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GDPR and the Extra-Territorial Reach of EU Privacy Law: Are You at Risk of Fines of 4% of Global Turnover?

Introduction

On May 25, 2018 the European Union ("**EU**") General Data Protection Regulation ("**GDPR**") will take effect, marking one of the most significant changes to European data privacy and security in over 20 years. Most multinational companies will be impacted by the GDPR and compliance will be an ongoing matter for anyone collecting and/or processing personal data in the EU and/or offering goods or services to EU citizens. The GDPR is based on the fundamental principle of the protection of the human right to privacy, and is designed to harmonize EU member state legislation and to ensure that personal data can flow freely and securely around the EU (Recitals 3, 5 and 6).

What Are the Principles Contained in the GDPR?

The GDPR contains significantly enhanced protections for individuals than currently in place under the EU Data Protection Directive (the "**Directive**"), and the associated national legislation. Its legal status as an EU Regulation is important as it has binding, and direct effect, within the EU and does not require national implementing legislation. Therefore, individuals have directly acquired rights – and remedies – in relation to the protection of their personal data. Personal data has a broad meaning under the GDPR, as under the old Directive, and encompasses "any information relating to an identified or identifiable natural person (data subject); an identifiable natural person is one who can be identified, directly or indirectly,

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Former U.S. Attorney William Weinreb Joins Boston Office

William (Bill) Weinreb joined the firm as a partner based in the Boston office on Tuesday, May 8. Mr. Weinreb served as U.S. Attorney for the District of Massachusetts and also as First Assistant U.S. Attorney. He is a 20-year veteran of Boston's U.S. Attorney's Office. Mr. Weinreb specialized in national security, organized crime and white collar criminal investigations and prosecutions. He has tried dozens of felony jury trials, including the Marathon Bombing case, health care fraud, and off-label marketing cases, and many counterterrorism, violent crime, and narcotics matters. Q

The Lawyer Names Alex Gerbi to 2018 "Hot 100" List

London partner Alex Gerbi was named by *The Lawyer* as one of its "Hot 100" in 2018. The annual list recognizes the UK's top lawyers for their innovative approaches on significant matters. The publication highlighted Mr. Gerbi's work over the past year representing Ukraine in a high profile and complex £3 billion bond dispute with Russia in which Mr. Gerbi argued that Russia's political, economic, and military aggression should free Ukraine from certain financial obligations. Q

Quinn Emanuel Awarded *Law360*'s "Practice Group of the Year" in Six Practice Areas

Law360 selected Quinn Emanuel as a 2018 "Practice Group of the Year" in six practice areas: Banking, Intellectual Property, Product Liability, Securities, Trials, and White Collar. The award honors law firms with major and significant litigation wins and deals that strongly impacted the industry within the past year. For 2018, *Law360* selected 176 groups in 35 practice areas for the prestigious award among 747 submissions. The publication highlighted Quinn Emanuel in their announcement for earning the six wins. Q

Attorney Advertising

in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person" (Article 4). Personal data, therefore, includes someone's name, email address, national security number, bank details, health insurance number and other identifiers of a living individual.

The GDPR places a specific accountability obligation on the data controllers in relation to the processing of personal data that requires the controllers to be able to demonstrate compliance (see Article 5(2)) and, therefore, seeks to embed its protections in corporate governance and culture at the highest levels of an organization.

Under Article 5 of the GDPR, there are six fundamental principles that apply to the processing of personal data. These specify that personal data must (1) be processed lawfully, fairly and transparently in relation to the data subject (also known as the "lawfulness, fairness and transparency" principle); (2) collected for specific, explicit and legitimate purposes and not processed for further purposes (also known as the "purpose limitation"); (3) adequate, relevant and limited to what is necessary (also known as the "data minimization" principle); (4) accurate, kept up to date where necessary and deleted/corrected if inaccurate (also known as the "accuracy" principle); (5) kept in a form that permits identification of data subjects and for no longer than is necessary (also known as the "storage limitation"); and (6) processed in a manner that ensures appropriate security and protection against unauthorized or unlawful processing (also known as the "integrity and confidentiality" principle). There are also further obligations when sensitive personal data is processed, *i.e.*, data that reveals information about individuals such as their racial or ethnic origin, political opinions, religious beliefs, trade union membership, genetic data, biometric data, health data or data concerning sexual orientation or sex life.

The lawfulness, fairness and transparency principle is one of the most detailed aspects of the GDPR as it sets forth, in Articles 6 and 7, the basis upon which personal data can be collected and processed and the conditions for obtaining consent. The changes to the consent rules are one of the most radical under the GDPR and bear close scrutiny if consent is being relied upon to collect and process personal data. In some circumstances, such as the employer/employee relationship, consent can no longer be relied upon where the relationship involves one where there is a fundamental imbalance of power such that consent cannot be freely given.

As set out above, one of the key purposes of the GDPR is to afford individuals specific rights in relation to their personal data. Articles 12 to 23 of the GDPR set out those rights, which give the data subject the right to (1) transparency; (2) receive information and access their personal data; (3) rectification; (4) erasure/to be forgotten; (5) restrictions on processing; (6) data portability; (7) object to processing; and (8) object to automated decision making.

Territorial Scope

A major change of the GDPR is the territorial scope of the new law. The Directive did not regulate businesses based outside the EU. However, under the GDPR, even if a US-based business has no employees or offices within the EU, the GDPR may still apply.

Under Article 3 of the GDPR (and Recitals 22-25), a non-EU established organization will be subject to the new law where it processes the personal data of EU citizens in connection with:

1. Offering goods or services to individuals in the EU (including doing so free of charge); **or**
2. "Monitoring" the behaviour of individuals in the EU.

