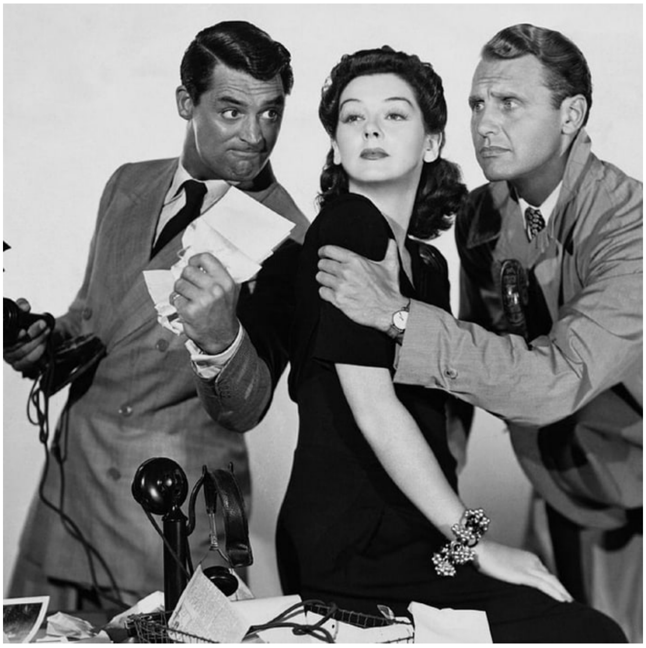
Why getting an agent is critical, to make it in the creative industries

In the creative industries, the talent is often represented by middle men, who reach out to end customers, and find avenues whereby, and marketplaces on which, the products and/or services and skillset of the talent they represent are marketed, sold, distributed, licensed, etc. So, in the art world, these middle men are **art galleries and auction houses.** In the **book publishing sector,** these middle men are called literary agents, while in the film industry, those representing the above-the-line talent (actors, directors, writers) are called

acting agents and agencies. Even music composers have their own composer agents, with a handful of players in this niche, in France and the United Kingdom ("UK"). So, why do you need an agent, as a creative? How do you find an agent? How will your relationship with the agent work?



1. Why do you need an agent, as a creative?

As a creative, as a talent, you have mostly honed your creative skills, be it your painting skills, your sculpting skills, your acting skills, your writing and literary skills, your fashion design skills, etc.

This is a completely different skill set than the one needed to:

- getting substantial work in your creative field, relying on smooth marketing tactics, social media and public relations skills;
- networking with the major players in your creative field, be it the most bankable film directors, the most skilled film producers, the stalwart book publishers, the most wealthy art collectors, the largest fashion brands who will hire you as a model for their catwalk presentations, etc.
- negotiating sales, licensing, distribution agreements;
- negotiating service providers agreement to act in a film or write the musical composition and soundtrack to a film;
- negotiating publishing agreements of a literary work with books publishers and online content providers;
- managing, in a strategical and optimal manner, the career of the talent, and
- doing some reputation management work, when and if the career and image of a talent is getting tarnished for some reason.

Well, in a nutshell, you have the required job description of an agent, set out above!

This is why you need an agent: because he or she will do all the things mentioned above, for you, in order to enhance your career as a talent, and get you some jobs, some bookings or some sales, depending on what you have to offer.

Also, there are very low barriers to entry to most creative fields, since everyone can become a player in that field without having to obtain a particular practising license or authorisation from one’s government to become an artist, a book author, a painter, an actor, a film director, etc.

Indeed, unlike regulated industries, such as the legal profession, the medical profession, the accountancy profession, the banking and finance profession, creatives do not need to pass any stringent test or exam to be granted the right to work their creative jobs.

Therefore, the gatekeepers in the creative industries are the agents: since it is in their interest to only work with the best talent, they will pick and choose only the most successful and skilled gamers, designers, artists, painters, actors, film directors, writers, models, music composers, etc. to represent.

So, if you want to be part of the club, in your creative field, and land those big fat contracts, you must find yourself a good agent.

2. How do you find an agent?

Most of the time, it is by word of mouth, or through connections that one finds an agent.

Of course, being an alumni from a prestigious creative school, such as the National Film and Television School ("**NFTS**"), in the UK, or the Royal Academy of Dramatic Art ("**RADA**") helps tremendously, especially since agents love mingling with young graduates there, attending their final and graduation presentations and reviewing their final graduation projects, to assess the amount of talent such graduates may have.

Think Alexander McQueen, the famed, and now deceased, fashion designer who was immediately spotted as a major player among top fashion designers, by the most elitist fashion press, when he presented his MA graduation collection, at his college Saint Martin's in 1992.

Having a family member or friend in the business also helps, and there are countless examples of film actors who gave a major push to their offsprings, in France, the UK and the United States ("**US**") by "connecting them" to their agents.

If you are not one for nepotism, then you could also approach and cold-call the best agents for your particular creative field, and present them with your portfolio of works and CV, in the hopes that they will retain you as their client. However, this route is the toughest one, and you will probably get a lot of rejections, if and when you get picked by an agent.

The web is an excellent source of information to find the best agents in your creative field, in France, the UK and the US.

For example, on the best articles I have ever read on the highly-secretive agenting business is "*Le fascinant business* *des agents de stars*", which dissects the rarified group of famous acting agents in Paris, France.

3. How will your relationship with the agent work?

The agenting business is mostly an unregulated one, although France, ever the formalistic one, has put in place some rules and regulations relating to the agenting profession in its labour code and a decree on the remuneration of artistic agents, which caps the agents' earnings at 10 percent of the gross remunerations paid to the talent.

The excellent French streaming series, "*10 pour cent*" ("Call my agent" on English streaming channels) gives a great example of what acting agents do, for a mere 10 percent of the actors' earnings.

In the UK and the US, there is way more of a "*laissez-faire*" approach to the agenting business, although the UK has some statutory regulations set out in the Employment Agencies Act 1973 and the Employment Businesses Regulations 2003, which set some standards in terms of:

- providing relevant information and advice to the agents' clients (i.e. the talent);
- conducting all affairs on behalf of the agents' clients, and
- keeping records, in particular of the contracts and visa application processes, entered into by the agents'

clients during the course of the creative activities.

UK and US agents usually get 15 percent commissions, although I have seen percentage rates going as high as 50 percent, in the case of art galleries selling consigned art works on behalf of artists they represent.

These discrepancies in the commission rates, and the various obligations owed by the agent to the talent, are caused by the variance in the provisions set out in the representation agreements entered into between the talent and his or her agent. Since the “freedom to contract” principle applies, the terms of the contractual agreements entered into between the parties are left mostly to the freedom of those parties, except for the rare statutory points mentioned above.

Very often, at our law firm Crefovi, we get approached by creatives who signed very poorly drafted, and very unbalanced, representation agreements with their agents in the past. Therefore, we support them in terminating such agenting agreements, while attempting to recover any earning unpaid to them by these agents.

Therefore, as a talent, it is always advisable to instruct an entertainment lawyer, in order to review, amend and negotiate the terms of any draft representation agreement sent by the agent, before such talent signs it.

Also, it is useful to become a member of a trade union for creative practitioners, such as Equity, which may provide you with ongoing career, business and legal advice, along the way.

If you want to be successful in the arts, you need a top agent in your creative field to represent you. However, an agent is not your friend, but your future business partner, so you need to establish some clear, transparent and fair working conditions with him or her, from the outset. The best way to achieve this is to instruct a seasoned entertainment lawyer, like us at Crefovi, to negotiate such representation agreement for you. Then, it should be plain sailing, a lot of hard work and, hopefully, success and recognition at the end of the line, in your creative field!

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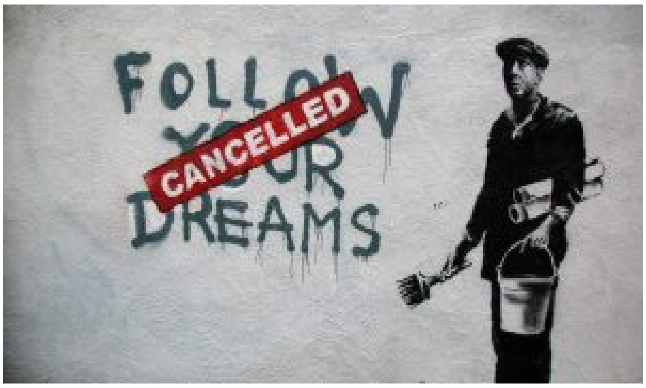
Cancel culture: how the creative industries should ride out the storm

Cancel culture is upon us. This is what we are currently being told by British and French mass media, who have finally caught up with the content of the latest, and first non-fictional, book ever published by acclaimed, yet heavily criticised, American author **Bret Easton Ellis**, **"White"**. The polemic rages on both sides of the pond, ignited by more than 150 public figures signing a **controversial letter denouncing cancel culture.**

So, what’s going on? What is “cancel culture”? Why should you pay attention to, and be cautious about it, as a creative professional? Is this even a thing in Europe and, in particular, in France and the United Kingdom? If so, how should you position yourself, as a creative, on, and about, cancel culture?



1. What is it? Where does it come from?

Following the 1990s’ culture wars, which sprung up in the United States of America as a way of denouncing and forbidding contemporary art exhibitions and other medium of creative expression judged by those instigating such culture wars as indecent and obscene, “cancel culture” has taken off in the early 2000s on social media, and has since become a cultural phenomenon in the USA and Canada – especially in the last five years or so – pervading every aspect of Northern America’s mass media.

