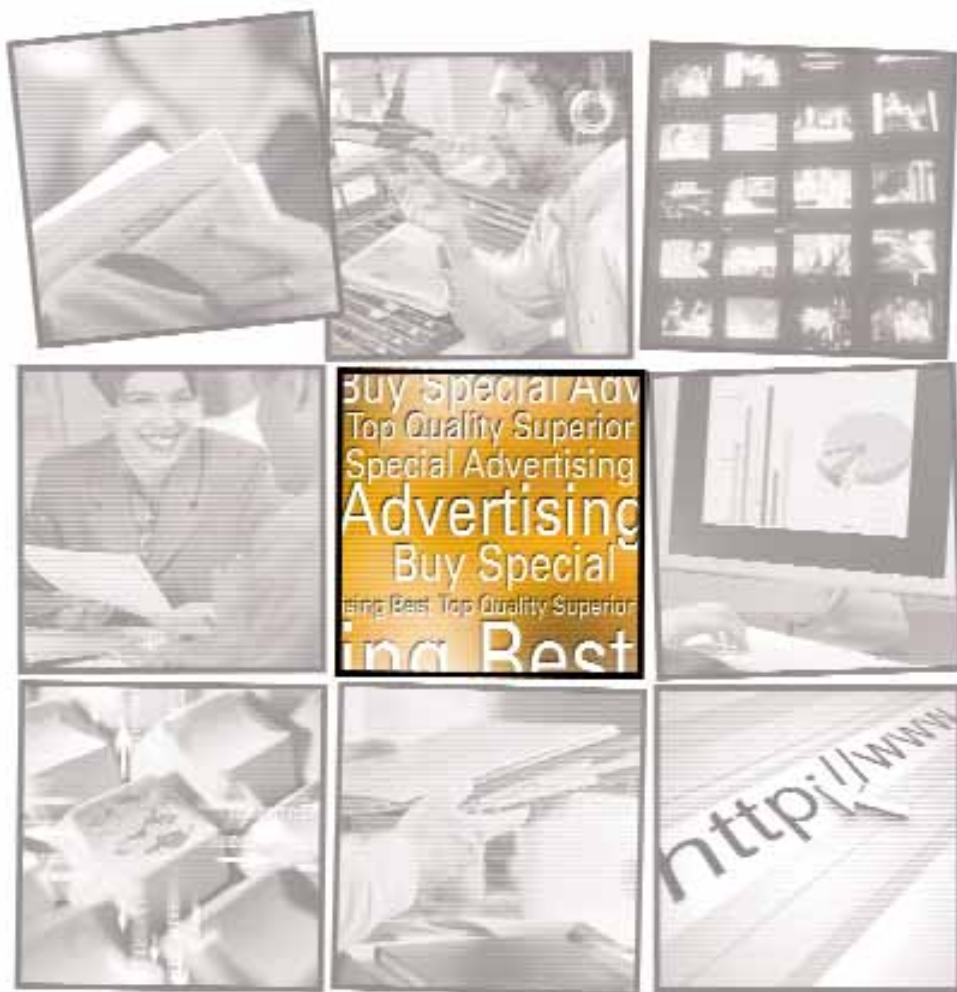




Managing Intellectual Property in the Advertising Industry

Creative Industries - Booklet No.5



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Advertising Industry



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INTRODUCTION

Advertising is not a new or recent activity. It has existed ever since man started producing and trading goods. Already in ancient Egypt and Sumer, in 3,000 BC, shoemakers and scribes promoted their services on clay tablets. Manufacturers of tableware and amphora clay vessels affixed their specific stamps (emblems, logos) to their products. Greek and Phoenician merchants used town criers to proclaim the arrival of their ships laden with grain, wine and spices. Nowadays, businesses try to attract customers in the traditional way with fancy business signs, pamphlets, brochures, billboards, press announcements, radio and TV commercials, telephone solicitations, door drops, commercial text messages, but also relying increasingly on the Internet and the digital environment to disseminate banners¹ and pop-ups,² e-mail advertisements (marketing),³ rich media advertisements⁴ and many other advertising techniques and tools.⁵

Advertising and publicity have developed in parallel with the modern consumer society. During the early years of capitalism in the late eighteenth and early nineteenth centuries, goods and services did not need much advertising and publicity as they were offered to an “empty” local market. With the increasing number of manufacturers and the internationalization of trade and commerce, competition became tougher, and more similar or identical goods were available on the market. Businesses felt more of a need to advertise the qualities and features of their goods and services to distinguish them from their competitors’ goods and services. Finally, during the last 15–20 years of the twentieth century – with the saturation of markets, the drastic reduction in product lifespans, the globalization of trade and manufacturing and the avalanche of information disseminated without borders – businesses started not only advertising their goods and services but actively creating needs and investing resources therein. Advertising became a product and service in itself.

Today, advertising companies are an important part of business in commerce and distribution. They also play an ever-growing role in politics and public communication. Nowadays, the mass media and mass communication mechanisms are the vehicles for competition between businesses and/or companies, and advertising agencies are the players in this market confrontation.

Advertising has become a contest to create a unique and seductive way of communicating selected information to customers and consumers, to positively influence and facilitate their buying decisions. Advertising companies fight for the publicity and advertising budgets of manufacturing, distribution and services companies, and they try to attract and engage the most creative individuals to create new, innovative and persuasive advertising and publicity materials, sketches, spots, commercials, posters, etc.

With the involvement of more and more creative efforts, it is difficult to keep advertising fact-based, as the distinction between facts and exaggeration concerning the benefits of a good or service is becoming increasingly blurred, given the natural human tendency to exaggerate the benefits of a good or service. It is easy to cross the thin line between mere flattery and misleading, deceptive or patently false advertising. Therefore, creating risk-free winning advertising is often as challenging as creating a risk-free good or service.

Advertising is a costly affair. In some businesses, advertising costs can comprise up to 15 per cent of the value of the products and services offered. Customers are bombarded with more and more information about new and allegedly superior goods and services, while cash-starved enterprises need to be more and more creative to be cost-effective in advertising their products and services.

To be effective, an advertisement must first attract attention, and then be remembered long enough to persuade the customer of the unique qualities and features of a good or service, so as to turn potential customers into real clients.

The variety of innovative digital advertising techniques in the online environment has created new opportunities for companies to expand advertising beyond its traditional supporting role for a good or service. As a result, advertising revenue represents the



main or only source of income in many online business models.⁶ At the same time, the Internet and digital technologies have created new potential problems because of the ease and speed with which advertising content can be copied, assembled, reshaped and distributed worldwide.

As in any creative and/or innovative industry, advertising companies are also faced with copycats, illegal use of their creative ads, products and contents by unfair competitors. It seems logical that, under such circumstances, companies will act to protect their creative achievements against unfair or illegal use by others. In this context, the intellectual property (IP) system offers various possibilities which advertising companies can and should use.

There are a number of IP issues related to creativity and advertising, such as how advertisers can protect their unique and original creations as intellectual property rights (IPRs); how advertisers can use registered trademarks; or the dangers of violating the IP rights of others while creating or using advertising content in a traditional or digital environment. But who should care about such IP issues – the company that creates and elaborates an advertising campaign, or the business that commissions advertising or publicity? In some areas, such as photography or music, there exist quite well-defined rules of behavior where copyright is involved, whereas in other areas, such as scripts of scenarios or promotional slogans, copyright practice is less well defined.

This study will address various IP-related issues that are important for the efficient management of companies active in creating and implementing advertising content and campaigns. The study will also be of interest to businesses that advertise their goods or services, as well as other stakeholders involved in advertising, such as employees who create promotional material, freelance advertising agents, marketing consultants, graphic designers, authors, photographers, etc. The authors have based their findings, conclusions and recommendations on a thorough review of the literature, empirical evidence and interviews with managers of selected advertising companies (large and small) in Europe and North America.

The authors of the study – Gordon Smith (President, AUS Consultants, United States (US)), Martin A. Bader (Head of Competence Center Intellectual Property Management, Institute of Technology Management, University of St. Gallen, Switzerland), Frauke Ruether (research associate and doctoral candidate, University of St. Gallen, Switzerland) and Vladimir Yossifov (IP management and licensing consultant, former Director at WIPO, Geneva, Switzerland) combine considerable practical and academic experience in the fields of IP management, assessment and valuation of intangible assets and IPR, and international cooperation in the field of IP.

Chapter 1 – The advertising industry in the global economy

The importance of proper management of IP in the advertising industry becomes more obvious to the reader when the place and influence of the advertising industry in the global economy is clearly defined. The global economy refers to an environment in which businesses are able to market products and services worldwide, and can be divided into several sectors or industries. In a very broad sense, the advertising industry is considered part of the creative sector (sometimes referred to as the economy of culture). Today, the cultural sector comprises the traditional cultural industry as well as the creative sector. In academic and professional literature and in practice, the expressions “cultural industries” and “creative industries” are sometimes used interchangeably. The World Bank estimates that, globally, the creative sector (or creative industries) account for more than seven per cent of world gross domestic product (GDP).⁷

Although the authors of this study have no intention of entering into a discussion on definitions, they feel that it is important to explain their understanding of the terms used in this study. Since the WIPO definition of “copyright industries” is widely used, the authors have adopted it for this particular study as well. WIPO uses the terms copyright-based industries, creative industries and cultural industries as synonyms to refer to those activities or industries where copyright plays an identifiable role. However, WIPO recognizes the differences that exist between the three terminologies and that the expression “creative industries” has a wider meaning and includes, besides the cultural industries, all cultural or artistic production, whether live or produced as an individual unit, and is traditionally used in relation to live performances, cultural heritage and similar



“high-art” activities.⁸ Based on the link between copyright and economic development, the definition is output-oriented and industries for creativity and culture are called copyright industries. “Core copyright industries” are defined as those wholly engaged in the creation, production, performance, exhibition, communication or distribution and sales of copyright-protected subject matter. These are press and literature; music, theatrical productions and operas; motion picture and video; radio and television (TV); photography; software and databases; visual and graphic arts; advertising services; and copyright collecting societies.” (WIPO (2005))⁹

In 2006, the European Commission (EC) published a study that describes the interdependence and cross-cutting effects of the creative industries in relation to other industries. Building on the WIPO definition, the EC study proposes the following definition to delineate the sectors that are covered by the cultural sector (or the economy of culture)::

- > The economy of culture encompasses, respectively, the cultural and creative sectors:
 - **The “cultural sector”** - includes industrial and non-industrial sectors. Culture constitutes a final product of consumption, which is either the result of activity in
 - (i) the non-industrial sectors that produce products that are non-reproducible and intended to be consumed on the spot (events such as a concert, an art fair, an exhibition);¹⁰ or
 - (ii) the industrial sectors that produce cultural products destined for mass reproduction, mass dissemination and export (a book, a film, a sound recording, an audiovisual product).
- > **The “creative sector”** - Culture, with regard to the second definition presented in (ii), above, may also enter into the production process of other economic sectors and become “creative” input for the production of non-cultural goods. In this case, such activities are referred to as “the creative sector”. (KEA (2006))¹¹

The EC definition and delineation of the creative industries is quite broad, providing a clear-cut specification as well. On the other hand, countries that have adopted a national definition of the creative industries focus on sectors which may refer to only a part of the KEA definition.¹² Table 1 shows the differences but also the interactions

between the creative and cultural industries. It also presents the sectors belonging to these industries.

Table 1: Delineation of creative and cultural industry (Source: KEA (2006))

CIRCLES	SECTORS	SUB-SECTORS	CHARACTERISTICS
CORE ARTS FIELD	Visual arts	Crafts Paintings – Sculpture – Photography	<ul style="list-style-type: none"> • Non industrial activities. • Output are prototypes and "potentially copyrighted works" (i.e. these works have a high density of creation that would be eligible to copyright but they are however not systematically copyrighted, as it is the case for most craft works, some performing arts productions and visual arts, etc).
	Performing arts	Theatre - Dance - Circus Festivals.	
	Heritage	Museums - Libraries Archaeological sites - Archives.	
CIRCLE 1: CULTURAL INDUSTRIES	Film and Video		<ul style="list-style-type: none"> • Industrial activities aimed at massive reproduction • Outputs are based on copyright
	Television and radio		
	Video games		
	Music	Recorded music market – Live music performances – Instruments of collecting societies in the music sector	
	Books and press	Book publishing - Magazine and press publishing	
CIRCLE 2: CREATIVE INDUSTRIES AND ACTIVITIES	Design	Fashion design, graphic design, interior design, product design	<ul style="list-style-type: none"> • Activities are not necessarily industrial, and may be prototypes • Although outputs are based on copyright, they may include other intellectual property inputs (trademark for instance). • The use of creativity (creative skills and creative people originating in the arts field and in the field of cultural industries) is essential to the performances of these non cultural sectors.
	Architecture		
	Advertising		
CIRCLE 3: RELATED INDUSTRIES	IT: manufacturers, MP3 player manufacturers, mobile industry, etc...		<ul style="list-style-type: none"> • This category is loose and impossible to circumscribe on the basis of clear criteria. It involves many other economic sectors that are dependent on the previous "circles", such as the ICT sector.

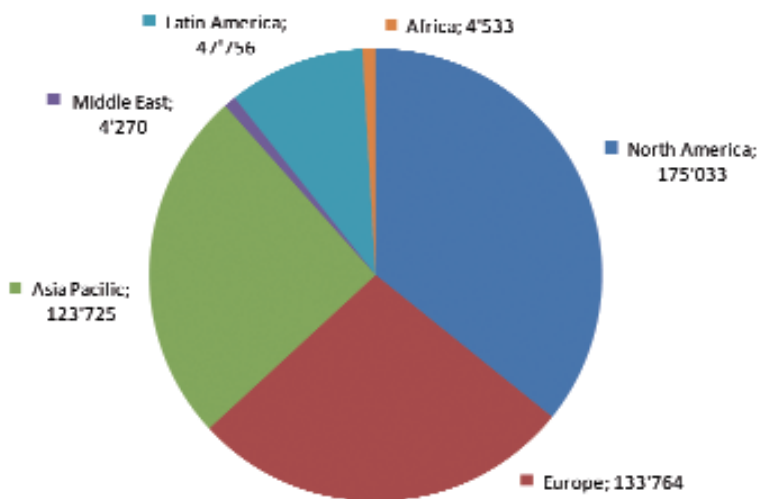
: "the cultural sector"
 : "the creative sector"

As table 1 above show, the characteristics of the industries differ. While the output of the cultural industries is solely copyrighted works and the activities are industrial, the output of the creative industries can also be IPRs in general. Activities in the creative industries are not necessarily industrial. Some sectors are not clearly definable, but it is apparent that they are dependent on design, architecture or advertising and also belong to the economy of culture. The EC considers advertising to be a direct part of the creative industries, because advertising techniques require creative input and the contribution of creative skills. This means that culture adds value and fuels creativity as well as innovation in the production process.



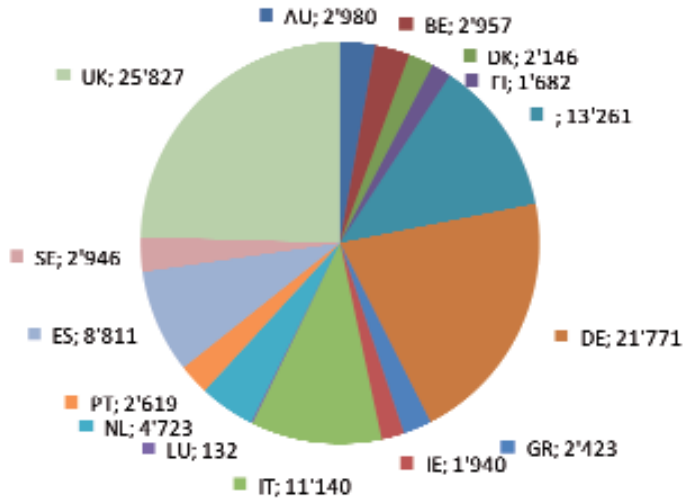
Expenditure figures show that the advertising industry has a major impact on national and global economy. In 2006, global advertising expenditure stood at USD 489 billion. Advertising expenditure is forecasted to grow by 10 per cent annually (PwC (2003)). For 2008, ZenithOptimedia¹³ forecasts the advertising expenditure growth in North America and Europe to be 3.8 per cent, against 11.1 per cent for the rest of the world. Looking at global advertising expenditure, Europe is ranked second after the US. Figure 1 shows the advertising expenditure in major media (newspapers, magazines, TV, radio, cinema, outdoor, Internet) by region in 2006.

Figure 1: Advertising expenditure by region in USD million (2006)
(Source: World Advertising Trends (2007))¹⁴



It is obvious that advertising expenditure is still highest in developed countries, such as those in Western Europe and North America. Almost 80 per cent (USD 103 billion) of European advertising expenditure (USD 133 billion) is spent in EU15¹⁵ countries. In 2006, advertising expenditure accounted for almost one per cent of EU15 GDP.¹⁶ Figure 2 shows the distribution of expenditure among EU15 countries. The EU5¹⁷ clearly have the highest share with more than 80% of total expenditure. The principal contributor was the United Kingdom (UK).

Figure 2: Advertising expenditure in the EU15 in 2006 (in USD million)
 (Source: World Advertising Trend (2007))¹⁸



Key: AU=Austria; BE= Belgium; DE= Germany; DK= Denmark; ES= Spain; FI= Finland; FR= France; GR= Greece; IE= Ireland; IT= Italy; LU= Luxembourg; NL= Netherlands; PT= Portugal; SE= Sweden and UK= United Kingdom

Even though total advertising expenditure is much higher in developed countries than in developing countries, growth rates show a different picture. Developing markets are expected to contribute 63 per cent of advertising expenditure growth between 2007 and 2010, and increase their share of the global ad market from 27 per cent to 33 per cent. Over the next three years, China and Russia are going to follow the US as contributors to growth. This reflects the dynamic aspect of the advertising industry, because China’s advertising market is just eight per cent of the size of the US advertising market, and Russia’s is five per cent. Brazil’s contribution is almost the same as the UK’s, while its ad market is less than half that of the UK’s. Between 2007 and 2010, China will rise in the rankings of the largest advertising markets from fifth to fourth; Russia will rise from eleventh to sixth; Brazil will rise from ninth to seventh; and India will rise from fourteenth to thirteenth (ZenithOptimedia (2008)).

Table 2 shows the top ten advertising markets in 2007 and the forecast for the top ten advertising markets in 2010. According to ZenthOptimedia, in the coming years developing markets will become the main drivers of global advertising expenditure growth. Developed markets (which are defined as North America, Western Europe and Japan) will contribute only 37 per cent of new advertising expenditure between



2007 and 2010. Over that period, the proportion of global advertising expenditure going to developing markets will rise from 27 per cent to 33 per cent. Central and Eastern Europe, Latin America and the Middle East/Africa/rest of the world are all growing at double-digit annual rates. The Asia–Pacific region is growing less rapidly, because it includes Japan, which is barely growing at all. Excluding Japan, the region grew by 13 per cent in 2007 and is expected to grow by 9 to 13 per cent per year until 2010. Finally, the Asia–Pacific region (including Japan) will overtake Western Europe to become the second-largest advertising region in 2010.

These forecasts show the importance of the advertising industry as part of the creative industries in developing countries. UNCTAD (2004)¹⁹ has stated that creativity is deeply embedded in every country's cultural context. Effective nurturing can open up opportunities for developing countries to increase their share of world trade and to “leapfrog” into new areas of wealth creation. A clear correlation is shown between advertising expenditure per capita and national income, which reflects a country's national wealth (de Mooij (2001)).²⁰ According to this correlation, the rise in advertising expenditure in developing countries could indicate an overall positive development. A good example of this relationship is economic development and advertising expenditure in Ireland. In the 1980s, Ireland had the lowest per capita income in Europe. Today, Ireland is one of the richest countries in the European Union (EU) and is known as the “Celtic Tiger.”²¹ This development can also be seen in total advertising expenditure per capita. In 1997, Ireland's advertising expenditure per capita was USD 190.90. Looking at the advertising expenditure worldwide, Ireland was ranked 17th. Only 10 years later, Ireland is ranked third after Hong Kong (SAR) and the US with a per capita advertising expenditure of USD 459.80. This impressive growth in advertising expenditure per capita reflects Ireland's economic development (see Table 3).

Table 2: Top ten advertising markets in 2007 and 2010 (forecast)
 (Source: ZenithOptimedia 2008)²²

Country	Ad expenditure (USD million) 2007	Rank	Ad expenditure (USD millions) 2010 (forecast)	Rank
United States	179,251	1	194,063	1
Japan	41,528	2	43,875	2
United Kingdom	23,320	3	27,861	3
Germany	21,676	4	22,678	5
China	15,023	5	24,266	4
France	12,881	6	13,486	8
Italy	11,227	7	12,319	9
Spain	9,847	8	no longer among the top 10	--
Brazil	9,703	9	14,223	7
Republic of Korea	9,701	10	11,796	10
Russian Federation		--	17,205 will rise from 11 position to join the top 10 group	6

Table 3 shows the top ten countries with respect to advertising expenditure per capita in 2006. The table also ranks absolute advertising expenditure in 2006. Eight out of the top ten countries belong to the 20 countries with the highest GDP in the world.

