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Research, analysis and opinion on international media law

Polish government reforms private and public media

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Poland seeks to regulate media sector through decreasing monopoly of foreign companies and raising revenue from public media subscription

The Polish government is working on a bill, to be introduced in 2017, that will limit foreign media ownership in a move to decrease the monopoly of foreign media companies in the private media sector.

Poland's conservative Law and Justice Party announced plans to achieve a more pluralistic media market. The government is also working on a separate initiative aimed at increasing revenues from public media subscriptions to ensure stable funding for public television and radio broadcasters.

Plans for public media reform include a tax to be paid by all citizens, even if they do not own a television or radio and do not use public media services.

In an official statement, Law and Justice President, Jarosław Kaczyńsk, said: "The bill is ready (...) and we hope that it will allow the Polish TV and radio to receive sufficient funding. They will have to compete on the advertising market, but if they are stronger, their market share should increase."

Speaking in Rzeszow, Poland, on 30 January, Mr Kaczyńsk said: "Several capital groups own a majority of Polish media." He added: "That needs to change, with the introduction of similar legislation as in ➔

Bahrain's new press law to protect media

Bahrain is set to adopt a new press and e-media law that is aimed at regulating electronic media and enhancing the protection of journalists.

During a cabinet meeting held at the start of January, government ministers discussed the draft law that would replace Law 47/2002, which governs the organisation of press, printing and publishing sectors.

The draft legislation aims to guarantee press and media freedom in accordance with ethical and professional standards, while providing legal protection for all those who work in the media industry.

As part of its aim to safeguard media personnel, the draft law criminalises the assault of a journalist, media person or correspondent by any person or entity.

Bahraini Minister of Information Affairs Ali Al-Rumeihi told Asharq al-Awsat newspaper that the draft law is part of the ministry's on-going efforts to ensure the law is up to date with industry developments including technological advance.

Highlighted during the cabinet meeting in Mr Al-Rumeihi's presentation, the bill addresses the regulation of digital media and the organisation of press, printing and publishing. The bill also addresses the issuance of printed newspapers and electronic counterparts.

The government's media strategy is expected to improve media industry performance. The draft law has been referred to the Ministerial Committee for Social Services, Communication and Media, under the chairmanship of Bahrain's Deputy Prime Minister Sheikh Ali bin Khalifa Al Khalifa. ■

What's inside

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Rise in foreign ownership as Mexico approves 49 per cent share of Univision by Televisa

The Federal Communications Commission (FCC) has allowed the increased foreign ownership of Spanish-language broadcaster Univision by TV powerhouse Grupo Televisa.

In a ruling issued in January, the FCC approved a joint petition filed by both companies in July 2016 to increase Televisa's stake in Univision from a 14.4 per cent voting interest and 10 per cent equity to a 40 per cent voting share and 49 per cent equity.

The FCC's declaratory ruling based its decision on the grounds that the "increased level of foreign investment in Univision will facilitate investment from new sources of capital in Univision that would not otherwise be available and encourage reciprocity by foreign governments".

In a Public Interest Analysis report, the FCC's media bureau chief, Bill Lake, states: "The Petitioners have also shown how grant of the application will further Univision's service to the Hispanic community and other minority communities and advance its empowerment initiatives….Therefore, we find that grant of the petition for declaratory ruling will serve the public interest."

As Univision's main programming supplier, Televisa has long sought to increase its stake in Univision making this a victory ruling for CEO and owner Emilio Azcarraga Jean. ■

Full merger review of Ireland's Celtic Media and INM deal

The proposed acquisition of Ireland's Celtic Media Group by Independent News and Media (INM) has been referred to the Broadcasting Authority of Ireland (BAI) for a full merger review to assess possible implications for media plurality.

Celtic Media Group, an Irish newspaper publishing and printing company, was initially given approval for the merger in November 2016 by the Competition and Consumer Protection Commission, which ruled that "the transaction would not lead to a substantial lessening of competition" in the areas of business concerned.

The merger was subsequently referred by Communications Minister Denis Naughten for review by the BAI, which is expected to provide a report and recommendations within 80 days.

In a statement issued by the Department of Communications, a spokesperson said: "In line with the Media Merger Guidelines and the relevant legislation, Minister Naughten proposes to appoint an advisory panel to provide an opinion to the BAI".

