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Robert M. Post

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make a recommendation to the appeal board. Such recommendation is purely advisory, however, and the board need not follow it.<sup>59</sup>

Because the adjudication of another man's conscience is always a delicate task and often an impossible one, the provisions for determining and classifying conscientious objectors will never be entirely satisfactory. The formulation of determined methods of procedure and rules of evidence in the examination of those claiming to be conscientious objectors would undoubtedly lessen, but could hardly eliminate, the dissatisfaction and charges of injustice that will inevitably arise. The chief difficulties, however, will probably grow out of the human element in the machinery of administration and in this regard the close cooperation which has been effected between the Director of the Selective Service Act and the National Service Board for Conscientious Objectors seems to indicate that the treatment of those, at least who are finally classified as conscientious objectors, will be as satisfactory as can reasonably be expected.

REV. JOSEPH T. TINNELLY, C.M.

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THE PROJECTOR'S REMEDIES TO ENFORCE A PROPERTY RIGHT  
IN AN IDEA \*

Recently, the courts of New York have rendered several decisions which involved the problem as to whether there is a property right in an idea. All the courts have sustained the general rule of law that an idea cannot be the subject of a property right<sup>1</sup> unless the projector creates a contract protecting it,<sup>2</sup> or reduces it to concrete form in order to subject it to patent or copyright. The word "idea" covers a wide range of possibilities but, for convenience sake, it is capable of being classified under three general divisions: (A) Literary ideas, *i.e.*, in a strict sense an artistic or dramatic writing or thought, as all ideas are literary until set into concrete form; (B) mechanical ideas, *i.e.*, new devices or inventions; (C) business ideas, *i.e.*, plans for development of business, trades secrets, etc. The

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<sup>59</sup> 3 SELECTIVE SERVICE REGULATIONS XXVII, 375, EXECUTIVE ORDER 8560, Oct. 4, 1940. C. C. H. WAR LAW SERVICE ¶ 63,537.14.

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<sup>1</sup> *Haskins v. Ryan*, 71 N. J. Eq. 574, 64 Atl. 436, *aff'd*, 75 N. J. Eq. 623, 73 Atl. 1118 (1909); *Anderson v. Distler*, 173 Misc. 261, 17 N. Y. S. (2d) 674 (1940).

<sup>2</sup> *Peabody v. Norfolk*, 98 Mass. 452 (1868); *Bristol v. Equitable Life Assurance Society of N. Y.*, 132 N. Y. 264, 268 N. E. 506 (1892); *Rodriguez v. Western Union Telegraph Co.*, 259 App. Div. 224, 18 N. Y. S. (2d) 759 (1st Dept. 1940); *Stone v. Liggett & Myers Tobacco Co., et al.*, 260 App. Div. 450, 23 N. Y. S. (2d) 210 (1st Dept. 1940).

problem raised in the cases is not difficult. It is the question of whether there is a property right in an idea. Early decisions refused to recognize any property right whatsoever,<sup>3</sup> except in the field of arts and sciences. At common law, literary men and dramatists, prior to publication, had a property right in their ideas and unpublished manuscripts.<sup>4</sup> But once the ideas involved were passed on to another party, the author lost his rights therein forever. This was the common law of copyright.<sup>5</sup> The same is true of mechanical inventions and ideas,<sup>6</sup> as patent rights are of more modern origin.<sup>7</sup> But an abstract idea not reduced to concrete form could not be the subject of a property right.<sup>8</sup> More recent decisions have shown tremendous variation of rules to be applied. In *Haskins v. Ryan*,<sup>9</sup> there is an absolute denial of any property in an idea. In *Bristol v. Equitable Life Assurance Society*,<sup>10</sup> it is admitted that there is a possibility of the existence of a property right, but insists that it be protected or suffer loss. This is affirmed in numerous cases thereafter.<sup>11</sup> Finally, the court finds that ideas may be the subject of property rights.<sup>12</sup> The trend of these decisions *do* tend toward rationalization of a rule of law to be followed in any future case that may arise. It is necessary to study the background of the principles involved herein, in order to formulate a general guide to follow.

<sup>3</sup> Denning v. Chapman, 11 How. Pr. 383 (N. Y. 1854); Williams v. Williams, 3 Meriv. 157, 36 Eng. Rep. 61 (1815); Newberry v. James, 2 Meriv. 446, 35 Eng. Rep. 1011 (1817). See note 1, *supra*.

<sup>4</sup> Wheaton & Donaldson v. Peters & Grigg, 8 Peters 591 (U. S. 1834); Stern v. Laemmle Music Co., 74 Misc. 262, 133 N. Y. Supp. 1082 (1911); Miller v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 301 (1769).

