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The Legal Protection of Ideas: Is it Really a Good Idea?

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I. INTRODUCTION

In 1980, Hwesu S. Murray, a television network employee, approached a television network executive with some ideas for future television series. The executive told Murray to submit the ideas in writing. Murray complied, submitting five ideas, and the executive asked him to "flesh out" one of the proposals entitled "Father's Day." Once again, Murray complied, submitting a proposal for a half-hour situation comedy which would star Bill Cosby and would focus on the family life of a black American family. Murray informed the executive that if the network used the proposal he expected to

receive compensation and to be named the executive producer.\textsuperscript{2}

The network rejected the proposal. But four years later, the network, NBC, premiered The Cosby Show, which starred Bill Cosby and focused on the everyday life of an upper middle-class black American family. Murray immediately wrote the network, claiming that The Cosby Show was derived from “Father’s Day.” The network disagreed, arguing that the show developed from Bill Cosby’s humor and was produced by an independent production company.\textsuperscript{3}

Murray sued NBC, claiming the network misappropriated his idea. Should Murray’s idea be entitled to legal protection? The Second Circuit Court of Appeals said “no,” affirming the district court’s grant of summary judgment for the network.\textsuperscript{4}

At about the same time, Mark Landsberg wrote a book about strategies for winning at the Scrabble board game. When he requested permission to use the Scrabble trademark, the trademark owner requested a copy of the manuscript. Landsberg complied, but subsequent negotiations for permission failed. Later, the trademark owner released its own Scrabble strategy book.\textsuperscript{5}

Landsberg sued the trademark owner, claiming copyright infringement and breach of contract. Should Landsberg’s idea of a strategy book for Scrabble be entitled to legal protection? The Ninth Circuit Court of Appeals said “yes,” rejecting his copyright claim but affirming the district court’s finding of an implied contract.\textsuperscript{6}

These two cases illustrate the unpredictability in an area of the law known as “idea law.”\textsuperscript{7} This Note will analyze the development of idea law within the traditional areas of intellectual property. It also will examine the theories currently being used to protect ideas, discuss the “novelty” and “concreteness” criteria, and explore the issue of preemption. Finally, based on recent case law and scholarly writings, it will predict how idea law will develop in the future and will recommend procedures which will protect the respective rights of the parties involved and prevent unnecessary litigation.

II. HISTORICAL PROTECTION OF IDEAS

The United States Constitution empowers Congress to “promote

\begin{footnotes}
\item[2] Id.
\item[3] Id.
\item[4] Id. at 992.
\item[6] Id. at 1196.
\end{footnotes}
the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The ratification of the Constitution, Congress enacted a patent statute and a copyright statute. In addition, the areas of trademarks, trade secrets, and unfair competition have evolved and developed both by statute and by common law. These five areas became known collectively as "intellectual property.

Traditionally, these areas provided no protection for what is commonly called an "undeveloped idea." As Justice Brandeis observed, "[t]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." Around the turn of this century, however, courts began to confront the need to reconcile the public's interest in having access to new ideas with the apparent injustice of permitting someone to exploit the ideas of others. As California Supreme Court Justice Schauer wrote:

"Generally speaking, ideas are as free as the air and as speech and the senses, and as potent or weak, interesting or drab, as the experiences, philosophies, vocabularies, and other variables of speaker and listener may combine to produce, to portray, or to comprehend. But there can be circumstances when neither air nor ideas may be acquired without cost. The diver who goes deep in the sea, even as the pilot who ascends high into the troposphere, knows full well that for life itself he, or someone on his behalf, must arrange for air (or its respiration-essential element, oxygen) to be specially provided at the time and place of need. The theatrical producer likewise may be dependent for his business life on the procurement of ideas from other persons as well as the dressing up and portrayal...

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9. The patent and copyright statutes were first enacted in 1790. The Patent Act has been revised three times (in 1793, 1836, and 1952) while the Copyright Act has been revised four times (in 1831, 1870, 1909, and 1976). See Arthur R. Miller & Michael H. Davis, Intellectual Property—Patents, Trademarks, and Copyrights 8, 283 (1983).
10. See Barrett, supra note 7, at 691-92. The logic behind grouping these areas together has been questioned by at least one commentator: "Except for tradition and the fact that the . . . subjects are commonly taught together in one survey course, one might question why a single book should include these . . . divergent subjects." Miller & Davis, supra note 9, at 1
11. Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines 35 (1973) (analyzing the rights in undeveloped ideas). The term "undeveloped idea" is in fact a misnomer. An idea will not be protected unless it is concrete, and the term "concrete" is often defined as "developed."
13. 3 Nimmer, supra note 7, § 16.01, at 16-2 to 16-3.
of his self-conceptions; he may not find his own sufficient for survival.14

Eventually, courts developed various theories under which an idea originator could recover either the value of the idea or the value of "the services in providing the idea."15 These theories are generally divided into five categories: property, express contract, implied contract, quasi-contract or unjust enrichment, and confidential relationship.16 The first theory is concerned solely with the nature of the idea to be protected, while the other four theories focus on the relationship between the idea originator (usually the plaintiff) and the person or entity to whom the idea is disclosed (usually the defendant). These theories were once highly regarded,17 but now are often criticized as being "haphazard and generally lacking in both internal coherence and overall focus."18

III. PRESENT PROTECTION OF IDEAS

The need to protect an idea usually arises after the idea has been disclosed to another party. Before an idea is disclosed, the other party—usually a publisher, producer, or manufacturer—is, understandably, quite hesitant to promise compensation or secrecy for the idea. Consequently, the idea usually is disclosed after the other party makes an ambiguous promise to "make satisfactory arrangements" if the idea is used or to "not tell anyone" if it is not used. Due in part to a strong federal policy against protecting unpatentable ideas,19 courts usually require the plaintiff to show that the relationship between the two parties is sufficient to permit a court to apply one of the five theories of protection.20 Courts also require that the idea be novel and concrete and the defendant's use be unauthorized.21 Finally, courts analyze patent and copyright laws to determine whether these federal statutes preempt the plaintiff's claim.22

14. Desny v. Wilder, 299 P.2d 257, 265 (Cal. 1956); see also H. CLARKE ANAWALT, IDEAS IN THE WORKPLACE—PLANNING FOR PROTECTION 4 (1988) ("While no one really owns ideas, the products of ideas may be owned and protected by law.").
15. Barrett, supra note 7, at 692-93.
16. See 3 NIMMER, supra note 7, §§ 16.02-06; Barrett, supra note 7, at 693.
18. Barrett, supra note 7, at 691.
19. See infra note 134 and accompanying text.
20. See supra note 16 and accompanying text.
22. See infra notes 126-161 and accompanying text.
A. The Five Theories of Protecting Ideas

1. The Property Theory

The property theory is the least accepted of the five theories. Indeed, some commentators argue that an idea simply cannot be owned. Other scholars and judges try to argue away the courts' recognition of the property theory. These arguments ignore the reality that some courts have, in fact, expressly recognized property rights in ideas.

