

# SENIOR KING

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THE PROGRESSION CENTRE MARK ROAD HEMEL HEMPSTEAD HERTS HP2 7DW TEL 0442 235600 FAX 0442 235145

November 21st, 1994

Mr John Donovan  
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Dear Mr Donovan

## EXPERT OPINION - DON MARKETING UK V SHELL UK LIMITED

I have been involved in Sales Promotion since the mid 1970's when sales promotion was a new sector of marketing since when the industry has grown very significantly, forming an integral part of the majority of marketing strategies. The dividing lines between above and below the line can now truly be said to be dissolved as fully integrated marketing campaigns are common practice and encompass brand advertising through TV and other mass media, targeted marketing such as door-to-door distribution, direct mail and even electronic sales promotion such as the recent launch of Shell "Smart".

My own experience covers working with major FMCG clients for over 20 years such as Heinz, Del Monte, Weetabix and Lyons Tetley through to national breweries such as Grand Metropolitan and more recently with Shell themselves for whom we carried out a series of significant promotions in recent years.

The nature of our business relies upon the "bright idea" as being the currency of our success however, it has to be said that it is extremely difficult to protect the copyright of any ideas. There has been concern in the industry that ideas and concepts are often transferred to other Agencies leaving the originator of the idea without any form of income. Proving the copyright and defining what is a unique idea can be difficult.

For the clients such as I have mentioned above they have always respected confidentiality of ideas, understanding that Agencies rely upon them for their income. Over a period of years this develops a high level of mutual trust whereby confidences are shared between Agency and client (often without any written support).

Our industry is distinguished by its relative informality which goes beyond the boundaries of legal contracts. Often ideas are expressed in a meeting, confirmed later in writing or through creative concept boards. The dynamics of the client/agency relationship is built on a free flow of ideas and, confidential information which is shared between agency and client.

Without there being a degree of trust and integrity then meetings would soon become stilted and stagnant and the creativity which is encouraged within a normal good business relationship will quickly decline. In essence the many relationships built up over time with client and agencies is founded on mutual trust.

The development of a promotional idea is a lengthy process which requires an Agency to invest heavily in management and creative costs upfront without any guarantee of recompense.



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To develop ideas to a sufficient level to present to an account of Shell's stature will take at least one month, involving several meetings with potential third parties, internal planning meetings and intensive creative sessions which enable the mechanic of the promotion to be cloaked with a creative concept.

## Shell "Make Money"

This is widely acknowledged within the industry as being a promotion which gained for Don Marketing and Shell considerable credence. It was undoubtedly successful and whilst the matching halves/game mechanic in one form or another is not unique Don provided a unique solution ensuring game security and that it was legal. I believe that Shell by seeking joint rights sought to ensure that Don Marketing would not be able to use this specific promotion concept/mechanic for another competitive forecourt retailer. Therefore, they recognised Don's copyright and its commercial value both to Shell and Don Marketing.

In my opinion, because Don are apparently restricted by the joint rights agreement from making money from this mechanic via another client it surely must be logical to assume that Shell should not attempt to run a "Make Money" promotion - however adapted without Don's involvement and recompense to them.

## Nintendo

It is clear that John Donovan approached Nintendo with a proposal which would link Shell with Nintendo in a promotion.

It seems clear that Nintendo gave permission to Don Marketing to take the idea to Shell. In my experience when discussions with potential promotion partners take place, the identity of the host brand is kept secret until such time as an agreement is in place.

Forecourt retailing is a cut throat competitive market whereby the next promotion is a jealously guarded secret.

Due to the long business relationship that Don Marketing had built with Shell I assume that John Donovan would not consider presenting this idea to another forecourt retailer - certainly at least until he was informed it had been rejected by Shell.

The fact that this and the Hollywood concept was put into research precluded Don Marketing from using the idea elsewhere.

It would seem to be the case that Nintendo and Shell acted to cut out the agency and (therefore saving fees I presume), and produce a promotion which was an almost exact replica of that presented by Don Marketing.