<sup>5</sup> Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. Supp. 311 (1921).

<sup>6</sup> 48 C. J. § 2.

<sup>7</sup> In United States: U. S. CONST. Art. I, cl. 8. The first patent law pursuant to the Constitution was enacted April 10, 1790, 1 STAT. 109. In England: Statute of Monopolies, St. 21 Jac. 1, c. 3 (1623).

<sup>8</sup> See note 1, *supra*.

<sup>9</sup> 71 N. J. Eq. 574, 64 Atl. 436 (1906) (action in equity for an accounting for profits realized from the use of complainant's idea for combining the entire white lead industry; *held*, that there is no property right in an idea).

<sup>10</sup> 132 N. Y. 264, 268 N. E. 506 (1892) (action in equity for an accounting for profits made from the use of the plaintiffs' idea for the sale of insurance; *held*, that in the absence of protection by express contract there was no property right in the idea itself).

<sup>11</sup> Lueddecke v. Chevrolet Motor Co., 70 F. (2d) 345 (C. C. A. 8th, 1934); A. O. Smith Corp. v. Petroleum Iron Works Co., 73 F. (2d) 531, *mod'd*, 74 F. (2d) 934 (C. C. A. 6th, 1935); Young v. Ralston-Purina Co., 88 F. (2d) 97 (C. C. A. 8th, 1937); Carter v. Baily, 64 Me. 458 (1874); Peabody v. Norfolk, 98 Mass. 452 (1868); Fendler v. Morocco, 253 N. Y. 281, 171 N. E. 56, *rev'g*, 217 App. Div. 791, 216 N. Y. Supp. 829 (1st Dept. 1926); Williamson v. New York Central R. R., 258 App. Div. 226, 16 N. Y. S. (2d) 217 (2d Dept. 1939); Rodriguez v. Western Union Tel. Co., 259 App. Div. 224, 18 N. Y. S. (2d) 759 (1st Dept. 1940); Stone v. Liggett & Myers Tobacco Co. *et ano*, 260 App. Div. 450, 23 N. Y. S. (2d) 210 (1st Dept. 1940); Taft v. Smith, 76 Misc. 283, 134 N. Y. Supp. 1011 (1912); Anderson v. Distler, 173 Misc. 261, 17 N. Y. S. (2d) 674 (1940); Stein v. Morris, 120 Va. 390, 91 S. E. 177 (1917).

<sup>12</sup> New Jersey Zinc Co. v. Signmaster, 4 F. Supp. 967, *mod'd*, 71 F. (2d) 277 (C. C. A. 2d, 1934), *cert. den.*, 293 U. S. 591, 55 Sup. Ct. 106 (1934).

## II

The law of patent rights and copyrights was created primarily to protect authors and projectors of ideas which assumed a concrete form or were of a mechanical design. Unfortunately, no basis has been discovered to protect the intangible idea itself as it was created in the mind of its author. Under the common law of patents, an inventor had the material right to deprive the public of the benefits of his invention by keeping it a secret.<sup>13</sup> Once he disclosed it, the public acquired the material right to use it, subject to the right of the inventor to be protected against disclosure or use by one who obtained his knowledge through fraud or breach of faith.<sup>14</sup> The exclusive right of the inventor was not recognized unless granted by the sovereign authority.<sup>15</sup> Today by statute<sup>16</sup> patent rights are created for the protection of the ideas, together with a concrete portrayal thereof. Immediately, the query arises as to why ideas are not patented. The answer is simple in that the mere existence of an intellectual notion that a certain thing can be done, and if done, might be of practical utility, does not furnish a basis for patent.<sup>17</sup> Patentable subject matter is enumerated and described in the statute and an idea cannot be classed as an art, machine, or manufacture.<sup>18</sup> If it is disassociated from definite design and description of machine,<sup>19</sup> or the means of reproduction are lacking, then an idea is not patentable.<sup>20</sup> Therefore, an author of an idea cannot look to patent rights for protection.

<sup>13</sup> *Westcott Church Co. v. Unueda National Church Co.*, 122 App. Div. 260, 106 N. Y. Supp. 1016 (3d Dept. 1907); *Rosenthal v. Goldstein*, 112 Misc. 606, 183 N. Y. Supp. 582 (1920).

<sup>14</sup> 32 C. J. §§ 210-216.

<sup>15</sup> *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698 (1910).

<sup>16</sup> U. S. CONST. Art. I, § 8, cl. 8; 35 U. S. C. A. §§ 1-82, REV. STAT. §§ 4883-4936 (1870); St. 21 Jac. 1, c. 3 (1623).