Any non-EU organization will also be subject to the GDPR if the personal data of EU citizens is transferred to it.

The creation of a level playing field for businesses established inside and outside the EU through an expansion of territorial scope was a much publicized objective of the GDPR. Although Article 3 of the GDPR represents a significant expansion of the territorial reach of an EU Regulation, a global approach to the protection of individuals' rights has been necessary for some time.

Offering Goods and Services to EU Citizens

The mere fact that a non-EU company's website is accessible from within the EU will not mean that it necessarily offers goods and services under the GDPR such that it must comply with its requirements. It must be clear that the organization intends to offer such goods or services to EU citizens to be subject to the GDPR's terms. Recital 23 to the GDPR sets out that if an organization's website provides an option to access the website in the EU Member State's local language, pay in the local currency or identifies EU customers specifically then this may make it apparent that the organization intends to offer goods and services to EU citizens. Therefore, a US company with an internet presence that targets sales or marketing to individual EU Member States may be subject to the

GDPR. For example, if such a company generally forms part of an internet search result and a French resident stumbles upon the webpage and contacts the company seeking to buy goods or services, the GDPR would be unlikely to apply to the company solely on that basis. However, if the organization advertises to French residents, accepts Euros, has a domain suffix for France, and offers shipping services to France, then the GDPR is likely to apply to the processing of the personal data of EU citizens who contact, or contract, what that company.

The CJEU (*Pammer v Reederei Karl Schluter GmbH & Co* and *Hotel Alpenhof v Heller* (joined cases (C-585/08) and (C-144/09)) has examined when an activity (such as offering goods and services) will be considered as "*directed to*" EU Member States in the context of determining jurisdiction for certain types of litigation and its comments are likely to guide interpretation of Article 3 to the GDPR. In addition to the considerations referred to above, the CJEU notes that an intention to target EU customers may be illustrated by:

1. "*Patent*" evidence, such as the payment of money to a search engine to facilitate access by those within a Member State or where targeted Member States are designated by name; and
2. Other factors – possibly in combination with each other – including the "*international nature*" of the relevant activity (for example certain tourist activities), outlay of expenditure on an internet referencing service, mentions of telephone numbers with an international code, use of a top-level domain name other than that of the state in which the trader is established (such as .de or .eu). and display of an international clientele composed of consumers domiciled in other Member States.

Monitoring

The Recitals to Article 3 make it clear that where data subjects are "*tracked on the internet*" this will constitute monitoring and subject the relevant organization to the requirements of the GDPR, including where such monitoring is used to take decisions to analyse/predict personal preferences, behaviours and attitudes (see Recital 24). Accordingly, all non-EU organizations that have websites that use tracking cookies and apps that track usage and, therefore, collect the personal data of EU citizens will be caught to the extent that the information they collect renders an individual identifiable.

Use of Cookies

Non-EU companies that carry out cookie profiling (for example by using persistent as opposed to session only cookies) to track a user's overall online activity across websites will be likely to be processing personal data to monitor behaviour, and therefore will be caught by the GDPR. This is consistent with the decision of the Court of Appeal in the UK that information on a user's browsing and internet usage could amount to personal data (*Vidal-Hall v Google, Inc.* [2015] EWCA Civ 311).

Conversely, the use of cookies that do not collect personal data or that do not track or profile a user (for example session only cookies that regulate website functionality) is unlikely to be caught by the GDPR.

IP Addresses

Individuals can also be monitored through website owners collecting and sharing the IP addresses of users. Many website owners keep logs of the IP addresses that have visited their website. These IP addresses may amount to personal data, especially if the user's internet access provider has data that, in combination with the IP address, can be used to identify the user (See *Breyer v Federal Republic of Germany* (C-582/14).

Data Transfers from the EU to Outside the EU

Transatlantic commercial activity has always resulted in significant amounts of personal data flowing between the EU and other countries, such as the U.S. The ability to easily and legally transfer EU citizens' personal data to the U.S. is clearly vital to many businesses.

Generally, the GDPR, like the Directive, prohibits the transfer of personal data to a country outside of the EU, except in the following specific circumstances:

1. where an Adequacy Decision has been made by the European Commission in respect of the recipient country;
2. where there are appropriate safeguards in place (which include the use of standard contractual clauses, or binding corporate rules); or
3. where a specific derogation applies.

Adequacy Decisions essentially allow the free flow of personal data without further measures to ensure compliance needing to be put in place. A third country that is recognized as being "adequate" can show that it shares the core privacy protections as in the GDPR, e.g., (1) recognizing privacy as a fundamental right; (2) adopting overarching data protection legislation; (3) putting in place enforceable individual rights and (4) establishing a supervisory authority. The US Privacy Shield Framework (the "**Privacy Shield**"), which was originally adopted pursuant to Article 25(6) of

the Directive, is partially the subject of an Adequacy Decision. It is a mechanism jointly implemented by the European Commission and the U.S. which enables organizations to voluntarily adhere to a certification scheme and implement technical measures to protect personal data.

However, the Privacy Shield only provides partial comfort for transfer of personal data to the U.S. It is only relevant for those organizations that have adopted it and it does not provide all the protections necessary under the GDPR. Therefore, simply signing up to self certification under the Privacy Shield will not be sufficient if personal data is transferred out of the EU to the U.S.

The GDPR also introduces regular reviews of Adequacy Decisions granted by the European Commission to non-EU jurisdictions (Article 45(4) and (5), and Recital 107 to Article 45 of the GDPR). The Privacy Shield will be annually reviewed with the possibility that the Privacy Shield may be found to offer insufficient protection under developing EU law under the new GDPR.

