

IP Australia - Profits from ideas – who’s making the money?

Business today isn’t what it used to be. Intellectual property – that’s ideas - not commodities, are now the drivers of economic growth and it’s good ideas that set the successful companies apart.

So what is intellectual property and why all the fuss?

Intellectual property is an umbrella term for a collection of property rights that typically arise out of innovative ideas, products or services. Intellectual property includes patents for inventions, registered designs for new shapes and patterns, trade marks for various types of symbols, signs and branding, copyright for literary and artistic works, confidential information/trade secrets and know-how, plant breeder’s rights for new plant varieties and circuit layout rights.

Most people have heard of patents, trade marks, designs, copyright and confidential information, but may not realise that to be valid, patents and designs must be registered before publication in each country/market of interest, and trade marks are more effective if registered. Copyright and confidential information, on the other hand, does not require separate registration, but do require appropriate use.

Advertising agencies, designers and marketing companies have long known the value of an original idea but they’ve been slow to really capitalise on it.

For example, when a graphic designer hands over a logo to a client, they are handing over what may well become that client’s single biggest asset. Think of some of the world’s most recognised brands - the dollar value placed on those brands, and Coca-Cola at US\$36 billion (Financial World magazine, 1994) comes immediately to mind, adds substantially to the overall worth of the company which owns that brand. Is the fee paid to the designer of the logo commensurable with that value?

There is a lack of understanding in the business community generally and, surprisingly enough in the advertising sector in particular, about the value of creative ideas. The expression of those ideas, whether they be a logo or a marketing campaign, are valuable intellectual property which bring substantial economic returns to the owner.

So who actually owns the intellectual property? Unless you have a contract with your client which states that they own the results of your work, then the agency owns it. Under the terms of the Copyright Act 1908, it is the person who originated the work - wrote, painted, drew, filmed or taped - who owns it. The ownership changes only when the originator assigns it to another party, such as the client.

Copyright is free and automatically safeguards original works of art, literature, music, films, broadcasts and computer programs from copying and certain other uses. It gives exclusive rights to license others in regard to copying the work, performing it in public, broadcasting it, publishing it and making an adaptation of the work.

Although making copies of copyright material can infringe exclusive rights, a certain amount of copying is permissible under the fair dealing provisions of the legislation. Copyright doesn't protect you against independent creation of a similar work. Legal actions against infringement are complicated by the fact that a number of different copyrights may exist in some works - particularly films, broadcasts and multimedia products.

Another form of intellectual property of particular relevance to the advertising industry is the trade mark. A trade mark can be a letter, number, word, phrase, sound, smell, shape, logo, picture, aspect of packaging or any combination of these. Whatever form it takes, a trade mark is an important business investment but, unlike copyright, it's not automatically protected from piracy. The owner of the trade mark must register it through IP Australia to ensure exclusive rights to its use.

For it to be registrable, a trade mark must be capable of distinguishing a company's goods and services from its competitors. It's a good idea to search existing trade marks before embarking on a new design for a brand or logo and certainly before applying for registration. An agency won't be doing its client any favours if it produces a logo similar to one already in use by someone else.

Agencies need to inform their clients that a company doesn't have to register its trade mark in order to use it. There is protection against misrepresentation under the trade practices or fair dealing legislation and it is possible to take action under common law. But registration is advisable because it's an expensive and time consuming exercise to take action under common law without it.

Intellectual property is a complex area and for many as it seems far removed from their day to day business, but the creative material coming out of Australia is of great value. In fact, it's worth even more now that the commercial environment has become increasingly competitive. We're seeing a new awareness in the business community that commercial success depends to some extent on a firm's ability to differentiate its products or services from its competitors and that's what branding and marketing is all about.