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Russell B. Long

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standpoints of tax justice, production of revenue, and tax administration.³⁶ Pending such a study, judgment concerning the best manner of dealing with the matter should be reserved.³⁷

ALVIN B. RUBIN

THE PROTECTION OF IDEAS

Although legal means have long been available to protect the form in which many ideas are embodied, the ideas themselves have remained unprotected almost until the present. Formerly, however, there was scant need for protection. In addition, the difficulties of administration of such protection made the courts reluctant to assume the task.

During a period when the majority of ideas for business use were those relating to mechanical improvements in the method of production and usually were supplied by the master or his servants for use in the business, patent¹ and trade secret² law

36. In this connection see the arguments for the taxation of certain intangible interests made in Welch, *The Exemption of Intangibles from Property Taxes, Tax Exemptions* (1939) 155. And see Hughes, *Tax Exemptions* (1935) 13 *Tenn. L. Rev.* 79, 87; Stimson, *Exemption of Property from Taxation in California* (1932) 21 *Calif. L. Rev.* 193, 218.

37. Consideration of the problem elsewhere has led to various conclusions. Some states have classified intangibles separately from other property and tax them at a lower rate. See, for example, *Ind. Stat. Ann.* (Burns, 1933) § 64-901 et seq.; *N.C. Code Ann.* (Michie, 1939) § 7880(156)⁰⁰ et seq. It has been suggested that they should be completely exempted, the loss of revenue and injustice to the payers of property taxes to be offset by adequate provisions in the general income tax law. See *Twentieth Century Fund, Committee on Taxation, Facing the Tax Problem* (1937) 432; *Michigan Tax Study Commission, Report of the Tax Study Commission* (1939) 37. Four states have levied a special income tax, measured only by income from intangibles. *Ibid.*

1. *Rev. Stat.* § 4886 (1874), as last amended by 53 *Stat.* 1212 (1939), 35 *U.S.C.A.* § 31 (1940) allows issuance of a patent for a new and useful machine, process, art or improvement thereof.

2. Former employees were enjoined from revealing trade secrets in *Peabody v. Norfolk*, 98 *Mass.* 452, 96 *Am. Dec.* 664 (1868); *O. & W. Thum Co. v. Tlocznski*, 114 *Mich.* 149, 72 *N.W.* 140, 38 *L.R.A.* 200 (1897); *Stone v. Goss*, 65 *N.J. Eq.* 756, 55 *Atl.* 736, 63 *L.R.A.* 344 (1903). See *Vulcan Detinning Co. v. Assman*, 185 *App. Div.* 399, 173 *N.Y. Supp.* 334 (1918). Compare *Silver Spring Bleaching & Dyeing Co. v. Woolworth*, 16 *R.I.* 729, 19 *Atl.* 528 (1890) where a formerly employed inventor was compelled to reveal to his former employer a trade secret discovered while he was in plaintiff's service.

Use of a trade secret by one who knew of the employee's breach of confidence will be enjoined. *Westervelt v. National Paper & Supply Co.*, 154 *Ind.* 673, 57 *N.E.* 552 (1900); *Aronson v. Orlov*, 228 *Mass.* 1, 116 *N.E.* 951 (1917); *Tabor v. Hoffman*, 118 *N.Y.* 30, 23 *N.E.* 12 (1889); *Eastman Co. v. Reichenbach*, 65 *Hun* 620, 20 *N.Y. Supp.* 110 (1892); *Macbeth-Evans Glass Co. v. Schnellbach*, 239 *Pa.* 76, 86 *Atl.* 688 (1913). Accounting of profits from use of

furnished adequate protection. Similarly before the growth of the radio and motion picture industries, literary productions were sufficiently protected by the law of copyright³ and literary property.⁴

The development of our present complex mercantile system brought with it the need for many new types of ideas. Large businesses needed advertising schemes, plans for expanding sales, reducing costs, increasing revenue. New styles became an important factor in merchandising.⁵ Many new industries required particular kinds of ideas. Radio and motion pictures needed ideas for programs that would appeal to the public as well as novel ways of presenting them. Ideas for programs became valuable apart from the form in which the ideas were expressed.⁶

These new types of ideas could not be protected by the established legal remedies. Patent law⁷ protected new machines, processes, or arts, but it did not extend to methods of doing business,⁸ or mere ideas for inventions.⁹ Trade secret law protected the secrets of a business from dishonest discovery¹⁰ by another

trade secret was directed in *Vulcan Detinning Co. v. American Can Co.*, 75 N.J. Eq. 542, 73 Atl. 603 (1909); 80 N.J. Eq. 443, 85 Atl. 318 (1912). See Nims, *The Law of Unfair Competition and Trade Marks* (3 ed. 1936) 425, § 154.