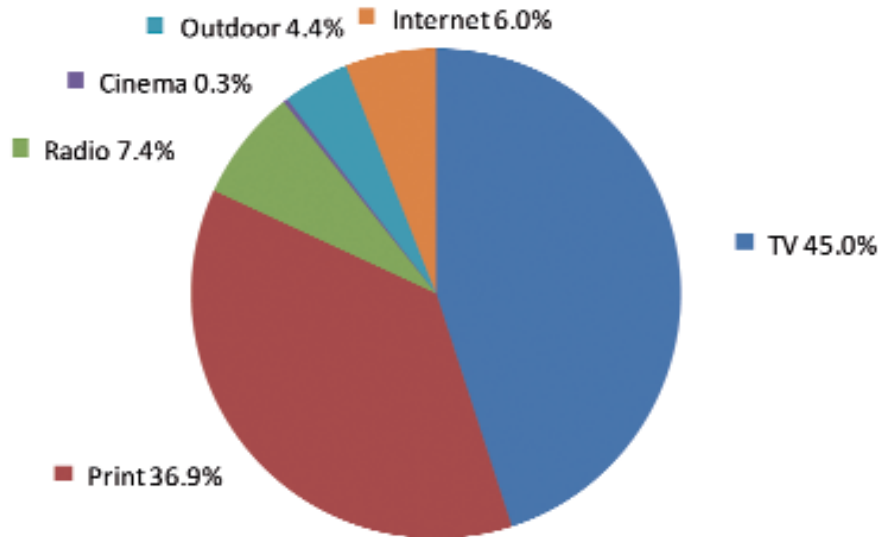


Table 3: Top ten countries' advertising expenditure per capita in 2006 (Source: World Advertising Trends (2007))

Country	Adspend/head in USD	Rank for adspend/head	Rank for absolute adspend
Hong Kong (SAR)	886.4	1	15
United States	541.6	2	1
Ireland	459.80	3	35
Norway	448.3	4	34
United Kingdom	431.4	5	4
Australia	427.2	6	11
Switzerland	412.7	7	21
Denmark	393.8	8	32
Austria	363.0	9	22
New Zealand	238.9	10	40

On a global level, TV accounts for the largest share of advertising expenditure, followed by newspapers and magazines, but the situation varies greatly between regions. Analyzing the revenue generated by the media sector including, in particular, TV (free-to-air commercial broadcasters are one of the single most important vehicles of advertising) and the press (newspapers and magazines), advertising expenditures in these media are so high that they have a relevant impact. Figure 3 shows global advertising expenditure by medium as a percentage of the total expenditure (USD 489,099 million) in 2006.

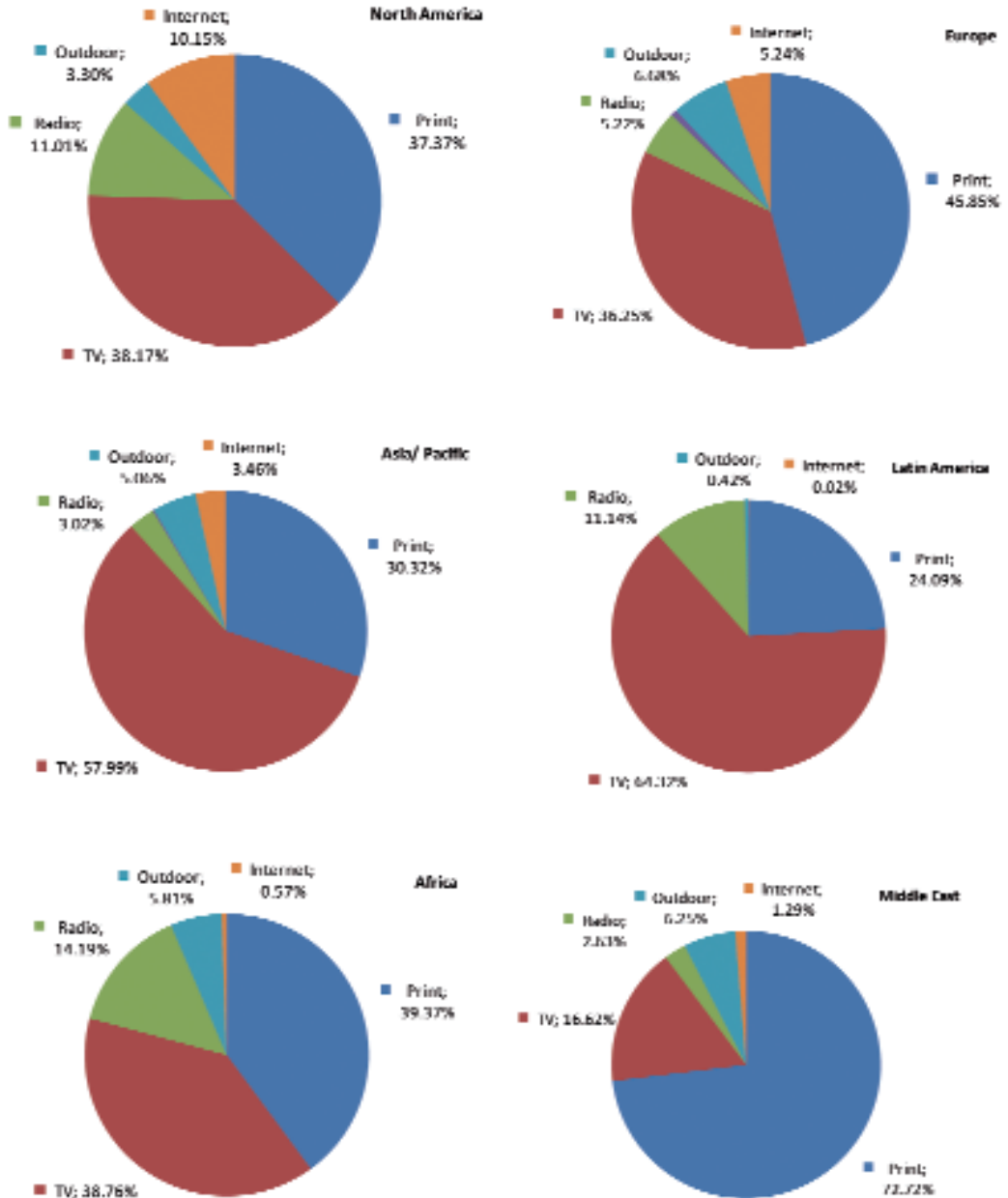
Figure 3: Division of global advertising expenditure by medium in 2006 (Source: World Advertising Trends (2007))



To analyze regional patterns of advertising expenditure by medium, Figure 4 shows the division of advertising expenses by region. This chart also shows that advertising mirrors the regional culture.



Figure 4: Division of regional advertising expenditure by medium in 2006 (Source: World Advertising Trends (2007))



In Asia and Latin America, where TV is the major information and entertainment source, the main advertising medium is also TV. In Asia, more than half of all expenditure is for TV advertising; in Latin America, it is almost two-thirds. Internet advertising is of minor importance in Latin America, as a result of low Internet penetration there. In 2008, only 24 per cent of the population were Internet users (compared with 74 per cent in North America and 48 per cent in Europe). Figures for use in Latin America are boosted by Chile (43 per cent) and Argentina (40 per cent).²³

In the Middle East, the main advertising medium is print. Although there is an increase in online advertising in the region, experts say that newspapers and magazines remain the major information and entertainment media in the Middle East and that print advertising will therefore continue to prosper over the next few years.²⁴

Observing only advertising expenditure in the EU, it is interesting to note that the percentage of spending on TV advertising in new EU Member States is significantly higher than in the EU15 countries. Spending in both EU10 and EU15 countries was quite stable with a very moderate growth rate during the period of 1997–2006. However, there are significant differences between individual countries within the groups. In 2003, for instance, the amount spent on TV advertising out of the total national share was lower than 20 per cent in Denmark, Finland and Ireland, yet higher than 50 per cent in Italy, Poland and Portugal.²⁵

Compared with other media, online advertising expenditure shows a rapid growth rate, due to rapid developments in digital technologies and growing Internet use. These global developments have had three major positive effects on the advertising industry:

- The Internet has become an important vehicle for advertising, and traditional advertisers are using new advertising space (online and new media).
- New Internet businesses are using traditional advertising mediums (print, TV and radio). Since the end of the 1990s, they have become new clients for the advertising sector.
- In response to companies' demands, new media agencies have been created to serve the global market.



Figure 5: Development of global online advertising expenditures (Source: World Advertising Trends (2007))

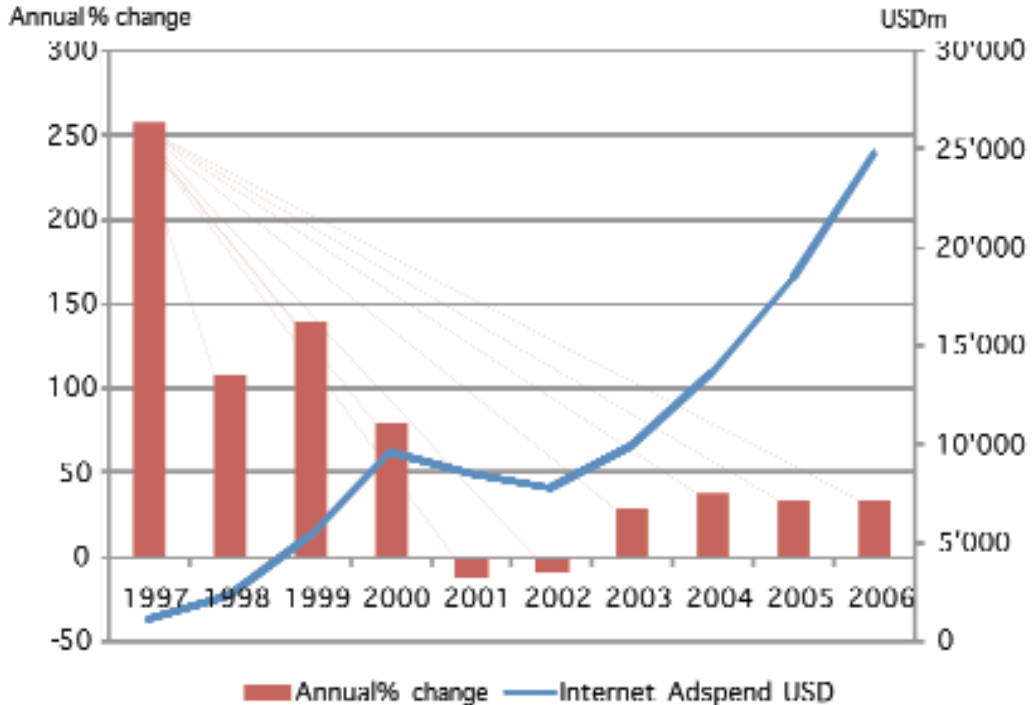


Figure 5 shows the development of global online advertising expenditure. With the exception of the years 2001 and 2002, expenditure for advertising on the Internet grew constantly. Due to the rise in Internet use at the end of the last century, annual growth rates at the end of the 1990s were higher than today's. They are still around 40 per cent. The slump in the years 2001 and 2002 was due to the bursting of the "new economy bubble". At the time, many recently founded dot-com companies went bankrupt, and the pace of technological development slowed.

In 2005, online advertising in Europe amounted to almost USD 5 billion. The UK accounted for 43 per cent of all of Europe's online advertising expenditure. France had the second largest share of the advertising expenditure market (22.5 per cent), while Germany accounted for 18 per cent of overall spending on online advertising. There is a significant gap between the three largest markets and the next tier, with Sweden, Spain and Italy each accounting for estimated expenditure of some three per cent of the online advertising expenditure market. The average share of online advertising out of total advertising expenditure is estimated at 6.8 per cent across

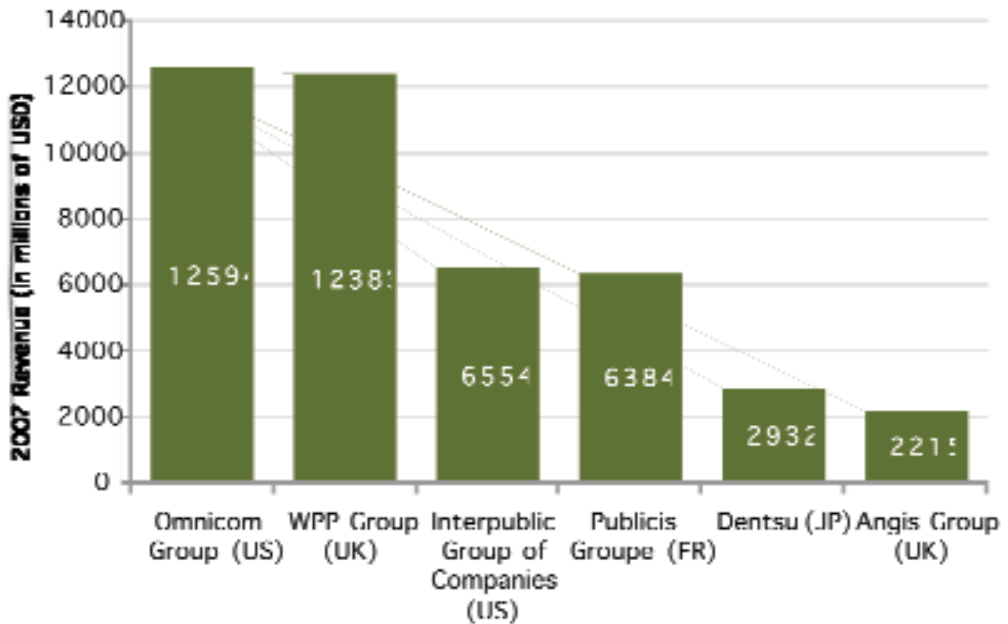
Europe.²⁶ By way of comparison, US Internet advertising revenue for 2005 exceeded USD 12.5 billion (€ 9.9 billion).²⁷

Information and communication technologies (ICTs) have also brought about major changes in the traditional advertising business. Reaching target audiences through traditional media outlets has become increasingly difficult because of the rise in new media technologies and further audience fragmentation. This is particularly the case with free-to-air TV broadcasts.

Besides its economic relevance, advertising makes a globally significant contribution in terms of creativity and innovation. Advertising agencies rely primarily on the creativity of their workforce. Advertising also has important spill-over effects on other creative sectors such as graphic design, interactive media and audiovisual production. Three of the world's six leading advertising agencies are Europe-based. European agencies are especially known for their creativity, which is key to attracting international clients. Figure 6 shows the top six marketing and advertising companies in the world, based on 2005 revenue. Three of them are European companies, two are based in the US and one is based in Asia. There are three main centers for the advertising industry: New York for the Americas, Tokyo for Asia, and London for Europe. Two-thirds of all international advertising agencies have their European headquarters in London.²⁸ Some very reputed, award-winning advertising agencies belong to European groups – prime examples are Ogilvy & Mather (part of WPP), Leo Burnett and Saatchi & Saatchi (part of the Publicis groupe SA).



Figure 6: Top six marketing and advertising companies (Source: ADAGE Agency Report (2008))



Chapter 2 – The value chain in the advertising industry

Advertising is a form of communication. It delivers a message that must convince actual and potential customers to buy a specific, mostly branded, product. The message is delivered through various media: TV, radio, cinema, print, telephone and the Internet. In addition, sponsoring and merchandising carry advertising messages. Companies often mandate advertising agencies to create these messages.

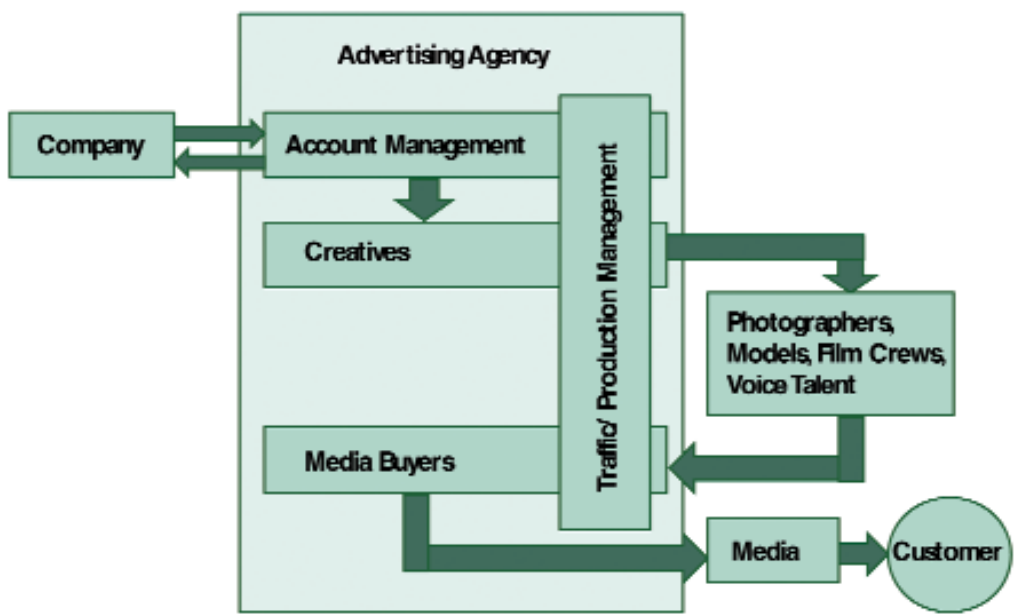
The value of advertising is mainly created by advertising agencies, but advertising agencies are not alone in the advertising process. Their business model is based on IP, which should be valued as a commodity. To understand the centrality of IP and its protection and management, advertisers should imagine themselves as one link in the chain of advertising activity. This chapter discusses that chain and the relationships between different participants, and helps to underscore the importance of IP.

With the development of new technologies and increasing reliance on the Internet, online advertising is becoming increasingly important. The digital environment is transforming the value chain and the business plans of advertising agencies. Web

marketers analyze data on customer visits, helping companies to implement the desired changes to goods, services and sales and marketing processes. Before analyzing these new business models, “traditional” advertising must be understood, and this is described in the following section.

Figure 7 shows the value chain in the advertising industry: it begins with the company (client–advertiser) that commissions an advertising campaign. The value chain goes through an advertising agency and ends by delivering the message to the customer via (several) media.²⁹

Figure 7: Value chain in the advertising industry (Source: Authors’ illustration)



Advertising agencies can manage every aspect of advertising campaigns. In the course of an advertising campaign, the value of the product to be advertised is generated and developed. Advertising agencies are full-service businesses, but the structure of an agency depends on its size and the needs of its clients. Some agencies have only one or two employees. In this case, the value is created by one person who has multiple functions – manager, creator and administrator. Moreover, the client focus can vary. While some agencies have only one or two major clients with an enormous budget, others have hundreds of clients spread throughout the country or the world. Despite differences in size and structure, value chains for advertising products or services are similar, irrespective of the size of the agency.



Before an advertising campaign is launched, the budget has to be agreed upon. That happens mostly through so-called "pitches", which are competitions involving several invited advertising agencies that present their ideas and work. Because advertising is a high-speed business requiring an enormous communication effort, the personal fit of staff of the respective contracting parties is important.

Once the contract is signed, the client's contact in the advertising agency is the Account Management Department. The Account Manager helps clients plan their marketing, determine budgets and set schedules. Preferably, the Account Manager works on the basis of an established strategic marketing plan, which is agreed by the client company and the agency. Usually, the strategic marketing plan allocates parts of the budget to specific initiatives and actions throughout the year. The strategic marketing plan is supported by the advertising agency's research department, whose main function is to provide details on the prospective audience for the final campaign or information about the market for the product being advertised. The Account Manager, and the contact person for the Creative Department, develops a creative brief with key points that need to be emphasized in the advertising work. Once the creative effort has reached the approval stage, the Account Manager reviews the creative work to ensure that it is consistent with the strategic and tactical needs agreed with the client.

After building a strategic marketing plan, the Creative Department transforms the theoretical guideline into art and an advertising campaign. Agencies employ experts in several creative fields.

- **Copywriters* (or adwriters/scriptwriters)** supply text for print ads and scripts for TV or radio advertising. A copywriter is responsible for an advertisement's verbal and textual content. Even if the words sound alike, the copywriter has nothing to do with a person working in the copyright field.
- **Graphic designers** create the visual presentation of print ads.
- The **Art Department** supplies images for all kinds of advertising formats.
- The **creatives**** are responsible for developing an advertising platform that sets the theme and tone of the campaign.

*copywriter (*Noun*) - a person employed to write advertising copy

Collins Essential English Dictionary 2nd Edition 2006 © HarperCollins Publishers 2004, 2006

**Creative (*Noun*) - a creative person, esp. one who devises advertising campaigns

Collins Essential English Dictionary 2nd Edition 2006 © HarperCollins Publishers 2004, 2006

It is important that the copywriter and art director work as a team and share ideas based on the creative brief.

If the client approves the creative work, the Creative Department will coordinate the photographers, film crews, voice talents and all those involved in developing the final product. Some big agencies have in-house photographers, but most rely on independent contractors.

The finished advertising product is placed by the Media Buyers in various media (print, broadcast, Web, outdoor, etc.), with the aim to reach the maximal potential audience within the smallest budget.