For example, the plaintiff in *Belt v. Hamilton National Bank* worked in the advertising business. He conceived an idea for a radio program and sought financial support from the defendant bank. The bank agreed to sponsor the program and hired the plaintiff to prepare the program. The bank subsequently cancelled the agreement and abandoned the project, but revived it some time later and hired another advertising agency to produce it. The plaintiff sued the bank for the value of his idea.

The jury found for the plaintiff and awarded him $3,300. After the bank moved for judgment notwithstanding the verdict, the court framed the issue accordingly: "The plaintiff sued for compensation for the use of his idea. In equity and good conscience he should be paid. Does the law provide a remedy? The principal question presented is whether there is a property right in an idea and, if so, to what extent." The court denied the bank's motion, finding that the law gave effect to a property right in an idea even though the idea...
was neither patentable nor subject to copyright.31 The court also required that an idea be "reduced to a concrete detailed form" and be "novel" before it can receive the protection of the law.32

The court of appeals affirmed.33 Although it found no precedent in its own jurisdiction, the court considered decisions from other courts and was convinced that a person has a property right in his own idea which enables him to recover damages for its appropriation.34 The court expounded on the criteria for finding a property right in an idea:

An abstract idea, in any event when not the subject of a contract, is so unattached as to be deemed legally without the quality of individual identity or property. Protection of ideas at all, in contrast with inventions, literary productions and trade secrets, the law with respect to which we do not now consider, must be careful to avoid attributing to individual ownership that which is in reality common property; and it would be unwise to place a burden upon communication of ideas by requiring compensation for their adoption and use. But the dangers suggested are sufficiently avoided to warrant the law in placing an idea among protected property rights when it is definite and concrete, new and novel, has usefulness and is disclosed for commercial purposes in circumstances which the parties ought reasonably to construe as contemplating compensation for its use.35

An entire line of cases involving television and radio formats36 has

31. Id. at 691. Some scholars ignore or try to argue away the courts' express recognition of the property theory. For example, Barrett suggests that the court in Belt did not adopt the property theory, but merely failed to specify what theory it was applying. Barrett, supra note 7, at 701.


"While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale. Of course, it must be something novel and new; in other words, one cannot claim any right in the multiplication table."


34. Id. at 708.

35. Id. at 708-09. Interestingly, Barrett quotes this language as support for her proposition that the Belt decisions (district court and court of appeals) were based on an implied contract theory rather than a property theory. See Barrett, supra note 7, at 701 n.54.

36. A "format" has a specific definition in the entertainment industry:

The term "Format" means 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 pro-
been decided primarily on the property theory. For example, in *Fink v. Goodson-Todman Enterprises, Ltd.*, the defendant asked the plaintiff to submit a presentation for a television show. The plaintiff’s proposal, tentatively entitled “The Coward,” centered around a World War II lieutenant who was labeled a coward when he surrendered his company to the enemy. After the war, he became a policeman who performed feats of bravery to overcome this label.

The defendant rejected the proposal, but five years later began to broadcast *Branded*, a series which centered around an “Old West” cavalry officer who was “branded” a coward after surviving an Indian battle where the rest of his company perished. In each episode of *Branded*, the central character performed feats of bravery to overcome this label.

The trial court dismissed the action, but the California Court of Appeal reversed. The appellate court held that common-law copyright could protect the plaintiff’s ideas so long as the ideas were sufficiently novel and concrete. The court recognized that it was extending protection to an uncertain middle ground, but the plaintiff’s ideas were sufficiently developed and concrete to warrant further review.

Legal philosophers also have acknowledged the existence of property rights in ideas. While recognizing that “the moral rights between persons which pertain to their ideas is a matter on which even the boldest and most confident writers on property have shown uncommon caution,” Andrew Wengraf argues that well-known scholar

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37. See, e.g., Szczesny v. W.G.N. Continental Broadcasting Corp., 315 N.E.2d 263 (Ill. App. Ct. 1974); Silver v. Television City, Inc., 215 A.2d 335 (Pa. Super. Ct. 1965). These cases were decided on common-law copyright grounds. As Barrett points out, however, “[e]xtension of common-law copyright protection to ideas is conceptually similar to adopting the ‘property theory’ for finding property rights in ideas, since most copying is precluded in either case, regardless of the lack of a contractual or confidential relationship between the parties.” Barrett, supra note 7, at 707. Since the 1976 Copyright Act purported to eliminate state common-law copyrights, the precedential value of these cases is questionable at best.


39. Id. at 683-84.

40. Id.

41. Id. at 694. For a discussion of the novelty and concreteness criteria, see infra notes 102-122 and accompanying text.

42. *Fink*, 88 Cal. Rptr. at 695.
Robert Nozick suggests that property rights should include property in ideas:

Nozick suggests, in particular, that holdings in ideas can be feasibly handled so as not to run afoul of his "Lockean proviso" concerning acquisition of unowned entities. He believes that a "free operation of a market system will not actually run afoul of the Lockean proviso" and he includes original inventions, technical discoveries, and trade secrets as part of this free operation. His remarks and examples refer to the moral equivalent of patents or private discoveries but he apparently leaves the moral status of full-blooded copyright to be argued either way. The constraints on the moral right to protection of property in ideas are set by the application of his Lockean proviso and by the other Lockean rights to liberty which people possess, which are rights to noninterference with what persons may do with what they unreservedly hold as property. It follows that the way in which the proviso works and the connection between rights to liberty and rights to property are crucial to Nozick's account.

By analyzing Nozick's examples that relate to property rights in ideas, Professor Wengraf concluded that for Nozick, "the essential feature of a property right in an idea is the right to determine what shall be done with that idea."

While some scholars and judges erroneously try to argue away the courts' recognition of the property theory, they are correct in asserting that the property theory rarely should be used to protect ideas. First, the novelty and concreteness criteria preclude the recognition of property rights in the majority of cases. Second, the preemption provisions of the 1976 Copyright Act and the Patent Act sufficiently eliminate state property right protection in those few cases that survive the novelty and concreteness scrutiny. Finally, the remaining theories of protection require the court to consider the parties' relationship, an element missing under the property theory.

