Protecting your ideas

Introduction

Often artists, writers, filmmakers, game developers and other content creators need to communicate their original ideas to a third party before entering into a contract with the third party for the commercial use of their ideas. When disclosing your ideas to others, you should be mindful that the third party might copy your ideas or pass them on to others without your permission or providing payment to you.

The law of confidential information is the legal means available to protect secrets, including ideas. Other laws that protect intellectual property include copyright or passing off (which is, for example, when someone represents to the public that the work is their work although it is not). However, a breach of copyright or passing off may be more difficult to establish as c opyright only protects the expression of ideas, not the idea itself and to argue a case of passing off successfully you must prove that you and your idea are already known in the market place.

What is the law of confidential information?

Essential elements

In order to assert that there has been a breach of confidence you must satisfy 3 elements:

1. **Requirement of secrecy**: the information must be of a “confidential” nature;
2. **Communication in confidence**: the information must have been communicated in circumstances that indicate that the person receiving it must respect its confidential nature. For instance you told the third party that they were to keep the information confidential or they signed a written contract stating that they would keep the information confidential; and
3. **Misuse by the third party**: there must be unauthorised use, including unauthorised disclosure, of the information to the detriment of the party communicating it.

It is up to the person asserting confidentiality to establish these requirements.

Requirement of secrecy

The confidential information must not be public knowledge; there must be an element of secrecy. The distinction, however, between confidential information and information that is public knowledge is sometimes hard to determine. In assessing whether information is of a confidential nature, a court will look at:

- the value of the idea to the plaintiff (i.e. the person who communicated the information);
- the extent to which the idea is known or has been disclosed to others, and whether that disclosure was made on a confidential basis;
- the ease or difficulty with which those ideas could be duplicated independently by others;

The law of confidential information is not limited to any particular type of information but the information must be reasonably ascertainable. The law has been used to protect a broad range of information. For instance, it has been used to protect information about Aboriginal cultural and religious ceremonies; information concerning the genetic structure of a tree; a scenario for a series of television programs; and unpublished artistic works.

Practical steps

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Steps to protect confidential information include:

1. Mark all documents which contain confidential information "CONFIDENTIAL". If copyright subsists in your documents, also include the copyright owner's notice. You can go further and mark each document with this notice:

"The information in this document is confidential and must not be used or without first obtaining **[name]**'s written consent."

1. Begin any conversation with words to the effect that the information disclosed, including ideas, are confidential and must not be discussed with anyone without first obtaining your consent, possibly in writing. This is an oral contract.
2. Most importantly, have the person or organisation which is to receive the information sign a confidentiality deed **before** you communicate any idea or submit any confidential documents to them. This is a written contract. Arts Law has a sample Confidentiality Deed. If you follow steps 2 and 3 you may also have an action for breach of contract against the recipient of the information if the information is used or disclosed without your permission.

Be aware that organisations can be reluctant to enter into confidentiality deeds. If you think that the third party to whom you wish to provide confidential information might not agree to sign the confidentiality deed, Arts Law recommends the following: include a clause in the deed stating that the third party is considered as having accepted the terms set out in the deed on receipt of your confidential information even if they have not signed and returned the deed to you. Alternatively, you might reconsider whether you really wish to disclose confidential information to that third party.

Arts Law recommends that, if you are posting the confidentiality deed, you send it by registered post to ensure that you can verify that the deed was received. If you are delivering it by hand, ask the receiving party to initial and date your copy of the deed to indicate that they have received it.

If possible, you should only submit **copies** of your confidential documents and **not** the originals.

Indigenous Cultural and Intellectual Property (ICIP)

If the confidential information that you are going to communicate to a third party includes ICIP (see Arts Law's information sheet on Indigenous Cultural & Intellectual Property), you should include a statement in the confidentiality deed mentioning this and attach the ICIP information sheet so that the third party is familiar with the interests associated with ICIP.

Further information

- **Arts Law Centre of Australia** (www.artslaw.com.au), tel. (02) 9356 2566 or toll-free outside Sydney on 1800 221 457.
- **Australian Copyright Council** (www.copyright.org.au) for information and advice on copyright, tel. (02) 9318 1788.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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