

## **Mallesons & FHA Image Design - Education about IP = money gained**

Business is not what it used to be for advertising agencies in Australia.

According to solicitor Katrina Rathie, a partner in Sydney legal firm Mallesons Stephens Jaques, "the old days of client/agency relationships existing on a handshake is from the prehistoric era."

"What the industry has instead is a golden opportunity to re-engineer the way it does business, and in doing so, open up new streams of revenue," Ms Rathie said.

Those logos, jingles and images can be so powerful – and potentially very profitable.

"One of the biggest opportunities is in the area of intellectual property but advertising agencies have traditionally disregarded their intellectual property rights, unaware that it's their most important asset."

Ms Rathie believes it's time agencies put a value on their creative ideas and that clients started to value the intellectual property created by agencies.

"Under the old regime, agencies gave their ideas away for free and most still do. Why? If creative ideas are the cornerstone of the advertising and design business, why do agencies insist on charging service fees for account management and other esoteric charges rather than charging a fee or royalty based payment for their ideas?"

"Other industries, such as films and book publishing, have made a fortune selling their intellectual property, based on royalty fees linked to box office and sales figures."

"Legally there is nothing to stop an ad agency retaining control of a campaign's intellectual property rights and collecting residual payments from clients, in the same way television actors are paid 'residuals' when their program is repeated," Ms Rathie said.

FHA Image Design, the company that was appointed creative director of the Sydney Olympics, is one agency which understands the value of its ideas and has successfully re-engineered its business, from logo designer in the late 1970s to IP savvy brand architects today.

FHA Creative Director Trevor Flett says the need for Australia to be world competitive is putting pressure on the advertising industry to come to grips with the issue of intellectual property.

"There's a recognition now that we have to do a lot more than manufacture a good product - we also have to package it and market it. This makes the whole exercise of branding and advertising vital to a company's success and it's important for an agency, and its clients, to know their worth - what their intellectual property is, and to lever it and commercialise it.

"We raise these issues with our clients but it's unusual in this business. Branding literacy is still very naive in Australia compared with the world's best practice nations - the US, Japan and in Europe - and most graphic designers don't understand the business of intellectual property or the importance of what they're doing.

"A company's trade mark - its brand or logo - is one of its most valuable assets and the delivery of that brand is as important as the image. It colours off on everything the company does," Mr Flett said.

"It's up to the agency to protect that intellectual property during its development until the job is finished and it signs the copyright over to the client."

The importance of this came home to Flett when, on one of the rare occasions FHA did not assign copyright to its client, it was called on to take legal action to protect that intellectual property.

"We developed a new image for a firm which was later subject to an aggressive takeover by a company which, without permission, began using our client's letterhead. Our client challenged their right to use the letterhead and, as the owner of the copyright, we sued the aggressor on their behalf and won with an out-of-court settlement."

Flett's advice to agencies seeking to find out more about intellectual property is to first, talk to a lawyer and patent attorney and second, talk to IP Australia about registering trade marks.

"Ownership and smart use of intellectual property - such as patents, copyright and trade marks - is the secret of commercial success today. Look at Bill Gates of Microsoft - he's reportedly earning \$16 million a day by exploiting his intellectual property rights.

"Traditional service fees and media commissions may become minor forms of remuneration as more agencies understand and take commercial advantage of intellectual property. Ideas, images, brands can be worth a great deal of money. Think of some of the world's most recognised brands - the dollar value placed on those brands, and Coca-Cola's at US\$36 billion comes immediately to mind, can very high indeed," said Ms Rathie.

Agencies need to start harnessing these valuable intellectual property rights. They need to implement an intellectual property clause in their contracts with clients which clearly states who owns the intellectual property rights in any new brand or an advertising campaign.

Ms Rathie goes on to say, "The client/agency contract should also cover third party rights, including express disclosure of any limitations on the ownership of advertising materials. For example, restrictions on the use of celebrity talent, limited form music licenses and so on. As well, your client should require you to procure intellectual property rights from any sub-contractors such as production houses, freelance writer and photographers and any others not employed by the agency.

"Agencies should also look to create a mutually rewarding system with their clients which exploits the success factors of advertising campaigns and rewards the agency over the long term," Ms Rathie said. "For example, what's to stop agencies being remunerated through a licensing of their intellectual property where royalties are linked to the success of the campaign, or the number of times an advertisement is shown, with bonuses on overseas use, climbing brand sales, consumer awareness and the like. Under such a scheme, clients would not necessarily have to pay for dud campaigns any more."