Therefore, using the other exceptions, and ensuring compliance with the GDPR, may be necessary.

Firstly, the use of standard contractual clauses or binding corporate rules (for intra-company transfers) will be the most appropriate way of effecting transfers from the EU to outside the EU. Essentially, these contractual arrangements will impose the requirements of the GDPR on the non-EU recipient of personal data.

Secondly, there are derogations from the prohibition on transfer contained in Article 49 of the GDPR. These can also be relied upon to transfer personal data outside the EU, to the U.S. for instance, if appropriate security measures and other measures for complying with the GDPR's principles are guaranteed. For example, under Article 49 an organisation may seek to ensure that: (i) the data subject has explicitly consented to the proposed cross-border transfer of data; (ii) the transfer of data is necessary for the performance of a contract or the implementation of pre-contractual measures; (iii) the transfer is necessary for the establishment, exercise or defence of legal claims; or (iv) the transfer is necessary for important reasons of public interest. Further guidance on the use of derogations has been

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NOTED WITH INTEREST

California Supreme Court Decides Workers Are Presumed Employees

A recent headline in the Los Angeles Times declared: "*California's top court makes it more difficult for employers to classify workers as independent contractors*." The headline is ironic in that the Supreme Court in *Dynamex Operations West v. Superior Court* (decided April 30, 2018) said it was setting a rule that would make classification decisions easier. But if by "more difficult" the Times meant "nearly impossible" to classify a worker as anything other than an employee, as least for wages, then the headline makes a good point. This decision has important implications for the gig economy. The ruling suggests that gig-providers like Grubhub, Uber, Lyft, and others will not be able to continue to treat their drivers as independent contractors in California without complying with California minimum wage and overtime laws.

Prior Law

For nearly 30 years California courts used multiple factors, which had been established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989), as the only appropriate standard for distinguishing employees from independent contractors. All factors had to be considered, although the most significant of those was control. Using this test, a federal district court found, less than three months prior to the *Dynamex* decision, that a driver for Grubhub was an independent contractor—not an employee—under California law. No. 15-CV-05128-JSC, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018).

Grubhub delivers food to customers who order using their smart phones. The plaintiff was a delivery driver for four months before bringing suit alleging the company improperly classified him as an independent contractor rather than an employee, thereby violating California's minimum wage, overtime, and employee expense reimbursement laws.

To determine whether the driver was an employee or an independent contractor, the court applied the test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (Cal. 1989). The multi-factored test primarily focuses on the level of control a principal asserts over its agent; the more control a principal possesses, the more likely the

agent will be considered an employee instead of an independent contractor. *Id.* at 350–51. But in addition to control, the *Borello* test requires consideration of secondary factors, including the level of skill involved, whether the work typically involves close supervision, and whether the principal provides the tools and instrumentalities for completing the work. *Id.* at 351.

The district court found that Grubhub lacked the "necessary control" over when and how its driver performed deliveries. Grubhub put no restrictions on the types of vehicles its drivers could use; nor imposed requirements on the vehicle's condition. Drivers did not receive any training or orientation or performance evaluations. Drivers could even work for competitors while delivering for the Grubhub. Finally, drivers had complete control over their schedules. While Grubhub set up "blocks," or shifts, that drivers could signup for, there was no minimum or maximum number of blocks. In fact, a driver did not need to sign up for *any* blocks.

The court found that some secondary factors weighed in favor of an employment relationship. The level of skill required was not very high (anyone with a driver's license could deliver for Grubhub); The plaintiff was not engaged in a distinct business or occupation; and, in practice, he was paid an hourly rate, which is typical of an employment relationship. Other secondary factors favored independent contractor. The driver did not have a supervisor. He provided his own vehicle, smart phone, and internet connection. Finally, the Plaintiff's work at Grubhub was short-lived, and he could stop making deliveries at any time.

The ABC Test

The Supreme Court discarded the multi-factor test and replaced it with the "ABC" test. Dynamex Operations West, Inc. (Dynamex), is a nationwide same-day courier and delivery service. Two delivery drivers sued, alleging that they had been misclassified as independent contractors instead of employees. Dynamex could show a lack of control over its drivers similar to Grubhub. Drivers were generally permitted to set their own schedule, determine the sequence of same-day deliveries, deliver for other companies when not performing Dynamex work, and hire or contract with others to make Dynamex deliveries for them. The plaintiffs brought claims for violations of both the Labor Code and applicable state wage orders. Dynamex argued on appeal that the lower courts used the wrong definition of employee. Dynamex won that argument but lost its appeal because the new definition the Court established is more inclusive than the pervious one. The Court decided that in determining whether a worker is an employee or independent contractor (1) the burden is placed on the hiring entity to establish that the worker is an independent contractor; and (2) the hiring entity, in order to meet this burden, must satisfy three conditions – the so-called ABC test:

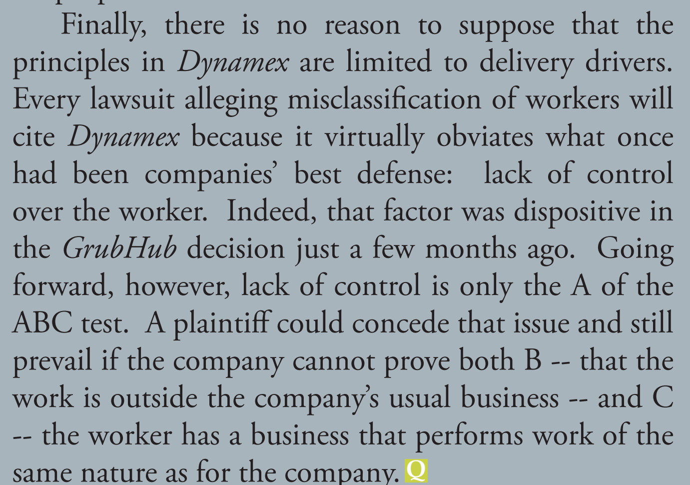
(A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact.

