NewsLetter

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Information by the Law Offices of Lutz Rechtsanwälte

Adaptation of the Intellectual Property Law to the Digital Age

On 1 July 2008 new provisions to the Copyright Act („CA") came into effect. The amended Intellectual Property Law was conformed to the Internet-Treaties of the World Intellectual Property Organization (WIPO) and confronts the challenges of digital technology with a better protection, in line with international standards. In the centre of the amended Act stands the newly created protection for technical measures with the objective of preventing the copying of copyrighted works. This article discusses the salient changes to the CA.

Ivo Meyer

Protection of Technical Measures

The use of digital technology has made the copying and publishing of literary works and art considerably easier. Prior to the amendment of the Act development, distribution and the running of programs designed to bypass copy protection was permitted. As a result, there was a significant increase in copyright infringements and piracy for commercial purposes. In response, the entertainment industry looked for technical measures which can be implemented to protect copyrighted works. However, resistance was felt from the consumer market as such protective measures overly complicated the copying for private use and in certain cases rendering it even impossible. With the amended Act the Legislator has chosen to take the middle ground.

The newly introduced art. 39a para 1 CA contains that effective technical measures for the protection of works and other objects of protection may not be bypassed. Technical measures of this nature include access locks or copy protections, digital watermarks, encryption, distortion and other conversion mechanisms. For instance, the production, the offering, the sale, the distribution and licensing of devices, which aim to avoid effective technical measures, is also prohibited, and so is advertisement of such devices. This means that any program that can bypass such protective measures is, with effect of 1 July 2008 in principle illegal. The infringement of those provisions constitutes an offence and is punishable by a fine or up to one year's imprisonment.

However, the Act provides for certain exceptions: The ban on bypassing protection does not apply to persons doing so exclusively for those purposes permitted by the Act. It is still permitted to record public works onto blank storage media for private and personal use (art. 19 para 1 lit. a CA). This provision includes the use by family members and closely-tied friends. People who are in possession of the respective software

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may, for instance, continue using it for the decoding of protected DVDs. As hitherto the Act provides for a royalty on storage media.

The solution provided by the Swiss legislator is less extensive than those in other European countries which afford a more comprehensive protection against the circumvention of technical measures.

Supervisory Body for Technical Measures

The amended Act establishes a supervisory board for technical measures. Its objective is the prevention of conflicts that could arise between user and provider in the area of protective measures. The Supervisory Body has the duty of monitoring the effects of using measures such as access locks or copy protections on the permitted uses of works, to locate any problems that might arise and to mediate amicable solutions between affected parties. Should it transpire that mediation will not succeed the Federal Council may bestow upon the Supervisory Body the authority to order the implementation of specific measures.

Downloads from File Sharing Networks

The downloading of works via electronic payment services remains legal and is now even exempt from the legal obligation of paying royalties on copies made for private use. During the drafting of the amendment to the CA controversy arose as to whether – in analogy to the respective laws of Germany – copies from apparent illegal sources should be prohibited. The proponents of the prohibition asserted that the legalization of Internet piracy by users was in contravention of the constitutional property guarantee and would stunt the development of legal Internet-based business. The opponents were of the view that illegal uploads should be focused upon and that the actions of the end user should not be criminalized. After much debate, the National Council explicitly abandoned the prohibition of downloads from illegal sources. The question of whether downloading from illegal sources is prohibited therefore remains to be decided by the Courts who have not yet provided a conclusive answer.

Changes for Performing Artists

An additional change to the intellectual property law relates to the rights of the performing artists. In addition to authors artists and interpreters may now also decide whether and in which form their works and performances may be published on the Internet. As a novelty they have the explicit right to be cited by name and to have the integrity of their artist performance protected. Folk art presentations are now also protected.

Expansion of the Limitations of the Intellectual Property Law

The amended Act not only provides for improvements for rights-owners but also for the user of protected works and performances by expanding the list of exceptions of protections. Accordingly, the broadcasting companies benefit from a simplified procedure of the acquisition of title if they want to make their archive material accessible online. Another simplified access is provided for so-called „orphaned works“, i.e. for works the rights-owner of which is unknown or untraceable. In addition, copies resulting from the use of legal online-offers are no longer obligated to pay royalties on copies for private use. ■

Directors' liability for Withholding Tax

As in other areas of tax matters the reach of the law is also broad with respect to the directors' liability for withholding tax, specifically in the case of a so-called factual liquidation. In order to prevent unpleasant surprises, the ambit of the pertinent provisions should be considered.

