CORPORATE & COMMERCIAL NEWSLETTER

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Australia

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Copyright Infringement
Downloading Music and Movies – the First Injunction Against Infringing Websites

Late last year, the film industry in Australia won its first legal battle against piracy and unauthorised downloading practices since the amendment of the Copyright Act in June 2015.

As a result of the Federal Court's judgment in *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503, largely used websites such as Torrentz, TorrentHound, IsoHunt and streaming service SolarMovie, will be shut down, and stopped from allowing users to download media content without infringing third parties' rights. Australian users will therefore, be prevented from downloading music, watching the latest released movie or famous TV series and shows from these websites.

The decision provides some insights to the wording of the Act, and what are the obligations imposed on the affected parties.

<u>The blocking power</u>

Under Section 115A of the *Copyright Amendment (Online Infringement)* Act 2015, the Federal Court is vested with the power to raise an injunction ordering Internet Service Providers (**ISPs**) such as Optus or Telstra to take the necessary steps to disable (by blocking or re-routing) websites infringing third party's copyright. The decision provided some clarity to the applicable criteria when determining whether an injunction is to be granted.

Firstly, the Court applied a test of substance (rather than of form), to determine whether a website infringes copyright. As a result, the Court analyzed the purpose for the creation and use of the website. If a website was established to give access to consumers to free (or paid) content and it is currently providing such-service, it would be subject to a blockage if such access is given without authorization.

Secondly, the judgement indicated that the website does not necessarily need to be infringing third parties' rights at the exact moment when the injunction is being made. This means that if the website was continuously active at the time the proceedings were entered, it would be subject to the remedy sought as long as the website was not taken down on a permanent basis. This approach is directed to prevent infringers from escaping injunctions by using technological tools such as temporarily hiding the webpage.

Finally, the decision enforces Section 115A(9) by ordering the applicant, Roadshow Films (**Roadshow**), to bear the costs of the services providers to block any access to the infringing websites. In this case, they were ordered to pay Telstra, Optus, M2 and TPG $50 per domain name to be disabled, and to pay the costs and fees for the proceedings. The rationale behind this order not only follows the norm but also imposes the economic responsibility on the Roadshow Films who are the ones benefited with the legal remedy sought.

<u>Sharing the tasks</u>

The obligations imposed by the Court's orders are divided between Roadshow and the ISP's. On the one hand, the ISP's are required to take all the necessary steps and measures towards disabling access to the infringing websites within a certain time. This encompasses removing access from its content and to re-direct people to another website. On the other hand, Roadshow is required to establish and maintain (bearing all costs related to it) a webpage informing users that the former one infringed copyright, were subject to a judicial decision and as a result, all the contents have been removed.

In the battle against intellectual property piracy, the Federal Court has been given the opportunity to apply the Act and to give relief to the entertainment industry. This judgment probably constitutes the first of many future decisions against infringers, but clearly constitutes a benchmark decision.

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Australia

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Update on Online Contracts
How binding is a "click"? How binding is a reference to a set of terms?

Australian case law tends to show that Australian courts apply general contract law principles to determine whether, and to what extent, a set of terms and conditions on the website are binding on the contractual parties.

Readers would be aware of "click wrap agreement" that are formed when a party clicks "I agree" on terms one website, and "browse wrap" agreements apply when there is a hyperlink or statement indicating the existence of terms and conditions. Indeed, it is not uncommon to find on a website a hyperlink which takes the user of the website to another page which contains terms and conditions that have not been previously drawn to his or her attention. The question is whether either, or both, create binding contracts at law.

Generally speaking, a term is considered as incorporated in an agreement if the parties consent to the term directly (by clicking I agree, actually signing, or sending confirmatory acceptance correspondence). Most of the time these are clear and there is no real dispute. In the case of clicking 'I agree' it is important that the party is actually taken to the page containing the terms to ensure that a binding contract is formed.

Browse wrap or click wrap agreements that do not occur after the terms have been viewed as more contentious and the facts of each case will be relevant to the court's considerations.

And the answer is not always straight forward as two recent cases illustrate. One Australian, one international.

In ***Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd*** [2016] QCA 213, an architect was commissioned by the owners of the land (**Surfstone**) to design a warehouse building. The architect hired Morgan Consulting (**Morgan**) to perform engineering services. Morgan proposed a fee and included in the fee proposal a statement that indicated that the commission would be generally in accordance with the ACEA Guideline Terms of Agreement. The ACEA Guidelines were not attached to the Fee Proposal and not signed by the customer. Morgan did not provide a copy of the ACEA Guideline Terms of Agreement to Surfstone either. Relevantly, a clause was included in these terms limiting Morgan's liability to one year from the date of completion of the engineering services.

A defect became apparent five years after completion of the services and the procedure started nine years after the last invoice was submitted. The owners of the house claimed that Morgan was negligent in carrying out the work.

Morgans relied on the ACEA Terms (particularly clause 4.3), and argued that the ACEA Guideline terms excluded its liability. Surfstone submitted that there was no evidence to show that Morgan's had drawn the limiting term to their attention and accordingly that clause 4.3 was not incorporated into the contract.

Accordingly, one of the main questions was whether the ACEA Guideline Terms were incorporated in the fee proposal and thus binding on the parties.

Having regard to:
1) the construction of the words of the proposal letter,
2) what a reasonable person would understand as to the offer, and
3) whether the term was commonly used in the industry,
the Queensland Court of Appeal agreed with the primary Judge and found that the ACEA Guideline Terms *were* incorporated in the fee proposal. Consequently, Surfstone had no right to sue in relation to the defect.

But a recent US development in this area, although not binding on Australian courts, can provide relev guidance about the way that the incorporation of contractual terms may be litigated in the future.

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In ***Meyer v Kalanick*** **No 15 Civ.9796 (Uber) (2016),** the online contract in issue included two contentious terms under which Uber riders waived their right to a jury trial and were submitted to an arbitration process. While the registration and payment fields were prominent, a smaller button was accompanied with the sentence, *"By creating an Uber account, you agree to the terms of service"* in smaller front. Further, the user could click on the "register" button without accepting the terms, or even opening the hyperlink to the terms and conditions. Even if users clicked on the hyperlink, they were unable to directly access the terms but had to follow a series of steps including several different new screens to access the terms.

An issue arose and Uber argued that Meyer agreed to arbitrate the dispute when he consented to the Uber's Terms of Services.

The main question was whether Uber reasonably disclosed the Terms of Service to the plaintiff and whether they were incorporated into the contract between the parties.

Taking into consideration the facts above and most importantly the multi-staged and complex process required to access the Terms, the United States District Court concluded that no enforceable agreement arose between the parties and rejected the notion to compel arbitration.

This case contrasts with the ***Surfstone*** case, and indicates a trend toward more thorough evaluation of the contractual acceptation process in the US. The reference to the 'highly legalistic language that no ordinary consumer could be expected to understand' also suggests that the judges seem to have carefully examined whether the consumers have a reasonable and realistic power to understand and negotiate the term, and further acknowledged the accepted reality of a real imbalance between the parties.

Another interpretation of the discrepancy between these two recent cases might be the difference between consumer and commercial contract. The contract in the former was a commercial contract between Surfstone Pty Ltd and Morgan Consulting – the judge's examination of whether the term was an industry standard term suggests that both parties may have been in a certain position to negotiate, or at least understand the term commonly used in the industry. The American case refers to a consumer contract.

For most certainty, if a parties wishes to bind a user to comply with particular terms and conditions, those terms should be clear, understandable and the user must have actually seen the terms and taken the positive step of clicking "I agree" after viewing the relevant page. Anything else will give rise to uncertainty and the court questioning whether there is sufficient evidence to support a finding that the user should be bound to the conditions set by the provider of services.

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The Belgian Bar Associations establish a 'Central Register of Insolvency"

By Statute of the 1st of December 2016 a 'Central Register of Insolvency' was established. This 'Central Register of Insolvency' is a digital database in which every bankruptcy file will be stored. This way, the Register will include all information and documents needed by the bankruptcy receiver to determine the liabilities of the bankruptcy, including the claims, the official reports of verification, etc.

