THE BULLETPROOF AGENCY NETWORK

Newsletter#6 | April 2022

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Bulletproof Agency Network was launched in February 2017, with a mission to unite industry experts and thought leaders on how to scale a thriving, profitable and robust digital agency.

A joint initiative between **MAP**, **RiskBox** and **BLM**, Bulletproof Agency Network's Podcasts and Events have reached a wide and diverse audience over the past 3 years.

The Bulletproof newsletter is produced quarterly for your enjoyment, full of engaging tales from interesting agency folk and useful insights into the wonderful creative world.

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RiskBox MAP. BLM

How to Review your **Hiscox Direct Policy**

Over the last ten years, we've found a high proportion of creative and digital agencies are with Hiscox Direct.

Whilst Hiscox are a strong, well established insurer, who we work with across many of our clients, there is a difference when the insurance is taken through their Direct channel.

Going Direct means the absence of independent broker support, potentially exposing your agency to gaps in protection. This is no one's fault, but just a natural drawback of transacting your insurance direct.

Introduction

First things first, Hiscox Direct isn't impartial, they're the insurer, which means there are certain things they can't advise you on. These areas include:

- **If there's a more suitable insurer with a better product**
- **If their premiums are uncompetitive**
- **Whether or not your claim is correctly presented with no missing information.**

Ultimately, they aren't doing anything wrong – far from it. But as the insurer, they're only able to operate within that remit.

Although sometimes Hiscox might be the right insurer for your business, that's not always the case. And if you go direct, you can't be sure, as your options will be limited. We believe going direct to any insurer is rarely in your best interests and doesn't give the premium advantage that's often perceived.

Having reviewed scores of Hiscox Direct policies, we wanted to highlight some areas that may need extra consideration.

Hopefully, this guide will help you to check that your Hiscox cover is appropriate, so you can stay protected whether you remain a direct customer or work with a broker.

What does my business do?

Ordinarily, insurers operate through a quote engine where you select a description for your business. But there's always a danger with this method, as descriptions can be vague.

One of the most common descriptions we've seen with Hiscox Direct was **'IT consultancy'**. It's been used for companies designing websites, delivering SaaS solutions, providing digital marketing, creating FinTech software, building apps, developing games, and even one who built technology directly installed into race cars. **Are any of these companies insured properly? Will they be paid out if there's a dispute about their deliverables?**

Our view is that these organisations shouldn't have been insured as IT consultancies. The insurer isn't necessarily to blame, as they can't have infinite options. Nor is the insured, as they may not appreciate the consequences of getting the business description wrong. It actually isn't a case of fault, it's just an example of issues that can arise without independent advice from a broker.

How do I make sure the business description is accurate?

If you're with Hiscox Direct, send them an exact description of your business activities. If it turns out they can no longer insure you, it's best to know now rather than once they've rejected your claim.

What about when things change?

Making changes to a policy is an important function of any commercial insurance programme, as businesses can grow and start to offer new services. Simple alterations such as increasing a value insured, or getting a limit increased due to contract, are normally easy to do and shouldn't trip you up.

When your business has to pivot and deliver something completely different, you should contact your insurer and explain your plans in detail. A risk here would be if the insurer doesn't fully understand, if they've made assumptions about your company's new direction, or if they've asked the wrong questions.

We've seen direct clients adapting their businesses to deliver different digital services, advising insurers, then having a claim rejected as it was outside the scope of services provided. That's despite the insurer being best positioned to obtain accurate information on the activities in the first place. Again, this is less likely to happen with a broker, as they'll ask more varied questions than an underwriter, gaining a deeper understanding of what your company does.

How do I know I'm giving the right information?

Insurance is a legal contract, so it's vital to ensure that the information it's based upon is accurate, otherwise claims can be rejected.

Like many direct insurers (and brokers), Hiscox Direct relies on Statement of Facts documents. This has many advantages in respect of getting quicker quotes and keeping premiums down. But there can be dangers when taking the policy out, at each renewal, and anytime your risk itself veers outside the parameters agreed.