3. 35 Stat. 1075 et seq. (1909), 17 U.S.C.A. § 1 et seq. (1927).

4. See, for examples of application of the literary property concept, *Feris v. Froham*, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492 (1912); *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 68 L.R.A. 591 (C.C.A. 2d, 1904); *Thompson v. Famous Players-Lasky Corp.*, 3 F. (2d) 707 (N.D. Ga. 1925); *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N.J. Eq. 593, 41 Atl. 672 (1898); *Palmer v. De Witt*, 47 N.Y. 532, 7 Am. Rep. 480 (1870).

5. Problems of protecting fashion designs are not discussed in this article. A protective boycott by style creators to prevent style pirating of published styles is deemed a combination in restraint of trade. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 557 (1941); *Millinery Creators' Guild v. Federal Trade Commission*, 312 U.S. 469, 61 S.Ct. 708, 85 L.Ed. 562 (1941). However styles will be protected until they have been "published." *Margolis v. National Bellas Hess Co., Inc.*, 139 Misc. 738, 249 N.Y. Supp. 175 (1931). For discussion of defensive boycott see excellent Comment (1941) 35 Ill. L. Rev. 546. See also Notes (1940) 20 B. U. L. Rev. 365, (1940) 26 Va. L. Rev. 828, (1940) 49 Yale L. J. 1290.

6. See *Cole v. Phillips H. Lord*, 28 N.Y.S. (2d) 404, 406 (App. Div. 1941).

7. See *supra* note 1.

8. *Fowler v. New York*, 121 Fed. 747 (C.C.A. 2d, 1903) (bitransit subway not patentable); *Hotel Security Checking Co. v. Lorraine Co.*, 87 C.C.A. 451, 160 Fed. 467, 27 L.R.A. (N.S.) 665 (C.C.A. 2d, 1908) (system for checking restaurant receipts not patentable).

9. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U.S. 480, 489, 11 S.Ct. 846, 849, 35 L.Ed. 521, 525 (1891): "It is evident the invention was not completed until the construction of the machine. A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character."

10. See note 2, *supra*.

only so long as the information remained undisclosed.¹¹ If a person revealed an idea in attempting to sell it, all secrecy was considered to be lost.¹² The law of copyright protected only the form and style in which the ideas were expressed; not the ideas themselves.¹³ Similarly the law of literary property assured the author of a literary production only against its unauthorized use or publication;¹⁴ the protection did not extend to the ideas expressed.¹⁵ Once an idea became generally known, policy considerations favoring free and unrestrained circulation of ideas prevented protection except in the case of patent or copyright infringement or passing-off cases where the public had been confused.¹⁶ Since

11. *Covell v. Chadwick*, 153 Mass. 263, 26 N.E. 856 (1891) (one who sells a trade secret is free to use his knowledge of it for his own benefit); *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401 (W.D. Mich. 1908) (a trade secret will not be protected where there has not been a sufficient effort to conceal it). See Nims, *op. cit. supra* note 2, at 411, § 148.

The argument has been advanced that there is no reasonable distinction between an original unpublished idea and a trade secret. See Note (1936) 21 *Corn. L. Q.* 486, 488. A distinction was made in *Haskins v. Ryan*, 71 N.J. Eq. 575, 580, 64 Atl. 436, 438 (1906) on the ground that a concurrence of several minds was required before an idea could become effective, while a trade secret or patented invention was capable of embodiment at the will of the creator alone. But see *Booth v. Stutz Motor Car Co. of America, Inc.*, 56 F. (2d) 963 (C.C.A. 7th, 1932) where an accounting of profits was ordered for use of an idea inequitably appropriated in violation of an agreement that ideas should remain the secret of the plaintiff until he was paid.