Christian Christen

According to art. 15 para 1 lit. a of the Withholding Tax Act ("WTA") persons commissioned with the liquidation are jointly liable with the taxable person for the tax of a dissolved legal entity to the maximum amount of the liquidation proceeds.

Formal and Factual Liquidation

The term liquidation not only includes the procedure as set forth in art. 739 ff. of the Swiss Code of Obligations ("CO") for the time subsequent to the occurrence of a ground for dissolution according to art. 736 CO (ground for dissolution in terms of the articles of association, resolution of general meeting, opening of bankruptcy, judgment, etc.), but it also refers to a factual liquidation, i.e. the process in which the assets of a company are alienated and the proceeds of the disposal are not reinvested but – directly or indirectly – distributed to the shareholders. In this process not all of the assets must be disposed of; it is sufficient if core areas of the company are being sold off without which the continuation of the business will be made difficult or will not seem expedient anymore.

According to the Federal Court no resolution to dissolve or an intention of the organs to liquidate the company in terms of the civil law is required. The moment at which, after consideration of all circumstances, a disposal of assets can no longer be considered a business transaction but rather has the effect of eroding the company, is the date of commencement of the factual liquidation.

Participation in the Liquidation?

In the past it remained controversial as to the extent to which a director had to actually participate in the liquidation activities in order to be considered a liquidator in terms of art. 15 WTA. The Federal Tax Appeals Committee just recently confirmed the liability of a director for withholding tax owed by the taxpayer even though the director himself did not perform any liquidation activities but a third party authorized with sole signature by the company was head of the liquidation. The Tax Appeals Committee was of the opinion that the director's liability was justified because by furnishing powers to others he organized the company in such a manner that it was factually being liquidated without him having been able to make sure that the tax owed in this regard would be paid.

Relevant Period

Over and above that, in terms of a *catch-all* provision, art. 15 para 2 WTA provides that the liquidators are liable for tax, interest due and other costs incurred which originate, are claimed or fall due during the term of their office. According to relevant literature this provision must be interpreted to the effect that a new member of the board of directors can also be held liable for taxes which accrued prior to the date of his taking

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office, however, such tax as was only claimed in the course of his office. Conversely however, it should be possible that a director gives his approval for the sale of an asset during the term of his office, but which the authorities consider as beginning of a factual liquidation only after his term. Thus, a director may still be held liable long after his retirement from office.

Scope of Joint Liability

The limitation of the joint liability to the amount of the liquidation proceeds proves of little effect for a director against whom a liability claim has been brought. Firstly, the liquidators are not jointly liable solely for withholding tax owed on the liquidation proceeds as the wording of art. 15 para 1 lit. a WTA might make one believe, but for any withholding tax demand, interest due and costs owed by the company whatsoever. Secondly, in the situation of a factual liquidation the liquidation proceeds can reach unexpected proportions, given that the basis for determining the liquidation proceeds is the total value of the company's assets at the beginning of the liquidation procedure.

Means of Exculpation

Finally, not of much help is the means of exculpation according to art. 15 para 2 WTA in terms of which the liquidators' liability does not apply if they can prove that they have done everything that can be expected from them to determine and fulfill the tax obligations. As opposed to art. 55 para 1 CO (principal's liability) this provision has a higher burden of proof. According to the jurisdiction "everything that can be expected" goes beyond the due diligence requirement as requested in these circumstances. A relief from liability would only be applicable if the liquidator fulfilled his duty "to the best of his knowledge and did everything what could reasonably be expected from him to secure and pay the tax." This test had to be applied even more stringently if the liquidator had special professional qualifications, e.g. attorneys, notaries, economists, chartered accountants etc, and was familiar with business life.

In connection to this Böckli speaks of a guarantor's liability under public law in respect of which in practice the principle *res ipsa loquitur* is adamantly applied. The facts themselves were sufficient evidence to hold that the board of directors obviously did not do "everything that could be expected" of them to establish and satisfy any tax obligations. Recently, it appears that the Federal Court invokes the notion established by literature on the basis of previous jurisdiction, in terms of which the liquidators' liability was in effect a strict liability, independent of the elements of fault, causality and adequacy, in order to justify the continuation of its line of jurisdiction also with the existence of corresponding literature (Judgment of 3 June 2008 [A-1506/2006]). An astounding reasoning.

