

THE MEDIA AND
ENTERTAINMENT
LAW REVIEW

Editors

R Bruce Rich and Benjamin E Marks

THE LAWREVIEWS

THE MEDIA AND ENTERTAINMENT LAW REVIEW

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PREFACE

We are very pleased to serve as editors and US chapter authors of this important survey work on the ever-evolving state of the law globally as affects the day-to-day operations of the media and entertainment industries.

This work is especially timely given the ongoing challenges to press freedom at the instance of repressive governmental regimes – a phenomenon, it should be noted, that is also testing the strength of free speech traditions in the world's most protective speech regime, the United States. It is equally well-timed in light of the ongoing digital revolution, which has created new challenges in both applying existing intellectual property laws, such as copyright, to the internet setting, and developing appropriate legislative and regulatory responses that meet current e-commerce, and rights holder and consumer protection needs.

This volume should be understood to serve, not as an encyclopaedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries, but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Our contributors are subject field experts, whom we gratefully acknowledge for their efforts. Each has used his or her best judgement as to the topics to highlight, recognising that space constraints require selectivity. As will also become plain, aspects of this legal terrain, particularly as relate to the legal and regulatory treatment of digital commerce, is very much in a state of flux, with many open issues of the moment remaining for future clarification.

The usual caveat is in order: of necessity, this work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel should continue to serve that function.

R Bruce Rich and Benjamin E Marks

Weil, Gotshal & Manges LLP

New York

November 2019

AUSTRALIA

Sophie Dawson, Jarrad Parker, Joel Parsons and Katrina Dang¹

I OVERVIEW

The year 2019 has seen the largest suite of law reform processes in Australian media law history, as regulators grapple with the implications of globalisation and convergence of the media and entertainment industries.

The most significant of these is the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Review, which resulted in the Digital Platforms Review Final Report, published on 26 July 2019 (the ACCC Report). The ACCC Report recommends significant changes to Australia's privacy laws and an inquiry in relation to the supply of advertising technology services and advertising agencies, codes of conduct to deal with disinformation and to govern the relationship between digital platforms and media organisations, and a variety of competition law, copyright, anti-disinformation, tax and educational measures.

There are also significant reviews and inquiries underway in relation to Australian defamation laws, court reporting and press freedoms.

Each of the reviews is considering, or has considered, Australia's existing media, communications or security laws. At the moment, in addition to defamation, copyright and other platform-neutral laws, Australia's media laws include platform-specific laws, with television and radio broadcasters regulated more extensively than other platforms.

Police raids on journalists and a trial relating to security laws (which is being held in closed court) have also caused the public and media to focus on Australia's whistle-blowing and official secrecy laws. These are the focus of the Parliamentary Joint Committee on intelligence and security.² In addition, the Environment and Communications References Committee is considering the adequacy of Commonwealth laws and frameworks covering disclosure, and reporting of sensitive and classified information.³

1 Sophie Dawson is a partner, Jarrad Parker and Joel Parsons are senior associates and Katrina Dang is an associate at Bird & Bird.

2 See www.apf.gov.au. Hearings were heard on 14 August 2019, 19 September 2019 and 20 September 2019. The Committee is due to report back to both houses of parliament on 28 November 2019.

3 See www.apf.gov.au. The closing date for submissions was 30 August 2019, and the Committee is due to report back on 4 December 2019.

II LEGAL AND REGULATORY FRAMEWORK

i Defamation laws

Australia's defamation laws, like those of the UK and the US, are largely based on common law principles originally developed in England.

They do not include the serious harm requirement introduced in the UK in 2013,⁴ nor do they contain the US public figure defence.⁵

In 2005, largely uniform defamation legislation was enacted in each Australian state and territory (the Uniform Defamation Acts) to harmonise Australian defamation laws. This legislation modifies certain common law principles relating to the question of whether and in what circumstances a cause of action arises, and in relation to damages. It also contains statutory defamation defences that apply in addition to common law defamation defences.

In Australia, it is necessary for a defamation plaintiff to establish:

- a publication (which may occur by any means of communication);
- b a defamatory meaning (a meaning that would be likely to cause the ordinary reasonable reader to think less of the plaintiff, or to shun and avoid him or her); and
- c identification (that some or all readers would understand the relevant communication as relating to the plaintiff).

The Uniform Defamation Acts provide that for-profit companies with 10 or more employees do not have a cause of action for defamation.⁶ It also changes the choice of law principle applicable to publication to persons within Australia, such that the applicable law is the law with the closest connection with the harm occasioned by the publication, which is determined by reference to a number of factors.⁷

Once a cause of action is established, the defendant will be liable unless it, he or she can establish a defence. The statutory defences are in addition to their common law counterparts. Key defences include:

- a common law and statutory qualified privilege defences;
- b fair protected report defences (which protect fair reports of court, tribunal and parliamentary proceedings);
- c justification (truth) defences;
- d contextual truth defence;
- e an honest opinion defence (which requires that the material for comment is included in or adequately referred to in the matter complained of);

4 Defamation Act 2013 (UK) Section 1(1); see also *Lachaux v. Independent Print Limited & Ors* [2015] EWHC 2242.

5 The public figure defence was established in *New York Times Co v. Sullivan* 376 US 254 (1964), and is a development of the common law qualified privilege defence. In Australia, there is a category of common law qualified privilege in relation to government and political matters that protects publications that are reasonable in the circumstances. The latter category flows from the implied constitutional freedom of speech in relation to government and political matters discussed in Section III.i.

6 See, for example, Section 9 of the Defamation Act 2005 (NSW).

7 See Section 11 of the Defamation Act 2005 (NSW). At common law, a cause of action arises each time defamatory material is read or received, and the law applicable to each cause of action is that of the place in which the recipient of the communication is situated: *Dow Jones & Co Inc v. Gutnick* (2002) 210 CLR 575.

- f* innocent dissemination (of particular relevance to internet content hosts, newsagents and other distributors); and
- g* triviality defence.

In addition, Clause 91 of Schedule 5 of the Broadcasting Services Act 1992 (Cth) provides immunity from state and territory laws and common law and equitable principles to internet service providers and internet content hosts where they are not aware of the nature of the content in question. Clause 91 has not been considered by the courts, and the extent of the protection that it gives such entities is uncertain.

There has been controversy in the past year in relation to certain decisions concerning liability for online publications.

The High Court in *Trkulja v. Google LLC*⁸ rejected findings by the Court of Appeal, which, in effect, applied special tests and considerations to determine whether search engine results were capable of defaming a plaintiff. The *Trkulja* case also confirms that search engines bear the onus of establishing 'that the degree of its participation in the publication of the impugned search results was such that it should not be held liable'.⁹

In the case of *Voller v. Nationwide News Pty Ltd*; *Voller v. Fairfax Media Publications Pty Ltd*; and *Voller v. Australian News Channel Pty Ltd*¹⁰ (*Voller*), media organisations were found to be 'primary publishers' of third-party comments made on their Facebook sites, with the consequence that they are liable for those comments as publishers from the time that they are posted regardless of whether they have received any complaint. This decision has been appealed, and media organisations have criticised it.¹¹

There is currently a review by the Defamation Working Party of Australia's defamation laws. That review has the support of Commonwealth, state and territory attorneys general. It is considering issues including whether to introduce a 'serious harm' test and what rules should apply in relation to online publications, including whether there should be clear take down requirements.¹²

ii Privacy laws

Privacy in Australia is regulated by a complex web of Commonwealth, state and territory legislation, as well as equitable (confidentiality) and potentially also common law principles.

The principal privacy law in Australia is the Privacy Act 1988 (Cth). This Act contains 13 Australian Privacy Principles that are the primary rules relating to collection, use and disclosure of, and access to, data held by private sector organisations, including media organisations.

Importantly, there is an exemption in the Privacy Act in relation to acts in the course of journalism by media organisations that have publicly committed to standards dealing with privacy in a media context. Most media organisations have made relevant public commitments

⁸ (2018) 92 ALJR 619; [2018] HCA 25.

⁹ [2018] HCA 25 at [41].

¹⁰ [2019] NSWSC 766.

¹¹ See, for example, www.theguardian.com/commentisfree/2019/jul/08/lawyers-are-now-free-to-cherrypick-defamatory-facebook-comments-looking-for-nuggets-of-gold.

¹² See www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx.

(eg, to the Press Council Privacy Principles,¹³ or, in the case of broadcasters, the relevant code of practice).¹⁴ This is important, as the Australian Privacy Principles would otherwise prevent media organisations from collecting sensitive information without consent, except in very limited circumstances.¹⁵

The ACCC Report focuses on advertising technology and other privacy practices of digital platforms. It concludes that certain changes should be made to Australian privacy laws, and raises the question of whether they should be more broadly reviewed. The Treasury is receiving submissions in relation to the ACCC Report, and the government will then respond to it.

There is mixed case law in Australia on the question of whether there is a cause of action for invasion of privacy either in the form of a tort or as a species of breach of confidence. In *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*,¹⁶ the High Court left the question of whether such a cause of action is available open. Since then, lower courts have, in different cases, made conflicting decisions about whether such a cause of action exists and on what basis. In *Doe v. Fairfax Media Publications Pty Ltd*,¹⁷ Fullerton J considered whether there was a cause of action based on equitable duties of confidence in relation to a victim of sexual assault in relation to an alleged breach of the statutory prohibition on publication of identification of the victims in proceedings in Section 578A of the Crimes Act. Fullerton J found that no such cause of action was available. Ultimately, however, the question of whether there is a breach of privacy cause of action in tort or as a species of breach of confidence will be determined by the High Court (the Australian ultimate court of appeal) or by statute. The ACCC Report recommends that a statutory privacy tort be introduced. The government will respond to that proposal after further submissions have been received and considered. Similar proposals have been made by the Australian Law Reform Commission previously (most recently in 2014) and have not resulted in any change to the law.¹⁸

iii Additional regulation of broadcasters

Broadcasters are also regulated under the Broadcasting Services Act 1992 (Cth), and are subject to licence conditions, codes and standards developed in accordance with the Act.

Key content rules for television broadcasters are contained in the Commercial Television Code of Practice. The Code contains rules relating to advertising time and placement on television, gambling advertising, programme classification and rules for news reporting requiring accuracy, fairness and respect for privacy. The Code is registered by the Australian Communications and Media Authority (ACMA). Content standards promulgated by the ACMA contain Australian content requirements. There are also children's television standards.

Radio broadcasters are similarly subject to a similar regulatory scheme, and the Commercial Radio Code of Practice, which is registered with the ACMA, contains key rules relating to content.

13 www.presscouncil.org.au/privacy-principles/.

14 See, for example, the Australian Commercial Television Code of Practice, www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/broadcasting-codes-schemes-index-radio-content-regulation-i-acma.

15 See Australian Privacy Principle 3.3.

16 [2001] HCA 63.

17 [2018] NSWCA 1996.

18 See 'Serious Invasions of Privacy in the Digital Era: Final Report', ALRC Report 123, June 2014.

iv Additional regulation of the internet

Schedule 7 of the Broadcasting Services Act 1992 enables the ACMA to issue notices to hosting services, live content services and links services in relation to prohibited content (generally content that is refused classification or in breach of classification requirements). Schedule 8 regulates online gambling services.

v Key regulators

The ACMA is the key regulator for broadcasters, internet service providers and in relation to direct marketing by electronic means. It administers legislation, including the Broadcasting Services Act 1992 (Cth), the Spam Act 2003 (Cth) and the Telecommunications Act 1997 (Cth).

The Australian Privacy Commissioner has responsibility for administering the key private sector privacy legislation, the Privacy Act 1988 (Cth).

The ACCC has recently become active in the media law area, as discussed in Section I.

The Australian Press Council is a self-regulatory body that hears complaints in relation to publications by print and online publishers.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Australia does not have any express constitutional freedom of speech.

However, the Australian High Court has repeatedly confirmed that an implied freedom of speech in relation to government and political matters arises from Australia's Constitution. When construing legislation, a presumption applies that the law was intended to be consistent with this implied constitutional freedom (which may affect the way in which it is interpreted). Laws that are not consistent with the implied constitutional freedom even after that presumption has been applied are invalid.

A majority of the High Court in *McCloy and Others v. New South Wales and Another* found that the test for the constitutional validity of a law is as follows:

1. Does the law effectively burden the freedom in its terms, operation or effect?

If 'no', then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as 'compatibility testing'.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is 'no', then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

- *suitable – as having a rational connection to the purpose of the provision;*
- *necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;*
- *adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.*

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be ‘no’ and the measure will exceed the implied limitation on legislative power.¹⁹

The High Court considered these principles in 2019 in the context of laws restricting communication, and protest, in relation to the subject of abortion in safe access zones near abortion clinics. Those laws were found to be constitutionally valid. The Court found that they were for a legitimate purpose (to protect the privacy and dignity of people attending the clinic) and were not disproportionate (they were neutral as between pro and anti-abortion view points, and only applied in a restricted area). The law relating to communication generally was not found to burden political speech as it was not connected to any election process (which meant that it did not infringe the implied freedom). The law in relation to protests was found to burden political speech, and was found to be valid on the basis above (it was for a legitimate purpose and was not disproportionate).

There is also case law to support the proposition that principles of open justice are similarly the subject of implied constitutional protection. In *Russell v. Russell*,²⁰ a Commonwealth law requiring state courts to hold family law proceedings in closed court was found by a majority of the High Court to be constitutionally invalid. Barwick C J observed that ‘the courts of the States . . . are in general required, because of the nature of the courts themselves and of the functions they perform, to sit and exercise jurisdiction in a place open to the public’. The Court in that case found that the Commonwealth did not have power to regulate state courts, and that the circumstances in which state courts can be closed must be regulated by state legislatures.

Principles of open justice have been the subject of close attention in the past year for two reasons. First, the NSW Law Reform Commission is conducting a review of laws affecting open justice, and the Victorian Law Reform Commission is conducting a review of contempt laws.²¹ Second, journalists and media organisations have been charged with contempt in relation to publications in connection with the trial of Archbishop George Pell.

19 *McCloy and Others v. New South Wales and Another* (2015) 325 ALR 15 at 18–19 per French C J and Kiefel, Bell and Keane J J.

20 (1976) 9 ALR 103.

21 See www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Courtinformation/Project_update.aspx; and www.lawreform.vic.gov.au/all-projects/contempt.

ii Newsgathering

Key laws affecting newsgathering in Australia include the law of trespass, surveillance laws and criminal laws prohibiting the release to the media of certain information concerning government and security matters.

Under the law of trespass, journalists can go to the front door of a private property to request permission to film, but if refused permission cannot thereafter film on the property.

Australia has state, territory and Commonwealth surveillance laws, which are different in substance. Consequently, it is important to understand which laws apply in the state or territory in which newsgathering activities are undertaken. There are surveillance laws affecting the recording of conversations, use of devices to hear or monitor conversations, video recording, use of tracking devices and computer surveillance. In relation to the recording of conversations, the Commonwealth law applies in respect of any communications intercepted when passing over the public switched telephony network, and state and territory laws generally otherwise apply. The applicable law is generally that of the state in which the recording is made.