<sup>17</sup> *Rubber Tip Pencil Co. v. Howard*, 20 Wall. 498 (U. S. 1874); *Standard Cartridge Co. v. Peters Cartridge Co.*, 77 Fed. 630 (C. C. A. 6th, 1896); *Westinghouse Electric Co. v. Saranac Lake Electric Light Co.*, 108 Fed. 221, *aff'd*, 113 Fed. 884 (C. C. A. 2d, 1902); *Aeolin Co. v. Cunningham Piano Co.*, 251 Fed. 301, *aff'd*, 255 Fed. 897 (C. C. A. 3d, 1919); *Foote v. Silsky*, 9 Fed. Cas. No. 4914 (1851); *Draper v. Potomaska Mills Corp.*, 7 Fed. Cas. No. 4072 (1878); *Wheaton v. Kendall*, 85 Fed. 666 (1898); *McEwan Bros. Co. v. McEwan*, 91 Fed. 787 (1899).

<sup>18</sup> *Jacobs v. Baker*, 7 Wall. 295 (U. S. 1869); *U. S. Credit System v. American Credit Indemnity Co.*, 53 Fed. 818, *aff'd*, 59 Fed. 139 (C. C. A. 2d, 1893); *Berardini v. Tocci*, 190 Fed. 329, *aff'd*, 200 Fed. 1021 (C. C. A. 2d, 1912); *Guthrie v. Carlett*, 10 F. (2d) 725 (C. C. A. 2d, 1926); Note (1908) 24 L. R. A. (N. S.) 665.

<sup>19</sup> *Measuregraph Co. v. Grand Rapids Show Case Co.*, 29 F. (2d) 263 (C. C. A. 8th, 1928); *Killifer Manufacturing Co. v. Duniba Associates*, 67 F. (2d) 362 (C. C. A. 9th, 1933), *cert. den.*, 54 Sup. Ct. 628, 292 U. S. 623 (1933); *O'Donnell v. United Shoe Machinery Corp.*, 2 F. Supp. 178 (1933).

<sup>20</sup> *Smith v. Downing*, 22 Fed. Cas. No. 13036 (1850); *Stephens, et al. v. Salisbury*, 22 Fed. Cas. No. 13369 (1855); *Measuregraph Co. v. Grand Rapids Show Case Co.*, 29 F. (2d) 263 (C. C. A. 8th, 1928); *Johnson v. Duquesne Light Co.*, 29 F. (2d) 784 (1928); *Koppe v. Burnstingle*, 29 F. (2d) 923 (1928).

Similar in vein are the rules covering copyright, in which the projector of an idea can find no comfort. At common law, an author had a property in his intellectual production before it had been published, and could obtain redress from anyone who wrongfully used it or obtained it by fraud.<sup>21</sup> The United States has continued this common law doctrine in conjunction with the statutory copyright acts.<sup>22</sup> In England, copyright is fixed strictly by statute, and the common law has been eliminated.<sup>23</sup> However, this property right created by copyright is in the *result* of intellectual productions: it is in the intellectual conception<sup>24</sup> and is not limited to the exact form in which the author has expressed his ideas. Such property is not in ideas in the abstract, for mere ideas are not the subject of private property,<sup>25</sup> but it exists only in the concrete form of its expression, and are the exclusive property of the author as long as they are not published.<sup>26</sup> They need not be reduced to writing as long as they are identifiable.<sup>27</sup> All ideas while still in the abstract are literary in nature and, as such, subject to literary rules of copyright. But the form and concrete expression of an idea alone can be copyrighted.<sup>28</sup> Once the idea has been divulged by publication the rights therein are forever lost.<sup>29</sup> The copyright merely protects the arrangement and manner of composition and not the words used or the ideas contained therein.<sup>30</sup> Therefore, common law copyright combined with statu-

<sup>21</sup> *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606 (1899); *American Tobacco Co. v. Werchmeister*, 207 U. S. 284, 28 Sup. Ct. 72 (1907); *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 30 Sup. Ct. 38 (1909); *Frohman v. Ferris*, 238 Ill. 430, 87 N. E. 327 (1909); *Isaacs v. Daly*, 39 N. Y. Super. 511 (1874); *Palmer v. De Witt*, 47 N. Y. 532 (1872); *Stern v. Carl Laemmle Music Co.*, 74 Misc. 262, 133 N. Y. Supp. 1082, *aff'd*, 155 App. Div. 895, 139 N. Y. Supp. 1146 (1st Dept. 1913); *Caird v. Sime*, 12 App. Cas. 326 (1887); *Exchange Tel. Co. v. Gregory* [1896] 1 Q. B. 147; Note 43 L. R. A. (n. s.) 639; see note 3, *supra*.