(B) The worker performs work that is outside the usual course of the hiring entity's business.

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

In a procedural quirk, the Supreme Court did not decide whether or not the drivers were in fact employees. The Court decided the test for employee status, and returned the case to the trial court to apply that test. But it does not take a weatherman to tell which way the wind is blowing. The Court noted the hiring entity was a delivery company hiring delivery drivers. Simply looking at the B of ABC test, Dynamex would be unlikely to convince a trier of fact that the delivery drivers are performing work outside the usual course of the company's delivery business. They are the business.

In another procedural quirk, the Court did not decide whether the ABC test would be used for any issue other than wages. The Court recognized the possibility that the old *Borello* test might still be applicable to determining, for example, whether a worker is entitled to reimbursement of business expenses. The possibility exists, therefore, that a worker's status might be "employee" for purposes of wage and hour laws but "independent contractor" for purposes of reimbursement of expenses. And whichever classification the worker might have under state law, the federal government might determine it to be different for purposes of federal taxation.



Finally, there is no reason to suppose that the principles in *Dynamex* are limited to delivery drivers. Every lawsuit alleging misclassification of workers will cite *Dynamex* because it virtually obviates what once had been companies' best defense: lack of control over the worker. Indeed, that factor was dispositive in the *GrubHub* decision just a few months ago. Going forward, however, lack of control is only the A of the ABC test. A plaintiff could concede that issue and still prevail if the company cannot prove both B -- that the work is outside the company's usual business -- and C -- the worker has a business that performs work of the same nature as for the company. Q

Asia-Pacific Litigation Update

Class Actions in Australia: Two Reviews. *"Some aspects of the proposed settlement of this matter may give rise to the perception … that the only real 'winners' in this litigation were the lawyers and the litigation funders. …" - HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (In Liq) (No 3)* [2017] FCA 650 at [126].

It is said by global insurers and litigation funders that Australia has become one of the hottest spots on the planet for class actions. It is against this perception – locally and globally – that two inquiries into class actions have been commenced in Australia. First, the Victorian Law Reform Commission started an inquiry in December 2016 into issues concerning litigation funding and the use of class actions. The report from that inquiry, which was completed on April 3, 2018, is expected to be published shortly after it is tabled in the Victorian Parliament. The inquiry is similarly looking into class action proceedings and the use of third party litigation funders at a federal level, and is expected to release its report by December 21, 2018. Both inquiries are focusing on (among other things) the ways in which the class action system can better protect the interests of group members, including in the context of the distribution of settlement amounts.

However, is the premise (and criticism) around class actions and the distribution of settlement amounts to class members (particularly in funded class actions) valid? Namely, does the available data gathered from the settlement of recent Australian funded class actions empirically and objectively support this position and in turn, the likelihood of legislative change?

To set the context, it will be useful to briefly outline some statistics that underlie the expansion of funded class actions in Australia. Professor Vince Morabito over the last year released an empirical study into Australia's class action regimes, and relevantly observed the following:

- The proportion of class actions that are funded increased from 0% in 1992 to approximately 50% in 2016;
- in particular, about 76% of investor and shareholder class actions are now funded; and
- the settlement rate in unfunded class actions was 48%, while it was 69% in funded class actions.

We have analyzed the settlement of recent Australian class actions (and in particular, the distribution of amounts for legal costs, funding commissions and group members), which we set out in the following table:

Class Action	Settlement Sum	Legal Costs / Disbursements	Funding Commission	Funding Commission (Gross %) / Net %)	Approximate Group Members Amount (before Settlement Distribution Costs)
NAB	$6,600,000	$600,000	$1,650,000	25% / 27.5%	$4,350,000 (65.9%)
Newcrest	$36,000,000	$10,279,057	$6,787,729	19% / 26%	$18,933,214 (52.6%)
Centro	$200,000,000	Unknown	Unknown	Unknown	Unknown
Downer EDI	$8,250,000	$2,850,000	$825,000	10% / (N/A)	$4,575,000 (55.5%)
OZ Minerals	$32,500,000	$12,600,000	$8,900,000	27% / 45%	$19,900,000 (61.2%)
Allco	$40,000,000	$10,513,834	$8,850,000	22% / 30%	$20,636,166 (51.6%)
DePuy ASR Hip Implants	$200,000,000 (two actions)	$36,856,243.95	N/A	N/A	$163,413,756.05 (81.7%)
Tamaya Resources	$6,750,000	$3,420,978	$1,152,713	17% / 35%	$2,176,309 (32.2%)
Reckitt Benckiser	$3,500,000	N/A	$750,000	20% / (N/A)	N/A
Slater & Gordon	$36,500,000	$4,000,000	$4,500,000	12.3% / 13.8%	$28,000,000 (76.7%)
Banksia Securities	$64,000,000	$5,225,000	$12,800,000	20% / 21.8%	$45,975,000 (71.8%)
Black Saturday Bushfires	$794,700,000 (two actions)	$80,164,595.26	N/A	N/A	$714,535,404.74 (89.9%)
QBE (subject to court approval)	$132,500,000	$22,500,000	$30,750,000	23.2% / 28%	$79,250,000 (59.8%)

Based on this available data, we can discern the following:

- The average gross percentage for the amounts received by group members as part of the total settlement amount for *funded* class actions is approximately 58.6%;
- if we were to exclude the exceptional circumstances found in the *Tamaya* class action, that percentage increases to 61.9%;
- gross percentages for funding commissions are in a range of 17% to 27%, while the net percentages are in the range of 21.8% to 45% (if we were to exclude the distinctive settlements in the Downer EDI and Slater & Gordon class actions).