Carriers and carriage service providers have obligations to retain certain telecommunications under the Telecommunications (Interception and Access) Act 1997 (Cth). Those obligations have been criticised on the basis that they give certain intelligence agencies a means to identify journalists' sources. In order to do so, they must obtain a warrant from a judicial officer or lawyer appointed by the relevant minister. Hearings take place in secret and without participation by the journalist, which has given rise to concern about the adequacy of the protection this process offers.²²

iii Freedom of access to government information

Australia has a federal system, with Commonwealth, state and territory governments. Freedom of information legislation is in place in relation to the Commonwealth and each state and territory.²³ The legislation enables journalists to seek access to documents held by government agencies. The documents must be produced unless an exception applies. Media organisations are concerned that agencies too often rely upon exceptions and have called for reforms to facilitate more extensive, and faster, media access to important government documents.²⁴

Court rules also allow for journalists to seek access to documents about court proceedings. In general, access is allowed to material read or relied upon in open court unless a suppression order is in place, or there are exceptional circumstances. In general, access to material on a court file that has not yet been read or relied on in open court is not readily given.

iv Protection of sources

Article 3 of the Media, Entertainment and Arts Alliance Code of Ethics requires that journalists should aim to attribute information to its source and not agree to anonymity without first considering the source's motives and any alternative attributable source. It provides that

22 See, for example, 'Impact of the Exercise of Law Enforcement and Intelligence Powers on the freedom of the press: submission to the Parliamentary Joint Committee on intelligence and security', Professor Peter Fray, Professor Derek Wilding and Richard Coleman, 31 July 2019.

23 See, for example, the Freedom of Information Act 1992 (Cth).

24 www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark.

‘where confidences are accepted, respect them in all circumstances’. Australian professional journalists generally abide by this rule, and some have gone to jail for not revealing sources when ordered to do so.

The newspaper rule (also known as ‘the rule in *Cojuangco*’) allows media organisations to avoid disclosing sources until the final hearing of a defamation action. If, however, a journalist gives evidence at the final hearing (which is important for defences such as statutory qualified privilege) and is asked to reveal a source then he or she is obliged to do so, and refusal to do so constitutes contempt.

Under Section 126K of the Evidence Act (Cth), journalists are protected from compulsion to disclose confidential sources, but this is subject to a power of the court to order disclosure if it is satisfied that the public interest in requiring an answer outweighs countervailing public and private interests. Each state and territory, except for the Northern Territory, has similar provisions in place.

v Private action against publication

The main basis upon which injunctive relief restraining publication is obtained in Australia is breach of confidence. This cause of action is available where the journalist is subject to a duty of confidence or (more commonly) is on notice of a breach of confidence by his or her source. Equity generally imposes a duty of confidence on a person who is on notice that information has been imparted to him, her or it in breach of confidence.

Australian courts do not generally grant injunctive relief on the basis of defamation. The reason for this is that the courts recognise that there is a public interest in freedom of speech.

vi Government action against publication

In June 2019, the Australian Federal Police (AFP) executed search warrants against media companies and journalists related to media coverage critical of the government and defence force. The relevant coverage was as follows:

- a* In 2017, the state-owned Australian Broadcasting Corporation (ABC) published a series of stories collectively called *The Afghan Files*, which detailed allegations regarding members of the Australian special forces when on tour in Afghanistan, including allegations of unlawful killings.
- b* In 2018, News Corporation’s newspaper *The Daily Telegraph* published a story reporting that the heads of the Defence and Home Affairs ministries had discussed the potential for the Australian Signals Directorate to be given powers to secretly access emails, bank accounts and other personal data, provided it had approval from relevant government ministers.

The AFP executed search warrants at the ABC’s Sydney-based head office, as well as at the home of a News Corporation journalist, Annika Smethurst. The search warrants were the result of investigations into the alleged unauthorised disclosure of government information by a Commonwealth officer, contrary to Section 70 of the Crimes Act 1914 (Cth) (since repealed and replaced by Part 5.6 of the Criminal Code Act 1995 (Cth)).

While this legislation is framed broadly, as an offence akin to breach of confidentiality, it has been used in this instance to address concerns regarding the handling of national security information.

The AFP is currently prosecuting one former Commonwealth official and his lawyer in relation to allegations that they leaked documents pertaining to the ABC's publication. The AFP has also confirmed that it is considering prosecutions against the journalists who authored the publications. These matters are ongoing.

On 4 July 2019, the Parliamentary Joint Committee on Intelligence and Security commenced an inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. The Committee has been requested to report back to both houses of parliament in the near future.

In October 2019, Australia's major media organisations, through Australia's 'right to know', launched a campaign against Australian government secrecy seeking reform of laws, including better whistleblower protections and court oversight of various government powers. The campaign included extensive advertising and editorial content highlighting the problems with existing laws and practices.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The Copyright Act 1968 (Cth) (the AU Copyright Act) is the predominant source of Australia's copyright law and gives protection to:

- a* 'works', being literary, dramatic, musical and artistic works; and
- b* 'subject matter other than works' (sound recordings, cinematograph films, radio broadcasts, television broadcasts and published editions).

The AU Copyright Act gives rights holders the exclusive right to carry out certain acts in respect of copyright-protected material in Australia, including the communication of the work to the public, and provides for various mechanisms for enforcement if those rights are exercised by others without authorisation. Protections have recently been extended to allow rights holders to obtain website-blocking injunctions.

For copyright to subsist in a work or subject matter other than works under the AU Copyright Act:

- a* the work must be original²⁵ (there is no requirement of originality for the subsistence of copyright in subject matter other than works);
- b* it must have the necessary 'connecting factor' between the relevant material and the author or Australia. The required connecting factor depends not only on the type of material but also on whether or not the work has been published. For example, for a published sound recording, copyright subsists if the maker was an Australian citizen or person resident in Australia or a body corporate incorporated under a law of the Commonwealth or a state of Australia,²⁶ the recording was made in Australia,²⁷ or the first publication of the recording took place in Australia;²⁸ and

25 AU Copyright Act, Section 32.

26 *id.*, Section 89(1).

27 *id.*, Section 89(2).

28 *id.*, Section 89(3).

- c most types of works or subject matter other than works must be reduced to a material form. For example, in the case of a literary work, it must be reduced to writing or some other material form.²⁹ However, a sound or television broadcast is protected once it is made from a place in Australia.³⁰

Australian copyright law largely reflects the basic framework provided by the Berne Convention: national treatment and automatic protection are reflected in the AU Copyright Act. However, there are some variations. For example, the terms of protection in Australia are longer than the minimums provided for under the Berne Convention. Generally, the AU Copyright Act provides protection for the life of the author, and 70 years after the end of the year of the author's death. In respect of duration of protection, see item (c).³¹

Recent changes to Australian copyright law include:

- a measures to prevent online piracy. On 11 December 2018, the website-blocking provisions in Section 115A of the AU Copyright Act were amended and expanded to make it easier for rights holders to obtain injunctions requiring internet service providers to block access to online locations facilitating copyright infringement. The provisions now also allow for injunctions that require search engine providers to prevent the dissemination of search results that link to online locations facilitating copyright infringement;
- b extension of 'safe harbours'. On 29 December 2018, further limitations were introduced on liability under the AU Copyright Act of service providers in the disability, education and cultural sectors in relation to their activities online; and
- c changes to copyright duration. On 1 January 2019, new time limitations for copyright protection came into force, and protection for unpublished materials became subject to a time limitation (previously unlimited). In certain circumstances, durations are, in effect, now shortened.

Recent notable infringement or enforcement disputes include:

- a *Roadshow Films Pty Limited v. Telstra Corporation Limited*:³² successful application pursuant to Section 115A of the AU Copyright Act by film studios resulting in the blocking of various domain names and IP addresses, accessible via apps installed on TV smart boxes;
- b *Australasian Performing Right Association Ltd v. Telstra Corporation Limited*:³³ successful application pursuant to Section 115A of the AU Copyright Act by music rights holders resulting in the blocking of various domain names of websites providing facilities for material to be ripped from YouTube sites; and
- c *Hells Angels Motorcycle Corporation (Australia) Pty Ltd v. Redbubble Ltd & Anor*:³⁴ claim by Hells Angels Motorcycle Corporation (Australia) Pty Ltd, which included a copyright infringement claim, against Redbubble, operator of a website allowing users to upload images on various goods, before arranging the production and distribution of

29 id., Section 22.

30 id., Section 91.

31 See the Resale Royalty Right for Visual Artists Act 2009 (Cth).

32 [2018] FCA 582.

33 [2019] FCA 751.

34 [2019] FCA 355.

goods. The copyright claim failed due to lack of proof of ownership, but it was found that Redbubble would have infringed copyright, in operating the relevant website, if ownership had been established.

The most significant recent reform proposal has been recommendation 8 of the ACCC Report, following its recent inquiry in digital platforms. Recommendation 8 proposes that digital platforms (online search engines, social media and digital content aggregators) be subject to a mandatory industry code providing for certain standards around copyright take-down requests. It is proposed that under the code, among other matters, digital platforms would be subject to certain time frames to act on copyright take-down requests. An intended consequence of this recommendation is the increased likelihood that digital platforms could, in certain circumstances, be found to be authorisers of copyright infringement under the AU Copyright Act.

ii Personality rights

Australia does not have personality rights in the same sense as the US.

Some relevant protection is, however, provided under the Australian Consumer Law (ACL), Schedule to the Competition and Consumer Act 2010 (Cth) (CCA), and the tort of passing off, and it is common for plaintiffs to rely upon both of these causes of action. For example, in *Hogan v. Pacific Dunlop Ltd*,³⁵ Paul Hogan, the actor who portrayed Crocodile Dundee, successfully sued Pacific Dunlop Ltd, which used a proximate portrayal of the Crocodile Dundee character in its advertising, which was found to be a misleading representation that Mr Dundee endorsed Dunlop.

The ACL prohibits a number of unfair business practices. Section 18 of the CCA prohibits conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. The CCA provides for private rights of suit against individuals and corporations that engage in this conduct, which can be used to protect personality rights.

In addition, Section 29(1) specifically prohibits individuals and corporations, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with their promotion, from:

- a* making false or misleading representations that a particular person has agreed to acquire goods or services;
- b* making false or misleading representations that purport to be testimonials by any person relating to goods or services;
- c* making false or misleading representations, relating to goods or services, concerning:
 - a testimonial by any person; or
 - a representation that purports to be such a testimonial;
- d* making false or misleading representations that goods or services have sponsorship, approval, performance characteristics accessories, uses or benefits; or
- e* making false or misleading representations that the person making the representation has a sponsorship, approval or affiliation.

Reputation is also frequently protected by way of defamation (see Section III.v).

35 (1988) 83 ALR 403.

iii Unfair business practices

A variety of different laws may be brought to bear in relation to editorial malpractice. These include copyright (in the case of misappropriation), restrictions on publication, such as *sub judice* contempt of court, and the laws of defamation. There are also standards and codes of practice enforced by bodies such as the Australian Press Council (with respect to newspapers, magazines and associated digital titles) and the Australian Communications and Media Authority (with respect to broadcasting and telecommunications). For example, in 2018, the Australian Communications and Media Authority found that a segment that aired on a network television morning programme, *Sunrise*, provoked serious contempt on the basis of race in breach of the Commercial Television Industry Code of Practice. Litigation was commenced by the network over the decision but later ceased.

V COMPETITION AND CONSUMER RIGHTS

i Enforcement proceedings

In 2019, Australian courts handed down two key judgments in the media and entertainment space. The first case is a prosecution brought by the ACCC against ticket reseller Viagogo AG. In this case, the Federal Court found that Viagogo contravened the ACL, and misled consumers. Viagogo's impugned conduct included claiming that tickets to certain events were scarce when this only related to the number of tickets available on Viagogo's platform, creating a false sense of urgency. The Federal Court also found that Viagogo's use of the word 'official' on its website and online marketing was misleading, as consumers were led to think that they were purchasing tickets from an official retailer, when in fact, Viagogo is only a reselling platform. It was also held that Viagogo failed to sufficiently disclose additional fees or specify a single price for tickets.

The second case was a prosecution brought by the ACCC against Valve Corporation, one of the largest online gaming retailers and operators of the Steam distribution platform. In this case, the Federal Court held that Valve breached the ACL by representing that consumers were not entitled to receive a refund for any games. This representation was held to mislead customers as to the nature of consumer guarantees. Valve was ordered to pay a penalty of A\$3 million.

ii Mergers and acquisitions

In October 2017, the ACCC updated its Media Merger Guidelines³⁶ in response to changes to Australia's media control and ownership laws under the Broadcasting Service Act 1992. Since these reforms, the ACCC has approved several key mergers and acquisitions in the media and entertainment industry in Australia, including the merger of Nine Entertainment and Fairfax Media (which created Australia's largest media company). In the past 24 months, it has also approved JCDcaux SA's acquisition of APN Outdoor Group Limited, oOh!media Limited's acquisition of Adshel Street Furniture Pty Ltd, and Seven Network and Nine Network's acquisition of Network Ten's shares in TX Australia, a company providing transmission services.

36 The ACCC's Media Merger Guidelines provide guidance on the ACCC's approach when assessing whether to approve media mergers, and outline potential areas of focus for the ACCC when assessing mergers in the media sector.

VI DIGITAL CONTENT

Australia does not have any equivalent of the United States' Section 230 of the Communications Decency Act.

Clause 91 of Schedule 5 of the Broadcasting Services Act 1992 (Cth) provides immunity from state and territory laws and common law and equitable principles to internet service providers and internet content hosts where they are not aware of the nature of the content in question. Clause 91 has not been considered by the courts, and the extent of the protection that it gives these entities is uncertain. In particular, based on the decisions relating to publication principles discussed directly below, the threshold for relevantly having knowledge of the 'nature of' content may be low.

Online publications can give rise to civil liability under various doctrines, including defamation and (in cases where confidentiality has been breached) breach of confidence.

There are also various statutory crimes that affect publication online and elsewhere. A new crime relating to streamed content was introduced in 2019 in response to the streaming of shootings in New Zealand, with the passage of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (the Act). The Act contains offences that apply to internet service providers, content services and hosting services in relation to failure to remove or report 'abhorrent violent material'.

Material will only be abhorrent violent material if it meets four criteria. First, the material must be in the nature of streamed or recorded audio, visual or audiovisual material.

Second, it must record or stream 'abhorrent violent conduct', which is defined to include terrorist acts, murder, attempts to murder, torture, rape and kidnapping.

Third, it must be material that reasonable persons would regard in all circumstances as being offensive.