The Register is established and managed by the Belgian (Flemish, French and German) Bar Associations and is accessible to:

- judges, court clerks, prosecutors, the public prosecutors, the prosecutor's secretary, bankruptcy receivers and court commissioners in carrying out their legal mandate;
- the bankruptcies, creditors and lawyers.

Since the Register contains personal data, the Bar Associations are responsible for compliance with the privacy legislation when managing and processing the information. The administrator of the Register cannot provide the information concerning the bankruptcy proceedings to third parties (persons not listed above).

Participants in the collection, processing or communication of the data relating to the bankruptcy must observe their confidentiality. The period of retention of the data is limited to a period of 30 years, starting from the bankruptcy judgement. After this period, the data will be transferred to the National Archives.

The creation of this Register is part of a larger plan to optimize and digitalize the Ministry of Justice and will save a lot of time and lower the administrative and travel expenses :

- the workload of the clerks will be reduced;
- creditors will be able to electronically upload their claims;
- the inventory of assets of the bankruptcy receiver will now be entered into the Register;
- the declaration of the bankruptcy receiver that the assets are insufficient to cover the costs of administration and liquidation will also be entered into the Register;

The entry into force of the statute is scheduled on 1/04/2017.
The government intends to ultimately roll out the Register in all sections of the Belgian commercial courts by that date.

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Belgium

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Antwerp Court rules that the purchase of real estate by e-mail is not legally valid: Stone Age revisited

On December 19th, 2016 the Antwerp Court of Appeal rendered a striking judgement in real estate land: neither the buyer nor the seller can buy or sell rights on real estate on the basis of e-mails, moreover, e-mails cannot even be used as the beginning of written evidence to proof an agreement between parties on the price nor the good.

The judge's ruling is based on the legal provisions of the 'Electronic Trade Act' stating in which ways contracts can be concluded through electronic means. The relevant provisions however are not applicable to contracts regarding real estate… Based on this premise, the Antwerp Court of Appeal ruled that the sale and purchase of real estate via e-mail is not legally valid. The Court even added that e-mails cannot even prove an agreement on subject and price.

This judgment was to say the least controversial. It rules entirely different from a previous judgment of the Ghent Court of Appeal in 2013 in which the court ruled that a text message (and therefore also an e-mail) may constitute indeed a beginning of written evidence. The ruling of the Antwerp Court of Appeal is already widely criticized and it is very probable that the Supreme Court will eventually have to clarify the whole matter.

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Denmark implements beneficial ownership registration

Transparency in the ownership or control of companies in Denmark is being expanded. In last year's spring newsletter, we detailed Denmark's plans for new legislation regarding registration and publication of indirect control or ownership of companies. These plans are now being carried out and implemented as legislation.

The implementation of the Danish government's tax haven package from 2014 and parts of the fourth anti-money laundering directive is planned to enter into force on May 23rd, 2017, in order to comply with the two-year deadline for implementation of the directive by June 26th, 2017.

The current legislation in Denmark mandates that any legal owner of a company (defined as a natural or legal person with ownership or voting rights exceeding 5 percent) be registered with and publicized by the Danish Business Authority. These rules apply to public, private and entrepreneurial limited companies as well as limited partnerships.

As an extension of this ruleset, the new rules as proposed will create a new and separate category of registration for beneficial ownership defined in accordance with the fourth anti-money laundering directive as an ownership interest of 25 percent or more. While legal owners can be both natural and legal persons, the definition of beneficial owners in the Danish Companies Act is restricted to natural persons who directly or indirectly own or control ownership- or voting rights.

Furthermore, these new requirements will apply to ownership or control of a wider range of entities, including general partnerships, commercial and non-profit foundations, financial companies, various other Danish company types with limited liability and European Companies. Legal entities whose shares are traded on regulated markets are exempt from the new requirements.

The company itself must gather information on beneficial owners and their rights to ownership or control, and the initial registration of this information must be filed with the Danish Business Authority by October 1st, 2017. Failure to comply is sanctioned by fines.

These duties include reporting or gathering information on ownership in the traditional sense, encompassing shares owned directly or indirectly (and, where applicable, information on different classes of owned shares), as well as potential ownership of shares, and registered management positions with the company. Furthermore, the information gathered must encompass any control obtained through other means, including by way of the company's articles of association or a shareholders' agreement, for example:

- transfer of voting rights,
- right to appoint and terminate management,
- right to approve annual reports in relation to payment of dividend,
- power to bind the company and
- veto powers or right of representation.

Where a beneficial owner cannot be identified, or where no natural person has a sufficient level of ownership or control, the CEO of the company will be registered as the beneficial owner.

Of particular note is the inclusion of rights obtained through shareholders' agreements, which according to the Danish Companies Act are non-binding for the companies in question. For example, a clause in a shareholders' agreement, which grants one particular shareholder the right to appoint and terminate management, will not be valid vis-a-vis the company on a general assembly if unsupported by the articles of association.

These and other issues particular to Denmark's implementation of the abovementioned directive will no doubt be subject to debate both prior and subsequent to the scheduled implementation in May 2017.

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Franchisor – Key points to consider when franchising your business

Expanding your business by opening new branches is a costly exercise. Each expansion will involve staffing and property costs as well as marketing and equipment expenditure. Franchising your business can prove a less expensive option but, as with most new business ventures, is not an automatic route to success.

In 2015, the results from the BFA/NatWest Franchise Survey showed the franchise industry's annual turnover to be over £15.1bn, with nearly 1000 franchisor brands operating in the UK market alone, employing over 620,000 people. If you are considering franchising your business, then we set out some key points to take into account to help you understand the process and be aware of the potential pitfalls.

Is your business ready?

A track record is an essential element of a franchise offering. The business will need at least two years trading history (often more) in order to attract franchisees and profitability. The business needs a service or other model that can be replicated. You should take time to evaluate the other alternatives to grow your business, such as acquisitions or organic growth.

Protecting your brand

Arguably a franchisor's most important element is its brand, particularly its business name and trade marks. It will therefore be important to protect your intellectual property (IP), your business ideas and concepts as best as possible. Any unique logos, names, shapes, colours etc should be registered as trade marks, and you should also ensure that your concepts and ideas are set down in writing and marked confidential with the company/ business name, the date and the copyright symbol. The franchise agreement will also contain robust provisions to protect your brand and IP. Before disclosing your concepts, ideas and methodologies you should ask potential franchisees to sign a confidentiality agreement (also known as an NDA – non disclosure agreement).

Franchising Operations Manual

The main appeal for franchisees will be your business's proven capacity for success and you must be able to demonstrate to a franchisee how to achieve this. Such sharing of "know-how" is done through an Operations Manual which sets out the day to day operational instructions for the franchisee and is an essential part of the franchise business and operation. The manual may be altered from time to time, giving you flexibility to respond to changes in market conditions. It should include information on the operating methods of the franchise (such as equipment and stock requirements) and the specific operation instructions (for example, standard procedures and necessary forms, staff uniforms and staff training). The franchisee will be obliged to run their franchise in compliance with this manual .

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The Franchise Agreement

The franchise agreement is a key document which sets out the rights and liabilities of both parties. We summarise some of the financial considerations below, but the agreement will cover every aspect of the relationship. This agreement should govern arrangements from the outset through to the termination provisions covering the parties' respective rights and restrictions after the relationship has ended.

Initial Fee – this is paid by the franchisee at the commencement of the franchise agreement, and is intended to cover the franchisor's "set-up costs" (for example, the franchisee's training). In terms of the specific initial fee, it is sensible to carry out research of similar franchises to find out what is normally paid in your specific sector. There may be a deposit which should be deducted from the Initial Fee. The franchisor's reasonable legal fees are often payable by the franchisee.

Continuing Fee – you will want to consider how this amount should be calculated for each year of the franchise agreement. It can either be linked to a percentage of the annual turnover, the operating profit, or be a fixed price. You should also consider the mechanism for payment, the frequency of any payments (for example on a monthly, quarterly or annual basis) and any tax implications (which will require input from your accountant).