"Cancel culture" refers to the popular desire, and practice, of withdrawing support for (i.e. cancelling) public figures, communities or corporations, after they have done or said something considered objectionable or offensive. "Cancel culture" is generally performed on social media, in the form of group online shaming.

Therefore, as a result of something said or done, which triggered negative reactions and emotions such as anger, disgust, annoyance and hate from some members of the public, a natural person or legal entity or group of natural persons ends up being publicly shamed and humiliated, on internet, via social media platforms (such as Twitter, Facebook and Instagram) and/or more localised media (such as email groups). Online shaming takes many forms, including call-outs, cancellation or cancel culture, doxing, negative reviews, and revenge porn.

While the culture wars of the 1990s were driven by right-wing religious and conservative individuals in the US (triggered by "hot-button" defining issues such as abortion, gun politics, separation of church and state, privacy, recreational drug use, homosexuality), the cancel culture of our 21st century is actually a left-leaning supposedly "progressive" identity movement which has taken hold in recent years due to the conversations prompted by #MeToo and other movements that demand greater accountability from public figures. According to the website Merriam-Webster, "*the term has been credited to black users of Twitter, where it has been used as a hashtag. As troubling information comes to light regarding celebrities who were once popular, such as Bill Cosby, Michael Jackson, Roseanne Barr and Louis C.K. – so come calls to cancel such figures*".

Yep. Check out your Twitter feed by typing in the search bar the hashtags #cancelled, #cancel or #cancel[*then name of the individual, company, organisation you think might be cancelled*], and you will be able to review the top current cancellation campaigns and movements launched against Netflix, British actress Millie Bobby Brown, twitter user @GoatPancakes_, etc.

So under the guise of defending laudable causes such as the recognition of the LGBTQ community and fighting against racism, sexism, sexual assault, homophobia, transphobia, etc., some communities of online "righteous" vigilante use violent methods, such as cancellation, in order to administer a virtual punishment to those who are on their radar.

This call-out and cancel culture is becoming so pervasive and effective that people lose their jobs over a tweet, some upsetting jokes or inappropriate remarks.

The Roseanne Barr's story is the ultimate cancellation example, since her ABC show, "Roseanne", was terminated with immediate effect, after Ms Barr posted a tweet about Valerie Jarrett, an African-American woman who was a senior advisor to Barack Obama throughout his presidency and considered one of his most influential aides. R. Barr wrote, in her litigious tweet, if the "*muslim brotherhood & planet of the apes had a baby = vj*". Whilst Ms Barr's remark was undoubtedly in extreme bad taste, it is fair to ask whether her tweet – which could have easily been deleted from Twitter to remove such kick well below the belt dealt to Ms Jarrett – justified wrecking Ms Barr's long-lasting entertainment and broadcasting career in one instant, permanently and for eternity.

To conclude, social media channels have become the platforms of virtual trials, where justice (i.e. cancellation) is administered in an expeditious manner, with no possibility of dialogue, forgiveness and/or statute of limitation. This arbitrary mass justice movement is not only cruel, but tends to put everything under the same umbrella, indiscriminately: so a person who cracked a sexist joke on Twitter would become vilified and even “cancelled”, in the same manner than an individual effectively sentenced for sexual assault by an actual court of justice.

How did we get to this point? Why does a growing number of Northern Americans feel the uncontrollable need to call-out, cancel and violently pillory some of their public figures, corporations and communities?

A pertinent analysis, although skewed by a European perspective, is that made by French sociologist Nathalie Heinich in French newspaper Le Monde and explained on the podcast “Histoire d’Amériques”, dedicated to Bret Easton Ellis’ “White”.

According to Ms Heinich, there is no legal limitation to freedom of speech – a personal liberty which is enshrined in the first amendment to the US constitution, in the USA. As a consequence, the US congress cannot adopt laws which may limit or curb freedom of expression, as is set out in this first amendment. Therefore, according to N. Heinich, since the US authorities cannot forbid speech and freedom of expression, it is down to US citizens to take on the role of vigilante and organise spectacular information and public campaigns, in order to request the prohibition of such expression and such speech.

This analysis made by this French sociologist needs to be nuanced: whilst it is true that no US statute or law may curtail freedom of speech in the USA, there is consistent and ample body of case law and common law, which rule on the categories of speech that are given lesser or no protection by the first amendment of the Bill of rights. Those exceptions include:

- incitement (i.e. the advocacy of the use of force when it is directed to inciting or producing imminent lawless action, Brandenburg v Ohio (1969));
- incitement to suicide (in 2017, a juvenile court in Massachusetts, USA, ruled that repeatedly encouraging someone to complete suicide was not protected by the first amendment);
- false statement of fact and defamation (Gertz v Robert Welch, Inc. (1974));
- obscenity (Miller v California (1973) established the Miller test whereby speech is unprotected if "*the average person, applying contemporary community standards, would find that the subject or work in question, taken as a whole, appeals to the prurient interest*", and "*the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law*", and "*the work, taken as a whole, lacks serious literary, artistic, political or scientific value*"), and
- child pornography (New York v. Ferber (1982) which ruled that if speech or expression is classified under the child pornography exception at all, it becomes unprotected).

Therefore, there are some common law exceptions to the first amendment consecrating freedom of speech in the USA, but they are few and far between, and they need to be hotly, and expensively, debated in court, probably months or years after the triggering content was made available in the public space in the first instance, before being found, by a court, unprotected by freedom of speech, in favour of higher public policy interests.

As a result, many American and Canadian citizens resort to violent tactics, in order to request the immediate, swiftly-enforced and free of legal fees and court fees, prohibition of controversial art exhibitions, entertainment shows, movies, jokes, remarks, etc. first through the 1990s culture wars, and now through the 21st century’s cancel culture.

This is paradoxical since cancel culture and call-out culture are some of the tools used to advocate for worthy causes such as fighting against racism, sexism, sexual predation and aggression, promoting LGBTQ rights. However, the methods used, through cancel culture and online shaming, to achieve those laudable goals, are very violent and totalitarian, all taking place in the virtual realm of social media, but with very serious and long-lasting “real-life” consequences such as loss of employment, loss of reputation, self-harm and sometimes, suicide.

2. Can cancel culture enter through our European borders, in particular in France and the United Kingdom?

I hate to break it to you, but cancel culture is already upon us in France and the United Kingdom. We are in a globalised world, all of us are online and check the media and social media from all over the world, thanks to the internet. So this Northern American trend has, of course, reached our European shores.

It is worth noting that the recognition of "cancel culture", and the realisation that is has become a sizable part of online culture, took place in the United Kingdom ("**UK**") at the beginning of the year 2020, when British television presenter and socialite Caroline Flack committed suicide allegedly because she was vilified on social media and by British tabloids, further to being sacked from British reality show "Love Island". This UK epiphany about "cancel culture" arrived earlier than elsewhere in Europe, probably due to the shared language, and culture, that the British have with Americans and Canadians.

France is only now getting familiar with this new concept of "cancel culture", further to hearing about the "letter on justice and open debate", drafted, and signed, in July 2020, by more than 150 global intellectuals and authors (among whom Margaret Atwood, Wynton Marsalis, Noam Chomsky, J.K. Rowling and Salman Rushdie), and denouncing the excesses of online shaming and cancel culture. France is currently going through a phase of introspection, asking itself whether "la culture de l'annulation" could take off on its Gallic shores. And it is.

Proof is, I was interviewed for the 8.00pm TV News of France TV on Sunday 20 September 2020, to discuss the attempts made by no less than the new very controversial French minister of the interior, Gerald Darmanin – who was himself under criminal investigation for sexual coercion, harassment and misconduct in 2009, and then again between 2014 and 2017 – to eradicate from all SVoD services platforms such as YouTube, Spotify, Deezer, Dailymotion, the release of the first music album created by Franco-Senegalese 28 years' old rapper, Freeze Corleone, "La Menace Fantôme" ("**LMF**"). On which grounds is such cancellation requested? Provoking racial hatred and racial slander, no less.

Artist Freeze Corleone is an uncompromising rapper, abundantly peppering his raps with the French translations of "nigger" ("négro") and "bitches" ("pétasses") in the purest Northern American rap tradition (F. Corleone lived in Montreal, Canada, before settling down in Dakar, Senegal). He also obscurely refers to "Adolf", "Goebbels", "Ben Laden" and "Sion" in his rather enigmatic LMF lyrics. However, qualifying his body of work in LMF as racial slander and/or provoking racial hatred is a stretch. If you do not like it, because this content triggers you, just move on and don't listen to it.

Freedom of speech is enshrined in the French declaration of rights of the human being and citizen, dated 1789. Article 11 of such declaration provides that the "*free communication of thoughts and opinions is one of the most precious rights of the human being: any Citizen may therefore speak, write, print freely, except where he or she has to answer for the abuse of such freedom in specific cases provided by law*".

