

2005

## An Idea Whose Time Has Come – But Where Will It Go

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### Recommended Citation

Jane C. Ginsburg, *An Idea Whose Time Has Come – But Where Will It Go*, 119 HARV. L. REV. F. 65 (2005).  
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“AN IDEA WHOSE TIME HAS COME” — BUT WHERE  
WILL IT GO?

*Jane C. Ginsburg\**

Replying to Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703 (2006).

This Reply picks up where Professor Miller’s bold proposal leaves off: with the private international law and international copyright implications of state common law protection for idea-submitters. We will first address the compatibility of the proposal with international copyright norms disqualifying ideas from copyright protection. We will then turn to the consequences of the proposal for a federal system. Professor Miller’s article thoroughly examines one aspect of the federalism problem, that of federal copyright policy preemption of state-based idea protection. But in advocating a regime constricted to the fifty separate states, not all of whose courts choose to secure idea submissions (and if they do, the scope of their coverage may diverge), the proposal raises implementation problems inherent in the territorial scope of the right. Given those problems, federal statutory coverage of idea-submitters might seem preferable. That in turn raises the question whether, assuming protection of the kind Professor Miller advocates is a good idea, Congress has power to enact it.

I. INTERNATIONAL NORMS

Both the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property and the World Intellectual Property Organization Copyright Treaty specify that copyright protection shall not extend to ideas.<sup>1</sup> These multilateral agreements thus express a policy that ideas shall remain free for all to adopt, implement, dispute, or exploit. The policy applies to each treaty member’s treatment of authors from other treaty countries; the international conventions do not purport to prescribe the level of protection members must accord their

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<sup>1</sup> World Intellectual Property Organization Copyright Treaty art. 2, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WCT]; Agreement on Trade-Related Aspects of International Property Rights art. 9(2), Apr. 15, 1994, 33 I.L.M. 81 [hereinafter TRIPS]. These agreements echo 17 U.S.C. § 102(b) (2000).

own authors.<sup>2</sup> Thus, the United States may not protect foreign residents' ideas, even if it would protect those of its own idea-devisers.<sup>3</sup> This prohibition would extend to the federated components of the national treaty member.<sup>4</sup> At first blush, this seems to indicate that neither the United States nor the separate states would be able to offer foreigners the same incentives for ingenuity that animate Professor Miller's argument for idea protection. U.S. entrepreneurs might, accordingly, miss out on potentially lucrative idea submissions, for foreign idea-submitters otherwise attracted by the resources U.S. companies might invest in their ideas will turn elsewhere.<sup>5</sup>

On further analysis, however, foreign idea-submitters should not encounter treaty barriers to the kind of protection Professor Miller urges. This is because, as *An Idea's* preemption discussion makes clear, Professor Miller does not propose to create a property right enforceable against the world.<sup>6</sup> Rather, the right would be (implied) contract-based, enforceable only against the idea-submittee. Persons who independently generate the same idea, or who learn of it under conditions not characterizing the relationship that gives rise to the proposed protection, encounter no liability if they subsequently exploit it. The same features of the proposal that save it from federal preemption should also safeguard it from international treaty incompatibility.

Whether a foreign idea-submitter would in fact be protected in whichever of the fifty states adopted the proposed protection would depend on whether, as a matter of that state's principles of private international law, it accorded foreign residents the same protection as lo-

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<sup>2</sup> See, e.g., WCT, *supra* note 1, art. 3; TRIPS, *supra* note 1, art. 1(3); Berne Convention for the Protection of Literary and Artistic Works art. 5.3, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

<sup>3</sup> See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND ¶¶ 6.110-6.111 (2006) (exploring the proposition that the Berne Convention imposes a ceiling as well as a floor on international copyright protection).

<sup>4</sup> See TRIPS, *supra* note 1, art. 1(1) ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.")

<sup>5</sup> See Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 HARV. L. REV. 703, 713-14 (2006) ("[B]ecause ideas have no geographic boundaries, the protections America accords must be sufficient to ensure that domestic idea-vendors are comfortable peddling their wares at home and that foreign ones direct their creative efforts to the United States rather than to countries with more protective legal regimes.")