Fourth, it must be 'produced' by a person (or two or more persons) who engaged in, conspired to engage in, attempted to engage in, or aided, abetted counselled or procured, or who was knowingly concerned in, the abhorrent violent conduct. It does not, therefore, apply in respect of material prepared by journalists (though it may apply in respect of any streaming by a journalist of footage originally produced by a perpetrator of the relevant conduct).

Failure to report

Section 474.33 of the Act makes it an offence for an internet service provider, content service or hosting service (together, the regulated providers) to fail to refer material to the AFP where the relevant person:

- a* is aware that the service provided by the person can be used to access particular material that the person has reasonable ground to believe is abhorrent violent material that records or streams abhorrent violent conduct that has occurred, or is occurring, in Australia; and
- b* does not refer details of the material to the AFP within a reasonable time of becoming aware of the existence of the material.

This is not the only offence relating to failure to report crime. For example, under Section 316(1) of the Crimes Act 1900 (NSW), it is a crime punishable by up to two years in prison to fail to report a serious indictable offence.

Section 474.34 of the Act makes it an offence for a person to fail to ensure the expeditious removal of abhorrent violent material from a content service provided by that person. The fault element in relation to this material being accessible through the service and in relation to failure to expeditiously remove it is recklessness.

Defences to this offence are expressly provided for in Section 474.37(1) of the Act, which provides that the offence in Section 474.34(1) of the Act does not apply where:

- a* the material relates to a news report, or a current affairs report, that is in the public interest and is by a person working in a professional capacity as a journalist;
- b* the accessibility of the material relates to the development, performance, exhibition or distribution, in good faith, of an artistic work;
- c* the accessibility of the material is for the purpose of advocating the lawful procurement of a chance to any matter established by law, policy or practice in an Australian or foreign jurisdiction, and the accessibility of the material is reasonable in the circumstances for that purpose;
- d* the accessibility of the material is necessary for law enforcement purposes, or for monitoring compliance with, or investigating a contravention of, a law;
- e* the accessibility of the material is for a court proceeding;
- f* the accessibility of the material is necessary and reasonable for scientific, medical, academic or historical research; or
- g* the accessibility of the material is in connection with and reasonable for the purpose of an individual assisting a public official in relation to the public official's duties or functions.

The Act added to relevant offences already in the Commonwealth Criminal Code. For example, Section 474.17 makes it an offence to use a carriage service in a way that reasonable persons would consider to be menacing, harassing or offensive. Section 474.22 makes it an offence to access, publish or transmit child abuse material, and Section 474.25 makes it an offence for an internet content provider or internet content host to fail to report child pornography material to the AFP within a reasonable time of becoming aware of it.

There are also state and territory statutory restrictions on publication and various offences that can be committed through internet publication.

VII CONTRACTUAL DISPUTES

Licensing disputes occasionally arise within the media and entertainment sector in Australia. They are heard at first instance before the Copyright Tribunal of Australia (the Tribunal), which has jurisdiction with respect to statutory licences (or statutory exclusions from infringement) and licences negotiated between the copyright owner, or its representative, and the licensee. A decision of the Tribunal can be appealed to the Federal Court.

The limits of the Tribunal's powers were recently tested in *Phonographic Performance Company of Australia Ltd v. Copyright Tribunal of Australia*.³⁷ The Phonographic Performance Company of Australia (PPCA) is an organisation representing copyright owners of sound recordings. In 2017, the Tribunal made a determination that the licensing scheme between PPCA and Foxtel should be varied to permit Foxtel to use the sound recordings on its streaming platform, Foxtel Now. On appeal, the Federal Court found that neither the PPCA

37 [2019] 368 ALR 203.

nor its members were willing to grant Foxtel the right to stream their work on Foxtel Now. The Tribunal had overstepped its powers by proposing a scheme that is not in respect of rights that the licensor is willing to license.

VIII YEAR IN REVIEW

As can be seen above, 2019 has been a year in which serious issues have been identified in relation to Australia's existing media law settings, coupled with a concentrated effort to consider the changes that should be made.

IX OUTLOOK

In the coming year, the outcomes of the various review processes should become clear. At a minimum, it can be expected that changes will be made to defamation laws to address problems with the drafting of the 2005 laws that have emerged through case law (such as in relation to the current contextual truth). More substantial reform, such as introduction of a serious harm test, is also a possibility. The likely future of Australian privacy law and of regulation of the interactions between digital platforms and the media will also become clearer.

BELARUS

Kirill Laptev and Pavel Lashuk¹

I OVERVIEW

The dynamic development of the media and entertainment industry, and the development of new instruments and technologies, has resulted in active legislative activities aimed at navigating the evolving landscape of the sector.

Recent trends include continuous improvement of legislation. Special attention is devoted to the introduction of new regulation in the intellectual property sphere, and legislative developments focus on the issues of personal data protection.

The Strategy of the Republic of Belarus in the sphere of intellectual property for 2012–2020² sets forth key points for future activities emphasising the development of institutional and legislative frameworks for the efficient functioning of a national intellectual property system.

The Information Security Concept of the Republic of Belarus 2019 (the Concept), adopted by Resolution No. 1 of the Security Council of the Republic of Belarus of 18 March 2019, addresses the issue of harmful content dissemination in the informational sphere. The Concept is a system of official views on the nature of, and content relating to, ensuring national security in the informational sphere. It also defines strategic tasks and priorities in the field of information security. In particular, the Concept establishes that relations in the field of mass media are based on the principles of legality, reliability, respect for human rights and freedoms, diversity of opinions and protection of morality, among others. Along with the constitutional provision of freedom of speech in Belarus, to comply with these principles, legislative requirements are established for the dissemination of mass media that is consistent with international practice and generally accepted social standards. There is a public control over the dissemination of illegal and inaccurate information in the information space. At the state level, measures are being taken to prevent the dissemination of information that could harm national interests and inaccurate information, as well as to reduce anonymity in the information space. When broadcasting content, it is not permitted to use hidden technological methods that affect the subconscious of people or have a harmful effect on their health. State bodies and other organisations must follow the Concept in their practices.

Current legislation provides for additional authorisation needed to carry out activities in the media sector. According to the Mass Media Law,³ the mass media are subject to a state registration procedure. TV and radio broadcasting are additionally subject to obtaining

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2 Adopted by Resolution No. 205 of the Council of Ministers of 2 March 2012.

3 Law of the Republic of Belarus of 17 July 2008 No. 427-Z ‘On mass media’.

a licence, which may be obtained by the mass media editor or by a foreign organisation. However, a licence is not needed if the broadcasting is carried out by a telecommunications operator without changing the form or content of the broadcast product:

- a* under a permit to distribute the products of a foreign mass media;
- b* under a contract with a legal entity entrusted with the functions of the editor of the mass media; or
- c* if the foreign organisation has a licence in the field of broadcasting.

The Mass Media Law defines ‘internet resource’ as a website, web page, forum, blog, application for a mobile device or other information resource (its component), located in the internet, through which mass media is distributed. As a general rule, the Mass Media Law applies to internet resources. An internet resource may be registered as an online edition and, consequently, be treated as mass media under the Mass Media Law.

Certain regulations apply specifically to internet resources. The Mass Media Law provides for a number of duties for internet resource owners, including social network owners, which involve the introduction of additional measures for analysing and monitoring information on such internet resources. In particular, further to the Mass Media Law requirement, the Regulation on the procedure for preliminary identification of internet resource or online edition users approved by the Resolution of the Council of Ministers of the Republic of Belarus of 23 November 2018 No. 850 (the Regulation on Pre-Identification) elaborates the requirements of user identification. The owner of an internet resource or online edition must identify users that leave a message in a comments section or forum; in particular, via the short message service verification mechanism.

II LEGAL AND REGULATORY FRAMEWORK

The main legislative acts regulating the media and entertainment sector in Belarus are:

- a* the Civil Code of the Republic of Belarus of 7 December 1998 No. 218-Z;
- b* the Mass Media Law;
- c* the Law of the Republic of Belarus of 10 November 2008 No. 455-Z ‘On information, informatisation and information (data) protection’;
- d* the Law of the Republic of Belarus of 17 May 2011 No. 263-Z ‘On copyright and related rights’ (the Copyright Law);
- e* the Law of the Republic of Belarus of 5 February 1993 No. 2181-XII ‘On trademarks and service marks’;
- f* the Law of the Republic of Belarus of 29 December 2012 No. 8-Z ‘On publishing in the Republic of Belarus’;
- g* the Law of the Republic of Belarus of 10 May 2007 No. 225-Z ‘On advertising’ (the Advertising Law); and
- h* the Law of the Republic of Belarus of 12 December 2013 No. 94-Z ‘On counteraction of monopolistic activity and development of competition’.

The President of the Republic of Belarus has also adopted a number of acts regulating the media and entertainment sector. In practice, they all have greater legal force than laws owing to the fact that, in accordance with Law of the Republic of Belarus of 17 July 2018 No. 130-Z

‘On normative legal acts of the Republic of Belarus’, in the event of divergence of presidential edict or decree with the law, the law has primacy only when the authority to issue an edict or decree has been granted by law.

The main regulatory presidential acts in the media and entertainment sector are:

- a* Edict of the President of the Republic of Belarus of 1 September 2010 No. 450 ‘On licensing of certain types of activities’;
- b* Edict of the President of the Republic of Belarus of 1 February 2010 No. 60 ‘On measures to improve the use of the national segment of the internet’; and
- c* Edict of the President of the Republic of Belarus of 6 February 2009 No. 65 ‘On the improvement of the work of public authorities, other state organisations with the mass media’.

The Council of Ministers of the Republic of Belarus has formed the legal framework for:

- a* the opening of correspondent offices (of both national and foreign mass media);
- b* accreditation procedures for journalists of foreign mass media; and
- c* authorisation for distribution of foreign media products.

On 21 August 2014, Resolution No. 810 was adopted, which established an expert committee for the evaluation of information products for signs of extremism.

The central management body responsible for state regulation, coordination of work and development of the mass media sector is the Ministry of Information of the Republic of Belarus (MinInform). MinInform has certain subordinate organisations, including two TV channels and an internet service provider (ISP).

MinInform, inter alia, carries out:

- a* state registration of mass media and print media publishers, manufacturers and distributors;
- b* licensing of polygraphic (i.e., printing and print-related) and broadcasting activities;
- c* maintenance of state registers of:
 - the mass media;
 - print media product distributors;
 - distributors of TV and radio broadcasting media products; and
 - print media publishers, manufacturers and distributors of the Republic of Belarus;
- d* media monitoring;
- e* oversight of foreign mass media products to ensure compliance with Belarusian legislation;
- f* issuance of permits for purchases of printing equipment;
- g* distribution of foreign mass media products in the Republic of Belarus without changing its form or content;
- h* issuance of measures for the prevention of unlawful restrictions on media freedom, censorship and distribution of information prohibited for distribution;
- i* events for the development of mass media, organisations and individual entrepreneurs carrying out publishing, polygraphic and distribution of printed media and media products;
- j* development and adoption of regulatory legal acts and technical regulatory legal acts;
- k* development of state programmes;
- l* international cooperation in the field of media, including interaction with international organisations and corresponding bodies of other states, ensuring the fulfilment of obligations under international treaties with the Republic of Belarus;

- m* assistance in the organisation of correspondent offices, bureaus and other offices of state mass media outside the country;
- n* accreditation of journalists; and
- o* monitoring compliance with publishing and mass media legislation and licensing requirements in the sphere of publishing and broadcasting.

The National Centre of Intellectual Property is a state organisation ensuring the protection of intellectual property rights and exercising the functions of the patent body of the Republic of Belarus.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

While the Mass Media Law guarantees the freedom of opinion, belief and expression to everyone in Belarus, it establishes certain restrictions on information that may be disseminated through mass media.

Taking into consideration provisions of the Code of Administrative Offences of the Republic of Belarus of 21 April 2003 No. 194-Z, the Criminal Code of the Republic of Belarus of 9 July 1999 No. 275-Z and other legislation, the following information is subject to a special regime of protection:

- a* state secrets;
- b* official secrets;
- c* secret of adoption;
- d* medical secrets;
- e* personal data;
- f* commercial secrets;
- g* attorney–client privilege; and
- h* banking and tax secrets.

Among other things, the Mass Media Law also limits the dissemination of information about the system of organisation, sources, methods, plans and results of investigative activities, as well as materials of inquiry, preliminary investigation and court proceedings until the end of criminal proceedings.

ii Newsgathering

Under the Mass Media Law, journalists have certain rights, privileges and duties regarding newsgathering. Thus, they are entitled to gather, request and receive information from public authorities, political parties, other public associations and legal entities (in accordance with certain specific rules established by such organisations).

Information and materials gathered by audio and video recording, filming and photography of a person without his or her consent cannot be disseminated until the application of measures against the possible identification of that person. This dissemination is possible provided that it does not violate personal rights and freedoms and is needed for protection of the public interest or in cases of dissemination upon request of the criminal prosecution body or the court for the preliminary investigation or trial.

The Draft Law on Personal Data specifies cases that do not require the consent of the data subject. In particular, the collecting, processing, dissemination or sharing of personal

data for the purpose of a journalist's professional activities or mass media activities, provided they are aimed at the protection of public interest, do not require the consent of the data subject. Such public interests shall constitute society's need for detection and disclosure of information about threats to national security, public order, public health and the environment or information affecting the performance of public officials or public figures.

The Code of Administrative Offences states that unauthorised access to computer information and violation of the mass media legislation are punishable.

The Criminal Code outlaws the following methods of gathering information:

- a* illegal collection or dissemination of information about private life, including the use of special technical means or by an official using his or her official powers;
- b* invasion of privacy and other legal possessions of citizens;
- c* violation of confidentiality correspondence, telephone conversations, telegraphic or other communications;
- d* misappropriation of computer information; and
- e* illegal production, acquisition or sale of means of obtaining secret information.

iii Freedom of access to government information

The access to government information may be limited at the government's discretion via the use of the accreditation mechanism. The Mass Media Law defines accreditation as a confirmation of the mass media journalist's right to cover events organised by state bodies, political parties, other public associations or legal entities, as well as other events within and outside the country's boundaries.

Belarus journalists obtain accreditation for specific events. To pursue their professional activities, foreign journalists are subject to mandatory accreditation by the Ministry of Foreign Affairs under the procedure established by the Regulation on the procedure of accreditation of journalists of the foreign mass media in the Republic of Belarus, adopted by the Resolution of the Council of Ministers of 25 December 2008 No. 2015. A foreign journalist can achieve permanent (one year or more) or temporary (up to two months) accreditation, depending on his or her functions.

The Mass Media Law does not allow unjustified refusal of accreditation. However, since there are no unified criteria in the legislation, government agencies can make their own decisions in the absence of specific procedures for the appeal of refusals.

A journalist operating without accreditation may face a fine for illegally producing media content.