You have to make sure the answers on the document are accurate and up to date at each renewal. But what happens if you're unsure about a question that's been asked?

What happens if you carry out activities that haven't been explicitly asked for? And how do you know if the questions you have answered leave you fully protected?

Click here to download our free guide.

To help we've pulled together a brief guide of the things you should look out for when reviewing your Hiscox Direct policy which you can access **here**.

If you would prefer RiskBox to step in and help review your current programme, please get in touch with us on **0161 533 0411** or email **info@riskboxuk.com**.

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The 7 Duties Of A Company Director....
Or The 7 Deadly Sins?

Many of the business managers and leadership I speak to see being a director of the business as "status". Yes, it might be. It can also be a privilege, but most of all it is a significant responsibility that too many just don't take the time to fully understand.

As a company director you have a number of significant legal duties, under The Companies Act 2006. These statutory duties under the law are "owed by each director to the company" and form the essence of what being a director is all about.

It is important to appreciate that under the law, the business is an actual entity in its own right...**with rights**, just as your employees and other stakeholders have.

Just because you may own the company, does not give you carte blanche in how you use it or treat it.

I often see cases where the responsibilities of that of the director and that of the shareholder get confused, especially in an owner operated business.

Shareholders have rights, but in reality, little say in how the business is run and no real legal responsibilities.

The first director's duty is that a director must act "within their powers" under the company's constitution. The most important part of the company's constitution is the articles of association. These are an important set of rules for your company and for your board.

When you first set your business up, you may have used what are referred to as model articles, sometimes called vanilla articles, as at the time the rules may not have been considered as important or you just bought a company name off the shelf with little, if any, professional advice.

Just as your business has changed over the years, then the articles should be reviewed to assess the appropriateness of them for the business, and directors, as they exist today.

Familiarize

As a director, it's important to be familiar with your articles of association as they are likely to control, and maybe constrain your decision-making powers in certain ways. If you exceed your powers, albeit unknowingly, then those decisions could be reversed and you might even have to personally compensate the company for any resulting financial losses.

Promote

The second major duty of a company director is to "promote the success of the company" This is probably the most known of the 7 duties and one that most directors believe they fulfil as a matter of everyday practice.

The duty states a director must act in a way that they consider "in good faith, would be most likely to promote the success of the company for the benefit of its members (shareholders) as a whole".

Again, we often see the wearing of the director and shareholder hats at the same time, making this difficult.

When making decisions, as a director you must consider the likely consequences for various stakeholders, including employees, suppliers, customers and communities in which you operate. You should also consider the reputation of the company, company success in the longer term and the interests of all of the shareholders (including minority shareholders) and nowadays, you should also consider the impact on the environment.

A duty to promote the success of the company may seem like an obvious task for a director. However, it brings with it a number of implications and at this point, it is worth asking yourself the question… ***is knowing enough?*** How could/would I prove this to be the case, if tested?

In recent years larger companies, with more than 250 employees, must explain how directors have fulfilled this duty in their annual report.

Board decisions can only be justified by the best interests of the company, if they can be demonstrated to not be made on the basis of what works best for any particular executives, shareholders or other business entities, such as a group company or "sister" company.

Judgement

The third major duty requires directors to exercise independent judgement. This can only be achieved if directors develop their own informed view on the company's activities.

It matters that you know, and understand, what is happening in your business. I have experienced the situation where one director believed the responsibility to be that of others to tell them what they needed to know, be that the owner, the MD, or the accountant. This is no longer acceptable and can lead you open to the risk of a shareholder claim against you.

No director can be a puppet who just implements the commands of other parties, such as the owner or majority shareholders/ stakeholders. Nor should they avoid their responsibility to make independent decisions by relying on the knowledge or judgement of other directors or "experts".

This includes the discipline that we serve. As your accountant, **MAP** submit the statutory accounts of your business into the relevant authorities, only once they have been approved by the company to be a "true and fair reflection of the company's activities", which if you are a director, includes you.

