ALWAYS USE PROTECTION! – Advising Clients On Submitting Their Ideas Without Getting Ripped Off

Just about everyone at one time or another has come up with an idea for a movie, TV show, product or service. They've seen or are aware of how much money can be made in such endeavors, figure their ideas are as good as anyone else's, if not better, and decide to take a shot at making their dreams of fame and/or fortune a reality (or maybe a reality show).

But, like in other situations, there are great dangers to a submitter and their submission unless they know that protection is available and how to use it. Without protection, the consequences to your client can be life-altering, very expensive and not something a few doctor visits or setting up a college fund can make better. Plus, you don't want to be a lawyer for a client who contracts the dreaded STD—Submission Theft Disorder. This is characterized by such symptoms as: seeing their idea appear on store shelves, on television, or in movie theatres; not seeing any money, credit or attribution for their ideas being brought to the masses; and in severe cases, homicidal or suicidal impulses (the former sometimes directed at you). And, like with most STDs, there is no known cure. It's too late once your client contracts it to do much about it. And if they can, it's very expensive.

I've always been a big believer in the "prophylactic" [1] approach to law. It's essential that your client understands the it's much less expensive to prevent a problem from happening than it is to try and clear it up once the problem occurs. With good legal advice and effective planning, a lot can be done to protect your client's idea before and during submission, avoiding STD and the burning feeling of seeing someone else take and benefit from their brilliance, forethought, hard work and creativity.

Copyright

Federal copyright law doesn't protect ideas. In fact, idea protection is specifically excluded. 17 U.S.C. 102(a) states that copyright protection exists only for "…original works of authorship *fixed in any tangible medium of expression*…from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." (emphasis added). "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.[2]

However, copyright law can protect any number of versions of an idea, once fixed in such a tangible medium. It then also protects the bundle of rights that goes with the version and their conveyance to third parties Protection for ideas and their submissions are protected by several state's laws, including in California. I'll discuss these later in this article.

If your client is the "idea person", the first step to take before they submit anything is to commit their version of the idea to paper, videotape, film or other tangible medium. This serves several purposes. One is it forces them to crystallize and be specific with their particular version of an idea. For writings involving ideas for television shows, books or motion pictures, they're usually called "treatments" or "synopses". When they involve ideas for audiovisual works, they're often called "demo reels" or "sizzle reels". For products and services, they often take the form of business plans, summaries, samples of proposed advertising and promotional materials and perhaps even product mock-ups. Ideally, they should be as detailed as possible regarding characters, story lines, plot points, locations, functionality, look and feel, depending on the nature of the submission. This

[1] This phrase was used and concept advocated by my late, great brother and law partner, Barry Menes, to whom this article is dedicated. Miss and love you, Bro.

[2] 17 U.S.C. 102 (b)

specificity can also qualify for "substantial similarity," which along with "access" are the two major elements needed to establish copyright infringement under federal law and idea theft under California law.[3] Substantial similarity is far easier to prove if the alleged infringer has taken a sufficient number of the submitter's unique idea elements, as opposed to just taking the broad idea itself.

Copyright attaches to an original work upon creation. Contrary to popular belief, a work doesn't have to be registered with the U.S. Copyright Office to be "copyrighted". However, the second step you or your client should take to protect their idea is to register the work they have created with the Copyright Office. This also serves several purposes. They include the Copyright Office being the recognized central depository for copyrightable works. The tangible mediums of expression for works include such things as writings, sound recordings, pictures, movies and other audiovisual works, sculptures, architecture, choreography, drawings, content visible and/or audible via the Internet or mobile devices (the fixation there being the tangible form in which the content is first fixed, like paper, videotape or a computer drive, which is then perceivable using a computer or handheld device once on a server or in a database), choreographic and architectural design.[4] Registration also establishes a date of creation. This is important because in the case of very similar works that were coincidentally created without the creator of one knowing about or copying the elements of the other, the first in time usually wins, if certain facts are present. Registration is also a prerequisite to filing a copyright infringement suit and the non-infringing party's right to claim certain statutory damages and attorneys fees from the infringers.