The general right and procedure for obtaining information or clarifications is established by the Law of the Republic of Belarus of 18 July 2011 No. 300-Z 'On applications from citizens and legal entities'. Therefore, journalists and the mass media may also use this general procedure for access to government information.

iv Protection of sources

Provisions of the Mass Media Law imply the rights to retain and disseminate information needed for professional activities. The dissemination may be carried out under the journalist's signature, under a pseudonym or without a signature. Journalists may specifically indicate the confidentiality of authorship.

The Mass Media Law establishes the following duties for journalists:

- a* to respect rights, freedoms and legitimate interests of others;
- b* to check the accuracy of obtained information, as well as provide reliable information for dissemination;
- c* to indicate the authorship at the will of persons providing information;
- d* to maintain confidentiality of the information and its sources (with exceptions);
- e* to obtain consent of persons for the dissemination of information on their private life;
- f* to obtain consent of persons for audio and video recording, filming and photography, excluding in public places and during events and cases when measures against possible identification of the person are taken;
- g* to refuse the task given by the founder or (chief) editor if this task or its performance violates Belarus law; and
- h* to show press credentials on demand.

Journalists and legal entities entrusted with the functions of the editor of the mass media are not obliged to name the source of information and shall not disclose information about the source without its consent. However, this information shall be disclosed at the request of a criminal prosecution body or a court in connection with a preliminary investigation or trial.

v Private action against publication

Belarusian legislation provides for certain types of infringements entailing different consequences.

Therefore, the Mass Media Law entitles individuals and legal entities (including foreign entities) that have been the subject of unjustified media reports damaging their honour, dignity or business reputation to demand the editors to correct this information.

The Civil Code establishes that civil claims under these infringements imply the publisher's obligation to provide evidence that the disseminated information reflects factual information. Otherwise, the publisher is obliged to distribute a correction statement (amendment or clarification). The correction statement shall be published in the same place and font as the original article, or broadcast at the same time of the day and during the same (or similar) programme as the original programme. Moreover, the concerned parties have the right to disseminate their answer in the same media or internet resources.

Along with the correction of information, legal entities have a right to claim compensation for losses, and individuals have a right to claim compensation for losses and moral harm.

Belarusian law contains provisions on liability for libel, insult and discreditation, as well as disclosure of the information considered to be secret. The legislation provides for offences against private individuals, legal entities, representatives of the state sector or even the state itself (the list of possible affected parties is different for each offence).

vi Government action against publication

Article 33 of the Constitution of the Republic of Belarus prohibits censorship, as well as monopolisation of the mass media by the state, public associations or individuals.

However, some critics claim that there is an uneven playing field for state and private mass media representatives. The critics mark a favourable status of the state mass media due to state support in form of financial, administrative, regulatory and bureaucratic mechanisms.

In particular, these critics draw attention to accreditation mechanisms, the ability to obtain information from public administration bodies and access to the process of discussion and adoption of legislation.

MinInform, being the central management body responsible for the mass media sector, may issue written warnings, suspend issuance of media products and file lawsuits for termination of issuance of media products in cases provided by law. MinInform also possesses the authority to restrict access to internet resources and online editions, as well as to grant access again in cases provided by law. According to MinInform's recent press releases, it has blocked websites containing information on the sale of drugs and inappropriate advertising. Certain online resources providing extremist materials are also subject to takedown based on court judgments listed on MinInform's official website. The procedure of access limitation is not fully transparent (e.g., the list of blocked internet resources is available to certain state bodies and ISPs only) and does not allow individuals to follow the practice of the regulator's decision-making to the full extent.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Belarusian legislation on copyright and related rights is created taking into account provisions of the main international treaties in the sphere, including the Berne Convention. The Copyright Law recognises the supremacy of international treaties. Consequently, the Berne Convention prevails, and the Copyright Law defines protection of works of foreign nationals who are neither citizens nor permanent residents of members states of the Convention.

The new Law of the Republic of Belarus of 15 July 2019 No. 216-Z introduced a number of amendments to the Copyright Law (the Copyright Amendments) aimed at the resolution of certain existing issues. The majority of amendments will enter into force on 27 May 2020. They deal with the following issues:

- a* introduction of an open licence as a non-exclusive licence concluded via a simplified procedure triggered by the commencement of use of the copyright or performance of other actions specified in the licence. The licence must be publicly available so that anyone can read it before using it. By default, an open licence will be free of charge. Its term will be equal to the term of the exclusive right for software, and to five years for other types of copyright and related rights. If the open licence does not stipulate a certain territory, it is considered to be worldwide. If the fee is established as a fixed amount, the agreement must also set a maximum number of reproducible copies of the work;
- b* consolidation of the licence agreement and authors' agreement;
- c* introduction of an author's right to conclude an oral licence agreement on the use of the work in periodicals, including the licensee's right to conclude a free sublicense agreement and subsequent use of this work;
- d* Belarus plans to join the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled. This has entailed amendments to the Copyright Law regarding the transformation of works into a special format;
- e* allowance of the use of small works and parts of legally published works to the extent justified for educational purposes;

- f* reduction of the minimum compensation for copyright infringement from 10 basic units to one basic unit;⁴ and
- g* a new exception to personality rights (see Section IV.ii).

Another innovation in the legislation is relevant for cybersquatting. The information about a domain name owner may be hidden by the owner. Previously, the registrar would refuse to disclose information because of personal data protection. The Edict of the President of the Republic of Belarus of 18 September 2019 No. 350 'On features of use of national network segment internet' allows for disclosure of information about domain name owners provided the request concerns 'the registered means of individualisation' of the requesting party.

ii Personality rights

The Copyright Amendments establish additional regulation in respect of personality rights. In particular, according to the Copyright Amendments, the reference to an author's name when the work is used in a radio programme may be made either during the respective radio programme or by other means, provided that the radio programme contains information about such means.

Currently, effective laws provide one exception to the rights of publication and recall: the author of a work-for-hire has no right to prevent its publication by the employer, or to exercise his or her right to recall. The Copyright Amendments stipulate the other case of such limitation: the obligation of the author of an audiovisual work not to prevent the publication of the audiovisual work by the producer, or to exercise the right of recall, unless otherwise provided by the contract.

In a recent case regarding authors' personality rights, an author found out that part of his poem was published in a newspaper and its online edition without his consent, appropriate award or indication of his name as the author. The claimant sued for the infringement of the exclusive right to reproduce and distribute the work and the infringement of exclusive right to communication to the public. The respondent referred to the Copyright Law and claimed that the part of the poem was used to the extent justified by informational purposes. The court held that a free use of work in mass media to the extent justified by informational purposes is allowed only as part of a report of current events, if the work is seen or heard; moreover, authors' personality rights must be respected when using the work. Thus, all claims were fully met by the court.⁵

iii Unfair business practices

The Belarus media and entertainment industry market faces the following most widespread unfair business practices in the sphere of intellectual property rights:

- a* using social networks' content without the author's consent;
- b* using mass media as a means for unfair competition;
- c* posting or placing photos in articles without due attribution; and
- d* misattribution of articles themselves (i.e., signatures referring to groups of people), which contradicts the notion of author.

⁴ The exact amount of basic unit is established by resolutions of Council of Ministers of the Republic of Belarus. As of 1 November 2019, one basic unit equals 25.5 Belarusian roubles.

⁵ www.court.gov.by/ru/justice_rb/praktice/intell/litera/a8fc7e69523849c1.html.

V COMPETITION AND CONSUMER RIGHTS

The mass media may be considered an instrument for unfair competition.

The Antimonopoly Law places a ban on the following unfair competition practices:

- a* discreditation;
- b* misrepresentation;
- c* flawed comparison;
- d* unauthorised acquisition or use of intellectual property;
- e* blurring; and
- f* illegal obtainment, use or disclosure of information constituting commercial, official or other secrets protected by law.

Considering recent case law, owners of internet resources are obliged to post correction statements in the same place and font of the original article, if articles posted on internet resources are recognised as damaging business reputation.⁶

There is a possibility of adopting new amendments to the Advertising Law,⁷ which may limit the amount of permissible information about awards, contests and rankings, as well as allow the use of images of individuals or property of individuals or legal entities without their consent if photographs were taken in public places, and are not the main object of advertising.

VI DIGITAL CONTENT

Because the Mass Media Law generally applies to internet resources, general requirements on unlawful content also apply to internet resources. The following types of content are unlawful:

- a* inauthentic information that could harm state or public interests;
- b* false information that discredits honour, dignity or business reputation; or
- c* information prohibited for distribution, in particular:
 - information shared on behalf of an unregistered entity, if registration is obligatory (e.g., registration as mass media) or an entity about which there is an effective decision of the authorised state body on its liquidation;
 - propaganda on the consumption of narcotic drugs and different analogues, as well as information on methods of their development, manufacture and use and purchase locations;
 - information regarding minors who have suffered a wrongful act, without the consent of their representatives;
 - information regarding methods of manufacturing explosive devices and explosives, as well as objects whose damaging effect is based on the use of combustible substances;
 - inappropriate advertising (e.g., for tobacco products, alcoholic spirits);
 - information aimed at promoting war or extremist activity or containing calls for such activity, pornography, violence and cruelty, including propaganda or inducing suicide; and
 - hidden materials affecting the subconscious or having a harmful influence on health.

⁶ Decision of the Appellate Instance of Minsk Economic Court of 17 January 2018, No. 313-3/2017/1869A.

⁷ <https://clck.ru/JF2No>.

Users may restrict access to certain sites voluntarily under a contract concluded with an ISP.⁸ Edict No. 60 clarifies that responsibility for the content placed in the national segment of the internet is borne by the persons who posted this information or the internet resource owners.

MinInform may block internet resources or online editions. To avoid this scenario, internet resource and online edition owners must:

- a* prevent dissemination of restricted information, information that may harm the state or public interests, or unfounded information that is damaging to the honour, dignity or business reputation of individuals and legal entities;
- b* delete unlawful information; and
- c* not allow posting of information by other users without their preliminary identification. For that purpose the procedure for a user's pre-identification during account registration and activation by text message has been established. This requires that terms and conditions shall include a warning about the inadmissibility of posts and materials containing information that is prohibited from being disseminated.⁹

If internet resource or online edition owners fail to perform their obligations, MinInform may issue an order to eliminate these violations.

VII CONTRACTUAL DISPUTES

Typically, disputes concern payment of the licence fee or penalties and interest incurred for late payment. The legislation does not provide for out-of-court procedures of resolution of such disputes.

One recent case is the scandal of 2017–2018 in the music sphere. A national artist sued one of the main TV channels for not mentioning his name as music author either at a concert or in the credits. The internet version of the TV channel did not mention his name either. The court found that his copyright was not violated on TV, as the titles contained information about the author. However, his name was not mentioned in the internet version. As a result, the author received compensation for moral damages. The same person filed a suit against another Belarusian national artist this summer for infringement of copyright, and intends to sue other Belarusian artists, due to the absence of agreements between the parties regarding the use of his works.

VIII YEAR IN REVIEW

The development of the media and entertainment sector in Belarus precedes the development of respective legislation. The government tries to maintain a balance of national interests and prevailing trends, and ensure national security by imposing pre-identification and other measures.

8 Regulation on the procedure for restricting (resuming) access to the internet resource approved by the joint Resolution of the Operational and Analytical Centre under the President of the Republic of Belarus, the Ministry of Communications and Informatisation of the Republic of Belarus and the Ministry of Information of the Republic of Belarus of 3 October 2018, No. 8/10/6.

9 The Regulation on Pre-Identification (see Section I).

The latest amendments to the Mass Media Law define the position of internet resources and provide the option for sites to register as online editions. This registration enables the mass media status of internet resources and provides their employees with the status of journalists.

IX OUTLOOK

As social networks are becoming more influential, accurate development of their legal status is an important task for the future. The government might need to change its perception of certain groups, communities, bloggers or social network as a whole with regard to their powers in the spheres of both information and monetisation.

BRAZIL

Raphael de Cunto and Sofia Cruz¹

I OVERVIEW

Brazil is the biggest media and entertainment market in South America, and, as an emerging country, it is expected that its entertainment industry will grow even more. Most of the population is ascending to middle class, which increases the consumption of cultural content.

The growth in the media and entertainment sector is likely to be boosted by the increase of internet access in the country. Although Brazil is frequently ranked as one of the countries with the largest number of internet users in the world, a large part of its population has yet to be connected, creating business opportunities with space to grow.

In this vibrant scenario, a regulatory overhaul is much needed, especially with regard to copyright under the new technologies.

II LEGAL AND REGULATORY FRAMEWORK

The Brazilian audiovisual industry is regulated by the National Film Agency (Ancine), a regulatory agency reporting to the Ministry of Citizenship, which replaced the Ministry of Culture. The cinema, home video, broadcasting and pay-TV market segments fall within the scope of Ancine's authority. The Agency has made efforts to include other segments under its authority, such as video games and video on-demand.

Industry players are subject to several different legal frameworks depending on the business. For instance, free-to-air broadcasters are subject to a legal framework of laws mostly dated from the 1960s, while pay-TV networks are regulated by a 2011 statute that created a new telecommunications service for pay-TV and defined a set of activities connected to this service (production, programming, packaging and distribution).

Another important aspect of the audiovisual sector is the relevance of tax benefits for the development of this industry. There are three main regulations on the subject: the Rouanet Act (Law No. 8,313 of 23 December 1991), the Audio-visual Act (Law No. 8,685 of 20 July 1993) and Provisional Measure No. 2,228-1 of 6 September 2001, which also created Ancine.

The right to freedom of expression and to freedom of the press are provided by the Federal Constitution. Federal statutes regulate specific matters, such as the Right of Reply Act (Law No. 13,188 of 11 November 2015) and the Information Access Act (Law No. 12,527 of

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18 November 2011), which regulates the access to government authorities' information. The Federal Press Act (Law No. 5,250 of 9 February 1967) was considered incompatible with the 1988 Federal Constitution by the Supreme Court.

The Internet Act (Law No. 12,965 of 23 April 2014) provides a legal framework for the online environment, with provisions that address, among other issues, net neutrality and liability for third-party content on the internet.

The Federal Constitution also provides for intellectual property rights, which are also regulated by international treaties to which Brazil is a signatory, and specific federal legislation, including the Industrial Property Act (Law No. 9,279 of 14 May 1996) and the Copyright Act (Law No. 9,610 of 19 February 1998).

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of speech and freedom of the press are protected under the Federal Constitution. Although manifestation of thought is free, anonymity is forbidden, and the right of reply (along with compensation for property or moral damages) is assured.

Freedom of expression is not absolute, and it may be overridden by other rights and values. There is no clear legal provision on the restrictions that may be imposed on freedom of expression. Rather, individuals must resort to court precedents to have some clarity on the subject.

Even though there is no leading case on freedom of speech in Brazil, several precedents from the Brazilian Supreme Court address the issue. In general, the decisions forbid any type of prior censorship, guaranteeing that freedom of expression protects not only truthful, admirable or conventional ideas, but also (and perhaps most importantly) ideas that may be considered doubtful, exaggerated, reprehensible or not supported by the majority.