2. The Express Contract Theory

An enforceable express contract arises if the person to whom an idea is submitted expressly promises to pay for it if the idea is used. Consequently, in a well-publicized case, Buchwald v. Paramount Pictures Corp., Los Angeles Superior Court Judge Harvey A. Schneider

44. Id. at 342-43.
47. 3 NIMMER, supra note 7, § 16.04, at 16-17.
concluded that Paramount Pictures breached its contract with humorist Art Buchwald when it released the movie *Coming to America*, starring Eddie Murphy. Buchwald had written a story tentatively entitled “King for a Day.” Paramount Pictures purchased the rights to the story and its concept. The contract included a clause entitling Buchwald to “contingent consideration” if Paramount produced a full-length movie “based upon” Buchwald’s work.

In a thirty-four-page opinion, the California court acknowledged that the case did not involve copyright infringement. Thus, it rejected Paramount’s contention that Buchwald must prove substantial similarity. The court concluded that *Coming to America* was “based upon” Buchwald’s story within the meaning of the contract, and that Buchwald and his co-plaintiff, producer Alain Bernstein, were entitled under the contract to $265,000 plus nineteen percent of the movie’s profits.

Under the express contract theory, a plaintiff should not have to show novelty and concreteness. This is appropriate since, as the United States Supreme Court recognized, the enforcement of a contract to pay for an idea may in fact enhance its dissemination to the public. Such a plaintiff may, however, be confronted with two hurdles not confronted under the property theory: consideration and the statute of frauds.

a. Consideration

Most commentators feel that sufficient consideration is found in the promise to disclose an idea.

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*Use of Buchwald Movie Idea Does Not Require Substantial Similarity, 39 PAT. TRADEMARK & COPYRIGHT J. (BNA) 205 (Jan. 18, 1990).*


50. Id.

51. Id. at 206.

52. Id.; *see also Second Round Looms After Buchwald Win, NAT’L LJ., Jan. 22, 1990, at 6, col. 1.* Interestingly, Paramount Pictures’ attorney insists that his client actually won since the court rejected Buchwald’s tort and punitive damages claims. Id.

53. *See, e.g., Vantage Point, Inc. v. Parker Bros., Inc., 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981) (“whether or not the idea is original or concrete, recovery may be permitted if there was an express promise to pay for its use”); Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 134 (1966) (“An idea which can be the subject matter of a contract need not be novel or concrete.”); see also Barrett, *supra* note 7, at 739-40.*

54. *Aronson v. Quick Point Pencil Co., 440 U.S. 257, 266 (1979); see also Stanley v. Columbia Broadcasting Sys., 221 P.2d 73, 85 (Cal. 1950) (Traynor, J., dissenting) (“Unlike a copyright, a contract creates no monopoly; it is effective only between the contracting parties; it does not withdraw the idea from general circulation. Any person not a party to the contract is free to use the idea without restriction.”).*

55. 3 NIMMER, *supra* note 7, § 16.04[A], at 16-18; Barrett, *supra* note 7, at 738.
Even if the idea furnished by plaintiff is not original or novel with him and even if the idea would have been accessible to defendant by means other than plaintiff’s disclosure, still if in return for plaintiff’s disclosure defendant promises to pay if he uses the idea and plaintiff does in fact disclose his idea, then such disclosure should constitute a valid and binding consideration. 56

Thus, the agreement to disclose the idea is sufficient consideration to support the contract, so long as there was no preexisting obligation to do so. 57

At least one court, however, determined that consideration was lacking because the plaintiff had no property right in the idea. In *Masline v. New York, New Haven & Hartford R. R. Co.*, 58 the Connecticut Supreme Court held that an idea may be protected by contract, but the idea must be something new before it can be the basis of consideration. 59 This decision has been severely criticized. 60 As Professor Nimmer points out, this decision “seems to ignore the fact that defendant had promised to pay for the idea without conditioning such promise upon plaintiff’s producing an idea which would be regarded as ‘property.’” 61

b. The Statute of Frauds

Unless the agreement regarding the idea disclosure is in writing, the plaintiff may confront a statute of frauds defense, based on either of two sections of the statute. Neither of these sections should hinder the enforcement of the contract.

First, the “sale of goods” section invalidates oral agreements if the price of the goods sold is $500 or more. A plaintiff should be able to defeat this defense by arguing that an idea does not constitute “goods,” making this section of the statute inapplicable. 62 Further, most jurisdictions recognize an exception to this section where the

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56. 3 Nimmer, supra note 7, § 16.04[A], at 16-18 to 16-19.
57. See High v. Trade Union Courier Publishing Corp., 69 N.Y.S.2d 526, 529 (1946) (“While the idea disclosed may be common or even open to public knowledge, yet such disclosure if protected by contract, is sufficient consideration for the promise to pay.”).
58. 112 A. 639 (Conn. 1921).
59. Id. at 641.
60. See, e.g., 3 Nimmer, supra note 7, § 16.04[A], at 16-18; Barrett, supra note 7, at 738.
61. 3 Nimmer, supra note 7, § 16.04[A], at 16-18.
62. Id. § 16.04[B], at 16-23 (“[T]he sounder approach would seem to be to regard the transaction as one involving not a sale of an idea but rather a contract for plaintiff’s services in disclosing the idea.”). See Kurlan v. Columbia Broadcasting Sys., 256 P.2d 962, 970 (Cal. 1953) (holding that acceptance of the goods took the contract out of the Statute of Frauds without ruling on whether an idea actually constitutes goods).
defendant actually receives and accepts the goods.63

Second, an oral agreement is invalid if it cannot be performed within a year.64 A defendant may argue that the promise not to use the plaintiff's idea without payment of compensation is a negative covenant of unlimited duration and is therefore incapable of performance within one year.65 A plaintiff should be able to overcome this defense by arguing for application of the generally accepted exception in favor of enforcement by a party who has completely performed under the contract.66

3. The Implied Contract Theory

If the parties do not have an express contract, the idea originator may be able to recover under an implied contract theory.67 Theoretically, the only difference between the two theories is that in an express contract the parties' agreement is expressed through words, while in an implied contract, the parties' agreement is expressed through conduct.68 Thus, the rules applicable to express contracts also should apply to implied contracts.69 Some courts, however, have not been so generous. While most courts apply the express contract rules to implied contracts, some courts hold that an implied contract cannot be enforced unless the idea satisfies the novelty and concreteness criteria.70

A court confronted with an implied contract claim must focus on the relationship between the parties to determine whether an implied contract exists. For example, courts usually will imply a contract where the plaintiff discloses an idea under conditions indicating

