3-1-1995

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Recommended Citation

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ARTICLES

WHAT IS YOUR PITCH?: IDEA PROTECTION IS NOTHING BUT CURVEBALLS

David M. McGovern*

I. INTRODUCTION

In the opening scene of the movie The Player, Griffin Mill, a studio executive, meets with several different “idea men” to hear their pitches for potential movies. Any one of these pitches may eventually turn out to be the next blockbuster hit, the next bomb, the next idea to be condemned to development damnation, or it may simply never be spoken of again. While the studio executive acts as if listening to pitch after pitch is a harrowing experience, everyone knows that he is licking his chops, waiting for the idea that will propel him up the studio ranks. After all, “‘[w]ho can resist something that sounds like a good movie? . . . Ideas are so seductive. A good pitch is irresistible.’”

Not all television or movie ideas originate from pitch meetings, many ideas are presented in the form of fully-developed scripts or lesser-developed treatments. Yet, regardless of how the idea-man chooses to present his idea, scripts and pitches raise serious concerns over the rights of studios and the rights of idea-men to the idea presented.

For instance, in one pitch meeting, Griffin Mill asks “What have you got for me?”; in another he asks, “What’s your pitch?”; and in that same

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1. THE PLAYER (Fine Line 1992). The film The Player was directed by Robert Altman, written by Michael Tolkin, and stars Tim Robbins as Griffin Mill.

2. Professor Nimmer defines the “idea man” as “one 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.” DAVID NIMMER, NIMMER ON COPYRIGHT § 16.01 (1993).

meeting, he concludes "[i]t’s an intriguing idea . . . . Let it sit with me for a couple of days . . . . Let me get back with you."^4 Suppose Griffin Mill

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4. Below is a transcript of two pitches from The Player, (Fine Line 1992). The idea man is noted by “IM” while the executive, Griffin Mill, is “GM.”

First Idea Man (IM) —

GM: What have you got for me?
IM: Ok. Here it is. The Graduate Part II.
GM: Oh, good.
IM: Now listen. The three principals are still with us. Dustin Hoffman, Anne Bancroft, Katherine Ross. Twenty-five years later. And so are the characters, Ben, Elaine, and Mrs. Robinson. Ben and Elaine are married still. They live in a big spooky old house, oh, in Northern California somewhere. And Mrs. Robinson lives with them. Her aging mother who’s had a stroke.
GM: Mrs. Robinson had a stroke?
IM: Yeah, Mrs. Robinson had a stroke, so she can’t talk.
GM: Is this going to be funny?
IM: Yeah, it’ll be funny. Dark and weird and funny and with a stroke.
GM: OK.
IM: Maybe it’s not a stroke, maybe, I don’t know what it is . . .
GM: Anyway, go on.
IM: It’s a malady of some sort. She’s up there in the bedroom upstairs listening to everything that happens. They’ve got a daughter who has just graduated from college.
GM: That’s good. That’s good. Young blood.
IM: Twenty-two, twenty-three years old, like a Julia Roberts.
GM: Great, that’s great.
IM: Ok, Julia Roberts, their daughter, the graduate . . .
GM: The new graduate. The post graduate . . .
Next Idea Man, “Jim” —

GM: What’s your pitch?
Jim: Well, does political scare you?
GM: Political doesn’t scare me. Radical-political scares me.
Jim: This is slightly politically radical, but —
GM: Is it funny?
Jim: It’s funny.
GM: It’s a funny political thing.
Jim: It’s a funny, it’s a thriller too.
GM: It’s a thriller.
Jim: And it’s all at once . . . Well, I want Bruce Willis. I think I can talk to him. It’s a story about a Senator, a bad guy Senator at first, and he’s traveling around the country on the country’s dime, you know, like that Sununu guy used too.
GM: I see, sort of a cynical political thriller comedy.
Jim: Yeah, but it’s got a heart, uh, in the right spot. And, anyway, he has an accident.
GM: An accident.
Jim: Yeah, and he becomes clairvoyant.
GM: Oh, I see.
Jim: Like a psychic.
GM: So it’s kind of a psychic political thriller comedy with a heart.
Jim: And, uh, not unlike “Ghost” meets “Manchurian Candidate.”
GM: Go on, go on, I’m listening.
Jim: Anyway, he can start to read people’s minds, and he gets to the President’s mind, and it’s completely blank. Completely blank . . . . Of course,
never calls, but instead hires a writer to draft a screenplay based upon the idea-man's pitch. Will the idea-man be protected? Does it matter that the parties met at an appointed time at Griffin Mill's office on the studio lot? If not, does it matter that Griffin Mill expressly requested the pitch at the beginning of the meeting? Taking the hypothetical a step further, would it matter if Griffin Mill was a bartender instead of a studio executive? What if the bartender or the studio executive never asked to hear the idea? On a different note, what if the idea-man had faxed a full script to Griffin Mill? Or a "spec" script? What if copyright does not provide adequate protection? Each of these questions raise very real problems for not only the studio executive and the idea-man, but also every company or person that receives or creates a potentially valuable idea.

Ordinarily, products of the mind or intellectual endeavors are protected under one of five traditional areas of intellectual property law:

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6. The definition of "idea" is as amorphous as one may expect. As one commentator stated, "an 'idea' is not an epistemological concept, but a legal conclusion prompted by notions - often unarticulated and unproven - of appropriate competition. Thus, copyright doctrine attaches the label 'idea' to aspects of work which, if protected, would (or, we fear, might) preclude, or render too expensive, subsequent authors' endeavors." Jane C. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 346 (1992). In the courts, the definition of "idea" changes depending upon which court is deciding the case, and which form of idea protection is being discussed. That is, requirements such as concreteness and novelty shape which conceptions fit within the term "idea."

Rather than emphasizing novelty and concreteness, the author finds that an idea should be defined as any disclosure which is considered valuable to the parties. See infra part V. Because this Article does not support a property theory in ideas, there is no need to distinguish between protected and unprotected ideas except when determining value under the quasi-contract, implied-in-fact contract, or express contract theories. While copyright law has struggled to distinguish idea from expression, protecting only the latter, idea law, by placing the emphasis on value, may avoid this struggle to separate the formulated idea from the unformulated idea.
Given the vast reach of intellectual property protection, it would seem that the idea-man could find solace under one of these five areas. However, this has not been the case. Instead, the idea-man, while not always left totally unprotected, has been wading through a morass of court opinions providing unpredictable, and, at best, inconsistent protection.

This Article will provide some helpful guidance to the idea-man and his prospective purchaser by putting some order to the myriad of cases known as "idea law." Part II gives an overview of the five theories of idea protection that have been adopted by the states in varying degrees. The overview includes a discussion of the general requirements for idea protection under each of the theories and the problems confronted by each,
specifically regarding the requirements of novelty and concreteness, and the
effect of federal preemption. Part III presents the basic laws of California
and New York, the two jurisdictions that most often deal with idea
protection and the entertainment industry. Part IV discusses available
methods for both the seller and purchaser to avoid litigation under current
doctrines. Finally, Part V concludes with a recommendation for a uniform
method of handling idea protection cases.\textsuperscript{12}

\section{II. \textbf{Five Theories of Idea Protection}}

It is a long-standing and general rule that ideas are as “free as the
air.”\textsuperscript{13} Justice Brandeis made this point clear in his oft-quoted dissent to
the seminal property case \textit{International News Service v. Associated
Press}.\textsuperscript{14} Specifically, Brandeis stated that ideas “become, after voluntary
communication to others, free as the air to common use.”\textsuperscript{15} However, as
with all general rules, there are notable exceptions. In \textit{Desny v. Wilder}, the
California Supreme Court noted such possibilities by stating, “there can be
circumstances when neither air nor ideas may be acquired without cost.”\textsuperscript{16}
It is with these exceptions that this Article is concerned.

