Technology Update

MOORE BLATCH
solicitors

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Welcome to the Moore Blatch Technology Update.

As usual, we've included articles on recent developments in technology and intellectual property law that we hope will be of interest to you.

All our articles are in the news section on our website (www.mooreblatch.com) in addition to being reproduced in this PDF.

If you have any comments or questions, please contact me on 023 8071 8078.

With kind regards,

Dorothy Agnew
Partner

Updates this month

Latest technology law news

- New crowdfunding policies
- A 'Tech-City' visa?
- Service provider unable to exercise lien over electronic database
- Comedy club wins in GLEE trademark dispute with 20th Century Fox
- High Court finds House of Fraser's pigeon logo infringed Jack Wills' pheasant logo
- Share buybacks

New crowdfunding policies

Driven predominantly by difficulties in securing traditional credit during the financial crisis, the crowdfunding sector has grown over recent years.

The concept of crowdfunding is simple. It is a means of connecting businesses which require finance (the "borrowers") with a large number of people, who together can offer the money the borrower requires (the "lenders" or "investors"). It is a mutually beneficial relationship where the borrower can secure funding where none is otherwise available and the lenders often get a greater return on their money than they might otherwise obtain in bank saving accounts or ISAs. However, as with any type of lending or investment, it is not without its risks.

There are two key types of crowdfunding: debt funding and equity funding. On the one hand, debt funding is a loan arrangement between the lenders and a borrower. The lenders receive their money back with interest, usually by monthly instalments over a fixed term. On the other hand equity funding enables investors to invest money in exchange for shares or debt securities in the borrower.

If the borrower is successful this method allows investors to gain from their investment, by way of a dividend or a disposal of the shares or debt securities for profit.

Following a consultation in October 2013, the Financial Conduct Authority (the "FCA") has recently drawn up new policies to regulate crowdfunding which came into force on 1 April 2014.

By introducing these policies the FCA aims to protect inexperienced, possibly vulnerable, investors. Many of the new rules centre around ensuring the investors have full transparency about the investments they are entering into and enable them to more clearly assess their risk.

A differentiation is made between the rules relating to debt funding and equity funding. The new debt funding rules include requiring crowdfunding operators to adhere to certain minimum capital requirements, to keep client money separate and to enable the administration of loans to continue if the crowdfunding operator goes out of business.

Equity funding will, however, see the biggest change as the investors will now have to fall within certain categories if they are able to make an equity funding investment. This means that the investors will have to be a:

(i) professional client

(ii) retail client who is advised

(iii) corporate finance or venture capital contact

(iv) certified sophisticated or high net worth individual or

(v) client confirming that it will not invest more than 10% of its net investible assets.

It is perhaps this last category which has caught the most negative headlines on the basis that it restricts ordinary investors from the amount they are able to invest in equity funding.

Only time will tell if the FCA has drawn up rules which are too tight and discourage investors, or whether the right balance has been struck between protecting the interests of investors and allowing them to invest through the crowdfunding model.

The full policy statement from the FCA can be found at http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-04.

A 'Tech-City' visa? Opportunities to attract the best global IT talent to the UK

A small but potentially significant change for the IT industry was introduced to the Immigration Rules in April.

The new changes allow Tech City UK, which is a Government initiative to encourage investment and support for the UK's technology cluster, to endorse top innovators and professionals in their field so that they can then come to the UK without the need for a sponsoring employer. The intention is that the UK's digital technology industry would be able to continue to attract the best global talent.

The Tier 1 (Exceptional Talent) immigration category allows individuals to live and work in the UK if they are "…endorsed as an internationally recognised leader or emerging leader in your field in science, humanities, engineering, medicine, digital technology or the arts…".

Originally intended as the successor provision to the Tier 1 General immigration category it is, in practice, little used. Only nine successful applications were made in the first year of the category's existence. Most potential applicants cannot be endorsed as an internationally recognised leader in their field; even those who potentially could tend to have other, more transparent options available. It appears an anomaly within the present Immigration Rules; an opportunity for subjective decisions to be applied within the framework of the points based system, which supposedly introduced points, uniformity of policy and clarity of decision-making.

There is often no realistic option within the Immigration Rules for those seeking to start operations in the UK with relatively little capital. Making an application for a sponsor licence, with its attendant costs, delay and record-keeping obligations tends not to be a suitable solution for smaller companies. A potential alternative, the Tier 1 Entrepreneur visa, can also present challenges; demonstrating the capital, the obligation to create UK jobs and the manner in which the "genuine entrepreneur" test can be applied are serious deterrents to using this immigration category.

