PRESENTED AT

33rd Annual Entertainment Law Institute

November 9-10, 2023
Austin, TX

Making the Perfect Pitch

Neville Johnson
Douglas Johnson

Making the Perfect Pitch

Neville Johnson and Douglas Johnson[1]

Introduction

Theft of idea and copyright litigation keep lawyers very busy as dishonesty involving literary property is very real. Hollywood's currency is good and valuable ideas. A creative executive who has no ideas can find him or herself without a job. Protectable intellectual property can be as simple as an expression of an idea or as complex as a completed screenplay or book. The starting point in idea theft is whether the idea is protectable. The fundamental belief is that ideas, on their own, are not legally protected.

Some ideas are so commonplace and ordinary that they are excluded from copyright law protection under the *scenes a faire* doctrine. The most common example of this doctrine is the plot from Shakespeare's "Romeo and Juliet," the story of two young people from warring families who fall in love with tragic results. A Wikipedia page currently lists 88 film and television adaptations of "Romeo and Juliet."

The most important method of selling ideas in the film and television industry is the pitch. So how does the intellectual property exchanged in a pitch meeting secure legal protection? Ordinarily before the pitch, there is no written contract between the two parties to buy and sell the idea. What is to stop the recipient from appropriating every good idea that comes his or her way? One legal protection for ideas is known as the "implied-in-fact" contract. California courts have held that an implied contractual right to compensation may arise when a creative submits material to a producer with the understanding that the creator will be paid if the producer uses that idea.

Given the possibility of an implied-in-fact contract, the recurring question asked by clients on both sides of the pitch is how to avoid claims of idea theft. How can the writers submitting intellectual property protect their rights in their submissions? And conversely, how can recipients of submitted scripts protect themselves from accusations of idea theft?

[1] Neville Johnson and Douglas Johnson are partners at Johnson & Johnson LLP, in Beverly Hills, CA, which specializes in entertainment litigation and transactions. Associate Ron Funnell assisted in writing the article.

Development of the Implied- In-Fact Contract in California

California's courts began wrestling with these questions in the 1950s in the seminal case *Desny v. Wilder* (1956) 46 Cal.2d 715, 731. In that case, Victor Desny called director Billy Wilder at Paramount Pictures, with a "great idea" for a movie. The central idea of the movie was the life story of Floyd Collins, a boy who became trapped in a cave eighty feet deep. Desny could not get past Wilder's secretary, who told him the 65-page treatment was too long for Wilder to read.

Three days later, Desny called back with a three-page outline. Wilder's secretary asked Desny to read the outline over the phone so she could take it down in shorthand, and he did. The secretary told Desny she liked the story, would talk it over with Wilder and "let him know" what happened. Desny told the secretary that Paramount and Wilder could only use the story if they paid him. To Desny's surprise, Wilder and Paramount made a movie concerning the life and death of Floyd Collins, "Ace in the Hole," which closely paralleled Desny's synopsis, as well as the historical material on Floyd Collins. However, the film also included fictional material unique to Desny's synopsis. Desny sued, claiming that Wilder and Paramount breached an implied contract.

The California Supreme Court agreed with Desny, recognizing that even when an unsolicited idea submission is made, the circumstances of the disclosure may support the finding of an implied-in fact-contract:

> 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 for it. In other words the recovery may be based on contract either express or implied. 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.

Desny, 46 Cal.2d at pp. 733-734.

A plaintiff suing for breach of implied-in-fact contract relating to an idea submission must prove that (1) he conditioned his offer to disclose the idea to the defendant on the defendant's express promise to pay for the idea if the defendant used it, (2) the defendant, knowing the condition before the idea was disclosed to

Title search: Making the Perfect Pitch

Also available as part of the eCourse
Entertainment Law Updates (2023)

First appeared as part of the conference materials for the
33rd Annual Entertainment Law Institute session
"Tales from the Trenches: Recurring Litigation Practice Minefields in Entertainment Law Cases"