



Ownership of Agency Ideas and Work Developed During a Pitch

ABOUT 4As

The Association of Accredited Advertising Agents Malaysia (4As), formed in 1971, is the Malaysian industry's foremost body that represents and promotes the 'value' of Advertising Agencies in the Marketing Communications industry among advertisers, media, suppliers, government and the public.

The organisation encompasses more than 50 homegrown and international Member Agencies who are key players in the advertising industry.

We help grow Member businesses and develop individual careers through professional development services, industry awards, advocacy and support.

OBJECTIVES

- 1. To Provide Industry Guidance & Leadership**
- 2. To Raise Standards & Professionalism**
- 3. To Promote Commercial Creativity & Its Effectiveness**
- 4. To Foster Continuous Professional Development for the Attraction & Retention of Agency Talent**
- 5. To be the Government's Principal Information Source & Advisor on Advertising**

Purpose

The purpose of this 4As Position Paper is to provide Advertising Agencies with guidance on best practices relating to the ownership of Agency-developed ideas, plans, and work created in the course of an Advertiser's search for Agency resources or a Request for Proposal (RFP).

The 4As recommends that Agencies retain ownership of all business-search ideas, plans, and work product, unless the Advertiser is prepared to pay the Agency fairly for the rights.

Background

Agency new business searches are an integral part of the industry dynamics. The 4As believes that it is prudent to promote practices that can facilitate effective, efficient and equitable new business activities.

The Agency search/new business process should be geared to help the Advertiser and all Agency participants to discuss business goals, marketing objectives and service expectations. The process should also foster a two-way assessment of capabilities, compatibility and economic expectations.

The Agency search/new business process should not be used by Advertisers as a mechanism to generate a bank of ideas and materials.

Considerations

The effort and activity involved in participating in a comprehensive Agency search is significant for both the Advertiser and Agencies. All parties involved in an Agency search, including third-party intermediaries, should strive to structure the search process to be efficient, timely and equitable.

- The key elements of the Advertiser's search process should be outlined upfront.
- Early dialogue and use of tools such as the 4As guide "Finding an Agency" should facilitate up-front discussion and initial screening. (See 4As website at <http://aaaa.org.my/resources/> to download this guide)
- When speculative plans or work is a component of the search process, the 4As urges that Agency participants and the Advertiser have a clear understanding of the purpose and scope of the work and of the deliverables and measurement standards that will be involved.
- Every effort should be made to adhere to an agreed upon process in the short list and final phases of a search leading up to the final pitch challenge.

Advertisers who practice and support the payment of pitch disbursements to shortlisted Agencies need to be informed that this payment is merely to partially offset some of the Agency costs incurred. It does not confer the right of the Advertiser to utilize the Agency's intellectual property directly or indirectly. The disbursement payment does not alter the Agency's ownership of Agency developed presentation concepts and materials. (Please refer to the 4As website at <http://aaaa.org.my/resources/> for more information, administration, exemptions, prohibitions about the "4As Professional Pitch Disbursement By-Laws")

Best Practice Guidance: Ownership, Assignment and/or Usage Rights

Agencies given an Advertiser's document asking for rights are not obliged to sign the document.

Also, Agencies must be alert on the fine print within RFP documents that stipulates:

- "All materials submitted in response to this RFP become the sole property of (Advertiser)"
- "All submissions for the RFP is not returnable and shall become the property of the Client"

This is deemed unethical.

Agencies retain the rights to the materials submitted unless an agreement is reached on the appropriate compensation in advance. The industry will be held to ransom if there is no mutual respect for intellectual property rights

However, in the event an Agency signs off such rights to a potential Client, even when they are not successful in the pitch, there is no more such protection under the law. It would therefore mean that the Agency CANNOT use an edited version, similar ideas, and plans for all future pitches, as it has been assigned.

The 4As maintains the position that no Agency shall participate in a pitch/RFP where the Advertiser requires that all or part of the pitch proposal becomes the Advertiser's property at the pitching stage or if the pitch proposal is unsuccessful.

