



Digital media in advertising

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Introduction

The growing importance of digital media and digital distribution methods in the advertising industry reflects the significant impact that the digital world has had on society in general over the last 10 years or so. New technology has not only created new ways in which advertising agencies can communicate to the public, but it has also enabled them to implement cheaper, more efficient and more targeted campaigns than was previously possible using solely analogue media and traditional distribution methods.

Over the next few years, the increasing uptake of technology by agencies will result in radical changes to the old analogue advertising industry similar to the far reaching changes seen in the music, TV and film industries over the past decade or so. Such changes present advertising agencies with new commercial and legal challenges.

What is digital media?

Digital media is any type of information or material which is held in digital format as opposed to analogue format. For example, all of the constituent elements of a website, whether they be video, photographs, music, text or illustrations, will all comprise of digital media. Digital media can either be recorded directly in digital format, e.g. High definition digital tv and music CD's, or it can be created by converting existing analogue media, such as magnetic tape recordings, into digital media using a process known as "digitisation."

How is digital media created?

Agencies engaged in the development and production of digital media are actually engaged in many of the activities traditionally associated with the information technology industry, such as software development, hardware procurement and technical support and maintenance. In particular, many digital media campaigns will involve the development of a website, then the population of the website with creative content, and finally the hosting and maintenance of that website on behalf of the agency's client. Sometimes the agency will purchase these services from third parties, but there is now an increasing trend for many, if not all, of these services to be provided by the agency "in-house."

The Agreement between the Agency and the Client

Creating digital media raises particular issues which are not generally covered under a standard client agency agreement for creative services. It is therefore crucial for an agency to ensure that when providing services comprising of the

development of digital media it uses an agreement which contains terms that specifically cover such activity. For example, two key issues that an agency will need to address in its agreement with the client when developing a website are:

- > acceptance testing; and
- > the transferred and/or licensing of the intellectual property rights ("Rights") in the website and the other digital media created by the agency contained on the website.

Acceptance Testing

Website development is similar to traditional software development, in that the agency and the client will agree a technical and functional specification for a website and then software (typically in html format) is written to create a website that complies with the agreed specification. To avoid disputes about whether the agency has actually delivered what the parties intended, the client agency agreement should provide for a detailed procedure to test the website to ensure that it complies with the agreed specification. In addition, the agreement should also set out the procedures for remedying any errors or defects discovered during the testing process.

Intellectual Property Rights

The client agency agreement should set out in sufficient detail which elements of the website are to be licensed to the client and which elements are to be assigned. (A licence is analogous with a lease and an assignment with a sale). Digital media assets and software in general can be separated into the following general categories:

- > materials created for the client by the agency or commissioned from third parties during the term of the client agency agreement ("Bespoke Materials");
- > materials created by the agency or commissioned from third parties prior to the date that the agency first supplied services to the client ("Pre-existing Materials");

- > materials owned by third parties and licensed to the agency for onward supply to the client ("Third Party Materials").

Generally speaking, the Rights in Bespoke Materials are assigned to the client. In contrast, the Rights in Pre-existing Materials and Third Party Materials are licensed to the client by the agency or, in the case of Third Party Materials, sometimes directly by the relevant third party owner.

Open source software

Open source software is commonly used by developers in the creation of digital media. Unlike the majority of software, open source software is licensed for use on the basis that the "nuts and bolts" of how the software works is made freely available to all users. Another key feature of open source software is that no restrictions are imposed on users of the software concerning changes or adaptations to it, provided that such changes or adaptations are also made freely available to all other users.

Such liberal licensing terms can create problems for agencies if portions of open source software are incorporated into other digital media. If this occurs, it can result in all the software elements of such hybrid digital media being subject to the open source licence rules referred to above. In many cases, this will then place the agency in breach of the terms of its licences covering those elements of the hybrid digital media owned by third parties.

Using Digital Media

Many agencies are under the misapprehension that the internet is an unregulated media. In fact there is an extensive and complex system of "private" controls and public regulations governing the use of digital media. The type of regulation will depend on the nature of the digital media concerned and the type of use to which the digital media is put.

Some of the key benefits of digital media, for example the ability to create and distribute cheap, high quality copies of a wide range of media, have

resulted in the owners of the Rights in such media imposing strict controls on its use. Such "private" controls can be divided into two types:

- > contractual controls; and
- > technology controls.