Conclusion

Administrative authorities and the Courts apply an extensive interpretation to art. 15 WTA and there is no change of trend expected in the near future despite much literary criticism. Particularly in view of the directors' stringent liability for accrued withholding tax of the company, delegations of competencies have to be examined for possibilities of actual control. If activities of a company can be interpreted as the initial stage of a factual liquidation, the directors have to exercise increased caution. It is then advisable to request the company to deposit the withholding tax accrued or even to apply to the tax authorities for a respective order for security. ■

Christopher Tillman

Poisoned Deals

There are many ways to earn money with real estate. One of the more unusual methods is to take legal action against a neighbor's construction project and demand an indemnity for retracting the suit.

Legally speaking, it's a very fine line: Is this kind of behavior admissible? Or is it, perhaps, a punishable offense? A recent decision by the Federal Court concerning a case in a Swiss City confirms both views.

The Planning Commission had granted a publicly listed company a construction permit for building a „medical center". A while later, the company filed a supplemental application for a change of use. That is what the neighbor then objected to. The construction company then repeatedly sought settlement agreement, since he was interested in clearing up any objections as quickly as possible. Later on, he offered to pay the sum of CHF 15,000 for the withdrawal of the objection. The neighbor called on the very same day and demanded that the sum be increased to at least CHF 150,000. That was not the end of it. A little later, the neighbor demanded that the building company pay CHF 820,000 (4 percent of the cost of the construction project) as commensurate compensation for withdrawing the objection. The builder owner company refused. On the following day, the builder owner company filed criminal charges against the neighbor. The district court found the neighbor guilty of attempted extortion according to criminal law and handed him a suspended sentence of seven months in jail plus a CHF 3,000 fine. Ultimately, the Federal Court had to clarify according to civil law whether the neighbor had been pursuing illegal aims with his threat by attempting to gain financial compensation for retracting his lawsuit.

Payment for waiving legal means

The Federal Court confirmed that construction projects delayed by red tape or legal tangles can lead to considerable costs for the building owner. Fundamentally, therefore, the credible threat of a delay in construction is objectively a well-suited method of bringing about acquiescence in a reasonable person in this situation. From the standpoint of criminal law, the Federal Court finally decided in its latest ruling, that anyone litigating against a construction project and is visibly engaged in defending non-legitimate claims and attempting to make huge financial gains will be liable to prosecution for extortion according to the Swiss Penal Code.

According to civil law, however, the Federal Court ruled that there is nothing that fundamentally violates public policy in waiving legal means in exchange for compensation. Even a lack of proportion between the service and the compensation offered will not mean that the waiver agreement violates public policy, since the basic values of our legal system do not prohibit a disparity in the value of contractual services. The only exception to this basic law is in the case of unconscientious dealings (exploitation of an emergency situation, inexperience or carelessness).

According to the Federal Court, however, the economic value of retracting the objection must result from those interests of the neighbor that are worthy of protection and not solely from the costs for the delays threatening the building owner. If the latter is the case, it amounts to the improper commercialization of a purely formal legal position, which will result in a violation of public policy and hence the invalidity of such compensatory agreements or waivers respectively.

For the moment, given the facts of the case, the Federal Court has confirmed that payment in lieu of a lawsuit that is not materially hopeless from the start can indeed be in violation of moral principles. ■

Lutz Rechtsanwälte
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On a Personal Note

We have the pleasure to announce that Mr. **Roger Meier** has become a Partner of our firm with effect of 1 July 2008, and we are very pleased about the additional backing. Roger Meier graduated from the University of Zurich in 1996. He was admitted as attorney in 2000. Roger Meier gained his first professional experience at the District Court of Bülach where he first had worked as a legal clerk and later as a judicial officer. From 2000 to 2008 he worked with a law firm in Zurich-Zollikon where he had been Partner since 2004. In mid 2008 Roger Meier has returned again to Lutz Attorneys, henceforth as Partner. He lectures commercial law at the Higher Technical College Dietikon. His preferred fields of activity are advising on and litigating in civil and commercial matters, company and trade law, insolvency and bankruptcy law, civil law including family and inheritance law as well as employment law. He speaks and advises in German and English. ■

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