It should be kept in mind that the above statistics do not account for the ongoing costs of administering settlement funds, which can sometimes run to many millions of dollars (depending on the size and complexity of the class action). Nevertheless, what we can draw from this data is that, to the extent that critics have asserted that class members have been severely disadvantaged in funded class actions, that position is perhaps overstated.

Further, mechanisms do exist to protect the interests of class members. The chief among them is judicial supervision of the settlement of class actions. In all Australian jurisdictions, a court needs to be satisfied that the overall settlement is fair and reasonable, having regard to the interests of all class members, before it will approve a settlement. Other protective mechanisms available include: the appointment of a contradictor for the hearing of a settlement approval application; the appointment of special referees to review costs; making provisional orders regarding the distribution of funding and legal costs (particularly in the context of competing class actions); the use of common fund orders, which may regulate the quantum of funding commissions; and the increased involvement of defendants in settlement hearings.

These points notwithstanding, there is clearly room for the class action system to be improved, in order to better protect the interests of class members. As a result, the outcome and recommendations of the two inquiries that are presently underway in Australia will be worth monitoring; both for plaintiff and defendant businesses and investors alike.

Trial Practice Update

Trial Report: Using Discovery and Trial Testimony to Turn a Defeat at Summary Judgment into a Victory at Trial. Quinn Emanuel recently secured a groundbreaking victory after trial in the Delaware Court of Chancery for its client, Crestview Partners, against Oxbow Carbon LLC and William Koch. With nearly half a billion dollars at stake, the firm faced an uphill battle from the start of the litigation, which centered on a gap in Oxbow's operating agreement, entered into by the parties in 2007. Victory appeared elusive after the Court's summary judgment ruling in the summer of 2016, which held that the plain meaning of the contract should be read *against* Crestview's position. Undeterred, the Quinn Emanuel team—led by partners Michael Carlinsky, Chad Johnson, Jennifer Barrett, and Corey Worcester—vigorously pursued and obtained important discovery that ultimately helped persuade the Court after trial that Crestview's position is the correct one.

The dispute, *In re Oxbow Carbon LLC Unitholder Litigation*, concerned Crestview's contractual right, as a minority stakeholder in Oxbow, one of the world's largest recyclers of natural gas byproducts, to require a sale of the company under the terms of Oxbow's LLC Agreement. Koch, Oxbow's founder and CEO, argued that a complex series of interlocking contractual provisions in the LLC Agreement prevented Crestview from invoking its exit sale right.

Crestview invested in Oxbow in 2007 with the clear understanding that it would be able to exit its investment after a fixed period of time. As reflected in the Oxbow LLC Agreement, Crestview had the right to exit its investment as follows: a right to offer its shares to the company for repurchase after seven years at fair market value, and, if the company declines to purchase the shares, a right to compel the sale of the company. However, under the agreement, the company "Exit Sale" can only occur if each member of the LLC receives 1.5 times its investment through prior dividends and sale proceeds.

By the time Crestview offered its shares to Oxbow for repurchase in 2015, the original parties to the LLC Agreement had received far more than 1.5 times their respective investments in dividends alone. The company declined to repurchase the shares, and Crestview invoked its right to compel an Exit Sale. After a prospective purchaser made an offer to buy the company, however, Mr. Koch and Oxbow's lawyers began arguing that two investment vehicles, which had made small investments in the company in 2011, prevented an Exit Sale. They argued that because the sale price combined with prior dividends would not result in a 1.5 times return to these small investors, and the LLC Agreement required all LLC members to participate in an Exit Sale, no sale could occur. They further argued that a series of other requirements for an Exit Sale in the LLC Agreement prevented Crestview

from making a "top-up" or "make-whole" payment to these small investors to get them to the 1.5 times threshold. Quinn Emanuel and Crestview disputed that the small investors were LLC members entitled to the 1.5 times provision, and argued that even if they were, the Agreement permitted members to be "left behind" in an Exit Sale.

Mr. Koch and Oxbow sued Crestview to prevent the sale, Crestview counterclaimed, and the parties both moved for summary judgment on their respective plain-meaning interpretations of the LLC Agreement. At that stage, the Court ruled in Oxbow's favor, finding that the small investors were LLC members entitled to the protection of the 1.5 times provision, and that the Exit Sale required all members to participate or else no sale could occur. However, the Court noted that Crestview's argument that "given the overall structure of the agreement and the concept of the Exit Sale, they never would have agreed that investors with a stake as small as the Small Holders' would be able to block the operation of the Exit Sale Right" was "an implied covenant argument" and a "fairly litigable" one.

Crestview and Quinn Emanuel pressed forward with an implied covenant claim, and the case went to trial in July 2017. Crestview showed at trial that when the small investors made their investments, the company's board failed to determine what rights these investors would have under the LLC Agreement, as the agreement required. The Crestview-appointed board members testified credibly that had the question been raised at the time, they would have insisted that the small investors not be entitled to the 1.5 times investment protection, and at the very least would have insisted that they have the right to make a top-up payment to these investors to ensure an Exit Sale could occur. Crestview also introduced documents and testimony into evidence showing that Koch himself did not believe the LLC Agreement prevented a top-up payment until one of the company's lawyers invented it as a "fun new theory" to prevent an Exit Sale in 2016 – nearly a decade after the Agreement was executed.