Basically, current idea law can be ordered into five theories of
protection: property, quasi-contract or unjust enrichment, express contract,
implied-in-fact contract, and confidential relationship.

\subsection{A. Property Theory}

Property, in the legal sense, is defined as the “aggregate of rights
which are guaranteed and protected by the government.”\textsuperscript{17} Included in the
bundle of property rights is the right to exclude others from using and
enjoying one’s property.\textsuperscript{18} Thus, the property theory, taken literally,
would provide the creator of an idea the exclusive right to prevent the use or disclosure of such idea without the idea-man’s permission.

The granting of property rights in ideas raises the policy concern that these rights impede progress as those embarking on intellectual endeavors are faced with one roadblock after another. In other words, creativity and improvements are stifled as the artist or inventor chooses not to publicize his creation or invention out of fear of liability to the idea-man. On the other hand, protecting ideas creates an incentive for the idea-man to disclose his idea, ultimately promoting progress as artists, inventors, and the general public have access to ideas which otherwise may have been withheld. The overriding question is, where should the commons end and the property begin? In other words, at what point is the incentive of property protection no longer necessary to aid progress?

The tension between creating an incentive to invent and protecting the free flow of ideas is not new. The Court addressed the same problem in the 1879 case *Baker v. Selden* where copyright protection was extended only to the method of expressing the idea, not to the idea itself. Similarly, patent law provides an inventor of a novel, nonobvious, and useful invention with a monopoly in the invention for a limited time; but the inventor does not have a monopoly in the underlying idea. For instance, Alexander Graham Bell, in patenting the telephone, received the exclusive right to his invention, but he did not have any exclusive rights in the idea of communicating through wire. Given the conclusions reached in these intellectual property fields, it is not difficult to understand why courts and commentators have been extremely cautious in embracing the property theory for protecting ideas. Notwithstanding the status of copyright and patent law, there have been a few courts that have found that the best way to relieve the tension is to recognize property rights in ideas.

19. *See* Stanley v. Columbia Broadcasting Sys., Inc., 221 P.2d 73, 84-85 (Cal. 1950) (Traynor, C.J., dissenting) (“They would indeed be stifled in their efforts to create forms worth protecting, if in the common through which they ranged they were diverted from their course by one enclosure after another.”); Barrett, *supra* note 12, at 696 (“Recognizing property rights in ideas may serve as an incentive to creativity, but it also may serve as a roadblock to creativity on the part of others.”); Grant Hammond, *The Legal Protection of Ideas*, 29 Osgoode Hall L.J. 93, 97 (1991) (“Ideas are part of the seamless web of humanity. Breaking pieces out of that web, unless for an overwhelming justification, robs us of part of ourselves.”).


21. *See* Baker v. Selden, 101 U.S. 99 (1879) (disallowing copyright in idea because plaintiff would have a de facto monopoly in the idea without satisfying the stringent patent standards).

1. Scope of Protection

There are primarily two areas in which such courts have recognized a property interest in ideas — slogans, and radio and television formats. However, before these courts will recognize a property interest in


24. A format for a television or radio series has been defined as: “a written presentation which sets forth the framework of the serial or episodic series within which the central running characters will operate and which framework is intended to be repeated in each episode, the setting, theme, premise or general story line of the proposed serial or episodic series.” Barrett, supra note 12, at 705 n.68 (citing Writers Guild of America, 1960 Television Film Basic Agreement as modified by memorandum of June 15, 1966, re: 1966 WGA TV Film Negotiations, art. 1(i)(aa)). For cases endorsing the property theory in radio and television formats, see Nimmer, supra note 2, § 16.02; Belt v. Hamilton Nat'l Bank, 108 F. Supp. 689, 691 (D.D.C. 1952), aff'd, 210 F.2d 706 (D.C. Cir. 1953) ("The law now gives effect to a property right in an idea even though the idea may be neither patentable nor subject to copyright."); Kovacs v. Mutual Broadcasting Sys., 221 P.2d 108, 112 (Cal. 1950) (in finding that a written and recorded radio program format was a protectable product of the mind, the court reasoned that "[a]n author who takes existing materials from sources common to all writers” is entitled to protection if the format is both original and novel); Kurlan v. Columbia Broadcasting Sys., 256 P.2d 962, 969 (Cal. 1953) (in finding causes of action to exist for infringement of a written and recorded radio program format, the court reasoned that "for Kurlan to have a protectable interest in his radio program idea as reduced to a production format, he must establish both originality and novelty."). It should be noted that both Kurlan and Kovacs arose prior to the amendment of California Civil Code § 980, in which the amendment limited protection to “the author or proprietor of any composition” from the previously broader provision providing protection for “the author of any product of the mind.” The amendment was interpreted to mean that California law recognizes the traditional theory of protection under common law copyright, thereby possibly limiting the reaches of Kurlan and Kovacs. See Weitzenkorn v. Lesser, 256 P.2d 947, 956 (Cal. 1953) (in sustaining a demurrer to a claim for misappropriation of plaintiff’s uncopyrighted literary composition, the court reasoned that “[t]he idea alone, the bare, undeveloped story situation or theme, is not protectable.”).
an idea, the idea must be both novel\textsuperscript{25} and concrete.\textsuperscript{26}

a. Novelty

Taken literally, novelty requires that the idea be "strikingly new, unusual, or different."\textsuperscript{27} Under such a definition, the novelty requirement is tremendously more difficult to meet than the copyright burden of originality. While originality requires that the author engage in some intellectual endeavor and not just copy from a preexisting source,\textsuperscript{28} novelty requires that no other such work has ever existed.\textsuperscript{29}

However, like most issues in idea law, the novelty requirement has been a source of confusion for the courts. Depending upon the jurisdiction, some courts have required novelty in the literal sense, others have required both novelty and originality, and still others have required novelty but used the definition of originality.\textsuperscript{30} In actuality, courts that require both novelty and originality are using the same standard as those that require only novelty. After all, originality encompasses novelty. That is, if an idea is novel (has never before existed), then obviously the idea is also original (has not been copied from a preexisting source).\textsuperscript{31} Thus, depending on the jurisdiction, novelty requires either that the idea has never existed

\textsuperscript{25} Murray v. National Broadcasting Co., 844 F.2d 988, 993 (2d Cir.), cert. denied, 488 U.S. 955 (1988) (In refusing to protect a non-novel written proposal for a television series from misappropriation, the court stated that "ideas that reflect 'genuine novelty and invention' are fully protected against unauthorized use."); Davies v. Carnation Co. 352 F.2d 393, 396 (9th Cir. 1965) ("A mere idea without novelty is not a property right to which one may claim exclusive ownership."); Hamilton Nat'l Bank v. Belt, 210 F.2d 706, 708 (D.C. Cir. 1953); Woman Golfer, Inc. v. Meredith Corp., 792 F. Supp. 211, 213-14 (S.D.N.Y. 1992) (In refusing to protect a non-novel oral proposal and written plan for a women's golf magazine from misappropriation, the court stated that "[a] property right in an idea derives from its novelty and originality.").

\textsuperscript{26} Hamilton Nat'l Bank v. Belt, 210 F.2d 706, 708 (D.C. Cir. 1953); Sellers v. American Broadcasting Co., 668 F.2d 1207, 1210 (11th Cir. 1982); O'Brien v. RKO Radio Pictures, Inc., 68 F. Supp. 13, 14 (S.D.N.Y. 1946). Professor Nimmer argues that concreteness should be a requirement for recovery under the property or quasi-contract theories because concreteness is defined as an "idea . . . sufficiently developed so as to constitute 'property.'" NIMMER, supra note 2, § 16.08[A].