Some expressions, however, are not awarded constitutional protection. That is the case of speeches that incite or advocate criminal behaviour. Based on the fact that race discrimination is a criminal offence in Brazil, discriminatory speech is also forbidden whenever it remains demonstrated that the agent responsible for the speech is:

- a* attesting the dissimilarity between different groups or individuals;
- b* supporting the superiority of one of the groups or individuals; and
- c* defending the lawfulness of other people's domination, exploitation, slavery, elimination, suppression and reduction of rights.

In this sense, to fall outside the scope of protection of freedom of speech, it is essential to demonstrate that the speech incites some sort of behaviour by means of violence.

ii Newsgathering

The Federal Constitution provides for the freedom of the press, guaranteeing that the manifestation of thought, in any form, process or medium, will not be subject to any restriction, except for provisions in the Constitution itself. In 2009, the Brazilian Supreme Court struck-down the Federal Press Act after it was considered incompatible with the 1988 Federal Constitution currently in force.

The Supreme Court has also decided that the government may not impose any type of condition to practice journalism, such as requiring a university degree or affiliation to a professional association.

Media outlets (newspaper and broadcasting) may only be owned by native Brazilians, by individuals naturalised for more than 10 years or by companies incorporated under the laws of Brazil with head offices in the country. In any case, at least 70 per cent of the voting capital of the media outlets must be held, directly or indirectly, by native Brazilians, by individuals naturalised for more than 10 years or by companies incorporated under the laws of Brazil with head offices in the country. There are also restrictions to the intellectual guidance of newspaper and broadcasting companies (including editorial responsibility, selection and direction of content). Only native Brazilians or individuals naturalised for more than 10 years may be in charge of these roles.

Under the Right of Reply Act, an individual that has been offended by a news article is entitled to the right of reply, free of charge and in a manner proportionate to the offence. The statute creates a special regime for right-of-reply requests, setting forth short time limits for the media outlet to act.

iii Freedom of access to government information

Under the Federal Constitution, individuals are entitled to the right of receiving, from government authorities, information in their personal interest or in the public interest, except for information that must be kept secret to guarantee the safety of society or the country.

The Information Access Act provides for the procedures that government authorities must follow to comply with the Federal Constitution. The law is applicable to all levels of the government (federal, state and local) and to all three branches (legislative, executive and judicial).

Any person may request access to any information related to a government authority. The mechanisms to make the request vary among the different authorities. There is no need to present a justification for making the request. However, the relevant authority may only deny the request upon valid justification (national security, police investigation, etc.). Authorities have up to 30 days to answer the access request.

The Federal Constitution also provides for the *habeas data* constitutional remedy. This remedy enables individuals to request access to any relevant information that concerns them and that is stored in a database kept by government authorities.

iv Protection of sources

Under the Federal Constitution, journalists are entitled to the right to protect their sources whenever necessary to the professional activity. The protection of sources is a prerogative of journalism, and it includes the right of journalists to not be subject to any type of direct or indirect punishment due to the lawful exercise of such prerogative.

The subject has been in the spotlight since the publication of a series of controversial news articles leaking private messages of individuals directly involved with the country's largest corruption investigation. The journalist did not reveal the source of the leaked records, starting a debate on the limitations of journalists' right to protect their sources. After the journalist's claims of coercion (by means of several investigations opened against him), a member of the Supreme Court barred the government from opening any type of investigation against him for the receipt and transmission of information through the media. The ruling is preliminary, as the full court must still take on the case.

v Private action against publication

The Federal Constitution assures individuals the right to seek compensation for damage caused by a faulty act or omission (negligence, imprudence or malpractice). Any individual that suffers somehow because of a publication is entitled to file a lawsuit. The damage claim can be based on several grounds. The most common in the media and entertainment business are copyright infringement, defamation, slander, privacy and image rights.

Damages are divided into two different categories: moral damages, which are related to anguish, pain and suffering; and property damages, which are related to compensation for actual damage and loss of profit. Courts assess damages claims on a case-by-case basis. For moral damages, courts take into consideration the circumstances of the case and the standards present in case law for similar cases. The indemnity must be reasonable and proportionate to the injury. For property damages, the burden of proof lies on the injured party, which must demonstrate the occurrence of the faulty act or omission, the causal relation between the offence and the injury, and the extent of the damage.

Apart from indemnification, courts may also impose obligations to do or not to do certain acts depending on the extent of the injury. For instance, a publisher may be ordered to stop publishing material.

In 2016, the Brazilian Supreme Court decided that biographical works do not depend on the main character's authorisation (or their relatives in the lack thereof). According to the Supreme Court, Articles 20 and 21 of the Brazilian Civil Code (Law No. 10,406 of 10 January 2002) must be interpreted in accordance with the Constitution, which provides for the fundamental right of freedom of expression. The Supreme Court asserted that ordinary law (such as the Civil Code) cannot restrict constitutional rights, even on the grounds of protecting another right provided for in the Constitution. In the case of a conflict of rights, the collective interest must prevail.

In addition to civil liability, offences to an individual's honour may also trigger criminal liability. The Brazilian Criminal Code (Law-Decree No. 2,848 of 7 December 1940) provides for three different crimes against honour:

- a* slander, which means falsely accusing someone of committing a criminal offence, is punishable by fine and imprisonment (six months to two years);
- b* defamation, which means damaging someone's reputation by communicating degrading statements about them, is punishable by fine and imprisonment (three months to one year); and
- c* insult, which means insulting someone by hurting their dignity or decorum, is punishable by fine and imprisonment (one to six months).

Copyright infringement is also a criminal offence, and penalties vary from fines to imprisonment. Under the Copyright Act, the intellectual work's author or a licensee may request injunctions, such as search and seizure measures.

vi Government action against publication

Public outcry was essential for successfully overturning two suppressing government actions in the past year.

A justice of the Brazilian Supreme Court ordered two online magazines to remove news articles on the grounds they were 'fake news'. The order came upon the request of another member of the Supreme Court. The news articles suggested that a contractor that had been convicted for corruption mentioned, during his deposition, the justice who had

requested the order. The decision was severely criticised by the public prosecutor's office, several organisations and public figures, including other members of the Supreme Court. The order was then revoked.

Rio de Janeiro's mayor tried to ban a comic book showing two male characters kissing because of its 'sexual content for minors'. He ordered a police raid to seize the copies of the comic from a book fair. The case received great public attention with protests on social media and at the book fair. A local judge prohibited the ban, but the decision was later overturned by the court of appeals, permitting the seizure. The case was then taken by the Brazilian Supreme Court, which ruled that the mayor's actions were illegal, and officials could not target LGBTQ+ content. According to the Supreme Court decision, the ban violated the right to freedom of expression and the right to equal protection for all.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Intellectual property rights are protected in Brazil by provisions set forth in the Federal Constitution and various federal acts and international treaties. Copyright is regulated by the Copyright Act, which follows the standards established in the Agreement on Trade Related Aspects of Intellectual Property Rights. Brazil is also a signatory to the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 and to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961.

Under the Copyright Act, any original work of authorship fixed in any tangible medium of expression is protected as intellectual property. The author is entitled to moral and economic rights related to the intellectual work created. Moral rights include the right to claim authorship and the right to object to any modification, while economic rights relate to the work's use and disposal. Economic rights are protected for a period of 70 years as of 1 January of the year following the author's death.

Copyright may be fully or partially transferred to third parties by licensing, assignment or any other mean provided by law, subject to specific limitations.

In Brazil, copyright is based on a declarative system, which means that registration of an intellectual work is optional and not essential for its protection. The Copyright Act also protects related rights.

Copyright infringement triggers criminal liability, while the injured party may also seek compensation for moral and property damages and ask courts for a preliminary injunction.

ii Personality rights

Personality rights are provided by the Federal Constitution, which establishes that individuals are entitled to the inviolability of their image, having also the right of reply and redress in case of violation. The right to image comprises the right to protect the individual's image as a whole or any part of their body (if it is identifiable by third parties as belonging to such person), as well as the right to protect their features and qualities, such as honesty, loyalty and professionalism, among other socially praised characteristics.

Under Brazilian law, everyone is warranted the right to protect their image from unauthorised public exposure in photographs, drawings, paintings, charges and other representations that would bring them into evidence, or publicity in newspapers, magazines, television, internet, advertising materials, etc.

Image protection is also governed by the Brazilian Civil Code, which establishes that a person may demand that injurious conduct (or the threat of an injurious conduct) to his or her personality rights is ceased. Affected individuals are also entitled to seek redress for losses and damages in court, regardless of other possible applicable penalties prescribed by law.

Unless authorised or otherwise necessary for administration of justice or maintenance of public order, the depicted person may prohibit the disclosure of writings, the transmission of words, or the publicity, exposure or use of his or her image, whenever it affects his or her honour, reputation or integrity. If the affected person is dead or missing, the spouse, ancestors or descendants are entitled to protect his or her image on his or her behalf.

The Brazilian Civil Code protects other personality rights, such as the right to a person's name and pseudonym and the right to honour, physical integrity and privacy. Names and pseudonyms cannot be used by third parties in publications or representations that are shameful, or in advertising material without authorisation.

The protection of personality rights is also applicable to legal entities to the extent possible. Legal entities are entitled to seek compensation for damages arising from the violation of their right to image, name and objective honour. In the case of an offence to the legal entity's reputation, for instance, an indemnity claim may be applicable.

iii Unfair business practices

Abstract ideas are not protected by copyright in Brazil. Instead, copyright protects creative works expressed in some kind of medium, tangible or intangible.

In Brazil, plagiarism is a criminal offence, as it falls within the scope of the copyright infringement crime. The penalty for this criminal offence varies from fine to imprisonment (of from three months to one year). If a person reproduces a work without the author's authorisation with the aim of making profit, he or she will be subject to more severe penalties (fine or imprisonment of two to four years).

A plagiarism case has made the headlines recently. A Brazilian novelist is being sued by a US writer, accused of copying and paraphrasing material from 10 of her books. The case has not yet been decided by Brazilian courts. The suit follows other plagiarism accusations against the Brazilian novelist.

The Industrial Property Act also addresses unfair competition by listing several wrongdoings that are punishable by imprisonment, including publishing a false statement that defames a competitor, diverting someone else's clientele and making unauthorised disclosure of confidential information. The Act presents an exhaustive list of unfair competition practices that trigger criminal liability. However, an injured party may seek compensation for other unlisted unfair competition practices that may have tainted their business' reputation.

V COMPETITION AND CONSUMER RIGHTS

While the *Disney/Fox* deal was cleared by the Brazilian antitrust authority (CADE) without further regulatory challenge (the acquisition was approved subject to the sale of the Fox Sports channel in Brazil and related sports programme rights), the merger of Time Warner and AT&T in the United States sparked controversy, particularly because of cross-ownership restrictions to which the Brazilian affiliates of both companies are subject.

The Pay TV Act (Law No. 12,485 of 12 September 2011) created a cross-ownership restriction among pay-TV networks, on one side, and free-to-air broadcasters, programmers (channels) and content producers (studios), on the other side. There are two different restrictions:

- a* free-to-air broadcasting companies, producers and programmers with headquarters in Brazil cannot provide telecoms services, and cannot own, directly or indirectly, more than 50 per cent of the total and voting capital of pay-TV networks; and
- b* pay-TV networks cannot provide broadcasting, programming or producing services, and cannot own, directly or indirectly, more than 30 per cent of the total and voting capital of broadcasting companies, producers and programmers with headquarters in Brazil.

AT&T has controlling interest in a Brazilian pay-TV network, while Time Warner has interests in several companies engaged in content production and channel programming in Brazil. Once AT&T and Time Warner merge, the pay-TV network and the production and programming companies would be under common control. The transaction was cleared from an antitrust perspective, with CADE approving the deal as long as the operations in Brazil remained separate, and sensitive information was not shared. On the regulatory side, however, the Board of the National Telecommunications Agency (Anatel) has not issued a final opinion. Parallel to Anatel's review of the merger but certainly driven by the deal, the National Congress is currently reviewing the Pay TV Act's cross-ownership restrictions.

Net neutrality rules are addressed in the Internet Act and are built on the principle of equal treatment to all data packages. Traffic discrimination and throttling are only permitted in cases of prioritisation of emergency services or implementation of technical requirements that are indispensable for the adequate provision of network services and applications. Decree No. 8,771 of 11 May 2016, which regulates the Internet Act, further explains that these indispensable technical requirements must be aimed at preserving network stability, security, integrity and functionality. The Decree also mentions that lawful network management technical requirements must be compatible with international standards.

In any event, the Internet Act determines that traffic discrimination must:

- a* not cause damage to users;
- b* be proportionate, transparent and equal;
- c* be informed in advance to users; and
- d* not be anticompetitive.

Internet service providers (ISPs) are prevented from blocking, monitoring, filtering or analysing the content of data packages. Commercial agreements between ISPs and internet application providers are forbidden in the case of:

- a* violation of the public and universal nature of the internet;
- b* prioritisation of data packages based on commercial arrangements; or
- c* prioritisation of applications offered by the ISP itself or by companies within the same economic group.

The net neutrality debate gained prominence when CADE opened an investigation against the four major mobile operators in the country. The investigation looked into different zero-rating practices carried out by the telecoms providers. In 2017, CADE decided to shut down the investigation, as it concluded that the zero-rating practices being investigated did not violate the net neutrality principle or any other provision of the Internet Act or the Decree. The antitrust authority's decision was supported by the favourable opinions of Anatel and the Ministry of Science, Technology, Innovation and Communication (MCTIC).

VI DIGITAL CONTENT

There is an ongoing debate on whether online video content must be regulated in the same way as TV content. In Brazil, TV content distribution is subject to two different regimes: pay-TV networks are subject to the authority of Ancine, while free-to-air broadcasters are subject to the authority of the MCTIC, both being heavily regulated. Despite Ancine's efforts to regulate video on-demand, the service remains unregulated for now.

With regard to secondary liability, under the Internet Act, ISPs are never liable for damages arising from third-party content, and internet application providers, including social media platforms, can only be held liable if they fail to comply with a court decision that orders the removal of infringing content. The court order must clearly indicate the infringing content, allowing the application provider to precisely locate it.

An exception applies to the unauthorised disclosure of content containing nudity or sexual acts that were meant to be private. In this case, the court order is not necessary, and a notice and takedown procedure is applicable instead. If the internet application provider fails to take action after receiving the notice, within its technical capability, it will be secondarily liable for damages.

Copyright infringements are expressly excluded from the Internet Act provisions related to secondary liability. Accordingly, a specific legal provision must address the issue. However, no law has yet been enacted in relation to the subject.

