# Idea Theft: Protecting All Sides


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With the increase in litigation over so-called “idea theft,” many aspiring writers are understandably concerned about protecting their work. They often ask whether you can “copyright an idea.” The short answer is no. The long answer is that there are ways to protect creative work.

The Copyright Act does not offer protection to “ideas” and “concepts.” While an author’s work is protected from the moment he or she writes it (although it’s a good idea to add a copyright notice – “© 2012 [name]” – before circulating it), that protection extends only to the more detailed expression of the creator’s idea, not to the underlying idea itself.

By way of example, there have been innumerable dramatic presentations of forbidden or doomed lovers who come from hostile factions or families, from before Shakespeare to the recent History Channel miniseries, “Hatfields & McCoys.” Copying this archetypal idea is *not* copyright infringement.

Indeed, it wouldn’t even be copyright infringement to copy the background against which the doomed lovers are portrayed; for example, depicting them as coming from opposing sides in an historic conflict or ethnic divide. For copyright infringement, the similarity must be in the *details*, excluding those details which are standard elements in such stories (such as the lovers’ families’ hostile reactions and tragic conclusions), and the bar for sufficient similarity is set rather high because, as the U.S. Court of Appeals for the Ninth Circuit has stated, “there is only rarely anything new under the sun.”

An *idea* -- such as an idea for a new type of “reality” television program, or even for another dramatic presentation of star-crossed lovers -- *can* be protected, but not by copyright law. Idea protection generally requires some sort of relationship between the parties that obligates the party receiving the idea to compensate the idea’s creator if the idea is used.

Moreover, the threshold for protectability of an idea varies. While copyright is a matter of federal law, idea misappropriation is governed by state law and some states, for example, require that an idea be novel to be protectable, while others do not.

There are also unique advantages and disadvantages to suing someone for either idea misappropriation or copyright infringement.

While copyright law protects only against the copying of the particular expression of an idea and not the idea itself, a copyright infringement claim can be asserted against anyone in the world who had access to the creator’s work (*i.e.,* the opportunity to copy). Idea misappropriation claims, in contrast, have a lower threshold for protectability because the similarity need not reach the level of detailed expression, but they can be asserted only against a party with whom the idea’s creator has some relationship or contact that creates a legal obligation to pay for the use of the idea.

The questions of how the idea was communicated, what (if anything) was said or done that might have created an obligation to pay for its use, and whether novelty is required all combine to make idea protection claims the quicksand of intellectual property law. Unlike copyright, protecting one’s idea -- or, if you are the party to whom ideas are offered, insulating yourself from a lawsuit -- is not so simple.

For an idea’s creator to have a viable legal claim for the misappropriation of his idea, California law on implied contracts generally requires that the idea was disclosed to the defendant (be it a production entity, screenwriter, film studio, etc.) for the purpose of trying to sell it and that the defendant voluntarily accepted the disclosure knowing the conditions on which it was being offered.

To meet this latter requirement, the defendant must have had the opportunity to reject the submission *before* it was made. (Some states, such as New York, also require that the idea be novel.) Thus, if an idea submission merely arrives, unsolicited and unannounced, over the transom at the defendant’s offices, the creator will likely be without recourse for its alleged use.

As the California Supreme Court said in Desny v. Wilder, the seminal case on implied contracts concerning the use of ideas in the entertainment industry: “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.”

Not surprisingly, the parties who are most often the recipients of such submissions usually have strict policies against accepting any “unsolicited” submissions (be they idea pitches, story treatments or full-length screenplays). And they are prudent to have such policies, lest they expose themselves to potential liability to every would-be “idea man” and screenwriter out there.

Accordingly, the general practice in Hollywood is to refuse to accept, or to send back unopened, any submission that did not come via a recognized Hollywood agency, and most agencies, in turn, also refuse submissions that are not from either their own clients or another agency.

Creators and submission targets, then, have competing concerns: the former want to protect their ideas, while the latter want to protect themselves. So if the creative person genuinely wants a shot at having his idea, treatment or script reviewed and considered, the best and proper course to take is to have an agent submit it *after* that agent has contacted the production entity/studio/screenwriter, because if the latter agrees to accept it, it is then deemed a "solicited" -- and therefore protectable -- submission.

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