63. See Restatement of Contracts § 201 (1932).
64. Id. §§ 178, 198.
65. See, e.g., Hollywood Motion Picture Equip. Co. v. Furer, 105 P.2d 299, 300 (Cal. 1940) (holding that an oral contract which may be performed within a year is enforceable). But see Cobb v. Southern Plaswood Corp., 171 F. Supp. 691, 700 (W.D. Ark. 1959) (applying the Arkansas Statute of Frauds, which invalidates oral contracts which, by their terms cannot, be performed within one year or which the parties contemplated no performance within one year).
66. See Restatement of Contracts § 198 (1932).
67. See, e.g., Annisgard v. Bray, 419 N.E.2d 315, 318 (Mass. App. Ct. 1981) ("Although the parties never agreed to the precise form or amount of compensation to the plaintiff in the event his idea and work were used, the defendants implicitly assented to pay the plaintiff.").
69. Barrett, supra note 7, at 740.
70. See, e.g., Downey v. General Foods Corp., 286 N.E.2d 257, 259 (N.Y. 1972) ("[W]hen one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent.").
that compensation is expected.\textsuperscript{71} Courts also will rely on industry custom regarding idea submissions and compensation to imply a contract.\textsuperscript{72}

The enforceability of an implied contract often hinges on the method by which the plaintiff transferred the idea to the defendant. Professor Nimmer has concluded that several methods preclude the formation of an implied contract. For example, if the defendant acquires the idea from someone other than the plaintiff, or if the defendant involuntarily receives the plaintiff's unsolicited submission, such as where the plaintiff "blurts out his idea," then an implied contract will not be enforced.\textsuperscript{73}

On the other hand, an implied contract will be found where the defendant actually solicited the plaintiff's idea. This was the case in \textit{Landsberg v. Scrabble Crossword Game Players, Inc.\textsuperscript{74}}, discussed in the introduction. The Ninth Circuit Court of Appeals found that the defendant's book lacked the requisite similarity to infringe the copyright in the plaintiff's nonfiction work, but the court affirmed the district court's finding for the plaintiff on the contract claim:

California law allows for recovery for the breach of an implied-in-fact contract when the recipient of a valuable idea accepts the information knowing that compensation is expected, and subsequently uses the idea without paying for it. If disclosure occurs before it is known that compensation is a condition of its use, however, no contract will be implied.\textsuperscript{75}

The method of transferring an idea that appears to give courts the most difficulty is one where the defendant voluntarily receives an unsolicited submission. Professor Nimmer suggests that a contract should not be implied under these circumstances unless the recipient has an opportunity to reject the submission. If the recipient has such an opportunity, however, and accepts the submission, a contract may be implied.\textsuperscript{76}

\textsuperscript{71}. See, e.g., \textit{Annisgard}, 419 N.E.2d at 318 ("Once they [defendants] represented to the plaintiff that they intended to pay him if they used his idea and services, they were bound to do so when they proceeded to use those ideas and services.").

\textsuperscript{72}. See, e.g., \textit{Whitfield v. Lear}, 751 F.2d 90, 93 (2d Cir. 1984) ("On the whole, the record raises a material issue of fact as to whether the appelees accepted Whitfield's submission on an understanding common in the industry that he expected payment if the ideas were used."); \textit{Vantage Point, Inc. v. Parker Bros., Inc.}, 529 F. Supp. 1204, 1217 (E.D.N.Y. 1981) ("[T]here is support for the proposition that such an implied agreement may be based upon industry custom or usage regarding submission and use of ideas.").

\textsuperscript{73}. \textit{NIMMER}, supra note 7, § 16.05[A]-[B], at 16-31 to 16-34.

\textsuperscript{74}. 802 F.2d 1193 (9th Cir. 1986). See supra note 5 and accompanying text.

\textsuperscript{75}. 802 F.2d at 1196 (citing Desny v. Wilder, 299 P.2d 257, 267, 270 (Cal. 1956)).

\textsuperscript{76}. "[A]ny device which gives the recipient advance warning of and an opportunity to prevent a proposed (non-gratuitious) idea submission will be sufficient to es-
Nimmer also suggests that the implied contract is unilateral (a promise for an act) rather than bilateral (a promise for a promise). Under this analysis, the submission constitutes an invitation for an offer and the failure to reject constitutes an offer for a unilateral contract. Courts, however, often consider the plaintiff's submission to be an offer and the defendant's subsequent use to be the acceptance.

Once a court finds an implied contract, it is confronted with three additional issues. First, the court must determine the price of the idea. In an implied contract, the parties usually do not agree upon the compensation the creator of the idea should receive. Courts, however, usually imply a reasonable compensation. Indeed, most courts permit the plaintiff to testify as to the value of his or her services in disclosing the idea.

Second, the court must determine when the contract became binding on the parties. The contract should be considered binding at the time the idea is disclosed. This will prevent the defendant from "rejecting" the plaintiff's "offer" and then using the idea without fear of retribution. Unfortunately, some courts confuse this point of creation with the point where the cause of action arises. This confusion results because contracts implied by courts usually require the defendant to compensate the plaintiff only if the defendant uses the plaintiff's idea. Thus, the plaintiff has no enforceable claim against the defendant until the defendant actually uses the idea. Thus, some courts erroneously hold that the contract is not binding until

3 Nimmer, supra note 7, § 16.05[C], at 16-36.1.
77. Id. § 16.05[C], at 16-37.
78. See, e.g., Liggett & Meyer Tobacco Co. v. Meyer, 194 N.E. 206, 210 (Ind. Ct. App. 1935) (holding that where plaintiff's letter to defendant included the statement, "I trust that this idea will be of sufficient value as to merit a reasonable charge therefor[,]" the statement constituted an offer and defendant's use of the idea constituted acceptance of the offer).
79. See, e.g., Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193, 1198 (9th Cir. 1986) (holding that damages are limited to the amount parties would have gained had both parties fully performed their obligations); Cool v. International Shoe Co., 142 F.2d 318, 320 (8th Cir. 1944) (holding reasonable compensation appropriate where uncertainty exists regarding compensation).
80. See, e.g., Donahue v. United Artists Corp., 83 Cal. Rptr. 131, 134 (1969) ("California courts have consistently held that an owner of literary property may properly testify as to its value even if he is not an expert in such matters."); Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 140 (1966) (rule that property owners are permitted to testify as to the property's value applies equally to ideas).
81. 3 Nimmer, supra note 7, § 16.05[F], at 16-43.
the cause of action arises. 83