\textsuperscript{27} AMERICAN HERITAGE DICTIONARY 850 (2d College ed. 1985).


\textsuperscript{29} A similar requirement may be found in the Patent Act, 35 U.S.C. § 102 (1995).

\textsuperscript{30} NIMMER, supra note 2, § 16.08[B] at 16-59; see also Barrett, supra note 12, at 711 (describing the different interpretation of the novelty requirement as either original to the plaintiff, innovative in character, or both original to the plaintiff and innovative in character).

\textsuperscript{31} Under the definitions provided in the preceding text, there can never be a novel idea that is not original to the author. However, there are innumerable ideas which are original to the author but not novel to the world. Thus, viewed as a Venn diagram, novelty is a smaller circle falling completely within the larger circle of originality.
before\textsuperscript{32} or that is be original to the idea-man (has not been copied from a preexisting source).\textsuperscript{33}

Courts that choose the more stringent novelty standard are reflecting the policy that ideas which have previously been in the public domain should remain there, free for public use. On the other hand, courts that require only originality have adopted the policy that ideas, like other intellectual creations, should be protected as property of the creator, so long as the creator's independent efforts lead to the submission of the idea.

b. Concreteness

As ironic as it may seem, the concreteness requirement is actually fairly amorphous. Some courts require that in order to meet this requirement, an idea must be fixed in tangible form.\textsuperscript{34} Others provide that an idea is concrete when "it is ready for immediate use without any additional embellishment."\textsuperscript{35} Still others hold that an idea is concrete when plaintiff and defendant can reduce it to usable form within twenty-four hours.\textsuperscript{36} Professor Nimmer lambastes such heavy requirements. He argues that requiring an idea to be developed to the point of present use is a contradiction in terms; that is, an idea ready for present use is no longer merely an idea.\textsuperscript{37} Instead, he concludes that the concreteness requirement is "another way of requiring that the idea be sufficiently developed so as to


\textsuperscript{33} See Smith v. Recron Corp., 541 P.2d 663, 665 (Nev. 1975). Professor Nimmer suggests that under the property and quasi-contract theories, the idea-man is or should be held to the same burden of proof as in a copyright action, which would include no greater burden than originality. NIMMER, supra note 2, § 16.08[B] at 16-58.

\textsuperscript{34} O'Brien v. RKO Radio Pictures, 68 F. Supp. 13, 14 (S.D.N.Y. 1946) (extending protection only to ideas in tangible form, and even then, only to the form of expression, not the idea itself). See Barrett, supra note 12, at 712-13.


\textsuperscript{36} Jones v. Ulrich, 95 N.E.2d 113, 120 (Ill. 1950) ("[H]e had in mind a specific device which needed only his directions and the defendant's mechanical skill to reduce it to material form within twenty-four hours."); NIMMER, supra note 2, § 16.08[A].

\textsuperscript{37} NIMMER, supra note 2, § 16.08[A] at 16-53; See also Barrett, supra note 12, at 692 n.4 (stating that the law of undeveloped ideas generally only protects ideas that are concrete, and many courts have defined "concrete" as "developed").
constitute 'property.'” No matter what the definition, the requirement of concreteness has led to inconsistent opinions.

Courts that require the idea to be fixed in a tangible form seem to snuff out any possibility of protecting an idea as property. Specifically, providing protection for ideas fixed in a tangible medium of expression may be preempted by federal copyright law. After all, copyright already affords protection to expressions fixed in tangible media, and disallows protection to ideas fixed in the same tangible media.

On the other hand, those courts which require ideas to be developed, rather than abstract, seem to be embracing the middle ground — understanding the tension between protecting individual intellectual labor and foreclosing ideas from the public domain. However, “developed” often entails nothing more than creating a copyrightable expression. These courts do nothing but promote continued confusion and misguided expectations.

In all, the concreteness requirement is vague and unpredictable. While the courts seem to embrace the concreteness standard in order to distinguish between “protectable” and “unprotectable” ideas, the idea-man


40. See discussion on preemption, infra, part II.A.2.d.

41. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. 17 U.S.C. § 102(a). Unfixed works of authorship, such as pitches or any other transmission of an idea without fixation in tangible form, are not subject to the Copyright Act, but may be protectable by common law copyright or, as discussed throughout this paper, under "idea law."

42. Copyright protection does not extend to any idea or concept, regardless of the form in which it is described, explained, illustrated, or embodied. 17 U.S.C. § 102(b).
and a prospective purchaser may be better protected by providing greater predictability under a standard which questions the value of an idea, instead of one which hinges upon the mode or method of disclosure.\textsuperscript{43}

2. Problems

Although property theory cases purport to protect ideas as “property,” there are several valid arguments that may lead one to conclude that the current property protection for ideas is a farce.

a. Mistake

Confusion arises because courts frequently refer to “property rights” in ideas, but seldom do these loose-lipped references mean anything more than a property interest created by contract or a special relationship.\textsuperscript{44} One commentator has explored this argument and concluded that these cases are the result of (1) some courts failing to adequately specify which of the accepted means of idea protection they were adopting (express contract, implied contract, quasi-contract, or confidential relationship),\textsuperscript{45} and (2) other courts misrelying on the former courts’ vagueness.\textsuperscript{46}

b. Impossible Burden

Courts that have adopted the property theory in its literal sense require that the high hurdles of novelty and concreteness be cleared before protection will be afforded. By requiring these elements, courts are in

\textsuperscript{43} See infra part V.

\textsuperscript{44} See Barrett, supra note 12, at 698; Vantage Point v. Parker Bros., Inc., 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981) ("[I]dea disclosure cases generally refer to the idea in suit as the plaintiff’s claimed ‘property,’ [but] the decisions have focused primarily on the relationship between the parties (or lack thereof) and not on any \textit{a priori} recognition of exclusivity in the idea."); Downey v. General Foods Corp., 286 N.E.2d 257 (1972) ("An idea may be a property right."); Liggett & Meyer Tobacco Co. v. Meyer, 194 N.E. 206, 210 (Ind. App. 1935).


actuality, only paying lip service to the property theory of protecting ideas. After all, the novelty and concreteness standards by definition require more than a mere idea, i.e., the idea must be developed to a certain degree. As a result, it is rare for an idea to be both novel and concrete, thereby qualifying for property protection, and not otherwise qualifying for protection under another wing of idea law. On the other hand, when an idea is either not novel or not concrete, or both, it will not qualify for property protection. Thus, while property protection may have a good ring to it, as long as novelty and concreteness are the standards, property in ideas is generally an unneeded and redundant form of protection.

c. Common Law Copyright — Not a Property Right in Ideas

Cases that have provided property protection to radio and television formats under the guise of common law copyright are problematic for two reasons. First, protection under common law copyright does not necessarily mean that courts have recognized the property theory for protecting ideas. These courts may have intended only to expand the subject matter considered to be copyrightable expression. If so, the general idea is still in the public domain, but the developed idea embodied in the radio or television format is protectable expression within the realm of copyright. Second, common law copyright protection has been sharply curtailed as of 1978 by the Copyright Act of 1976.

d. Preemption

Property protection for ideas may be preempted. Federal copyright law preempts state created legal or equitable rights if the state rights (1) are equivalent to any of the exclusive rights as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression, and

47. The problems and benefits of the novelty and concreteness requirement are discussed supra part II.A.1.a-b.
49. Barrett, supra note 12, at 707 (arguing that formats are highly developed, complex combinations of ideas that lie between undeveloped ideas and expressions).
50. For a discussion of preemption, see infra part II.A.2.d. It should be noted that even if common law copyright protection for ideas expressed in tangible media has been preempted by the 1976 Act, ideas expressed in intangible media, such as pantomime or spoken words, may still be protectable by common law copyright.
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55. Id. (extra elements such as awareness or intent alter the scope but not the nature of an action); Harper & Row Publishers v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), rev’d on other grounds, 471 U.S. 539 (1985).
56. Barrett, supra note 12, at 725.
57. An idea expressed orally is clearly not within the subject matter of copyright.
removes ideas from the subject matter of copyright. Others argue that ideas are works of authorship which, when fixed in a tangible medium of expression, come within the subject matter of copyright as specified by section 102(a), but left unprotected by section 102(b). This argument has yet to be definitively settled. Therefore, the property theory of protecting ideas is still viable in those jurisdictions that choose to recognize it.