INM owns 13 regional newspapers, including the Fingal Independent, the Kerryman, the Sligo Champion, the Wexford People and the Bray People.

If approved, the deal will allow INM to expand its portfolio of regional print and digital titles with the addition of seven regional newspapers from CMG, including the Anglo-Celt in Co Cavan, the Meath Chronicle and the Connaught Telegraph. ■

Polish government reforms media

continued from page 1

← France." The party wants to implement ownership rules imposed on newspapers and television providers that are comparable to those in France, where anti-concentration rules are among the most stringent in the European Union, according to consultancy practice Wagner Hatfield, which specialises in public affairs, policy, regulation and strategy.

US and German media outlets are expected to be the most affected by Poland's change to foreign ownership rules. Germany's Bauer Media Group controls the biggest independent radio broadcaster in Poland and the country's leading web portal, Interia.pl.

Swiss-German joint venture Ringier Axel Springer Media publishes the biggest tabloid Fakt, along with the Polish edition of Newsweek. It also publishes web portal and television Onet. TVN, Poland's largest private-television network, along with its news channels TVN24 and TVN24BiS, is controlled by Knoxville, Tennessee-based Scripps Network Interactive Inc.

In an statement, the Polish Vice Minister Of Culture, Jarosław Sellin, said: "No serious country in Europe would allow that a space as delicate as the media, significant not only for business, but also for the freedom of debate and exchange of ideas, is dominated by foreign capital, as it is presently in Poland." ■

Exclusion of liability for Wi-Fi networks with infringing content

Agnieszka Wiercińska-Krużewska

An ECJ ruling states that providers of free Wi-Fi access are not liable for infringement of users

We are all addicted to the internet. We wake up in the morning to check social media, news and work-related matters. Due to costs involved we tend to search for the best accessible Wi-Fi network in the area.

Venues such as hotels, bars and restaurants advertise by informing customers that anyone can connect to their Wi-Fi network. But does everyone use the network for legitimate purposes? Should the private Wi-Fi network really be totally open? Should the Wi-Fi provider allow anyone to connect? Is it possible that the Wi-Fi provider could be held liable for activities of their users?

Some of these questions were answered by the European Court of Justice (Case C-484/14, McFadden). This verdict seems to be crucial for coffee shops, restaurants, hotels, museums, shopping malls and airports. The ECJ expressed a general rule that free Wi-Fi network providers are not liable for infringements committed by users of those networks (eg. downloading illegal files, posting illegal content).

The Court also stressed that the providers of Wi-Fi networks do not have the duty to monitor for infringing content, nor the obligation to remove such content. In other words, the Court confirmed that the private Wi-Fi providers share the same exclusion of liability as entities that provide data transmission services in the telecommunications network, or provide access to the telecommunications networks.

However, the Court also came to the conclusion that the entities whose rights are being violated through the Wi-Fi network (e.g. music or film producers) can claim through the court for appropriate measures to stop violations unless the network implement certain security measures.

The Court emphasised that such appropriate technical solutions would be to secure the Wi-Fi network with a password and require users to disclose their identity.

The judges concluded: "The measure of securing internet connection with a password could discourage users of such link from the infringement of copyrights or related rights if these users are obliged to reveal their identity in order to obtain the required password and cannot therefore act anonymously."

This means the Court seems to imply that right holders will be able to pursue claims through the court unless such measures are implemented. Free and open Wi-Fi owners will risk that the exclusion of liability for the infringements will not be applicable.

Based on this court judgment, it is recommended that private Wi-Fi network providers implement terms and conditions of Wi-Fi use, register the individual users, and based on such identification provide him/her with the password. The terms and conditions should emphasis for which purposes the network cannot be used. This will also require the implementation of appropriate data privacy measures.

European jurisdictions provide for different procedural grounds to demand from internet providers (Wi-Fi providers) to stop the infringements taking place in their networks. There are also countries, such as Poland, that failed to implement article 8 item 3 of the Directive 2001/29/WE of 22 May 2001 r. on the harmonisation of certain aspects of copyright and related rights in the information society.

This, in practice, makes it impossible to request through the court any interim measures against network providers. The lack of implementation is subject to the Commission investigation. ■

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Calculation of Damages for Copyright Infringement Arising from Peer-to-Peer Sharing

The term "peer-to-peer (abbreviated frequently to "P2P") file sharing" refers to the online reproduction and communication of digital content using P2P networking technology.