VII CONTRACTUAL DISPUTES

One of the main contractual litigation issues in the media and entertainment sector currently relates to the collection of royalties for the public performance of musical works. Under the Copyright Act, the Central Bureau for Collection and Distribution (ECAD) is entitled to collect the royalties for public performances of musical works for later distribution to the copyright holders. The dispute centres on music streaming and whether it can be considered a public performance.

After much debate, the Superior Court of Justice decided that streaming (both webcasting and simulcasting) must be considered public performance of music, authorising ECAD to collect and distribute the applicable royalties. The decision is not binding to third parties, but lower courts will likely follow its reasoning in the future.

Other common issues brought to trial are licensing and royalty disputes, employment contract disputes, image rights, future works (artists can only be bound to a contract for a maximum of five years) and performance of old works in new media, such as streaming platforms. Reruns have also been the object of dispute between performers and TV studios, as artists seek some sort of compensation for the rebroadcast of their performance.

VIII YEAR IN REVIEW

The year 2019 has been marked by the election of President Jair Bolsonaro, which was followed by several changes in the government's structure, particularly with the cutback on the number of Ministries. The Ministry of Citizenship was created, assembling the powers of the former Ministry of Culture, Ministry of Sports and Ministry of Social Development.

The National Congress' efforts have been mainly focused on the social security reform with few successful legislative initiatives. The President, however, was able to pass the Economic Freedom Act (Law No. 13,874 of 20 September 2019), which aims at simplifying the bureaucratic procedures for business activities in Brazil.

In the private sector, international streaming services continue to thrive while traditional players migrate their business efforts to digital platforms. The year has also been exciting to the video game subsector, with researches indicating that more than half of the Brazilian population plays some type of electronic game.

IX OUTLOOK

Over 20 years since the enactment of the Copyright Act, the government decided to carry out a public consultation to review the copyright legal framework in Brazil. The legal overhaul is highly anticipated by the market in general, as the current legislation is not entirely fitting to most of the current technologies and business models, especially in the digital environment. Even though the initiative was influenced by recent changes introduced to European copyright legislation, the government's office in charge of the process has assured that the Brazilian reviewing process will run independently, not necessarily following the European approach.

Changes are also expected in relation to the scope of Ancine's authority. The agency has been making efforts to include new market segments under its full control, such as video on-demand. One of the biggest controversies centres around the 'contribution to the development of a national cinematographic industry' payment required of video on-demand providers. Similar to video games, the video on-demand market segment is not considered a part of the audiovisual industry under Brazilian law, which means regulation depends on legislative action.

ESTONIA

Mihkel Miidla and Kirsi Johanna Koistinen¹

I OVERVIEW

Estonia is a country that favours free press and the development of its media and entertainment industry. Estonia's media policy is considered to be in line with the European Union media policy, and in 2019, Estonia ranked 11th in the world in the Press Freedom Index.²

The Estonian government is currently making efforts to attract UK-based broadcasters. According to the European Audiovisual Observatory, 1,203 out of 3,005 TV channels in the EU are based in the UK, which may be looking for a new country of origin (COO) to continue to broadcast under the Audiovisual Media Services Directive (AVMSD)³ terms within the EU.⁴

Estonia is marketing itself as having sensible broadcasting licence terms alongside the innovative Estonian e-Residency, which can offer a more effective digital business environment.

Estonia's biggest competitors that are also actively seeking to become the new European broadcasting hub are Luxembourg, the Netherlands and Ireland.⁵ Estonia's biggest advantage compared with these other countries is most likely its corporate tax regime: on retained and reinvested profits, the corporate income tax in Estonia is 0 per cent.

II LEGAL AND REGULATORY FRAMEWORK

Broadcasting and video on-demand is regulated by the Media Services Act (MSA).⁶

The MSA provides the procedure and principles for the provision of audiovisual media services, radio services and for the issuing of activity licences. The Act also sets out the principles of protection of persons who have provided information for journalistic purposes (protection of sources).

According to the MSA, the AVMSD's COO principle will be applied if the provider of the media services has its head office in Estonia and the editorial decisions about the media service are taken in Estonia.

1 Mihkel Miidla is a partner and Kirsi Johanna Koistinen is an associate at Sorainen.

2 Reporters Without Borders, 'Data of press freedom ranking 2019', available at https://rsf.org/en/ranking_table.

3 <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

4 European Audiovisual Observatory, Brexit report, Strasbourg, 28 June 2018, available at www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/9iKCxBYgiO6S/content/29-of-all-european-tv-channels-are-based-in-the-uk?_101_INSTANCE_9iKCxBYgiO6S_viewMode=view/.

5 Broadband TV News, 'Levira makes post-Brexit pitch', www.broadbandtvnews.com/2019/05/02/levira-makes-post-brexit-pitch/.

6 Available in English at www.riigiteataja.ee/en/eli/506112013019/consolide.

The Estonian Public Service Broadcaster (ERR) is regulated by the Public Broadcasting Act (PBA).⁷ The PBA sets out the legal status, objectives, functions, financing and organisation of management and activities of the ERR. The Act states that public broadcasting must be independent in the production and transmission of its programmes, and its objectives are, for example, to support the development of the Estonian language and culture.

The ERR also has an ethics adviser that, according to the PBA, monitors the conformity of the operation of the ERR with the professional ethics and good practices of journalism.

The ethics adviser is appointed by the management board with the approval of the supervisory board of the ERR. The function of the ethics adviser and its independency has at times fallen under criticism, as the adviser is a body operating under the broadcaster and, therefore, may be looking out for the interests of the ERR, rather than being an authority outside of the organisation that could be an unbiased arbitrator for both sides. A draft to change the legislation to make the ethics adviser's position obsolete with the suggestion to create a new third-party adviser that would be independent from the ERR was submitted to the Estonian Parliament at the end of 2016, but the law was not passed.

Other relevant legislation governing the media and entertainment industry are:

- a* the General Part of the Economic Activities Code Act, which regulates general conditions and procedures for exercising economic activity;
- b* the Advertising Act, which sets out the general rules of advertising (specific overriding terms come from the Media Services Act);
- c* the Child Protection Act;
- d* the Consumer Protection Act; and
- e* the Medicinal Products Act.

There are also specific legal acts for certain sectors, such as gambling and state-funded theatres.

Media policies are devised by the Estonian Ministry of Culture, and the most relevant supervisory authority is the Consumer Protection and Technical Regulatory Authority. Under the Ministry of Culture, an expert committee has also been established to regulate the dissemination of works that contain pornography or promote violence or cruelty.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

According to the Constitution of Estonia, everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means.⁸ This right may be restricted by law to protect public order, public morality and the rights and freedoms, health, honour and good name of others. Restrictions may also occur regarding public servants employed by the national government and local authorities to protect state secrets.

The most frequently emerging issue in the Estonian media has been finding a balance between freedom to disseminate ideas and protecting a person's family and private life.

The Supreme Court of Estonia has stated that a person who is regarded as a public figure is not fully extended this protection as they must endure a higher amount of public scrutiny due to the position they hold in society.⁹

⁷ Available in English at <https://www.riigiteataja.ee/en/eli/501042019011/consolide>.

⁸ Available in English at <https://www.riigiteataja.ee/en/eli/521052015001/consolide>.

⁹ Supreme Court of Estonia, 13 May 2005, Case 3-2-1-17-05.

Interpreting this statement has become somewhat problematic, as in certain cases it can be difficult to determine whether the person in question is a public figure or not. Furthermore, to scrutinise the personal life of a public figure, there needs to be actual public interest for the matter as well.

When the previous President of Estonia, Toomas Hendrik Ilves, was about to marry Ieva Ilves (née Kupce), a press statement was released by the Office of the President, announcing that, after marrying the president, Ieva would not become a public figure. The Supreme Court has stated that a person cannot be regarded as a public figure simply because of their relationship to a public figure (e.g., through marriage).¹⁰ For Ieva Ilves, this, of course, was not a possibility since the President's spouse is also regarded a state representative in Estonia.

There have also been times when journalism has overstepped the line with persons that are not public figures. For example, prior to the 2019 parliamentary elections, one of the biggest newspapers in Estonia published a story about one particular party and its members who had been criminally convicted.¹¹ Some of the people on the list were not actively participating in politics and were just enlisted as party members, therefore, they could not have been regarded as public figures and there was no actual overriding public interest to announce the criminal convictions of these people. What is more, some of the members' convictions had already expired from the Criminal Records Database, so, according to the law, they had already been given a 'clean slate'.

Other forms of expression that are restricted are advertising, commercial communications and hate speech, the latter of which is prohibited.

Commercial communications are a form of expression that is restricted by the Media Services Act, the Electronic Communications Act and the Information Society Services Act.

Commercial communications broadcast by a media service provider must be clearly recognisable and distinguishable from the other part of the programme service; surreptitious commercial communication is not allowed.

Furthermore, a media service provider must establish a code of conduct by means of self-regulation regarding inappropriate audiovisual commercial communication that would accompany or be included in children's programmes. This regards commercial communications of foods and beverages containing nutrients and substances with a nutritional or physiological effect; in particular, those such as fat, trans-fatty acids, salt, sodium and sugars, excessive intake of which in the overall diet is not recommended for children. If the media service provider fails to establish a self-regulating code of conduct, a regulation will be established by the minister responsible for the area instead.

The acts also regulate television and radio advertising and teleshopping, information regarding sponsorship and product placement, which, with certain exceptions, is prohibited.

ii Newsgathering

There are very few legal acts that specifically regulate newsgathering, and in most cases the general legal framework applies.

In addition to laws, the Estonian Newspaper Association has established a code of ethics for the Estonian press.¹²

10 Supreme Court of Estonia, 26 August 1997, Case 3-1-1-80-97.

11 Joosep Tikas, 'Praegused ja endised kriminaalid Eesti 200-s. Kaks visati välja, üks lahkus ise, ülejäänutele andestatakse', *Eesti Päevaleht*, 16 January 2019.

12 Available in English at www.eall.ee/code.html.

Journalists cannot enter onto someone's property without their permission or conduct covert surveillance, conduct electronic eavesdropping or obtain information in any other unlawful way. Filming and taking photos in public places is allowed, as long as the processing of personal data rules, which come from the Personal Data Protection Act¹³ (PDPA) and the General Data Protection Regulation,¹⁴ are followed. The PDPA states that permission from a data subject for audio or visual recording need not be obtained if, instead, the data subject is notified of the recording in a manner that allows them to understand the fact of recording and gives them an opportunity to prevent the recording if they so wish. The notification obligation does not apply in the case of public events, recording of which for the purposes of disclosure may be reasonably presumed.

Under the PDPA, personal data may be processed and disclosed in the media for journalistic purposes without the consent of the data subject; in particular, the personal data may be disclosed in the media if there is public interest thereof and this is in accordance with the principles of journalism ethics. Disclosure of personal data must not cause excessive damage to the rights of any data subjects.

A method in investigative journalism known as the 'journalistic experiment' can be used as a last resort when all other recognised methods have been exhausted yet the public interest on the matter remains high.

There is no recent case law against journalists using the journalistic experiment method. The last case where there is a mention of a journalistic experiment being used comes from a 2012 judgment from Harju County Court, where a man was sentenced to one year and three months' imprisonment for trying to persuade what he thought was an 11-year-old girl in an online chat room to meet with him and perform sexual acts with him. The girl was actually an adult journalist, performing a journalistic experiment.¹⁵

iii Freedom of access to government information

The freedom to access government information is regulated by the Public Information Act.¹⁶ Public information is information that is recorded and documented in any manner and on any medium and that is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof.

Holders of public information are required to ensure access to the information in their possession under the conditions and pursuant to the procedure provided by law in the quickest and easiest manner possible.

The law outlines the basis upon which a request for information can be refused by the holder (e.g., if the person requesting the information has not made evident enough which information the request has been made for).

The head of an agency, who is a holder of public information, may establish a restriction on access to information and classify information as information intended for internal use.

Case law on the matter includes a recent ruling from the Tallinn Administrative Court where a journalist requested documentation from the Estonian Social Security Agency (SSA) about the discontinuance of special pension payments to a person who had been accused of

13 Available in English at www.riigiteataja.ee/en/eli/523012019001/consolide.

14 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569416590419&uri=CELEX:32016R0679>.

15 Harju County Court, 17 December 2012, Case 1-12-11607/4.

16 Available in English at <https://www.riigiteataja.ee/en/eli/529032019012/consolide>.

committing treason.¹⁷ The journalistic interest behind this request was to find out whether the current legislation is sufficient enough to enable the discontinuance of distributing the state's budget to traitorous persons.

The SSA denied the request, stating that while treason itself does not per se provide a basis for the discontinuation of pension payments, there are other legitimate bases for that. Nevertheless, making public the pension information of a specific data subject would not be necessary for that type of analysis. In addition, the SSA did not find an exception for the request under the PDPA to grant the journalist access to the personal data of this certain data subject.

The journalist filed a complaint to the Estonian Data Protection Agency, and afterwards, a lawsuit against both government agencies to the Tallinn Administrative Court. The complaint claimed that if the SSA's decision to deny the requested information was based on insufficient reasoning on the journalist's part, the SSA should have provided guidelines on which grounds such information would be released. The Administrative Court ruled that the holder of the information is not responsible to provide this type of guidance.

Other legislation that regulates access to government information is the Response to Memoranda and Requests for Explanations and Submission of Collective Proposals Act, which stipulates that the state or local government authorities shall provide explanations free of charge to questions concerning the legislation and drafts thereof prepared by such authorities, the legislation that is the basis for the operation thereof, and their competence and legislative activities. The Archives Act governs the activities of the National Archives and access thereto.

iv Protection of sources

The MSA gives protection to sources of information, stating that a person who is processing information for journalistic purposes shall have the right not to disclose the information that would enable identification of the source of information. Furthermore, consent of the source is required in order to disclose any information that would enable identification of the aforementioned.

This requirement is dismissed if the source has knowingly provided false information. In this case, a journalist and a source are seen as having a contractual relationship and if one of the parties breaches his or her duties, the other one is no longer bound by his or hers either.

The Code of Criminal Procedure¹⁸ provides certain grounds for a journalist to be obligated to disclose information about his or her sources.

Estonia does not have any relevant case law on the matter.

v Private action against publication

The case law in Estonia awards claimants with non-patrimonial damages, but in most cases the awarded amounts are quite low.

The Estonian Law of Obligations Act¹⁹ states that, in the case of violation of personality rights, including defamation of a person, the aggrieved person shall be paid a reasonable amount of money as compensation for non-patrimonial damage.

17 Tallinn Administrative Court, 22 February 2019, Case 3-18-544.

18 Available in English at <https://www.riigiteataja.ee/en/eli/515052019002/consolide>.

19 Available in English at <https://www.riigiteataja.ee/en/eli/507032019001/consolide>.

When interpreting this ‘reasonable amount’, the Supreme Court has repeatedly stated that the amount of non-patrimonial damage has to reflect and be in accordance with the general well-being of society.²⁰ Therefore rewarded amounts have remained rather low, as general income rates in Estonia are low compared with other western countries.