12. *Bristol v. Equitable Life Assurance Soc.*, 132 N.Y. 264, 30 N.E. 506 (1892); *Haskins v. Ryan*, 71 N.J. Eq. 575, 64 Atl. 436 (1906). See *Leuddecke v. Chevrolet Motor Co.*, 70 F. (2d) 345, 347 (C.C.A. 8th, 1934). Compare *Booth v. Stutz Motor Car Co. of America, Inc.*, 56 F. (2d) 962 (C.C.A. 7th, 1932) which might be harmonized by finding an express agreement to guard the disclosure.

13. *Bunell v. Chown*, 69 Fed. 993 (N.D. Ohio, 1895); *Eichel v. Marcin*, 241 Fed. 404 (S.D. N.Y. 1913); *Nichols v. Universal Pictures Corp.*, 34 F. (2d) 145 (S.D. N.Y. 1929), cert. denied, 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795 (1930).

14. Cases cited in note 4, *supra*.

15. The accepted view that literary property rights in an unpublished manuscript are no broader than copyright protection for a published work was the basis of the decision in *Fendler v. Morosco*, 253 N.Y. 281, 287, 171 N.E. 56, 58 (1930): "There may be literary property in a particular combination of ideas or in the form in which ideas are embodied. There can be none in ideas."

English cases on literary property protection took the position that ideas were incapable of ownership. See Justice Yates' dissenting opinion to *Millar v. Taylor*, 4 Burr. 2303, 2366, 98 Eng. Reprint 201, 205 (K.B. 1769).

16. In *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918), the court enjoined *International News Service* from copying news collected by their competitor so long as its news value remained. The decision indicated that thereafter a competitor would be enjoined from systematically appropriating the published ideas of a competitor. In *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279 (C.C.A. 2d, 1929), cert. denied 281 U.S. 728, 50 S.Ct. 245, 74 L.Ed. 1145 (1930), a case involving an application for injunction to prevent copying original designs, the rule of the *Associated Press* case was limited to news appropriation. Learned Hand, J., referring to the latter case, said: "While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at

the principal value of many innovations lay in their novelty, the business that first used such ideas exhausted the greater part of their value before they became available to others.

The need for new forms of protection was most acutely felt in the field of advertising, where the advertising agent's stock in trade consisted of original ideas which, once used, lost all right to protection. So long as advertising ideas were supplied by persons or firms employed for that purpose, there was little difficulty. The services were taken as consideration for the wages. But when strangers began to suggest ideas for which they requested compensation a more perplexing problem was presented. Justice would seem to require that a business which made use of the valuable product should be forced to pay for it. But a real problem lurked in the administration of the new type of "property."

ADMINISTRATIVE DIFFICULTIES

If a court is to allow a recovery for the use of an idea, it must place a value upon it. How much is an idea worth? What part of the success in using the idea is attributable to the expenditure of capital, the risk undertaken, and the proper execution? What if the net result indicates that the use of the idea did not justify the expense?¹⁷

once the justification for, and the limit of, what is decided. This appears to us such an instance; we think no more was covered than situations substantially similar to those then at bar." 35 F. (2d) at 280.

Other decisions have attempted to prevent competitors from taking a free ride at the expense of another even in the absence of passing-off. In *Fonotipia v. Bradley*, 171 Fed. 951 (E.D. N.Y. 1909) the defendant was enjoined from making duplicates of plaintiff's phonograph records. In *Meyer v. Hurwitz*, 5 F. (2d) 370 (E.D. Pa. 1925), the defendant was enjoined from selling post cards to fit plaintiff's vending machines.

In *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133, 19 A.L.R. 937 (1921), the defendant was enjoined from using the comic characters Mutt and Jeff drawn by another cartoonist on the ground that the plaintiff was associated with the comic characters in the public mind. Compare *New York Herald Co. v. Star Co.*, 146 Fed. 204 (S.D. N.Y. 1906), affirmed without opinion, 76 C.C.A. 678, 146 Fed. 1023 (1906); *Atlas Mfg. Co. v. Street & Smith*, 122 C.C.A. 568, 204 Fed. 398 (1913), appeal dismissed 231 U.S. 348, 58 L.Ed. 262, 34 S.Ct. 73 (1913).