Again, I have personally worked in a business where "the numbers were the responsibility of one of the other directors".

A director needs to form their own view, and this will require effort, and maybe training, if they are not already familiar with key aspects of the company's activities.

Ignorance is not a defence under the Companies Act.

Diligence

The next duty is that the directors must "exercise reasonable care, skill and diligence".

This means that the days of a director being appointed purely for their name, reputation, or status in the industry, with the understanding that they wouldn't need to do any real work as a board member, are well and truly over.

The expectation today is that of a diligent individual with the general knowledge, skill and experience that could "reasonably be expected from a person carrying out the director's functions".

In a professional services business such as **MAP**, those directors with specific professional training or skills are held to a higher standard in related issues than less qualified colleagues.

Independence

The last 3 legal duties relate to the need for directors to avoid conflicts of interest which may affect their objectivity or ability to remain independent.

As I explained earlier, the Company is an entity in itself and what is referred to in law as "The duty of loyalty" requires a director to be completely loyal to the company at all times.

If therefore a situation arises which could create multiple claims on a director's loyalty, or attention, it is essential that they disclose them to fellow board members. It will then be up to the other non-conflicted board members (or in some cases, the shareholders) to decide how to approve, or manage, the conflict so as to maintain the integrity of the board's decision-making process.

Often seen examples of conflicts of interest are situations where one director has a relationship of a business, or personal, nature with another person or company that are affected, or influenced, by the company's activities. This is all too often the case in a family business.

In small businesses I also see this where, often unknowingly, the director takes advantage, on a personal basis, of property, information or opportunity which actually belongs to the company. Gifts or "benefits" from third parties are also a potential minefield when it comes to director's duties and objectivity, and I would always suggest that the company has a clear written policy on the definition and treatment of what is often masked as "Hospitality".

So as maybe you asked yourself earlier… **How can I as the director, prove that I have fulfilled these legal duties?**

One of the important aspects of my role as a chair is to run the board, and one of the purposes of the minutes that I take is to provide a record of the board's decision-making process.

Most directors do not know this, but by law these minutes must be kept for…. wait for it, **10 years**.

Years from now, and I see this time and time again in a due diligence and/or warranty situation, it may be difficult for you to even remember the decisions you made, let alone demonstrate if you fulfilled your directors' duties at the time of making the decision.

The evidence that you did, may well be something that you have cause to be thankful for.

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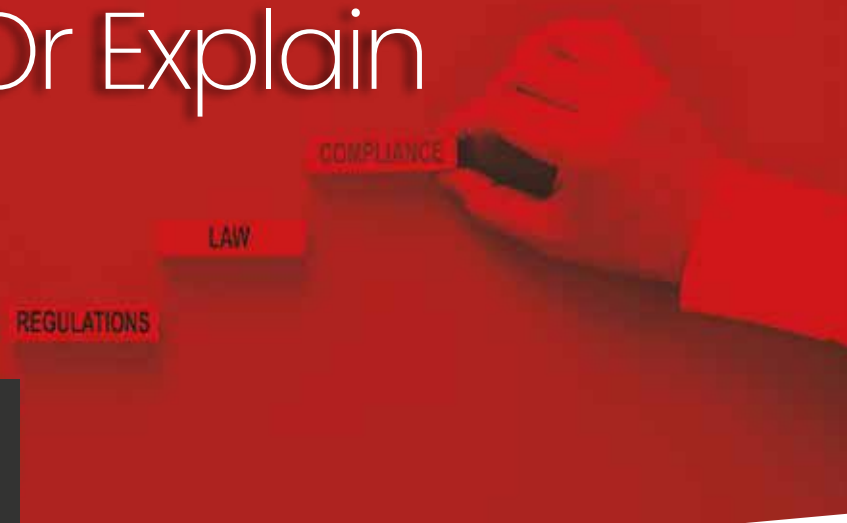
Comply – Or Explain



It's probably fair to say – at least historically – that the business of creativity hasn't usually responded particularly positively when it comes to legal compliance. I've seen this first-hand, with Legal Teams often referred to as the "Department Of Business Prevention". It's probably one of the more easily repeatable lawyer jokes I've been on the receiving end of, but it's also reflective of an occasionally-fair stereotype of a risk-averse profession in search of legal perfection at the expense of commercial reality.

