

*Research, analysis and opinion on international media law*

## Digital age spurs legal reform, convergence and consolidation



### Global media law is at a tipping point as Media Law International launches sector's first e-Zine dedicated to legal and business developments

Media law is undergoing unprecedented global reform as the influence of digital and social media advances with bewildering speed. While a wave of industry consolidation and convergence builds, legislators, media companies and law firms are having to re-think their approaches to the sector.

From President Putin's controversial internet data law and high profile mergers and acquisitions to online television networks dominating markets around the world (see page 2). There is no shortage of sector development, legislative change or regulatory disorder.

Digital technologies have caused a revolution. New trends are emerging and associated business models changing as telecommunications operators become content distributors, content distributors become content producers and bloggers become defendants in defamation cases. Consequently, the need for access to specialist lawyers with media law expertise is greater than ever.

Stefan Engels, co-head of Bird & Bird's German practice, explains: "The digital transformation process is the most important thing going on in the media sector. We →

### Netflix expands in Asia ahead of 2016

Netflix will launch its streaming service in four Asian markets at the start of next year in a move that will bring it closer to completing its international expansion.

The California-based company plans to expand into South Korea, Hong Kong, Singapore and Taiwan, according to a statement issued by the company on 08 September. The announcement came after Netflix became operational in Japan the preceding week, representing its first move into the region. In contrast to other markets where local content accounts for approximately 20 per cent, local content offered in Japan will dominate almost 50 per cent of output with plans for the expansion of Japanese films and dramatic television series.

Reed Hastings, chief executive officer of Netflix said: "The combination of increasing Internet speeds and ubiquity of connected devices provides consumers with the anytime, anywhere ability to enjoy their favorite TV shows and movies on the Netflix service," said Reed Hastings, chief executive officer of Netflix." He added: "These four markets well represent those trends."

The streaming service will be available on tablets, smartphones, computers and a range of internet-capable game consoles, with details of pricing and programming made available at a later date.

With over 65 million subscribers in more than 50 countries, Netflix has become a world-leading internet television network with its own original television series, documentaries and full-length films. But figures do not stop there. Netflix aims to reach 200 countries, including China, by the end of 2016. ■

#### What's inside

- 1-2 MEDIA MARKET NEWS COVERAGE
- 3 TV MARKET ANALYSIS: IS CORD-CUTTING A MYTH?
- 4-7 SOCIAL MEDIA AND DEFAMATION IN AUSTRALIA: LESSONS FROM THE UK

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Media  
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## Media General to acquire Meredith in US\$2.4 bn deal

Media General will acquire Meredith Corporation in a US\$2.4 billion deal that will create a multiplatform media company with 88 television stations across 54 markets.

Announced on 08 September, the cash and stock transaction will form new entity Meredith Media General, which will be the third largest local television station owner reaching 30 per cent of US television households.

According to J. Stewart Bryan III, Chairman of Media General, "This merger creates greater opportunities for profitable growth than either company could achieve on its own. Importantly, shareholders of both companies will benefit from the upside potential of a diversified and strategically well-positioned media company with a

strong financial profile and the ability to generate significant free cash flow."

Steve Lacy, CEO of Meredith, said: "This merger will create a strong and efficient company positioned to realise the significant earnings and cash flow potential of local broadcasting; leverage the unparalleled reach and rich content-creation capabilities of Meredith's national brands; and capture the rapidly developing growth potential of the digital media space."

Meredith Media General will include 40 Big Four network-affiliated television stations located in the top 75 designated market areas. The transaction, expected to close by 30 June 2016, has been approved by boards of directors of both organisations and is subject to shareholder and regulatory approvals. ■

## UK automated display ads dominate spend continued from page 1

← see this in the music and entertainment area with Spotify in music and Netflix in film. Worldwide players are now launching products on a worldwide basis because things are moving faster."

And law firms are reacting with equal speed, expanding their media law divisions, working with clients and legislators to align legal frameworks with industry developments. At European level, plans are

underway to create a digital single market that will enhance mainstream digitalisation and modernise copyright rules.

According to a report by the European Commission 'too many barriers still block the free flow of online services and entertainment across national borders.' The initiative, which will merge 28 national markets into a single one, is expected to update EU single market rules for the digital era and contribute EUR415

## Russia's internet data law raises privacy concerns

Russia has implemented a controversial data protection law aimed at localising personal data processing.

Effective from 01 September, the amended legislation imposes stricter data residency requirements that oblige international companies to store data on servers that are physically located within the country.

