

# Marketing Intellectual Property: Who Owns It?

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The growth of online marketing and sales has produced a commensurate increase in the number of marketing agencies that provide marketing services to a growing number of businesses.

The outsourcing of marketing by a business raises unique issues not usually present with other functions that are typically outsourced, such as legal and accounting services. Specifically, marketing is business function that creates intellectual property for the business typically in the form of content and branding. In addition, marketing programs typically generate additional intellectual property in the form of business intelligence through the collection of a wide range of data, including data concerning potential customers, usage data, etc.



## VALUABLE ASSETS

Marketing intellectual property can represent a valuable asset of the business that must be protected. For example, Apple has filed over 1500 US trademark applications to protect its brands, and the Apple brand represents a substantial asset of the business. Nearly the entire value of companies, such as Google and Facebook, is related to the collection and sale of user data for advertising, etc.



## COPYRIGHTS, TRADEMARKS, TRADE SECRETS



Marketing content and branding is generally created for public consumption by target consumers, so protection of this intellectual property is typically in the form of copyrights for content and trademarks for branding. Whereas, business intelligence generated by marketing programs is generally not for public consumption, but for the private use of the business. Business intelligence is one form a confidential information that may be owned by the business and the data may be a trade secret, if the data has independent economic value by virtue of the fact that data is not publicly known. Confidential information including trade secrets must be protected by contracts with the various parties that have access to the confidential information.

## THE BIG QUESTION: WHO OWNS IT?



So, the question that arises when you work with a marketing agency or consultant is **who owns the intellectual property that is created by the marketing agency and generated through various marketing campaigns?** Unfortunately, the answer is that it depends on your agreements with the agency. In addition, it may also depend on the agency's agreements with its personnel, since agencies themselves may be outsourcing the creation and generation of intellectual property for your business to other companies and independent contractors.

In general, copyrights in a creative work come into existence at the time of the works' creation and are owned by the person(s) that created the work. Notably, creative works related to branding and protectable as a trademark, may also be protected by copyright laws. In the US, trademark rights come into being when a mark is used to identify a business as the source of goods and services and provisionally when an intent-to-use US trademark application is filed. In other countries, trademark rights may come into existence upon the filing of a trademark application, irrespective of use, in addition to at the time of use.



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## THE IMPORTANCE OF CONTRACTS

For marketing agencies and the businesses hiring them, it is important that contracts between the marketing agency and the business include provisions providing for the assignment of the intellectual property and rights created and generated by the marketing agency to the business, so the business has full title to the intellectual property and rights, except for any residual moral rights that cannot be assigned to the business. Furthermore, it is important for the business to have assurances that the marketing agency has acquired any intellectual property and rights from their personnel and contractors necessary to allow them to transfer the intellectual property rights to the business.



## PROTECTION



It is also important that the business require the marketing agency to provide protection for the business if any of the intellectual property provided to the business by the marketing agency is alleged or found to infringe the intellectual property rights of a third party. The marketing agency will want to have similar assurances from its personnel and contractors and the business.

Lastly, the business and the marketing agency want to make it clear which entity has responsibility for pursuing any patent, copyright, or trademark protection for the intellectual property being created and generated. This responsibility typically falls to the entity that is going to own the intellectual property, but it is good practice to make sure both parties are clear on the responsibility.



## MORE INFORMATION

If you are a business or a marketing agency and have any questions about intellectual property ownership and the steps you need to protect it, please feel free to contact Michael Antone at [mcantone@nemphosbraue.com](mailto:mcantone@nemphosbraue.com), 410-321-9335, or reach out to any of the other attorneys at Nemphos Braue.

A collage of various images including a microscope, a hand holding a pen, a green door with a padlock, a computer chip, a construction site, a cannabis plant, and a house.

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