In addition to these private controls there are also the "public" controls:

- > statutory regulation; and
- > trade regulations.

Added together these controls have a significant impact on the use of digital media.

Contractual Controls

We have already considered the importance of contracts and contractual terms when agencies are engaged to create digital media for supply to their clients. However, contracts also have a crucial role in governing the agency and client's use of digital media, particularly where the Rights in such digital media are owned by a third party.

An Agency seeking to use digital media and/or use analogue media in a digital environment has 3 choices when obtaining the Rights that it requires:

- > to acquire the Rights to such media from third parties under a contractual assignment;
- > to licence the Rights from the relevant third party owners; and/or
- > to create such digital assets within the agency using its own employees.

Generally speaking, both the acquisition of Rights as in point one above, and/or creating the digital media inside the agency as in point three above, would give the agency all of the Rights that it would require to use the relevant digital media, without any restrictions being imposed by third parties. However, in many cases, it will not be possible to take either of these steps. In that case, the agency will be forced to obtain appropriate licences from the relevant third party owners.

The terms of such contractual licences to use digital media can be complex and the type of uses granted by the Rights owner will typically be very

specific e.g. the digital media can only be hosted on a website, or alternatively can only be made available to end users as a streamed file (where no permanent copy is made on the user's pc) rather than as a download.

Technological Controls

The most common form of technological control of digital media is known as DRM, or Digital Rights Management. This comprises of a variety of technological systems that enable Rights owners to specify and control how digital media is used so preventing unauthorised use. The law has recently been changed to strengthen the remedies available to Rights owners where a user attempts to circumvent DRM systems, or makes an article available to others which can be used to circumvent such systems. Such remedies now include criminal penalties.

Statutory Controls

Intellectual Property Rights

One or more of the following Rights can exist in digital media:

- > copyright;
- > moral rights;
- > trademarks;
- > design rights;
- > performers' rights;
- > database rights; and
- > patents.

Copyright, moral rights, trademarks and design rights

The basic rules relating to copyright, moral rights, trademarks and design rights are dealt with in other Lewis Silkin inbrief publications.

Performers' rights

Performers' rights exist in those digital works which comprise of the recording and/or broadcast of a live performance. The first owner of such rights is the performer. He or she has broadly the same rights in relation to his/her performance as an author has

in relation to a copyright work, e.g. the exclusive right to copy, distribute or make available performances to the public. It should also be noted that performances are now also protected by moral rights.

Database rights

Databases appear throughout the internet and digital media. Digital versions of customer lists, tables of contents and indexes are all examples of works which may be entitled to protection under database right as well as being protected by copyright. There is no need to register database right as it comes into existence automatically upon creation of the database. The maker of the database will be the first owner of the database right in the database which he/she creates. The database right only exists within the European Economic Area.

Patents

Whilst a detailed account of patents is outside the scope of this inbrief, it should be noted that it is possible to obtain patent protection for digital media platforms. If granted, a patent will prevent any person other than the patent owner and its licensees from exploiting the invention patented.

For example, a digital media platform invention may be patentable either as a computer system and/or a business method. Whilst patent protection is still difficult to obtain in the UK and Europe, a far more liberal approach, is adopted in the USA. Therefore an agency intending to make a digital media platform available for use in the USA should ensure that appropriate

clearances and permissions are sought from those persons licensing the systems to the agency.

Other forms of statutory control

In addition to intellectual property rights legislation, digital media may also be subject to other forms of statutory control, such as legislation governing e-commerce and the internet, data protection, gambling and consumer protection legislation.

Regulation by trade bodies

Various trade and self-regulatory bodies, such as the Advertising Standards Authority ("ASA") and the Direct Marketing Association ("DMA") are also involved in the regulation of various aspects of digital media. For example, the ASA regulates banner advertisements and pop-up advertisements on the internet whilst the DMA regulates internet marketing activities such as direct marketing via email.

For further information on this subject, please contact:

Simon Morrissey
Senior Associate
T: +44 (0) 20 7074 8221
E: simon.morrissey@lewisilkin.com

Phil James
Associate
T: +44 (0) 20 7074 8028
E: philip.james@lewisilkin.com

lewisilkin

Lewis Silkin LLP

5 Chancery Lane
Clifford's Inn
London EC4A 1BL

DX 182 Chancery Lane

T: +44 (0) 20 7074 8000

F: +44 (0) 20 7864 1200

E: info@lewisilkin.com

www.lewisilkin.com

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