Finally, the court must determine when the breach occurred. This is one of the most difficult issues. This problem is most evident in the television and motion picture industries. 84 For example, does the breach occur when the defendant incorporates the idea into a television or movie script, when that script becomes the basis for a television program or movie, or when the program or movie is first exhibited to the public? 85 While the question is one of fact, most courts hold that the parties impliedly contracted for a use which "disclosed the idea to a substantial segment of the public" since such use "would certainly destroy any further marketability of the idea." 86

4. The Quasi-Contract Theory

A quasi-contract is not a true contract. 87 Rather, it is an equitable doctrine developed by the courts to prevent unjust enrichment. 88 To recover under this theory, a plaintiff must show that the defendant was enriched by using or knowing the idea and that it would be unjust to permit the defendant to refuse to compensate the plaintiff. 89 Courts also require the plaintiff to satisfy the novelty and concreteness criteria. 90 Nevertheless, the courts have not hesitated to apply the theory to idea submission cases. 91

83. Id. This interpretation was also suggested by amicus for the defendant in Stanley v. Columbia Broadcasting Sys., 221 P.2d 73, 75 (Cal. 1950).

84. 3 NIMMER, supra note 7, § 16.05[F], at 16-44.

85. See Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 491 (9th Cir. 1984) (stating that statute of limitations probably triggered by general publication rather than limited publication).


87. "[Quasi contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." Weitzenkorn v. Lesser, 256 P.2d 947, 959 (Cal. 1953) (quoting RESTATEMENT OF CONTRACTS § 5 cmt. a (1932)).

88. The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract, but where "the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another." Matarese v. Moore-McCormack Lines, 158 F.2d 631, 634 (2d Cir. 1946).


90. See, e.g., Official Airlines Schedule Info. Serv., Inc. v. Eastern Airlines, Inc., 333 F.2d 672, 674 (5th Cir. 1964) (requiring plaintiff to show that idea was novel, disclosed in confidence, and that idea was used by defendant); Smith v. Recrion Corp., 541 F.2d 663, 665 (Nev. 1975) ("An idea must also meet the test of concreteness and novelty before its author is entitled to quasi contractual recovery.").

91. See, e.g., Vantage Point, Inc. v. Parker Bros., Inc., 529 F. Supp. 1204, 1216 (E.D.N.Y. 1981) ("[I]t is now accepted that recovery may be had wholly apart from contract where there has been 'undue advantage through unfair conduct—a breach of confidence [or] reprehensible means of obtaining the valuable property rights of
5. The Confidential Relationship Theory

The courts sometimes use the confidential relationship between the parties to protect the plaintiff’s submission of an idea to the defendant. Such a relationship is usually found in an employer-employee situation, but is certainly not limited to these relationships. As set forth in the Restatement of Trusts:

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relation or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent.

One commentator argues that the confidential relationship theory should be subsumed by traditional trade secret law. This argument ignores the fact that the theory is applicable even where the idea may not be wholly secret. For example, where the plaintiff discovered a little known public domain folk song and disclosed it to the defendant, the court held that the defendant could not exploit the song without the plaintiff’s authorization due to the parties’ confidential relationship.

Some courts apply the theory only where the parties have an express or implied agreement to treat the idea in confidence. Other courts have applied the theory regardless of an agreement between another without compensation.

93. Davies v. Krasna, 535 P.2d 1161, 1166 (Cal. 1975) (quoting RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. (b)).
94. Barrett, supra note 7, at 741 (“It is unclear why the confidential relationship theor[y] of idea law should be necessary. Adequate protection should be available to deserving plaintiffs through trade secret law.”).
95. See, e.g., Carpenter Found. v. Oakes, 103 Cal. Rptr. 368 (1972) (holding theory applies to materials embodied in letters, lectures, sermons or addresses); Radium Remedies Co. v. Weiss, 173 Minn. 342, 217 N.W. 339 (1928) (holding qualified or partial secrecy is sufficient to invoke the theory).
97. See, e.g., Sloan v. Mud Products, Inc., 114 F. Supp. 916 (N.D. Okla. 1953); Gilbert v. General Motors Corp., 32 F. Supp. 502 (W.D.N.Y. 1940). These courts held that while the plaintiffs were required to show that the ideas were both novel and disclosed in confidence under circumstances which contemplated compensation, plaintiffs were not required to specifically demonstrate the terms of the agreement.
Id.
the parties. The latter view is preferable, and the distinction is important for two reasons. First, a pure breach of confidential relationship action is an equitable action. This permits equitable remedies such as an injunction and an accounting in addition to equitable defenses such as laches. Second, the statute of limitations applicable to an equitable action may be longer than the period for a breach of contract or quasi-contract.

B. The Novelty, Concreteness and Unauthorized Use Requirement

Regardless of which theory a plaintiff pursues, courts will generally protect only ideas that are both novel and concrete. Courts usually discard this requirement when they find an express contract, but some courts require these elements under that theory as well. Additionally, a defendant's use of the idea must be unauthorized. Unfortunately, courts have not been uniform in defining these requirements.

1. The Novelty Requirement

Courts uniformly deny recovery to an idea originator unless the idea is sufficiently novel. From a policy standpoint, the novelty requirement serves to confine protection to those ideas that are truly valuable to society. While this policy is appropriate, it is question-

98. See, e.g., Thompson v. California Brewing Co., 310 P.2d 436 (Cal. 1957) (holding that a confidential relationship was created when an advertising idea was disclosed to defendant with the expectation that defendant would pay for its use); Davies v. Krasna, 54 Cal. Rptr. 37 (Ct. App. 1966) (reversing trial court's granting of nonsuit on a confidential relationship theory).


100. See Davies v. Krasna, 535 P.2d 1161 (Cal. 1975) (holding that statute of limitations to be applied is determined by the nature of the rights sued on, not by the form of the action or the relief demanded).


103. See, e.g., Ed Graham Prods., Inc. v. NBC, Inc., 347 N.Y.S.2d 766, 769 (N.Y. Sup. Ct. 1973) (holding that "where plaintiff's idea is wholly lacking in novelty, no cause of action in contract or tort can stand based upon the alleged misappropriation of that idea.").

104. Barrett, supra note 7, at 710.

Only if the idea is truly valuable to society could the benefit of protection, which theoretically served as an incentive to create the idea, be deemed sufficient to offset the necessary impairment to competition that results whenever individual rights are recognized. While there is no objective, uniform way to measure the value of an idea, some standards may be more successful than others in ensuring that a particular idea has value to a significant number of people.

Id.
able whether the novelty requirement adequately serves this purpose.