Territory

You should take into account the territory in which the franchisee is to operate their business. This should be specifically set out in the franchise agreement, using a map if appropriate. Important points to consider here are whether the territory will be exclusive to the franchisee, whether you wish to reserve the option to also operate in the franchisee's territory, or whether you would like to enter into a licence to allow another franchisee to operate in the same territory. Restrictive covenants in the franchise agreement may also be linked to the given territory.

Recruiting Franchisees

This is one of the most time consuming and hardest aspects of the franchise model. As well as advertising and trade exhibitions, there are franchise recruitment consultants and recruitment websites. The key to success is to think long-term and select the right candidates based on the quality of the applicant's specific attributes. Much of the initial research of potential franchisees will be web based. Your website should be up to date and contain specific franchising pages and set out the process for new franchisee applications.

Your Legal Advisors

At Mundays we have a vast amount of experience assisting with the set-up of franchises. We will take steps to fully understand your business in order to put in place the somewhat daunting documents that are standard in the industry. Neale Andrews and Fiona Moss head up the Franchise Team at Mundays and the team covers property, employment, dispute and commercial. If you are interested in franchising your business then please get in touch on 01932 590500 or email **franchising@mundays.co.uk**

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Corporate Governance

The Reform

The collapse of BHS, which is reported to have left its pension fund in deficit by over £500 million, appeared to influence the Government's green paper on corporate governance which was published on 29 November 2016.

One of the focus areas of the green paper was the extension of the Corporate Governance Code to large privately-held businesses. At present the strongest corporate governance and reporting standards in the UK are focused on public companies.

In response to the Government's green paper, the Work and Pensions Committee (the "**WPC**") has made the following recommendations:

1– The corporate governance and reporting requirements for public listed companies should be extended to private companies that have an important social impact. The WPC went on to state that this should apply to private companies that are large (as defined by the Government) or have over 5,000 defined benefit scheme members;

2– Pension scheme trustees should be added to section 172(1) of the Companies Act 2006. Section 172 relates to a directors duty to promote the success of the company. At present the list of stakeholders that the directors must have regard to does not include defined benefit pension scheme beneficiaries or the trustees of such schemes. The WPC believes that their inclusion may help ensure that directors take into account the interests of current and future pensioners and that if they fail to do so they should be held accountable.

The proposals set out in the Governments' green paper are open for consultation until 17 February 2017 and we will issue a further update once the outcome of the consultation is known.

The Financial Reporting Council's proposals

Following on from the article we published on 14 February 2017, the Financial Reporting Council ("**FRC**") has provided its response to the Green Paper on Corporate Governance Reforms.

It appears that the interests of stakeholders, executive remuneration, the accountability of large private companies and effective enforcement are key themes in the FRC's
response.

The FRC has proposed reform in the following four key areas:

The interests of major stakeholders. The Companies Act 2006 places a duty on directors of all companies to promote the success of the company, and in so doing to have regard to a range of factors, such as long-term consequences, the environment, employees, suppliers and customers. The FRC believes that this duty must be reinvigorated and that companies should be required to report more effectively on how they have discharged such duties.

Large private companies. The FRC proposes large private companies should be more accountable to their stakeholders given their significance to the public interest and the privilege and benefits of limited liability status. Apparently the FRC supports the introduction of corporate governance principles for such companies and associated reporting.

Effective enforcement of the law. The FRC believes that the regulatory framework is fragmented, with gaps in enforcement action. The FRC states that it proposes extending its powers to investigate and prosecute all directors for financial reporting breaches and associated issues of integrity.

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Trademarks – What you need to know to protect your intellectual property

Protecting your intellectual property has become more important than ever before and investment in intellectual property over the last few years has increased significantly. Many businesses are realising the value of their intellectual property and carrying out intellectual property audits and putting intellectual property strategies and policies in place.

A trade mark is a sign or symbol, which can distinguish your organisation or your goods and/or services from those of another e.g. your 'brand'.

Trade marks can be registered, which provides a tangible record of your asset. Think about the "value" attributed to trade marks such as Virgin, Mercedes, Hilton, IBM and Coca Cola. Even relatively new businesses can quickly establish a strong market position through their trading and trade marks, Google, Amazon, Facebook and Uber contributing huge value to the underlying business.

Here are a few key points to consider when thinking about trade marks.

1- Trade marks can be words, phrases, slogans, logos or pictures, sounds or jingles, shapes or colours, an aspect of your packaging or a combination of some or all of these. The most effective trade marks are distinctive for the goods or services which they protect and you need to avoid descriptive names.

2- There are some things you cannot register, for example, anything offensive, protected emblems, flags, anything which describes the goods or services you are selling or providing, 3D shapes which are typical of the goods you are selling, anything which is intended to deceive and anything which is an indicator of origin or which is customary in the relevant line of trade.

3- Before you decide on a brand name or logo you should run a clearance search to ensure that the name or logo you want is not already registered by someone else. This will reduce the risk of trade mark infringement and will help you determine the registrability of the trade mark. You can do a basic check yourself by using a free service at https://www.gov.uk/search-for-trademark but consider carrying out a full clearance search, for which you should seek specialist advice.

4- If you decide to register a trade mark you will obtain an exclusive right to use the trade mark for the goods and services for which the trade mark is registered. Registering your trade mark may also help in preventing people using your trade mark without your permission and will make it easier for you to take legal action against them if they do. Registering your company name at Companies House or registering a domain name will not protect your trade mark to anywhere near the same extent as a trade mark .

5- Trade marks are registered by the Intellectual Property Office in the UK and other entities worldwide. The process of registering a trade mark in the UK usually takes about 3 months, but can take longer if your application is opposed by someone else.

6- Trade marks are territorial in nature, meaning that you are only protected in the territory in which you have registered the trade mark. When thinking about registering a trade mark you should look at other territories in which you may want to expand in the future. If you are thinking of operating or selling your goods and services into Europe, you may want to consider registering an EU trade mark (EUTM).

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7- Trade marks must be renewed every 10 years and can theoretically last forever, provided that you pay your renewal fees. However, if you are not using the trade mark, your registration could be taken by someone else.

8- Remember to keep your registrations up to date, e.g. if your logo has changed slightly over the years make sure you have registered the latest version.

9- Use the ® symbol and ™ symbol correctly. After you have registered your trade mark you can use the ® symbol. Before you have registered your trade mark you can only use the ™ symbol, but this does not offer any protection. It is a criminal offence to use the ® symbol if you have not registered your trade mark.

10- If someone else is using your registered trade mark you should consider writing to them and requiring them to stop doing so, but you should investigate fully first and take appropriate legal advice on the best course of action in the specific circumstances.

Remember that a registered trade mark is an asset which adds real value to your business and which you can sell, licence or franchise to someone else. Intellectual property assets can also raise the value of your business in a sale or acquisition.

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Sapin II Act - A significant Reform on Anti-corruption in France

The law n° 2016-1691 of December 9, 2016 on transparency, anti-corruption and economic modernization (Law known as "Sapin II Act") has been enacted in the Official Journal on December 10, 2016 after the consultation of the Constitutional Council. The Sapin II Act entered into force on December 11, 2016.

The Law is based on three main objectives: to enhance transparency, to fight against corruption and to modernize the economy.

The most significant innovation encompasses various aspects regarding the fight against corruption in France and abroad.

The new Law requires large companies and management to take means in order to prevent risks of influence peddling and corruption. In fact, the Sapin II Act defines an anti-corruption compliance program.

This anti-corruption compliance program has to be implemented by any company employing at least 500 employees and having an annual turnover or a consolidated annual turnover of at least Euros 100 million.

This requirement applies also to any company belonging to a group of companies with the same criteria (employment and turnover) whose parent company is established in France.

The Law applies to the companies themselves and to their management (the company president), the CEO (*directeur général*), the managing director (*gérant)* and the members of the executive board (*membres du directoire*) .

The anti-corruption compliance program is largely defined by the Law.