<sup>6</sup> See, e.g., *id.* at 732 (arguing that protection should not "give the plaintiff a monopoly power or create an anticompetitive effect"); *id.* at 733 (objective is "protecting ideas without creating monopolies"); *id.* at 763-64 (federal law preempts "monopolistic property rights," but the proposed idea submission right is not that kind of right); *id.* at 772 (characterizing proposed protection as "contractual obligations"); *id.* at 778 (whether state law confers equivalent of a monopoly depends both on the "range of parties against whom [the claim] can be enforced, [and] on the degree of control that the law affords").

cal. The rule of national treatment is a mainstay of international copyright protection,<sup>7</sup> but it applies only to subject matter whose coverage the treaties require. With respect to idea-submission claims, by contrast, we are in the broader realm of contract law, and assuming no separate state declines to enforce an obligation expressly or implicitly entered into with a foreign resident, then a British, Egyptian, or Korean idea-submitter should be able to claim the same coverage as an ingenious American.

## II. APPLICABLE STATE LAW(S)

But what is that coverage? Here we encounter the more elusive problem of domestic conflict of laws. Unless the highest courts of all fifty states follow Professor Miller's prescriptions and not only determine to protect idea-submitters, but also to protect them to the same extent, there will be some states in which the submitter will be less protected than others, and some in which she will not be protected at all. Which state's law will apply to the idea-submission relationship?

We are positing that there is no written idea-submission agreement; the problem Professor Miller seeks to redress, after all, arises because idea-submitters generally cannot obtain written agreements from the submittee to compensate the submitter if the idea is used. As a result, there is no choice of law clause to guide us to the applicable rule. This means that, to determine the law that governs the relationship, the relationship would have to be "localized,"<sup>8</sup> but where? At the place where the idea was disclosed? At the residence of the idea-submitter? At the headquarters of the business to which the claimant pitched the idea?

The first of these points of attachment finds support in the *Restatement (Second) of Conflict of Laws*, whose section 188(3) provides that if the place of negotiation and of performance of the contract are the same, "the local law of this state will usually be applied." In the case of an idea submission, the negotiation and the "performance" — here, the disclosure of the idea — would occur in the same place if, as may have been traditional, the submitter pitched her idea to defendant's personnel at defendant's place of business. Where, as may in-

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<sup>7</sup> See, e.g., Berne Convention, *supra* note 2, art. 5(2); RICKETSON & GINSBURG, *supra* note 3, ¶¶ 6.74–6.97. See generally TRIPS, *supra* note 1, art. 3.

<sup>8</sup> See, e.g., Wright v. Sony Pictures Entm't, Inc., 394 F. Supp. 2d 27 (D.D.C. 2005) (localizing contract at place where contract was negotiated, signed, and substantially performed), discussed in Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. LAW (forthcoming 2006), available at <http://www.willamette.edu/wucl/wlo/conflicts/index.htm>; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) [hereinafter RESTATEMENT] (discussing "law governing in absence of effective choice by the parties" and the localizing factors to take into account).

creasingly be the case, the pitching and the disclosure no longer take place in a terrestrial office, but over the Internet (or even over the telephone), then these factors may be less pertinent.<sup>9</sup>

The second point of attachment is probably atypical<sup>10</sup> but avoids the problem of multiple locations. It has the additional advantage of giving effect to a particular state's determination to adopt Professor Miller's proposal in the hope that local protection will encourage innovators to reside in that state. It bears emphasis that a different choice of law rule, for example, one that looks to the place of the submittee's business, would in practice sidestep the submitter-favorable policy of the plaintiff's residence (unless the state of the submittee's business also protected idea-submittees).