3. Summary

The property theory of protection is, at best, a sporadic means for some courts to provide a remedy to the idea-man, and at worst, a misconceived notion that should never have been accorded such recognition. Despite any precedential support, the property theory of idea law faces the almost insurmountable burdens of novelty, concreteness, and federal preemption. In sum, the idea-man should look elsewhere for protection. The property theory should be the protection of last resort.

B. Quasi-Contract or Unjust Enrichment Theory

A quasi-contract is not a true contract — it is not based upon any intent of the parties or on any promises they may have made; rather, it is an obligation created by law for reasons of justice. The purpose of granting recovery where no promise was actually made is to prevent one party from capitalizing upon an idea at another party's expense or, in other words, to avoid unjust enrichment. Specifically, a quasi-contract or contract implied in law requires that (1) the defendant be enriched, (2) at the plaintiff's expense, (3) under circumstances that, in equity and good

58. Rand McNally & Co. v. Fleet Management Sys., 591 F. Supp. 726, 739 (N.D. Ill. 1983) (items that "are expressly excluded from copyright protection, § 102(b), . . . fail the subject matter test of § 301(a) and are not preempted."); Bromhall v. Rorvik, 478 F. Supp. 361, 367 (E.D. Pa. 1979) (since ideas "are not entitled to protection under the Act, they are not preempted by the Act."). See Paul Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 UCLA L. REV. 1107, 1119 (1977).

59. Suid v. Newsweek Magazine, 503 F. Supp. 146, 149 (Dist. D.C. 1980) (where items such as facts, themes, research, and, by analogy, ideas "have been deliberately exempted from the scope of copyright protection to vindicate the overriding goal of encouraging contributions to recorded knowledge, the states are pre-empted from removing such material from the public domain.").


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. 62

1. Scope of Protection

Quasi-contract typically arises where the transaction resembles a normal contractual relationship but the parties did not manifest mutual assent. 63 However, there is no set formula or set of facts which will lead to recovery. Courts consider many factors, including: the nature of the idea, the relationship and interaction of the parties, public policy concerns, and the expectations of the parties. 64 Courts do not require a special relationship or confidential disclosure, 65 but they do require novelty and concreteness. 66

2. Problems

The idea-man trying to recover under quasi-contract is faced with many of the same problems as a counterpart pursuing a property theory claim. First, the requirements of novelty and concreteness will often be a claim-killing burden, depending on the jurisdiction and its definition of each. 67 Second, federal preemption is a grave concern, as courts seem to disagree over whether quasi-contract theory entails the same rights covered by the Copyright Act. 68

Third, courts are prone to make mistakes in applying the quasi-contract theory. For instance, some courts have mistakenly denied protection under a quasi-contract theory, reasoning that where no express

63. NIMMER, supra note 2, § 16.03 at 16-11; WILListon, CONTRACTS Ch. 6, § 3 (rev. ed. 1936).
65. Id. at 280.
67. See discussion supra part II.A.1.a-b.
or implied-in-fact contract existed, there should be no recovery under quasi-contract. This ignores the fact that the function of quasi-contract is to provide a remedy, particularly when there is no contract. Other courts have denied protection where the plaintiff based a claim on the existence of custom in the industry. Although it is firmly-rooted law that custom will not create an express or implied-in-fact contract contrary to the intention of the parties, it would be totally consistent with the purpose of quasi-contract to allow custom to influence the determination of whether the defendant was unjustly enriched.

Fourth and finally, it is possible that allowing recovery in quasi-contract contradicts generally accepted principles of property law. If property theory is not recognized then quasi-contract theory should not be either. That is, if an idea is common property, unprotected by express or implied-in-fact contract, copyright, or the property theory of idea law, then the taking of the idea can result in no unjust enrichment. The taker has taken nothing to which the idea-man or anyone else could claim exclusive ownership.

3. Summary

While quasi-contract protection is recognized with greater frequency than property theory, it is difficult to distinguish the two as currently applied. Although quasi-contract requires additional factors to exist before protection will be afforded, the granting of protection is no less ad hoc than under a property theory which requires novelty and concreteness. Quasi-contract theory may be the means for a court to be equitable; but, in the end, inconsistent application creates unpredictability and promotes litigation.


70. Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 449 (Pa. 1969) (stating that quasi-contract recovery may be had without assent by the parties, and even in spite of a party's contrary intent).


72. Savings Bank v. Ward, 100 U.S. 195, 206 (1879) ("Where there is no contract, proof of usage [i.e., custom] will not make one.").


74. This argument weakens as one considers that the value of an idea derives not from a direct property interest in the idea, but in the ability to disclose or withhold disclosure of the idea. This argument is discussed infra in part V.
Courts have mistakenly required novelty and concreteness, and have misunderstood the scope of quasi-contract law, especially as distinguished from the property theory. As a result, courts are failing to provide protection to idea-men and condoning the unjust enrichment of prospective purchasers when, instead, they should be righting wrongs for reasons of justice.

The entertainment industry’s development process is a perfect reflection of the types of situations that quasi-contract was created to remedy. In the typical entertainment industry idea case, the prospective purchaser knowingly and voluntarily accepts the idea-man’s services either by direct solicitation of the idea or by setting up a meeting for the future disclosure of the idea. Industry custom, including the frequent development and use of ideas, gives rise to the expectation of remuneration for the idea-man’s disclosure of the idea. If the idea is ultimately developed and used without payment to the idea discloser, the purchaser has been unjustly enriched at the idea-man’s expense, and equity compels an accounting. In sum, entertainment industry idea disclosure cases are ripe for protection under quasi-contract, and courts are simply missing the boat.

C. Express Contract Theory

An express contract exists where one party promises to pay for the use of a submitted idea. The express contract theory of recovery is more widely recognized by the courts because it is not subject to the same policy concerns as the quasi-contract or property theories. The fear that monopolization of ideas will foreclose progress in the arts and sciences is not present under the express contract theory because a contract binds only the parties and leaves others free to use the idea. Moreover, state protection under the express contract theory may actually aid dissemination in some instances. For example, a purchaser, unable to come up with a saleable product, is often able to develop and market an idea only because of a contract for disclosure with an idea-man. Given that the idea-man typically finds no shelter under copyright law or property theory, dissemination is enhanced by the built-in incentives of contract theory; namely, the purchaser profits from the exploitation of the idea, the idea-man benefits through payment of the contract price by the purchaser, and the public

75. Nimmer, supra note 2, § 16.04.
76. Stanley v. Columbia Broadcasting Sys., 221 P.2d 73 (Cal. 1950) (Traynor, J., dissenting); Hammond, supra note 18 at 114 (“Any party outside the contract is quite free to use it without restrictions. The encumbered party simply agrees not to do what they could otherwise do.”). Id.
gains access to the idea and the freedom to use and develop the idea once marketed by the purchaser.

