MEDIA LAW INTERNATIONAL ®

e-Zine 11/15

Research, analysis and opinion on international media law

Television streaming brings validity of law into question


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The pace of digital media development is forcing governments around the world to assess legal frameworks and foreign ownership rules

As Australian television networks Seven West Media and Nine Entertainment announce plans to stream their television channels over the internet, government pressure to amend legislation mounts.

Online streaming obliterates the country's "audience reach rule", which restricts licence holders from broadcasting to more than 75 per cent of the population.

Australian Competition and Consumer Commission chairman Rod Sims told Fairfax Media: "The rule is pretty clearly, I think, redundant in the sense that you can't own a television station that reaches more than 75 per cent, but you can stream to 100 per cent of Australia. Now Seven is streaming, that really shows the law is just being made redundant by technology."

MPs and broadcasters are calling for the abolishment of the audience reach rule, which Liberal MP Angus Taylor describes as antiquated. The Turnbull government also faces pressure over ownership regulation that prevents media companies from owning more than two television, radio and newspaper assets in the same market – known as the "two out of three rule". Although yet to happen in Australia, media ownership ➔

India raises limit on foreign ownership

The Indian government has implemented a welcomed change to the country's foreign direct investment (FDI) policy, raising the ownership limit to 49 per cent across the broadcasting sector.

Prime Minister Narendra Modi announced the increase from 26 per cent on Tuesday last week, highlighting allowable foreign investment in television news channels and private FM radio. Investment restrictions have been lifted entirely for broadcast distribution platforms such as digital cable and direct-to-home services, allowing 100 per cent overseas ownership. Print media ownership remains capped at 26 per cent.

According to a government statement, the 'big bang' reform is expected to 'rationalise and simplify the process of foreign investments into the country.' In turn, this will liberalise and globalise the sector by attracting global expertise, innovation and better programming.

Economic Affairs Secretary Shaktikanta Das said: "The government's decision on liberalising FDI policy is a welcome step and is part of improving the ease of doing business. These decisions come into force with immediate effect."

Saurabh Dhoot, Executive Chairman of Videocon d2h, said the change will "boost the investment environment and lead to globalisation of the entire media sector in India. With more than 150 million Pay TV homes, India is amongst the world's largest Pay TV markets and certainly the fastest growing media market across the world. This will give a chance to several global companies to participate in India's growth story." ■

What's inside

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Asian media market to receive US$300 million investment

Global investment firm KKR and The Chernin Group, a US independent media holding company, announced a joint venture to launch Emerald Media, a vehical to fund investments in the media and entertainment industries in India, Hong Kong and Singapore.

According to a statement issued by KKR at the start of this month, Emerald Media will provide growth capital ranging from US$15 million to US$75 million for control and minority positions in entertainment and digital media businesses in Asia. KKR has committed a total of US$300 million to Emerald Media, which The Chernin Group will join as a minority co-investor.

As part of the deal, KKR has acquired a minority stake in CA Media, the existing Asian media platform of The Chernin Group.

Emerald Media will be co-led by Rajesh Kamat and Paul Aiello, CA Media's group COO and CEO respectively.

Commenting on the partnership, Rajesh Kamat said: "The media and entertainment sector is on the cusp of a strong growth phase - driven by media convergence, an attractive investment environment, and rising discretionary spends. With the building blocks for growth in place, there is a significant opportunity to create a diversified portfolio of assets in this space."

Sanjay Nayar, member and CEO of KKR India, said: "The media, entertainment and digital media segment across Asia, especially in India, enjoys attractive macro fundamentals, mirroring the trajectory of the region's consumer sector." ■

US sports industry revenue to reach US$73.5 bn by 2019

The sports market in North America will be worth US$73.5 billion by 2019 with the media rights segment becoming the industry's most lucrative revenue stream, according to a report by PricewaterhouseCoopers.

The increase from US$60.5 billion in 2014 takes into account tickets, merchandise, media rights and sponsorships. In the report, titled At the Gate and Beyond, PwC predicts that media rights will surpass gate revenues for the first time, becoming the sports industry's largest segment. Other categories such as sponsorship and licensed merchandise are also expected to grow.

Published on 25 October, the industry report states that media rights 'should continue to recognise higher than indexed growth of existing rights deals through the end of the period as rights owners continue to carve out or reserve in-demand digital assets and further monetise this inventory under new deals or through in-house ventures.' Over 35 per cent of existing local television rights deals with the National Basketball Association, National Hockey League and Major League Baseball are due to expire by 2019, with assumed new deals contributing to overall growth predictions.