Concerns of a government scheme to control the internet have been mounting since President Vladimir Putin described the internet as a "CIA project" at a media conference in St Petersburg last year.

The law not only accentuates fears of web surveillance but challenges traditional conceptions. More crucially it represents a shift in the way the internet operates - not only localising processes but potentially localising the internet.

Russian regulatory body, Roskomnadzor, has made an exception for air travel data, which must be stored internationally according to international conventions. Vadim Ampelonsky, spokesman for Roskomnadzor, told Kommersant-FM radio "Transnational internet giants are not the main object of attention for this law. It's more about the banking sphere, air travel, hotels, mobile operators, e-commerce. This is what is important."

Highlighting Facebook, Twitter and Google, Mr Ampelonsky went on to add: "We are not saying that if they don't move their data to Russia, we'll close them down, and in 2015 we definitely won't say that." ■

billion a year to the European economy.

The importance of copyright and territoriality has been propelled by the advance of digital technologies, adding to global trends including the rapid uptake of video-on-demand services, game developers and publishers expanding worldwide, self publication reviving the publishing sector and programmatic advertising dominating media budgets. ■

# Netflix ends Epix deal in favour of exclusive content

Andrew McMillan



## Media lawyer Andrew McMillan highlights sustained significance of traditional delivery platforms

At the end of last month, Netflix announced it would not be renewing its distribution deal with Epix in the US. This raised a few eyebrows, as Epix (a joint venture between MGM, Paramount and Lion's Gate) has the rights to such marquee movie titles as The Hunger Games: Catching Fire and Transformers: Age of Extinction. (The rising use of the colon in movie titles will likely form the subject matter of an article that someone else will write.)

Ted Sarandos, Netflix's Chief Content Officer, made a couple of interesting comments about Netflix's decision on his blog. He said: "Our goal is to provide great movies and TV series for all tastes, that are only available on Netflix". He was also critical of the delay ("often... more than a year") between a movie's theatrical release and the

time when consumers are able to watch that movie "when and where they want" (i.e. via Netflix).

Netflix's increasing focus on exclusive content should not come as a surprise. Back in 2013, Mr Sarandos said: "The goal is to become HBO faster than HBO can become us". And HBO's success was founded on the use of high quality, exclusive content.

Netflix gained many column inches and several awards for its television series, House of Cards. Also interesting, alongside the high quality of production values and cast, was Netflix's decision to release all 13 episodes of the first season on the same day, allowing its customers to "binge watch" to their hearts' content.

Of course, you don't have to produce your own content to obtain exclusivity. Under a

deal Netflix struck with Disney in 2012 and which comes online next year, Netflix will be the "exclusive U.S. subscription television service" for Disney's new movie releases. Mr Sarandos comments: "The majority of these films will arrive on Netflix faster than traditional arrangements had previously allowed."

This increasing emphasis on exclusive content is also being seen elsewhere in the market. BT made headlines with its aggressive acquisition of rights to the Champions League football and Premiership rugby. And, following the BBC's decision not to move beyond Season 2 of period detective drama Ripper Street, Amazon stepped into the breach, commissioning Season 3 and releasing it exclusively on its Amazon Prime platform. Amazon has just announced the commissioning of two further seasons. In effect, differentiation is currently seen as more important than consolidation and commoditisation.

So what does this move to exclusive content mean for the industry as a whole?

On the one hand, Netflix's move can be seen as a tacit acknowledgement by it that it will never be a one-stop shop for consumers of audio-visual content. I have highlighted elsewhere some of the reasons digital distributors within the audio-visual sector are unlikely to enjoy the same power as Apple enjoys in respect of digital music or Amazon enjoys in respect of e-publishing.

More than that, I see it as an acknowledgement that cord-cutting is not as great a threat to traditional delivery platforms as has been believed, and a recognition that the market has plenty of room for services which are, at heart, complementary rather than competitive. ■

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# Freedom of Speech versus Defamation

**Defamation expert Peter Bartlett, Minter Ellison, calls for reform of Australia's law on defamation - highlighting UK as an example**

'Freedom of Speech has been characterised as one of the 'fundamental values protected by the common law' and as 'the Freedom Par Excellence, for without it, no other freedom could survive'. However, new communication platforms such as Facebook and Twitter are testing the laws of defamation, requiring our courts to reconsider how the 'tension' between freedom of speech and protection of reputation is balanced.

