# Defining "Control" of Motion Picture and Television Companies under French Law

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Two recent court decisions shed light on the meaning of "control" under French corporate law.

## "A Very Long Engagement"

On November 10, 2004, the Paris Administrative Court held that Jean-Pierre Jeunet's motion picture *A Very Long Engagement* (*Un Long Dimanche de Fiançailles*) was not entitled to earn French motion picture production subsidies because the picture's producer is controlled by Warner Bros, a non-European entity.

*A Very Long Engagement* is based on a famous French novel on a historic French subject; the director and screenwriter are French; the cast and crew are French; special effects and post-production were provided by French companies; the film was shot in France in the French language. It is difficult to imagine a movie that is more "French".

*A Very Long Engagement* was produced by 2003 Productions, a French company the capital of which is held 32 per cent by Warner France and 68 per cent by French nationals who also happen to be Warner France employees. Before granting its approval, the CNC asked 2003 Productions to modify its corporate purpose so as to be authorised to produce only French movies. The CNC then granted approval to the picture, thereby allowing 2003 Productions to earn subsidies based on the box-office results of *A Very Long Engagement*. The subsidies earned may then be applied by 2003 Productions to help finance a subsequent French picture.

Two independent producer associations challenged the CNC's decision on the ground that 2003 Productions was in fact controlled by Warner Bros, and that the company is therefore not entitled to receive subsidies. On November 10, 2004, the Paris Administrative Court decided in favour of the French producer associations, cancelling the CNC's approval. This decision could potentially result in the loss to 2003 Productions of three to four million euros in public subsidies. According to the court, 2003 Productions is controlled by Warner Bros. Under Art.7 of Decree no. 99—130 of February 24, 1999 relating to financial support to the movie industry, CNC approval and public subsidies may be granted only to production companies controlled by EU persons.

The Court applied the definition of "control" contained in Art.L.233-3 of the French Commercial Code. That article provides that a company will be deemed to control another if it "directly or indirectly holds a fraction of capital conferring on it a majority of the voting rights in that company". A company will also be deemed to control another if, "de facto, it determines that other company's decision-making process". Two or more persons or companies may be deemed to act in concert and to exercise joint control over a company if they in fact determine decisions made at shareholder meetings. Control is presumed under Art.L.233—3 if a company directly or indirectly holds more than 40 per cent of the voting rights and no other single shareholder holds a bigger interest. Finally, a company is deemed to act "in concert" with another for purposes of control if there exists an agreement between them regarding how shares are voted. Such an agreement is presumed to exist between a company and its managing director.

Based on these provisions of the Commercial Code, the court found that 2003 Productions is 32 per cent held by Warner France (itself controlled by Warner Bros Entertainment Inc), and 16 per cent held by Warner France's managing director. According to the court, this yields a total interest of 48 per cent controlled by Warner Bros—Warner France and its managing director being deemed to act in concert for purposes of control. The court noted that the other shareholders are Warner France employees and that significant decisions require a super-majority vote of 75 per cent. Consequently, the court found that Warner France and its managing director determine, in fact, decisions made at shareholder meetings, and that they thereby hold joint control over 2003 Productions. The court went on to say that the sole purpose of this structure was to permit Warner Bros to qualify for French productions subsidies, and that this therefore constituted "fraudulent use of the law" (fraude à la loi).

The Paris Administrative Court's decision has highlighted the inadequacy of the February 24, 1999 decree on French motion picture subsidies. The current decree leads to anomalous results: Oliver Stone's recent picture *Alexander*, filmed in English with a mostly non-French cast, qualifies for French subsidies whereas Jeunet's film *A Very Long Engagement* does not so qualify, even though it has much more French content. The French government, and large parts of the French motion picture industry, want to encourage US majors to invest in French films. A revision of the decree is therefore likely, but will take time, given the hostility of certain independent French producers. Revision of the decree will also have to take into account the new French tax credit regime for motion picture production services, which is also linked to obtaining CNC approval.

## The TF1/Canal+ case

The French Conseil d'Etat's October 6, 2004 decision involving TF1, Canal+ and Lagardère Group also revolved around the concept of "control". TF1 brought an action to annul a decision by the French broadcasting authority (CSA) granting a digital terrestrial television

licence to "Lagardère Thématique" for two television channels, Canal J and MCM. TF1 argued that by granting a licence for these two channels, the CSA had indirectly granted more than five broadcast licenses to Canal+, thereby violating the French broadcasting law.[1] The Conseil d'Etat agreed with TF1's analysis. The Conseil d'Etat held that Canal+, as 49 per cent shareholder of "Lagardère Thématique", exercised joint control over Lagardère Thématique with the Lagardère Group.

The Conseil d'Etat focused on the shareholders' agreement between Canal+ and Lagardère. The shareholders' agreement stated that each party would have equal representation on the board, and that the chairman of the Board would be a nominee of Lagardère. The shareholders' agreement provided that the chairman would have a deciding vote in the event of a tie, but that certain major decisions would require the affirmative vote of at least one board member nominated by Canal+. The Conseil d'Etat concluded that this provision de facto required the consent of both parties for major management decisions, and reasoned that this gave Canal+ joint control over Lagardère Thématique under Art.L.233-3 of the Commercial Code. Because Canal+ is deemed to hold joint control over Lagardère Thématique, the broadcasting licences granted to Lagardère Thématique must be treated as if they were granted to Canal+ for the purpose of calculating the five-channel limit. Because Canal+ had already been awarded five broadcasting licences for other wholly-owned channels, the licences granted for Canal J and MCM caused Canal+ to go over the five-channel limit. The licences therefore were cancelled and the CSA had to organise a new application procedure.

1. The law was subsequently changed to permit an entity to hold up to seven licences.

# Comparative Advertising and Trade Mark Infringement—The O2 Case—Bubble and Strife?

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## *O2 Ltd v Hutchison 3G UK Ltd,* November 9, 2004

This decision from Pumfrey J. shows how difficult it can be to block a comparative advertisement with an interlocutory injunction application based on trade mark infringement, particularly where there is no real evidence of dishonesty and the case on confusion is weak such that the damage caused to the claimants is small. It was for these reasons that such an application by the mobile phone operator O2 failed in relation to further use of television advertisements by its competitor 3 featuring bubbles and O2's well known "O2" trade mark. Although Pumfrey J. conceded that trade mark infringement was "plainly arguable", he considered, as a matter of policy, that the right to make accurate comparative advertisements should not be interfered with by an allegation of trade mark infringement when the trade mark needed to be used in order to identify the services with which the advertiser wished to compare prices. In the end, it was also arguable that 3 had a defence under s.10(6) of the Trade Marks Act 1994 and Art.12(b) of the Community Trade Mark Regulation (40/94) which permit comparative advertising provided that the use made by advertisers is in accordance with honest commercial practices.

### Background

The television advertisement to which O2 objected was a price comparison between O2's Talkalot and Talkalotmore tariff on the one hand and 3's VideoTalk 25 voucher on the other. The ad begins in black and white with a shot of a circular field of bubbles. This circular region expands to fill the screen, accompanied more or less immediately by a voice over as follows: "On O2 "pay-as-you-go" the first three-minute peak rate call each day could cost you 75 pence". By the words "75 pence", which happen about nine seconds into the advertisement, what is called a "Super" appears at about 7.5 seconds into the advertisement. This consists of three lines at the foot of the screen and reads: "O2 Talkalot and Talkalotmore 5p per minute thereafter. Based on a £25 VideoTalk