<sup>22</sup> 35 STAT. 1075, c. 320, § 2, 17 U. S. C. A. § 2 (1909).

<sup>23</sup> St. 1 & 2 GEO. V, c. 46, § 31 (1911).

<sup>24</sup> *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606 (1899); *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577, *aff'd*, 212 Fed. 301 (C. C. A. 2d, 1914); *Maxwell v. Gordon*, 93 Fed. 665 (1899); *Taft v. Smith*, 76 Misc. 283, 134 N. Y. Supp. 1011 (1912).

<sup>25</sup> *Perris v. Hexamer*, 99 U. S. 674 (1878); *Stowe v. Thomas*, 23 Fed. Cas. No. 1351 (1853); *Brunell v. Chown*, 69 Fed. 993 (1895); *Werchmeister v. Springer Lithograph Co.*, *et al.*, 134 Fed. 321 (C. C. A. 2d, 1904); *Carter v. Bailey*, 64 Me. 458 (1874); *Ortel v. Wood*, 40 How. Pr. 10 (N. Y. 1870); *Taft v. Smith*, 76 Misc. 283, 134 N. Y. Supp. 1011 (1912); *Jeffry v. Boosey*, 4 H. L. Cas. 815, 10 Eng. Rep. 681 (1854); *Cartwright v. Wharton*, 25 Ont. L. 357, 20 Ont. W. R. 853 (1912).

<sup>26</sup> *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177 (1887); *Wright v. Eisle*, 86 App. Div. 356, 83 N. Y. Supp. 887 (2d Dept. 1903).

<sup>27</sup> *White-Smith Music Pub. Co. v. Apollo Co.*, 139 Fed. 427, *aff'd*, 147 Fed. 226, *aff'd*, 209 U. S. 1, 28 Sup. Ct. 319 (1908); *Walter v. Lane* [1900] A. C. 539.

<sup>28</sup> *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606 (1899).

<sup>29</sup> *Baker v. Selden*, 101 U. S. 99 (1879); *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606 (1899); *Carter v. Bailey*, 64 Me. 458 (1874).

<sup>30</sup> *Dymow v. Bolton*, 11 F. (2d) 690 (C. C. A. 2d, 1926); *Moore v. Ford*

tory regulation offers no protection to the author for his ideas. It is necessary that the author disclose his idea in order to turn them into concrete form so that he may realize an economic gain therefrom.

### III

As the author has no protection in copyright and does not come within patent rights, the next query is how can the projector of an idea acquire rights and protection? Theoretically, the definition of property would appear to include a right in an idea,<sup>31</sup> but the decisions have excluded ideas as subjects of property,<sup>32</sup> although authors have been granted a literary property in manuscripts or contents thereof.<sup>33</sup> Often an idea has become a trade secret or developed into a formula which cannot be patented for fear of disclosure. Property rights are recognized in these ideas,<sup>34</sup> although early decisions at first denied it on the strength of the general rule which guides the courts today in the law of ideas.<sup>35</sup> The problem created by trade secrets is analogous to the problem of property rights in an idea. Where the abstract idea is new and novel, it becomes a trade secret and as such, proprietary rights attach thereto.<sup>36</sup> A trade secret is the idea expressed in concrete form. This concrete form is protected as property against use or disclosure obtained by fraud or breach of

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Motor Co., 28 F. (2d) 529, *aff'd*, 43 F. (2d) 685 (C. C. A. 2d, 1930); Leroy v. O'Neil, 49 F. (2d) 603 (1931); Downes v. Culbertson, 153 Misc. 14, 275 N. Y. Supp. 233 (1934).

<sup>31</sup> The term "Property" is *nomen generalissimum* and includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. Hoyd v. Citizens Bank of Albany Co., 89 F. (2d) 105 (C. C. A. 6th, 1937); Wapsie Power & Light Co. v. City of Tipton, 197 Iowa 996, 193 N. W. 643 (1923); McAlister v. Pritchard, 287 Mo. 494, 230 S. W. 66 (1921). "Property" is anything that may be the subject of ownership. *In re Delaney*, 256 N. Y. 315, 176 N. E. 407, *rev'g*, 230 App. Div. 821, 244 N. Y. Supp. 833 (1st Dept. 1931).

<sup>32</sup> Trover will not lie for conversion of ideas where the physical plans were not used, the court observing that it knew of no authority where an action had been sustained for anything so intangible as an idea not connected with something tangible. Mackay, *et al.* v. Benj. Franklin Realty & Holding Co., 288 Pa. 207, 135 Atl. 613 (1927); 6 R. C. L. (1915) 1097, § 3.