1. Scope of Protection

Idea protection under the express contract theory is merely a recognition of the general freedom to contract. Therefore, express contract cases are decided "by reference to the agreement between the parties and the rules of contract construction, as well as the principals [sic] of law enunciated in the applicable legal authorities."78

2. Problems

As always, the issues of novelty,79 concreteness,80 and pre-emption81 cause problems. In addition, contract claims raise difficulties relating to the consideration requirement and the statute of frauds.

a. Consideration, Novelty, and Concreteness

Some courts, in their misguided attempts to avoid the monopolization of ideas, have used the consideration requirement to void contracts for ideas. Specifically, these courts require that the idea qualify as property in order to be valid consideration.82 These courts insist that the idea be novel and/or concrete before the contract will be enforced.83 As discussed, the novelty and concreteness requirements are often claim-killing burdens, protecting only the most developed ideas.

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79. Professor Nimmer argues that under the express or implied contract theories, courts should respect the parties' freedom to contract and not seek to impose the added requirements of novelty or originality. After all, "the idea-user is paying for the disclosure of the idea and not for the discloser's efforts in creating the idea." NIMMER, supra note 2, § 16.08[B].
80. Professor Nimmer argues that concreteness should not be a requirement in either express or implied contract cases because the purchaser knowingly and willingly enters into the bargain to pay for the idea, regardless of how abstract. NIMMER, supra note 2, § 16.08[A].
81. A claim based upon a contractual agreement has been considered to be qualitatively different from a copyright claim, and not preempted by the Copyright Act. Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp 981, 986 (S.D.N.Y. 1985); see also NIMMER, supra note 2, § 16.04[C] (reasoning that beyond the mere acts of reproduction, distribution, performance or display, a contract claim requires the additional element of an express or implied promise before the claim may be pursued).
83. Id. (novelty requirement); Stanley v. Columbia Broadcasting Sys., 221 P.2d 73, 75 (Cal. 1950) (concreteness).
Demanding novelty or concreteness in an express contract is absurd, regardless of whether the court requires them outright, or shrouds them in the consideration requirement. The parties have voluntarily bargained for the disclosure of the idea on their own terms, without concern for the idea’s novelty, concreteness, or property status. By exacting such requirements, the court is adding terms that were not considered important by the parties.

However, not all courts are so draconian in their ways. Many sidestep the consideration land-mine altogether. These courts allow the contract to stand based upon the theory that the service of disclosing the idea, not the idea itself, is the consideration.\(^8\) As a result, such courts recognize a binding contract when one party promises to pay and the other party discloses the idea, regardless of its concreteness or novelty.\(^5\)

But even in these courts, contracting for the disclosure of an idea does not always lead to smooth sailing. There are still two instances that may cause a contract to be considered void. First, when one is already bound to disclose an idea by law or contract, neither the promise to disclose nor the actual disclosure will be valid.\(^6\) Second, past consideration will not be valid consideration.\(^7\) That is, if the idea-man discloses an idea before the other party promises to pay, then even if the other party later makes such a promise, there is no binding contract because past consideration is not valid consideration.

Yet, at least one jurisdiction has recognized an exception to the past consideration rule. Where there is an express promise made after the disclosure of an idea, California courts reason that past services rendered in the expectation of payment create a moral obligation on the other party which serves as the consideration for the subsequent promise.\(^8\)

In all, courts are generally fair in applying the traditional rules of contract, and most recognize that the service of disclosing an idea constitutes valid consideration. The California exception to the past consideration rule is probably a better way to respect the intent of the parties. However, even if a court rejects such an exception, the traditional

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86. Nimmer, supra note 2, § 16-04[A].
87. Id.
past consideration rule has provided, and should continue to provide, predictable and equitable results. As for those courts which require novelty, concreteness, or property status in the idea subject to contract, they should step down off their pedestal and recognize the parties freedom to contract, i.e., to bind themselves to mutually agreed upon terms.

b. Statute of Frauds

Contracting for the disclosure of an idea raises two problems under the statute of frauds. First, the statute of frauds invalidates oral or implied promises when the price of the goods exceeds $500.89 This roadblock is usually circumvented because most jurisdictions recognize an exception when there is an acceptance and receipt of goods.90 However, given the intangible nature of an idea, it is difficult to gauge when the actual receipt of the idea has taken place. To avoid this, it has been suggested that the transaction be regarded as a sale of services in disclosing the idea, not a sale of the idea itself.91

A second problem arises because the statute of frauds invalidates contracts not in writing if they are not performed within one year. However, this problem is easily averted by the generally recognized exception that where one has completely performed under an oral contract, the one-year requirement is inapplicable.92

3. Summary

The express contract theory is the most widely recognized of the five theories, and rightfully so. An express contract remedy is clearly the most equitable as it usually reflects the intents and expectations of both parties. The formal requirements of contract law have been, and should continue to be, enforced in idea protection cases. After all, such contracts are no different than any other contracts for the purchase and sale of marketable goods or services. As for the problems discussed above, courts should hesitate before forcing their own interpretation upon the parties. Specifically, the novelty and concreteness requirements have no place in the contract theory of idea protection.

89. NIMMER, supra note 2, § 16.04[B].
90. Kurlan v. Columbia Broadcasting Sys., 256 P.2d 962 (Cal. 1953) (en banc) (ignoring the receipt requirement, the court held the contract valid and excepted from the statute by reason of defendant's acceptance of part of the goods).
91. NIMMER, supra note 2, § 16.04[B].
Express contract provides the easiest road to the best remedy for the idea-man. However, a lack of bargaining power and poor business acumen often leaves the idea-man wishing for an express contract and the protection it provides.

D. Implied-in-Fact Contract Theory

The only difference between an implied-in-fact contract and an express contract is that the consent of the parties is expressed by conduct instead of words. For example, one court created an analogy between the act of a movie producer promising to pay an idea-man for the disclosure of the idea-man's idea and the more familiar acts of soliciting advice from a lawyer or a doctor. Specifically, the court stated:

The lawyer or doctor who applies specialized knowledge to a state of facts and gives advice for a fee is selling and conveying an idea. In doing that he is rendering a service. The lawyer and doctor have no property rights in their ideas, as such, but they do not ordinarily convey them without solicitation by client or patient. Usually the parties will expressly contract for the performance of and payment for such services, but, in the absence of an express contract, when the service is requested and rendered the law does not hesitate to infer or imply a promise to compensate. . . . The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover.

The policy implications are the same under the implied-in-fact contract theory as under the express contract theory. However, because the contract is being inferred from the conduct of the parties, courts are more cautious in providing a remedy.

1. Scope of Protection

Basically, a contract, either express or implied-in-fact, exists when two parties agree to do or not to do something. Thus, the “million dollar” question is, when have the parties agreed?

93. See Vantage Point, 529 F. Supp. at 1216. For a discussion of the elements required under California law, see Aliotti v. R. Dakin & Co., 831 F.2d 898, 902 (9th Cir. 1987).
95. Id.
Before finding an agreement, courts consider many factors, including: the relationship and interaction between the idea-man and the purchaser, the customary idea submission and compensation policy of the purchaser, and the customary idea submission and compensation policies of the industry as a whole. Moreover, some courts continue to require novelty and concreteness. Although the inquiry is fact-specific, some general rules and exceptions have developed.