An important task in the value chain of the advertising industry is performed by the Traffic/Production Management. Although it does not create value on the advertising campaign, this Department ensures that the work is done on time and within the allocated budget. It is also responsible for the information flow within the agency in terms of job requisitions, order changes, etc.

Today, in the era of the Internet and information technology, the consumer has more options for visual entertainment. As a result, mature advertising channels like print media and radio and TV broadcasting are on the wane, and interactive advertising formats are increasing in importance. As technology develops, consumers gain more control over how they view, interact with and filter advertising in a multichannel world, leading to a reconfiguration of the traditional advertising value chain. Advertising agencies face the danger of commoditization of their services. TV broadcasters lose revenue and become less predominant. Media buyers within the agencies have to find new platforms, formats and advertising capabilities. These three links in the value chain must adapt to a new environment where consumers and interactive players have greater leverage (IBM (2007)).³⁰



Another trend connected to new technologies that reflects a change in the value chain and affects the creation and handling of IPRs is that of consumer-created campaigns. In this case, companies do not mandate agencies to create advertising campaigns but rather hold competitions for the public to create campaigns and advertisements for their products (also known as V-CAMs, viewer-created ad messages) (IBM (2007)). The best idea in the competition is chosen for the advertisement, and the creator receives a prize. One example of this kind of contest is a TV spot for Doritos during the 2007 Super Bowl. Moreover, companies like General Motors (for the Chevy Tahoe), MasterCard, Quiznos, Alka-Seltzer, Converse and Chevrolet have launched this kind of competition. This trend could mean that advertising agencies will become less important in the advertising process. Critics point out, however, that this form of marketing could lead to a lack of brand consistency and may not help to promote the products in the long run. On the other hand, the trend could be seen as an opportunity for advertising agencies, which could incorporate customers into advertising campaigns as part of a new business model.

Chapter 3 – Intellectual property rights (IPRs) in the advertising industry

Similar to the results of research and development (R&D) with regard to information and knowledge which, once published, become public goods, the output of the creative industries – creative ideas, slogans, promotional campaigns, sound, music, etc. – also have the characteristics of public goods and, once published, can be recognized and imitated. Once a slogan, logo or creative idea is shown in public, it can be copied and used by third parties without leading to significant costs. Therefore, similar to the results of R&D and technological and product innovation, which give users a competitive advantage and can be protected against illegal or unsolicited use by patents, utility models or industrial designs, creative industries (including advertising, where creativity is one of the most important components) also have to protect their outputs against potential infringers (free riders).³⁴ Such protection exists under the IP system, which acts as an incentive for innovation and creativity.

As already mentioned, the advertising industry is one of the major components of the service sector where individual creativity and IPRs are gaining importance. This is because the advertising sector comprises a combination of players, such as advertising professionals, advertising and publicity agencies, media agencies, advertising mediums (providers of advertising/publicity space) and producers who participate in the production of advertisements and publicity.

IPRs in a business context

While this study focuses on the management of IPRs in the advertising industry, it is important to understand the business context in which those rights exist. Every business, including those in the advertising industry, has a portfolio of assets. Further, the market value of these enterprises is equal to the market value of the assets they own.

At the highest level, we observe the market value of several advertising firms whose capital stock is publicly traded. A number of these are worldwide organizations (see Annex A).

Table 4 shows the market capitalization value (market value of common stock plus long-term debt) of a number of advertising companies taken from this list of publicly traded companies. The financial data are taken from the most recent data reported by these companies. These balance sheet data are not particularly time-sensitive:



Table 4 – Market Capitalization Value

		Market Capitalization (\$bill)
Interpublic Group		\$ 70,652
RH Donnelley Corp.		101,640
Omnicom Group		165,239
Valassis Comm.		14,618
AirMedia (Cayman Island inc)		16,305
Daktronics		7,951
ValueClick		10,403
VisionChina (Cayman Island inc)		13,125
WPP Group - pounds		37,409
Yahoo		258,491
		\$ 695,832
	Percent	100.0%

In Table 5, the balance sheets of selected companies are used to estimate the market value of monetary and tangible assets in each company. These amounts are then subtracted from the market capitalization value (above) to estimate the market value of their intangible assets, including the value of IP. We can observe that intangible assets and IP comprise approximately 85 per cent of the total market value.

Table 5 – Market value of intangible assets and IPRs

	Market Capitalization (\$M)	Net Working Capital	Tangible Assets	Intangibles and IPRs	Percent Intangibles and IPRs
Interpublic Group	\$ 70,652	\$ 32,831	\$ 5,985	\$ 31,835	45.1%
Hill Donnelley Corp.	101,610	(200)	1,080	98,900	98.1%
Omnicom Group	165,298	(7,084)	7,087	165,298	100.0%
Valassis Comm.	14,618	2,474	2,621	9,493	64.9%
AurMedia (Cayman Island inc)	16,305	2,323	180	13,022	81.8%
Daktronics	7,851	779	988	6,255	78.7%
ValueClick	10,403	1,325	190	8,888	85.4%
VisionChina (Cayman Island inc)	13,125	1,111	//	11,513	88.2%
WPP Group - public	37,409	2,432	4,408	30,481	81.5%
Yahoo	258,491	20,263	14,158	218,070	84.4%
	\$ 695,832	\$ 62,560	\$ 37,620	\$ 595,653	
Percent	100.0%	8.0%	5.4%	86.6%	

The conclusion is that advertising businesses have intangible and IPR assets of considerable value, which it is important to manage astutely.

With that background, we need to understand what is meant by assets and what is meant by **monetary, tangible and intangible assets and IPRs**.

The accounting profession has long struggled to define business assets for financial reporting purposes. The most current meaning is:

- **Assets** are probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events.
- **An asset** has three essential characteristics:
 - (i) It embodies a probable future benefit that involves a capacity, singly or in combination with other assets, to contribute directly or indirectly to future net cash inflow;
 - (ii) A particular entity can obtain the benefit and control others' access to it; and



- (iii) A transaction or other event giving rise to the entity's right to or control over the benefit has already occurred.

The common characteristic possessed by all assets (economic resources) is "service potential" or "future economic benefit," i.e. the scarce capacity to provide services or benefits to the entities that use them. In a business, that service potential or future economic benefit eventually results in net cash inflow to the enterprise.

An entity's assets are changed both by its transactions and activities and by events that happen to it (the entity obtains them by exchanges of cash or other assets). The entity adds value to non-cash assets through operations by using, combining, and transforming goods and services to make other desired goods and services. An entity's assets or their value [may be] increased or decreased by other events that may be beyond the control of the entity, for example, price changes, interest rate changes, technological changes, taxes and regulations, etc.

Once acquired, an asset continues to be an asset of the entity until that entity collects it, transfers it to another entity, uses it up, or some other event or circumstance destroys the future benefit or removes the entity's ability to obtain it.³⁵

Within these broad criteria, the valuation profession has observed asset classifications as follows:

"4.4 Under the terminology of accounting, both tangible and intangible assets are included among the assets of a business entity:

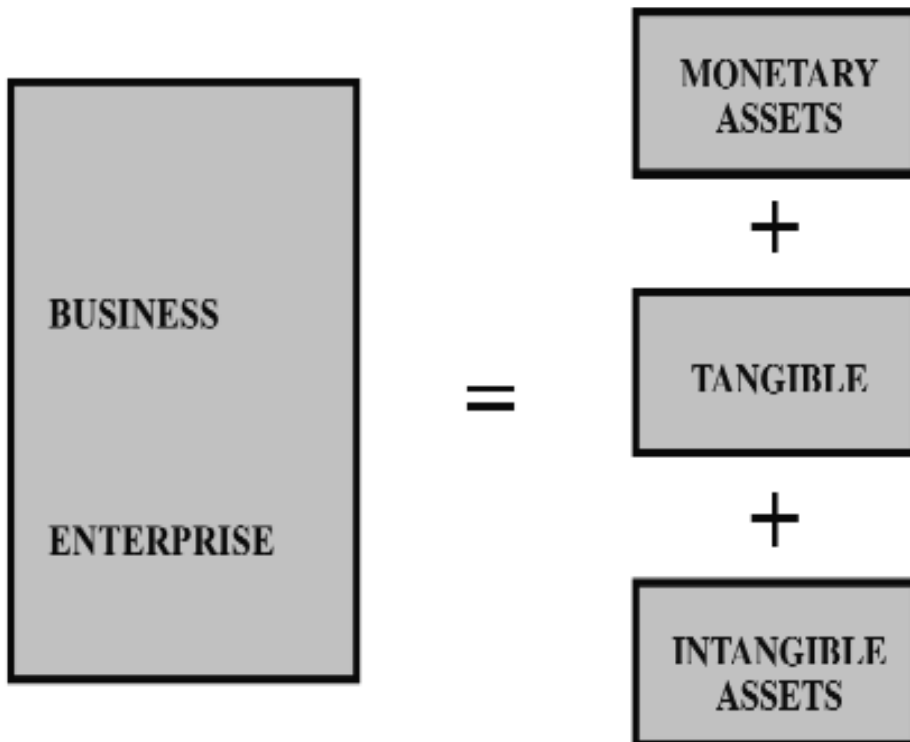
4.4.1 Tangible assets include current assets, and long-term assets such as realty, fixtures, equipment, and tangible personal property.

4.4.2 Intangible assets, which are considered intangible personal property, include management skill, marketing know-how, credit rating, an assembled workforce, and operational plant, goodwill, and ownership of various legal rights and instruments (e.g., patents, trademarks, designs, copyrights, franchises, and contracts, etc.).

4.4.2.1 Goodwill may include two distinct components: goodwill that is property-specific, or inherent within the property and transferable to a new owner on sale of the property, and personal goodwill that is associated with the proprietor or manager."³⁶

Smith & Parr categorize the assets within an enterprise as illustrated in the following chart, and we will use this terminology thereafter.³⁷

Figure 8: Composition of enterprise assets (Source: G. Smith)
Monetary assets



Monetary assets, also referred to as net working capital, are defined on a company's balance sheet as current assets less current liabilities.

Current assets include:

- Cash
- Short-term investments, such as marketable securities
- Receivables from all sources, less reserves
- Inventories, including raw materials and work-in-process, finished goods
- Prepayments



Current liabilities include:

- Accounts payable
- Current portions of long-term debt
- Income taxes and other accrued items

In most cases, there is an excess of current assets over current liabilities, and net working capital is therefore positive. In the most simplistic scenario, this can be thought of as the “cash in the till, necessary for the workings of the business.” Because of the conservatism inherent in accounting for these amounts, it is reasonable to assume that the book value of monetary assets is equal to their market value.

Tangible assets

Tangible assets are usually shown on the balance sheet as “Plant, Property, and Equipment.” The following classifications are typically included in this asset category:

- Land
- Land improvements
 - Paving, fencing, landscaping, yard lighting, sewerage, fire protection
- Buildings
 - Building construction and services
- Improvements to leased property
 - Structural improvements, building services, power wiring, piping
- Machinery and equipment
 - Machinery, power wiring, plant piping, laboratory equipment, tools
- Special tooling
 - Dies, jigs, fixtures, molds
- Drawings
- Office furniture and equipment
- Licensed vehicles
- Construction in progress

While balance sheet amounts for tangible property are not a precise guide to market value, we have used a “rule of thumb” method to estimate the market value of advertising firm tangible assets in Table 5. Given the relative unimportance of tangibles in the advertising industry, this is a reasonable approach.

Intangible assets

Smith & Parr define “intangible assets as all the elements of a business that exist separately from monetary and tangible assets. They are the elements, separate from working capital and fixed assets, which give the enterprise its character and are often the primary contributors to the earning power of the enterprise. Their value is dependent on the presence, or expectation, of enterprise earnings. They typically appear last in the development of a business and often disappear first upon its demise. Intangible assets can be categorized³⁸ as follows:

- Rights
- Relationships
- Undefined intangibles
- Intellectual property”

Some definitions of the terms used are as follows.

By **rights**, we refer to contractual agreements to receive or provide goods or services, such as leases, distribution agreements, employment agreements, financing arrangements, licenses, and the like.

Relationships refer to non-contractual arrangements, such as those with customers, suppliers and an assembled workforce. These can be quite valuable within a business, and even more so in service companies such as advertising firms.

Undefined intangibles refer to the residual value of a business that remains when monetary, tangible and identifiable intangible assets (i.e. rights, relationships, and IP) are subtracted. This is commonly referred to as “goodwill”

Intellectual property refers to creations of the mind: inventions (patents), trademarks, trade secrets or know-how, literary and artistic works (copyright) and symbols, names, images and designs used in commerce³⁹.

This is a special classification of intangible property and is unique because owners of IP are protected by law from unauthorized exploitation of their rights. We include computer software in the following discussion, because it can be subject to patent, trade secret, or copyright protection.

A business that owns IP can either utilize its benefits internally or transfer interests in the rights to others to exploit. As with other types of intangible property,



not all IP has value. Its value is usually determined by the marketplace, either directly or indirectly.⁴⁰

These definitions are those that would guide an appraiser in the valuation of the intangible assets that are a part of a business. Typically, an appraiser is not concerned with whether these assets were created by the enterprise or were acquired from outside the business.

It is important to note that intangible assets are defined differently for accounting purposes:

"An intangible asset shall be recognized as an asset apart from goodwill if it arises from contractual or other legal rights (regardless of whether those rights are transferable or separable from the acquired entity or from other rights and obligations). If an intangible asset does not arise from contractual or other legal rights, it shall be recognized as an asset apart from goodwill only if it is separable, that is, it is capable of being separated or divided from the acquired entity and sold, transferred, licensed, rented, or exchanged (regardless of whether there is an intent to do so). For purposes of this Statement, however, an intangible asset that cannot be sold, transferred, licensed, rented, or exchanged individually is considered separable if it can be sold, transferred, licensed, rented, or exchanged in combination with a related contract, asset, or liability. For purposes of this Statement, an assembled workforce shall not be recognized as an intangible asset apart from goodwill."⁴¹

and:

"Costs of internally developing, maintaining, or restoring intangible assets (including goodwill) that are not specifically identifiable, that have indeterminate lives, or that are inherent in a continuing business and related to an entity as a whole, shall be recognized as an expense when incurred."⁴²

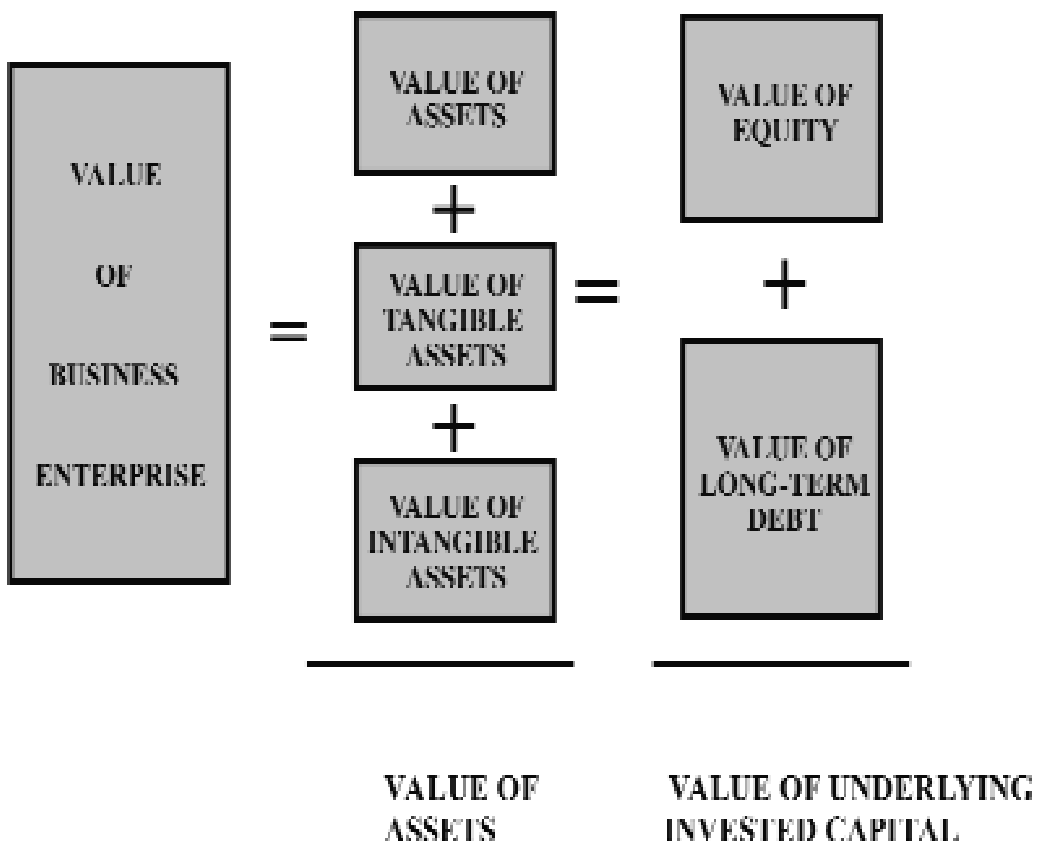
Two essential differences between the valuation and accounting versions of what constitutes an asset are the issues of separability and contractual rights. Valuers do not require these tests to qualify business assets. Examples are assembled workforce and customer relationships. Typically, neither of these assets is tied to the enterprise contractually, nor can they be separated from the business without its demise. These assets can be quite valuable to a business and must be recognized in

its valuation, but cannot be capitalized for accounting purposes.

A second difference between accounting and valuation treatment of intangibles is that appraisers recognize the value of self-created intangibles, even though they are not recognized on a company's balance sheet.

To complete this discussion, we present the business valuation equation, by which we estimate the market value of advertising business intangibles:⁴³

Figure 9: The value of a business (Source: G. Smith)



IPRs in the advertising industry

In most countries, copyright in the products of advertising agencies is protected under national copyright law. Numerous professional public associations and law firms, as well as specialized private organizations and institutions, offer services to protect the producer and user of creative works in advertising agencies. However, the main challenge is to ensure that these organizations and laws are made known to and used effectively by the advertising sector.



Creative works and products are the main output of the agencies, and they form a company's competitive advantage in competing with other advertising and publicity agencies to gain a share of the market and also participate in fundamental contests to strengthen the reputation of the agency.

Furthermore, creative works result from the ability to create something valuable and different. Therefore, public (laws, regulations, etc.) and non-public instruments (confidentiality arrangements, non-disclosure agreements, etc.) are vital to protecting such creative effort. Creative content produced by advertising agencies comprises, among other things, visual and written materials such as slogans, sounds, photographs, art, music, videos and graphics. Some of these could be protected under copyright law, others as industrial designs or trademarks (see Table 6, below).

Obviously, the business of advertising firms is, to a large extent, to create IP. An advertising campaign comprises a theme and a message that is delivered to potential buyers, constituents or consumers in the form of words, images and sounds. Many of these elements may be legally protected as IPRs.

The economic success of an advertising enterprise depends on its ability to create advertising campaigns that are demonstrably effective for clients. An essential question is whether the IP created for a campaign belongs to the client or to the advertising firm, or to an employee of an advertising firm.

IPRs in the form of copyrighted material are described or defined in national laws and international treaties. For example, Article 2 of the Berne Convention for the Protection of Literary and Artistic Works defines Protected Works as follows:

"(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed

by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(5) Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections”⁴⁴.

It should be noted that, while authors of copyrighted works automatically have ownership of them, “works made for hire” become the property of the author’s employer. In effect, there can be several transfers of ownership from an advertising firm employee to the firm, and from the firm to its client. Note also the need for a written document if this arrangement is to be altered

Trademarks developed as part of an advertising campaign are commonly registered in the name of the client. Even if a client agreed to the advertising agency’s registering a mark under its own name and negotiating a license for its use, it is extremely unlikely that the agency could exploit the mark on its own behalf or that of other clients without committing infringement. So, while an advertising firm may have trademarks for its own firm(s) or its own services or analysis tools, trademarks developed for clients typically become the property of the client.

It would be a rare occurrence, as in the case of Navic, for a patentable invention or innovation to be developed by an advertising firm.⁴⁵

However, an advertising firm might develop proprietary technology (knowledge or information which could qualify for protection as a trade secret).

This study, therefore, focuses on intangible assets and IP that are exploitable by the advertising enterprise to the exclusion of others.