In *Waring v. WDAS Broadcasting Sta., Inc.*, 327 Pa. 433, 194 Atl. 631 (1937), an injunction was granted to prevent the defendant from broadcasting phonograph recordings where the records were marked, "not leased for radio broadcast." Contra: *RCA Mfg. Co., Inc. v. Whiteman*, 114 F. (2d) 86 (C.C.A. 2d, 1940), cert. denied 311 U.S. 712, 61 S.Ct. 393, 85 L.Ed. 280 (1940). For an argument that the doctrine of unfair competition should be extended to prevent inequitable appropriation of the product of another's work and effort, see *Callman, Copyright and Unfair Competition* (1940) 2 *LOUISIANA LAW REVIEW* 648.

17. See *Stone v. Liggett & Myers Tobacco Co.*, 260 App. Div. 450, 23 N.Y. S. (2d) 210, 212 (1940): "It is familiar law that owing to the difficulties of enforcing such rights, the courts have uniformly refused to protect property

Before protection can be administered an appropriation of the idea must be shown. In many cases ideas are not used in the exact form in which they are offered. In addition, if the idea is one of the same general sort that is in current use, or if the defendant might reasonably have conceived of it, it is difficult to find an appropriation.¹⁸

Additional problems arise where ideas are submitted prematurely, before they are practicable, and are used years later when changed circumstances warrant. X's idea of utilizing commercial airline radio sets for the transmission of personal messages of passengers, is rejected in 1930 because the volume of business does not justify the service. In 1945 increased traffic and technical improvements in radio transmission induce the institution of the service. Is X entitled to compensation for his idea?¹⁹

How is the court to distinguish between ideas that are worthy of legal protection and others that are not? The slogan "Goody Candy is Good" is neither original nor clever. But a slogan for a cleansing powder, "Hasn't Scratched Yet," accompanied by a picture of a new-born chick would seem ingenious enough to entitle its creator to remuneration. What distinction, capable of consistent application, can be drawn between the two situations?

Leaving these difficulties with a jury is a possible solution. But juries in this type of case tend to be plaintiff-minded; usually the judge will be better acquainted with the problems involved.

CONTRACT CASES

Problems of administration are minimized where the parties have agreed upon a price to be paid for an idea before it is revealed. In such a case the parties by contract fix the price of the

in ideas that have not been reduced to concrete form." See also Comment (1934) 47 Harv. L. Rev. 1419, 1427.

18. If there is a reasonable amount of difference in two plans the courts will usually hold that the plaintiff's idea was not used. See *Ketcham v. New York World's Fair 1939, Inc.*, 34 F. Supp. 657 (E.D. N.Y. 1940). See also *Larkin v. Pennsylvania R.R.*, 125 Misc. 238, 210 N.Y. Supp. 374 (1925), affirmed 216 App. Div. 832, 215 N.Y. Supp. 875 (1926), affirmed without opinion 245 N.Y. 578, 157 N.E. 864 (1927); *Rodriguez v. Western Union Telegraph Co.*, 259 App. Div. 224, 18 N.Y. S. (2d) 759 (1940), affirmed 34 N.E. (2d) 375 (N.Y. 1941); *Industrial Savings Corp. v. Morris Plan Co.*, 234 Fed. 382 (S.D. N.Y. 1916). See *Moore v. Ford Motor Co.*, 43 F. (2d) 685 (C.C.A. 2d, 1930), where the plaintiff was unable to prove that a similar idea had not come from employees of defendant. This case has been criticized in Note (1929) 7 N.C. L. Rev. 318.

19. Recovery was denied on other grounds without discussion of prematurity of the idea in *Rodriguez v. Western Union Telegraph Co.*, 259 App. Div. 244, 18 N.Y. S. (2d) 759 (1940), affirmed 34 N.E. (2d) 375 (N.Y. 1941), involving an idea for ship-to-shore radio communication.

idea. It should be unnecessary to examine the nature of the idea, for the purchaser has assumed the risk that he may pay more than the idea is worth. It is as though the parties were trading horses sight unseen. However, the courts have gone into examination of the character of the idea even in contract cases. In *Masline v. New York, New Haven & Hartford Railroad*²⁰ the defendant agreed to pay five per cent of the net profit resulting from the use of valuable information which the plaintiff warranted would increase net revenue by at least \$100,000 annually. The plaintiff then advised the defendant to sell advertising space on its right of ways, cars, and stations. Although use of the idea increased revenues even beyond expectations, the defendant refused to pay. The court justified the defendant's refusal on the theory of an implied condition of originality in idea contracts. Judicial notice was taken of the fact that somewhat similar schemes had been used elsewhere. This generally accepted case²¹ seems inconsistent with elementary contract principles. Plaintiff represented merely that use of his information would increase profits more than \$100,000 annually. He did not warrant originality. An idea worth \$100,000 should furnish as much consideration as a peppercorn, or even a horse, a hawk, or a robe. Although a shrewd business man would seldom agree to pay for something before he knows what he is to receive, when a person shows himself willing to take the chance, he should not be permitted to obtain the benefits of the information without paying for it. More recent cases indicate a tendency to depart from the rule of the *Masline* case.²²

20. 95 Conn. 702, 112 Atl. 639 (1921), criticized in Note (1921) 19 Mich. L. Rev. 874, 875.