The Court's post-trial decision validated Crestview's implied covenant approach. The Court held that "[b]y failing to follow proper formalities, [Koch and Oxbow] created a gap regarding the terms on which the Small Holders became members." The Court credited Crestview's testimony that Crestview "never would have consented to admitting the Small Holders if they had understood that the admission would reset the 1.5x Clause," and that Koch and Oxbow would not have insisted that Crestview could not top-up the small investors to get them to the 1.5 times return. The Court also concluded that Koch's LLC Agreement construction was lawyer-driven, and did not reflect the parties' reasonable expectations at the time of contracting. The Court thus concluded that "issues of compelling fairness call for deploying the implied covenant."

The *Oxbow Carbon* result teaches at least two lessons. First, when faced with a loss on the plain meaning of a contract at summary judgment, parties who can later show that the court-determined plain meaning is at odds with the parties' reasonable expectations at the time of contracting should consider an implied covenant theory. Second, when advancing such a theory, a party should vigorously pursue document discovery, including from counsel where possible. Quinn Emanuel unearthed significant evidence proving that Oxbow's lawyers invented the "fun new theory" long after the LLC Agreement was executed – thus proving Mr. Koch did not believe in that construction of the LLC Agreement at the time of contracting. Because the decision about whether the implied covenant of good faith and fair dealing applies to a given situation is "fact-intensive," as the *Oxbow Carbon* Court noted, carefully crafted and vigorous discovery efforts can be the difference between winning and losing on an implied covenant theory at trial.

Trademark & Copyright Litigation Update

Ninth Circuit Affirms Dismissal of Nike "Jumpman" Copyright Infringement Case. A divided Ninth Circuit panel recently issued a rare affirmance of the dismissal of a copyright infringement suit at the pleadings stage. In *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018), the majority found the copied elements of a famous photograph largely non-copyrightable but found the compilation of such elements copyrightable and subject to broad protection. Nonetheless, it found the two photographs were not sufficiently similar to support infringement.

Rentmeester v. Nike traces back to 1984 when Jacob Rentmeester took his now-famous photograph of Michael Jordan, then a student-athlete at the University of North Carolina, for inclusion in a *Life Magazine* spread in the run-up to the 1984 Olympic Games. The photograph depicts Jordan in mid-air, his pose modeled on ballet's *grand jeté* position, stretching the ball towards a hoop that Rentmeester had installed on a grassy hill. After the photo's publication, Nike, then at the nascent stage of its partnership with Jordan, asked Rentmeester to borrow the color transparencies of his photo under a limited license. Soon thereafter, Nike produced and released its own photograph of Jordan in a similar pose. To head off threatened litigation from Rentmeester, Nike entered

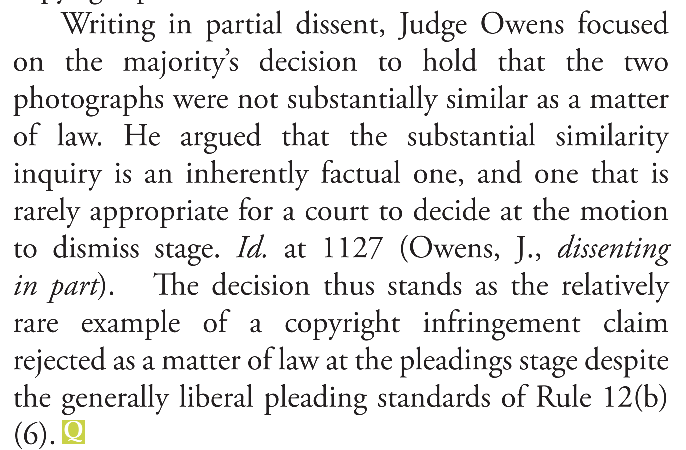
into a limited-term agreement with Rentmeester that allowed the company to continue to use its photograph to market its relationship with Jordan. Rentmeester claimed that Nike continued to use its photograph modeled on his original work far beyond this limited term, and in 2015, he filed suit alleging multiple claims for copyright infringement. The district court granted Nike's motion to dismiss, holding that Nike's photograph did not infringe Rentmeester's copyright as a matter of law. *Id.* at 1116. Rentmeester appealed, but the Ninth Circuit affirmed.

Judge Watford wrote for the Ninth Circuit majority (joined by Judge Berzon). The majority ruled that, although Rentmeester could plausibly allege that Nike copied his photograph in creating its own version, he could not plausibly allege that Nike copied enough of the *protected* aspects of the photograph's expression. *Id.* at 1121. The court sought to dispel confusion that had arisen in prior cases about the use of the term "substantial similarity" to describe "both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation"—even though "copying" and "unlawful appropriation" are distinct components of a claim for copyright infringement. *Id.* at 1117. To prove copying, the court wrote, the similarities need not be extensive and non-protected elements can be considered in the analysis; to prove unlawful appropriation, "the similarities between the two works must be 'substantial' and they must involve protected elements of the plaintiff's work." *Id.* Thus, to prove *actionabl*e copying, the plaintiff must show that a defendant "copied *enough of* the [work's] protected expression to render their works 'substantially similar.'" *Id.* at 1118. (emphasis added). Substantial similarity in this second sense requires both the "objective" (or "extrinsic") similarities between the protected elements in two works (an issue that may be decided by the court as a matter of law) and "subjective" (or "intrinsic") similarity between the two works taken as a whole.

