I. Introduction

In today’s information-based economy, crowdsourcing is becoming an ever-increasing reality for organizations, no matter what space they inhabit. Havas, a major French holding company, recently bought a majority stake in crowdsourcing agency Victors & Spoils, whose clients have included Coca-Cola, Converse, Discovery Channel, Harley-Davidson, and Levi’s. The Pentagon recently revealed its sponsorship of a $4 million crowdsourced prize contest for designing an amphibious vehicle for the Marines. When official sources for information about the Fukushima Daiichi nuclear reactor failure were lacking, hacker group Safecast used crowdsourced data to measure and map radiation contamination around Japan. At the cutting edge of innovation, the crowdsourcing environment presents challenging legal issues. The question is, when crowdsourcing arrives at your front door, usually from your internal marketing or R&D people, what do you tell your clients?

Below we provide a brief introduction to crowdsourcing, with some real world examples and discussions of potential risks, followed by a discussion of specific risks associated with intellectual property and idea submissions in the crowdsourcing context.

II. What Is Crowdsourcing? A Basic Overview

A. Four Categories of Crowdsourcing

Crowdsourcing is the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call. Also referred to as “open innovation” or as a subset of “user-generated content,” crowdsourcing can be divided into four general categories: crowd voting, crowd creation, crowd wisdom, and crowd funding. If you have ever tuned into American Idol or chosen a restaurant based on Yelp.com reviews, you have experienced crowd voting—a type of crowdsourcing where end users or computer algorithms assess the popularity of a given object.

With crowd creation, people are asked to do something, often solving a problem or working on a system. The Linux operating system is a classic example. Toyota utilized crowd creation in its logo re-design, as did Pepsi with its refresh campaign. Snack food maker Doritos relies on the public’s creativity for its successful user-submission-based “Crash the Super Bowl” television commercial campaign.

Crowd wisdom involves capitalizing on the diverse knowledge of a group to solve problems, predict future outcomes, or guide corporate strategy. For example, the Iowa Electronic Markets (“IEMs”) are small-scale online futures markets where contract payoffs depend on economic and political events such as elections. Developed and used as a research tool by the University of Iowa, the IEMs provide an “unparalleled laboratory in which we can study individual trading behavior as well as market level performance.” In another fascinating example of crowd wisdom, last year, over the course of just three weeks, online video gamers created an accurate three-dimensional map of a monomeric protease enzyme, solving a puzzle that had stumped AIDS research scientists for more than a decade.

B. Benefits and Risks of Crowdsourcing

Exemplified by the success of organizations across these four categories, the upside to crowdsourcing can be quite high. Tapping into the intelligence of a crowd provides a vast, yet inexpensive, resource and mechanism for acquiring new ideas, solutions, funding, and information. Crowdsourcing can also result in consumers becoming more invested in a product, service, or activity and its ultimate success. The Doritos “Crash the Super Bowl” campaign is one of the most successful crowdsourcing projects in recent memory. Since 2006, this contest has offered the public the opportunity to submit television commercials for consideration, with finalists aired during the Super Bowl and a million dollar prize to the winner. According to social media news source Mashable, the Doritos campaign has generated thousands of submissions result-
ing in millions of votes cast and an estimated one billion impressions. And the positive publicity generated from this campaign has driven up sales.

Additionally, organizations often use crowdsourcing as a way of giving back to consumers and to the community, generating goodwill. For example, Skechers recently launched a crowdsourced customer rewards program. Rewards program members can earn points towards future purchases when they publish product reviews on Skechers’ website or answer questions posted by other customers.

While crowdsourcing offers potentially spectacular benefits, it nonetheless involves some risk, and indeed high-profile risk in some cases. For example, popular video content delivery service Netflix created a significant public relations buzz when it offered a million dollar prize called the Netflix Prize to the team of mathematicians who created the best algorithm for improving the company’s movie suggestions to consumers. Netflix awarded the prize to the winning team, but Netflix ultimately never used the winning algorithm due to engineering logistics. Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics. Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.15 Although it achieved a high level of notoriety by hosting the crowdsourced competition, Netflix ultimately never used the winning algorithm due to engineering logistics.

Accordingly, the Netflix Prize provides a good example of the potential risks and rewards associated with crowdsourcing. A high-profile crowdsourcing project can energize consumers and, if innovative and exciting, create its own news story, potentially raising a brand’s profile. But a company hosting a crowdsourcing project should fully analyze all associated legal issues to gauge the acceptable level of risk.

Companies face several intellectual property and confidentiality risks when conducting a crowdsourced project. Because crowdsourcing draws from the general public, the statistical reality is that a crowdsourced project easily could and very well may receive submissions that contain infringing or unauthorized material. In view of the high cost and difficulty in verifying whether submissions are non-infringing or sufficiently authorized, the company’s exposure to infringement liability and other damages increases, and, as a practical matter, the company has no legitimate indemnification against such claims because chances are that the crowdsourced submitter lacks assets or resources to indemnify the company.