The Law requires the company to implement a code of conduct to prevent corruption. The code defines and illustrates the various prohibited behaviors likely to characterize acts of corruption or of influence peddling. Such code must form an integral part of the internal company rules. So, this code should be subject to company employees' representatives consultation (by the works council, the committee for health and safety and working conditions).

The Law requires to put in place an internal whistleblowing system, allowing employees to report acts or behaviors contrary to the company's code of conduct.

The Law requires a risk map of corruption under the form of a document regularly updated and designated to identify, analyze and prioritize the risks for the company to be exposed by third parties' requests for corruption acts, according to the sector and geographical areas in which the company operates its activities.

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It is required as well the implementation of assessment procedures for clients, first ranking suppliers and intermediaries in light of the risk mapping. An internal or external accounting control system is required to ensure that the company's books, registers and accounts are not used to hide acts of corruption or influence peddling. Such accounting control system can be performed either internally or by the company's external auditor (*commissaire aux comptes*) which is responsible for the certification of the company's accounts.

A training program is required for managers and employees most likely to be exposed to the risks of corruption and influence peddling.

The companies have to establish a disciplinary regime, including sanctions in case of violation of the code of conduct and an internal system of control and evaluation of the above means against corruption.

The Law creates a new agency, the "French anti-corruption agency". This new body will monitor companies' compliance with the legal means and procedures.

In case of violation of the Law, the French anti-corruption agency can issue a warning to the companies representatives, to require the company to adapt its procedures in accordance with its recommendations or to refer the issue to its sanction commission (which can enforce a financial penalty proportionated to the seriousness of the violation and the financial situation of the company of no more Euros 200.000 for managers and Euros 1 million for the company).

The obligation to implement such anti-corruption compliance program in the related French companies will enter into force on June 1st, 2017.

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EU State Aid and Tax: Apple, Starbucks, Fiat & others – Who's next?

The European Commission has ruled once again that national tax rulings in favor of certain companies can constitute illegal State aid. The Commission has been investigating the tax practices of the Member States of the European Union since June 2013. After Fiat and Starbucks, it is now Apple that has to repay State aid granted by the Irish Government by means of favorable tax rulings. The Apple case – which is currently under appeal in before the Court of the EU in Luxemburg – involves an enormous recovery of up to 13 billion EUR plus interest. The cases of other companies are currently under investigation. Who's next? Internationally active companies should be aware of this problem – and they must be prepared.

Legal background

According to Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU), State aid is generally prohibited. To qualify as State aid, a measure needs to fulfill the following requirements:

- There must, first, be an intervention by the state or through state resources which can take a variety of forms (also tax rulings or other tax measures);
- Second, the intervention must confer a selective advantage on an undertaking;
- Third, the intervention must distort or threaten to distort competition, and
- Fourth, the intervention must have the capacity of affecting trade between EU Member States.

State aid measures can, in general, only be implemented after notification to and approval by the Commission. Furthermore, the Commission has the right to order the recovery of inappropriate State aid plus interest for a ten-year period preceding the Commission's first request for information.

Tax ruling cases – in particular Apple

The Commission has in recent times repeatedly examined national tax measures, in particular tax rulings, in the light of European State aid law. A Task Force on Tax Planning Practices was set up in 2013 to examine allegations of favorable tax treatment for certain companies. Currently, there are several ongoing formal investigations by the Commission, in particular concerning Luxembourg tax rulings with respect to Engie (formerly GDF Suez; see European Commission, decision of 19 September 2016, SA.44888), Mc Donald's (see decision of 3 December 2015, SA.38945) and Amazon (decision of 7 October 2014, SA.38944).

In the past, the Commission has adopted numerous decisions on national tax planning practices, which provide precedents for the ongoing investigations.

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Two decisions were recently issued by the Commission in 2015 with respect to tax benefits granted to the U.S. American company Starbucks (see decision of 21 October 2015, SA.38374) and to the European company Fiat (decision of 21 October 2015, SA.38375). A third decision was issued in 2016 with respect to tax advantages granted by Belgium to at least 35 mainly European companies (decision of 11 January 2016, SA.37667). In all these cases, the Commission found that the tax rulings constituted State aid and had to be recovered. These decisions are currently under appeal (see in particular cases T-760/15; T-636/16, T-755/15, T-759/15 and T-131/16).

The same is obviously true for the mentioned Apple case (decision of 30 August 2016, SA.38373). According to the Commission, the facts of the case are as follows:
The Apple Group acted via Apple Sales International (ASI) and Apple Operations Europe (AOE) – both Irish incorporated companies – in the European Union. Apple set up its sales operations in Europe so that customers were buying products from ASI and not from the shops that physically sold the items.
The involved Irish tax rulings issued in 1991 and 2007 dealt with the internal allocation of the profits within ASI and AOE. They accepted the fact that the profits were internally allocated to a "head office" within ASI/AOE which was not based in any country, had no employees and no premises. Only a small share of the profits was allocated to the Irish Apple branch and finally taxed; the rest remained untaxed. Although especially ASI recorded 16 billion EUR profits in 2011, only 50 million EUR were taxed.

The Commission, just as in the previous cases, stated that tax rulings are legal when they give clarity to the company on how its profits will be taxed. Nevertheless, in the case at hand, according to the Commission, Ireland granted Apple a selective advantage covered by Article 107 (1) TFEU by accepting the allocation of profits that had no factual or economic justification. The Commission held that the internal allocation was artificial.
The Commission's reasoning seems to follow the path of the previous decisions. In the Starbucks and the Fiat decisions, the Commission examined whether a tax benefit was granted to the company in question that was not granted to other undertakings in a comparable factual and legal situation. The tax rulings in these cases endorsed artificial methods to establish taxable profits for the companies that did not – according to the Commission – reflect economic reality. Both the Irish Government and Apple have filed an appeal against the Commission decision with the General Court of the EU in Luxemburg (cases T-778/16 and T-892/16). Both applicants argue that the Commission's assertion that ASI and AOE were granted an advantage is incorrect because the present case did not depart from "normal" taxation. According to the Irish government, the Commission attempts to rewrite the Irish corporation tax rules which is a breach of Member State sovereignty in the area of direct taxation.

Against this background, it seems likely that the General Court's judgment will also be appealed and that the case – after many years – will ultimately be decided by the European Court of Justice.

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Outlook

It remains to be seen whether the EU Courts in Luxemburg will approve the Commission's practice in the tax ruling cases currently under appeal. The Commission seems to differentiate between whether the tax ruling in question can be justified due to factual or economic circumstances and whether the applied tax mechanism is purely artificial. In the latter case, the Commission orders the recovery of State aid.

This can have far-reaching consequences for all undertakings because it is the undertaking that has to pay the "unpaid" taxes directly to the national treasury. Finally, it is always the business that has to bear the brunt and not the Member State.

Furthermore, the assessment of potential State aid by the Commission in the tax sector is not only limited to tax rulings. In its "Notice on the notion of State aid" from July 2016 (2016/C 262/01) the Commission devotes a whole chapter to "specific issues concerning tax measures" and addresses the following tax matters besides tax rulings:

- Depreciation/amortisation rules,
- Fixed basis tax regime for specific activities,
- Anti-abuse rules,
- Excise duties,
- Cooperative societies,
- Undertakings for collective investment,
- Tax amnesties and
- Tax settlements.

Consequently, companies should be aware of potential legal consequences in cases of favorable tax deals with national authorities as a result of EU State aid law and seek legal advice if there are any doubts.

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Automatic Exchange Of Financial Information

Law 4428/2016 “Ratification of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information” was published in the Government Gazette numbered A' 190/13-10-2016.
The Law 4428 / 2016 is effective as of 01.01.2016 and the automatic exchange of information shall take place up to 30.09.2017.

Said law is the culmination of Greece signing the Convention on Mutual Administrative Assistance in Tax Matters on 22 February 2012.

In essence Law 4428/2016 incorporates into the Greek legislation the OECD Multilateral Competent Authority Agreement ('the Agreement') on the automatic exchange of financial account information.