The 4As recommends that Agencies retain ownership of new business-search ideas, plans, and work product.

Illustrative ownership retention language that Agencies might wish to consider incorporating in all pitch materials/documents and new business agreements is provided below.

Clause A

"The copyright of this work is vested in Ad Agency Sdn Bhd. This document is issued in confidence for the purpose only for which it is supplied. It may be reproduced in whole or part, solely for the purposes of evaluation and then only on the condition that this notice is included in any such reproduction.

No information as to the contents or subject matter of this document or any part thereof arising directly or indirectly there from, may be implemented, utilized or be given orally or in writing or communicated in any manner whatsoever to any Third Party, being an individual firm or company or any employee thereof, without the prior consent in writing of Ad Agency Sdn Bhd. © Ad Agency Sdn Bhd (date)"

Clause B

"Advertiser acknowledges that any and all ideas, concepts, strategies, trademarks and materials that Agency presents or provides to Advertiser (the "Presentation Concepts and Materials") are being presented or provided for the sole purpose of allowing Advertiser to determine whether Advertiser wishes to use the Presentation Concepts and Materials and to engage Agency's ongoing services. Advertiser acknowledges and agrees that the Presentation Concepts and Materials are, and will, remain Agency's property regardless of any payment made by Advertiser to Agency in connection with Agency's participation in the review. Agency shall retain all rights, title and interest in connection with the Presentation

Concepts and Materials regardless of whether the physical embodiment of the creative work is in Advertiser's possession in the form of copy, artwork, etc."

If your Agency encounters an Advertiser that is concerned about potential confusion or legal dispute resulting from ideas, plans, or work that was in the possession of the Advertiser prior to submission by the Agency or similar work submitted from other participants in a review, then the Advertiser's concerns can be carved out in an agreement between the Advertiser and the shortlisted Agencies.

The following is an illustrative carve-out provision:

Clause C

"Advertiser and Agency agree, however, that Advertiser's acknowledgement of Agency's ownership of, and Advertiser's ability to utilize, the Presentation Concepts and Materials shall not apply to any Presentation Concepts and Materials that:

- i. Advertiser independently develops (or has already independently developed) without any use of any of the Presentation Concepts and Materials presented by Agency,
- or
- ii. are provided to Advertiser by an independent third party (including another Agency) that is not affiliated with Agency or under a confidentiality obligation to Agency."

Postscript

If an Agency has an interest in selling its ideas, plans, or work developed in the course of an Agency search and if the Advertiser is interested in buying the Agency's ideas, plans, or work, then the parties should discuss when and how fair compensation can be established.

Ultimately fair compensation must be determined by mutual agreement between the two parties. There is a broad range of possible approaches that can be used to arrive at fair compensation for Agency ideas, plans, and work.

For example:

- The parties can agree to a one-shot buyout. (Think of buying out talent or buying out photography rights.)
- There can be a phased approach with some minimum initial payment and provision for subsequent payments depending on the level and/or duration of subsequent usage by the Advertiser. (Think of a talent-session fee and their ongoing reuse fees.)
- Alternatively, the parties can agree to negotiate a specific compensation formula at a future date. Rather than trying to determine a specific payment approach during the search process, the parties can agree to negotiate fair payment in the future in the event the Advertiser wants to use the Agency's ideas, plans, or work.

To illustrate:

Clause D

"If Advertiser ultimately decides, in its discretion, that Advertiser would like to use or exploit the Presentation Concepts and Materials in any manner, or if Advertiser would like to engage Agency's ongoing services as Advertiser's advertising agency, Advertiser and Agency will negotiate in good faith and enter into a separate agreement setting forth the terms of Agency's services, or of such use or exploitation, including the amount of Agency's compensation."

The best long-term, Advertiser-Agency relationships involve an open, equitable two-way dialogue on goals, processes and economics. The 4As encourages Agencies to value and protect their ideas and work. Advertisers that are seeking a communications partnership with an Advertising Agency must respect Agency work and value it fairly.



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