21. Accord: *Soule v. Bon Ami Co.*, 201 App. Div. 794, 195 N.Y. Supp. 574 (1922), affirmed on other grounds 253 N.Y. 609, 139 N.E. 754 (1923); *Burwell v. Baltimore & O. R.R.*, 31 Ohio App. 22, 164 N.E. 434 (1928). Compare Williston, *The Law of Contracts* (2 ed. 1936) 391, § 115: "However an idea lacking in novelty and originality and universally known, whether or not technically sufficient to serve as consideration, will not readily be regarded as requested by a promisor as the consideration for his promise." See also *Lueddeche v. Chevrolet Motor Co.*, 70 F. (2d) 345, 348 (C.C.A. 8th, 1934).

22. *Elfenbein v. Luckenback Terminals*, 111 N.J. Law 67, 166 Atl. 91 (1933), discussed in Note (1933) 67 U.S. L. Rev. 595. See opinion by Judge Learned Hand in *Taylor v. Burr Printing Co.*, 26 F. (2d) 331, 332-333 (C.C.A. 2d, 1928): "We cannot agree with the learned judge in substituting for the judgment of the defendant his own estimate of the value of the plan. . . . These men were not children, but seasoned in their business, and, if they chose to enter into an improvident contract, any resulting loss is as much to the account of their principal as in any other case."

The present tendency is to require idea-men to sign contracts giving the agency the power of determining the originality of the idea. See Comment (1939) 10 Air L. Rev. 408.

IDEAS WITHOUT BENEFIT OF CONTRACT

In early cases, the courts protected ideas only where an express contract for them had been made prior to disclosure.²³ Pressed by the needs of the times, the courts have begun to seek a practicable method of protecting ideas not expressly contracted for, by means of an implied contract. An effort has been made to establish a working rule by creating a distinction between an idea that is "concrete" and therefore protectable in the absence of contract, and one that is "abstract," and hence protected only under the terms of an express contract.

The "concrete" idea distinction was first expressed in *Liggett & Myers Company v. Meyers*,²⁴ a case involving a suggestion for a billboard advertisement for cigarettes. It was held that adoption of a plaintiff's suggestion entitled him to recover on the basis of an implied contract to pay for property used. The Indiana court of appeals stated that the idea had taken on a concrete form. In *Ryan v. Century Brewing Association*²⁵ the plaintiff, on invitation, suggested the slogan "The Beer of the Century." Recovery on a quantum meruit basis was again allowed, this time for services. The Washington court followed the previous *Meyers* case, adding that it made no difference whether the suit were brought for the value of the services or the idea since both amounted to the same thing.²⁶

The *Meyers*²⁷ and the *Ryan*²⁸ cases both indicate that the test of a "concrete" idea is whether it has been reduced to the form in

23. *Universal Savings Corp. v. Morris Plan Co.*, 234 Fed. 332 (S.D. N.Y. 1916); *Bristol v. Equitable Life Assurance Society*, 132 N.Y. 264, 30 N.E. 506 (1892); *Haskins v. Ryan*, 75 N.J. Eq. 330, 78 Atl. 566 (1903); *Stein v. Morris*, 120 Va. 390, 91 S.E. 177 (1917); *Anderson v. Distler*, 173 Misc. 261, 17 N.Y. S. (2d) 674 (1940). Recovery allowed under terms of contract in *Shapiro v. Press Publishing Co.*, 235 App. Div. 689, 255 N.Y. Supp. 899 (1932).

24. 101 Ind. App. 240, 194 N.E. 206, 210 (1935). "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." Notes (1935) 15 E.U. L. Rev. 633, (1936) 21 Corn. L. Q. 486, (1935) 44 Yale L. J. 1269.

