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WHAT'S INSIDE

EXPERT INTERVIEW

Q&A: Entertainment attorney James Sammataro on the impact of the 'idea submission' lawsuit involving 'Stranger Things'

By Patrick H.J. Hughes

The brothers Matt and Ross Duffer began working on a project in 2010 that became the "Stranger Things" series launched on Netflix in July 2016.

Filmmaker Charlie Kessler claimed he pitched a film concept at the 2014 Tribeca Film Festival to the Duffer brothers.

The pitch was based on his short film "Montauk," produced in 2012, about a government facility performing top-secret experiments involving the supernatural. Kessler pitched the idea for a full-length film.

In April 2018, Kessler filed a lawsuit in Los Angeles federal court claiming the Duffer brothers breached an implied contract in creating "Stranger Things." *Kessler v. Duffer*, No. BC700197, *complaint filed* (Cal. Super. Ct. Apr. 2, 2018).

The Duffer brothers moved for summary judgment, but the court denied the motion.

The litigation ended in May, when Kessler dropped his case and announced to Deadline.com that his work "had nothing to do with the creation of 'Stranger Things.'"

REUTERS/Mario Anzuoni

"Stranger Things" creators Ross (L) and Matt (R) Duffer pose at the premiere for the second season of the Netflix series in Los Angeles on Oct. 26, 2017.

Thomson Reuters: What is the general legal framework involving idea-submission cases as opposed to a copyright infringement case? For instance, what legal theories do plaintiffs generally rely upon in an idea-submission case?

James Sammataro: Claims for copyright infringement and idea misappropriation are often filed in tandem. Federal law governs copyright,

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EXPERT ANALYSIS

When can exclusive patent licensees sue in their own name?

Venable LLP attorneys Christopher E. Loh and Frederick C. Millett discuss the standing requirement for patent licensees bringing suit and say what those entering into patent license agreements should do.

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'Stranger Things'

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but state law governs idea-submission law with five interrelated theories: property, express contract, implied contract, unjust enrichment/quasi-contract, and confidential relationship.

These theories have been inconsistently applied by state courts exercising their express or implied powers to fashion justice based on the particular facts in front of them.

Consequently, the case law is all over the place, affording different levels of protection in different states for those who submit ideas and then claim misappropriation.

TR: When does a pitch give rise to potential legal exposure?

JS: Typically, it is the parties' relationship, rather the substance of the idea/pitch, that determines exposure.

An idea voluntarily shared by a stranger during cocktail party small talk should be subject to a vastly different fate than one shared at a pre-arranged formal business meeting scheduled between known parties on a studio lot.

However, there is no precise line at which a pitch crosses from conversation to contract. The conduct of the parties must suggest that a pitch was invited and rendered based on an inferred promise to be compensated.

The typical idea submission case turns on the following questions: (i) How did the parties interact? (ii) where did the parties meet? (iii) Was the idea solicited or unsolicited? (iv) What did the plaintiff share (i.e., a raw idea, a treatment, a script, a screenplay)? (v) Was the idea disclosed in the context of a business meeting or casual conversation? (vi) Did the plaintiff communicate an expectation of receiving compensation in exchange for his idea? (vii) Did the defendant have the opportunity to prevent disclosure?

TR: What are the types of facts that can prove dispositive in an idea-submission case?

JS: A plaintiff must establish facts demonstrating: that she prepared a work (a script, spec, treatment or otherwise); that she clearly conditioned her offer to disclose the idea upon an obligation to be compensated if the recipient uses the idea; the recipient used the idea without compensating her; the recipient had the opportunity to reject the attempted disclosure if the conditions of tender were unacceptable; and the reasonable value of the work.

It is insufficient to show merely that an idea was conveyed, is valuable, and has been used for profit.

A plaintiff must also show salient circumstances preceding and attending disclosure.