The last of these points of attachment serves in the analogous area of trade secrets,<sup>11</sup> in which the law of the place where the secret is used generally governs.<sup>12</sup> Professor Miller's substantive focus on the "defendant's gain"<sup>13</sup> mirrors the trade secret courts' attention to the place "where the benefit was obtained,"<sup>14</sup> and supports applying the law of the state of the defendant's headquarters, for that is where the defendant will have reaped the gain that justifies the claim. But were the choice of law rule to designate the submittee's place of business, one might anticipate that idea-submittees hoping to avoid obligations

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<sup>9</sup> Cf. RESTATEMENT, *supra* note 8, § 188 cmt. 2(e) (place of negotiation contact "is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but conduct their negotiations from separate states by mail or telephone").

<sup>10</sup> The parties' domicile or residence are factors under § 188(2)(e), but "their significance depends largely . . . upon the extent to which they are grouped with other contacts." *Id.* Thus, making the plaintiff's residence the sole point of attachment, when that state is neither the place of negotiation nor performance, may be incompatible with the *Restatement's* general direction to apply the law with "the most significant relationship to the transaction." *Id.* § 188(1).

<sup>11</sup> See Miller, *supra* note 5, at 734-37, 766-67 (discussing commonalities between idea submission claims and trade secrets).

<sup>12</sup> See, e.g., *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1140 (11th Cir. 2005) ("In a trade secret misappropriation case, the *lex loci delicti* is not the place where the information was learned, but where the tortious act of misappropriation and use of the trade secret occurred." (citing *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 735 F. Supp. 1555, 1568 (M.D. Ga. 1989))). As a practical matter, however, the choice of law problem may rarely arise, in part because the disclosure of trade secrets often occurs through a licensing process that includes a choice of law clause, and in part because there is little substantive difference across states since forty-five states adopted the Uniform Trade Secrets Act, 14 U.L.A. 433 (1985).

<sup>13</sup> Miller, *supra* note 5, at 734-37.

<sup>14</sup> See, e.g., *Wilson v. Electro Marine Sys., Inc.*, 915 F.2d 1110, 1115 (7th Cir. 1990) (stating that "in misappropriation of trade secrets cases, the law of the place where the alleged wrong was committed or benefit was obtained applies" and applying the law of New York because that was where the defendant "maintains its principal place of business . . . and would have obtained any benefit"); see also RESTATEMENT, *supra* note 8, § 221(2) (listing factors to determine law applicable to an action for restitution, including "the place where the benefit or enrichment was received").

might (all other things being equal<sup>15</sup>) seek to locate themselves in jurisdictions that have not adopted the proposed protection. In that case, any claim might be wholly fruitless. On the other hand, if Professor Miller is correct that idea submission protection will provide an incentive to generate and propose potentially lucrative ideas, then businesses seeking those benefits should be willing to pay for them and would situate themselves in states that have adopted the proposed coverage.

Suppose, however, a business wants it both ways: to attract idea-submitters but to avoid paying them. Would common law idea protection end up causing entrepreneurs to reverse course, from declining to sign any agreements with idea-submitters to requiring that idea-submitters sign waivers before submitting their ideas? Assuming the waivers are enforceable,<sup>16</sup> any protection the state accorded would easily be circumvented.

As a common law right, then, protection for idea submissions, even if not waived, encounters the difficulties inherent in a federal system, in which nationally exploitable intellectual subject matter receives potentially inconsistent (or nonexistent) application across the fifty states. Even if the disclosure can be confined to a single state, the exploitation of the disclosed idea will almost always be interstate (if not international). This means that an idea-protecting state's law may well produce effects in other states, if the remedy takes account of that extra-territorial exploitation. Professor Miller's proposal tempers the potential extra-state impact because he would not award injunctive relief to an aggrieved idea-submitter.<sup>17</sup> Rather, he would limit the idea-submitter's remedy to "the value of what was received' by the idea-developer."<sup>18</sup> But it is not clear how that value would be calculated. Professor Miller acknowledges that the idea-exploiter may add some (or much) of the value<sup>19</sup> but does not detail how to evaluate the idea-submitter's respective contribution, once identified. If, at least under

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<sup>15</sup> A proposition perhaps more theoretical than probable.

