Advertising is as old as commerce. Some 3,000 years ago, shoemakers and scribes promulgated their services on clay tablets. Ancient Greeks used town criers to proclaim the arrival of ships laden with wine and spices. Today, businesses beacon potential customers with attractive signs, brochures, billboards, radio and television commercials, telemarketing, text messages, e-mails, Internet banners and pop-ups, rich media advertisements and more. For a number of online business models, receipts from advertising are the main or sole source of income.1

To be effective, an advertisement must be first noticed, and then remembered long enough to communicate persuasively the unique selling points of a product or service. Thus, advertisers race to create new and enticing ways of communicating information to customers to influence their buying decisions. This article deals with intellectual property (IP) issues in the creative process of advertising, from how advertisers can protect their exclusive rights in their creations, to the dangers of violating the IP rights of others.

Which IP rights?

The elements of a good advertisement are likely to be imitated or copied by others. So, businesses need to be aware of the various IP rights that can come into play when creating content for an advertisement or running an advertising campaign. These are summarized in the table on the following page.

Businesses are finding ever more inventive ways to advertise their products and services. Each level of increased sophistication will occasion additional IP rights. The simplest advertisement may involve only the copyright and/or trademark rights associated with a logo; whereas advanced audio-visual works may raise many complex IP issues.

Protection strategies

Creating a successful advertising campaign often requires significant investment of time and money. Competitors are likely to try to free ride upon an innovative company’s creativity, skills and efforts. Businesses need therefore to devise appropriate strategies to protect their advertising creations by using the legal tools at their disposal in the IP system. Such strategies may include:

- registering the advertisement and other copyright protected material (including a website) with the national copyright office in countries which provide this option;
- alerting the public that advertising material is legally protected by copyright law. This may be done simply by means of a copyright notice;
- registering trademarks. Trademarks are typically words, numerals and/or logos. However, technological developments have given rise to new and more creative marks. Animated image marks and sounds, for example, are particularly suitable for advertising in the Internet environment;
- registering trademarks as domain names. A trademark and a domain name may be inseparably linked. It is frustrating for customers when they cannot find a business’s website easily, and frustrating for a business when customers end up on the website of a competitor. So it is worth registering trademarks as domain names before someone else does;
- using trademarks consistently and properly in all promotional material. Use only 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. Mark all trademarks with a trademark notice: ®, ™, SM or equivalent symbols (see Trademark Usage, Getting the Basics Right, WIPO Magazine March/April 2004);
- patenting innovative advertising technologies and online business methods in countries where such protection is available;
- preventing 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,

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1 Rich media advertisement is Internet advertising which uses advanced technology to allow 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.

2 According to JupiterResearch, Internet advertising increased 37 percent worldwide in 2004, rising to US$ 8.4 billion. Approximately 85 percent of Yahoo!’s total revenues comes from advertising. (Source: Le Temps, 20/01/2005).
IP Rights and Advertising

<table>
<thead>
<tr>
<th>Elements of advertising</th>
<th>Possible means of protection (depending on national legislation and other factors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creative content, such as written material, photographs, art, graphics, music and videos</td>
<td>Copyright</td>
</tr>
<tr>
<td>Slogans and sounds, including business names, logos, product names, domain names</td>
<td>Copyright and/or trademark law</td>
</tr>
<tr>
<td>Geographical indications</td>
<td>Laws against unfair competition; consumer protection laws; laws for the protection of certification marks; special laws for the protection of geographical indications or appellations of origin</td>
</tr>
<tr>
<td>Computer-generated graphic symbols, screen displays, graphic user interfaces (GUIs) and even web pages</td>
<td>Industrial design law</td>
</tr>
<tr>
<td>Website design</td>
<td>Copyright</td>
</tr>
<tr>
<td>Software to create digital advertisements, such as computer generated imagery (CGI)</td>
<td>Copyright and/or patents, depending on the national laws</td>
</tr>
<tr>
<td>Some advertising techniques or means of doing business</td>
<td>Patents or utility models</td>
</tr>
<tr>
<td>Distinctive packaging, such as the shape of a container</td>
<td>Trademark, industrial design or, in some countries trade dress</td>
</tr>
<tr>
<td>A person's identity, such as name, photograph, image, voice or signature</td>
<td>Publicity or privacy rights</td>
</tr>
<tr>
<td>Databases, for example of consumer profiles</td>
<td>Copyright or by sui generis database laws</td>
</tr>
</tbody>
</table>

Note. Unfair advertising methods, including false advertising claims, false endorsement of products, deceptive packaging, dishonest promotions or marketing, are prohibited by unfair competition laws.