In this case, although certain choices Rentmeester made in composing his image—subject, pose arrangement, angle, lighting, and the like—may not be copyrightable when considered individually, the majority acknowledged that the sum of creative choices he made in selecting and arranging those individual elements *is* entitled to copyright protection; indeed, the majority recognized that "Rentmeester's photo is undoubtedly entitled to broad rather than thin protection" based on the "range of creative choices" available to him. *Id.* at 1120. The court also acknowledged that, taken in whole, the two photographs are similar. *Id.* at 1116. Both photos capture Jordan attempting to dunk in a pose inspired by ballet's *grand jeté*. Both images place Jordan against a background that appears slightly fantastical when captured from a low angle. *Id.* at 1221.

But the court in the end found nonetheless that the only similarities shared by Rentmeester's and Nike's photographs were "general ideas or concepts," and that those elements are unprotected because copyright law "encourag[es] others to build freely upon the ideas and information conveyed by a work." *Id.* at 1122-23. For example, having Michael Jordan dunking in a *grand jeté* pose is an idea or concept that is not subject to a copyright protection. *Id.*

Writing in partial dissent, Judge Owens focused on the majority's decision to hold that the two photographs were not substantially similar as a matter of law. He argued that the substantial similarity inquiry is an inherently factual one, and one that is rarely appropriate for a court to decide at the motion to dismiss stage. *Id.* at 1127 (Owens, J., *dissenting in part*). The decision thus stands as the relatively rare example of a copyright infringement claim rejected as a matter of law at the pleadings stage despite the generally liberal pleading standards of Rule 12(b)(6).



Electric Vehicle Patent Victory

As part of Volkswagen's $15 billion settlement for its vehicle emissions scandal, Volkswagen created a subsidiary called Electrify America to spend $2 billion to install electric vehicle charging stations across the country and encourage the use of electric vehicles. Not everybody saw this investment as a boon. ChargePoint, a well-funded company and dominant player in the electric vehicle charging station market, viewed this influx of investment and the accompanying competition as a threat to its market position. First, ChargePoint objected to the settlement. Second, when that failed, ChargePoint submitted a bid for a share of the Electrify America investment committed to installing 2,800 charging stations across the United States. Third, when Electrify America did not select ChargePoint's bid, ChargePoint resorted to suing one of the winners of the Electrify America bid—SemaConnect—for allegedly infringing four patents.

ChargePoint's litigation strategy was straightforward: aggressively leverage its size and patent portfolio to derail SemaConnect's participation in the Electrify America investment. On Friday, December 15, 2017, ChargePoint filed an extensive complaint in the District of Maryland in Baltimore and an emergency motion for a TRO. ChargePoint took the position that its patents gave it a monopoly over all network-connected charging stations. From day one, this lawsuit was closely watched by other members of the industry as a bellwether case for the future of ChargePoint's efforts to maintain dominance in the electric vehicle charging station market. If ChargePoint's aggressive strategy against SemaConnect were to succeed, other members of the industry would be next, permanently stifling competition in the electric vehicle charging station market.

But ChargePoint did not succeed. By the next Thursday, December 21, SemaConnect filed its opposition to ChargePoint's emergency motion, contesting ChargePoint's arguments as to each and every element required for injunctive relief and demonstrating that ChargePoint was unlikely to succeed on the merits, as its patents were invalid under 35 U.S.C. § 101 for claiming an abstract idea. At the TRO hearing the next day, December 22, not only did SemaConnect convince the Court to deny the TRO, but the Court also rejected ChargePoint's request for expedited preliminary injunction briefing. In a drastic turn of events, the Court instead set an expedited schedule for *SemaConnect's* motion to dismiss based on its argument that the asserted patents were invalid under 35 U.S.C. § 101. The Court held a hearing on SemaConnect's motion on February 6.

On March 23, 2017, just over three months after ChargePoint filed its complaint, the district court case was already over. The Court sided with SemaConnect, found that all patent claims asserted by ChargePoint were invalid under 35 U.S.C. § 101, and entered judgment in SemaConnect's favor. In its 70-page opinion, the Court agreed with SemaConnect that the asserted patents were directed to an abstract idea and lacked an "inventive concept" sufficient to confer patent eligibility. Needless to say, SemaConnect, Electrify America, and the rest of the charging station industry are thrilled with the result.

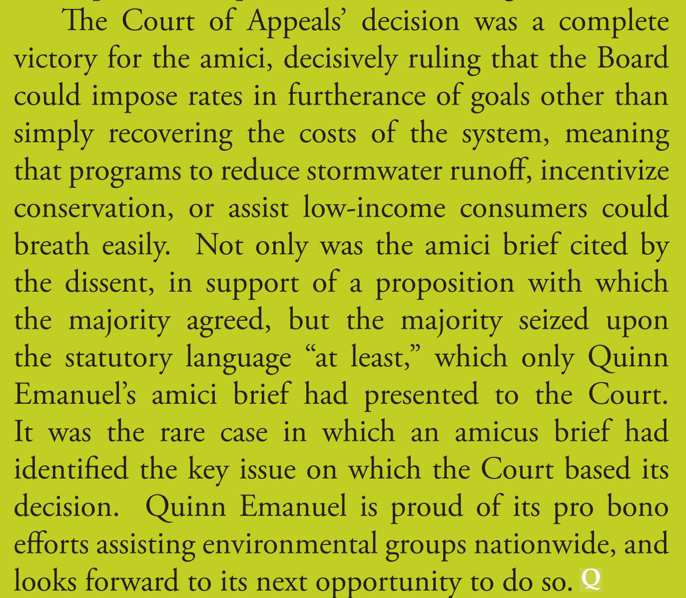
Victory for Environmental Groups in New York Court of Appeals

Stormwater runoff is one of the most pressing environmental issues affecting urban areas today. When rain falls onto cities covered in pavement and asphalt, it has nowhere to go—it cannot soak into the ground like it would in nature. Instead, it flows along the streets and sidewalks, collecting all the pollutants that accumulate there over time, before eventually making its way through the sewers back to open water, taking those pollutants with it. Recently, Quinn Emanuel served as pro bono counsel for two environmental groups trying to save New York City's ability to fight stormwater runoff and other issues, and is proud to report a stunning victory in that effort.