PwC attributes market growth to 'Related initiatives involving a la carte and streaming media are allowing consumers to purchase specific content, watch games in a condensed format shortly after completion, and watch replays on league platforms before they are available through general media.' ■

Television streaming brings law into question continued from page 1

rules are changing globally. In India predictions for media market growth were followed by legal reform as the government raised the limit on foreign ownership to 49 per cent. A move the prime minister hopes will globalise the sector. Meanwhile Russia is home to divestments and strategic exits with Swedish Modern Times Group leaving the Russian market ahead of foreign ownership restrictions taking effect in January 2016.

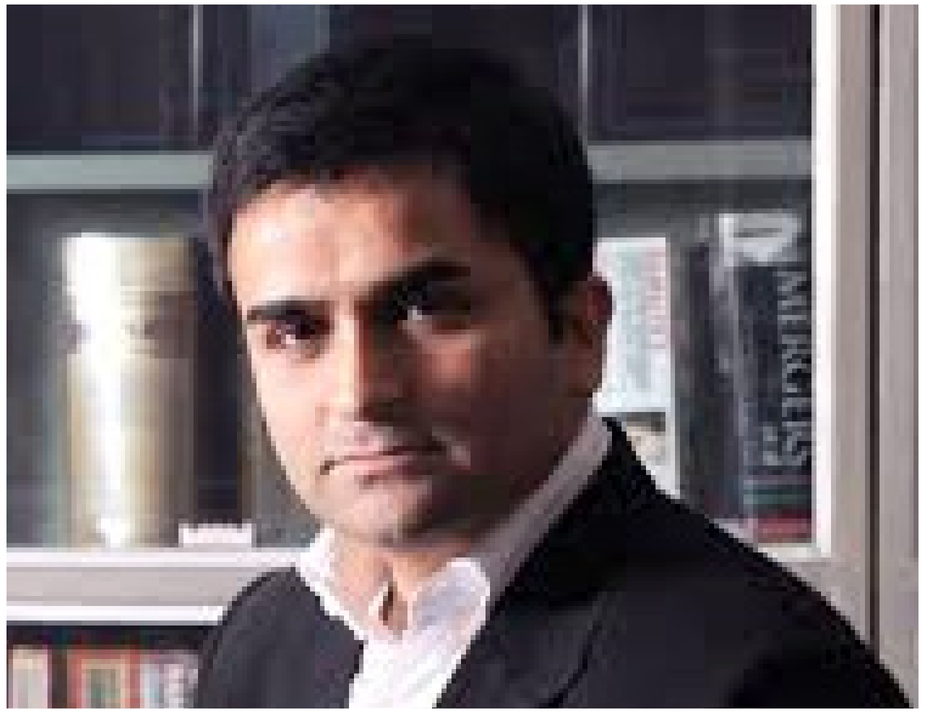
On a European level the digital environment will undergo fundamental change as the European Union plans for a Digital Single Market that will transform 28 national markets into a single one.

John Nendick, Ernst & Young's global media and entertainment leader, highlights "The evolution of the M&E industry continues to focus on the exploitation of digital distribution and finding new and innovative ways to reach and interact with the consumer. With surging demand for content, M&E companies are growing their profitability through multiple consumer offerings and international expansion."

As digitalisation continues to surge in markets around the world, so do controversies. Censorship, data protection and copyright remain key focus areas for sectors worldwide, business and legal. ■

Indian copyright law in conflict with works of parody

Rahul Chaudhry



Leading lawyer Rahul Chaudhry outlines need for legislative reform to broaden national copyright laws

'Parody' does not appear in Indian copyright laws. The lack of regulation in this particular area has resulted in numerous lawsuits against parodists by owners of original works claiming infringement of copyright. Parody refers to a work, which humorously and critically comments on an existing work in order to expose the flaws of the original work (Van Hecke). For the audience to connect with a parodist's work, it is important that they recognise the link between the two works. Inevitably, parodists have to depend substantially on the original work.

Section 52 of the Copyright Act, 1957 deals with the concept of 'fair use'. Although providing protection against critisism, the provision does not mention 'parody'. This narrow position of law has been used by owners of original works to their advantage.

Judicial pronouncements have, however, bettered the situation. In the case of Blackwood and Sons Ltd., the court stated the two requirements of fair use - not to compete with original work and not to make improper use of original work. However, the court considered it to be a violation of fair use due to substantial borrowing from original work and intention to derive profit.

The Supreme Court, in R.G Anand, held that when two works are a result of the same idea developed differently, some similarities are unavoidable which may or may not fall under fair use. In Civic Chandran, three factors that determined fair use were highlighted as the quantum of matter borrowed, the purpose for which the matter was borrowed and the likelihood of competition between the two works.

Moral rights have been recognised by the Copyright Act from the very beginning as right to claim authorship and to claim damages for mutilation or distortion of the work when it is detrimental to the reputation of original work. The artistic integrity enshrined in moral rights is not violated through works like parody. Although comical, parodies in nature do not mutilate the original work. In fact, a parody is a whole new work in itself which borrows few elements from the original work. Further, weight should be given to the non-rivalrous approach of parodies which do not intend to compete with original works nor have detrimental effect on their importance.