<sup>16</sup> There may be a question whether the waiver is supported by any consideration: Is "I'll listen to you if you disclose your idea" sufficient consideration for waiving any rights to compensation if the listened-to idea is used? On the other hand, the submitter has no entitlement to impotune the submittee, who has no obligation to listen to the idea in the first place.

<sup>17</sup> See Miller, *supra* note 5, at 767 (arguing that claims for injunctive relief should be preempted); *id.* at 776 ("A successful quantum meruit claimant could neither enjoin the use of his work nor acquire an exclusive right to benefit from that use . . .").

<sup>18</sup> *Id.* at 776 (quoting RESTATEMENT OF RESTITUTION § 155 (1937)); *cf.* Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001) (declining to award copyright infringer's profits and limiting remedy to fee plaintiff would have charged had defendant sought a license).

<sup>19</sup> Miller, *supra* note 5, at 723 & n.81, 742-43; *cf.* Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985) (awarding copyright damages by parsing profits attributable to underlying infringed musical works (songs from *Kismet*), as opposed to profits attributable to other aspects of defendant's musical revue).

some circumstances,<sup>20</sup> the compensation takes the form of royalties from the exploitation, and the exploitation extends beyond the state whose law applies to the idea submission transaction, then the plaintiff may in effect reap rewards from activity conducted in a state that has not chosen to protect idea submissions.

On the other hand, the potentially extraterritorial nature of the damages award may be a false problem if one conceives of the law of idea submissions as regulating a relationship between two parties, rather than as granting rights in ideas as such. Let's start with a scenario in which two parties unmistakably agree to share the fruit of one party's exploitation of the other's idea. That agreement should be enforceable wherever the idea is carried out. Outside the state in which the exploiter's business is located, the states in which the exploitation is occurring have no particular interest in invalidating an agreement that binds no one other than its parties. Professor Miller identifies two policies behind common law courts' refusal to protect idea-submitters: maintaining the free flow of ideas, and protecting entrepreneurs against sham claims.<sup>21</sup> If the claim neither seeks nor achieves a monopoly in a disclosed idea, because the submitter has no rights to enforce against anyone other than the submittee, the first concern should be allayed. As to the second, if the entrepreneur has agreed to compensate the submitter, then it is hard to see how another state's solicitude to insulate entrepreneurs against spurious claims has any relevance.

Professor Miller's scenario differs from ours in that his contractual relationship is implicit rather than explicit. Drawing on the equitable principles of quantum meruit,<sup>22</sup> Professor Miller would create a constructive agreement out of the "special relationship"<sup>23</sup> that arises between an idea-submitter and an entrepreneur who gains value from implementing the submission. If a state adopts Professor Miller's proposal, then it will have determined for its resident entrepreneurs that the circumstances giving rise to the constructive agreement adequately safeguard both their security and the broader interests in freedom of ideas. At that point, the same inquiry into the interests of states other than those in which the relationship is grounded would pertain and should lead us to conclude that one state's adoption of Professor Miller's proposal should not tread on another state's interests.<sup>24</sup>

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<sup>20</sup> See Miller, *supra* note 5, at 776 (when idea-recipient obtained the idea through "consciously tortuous conduct" (quoting RESTATEMENT OF RESTITUTION, *supra* note 18, § 152)).

<sup>21</sup> See Miller, *supra* note 5, at 720-23.

<sup>22</sup> *Id.* at 773-78.

<sup>23</sup> *Id.* at 774.

<sup>24</sup> This analysis assumes that the applicable law would be that of the state in which the submittee resides. If the court applies a different law, say that of the submitter's residence, and that

Although Professor Miller's proposal avoids creating policy conflicts across the fifty states, the common law nature of idea submission protection still means that, unless or until all the states follow *An Idea's* prescription, coverage will be inconsistent, with similarly situated idea-submitters receiving different (or no) protection, most likely depending on the residence of the companies to which they pitch their ideas. If the need to protect idea-submitters is as great as Professor Miller claims,<sup>25</sup> then perhaps Congress should step in to provide uniform coverage. This brings us to our last inquiry: Congress's power to enact such a statute.