In Australia, the recent case of *Hockey v Fairfax* has illustrated a number of the challenges posed by Twitter in the realm of defamation. The *Hockey* judgment reveals a tendency of Australian courts to favour the protection of reputation in the face of novel circumstances.

The United Kingdom's encounter with libel and twitter is just as novel. However the introduction of a new Defamation Act in 2013

makes it easier to uphold freedom of speech. Only by considering similar reform can Australia be best positioned to tackle developing modes of communication in the future.

## Hockey v Fairfax

On 30 June 2015 the Federal Treasurer of Australia, Joe Hockey, was awarded significant damages in a case against Fairfax Media. Of significant interest, Mr Justice White found that two tweets regarding the Treasurer were defamatory and awarded A\$40,000 each. A lot of money for a few words. The first tweet comprised only the words 'Treasurer Hockey for sale' and a truncated hyperlink to the subject article. The second, 'Treasure for sale: Joe Hockey offers privileged access'. A third tweet with the article was found not to be defamatory.

Counsel for Mr Hockey submitted that 'a tweet should be regarded as a discrete publication and its defamatory meaning determined separately'. In support of this argument, it was argued that of the 280,000 followers who were exposed to the tweet, 'only 789 of [those] had that day downloaded the article'.

Judge White found that the headline when read with the article was not defamatory. However, his honour considered Hockey's submissions convincing, finding that a link to the article did not prevent the tweets from amounting to defamation. I, however, do not agree. Fairfax made a convincing submission that 'the ease with which followers of tweets may obtain access to the article suggests that, if the tweet has any impact on those reading it, they are likely to have used the hyperlink to obtain more'.

The nature of twitter is distinct from traditional media, and should be treated as such. Decisions such as this have a chilling effect on new communication platforms, and stifles the dissemination of responsible reporting to a broader audience.

## Twitter in the High Court of Justice

The approach of Australian courts to Twitter can be compared to the UK, where a number of interesting and complex cases have come before the High Court of Justice.

On 14 July 2015, Judge Anthony Seys-Llwellyn QC, sitting as a Deputy High Court judge, dismissed a libel claim over tweets and re-tweets. In stark contrast to Judge White in *Hockey*, Judge Seys-Llwellyn considered tweets to have an 'ephemeral nature', where 'one tweet will be pushed down the timeline by newer tweets'. His Honour referred to evidence given by the First Defendant:

'[They] have a publication lifetime that is ordinarily measured in minutes or hours. Users of Twitter see a stream of tweets from those users or issues they follow. Older tweets are pushed down a user's views in real time, so typically most users only see a small fraction →



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## Australia: Social Media and Defamation



← of their potential stream during the time they are online and using Twitter. Older tweets rapidly become very unlikely to be viewed. The time frame will vary on how many users a person follows and how prolific these people are, but for most people this degradation will occur over tens of minutes. The only way to see older tweets is typically to make the unusual step of actively searching for them.

The decision in *Lord McAlpine of West Green v. Sally Bercow*, however, was less comforting. This case considered a report, published by the BBC, relating to child abuse in Wales and mentioned the involvement of a 'leading conservative politician from the Thatcher years'. The wife of the then Speaker of the House of Commons, Mrs Bercow published a tweet 'Why is Lord McAlpine trending? \*innocent face\*'.  

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Mr Justice Tugendhat formed the view that a reasonable reader would understand the words 'innocent face' as being insincere and ironical. He thought that the reader would assume that McAlpine fitted a description of the unnamed abuser. The Judge found that by repeating the BBC story and providing the last piece in the jigsaw (naming the politician) the defendant had basically made the allegation herself, that Lord McAlpine was a paedophile. The case then settled.

Leading UK media QC Hugh Tomlinson raises the question, how would a tweet reader link the BBC report to the tweet? I agree with him. There are millions of tweets that leave people in doubt as to what they actually refer to.

### Calls for reform

The decision in *Hockey* is a reminder that it is important to revisit our laws as society and circumstances change. Recent developments in the UK provide a sound grounding for this process, with UK journalists provided a greater level of protection than their Australian counterparts. The UK has introduced a requirement that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the plaintiff. Australia's defence of triviality is weak and a similar provision to that in the UK should be introduced. The UK's single publication rule, which applies to the first publication of the matter regardless of the medium is another important consideration. The balancing act between freedom of speech and protection of reputation can never be perfected on the statute books. Circumstances change too quickly. However, reform similar to that undertaken in the UK will ensure that Australia's legislative framework is flexible enough to meet the challenges posed to freedom of speech in the future. ■



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