And such specific cases where freedom of speech may be curtailed, under French statutory law, include:

- Law dated 1881 on the freedom of the press which, while recognising freedom of speech in all publication formats, provides for four criminally-reprehensible exceptions, which are insults, defamation and slander, incentivising the perpetration of criminal offences, if it is followed by acts, as well as gross indecency;

- Law dated 1972 against opinions provoking racial hatred, which – like the four above-mentioned exceptions, is a criminal offense provided for in the French criminal code;
- Law dated 1990 against revisionist opinions, which is also a criminal offense in order to penalise those who contest the materiality and factuality of the atrocities committed by the Nazis on minorities, such as Jews, homosexuals and gypsies before and during world war two, and
- Law dated July 2019 against hateful content on internet, which provisions (requiring to remove all terrorist, pedopornographic, hateful and pornographic content from any website within 24 hours) were almost completely censored by the French constitutional council as a disproportionate infringement to freedom of speech, before entering into force in its expurgated finalised version later on in 2019.

Therefore, according to French sociologist Nathalie Heinich, France does not need "cancel culture" because freedom of speech is already strictly corseted by French statutory laws. By this, she means that French individuals won't have to take to social media platforms, in order to "cancel" whoever is misbehaving, since the all-pervading French nanny state will strike the first blow to the "offender", in the same manner than French minister of justice G. Darmanin unilaterally requested all cultural streaming and video platforms, from YouTube to Spotify and Deezer, as well as all French radio and TV channels, to immediately and permanently remove the songs of Freeze Corleone's LMF, further to opening a criminal inquiry against the latter, for allegedly committing racial slander and/or provoking racial hatred through his lyrics.

Is this above-mentioned French regal method a better tool than having the populace publicly decrying and shaming an individual who “steps out of line”, by using “cancel culture”? By no means, because, at the end of the day, it’s our collective freedom of speech which is being breached and infringed, on a whim. And that is unacceptable, in a democracy.

On the other side of the channel, the legal framework around freedom of speech is no panacea either. Freedom of expression is usually ruled through common law, in the UK. However, in 1998, the UK transposed the provisions of the European Convention on human rights – which article 10 provides for the guarantee of freedom of expression – into domestic law, by way of its Human rights act 1998.

Not only is freedom of expression tightly delineated, in article 12 (Freedom of expression) of the Human rights act 1998, but there is a broad sweep of exceptions to it, under UK common and statutory law. In particular, the following common law and statutory offences, narrowly limit freedom of speech in the UK:

- threatening, abusive or insulting words or behaviour intending or likely to cause harassment, alarm or distress, or cause a breach of the peace (which has been used to prohibit racist speech targeted at individuals);
- sending any letter or article which is indecent or grossly offensive with an intent to cause distress or anxiety (which has been used to prohibit speech of a

racist or anti-religious nature, as well as some posts on social networks), governed by the Malicious communications act 1988 and the Communications act 2003;

- incitement (i.e. the encouragement to another person to commit a crime);
- incitement to racial hatred;
- incitement to religious hatred;
- incitement to terrorism, including encouragement of terrorism and dissemination of terrorist publications;
- glorifying terrorism;
- collection or possession of a document or record containing information likely to be of use to a terrorist;
- treason including advocating for the abolition of the monarchy or compassing or imagining the death of the monarch;
- obscenity;
- indecency including corruption of public morals and outraging public decency;
- defamation and loss of reputation, which legal framework is set out in the Defamation act 2013;
- restrictions on court reporting including names of victims and evidence and prejudicing or interfering with court proceedings;
- prohibition of post-trial interviews with jurors, and
- harassment.

In Europe, and in particular in France and the UK, there is already a tight leash on freedom of speech, whether at common law or statutory law. However, "cancel culture" is nonetheless permeating our European online shores, following the trend started in Northern America. As a result, it is a tough time to be a free and creative European citizen, let alone a public figure or corporation, in this 21st century Europe. Indeed, not only could you have trouble with the law, if you were to make triggering or contentious comments or jokes or lyrics in the public domain, but you could also be shot down in flames by the online community, on social media, for your speech and expression.

3. How to ride the storm of "cancel culture", while remaining consistently creative and productive?

In the above-mentioned cultural and legal context, it is crucial for creative professionals to think long and hard before posting, broadcasting, speaking, and even behaving.

As a result, book publishers use the services of "sensitivity readers", before releasing a new work, whereby such consultants read books to be published, in order to look for, and find out, any clichés, stereotypes, scenes, formulations that may offend a part of the readership. This use of sensitivity readers is becoming more and more systematic, especially when the author speaks about themes which he, or she, does not personally master.

For example, an heterosexual author who describes a gay character, or a white author who describes Mexicans, in his or her new book, will most definitely have a sensitivity consultant review his or her output before publication. Almost inevitably, such sensitivity reader will request that some changes be made to the written content, so as to avoid a boycott of the published book, or cancellation of the author and book, altogether.

Whilst some of the classics of global literature were perceived as very shocking when they were first released (think “Lolita” from Vladimir Nabokov about the obsession of a middle-aged literature professor with a 12 year’s old girl, which today would probably be described as a glorification of pedophilia), they would probably never see the light of day, if they were to be published in our era.

Therefore, today’s cultural sensitivities push towards the publication and broadcasting, of written, audio and visual creative content which is bland, right-thinking, watered-down, in which the author only refers to what he or she knows, in the most neutral way possible.

This need to use “auto-censorship” in any content a creator wishes to publish is compounded by the fact that today, consumers of creative content do not differentiate between the author of the work, and his or her creative output. There is no separation between the author and content creator, and his or her body of work and/or fictional characters. With Millenials and US universities becoming obsessed with identity questions (i.e. the identity or feeling of belonging to a group, such as the gay community, the black community, etc.), it is the person who writes the book, or song, or writes or directs a film, who is now also important, maybe even more important than the work itself.

As a result, any content creator who writes or sings or produces an audiovisual work about a community other than his or her own, may be accused of cultural appropriation (i.e. the adoption of an element or elements of one culture or identity by members of another culture or identity) and even become the object of victimhood culture (i.e. a term coined by sociologists Bradley Campbell and Jason Manning, in their 2018 book "The rise of victimhood culture: microaggressions, safe spaces and the new culture wars", to describe the attitude whereby the victims publicize microaggressions to call attention to what they see as the deviant behaviour of the offenders, thereby calling attention to their own victimization, lowering the offender's moral status and raising their own moral status).

In this climate, it is therefore easier to publish or broadcast creative content if you belong to a minority (by being, for example, homosexual, black, brown, or a female), while white heterosexual male creators have definitely become disadvantaged, and more susceptible to being targets of "cancel culture".

To conclude, a lot of prior thoughts and research and preparation and planning need to be put into the creation, and then broadcasting and publication, of any creative content today, not only with respect to such output, but also in relation to the identity, and positioning, of his or her author. If this conscious effort of adhering to right-thinking and bland ideologies is appropriately and astutely done, you and your creative output may successfully ride the storm of, not only French and UK legal limitations to your freedom of expression, but also the nasty impact of cancel culture and online shaming, hence maximising your chances that your creative work generates a commercial success.

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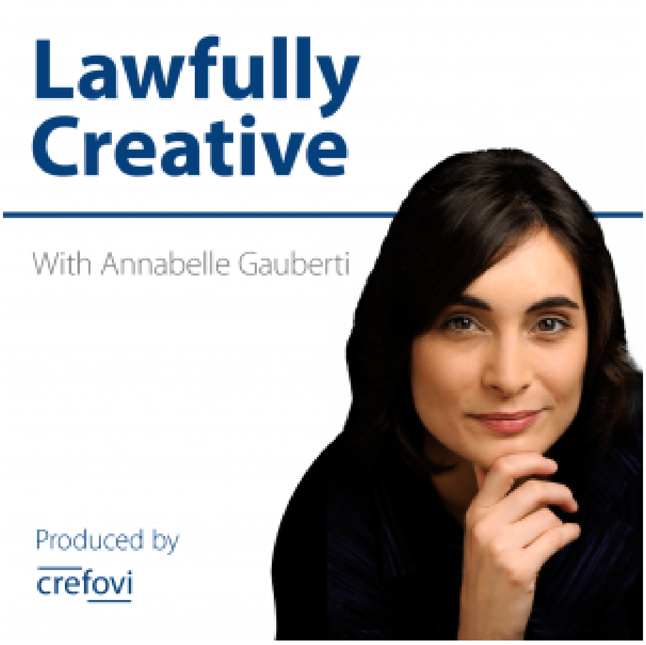
Lawfully Creative | Antoine Pecqueur, musician, journalist and author

About the show



The podcast "Lawfully Creative" is a series of intimate and honest conversations hosted by **Annabelle Gauberti**, the founding and managing partner of **London and Paris-based law firm Crefovi**, which focuses on advising the creative industries. Annabelle talks with artists, policy makers and professionals in the creative industries – to hear their stories, what inspires their creations, what decisions changed their careers, and what relationships influenced their work. Produced by Crefovi.

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Episode n. 14: Antoine Pecqueur, musician, journalist and author

Antoine Pecqueur is a thorough and enthusiastic journalist focusing on culture and the creative industries, who interviewed our founding and managing partner, Annabelle Gauberti, twice, on legal issues relating to the art sector. However, Antoine has several strings to his bow, being also a professional bassoonist and author.