### III. CONGRESS'S AUTHORITY TO PROTECT IDEA-SUBMITTERS

The two most likely sources of congressional authority are the Patent-Copyright Clause, addressing the "Writings" of "Authors,"<sup>26</sup> and the Commerce Clause, covering interstate and international commerce.<sup>27</sup> For two reasons, however, the Patent-Copyright Clause might not be the appropriate locus of power. First, a pitched idea may not qualify as a "Writing." If the idea is communicated orally, and has not previously been written down, it is not "fixed," and prior fixation may be a prerequisite to characterization as a "Writing."<sup>28</sup> Moreover, were an idea (as opposed to its particular "expression"<sup>29</sup>) a "Writing," and thus protectable subject matter, the resulting federal monopoly might be inconsistent with the Patent-Copyright Clause's policy authorizing Congress to "secur[e]" authors' "exclusive Right" in order "to promote the Progress of Science," a goal achieved by ensuring the free flow of ideas.<sup>30</sup> Second, if as Professor Miller contends, the subject matter of protection is not the idea itself, but the idea-submission *relationship*, whose enforcement does not give rise to exclusive rights, then the Patent-Copyright Clause would offer no authority for Congress's regulation in any event. Against these objections, one might contend that Congress's power to promote the progress of science is not limited to granting a monopoly; Congress might achieve that end by securing

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law is more protective of submitters than the law of the submitter's residence, then the latter's interests may be trodden upon.

<sup>25</sup> See *id.* at 711-15.

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>27</sup> *Id.* cl. 3.

<sup>28</sup> See *KISS Catalog, Ltd. v. Passport Int'l Prods.*, No. CV 03-8514 DSF (CWx), 2005 U.S. Dist. LEXIS 37671, at \*6 (C.D. Cal. Dec. 21, 2005) (stating that fixation is a constitutional requirement); *United States v. Martignon*, 346 F. Supp. 2d 413, 423 (S.D.N.Y. 2004) (same).

<sup>29</sup> See Miller, *supra* note 5, at 715-16 & nn.46-48.

<sup>30</sup> See, e.g., N.Y. Univ. Law Review, *The Meaning of "Writings" in the Copyright Clause of the Constitution*, in *STUDIES ON COPYRIGHT* 43, 69 (Arthur Fisher Mem. Ed. 1963).

lesser rights. Moreover, fostering idea-disclosure would also seem to promote the progress of “Science” because the subject matter, even if not itself a “Writing” or a “Discovery,” is akin to them and could become one or the other if successfully developed by the submittee.<sup>31</sup>

Whether or not the Patent-Copyright Clause authorizes federal protection, the Commerce Clause also seems a probable candidate because Congress would be regulating a relationship whose fruits impact interstate or international commerce.<sup>32</sup> This should suffice, but recent case-law and commentary addressing the relationship of the Patent-Copyright and Commerce Clauses<sup>33</sup> may complicate the inquiry. When Congress acts under the Commerce Clause to protect subject matter that is explicitly or implicitly excluded from the scope of the Patent-Copyright Clause,<sup>34</sup> or provides a scope of protection in excess of that allowed by that clause,<sup>35</sup> the policies underlying the Copyright Clause may well constrain Congress’s ability to enact under the Commerce Clause laws impermissible under the Patent-Copyright Clause.<sup>36</sup> Whether or not Congress is barred from enacting copyright-like legislation under the Commerce Clause (either simply because that legislation exceeds a limitation contained in the Copyright Clause, or at least when that limitation expresses a basic public policy that should not be cir-

<sup>31</sup> One might thus argue that idea submission protection is permissible under the Necessary and Proper Clause as well. See U.S. CONST. art. I, § 8, cl. 18.

<sup>32</sup> For a recent statement of Congress’s broad authority to enact legislation pursuant to the Commerce Clause, see *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005) (“Our case law firmly establishes Congress’s power to regulate [even] purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” (citations omitted)).