Main points of the Law are summarized below:
-Following the incorporation into the domestic legislation of the Council Directive 2014/107/EU regarding the mandatory exchange of information on tax matters between Member States (L. 4378/2016), the present Law ratifies the Multilateral Competent Authority Agreement (“the Agreement”) on the automatic exchange of Financial Account information of the OECD.

-Moreover, the Common Reporting Standard (“CRS”) of the OECD with respect to the reporting and due diligence rules of the Financial Accounts information is introduced into the domestic legislation. It is noted that Directive 2014/107/EU also refers to the CRS of the OECD. (Consequently uniform rules for the exchange of Financial Account information will apply both between the Member States of the EU as well as Member Countries of the OECD).

-101 countries/jurisdictions have been committed to implement the CRS (as per the latest information of the OECD on 26.7.2016). In particular, 53 (including Greece) will implement the first automatic exchange of information in the year 2017 (2016 income), whilst 31 counties in the year 2018 (2017 income). The remaining 17 countries have already committed on the automatic exchange of information, however, they have not signed yet the Agreement. Greek tax authorities are currently contemplating the imposition of sanctions to countries that are not abiding by the standards of the said Law.

-The present Law is effective as of 1.1.2016. For calendar year 2016, the automatic exchange of information shall be effected up to 30.9.2017.

-A Ministerial Decision will be issued determining the catalogue of the countries/jurisdictions with which Greece intends to automatically exchange information by virtue of the Agreement. Similarly, the dates of entry into force of the Agreement on bilateral basis, will be determined by Ministerial Decisions.

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Ireland

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Benefits of an Irish Base in Brexit changing times

Sensible businesses must now be reviewing their strategies in light of the impending Brexit scenario and the implications that will have on their businesses. To counter the uncertainties, one option likely here to arise is for businesses to consider establishing a new base in Ireland or expanding their existing operations.

Ireland, with its common law legal jurisdiction and regulated regime as well as a well-developed and positively recognized business environment is well placed to offer solutions in the climate of Brexit uncertainties. Eugene F Collins is happy to discuss options and issues with any businesses looking to establish or expand in Ireland.

Issues likely to arise in relation to any such expansion or re-location strategy relate to a number of issues, which we can provide expert advice. These include:

- **Company structure and formation** – Our Corporate team can advise on optimal corporate structures and implement such, being assisted and supported by our discreet Company Secretarial group;
- **Employees** – all issues relating to recruitment and / or relocation are matters with which our Employment Group can assist and our specialist Immigration Group is available to advise in relation to all immigration issues that might arise or impact on a proposed re-location of employees to Ireland;
- **Property** – any new business entrants to Ireland will most likely require a property, there being no restrictions on non-Irish or non-EU entities holding an interest in real estate in Ireland. Our property team has expert knowledge in a wide variety of property matters including all aspects of commercial property acquisition and investment;
- **EU Regulation Competition and Procurement** – Our Competition and EU group has the necessary experience to advise clients on issues that may arise in relation to Competition law, compliance requirements and State Aid matters together with any procurement law issues;
- **Financial Services** – as a highly recognized financial services centre, Ireland is well positioned to attract new business in the financial services sector and our specialist Financial Services group advises a variety of clients on financial regulation and compliance matters including in particular, applications for authorizations from the Central Bank of Ireland. This is particularly relevant to businesses seeking to be authorized in an EU member state and avail of the passporting facilities available under the Financial Regulation regimes.

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The Italian "Patent Box"

Since 2015, the possibility exists under Italian law to opt for a system of taxation which is especially designed to take into account the specificities of income derived from the use of intellectual property, industrial patents, trademarks, designs and models, as well as processes, formulae and information relating to legally protected experience acquired in industry, commerce or science.

Such a possibility is intended to render the Italian market a more attractive one to both domestic and foreign investment without prejudice to the Italian tax base. The scheme, as a matter of fact, supports the relocation to Italy of intangible assets currently held abroad and avoids the relocation abroad of intangible assets currently held in Italy while encouraging investment in research and development.

The beneficial treatment applies to income derived *inter alia* from the use of intellectual property, industrial patents for inventions and utility models, trademarks, designs and business information and experience of technical or industrial nature that may be protected as secret information according to the law. Due regard is given to relevant OECD principles concerning the taxation of income generated by the use of intangible goods.

The regime at issue is set out in a Decree jointly adopted by the Ministry for Economic Development and the Ministry for Economy and Finances on 30 July 2015. On 7 April 2016 the Italian Tax Authority (*Agenzia delle Entrate*) issued a comprehensive circular letter (No. 11/E) intended to address a number of questions that had arisen during the first period of application of the "patent box" regime.

Personal data entered in a company register and protection of individual rights: the recent ruling of the European Court of Justice in *Manni*

In a case referred by the Italian Supreme Court (*Cassazione*), the European Court of Justice (ECJ) addressed a number of issues relating to the interpretation of Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data and of First Council Directive 68/151/EEC, of 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003.

Under scrutiny were various provisions of Italian law dealing with the establishment and functioning of chambers of commerce and the national legislation concerning the protection of data protection.

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The ECJ held that the relevant European legislation, as it currently stands, leaves it to the Member States to establish whether natural persons may apply to the authority responsible for keeping the companies register to determine, on the basis of a case-by-case assessment, if it is exceptionally justified, on compelling legitimate grounds relating to their particular situation, to limit, on the expiry of a sufficiently long period after the dissolution of the company concerned, access to personal data relating to such natural persons, entered in that register, to third parties who can demonstrate a specific interest in consulting that data.

The case (no. C-398/15, decided on 9 March 2017) arose out of the complaint of the former sole director and liquidator of a company which had been declared insolvent in 1992 and struck off the companies register, following liquidation proceedings, on 7 July 2005. The plaintiff, in his new position of sole director of a building company which had been awarded a contract for the construction of a tourist complex, blamed the local chamber of commerce for the difficulty he was facing in selling properties within that tourist complex due to the fact that the chamber of commerce had refused to remove from the register personal data concerning him and showing his connection to the liquidation of his previous company.

The plaintiff sought an order requiring the chamber of commerce to erase, render anonymous or block such data as well as to compensate him for the damage he had suffered by reason of the injury to his reputation. A ruling of the court of first instance, which upheld the requests of the plaintiff, was appealed to the Supreme Court, which in turn referred the case to the ECJ.

The full judgment is available on the website of the ECJ at http://curia.europa.eu.

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Singapore

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Enforcement of Copyright against Digital Piracy
Practical considerations of tackling individual digital pirates

With the increasing importance of the shift from traditional, more physical, distribution methods of products to digital distribution**(1)**, digital copyright piracy is becoming one of the most crippling problems facing the entertainment industry. After all, with the so-called anonymity provided by the internet and the ability to make illegal copies of music or entire movies at the push of a button, digital piracy is an appealing choice to many would be customers who can now live outside of their means.

Indeed, this problem is one that has caused the global entertainment industries billions of dollars in lost revenue**(2).** It is no wonder that many copyright holders have attempted to stamp out these pirates though various means, such as appealing to the government to enact legislation**(3)** or, as is often the case, to take legal action against the pirates directly.

As of recent times, the latter option has been increasingly exercised as copyright owners and their legal councils enact campaigns to pursue individual end users in mass legal suits. These campaigns, involving dozens of 'does', aim to both to recoup losses in revenue incurred by a direct infringer and to act as a deterrent to other would be pirates by making a public example out of the sued infringers.

These copyright owners and their legal support have faced many challenges in their campaigns, and these problems have highlighted the inherent difficulties in taking individual pirates to task for copyright infringement.

BRIEF BACKGROUND AND OVERVIEW

Copyright is the intellectual property that protects creative works.

Under the Berne Convention**(4)**, authors, performers and other artistes who contribute to the work have a right to commercially exploit their creations. This includes film productions, which are works that involve the creative contributions of hundreds, if not thousands of individuals. It is Copyright which the foundation in which the entire entertainment industry is built upon, and it is Copyright Infringement which undermines this foundation.

Digital piracy is the new form in which copyright piracy has taken in the 21st Century. As opposed to recording of films from television**(5)**, illegal distribution of pirated videotapes or DVDs, the internet has given digital copyright pirates an effective, sophisticated new distribution medium such as Peer to Peer file sharing software, such as 'Torrent software'**(6)**, file sharing websites**(7)** and illegal file streaming.