Of course, that's not necessarily the case when it comes to working on issues which relate directly to your relationships with clients. Even if you have put in place contracts of your own which deal with all of the issues you'll be confronted with when providing your services and deliverables to clients such as your basic obligations (and that of the client), approvals, what happens in the event of a dispute and limitations of liability, you may from time to time be convinced to trade on someone else's terms.

Those terms will, now more than ever, contain several obligations that should be at the front of your mind when dealing with clients – often taking the form of warranties with which you need to comply and indemnities which kick in and force you to pay out when you don't.

Mike and the market-leading team at **RiskBox** will be able to tell you exactly how and when any insurance will be able to step in when you need to deal with them, but the chances are you'll know when you find yourself in a dispute, and very quickly.

What many agreements will also contain are obligations upon you to help your clients comply with their own legal and regulatory obligations, with data protection (yes, THAT again) and anti-bribery being some of the most common.

Although it's true to say that this reflects clients looking to pass risk down their supply chain and make them your problem as well as being able to refer to them if and when there's a regulatory issue in which you become involved, it's important to remember that even when clients don't force them upon you there are a number of regulatory regimes which you need to be aware of and which can have a genuine impact upon your business and how you interact with clients and the wider world.

Even post-Brexit, data protection is still very much a thing. Much as many of the main obligations fall on clients as "data controllers" on the basis that they decide what personal data (very widely-defined as pretty much any information relating to a living individual) is collected and for what purpose, with you usually acting as "processors" dealing with or making use of that data on their behalf.