This technology allows users to access and share content files such as books, music, movies, and games using a P2P software program that searches for such content from other computers connected on the P2P network. The nodes (peers) of such networks are end-user computers and distribution servers, rather than one single provisionary source. P2P file sharing technology has evolved through several stages from the earlier iterations such as Napster, to those currently popular, such as BitTorrent.

When proprietary media content is sourced for and downloaded on a PC through a P2P network, theoretically, the downloader would have committed a few possible acts of copyright infringement simply from effecting a single download, including (without limitation) reproduction of the content without the consent of the copyright owner into the hard drive of his PC.

At the same time, because a downloader would automatically become a "source" node for other users of the network, he would, by virtue of the download, contemporaneously, also (most times unconsciously), become a provider of infringing material, giving rise to a further possible claim in damages against him, this time for communicating the work to the public and authorising further downloads downstream.

In line with the rise of P2P technology are technologies that now allow copyright owners to track not only the IP addresses of downloaders; but also (as is claimed) the number of times downloads by other users down the stream have been facilitated by the original downloader's download.

This has led to a perfect legal storm.

The proliferation of copyright infringements arising from the ease by which reproductions and communications to the public may be effected through P2P networks have led to lawsuits being brought against downloaders and massive awards for damages by courts in some jurisdictions.

These oversized awards have led to a backlash against copyright owners now seen to be punishing infringers claiming "innocence". Infringers clearly wish not to be paying financial penalties even if they acknowledge that their actions are illegal.

In this regard, with reference to such a system, the Federal Court of Australia in the case of Dallas Buyers Club LLC v. iiNet Limited [2015] FCA 317, had in its judgement, at 30, held

"…I do not regard as fanciful the proposition that end-users sharing movies on-line using BitTorrent are infringing the copyright in these movies. Indeed, if there is anything fanciful about this, it is the proposition that they are not."

If liability on the part of a home infringer is accepted, what exactly would be the damages payable for such infringement?

Capitol Records, Inc. v. Thomas-Rasset was the first file-sharing copyright infringement lawsuit in the United States brought by major record labels to be tried before a jury.

The defendant, Jammie Thomas-Rasset, was found liable to the plaintiff record company for making 24 songs available to the public for free on the Kazaa file sharing service and was ordered to pay $220,000.

Before filing suit, Capitol Records offered to settle for $5,000, but Thomas-Rasset declined. The ultimate damage order came after several trials and appeals between 2007-2013. ➔

Samuel Seow highlights the difficulty in the calculation of P2P copyright infringement cases

The damage award at one stage reached $1,920,000.

The concept of compensation in the form of damages paid to copyright owners for infringements have long been a mainstay.

However, with the technological advancement of the globalising world, including the proliferation of P2P technologies, the calculation of such damages is also taking on the complexion and complexities of a globalisation effect.

This has led to damages awarded in such cases to be potentially massive, despite being based on clear statutory provisions enacted to address the issue, during a simpler time where P2P forms of reproduction and communication did not yet exist.

In Singapore, Section 119(2) of the Copyright Act (Cap. 63) provides for specific remedies regarding copyright infringement cases.

"Subject to the provisions of this Act, in an action for an infringement of copyright, the types of relief that the court may grant include the following:

(a) an injunction (subject to such terms, if any, as the court thinks fit);

(b) damages; or

(c) an account of profits;

(d) where the plaintiff has elected for an award of statutory damages in lieu of damages or an account of profits, statutory damages of —

(i) not more than $ 10,000 for each work or subject-matter in respect of which the copyright has been infringed; but

(ii) not more than $200,000 in the aggregate, unless the plaintiff proves that his actual loss from such infringement exceeds $200,000."

The Section thus presents to the copyright owner two mutually exclusive broad categories of damages; damages/account of profits based on losses; or pre-determined statutory damages. Nonetheless, one would note that, as stated on the Intellectual Property Office of Singapore's website:

"In determining the amount of statutory damages, the Court is to consider these factors:

- nature and purpose of the infringing act, including whether the infringing act was of a commercial nature or otherwise;
- flagrancy of infringement;
- if the act was done in bad faith;
- any loss suffered or likely to be suffered by the copyright owner;
- any benefit shown to have accrued to the defendant;
- conduct of both parties before and during proceedings;
- the need to deter similar instances of infringement; and
- all other relevant matters."