For the purpose of this study, and subject to the findings of industry interviews and subsequent analysis, it is expected that the following would be identified as intangible assets and IP assets within companies in the advertising industry:⁴⁶

INTANGIBLE ASSETS IN THE ADVERTISING INDUSTRY

- Assembled workforce
- Key employees, covenants not to compete
- Client relationships
- Client files
- Backlog, client contracts
- Industry information and know-how
- Computer software and/or databases
- Licenses, certifications
- Advantageous contracts
- Financial institution relationships
- Franchise contracts
- Non-disclosure agreements

INTELLECTUAL PROPERTY ASSETS IN THE ADVERTISING INDUSTRY

- Patents
- Trademarks, (including domain names, company names)
- Copyright, including *inter alia*,
 - Art, photographic libraries
 - Graphic designs
 - Video, audiovisual materials
- Proprietary technology, trade secrets
- Proprietary training programs, procedure manuals
- Advertising effectiveness research files
- Market research results

Just like the components of a good product or service, the elements of a good advertisement are likely to be imitated or copied by others. In fact, in creating content for an advertisement or publicity, or during the launch of an advertising campaign, various elements may be protected as IP rights, such as:

- **Creative content**, e.g. written material, photographs, art, graphics, the layout of an advertisement or publicity leaflet, music and videos, is covered by copyright protection;
- Advertising **slogans** and **sounds** may be protected, in some countries, under copyright and/or trademark law;⁴⁷
- Business names, logos, product names, domain names and other **signs** used in advertising may be protected as trademarks;
- Computer-generated **graphic symbols, screen displays, graphic user interfaces** (GUIs) and even **web pages** may be protected by industrial design law;
- A **website design** may be protected under copyright law;
- **Software** to create digital advertisements, such as computer-generated imagery (CGI), may be protected under copyright law and/or patent law, depending on the national legislation;
- Some forms of **advertising techniques** or **means of doing business** may be protected in the US by patents or utility models;⁴⁸
- Distinctive **packaging**, such as the shape of a bottle or container, may be protectable as a trademark, industrial design or, in some countries, as trade dress;⁴⁹
- A person's **identity**, such as his or her name, photograph, image, voice or signature, may be protected by publicity or privacy rights;
- A company's **corporate identity**, which comprises logos, letterheads, designs, colors, etc. that, as a whole, represent or identify the company, such as McDonalds' golden arches, or the Coca-Cola logo and red color;
- **Databases**, for example of consumer profiles, can be protected by copyright under *sui generis* database laws;
- **Unfair advertising methods**, including false advertising claims, false endorsement of products, deceptive packaging, dishonest promotion or marketing, are prohibited under unfair competition laws.

Businesses are finding ever more inventive ways to advertise their products and services.



With each level of increased sophistication in advertising, additional IP rights may emerge. Thus, the simplest advertisement or publicity may involve only a logo's copyright and/or trademark rights, whereas advanced audiovisual works may raise many complex IP issues.

The matrix in Table 6 shows the relevance of IP to the variety of advertising contents, elements and techniques and how they could be protected as IPRs.

Table 6.

Legal instruments for protecting various creative works and products relevant to advertising industries

	Copyright law	Trade mark law	Patent and/or utility model law	Industrial design law	Geographical indications and appellations of origin laws	Other laws (<i>sui generis</i>)	Unfair competition law
advertising elements and products							
creative content	X						
slogans and sounds	X	X					
business names, logos, product names, domain names and other signs		X				X	
graphic symbols, screen displays, graphic user interfaces (GUIs), web pages		X				X	
website design	X						
software (e.g. used for digital advertisements, such as computer generated imagery (CGI))	X		X				
advertising techniques or means of doing business			X (US only)				
distinctive packaging		X		X			
person's identity, (name, photograph, image, voice or signature)						X	



corporate identity (logos, letterheads, designs, colors, etc.)		X				X	
Databases	X					X	
unfair advertising methods, including false advertising claims, false endorsement of products, deceptive packaging, dishonest promotion or marketing							X

Chapter 4 – IPR management in the advertising industry

Financial principles

Knowledge about the value of business assets is the key to their management. As an example, a real estate development enterprise might own a portfolio of properties. The enterprise directs its resources and attention to those properties in the portfolio that are most valuable, in this case those with the highest current and potential profit contribution to the business.

As shown in Figure 8 of Chapter 3, each business has a portfolio of assets, the value of which is made up of the value of each separate asset. Furthermore, the values of individual assets are a function of their income-producing capability.

Therefore, identifying the intangible assets and IPRs of significant value means identifying those assets that drive the earning power of the enterprise. It may not be necessary to develop precise market values, as would be the case to support litigation, but it is advantageous for management to understand the principles of valuation in order to better set priorities. This then becomes a guide to management for:

- Identifying what types of assets to invest in;
- Identifying which assets need to be protected;
- Determining how to allocate the financial resources of the enterprise;
- Identifying which assets to concentrate on to maximize exploitation;
- Identifying the best opportunities for exploitation.

Thus, it becomes clear that an understanding of the place of IP and its value is a starting point in the asset management process.

Market value defined

The term “value” has been defined and described in various ways. When used in this study, it refers to **“market value”**. The terms **“fair market value”** and **“fair value”** are often used interchangeably. Current accounting practice worldwide tends to use the term fair value, and the debate continues as to how to define fair value in a way that is widely acceptable and will provide international consistency in financial reporting.

The classic definition of market value is as follows:

- (i) Market value is the amount at which a property could be exchanged ...
Two persons are coming together for the purpose of exchanging property for money (since an appraisal is made in terms of money).
- (ii) ... between a willing buyer and a willing seller ...
These two persons want to make the exchange.
- (iii) ... neither being under compulsion ...
Neither of the parties is being forced, by the other or by circumstances, to make the transaction.
- (iv) ... each having full knowledge of all relevant facts ...
Both parties are aware of what is included in the sale, the condition of the property, its history and possible use, and its liabilities against it.
- (v) ... and with equity to both.
The exchange will be fair to both parties, and neither will gain advantage in negotiation or in the terms of the sale.

92. An alternative definition is based on the economic elements of the transaction. Market value is equal to the present value of the future economic benefits of ownership.



The International Valuation Standards Committee (IVSC) discusses the valuation of intangible assets as follows:

“In general, the concepts, processes, and methods applied in the valuation of intangible assets are the same as those for other types of valuations. Certain terms may have different meanings or uses. Those differences become important disclosures wherever they are used...”⁵⁰

Intangible asset valuation – methodologies

Professional appraisers accept the fact that, in valuing inventions/technical IPRs (new products, devices, tools, apparatuses, methods, processes, machines, etc.), there are three basic methods for estimating value – the **cost, market and income methods**. We define market value either as the traditional, “willing buyer/willing seller” transaction or, alternatively, as the present value of the future economic benefits of ownership. These methods are used for all types of property rights, across all industry sectors. In practice, the selection of the appropriate valuation method depends to a great extent on the valuation context.⁵¹

The **cost method** measures the future economic benefits of ownership by estimating the amount of money that would be required to replace or reproduce the future service capability of the property. The underlying principle of this method is that the price of new property is commensurate with the present economic value of the service that the property can provide during its life.

The cost method is used extensively in the valuation of tangible assets. It is used much less frequently to appraise intangible assets, although it is commonly used for intangibles such as an assembled workforce, customer relationships and internally used computer software. It is rarely relied on in the valuation of IP, because IP takes its value from the economic benefit of future exploitation. The cost of developing IP is only rarely indicative of its future exploitation benefits.

The **market method** is appealing because it is the most direct and easily understood appraisal technique. It measures the present value of future benefits from a consensus of what others in the marketplace have judged it to be. What is needed is an active, public market and an exchange of comparable properties.

With this method, a population of transactions is gathered from which it is possible to extract those that best match the description of the virtual transaction that is being constructed. The market approach is most effective for real estate, machinery and equipment, general-purpose software for which there is a market equivalent, some traded licenses and franchises.

The market method is rarely used to appraise intangible assets because they are seldom sold outside of an enterprise. It is used even more rarely for IP because, even if it is sold or exchanged separately by an enterprise, the details of the transaction are seldom known. Some professionals believe the recently organized IP auctions may provide meaningful market information, but that has not yet been thoroughly tested.

The **income method** based on the income-producing capability of the property, is directly related to the present value of the future economic benefits of the IPRs.

The three essential ingredients of the income approach are:

- The economic benefit that can be reasonably expected from exploiting the property;
- The way in which that economic benefit will be received;
- An assumption as to the risk associated with realizing the amount of economic benefit in that way.

Because the market value of most intangibles and all IP is unrelated to the cost of creation, the cost method is largely unusable. Market data are scarce and unreliable, so that method is not often of practical use. Therefore, appraisers rely on the income method for most intangibles and all IP.

The income method is quite straightforward and based on financial interest calculations that have been used by investors and lenders for years. When these principles are applied to a valuation by the income method, the calculation is commonly referred to as a discounted cash flow (DCF) analysis.

It is the *input* to the process that can be quite difficult to estimate, especially for intangible assets and IP.



Valuation and assessment of marks and brands and other distinctive signs

Due to the increasing importance of brands for corporate success, their valuation has gained increased attention in research and practice. Especially for advertising agencies whose main IPRs, beside copyright, are brands and trademarks, the valuation of these IPRs could matter. The above-mentioned valuation methods are also applicable in valuing trademarks. In view of their increasing importance, a short description of brand valuation methods is given below. First, to facilitate the reader's understanding of the difference between trademarks and brands, a short explanation of both concepts is given.

A **mark** (or trademark) is a **distinctive sign** that identifies certain goods or services as those produced or provided by a specific person or enterprise.⁵² Trademarks are a type of industrial property, protected by IPRs. To obtain protection for their trademarks, companies have to register them with a national or regional IP office. Trademarks can include any device, brand, label, name, signature, word, letter, numerical symbol, shape of goods, packaging, combination of colors, or any combination enabling the goods and services of one person or company to be distinguished from those of others. One example of a trademark is the well-known initials of BMW or the company's round logo.

A **brand** is a symbolic embodiment of all the information connected to a company, product or service. Albeit not a legal instrument, a brand serves to create associations and expectations related to a company's products. It often includes a logo, fonts and color schemes. Symbols and sound are used to represent implicit values, ideas, and even personality. BMW's brand is the car itself as well as the technology, power and luxury it contains and the owner's sense of having a certain social status.

In addition to the foregoing financial methods, the price premium model is often used to identify brand value. This method is based on the assumption that consumers attribute additional value to products linked to a brand and are willing to pay more for a labeled product than for an unlabeled one. This difference is measurable in the price premium.

Often, brand value is not completely reflected by fiscal and accounting indicators. To incorporate brand association by consumers into the monetary valuation of brands, several behavioral science-oriented models are available. Combinations of financial and behavior-oriented approaches are also often used. The brand equity measure of Interbrand, a division of Omnicom, is one such combined method that is well established in media. The Financial Times publishes annually the 100 most valuable brands based on the Interbrand method.⁵⁴

The name and the logo of an advertising agency are trademarks, along with the creativity and uniqueness of its campaigns. Industrial companies and service companies have already recognized the importance of brand management. In order to benefit from their own brand, advertising agencies should also manage (and therefore value) their brands.

IPR management in the advertising industry

What is management? The Merriam-Webster dictionary defines management (from Old French *management* = “the art of conducting, directing,” from the Latin *manu agere* = “to lead by the hand”) as the act or art of managing: the conducting or supervising of something (as a business) or the judicious use of means to accomplish an end. Another online source refers to management as “the process of leading and directing all or part of an organization, often a business, through the deployment and manipulation of resources (human, financial, material, intellectual or intangible).” We prefer the following definition for its comprehensiveness and clarity: “**Management** in business and human organization activity means, in simple terms, the act of getting people together to accomplish desired goals. Management comprises planning, organizing, **resourcing**, leading or directing, and controlling an organization (a group of one or more people or entities) or effort for the purpose of accomplishing a goal. **Resourcing** encompasses the deployment and manipulation of human, financial, technological and natural resources.”⁵⁵

One of the basic functions of management is to “make optimal use of resources.” “Optimal use” can be assumed to mean “profitable exploitation,” which is why discussions on financial aspects of IP have been included in this chapter. Before



discussing the role of IPRs in the advertising industry, the most important resources in an advertising agency are briefly presented hereafter.

Assembled workforce (human resources)

It is clear from the interviews and research carried out in preparing this study that the single most important resource in an advertising enterprise is its employees – the people whose skills and creativity drive the success of the business. They represent an intangible asset of great value within the enterprise. It is, however, beyond the scope of this study to examine the challenges of managing employees.

Trademarks and brands (financial resources)

Every advertising enterprise has one or more trademarks or trade names, whether or not they are registered with an IP office or regulatory agency. Often these marks (trade names, company names, brands) are names of people such as “Goodby, Silverstein & Partners,” “Burson-Marsteller,” or “Olgivy & Mather.” This reflects the importance of people, as noted above. Many agencies belong to groups that tend to have more impersonal marks, such as “WPP Group” or “Publicis Groupe.” Very often such business identifiers are referred to as “brands.”

The importance of trademarks to an advertising enterprise should not be underestimated. To better explain the place of trademarks in the business of advertising companies, we use a quote from a book on trademark valuation, published by one of the authors, G. Smith, in 1997.

“This is a business classification [industrial/commercial services] in which one intuitively realizes a wide range of importance for trademarks. Services are provided by people and so there can be a variety of combinations of personal and trademark power to drive such a business. As a general rule, the character of smaller service firms is formed by their personnel, while that of large firms is more of a “corporate character”. Employees of small firms may take customers or clients with them if they move to another firm. This is much less likely to happen with larger service providers. There tends to be a much more personal relationship between the customers and employees of a small advertising, accounting or legal practice than there is at larger firms.”

The relative power of a trademark is quite evident in professional services. As an example, one could assume that an audit performed in accordance with Generally Accepted Accounting Principles by a Certified Public Accountant would be essentially the same service, no matter which firm provided it. We have, however, observed a price difference in the audit services of small vs. large accounting firms. In addition, a small or middle-market company (which would have a free choice between a large or small auditing firm) will most often opt for the large firm if it is contemplating a public offering of stock or seeking other significant financing. The motivation in this is that investors, and perhaps regulators, take a higher degree of comfort in an audit by a larger, more well-known accounting firm and the process may be smoother as a result. For the same reason, a public company involved in a major transaction will seek the assistance of a major investment banker. It is a bit more difficult, in this case, to ascribe this entirely to the power of the trademark (because of the nature of the services required), but unquestionably the directors of such a company derive some comfort by this action, given the litigious nature of our financial society.

Obviously, a large professional firm, advertising agency, market research, consultant, designer or constructor can offer "one-stop-shopping" and an ability to handle large tasks. So the advantage is not only from its trademark. But a firm's trademark does become a symbol of its particular prowess and is an attraction in its own right. There are those that feel that receiving a letter from a prestigious law firm will strike more fear and trepidation in the heart of an alleged transgressor than that from an attorney or firm less well known.

Hiring a world-renowned management consulting firm can provide an element of insurance against criticism that may not be available from a less well-known firm, even though the advice received may be the same. This is the power of the image, of the reputation, of a trademark."⁵⁶



Trademark management focuses on protection. Legal protection includes obtaining registered status, maintaining the registration according to national statutes, and being watchful of infringement by others. Economic protection centers on conducting business under the mark in a competent and ethical way so as to avoid damaging its power or eroding a company's reputation.

Business systems, databases & software (technological resources)

A number of larger advertising firms have developed systems for analyzing market data and ad effectiveness. Many firms maintain databases of information for their clients, such as the results of advertising research into the effectiveness of various advertising forms and techniques. Some of these systems are supported by software.

Typically, these assets are less important to the firm than the assembled workforce or trademarks. In many cases, they are not recognized as IP because of national laws.

The management of such assets generally involves treating them as proprietary and not divulging them, also known as trade secrets, to outsiders.

Chapter 5 – A new role for IP in the advertising industry

From the interviews and research conducted in preparation of this study, it has been noted that a change is occurring in the advertising industry relative to IP that heretofore passed through the hands of the advertising agency to its client. The following section discusses that change.

Historical perspective

In the US , media advertising (previously primarily in newspapers) was sold to advertisers by newspaper salesmen. Newspapers would design an advertisement, place it in the paper, and bill the advertiser. This, in fact, is still the way advertising is sold by small local newspapers to local businesses.

As business grew, advertising agencies came into being, but their role was essentially to replace the newspaper sales employees. Advertising agents were paid on a commission basis, and a typical commission amounted to approximately 15 per cent of the newspaper's space charge. The advertiser paid the agent the newspaper's standard rate for space, and the newspaper charged the agency the standard rate less 15 per cent. The agency's revenue was the mark-up.

As competition among the media grew, the role of the advertising agency shifted to that of advertising client representative, rather than agent of the media supplier. This came to be the business model for advertising agencies throughout the US. Interestingly, the 15 per cent commission arrangement remained in effect even after the change in business model. Advertising agencies began to supply a wide range of services to clients, including designing advertising campaigns, as well as designing and executing individual advertisements for a variety of media outlets. The agencies' compensation, however, continued to be based on a commission (by now 15 per cent on monies spent for media and 17.65 per cent on monies spent for production). There were those in the field⁵⁷ who advocated moving away from the commission system, but it remained the primary model.

The commission compensation model

The commission arrangement permitted advertising agencies to participate in the success of their advertisers/clients. As an example, if a particular advertising campaign proved to be successful, the advertiser presumably enjoyed greater sales revenue, and presumably greater profits. That, in turn, caused the advertiser to place more advertisements, which of course increased the advertising agency's commission.

Advertising agencies therefore had a strong incentive to create successful advertising programs for their clients. Advertising agencies sought to employ creative and imaginative people, who were then paid well and became key success factors for agencies. This is still true today. Figure 10 shows the various parties involved in the process of creating advertising.

In Chapter 2, we discussed the value chain in the advertising industry. We can also make use of that illustration to observe the "flow" of IPRs among the parties involved. In simple form, we illustrate in Figure 11 the typical interactions among the parties in developing an advertising program for a client-advertiser.



Figure 10 – The parties to the process

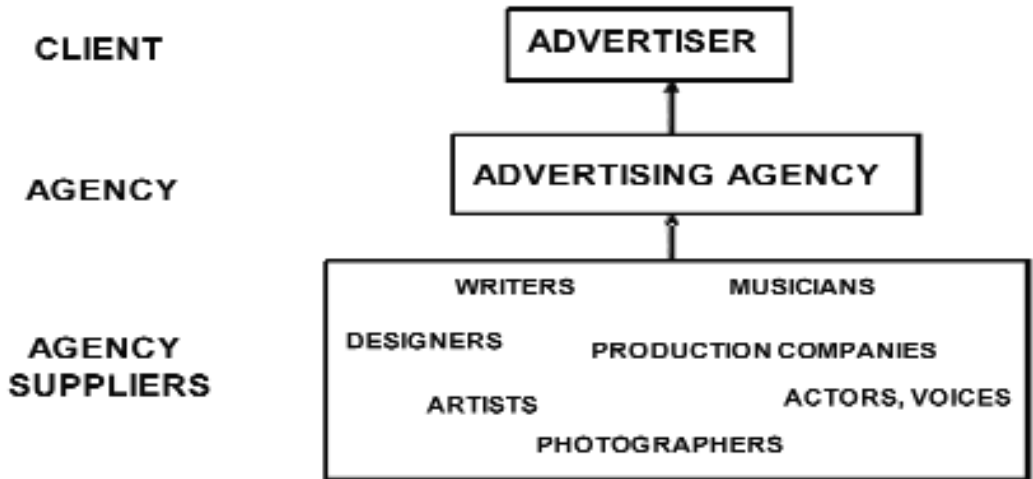
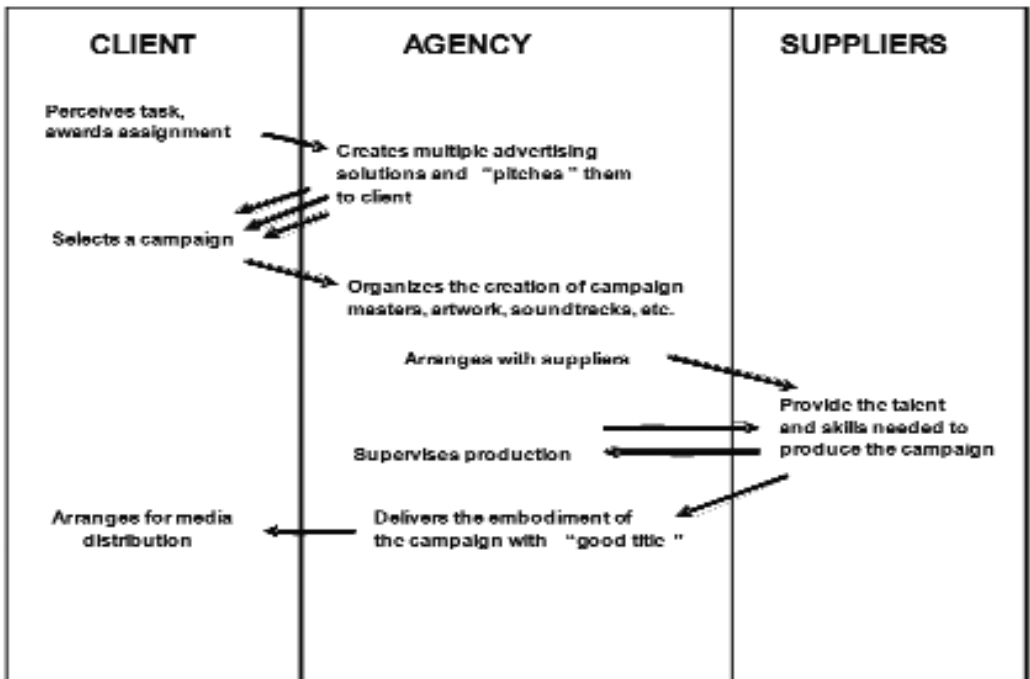


Figure 11 – Interaction of the parties



In its traditional form, several alternative campaigns are developed in tentative. Traditionally, several alternative campaigns are proposed by the agency. These are

presented (“pitched”) to the prospective client-advertiser who selects one theme. The pitches are conceptual in nature, and formal IPRs are not involved at that stage.