The third step is for your client to place a conspicuous copyright notice on their submission materials before disseminating any copies. The notice should be "affixed in such manner and location as to give reasonable notice of the claim of copyright." [5] While copyright notice is no longer a requirement to establish a copyright or maintain copyrightability, it lets others know that the submitter is claiming a particular original work as theirs. A few examples of good locations for such a notice would be at the bottom of the title page on a writing, on the container and visible at the very beginning of an audiovisual work, on the container and label of an audio recording and on the "splash page" of a website from which a work is perceivable or accessible. One proper copyright notice consists of a "c" in a circle, the date of creation and the person or company claiming ownership.[6] Please refer to mine at the end of this article for an example.

Submission / Confidentiality Agreements

Now your client's almost ready to submit their materials to those third parties who can make their dreams come true. However, sending out these materials without taking advantage of the protections awarded by state law, is like discovering holes in the protection. It may work, but there's no up-side and plenty of down-side. Basically, California law uses various express and implied contract theories to protect ideas. I believe an ideal way of using both available federal and state law protection is to get the materials recipient to sign a non-disclosure/confidentiality agreement ("NDA") before submission.

Certain provisions should appear in an NDA. Like your submission materials themselves, the more specificity in an NDA, the better. Courts are loath to enforce over-broadly worded NDAs. The provisions I counsel clients to have in NDAs are:

- A clear statement or definition of the materials that will be submitted;

[3] Golding v. RKO Pictures, Inc. (1950) 35 Cal 2d 690, 695: Sid and Marty Kroft Television v. McDonald's Corp. (9th Cir. 1977) 562 Fed. 2nd 1157.
[4] 17 U.S.C. 102 (a)(1)-(8)
[5] 17 U.S.C. 401 (3)(c)
[6] 17 U.S.C. 401 (b)

- The specific limited purpose ("Purpose") for which they're being submitted. Examples would be to explore the funding, production and/or exploitation of your TV series idea or the licensing of your innovative product;

- A provision limiting those people on the recipient side who are authorized to review the materials, with language providing that anyone else a designated recipient person desires to also participate in the review or handling of these materials sign a copy of the NDA and thereby be bound by it;

- A strict, detailed confidentiality provision including language that specifies which particular materials in the submission constitute the submitter's "confidential information" and "trade secrets", that they're only being submitted them to be evaluated for the Purpose and that the submitter wouldn't have sent these materials unless the recipient assured them they would be held in strictest confidence;

- A specific time limit to evaluate the materials for the Purpose with provisions for your client to unilaterally and for any reason terminate the NDA upon written notice to the recipient;

- Upon termination for any reason, all submitted materials and all copies and derivatives made of them in any forms or formats whatsoever, are all returned to you or your client, with warranties, representations and covenants by the recipient that they have not retained parts or all of any copies or versions;

- An acknowledgement by recipient that the submitter expects to receive money or other compensation and perhaps credit or other attribution for any use, in whole or in part, of any kind or nature of any of the materials by recipient or anyone else;

- That any use of any kind or nature of any of the materials except for purposes of evaluating the materials for the Purpose without your client's prior written consent constitutes intentional copyright infringement and violations of applicable state law.

The NDA should be mutual where applicable. such as for any recipient confidential information your client may learn of or receive during discussions about the materials or the Purpose. This may give the recipient more incentive to accept and sign the NDA.

Unfortunately, there are a lot more people wanting to submit ideas than there are people or companies to submit them to, let alone that will accept such submissions. There are only so many production companies, product manufacturers and service providers out there for any particular type of submission. The unequal bargaining power this creates puts the recipient in the position to not want to sign NDAs. Moreover, because of liability issues, many recipients won't accept unsolicited materials. They usually log them in unopened, then either throw them away or return them to the submitter. If your client is allowed to make a submission, the recipient may have their own NDA they require your client to sign before making the submission. Naturally, these NDAs are very one-sided and protective of the recipient and greatly limit the rights and remedies the submitter has in the event that the submitter and recipient can't make a deal for the submitter's materials and the submitter subsequently feels the recipient used some or all of them thereafter. These recipient-created NDAs are not always negotiable and are usually made a condition of a recipient accepting a submission.

"C.Y.A." Correspondence

What if the recipient in essence tells you or your client not to use protection and that "you can trust me" with the submission—the recipient refuses to sign any kind of NDA and will only accept the materials or talk to you or your client without one? All is not lost.