The greatest problem arises from the variety of ways the courts have defined "novel." Generally, depending on the jurisdiction, courts have found an idea to be "novel" if it was original to the plaintiff, innovative in character, or both original to the plaintiff and innovative in character.\(^{105}\) Obviously, the first definition is broader than the second, and the second definition is broader than the third. For example, an idea original to the plaintiff may already be in the public domain, but an idea that is "innovative," by definition, is not.\(^{106}\)

The problem is compounded by the originality requirement. Some courts require ideas to be both original \(\text{and}^{107}\) novel while other courts use the terms interchangeably.\(^{108}\) This problem may be illusory since, as Professor Nimmer points out, "it would seem that requiring both novelty and originality adds nothing to merely requiring novelty since if an idea is novel it must by definition also be original."\(^{109}\)

The definition of "novel" may best be discerned by observing what ideas the courts consider novel. For example, ideas relating to advertising and promotional activities have been found to be sufficiently novel,\(^{110}\) as have the subject matter of magazine articles\(^{111}\) and the design and composition of manufactured products.\(^{112}\) "[I]deas that reflect 'genuine novelty and invention' are fully protected against unauthorized use."\(^{113}\) On the other hand, the idea that a business can realize greater profits by increasing the price of

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105. Id. at 710-11 (footnotes omitted) (emphasis in original).

106. Id. at 711.

107. See, e.g., Kurlan v. Columbia Broadcasting Sys., 256 P.2d 962 (Cal. 1953) (plaintiff claimed CBS copied radio program created by plaintiff); Kovacs v. Mutual Broadcasting Sys., 221 P.2d 108 (Cal. 1950) (affirming plaintiff's claim that his idea and format of a radio program were original and novel).


109. 3 NIMMER, supra note 7, § 16.08[B], at 16-59 n.39.

110. See, e.g., Hamilton Nat'l Bank v. Belt, 210 F.2d 706 (D.C. Cir. 1953) (holding that idea was sufficiently novel and concrete to support claim for damages incurred by appellant's appropriation of a particular type of radio program that appellee had made known to defendant).

111. See, e.g., Werlin v. Reader's Digest Ass'n, Inc., 528 F. Supp. 451 (S.D.N.Y. 1981) (holding that author's copyrighted article was sufficiently novel and concrete to support claim for infringement, misappropriation, and unjust enrichment).


its products is not sufficiently novel; nor is the idea that Elvis Presley was murdered or an advertisement which depicts a young child eating yogurt in a high chair.

2. The Concreteness Requirement

Courts have shown even more uncertainty in defining "concreteness" than they have in defining "novelty." There appears to be two general approaches to defining concreteness. Some courts focus on the form of the idea and determine that the idea is concrete only if it is in a "tangible form." Other courts focus on the development of the idea and determine that the idea is concrete only if it is ready for immediate use. In practice, the latter approach generally encompasses the former, since most courts are not likely to find an idea ready for immediate use unless the idea is in a tangible form.

There are problems with both approaches. For example, some courts require an idea to be in writing before it is considered "tangible." This position has been severely criticized:

[T]he better and probably more generally accepted view is that an idea may be sufficiently developed so as to be concrete without ever having been on paper. Certainly writing should not be determinative on the question of concreteness since a totally abstract idea may be put on paper and a highly developed and detailed 'idea' may be presented orally.

The "ready for immediate use" approach, on the other hand, redefines the definition of "idea." "If we think of an idea as 'a conception[,] . . . a preliminary plan,' then surely to speak of an idea

117. Barrett, supra note 7, at 712.
118. See, e.g., Hamilton Nat'l Bank v. Belt, 210 F.2d 706, 708 (D.C. Cir. 1953) ("An abstract idea . . . is so unattached as to be deemed legally without the quality of individual identity or property."); O'Brien v. RKO Radio Pictures, 68 F. Supp. 13, 14 (S.D.N.Y. 1946) ("[A]n author has no property right in his ideas unless the same are given embodiment in a tangible form.").
119. See, e.g., Smith v. Recrion Corp., 541 P.2d 663, 665 (Nev. 1975) ("An idea in order to meet the test of concreteness must be ready for immediate use without any additional embellishment.").
120. See, e.g., id. ("The purpose of the test is to insure that the idea merits protection: That it is 'tangible' and would not exist but for the independent efforts of the author.").
122. 3 Nimmer, supra note 7, § 16.08[A], at 16-53 to 16-54 (citations omitted).
developed to the point where it is ready for use presents a contradic-
tion in terms since if an idea is so developed it ceases to be merely an
idea.”

3. The Unauthorized Use Requirement

Most courts that address the issue of idea protection merely con-
centrate on the novelty and concreteness criteria. Indeed, even
the major commentators in the field limit their discussion to these
two criteria. This probably occurs because the novelty and con-
creteness requirements apply to the idea itself. However, before a
plaintiff can recover from the defendant under any of the theories of
recovery, the plaintiff must show that the defendant’s use was
unauthorized.

While most courts simply imply the unauthorized use criterion,
some courts expressly make this an additional requirement. For ex-
ample, in Sellers v. American Broadcasting Co., the Eleventh Circuit
Court of Appeals recognized that, under New York law, recovery for
the misappropriation of an idea is permitted if the idea is novel, the
idea is in concrete form, and the defendant makes unauthorized use of
the idea. To show unauthorized use, the plaintiff must demon-
strate “some substantial similarity” between the plaintiff’s idea and
the idea used by the defendant.

IV. The Issue of Preemption

“Preemption” is defined as a “[d]octrine adopted by [the] U.S.
Supreme Court holding that certain matters are of such a national, as
opposed to local, character that federal laws preempt or take prece-
dent over state laws. As such, a state may not pass a law inconsistent
with the federal law.” The preemption doctrine finds its roots in the
Supremacy Clause of the United States Constitution.

Two federal bodies of laws overlap the area of idea law: patent law

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123. Id. at 16-53 (quoting WEBSTER’S NEW INT’L DICTIONARY 1236 (2d ed. 1983)).
124. See, e.g., Matarese v. Moore-McCormack Lines, 158 F.2d 631, 634 (2d Cir.
1946) (holding employer liable for reasonable value of use of inventive ideas dis-
closed by employee who had expectation of payment).
125. See, e.g., 3 Nimmer, supra note 7; Barrett, supra note 7.
126. Sellers v. American Broadcasting Co., 668 F.2d 1207 (11th Cir. 1982) (re-
jecting plaintiff’s claim of novelty in “exclusive story”).
127. Id. at 1210.
128. Id.; see also Galanis v. Proctor & Gamble Corp., 153 F. Supp. 34, 38 (S.D.N.Y.
1957) (holding that plaintiff must establish that the idea was actually appropriated by
the defendants).
129. Kurlan v. Columbia Broadcasting Sys., 256 F.2d 962, 969 (Cal. 1953), quoted
in Whitfield v. Lear, 751 F.2d 90, 93 (2d Cir. 1984).
131. U.S. CONST. art. VI.
and copyright law. Both are statutory, finding their roots in the Constitution. The United States Supreme Court has addressed the issue of patent and copyright preemption on several occasions, with seemingly contradictory results.