1 May 2020 – Antoine Pecqueur and Crefovi's founding and managing partner, and Lawfully Creative's founder and editor, Annabelle Gauberti, had a Zoom video call, during these times of lockdown, in order to discuss Antoine's trajectory in three distinct, yet complementary, cultural fields, which are music, journalism and writing. Antoine has accumulated an impressive body of work, at 38 years' old, thanks to a strong work ethic and relentless work. Listen to the lowdown, from Antoine, in this entertaining and chatty "Lawfully Creative" podcast!

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Please do leave a review and rating about the podcast "Lawfully Creative", to encourage others to discover our curated content.

A global network

Clients praise Crefovi's lawyers for their responsiveness & ability to understand the technical, business and legal aspects of each commercial transaction and come back, deal after deal, to be advised by them.

While London and Paris based, we routinely work across borders. The vast majority of our engagements are multi-jurisdictional. We are used to working in multinational teams, and rely on our network of specialist lawyers for support in other jurisdictions.

The team has therefore established an extensive international network of creative industries' contacts and a close association with other specialist lawyers worldwide. Our history of successes in high profile, politically sensitive matters reflects an ability to act swiftly and with the utmost discretion.

Indeed, Crefovi's lawyers are very well connected in the world of the creative industries, attending, and participating to discussion panels at, on a regular basis, each session of the professional trade shows such as CES, Web Summit, DLD & Slush, Midem, as well as the Cannes film festival and EFM and the

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Why the valuation of intangible assets matters: the unstoppable rise of intangibles' reporting in the 21st century's corporate environment

It is high time France and the UK up their game in terms of accounting for, reporting and leveraging the intangible assets owned by their national businesses and companies, while Asia and the US currently lead the race, here. European lenders need to do their bit, too, to empower creative and innovative SMEs, and provide them with adequate financing to sustain their growth and ambitions, by way of intangible assets backed-lending.

Back in May 2004, I published an in-depth study on the financing of luxury brands, and how the business model developed by large luxury conglomerates was coming out on top. 16 years down the line, I can testify that everything I said in that 2004 study was in the money: the LVMH, Kering, Richemont and L'Oreal of this word dominate the luxury and fashion sectors today, with their multibrands' business model which allows them to both make vast economies of scale and diversify their economic as well as financial risks.

However, in the midst of the COVID 19 pandemic which constrains us all to work from home through virtual tools such as videoconferencing, emails, chats and sms, I came to realise that I omitted a very important topic from that 2004 study, which is however acutely relevant in the context of developing, and growing, creative businesses in the 21st century. It is that intangible assets are becoming the most important and valuable assets of creative companies (including, of course, luxury and fashion houses).

Indeed, traditionally, tangible and fixed assets, such as land, plants, stock, inventory and receivables were used to assess the intrinsic value of a company, and, in particular, were used as security in loan transactions. Today, most successful businesses out there, in particular in the technology sector (Airbnb, Uber, Facebook) but not only, derive the largest portion of their worth from their intangible assets, such as intellectual property rights (trademarks, patents, designs, copyright), brands, knowhow, reputation, customer loyalty, a trained workforce, contracts, licensing rights, franchises.

Our economy has changed in fundamental ways, as business is now mainly “knowledge based”, rather than industrial, and “intangibles” are the new drivers of economic activity, the Financial Reporting Council (“**FRC**”) set out in its paper “Business reporting of intangibles: realistic proposals”, back in February 2019.

However, while such intangibles are becoming the driving force of our businesses and economies worldwide, they are consistently ignored by chartered accountants, bankers and financiers alike. As a result, most companies – in particular, Small and Medium Enterprises (“**SMEs**”)- cannot secure any financing with money men because their intangibles are still deemed to … well, in a nutshell … lack physical substance! This limits the scope of growth of many creative businesses; to their detriment of course, but also to the detriment of the UK and French economies in which SMEs account for an astounding 99 percent of private sector business, 59 percent of private sector employment and 48 percent of private sector turnover.

How could this oversight happen and materialise, in the last 20 years? Where did it all go wrong? Why do we need to very swiftly address this lack of visionary thinking, in terms of pragmatically adapting double-entry book keeping and accounting rules to the realities of companies operating in the 21st century?

How could such adjustments in, and updates to, our old ways of thinking about the worth of our businesses, be best implemented, in order to balance the need for realistic valuations of companies operating in the “knowledge economy” and the concern expressed by some stakeholders that intangible assets might peter out at the first reputation blow dealt to any business?

1. What is the valuation and reporting of intangible assets?

1.1. Recognition and measurement of intangible assets within accounting and reporting

In the European Union (“**EU**”), there are two levels of accounting regulation:

- the international level, which corresponds to the International Accounting Standards (“**IAS**”), and International Financial Reporting Standards (“**IFRS**”) issued by the International Accounting Standards Board (“**IASB**”), which apply compulsorily to the consolidated financial statements of listed companies and voluntarily to other accounts and entities according to the choices of each country legislator, and
- a national level, where the local regulations are driven by the EU accounting directives, which have been issued from 1978 onwards, and which apply to the remaining accounts and companies in each EU member-state.

The first international standard on recognition and measurement of intangible assets was International Accounting Standard 38 (“**IAS 38**”), which was first issued in 1998. Even though it has been amended several times since, there has not been any significant change in its conservative approach to recognition and measurement of intangible assets.

An asset is a resource that is controlled by a company as a result of past events (for example a purchase or self-creation) and from which future economic benefits (such as inflows of cash or other assets) are expected to flow to this company. An intangible asset is defined by IAS 38 as an identifiable non-monetary asset without physical substance.

There is a specific reference to intellectual property rights

("**IPRs**"), in the definition of "intangible assets" set out in paragraph 9 of IAS 38, as follows: "*entities frequently expend resources, or incur liabilities, on the acquisition, development, maintenance or enhancement of intangible resources such as scientific or technical knowledge, design and implementation of new processes or systems, licenses, intellectual property, market knowledge and trademarks (including brand names and publishing titles). Common examples of items encompassed by these broad headings are computer software, patents, copyrights, motion picture films, customer lists, mortgage servicing rights, fishing licences, import quotas, franchises, customer or supplier relationships, customer loyalty, market share and marketing rights*".

However, it is later clarified in IAS 38, that in order to recognise an intangible asset on the face of balance sheet, it must be identifiable and controlled, as well as generate future economic benefits flowing to the company that owns it.

The recognition criterion of "identifiability" is described in paragraph 12 of IAS 38 as follows.

"*An asset is identifiable if it either:*

a. is separable, i.e. capable of being separated or divided from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, identifiable asset or liability, regardless of whether the entity intends to do so; or

b. arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations".

"Control" is an essential feature in accounting and is described in paragraph 13 of IAS 38.

"*An entity controls an asset if the entity has the power to obtain the future economic benefits flowing from the* *underlying resource and to restrict the access of others to those benefits. The capacity of an entity to control the future economic benefits from an intangible asset would normally stem from legal rights that are enforceable in a court of law. In the absence of legal rights, it is more difficult to demonstrate control. However, legal enforceability of a right is not a necessary condition for control because an entity may be able to control the future economic benefits in some other way*".

In order to have an intangible asset recognised as an asset on company balance sheet, such intangible has to satisfy also some specific accounting recognition criteria, which are set out in paragraph 21 of IAS 38.

"*An intangible asset shall be recognised if, and only if:*

a. it is probable that the expected future economic benefits that are attributable to the asset will flow to the entity; and

b. the cost of the asset can be measured reliably".

The recognition criteria illustrated above are deemed to be always satisfied when an intangible asset is acquired by a company from an external party at a price. Therefore, there are no particular problems to record an acquired intangible asset on the balance sheet of the acquiring company, at the consideration paid (i.e. historical cost).

1.2. Goodwill v. other intangible assets

Here, before we develop any further, we must draw a distinction between goodwill and other intangible assets, for clarification purposes.

Goodwill is an intangible asset that is associated with the purchase of one company by another. Specifically, goodwill is the portion of the purchase price that is higher than the sum of the net fair value of all of the assets purchased in the acquisition and the liabilities assumed in the process (= purchase price of the acquired company – (net fair market value of identifiable assets – net fair value of identifiable liabilities)).

The value of a company's brand name, solid customer base, good customer relations, good employee relations, as well as proprietary technology, represent some examples of goodwill, in this context.

The value of goodwill arises in an acquisition, i.e. when an acquirer purchases a target company. Goodwill is then recorded as an intangible asset on the acquiring company's balance sheet under the long-term assets' account.

Under Generally Accepted Accounting Principles ("**GAAP**") and IFRS, these companies which acquired targets in the past and therefore recorded those targets' goodwill on their balance sheet, are then required to evaluate the value of goodwill on their financial statements at least once a year, and record any impairments.

Impairment of an asset occurs when its market value drops below historical cost, due to adverse events such as declining cash flows, a reputation backlash, increased competitive environment, etc. Companies assess whether an impairment is needed by performing an impairment test on the intangible asset. If the company's acquired net assets fall below the book value, or if the company overstated the amount of goodwill, then it must impair or do a write-down on the value of the asset on the balance sheet, after it has assessed that the goodwill is impaired. The impairment expense is calculated as the difference between the current market value and the purchase price of the intangible asset. The impairment results in a decrease in the goodwill account on the balance sheet.

This expense is also recognised as a loss on the income statement, which directly reduces net income for the year. In turn, earnings per share ("**EPS**") and the company's stock price are also negatively affected.