Adding to the infringement risks are the increased contractual obligations and insurance coverage issues. Indeed, if a company launches a crowdsourcing campaign, the contractual language for submissions, usage, compensation, and credit can be extensive. And while insurance costs should not rise in connection with such campaigns, if your insurance company views a particular campaign as risky, there could be circumstances where additional premiums are charged or riders required before launching any such campaign.

As noted above, uses of consumer data in crowdsourcing projects can raise issues pertaining to the consumer’s right of privacy under state law, if for example consumers are surprised to learn that their personally identifiable data has been used or shared. Similarly, issues can arise when a company’s online privacy policy and otherwise applicable terms do not conspicuously and expressly address the uses to be made of consumer data or obtain necessary consent from consumers. In addition, some states recognize a right of publicity that grants an individual a right to monetize his or her name and likeness, and this right can create similar issues if a company crowdsources, for example, uncleared images or recordings of individuals.

And of course, any crowdsourced competition likely abuts regulations pertaining to sweepstakes or gaming, another area of the law that must be considered by the organizer of such projects.

Despite the aforementioned risks, companies have implemented very successful crowdsourcing campaigns, saved their companies lots of money, and enabled their companies to connect with the consuming public in ways they never could before. So, how can you deal with these risks, and make better informed choices about whether and how to implement crowdsourcing in your organization?

One of the most important steps to take is the creation of written terms governing the relationship between the parties involved in a crowdsourcing project. Below we focus on how to address some of the intellectual property risks associated with such projects.

III. Evaluating Intellectual Property Risks of Crowdsourcing

A. The Source Risk Continuum

Whenever companies source work product protected by intellectual property law, the level of risk associated with exploiting the work product falls along a continuum based on the source of the work product. Whether dealing with copyright, patent, or trademark law, this risk continuum generally applies throughout intellectual property law, because the burdens of clearing potential infringement and obtaining rights in the work product generally are similar.
For example, take a project that sources a design for a logo. Because of the ability of the company to control the internal design process, an internally sourced design (one created by an employee of the company) generally falls on the low risk end of the continuum, while a crowdsourced design falls in the high risk zone. A design sourced from a reputable creative agency occupies the middle area.

1. Internally Sourced Designs

Internally sourced designs occupy the lowest risk area of the design source continuum and theoretically have the lowest clearance risk of the three categories discussed, due to the element of control a company has over its employees. Additionally, the issue of ownership is substantially less complicated where the employee works within the scope of employment, because works created by employees within the scope of employment qualify as works made for hire.\textsuperscript{17} With a work made for hire, neither assignment nor termination of transfer issues exist because copyright vests in the employer.\textsuperscript{18} In this situation, indemnification and insurance are not additional concerns because the company is merely conducting business in the normal course. But while internal sourcing may offer the lowest risk, practically speaking, companies often look to external sources for increased expertise and potential rewards.

2. Crowdsourced Designs

Of all sources for design, crowdsourced designs involve the highest risk of infringement because of the large number and anonymous nature of contributors and the consequent difficulties associated with clearance. Even if warranties or indemnification concerning the non-infringing origins of the work can be obtained, they may be worthless. Importantly, a company must obtain complete written assignment of rights. Further, companies using crowdsourcing need to address the use of designer’s name and likeness.

If your company is concerned with owning the result of the crowdsourcing project, as it often would be, crowdsourced designs protected by copyright involve additional challenges because crowdsourced works might not qualify as works made for hire. Because contributors likely are not considered employees under U.S. copyright law,\textsuperscript{19} the only way a crowdsourced work can be eligible for work for hire status is if the work falls within one of the statutorily enumerated categories and the parties expressly agree the work is for hire.\textsuperscript{20} If a work is not considered a work made for hire, termination of transfer issues can crop up, allowing the original creator of the work to reclaim ownership of the work after a statutory period of time, despite having assigned the work to you.\textsuperscript{21}

Adding another wrinkle, crowdsourced contributor contracts may be in the form of electronic click-through agreements because much of crowdsourcing happens over the Internet. While courts generally uphold these agreements, courts have yet to address the validity of such contracts within the context of crowdsourcing.\textsuperscript{22} Also, with crowdsourced projects, insurance may not cover liability or the full extent of damages.

3. Agency Sourced Designs

Agency sourced designs fall within the medium risk zone of the design source continuum. Lower clearance risk exists if the agency is obligated to clear the works. Likewise, warranties or indemnification may be of some value if you are dealing with a reputable, established agency. As with any independent contractor arrangement, the hiring party must obtain a complete written assignment of the rights. For agreements concerning copyrighted material, including both an assignment and a work-for-hire provision is a good idea, because the latter may avoid copyright termination issues if you can establish that the work falls within one of the statutorily enumerated categories. As with crowdsourced design, insurance may not cover liability or the extent of damages.