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(1) IFPI Digital Music Report 2015
(2) 2010 Piracy Study, Eighth Annual BSA Global Software, May 2011 edition
(3) Stop Online Piracy Act, "To promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes." —H.R. 3261, 112th Congress (2011 - 2012), H.R.3261
(4) Berne Convention for the Protection of Literary and Artistic Works 1886
(5) Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417
(6) Responsibility of Bittorrent Search Engines for Copyright Infringements, Michal Czerniawski, University of Warsaw, December 20, 2009
(7) See case A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (2001) and Newsmaker: Megaupload a story of Dotcom boom and bust, Reuters, 20 Jar examples

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Each means of distribution allows pirates to widely distribute copyright protected material to a large number of other individuals across a wide geographical area, often across international borders.
The illegal copying of material is often done with the pretence of anonymity and often though channels that would normally be used for legal purposes.

Illegal downloading of Copyright protected material has become so commonplace that an entire generation of consumers have grown up believing that Digital Piracy is simply part of internet-culture, when it is in fact a very damaging illegal activity that is costing the industries it effects thousands of jobs and billions in revenue.

This state of affairs is unacceptable, and something must be done.

DIFFICULTIES IN PURSURING COPYRIGHT PIRATES

The rationale of a copyright holder seeking redress against infringers is very clear cut in the Berne Convention**(8)** and the many Copyright Statutes around the world.**(9)** However the very nature of the internet, including its method of function and the persons involved, creates difficulties for copyright holders and their legal councils when trying to enforce their rights against those involved in copyright piracy.

The largest party to digital piracy, the Internet Service Providers whose physical hardware are used to transmit the copyrighted material, have become increasingly difficult to hold accountable for infringement due to 'safe-harbour' provisions offered by both legislation**(10)** and case law**(11)**.

Service providers who have no 'control' or 'knowledge' over how their services are used by their clients cannot be held accountable for a copyright infringement perpetrated by the services they have provided, as this crime would be done without their knowledge, consent or control.

The next identifiable party would be the illegal distributors of the copyrighted material themselves, such as the file sharing service Megaupload**(12)** or online digital content index Piratebay**(13)**. In this instance, copyright owners have been much more successful in seeking redress for their losses in the courts.

However, actually getting a judgement for damages and other remedies and seeing that judgement actually being enforced are two different matters. For example, as in the case of Pirate Bay, there was much difficulty in securing Hans Fredrik Lennart Neij, founder of the infringing website, for trial**(14)**. Even then, the ability of these individuals to pay the amount of damages actually incurred by the copyright owners is limited to their own finances. When the costs to the industry is in the billions, clearly more must be done.

It is hard to hold the service providers liable for the infringement due to legal exemptions. It is difficult to actually get the illegal distributors pay the full sum of the copyright damages due to practical considerations.

This has left many copyright holders with one other alternative; take actions against the end users who have downloaded the illegal material themselves.

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(8) Berne Convention for the Protection of Literary and Artistic Works 1886
(9) For example… s31 COPYRIGHT ACT (CHAPTER 63) Singapore
(10) For example… Section 512, Digital Millennium Copyright Act (DMCA){FN72: 17 U.S.C. §512}
(11) For example… RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and others [2010] SGCA 43
(12) "Department of Justice indictment, on The Wall Street Journal's website". The Wall Street Journal. Archived from the original on 15 July 2012.
(13) Gibbs, Samuel (10 December 2014). "Swedish police raid sinks The Pirate Bay". The Guardian.
(14) "Pirate Bay Cyberlocker Bayfiles Disappears After Arrest". Torrentfreak. Retrieved 13 May 2015

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FINDING AND SEEKING REDRESS FROM ILLEGAL DOWNLOADERS

There is a general strategy that is used by copyright owners and their legal councils when seeking redress against individual digital copyright pirates which is outlined as follows.

Firstly, locating the individuals who commit copyright infringement requires two things; specialised software that can be used to locate end users that have downloaded copyrighted material and, more importantly, permission from the courts and the internet service providers to use that software on the internet service provider's records **(15)**. Once access has been granted, the software will identify which of the internet addresses, and therefore which individuals known as 'Does', have illegally downloaded copyright protected material and generate a list of infringers to take action against.

From this list, a common strategy employed by copyright owners and their legal councils would be to issue large numbers of Letters of Demand to these 'Does'. The letter of demand informs the Does that the copyright holder and their representatives are aware of the Doe's illegal actions and will commence legal proceedings unless an amicable settlement can be reached, normally involving a monetary payment of some kind**(16)**, and a promise that they will cease all illegal activity in the foreseeable future.

The monetary payment from these 'Does' can vary from case to case. However in a vast majority of cases the 'Does', having been confronted with the knowledge that they have been 'found out', will likely want an out of court resolution to protect their reputations, or out of guilt or genuine remorse.

The reasons for going after these 'Does' is twofold.

Firstly, the process of reaching out of court settlements with 'Does' produces results faster than its alternatives. It takes less time, effort and legal costs to reach a settlement compared to fighting a legal battle against the Internet Service Providers. The smaller settlement sums, compensated by the large numbers of 'Does', also ensure that the infringers are not likely to attempt to evade justice, as with the case of the owners of Pirate Bay who evaded the authorities for a substantial period of time**(17)**.

Secondly, if the campaign goes well, the resulting media coverage showing that copyright owners are willing, and able, to enforce their copyright against individual copyright infringers would deter other possible digital copyright pirates from further infringing activity. This deterrence effect would thus prevent further losses from being incurred by the industry.

This strategy was successfully employed in several instances in Singapore, including the ODEOX Entertainment**(18)** and Voltage Pictures**(19)** campaigns in Singapore. However, despite the successes of these campaigns, they were not without problems.

(15) Liew Hanqing (9 August 2007). "Court forces ISP to reveal culprits". The New Paper.
(16) "IP in the News – 31 August 2007". Intellectual Property Office of Singapore. 31 August 2007.
(17) "Pirate Bay Cyberlocker Bayfiles Disappears After Arrest". Torrentfreak. Retrieved 13 May 2015
(18) Associated Press (14 August 2007). "Singapore court orders Internet company to reveal customers who illegally download videos". International Herald Tribune. Retrieved 11 July 2008.
(19) Tham, Irene (April 7, 2015). "Studio demands compensation from more than 500 people here who downloaded movie". Straits Times.

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PUBLIC OPPOSITION TO LEGAL CAMPAIGN

It is an unfortunate reality that, despite digital copyright piracy being an illegal activity, that the general public and News media would react critically to a strategy targeting ‘end users’ of computers, especially if a multi-national film production company like Voltage Pictures is the copyright owner seeking to enforce their rights**(20)**. Public backlash can come for a variety of sources, and the three of the most crucial ones are as follows;

Firstly, the online community values the so called ‘anonymity’ granted by them by the internet**(21)**. Whether real or imagined, many internet users take it for granted that their real life identities are entirely removed from their online personas. The internet is the proverbial ‘final frontier of free speech’, where they are allowed to say or do anything as they please entirely without consequence**(22)**.

Any action tearing back the perceived veil of anonymity threatens any ‘netizen’ who has ever taken comfort in being anonymous and untraceable will be deemed as threatening, and netizens will react badly, lashing out at the perceived cause.

Secondly, given that copyright owners financially capable of enforcing their rights are normally large companies with large amounts of financial resources, they may run the problem of being viewed by the general public as ‘bullies’ that are ‘unjustly’ coming after the ‘little guy’ with the proverbial legal hammer. Allegations of ‘bullying’, ‘black mailing’ and other unsavoury allegations will be levelled at the copyright holder by public and the press. This is a narrative that the media knows will resonate with their readers, and it is a story they will propagate and encourage.