The agency then further develops the chosen campaign and often seeks outside suppliers to furnish specific artwork, audio or video components and the like. At this point, formal, recognizable IP is emerging.

In most IP regimes, the copyright associated with an original work reside with its creator. This underlying philosophy suggests that a “copyrighter” employed by an advertising agency owns his or her work product and has the right to exploit it to the exclusion of others. It has come to be widely accepted, however, through jurisprudence, that by accepting employment, an employee agrees to turn over ownership rights to the employer. Thus, “work-for-hire” belongs to whoever does the “hiring.” Outside of the employer–employee relationship, however, there must be some formal agreement between the parties concerning the ownership of the IP created.

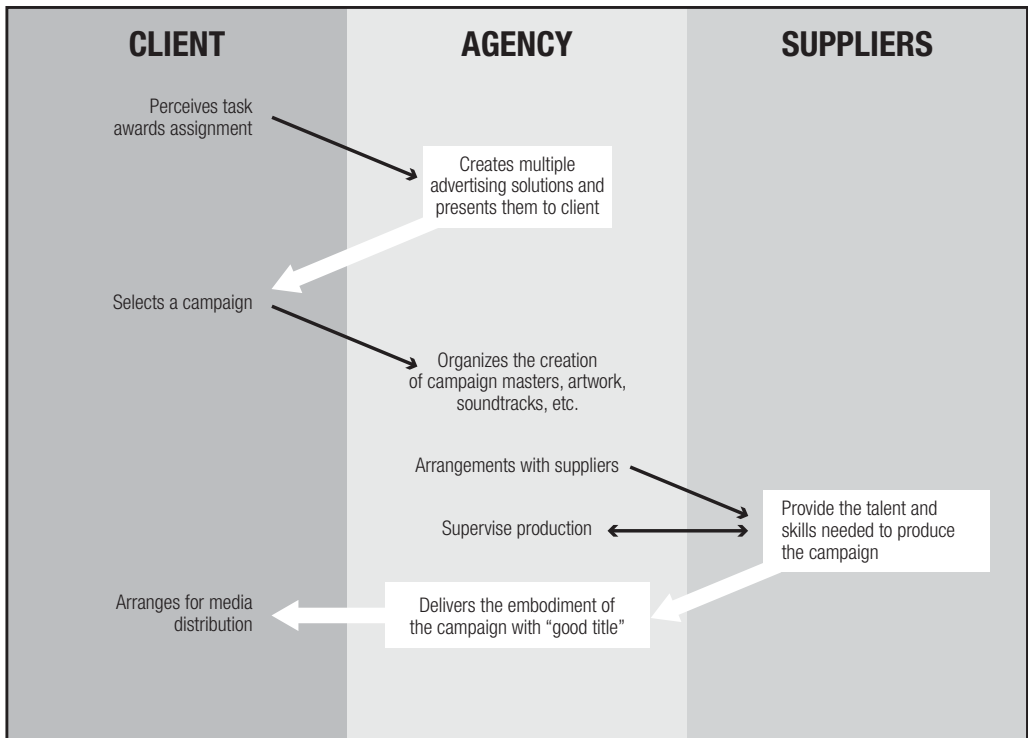
So when an advertising agency uses the services of outside suppliers of creative content – such as artists, actors, writers or photographers – it must have a contractual agreement specifying the IPRs that it will acquire under the work-for-hire arrangement. This does not systematically equate full ownership rights. Many creators only transfer partial rights that are limited in time (e.g. five years), use (e.g. to advertising for automobiles) or geography (e.g. a nation or region).

In the traditional model of the flow of IPRs among parties, the rights to the IP that the agency creates or contracts for are turned over to the client–advertiser by the agency, in return for the right to receive a commission based on the future cost of media placements.

This traditional IPR flow is illustrated in Figure 12. We observe that very few, if any, IPRs are “stuck to the fingers” of the agency. All IPRs were transmitted to the client–advertiser.



Figure 12 – IPR flow under the compensation-based model



In the period from 1950 to 1970, the advertising agency business grew very strongly in response to the rapid growth of consumer packaged goods advertisers. In addition, there was a “stacking effect” on commission compensation, because media rates were also increasing by 10 to 15 per cent annually. Commission structures were sometimes changed, but they were not reduced and remained the primary compensation system for advertising agencies. Therefore, profits in the advertising agency industry were very high, and agencies that were able to create successful advertising programs became highly valuable.

The recognized earning power of the advertising agency industry attracted a great deal of merger and acquisition (M&A) activity. During the 1980s, there were many acquisitions of advertising agencies – often UK companies acquiring US agency groups because of the demonstrated earning power of US agencies. For example, the WPP Group acquired the Olgivy Group for a price of USD 864 million which was, at the time, the highest price ever paid for an advertising agency. In fact, startlingly high prices were the norm during this flurry of M&A activity.

The recognition of the wealth produced by advertising agencies caused a backlash among advertisers. They realized that the commission system had caused (in their eyes) an undue amount of money to flow to advertising agencies as they creatively served growing consumer markets.

A fee-based compensation model

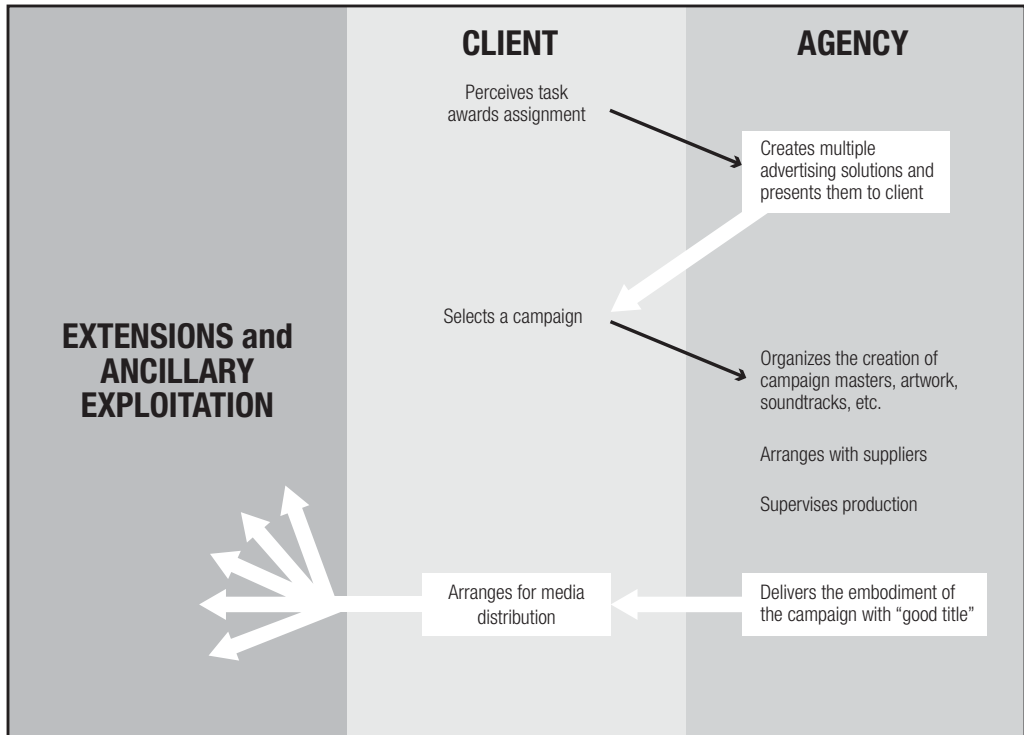
This recognition caused large advertisers to insist on some form of fee-based compensation in their negotiations with advertising agencies. This pressure eventually killed the commission-based compensation scheme for the advertising industry in the US and, to a great extent, worldwide. Much of the world's advertising business is done among giant multinational advertising groups and large multinational corporations. It is therefore understandable that the business models used by them eventually become the model for the industry worldwide.

Some client–advertisers have also insisted on taking ownership of all “pitch” ideas, not just the one chosen for the campaign, arguing that they paid for their development.

Under the fee-based model, in its simplest form, an advertising agency is engaged to create an advertising campaign; is compensated at an hourly rate or on an overall fee basis; and delivers the campaign to the advertiser. Its role is then over. Obviously, large advertisers sometimes maintain long-term relationships with advertising agencies, but compensation is made on a project-by-project basis, not as before. The flow of IPRs under this system is illustrated in Figure 13.



Figure 13 – IPR flow under the fee-based model



We observe that, in this model, the client–advertiser might enjoy additional profits in using the IP created by the advertising agency for product extensions or ancillary exploitation, without bearing the additional cost of an agency commission.

An example of a fee-based model is the current advertising campaign of Staples, Inc., the world’s largest office supply retail store chain with over 2,000 stores worldwide in 21 countries. The campaign is built around the phrase “That was easy,” which is a registered service mark. This campaign was initiated in 2003, and the creative development was the work of the Martin/Williams Advertising Agency. In 2005, Staples announced the launch of the Staples “Easy Button” Figure 14, also trademarked, as a desk accessory. This device contains a battery-powered chip that causes a voice to speak the words, “That was easy” when the button is pressed. Staples sells the desk accessory at a current price of \$4.99.⁵⁸ According to several in the industry whom we interviewed, Staples used the IP developed in its original advertising campaign, and the Martin/Williams Advertising Agency had not participated in the success of the desk accessory, a product that grew out of the original advertising concept.

Figure 14. The Staples “Easy Button”



As a result, advertising agency profits and employee compensation have fallen substantially from the halcyon days of two decades ago.

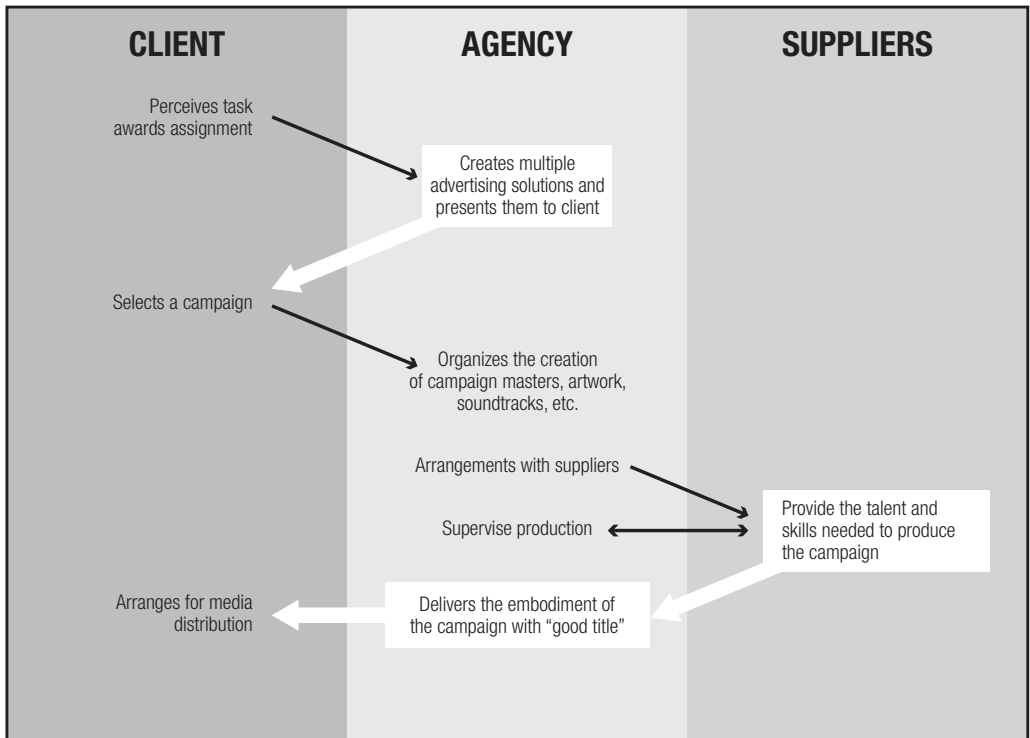
A new incentive model?

In the face of all this, advertising agencies have become increasingly uncomfortable with this compensation arrangement. Primarily, they complain that this arrangement does not adequately compensate the agency, especially where the agency is creative enough to build a highly successful advertising campaign for its client. The agency does not participate in the success of that campaign for its client. The benefit of a successful campaign to an advertising agency is seen in the extent to which it leads to additional clients or enhances services to existing clients.

In response, advertising agencies have begun to understand and focus on the value of the IP that they create for their clients. One proposed solution is that an advertising agency should retain ownership of the IP it creates for an advertising campaign and license it to the client for use in specific products or services, for a specific time period, and perhaps in a specific geographical area. The resulting license fees would then reward the advertising agency in much the same fashion that the prior commission arrangement did. Figure 15 illustrates how this might work.



Figure 15 – A new participation model



One can observe from this illustration that, early in the process, the advertising agency would take on the ownership of the creative content of its advertising “pitches.” While much of this material may not be protectable as IP because it is in an embryonic stage, it nevertheless represents information of value to the agency. The most important element of this new compensation model is that an agency would not turn over the IP it created or contracted for but would license it to the advertiser. In this way, as long as the licensed IP was used by the advertiser, the agency would benefit in the form of royalty income. Presumably, the more successful the advertising campaign, the longer and more extensively it would be used by the advertiser, enhancing the potential royalty income to the agency.

Another important element of this compensation model is that the agency would participate in product or service extensions using the advertising campaign or in ancillary products using the licensed IP. The client–advertiser would have to negotiate a new licensing agreement with the agency if it wanted to extend its use of the IP. This could be an important component of agency compensation.

The following example illustrates how a participation model compensation scheme could benefit an advertising agency. A child character named “Baby Bob” was created by an advertising agency in Los Angeles in 1999 for an Internet company called “Freeinternet.com.” This e-commerce company was subsequently dissolved, but the advertising agency apparently retained the rights to the Baby Bob character. In 2002, CBS (a national TV channel) aired a sitcom featuring Baby Bob after negotiating an arrangement with the same advertising agency. The show was not popular and went off the air after a short period of time. In 2004, the Quiznos fast-food chain retained the services of the advertising agency and began using Baby Bob in its advertising campaign. Presumably, the advertising agency retained ownership rights in the Baby Bob character and concept, and it is now in its third “life.”

Figure 16. A snapshot of Quiznos web page with the Baby Bob brand





Implications for IPR management in the advertising industry

We cannot be sure that advertising agency compensation schemes will revert to some form of participation paradigm. It is impossible to foretell how the present tension between agencies and client–advertisers will be resolved. It is reasonable to assume, however, that in at least a portion of future agency–client agreements, there will be some form of a participation paradigm. Therefore, agencies should be prepared for the likely results.

- If the new participation compensation model becomes common practice, advertising agencies will own various types of IP that they had never owned before, including advertising and market materials, plans, sketches, layouts, copy, finished content, promotional materials, commercials, films, photographs, illustrations, transcriptions, and literary and artistic materials.
- These materials can only generate value for advertising agencies through successful exploitation.
- Successful exploitation includes using IP within the agency, or making IP available through joint ventures or other types of alliance and, very importantly, possibly licensing the use of IP to entities other than the agency’s original client.
- Advertising agencies will need to educate themselves as never before in the proper protection of the body of IP they will gradually accumulate.

Chapter 6 – Best practices for IPR management in the advertising industry

It is clear that there are two potential trouble spots for advertising agencies related to the movement of IPRs as illustrated above in Figure 15. One is the transfer of IPRs from outside suppliers to the agency, and the other is the transfer to the client–advertiser. Simply stated, the agency must obtain appropriate IPRs from its outside suppliers so that it can deliver what is needed to the client–advertiser for the advertising campaign.

In the new incentive model illustrated in Figure 15, the same trouble spots occur, but are exacerbated by the added complexity of potential agency ownership of IPRs.

Some of those complex issues are briefly discussed below:

Protect creative ideas and concepts

- Creative ideas and concepts at the “pitch” stage of development must be carefully protected in the same way that proprietary technology is protected. Agency management must understand that much of this material is not protectable except by keeping it highly confidential and in the agency’s possession.

Avoid infringing 3rd parties’ rights

- It was very clear from our interviews that the primary cause of litigation against advertising agencies arises from their misuse of the IP of others. A great deal of information is available today from many sources, especially the Internet. The tendency is to assume that much of this information is in the public domain and can be used commercially by the agency in serving its clients. This is not always true.
- One of the primary features of IP is the extent to which IPRs can be subdivided among parties. As an example, if one wishes to use published music in an advertising commercial, it may be necessary to get permission not only from the publisher, but also the composer, the artists (and their estates), recording companies, distributors and others. Permission from only one source may not be enough.

Agree on clear scope of IPRs used or contracted

- ➤ Another primary feature of IP is the extent to which IPRs can be subdivided among interests and uses. As an example, an advertising agency might want to use the services of a freelance writer to create copy for use in print advertisements. If the freelance writer is the sole owner, the work product is not automatically a “work-made-for-hire”, and a contract between the agency and freelancer is needed. What if the client–advertiser subsequently wants to put the copy on a CD to send to customers? If the contract with the freelancer specifies use in print form only, there could be a problem.



Search additional opportunities for exploiting one's own IPRs

- Be extremely sensitive to exploitation opportunities for the IP that your agency might be accumulating. It may be necessary for an agency to set up a separate employee group tasked with identifying such exploitation opportunities. Managing IPRs entails not only seeking out opportunities for their use but also carefully evaluating those opportunities as to their profit-making potential and their potential to cause damage to the IPRs. For example, if an advertising agency were to license a body of IPRs to its advertising client, it must also ensure that it does not license some of those rights to another entity for use in a way that might damage the rights and cause the original advertiser to cease using the material. In other words, it is important to check whether the IPR has been licensed to one/more advertising client(s) and, if so, whether it is covered under an exclusive, sole or non-exclusive license agreement and what geographical territory is specified in that agreement.

Have clear and exhaustive agreements with clients on transfer of IPRs

- If your client still insists on transferring IPRs from the agency to the client, use different kinds of contracts to satisfy the client's demands. A possible contractual regulation could be that the IPR only devolves to the client after a minimum contract duration. If the client cancels the contract before this term is up, the IPR stays with the agency. This helps to recoup initial investments and prevents clients from appropriating creative ideas without really paying for them. Another possible contractual regulation could be that the IPRs devolve to the client only for an assigned period (e.g. two years). After this period, the IPR reverts to the agency, and the client has to license it in or the agency could use it for another campaign.

In the case of devolvement to the client, you should still be aware of the value of your IP. Calculate your campaign budget, including the ideas created and lost exploitation possibilities.

Protect, protect, protect

Companies often spend much time and money creating a successful advertising campaign. Therefore, it is important to protect IP assets so that others do not unfairly copy or use innovative creations.

With the growing need for an attractive market presence in today's very competitive business environment, competitors are likely to copy, imitate and take advantage of good creative inspiration, design, skill and effort. Remember that only the good examples are copied; nobody will copy a publicity or advertising flop. Therefore, companies (both advertising companies, as well as businesses using advertising) should establish appropriate policies and strategies to identify and protect their creations through legal systems and, in particular, the IP system. Such policies and strategies may include:

- (a) Systematically alerting the public and potential infringers or copycats to the fact that advertising material is legally protected under copyright law. This may be done simply by using a **copyright notice** (which includes the symbol © or the word "Copyright"; the name of the copyright owner and the year in which the work was first published);
- (b) Registering the advertisement and any other material protected by copyright (including, for example, texts, photographs, a website) with the national copyright office (in countries providing for such registration (e.g. the US);
- (c) **Registering trademarks, trade names and logos:** trademarks are typically words, designs, pictures, logos, numerals. Recent technological developments permit the creation of new and more creative marks, such as animated/moving image marks and sounds, which are particularly suitable for advertising and ideal for the Internet environment. Some countries allow the registration of such non-traditional trademarks;⁵⁹
- (d) **Registering a trademark as a domain name or a domain name as a trademark.** A trademark and domain name may be inseparably linked. It is frustrating for customers when they cannot find a website easily, and frustrating for companies when customers find the site of an unrelated company or, even worse, when they end up on the website of a competitor. Therefore, it may be strategically useful to register a trademark as a domain name before someone else does. Internet-based companies, after first creating and registering their domain name, should



also consider registering that domain name as a trademark, thereby significantly enhancing corporate identity.

- (e) **Using trademarks consistently and properly** in all promotional material. One should only use the specific font, color size, or other features that are part of the trademark. This will enhance the distinctiveness and value of the trademark over time. All trademarks should be marked with the **trademark notice** ®, TM, SM or equivalent symbols;⁶⁰
- (f) Considering the possibility of **patenting** technical solutions, developed for or in the framework of an advertising project, as well as innovative advertising technologies and online business methods, in the countries where such protection is available (e.g. US);
- (g) **Registering industrial designs** and graphic creations under design laws, where such an option is possible and feasible;
- (i) Taking precautions to prevent inadvertent disclosure of **trade secrets**. Any confidential business information that gives a business a competitive advantage, such as sales methods, consumer profiles, lists of suppliers, manufacturing processes, marketing plans, a great idea for an advertising campaign, etc., can be protected by trade secret law or laws on unfair competition. However, once a trade secret is disclosed to the public, even accidentally, it is no longer possible to protect the information.
- (h) Avoiding using unpublished information related to new inventions, technologies and patents for publicity or advertising campaigns. In order to obtain a patent, an invention must be "new" or "novel". This means that an invention must not have been disclosed to the public prior to the filing of a patent application. If a business has conceived a valuable invention for which it wishes to obtain a patent, it should abstain from any marketing efforts or disclosure of information relating to the invention prior to filing a patent application. When a product is presented in advertising and the product description discloses its innovative qualities, such a disclosure will most likely be an obstacle to obtaining patent protection.⁶²

- (j) Using factual protection methods to prove copyright ownership. For pitch material, a factual protection method could be for the agency to send to itself the pitch material by certified mail, without opening it. In addition, depositing the pitch material with a notary could help to prove who created the campaign first.