The Financial Accounting Standards Board ("**FASB**"), which sets standards for GAAP rules, and the IASB, which sets standards for IFRS rules, are considering a change to how goodwill impairment is calculated. Because of the subjectivity of goodwill impairment, and the cost of testing impairment, FASB and IASB are considering reverting to an older method called "goodwill amortisation" in which the value of goodwill is slowly reduced annually over a number of years.

As set out above, goodwill is not the same as other intangible assets because it is a premium paid over fair value during a transaction, and cannot be bought or sold independently. Meanwhile, other intangible assets can be bought and sold independently.

Also, goodwill has an indefinite life, while other intangibles have a definite useful life (i.e. an accounting estimate of the number of years an asset is likely to remain in service for the purpose of cost-effective revenue generation).

1.3. Amortisation, impairment and subsequent measure of intangible assets other than goodwill

That distinction between goodwill and other intangible assets being clearly drawn, let's get back to the issues revolving around recording intangible assets (other than goodwill) on the balance sheet of a company.

As set out above, if some intangible assets are acquired as a consequence of a business purchase or combination, the acquiring company recognises all these intangible assets, provided that they meet the definition of an intangible asset. This results in the recognition of intangibles – including brand names, IPRs, customer relationships – that would not have been recognised by the acquired company that developed them in the first place. Indeed, paragraph 34 of IAS 38 provides that "*in accordance with this Standard and IFRS 3 (as revised in 2008), an acquirer recognises at the acquisition date, separately from goodwill, an intangible asset of the acquiree, irrespective of whether the asset had been recognised by the acquiree before the business combination. This means that the acquirer recognises as an asset separately from goodwill an in-process research and development project of the acquiree, if the project meets the definition of an intangible asset. An acquiree's in-process research and development project meets the definition of an intangible asset when it:*

a. meets the definition of an asset, and

b. is identifiable, i.e. separable or arises from contractual or other legal rights."

Therefore, in a business acquisition or combination, the intangible assets that are "identifiable" (either separable or arising from legal rights) can be recognised and capitalised in the balance sheet of the acquiring company.

After initial recognition, the accounting value in the balance sheet of intangible assets with definite useful lives (e.g. IPRs, licenses) has to be amortised over the intangible asset's expected useful life, and is subject to impairment tests when needed. As explained above, intangible assets with indefinite useful lives (such as goodwill or brands) will not be amortised, but only subject at least annually to an impairment test to verify whether the impairment indicators ("triggers") are met.

Alternatively, after initial recognition (at cost or at fair value in the case of business acquisitions or mergers), intangible assets with definite useful lives may be revalued at fair value less amortisation, provided there is an active market for the asset to be referred to, as can be inferred from paragraph 75 of IAS 38:

"*After initial recognition, an intangible asset shall be carried at a revalued amount, being its fair value at the date of the revaluation less any subsequent accumulated amortisation and any subsequent accumulated impairment losses. For the purpose of revaluations under this Standard, fair value shall be measured by reference to an active market. Revaluations shall be made with such regularity that at the end of the reporting period the carrying amount of the asset does not differ materially from its fair value*."

However, this standard indicates that the revaluation model can only be used in rare situations, where there is an active market for these intangible assets.

1.4. The elephant in the room: a lack of recognition and measurement of internally generated intangible assets

All the above about the treatment of intangible assets other than goodwill cannot be said for internally generated intangible assets. Indeed, IAS 38 sets out important differences in the treatment of those internally generated intangibles, which is currently – and rightfully – the subject of much debate among regulators and other stakeholders.

Internally generated intangible assets are prevented from being recognised, from an accounting standpoint, as they are being developed (while a business would normally account for internally generated tangible assets). Therefore, a significant proportion of internally generated intangible assets is not recognised in the balance sheet of a company. As a consequence, stakeholders such as investors, regulators, shareholders, financiers, are not receiving some very relevant information about this enterprise, and its accurate worth.

Why such a standoffish attitude towards internally generated intangible assets? In practice, when the expenditure to develop intangible asset is incurred, it is often very unclear whether that expenditure is going to generate future economic benefits. It is this uncertainty that prevents many intangible assets from being recognised as they are being developed. This perceived lack of reliability of the linkage between expenditures and future benefits pushes towards the treatment of such expenditures as "period cost". It is not until much later, when the uncertainty is resolved (e.g. granting of a patent), that an intangible asset may be capable of recognition. As current accounting requirements primarily focus on transactions, an event such as the resolution of uncertainty surrounding an internally developed IPR is generally not captured in company financial statements.

Let's take the example of research and development costs ("**R&D**"), which is one process of internally creating certain types of intangible assets, to illustrate the accounting treatment of intangible assets created in this way.

Among accounting standard setters, such as IASB with its IAS 38, the most frequent practice is to require the immediate expensing of all R&D. However, France, Italy and Australia are examples of countries where national accounting rule makers allow the capitalisation of R&D, subject to conditions being satisfied.

Therefore, in some circumstances, internally generated intangible assets can be recognised when the relevant set of recognition criteria is met, in particular the existence of a clear linkage of the expenditure to future benefits accruing to the company. This is called condition-based capitalisation. In these cases, the cost that a company has incurred *in that financial year*, can be capitalised as an asset; the previous costs having already been expensed in earlier income statements. For example, when a patent is finally granted by the relevant intellectual property office, only the expenses incurred *during that financial year* can be capitalised and disclosed on the face of balance sheet among intangible fixed assets.

To conclude, under the current IFRS and GAAP regimes, internally generated intangible assets, such as IPRs, can only be recognised on balance sheet in very rare instances.

2.Why value and report intangible assets?

As developed in depth by the European Commission (“**EC**”) in its 2013 final report from the expert group on intellectual property valuation, the UK intellectual property office (“**UKIPO**”) in its 2013 “Banking on IP?” report and the FRC in its 2019 discussion paper “Business reporting of intangibles: realistic proposals”, the time for radical change to the accounting of intangible assets has come upon us.

2.1. Improving the accurateness and reliability of financial communication

Existing accounting standards should be advanced, updated and modernised to take greater account of intangible assets and consequently improve the relevance, objectivity and reliability of financial statements.

Not only that, but informing stakeholders (i.e. management, employees, shareholders, regulators, financiers, investors) appropriately and reliably is paramount today, in a corporate world where companies are expected to accurately, regularly and expertly manage and broadcast their financial communication to medias and regulators.

As highlighted by Janice Denoncourt in her blog post “intellectual property, finance and corporate governance”, no stakeholder wants an iteration of the Theranos’ fiasco, during which inventor and managing director Elizabeth Holmes was indicted for fraud in excess of USD700 million, by the United States Securities and Exchange Commission (“**SEC**”), for having repeatedly, yet inaccurately, said that Theranos' patented blood testing technology was both revolutionary and at the last stages of its development. Elizabeth Holmes made those assertions on the basis of the more than 270 patents that her and her team filed with the United States patent and trademark office ("**USPTO**"), while making some material omissions and misleading disclosures to the SEC, via Theranos' financial statements, on the lame justification that "*Theranos needed to protect its intellectual property*" (sic).

Indeed, the stakes of financial communication are so high, in particular for the branding and reputation of any "knowledge economy" company, that, back in 2002, LVMH did not hesitate to sue Morgan Stanley, the investment bank advising its nemesis, Kering (at the time, named "**PPR**"), in order to obtain Euros100 million of damages resulting from Morgan Stanley's alleged breach of conflicts of interests between its investment banking arm (which advised PPR's top-selling brand, Gucci) and Morgan Stanley's financial research division. According to LVMH, Clare Kent, Morgan Stanley's luxury sector-focused analyst, systematically drafted and then published negative and biased research against LVMH share and financial results, in order to favor Gucci, the top-selling brand of the PPR luxury conglomerate and Morgan Stanley's top client. While this lawsuit – the first of its kind in relation to alleged biased conduct in a bank's financial analysis – looked far-fetched when it was lodged in 2002, LVMH actually won, both in first instance and on appeal.

Having more streamlined and accurate accounting, reporting and valuation of intangible assets – which are, today, the main and most valuable assets of any 21st century corporation – is therefore paramount for efficient and reliable financial communication.

2.2. Improving and diversifying access to finance

Not only that, but recognising the worth and inherent value of intangible assets, on balance sheet, would greatly improve the chances of any company – in particular, SMEs – to successfully apply for financing.

Debt finance is notoriously famous for shying away from using intangible assets as main collateral against lending because it is too risky.

For example, taking appropriate security controls over a company's registered IPRs in a lending scenario would involve taking a fixed charge, and recording it properly on the Companies Registry at Companies House (in the UK) and on the appropriate IPRs' registers. However, this hardly ever happens. Typically, at best, lenders are reliant on a floating charge over IPRs, which will crystallise in case of an event of default being triggered – by which time, important IPRs may have disappeared into thin air, or been disposed of; hence limiting the lender's recovery prospects.

Alternatively, it is now possible for a lender to take an assignment of an IPR by way of security (generally with a licence back to the assignor to permit his or her continued use of the IPR) by an assignment in writing signed by the assignor[1]. However, this is rarely done in practice. The reason is to avoid "maintenance", i.e. to prevent the multiplicity of actions. Indeed, because intangibles are incapable of being possessed, and rights over them are therefore ultimately enforced by action, it has been considered that the ability to assign such rights would increase the number of actions[2].