<sup>33</sup> Frohman v. Ferris, 238 Ill. 430, 87 N. E. 327, *aff'd*, 223 U. S. 424, 32 Sup. Ct. 263 (1912); Palmer v. De Witt, 47 N. Y. 532, 537 (1872); Bateman v. Ryder, 106 Tenn. 712, 64 S. W. 48 (1901); see note 4, *supra*.

<sup>34</sup> Durand v. Brown, 236 Fed. 609 (C. C. A. 6th, 1916); Coca-Cola Bottling Co. v. Coca Cola Co., 269 Fed. 796 (1920).

<sup>35</sup> Dening v. Chapman, 11 How. Pr. 382 (N. Y. 1854); Newberry v. James, 2 Meriv. 446, 35 Eng. Rep. 1011 (1817); Williams v. Williams, 3 Meriv. 160, 36 Eng. Rep. 61 (1817).

<sup>36</sup> Liggett & Myers Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N. E. 206 (1935); Eastman Co. v. Reichenback, 20 N. Y. Supp. 110, *aff'd*, 29 N. Y. Supp. 1143 (1894); Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P. (2d) 1053 (1936).

confidence.<sup>37</sup> If knowledge is gained by other than surreptitious means, then the acquirer has the right to use his knowledge so acquired.<sup>38</sup> By transposing these rules to a concrete case, the reasoning applied in *Anderson v. Distler*<sup>39</sup> is recognized. In that case an insurance agent gave the defendant a valuable suggestion to retain insurance on a third party, and by following it defendant realized very handsomely on a small outlay of money. Plaintiff sought compensation for the use of his idea. *Held*, that in the absence of a property right in an idea, and lacking a contract for compensation for the disclosure, plaintiff failed to sustain his cause of action. While an idea in the abstract cannot become the subject of a property right, still the decisions point out that the author can protect his idea by a contract. No decision states whether it is the idea that is protected or the act of disclosure by projector.

There should be no problem in the law of ideas for the courts to decide in the face of an express contract against disclosure to third parties, or in the use of an idea obtained as a result of the protection rendered by the contract. Such contract must be clear and definite as to terms and subject matter or it will be unenforceable as too indefinite,<sup>40</sup> or as a contract to make a contract.<sup>41</sup> Compensation for the use of an abstract idea is usually sought in equity on an implied or *quasi* contract. A review of the decisions, however, fails to show one instance wherein the implied contract is upheld.<sup>42</sup> As for sustaining a *quasi* contract on equitable grounds, the courts fall back on

<sup>37</sup> *Eli Lilly & Co. v. Warner & Co.*, 268 Fed. 156, *rev'd*, 275 Fed. 752 (C. C. A. 3d, 1922), *rev'd*, 265 U. S. 526, 44 Sup. Ct. 615 (1923); *Allen-Qualley Co., et al. v. Shellmar Prod. Co.*, 31 F. (2d) 293, *aff'd*, 36 F. (2d) 623 (C. C. A. 7th, 1929); *Peabody v. Norwalk*, 98 Mass. 452 (1868); *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068 (1890); *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12 (1889); *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 47 N. W. 810 (1891); *Smith v. Dickinson*, 3 Bos. & P. 630, 127 Eng. Rep. 339 (1804); *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (1820); *Morison v. Moat*, 9 Hare 241, 68 Eng. Rep. 492 (1851); *Hamlyn v. Houston* [1903] 1 K. B. 81; Note (1891) 11 L. R. A. 267.

<sup>38</sup> *Affiliated Enterprises v. Gruber*, 86 F. (2d) 958 (C. C. A. 1st, 1937); *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369 (1903); *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068 (1890); *Watkins v. Landon*, 52 Minn. 389, 54 N. W. 193 (1893); Note (1889) 6 L. R. A. 839; Note (1893) 19 L. R. A. 236; Note (1904) 63 L. R. A. 255. See also *Champlin v. Stoddart*, 30 Hun 300 (N. Y. 1883).

<sup>39</sup> 173 Misc. 261, 17 N. Y. S. (2d) 674 (1940).

<sup>40</sup> *Stern v. Premier Shirt Corp.*, 260 N. Y. 201, 183 N. E. 363, *aff'g in part*, 235 App. Div. 722, 255 N. Y. Supp. 964 (1st Dept. 1932); *Sears v. N. Y. Hippodrome Corp.*, 104 Misc. 240, 171 N. Y. Supp. 181 (1918).