A. Patent Law Preemption

Obtaining a patent is the normal means of protecting an idea. Indeed, some commentators have suggested that a patent is the only method available to protect ideas. A patent can be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” However, the Supreme Court has recognized the “strong federal policy favoring free competition in ideas which do not merit patent protection.” Consequently, while an idea may lead to the invention or discovery of patentable subject matter, an idea itself is not patentable.

B. Copyright Law Preemption

The 1976 Copyright Act expressly preempts any state law that creates rights “equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.” Section 102(b) prohibits the originator of an idea from securing copyright protection for that idea: “In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained,
illustrated, or embodied in such work.’’\textsuperscript{139} The crucial issue thus becomes whether an idea comes within the scope of section 102.\textsuperscript{140}

Even if ideas fall within the scope of copyrightable subject matter, most of the theories of idea protection would not be preempted. Section 301 preempts only state laws that create rights “equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”\textsuperscript{141} Indeed, the section expressly permits “any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”\textsuperscript{142} While there is little case law that directly addresses these issues, the consensus is that ideas are not only outside the scope of copyrightable subject matter under section 102, but ideas are also outside the scope of subject matter under section 301.\textsuperscript{143}

Courts generally apply an “extra element” test to determine whether a state law is preempted. “[W]hen a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur.”\textsuperscript{144} The express and implied contract theories include the element of a contractual relationship, thus effectively removing them from the scope of preemption.\textsuperscript{145} Similarly, the confidential relationship the-

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\item \textsuperscript{139} \textit{Id.} § 102(b)(3).
\item \textsuperscript{140} \textit{See} 3 \textit{Nimmer, supra} note 7, § 16.04[C], at 16-24 to 16-25 (“It is arguable that an idea for a literary work does fall ‘within the subject matter of copyright as specified in section 102 and 103.’ ”). This is certainly a reasonable interpretation, based on the courts’ preemption of state laws regarding historical facts, themes and research, which have been deliberately excluded from the scope of copyright. \textit{See, e.g.}, Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983), rev’d on other grounds, 471 U.S. 539 (1985); Suid v. Newsweek Magazine, 503 F. Supp. 146, 149 (D.D.C. 1980).
\item \textsuperscript{141} 17 U.S.C. § 301(a) (1988).
\item \textsuperscript{142} \textit{Id.} § 301(b)(3) (emphasis added).
\item \textsuperscript{143} \textit{See, e.g.}, Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1532 n.16 (S.D.N.Y. 1985) (“[s]tate laws that protect ideas, as distinct from their expression, are without the subject matter of copyright and therefore not preempted under § 301.”); Bromhall v. Rorvik, 478 F. Supp. 361, 367 (E.D. Pa. 1979) (“Copyright protection extends only to expression of an idea, not the idea itself. . . . Since the claims now being considered are not entitled to protection under the Act, they are not preempted by the Act.”) (emphasis in original).
\item \textsuperscript{144} \textit{Harper & Row}, 723 F.2d at 200. The “extra element” must be one which makes a qualitative difference in the nature of the action. “Elements such as awareness or intent, which alter the action’s scope but not its nature, will not save it from preemption under § 301.” \textit{Mayer}, 601 F. Supp. at 1535.
\item \textsuperscript{145} \textit{See, e.g.}, Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981, 986 (S.D.N.Y. 1985) (Breach of contract claim is “qualitatively different from a copyright claim and therefore not preempted by § 301.”).
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ory includes the obligation not to disclose an idea revealed in confidence.  
146 There is a split of opinion regarding the quasi-contract theory; some courts find an extra element in the theory  
147 while other courts fail to find any element which renders this count different from copyright infringement.  
148 The property theory, on the other hand, does not contain the requisite additional element. Consequently, any claim brought under the property theory will be preempted unless the court determines that ideas fall within the scope of copyright subject matter.  
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C. Intellectual Property Preemption Case Law

The Supreme Court first addressed the preemption doctrine in an intellectual property context in Sears, Roebuck & Co. v. Stiffel Co.  
150 and Compco Corp. v. Day-Brite Lighting, Inc.,  
151 two similar cases decided on the same day. In the Sears and Compco decisions, the Court determined that Congress had reached a compromise when it drafted the patent statute: inventions that were truly novel and non-obvious (i.e., patentable) would be granted a monopoly of limited duration while inventions which failed to satisfy the patent criteria should remain in the common domain.  
152 Under this reasoning, any state law that protected an inventor whose invention was not patentable would frustrate Congress's intent and was thus preempted.

To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that . . . States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an en-

146. See, e.g., Smith v. Weinstein, 578 F. Supp. 1297, 1307 (S.D.N.Y. 1984) (holding that party may contract to pay for ideas even though they could not be protected by copyright law), aff'd, 738 F.2d 419 (2d Cir. 1984).
148. P.I.T.S. Films v. Laconis, 588 F. Supp. 1383, 1386 (E.D. Mich. 1984); see also Ronald Litoff, Ltd., 621 F. Supp. at 986 (finding that plaintiffs' claim of unjust enrichment was preempted because it involved "the same rights . . . which plaintiffs seek to protect in their copyright claim").
149. Barrett, supra note 7, at 725 ("Should the higher courts ultimately determine that ideas are within the statutory subject matter, the property theory should be preempted pursuant to Section 301 of the Copyright Act.").
152. Id. at 237-38.
croachment on the federal patent system to be tolerated.\textsuperscript{153}

The Court took a different approach in its next two opinions on the issue. In \textit{Goldstein v. California}\textsuperscript{154} and \textit{Kewanee Oil Co. v. Bicron Corp.},\textsuperscript{155} the Court determined that when Congress failed to provide protection for a particular type of intellectual property under the patent and copyright statutes, it left that field unattended and open to state regulation. In \textit{Kewanee} the Court decided that "[t]he only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress."\textsuperscript{156}