(all emphases in all quotations herein ours)

Extrapolating from the above, it is then important, for the purposes of investigations of infringing activity and for the determination of compensation, that the copyright owners in P2P infringement cases can determine with sufficient certainty the number of days a file has been uploaded by a particular user as well as the average number of downloaders the user had made the work available to per day (on the average).

In fact, this proposition of infringement, based on the end-users

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sharing the infringing material online, appears fairly consistently. Keeping in mind that this form of infringement ignores geographical borders and general physical restrictions (aside from the internet's limitation in the respective jurisdiction), its reach is almost limitless.

Accordingly, the damages flowing from such infringement should, in line with case law, take an escalating domino effect that is reflected, inter alia, in the following materials:

Halsbury's Laws of England vol 9 (Butterworths 4 Ed., at 612)

"In an action for infringement of copyright it is not necessary to give proof of actual damage; the damages are at large."

The learned author went on to elaborate that the damages assessed may include,

(a) the amount which would have been received by the plaintiff if he had himself been able to sell the copies sold by the defendant;

(b) a substantial sum for injury to trade by reason of the fact that the defendant's prices were lower than those usually charged by the plaintiff;

(c) the profit which the plaintiff would have made; and

(d) the licence fee that he would have charged.

Dootson Investment Corp v. Highway Video Pte Ltd [1997] SGHC 314

In this case, the learned High Court had approved of the foregoing stated in Halsbury's, and had further held the following:

"In cases where damages are in the nature of loss of profits it is necessary to plead and prove them and prove them; not so when they are at large. In the latter case one of the principal underlying purposes of damages is to send the message "tort does not pay". In copyright infringement cases the message therefore is "piracy does not pay."

and

"When a laserdisc is rented out many times on each occasion several persons can view it. Seen in this light there is a snowball effect on the damage done by pirated copies."

Based on the foregoing words of the learned G P Selvam J., it is clear that the snowball effect, when applied to the P2P sharing networks presently under consideration, would be much greater than that occasioned by a video rental store renting out pirated material. In that case, the Court had regard to the snowball effect multiplied by the "loss of profits" to the plaintiff.

In the article, Damages in Intellectual Property Rights, European Observatory on Counterfeiting & Piracy, the learned authors of the work had stated in some detail (at p. 2) the purpose of damage and

while the authorities address the issue that copyright damages not only compensate for the rights infringed but should also impose additional punishment so as to deprive unjust enrichment, it fails to show how such damages are to be calculated in the circumstances where such damages have to mimic free-market transactions in an environment whereby such free-market have already been disrupted (or may not even be contemplated).

In short, the calculation of damages under the "profit lost per download" type of formula is the utopia which everyone appears to know but no one knows how to reach.

The calculation not only has to internalise the positive externalities, such as the "snowball effect", the royalties or fees correctly due or the far reaching damages into the industry, but also serve as a deterrence for infringement. These are all intangibles which values are often the subject of contention.

Indeed, the Intellectual Property Office of Singapore had stated in its Copyright Notice Number 1/2015 at page 4 thereof that "[t]o-date, no court cases in Singapore have considered how to calculate statutory damages in the context of downloading or sharing a movie via a peer-to-peer network".

It is submitted that this issue of damages accruing to the copyright holder requires clear and accurate pronouncement of the legislature.

Barring the complete removal of the concept of statutory damages, the alternatives to provide for a fixed or narrow-range of pre-established damages (or calculations) for specific types of infringement, such as playing music on a jukebox without paying the statutory license fees, or P2P file sharing of music, or movies, need to be seriously contemplated.

It would not defeat the purpose to require a plaintiff seeking more than the statutory minimum to pass a threshold level of proof to establish that actual economic losses, though difficult to quantify with precision, nevertheless qualify for a statutory damages claim.

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BAKER & McKENZIE

Information Technology & Communications

The growing interaction among smart devices (fixed and mobile), as well as their ability to operate and send information across multiple platforms and countries are impacting all business sectors. Digital convergence has redefined many innovation models and has resulted in new industries emerging and in the dramatic increase of productivity of human resources.

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