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How Do I Protect My Advertising Idea After Disclosure?

[Kristie Prinz](#)**Q.**

How do I protect an idea for advertising that was presented almost seven years ago to [company name]? I am researching for the creator of the idea. He presented the idea a second time last year at a stockholders' meeting. He feels the company is interested but refuses to purchase it. Based on current advertising it is a huge possibility that they may be preparing to use it anyway.

-- Rhonda

A.

Unfortunately, it may be difficult to protect an advertising idea seven years after disclosing it, although it may be possible to protect elements of that idea.

What elements of an advertising idea are protectable?

Well, the general rule is that copyright law does not protect ideas; however, copyright law does protect descriptions, illustrations, explanations, musical, and even audiovisual elements that could all make up the backbone of an advertising idea.

[Section 102\(a\) of the Copyright Act](#) provides as follows:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Thus, it is not necessary to register a copyright to protect a copyrightable work. Furthermore, even without registration, copyrightable elements of an advertising idea would be protected under copyright law seven years after they were created, assuming they were fixed in a tangible medium of expression.

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However, to the extent the advertising idea was composed purely of noncopyrightable elements, the creator may have a problem in trying to prevent Energizer or anyone else from using that idea once it has been disclosed outside of the protections of a solid nondisclosure agreement. While it theoretically is possible to retroactively backdate a nondisclosure agreement, you generally have to have enough leverage with the other side to successfully convince them to agree to sign a retroactive agreement. After seven years, this may not happen, particularly if the other party wants to use the idea. Moreover, even if you did convince the other side to sign an agreement retroactively, they may not be willing to backdate it seven years, particularly given the fact that terms of nondisclosure agreements rarely even run for seven years.

My advice to the creator is to consult with a [copyright attorney](#) in his or her jurisdiction as soon as possible to see what specific elements of the idea might potentially be protectable and to discuss with that attorney whether it might be worthwhile to proceed with registering those elements, so a public record exists of his or her rights in the work. Also, the creator should ask that attorney to assist him or her with drafting a solid nondisclosure agreement, so that if he or she ever has advertising ideas in the future to share with a third party, such creator will be prepared to share those ideas only after the third party has signed a nondisclosure agreement.

-- Kristie Prinz

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