If a company decides to commission an advertising agency or a consultant to create an advertisement or publicity, it should ensure that all who have access to its trade secrets or confidential business information are bound by a confidentiality or non-disclosure agreement. This will provide protection against unauthorized disclosure of the company's know-how and trade secrets.

Trade secrets and other confidential information should not be disclosed in advertising. Publishing photographs of a secret manufacturing process or the address list of clients or suppliers in advertising or on a website could have disastrous consequences.

However, protection is not worth anything if agencies do not react to infringements. Lawsuits tend to be long and costly, and many agencies do not see a positive cost-benefit ratio in them. But lawsuits are not the only possible course of action. In-house attorneys can send "cease-and-desist" orders. In addition, infringements by competitors should be publicized. The fear of harming their reputation would act as a deterrent to potential infringing agencies. These measures are not as aggressive as a lawsuit and may not bring in much money, but they could help to improve industry awareness of IPRs.



Chapter 7 – Checklist of issues to be addressed when assessing the role of IP in an advertising business

The following checklist highlights different issues that should be taken into account in managing IPRs in the advertising business. To systematize the process of IPR management, the checklist is organized stepwise and follows the processes of assessment and valuation, namely:

- (i) Identification of intangible assets
- (ii) Analysis of whether some intangible assets may be protected as IPRs – (also known as an IP audit)
- (iii) Valuation of IP assets
- (iv) Protection of IPRs, managing and using them to add value to your advertising business.

(i) Identification of intangible assets

First of all, it is important to analyze a business to identify the intangible assets that create its value. To do this, all possible intangible value drivers should be compiled and listed. A non-exhaustive list of possible intangible assets and IPRs can be found in Table 6, and a more detailed description can be found on page 46-49.

(ii) Analyzing whether some intangible assets may be protected as IPRs

Differences between intangible assets and IP

Not all intangible assets can be protected under IP law. Consequently, it is necessary to analyze the intangible assets identified to determine which of them fall under the category of IP and can be protected by a legal instrument. For example, a system for quality control is an intellectual asset but not IP. But if an advertising agency creates a logo, it can be protected as IP and becomes an IPR. Page 32 defines IP, while page 46 gives a list of intangible assets and IPRs. Table 6 shows which type of creative output can be legally protected under IP and other laws.

Property ownership

It is important to clearly identify who owns IP. Many types of IP can be created as part of an advertising campaign, and ownership could reside with the original creator (employee or subcontractor), the advertising firm or the firm's client.

Legal standing

It is also important to identify the legal standing of the various types of intangible and IP assets that can flow from an advertising campaign. Companies need to know which of these have (or may have) legal protection and which require special protection by the owner (such as trade secrets).

Some IPRs, such as copyright and trade secrets, may not have to be registered with a government agency, but have legal protection simply by the fact of their creation (copyright) or through special protection by their owner (trade secrets).

(iii) Valuation of IP assets

To ensure optimum management of IP assets, it is necessary to determine their monetary value. Various factors should be considered in this process.

Forecasts

Appraisals are forward-looking, so forecasting is nearly always important. Forecasts should reflect "reasonably expectable" future events. When speculative exploitation of IP is included, it should be so identified.

Where there is no past experience to use as a benchmark, look for an analogous situation that can serve as a guide. The expectations for embryonic IPRs might be based on the proven performance of other IPRs that also had an embryonic start. Remember that forecasts are time sensitive and based on economic and market conditions at a specific moment.

In valuing property as of a particular date, only the information available at the time should be included in calculations. Hindsight should not be used.



Research

An appraisal is an opinion based on facts, so careful research is essential. This is especially true in the valuation of IPRs, because the range of potential exploitation can render an estimation of the potential economic benefit very difficult.

Research should be guided by a protocol, to ensure that it is exhaustive and unbiased. Data collection should be multisourced.

Extensive personal interview contact is often necessary within the IPR-owning enterprise to ensure a complete understanding of current and possible future exploitation.

If unrestricted investigation is not possible or is denied (as might be the case during litigation), the valuation report should make that clear.

External or independent experts may be required to supplement particular areas of knowledge.

Valuation methodology

As already mentioned in page 43, selecting the appropriate valuation method depends to a large extent on the valuation context. The following paragraphs describe important issues to be considered in selecting the valuation methodology.⁶³

Cost method

Include **all** sources of cost of the underlying IP asset. As an example, the cost of creating computer software should include expenses associated with testing, managing the project and “soft costs” such as overheads, insurance and labor benefits.

Market method

Analyze transactions that might appear comparable in order to detect unusual conditions that might disqualify them.

Be aware that market forces continually change and can do so fairly rapidly. This can also disqualify transactions that might appear to be comparable.

The range of potential exploitation possibilities for IP makes it difficult to establish comparability of market transactions.

Income method

Forecasted income streams should include all *reasonable exploitation* that makes sense from a business standpoint and that is permitted by the rights being appraised. This is true whether or not the IPR owner is currently exploiting the full range of rights.

It may be necessary to separate income streams from different types of exploitation in order to reflect their particular characteristics and to observe the sensitivity in the overall value.

All IPR exploitation requires some investment in complementary assets. The return on that investment must be reflected as a reduction in cash inflow.

When using royalties as the type of income attributable to IPRs, be sensitive about the imprecision inherent in “market” or “industry standard” royalty rates. Such royalty rates may represent payment for only a portion of the total bundle of rights associated with IP ownership and may therefore understate the income attributable to IP.

Ensure that discount and capitalization rates are tax compatible with the income streams to which they are applied (i.e. use pretax rates for pretax income).

(iv) Protecting, managing and using IP assets to add value to your advertising business

After identifying and valuing the agency’s IP assets, decisions have to be made about the most gainful use of such assets.

Legal instruments and expert help

Once the value of IP assets has been established, the agency’s management should decide if one or another asset should be formally protected and by what means. Table 6 shows which legal instruments are available for the different types of IP assets that may be created by an advertising agency.



In any case, an IP professional (e.g. lawyer) should be consulted in selecting the optimal protection strategy for IP assets. Some IPRs, such as copyright and trade secrets, may not have to be registered with a government agency, but have legal protection simply by the fact of their creation (copyright) or through special protection by their owner (trade secrets).

Devolvement of the creative output

As a matter of policy it is useful and beneficial for an agency to take the necessary steps to protect its IPRs (i.e. creative output, logos, sounds, etc.), irrespective of whether it will keep that IP and license its use by clients of other agencies, or whether such IPRs would be assigned to the clients for whom the project has been developed. Well-defined and properly protected IPRs constitute a competitive advantage for which clients may be ready to pay a premium price.

If the output devolves to the client, efforts should be made to ensure that the agency still benefits from the mandate and creation of the IPRs. Some examples of contractual possibilities in this respect are:

(a) Budgeting the devolvement of the IPRs

Depending on the right of use, a right of use, unlimited in time and space, has more value (is more expensive) than a right of use subject to geographical or temporal limitations.

(b) Minimum contract terms

If the client cancels the agency contract before the minimum contract term, the created output devolves to the agency and the client has to license it.

Finally, it should not be forgotten that IPRs are intangible assets that can be used simultaneously by many users/clients (similar to music or software) and can thus generate income from multiple sources.

Exploitation of IPRs

If the agency decides to keep the IPRs, it should consider different ways of exploitation, such as:

- Using the created output as a creative impulse for a different campaign;
- Licensing characters or concepts to other clients (page 58 shows such an example);

- Using very successful brands or logos to help promote the advertising agency.

Some final words from the authors:

The work on this study confirmed the ancient philosopher's words: "the more we know, the less we understand!" The preparatory work gave us new insight into a world in which, at first glance, there is little room for IP management but where, after taking a closer look at the various aspects of the work of advertising and publicity agencies, we are convinced that there is a vast, unexplored field for IP management. We hope that this first effort to explore the place of IP management in the advertising business will encourage advertising and IP professionals to spend some time and thought on how to make efficient use of IP management and valuation techniques in order to tap into its hidden value in the advertising business.

We hope that this study will encourage IP professionals and those who will shape the future IP system to analyze the challenges of the present system (e.g. speed, cost, enforcement of rights, etc.) and find appropriate solutions that will permit the advertising industry, in particular small ad agencies, to derive maximum benefit from the IP system.

We would like to thank WIPO for giving us the opportunity to explore a new territory for IP management and valuation, and we encourage the readers and users of this study to follow up on and share with us critical and constructive proposals, with cases and practical examples, to make it a real-life practical guide on IP management for advertising professionals.



ANNEX A

Interviews, examples and case studies

The following advertising companies were interviewed in preparation for the study

Interpublic Group, New York, USA

Harris, Baio & McCullough, Philadelphia, USA

ReedSmith LLP, New York, USA

American Association of Advertising Agencies (AAAA), New York, USA

Major advertising industry law firm, New York, USA

Major advertising agency, California, USA

DreamLand GmbH & Co KG, Germany

Small advertising company from northern Germany

WE DO communication GmbH, Berlin, Germany

Large advertising company, Germany

Large advertising company, Switzerland

Saatchi&Saatchi Simko, Geneva, Switzerland

Interviews conducted by Gordon Smith

Interview with two executives from the Legal Department of Interpublic Group

Interpublic Group - 1114 Avenue of the Americas
New York, NY 10036, USA
<http://www.interpublic.com/>

August 28, 2008

Interpublic Group is one of the four largest advertising agency groups in the world, with 43,000 professionals and revenue in 2007 of USD 6.56 billion. Its McCann Erickson Worldwide company is the world's third largest, with revenue in 2007 of USD 1.62 billion.

Interpublic Group always operates through written agreements with its clients. For large multinational clients and large advertising campaigns, the contracts can be quite voluminous. At the smallest level, the contract could be in the form of a letter of agreement spelling out the deliverables and the fee and time schedule.

One of the biggest issues currently is who owns rejected materials. When a client-advertiser begins a campaign, it seeks creative ideas from one or more advertising agencies. Typically, an agency will present four or five "pitches" for campaigns. These pitches may contain "storyboards" or mock-ups of print advertising, pictures of characters or artwork, or perhaps even digital videos of sample materials. A good deal of work goes into the preparation of these creative ideas by the advertising agency. Traditionally, the client-advertiser will only end up owning the particular campaign that it selects, that is, the rejected material remains the property of the advertising agency, which is free to use that material in other campaigns for other clients.

In the period during which client-advertisers began to resist the commission compensation paradigm, they began to negotiate agreements according to which they would own all of the pitch materials, not just the one selected and used. Some



even pushed to own creative ideas that were in such formative condition that they would not be protectable as IP. The law in the US stipulates that such creative material remains the property of the creator, unless there is a specific agreement to the contrary with another party. Client-advertisers, therefore, sought to put such agreements in place. This remains an issue in negotiations between advertising agencies and client-advertisers.

The interviewees also stressed that another trouble spot in the flow of work is ensuring that the advertising agency has proper contractual arrangements with the suppliers it uses to create the campaign. These include artists, photographers, acting or voice talent, copywriters and other creative freelancers.

The advertising agency must ensure that it obtains sufficient guarantees as to the time period during which these materials can be used by the advertiser, including whether there are any location restrictions and the like. Without this, the advertising agency is not able to turn the ad campaign over to its client-advertiser with proper "title".

When asked what advice the interviewees would give as to other areas of difficulty relative to IPRs, the response was that the area that probably contributes the most to litigation for them is when someone has not been careful with the IPRs of others. That is, written material, photographs or artistic materials have been used that were seemingly in the public domain but turned out not to be. They stressed the fact that most creative materials such as music, photos, writing and the like involve many different entities, each of whom has some rights to the property. One cannot assume that, for example, obtaining rights from a music publisher will clearly authorize the use of a piece of music. It may involve obtaining rights from the composer, musical groups, recording companies,, and others. Identifying these right holders also may entail a worldwide search.⁶⁴

Interview with the Vice President & Creative Director of

Harris, Baio & McCullough - 520 S. Front Street
Philadelphia, PA 19147, USA
<http://www.hbmadv.com/>

July 30, 2008

HB&M is a full-service advertising/public relations firm. Annual revenue is in the range of USD 80 million. The company has 50 employees located in Philadelphia, PA, and Charlotte, NC.

Also present at the interview was an acquaintance of the interviewee who had lengthy experience in the film production business, now digital, for TV, Internet ads and infomercials.

This report combines the comments of both individuals.

HB&M – client relationships

It is standard practice at HB&M to include a copyright notification with proposals and presentations, to make prospective clients aware that they should not use the ideas presented unless they retain the firm.

Client agreements range from a simple letter of confirmation to a more formal contract. The letter of confirmation states what will be done, in general terms, and the estimated fee, whereas the contract provides more detail. There is no specific reference to who owns the IP created by the ensuing work.

However, the clear unwritten rule is that all IP created is the property of the client. HB&M will not use anything (even small clips of ads) for another client. On rare occasions, if a client wants to use something done for another client, HB&M directs them to contact the other client directly to negotiate.

Traditional advertising agency fees were 15–17 per cent of media cost. Today, more and more fees are based on hourly rates or flat fees. Many clients use HB&M to create a campaign and then use media buyers to disseminate the program.



HB&M – subcontractor relationships

HB&M uses many subcontractors for photography, modeling, voice, artwork, copywriting, script writing, film production, music, vocalists.

HB&M requires that all subcontractors do their work as “work for hire,” so that HB&M has full control over their output and can then present it to their client with a “clear title.”

HB&M has contractual arrangements with all subcontractors, and seeks to secure rights without a time limit for any use. Some subcontractors will not grant perpetual rights, but HB&M will accept a shorter period, usually five years minimum. HB&M seeks no restrictions on use of the material (e.g., a photo originally for a brochure that is later used on a billboard or in a TV commercial).

Traditionally, subcontractors retained their rights to their material and charged “by use.” HB&M will not do business this way anymore and tries, wherever possible, to use “stock,” non-copyrighted material.

HB&M always uses non-copyrighted material for brochures to be distributed overseas, because they have no control over the use made of the material by the foreign subsidiaries of their clients, which could lead to problems with copyrighted material.

Subcontractor – freelancer / individual creator relationships

Subcontractors also need to be able to deliver products to HB&M with a “clear title.” This would be the case when, say, a production company, delivering a digital master recording, hires actors, models, singers and the like

If the individuals are unionized, extensive union rules would govern the arrangement. The main unions in the US are the American Federation of Television and Radio Artists (AFTRA) and the Screen Actors Guild (SAG). Most large, multinational advertising agencies use union artists exclusively.

If the individuals are not unionized, the subcontractor negotiates a contract with them to ensure that it can turn over the product to the ad agency client without any restrictions on its use.

Interview with Mr. Douglas J. Wood, Partner, Advertising, Technology & Media Law

ReedSmith LLP - 599 Lexington Avenue
New York, NY 10174, USA
<http://www.reedsmith.com>

August 28, 2008

Mr. Douglas J. Wood

Partner, Advertising, Technology & Media Law
tel: +1 212-549-0377; e-mail: dwood@reedsmith.com

Background

A member of Reed Smith's Executive Committee and the firm's Advertising Technology & Media Group, Mr. Wood has more than 30 years' experience representing national and multinational companies in advertising, marketing, promotions, unfair competition, IP and e-commerce matters. He serves as legal adviser to several worldwide advertising industry trade organizations and is General Counsel to both the Association of National Advertisers (ANA) and the Advertising Research Foundation.

This interview was quite important, because Mr. Wood provided the historical and current context of the intersection of advertising agency compensation and IP ownership/valuation.

This major paradigm shift in the advertising industry has made ownership and market value of IP a focal point.

This subject and the information provided by Mr. Wood are fully discussed in Chapter 5 and are therefore not repeated here.

Publications

- Author of *Please Be AdVised - The Legal Reference Guide for the Advertising Executive*, published by the ANA (in its 4th edition)

This book includes a CD that contains sample forms useful in the advertising business.



- Co-author of *Legal Problems in Advertising*, published by Matthew Bender & Co. (in its 9th edition)
- Co-author of "The Internet and Advertising Law"; a chapter in *Advertising Law in Europe and North America*, published by Kluwer Law International

Interview with Mr. Michael D. Donahue, Executive Vice President American Association of Advertising Agencies (AAAA)

405 Lexington Avenue
New York, NY 10174-1801, USA
www.aaaa.org

September 4, 2008

Mr. Michael D. Donahue

Executive Vice President

Tel: +1 212-850-0702; E-mail: donahue@aaaa.org

Established in 1917, the AAAA has, in recent years, advocated forms of value-based compensation for agencies on behalf of its advertising agency membership.

Mr. M. D. Donahue confirmed that the 1970s and 1980s saw the beginning of the demise of the 15 per cent commission-based compensation. He noted that at the time, media costs were inflating at a rate of 15 to 20 per cent annually and that this, combined with the fast-growing demand for consumer goods, was the driver of the increased pressure from client-advertisers to opt for a work-for-hire, fee-based compensation system. He also noted that some attention was given to the management consulting business where value-based rates were in use and fees were not totally dependent upon standard hourly rates.

He cited the example of Mary Teresa Rainey, who had had a very influential career in the advertising industry in the UK and who had founded her own company, Rainey Kelly Campbell Roalfe, in 1993. She had been one of the early advocates of the move

from commission income to agencies charging for ideas and IP. After helping spark a considerable debate about that change in the compensation paradigm, she had been a pioneer in introducing it in the advertising industry.

He noted that the commission system was actually a fairly good means of achieving value-based compensation, but agreed that there was no chance of its being revived as a compensation paradigm.

When asked what he thought the compensation system might look like five years from now, he said it was evolving toward a basic fee-plus-bonus system. He noted that, in the 1950s, many advertising agencies had made a lot of money by creating programs for networks. Those had been complete TV series such as “I Love Lucy”. They had been created by agencies for clients, and that work had been done on the old commission system. In his view, that type of advertising was coming back in the form of digital content, which was more extensive than a simple picture and text advertisement. He considered that content creation would be the new model and value-based compensation would come to be the norm.

Interview with a partner in a major New York City law firm specialized in the advertising field

(We granted the request of the interviewee that we not name him or his company)

September 3, 2008

The firm describes itself as the “Number 1 Marketing Communications Law Firm in the World”. It numbers four of the largest advertising agency groups among its clients. The firm comprises 100 attorneys located in New York City.

The interviewee is the head of the firm’s Intellectual Property; Entertainment, Publishing and Media; and New Media Groups, and is considered one of the top advertising, promotion and marketing lawyers in the US.



He corroborated the progression outlined by Douglas Wood, to the effect that advertising agencies had started out as agents only and that their creative work was an early add-on. He agreed that, during the 1960s and 1970s, because of sharp media price rises and the demand for consumer advertising, agencies had become very rich on the commission-based compensation paradigm. That was the point at which advertisers had begun to resist and push for negotiations toward fee-based services.

He pointed to two advertising campaigns that illustrated the change in the compensation paradigm – the “Baby Bob” character and the Staples Inc. “Easy Button” concept and product, both of which are presented in further detail in Chapter 5 of this study.

He also noted that, in the last four to five years, the nature of the services provided by advertising agencies had also changed radically, adding to the impetus to find new

He confirmed that those trends could be seen worldwide, primarily because they were being led by multinational agencies serving multinational clients. Most multinational advertising agencies were in fact groups of individual companies that were established entities in many nations worldwide. The same terms negotiated by the parent group with a major multinational advertiser might become the contract conditions for each local company. It was thus that the new compensation paradigms spread into local national markets.

The last four and five years had seen a substantial blurring between traditional advertising, character development, entertainment and the variety of content available to advertisers (including Internet-based techniques). As the needs of client-advertisers had changed, advertising agencies had responded with new techniques.

In its initial form, the compensation paradigm that replaced the traditional commission structure focused on the work-for-hire concept, according to which the advertiser would hire the advertising agency to create an advertising product. It would then pay the agency a fee for that creation, and the agency would turn that property over to the advertiser.

Nowadays, advertiser/agency deals are predominantly work-for-hire based. A growing minority of them typically involve a fee plus a bonus depending on the

success of the campaign. Obviously, measurements of success were very difficult to delineate (the old commission system was imperfect but acceptable for this portion of agency compensation). A lot of creativity was applied in the area of bonuses, or success fees. The interviewee indicated that there was now considerable receptivity to including that ingredient in agency compensation. A few years ago, it probably would have been rejected out of hand by advertisers.

Interview with the Chief Financial Officer of a mid-sized advertising agency located in California

(We granted the request of the interviewee that we not do name him or his company.)

September 12, 2008

The interviewee was recommended as having been at the forefront of advertising industry efforts to bring about changes in the compensation system.

