**Are pure ideas, whether commercial or otherwise protectable?**

In a recent United States case heard in California**, (Morawski v Lightstorm Entertainment USDC C.D. California, January 31, 2013 (unpublished opinion)** –concerning a Claimant party who failed in a claim that his original ideas in a film concept were appropriated by the makers of the blockbuster 2009 film called *Avatar)*, District Judge Mrs Margaret Morrow noted that in literature, there are about only 36 fundamental dramatic situations which form the basis of all human drama. That is probably right; is it not common for viewers when watching films, television or plays to experience a deep and unsettling sense that they could (and possibly did in fact - in another life) write the story themselves?

Appropriation of commercial and (scientific) ideas

However, in regard to claims for misappropriation of commercial or scientific ideas, it is hoped there could be more certainty regarding ‘ideas’ that are freely available in the public domain. However there is (possibly) is no greater certainty than what occurs regarding freely available ideas in the ‘literary and dramatic’ public domain.

When protecting ideas of any sort, you should have regard to the following:

For an idea to qualify as ‘confidential information’ and to be protectable it should:

1. Contain a significant element of originality and confidentiality
2. Be clearly identifiable as an idea of the disclosing party
3. Have potential commercial applicability
4. Be sufficiently developed to be capable of commercial realisation.

In order to protect commercial (and scientific) ideas you should consider the following:

1. Enter into a Non-disclosure agreement (NDA) specifying how the information is to be dealt with by the parties
2. If there is no contract or NDA between the parties, you might need to rely upon the relationship being so close that there is an obligation or cause of action in confidence recognised at common law – as recognised in *Coco v Clark [1969] RPC 41* – employing the famous formulation of Justice Megarry.

Justice Megarry said (at page 47) in *Coco*:

**“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information must itself … have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”**

1. However, in spite of Justice Megarry’s famous formulation, it is often unclear what are the specific facts and circumstances in order to infer an obligation of confidentiality that the Courts would recognise and uphold. So in most cases it is advisable to have in a place a Non-disclosure agreement (NDA) setting out the clear contractual obligations regarding the use of confidential information exchanged between the parties.

The essential contents of a Non-disclosure agreement

1. A clear description of the confidential information – which could be contained in a Schedule if required
2. A clear obligation on the receiving party to keep the confidential information confidential
3. A clause setting out the express purpose for which the confidential information might be used (usually stating that it is to be used only for the stated purpose or project)
4. Clear indemnity provisions to ensure compensation for the disclosing party
5. A Termination provision permitting the disclosing party to terminate at any time or on a specified period of notice
6. A clause stating that no representations or warranties are given regarding accuracy of the information or the purpose for which it might be used – the aim being that the use, quality or accuracy of the information is strictly in the eye of the recipient.

In any Contract Review the above points are a good Checklist; and Contract drafters taking a practical view are less concerned about the more fundamental question as to whether the ideas themselves are in fact more widespread and freely available than the parties actually admit to. In the *Avatar* litigation, the ancient axiom appeared to scupper the Claimant’s claim to the ‘originality’ of his own film and dramatic scenario. Did the Court not effectively decide that there is ‘nothing new under the sun’?