

Cyber-attacks and the media industry



Summary

Following the hysteria surrounding the hacking of Sony Pictures' computer systems, this article looks at some things which could be done to protect your business against a cyber-attack.

Business impact

The impact of a cyber-attack on a business can be significant and in many cases unquantifiable. It can cause damage to a company's reputation, result in the leaking of confidential information and of course disruption to a company's all important computer system.

Legal detail

One of the biggest news stories over the Christmas holidays was the hacking of Sony Pictures' computer systems by North Korean hackers. From the hack, Sony Pictures' then unreleased feature, *The Interview* was discovered. The satirical film starring James Franco and Seth Rogen is about the plot to kill the North Korean President.

The hackers threatened to carry out terrorist attacks at cinemas where the film was shown. In response, the film was temporarily pulled. The decision received condemnation from President Obama and the general entertainment industry.

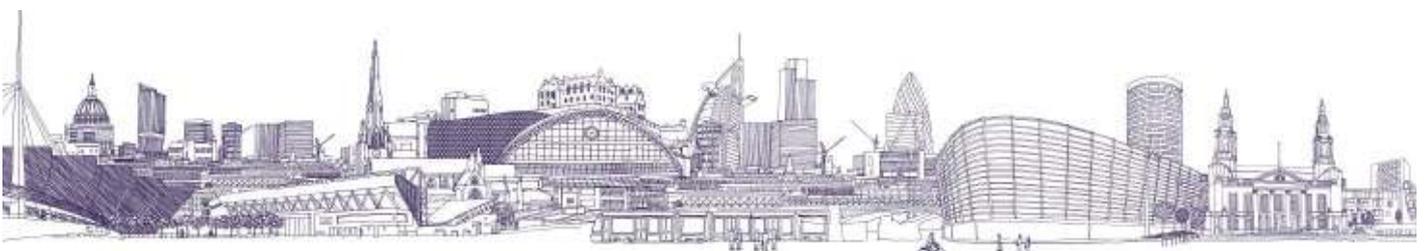
The film was eventually released on limited theatrical release and digital distribution and is set for theatrical release in the UK and Ireland later this year.

However, the incident sparked debates on various issues sensitive to the media industry such as the creator's right to freedom of expression and to make satirical and parody works.

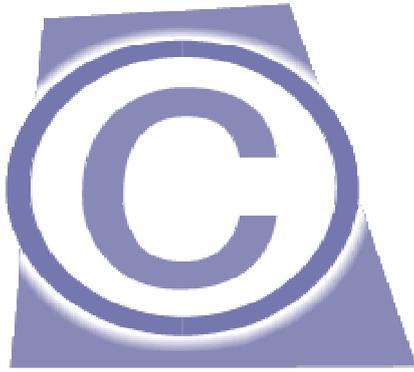
Another issue posed was on the dangers of cyber-attacks in the digital age. Since this is a topical issue, below are a few tips for you and your staff on how to protect your business from cyber-attacks:

- Ensure that you use strong passwords (i.e. combination of letters and numbers, upper and lowercase) and avoid writing down your passwords
- Do not use the same password for different services
- Install appropriate anti-virus software and keep all your software up to date
- Be vigilant and pay attention to website URLs
- If required to provide personal or sensitive information by email, check the identity of the requesting companies/individuals by contacting them directly
- Do not click on links or open attachments to suspicious emails
- Do not insert suspicious hard drives or USB sticks into your computer
- Beware of phishing scams (such scams usually have a spelling or grammatical error, use a supposed link for a popular or well-known company or include a threat such as blocking of an account if instructions in email are not followed).

The list above is by no means exhaustive but offers some food for thought in the battle against cyber-attacks.



New Orphan Works Licensing System



Summary

In order to use works protected by copyright, the user will first need to obtain the permission of the copyright owner (licence). Unless an exception applies, use of the work without the permission of the owner is in breach of copyright law. However, there are instances where the identity of one or more of the copyright owners is unknown or where the relevant copyright owner cannot be located, making it extremely difficult to obtain consent. Such works are often referred to as orphan works. To deal with the problems relating to Licensing Orphan Works, the UK has launched a Licensing System.

Business impact

The new licensing system will make it possible for people within the creative industry to use orphan works for commercial and non-commercial purposes. This will have a huge and positive impact on the creative and cultural industry as it will give greater access to culturally valuable creative works.

Legal detail

The UK launched the Orphan Works Licensing System on 29 October 2014. The scheme is part of the Government's on-going project to modernise the UK copyright system and will be administered by the Intellectual Property Office (IPO).

Where the owner of copyright works is unknown or cannot be identified, the prospective user can pay a small administration fee and apply to the IPO for a licence to use such works. For example, if a writer wanted to use art work by an artist in his book, he would ordinarily need to obtain the permission of the artist. However, if the artist is unknown or cannot be located, the writer would now be able to apply to the IPO for a licence to use such works under the new scheme.

The applicant will need to show in its application that it has undertaken 'diligent search' in trying to find the copyright owner. The IPO's website has a guidance note to help users understand what constitutes diligent search. If the IPO is satisfied with the prospective user's efforts in trying to ascertain the copyright owner, it will grant the user a non-exclusive licence to use the orphan works. That said, in addition to inadequate diligent search, the IPO may refuse to grant a licence where it considers that the proposed adaptation of the orphan work might be derogatory or where it considers that it would not be in the public interest to grant a licence for that use.