He commented that the commission system was still active among advertising agencies and client-advertisers but was no longer common. The commission system was originally replaced by some form of fee-based system based on the traditional 15 per cent commission system, although calculated on a different basis. The 15 per cent amount was used by client-advertisers as a reference, when negotiating fees based on a mark-up of advertising agency costs.

In the interviewee's opinion, advertising agency work was now significantly under-valued, because it was often priced based on the cost of labor and materials with a modest profit margin added.

He and others in the advertising industry had advocated some kind of incentive-based system contingent upon the performance of the advertising campaign. Incentive-based fees could still be based on cost, but would include a bonus based on performance. He agreed that measuring performance was difficult. Some used an objective measure



such as comparing year-to-year sales of the advertised product or service, while others relied on subjective judgment about an advertising campaign's performance. Moreover, it was very difficult to measure the potential long-term results of a successful advertising campaign.

The interviewee's personal preference was for some form of value-based fee, such as that used in most of the consulting world, whereby hourly rates were based on the perceived value of the service provided rather than the cost of the labor involved.

He agreed that there was some experimentation going on within the industry to reflect the IPR element in the value-based fee structure. For example, advertising agencies were attempting to structure compensation arrangements to include ancillary rights for "non-advertising uses" of their IPRs. Some had even experimented with licensing and royalty rates for some elements of the advertising campaign. He felt that there would be a natural progression within the advertising industry towards the model used in the entertainment industry according to which the creator of an IPR owned it and licensed it to others to use.

Interviews conducted by Frauke Ruether

Summary of interview findings on how small and medium-sized advertising agencies handle IP matters (based on the interviews conducted)

Small and medium-sized advertising agencies (SMAAs) employ less than 50 people. They are seldom involved in international networks and frequently employ freelancers. SMAAs therefore have limited capacity with which to work in their creative business. This is why such advertising agencies will not employ own staff to manage IP matters. The CEO or management board is caught up in the daily workload and is seldom able to concentrate on or manage IP matters.

The interviews showed that SMAAs were aware that IP was an asset but they rarely used its full potential. Most smaller advertising agencies neither have nor

implemented strategic IP management. In general, SMAAs protect their agency names and logos as trademarks, and often own creative domain names as well. Patents are usually not owned, because no patentable IP is created. In addition, the patent system seems too complex and non-transparent for SMAAs, which would not have the resources (human and financial) to file and handle patent applications that entail costly external legal assistance.

Awareness of the IP system in general and IPRs used in business in particular varies widely. While some agencies pay close attention to IPRs (e.g. photos, texts, technology), obtaining licenses for all relevant IPRs, other agencies, and especially their freelancers, are less careful.

In most SMAAs, the IPRs created in the framework of a project are transferred to the agency's clients but the contractual regulations can differ tremendously. Some agencies do not use contracts to cover the transfer, while other agencies have very sophisticated transfer systems. Some contractual possibilities are, for example, minimum contract durations or time limited transfers. Often the calculation of the campaign budget includes the complete transfer of IPRs. The clients pay for the copyright and therefore gain the full rights of use.

Relations with freelancers are based on excellent contractual arrangements. The IP created by freelancers belongs to the agencies, and all creative output is automatically transferred to the agencies.

Infringements are mostly detected during the analysis of competitors' activities. Most agencies try to avoid suing violators, as lawsuits would be too expensive for them. In addition, the accurate determination of IP infringement is rarely known. Most SMAAs do not see possibilities for exploiting IPRs generated in projects in ways other than that for which the IPRs were initially created. The ideas and output are unique and too customized. They can only serve as an inspiration for future campaigns.



DreamLand GmbH & Co KG - Schwabstr. 43,
89555 Steinheim, Germany

September 18, 2008

Mr. Johannes Tiemann,

Director Marketing and Sales

j.tiemann@dreamland-mail.de

Founded in 1996, Dreamland is an advertising agency for new media and visual design. Today, Dreamland employs six professionals in the areas of marketing, design, print and new media. To offer a wide business spectrum to a wide range of customers (e.g. start-ups, SMEs, municipalities and global players), Dreamland works with partner companies in areas such as photography, illustration, text, public relations and audio.

DreamLand sees IP primarily in copyright and rights of use. The company name, logo and the domain are trademarks owned by the agency. All other (possible) trademarks are transferred to clients. Dreamland does not implement strategic IP management. The agency has heard about factual protection methods (e.g. sending a certified letter including the IP to itself and not opening it) but has not applied any, mainly due to uncertainty about legality.

The IP created devolves to Dreamland's clients. The calculation of the campaign budget includes the full transfer of IPRs. The client pays for the copyright and therefore gains the full rights of use. DreamLand does not process clients' trademarks or other IP but refers clients to an attorney. The IP created by freelancers belongs to the client as well. Dreamland holds agency contracts with all freelancers.

The contracts stipulate that freelancers are not visible in public. They further provide that the IP created is automatically transferred to the client. Infringements are mostly detected by market analysis. Per annum, the in-house attorney sends one or two "cease-and-desist orders". Most infringing companies are third parties (e.g. publishers, other agencies) who use clients' logos without permission or in a slightly modified form. DreamLand builds long-term relationships with its clients and therefore does not send them "cease-and-desist orders". However, if a client

switches agencies and the new agency uses the company's trademarks as having been created under the new agency names, DreamLand would send such an order to the other agency.

Dreamland is aware of IP assets. Its domain name trademark is already valued by a third party. Until now, its IP has not been exploited.

Interview with the CEO of a small advertising company located in northern Germany

(In view of the small size of the agency and the confidential details the CEO was willing to provide, it was decided not to name the agency.)

September 19, 2008

The agency interviewed was founded in 2000. Today, it employs 3 to 10 professionals and 10 to 20 freelancers in the areas of graphics, programming, etc. The main business areas are websites, online shops and design of advertising material. Customer relationships are built to become long-term ones.

The agency sees its main IP as residing in graphics and design elements, designs, usability and programming ideas regarding interaction design. Though aware of IPRs and their potential value, the agency does not own any IPRs. The main reasons it does not apply for IPRs are lack of knowledge about the application process as well as negative experiences. The agency does not seek patent protection, because it believes the patent regime is too complex and non-transparent for an agency of its size. To apply for patents without costly legal assistance is not possible for it. Negative experiences occurred when the agency applied for a trademark. The trademark was denied without a reason given and the agency lost a lot of money. Even though the agency does not own IPRs, it pays close attention to the IP that it uses in its work (e.g. photos, texts, technology). All IPRs applied are licensed. At the agency, there is no strategic IP management.



The IP created devolves to the agency's client, but the transfer is not contractually regulated. Most customers are not aware that IP was created during a campaign. They assume that they own it automatically, because it is part of the already paid for campaign. Only one out of 300 customers applies for a contractual IP transfer. If a customer were to switch to another agency, the IP would be lost to the agency (until now, no customer has left the agency, so the agency does not have any experience as to how it would react). The IP created by freelancers belongs to the agency, which holds contracts with all freelancers, and all possible creative output is automatically transferred to the agency.

Infringements are mostly detected during analysis of competitors. The agency does not sue violators. A lawsuit would be too expensive for the agency, and IP infringement cannot be accurately determined. The agency tries to protect itself by learning by doing. In the past, precise design drafts were made for a pitch. However, the agency realized that some of its draft designs that did not lead to a contract were being used by other agencies. Today, the agency's pitches are not as detailed as they used to be.

The agency is aware of IP as an asset and is interested in opportunities for its exploitation. It sees the main problem as the fact that many web users think everything designed and created for the Internet is free. This attitude makes successful exploitation difficult.

WE DO communication GmbH - Chausseestr. 13,
10115 Berlin-Mitte, Germany

September 24, 2008

Mr. Gregor Blach, CEO

blach@we-do.eu

WE DO communication was founded in 2002. Today, WE DO employs 30 professionals and some 5 freelancers. The main business areas are advertising and design, public relations, multimedia and events. Its main customers are SMEs and municipalities.

WE DO believes that its IP is primarily in advertising ideas (including disclaimers, slogans, headlines and motifs) and the whole advertising concept (with ideas for promotions and web pages). The WE DO name and logo are trademarks owned by the agency. WE DO also owns several domain names. WE DO's attorney applies for trademarks to protect logos and slogans developed for clients. WE DO does not have an IP management strategy. The way the IP created is handled differs from case to case and is not bound to one person.

The IP created devolves to WE DO's clients. In some cases, devolvement is unlimited in space and time whereas, in other cases, it must be renegotiated after two or five years. The calculation of the campaign budget includes the full transfer of IPRs. The client pays for the copyright and therefore gains the full rights of use. The IP created by freelancers belongs to the agency. It holds contracts with all freelancers, and all possible creative output is automatically transferred to the agency.

WE DO tries to avoid suing infringing clients or companies, due to a negative cost-benefit ratio and the fact that infringement is difficult to prove. WE DO is aware of the infringement problem and has stated that factual protection methods could help to prevent copycats. Furthermore, the agency suggests depositing all ideas for a pitch with a notary, which could help prove which agency created an idea first.



WE DO does not see opportunities for exploiting the IP it creates in ways other than the one for which it was initially created. The ideas and output are unique and too customized.

Interview with the Managing Partner of a big advertising company located in Germany

(In view of the confidential details the Managing Partner was willing to provide, it was decided not to name the agency.)

September 24, 2008

The agency interviewed is a German full-service advertising agency that is part of an international network of advertising agencies (Group revenue of over EUR 3 billion in 2007). It employs 150 professionals. Most of the work is done in-house, but a few freelancers are employed on occasion.

The agency owns copyright. Logos or graphics are not registered as trademarks. The agency does not have an IP management strategy, and there are several reasons for this. One reason is that the agency does not see a positive cost-benefit ratio for strategic IP management. Today, the main revenue stream for agencies comes from the production of advertising material, not from the IP behind the material. Even given that IP and creativity are unique selling propositions, they are not valued monetarily by the market. Another reason is that, unlike the strong legal certainty of sound trademarks, the agency sees legal uncertainty in the area of trademarks for designs and logos.

The IP created devolves to its clients. The calculation of the campaign budget includes the full transfer of IPRs. The client pays for the copyright and therefore gains the full rights of use. The IP created by freelancers belongs to the agency. The agency holds contracts with all freelancers, and all possible creative output is automatically transferred to the agency.

The agency is aware of the infringement problem. If it cannot be avoided, the agency would sue infringing clients to protect its business. The agency has already won lawsuits for infringement. The enforcement of legal claims is difficult if a competitor adopts or copies its ideas. The main punishment thus is that the infringing agency "makes a fool of itself". Legal consequences are unusual.

The agency does not see opportunities for exploiting the IP it creates in ways other than the one for which it was initially created. The ideas and output are unique and too customized, and can only serve as an inspiration for future campaigns.

Interview with the CEO of a large advertising company located in Switzerland

(In view of the confidential details the Managing Partner was willing to provide, it was decided not to name the agency.)

September 24, 2008

The agency interviewed is among the five leading advertising agencies in Switzerland and part of an international network of advertising agencies. The main units are online marketing, advertising and public relations. The agency employs 60 to 80 professionals and 1 to 10 freelancers. The freelancers work mainly in the area of creation and consulting.

The agency owns copyright and domain names. Logos or graphics rejected by clients are not registered as trademarks. Their creation is specific to the particular client and cannot be used in other cases. Only rejected but promising domain names are registered. The agency does not have an IP management strategy. IP is found by chance and not managed through an active process. The agency does not see a positive cost-benefit ratio in strategic IP management.



The agency's awareness of IP is reflected by its contractual arrangements regarding IP ownership. During the mandate, the client is allowed to use the IP. If the mandate ends, two contract options are possible. According to one option, all exploitation rights to the IP created devolve to the agency. The other option is based on a minimum contract term (generally three years). If the client cancels the contract before the minimum term, all exploitation rights devolve to the agency. This kind of contract helps ensure the amortization of the initial investment, which is funded by the agency to successfully launch a campaign. If the client cancels the contract after the minimum term, all exploitation rights devolve to the client. Another point that is contractually regulated is the ownership of rejected ideas and creations. All rights to rejected material (mandate and pitch) devolve to the agency. The IP created by freelancers belongs to the agency as well. Due to negative experiences, the agency it holds contracts with all freelancers. In the past, informal agreements had created problems. After cancelling them, freelancers demanded yearly payments for the IP created.

In Switzerland, infringement of advertising agencies' IP is fairly uncommon. Agencies try to avoid lawsuits, due to a negative cost-benefit ratio and to the fact that infringement is difficult to prove. Advertisers could say that "great minds think alike" and that, therefore, lawsuit outcomes are too uncertain. If a client were to adopt an idea without permission, the agency would only sue as a last resort. It is unusual that competitors adopt their ideas. In such a case, the agency would contact the infringing agency informally to clarify the situation.

The agency does not see opportunities for exploiting the IP it creates in ways other than the one for which it was initially created. The ideas and output are unique and too customized, and can only serve as an inspiration for future campaigns. The only way to exploit IP could be the trading of domain names.

The agency has seen that many clients are not aware of the fact that creativity is, among other things, related to experience. This often results in an unwillingness to pay for such experience. Therefore, they do not really pay for IP. Clients' preferred type of payment would be an hourly rate. However, the trend is towards a bonus system based on degree of success, which helps to develop a positive monetary reward for IP.

Interview with the New Business Director of a large advertising company located in northern Germany

(In view of the confidential details the Managing Partner was willing to provide, it was decided not to name the agency.)

September 25, 2008

The agency interviewed is a German full-service advertising agency. It is among the ten biggest owner-managed advertising agencies in Germany and is regularly ranked among the ten most creative agencies. It employs 140 to 160 professionals. The agency strives to do most work in-house, employing a few freelancers only infrequently.

The agency sees its IP primarily the communication of ideas. It owns copyright but has not applied for a trademark to protect the agency's name. The agency is aware of IP as an asset and follows a strategy to achieve the best possible monetary results from IP. Its strategy is mainly implemented through agreements with clients. The entity responsible for implementing the IP strategy is the CEO/Management Board. The high priority given to IP is due to the fact that many clients are not aware that the product they obtain is based on IP. This often results in an unwillingness to pay for it. The client's preferred payment would be by hourly rate. To receive a suitable payment for IP, strategic management is necessary.

The IP created devolves to clients on an unlimited spatial and temporal basis. The calculation of the campaign budget includes the full transfer of IPRs. The client pays for the copyright and therefore gains the full rights of use. The IP created by freelancers belongs to the agency. The agency holds contracts with all freelancers, and all creative output is automatically transferred to the agency.

The agency tries to avoid lawsuits, due to a negative cost-benefit ratio and to the fact that infringement is difficult to prove. The agency has already seen cases in which rejected pitch ideas were subsequently used by the pitching company. To prevent this, a German association in the area of communication and advertising unsuccessfully tried to implement "Idea Safe" as a factual protection method. The



concept behind the Idea Safe is that agencies could deposit pitch ideas and would then have proof that they had come up with the idea first.

The agency does not see opportunities for exploiting the IP it creates in ways other than the one for which it was initially created. The ideas and output are unique and too customized, and can only serve as an inspiration for future campaigns. Another reason is that older campaign ideas lose their "zeitgeist".

The agency does not have an implemented monetary valuation system. Valuation results from market success.

Interview conducted by Vladimir Yossifov

Interview with Mr. Pedro Simko, Chairman of Saatchi & Saatchi Simko, Geneva and Zurich, Switzerland

Saatchi & Saatchi Simko

15 Place du Temple
CH-1227 Carouge
Switzerland
tel: +41 22 307 2727
fax: +41 22 307 2770
<http://www.saatchi-ch.com>

October 6, 2008

Mr. Simko is the Chairman of Saatchi & Saatchi Simko and Member of the Saatchi & Saatchi Worldwide Executive Board.

Saatchi & Saatchi Simko is one of Switzerland's leading advertising agencies and the biggest communication company based in the French-speaking part of the country. The agency has first-class clients from Switzerland and abroad and handles leading national and international brands.

Saatchi & Saatchi Simko is part of the Saatchi & Saatchi worldwide network, and can therefore offer its clients the advantages of a smaller, dynamic and entrepreneurial structure combined with all the services that a large agency would typically provide – strategic planning, in-house production, large account handling and creative departments.

Furthermore, the Geneva-based agency is truly multinational – its staff of over 100 represents more than 13 different nationalities and over 11 languages.

Mr. Simko explained that his company pays great attention to not infringing third party's IPRs. If necessary, agreements for use of such rights are concluded. The account managers for various projects – called "Idea Navigators" in the agency – are primarily responsible for IP-related issues.

If IPRs are generated/created in developing a project for a client, the company does not retain ownership in the IPRs but transfers all of them to the client. It then becomes the client's responsibility to decide whether and how to protect and manage their IPRs.

All collaborators, including the creatives – called "Ideas Generators" in the agency – who create IP have a contractual obligation to assign their rights to the client.

Mr. Simko was aware of the importance of IP; however, the main handicap to active protection and use of IPRs was the slowness of the registration procedures and the related costs. Work on advertising projects was very dynamic and subject to extreme time pressure: advertising projects were usually implemented within very short time-frames – four to eight months.

According to Mr. Simko, the reason why most advertising agencies protect and own their IPRs was related to the highly dynamic aspect of generating creative ideas and the variety of client needs. Each project was different, and the same ideas were rarely suitable for two different projects. Should an agency decide to protect and own some IPRs, it would have to engage additional resources – and it was not very clear what the potential returns would be.

Of course, there was the potential for advertising agencies to use IPRs actively to enhance their business; however, that required more specific considerations and,



most importantly, a more dynamic, cheaper and quicker IP protection system. Mr. Simko emphasized that, in respect of some IPRs, such as rights related to photographs and music, authors often retained ownership of the IPRs, and the agencies would enter into contracts with the authors on the basis of one-time remuneration, not royalties.

Certain business models and software programs developed by advertising agencies to enhance their work could be protected as IPRs. However, advertising agencies tended to apply the open access approach rather than privatizing their experience and IPRs. One such example was Lovemarks.com – a rating and assessment system developed and operated by Saatchi & Saatchi and designed as a neutral online space for collecting and showcasing succinct consumer stories about most-loved, most emotional consumer experience(s).

Of course, advertising agencies should protect their logos, company trademarks and trade names, which were part of their [goodwill].

ANNEX B

Questionnaire "IP in the Advertising Industry"

(used for the interviews)

Information on interviewed person

Last name:

First name

Title:

Company:

Phone:

E-mail address:

Structure of the questionnaire

- I. General information regarding the company
- II. Management of IP
- III. Valuation of IP
- IV. Concluding remarks

I. General information regarding the company "Firm Data"

Please indicate

- 1. your geographical location
- 2. your organizational structure
- 3. your core competencies
- 4. your number of employees
- 5. the number of staff occupied with IP
- 6. your turnover last year and the year before last

II. IP management

- 1. Where do you use IP? Which IP is the most valuable for your company?
- 2. Does your company own IP?



- If yes, what type of IP does it own?
- If no, does it mean your company does not own IP or are there other reasons (e.g. no knowledge about IP, no interest, not necessary in advertising, too expensive for companies in advertising)?

Please indicate, how many

Trademarks

Copyrights

Designs

Patents

has/owns your company have/own?

3. How and when does your company decide to seek formal IP protection (motives)? Which IPRs do you use for which type of creative output? Do you also use factual protection methods?

4. Do you actively observe and manage the IP your company creates? Is there an IP strategy in your agency/ company? Who is responsible for the management of and decisions regarding management and use of IP?

5. Are there specific measures in place to make sure that your IP is not infringed? How do you react to infringements? Do you have experience with infringements? Please explain.

6. How do you ensure that your business partners and freelancers will protect the IP that you may use in the course of doing business (e.g. through non-disclosure agreements, trade secrets, licensing, etc.)? How do you protect your own IP? How is the devolvement of IP organized (contractual or not)?

III. IP valuation

1. Do you exploit your IPRs? If yes, how (licensing, trade, collateral, etc.)? Where do you see a possibilities for exploiting IP in the advertising industry?

2. Do you value your IPRs? If yes, how (monetary vs. non-monetary methods; cost-based, market or income approach; own valuation method or external providers)?

IV. Final remarks

Interviewees were also asked to discuss one or more of the following points:

- an interesting story related to IP
- the meaning of IP
- the future of IP in the advertising industry



ANNEX C

Major international advertising groups and companies

Catalina Marketing Corporation

St. Petersburg, FL 33716, USA

<http://www.catalinamarketing.com>

Clear Channel Outdoor Holdings, Inc

Phoenix, Arizona, USA

<http://www.clearchanneloutdoor.com>

Digital Generation Systems, Inc.

Irving, Texas 75039, USA

www.dgsystems.com

Dentsu INC.

Tokyo, Japan

www.dentsu.com

Grey Global Group Inc.

New York, NY, USA

www.grey.com

Interpublic Group of Companies, Inc.

New York, NY, USA

<http://www.interpublic.com>

Fitzgerald + Co;

Lowe Worldwide;

McCann Erickson Worldwide;

Rivet;

MRM Worldwide;

accentmarketing

Havas

Suresnes, France

www.havas.com

Snyder Communications,

Arnold Worldwide Partners

Lamar Advertising Company

Los Angeles, CA, USA

www.lamar.com

Omnicom:

New York, NY, USA

www.omnicomgroup.com

Arnell Group;

Element 79 Partners;

Goodby, Silverstein and Partners;

GSD&M Idea City;

Martin/Williams;

Merkley and Partners;

Roberts & Tarlow;

Zimmerman Advertising

Princeton Video Image, Inc.

