PRINT DOCUMENT

MorganAndersonconsulting
Pioneering Agency ROI Solutions For Marketers Worldwide

"Advertising Agency Review: Who Owns Agency Work Product in a Search?"

By Arthur Anderson

SHRINKING the 'ELEPHANT' in the ROOM

Better Business Practices for Ownership of Intellectual Property Rights Presented During Agency Search

In early February, the American Association of Advertising Agencies requested agency search advisors to address a perennial "elephant in the room" that lurks between marketers and agencies: Ownership of Intellectual Property rights for work an agency presents when pitching new business to a marketer. An industry practice in the past has been that the marketer owns IP rights, and the marketer pays an honorarium to the finalist agencies participating.

Kudos to Tom Finneran of the AAAA and his committee for addressing this prickly issue. Although it's currently the resident elephant, it need not be an unwieldy pachyderm, but one that is manageable on a case-by-case basis using a best-practice contract provision.

Some agency search advisors have responded to the AAAA's call that ownership of Intellectual Property rights is not an issue they should be stuck in the middle of and be responsible for, and that they are engaged by marketers and should not become agency advocates. Yet, legitimate rights and concerns are involved. An agency doesn't want (and should not) be ripped off from its work product, and a client doesn't want to (and should not) be put at risk because it is doing a search. For example, the client may have previously had work done for it resulting in a similar idea. Rights to ownership will also vary depending on the type and size of the client and agency. The more marketing-sophisticated client counsel and procurement are, the easier it is to work out an equitable solution.

Intellectual Property rights can involve complex areas such as trademark, copyright, and trade secrets law and requires advice of legal counsel. As management consultants, we recommend business and financial strategies and not legal provisions. We do, however, share ideas we encounter which we consider better business practices.

Back to Morgan Anderson Consulting Website

As laymen, it is our understanding that a) ideas are not copyrightable, b) certain expressions, like slogans, are not copyrightable, c) product names, titles and slogans are subject to trademark laws, and d) agencies have been known to submit material which was in use or so common as to not be original or unique such that it could not be subject to ownership rights provisions. On these, and similar questions, consult the advice of legal counsel.

Drawing upon our experience, the following are adapted from provisions used by marketers in a search context for finalist agencies. We share these as "food for thought" and believe them to be better business practices for a search, subject, of course, to review by legal counsel*.

a) Honorarium: Client pays an honorarium fee TBD to Agency

b) Agency agrees:

- To continue as a finalist until such time as Client's search process is completed
- Agency can use public-domain material for presentation purposes
- Work product presented by Agency not to infringe on third party rights
- Ownership of copyright and other IP on work product presented to Client during search process resides with Agency
- If/when appointed as Client's Agency, copyrights and other IP transferred to Client
- Agency not to use work product presented to Client for itself or third party for TBD period after search process is completed

c) Client agrees: It will not use Agency work product presented during the agency search process IF Agency is not engaged by Client

d) Client and Agency agree: The forgoing is not applicable and Client has no obligation to Agency if Agency is not the winning agency IF Client can demonstrate it previously used or considered an idea or work product similar to that presented by Agency

In the final analysis, it is up to the marketer to determine which agencies will participate in the agency search and to set forth the parameters of the process. Agencies can, and should, say "no" if marketer terms are unreasonable or otherwise unacceptable. This type of contract provision should help shrink the elephant in the room and encourage constructive client/agency dialogue.

***

Should you wish specifics of the study or to learn more, please email Lee Anne Morgan at lamorgan@morgananderson.com or Arthur Anderson at aanderson@morgananderson.com.

Back to Morgan Anderson Consulting Website