B. An Example of Risk Associated with Idea Submissions

While the following case law examples are not true crowdsourcing situations, we present them to provide you with an understanding of risks associated with accepting ideas submitted by the public. Ultimately, the issues of payment and confidentiality are important to address in any idea-submission agreement, and when operating in the crowdsourced space such terms are equally important.

In Desney v. Wilder, the California Supreme Court set the precedent for the eponymous “Desney claim” in holding that an idea submission can be construed as an implied in fact contract.\textsuperscript{23} In Desney, the plaintiff pitched a television program to an executive at Paramount Studios. The court explained that if the idea purveyor clearly conditioned the conveyance with the expectation of compensation and the recipient voluntarily accepted the disclosure, then an implied in fact contract would be found, despite the work’s eligibility for protection under copyright law.

In Larry Montz v. Pilgrim Film and Television, the court expanded on Desney and held that copyright law does not preempt a “Desney claim” where the plaintiff alleges a bilateral expectation that he would be compensated for use of the idea.\textsuperscript{24} Likewise, in Riggs v. Myspace, Inc., the court reversed dismissal where the plaintiff alleged that
she offered to sell her ideas to MySpace before disclosing them to MySpace.\textsuperscript{25}

New York courts have also found implied in fact contracts in idea submissions. In \textit{Forest Park Pictures v. Universal Television Network, Inc.}, television show developers brought an action against a network, alleging breach of an implied contract term to pay reasonable compensation if the network used the embodied concept in a television show.\textsuperscript{26} The court held that the network knew or should have known of the implied condition for payment and that, while the developers’ treatment fell within the subject matter of copyright, the breach of the implied contract term precluded a finding of Copyright Act preemption.

Nondisclosure agreements also may protect the purveyor’s idea submission. In \textit{Apfel v. Prudential-Bache Securities Inc.}, an intermediate New York state court held that nondisclosure agreements are enforceable where there is a showing of sufficient consideration.\textsuperscript{27} The \textit{Apfel} court reasoned that the agreement to purchase plaintiffs’ idea for issuing and selling municipal bonds sufficed in that it was novel to or otherwise of value to the buyer.\textsuperscript{28}

Plaintiffs can also bring a misappropriation of property claim under New York law; however, such claims require proof of originality, or general novelty; novelty to the buyer alone is insufficient.\textsuperscript{29} In some cases, the submitted idea may be so unoriginal or lacking in novelty that knowledge of the idea will be imputed to the buyer and the claims dismissed. For instance, in \textit{Nadel v. Play-By-Play Toys & Novelties, Inc.}, the Second Circuit reversed the lower court’s dismissal and remanded the case to determine whether “an upright, sound-emitting, spinning plush toy” was either novel or original.\textsuperscript{30}

The bottom line is that—bearing in mind the case law discussed herein—payment and confidentiality terms governing idea submissions should be clearly stated to avoid potential implied contract claims under state law. Any agreement governing a crowdsourcing project where the company does not intend to (i) pay for submissions or (ii) keep submissions confidential should state these terms expressly.

\textbf{IV. Minimizing Crowdsourcing Risks}

Crowdsourcing is here to stay. And while one cannot avoid the risks associated with using crowdsourcing, informed lawyers can work to mitigate those risks by taking the following steps in drafting terms and agreements governing crowdsourcing projects:

\begin{itemize}
  \item If you want your company to be the owner of the submitted work product, take care to explicitly assign all intellectual property to the company. Whether the project involves patents, copyrights, or trademarks, under these circumstances a company should make sure to obtain a full grant of rights, including the right to sue for infringement. When dealing with copyrights, designate the work as made for hire whenever possible.
  \item Alternatively, if ownership of crowdsourced work product is less of a concern, your company may consider taking a broad license from the submitter in some circumstances.
  \item Obtain releases to use a contributors’ name, image, likeness, and personally identifying information.
  \item Even though it ultimately may not hold significant weight in the event of an infringement action, require contributors to provide a warranty or representation of originality and non-infringement for their contributions. Similarly, require an indemnity covering infringement and misappropriation damages.
  \item Make provisions clear that you do not accept confidential submissions, or those containing proprietary information belonging to a third party.
  \item Detail logistics for submissions and draft clear provisions on the matter of payment, prizes, and awards for submissions, or lack thereof.
  \item Also be sure to include appropriate provisions for the selected crowdsourcing method. For example, sweepstakes law, employment law, and privacy law often apply to crowdsourced projects.
  \item Always determine whether third-party website terms of use apply to the company’s selected crowdsourcing method. Websites such as Facebook and Twitter have policies regarding how companies can use the sites to interact with contributors.\textsuperscript{31}
\end{itemize}

\textbf{Endnotes}


5. Id.
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