Whilst there are improvements needed to the practicalities and easiness of registering a security interest over intangible assets, the basic step that is missing is a clear inventory of IPRs and other intangible assets, on balance sheet and/or on yearly financial statements, without which lenders can never be certain that these assets are in fact to hand.

Cases of intangible asset- backed lending (“**IABL**”) have occurred, whereby a bank provided a loan to a pension fund against tangible assets, and the pension fund then provided a sale and leaseback arrangement against intangible assets. Therefore, IABL from pension funds (on a sale and leaseback arrangement), rather than banks, provides a route for SMEs to obtain loans.

There have also been instances where specialist lenders have entered into sale and licence-back agreements, or sale and leaseback agreements, secured against intangible assets, including trademarks and software copyright.

Some other types of funders than lenders, however, are already making the “intangible assets” link, such as equity investors (business angels, venture capital companies and private equity funds). They know that IPRs and other intangibles represent part of the “skin in the game” for SMEs owners and managers, who have often expended significant time and money in their creation, development and protection. Therefore, when equity investors assess the quality and attractiveness of investment opportunities, they invariably include consideration of the underlying intangible assets, and IPRs in particular. They want to understand the extent to which intangible assets owned by one of the companies they are potentially interested investing in, represent a barrier to entry, create freedom to operate and meet a real market need.

Accordingly, many private equity funds, in particular, have delved into investing in luxury companies, attracted by their high gross margins and net profit rates, as I explained in my 2013 article “Financing luxury companies: the quest of the Holy Grail (not!)”. Today, some of the most active venture capital firms investing in the European creative industries are Accel, Advent Venture Partners, Index Ventures, Experienced Capital, to name a few.

2.3. Adopting a systematic, consistent and streamlined approach to the valuation of intangible assets, which levels the playing field

If intangible assets are to be recognised in financial statements, in order to adopt a systematic and streamlined approach to their valuation, then fair value is the most obvious alternative to cost, as explained in paragraph 1.3. above.

How could we use fair value more widely, in order to capitalise intangible assets in financial statements?

IFRS 13 “Fair Value Measurements” identifies three widely-used valuation techniques: the market approach, the cost approach and the income approach.

The **market approach** “*uses prices and other relevant information generated by market transactions involving identical or comparable*” assets. However, this approach is difficult in practice, since when transactions in intangibles occur, the prices are rarely made public. Publicly traded data usually represents a market capitalisation of the enterprise, not singular intangible assets. Market data from market participants is often used in income based models such as determining reasonable royalty rates and discount rates. Direct market evidence is usually available in the valuation of internet domain names, carbon emission rights and national licences (for radio stations, for example). Other relevant market data include sale/licence transactional data, price multiples and royalty rates.

The **cost approach** “*reflects the amount that would be required currently to replace the service capacity of an asset*”. Deriving fair value under this approach therefore requires estimating the costs of developing an equivalent intangible asset. In practice, it is often difficult to estimate in advance the costs of developing an intangible. In most cases, replacement cost new is the most direct and meaningful cost based means of estimating the value of an intangible asset. Once replacement cost new is estimated, various forms of obsolescence must be considered, such as functional, technological and economic. Cost based models are best used for valuing an assembled workforce, engineering drawings or designs and internally developed software where no direct cash flow is generated.

The **income approach** essentially converts future cash flows (or income and expenses) to a single, discounted present value, usually as a result of increased turnover of cost savings. Income based models are best used when the intangible asset is income producing or when it allows an asset to generate cash flow. The calculation may be similar to that of value in use. However, to arrive at fair value, the future income must be estimated from the perspective of market participants rather than that of the entity. Therefore, applying the income approach requires an insight into how market participants would assess the benefits (cash flows) that will be obtained uniquely from an intangible asset (where such cash flows are different from the cash flows related to the whole company). Income based methods are usually employed to value customer related intangibles, trade names, patents, technology, copyrights, and covenants not to compete.

An example of IPRs’ valuation by way of fair value, using the cost and income approaches in particular, is given in the excellent presentation by Austin Jacobs, made during ialci’s latest law of luxury goods and fashion seminar on intellectual property rights in the fashion and luxury sectors.

In order to make these three above-mentioned valuation techniques more effective, with regards to intangible assets, and because many intangibles will not be recognised in financial statements as they fail to meet the definition of an asset or the recognition criteria, a reconsideration to the “Conceptual Framework to Financial Reporting” needs being implemented by the IASB.

These amendments to the Conceptual Framework would permit more intangibles to be recognised within financial statements, in a systematic, consistent, uniform and streamlined manner, therefore levelling the playing field among companies from the knowledge economy.

Let’s not forget that one of the reasons WeWork co founder, Adam Neumann, was violently criticised, during WeWork’s failed IPO attempt, and then finally ousted, in 2019, was the fact that he was paid nearly USD6 million for granting the right to use his registered word trademark “We”, to his own company WeWork. In its IPO filing prospectus, which provided the first in-depth look at WeWork’s financial results, WeWork characterised the nearly USD6 million payment as “fair market value”. Many analysts, among which Scott Galloway, begged to differ, outraged by the lack of rigour and realism in the valuation of the WeWork brand, and the clearly opportunistic attitude adopted by Adam Neumann to get even richer, faster.

2.4. Creating a liquid, established and free secondary market of intangible assets

IAS 38 currently permits intangible assets to be recognised at fair value, as discussed above in paragraphs 1.3. and 2.3., measured by reference to an active market.

While acknowledging that such markets may exist for assets such as “*freely transferable taxi licences, fishing licences or production quotas*”, IAS 38 states that “*it is uncommon for an active market to exist for an intangible asset*”. It is even set out, in paragraph 78 of IAS 38 that “*an active market cannot exist for brands, newspaper mastheads, music and film publishing rights, patents or trademarks, because each such asset is unique*”.

Markets for resale of intangible assets and IPRs do exist, but are presently less formalised and offer less certainty on realisable values. There is no firmly established secondary transaction market for intangible assets (even though some assets are being sold out of insolvency) where value can be realised. In addition, in the case of forced liquidation, intangible assets’ value can be eroded, as highlighted in paragraph 2.2. above.

Therefore, markets for intangible assets are currently imperfect, in particular because there is an absence of mature marketplaces in which intangible assets may be sold in the event of default, insolvency or liquidation. There is not yet the same tradition of disposal, or the same volume of transaction data, as that which has historically existed with tangible fixed assets.

Be that as it may, the rise of liquid secondary markets of intangible assets is unstoppable. In the last 15 years, the USA have been at the forefront of IPRs auctions, mainly with patent auctions managed by specialist auctioneers such as ICAP Ocean Tomo and Racebrook. For example, in 2006, ICAP Ocean Tomo sold 78 patent lots at auction for USD8.5 million, while 6,000 patents were sold at auction by Canadian company Nortel Networks for USD4.5 billion in 2011.

However, auctions are not limited to patents, as demonstrated by the New York auction, successfully organised by ICAP Ocean Tomo in 2006, on lots composed of patents, trademarks, copyrights, musical rights and domain names, where the sellers were IBM, Motorola, Siemens AG, Kimberly Clark, etc. In 2010, Racebrook auctioned 150 American famous brands from the retail and consumer goods’ sectors.

In Europe, in 2012, Vogica successfully sold its trademarks and domain names at auction to competitor Parisot Group, upon its liquidation.

In addition, global licensing activity leaves not doubt that intangible assets, in particular IPRs, are, in fact, very valuable, highly tradable and a very portable asset class.

It is high time to remove all market’s imperfections, make trading more transparent and offer options to the demand side, to get properly tested.

3. Next steps to improve the valuation and reporting of intangible assets

3.1. Adjust IAS 38 and the Conceptual Framework to Financial Reporting to the realities of intangible assets’ reporting

Mainstream lenders, as well as other stakeholders, need cost-effective, standardised approaches in order to capture and process information on intangibles and IPRs (which is not currently being presented by SMEs).

This can be achieved by reforming IAS 38 and the “Conceptual Framework to Financial Reporting”, at the earliest convenience, in order to make most intangible assets capitalised on financial statements at realistic and consistent valuations.

In particular, the reintroduction of amortisation of goodwill may be a pragmatic way to reduce the impact of different accounting treatment for acquired and internally generated intangibles.

In addition, narrative reporting (i.e. reports with titles such as “Management Commentary” or “Strategic Report”, which generally form part of the annual report, and other financial communication documents such as “Preliminary Earnings Announcements” that a company provides primarily for the information of investors) must set out detailed information on unrecognised intangibles, as well as amplify what is reported within the financial statements.

3.2. Use standardised and consistent metrics within financial statements and other financial communication documents

The usefulness and credibility of narrative information would be greatly enhanced by the inclusion of metrics (i.e. numerical measures that are relevant to an assessment of the company's intangibles) standardised by industry. The following are examples of objective and verifiable metrics that may be disclosed through narrative reporting:

- a company that identifies customer loyalty as critical to the success of its business model might disclose measures of customer satisfaction, such as the percentage of customers that make repeat purchases;
- if the ability to innovate is a key competitive advantage, the proportion of sales from new products may be a relevant metric;
- where the skill of employees is a key driver of value, employee turnover may be disclosed, together with information about their training.

3.3. Make companies' boards accountable for intangibles' reporting

Within a company, at least one appropriately qualified person should be appointed and publicly reported as having oversight and responsibility for intangibles' auditing, valuation, due diligence and reporting (for example a director, specialist advisory board or an external professional adviser).