The Supreme Court directly addressed the issue of idea protection in \textit{Aronson v. Quick Point Pencil Co.}\textsuperscript{157} In \textit{Aronson}, the plaintiff developed a unique keyholder and entered into a royalty agreement with the defendant. The agreement required the defendant to pay royalties to the plaintiff whether or not the keyholder was patentable. When the United States Patent Office refused to issue a patent for the keyholder, the defendant sought to repudiate the agreement, claiming that enforcement of the agreement was preempted by the patent statutes. The Supreme Court disagreed.\textsuperscript{158}

The Court first recognized that statutes "seek to assure that ideas in the public domain remain there for the use of the public."\textsuperscript{159} The

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\item \textsuperscript{153} Sears, Roebuck, 376 U.S. at 231-32. The Court came close to addressing the protection of ideas in Lear, Inc. v. Adkins, 395 U.S. 653 (1969). While the Lear decision directly addressed the issue of licensee estoppel, the Court raised the issue of whether and to what extent states "may protect the owners of unpatented inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties." \textit{Id.} at 674 (emphasis in original). The Court declined to answer this question, but did recognize the "conflicting demands" involved:
  
  On the one hand, the law of contracts forbids a purchaser to repudiate his promises simply because he later becomes dissatisfied with the bargain he has made. On the other hand, federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent.

  \textit{Id.} at 668.

\item \textsuperscript{154} 412 U.S. 546 (1973).

\item \textsuperscript{155} 416 U.S. 470 (1974).

\item \textsuperscript{156} \textit{Id.} at 479; see also \textit{Goldstein}, 412 U.S. at 570. The pre-1976 Copyright Act did not include sound recordings within the scope of copyrightable subject matter; thus, there was no conflict between federal law and a state law protecting recordings. "Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act." \textit{Id.} The Court in \textit{Goldstein} expressly distinguished the protection of ideas. "No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording." \textit{Id.} at 571. The Court did not elaborate on this point.

\item \textsuperscript{157} 440 U.S. 257, 262 (1979).

\item \textsuperscript{158} \textit{Id.} at 257.

\item \textsuperscript{159} \textit{Id.} at 262.
\end{itemize}
Court concluded that the agreement at issue did not frustrate Congress's intent, since “encouraging Mrs. Aronson to make arrangements for the manufacture of her keyholder furthers the federal policy of disclosure of inventions.”\textsuperscript{160} Thus, since the idea behind the keyholder was not in the public domain before the parties entered into the royalty agreement, the agreement was not preempted by the patent laws. Indeed, the agreement actually furthered the policy behind the patent laws by encouraging the disclosure of an idea which otherwise would not have been disclosed.

This point was reinforced ten years later in \textit{Bonito Boats, Inc. v. Thunder Craft Boats, Inc.}\textsuperscript{161} In \textit{Bonito Boats}, the Supreme Court affirmed the Florida Supreme Court's decision that the federal patent laws preempted a Florida statute that prohibited the use of direct molding processes to duplicate unpatented boat hulls.

A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception which has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy.\textsuperscript{162}

Nevertheless, the Supreme Court recognized that its decisions since \textit{Sears} took a decidedly less rigid view of the scope of federal preemption under the patent laws.\textsuperscript{163} The Court also reaffirmed both \textit{Kewanee Oil} and \textit{Aronson}.\textsuperscript{164} The balance struck by the Court is, in its own words, pragmatic.\textsuperscript{165} So long as the nondisclosure of an idea does not remove that idea from the public domain, and thus contravene the purpose of the patent laws, the disclosure of the idea can be protected by state law. However, if the idea is “freely disclosed by the author to the public at large,” no state law may interfere with the public's use and enjoyment of that idea.\textsuperscript{166}

\textbf{V. Future Protection of Ideas}

It is difficult to predict how the courts will address the issue of protecting ideas in the future. Given the United States Supreme Court's reluctance to strictly enforce patent preemption and the lower courts' tendency toward excluding ideas from copyright sub-

\textsuperscript{160. Id. at 262-63.}
\textsuperscript{161. 489 U.S. 141 (1989).}
\textsuperscript{162. Id. at 156-57.}
\textsuperscript{163. Id. at 156.}
\textsuperscript{164. Id.}
\textsuperscript{165. Id. ("We have since reaffirmed the pragmatic approach which \textit{Kewanee} takes to the preemption of state laws dealing with the protection of intellectual property.").}
\textsuperscript{166. Id. at 157 (stating that free disclosure by author would contravene the goal of public disclosure).}
ject matter for preemption considerations, it seems probable that the courts will not preempt a state law which protects ideas. Nevertheless, as case law develops and the novelty and concreteness criteria become more refined, courts may be more hesitant to protect ideas unless satisfied that the idea is sufficiently new, concrete, and developed to deserve protection.

Due to the uncertainty surrounding the protection of ideas, both potential plaintiffs and defendants should take appropriate steps to protect their respective positions. The best approach for both parties is to document all correspondence and discussions regarding the disclosure of an idea.

For example, an idea originator should submit the idea in a separate envelope. The envelope should contain a warning printed on it alerting the mail opener that the envelope contains an idea being disclosed in confidence. Additionally, the idea originator should include a letter detailing the terms of disclosure and requesting the return of the envelope unopened if the recipient decides not to agree with those terms.167

On the other hand, a business that is likely to receive unsolicited ideas has a greater exposure to liability and, thus, should take steps to insulate itself from a potential lawsuit. First, the company should formulate and articulate a written policy regarding idea submissions.168 Second, the company should designate one person to whom all unsolicited ideas are routed.169 Finally, upon receipt of an idea, the company should send a letter to the submitter which informs him of the company's policies and procedures for handling the idea. This letter should also inform the submitter of the status of the parties' relationship and proposed use of the idea.170

VI. Conclusion

Several theories of recovery are available to a person who submits an idea expecting remuneration which never materializes. All of these theories, however, have substantial barriers which must be


168. MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY 159 (1985). This policy should "set forth in detail the procedures that will be followed whenever the company receives an idea or suggestion from the public. A company's written policy regarding idea submissions should be distributed and made known to all employees." Id.

169. Id. at 160.

170. See, e.g., 2 LINDEY, supra note 167, at 1315-17 (providing an example of a letter to be sent to an idea submitter).
overcome before a court will award recovery. To avoid the uncertainty and additional cost of litigation, both potential plaintiffs and defendants should take appropriate steps to ensure that the other party is fully aware of the agreement surrounding the disclosure of an idea. If appropriate steps are taken, idea originators can disclose their ideas knowing that they will be compensated if the ideas are used, and idea recipients can receive ideas knowing that they need not fear litigation if they decide not to use the ideas.

Steve Reitenour