Thirdly, digital copyright piracy is largely seen by the mass public as a victimless crime**(23)**. This is largely due to public perceptions of the entertainment industry; celebrities enjoy lavish, expensive lifestyles. The box office routinely reports opening nights where the takings number in the tens of millions. Vast merchandizing and advertising campaigns give consumers the notion that the entertainment industry has a limitless source of money. One person downloading a few movies can’t possibly impact the behemoth that is the multibillion dollar entertainment industry. This is untrue of course, especially for the thousands of supporting technical and creative people employed by said industry. However, the general public isn’t aware of this fact, and as such are unaware of the actual cost to the industry and the people who depend on it caused by these illegal activities.

Because of the above reasons, copyright holders and their legal counsels may find themselves being assaulted by bad publicity when trying to enforce their legal rights**(24)**. Worse still, publicity that can end up becoming disruptive, as in the case where ODEOX’s website was hacked as a reprisal for their legal campaign**(25)**.

As such, it is imperative that a media control strategy is important for any campaign of this nature.

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(20) Jessica Oh, KUSA (December 26, 2014). "Hundreds of Coloradans sued by 'Dallas Buyers Club' maker". 9News.
(21) Unraveling Internet Identities: Embedding Accountability & Anonymity at the Application Layer, Josephine Wolff, Rochester institute of Technology, April 26, 2012, 2012 TRPC
(22) Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech, Jason M. Shepard, Genelle I. Belmas, Yale Journal of Law & Technology, Vol. 15, pp. 92, Fall/Winter 2012
(23) Cybercrime: The Psychology of Online Offenders, 2013, Cambridge University Press (September 23, 2013)
(24) Kelly Ng, 23 Jun, 2015 Law firm in Dallas Buyers Club action accused of bullying tactics, Channel News Asia
(25) Liew Hanqing (23 November 2007). "Odex website hacked". The New Paper. Retrieved 13 July 2008.

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Spain

Ceca Magán Abogados

Shareholders separation right for lack of dividends distribution

Article 348 bis of the Spanish Companies Act provides the shareholder right of separation –in non-listed companies –in case of lack of distribution from the fifth financial year, provided that the shareholder had voted in favor of at least one third of the company's profits sharing legally available for distribution.

Such Article was suspended since June 24, 2012 until December 31, 2014, This suspension was subsequently extended until December 31, 2016 for the First Final Provision of Royal Decree-Law 11/2014, September 5.
However, Article 348 bis of the Spanish Companies Act entered into force since January 1, 2017. Accordingly, we consider it would be helpful to review the requirements to be met by shareholders (e.g. new investors in startups or consolidated shareholders which are in dispute with other shareholders) in order to exercise the right of separation in case of failure for distributing dividends.

Until the approval of Article 348 bis a legal recognition of a shareholder's right to dividends did not exist in our legal system. Some parts of the Spanish doctrine understand that this right is configured to be an abstract right, given that, it arises at the moment in which the general meeting decides to allocate a portion of the profits and distribute them between the shareholders, through the annual accounts approval resolution and allocation of profits.
Therefore, this article was created to incorporate in our legal system a protection for the minority shareholders against the abuse by the majority in case of unjustified retention of profits by the company. In particular, in companies with disputes it is a remedy acceptable to allow the shareholder to obtain an economic benefit derived from the condition of shareholders. This ensures a periodic partial distribution and obliges the company to acquire the shares of the shareholders who voted in favor of the resolution of distributing company profits.
Also, considering the economic situation that Spanish companies found in the previous years, the legislator suspended the application of this article due to the urgent measures adopted regards to the insolvency situation of some Spanish companies.

Once the solvency situation of the Spanish companies have improved, the temporary suspension of the article was lifted. The first problem that we find is the article's wording , which gave rise to some of interpretative doubts because the article does not come to assess if the non-paying resolution of the general meeting is adapted to the corporate interests or whether, on the contrary, it has a noticeable abuse nature.

The requirements to exercise the right of separation are the following:

(a) The company has to be registered in the Commercial Registry for at least five years. The first year shall be taken into account, even if it is incomplete.

(b) The non-sharing of the profits (legally distributable). It is not necessary the repetition in the lack of distribution. The Resolution of the Provincial Court of Barcelona of March 26, 2015, states that "it is only required five years from the register, and not the reiteration in the lack of dividends distribution in the prior five years".

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(c) The shareholder had voted in favor of the dividends distribution or, where applicable, had voted against retention. On one hand, sometimes the proposal is not performed "literally" in favor of the profit sharing, but it consists in the allocation of the results against reserves. In such case, formally, the proposal that not fulfill with the requirement establishes in the article and the shareholders shall be forced to ask for an amendment of the meeting agenda, where applicable under the law, introducing a new point in the agenda relating to the "profit sharing".

Provincial Court of Barcelona resolution of January 21, 2011 considers that the shareholders have the right of separation when the allocation proposal does not imply a higher share regarding the one already indicated in the article.

On the other hand, members who have been unlawfully deprived to the right of voting will be entitled to exercise this right; however, those who did not attend the general meeting, those defaulting on the payment of capital calls, those who abstained from the voting or voted in blank, and holders of company shares or non-voting shares will not be entitled.

(d) The profit sharing shall be at least one third of the company's profit gained during the previous financial year. The accounting meaning of operating results are those the company obtain before taxes and non-deducting financial expenses. However, the article establishes that "it shall be legally distributable"; therefore, the meaning of "operating profits arising from the corporate purpose", which provides the Spanish Companies Act, is not the accounting meaning.

This right may be exercised within one month from the date on which the ordinary general meeting of shareholders was held.

The Article requires that the right was exercised in writing; therefore, it will be enough any communication addressed to the company. Although, we recommend use a way which allow us to prove the reception of the notice and its content.
Executing the separation right, the company shall: (i) make a shares valuation; but, in the absence of an agreement between the shareholders, the commercial registry shall appoint an independent expert; (ii) reimburse the amount resulting from the valuation report in two months from its reception or three months in case creditors has the right of objection; and, (iii) reduce share capital or acquire the shares.

Finally, it should be noted that the shareholder has the right to waive to the separation right in a particular financial year. However, it is not clear if it is valid the waiver of this right executed in an extra statutory agreement (e.g. shareholders agreement), due to the right of separation of the shareholder is understood by the Spanish doctrine as public order matter, according to the Article 6.2 of the Spanish Civil Code. Although, there are some doctrine which consider that it is possible to waive to the right by unanimous agreement.

In conclusion, the minority shareholders should be informed about the existence of this separation right to avoid the abuse of the majority, moreover, when the company is involved in disputes.

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The JOBS Act:
New opportunities in Corporate Finance for Foreign Companies

On April 5, 2012, the Jumpstart Our Business Startups (JOBS) Act was signed into law by President Barack Obama. The JOBS Act contains seminal changes to U.S. federal securities law. The legislation was promulgated in six titles and effectively deregulates in the areas of capital raising and SEC reporting.

This article shall serve to (i) provide a summary of the JOBS Act and (ii) highlight key considerations for non-U.S. companies in connection with the legislation.

General Summary of the JOBS Act

I. Emerging Growth Companies

Title I, also commonly referred to as The IPO On-Ramp, is designed to facilitate the process of going public. It applies to companies with less than $1 billion in annual gross revenues ("emerging growth companies", or "EGCs"), providing EGCs with the option of scaling their disclosure and compliance requirements gradually in connection with an IPO. The advantages include:

- up to 5 years of forbearance from certain reporting requirements leading up to, during and immediately after the IPO
- the ability to pitch the IPO to institutional investors before filing papers
- the option to initiate the IPO process confidentially
- a provision to opt out of certain Sarbanes-Oxley and Dodd-Frank provisions related to accounting and executive pay disclosures
- permission for analysists employed by the underwriter to publish reports immediately upon earnings release

II. Private Placements

Title II liberalizes (i) the way a company may advertise its private placement offering to potential investors and (ii) the way in which securities bought in a private placement may be advertised in the secondary market. More specifically, Title II:

- lifts the ban on general solicitation for Rule 506 private placement offerings in connection with accredited investors – solicitation remains restricted with non-accredited investors
- enables offers to be made in the secondary market without a holding period to non-QIBs, allowing for general advertisement (actual sales remain restricted)

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III. Crowdfunding

Crowdfunding refers to a means of raising funds by which small amounts are solicited from a large number of people. Under the JOBS Act, brokers and funding portals can serve as intermediaries for fund raising. The amount of annual investment per investor is subject to restrictions based on the investor's annual income. An issuer is permitted to raise up to $1 million over a 12-month period. The issuer has certain disclosure requirement with the SEC, its intermediary and (potential) investors. Annual reports are required on the issuer's operations and financial statements and the issuer is required to use U.S. GAAP. Under Title III, the full funding goal must be met or no sales of securities shall occur.