The Hollywood promotion again has similar mechanics and creative approach which are so close as to be implausible to suggest that the mechanic was based, if not copied, from the Don Marketing proposals.

Generally the industry operates on the principal that if a concept, once presented, is not used by a client then the idea is released to be presented to an alternative client, unless the agency has a contract or retainer arrangement.

Clients would normally advise the agency if a concept was not to be used and the agency can then seek to place the idea elsewhere which at least gives the agency a chance to recover the investment.

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Shell, probably due to the very competitive market conditions, seemed to adopt a strategy of trawling for ideas and then trying to retain the concept, thus avoiding any risk of them being presented elsewhere.

From my personal experience of working with Shell they put concepts into research and even when the results indicated that a promotion was not appropriate would seek to keep the idea off the market for as long as possible.

It has to be understood that this continues to be a very competitive market place and it is perfectly understandable that they adopt a ruthless approach.

My company has had first hand experience of working with Shell and Andrew Lazenby and can confirm that Andrew appeared to adopt a very different approach to his predecessors, who in my experience more readily acknowledge the rights of agencies concepts and the copyright.

We were retained by Shell to provide strategic advise regarding promotions and in that capacity carried out a very intensive review of the forecourt retail market place, and the role of promotions.

For all the major brand petrol retailers a new threat to their market share was swiftly emerging from the grocery retailers. At the time we undertook our review the grocery retailer had swiftly achieved 8-10% market share, and my agency forecast that this would double within 5 years. I believe their share now stands at 20%. Most forecourt brand retailer had been running lengthy and costly collector promotions - B.P. Option, Texaco Star and Shell, own scheme. Shell had already decided to close their scheme and revert to tactical promotions.

The major reason for closing the Shell collector scheme was:-

- a) It appeared not to be achieving loyalty.
- b) A balance sheet time bomb as the value of unredeemed points continued to accrued.
- c) Consumer indifference.
- d) Similar to competitors schemes.

We undertook the review whilst at the same time operating promotions or advising on promotions proposed by other agencies.

The conclusion of our review was presented and is simply summarised below.

- 1) Shell had to continue to lead the market via technical innovation to products to a competitive edge - particular other cheaper "grocery" brands.
- 2) The Mobil/Argos scheme - which whilst seriously flawed showed the potential of promotional technology.
- 3) That Shell would have to invest in a technically advanced electronic promotion which offered both long term promotional mechanics, and tactical flexibility to enable Shell to be responsive to the market place and added value.
- 4) That the only available solution was the Smart Card which featured a micro-chip.

By the conclusion of our retainer we had presented a detailed strategic document reviewing the market and the technical options. We recommended that Shell should move swiftly to a pilot scheme to test market "Shell Smart".

We were then advised by Andrew Lazenby that they would be seeking to have presentations from several agencies and technology suppliers.



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Along with several agencies we were invited to present specific proposals for an "electronic loyalty scheme".

The Shell Smart promotion now launched is remarkably similar to our confidential presentation called "ONYX".

Copyright and confidentiality are emotive subjects and in my view this area requires clarification to enable client and agencies to work within acceptable business practise guidelines. Relying upon what is in effect "Gentlemen agreement" is no longer practical.

However in the case referred to in this opinion it is clear that presentations were covered by Terms of Business and confidentiality clauses so that reliance on trust and normal business ethics were further supported.

Regrettably the very competitive nature of our business is matched by an even more competitive situation amongst our clients and their own markets. This will lead to a more ruthless approach not compatible with the former "gentlemanly ethics" relied upon in the past.

The I.P.A., I.S.B.A. and other industry institutions urgently need to review current practise as a consequence of the action referred to in these notes if repetition and similar instances is to be avoided. The relationship between clients and agency requires clarity on these issues.

The reader of this opinion should be aware that we are considering our position with regard to any breach of confidential information or copyright in regard to the recent presentation to Shell regarding Shell Smart.

Yours sincerely,

STEVE KING.



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