A group of landlords sued the New York City Water Board, alleging that when the Water Board paired a recent rate hike with a bill credit for a certain class of homeowners, it acted outside of its statutory authority, which required the Board to only charge customers rates tied to the costs those customers impose on the system as a whole. The landlords also accused the Board of acting unreasonably, arbitrarily, and capriciously because there was no good reason to provide the bill credit to only the one class of customer. After a trial court adopted both of the landlords' theories, and the appellate court affirmed the finding that the Board had acted unreasonably, the case was appealed to the New York Court of Appeals. The Natural Resources Defense Council and the Public Utility Law Project of New York took note, because if the Court of Appeals adopted the landlords' theory that the Board acts *ultra vires* whenever it imposes rates not strictly tied to a customer's cost of service, it would hamstring the Board's ability to incentivize property owners to reduce stormwater runoff, as preventing runoff does not directly lower the costs on the overall system. Similarly, it would make it difficult or impossible for the Board to incentivize water conservation and to

provide preferential rates for low-income consumers and seniors, jeopardizing existing programs. The environmental groups decided to submit an amicus brief on the appeal, pointing out that the broad theory advanced by the plaintiffs and adopted by the trial court would, if adopted by the Court, have immense "downstream" (so to speak) effects on the Board's authority to implement and keep up these existing programs.

Enter Quinn Emanuel. Quinn Emanuel worked with the amici to identify programs being implemented nationwide to address these concerns, and presented them to the Court, pointing out that adopting the landlords' broad theory would mean New York would fall behind. Quinn Emanuel also demonstrated to the Court that multiple existing programs in New York state would be in trouble if the landlords had their way. While the amici did not take a position on the overall disposition of the case, they did want the Court to rule that the Water Board did not have to tie its rate structure directly to the cost of providing service to a given customer. In support of that, Quinn Emanuel



identified a key provision of the statute—that rates must be "at least" sufficient to fund the water system overall—and argued that it meant by implication that the Board had discretion to implement rates not strictly tied to cost of service. Neither party discussed the import of this provision in its briefing.

The Court of Appeals' decision was a complete victory for the amici, decisively ruling that the Board could impose rates in furtherance of goals other than simply recovering the costs of the system, meaning that programs to reduce stormwater runoff, incentivize conservation, or assist low-income consumers could breath easily. Not only was the amici brief cited by the dissent, in support of a proposition with which the majority agreed, but the majority seized upon the statutory language "at least," which only Quinn Emanuel's amici brief had presented to the Court. It was the rare case in which an amicus brief had identified the key issue on which the Court based its decision. Quinn Emanuel is proud of its pro bono efforts assisting environmental groups nationwide, and looks forward to its next opportunity to do so. Q

(Lead article continued from page 4)

published by the Article 29 Working Party of EU Data Protection Authorities.

Enforcing the GDPR Outside the EU

Article 51 of the GDPR provides that each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of the Regulation, and under Article 78 all data subjects have the right to an effective judicial remedy against any legally binding decision of such a supervisory authority.

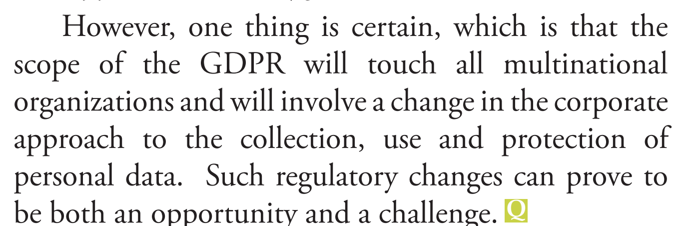
Under Article 27 of the GDPR there is a requirement for an overseas data controller or processor falling within its scope to designate a representative in their organisation who is based in an EU Member State who will act as the point of contact for the relevant supervisory authority, and who is also subject to certain record-keeping requirements. Further, the recitals to Article 27 of the GDPR state that the designated representative could be subject to enforcement actions in case of non-compliance by the controller. However, the GDPR fails to specify in what circumstances the representative or the data controller may be subject to enforcement measures, merely stating that the designation of a representative is without prejudice to the liability of the controller.

However, the mechanism for overseas enforcement is currently unclear and it is highly likely that litigation will ensue both within and outside the EU to clarify how individual's rights are to be protected.

It should also be remembered that the GDPR establishes a right to compensation for damages suffered by an infringement, whether monetary loss or non-material damage (Article 82). Necessarily, this provision will lend itself to class actions and/or group actions by aggrieved individuals.

Conclusion

The GDPR is a lengthy and complex Regulation that sets down high level principles. There is plenty of scope for years of judicial and regulatory interpretation of its 99 Articles and 173 Recitals.



However, one thing is certain, which is that the scope of the GDPR will touch all multinational organizations and will involve a change in the corporate approach to the collection, use and protection of personal data. Such regulatory changes can prove to be both an opportunity and a challenge. Q

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