First, by definition, an implied-in-fact contract will not be found when the purchaser appropriates an idea by some means other than consensual agreement with the idea-man. Conversely, when the purchaser requests that the idea-man submit an idea, courts are willing to imply a promise to pay if the purchaser uses it. Ordinarily, exculpatory language in the request will not relieve the recipient from a duty to pay for the use of the idea.

Second, when the idea-man gives an idea to another party without first striking an agreement, courts will not imply an agreement. The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power.

However, industry custom, coupled with other favorable facts, may negate this requirement. The rationale for such an exception is that the idea-man’s submission of his idea is an acceptance of the purchaser’s implied continuing offer to pay for any submitted ideas which he elects to use. Moreover, regardless of industry custom, courts have found an exception where the idea recipient had an opportunity to prevent the idea-man from

97. Epstein, supra note 63, at 282-283.
98. Id. at 284; see discussion supra part II.C.2.a. (regarding the irrationality of such requirements in contract).
103. Desny, 299 P.2d at 270.
105. NIMMER, supra note 2, § 16.05[B].
making his submission, but through inaction allowed the idea to be submitted. In such a situation, California courts have inferred such inaction to be a promise to pay for the idea if it is used. However, putting an affirmative duty on the recipient is problematic because his inaction will burden them with an obligation regarding an idea that, as a matter of law, is the property of neither the idea-man nor anyone else.

2. Problems

The problems associated with the implied-in-fact contract theory are similar to those encountered in the express contract theory, especially in relation to the statute of frauds, preemption, consideration, concreteness, and novelty. A problem unique to implied-in-fact contracts is deciding which facts are necessary to the existence of an implied contract. As shown above, the courts have created some general rules and exceptions to aid in their analyses; but, as with any case by case determination, the decisions vary as much as the facts.

3. Summary

Proving the existence of a contract under the implied-in-fact theory is more difficult than under the express contract theory. However, once proven, courts are as willing to provide a remedy to the idea-man under implied contract as under express contract. Yet, because the intent and the expectations of the parties must be grafted from conduct instead of words, courts remain cautious to avoid overreaching and creating a bargain where none existed. In all, implied contract theory provides an adequate remedy for the idea-man. The problem is, the idea-man must actually contract.

E. Confidential Relationship Theory

1. Scope of Protection

A confidential relationship exists when "one has gained the confidence of the other and purports to act or advise with the other’s interest in

106. Minniear v. Tors, 72 Cal. Rptr. 287 (1968); Donahue, 54 Cal. Rptr. at 138; Desny v. Wilder, 299 P.2d 257 (Cal. 1956).
107. Nimmer, supra note 2, § 16.05[C].
108. See discussion supra part II.C.2.
109. Nimmer, supra note 2, § 16.05.
mind." In other words, when dealing on unequal terms, one party becomes reliant on the other's good faith. Typically, a confidential relationship will exist in areas such as: employer-employee relations, family or friendship relationships, or any relationship similar to the confidences which arise between physician-patient or priest-penitent. Occasionally a confidential relationship has been recognized when an idea-man submits an idea to one who will transform the idea into a tangible product and produce it for market.

Once a confidential relationship is established, protection is afforded in one of several ways. Some courts ground a confidential relationship claim in either express or implied contract, while others provide a remedy in quasi-contract under breach of confidence, and the remainder look to equity for breach of confidential relationship. Such differences are important because the remedies and defenses will vary depending on whether the action sounds in contract or in equity.

Professor Nimmer has pointed out that from a policy standpoint, courts should be more apt to recognize a confidential relationship claim when it arises from an express or implied-in-fact contract, or when it arises from one of the generally accepted confidential relationships. He further argues that courts should be hesitant to grant a remedy under quasi-contract when no such relationship exists. At first blush, his conclusion seems correct. After all, when a bargain is struck for the confidential disclosure of an idea, the courts, by granting a remedy for breach, are simply enforcing the will of the parties. Similarly, when no contract exists, the courts should exercise their equitable powers to protect a confidential disclosure by an idea-man who has relied upon a fiduciary or confidential relationship. However, where no contract or previous

111. Id.; Fink v. Goodson-Todman Enters., 88 Cal. Rptr. at 695.
114. Davies v. Krasna, 121 Cal. Rptr. 705 (1975). For a discussion of the pros and cons of quasi-contract based recovery in idea protection, see discussion supra part II.B.
115. See Davies, 121 Cal. Rptr. at 705.
116. NIMMER, supra note 2, § 16.06.
117. Id.
118. The author disagrees with the conclusion that quasi-contract should be employed especially when the idea has been solicited in an arms-length negotiation, and the solicitor has been unjustly enriched. See discussion supra part II.B.3. and infra part V. for arguments why quasi-contract recovery should be expanded in the law of ideas.
relationship exists, the courts should not misuse their equitable powers by finding an agreement or a confidential relationship between two parties that are ordinarily considered to be at arms-length.

2. Problems

Because the confidential relationship theory of idea protection is often based on one of the other four theories of protection, the problems it faces echo those problems associated with the other theories. More specifically, when the theory is based in equity as a breach of confidential relationship, the problems are similar to those of quasi-contract.

3. Summary

Although presented as its own theory, the confidential relationship theory is a hybrid of the other theories. That is, when a court grants recovery under this theory, it is doing so either at law under express contract or implied-in-fact contract, or in equity under quasi-contract or breach of confidential relationship. Therefore, when recovery is granted in contract, the principles and problems applicable to express or implied-in-fact contract theories become important. Similarly, when recovery is granted in equity, the principles and problems applicable to quasi-contract and, to a lesser degree, property theories gain import.

The confidential relationship theory provides adequate protection when the idea-man has negotiated with confidants or when he has contracted with the prospective purchaser to keep the idea in confidence. However, when the idea-man discloses his idea prior to contracting with a party in a typical arms-length negotiation, he will usually find that the confidential relationship theory will leave him high and dry.

119. For a discussion of problems, see supra parts II.A.2, II.B.2, II.C.2, and II.D.2.
120. See supra part II.B.2.
III. PRIMARY JURISDICTIONS: CALIFORNIA & NEW YORK

A. California

California courts do not recognize the property or quasi-contract theories of idea protection, but do recognize both the implied-in-fact and express contract theories, regardless of whether the idea is expressed orally or in writing. While an express contract is inferred from words, an implied-in-fact contract is inferred from actions based upon the "reasonable person" test. That is, an implied-in-fact contract will be found where a reasonable person would believe the party's actions convey an intent to enter into a contract.

Under both contract theories, consideration and mutual assent are required, while novelty and concreteness are not. Furthermore, California courts find the act of disclosing the idea to be adequate consideration. However, disclosure alone is not enough to create a contract, there must be a countervailing promise, solicitation, or voluntary acceptance. As a result, a gratuitous disclosure will not create a unilateral contract. Moreover, if the idea discloser is relying on circumstances to prove a promise, California courts hold that "[t]he law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit. . . ."

In all, a contract is recognized when the following test is met: (1) one must submit a valuable idea to an offeree; (2) the offeree must either have solicited or voluntarily accepted the idea disclosure; (3) the offeree

121. Desny, 299 P.2d at 265 ("[i]t is clear that California does not now accord individual property type protection to abstract ideas."). Id.
122. Donahue, 54 Cal. Rptr. at 137 ("[r]ecovery for the use of an idea must be based either on an express or implied in fact contract. . . . The law will not imply a promise, never made expressly or impliedly, to pay for something which defendant can have for the taking.") (citations omitted).
125. Desny, 299 P.2d at 267.
126. Id. at 267.
128. Donahue, 54 Cal. Rptr. at 134.
129. Chandler, 319 P.2d at 780.
130. Desny, 299 P.2d at 270.
131. Id.
must know that the idea disclosure was made with the expectation of remuneration upon use; and (4) the offeree must actually use the idea."^{132}

B. New York

New York cases are a bit more unsettled. As in California, the express and implied-in-fact contract theories are the only forms of protection for the idea-man in New York. However, New York courts have not yet reached a consensus on what exactly is protected under these theories.