This would enhance the importance of corporate governance and board oversight, in addition to reporting, with respect to intangible assets.

In particular, some impairment tests could be introduced, to ensure that businesses are well informed and motivated to adopt appropriate intangibles’ management practices, which should be overseen by the above-mentioned appointed board member.

3.4. Create a body that trains about, and regulates, the field of intangible assets’ valuation and reporting

The creation of a professional organisation for the intangible assets’ valuation profession would increase transparency of intangibles’ valuations and trust towards valuation professionals (i.e. lawyers, IP attorneys, accountants, economists, etc).

This valuation professional organisation would set some key objectives that will protect the public interest in all matters that pertain to the profession, establish professional standards (especially standards of professional conduct) and represent professional valuers.

This organisation would, in addition, offer training and education on intangibles’ valuations. Therefore, the creation of informative material and the development of intangible assets’ training programmes would be a priority, and would guarantee the high quality valuation of IPRs and other intangibles as a way of boosting confidence for the field.

Company board members who are going to be appointed as having accountability and responsibility for intangibles’ valuation within the business, as mentioned above in paragraph 3.3., could greatly benefit from regular training sessions offered by this future valuation professional organisation, in particular for continuing professional development purposes.

3.5. Create a powerful register of expert intangible assets’ valuers

In order to build trust, the creation of a register of expert intangibles’ valuers, whose ability must first be certified by passing relevant knowledge tests, is key.

Inclusion on this list would involve having to pass certain aptitudes tests and, to remain on it, valuers would have to maintain a standard of quality in the valuations carried out, whereby the body that manages this registry would be authorised to expel members whose reports are not up to standard. This is essential in order to maintain confidence in the quality and skill of the valuers included on the register.

The entity that manages this body of valuers would have the power to review the valuations conducted by the valuers certified by this institution as a "second instance". The body would need to have the power to re-examine the assessments made by these valuers (inspection programme), and even eliminate them if it is considered that the assessment is overtly incorrect (fair disciplinary mechanism).

3.6. Establish an intangible assets' marketplace and data-source

The development most likely to transform IPRs and intangibles as an asset class is the emergence of more transparent and accessible marketplaces where they can be traded.

In particular, as IPRs and intangible assets become clearly identified and are more freely licensed, bought and sold (together with or separate to the business), the systems available to register and track financial interests will need to be improved. This will require the cooperation of official registries and the establishment of administrative protocols.

Indeed, the credibility of intangibles' valuations would be greatly enhanced by improving valuation information, especially by collecting information and data on actual and real intangibles' transactions in a suitable form, so that it can be used, for example, to support IPRs asset-based lending decisions. If this information is made available, lenders and expert valuers will be able to base their estimates on more widely accepted and verified assumptions, and consequently, their valuation results – and valuation reports – would gain greater acceptance and reliability from the market at large.

The wide accessibility of complete, quality information which is based on real negotiations and transactions, via this open data-source, would help to boost confidence in the validity and accuracy of valuations, which will have a very positive effect on transactions involving IPRs and other intangibles.

3.7. Introduce a risk sharing loan guarantee scheme for banks to facilitate intangibles' secured lending

A dedicated loan guarantee scheme needs being introduced, to facilitate intangible assets' secured lending to innovative and creative SMEs.

Asia is currently setting the pace in intangibles-backed lending. In 2014, the intellectual property office of Singapore ("**IPOS**") launched a USD100 million "IP financing scheme" designed to support local SMEs to use their granted IPRs as collateral for bank loans. A panel of IPOS-appointed valuers assess the applicant's IPR portfolio using standard guidelines to provide lenders with a basis on which to determine the amount of funds to be advanced. The development of a national valuation model is a noteworthy aspect of the scheme and could lead to an accepted valuation methodology in the future.

The Chinese intellectual property office ("**CIPO**") has developed some patent-backed debt finance initiatives. Only 6 years after the "IP pledge financing" programme was launched by CIPO in 2008, CIPO reported that Chinese companies had secured over GBP6 billion in IPRs-backed loans since the programme launched. The Chinese government having way more direct control and input into commercial bank lending policy and capital adequacy requirements, it can vigorously and potently implement its strategic goal of increasing IPRs-backed lending.

It is high time Europe follows suit, at least by putting in place some loan guarantees that would increase lender's confidence in making investments by sharing the risks related to the investment. A guarantor assumes a debt obligation if the borrower defaults. Most loan guarantee schemes are established to correct perceived market failures by which small borrowers, regardless of creditworthiness, lack access to the credit resources available to large borrowers. Loan guarantee schemes level the playing field.

The proposed risk sharing loan guarantee scheme set up by the European Commission or by a national government fund (in particular in the UK, who is brexiting) would be specifically targeted at commercial banks in order to stimulate intangibles-secured lending to innovative SMEs. The guarantor would fully guarantee the intangibles-secured loan and share the risk of lending to SMEs (which have suitable IPRs and intangibles) with the commercial bank.

The professional valuer serves an important purpose, in this future loan guarantee scheme, since he or she will fill the knowledge gap relating to the IPRs and intangibles, as well as their value, in the bank's loan procedure. If required, the expert intangibles' valuer provides intangibles' valuation expertise and technology transfer to the bank, until such bank has built the relevant capacity to perform intangible assets' valuations. Such valuations would be performed, either by valuers and/or banks, according to agreed, consistent, homogenised and accepted methods/standards and a standardised intangible asset's valuation methodology.

To conclude, in this era of ultra-competitiveness and hyper-globalisation, France and the UK, and Europe in general, must immediately jump on the saddle of progress, by reforming outdated and obsolete accounting and reporting standards, as well as by implementing all the above-mentioned new measures and strategies, to realistically and consistently value, report and leverage intangible assets in the 21st century economy.

[1] “Lingard’s bank security documents”, Timothy N. Parsons, 4th edition, LexisNexis, page 450 and seq.

[2] “Taking security – law and practice”, Richard Calnan, Jordans, page 74 and seq.

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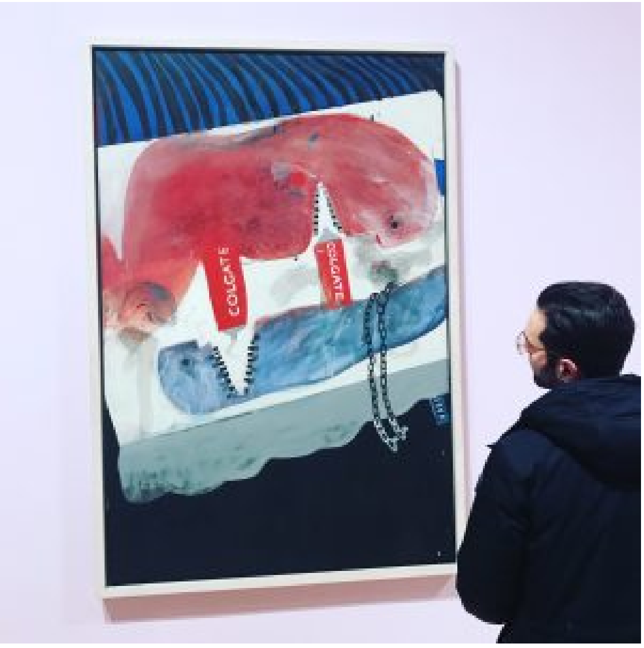
How to defend yourself in case the artwork bought at auction does not match its pre-sale description?

While collecting art works is becoming an increasingly popular & sexy hobby for affluent individuals, the financial & legal risks involved in such activities are very high, especially when such art pieces are bought at auction. Indeed, it is in the interest of auction houses to depict a rosy & partial portrait of any artwork on sale, which often does not reflect

the exact provenance and/or condition of such work of art. How can a collector prevent such partial disclosures and inaccurate embellishments relating to the condition or provenance of a coveted artwork on sale, at auction?



1. A real risk

Our art law firm Crefovi currently advises several individuals – all art collectors – who have fallen into the following trap: they all based themselves on the (proven, later, to be incorrect) information provided by the auction house responsible for the sale of an artwork, to enthusiastically and successfully bid at auction for such work of art. When, or shortly after, they went to collect the artwork, deception ensued, as they found out that they had been the subject of deceit, as far as the condition and/or provenance of the artwork were concerned. Therefore, the artwork you bought at auction does not match its pre-sale description.

For example, one of our clients is a keen collector of Chinese antics who resides in the United Kingdom, on his Chinese passport and work visa. In an auction sale organised by the French auction house Tajan, he mostly relied on the condition report provided by such auctioneer, which set out that the Chinese vase was in "*good aged-related condition (and had) normal age-related traces of wear*", to successfully bid for that lot. When he came to Tajan's offices in Paris to view this Chinese vase for which he was now the successful bidder, further to obtaining a travel visa to France, he was floored to discover that this vase was not as described in the condition report. The state of the vase is, indeed, poor, since it is damaged by several marks and traces of wear and tear, in many places; there is a large crack at the base of such vase, which means that no water stays in the vase because it escapes from that crack; several enamel parts are missing; certains parts, such as the panels on the inferior part of the vase and the enamels on the neck of the vase, seem to have been added after the manufacturing stage of the vase, etc.