However, the courts will maintain an action for an injunction to enforce a negative promise which here would be an agreement not to disclose the idea given. *Lumley v. Wagner*, 1 De G. M. & J. 604, 42 Eng. Rep. 687 (1852).

<sup>41</sup> *Haskins v. Ryan*, 71 N. J. Eq. 574, 64 Atl. 436 (1906), *aff'd*, 75 N. J. Eq. 623, 73 Atl. 1118 (1908).

<sup>42</sup> *Bristol v. Equitable Life Assurance Society of N. Y.*, 132 N. Y. 264, 268 N. E. 506 (1892); *Rodriguez v. Western Union Tel. Co.*, 259 App. Div. 224, 18 N. Y. S. (2d) 759 (1st Dept. 1940); *Stone v. Liggett & Myers Tobacco Co. et ano.*, 260 App. Div. 450, 23 N. Y. S. (2d) 210 (1st Dept. 1940).

the primary theory that ideas have no property, and hence the party who makes use of an idea that has been divulged to him is not unjustly enriched by use of property for which he has not paid.<sup>43</sup> The divulgence was at the risk of the projector who should have taken steps to protect his idea.

#### IV

A study of the more recent cases which have evolved the present day law of ideas discloses that it follows the common law of copyright and trade secrets. In *Bristol v. Equitable Life Assurance Society*<sup>44</sup> an accounting was sought in equity for the defendant's use of a system of soliciting life insurance. The plaintiff claimed he had disclosed this to the defendant in a letter asking for employment. No contract against use or disclosure was alleged or proven. The court held that the system was not new and novel so as to partake of the nature of a trade secret and thus be free from danger of use or disclosure. It went on to say that the originator or proprietor of an idea should protect himself upon disclosure by a contract guarding and regulating the disclosure, or the idea upon its divulgence could be used by anyone acquiring knowledge thereof. The court did not deny that an idea could be the subject of a property right; nor did it state how the property right was acquired.

Subsequently, the New Jersey court decided the case of *Haskins v. Ryan*.<sup>45</sup> This was also an action for an accounting for profits derived from the use of plaintiff's idea. Haskins had conceived of a plan to combine all the white lead industry in the United States. He sought the financial aid of Ryan, which necessitated full disclosure of his plan. Ryan at first was extremely cooperative, but before becoming too deeply involved, he told the plaintiff that he could not give him the necessary financial support. This caused Haskins to abandon his idea. However, Ryan later developed the plan and made a large profit from its operation. There was no allegation of any contract to protect plaintiff's rights in the idea. The court held that an idea was something over which the originator had no dominion, as an idea depended upon further acts to bring it to realization. Such an idea could scarcely be called property. It has never, in the absence of contract or statute, been held that mere ideas are capable of legal ownership or protection.

These two cases form the basis of all subsequent cases dealing with the subject. They have been affirmed countless times on the rule

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<sup>43</sup> *Haskins v. Ryan*, 71 N. J. Eq. 574, 64 Atl. 436 (1906), *aff'd*, 75 N. J. Eq. 623, 73 Atl. 1118 (1909); *Bristol v. Equitable Life Assurance Society of N. Y.*, 132 N. Y. 264, 268 N. E. 506 (1892).

<sup>44</sup> 132 N. Y. 264, 268 N. E. 506 (1892).

<sup>45</sup> 71 N. J. Eq. 574, 64 Atl. 436 (1906), *aff'd*, 75 N. J. Eq. 623, 73 Atl. 1118 (1909).

of law that a method, scheme or idea could not be the subject of a property right. In *Stein v. Morris*,<sup>46</sup> the complainant sought an accounting for the use of an idea which brought about the development of the "Morris Plan Bank". Plaintiff sought to bind defendant on theory that the plan was divulged in confidence under a promise of secrecy. The court, after rejecting the claim of a property right, refused to sustain the claim of breach of confidence and a negative contract. It stated that the very nature of the idea demanded divulgence to the public in order to perfect it. It should be noted that here the court did not reject the theory of a breach of confidence, but merely held that no such agreement was proven.