1. Express Contracts

It is clear that New York courts protect both novel and non-novel ideas made under written contract.^{133} However, there is a split among New York courts over whether protection extends to both novel and non-novel ideas made under express oral agreements, with some courts requiring novelty before protecting ideas disclosed under express oral agreement.^{134}

2. Implied-in-Fact Contracts

The predominant view in New York courts is that a novel idea can be the subject of an implied-in-fact contract, although there is some authority which concludes novel ideas are protected only by express contract.^{135} On the other hand, it is established in New York that non-novel ideas will not be protected under any implied-in-fact contract theory.^{136}

IV. STRATEGIES FOR PROTECTION UNDER CURRENT DOCTRINES^{137}

The previous two sections have established the principles of idea law. It is clear that in certain circumstances, courts are willing to protect idea-men from conniving purchasers. But, it is equally clear that in other

133. Caswell, supra note 132, at 747.
134. Id. at 748.
135. Id. at 749.
136. Id. at 750.
137. In order to provide guidance to the idea-man and his prospective purchaser in regard to the current doctrines of idea protection, this section ignores the problems currently facing the law of ideas, and accepts the law as is. See infra part V. for a suggested model for change.
circumstances, the courts are willing to protect potential purchasers from overzealous idea-men. This section will provide strategies for both parties to promote agreement and avoid litigation.

The difficulty with idea protection is that it is governed by state law. The states vary in not only which of the five theories they adopt, but also how they choose to interpret the ones they do adopt. As a result, the idea-man and purchaser are compelled to forum shop. Comparing the two primary jurisdictions, the idea-man is favored in California, while the purchaser is favored in New York. However, regardless of the jurisdiction, an express written contract is the best solution for both parties.

More often than not, the parties fail to adequately strike a bargain prior to disclosure of the idea. Thus, the idea-man is usually left arguing that there was an implied contract; or begging the court to use its equitable powers to find a quasi-contract or a confidential relationship; or, even worse, insisting that the court find a property right in his idea. The potential purchaser is left defending each of these claims. Both parties would be saved the uncertainty and expense of litigation if they followed some simple procedures that would protect their interests in any jurisdiction.

Typically, the idea-man lacks bargaining power because he is reliant upon the potential purchaser’s resources to develop and market his idea. The idea-man usually has no leverage, except for having an idea in which the potential purchaser may be interested. Therefore, it is clearly in the best interest of the idea-man to establish his expectations prior to the disclosure of his idea.

Similarly, the prospective purchaser should be equally diligent in revealing his expectations prior to disclosure. If the potential purchaser opts to hear the pitch without first establishing a payment obligation, the purchaser faces the uncertainty of litigation in the law of ideas. With the vast number of ideas that a prospective purchaser hears in any given year, the potential for liability is enormous. Moreover, the potential purchaser faces the more intangible liability of losing goodwill, by offending the creative personalities upon which he relies. No matter how little bargaining power an individual idea-man may have, the idea-men collectively hold the creative juices upon which the purchaser thrives. After all, there is still a viable and competitive market for good ideas, and no purchaser will want to damage its opportunities in that market.
A. Purchaser

The primary goal of a potential purchaser of ideas is to avoid any situation in which an overzealous idea-man may claim that the purchaser used his idea in breach of contract or in breach of confidential relationship, or that the purchaser is liable under quasi-contract for unjust enrichment. Proof of these claims is often fact-specific and depends on the court’s interpretation of the facts in relation to various factors. Therefore, it is in the best interest of either party to create a trail of facts to support his position.

Any purchaser who solicits ideas or is prone to receiving unsolicited ideas should have a written policy which sets forth the internal procedures to be followed in each case. The policy should clearly state whether or not the purchaser pursues unsolicited ideas and, further, should be distributed and explained to every employee.

1. Unsolicited Ideas

Upon receipt of an unsolicited idea, the purchaser’s first step should always be to isolate it from any employee who may use it. Specifically, the unsolicited idea should not be copied, distributed, or discussed by anyone, except as required when sending it to the employee in charge of returning or pursuing unsolicited ideas. This step takes place regardless of whether company policy is to review and evaluate unsolicited ideas, or to reject them flat out.

138. See Epstein, supra note 63, at 288-288.6. See also BBC’s New Deal for Indies, THE HOLLYWOOD REPORTER, July 7, 1993. The Hollywood Reporter provides that the BBC, in conjunction with the Producers Alliance for Cinema and Television, introduced new procedures to deal with independent producers. Id. The procedures are a response to complaints by the producers that program ideas have been “lifted” by the BBC. Id. The procedures include: (1) giving an explanation on how program ideas may be submitted; (2) logging all program proposals, sending an acknowledgement within 10 working days, and sending an initial response within four weeks; (3) explaining the criteria the BBC will use to evaluate program ideas; (4) giving independent producers the names of contacts within the network; and (5) establishing an appeal process. Id.

139. See Vantage Point, Inc. v. Parker Bros., 529 F. Supp. 1204, 1211 (E.D.N.Y. 1981) (Defendant not required to compensate idea-man when unsolicited submissions are routed “to the customer service department without being shown to anyone in game development.”); Downey v. General Foods Corp., 334 N.Y.S.2d 874, 878 (N.Y. 1972) (General Foods not required to compensate idea-man when idea immediately isolated from employees who could have used it).
a. Policy Against Accepting Unsolicited Ideas

If company policy is to reject unsolicited ideas without consideration, the employee in charge should immediately send the original letter back to the idea-man. Along with the original letter, the employee should also send a company letter stating that the idea was not disclosed, distributed, or discussed by anyone in the company except by the employee who signs the letter. Furthermore, the company letter should state the purchaser’s policy that unsolicited ideas are never used. Finally, it would do no harm to send a copy of the company’s written policy along with the letter.

b. Policy For Accepting Unsolicited Ideas

If the purchaser does consider unsolicited ideas, it should immediately send a letter explaining the company’s compensation policy for using ideas. The letter should state that the idea will not be disclosed, distributed, evaluated or discussed by anyone within the corporation until the idea-man agrees to the company’s compensation policy. This policy should discuss the rights and liabilities of the parties regarding the purchaser’s evaluation of the idea.

Specifically, the terms of the compensation policy should include whether: the corporation requires novelty, originality, or concreteness; it compensates for all ideas submitted, or for only those actually used, or for none at all; an evaluation and review by the company creates an agreement to compensate; an evaluation and review creates a confidential relationship; an evaluation and review will limit the company’s rights to any ideas already within its possession; negotiations are considered to be an admission of the novelty, originality, or concreteness of the idea; compensation will be at the corporation’s discretion; and the contract is binding upon disclosure or actual use. These provisions will limit the court’s ability to find an implied-in-fact contract, quasi-contract, or confidential relationship, and will aid in settling disputes under express contract.

2. Solicited Ideas

If the company solicits ideas, it should follow the policy for accepting unsolicited ideas. Specifically, the company should negotiate the terms of the agreement prior to the disclosure of the idea.
B. Idea-Man

The primary goal of the idea-man is to protect his idea against premature disclosure, or exploitation without just compensation. Although some courts recognize protection under quasi-contract, the burden is often too great to provide adequate and consistent protection. Therefore, the only sure remedy is under contract theory.