When patrimonial damages are awarded, the aim is to place the aggrieved person in a situation as close as possible to that which the person would have been, had the damage not occurred. For non-patrimonial damages, the bases on how much damages can be awarded are the gravity and scope of the violation, the conduct and attitude of the person who caused the damage and the need to exert influence upon the person who caused the damage to avoid causing further damage.²¹

The Supreme Court has stated, in a case concerning two plaintiffs who had filed a lawsuit against a publisher asking for damages for breach of their private lives, that the burden of proof lies on the plaintiff and the court needs to be able to determine that some sort of moral damage has occurred, the damage has been caused unlawfully, no circumstances overruling the unlawfulness have occurred and the defendant is at fault for causing the damage.²²

In this case, the court stated that where a newsgatherer has unlawfully breached someone’s privacy, to determine the amount of non-patrimonial damages to be awarded, the scope of the violation should first be analysed. For example, whether the information was published only in a paper edition or also on the internet needs to be taken into account, as the news is more likely to reach a bigger audience through the internet. The court also stated that in these types of cases where the defendant is a journalistic publisher, persons need to be protected from a forced commercialisation of their lives and the motive for publishing needs to be determined, since someone’s privacy cannot be violated simply with the aim of making a profit.

Noteworthy in this case is also the fact that one of the plaintiffs was a minor and neither one of the plaintiffs had given his or her permission to publish the story. In their suit they asked the court of the lowest instance to award a fair amount of damages. Both plaintiffs were awarded damages in the amount of €2,500, so the defendant had to pay damages of €5,000 in total. The plaintiffs appealed the decision, stating that, given the circumstances, this was not a fair amount and that the fact that the defendant was a business was not fairly taken into account. The Court of Appeal and the Supreme Court did not change the ruling and found the damages fair and reasonable.

vi Government action against publication

No government action against publication has been initiated in Estonia. Sputnik, a pro-Russian propaganda publisher, has been condemned by the government, and politicians are not allowed to give interviews to the publisher, but no other examples can be found at this time.

20 For example, Supreme Court of Estonia, 25 September 2013, Case 3-2-1-80-13.

21 <https://www.riigiteataja.ee/en/eli/507032019001/consolide>, Section 134.

22 The Supreme Court of Estonia, 26 June 2013, Case 3-2-1-18-13.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

According to the Estonian Copyright Act,²³ literary, artistic and scientific works are protected by copyright. Works protected by copyright are an original result in an objective form, and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation. Works are protected by copyright regardless of the purpose, value, specific form of expression or manner. This also means that the registration or deposit of a work or completion of other formalities is not required for the work to be protected by copyright. Copyright in a work is created in the moment of expression of the work in any objective form that allows the perception and reproduction of fixation of the work. Content of copyright is constituted by moral and economic rights. Authors' moral rights are inseparable from the author's person and, therefore, non-transferable. The economic rights, however, can be transferred as a single right or as a set of rights for a charge or free of charge. There are some forms of works that are not protected by copyright under Estonian law, such as:

- a* ideas, images, notions, theories, processes, systems, methods, concepts, principles, discoveries, inventions and other results of intellectual activities that are described, explained or expressed in any other manner in a work;
- b* works of folklore, legislation and administrative documents (acts, decrees, regulations, statutes, instructions, directives, etc.) and official translations thereof;
- c* official symbols of the state and insignia of organisations (flags, coats of arms, orders, medals, badges, etc.);
- d* news of the day;
- e* facts and data; and
- f* ideas and principles that underlie any element of a computer program.

The term of copyright is the life of the author and 70 years after his or her death, irrespective of the date the work is lawfully made available to the public.

Jill Greenberg filed an action against Estonian political party Keskerakond and against non-profit organisation Vaba Ajakirjandus with a claim of indemnification of monetary loss of €37,500 and non-patrimonial damage of €20,000. Jill Greenberg is a notable portrait and animal photographer in the United States whose most famous work is photo series *End Times*, containing 32 photo portraits depicting toddlers crying. Newspaper *Kesknädal* used a banner from 31 August 2011 to 30 September 2011 on its website illustrated with one of Jill Greenberg's crying toddler photos without any reference to the photographer. Furthermore, the photo had been cropped, flipped and modified without her prior authorisation. To top it all, the newspaper banner was reproduced as a screen caption to the political party's Facebook page. Therefore, the moral and economic rights belonging to Jill Greenberg had been breached by the newspaper and by the political party.

Keskerakond argued that it is not obliged to indemnify Jill Greenberg because it merely reposted the newspaper's banner and this did not constitute a new breach. The newspaper argued that the plaintiff has not substantiated the sum of her claim. Obtaining a photo similar to the plaintiff's photo online would not cost more than €20, therefore the licence fee using the plaintiff's photo would not have been as high, as the plaintiff claims it to be. In

23 Available in English at <https://www.riigiteataja.ee/en/eli/504042019001/consolide>.

addition, Estonian case law does not recognise indemnification for non-patrimonial damage in relation with such breach. The Supreme Court found that the defendants' argument that similar photo could have been obtained for €20 is not a valid argument, because only the value of the specific piece is relevant when calculating the hypothetical licence fee. With regard to indemnification for non-patrimonial damage, the Supreme Court stated that according to Estonian law non-patrimonial damage can, indeed, be indemnified. However, in terms of intellectual property breach the non-patrimonial indemnification requires a culpable act by the breaching party. The mere breach is a sufficient basis for indemnification. Indemnification for non-patrimonial damage on the other hand is based on a culpable act. The Supreme Court sent the case back to lower courts for a review and the dispute has still not been resolved.²⁴

ii Personality rights

Personality rights are rights that are acknowledged in the legal system of many states. In these legal systems, an individual's name, likeness or other indication of identity are recognised as publicity rights, a type of property interest (i.e., intellectual property) that can be assigned or licensed.²⁵ In Estonia, however, personality rights do not belong in the sphere of intellectual property law. Rather, personality rights have remained where they originated – in the sphere of privacy rights.

Under Estonian law, copyrights protect the work or intellectual creation of an author. Since a person's name, identity and image are not a creation or a work, these traits are not protected as intellectual property. This does not, however, mean that an individual possesses no control of his or her name, identity, etc. Indeed, protection regarding personality rights is regulated under tort law. Unjustified use of a person's name, image or breach of the inviolability of the private life is a tort under Estonian regulation. This means that commercialising someone's identity without his or her authorisation can bring about an action for compensation of damage and a claim to stop the behaviour causing the breach of personality rights.

The other tort considered as breach of personality rights is the disclosure of incorrect information by incomplete or misleading disclosure of factual information concerning a person or his or her activities. This regulation can be enforced in a situation where, for example, a product is promoted with a claim that a certain famous person endorses the product in question. In such case, the certain famous person has the right to demand the refuting or correction of such information.²⁶

There have been two interesting cases where personality rights were breached in the realm of film production.

The film *Magnus* was made about a boy who had committed suicide in 2000. The mother of the young man who had committed suicide filed an action with the court to prohibit any public screening of the film in Estonia, and, in 2007, the screening of the film was prohibited in Estonia. Regardless, the film was entered into the Cannes Film Festival in the same year. In 2008, the court prohibited any public screening in any country for seven years. Nevertheless, the film was screened in some Estonian cinemas. Due to the breach

24 The Supreme Court, 29 November 2017, Ruling 2-14-56641.

25 B Beebe, et al. *Trademarks, Unfair Competition, and Business Torts*. Aspen Publishers, 2011, Chapter 3.

26 P Varul, et al. *Võlaõiguseadus III. Kommenteeritud väljaanne* (Law of Obligations Act III. Commented edition). Juura, 2009, p. 664.

of prohibition, a new proceeding was commenced, with a potential 30-year long screening prohibition on the film.²⁷ A circuit court ruling came into force on 27 April 2010, which prohibited any screening or any publication of the film globally until 2025.²⁸

The publication of the film was prohibited because the event and persons in the film were too easily traceable to the real-life persons; especially because the role of the protagonist's father was played by the boy's actual biological father, who was engaged in the events that led to the boy's suicide. Since the courts ruled that the film was intruding on the personal life of the mother and causing her mental damage, the release of the film was prohibited.²⁹

In another case, however, the courts ruled in favour of the director and producer of the film.³⁰ *Sangarid*, a film telling the story of four young men escaping from Soviet Estonia to Sweden, was produced and screened in Estonia. Since the film was loosely based on the lives of actual real-life persons, three of them filed an action with a claim of €25,000 for non-patrimonial damage for breach of their privacy. The courts ruled that the plaintiffs were insincere and wished to profit from the director's intellectual property. In addition, the courts found that the events in the film relating to the life of the plaintiffs were too ambiguous and unspecific to be traced back to these plaintiffs, arguing that many Estonians in that era led similar lives and experienced similar destinies. Moreover, the film was mainly composed of fictitious events and details, therefore the plaintiffs were not identifiable, and the average audience was unable to tell which events could have been based on real-life events and which events were fictitious.³¹

iii Unfair business practices

The most common unfair business practices in intellectual property law are related to unlawful reproduction of someone's work (intellectual property) and failure to pay authors remuneration when using someone else's works. The following are some noteworthy cases regarding these problems.

Sanoma Baltics v. Eesti Ajalehed and Delfi

Sanoma Baltics owned the web platform www.auto24.ee where users can upload advertisements for selling vehicles. The defendants reproduced the advertisements from the plaintiff's website to advertise the same vehicles on their own websites. Sanoma Baltics filed an action against Eesti Ajalehed and Delfi for unlawful reproduction of the advertisements, demanding €9,600 for loss of licence fees. The plaintiff stated that, even though photos and advertisements are created by users, the users transferred the copyright to the plaintiff when they agreed with the plaintiff's terms of service. The plaintiff owns the copyrights to the objects created on the basis of his investment: the database, the software and the graphic design of the website, and the photos for which copyright was assigned to him by users. The plaintiff found that it is both a database protected as an original work (including a collective work) and a database with *sui generis* protection.

27 Estonian Film Database's article about *Magnus*, available at www.efis.ee/et/filmiliigid/film/id/775/ huvitavat-lugemist.

28 "Magnus" keelu all 2025 aastani', *Eesti Päevaleht*, 28 April 2010.

29 D Hanschmidt, 'Kohus keelas filmi "Magnus" näitamise seitsmeks aastaks', *Postimees*, 13 May 2008.

30 R Ernits, 'Mängufilmi "Sangarid" tegijad said riigikohtus võidu', *ERR news*, 18 June 2019.

31 Tallinn Circuit Court, 9 January 2019, Decision 2-16-16730.

The defendants argued that the database is not protected with copyright because of its lack of originality. They found that it is an objective collection of data, lacking any decision-making or one person's personal style. Second, they found that the database does not fall in the scope of *sui generis* protection because compiling such data did not need any significant investments from the plaintiff. The Supreme Court ruled that the website is to be deemed as original work and, therefore, it is protected with copyright, in addition the website constituting a database with *sui generis* protection. The court found the determining factor for ruling the database as an original work was the fact that www.auto24.ee users had transferred the copyright to the plaintiff and this fact was uncontested by the defendants. The database was protected with *sui generis* protection because the court found that creating such a website, maintaining the servers for the advertisements and the effort of the staff put into servicing the website, is to be considered as a significant investment.³²

Estonian Authors' Society v. Viasat

The Estonian Authors' Society (EAÜ) filed an action against Viasat to either refrain from retransmitting the Estonian TV channels (ETV, ETV2, Kanal2, TV and Kanal11) or pay an author's remuneration of €285,346 to EAÜ for satellite retransmissions of these channels.

The EAÜ stated that Viasat unlawfully retransmitted Estonian broadcasters' TV shows to Latvian audiences.

Viasat argued that it does not commit any act deemed as communicating work to the public (i.e., transmit), it merely provides technical solutions as a service to broadcasters who transmit their signal via Viasat's satellite, using microwave technology. The first and second instant courts ruled in favour of the EAÜ. The Supreme Court, however, dismissed the former rulings and sent the case back to circuit court for a review. In the end, the courts ruled in favour of Viasat, arguing that the input of TV programmes' signals is under the control of broadcasters and, therefore, it is broadcasters that communicate the channels to the end-user. According to the Estonian Copyright Act, only persons who communicate a work to the public are obligated to pay an author's remuneration. Therefore, the courts found that Viasat, as a technical service provider, is not obliged to pay an author's remuneration to the EAÜ for the retransmission of the Estonian TV channels.³³

EAÜ v. City of Tartu

The EAÜ filed an action against the city of Tartu with a claim to pay remuneration of €81.55 to an author. A Tartu municipal secondary school held a concert where the students, the alumni and the employees of the school performed different songs but did not pay the standard fee that is required for publicly performing songs created by someone else. The city of Tartu built its case on the fact that using authors' works in the direct teaching process in educational institutions by the teaching staff and students is not prohibited. The problem was, however, that the concert was held outside the school's premises. In addition, tickets for the concert were sold publicly. Therefore, the courts ruled in favour of the EAÜ and found that the city of Tartu is obliged to pay the author's remuneration of €81.55.³⁴

32 The Supreme Court, 6 June 2012, Decision 3-2-1-71-12.

33 The Supreme Court, 29 May 2013, Decision 3-2-1-50-13.

34 The Supreme Court, 27 February 2017, Decision 3-2-1-159-16.

V COMPETITION AND CONSUMER RIGHTS

During the past year, some prominent mergers of large and medium-sized media companies operating in Estonia took place.

The merger control of Estonian entities is carried out by the Estonian Competition Authority (ECA), unless the threshold established under the EU law³⁵ is reached and, in this case, the competent authority for merger control is the European Commission. The mergers of nine media companies, which took place between September 2018 and September 2019, were inspected by the ECA and all were cleared without any additional conditions.

The reasons for media companies' merger and acquisition (M&A) transactions are diverse; for instance:

- a* the aspiration to enter into the media market, as it was for the Alexela Varahalduse AS and its parent company Alexela Group OÜ. The group operates in the field of energy, real estate, metalworking and financial investment administration and has now acquired control over the newspaper publishing company AS Õhtuleht Kirjastus;³⁶
- b* the termination of business activity, as it was for Osaühing Põlva Koit, which sold its intellectual property to a huge media company, AS Postimees Grupp;³⁷
- c* when the telecommunications, radio and printed media company AS Eesti Meedia acquired the advertisement company Baltic Media Services OÜ, it justified the transaction with simplification of workflow processes since the acquired company had already been providing radio advertisement services to the buyer;³⁸
- d* AS Eesti Meedia acquired the majority stake in (at that time yet-to-be-established) Eesti Audiovisuaalse Kultuuripärandi OÜ, with the intention of bringing various classic Estonian TV series and films to the Estonian viewer;³⁹
- e* the desire to expand businesses within, or into, whole new markets in the media and marketing communications sectors;
- f* the intention to contribute more to local film industry development; and
- g* to instigate sector-based financial investments.