IV. Regulation A

Title IV splits Regulation A offerings into two categories: Tier 1 and Tier 2. For Tier 1 offerings, the JOBS Act raises the fund raising cap from $5 million to $20 million. Importantly, Tier 1 offerings remain subject to "blue sky" laws and thus issuers must remain compliant with securities laws in each jurisdiction in which securities will be offered. Ongoing reporting requirements are minimal for Tier 1 offerings. For Tier 2 offerings, the JOBS Act raises the fund raising cap from $5 million to $50 million. Tier 2 offerings are not subject to "blue sky" laws, but remain subject to traditional ongoing reporting requirements. Further, non-accredited investors may invest only 10% of the greater of income or net worth in any single Tier 2 offering.

V–VI. Exchange Act Registration and Deregistration

Titles V and VI adjust regulations which require companies to go public. With respect to the threshold limit for shareholders of record, the JOBS Act raises the limit from 500 to 2,000, as long as the shareholders of record are accredited (threshold for non-accredited shareholders remains at 500).

Key Considerations for Foreign Private Issuers

A foreign company will qualify as a foreign private issuer ("FPI") if 50% or less of its outstanding voting securities are held by U.S. residents; *or* if more than 50% of its outstanding voting securities are held by U.S. residents and *none* of the following three circumstances applies: the majority of its executive officers or directors are U.S. citizens or residents; more than 50% of the issuer's assets are located in the U.S.; or the issuer's business is administered principally in the U.S.

Title III (Crowdfunding) and Title IV (Regulation A) of the JOBS Act are directed to the domestic U.S. market. The issuer must be a U.S. entity under Title III and either a U.S. or Canadian entity under Title IV.

Relief provided under the JOBS Act in connection with IPOs applies to FPIs, including that of a confidential filing of an IPO registration statement, the ability to communicate with institutional investors before filing papers, the distribution of pre-IPO research, relaxed disclosure requirements and reporting requirements in connection with Sarbanes-Oxley and Dodd-Frank. The SEC has made clear that the relief provided under the JOBS Act will benefit FPIs in addition to the existing concessions for SEC-registered IPOs afforded to foreign private issuers (vis-à-vis Form 20-F concessions).

FPIs can reap the benefit of the JOBS Act's Title II legislation for private placements. The JOBS Act provisions apply only to offerings conducted under Rule 506 and Rule 144A – they do not apply to offerings conducted under Section 4(a)(2) (formerly 4(2)) (traditionally, frequently used by FPIs).

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Immigration Law in the U.S.

Since President Trump won the election in November 2016, Immigration has been one of the most debated topics in the United States. Below we **(1)** provide an overview on some important work visas; **(2)** share some of the new measures already taken by the Trump Administration; and **(3)** discuss our practice of Immigration Law.

(1) Overview on some important work visas

H-1B visa: The U.S. H-1B visa is a non-immigrant visa that allows U.S. companies to employ graduate level workers in specialty occupations that require theoretical or technical expertise in specialized fields. The visa applicant must be sponsored by an employer, and the job must be one in a defined list of job areas, as outlined by the law. Currently, H-1B visas are allocated by a lottery system. It has an initial duration of 3 years which can generally be extended up to 6 years.

L-1 visa: L-1 visas are available to employees of an international company with offices in both the United States and abroad. The visa allows such foreign workers to relocate to the corporation's U.S. office. There are two types of employees who may be sponsored for L-1 visas:

- **L-1A Executives and Managers**

The executive or manager should have supervisory responsibility for professional staff and/or for a key function, department or subdivision of the employer. L-1A visas are initially issued for a 3-year period extendible in two year increments to a maximum of 7 years.

- **L-1B Specialized Knowledge Staff**

This category covers those with knowledge of the company's products/services, research, systems, proprietary techniques, management, or procedures. L-1B visas are initially issued for 3 years extendable to a maximum of 5 years.

E-1 (Treaty Trader) and E-2 (Treaty Investor) visas: E-1 and E-2 visas are devised for citizens of countries with which the United States maintains treaties of commerce and navigation. Nationals of countries with such Treaties can obtain visas to work in the U.S. in order to develop and direct their investment in and/or trade with the U.S. under the E-2 and E-1 visa schemes.

E-1 Treaty Trader

The E-1 visa is for businesses and individuals engaged in substantial international trade between the U.S. and the treaty investor country. The volume of trade must be sufficient to provide employment for a number of people in the U.S. and must constitute the majority of the trader's international trade.

E-2 Treaty Investor

The E-2 visa is for those who have made a significant investment in a U.S. business in which the investor has at least a 50% ownership. The investment must be sufficient to provide employment for a number of people in the U.S., and must be in an active U.S. business.

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(2) New measures already taken by the U.S. government

Executive Orders

On January 25, 2017, the first Executive Orders were signed. Major topics were addressed by the Orders:

- Construction of a Wall along the border with Mexico. The president ordered that the Secretary of Homeland Security should "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border"; and,
- Detention of undocumented immigrants without evidence that they pose threat and detention of immigrants that are suspected of having violated Federal or State law pending conviction of crimes.

On January 27, 2017, another Executive Order was signed.

- It suspended all refugee admissions within 120 days and ordered to review whether additional procedures should be taken.
- It also indefinitely prohibited entry of all Syrian refugees into the country.
- In addition, it imposed a temporary ban of 90 days on the entry of nationals from 7 Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. However, a new Executive Order was signed on March 6th, reproducing and replacing the previous Order, and now citizens of Iraq are no longer subject to the ban.

However, on March 15 and March 16, 2017, the ban was temporarily blocked by two federal judges in Hawaii and in Maryland. The nationwide decisions granted a temporary restraining order and blocked enforcement of the revised Executive Order, which failed to meet a secular purpose, violated the Establishment Clause, and was deemed religiously discriminatory.

H-1B and L-1 Visa Reform Act.

The H-1B and L-1 Visa Reform Act of 2017 is a bill amending the Immigration and Nationality Act to revise employer and government requirements regarding visas for nonimmigrant aliens rated H-1B and L-1.

The bills would, among others:

- Require employers to make a good faith effort to recruit U.S. workers by instituting a pre-application, 30-day job posting requirement;
- Prohibit large companies from hiring H-1B workers if more than 50% of their employees are on H or L visas and prohibit restructuring to avoid the 50%-threshold;
- Eliminate the random H-1B lottery and replace it with an allocation system that prioritizes those foreigners with the highest salaries and with advanced U.S. STEM degrees;
  Prohibit replacement of U.S. workers by H-1B or L visa holders for 180 days before and after hire.

These changes would require all employers using outsourcing services to rethink their hiring practices and immigration strategies.

(3) Our Immigration Practice

Dunnington's immigration practice concentrates on providing legal assistance to companies and individual clients in matters involving business immigration, family immigration, citizenship, removal defense, asylum, and federal court litigation. Our immigration team handles:
(1) Assistance with applications for permanent residency, "Green Card", to the United States; **(2)** Naturalization matters; **(3)** Visas for investors and entrepreneurs; **(4)** Visas for intracompany transferees; **(5)** Visas for the temporary employment of foreign workers in specialty occupations in the United States; **(6)** Visas for individuals who possess extraordinary ability in the sciences, arts, education, business, or athletics, or who have demonstrated a record of extraordinary achievement in the motion picture or television industry; **(7)** Training, Internship, and Cultural and Educational exchange visas; **(8)** Visas for health care professionals; and **(9)** Visa assistance to international students and scholars.

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