New Jersey, USA

www.pvi.tv

Publicis Groupe S.A

Paris, France

www.publicisgroupe.com

Leo Burnett,

publicis,

saatchi & saatchi

R.H.Donnelley Corporation

Cary, North Carolina, USA

www.rhd.com



TMP Worldwide Inc.

New York, NY, USA

www.tmp.com

Valassis Communications, Inc.

Livonia, Michigan, USA

www.valassis.com

AirMedia Group, Inc.

Daktronics, Inc.

Envoy Capital Group, Inc.

Focus Media Holding, Ltd.

Insignia Systems, Inc.

Jupitermedia Corporation

Lamar Advertising Company

Local.com Corp.

MDC Partners, Inc.

Interlink Companies, Inc.

ValueClick, Inc.

VisionChina Media, Inc.

WPP Group plc.:

10AM Communications,
Bates 141,
Batey,
BPG Group,
BrandBuzz,
CHI&Partners,
Contract Advertising,
Enfatico,
George Patterson,
Grey,
hma Blaze,
Jan Kelley Marketing,
Johannes Leonardo,
JWT,
The MC Group,
Ogilvy & Mather Worldwide,
Red Cell,
Roman BrandGroup,
santamaria,
Soho Square,
The Brand Shop,
the campaign palace,
Young & Rubicam

Yahoo! Inc.

Trans-Lux Corporation



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INTERNET LINKS

For further reading and more information on the subject, below are some links on advertising, IP and the Internet.

NATIONAL DEFINITIONS OF CREATIVE INDUSTRY

DEFINITION UNITED KINGDOM:

<http://www.culture.gov.uk/images/publications/foreword.pdf>

DEFINITION UNESCO:

<http://www.uis.unesco.org/template/pdf/cscl/framework/1986original.pdf>

DEFINITION OECD:

<http://www.oecd.org/dataoecd/49/44/35930616.pdf>

DEFINITION OF EU15

<http://stats.oecd.org/glossary/detail.asp?ID=6805>

DEFINITION OF EU5

http://www.ft.com/cms/s/0/5ac11fe2-2e00-11da-aa88-00000e2511c8.html?nclick_check=1

FOR DEFINITIONS RELATING TO ADVERTISING ON THE INTERNET, SEE:

http://whatis.techtarget.com/definition/0,,sid9_gci211535,00.html

http://www.btonlineads.co.uk/guidelines_ad_guide.htm

INFORMATION ON PATENTS AND ADVERTISING

http://www.navic.tv/press/press_releases/recent_releases/microsoft_announces_acquisitio.php

DATABASE ABOUT THE USAGE AND PENETRATION OF THE INTERNET

<http://www.internetworldstats.com/>

A USEFUL LINK DESCRIBING THE STRUCTURE OF AN ADVERTISING AGENCY

<http://www.enotes.com/small-business-encyclopedia/advertising-agencies>

MORE INFORMATION ABOUT THE CHANGES IN THE ADVERTISING INDUSTRY

http://www-03.ibm.com/industries/media/doc/content/bin/media_ibv_advertisingv2.pdf

EXAMPLE FOR A CONSUMER-CREATED CAMPAIGN (DORITOS 2007 SUPERBOWL)

<http://promotions.yahoo.com/doritos/>

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<http://www.fastcompany.com/resources/marketing/post/111504.html>

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<http://www.pwc.com/extweb/service.nsf/docid/8303B04C7A0A4EC380257142003D>

[DD70](#)

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VARIOUS GLOSSARIES, DICTIONARIES, REFERENCE SOURCES

www.wikipedia.com

http://en.wikipedia.org/wiki/Web_banner

http://en.wikipedia.org/wiki/E-mail_marketing#cite_note-0

<http://whatis.techtarget.com>

http://whatis.techtarget.com/definition/0,,sid9_gci212806,00.html

http://whatis.techtarget.com/definition/0,,sid9_gci212901,00.html)

www.answers.com

<http://www.answers.com/topic/web-banner?cat=technology>

<http://www.answers.com/pop%20up>

<http://www.leadership501.com/definition-of-management/21/>

http://www.aneki.com/countries_gdp_per_capita.html

<http://dictionary.reverso.net/english-definitions/management>

<http://dictionary.reverso.net/english-definitions/management>

http://www.managementhelp.org/ad_prmot/defntion.htm

NEWS ABOUT ADVERTISING AGENCIES: ADVERTISING AGE

<http://adage.com/datacenter/>



LIST OF ABBREVIATIONS

AI	Advertising Industry
EU5	cluster of the 5 biggest European countries
EU15	European Union before May 1, 2004
EUR	Euro (currency of the European Union)
GDP	Gross Domestic Product
ICT(s)	Information and Communication Technologies
IP	Intellectual Property
IPR(s)	Intellectual Property Right(s)
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
SMAAs	Small and medium-sized advertising agencies
TV	Television
UNCTAD	United Nations Conference on Trade and Development
USD	US Dollar (currency of the United States of America)
UNESCO	United Nations Educational, Scientific and Cultural Organization
V-Cams	Viewer-created Ad Messages
WIPO	World Intellectual Property Organization

ENDNOTES

- 1 A web banner or banner ad is a form of advertising on the Internet, which is usually a visual display (graphic image, 468 x 60 pixels) containing an online advertisement, posted on a web page (usually in the top or bottom margin of a web page, linked to the advertiser's website. It is intended to attract traffic to a website by linking to the website of the advertiser. The advertisement is constructed from an image (GIF, JPEG, PNG), JavaScript program or multimedia object employing technologies such as Silverlight, Java, Shockwave or Flash), often employing animation or sound to maximize presence. Images are usually in a high-aspect ratio shape (i.e. either wide and short, or tall and narrow) hence the reference to banners. These images are usually placed on web pages that have interesting content, such as a newspaper article or an opinion piece. The web banner is displayed when a web page that refers to the banner is loaded into a web browser. This is known as an "impression". When viewers click on the banner, they are directed to the website advertised in the banner. This is known as a "click through". In many cases, banners are delivered by a central ad server. When advertisers scan their logfiles and detect that a web user has reached the advertiser's site from the content site by clicking on the banner ad, the advertiser sends the content provider a small amount of money (usually around five to ten US cents). This payback system is often how the content provider is able to pay for Internet access in the first place. Web banners function the same way as traditional advertising does: by notifying consumers of the product or service and presenting reasons why the consumer should choose the product in question. Although web banners differ in that the results for advertising campaigns may be monitored in real-time and targeted to the viewer's interests. Many web users regard these advertisements as highly annoying, because they distract from a web page's actual content or waste bandwidth. (Of course, the purpose of the banner ad is to attract attention, and many advertisers try to do this by making the advertisements annoying. Without this, it would provide no revenue for the advertiser or the content provider.) Newer web browsers often include options to disable pop-ups or block images from selected websites. (source: http://en.wikipedia.org/wiki/Web_banner)

In addition to accessing another website, banner ads may also collect information from consumers, make sales, or offer activities such as games. Currently, banner ads are the Internet equivalent of a direct-mail envelope, enticing the reader to seek more information about the contents of the envelope or website. Click-throughs on banner ads are declining and are now estimated at less than 1% of advertising on the Internet. Many advertisers are considering ways to make banner ads operate more like TV commercials, offering a complete message without a click-through. In 1998, the average cost of a banner ad was \$36 per thousand impressions, but it can range from USD10 for a search engine site to over USD200 for a computer supply site. Results have shown banner ads to be better suited to direct selling than brand building. (source: <http://www.answers.com/topic/web-banner?cat=technology>)
- 2 **[A pop-up is a graphical user interface (GUI) display area, usually a small window, that suddenly appears ("pops up") in the foreground of the visual interface of a computer screen. Pop-ups can be initiated by a single or double mouse click or**



rollover (sometimes called a **mouseover**), and also possibly by **voice command** or by simply being **timed to occur**. A **pop-up window** must be **smaller than the background window or interface**; otherwise, it is a **replacement interface**. (source: http://whatis.techtarget.com/definition/0,,sid9_gci212806,00.html). Another definition can be found at <http://www.answers.com/pop%20up>

3 **E-mail advertising/marketing** is a form of direct marketing that uses electronic mail as a means of communicating commercial or publicity messages to audiences. In its broadest sense, every e-mail sent to a potential or current customer could be considered e-mail marketing. However, the term is usually used to refer to:

- sending e-mails to enhance the relationship between a merchant and its current or previous customers and to encourage customer loyalty and repeat business,
- sending e-mails to acquire new customers or to convince current customers to purchase something immediately,
- adding advertisements to e-mails sent by other companies to their customers, and
- sending e-mails over the Internet.

Researchers estimate that US firms alone spent US\$400 million on e-mail marketing in 2006.

(sources Wikipedia and DMA: "The Power of Direct Marketing: ROI, Sales, Expenditures and Employment in the U.S., 2006-2007 Edition", Direct Marketing Association, October 2006

http://en.wikipedia.org/wiki/E-mail_marketing#cite_note-0

4 **Rich media advertisement** refers to Internet advertising that uses advanced technology allowing for user interaction and special effects. Rich media advertisements often contain streaming video, audio, fill-in forms, pull-down menus, search boxes and other visual or interactive elements that are more elaborate than traditional images and text, downloaded applets (programs) that interact instantly with users, and ads that change when the user's mouse passes over them.

For example:

- An ad for a Hollywood movie that includes a streaming video sample of a scene from the movie
- A mouse cursor that changes into an image on a particular website if the user requests it (for example, a cursor that changes into a tiny red question mark on a site like whatis.com)
- A standard-sized banner ad that includes an inquiry form about ISDN installation, capturing the user's filled-in personal information, and telling the user they will be contacted by a company representative - all simply by interacting with an ad on an online publisher's web page

Advertiser servers of rich media ads that use Java applets or components may also serve regular GIF images to people whose browsers don't support Java well.
(source: http://whatis.techtarget.com/definition/0,,sid9_gci212901,00.html)

- 5 For definitions relating to advertising on the Internet, see:
http://whatis.techtarget.com/definition/0,,sid9_gci211535,00.html and
http://www.btonlineads.co.uk/guidelines_ad_guide.htm.

- 6 According to Jupiter Research, Internet advertising has increased by 37% worldwide in 2004, reaching US\$ 8.4 billion. Approx. 85% of Yahoo!'s total revenue comes from advertising. (Le Temps, January 20, 2005)

- 7 World Bank (2003), Urban Development needs creativity: How creative industries affect urban areas, in: Development Outreach, November
<http://www1.worldbank.org/devoutreach/nov03/article.asp?id=221>

- 8 WIPO Guide on surveying the economic contribution of the copyright-based industries p.18

- 9 WIPO (2005), Copyright-based Industries: Assessing their weight.
http://www.wipo.int/wipo_magazine/en/2005/03/article_0012.html

- 10 The arts field comprises visual arts including paintings, sculpture, crafts, photography; the arts and antique markets; the performing arts including opera, orchestra, theatre, dance, circus; and heritage including museums, heritage sites, archeological sites, libraries and archives (see page 2 of above mentioned document)

- 11 KEA (2006), The Economy of Culture in Europe, Study prepared for the European Commission (Directorate-General for Education and Culture)
<http://www.keanet.eu/Encoculture/Study%20new.pdf>

- 12 For other definitions, see:
UK: <http://www.culture.gov.uk/images/publications/foreword.pdf>
UNESCO: <http://www.uis.unesco.org/template/pdf/cscl/framework/1986original.pdf>
OECD: <http://www.oecd.org/dataoecd/49/44/35930616.pdf>

- 13 <http://www.zenithoptimedia.com/gff/pdf/Adspend%20forecasts%20March%202008.pdf>

- 14 World Advertising Trend 2007, published by World Advertising Research Center (WARC). Both the 2007 and 2008 editions may be obtained from the WARC Store at
<http://store.warc.com/DisplaySection.aspx?ProductID=587>



- ¹⁵ EU15 refers to the 15 countries in the European Union before ten more European countries joined the Union on May, 1 2004. The EU15 comprised the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.
(<http://stats.oecd.org/glossary/detail.asp?ID=6805>)
- ¹⁶ World Economic Outlook Database
(<http://www.imf.org/external/pubs/ft/weo/2006/02/data/index.aspx>)
- ¹⁷ EU5 refers to Germany, United Kingdom, France, Italy and Spain and is an unofficial term or the five countries with the largest population and hence the largest votes.
(http://www.ft.com/cms/s/0/5ac11fe2-2e00-11da-aa88-00000e2511c8.html?nlick_check=1)
- ¹⁸ See endnote 14, above.
- ¹⁹ UNCTAD (2004) Creative Industry and Development
http://www.unctad.org/en/docs/tdxibpd13_en.pdf
- ²⁰ de Mooij, Marieke (2001), The Impact of Culture on Advertising, in: Advertising Worldwide, Pub: Ingomar Kloss, Springer Verlag
- ²¹ Irish Economy News (2008). The UK economist Kevin Gardiner, then head of global equity strategy at the investment banking unit of HSBC, coined the term Celtic Tiger in 1994. The term compares Ireland's unexpected economic take-off to the Asian tiger economies. The term "celtic tiger" is a metaphor for Irish economic growth.
(source: <http://www.finfacts.ie/irecon.htm>)
- ²² ZenithOptimedia Press Release
<http://www.zenithoptimedia.com/gff/pdf/Adspend%20forecasts%20March%202008.pdf>
- ²³ source: SRMG (2008) <http://www.internetworldstats.com>
- ²⁴ source: <http://www.ameinfo.com/151825.html>
- ²⁵ Europe – Public Television in the New Member States - European Broadcasting Union, Strategic Information Service, Brussels, 2005, p.109, and World Advertising Trends 2007
- ²⁶ EIAA (2006): European Interactive Advertising Association: Europe Online, August 2006
- ²⁷ Van Duyn (2006): Old media increase share of online ads, Financial Times, September 12, 2006

- ²⁸ DCMS (2001): Creative industries Mapping Document: Department of Culture, Media and Sport, London 2001.
- ²⁹ A useful link which describes the structure of an advertising agency
<http://www.enotes.com/small-business-encyclopedia/advertising-agencies>
- ³⁰ For more information about the changes of the advertising industry see:
http://www-03.ibm.com/industries/media/doc/content/bin/media_ibv_advertisingv2.pdf
- ³¹ For more information about this kind of campaign: <http://promotions.yahoo.com/doritos/>
- ³² See, for example, Walker (2006),
http://www.nytimes.com/2006/05/28/magazine/28wwln_consumed.html?ei=5090&en=6e51b5bca778f366&ex=1306468800&partner=rssuserland&emc=rss&pagewanted=print
Brownstein (2006), http://adage.com/smallagency/post?article_id=113240
- ³³ For details, see Yohn (2006)
http://www.brandchannel.com/brand_speak.asp?bs_id=141
- ³⁴ For products that can be protected by copyright, their protection is automatic as soon as they are created. This principle applies in all the countries party to the Berne Convention. See: <http://www.wipo.int/about-ip/en/copyright.html>
- ³⁵ *Statement of Financial Accounting Concepts No. 6* (Norwalk, CT: Financial Accounting Standards Board, 1985), pp. 10, 11, 12
- ³⁶ International Valuation Standards, eighth edition, 2007, p.57
- ³⁷ Smith, Gordon V. and Parr, Russell L., "Intellectual Property: Valuation, Exploitation and Infringement Damages," John Wiley & Sons, Inc., Hoboken, NJ, 2005, Chapter 4, pp. 66-68.
- ³⁸ Ibid. Smith & Parr, p.13. These categorizations were adopted by the International Valuation Standards Committee and are published in its Eighth Edition in 2007.
- ³⁹ Intellectual property is divided into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs and geographic indications of source; and copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
<http://www.wipo.int/about-ip/en/>



- 40 Ibid., Smith & Parr, p. 21
- 41 Statement of Financial Accounting Standards No. 141, paragraph 39; see also International Financial Reporting Standards, 3.
- 42 Statement of Financial Accounting Standards No. 142, paragraph 10
- 43 Ibid., Smith & Parr, p.68
- 44 Berne Convention for the Protection of Literary and Artistic Works, WIPO http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P85_10661
- 45 For more information on advertising and patents see http://www.navic.tv/press/press_releases/recent_releases/microsoft_announces_acquisiti_o.php) and <http://www.cptech.org/ip/business/admarketing.html>
- 46 It is recognized that individual assets can be considered either as intangible property or, if legal protection is in place because of jurisdiction or actions of the owner, as intellectual property.
- 47 Unlike copyright protection, which is automatic in most countries, other intellectual property rights are not automatic and their creators/owners need to apply for protection.
- 48 Various innovative multimedia advertising technologies are being patented. For example, MindArrow Systems Inc. has a patent for its "Electronic Mail Deployment System" that protects methods and systems to deliver, manage and track rich media content in e-mail (www.clickz.com/news/article.php/1465461). Unicast Communications Corp. owns patents that protect procedures it uses in delivering its interstitial advertisements. (<http://www.internetnews.com/ec-news/article.php/508331/Unicast+RealNetworks+In+Marketing+Deal.htm> and <http://www.clickz.com/showPage.html?page=1465461>)
- 49 **Trade dress** refers to the way in which a product - or place of business - is "dressed up" to go to the market. It is the totality of elements in which a product or service is packaged or presented. It may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques. Examples are the front grill on the Rolls-Royce automobile and the shape of a Coca-Cola bottle.
- 50 International Valuation Standards, eighth edition, 2007, International Valuation Guidance Note No. 4, Valuation of Intangible Assets, paras 1, 3
- 51 See also study of University of StGallen, it is IP advisory spin-off BGW and PriceWaterhouseCoopers (2008): "One Valuation fits all? - How Europe's most innovative

companies value technologies and patents"; <http://www.bgw-sg.com>

⁵² See WIPO Trademarks gateway - <http://www.wipo.int/trademarks/en/trademarks.html>

⁵³ A **brand** is a collection of images and ideas representing an economic producer; more specifically, it refers to the descriptive verbal attributes and concrete symbols, such as a name, logo, slogan, and design scheme, that convey the essence of a company, product or service. Brand recognition and other reactions are created by accumulating experience with a specific product or service, both directly relating to its use, and through the influence of advertising, design, and media commentary. A brand is a symbolic embodiment of all the information connected to a company, product or service. A brand serves to create associations and expectations among users of products made by a producer. A brand often includes an explicit logo, fonts, color schemes, symbols and sound which may be developed to represent implicit values, ideas, and even personality. The key objective is to create a relationship of trust.

The brand, "branding" and brand equity have become increasingly important components of culture and the economy, now being described as "cultural accessories and personal philosophies".

In non-commercial contexts, the marketing of entities that supply ideas or promises rather than products and services (e.g. political parties or religious organizations) may also be known as "branding". – for more details see WIKIPEDIA - <http://en.wikipedia.org/wiki/Brand>

⁵⁴ The 100 most valuable brands and which value Interbrand computed can be found under: http://www.interbrand.com/best_global_brands.aspx?langid=1000

⁵⁵ From Wikipedia, the free encyclopedia, <http://en.wikipedia.org/wiki/Management>, emphasis supplied.

⁵⁶ Smith, Gordon V., "Trademark Valuation", John Wiley & Sons, Inc., Hoboken, NJ, 1997, page 61 ff.

⁵⁷ MT (Maria Theresa Ramos), well-known in the UK advertising community "famously championed the move away from commission income to agencies charging for ideas and intellectual property, which helped create considerable debate and material change in the industry <http://www.demos.co.uk/people/mtrainey>

⁵⁸ Staples introduced another "Parent's" model that has three additional phrases and sells for \$5.99. One therefore assumes this product has been reasonably successful.



- ⁵⁹ A famous example of a sonic mark is that of the **"Sega scream"**.
<http://www.fastcompany.com/resources/marketing/post/111504.html>). For more information on non conventional trademarks, see:
http://www.wipo.int/sme/en/documents/wipo_magazine/7_2004.pdf
- ⁶⁰ The ® symbol is used once a trademark has been registered, whereas TM and SM (service mark) denote that a given sign is a trademark or service mark. See also the WIPO article "Trademark Usage, Getting the Basics Right":
http://www.wipo.int/sme/en/documents/wipo_magazine/3_2004.pdf.
- ⁶¹ A great idea for an advertising campaign is potentially vulnerable, because the idea itself is not protected by law. Copyright only protects the expression of ideas, not the ideas themselves.
- ⁶² Some countries, like the US and Canada, have a grace period of one year, meaning that a patent for a claimed invention must be sought within 12 months of the first public disclosure, sale or use of the patent concept.
- ⁶³ For more details see also study of University of St. Gallen, it is IP advisory spin-off BGW and PricewaterhouseCoopers (2008): "One Valuation fits all? - How Europe's most innovative companies value technologies and patents"; <http://www.bgw-sg.com>
- ⁶⁴ It should be noted however, that, in countries where they exist, collecting rights societies can be very helpful in solving this difficulty.
- ⁶⁵ For further information about the "idea safe"
<http://www.kommunikationsverband.de/service/ideentresor> (available in English upon request)