25. 185 Wash. 600, 55 P. (2d) 1053 (1936), noted in (1936) 36 Col. L. Rev. 1375.

26. 185 Wash. at 604, 55 P. (2d) at 1054: "So far as appellant is concerned, we see no difference between a suit such as this for services rendered and a suit based upon the originator's property right in his own idea."

27. 101 Ind. App. 420, 194 N.E. 206 (1935).

28. 185 Wash. 600, 55 P. (2d) 1053 (1936). Compare *Healey v. R. H. Macy & Co.*, 251 App. Div. 440, 297 N.Y. Supp. 165 (1937), affirmed 277 N.Y. 681, 14 N.E. (2d) 348 (1938), where recovery was allowed for the reasonable value of Christmas slogans on the basis of quasi contract. The "concrete" idea distinction was not mentioned.

which it is to be used. The idea must be something more than an indefinite hint. No exceptional ability was required for the conception of the idea involved in either suit. The elements that were present in both cases, and probably influenced the courts, were (1) the relative ease of determining whether a slogan or slogan-like advertisement has been used, (2) the fact that advertisers are accustomed to paying for such ideas, and (3) the fact that a fairly standard price for such ideas has been established by advertising agencies. Due to these factors, slogan cases lend themselves to equitable as well as relatively simple administration. There is a firm basis for implying a contract and a fairly accurate criterion for making an estimation of value.²⁹ Nevertheless if a contract is to be implied: (1) the idea must be original; (2) the idea must not have been freely circulated by the creator; (3) it must have been submitted in expectation of remuneration.³⁰

The "concrete" idea distinction has not been applied to other types of ideas in the same manner that it has been applied to slogans. In New York, where most of the late cases on the subject have arisen, the courts have recognized the "concrete" idea distinction,³¹ but they seem to require more than merely an original idea reduced to definite form. An idea for advertising a railroad at the world's fair by means of a miniature railroad was held to be abstract.³² Other ideas that were not considered suffi-

29. In *Liggett & Myers v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935), plaintiff suggested a fee of ten per cent of the gross cost of advertising which would have amounted to approximately \$25,000. The court awarded \$9,000.

30. In *Ryan v. Century Brewing Ass'n*, 185 Wash. 600, 55 P. (2d) 1053 (1936), a recovery of \$7,500 was allowed. In *Healey v. R. H. Macy & Co.*, 251 App. Div. 440, 297 N.Y. Supp. 165 (1937), \$2,500 was allowed for Christmas slogans. These recoveries indicate that the volume of advertising and the period for which it is used will be substantial factors in the quantum of recovery. Compare *Cole v. Phillips H. Lord*, 28 N.Y. S. (2d) 404, 410 (App. Div. 1941), where the court held that the jury might use contractual terms discussed by the parties as a "yardstick" for assessing damages on a quantum meruit basis. See also *Booth v. Stutz Motor Car Co.*, 56 F. (2d) 962, 969 (C.C.A. 7th, 1932).

31. For analysis of necessary limitations on protection of concrete ideas see Comment (1939) 10 Air L. Rev. 394, 408. In this connection see also Logan, *Legal Protection of Ideas* (1939) 4 Mo. L. Rev. 239, 255-264.

32. Lip service was paid to the "concrete" idea distinction in *Rodriguez v. Western Union Telegraph Co.*, 259 App. Div. 224, 18 N.Y. S. (2d) 759 (1940), affirmed 34 N.E. (2d) 375 (N.Y. 1941); *Williamson v. New York Central R. R.*, 258 App. Div. 226, 16 N.Y. S. (2d) 217 (1939); *Stone v. Liggett & Myers Tobacco Co.*, 260 App. Div. 450, 23 N.Y. S. (2d) 210 (1940); *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y. S. (2d) 892 (1940).