In order to protect his rights under contract, the idea-man should make it clear that he is divulging his idea in a confidential manner, and that he expects that the prospective purchaser will not use or divulge the idea without first entering into a good faith negotiation for compensation. Specifically, he must negotiate the points discussed above. 140

C. Summary

Both the potential purchaser and idea-man have a lot to lose in litigation over the use of ideas. Therefore, their joint goal should be to avoid confusion in the purchase and sale of the idea. Because proof of most claims under idea law is fact-specific, it is in the best interests of both parties to create a paper trail to support his or her position. It is obvious that an express written contract is the best solution for both parties.

V. CONCLUSION: THE NEED FOR A UNIFORM STANDARD

The technological breakthroughs of the twentieth century have helped fuel the fire for what, at present, seems to be an insatiable demand for entertainment. The potential markets created by interactive television and the information super-highway will continue to spur the demand for good ideas. Thus, the successful entertainment companies of the twenty-first century will be those that can continue to provide quality products in an extremely competitive marketplace. As always, quality products begin with quality ideas.

The task of finding quality ideas should not be too difficult given that "ideas are as free as the air." 141 Of course, if ideas are truly as free as the air, one must question why others would be willing to pay so much money for them. The answer is simple: While the idea itself may be free,

140. See supra part IV.A.1.b.
141. See supra note 13 and accompanying text.
finding the idea is a service that people are willing to pay for. Like any server, the idea-man provides a means to an end. Even though the end would ordinarily cost nothing, it should not follow that the means to the end is also free for the taking. This reasoning was perhaps best captured by a California court which stated:

[T]he 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 the claim of the writer. This is so even though the material to be purchased is abstract and unprotected material.

Therefore, the law of ideas should reflect the policy that disclosure of an idea is a valuable service entirely separate from the idea's novelty, concreteness, or property status.

After all, it would seem hypocritical in a capitalistic economy not to reward the idea-man who brings the valuable idea to the entertainment company. Regardless of whether the entertainment company spends time, money, and effort developing the idea, the idea-man should be rewarded commensurate with his contribution. Furthermore, the policy of paying for good ideas is nothing new for the entertainment industry. Ideas have been, and will continue to be, purchased in the form of completely developed scripts; of undeveloped, abstract ideas; and of moderately developed ideas, fleshed out as "spec" scripts.

142. Ideas are not freely usable by the entertainment media until the latter are made aware of them. Blaustein, 88 Cal. Rptr. at 329.
144. See Marx, supra note 3. For instance, producer David Permut walked into the office of Frank Price (ex-head of Universal Pictures), merely hummed "Dum-de-dum-dum," and within seconds had a deal to make the movie "Dragnet"; Permut also got $175,000 upfront for an unknown screenwriter based only on the pitch for the movie "Blind Date"; and recently, Don Simpson and Jerry Bruckenheimer, producers of "Top Gun," shelled out a load of money for the pitch project "Triads." Id. (other pitches that later became movies, include "Man's Best Friend," "Splash," "Kindergarten Cop," and "Night Shift").
145. The undeveloped, abstract idea is usually sold in pitch form. The reason studios and producers buy an idea in pitch form is because the producer and the writer are able to collaborate from inception, thereby bringing down the cost of having to rework an already developed script. Id.
146. The reasons the spec script has become the most favored vehicle for buying and selling ideas is because not only can the producer and writer collaborate from inception, bringing down the purchaser's cost of having to rework an already developed script; but also, writers can sell a moderately developed idea for more money than they could an undeveloped pitch, and the purchaser is willing to pay the greater fee for the certainty of knowing exactly what they are buying. Id.
Without the five theories of idea protection, idea-men would be helpless against purchasers who fail to fulfill their purchase obligations. This includes not only sellers of undeveloped ideas in pitch form, but also sellers of scripts. Although the script sellers may be protected by copyright, they sometimes find that copyright protection is not enough. In those situations, the real value lies not in the expression of the idea, but in the disclosure of the idea itself.

The demand for quality ideas will continue to grow. With the increased demand comes the need for consistent protection, so that both the purchaser and seller are aware of their legal rights and responsibilities.

The express and implied contract theories provide adequate protection when a bargain is actually struck. However, lack of bargaining power on the part of the idea-man or skepticism on the part of the purchaser often results in a failure to come to terms prior to disclosure. Therefore, some other extended form of protection is necessary to adequately protect the idea-man who is unable to reach an agreement prior to disclosure.

This remedy would emphasize the objective theory of contract by explicitly recognizing that a meeting of the minds is not required; rather, the parties' objective words, acts, and relationship form the basis for recovery. Objective outward appearance, rather than state of mind, should be the key determinant. California courts have recognized this theory for many years in their interpretation of implied-in-fact contracts, holding the parties to be bound by the terms of an offer even when an offeree expressly indicates dissent, provided his actions could only lawfully mean assent.

Furthermore, this remedy would advance the objective theory of contract beyond its current realm and recognize that industry custom can be a pivotal factor in idea protection cases. Currently, courts are hesitant to recognize an implied-in-fact contract based on industry custom. Although most courts are willing to recognize a quasi-contract action based on industry custom, many of those courts refuse to recognize quasi-contracts in idea protection cases, reasoning that with no property right in ideas, there can be no actionable misuse. Moreover, those courts that do recognize quasi-contract recovery for ideas limit the idea-man's ability to recover under such theory by requiring novelty and concreteness.

Therefore, the solution to the uncertainty of idea protection lies in bridging the gap between implied-in-fact contract recovery and quasi-

contract recovery by recognizing the need for quasi-contract protection of ideas and by removing the burdensome prerequisites of novelty and concreteness.

Granted, this remedy should not require that a contract or equitable remedy always be found when an idea-man discloses an idea to a prospective purchaser. For instance, if an idea-man pitches an idea that is already in development or already developed, he should not be accorded recourse against a simultaneous, or prior, independent developer. There must be some limitations to quasi-contract recovery lest all ideas be forever foreclosed from the commons. However, the solution to this problem, as some courts would have us believe, does not lie in the weighty and outdated requirements of novelty, originality, and concreteness. Such requirements weed out far too many valuable ideas for the wrong reasons.

Instead, this remedy focuses on value in the marketplace. Value can be derived from either subsequent use by the purchaser, subsequent disclosure by the purchaser and use by another party, or subsequent sale by the purchaser. The purchaser will have the defense, as well as the burden of proof, of independent production of the idea. Similar to copyright law, access and similarity will defeat the defense. But, unlike copyright law, substantial similarity will not prove access because the idea is in the public domain and is not protected in and of itself. After all, the value of the idea is directly linked to the ability to disclose or withhold disclosure. Substantial similarity alone means nothing.

Courts should be more willing to imply a contract or grant an equitable remedy under quasi-contract when an idea-man discloses an idea to a prospective purchaser, especially when the purchaser could have freely developed the idea prior to disclosure, but for some reason lacked the intellectual or creative power to extract the idea from the commons. The emphasis of idea-law has been misplaced. Value lies not in the idea, but in the power to disclose or withhold disclosure of the idea. A legal system that creates an incentive for disclosure compels development and ultimate dissemination of the idea. Recognizing value in the disclosure of an idea will not belittle or destroy the valid concern that protecting ideas inhibits innovation as the scientist, inventor, or author is foreclosed from building upon the ideas of others. Instead, it will aid progress and development because protection granted for idea disclosure encourages dissemination; and widespread dissemination allows all would-be-inventors the opportunity to see farther by standing on the shoulders of the idea-man.