Ideas Are As Free As Air – Aren't They?

By Paul Remus and Jonathan Eck

Your client took a tour of the Live Free & Drink Brewing Co. six months ago. She mentioned to the tour guide that a beer brewed with maple syrup might be a big seller in New Hampshire. Yesterday, she saw a display in the local supermarket for Maple Magic, the new brew from Live Free & Drink Brewing Co. She remembers signing a "permission slip" at the start of the tour, but she has no idea what was in it. She is madder than a wet hen and wants to be compensated for her idea. What recourse does she have?

As our society becomes more and more information based, the courts are tending to recognize the value of ideas. Idea submission claims allow the originator of an idea to recover damages when someone else engages in the unauthorized use of the originator's idea. This article examines the developing bases for such claims. First, however, it should be noted that copyright and patent law are not helpful here. Ideas are not protected by copyright law because copyrights protect expressions of ideas, but do not protect the actual ideas themselves. *Brown v. Armstrong*, 957 F. Supp. 1293, 1306 (D. Mass. 1997). Ideas are not protected by patent law because an idea alone is not patentable. Some reduction of the idea to practice is required.

Claimants can pursue idea submission claims under state common law theories of property, express contract, implied contract, and unjust enrichment/quasi-contract and, in certain circumstances, under state consumer protection statutes. The state common law theories are not well developed in New Hampshire but do find some support as is discussed below. As is also described below, the New Hampshire Consumer Protection Act, RSA §358-A, may support an idea submission claim.

Property

The first idea submission claim theory is the property theory of recovery. The property theory seeks to establish that the ideas are the originator's property and that the originator should be compensated for the misappropriation of those ideas. Unlike the other idea submission claim theories, the property theory primarily concerns itself with the nature of the idea and not the parties' relationship. Therefore, in order to avoid infringing upon the public domain, courts only grant an enforceable property right to those ideas that are novel and original conceptions. *J. Irizarry y Puente v. President and Fellows of Harvard Coll.*, 248 F.2d 799, 802 (1st Cir. 1957).

New Hampshire does not have a well-developed common law rule identifying when an idea is "property" for the purposes of idea submission claims. However, a federal court evaluating property based idea submission claims under New Hampshire law has applied a variation of the aforementioned rule. The United States District Court has held that where an idea is the product of a person's "labor and inventive genius" and is not meant to leave that person's "exclusive control," the person has a right to "the possession of their property, both tangible and intangible." *Curtis Mfg. Co. v. Plasti-Clip Corp.*, 888 F. Supp. 1212, 1233 (D. N.H. 1994) (quotation omitted). Also, the Court in *Mueller v. U.S. Pipe & Foundry*, 03-170-JD, at *1 (D. N.H. Oct. 2, 2003) (Loislaw.com, Fed. Dist. Ct. Case Law) noted that "[c]ourts have generally applied the misappropriation doctrine to prevent a defendant from free-riding on the plaintiffs innovation or effort in developing something having commercial value, but nevertheless falling outside of traditional trademark and copyright protections." Thus, because the property theory is accepted in many jurisdictions and has been used by federal courts in applying New Hampshire law, it should certainly be advanced as a basis for an idea submission claim.

Express Contract

The second idea submission claim theory is the theory of express contract. Courts generally enforce idea submission contracts whereby an individual or company expressly agrees to compensate the originator of an idea for the use of the idea. In order to prevail on a breach of contract theory, a claimant must prove that the parties entered a valid and enforceable contract, the claimant performed, the defendant breached the contract, and that the defendant's breach injured the plaintiff. *See Chisholm v. Ultima Nashua Indus. Corp.*, 150 N.H. 141, 144–45 (2003).

The greatest challenge for the idea's originator when advancing a breach of contract theory is to show that the idea qualifies as consideration. In some jurisdictions, courts have not recognized ideas as valid consideration unless they were truly novel and original such that they were the provider's property. However, a Second Circuit case dismissed this theory under New York Law and held that an idea need not be "novel or original" to be valid consideration because the act of agreeing to contract demonstrates that the idea has value to the defendant and therefore the idea is consideration. *Nadel v. Play-By-Play Toys & Novelties,* 208 F.3d 368, 374 (2nd Cir. 2000).