33. *Williamson v. New York Central R.R.*, 258 App. Div. 226, 16 N.Y. S. (2d) 217 (1939).

ently concrete included an idea for demonstrating the use of an electric shaver by a chart showing directions in which hair grows on the face,³³ an idea for ship-to-shore radio form communications,³⁴ and a skit for advertising cigarettes by radio or motion pictures.³⁵ Such cases obviously do not turn on the question of whether or not the idea has been reduced to its ultimate form. In the electric shaver case,³⁶ for example, a chart would not have demonstrated the idea more accurately than the written explanation. The court seems to be influenced by the nature of the idea itself and the amount of work and effort required to develop it into a valuable form. Thus a formula for a radio fiction was held to embody a sufficiently original idea to form a right separate and apart from the script itself.³⁷ In *Ketcham v. New York World's Fair 1939*,³⁸ the court stated, by way of dictum, that a thoroughly worked out plan for the color schemes of the World's Fair could be protected as literary property.³⁹ If there had merely been an idea to paint the building the colors of the rainbow, the court would probably have considered the idea unworthy of protection in the absence of an express contract.⁴⁰ When the creator of the idea develops it into an attractive, harmonious scheme, the situation is altered. The distinction is due both to the effort re-

33. *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N. Y. S. (2d) 892 (1940).

34. *Rodriguez v. Western Union Telegraph Co.*, 259 App. Div. 224, 18 N.Y. S. (2d) 759 (1940), affirmed 34 N.E. (2d) 375 (N.Y. 1941).

35. *Stone v. Liggett & Myers Tobacco Co.*, 260 App. Div. 450, 23 N.Y. S. (2d) 210 (1940).

36. *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y. S. (2d) 892 (1940).

37. *Cole v. Phillips H. Lord, Inc.*, 28 N.Y. S. (2d) 404 (App. Div. 1941), the court found sufficient facts that the jury might find an express contract or an implied contract based on the relationship of trust and confidence.

38. 34 F. Supp. 657 (E.D. N.Y. 1940).

39. Insofar as the *Ketcham* case, 34 F. Supp. 657 (E.D. N.Y. 1940), indicates that literary property protection extends to the ideas themselves, it is subject to criticism.

Under the rule of *Erie Ry. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938), the federal courts should follow the common law decisions of the state courts. *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930), should have been controlling on that point. If the resemblance of plans had been so close to amount to an infringement or copying of the chart rather than a mere taking of an idea, literary property protection would have been a proper remedy. Nevertheless the idea should have been considered "concrete" and capable of protection as an idea. In this connection see Comment (1939) 73 U.S. L. Rev. 4, discussing a compromise of a claim of the alleged creator of an idea for the theme-center of trylon and perisphere for the New York World's Fair.

40. The *Ketcham* case, 34 F. Supp. 657 (E.D. N.Y. 1940), was distinguished from cases involving abstract ideas on this basis in *Alberts v. Remington Rand*, 175 Misc. 486, 23 N.Y. S. (2d) 892 (1940).

quired to reduce an idea to a form in which it can be used and the fact that only in such shape can its value be appreciated.⁴¹

The degree of novelty promises to play an increasingly important part in the cases, although it may seldom be discussed. When a decision is based on this factor, the use of the description "concrete" as the basis for the distinction is misleading. In this connection the "concrete" idea distinction may be merely a legal device by which the court reserves to itself the determination of a question of fact. Thus an extremely ingenious idea will probably be regarded by the court as "concrete" while another not so brilliant will be regarded as abstract although the latter may have been reduced to a more definite form.

CONCLUSION

All ideas should serve as consideration for express contracts. In addition original ideas will be protected on the basis of quasi contract whenever the courts feel that the circumstances justify undertaking the difficulties of administration involved. Whether protection will be extended will depend largely upon the degree of novelty, the definiteness of the form and the amount of effort expended in reducing the idea to a detailed form. Due to the relative ease of administering them, slogans and slogan-like advertisements have been the first type of ideas to which the courts have accorded protection. The term "concrete" has been used to designate those ideas whose administration the courts deem feasible.

RUSSELL B. LONG

JOINDER OF CRIMINAL OFFENSES IN LOUISIANA

The problem of joinder of criminal offenses in Louisiana has struggled through an interesting cycle. Prior to the adoption of the Code of Criminal Procedure, the general rule in Louisiana, like that of the common law jurisdictions,¹ was that two or more

41. In *Keller v. American Chain Co.*, 255 N.Y. 94, 174 N.E. 74 (1930), an idea for reducing freight rates by changing the classification of certain goods was held to be sufficient consideration to support a contract, due to the effort required to work out the new schedule. Judgment was for the defendant, however, because of a pre-existing duty on the part of the plaintiff's employer.

1. *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383 (1856); *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216 (1892); *State v. Houx*, 109 Mo. 654, 32 Am. Dec. 686 (1891); *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954 (1895). See Bell