Parodies are an artist's form of expression through which he makes known his opinion on a particular subject. In the US the First Amendment, while granting Freedom of Speech and Expression to all individuals, incorporates a high threshold for the right to be intervened. This is evident from New York Times v. Sullivan and Hustler Magazine, Inc. v. Falwell, where courts mandated the presence of actual malice on the part of the person expressing an opinion for right to be restricted. In India, an express provision exists in the form of Article 19(2) imposing Constitutional restrictions. Creating a bar on expression of artists not only affects their freedom, but also the rights of a large number of people who wish to view their content.

In 2011, Professor Ian Hargreaves' independent report gave recommendations for development of IP law in UK. One of them related to creating exceptions with regard to works such as parodies. To match global standards, Indian law makers too should broaden the scope of copyright laws in India by amending the provisions of fair use to include parodies under its ambit. To avoid future conflict, an equilibrium needs to be established between the rights of owners of the original works and those of the parodists for mutual co-existence. ■

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Geo-blocking in digital era

Andrew McMillan, one of the UK's top media lawyers, reviews the impact of a Digital Single Market on the audio-visual sector and content diversity

In May of this year, the European Commission (EC) announced its plans for a Digital Single Market (DSM). The EC's stated aim was to "tear down regulatory walls and… move from 28 national markets to a single one."

The ambition behind this can only be applauded. I have argued elsewhere that European players in certain sectors are disadvantaged on the world stage by the relative lack of scale of their home markets. A larger home market would grant European players access to a greater number of customers and allow them to enjoy the efficiencies that come with scale.

Does this single digital market make sense in the context of the audio-visual sector?

When I think about telecommunications services and connectivity in particular, I like to think that I am influenced by quality and price and little else. Brand experts would tell me that brand also plays an important role in my choice of service provider and of course, once I have chosen a provider, changing provider involves a degree of inconvenience. But in essence, this is a service that can be judged by the same metrics anywhere in the world.

When we talk about audio-visual content, however, we are talking largely about an expression of personal taste and beyond that, cultural identity. (Coverage of news and certain sports are notable exceptions to this, however.)

The EU comprises a number of diverse cultures with interwoven but distinct histories. It has 24 official languages, with many more being spoken on the ground. Diversity is at the heart of the EU and is a large part of what makes it special. That said, EC President Jean-Claude Juncker in his State of the Union speech, delivered in September this year, focused on his desire for greater unity and solidarity within the EU rather than cultural diversity (although this did get a mention or two in the supporting documents).

It is perhaps an obvious statement, but one that I think worth making: markets are sometimes partitioned not for economic reasons, but because personal and cultural preferences, expressed on a national scale, require them to be so partitioned. Having lived for a while in the Czech Republic, I have a soft spot for Czech content, but it is not for everyone. And French 'humour' is undoubtedly best understood in France…

EC investigation into pay-television licensing arrangments

In January 2014, the EC opened an investigation into certain provisions in licensing agreements between the six major Hollywood film studios and major European broadcasters. In July this year, it issued a Statement of Objections to the film studios and Sky UK, alleging that their licensing arrangements "put in place contractual restrictions that prevent Sky UK from allowing European consumers located elsewhere to access, via satellite or online, pay-television services available in the UK and Ireland". If the EC's preliminary position is confirmed, each of the companies will have breached ➔

Featured Firm: Preu Bohlig & Partner

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Chambers Europe, 2014

Excellent solutions in media and entertainment law

Preu Bohlig & Partner advises companies and individuals in the media and entertainment business. Our clients are record labels, producers, talents, but also agencies, associations and individual artists. Besides transactional support and deal negotiation we are involved in litigation when it comes to defending our clients' reputation in defamation and libel cases.

The firm gains recognition for its work in reputation management and crisis communication matters. Further, our international professional and legal network allows us to assist clients in cross-border situations.

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UK Perspective on the Digital Single Market

← European Union competition rules prohibiting anti-competitive agreements.

The use of "geo-blocking" (that is, the practice of restricting access to content on the basis of a user's geographic location), is widespread within the audio-visual content market. Arguably, it underpins the entire content value chain, from production to consumption, in the form of territorial licensing.

Rights-holders generally license content on a territory-by-territory basis rather than a pan-European one, with a view to maximise returns. But there is an obvious tension here, between this practice and the EC's desire to create a DSM.

What is the problem that the EC is trying to solve?

Mr Juncker is reputedly keen on the idea of cross-border European media champions who are capable of competing not only with the US film studios, but also with digital platforms such as Facebook and Google.

But he should be careful what he wishes for. If content is to be licensed on a pan-European rather than a territory-by-territory basis, we will see strong growth in the production of homogenised content which is designed to appeal to the widest possible (cross-border) audience.