In a more recent case, *Moore v. Ford Motor Co.*,<sup>47</sup> the court upheld the reasoning of prior decisions that property rights do not exist in an idea. But it did say that the originator may impose such conditions as he may see fit in return for his disclosure.<sup>48</sup> This case presents the interesting problem of whether a negative contract preventing disclosure will be enforced. Logically, one would say "yes", in that parties may contract concerning what they wish and, unless public policy prevents, it will be enforced. But in view of the common law guiding the courts, one would be reluctant to say such a contract is enforceable. The courts consistently refuse recognition of an idea as property unless reduced to concrete form, such as a trade secret or process. Thus a contract to prevent disclosure is merely an agreement concerning a subject matter to which the courts give no recognition. However, it is possible that, when such a situation does present itself to the courts, the reasoning in *Moore v. Ford Motor Co.* will be applied, *i.e.*, while an idea cannot be the subject of a property right, the parties may create a property therein by express contract, which contract will be enforced. As a contract for compensation for disclosure of the idea will be enforced,<sup>49</sup> why cannot a contract preventing disclosure, even though the idea is not used, be enforced? There is only one case, *Anderson v. Distler*,<sup>50</sup> that specifically holds that an idea cannot be the subject matter of a contract. However, the court limits this statement by stating that "there may be property in an idea, trade secret or system \* \* \*." The logical implication is that the court in its first statement was referring to abstract ideas

<sup>46</sup> 120 Va. 390, 91 S. E. 177 (1917).

<sup>47</sup> 28 F. (2d) 529, *aff'd*, 43 F. (2d) 685 (C. C. A. 2d, 1930).

<sup>48</sup> "I think that it would be going further than the courts have gone or should go, in absence of some agreement or a judiciary relationship, to hold that where one imparts a mere idea to another and that one acts upon it and profits thereby, he is liable for the profits derived. Obviously a contrary rule would place a serious limitation upon industry, and would be impractical, and, of course, no one needs disclose his idea, except upon his terms" (citing as authority the *Bristol*, *Stein*, *Hamilton* and *Haskins* cases). *Moore v. Ford Motor Co.*, 28 F. (2d) 529, *aff'd*, 43 F. (2d) 685 (C. C. A. 2d, 1930).

<sup>49</sup> *Bristol v. Equitable Life Assurance Society of New York*, 132 N. Y. 264, 268 N. E. 506 (1892); *Shapiro v. Press Publishing Co., Inc.*, 235 App. Div. 698, 255 N. Y. Supp. 899 (2d Dept. 1932).

<sup>50</sup> 173 Misc. 261, 17 N. Y. S. (2d) 674 (1940).

that had no semblance of concreteness and had not been perfected as yet. Not too much reliance can be placed on that decision as authority for the proposition that an idea cannot be the subject of a contract, as the supporting decision cited in no way substantiates the claim. It merely holds that an idea is not the subject of a property, but it may be protected by contract. Even conceding the argument in the *Anderson* case, it raises the question of what will guide the court as to when an idea becomes concrete enough in substance to be the subject of a contract. That would necessarily become a question of fact for a jury. Consequently, all causes of action on an idea would then be valid, the question to be decided by the jury. To carry the problem one step further, and to allow an idea to become a proper subject for contract only after it assumes concrete form, is to place it in the category of a trade secret. This does not create a problem, but ends our initial problem, as it is a well-known rule of law that a trade secret is a proprietary right and protected from disclosure by contract.<sup>51</sup> But it is not possible that the opinions written on property rights in ideas limited their statements to ideas that have assumed a concrete form because there is no problem involved there. When the decisions warned the originator that he must protect himself by contract, they referred to abstract ideas in their intangible state.

The entire problem of property rights in ideas has been the subject of three very recent cases both in the federal courts and in New York. In *Ketcham v. New York World's Fair 1939, Inc.*,<sup>52</sup> the court recognized the plaintiff's property right in an idea, but rendered a decision for the defendant due to the failure to show an invasion of the right by a use of the idea. The plaintiff had developed a color chart for the World's Fair buildings, together with suggestions in its use. He claimed that the defendant had made use of his ideas, and was therefore entitled to an accounting. The court did recognize that plaintiff had a property right in his original intellectual production in its concrete form, and that he could contract and impose such restrictions in the use thereof as he saw fit, but that once he disclosed it by publication, the property right, in absence of contract, was lost. However, the Court went on to say that plaintiff failed to show in any respect that the defendant had made use of the ideas furnished and, unless plaintiff's recognized property right was injured, he could not recover.

In a later case, the United States Supreme Court affirmed the common law rule of copyright. *Fashion Originators Guild v. F. T. C.*,<sup>53</sup> involved an appeal from a "cease and desist" order of the Federal Trade Commission for certain "unfair trade practices".

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<sup>51</sup> See notes 34, 37, *supra*.

<sup>52</sup> *Ketcham v. New York World's Fair, 1939, Inc.*, 34 F. Supp. 657 (1940).

<sup>53</sup> *Fashion Originators' Guild v. Federal Trade Commission*, 114 F. (2d) 80, *aff'd*, 61 Sup. Ct. 703 (U. S. 1941).