<sup>33</sup> See, e.g., cases cited *supra* note 28; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Restraint on Congress*, 2000 U. ILL. L. REV. 1119 (contending that Copyright Clause exclusion of certain subject matter should preempt Commerce Clause coverage). But see Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) (rejecting cross-clause preemption arguments).

<sup>34</sup> Unfixed works may be explicitly excluded, see *United States v. Martignon*, 346 F. Supp. 2d 413, 423 (S.D.N.Y. 2004), while facts and ideas are implicitly excluded, see, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991).

<sup>35</sup> For example, a law providing perpetual protection despite the Patent-Copyright Clause’s restriction to “limited Times.” See, e.g., cases cited *supra* note 28.

<sup>36</sup> While strong public policy reasons underlie the exclusion of ideas, so that copyright-like legislation under the Commerce Clause protecting ideas might indeed seem an impermissible “end run” around the Patent-Copyright Clause’s limitations, the same cannot be said for the fixation requirement. If the fixation requirement were fundamental to the copyright system, one would expect that unfixed works should remain free from any protection, state or federal; that the limitation, like the idea/expression distinction, would define not only what may be protected but also what must not be protected. See Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y 560, 604 (1982) (contending that § 102(b) implicitly precludes state law protection for elements excluded from federal protection). However, that is not the case. See 17 U.S.C. § 301(b)(1) (2000) (preserving state law protection of unfixed works). Thus, one may wonder why a limitation that does not compel the “vertical preemption” of state coverage would nonetheless mandate the “horizontal preemption” of one constitutional clause by another.

cumvented by the mere sleight of hand of shifting Article I, Section 8 clauses), it is not necessary in this case to enter the inter-clause preemption debate<sup>37</sup> because *An Idea* does not propose copyright-like protection. Nor is it advocating coverage that might retain the form of a contract, but through serial adhesion agreements would function like a generally-assertable property right.<sup>38</sup>

#### CONCLUSION

This Reply has not challenged the initial premise of Professor Miller's article, that protection for idea submissions is necessary to our information-drenched economy. The protection Professor Miller advocates may well stimulate communication of promising commercial ideas to entrepreneurs who will appropriately compensate their ingenious confidantes. Whether we now suffer a dearth of idea submissions, or whether protecting submitted ideas will cause them not only to be fruitful (to their submitters) but to multiply (in their disclosure), are propositions that may be impossible to prove.<sup>39</sup> This may be why Professor Miller also grounds his arguments in fundamental fairness: "[T]he basic idea . . . is that it is inequitable for one party to receive a benefit from another without paying for it . . . ."<sup>40</sup> Sensitive to that instinct's risk of overbroad application, Professor Miller emphasizes that in most instances in which the requisite "special relationship" is present, the measure of damages would not be calculated as a percentage of profits from the successful implementation of the idea, but would constitute a kind of fee for services.<sup>41</sup> In effect, the idea pitcher to whose importuning the entrepreneur agreeably submits would be entitled to the same payment as the business consultant whose advice the entrepreneur deliberately seeks out. In the former case, the idea supplier comes to the entrepreneur; in the latter, the entrepreneur goes to the idea supplier. There is no reason the suppliers should be treated differently, at least so long as the unsought submission is willingly received and implemented.

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<sup>37</sup> Compare *Martignon*, 346 F. Supp. 2d at 425 (holding that Congress may not legislate under the Commerce Clause that which it could not under the Patent-Copyright Clause), with *KISS Catalog, Ltd. v. Passport Int'l Prods.*, No. CV 03-8514 DSF (CWx), 2005 U.S. Dist. LEXIS 37671, at \*4 (C.D. Cal. Dec. 21, 2005) (holding that the Copyright Clause does not constrain Congress's power to legislate with respect to subject matter falling outside the scope of the Patent-Copyright Clause).

<sup>38</sup> See Miller, *supra* note 5, at 770-71.

<sup>39</sup> Cf. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 293-313 (1970) (noting that whether copyright serves as an incentive to create and disseminate works of authorship remains unproven).

<sup>40</sup> Miller, *supra* note 5, at 773.

<sup>41</sup> *Id.* at 775-76.