiality agreement should contain specific provisions concerning limiting access to the confidential information [clearly marking the information ‘confidential’].”).

<sup>103</sup> *Montz v. Pilgrim Films and TV, Inc.*, 649 F.3d 975, 979-81 (9th Cir. 2011) (en banc).

<sup>104</sup> *Id.* at 977.

<sup>105</sup> *Id.* Larry Montz was joined by plaintiff Daena Smaller, a publicist and a producer who together with Montz, made the sales pitches.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The show starred Jason Conrad Hawes as the leader of the team of investigators who trained across the country to study paranormal activity.

breach of confidence, and several other courses of action.<sup>110</sup> The court concluded that the complaint alleged facts sufficient to state a federal copyright claim, but that federal copyright law preempted plaintiffs' state law claims.<sup>111</sup> After the parties stipulated to the voluntary dismissal of their amended copyright claim, the district court entered final judgment in favor of defendants, which was subsequently affirmed.<sup>112</sup>

The court,<sup>113</sup> referring back to its application of the so-called "*Desny*-claim" in its 2005 decision,<sup>114</sup> again held that copyright law does not prevent a contract claim where plaintiff alleges a bilateral expectation of compensation for the use of the idea. The court noted that, for preemption purposes, state law protection for fixed ideas falls within the subject matter of copyright and, thus, satisfies the first prong of the statutory preemption test, despite the exclusion of fixed ideas from the scope of actual federal copyright protection.<sup>115</sup> Therefore, the major focus must be the second prong of the preemption test, namely, whether the asserted state right is equivalent to any of the exclusive rights within the general scope of copyright.<sup>116</sup> To survive preemption, a state cause of action must assert rights that are quantitatively different from the rights protected by copyright.<sup>117</sup> With regard to plaintiffs' breach of confidence claim, the court held that it also survives copyright preemption noting that the claim protects the duty of trust or

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Montz v. Pilgrim Films & Television Inc.*, 606 F.3d 1153, 1156 (9th Circuit 2011).

<sup>113</sup> *Id.* at 1157-58.

<sup>114</sup> *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004), amended 400 F.3d 658 (9th Cir. 2005), cert. denied 546 U.S. 824 (2005) (The court held that an implied contractual claim is not preempted by federal copyright law but that the contractual claim requires that there be an expectation on both sides that use of the ideas requires compensation, and that such bilateral understanding of payment constitutes an additional element that transforms a claim from one asserting a right exclusively protected by copyright law, to a claim that is not preempted by copyright law). *But see* *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (1987) (The court recognized a claim for unjust enrichment as essentially equivalent to a claim of copyright infringement and therefore preempted).

<sup>115</sup> *See* 17 U.S.C. § 102 (2011) ("In no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept . . . embodied in such work.").

<sup>116</sup> *See* *Grosso*, 383 F.3d at 968.

<sup>117</sup> *Id.*

confidential relationship between the parties, an extra element that makes it quantitatively different from a copyright claim.<sup>118</sup>

### CONCLUSION

Idea submission claims continue to be a source of difficult litigation and many of the legal issues involved remain unsettled in a uniform manner.<sup>119</sup> To state a tenable claim under copyright law, a plaintiff must show that his idea submission moved beyond the realm of an idea and into the domain of expression because copyright law has never protected *ideas* as such, but rather the original expression of an idea.<sup>120</sup> Because of the way the entertainment industry operates, this is often an insurmountable hurdle in such a claim. In addition, copyright law affords no protection to so-called “scenes a faire” (i.e. characters and settings or events which necessarily follow from a theme or plot situation).<sup>121</sup>

Debates continue as to what a plaintiff must show to establish formation of an appropriate common law remedy. Courts are constantly trying to work out protection that does not run afoul of the historical concept that there is no property right in an idea.<sup>122</sup> This is being done by enforcing express or implied in fact contracts, which provide idea purveyors with the broadest

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<sup>118</sup> *Id.*; see also *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 982 F.3d 693, 717 (2d Cir. 1992); *Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535, 542 (D. Md. 2000) (the dissenting opinion in *Monty* takes issue with the majorities application of “quantitative difference,” stating that “Montz asserts that Pilgrim produced and broadcast a television program derived from Montz’s screenplays, video, and other materials without authorization. These rights are equivalent to the rights of copyright owners under section 106 namely, the exclusive rights to authorize reproduction, distribution, and display of original works, and to authorize preparation of derivative works.”); See *Del Madera Props. v. Rhodes on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (“[A]n implied promise not to use or copy materials within the subject matter of copyright is equivalent to the protection provided by section 106 of the Copyright Act.”).

<sup>119</sup> See Brian Devine, *Free as the Air: Rethinking the Law of Story Ideas*, 24 HASTINGS CONN & ENT L. J. 355, 394 (1988).

<sup>120</sup> See, e.g., Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, n.110 (Winter 1990).

<sup>121</sup> See, e.g., Michael D. Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 781-82 (Fall 2006).

<sup>122</sup> The reason for requirement of a property right in common law copyright was to have a remedy good against the world. The reason for this requirement is missing in an action on a contract. Unlike a copyright, a contract creates no monopoly and is effective only between the contracting parties. See *Chandler v. Roach*, 156 Cal. App. 2d 435, 441 (1957).

protection in idea submission cases.<sup>123</sup> Also, but to a lesser extent, confidential relationship law has been applied in such cases. Without this protection, potentially valuable creative sources would be left with very little protection. Contract and confidential relationship claims are not preempted because they flow from agreements and understandings different from the monopoly protection of copyright law.<sup>124</sup>

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<sup>123</sup> As a matter of practicality for the idea purveyor unable to secure a written bilateral protective contract from the party to whom an idea is being pitched, he should minimally make it clear in words to the other party that he is disclosing the idea with the specific understanding that if it is used by the third party or anyone to whom the third party communicates the idea, that he expects to receive appropriate and reasonable compensation to be negotiated between the parties in good faith. Having a disinterested witness to such conversation is clearly a plus.

<sup>124</sup> Generally, any person not a party to the contract is free to use the idea without restriction. *See* Chandler v. Roach, *supra* note 59, at 441.