Safe ideas

Philip Circus explains how to protect the parts of your work that copyright doesn't reach

The issue of a writ by Don Marketing against Shell has, once again, thrown up the issue of promotional ideas and how they can be protected. Usually, the issue arises when an agency claims that a client or potential client has used, but not paid for, their idea.

The problem is that protecting promotional ideas and concepts is more difficult than protecting the tangible work which flows from that idea or concept. Actual artwork and copy is subject to copyright protection.

Particularly important is the fact that copyright protection does not extend to ideas. So long as the idea is given an original interpretation, no copyright action will lie, even though the idea is often the most valuable aspect of the consultancy's work.

The only way in which ideas and concepts can be protected is by invoking what is known as the law of confidence.

In a leading case, the court said three elements were needed. First, the relevant information had to be of a confidential nature. For example, in Fowler v Facenda Chicken Ltd in 1986, in an action against an ex-employee, the court held that information relating to sales and prices did not amount to a trade secret. If the idea is to use a bog standard promotional technique, such as an instant-win, it cannot be regarded as being of a confidential nature. Some original and distinctive features would be necessary.

Strictly confidential

Secondly, the information has to be communicated in circumstances which make it clear that there is an obligation of confidentiality. This means making it clear to the other party that the idea is strictly confidential – preferably in writing.

Thirdly, the party to whom the confidential information is being given has to be making or be about to make unauthorised disclosure of the information.

Thus, it will be seen that it is not difficult to establish that the idea was capable of being regarded as confidential. It must be established that the idea was communicated in circumstances which impose a duty of confidentiality.

The leading case in this field is the Rock Follies case. In 1973, three actresses formed a rock group with the help of a manager who was also their composer. They developed an idea for a TV series which was to portray the formation of a three-girl rock band and the group's subsequent experiences. Oral discussions took place with Thames Television as a result.

One of the actresses was unavailable at that time due to another engagement and Thames started shooting the series with three other actresses. The actresses and the manager sued Thames, the producer and the director, and won £500,000 in damages. The court held that the idea had been given to Thames in confidence.

There is little doubt that original creative ideas can be legitimately regarded as confidential information, but they must also be commercially valuable. In the case of Exchange Telegraph Co Ltd v Central News Ltd in 1897, the judge put it in these words: "By the expenditure of labour and money, the plaintiffs had acquired this information, and it was, in their hands, valuable property in this sense – that persons to whom it was not known were willing to pay, and did pay, to acquire it."

How then can agencies protect the ideas they present? The answer is to make it clear that there is a duty of confidentiality. One can write to potential clients explaining that confidentiality is a term of the agreement for the creative presentation and this can be reinforced by stamping an appropriate notice on all material presented to the client, such as:

"The concepts and ideas submitted to you by this agency are of a confidential nature and are submitted to you on the understanding that they are to be considered by you in the strictest confidence and that no use shall be made of the said concepts and ideas, including communication to a third party, without the agency's express prior consent."

Copyright protection

Since this protection is additional to that provided by copyright, such agencies may wish to remind potential clients that actual artwork and copy will automatically be protected in copyright law.

Even where one has been successful in acquiring a client there is much to be said for including a clause in the written agency/client contract to deal with confidentiality. Something along the following lines is suggested:

"You acknowledge and agree that any identifiable and original idea or concept presented by us in relation to any promotion invented or developed by us shall be acknowledged as being available only for such promotion or campaign and shall not be used for any other purposes whatsoever without our express prior agreement given in writing. Even where no promotion or campaign is agreed, the ideas and concepts presented to you shall remain strictly confidential and shall not be used in any way, including communication to any third party, without our express prior consent."

Some agencies may think that such steps smack of distrust for the client or potential client. However, it is my belief that the use of this branch of law shows that the consultancy has a professional approach to its work and values it sufficiently to want to protect it. □

Philip Circus is legal adviser to the ISP