Dispositive showings in real-world cases have included, for example, an arranged meeting at the defendant's studios or in their offices; a calendar invitation that reads: "pitch meeting"; the arrangement of the meeting by a manager, agent or an attorney; an existing relationship in which the defendant previously compensated plaintiff; defendant solicited or requested the materials before, during or after the meeting; a paper trail (texts/WhatsApp communications, internal emails); and the provision of Vimeo passwords.

Ultimately, the more it feels like a business meeting, the more it is likely to be considered a business meeting and, by extension, a compensable pitch.

TR: What could the Duffers have done differently to better protect themselves? Are there magic words or specific actions that should be used to fortify a defense?

JS: The denial of the Duffers' summary judgment motion was so startling because the underlying fact pattern had all the hallmarks of a doomed case. The "meeting" was the classic, happenstance cocktail pitch.

There was no existing relationship between Kessler and the Duffers.

There was no pre-arrangement. Kessler testified that he did not know that the Duffers would be attending the party.

The meeting occurred in a social setting (at a cocktail party), not on a studio lot. The conversation was brief, 10 to 15 minutes.

There was no exchange of written materials: Kessler admittedly never sent the Duffers any written materials after the alleged meeting and his short film was publicly available at the time of the meeting.

Kessler never followed up with the Duffers.

About the only thing that the Duffers could have done differently was skip the premiere party, refrain from social banter and avoid civil niceties.

TR: What, if anything, was the significance that Kessler's short film "Montauk" was publicly available?

JS: Justice [Louis] Brandeis famously stated that "[ideas] become, after voluntary communication to others, free as the air to common use."

When Kessler voluntarily communicated "Montauk" to the public, he undercut any reasoned suggestion that he conditioned his disclosure of the story's thematic elements upon receiving future compensation.

TR: Kessler claimed he pitched his story in New York, but he brought suit in California. Do different jurisdictions afford different levels of protection to idea submissions? Are certain jurisdictions more defendant-friendly?

JS: Because different states have different idea submission laws, venue shopping is a critical part of a plaintiff's strategy. New York and California law are openly in conflict.

A claim premised on a property right or unjust enrichment is not recognized in California, but is in New York.

New York law requires a higher standard of proof that the idea be sufficiently novel — or "strikingly new, unusual or different."

California courts do not require novelty and tend to overly examine the conduct of the parties (that is, was the promise to pay

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stated after the idea was disclosed, was the recipient charged with the knowledge that the submitter sought payment?).

Kessler simply filed in a jurisdiction more friendly to his facts.

TR: What advice do you provide clients who want to share but protect their ideas?

JS: We counsel our media clients from dealing with unknown parties or creating any opportunity in which an opportunistic plaintiff can claim that a casual conversation gives rise to an entitlement to compensation.

In recent years, we have, for example, advised clients to meet first-time pitchers in a coffee shop (not on a studio lot).

We have also urged our clients to respond to "preserve the record" correspondences, and respond with details to correct inaccurate emails/texts summarizing a one-sided account of an alleged meeting.

TR: What kind of impact can an idea-submission claim have on a film's release or on the launch of a TV series?

JS: Even frivolous claims can wreak devastating consequences, particularly if they're brought early during production.

> "Don't expect to attend a Hollywood party and find a director or producer ready for a giddy chat about your spectacular new idea for a show."

A claim may preclude the producer's ability to secure an errors-and-omissions insurance policy or, worse, result in a lost distribution window as a distributor may be reticent to release a film under threatened or pending litigation.

TR: Has there been any industry fallout from the "Stranger Things" case?

JS: Don't expect to attend a Hollywood party and find a director or producer ready for a giddy chat about your spectacular new idea for a show.

Parties used to be considered relatively safe ground.

After the court's denial of the Duffer brothers' motion for summary judgment, however, all social gatherings now pose professional hazards.

It helped that the case was dismissed, but even that is under suspicion of a hush-hush settlement.

Now the industry's professional risk managers are calculating whether anybody who claims to have blurted an idea at a sweet 16 bash can hold a project ransom for a five- or six-figure nuisance settlement. Trust erodes. Vigilance escalates. Hollywood chalks the outline around another cautionary tale. WJ