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Sale of TV Shows and other copyrighted content – Quo Vadis?

In an event titled “Content on the Internet – Opportunities and Challenges in the World of New Media” held in November 2018 at the Gornitzky offices (Jointly with the Association of Corporate Counsel Israel) we discussed the legal implications of transactions in which copyrighted content is sold to other entities – with the sale of Israeli TV series “Fauda” to Netflix serving as an example.

Here are some of the points to consider when selling or buying cinematic works or any other copyrighted content in Israel.

Transactions with respect to media content raise several legal issues. The main question when contemplating such a transaction is which intellectual property (“IP”) rights are relevant and who controls them?

Any deal involving media content, whether in its original form or in a derivative from (e.g. format sale), involves a set of IP rights which are either sold or licensed. In the context of such transactions, the ability to identify the relevant IP rights, understand their nature and ascertain who owns them is crucial. For example, when entering a transaction in which a TV show is sold “as is” (such as the Fauda deal), if the sellers did not secure IP rights in the theme music of the show the composer of the music may stop the sale.

A TV show is one example, but the same principle applies to any transaction with respect to any type content on any media.

Here are four basic issues that must be taken into consideration in the context of transactions involving copyrighted content:

1. What is the subject of the transaction?

What assets are the subject of the transactions? Who holds the various rights to the relevant assets? Identifying the relevant assets is crucial. Any media content, and certainly something as complicated as a TV show (especially when it is sold “as is” and not as a format intended for reproduction), is in fact a compilation of numerous individual IP rights – including rights related to the story, the cinematography, the soundtrack, the execution (by directors, actors, etc.), the design of costumes and set – and even the font used in the opening titles. Each of these represents a separate (single or multiple) IP right(s). The first step is therefore to ensure that all IP rights relevant to the transaction have been identified and mapped.

2. What is the nature of the transaction?

Not all transactions are the same. A sale is different than a license. A lump sum payment is not the same as ongoing royalties. Defining the nature of the transaction is crucial not only for formulating the actual contract but also for outlining to all parties involved what can be done with the content post-transaction. In a sale, the buyer gets full control over all relevant IP and generally has total freedom to further transact with respect to the rights covered by the transaction. License rights, by comparison, limit the licensee to rights and will subject the licensee to limitations as set forth in the license. There are also other models, as well as hybrid models incorporating elements of sale and license.

3. How to guarantee that all relevant rights have been transferred?

Similarly to any other sale or investment deal, a due diligence process is required in order to ensure that sellers actually have the ability to enter and execute the transaction and that buyers get what they negotiated. In the context of transactions involving media content the main part of a due diligence process would be the establishment of a chain of title. A “chain of title” means mapping all rights folded into the relevant media content, following them down to the source along the creation process and ensuring that whoever is now selling the asset actually has legal control over the asset. A chain of title is important since “one cannot sell more than what one owns” – and in the context of something as complicated as media content what is owned and sold is not necessarily immediately apparent. For example: if a song is included in a certain episode of a TV show being sold, the relevant IP rights (e.g. with respect to words, music, performance, etc.) must be identified, and the conclusion, that whoever is now selling the TV show has the right not only to include the song as part of the episode but to sell the show which includes the song, must be clearly established. Mapping the relevant assets and substantiating a chain of title with respect to all of them is therefore crucial.

Establishing a chain of title is obviously in the interest of the buyers but it is also in the interest of the sellers to ensure that they can actually sell what they offer. For the sellers, establishing a chain of title and securing all relevant rights is an important preliminary and preparatory step in ensuring that the contemplated sale is even possible from a legal standpoint.

4. Considerations for the formulation of the transaction

Once a decision to enter a transaction with respect to media content had been reached, and prior to formulating the actual transactions, some key additional issues must be considered. These often include geography (are the rights conferred within the transaction limited to certain territories?), the right to sub-license, the right to create and allow the creation of derivatives (by the seller or by the buyer), merchandising rights, etc.

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