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 will no longer be possible to protect the information. (See Trade Secrets are Gold Nuggets: Protect Them, WIPO Magazine April 2002 and Policy Framework for Protecting Trade Secrets, WIPO Magazine May 2002);

- not disclosing patent related information. If a business wishes to obtain a patent on a new product, it must not disclose the product’s innovative qualities in any advertising or marketing, as this can bar it from the “novelty” requirement for obtaining patent protection, unless the national patent law provides for a ‘grace period.’

Using other people’s IP

Current technology makes it easy to use material created by others, such as film and television clips, music, graphics, photographs, software, text, etc. However, the use of IP-protected material without authorization from the rights owner can have dire consequences. The same rules apply for making an advertisement
vidual are protected by privacy and publicity rights. The right of privacy gives a person the right to protect their image from certain uses by others. The right of publicity recognizes that a person’s image has an economic value that is presumed to be the result of the person’s own effort, and gives each person the right to exploit their own image.

Comparing the competition

We see it everywhere: Coca-Cola and Pepsi challenge each other in taste tests, mobile phone companies compare each other’s tariffs, and car manufacturers challenge the effectiveness of each others products. Can a company compare the relative qualities of its products and services with those of named competitors without running foul of trade-mark laws or unfair competition laws?

Countries throughout the world take different, and sometimes conflicting, approaches to comparative advertising. The legislation in certain countries, for example in the United States of America, broadly supports comparative advertising and considers that truthful comparisons are valid consumer information and beneficial to competition. Other countries, for example in Europe, allow comparative advertising as a general principle, but lay down specific requirements for it to be considered legitimate. Some countries ban comparative advertising in general or for specific products.

Famous faces

Golf star Tiger Woods appears in Buick car commercials, Nicole Kidman is the new face of Chanel No 5 perfume, while Humphrey Bogart and Audrey Hepburn have been “Ambassadors of elegance” for Longines watches since the 1950s (page 6). Businesses have long appreciated the value that celebrities bring to the promotion of their wares. A celebrity image can grab consumer attention and create a perception of high value and credibility for a product or service. But businesses must proceed with caution if planning to use a celebrity’s identity in an advertisement. In many countries the name, face, image, voice and likeness of an individual are protected by privacy and publicity rights.

Caution must be taken to avoid the following, which are not permitted:
- derogatory or defamatory comparisons;
- deceptive comparisons. Comparisons must be true and accurate, and should never express opinion as fact;
- comparisons that are likely to cause confusion with the competitor’s products or services.

Comparative advertising by its very nature can mislead consumers, and can unfairly discredit the identified competitors. This is why many countries place severe legal restrictions on it. Businesses must check the applicable laws and regulations carefully when using comparisons in advertising as the risk of making legal mistakes is much high, especially if a competitor is named.

Who owns the rights?

In most countries, if an advertisement has been developed by an employee who is employed for this purpose, then the company (as the employer) would own the copyright over the advertisement, unless agreed otherwise with the employee.

However, many companies which outsource the creation of their advertising campaigns to an agency or contractor assume they own the IP rights, simply because they paid for the work. Beware – unlike employees, independent contractors usually own all IP...
rights in the works they create – even if they were paid for it unless otherwise stipulated in a written contract. (For further guidelines see IP Ownership: Avoiding Disputes, WIPO Magazine Nov/Dec 2002). A business should always, therefore, have a written agreement with its advertising agent and other independent contractors, which specifies the IP ownership of each element of the work that will be created.

**Proceed with care**

Advertising depends upon creativity. Major technological breakthroughs and the Internet have facilitated the spread of new marketing techniques. Advertising is a powerful medium of influence, but as such carries the potential for misuse and abuse. This is why in many countries advertising practices are heavily regulated. When launching an advertising campaign, businesses may need to comply with a range of laws and regulations governing, for example, labeling, use of children, sensitive product categories such as tobacco and alcohol, broadcast time restrictions, etc. These laws differ from country to country and depending on the content of the advertisement. Today, it is impossible to be a successful advertiser without understanding the legal framework surrounding the business of advertising. A lack of caution can lead to the loss of a company’s own IP rights or liability for infringing the IP rights of others. To avoid costly mistakes, businesses should conduct rigorous checks both from the general legal perspective and from an IP perspective before launching a new advertising campaign.

For more information on various practical aspects of the IP system of interest to business and industry, please visit the website of the SMEs Division at www.wipo.int/sme.

The next article in the IP and Business series will discuss “Creativity and Intellectual Property in the Fashion Industry.”