It is not clear whether the New Hampshire common law will follow the Second Circuit's approach. If it does, idea submission claims based on the express contract theory will prevail if an idea is novel to the defendant at the time that the parties agree to a contract, the contract promises to compensate the originator if the idea is used, and the idea is then used. *See Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626, 631 (2000) (finding that the "consideration provided was more than the peppercorn of consideration the law requires to save the contract from unenforceability") (quotation omitted).

Implied Contract

The theory of implied contract is the third idea submission claim theory. The New Hampshire Supreme Court recognizes an implied in fact contract as a "true contract that is not expressed in words." *Morgenroth & Assocs., Inc. v. Town of Tilton*, 121 N.H. 511, 514 (1981). Therefore, express contracts and implied contracts are functional equivalents and the latter receive all of the protections granted to the former.

In addition to recognizing equal protections for implied and express contracts, courts have exhibited a tendency to void contract provisions that waive, in advance of submission, the recovery rights of an idea's originator. By its own admission, the First Circuit Court of Appeals has been "hard pressed to understand why . . . inventors would submit their ideas for consideration and thereby waive all rights to compensation for their work." *Burten v. Milton Bradley Co.*, 763 F.2d 461, 467 (1st Cir. 1985). The United States District Court showed the same inclination when it voided waivers that would impose "harsh results" and require the "unreasonable assumption" that a party would submit an "idea with no expectation of compensation beyond what was provided as a matter of grace and generosity from [the idea recipient/user]." *Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 152 (D. N.H. 1996).

New Hampshire case law gives full effect to breach of contract claims based on implied contracts although not yet to implied contracts for idea submission. However, the decision in *Anderson* suggests that it will be so extended.

Unjust Enrichment / Quasi-Contract

The fourth idea submission claim theory is the theory of unjust enrichment/quasi-contract. Quasi-contracts are equitable constructions that impose a payment obligation upon a party that did not contract with an idea originator, but who is unjustly enriched by using the idea free of charge. *Petrie-Clemons v. Butterfield*, 122 N.H. 120, 127 (1982). The New Hampshire Supreme Court recognizes quasi-contracts as "a legal remedy imposed by a court without reference to the assent of the obligor, arising from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution." *Morgenroth & Assocs., Inc. v. Town of Tilton*, 121 N.H. 511, 514 (1981); S*ee also R. Zoppo Co. v. City of Manchester*, 122 N.H. 1109, 1113 (1982). Unjust enrichment damages under New Hampshire law are based "upon the value of what was actually received by the defendant." *Iacomini v. Liberty Mut. Ins. Co.*, 127 N.H. 73, 78 (1985).

Thus, the specific facts of a case may support an idea submission claim based on an unjust enrichment theory. Counsel should, in such a situation, review the idea user's policy for collecting submitted ideas. This review could reveal that a company uses an independent third party screen as a filter for unsolicited ideas in order to isolate those ideas, specifically to defeat such a claim. *See Downey v. Gen. Foods Corp.*, 286 N.E.2d 257, 259 (N.Y. 1972) (stating that unauthorized use claims can be defeated by companies through screening processes that receive and contain unsolicited idea submissions).

The New Hampshire Consumer Protection Act

The New Hampshire Consumer Protection Act (CPA), RSA §358-A (2004) is a New Hampshire specific basis for an idea submission claim that may be used if the originator of the idea is a business. The

United States District Court gives the Act broad application and relies upon it in cases where businesses sell products that are based on a non-affiliate's product design ideas. *See Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 153 (D. N.H. 1996) (stating that "[t]he Act casts a wide net"); *Curtis Mfg. Co. v. Plasti-Clip Corp.*, 888 F. Supp. 1212, 1227 (D. N.H. 1994) (recognizing the "expansive embrace contemplated by the [New Hampshire] Legislature in enacting the CPA"); *Chase v. Dorais*, 122 N.H. 600, 601 (1982) (calling the Act a "comprehensive statute designed to regulate business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices"). If a claimant is a business that creates an idea that is later used by a competitor in a manner that violates the New Hampshire Consumer Protection Act, it provides an independent basis for recovery in addition to the claimant's common law idea submission claims.

Conclusion

The theories behind idea submission claims are not well settled in most jurisdictions, including New Hampshire. However, the theoretical framework appears to be available in New Hampshire to support such a claim when it is brought.

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