This is therefore a welcome development for Tech City entrepreneurs. It is to be hoped that a sufficient quantity of Tier 1 ET visas will be allowed to Tech City in order to meet demand for the application and a degree of objectivity can be brought back in to the process by allowing expert assessment of potential applicants.

IT companies seeking to start new operations in the UK should carefully assess potential immigration options before implementing plans to hire staff from overseas since each potential application has some degree of attendant risk to the company.

Service provider unable to exercise lien over electronic database

In Your Response Ltd v Datateam Business Media Ltd [2014] EWCA Civ 281 the Court of Appeal confirmed that it is not possible to exercise a common law lien over intangible property, such as data in an electronic database.

Thus, where a customer did not pay a bill for the database manager's services, the database manager could not refuse to release the database or give the customer access to it until all outstanding fees were paid.

However, a database manager could seek to include in the contract for its services a right to withhold access to the database pending full payment of the service fees.

Therefore, it is crucial that those dealing with providing and/or receiving services in relation to intangible property consider whether such a right will form part of the service contract.

Comedy club wins in GLEE trademark dispute with 20th Century Fox

Comic Enterprises Ltd (Comic) won its case in the High Court claiming that 20th Century Fox (Fox) had infringed a registered trade mark following Fox's use of a sign depicting the word "glee".

Comic was a comedy club which registered a trade mark consisting of a device mark including the words "The Glee Club" in respect of entertainment services. Fox was responsible for a successful TV series called "Glee" which was broadcast in the UK in 2009 and was shortly followed by studio albums, concert tours and merchandise, using the "Glee" sign.

The judge ruled that "there is a likelihood of confusion and 20th Century Fox's use causes dilution and tarnishing, the damage suffered by Comic Enterprises is caused by its venues being confused with the TV show and its potential customers being put off".

The Court will deal with the issue of compensation in a subsequent hearing, but in the meantime Fox has suggested it will appeal the decision.

High Court finds House of Fraser's pigeon logo infringed Jack Wills pheasant logo

Jack Wills had registered their pheasant logo as a UK and Community trade mark for clothing. House of Fraser later created a similar logo which depicted a pigeon wearing human accessories, which was the unique feature of the Jack Wills logo. House of Fraser also chose to embroider the logo onto the same part of garments as Jack Wills.

The Court concluded that there was a likelihood of confusion between the two brands, despite Jack Wills not putting forward any evidence of actual confusion. The degree of attention paid by the average consumer, the identity of the goods, the distinctive character of the trade mark and the similarity between the logos all led towards that conclusion.

The decision serves as a reminder that the Courts are willing to take a strong approach to look-alikes of prestigious brands and products.

Share buybacks

Companies may in certain circumstances wish to buy back some of the issued share capital from its shareholders. For example, it is not efficient for a company to hold excessive cash and a share buyback is one way of returning excess cash to shareholders.

In a private company context, a share buyback may also be used to facilitate a shareholder exit or to retrieve shares issued to a departing employee under an incentive scheme. In a public company context, share buybacks are commonly used as a way of increasing earnings or net assets per share and/or to increase share liquidity.

The Companies Act 2006 (the "Act") lays down rigid procedural requirements for a company to comply with when carrying out a share buyback. Private companies and Public companies have separate regimes to comply with but in either case contravention of the requirements will result in the acquisition being void and burden the company with the added cost of having to revisit the transaction to put matters right.

The Act permits a repurchase subject to any restrictions in the company's articles of association and the procedural requirements of the Act.

The procedural requirements laid down by the Act include a requirement, often overlooked in a private company context, to prepare a written contract or memorandum setting out the terms of the buyback. This document must be approved by a special resolution of the shareholders of the company before the shares are purchased.

Usually a company will want to finance the buyback out of profits available for distribution, however the Act also provides that a buyback can be funded out of capital or from the process of a fresh issue of shares. In the case of a buyback out of available profits, all consideration must be paid in full on the date of the buyback (the prevalent view from the cases heard in this area is that deferral of the payment is not permitted) and in the case of a buyback out of capital, all consideration must be settled between five and seven weeks after the resolution approving the transaction is passed.

The procedure for completing a share buyback is relatively straightforward for those used to dealing with them. However, we have seen a number of instances recently where the procedure has not been properly adhered to and, in particular, in respect of the two requirements listed above.

In a private company context, the decision to undertake a share buyback or some other way of returning cash to shareholders will commonly be led by tax considerations and it is important to take professional advice at an early stage to avoid the potential pitfalls.

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