The next best thing to an NDA is to send "C.Y.A." (convey your anticipation) letters or emails. Sort of the equivalent of a "morning-after" remedy. I vastly prefer emails for this purpose. Recipients can claim they never

received letters. I also believe that sending letters registered mail, FedEx or by other confirmed delivery method ("Delivery Service"), raises red flags and can cause them to be rejected. Email, on the other hand, gets to the recipient and you have almost indisputable proof of delivery, unless it winds up in the "Spam" folder. This is something you can usually avoid, since you obviously need the recipient's email address to send the materials, follow-up and correspond.

The basic purpose of this CYA correspondence is to confirm as much as possible having to do with the submission. But, it's very important the tone be friendly, conversational and innocuous. For example, if your client is allowed to submit the materials, it should be accompanied by a cover email (or if the materials can't be emailed, by a letter when the materials are delivered or send by Delivery Service) saying such things as:

- how happy they are to be able to have this opportunity to submit;
- a list of what materials are being submitted;
- why it's being submitted (the "Purpose");
- what the recipient is expected to do with the materials (for example, evaluate a script/treatment for a possible reality TV show);
- to contact you or your client to let it be known what they think of the materials and if they have any questions or want to discuss it with you further. If they do want to discuss it further, your client is happy to do so, including the fact that your client would of course discuss compensation payable to them in the event the recipient wants to make any use of the materials.

If the recipient wants to have a meeting or telephone conference about the materials, either initially or after submission, confirm it in writing. It could be something as simple as stating that your client "just wants to confirm the meeting of (whatever date and time) at (whatever location) and that they look forward to meeting the recipient and discussing the materials with them for the Purpose."

An email should also be sent after a telephonic or in person meeting, thanking them for their time and interest and briefly summarizing what was discussed and whether any further discussions or meetings are contemplated.

In the unfortunate event that you or your client feel there's a claim for copyright infringement or theft of your client's ideas, a signed NDA or the CYA correspondence can help you establish the necessary elements. As mentioned above, the two basic elements to prove copyright infringement under federal law and idea theft under California law are "access" and "substantial similarity". Receipt by the recipient can establish access. And, the more similarity between specific points, details and characterizations between the materials and the alleged infringing materials, the likelier it is for you to be able to prove substantial similarity.

California / State Law

In California and in other states, state law allows theft of idea claims under several theories. One such theory is that the submission constitutes an implied-in-fact contract if the conduct of the parties manifests its existence and terms.[7] Another would be the misappropriation of the submitter's confidential, proprietary information or "trade secrets", per California's Uniform Trade Secrets Act (Civil Code sections 3426 *et seq*), which provides for injunctive relief and monetary damages for both the acquisition and use of the trade secret. Relief has also been

[7] California Civil Code § 1621.

granted by the courts in several California cases when both the existence of a fiduciary relationship between submitter and recipient and recipient's breach of this fiduciary duty by unauthorized use of the submitted idea is established.[8] There's also a separate cause of action available in California to the submitter when disclosure of an idea in confidence may give rise to a "confidential relationship" between submitter and recipient and recipient violates its duty to maintain this confidence.[9] The elements you'd need to prove under each of these theories are different. For example, to prove breach of an implied-in-fact contract, one must show:

- that the plaintiff prepared the idea themselves[10];
- that the plaintiff disclosed the idea with the understanding that the recipient would pay for any use of the idea [11];
- the recipient's voluntary acceptance of the idea with the understanding that the recipient would pay for any use of the idea [12]; and
- the recipient's unauthorized exploitation of the idea. [13]

A Few Final Words

I understand the excitement of having an innovative idea for a show, movie, product or service. I also understand the desire to plunge ahead quickly and with some abandon in the heat of this excitement. Submitting an unprotected idea may feel like a good idea at the time. But, having it ripped off is no better and often far worse than not submitting it at all. By moving slower, cautiously and following the steps above, your client greatly increase the odds of having a satisfying and fulfilling submission experience.

 Ira M. Steinberg assisted with legal research for this article.

[8] Stevens v. Marco, 147 Cal. App. 2d 357; Davies v. Krasna, 14 Cal. 3d 502, 511-512.
[9] Davies, 14 Cal. 3d at 510.
[10] Aliotti v. R. Dakin & Co., 831 F. 2d 898, 902.
[11] Alliotti, *supra*; Minniear v. Tors, 266 Cal. App. 2d 495, 504.
[12] Alliotti, *supra;* Minniear, 266 Cal. App. 2d at 504; Desny v. Wilder, 46 Cal. 2d 715, 745-746.
[13] Davies, *supra*.