Plaintiff was an association of dressmakers and dealers who had combined in order to prevent style piracy and insure fair trade among dress dealers and manufacturers. All members of the Guild made their dresses from designs created by the various members of the association, and by forms of boycott sought to prevent non-members from copying the designs. These designs were neither patented nor copyrighted, although they were registered in the association. The Circuit Court of Appeals delved into the common law of property in ideas and recognized the property right, but only in its original and unpublished state. Once these designs were made into dresses and offered to the general public for sale, it was a publication that deprived the originator of his common law property. The court went on to say that the Constitution and copyright statutes did not give the author a property right in a concrete idea forever. This property right did not survive publication, and the author's sole remedy is to have the copyright law changed so as to allow ideas to be registered and protected as originals. This would not prevent copies from being made, but they would have to be so designated. The Supreme Court in its affirmance recognized the property right in concrete ideas, but would not permit the plaintiff, in seeking to protect this property after publication, to indulge in unfair trade practices.

Perhaps the last word in this problem is stated very succinctly in the decision of *Alberts v. Remington Rand, Inc.*<sup>54</sup> In most of the cases discussed previously, we have found a property right, but it has been so created because the idea has been reduced to concrete form or has been made the subject of an express contract. In such cases, the courts quickly protect and enforce the rights. But in the *Alberts* decision, the distinction between an idea in its concrete form and one still in the abstract is clearly demonstrated. In this decision the plaintiff sought to recover on two causes of action. The first one proceeded on the theory that plaintiff's original idea had been used and defendant had not paid therefor, despite an express contract to do so. It was conceded that that stated a valid cause of action. Recovery in the second cause of action was based upon the defendant's liability for the reasonable value of the idea on the theory of an implied contract. In granting a motion to dismiss this cause of action, the court stated what is undoubtedly the rule of law followed in the courts of the United States:<sup>55</sup>

In the absence of an express agreement the originator or proprietor of an idea, trade secret or system which cannot be sold, negotiated or used without disclosure, cannot hold another liable if he uses the idea for his own benefit.

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<sup>54</sup> 175 Misc. 486, 23 N. Y. S. (2d) 894 (1940) (Action to recover for the use of an idea submitted to defendant. The idea consisted of a written suggestion that defendant make a chart or graph of the direction in which hairs on the face grow and that the chart be issued to customers as an aid in the use of defendant's razors).

<sup>55</sup> *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 487, 23 N. Y. S. (2d) 892, 894 (1940).

\* \* \* Only where the idea has been reduced to concrete form prior to its disclosure to and appropriation by the defendant may recovery be had upon an implied contract.

This case clarifies the rule laid down in *Anderson v. Distler*.<sup>56</sup> There the court referred to abstract ideas and stated that they could not be the subject of a property right or a contract. The better rule is that they may be the subject of a contract as parties may contract concerning anything that is not illegal or contrary to public policy, and once the idea is made the subject of a contract, then no matter how abstract in form it may be, the idea is protected.

## V

Much as it is desired to support the originator or inventor of an idea and create a property right therein, in the face of the definite stand taken by all the courts, it would be difficult to reverse themselves and create a property right where they claim none existed. A careful analysis of the decisions shows two common elements. The originator may protect himself by an *express* contract. No property right or implied contract will be recognized. Naturally, obtaining an express contract is not a simple procedure, as most people wish to know something about which they contract. Also, the court will only enforce the contract if it is definite and not merely an agreement to agree, which is unenforceable.<sup>57</sup> Because of the difficulties surrounding the creation of a contract, the best remedy to protect the author of an idea is by legislative enactment creating a property right in ideas. The definition of "property" is general enough<sup>58</sup> so that ideas can be classified as intangible, incorporeal property and, as such, subject to protection as any other personal property.

ROBERT M. POST.

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CORPORATION STOCK REPURCHASE AGREEMENTS; MUTUALITY OF OBLIGATION AND ILLUSORY PROMISES

A corporation, subject to the provisions of its charter and by-laws, has the inherent power to purchase its own stock.<sup>1</sup> Such power

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<sup>56</sup> See note 39, *supra*.

<sup>57</sup> See note 41, *supra*.

<sup>58</sup> See note 31, *supra*.

<sup>1</sup> *West Penn. Chemical and Mfg. Co. v. Prentice*, 236 Fed. 891 (C. C. A. 3d, 1916); *Verplanck v. Ins. Co.*, 11 Edw. Ch. 84 (N. Y. 1831); *City Bank of Columbus v. Bruce and Fox*, 17 N. Y. 510 (1858); *Laue v. Bethlehem Steel Corp.*, 243 App. Div. 57, 276 N. Y. Supp. 173 (1st Dept. 1934).