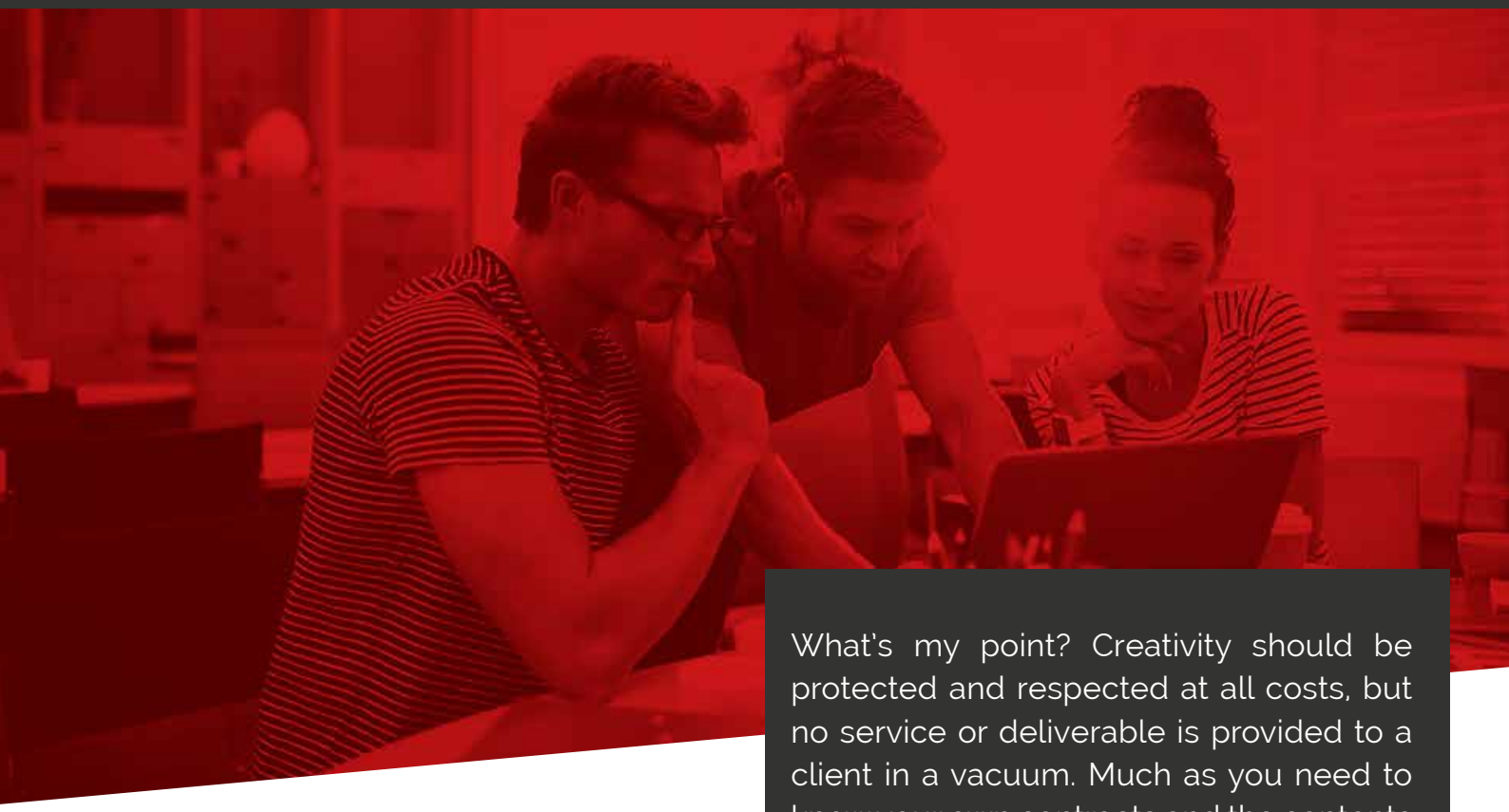
You'll still need to comply with data protection law in your own right and have policies, processes and procedures in place to not only demonstrate to the ICO that you comply if they ever come knocking, but also to meet client expectations and increasingly-onerous contractual terms, which may end up going further than your baseline requirements and lead to expensive disputes if and when you may be caught up in a data breach.

Again, there's insurance to deal with that risk but it has its limits as part of a hardening market and Mike's team are the best people to lead you through it.

Data breaches can, of course, see you sued or fined. So, surely you don't need to worry about the Advertising Standards Authority, who can't? You'll likely know that the ASA operates and enforces the CAP Code, which applies to the content and presentation of pretty much all marketing communications in the UK regardless of medium but also including social media posts, video content and even website text.

You may somewhat justifiably say that if there is a complaint to the ASA in relation to content which you've helped to create then it's really the client's problem. You'd be partially right, in that primary responsibility for compliance does fall on the relevant "Marketer", however the CAP Code also confirms that "others involved or preparing or publishing marketing communications, such as agencies, also accept an obligation to abide by the code.

The CAP Code is based on the core concepts that marketing communications need to be legal, decent, honest, truthful, not misleading, identifiable and prepared with a sense of responsibility to consumers and society.



All very worthy expectations, of course, and although the ASA can investigate and potentially rule against a marketing communication even based on a single complaint, they can't fine you or a client but can bring several other sanctions to bear including denial of advertising space and removal of paid search results. Certainly, an upheld ASA complaint won't do much to burnish a client's brand legacy of your own reputation – not all publicity is good publicity,

Again, while you can and should do all you can to make the final call on any content an issue for the client to resolve, many are increasingly trying to create a shared responsibility and even force you to get legal advice on whether it's compliant at your own cost, thereby cutting into ever-thinner margins.

What's my point? Creativity should be protected and respected at all costs, but no service or deliverable is provided to a client in a vacuum. Much as you need to know your own contracts and the contents of those you sign, getting comfortable with your wider obligations will only help to keep you on the right side of regulators and, ultimately, your clients.

The Department For Business....Sustainability is very much open for business, and we'd be delighted to hear from you.

Please contact us for more information.

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