Another example is the successful bid made by another client of our firm, for a painting "*attributed to Alighiero e Boetti*" as per the catalogue and website of the auction house Bellmans. While our client took the time to view and inspect the painting prior to its auction at Bellmans' Sussex Room, he was in great turmoil when he was turned down by the Archivio Alighiero Boetti (a cultural association based in Rome, founded by the heirs of the artist Alighiero Boetti, in order to authenticate works of art which are alleged to have been made by Alighiero Boetti) to which he had asked for a certificate of authenticity for that art work. Indeed, when he spoke to Matteo Boetti, son of Alighiero Boetti and president of Archivio Alighiero Boetti, he was told that this painting had already been unsuccessfully submitted to the authentication committee three times before, in order to obtain a certificate of authenticity! Archivio Alighiero Boetti declined to provide such certificate of authenticity to the previous owners of the artwork because, according to Matteo Boetti, it was a fake, a forgery, a counterfeit, and therefore not of the hand of Alighiero Boetti.

This risk of falling prey to the deceit of auction houses (and of their anonymous sellers of such flawed artworks) is definitely not mitigated by the terms and conditions of sale of such auction houses. Indeed, these T&Cs are riddled with liability waivers, such as this one extracted from Bellmans' T&Cs: "*Please note that Lots (in particular second-hand Lots) are unlikely to be in perfect condition. Lots are sold "as is" (i.e. as you see them at the time of the auction). Neither we nor the Seller accept any liability for the condition of second-hand Lots or for any condition issues affecting a Lot if such issues are included in the description of a Lot in the auction catalogue (or in any saleroom notice) and/ or which the inspection of a Lot by the Buyer ought to have revealed*" or these gems set out in Tajan's T&Cs: "*If no information on restoration, an accident, retouching or any other incident is provided in the catalogue, the condition reports or labels or during a verbal announcement, this does not mean that the item is void of defects. The condition of the frames is not guaranteed*" and "*Buyers may obtain a condition report on items included in the catalogue that are estimated at more than €1 000 upon request. Information contained in such reports is provided free of charge and solely to serve as an indication. It shall by no means incur the liability of Tajan*". Of course it is very likely that such liability waivers, which remove any liability from the shoulders of a deceitful auctioneer, are unlawful. But it will take a protracted, expensive and painful lawsuit to demonstrate that such liability waivers are in severe breach of English or French contractual law. Which art collector has the time or appetite for that?

2. To pay or not to pay the hammer price?

In the two above-mentioned examples, our clients faced several scenarios: our fervent Chinese art collector refused to pay for the price of the Chinese vase, immediately rescinding his successful bid by way of a formal email to Tajan, sent on the same day that he discovered that the Chinese vase was not as per the description made of it in the condition report and Tajan's catalogue. However, our Italian modern art enthusiast client dutifully paid the price of GBP25,912 by credit card to Bellmans, on the day of his successful bid for the painting "*attributed to Alighiero e Boetti*" (sic).

While not settling the price and not collecting the deceitful lot was the right move to make, for the Chinese art collector who immediately spotted the fraud upon close inspection of the Chinese vase post-auction, it opened the way to court litigation since Tajan and its anonymous seller contested, of course, that their condition report and catalogue had hidden the truth about the poor condition of such lot. Indeed, further to an unsuccessful attempt to mediate this dispute with the (rather useless) "*commissaire du gouvernement près le Conseil des ventes volontaires de meubles aux enchères*" (i.e. the statutory body which role is to regulate French auction houses), Tajan lodged a lawsuit against our client with the Paris Tribunal de grande instance in early 2017 which is still ongoing, to this day.

Meanwhile, our UK-based collector also did the right thing, by settling the hammer price and buyer's premium including VAT, and by collecting the painting "*attributed to Alighiero e Boetti*" since he was still convinced that this was a genuine painting made by the hand of Alighiero Boetti; until he was proved otherwise by the authentication committee of Archivio Alighiero Boetti, a few weeks later.

To conclude on this point, the logical rule is that, as soon as you discover the deceit or forgery, you should let the auction house know that you rescind the successful bid by way of a formal communication with them; be it before you have paid the hammer price and buyer's premium, or after. Ideally, you want to make such formal disclosure of the deceit or counterfeit to the auction house as soon as possible, since most auctioneers set out, in their T&Cs, that they will not consider claims of forgery by the successful bidder, if these claims are made after a short period following the successful bid. Here is, for example, Bellmans' liability waiver on this topic: "*You may return any Lot which is found to be a Deliberate Forgery to us within 21 days of the auction provided that you return the Lot to us in the same condition as when it was released to you, accompanied by a written statement identifying the Lot from the relevant catalogue description and a written statement of defects*".

3. Preemptive measures to avoid being the unhappy successful bidder of a deceitful lot

Buyers of art works have no mandatory obligations to conduct any due diligence, under French or English law or case law.

However, the principle of *caveat emptor* (i.e. "buyer beware", in Latin) applies, by which the onus is on the buyer to investigate the property or object he is acquiring. Since such burden of due diligence rests with buyers, they typically search the stolen art database of the Art Loss Register and conduct enquiries on ownership, authenticity, condition, provenance and lawful export of art. Due diligence depends on the type of asset, its value, and the information volunteered by the seller.

As a rule of thumb, any buyer should, at the minimum, conduct the following searches:

- attend the auction's location in person and inspect the coveted art work before taking part into a bid for it;
- research the coveted art work on price databases, such as ArtNet, in order to find some historical data about

past sales of such art work;

- research lost or stolen art databases, such as the Art Loss Register and Interpol, since such databases include data about art works which authenticity is challenged, and therefore report authenticity issues. The database of the Art Loss Register is not publicly available but it can be searched on request. Some data on the Interpol database can be searched by members of the public and,
- if in existence, read the "*catalogue raisonné*" of the artist who the artwork is attributed to, in order to assess whether such artwork has been indeed recognised by the field as being of the hand of such artist.

If you, buyer, conduct such above-mentioned searches and due diligence steps, and provided that you are a consumer (and not acting as a professional, such as an art dealer or trader), the courts would probably find that you have complied with the principle of *caveat emptor* (buyer beware).

4. What are your options, after the successful bid and unhappy discovery that the artwork is unlike its description set out in the auctioneer's documents?

As set out above in paragraph 2. above, you should send an official letter to the auction house, denouncing the forgery and/or poor condition (or any other undisclosed defect) of the art work, very soon after you have discovered it, rescinding the successful bid and requesting to return the disputed lot to the auctioneer, against the full refund of the hammer price, the buyer's premium including VAT, any other costs associated with the bid (such as transport costs) and the costs relating to the authentication and/or inspection of the artwork.

While it is unlikely that the auction house, recipient of such formal letter of complaint, will accept to cover the authentication and/or inspection costs, any auctioneer who wants to keep his reputation intact would accept to take back the litigious lot and refund the rests of the requested costs; especially if you sent your official communication as close as possible to the date of the successful bid, and if you have gathered much strong evidence that the artwork is indisputably a forgery or not at all like it was described in the condition report and/or the catalogue.

If the French auction house and you, unhappy bidder, cannot see eye to eye, you can lodge a formal complaint and request for mediation with the "*commissaire du gouvernement près le Conseil des ventes volontaires de meubles aux enchères*" (i.e. the statutory body which role is to regulate French auction houses), bearing in mind, though, that the "*Conseil des ventes volontaires de meubles aux enchères*" may come across as biased, since it is not in its best interest to annoy its members, the French auction houses.

In the UK, there is no regulatory body in charge of watching and regulating UK auction houses. However, most UK auction houses belong to trade federations, such as the Society of Fine Art Auctioneers and Valuers, which have issued some guidance notes for good practice and often have complaint handling schemes in place, and even mediation services, when one of their members is the subject of a dispute with one of its buyers. Indeed, the strategy of "naming and shaming" is particularly effective in the UK, much less so in France where French auction houses act as if they were in contempt of any regulations or complaints handling schemes that may limit their ability to waive their liability vis-a-vis their buyers.

If the dispute between the auction house and the buyer escalates into a fully-fledged lawsuit, your defense, as a buyer, should be based around proving that the work of art was deceitfully sold at auction, because of gross misrepresentation and negligence committed by the auctioneer and, accessorily, the seller. As much evidence of the forgery, counterfeit and/or poor condition, as possible, should be provided to the court, even by way of requesting an expertise of the deceitful artwork, executed by an art expert, under supervision of the court.

Meanwhile, you, as a buyer and defendant in the lawsuit, should request and attempt mediation all the way, during the lawsuit, in order to demonstrate that you are ready to compromise and find a constructive, time-efficient and cost-effective resolution to this dispute. The other side, however, may not agree to such alternative dispute resolution, out of cheer stupidity or because their legal fees may not be covered by their legal insurance policy, should a mediation or any other alternative dispute resolution process be put in place between the parties.

To conclude, you really want to avoid finding yourself in the situation of an unhappy successful bidder who discovers, post-auction, that he has overpaid for an artwork which is not at all what it seemed, or was presented to be, by the auctioneer and its anonymous seller. Our guidelines, above, should save you from that headache and situation. However, if that is not the case, don’t worry and call us, since we are here, at Crefovi, to service you to find a solution to your bad auction experience and deceitful transaction, in the most cost-efficient and time-efficient way.

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Your email (required)

Subject

Your message

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