If a licence is granted, the licence will be for up to seven years and a market rate licence fee will be payable by the user. This is to ensure that if the copyright owner is located, it can be remunerated accordingly. The user must credit the copyright owner (where known) and provide a web-link providing details of the IPO and the orphan works licence number.

As part of the licensing system, the IPO will maintain an electronic register dealing with orphan works. The register will identify those works which are subject to application, those for which an orphan work licence has been granted as well as those in relation to which a licence has been refused. The register will therefore enable rights holders to see if any of their works are subjected to an orphan works licence and if so, identify themselves as the copyright owner.

As the IP Minister, Baroness Neville-Rolfe commented:- *"The scheme has been designed to protect right holders and give them a proper return if they reappear, while ensuring that citizens and consumers will be able to access more of our country's great creations, more easily"*. The licensing system is very much a welcome change to the UK copyright system.

Theatre tax relief



Summary

A new theatre tax relief has been introduced to complement the reliefs already available to the film, TV, computer game and animation industries.

The relief works in one of two ways: an additional deduction used when calculating the production's

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corporation tax liability and a theatre tax credit in exchange for losses surrendered to HMRC.

To qualify for the relief, both the show and the activities of the theatrical production company must meet certain criteria.

It is hoped that the new theatre tax relief will allow the UK's theatre companies to continue to produce innovative and ground-breaking productions and contribute to the cultural capital of the UK.

Business impact

Theatre companies will be able to reduce their tax liability during the production phase of a show. This will have a positive impact on cash flow since during this phase costs are incurred while little revenue is generated.

Legal detail

The rules apply to theatrical productions for accounting periods commencing on or after 1 September 2014.

The relief will be available to production companies which present live theatrical dramatic or ballet productions (the relief is not available in some cases, for example where the show is mainly advertisements or includes a competition).

Only the company most actively involved in production can claim the relief; the relief is only available to one company involved in any production.

The production company must meet the Commercial Purpose Condition and the European Economic Area (EEA) Expenditure Condition to qualify for relief.

To satisfy the Commercial Purpose Condition, the production company must intend that most of the performances will be made to paying punters or educational audiences. To meet the EEA Expenditure Condition, at least 25% of the core expenditure must be on goods and services from the EEA.

If these criteria are met, the production company can benefit from a reduced corporation tax liability. This is calculated by treating all the revenue and costs of the production as a discrete trade and then deducting a proportion of the shows costs based on how much the show has spent on EEA goods and services. This relief is in addition to any other deductions that the company may receive.

Where a theatrical production has generated a loss, a company may claim theatre tax credit of up to €50million per year (based on the amount of losses it surrenders to HMRC which need not be all the losses it has made). The rate of loss depends on whether the show is a touring or non-touring production.

It will be interesting to see how popular this is amongst production companies and whether this relief stimulates growth in the theatrical industry in the same way that it has in the film industry.

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Theatre actors: To be or not to be workers? That is the question



Summary

In the case of *MacAlinden t/a Charm Offensive -v- Lazarov and others* UKEAT/0453/13/JAJ, the Employment Appeal Tribunal has found that actors in a play who were engaged by a theatrical producer under a profit share agreement were not necessarily 'workers' for the purposes of employment legislation. This means they would not necessarily be entitled to receive national minimum wage and holiday pay for the time that they were involved in the play. The case has been brought before another Employment Tribunal which will now decide whether the actors' claims should succeed.

Business impact

Depending on how the Employment Tribunal decides the actors' claims, this case may lead to production companies engaging individuals in profit share agreements (whereby the individuals will only receive payment if the play or production produces a profit) to avoid having to pay national minimum wage or holiday pay. Whether or not this tactic will be successful very much depends on the facts.

Legal detail

Five actors were hired by a theatrical director and producer (Charm Offensive) to act in a theatre production pursuant to an 'actor's contract' which provided that they would be paid in line with a percentage of the profits made by the production. The contract provided no other provision for payment to the individuals. However, whilst

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the production gained critical success, it did not make a profit and so the individuals did not receive any pay for their work. They therefore brought an Employment Tribunal claim for payment of the national minimum wage and holiday pay on the basis that they were workers under UK employment law (if individuals are classed as workers then they are entitled to the national minimum wage and holiday pay).

Under section 54 of the National Minimum Wage Act 1998, a worker is defined as an individual who has entered into or works under a contract whereby *'the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'*. Initially, the Employment Tribunal decided that the individuals were workers because there was a contract between them and the producer and they undertook to perform their work personally.

The producer appealed this decision on the basis that the judge had failed to consider properly whether the actors were carrying out a profession or business undertaking

and whether the producer was a client or customer of the actors.

The Employment Appeal Tribunal agreed and noted that the witness evidence in the Employment Tribunal hearing showed that there was an indication that the actors were embarking on a profession or business undertaking.

A key reason for this was that the individuals promoted and marketed their acting services on a wide basis (i.e. to other producers). Furthermore, whilst they were immersed in the play, once they were cast; they were only engaged for that play alone and were not integrated into the producer's theatre production business on a wider basis.

The Employment Appeal Tribunal sent the case back to a different Employment Tribunal to decide this issue. Readers should therefore await the outcome of the Employment Tribunal's decision before relying on this case and in any event should always consider the facts of their particular circumstances.

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