This growth will likely be at the cost of more localised or niche content. And we should take care when we talk about a 'consumer'. Is it meaningful to refer to an 'EU consumer' in the context of the audio-visual sector? If not, what market will there be for pan-EU content? Content producers would likely adapt to this new market structure, but, I would argue, at the cost of individual consumers. It would also have an interesting impact on content distribution; and by this, I mean the platforms that deliver content to consumers.

There are, as yet, no true pan-European platform providers. This, along with the fact that licence fees are based primarily on market size, means that any platform providers will likely have to pay over the odds for a pan-European licence. In turn, this could drive platform consolidation, predominantly among the larger Euroopean markets.

While on the one hand, there may be concern that the audio-visual sector could follow digital music and e-publishing, with the largest distributor(s) enjoying significant pricing power or even dominance within the market, on the other, we should not forget the number of distribution channels that now exist alongside traditional broadcast media, such as Netflix.

And this is perhaps also the answer to the risk of content becoming too homogenised. We have seen an explosion in the popularity of content delivered over the top (OTT) and user generated content (UGC) in recent years.

Also noteworthy is the computer gaming industry which has been praised for offering games which, in some cases, contain stronger narratives and make greater intellectual demands of its audience than blockbuster films do.

In short, the current investigations and consultations could ultimately lead to a lowering in the range and diversity of content, and consolidation among traditional platforms. But perhaps we will all be sourcing our content from alternative sources by then. ■

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Protecting creative industries through policy and education

Simon Whitehouse, Senior Director EMEA at Reuters-owned MarkMonitor

Creative industries like film, television and music contribute £77 billion to the UK economy and account for 5.6 per cent of all jobs. According to the UK government, in 2013 these industries showed growth of almost 10 per cent, which was three times more than the rest of the UK economy. While these figures demonstrate the importance of the role that the creative industry plays, what they don't show is the affect that issues like piracy and copyright infringement have on the industry.

Earlier this year the government announced more stringent plans to deal with online piracy. These plans have likely been influenced by the increase in illegal downloads and streaming. Research commissioned by the Intellectual Property Office (IPO) indicates that the number of people accessing content illegally is increasing. Almost eight million UK Internet users aged 12 and over (18 per cent) have watched illegal content over a three-month period, according to the research. A further 6 per cent of UK Internet users aged 12 and over indicated they only watch illegally obtained content. In addition to steeper penalties for copyright infringement, the government is also funding the Police Intellectual Property Crime Unit (PIPCU) to address copyright infringement. The PIPCU will receive £5.56 million until 2017.

Educating consumers is important but is this enough? With the creative industry contributing so much to the economy and employing so many people, the threat from piracy and copyright infringement is immense. The workforce and future projects must be protected. The challenge comes in getting the general public to recognise the value that the creative industry brings and encourage users to use legal channels and move away from illegal downloads. This is the aim of the recently launched campaign titled Get it Right from a Genuine Site. The initiative is the first of its kind and seeks to encourage respect for the value of creativity in the UK and boost consumer awareness and use of the wide range of legal sources of content available to them.

Supported by the government, Get it Right from a Genuine Site is a collaborative effort between content creators from the film, television and music industries, as well as trade unions, retailers, other creative industries, and Internet Service Providers.

Educating consumers is a two-pronged approach; the first seeks to educate consumers on the value of supporting the creative industries by paying for content or legally downloading free content. The other approach sees rights holders, content creators from the film, music and television industries, as well as retailers and other creative industries, making it as easy as possible for consumers to find and access legitimate content. For example, there are sites available that offer consumers a marketplace environment for film and television content in all formats, including film, DVD, legal downloads and streaming services. Yet again, combating piracy and copyright infringement requires a comprehensive approach that takes all stakeholders into account.

Owners of digital content can't just rely on consumers to do the right thing. Instead, they need to take a proactive and comprehensive approach to fighting online piracy. This includes the process of gathering business intelligence while pinpointing and monitoring illegally downloaded activity across a wide-array of global Internet channels such as peer-to-peer networks, search engines, user generated content on video platforms, social media networks, blogs and live and video streaming sites. Often this is accomplished by partnering with a brand protection provider who has the expertise and industry knowledge required to guide rights owners through the process, for example, by showing to them how big their problem really is and advising on remedies that can be put in place.

Detailed business intelligence which highlights the downloading behaviour online also provides rights owners with business opportunities and data relevant to content acquisition, development and programming strategies.

In the digital age the ease of accessing illegal content or downloads is increasing. Making an impact on minimising and stopping copyright infringement and piracy will require support from all parties concerned, as well as government, and features a strong educational element to change the behaviour of viewers. And certainly, the changes in 2015 are a step in the right direction. ■