The increasing trend of M&A transactions in the media and telecommunications sector shows the interest of both Estonian and foreign media companies to invest in the sector and, therefore, provide better quality media, entertainment and advertisement content to Estonian viewers. The Estonian television and motion picture industry develops rapidly, with more quality and high-budget pieces of entertainment emerging every year. Hence, the continuing growth in investments and M&A transactions can be expected in the future.

Considering the media and entertainment sector in Estonia is still relatively small, no major or remarkable regulations in respect of consumer rights have emerged in the past few years. Estonia is an avid supporter of net neutrality; hence, no consumer disputes have arisen on that ground and no significant advancements have taken place. The ECA has, nevertheless, expressed its view on plans to establish the 5G network and regulatory matters that entail

35 Council Regulation (EC) No. 139/2004, Article 1.

36 Competition Authority, 19 June 2019, Decision 5-5/2019-031.

37 Competition Authority, 14 June 2019, Decision 5-5/2019-030.

38 Competition Authority, 18 October 2018, Decision 5-5/2018-065.

39 www.konkurentsiamet.ee/public/KOONDUMISE_LUHIKOKKUVOTE_Eesti_Audiovisuaalse_Kultuuriparandi_OU.pdf.

its establishment.⁴⁰ Once available, the 5G network will without a doubt influence how Estonians consume media and entertainment, which, in turn, will precipitate developments in both sectors.

VI DIGITAL CONTENT

The requirements for information society service providers, and the organisation of supervision and liability that lies upon them are set forth in the Information Society Services Act.⁴¹ In practice, this Act concerns apps and other service providers, including those in the media and entertainment sectors. The Act implements the rules on advertising, notification obligations, data transmission and disclosure for such services. Pursuant to the Act, a service provider is not obliged to monitor information upon the mere transmission, provision of access, temporary storage in cache memory or at the request of the recipient of the service, nor is the service provider obliged to actively seek facts or circumstances indicating illegal activity. In respect of the Act, one court case has been tried in the Supreme Court of Estonia.⁴² The plaintiff of the case filed the lawsuit against an internet forum for disclosing false data about the person who allegedly posted insulting commentaries about the plaintiff on that respective forum. This resulted in a dismissed court case against that person, therefore, causing not only non-patrimonial damage to the plaintiff as a result of such commentaries, but also patrimonial damage (i.e., procedural costs of the ‘false’ defendant that the plaintiff had to bear). While the plaintiff did not use the Information Society Services Act as the basis for her claim, the Supreme Court expressed that, in theory, it could be a basis for similar claims.

Another case concerning the Act took place at the Tallinn Circuit Court,⁴³ where the court sought a preliminary ruling from the European Court of Human Rights⁴⁴ for the definition of ‘information society service’ in the context of IP law. The most famous court case in connection with liability of a website – in particular, a news portal – is the *Delfi* case that has made its way to the European Court of Human Rights. This landmark case found that Estonia has acted in compliance with the law for holding Delfi liable for defaming comments posted on its news portal and has since been cited in several other court cases that followed.⁴⁵

No other remarkable case law developments have taken place recently. It can be anticipated, however, that with the upcoming implementation of European Union law,⁴⁶ new case law and regulatory provisions will be initiated.

40 Competition Authority, 10 July 2019, Decision 5-5/2019-035.

41 Available in English at www.riigiteataja.ee/en/eli/515012019001/consolide.

42 Supreme Court of Estonia, 6 June 2018, Case 2-16-14655.

43 Tallinn Circuit Court, 26 November 2018, Case 2-14-6942.

44 European Court of Human Rights, 10 October 2013, *Delfi AS v. Estonia* (Application No. 64569/09).

45 Columbia University Global Freedom of Expression, *Delfi AS v. Estonia* (case significance), available at <https://globalfreedomofexpression.columbia.edu/cases/delfi-as-v-estonia/>.

46 For example, Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=EN>.

VII CONTRACTUAL DISPUTES

In the Estonian jurisdiction, the majority of disputes related to the media and entertainment sector are non-contractual disputes rather than contractual disputes. These disputes usually relate to the unlawful reproduction of authors' work and trademark issues. Another notable segment in case law regarding the media and entertainment sector are breaches of advertisement law; however, these breaches are processed in administrative proceedings.

VIII YEAR IN REVIEW

In the past 12 months, the most notable events in the Estonian entertainment sector have certainly taken place in the film industry.

In 2016, the Estonian Ministry of Culture launched a pilot project, Film Estonia, to support film and series production in Estonia based on foreign capital. The aim of the programme is to further cooperation opportunities of Estonian and foreign film producers for making films in Estonia. A producer can be reimbursed with up to 30 per cent of local production costs.

The most notable example of the programme attracting a foreign production to Estonia is the film *Tenet*, directed by Christopher Nolan, which is scheduled to be released by Warner Bros Pictures in July 2020. Filming in Estonia took place in June and July 2019 in the streets of Tallinn and the Tallinn city government permitted temporary road closures and detours to enable the filming.

The production costs in Estonia amounted to €16 million, so the estimated return from Film Estonia will be almost €5 million. In addition to enhancing cooperation with foreign film producers, the Estonian government believes that other sectors, such as tourism, will also benefit from these investments, as film fans tend to visit production locations.⁴⁷

Another noteworthy event in the Estonian entertainment sector concerns the 'empty cassette remuneration'. The current problem is Estonia's outdated legislation from 2006, which stipulates that the manufacturer and importer of empty cassettes, such as DVDs and VHSs, are charged with an empty cassette fee.⁴⁸ The idea is to collect the fees from different authors' societies and reimburse owners of copyright for their creation (film, music video, song, etc.) being recorded for personal use by the buyer of the empty cassette. Nowadays, no one buys DVDs or VHSs, but the creators' empty cassette fee system remains the same, while users have moved on to more modern platforms (apps such as Spotify). Estonian artists have initiated a claim against the Estonian government for loss of profit for €38 million for the past four years, for which a judgment has not yet been rendered.⁴⁹

47 <https://kultuur.err.ee/954026/riik-annab-nolani-filmile-viis-miljonit-eurot>.

48 www.riigiteataja.ee/akt/129122011156.

49 www.err.ee/864254/loomeinimesed-laksid-saamata-jaanud-tasude-parast-riigi-vastu-kohtusse.

IX OUTLOOK

In the coming year, the main issues and legal developments for Estonia will be to adopt two new directives into legislation by 2021: the Directive on Copyright in the Digital Single Market⁵⁰ and the Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.⁵¹

Discussions on how the government shall adopt the directives into Estonian legislation have started, but no public draft acts are yet available. Furthermore, adopting the Directive on Copyright in the Digital Single Market may prove to be a challenge for Estonia, as many politicians have openly opposed it, and during the vote in the European Parliament, Estonia remained impartial with only one of its MEPs voting for the Directive.

50 <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

51 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2019.130.01.0082.01.ENG.

GERMANY

*Mark Peters*¹

I OVERVIEW

The German media and entertainment industry had a total turnover of €60.6 billion in 2017,² and employed approximately 520,000 media workers.³ In Germany, there is a clear divide between the classical (print) and the digital world, with the former steadily losing business (down 1.8 per cent in 2017 for newspapers), and strong growth for digital media (up 12.1 per cent in 2017). This shift also influences regulation, as the ancillary copyright for press publishers introduced in Germany in 2013 illustrates.⁴

II LEGAL AND REGULATORY FRAMEWORK

Individual German states, rather than the federal state, are competent for regulating the media. This distribution of power guarantees an independent media, allowing citizens to form their own opinions and safeguarding the control function of the media. For print media, the states have enacted press regulations addressing relevant topics from claims for counterstatements to information rights against public authorities. Correspondingly, TV and radio broadcast media are also regulated by the states based on the Interstate Broadcasting Treaty⁵ and their state-specific broadcasting or media acts. Public broadcasting services are supervised by broadcasting councils. Private broadcasters are regulated by 14 different state regulatory authorities,⁶ which grant the required licences, allocate frequencies or cable capacity and supervise compliance with applicable legislation. Their focus is on safeguarding diversity of opinion, but also on

1 Mark Peters is counsel at Grünecker Patent und Rechtsanwälte PartG mbB.

2 PwC, 'German Entertainment and Media Outlook 2018–2022', www.pwc.de/de/technologie-medien-und-telekommunikation/gemo-2018.pdf.

3 Statista, 'Anzahl der Beschäftigten in der Medienbranche (Media Worker) in Deutschland in den Jahren 2015 bis 2017', <https://de.statista.com/statistik/daten/studie/752793/umfrage/beschaeftigten-in-der-medienbranche-in-deutschland/>.

4 According to the Court of Justice of the European Union, Case C-299/17, the German Act implementing the ancillary copyright is invalid as the legislative process was not notified to the European Commission. The ancillary copyright for press publishers is now included in Article 15 of the Copyright Directive (Directive (EU) 2019/790).

5 www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/RSStV_22_english_version_clean.pdf.

6 Joint website available at www.die-medienanstalten.de.

compliance with advertising⁷ and regulations for the protection of minors.⁸ The regulatory authorities have wide regulatory powers at their disposal, ranging from complaints or fines to the revocation of licenses. Core regulation for online media is provided by the Telemedia Act (TMG),⁹ which applies to telemedia services.¹⁰ The TMG includes provisions on applicable law, information obligations, restriction of liabilities and data protection.¹¹ The Interstate Broadcasting Treaty,¹² regulating journalistic aspects, and the State Treaty on the Protection of Minors also apply. The regulatory authorities supervise telemedia services, for which, in general, no licence is required, with the exception of regular live journalistic video streams.¹³

Freedom of expression and freedom of information are comprehensively protected by the German Constitution, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR).¹⁴ Private parties (e.g., social networks) also need to consider their users' right to freedom of expression when acting in respect of content on their platform. Intellectual property rights are protected by the Copyright Act (UrhG)¹⁵ and the Trademark Act (MarkenG),¹⁶ which also protect titles of publications, cinematic or other comparable works. The Publishing Act regulates the relationship between the publisher and the author.

EU directives and the case law of the Court of Justice of the European Union (CJEU), the German Federal Supreme Court (BGH) and Constitutional Court and the European Court of Human Rights have a strong impact on the media and entertainment industry.

Finally, collecting societies are an important player within the German media and entertainment industry. Based on the Collecting Societies Act,¹⁷ and, in general, regulated by the German Patent and Trademark Office, they manage copyright or related rights on behalf of rights holders.

7 www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Werberichtlinien_Fernsehen.pdf.

8 www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Treaty_on_the_Protection_of_Minors_in_the_Media_JMStV_in_English__19th_Interstate_Broadcasting_Treaty.pdf.

9 www.gesetze-im-internet.de/tmg/.

10 Electronic information and communication services with the exception of telecommunication and broadcasting services.

11 There has been ongoing discussion since the General Data Protection Regulation entered into force of whether those provisions still apply.

12 Creating an obligation to provide information on the provider of the service as well as the right for information from public authorities.

13 For internet radios only, a notification to the regulatory authority is required.

14 Article 5 German Constitution, Article 11 Charter of Fundamental Rights of the European Union and Article 10 ECHR.

15 www.gesetze-im-internet.de/englisch_urhg/index.html.

16 Section 5, Paragraph 3 MarkenG, www.gesetze-im-internet.de/englisch_markeng/englisch_markeng.html#p0039.

17 www.gesetze-im-internet.de/englisch_vgg/index.html.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of speech and media freedom are comprehensively protected in particular by the German Constitution (GG) (Article 5, Paragraph 1).¹⁸ However, protection is not absolute, but is limited by ‘general laws, provisions for the protection of young persons, and in the right to personal honour’. The expression of opinion and of fact are protected. Deliberately false statements of fact (fake news) have very limited protection. Expressions of opinion within a (political) public debate are particularly protected. Different from a private dispute, their legitimacy is generally presumed. Critical, satirical, excessive, polemic and shocking expressions of opinion generally also fall within the scope of protection. Moreover, where several interpretations are possible, a court may not refer to one possible interpretation unless there are valid reasons to exclude others. Accordingly, even hate speech may theoretically fall within the scope of protection. Whether a specific statement is legitimate generally has to be determined by balancing opposing interests against one another. Only where a statement violates human dignity, constitutes a formal insult or a mere invective, such balancing is not required. It is evident that this weighing of fundamental rights leads to uncertainties, particularly where hate speech is concerned.

Nevertheless, the German legislator has introduced the Network Enforcement Act (NetzDG)¹⁹ applying to social networks, but not to classic media platforms (i.e., those offering journalistic or editorial content). The NetzDG requires the implementation of specific complaint procedures, requiring the provider to remove user content infringing a catalogue of criminal provisions, generally within seven days of receipt of notification. As a recent development following the introduction of the NetzDG, internet users affected by a content takedown by the platform are challenging these measures before the courts, resulting in multiple preliminary injunctions²⁰ ordering social networks to reinstate content on the grounds that the removal did not appropriately take the user’s constitutional right to freedom of speech into account. These decisions emphasise the effect of freedom of speech even on contractual relationships between private parties.

Recent high-profile cases addressed the limitations of free speech and media freedom. Notably, the *Böhmermann* case, where German comedian Jan Böhmermann, in his weekly satirical programme, broadcast an offensive poem about the Turkish President, criticising excessive reactions to a legitimate parody. The Hamburg Court of Appeal prohibited elements of the poem referring to sexual acts as violating human dignity. The BGH rejected an appeal,²¹ and now Böhmermann has announced an appeal to the German Constitutional Court (BVerfG). The relationship between intellectual property (IP) rights and media freedom has been the subject of the *Afghanistan Papiere* case, where the German government, based on copyright, sued a publisher that had made confidential military reports available on its online

18 www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0037.

19 www.bmjjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&cv=2.

20 Higher Regional Court (OLG) Munich, Case 18 W 1294/18, judgment of 24 August 2018; OLG Dresden, Case 4 W 577/18, judgment of 8 August 2018; OLG Oldenburg, Case 13 W 16/19, judgment of 1 July 2019; German Constitutional Court, Case 1 BvQ 42/19, judgment in a preliminary proceeding of 25 May 2019.

21 BGH, Case VI ZR 231/18, judgment of 30 July 2019.

platform. The CJEU, answering to a referral from the BGH, questioned whether such reports were copyright protected, although the publication in any event might have been legitimate based on the exception for reports on current events.²²

Further, Holocaust denial, dissemination of propaganda and use of symbols of unconstitutional organisations (e.g., a swastika) constitute criminal acts that are not protected by freedom of speech.²³

In a case concerning online newspaper archives, the European Court of Human Rights confirmed that there was no obligation to remove crime reports regarding the murder of a German actor that identify the perpetrator from the archive, in order to protect the reintegration perspective of the perpetrator.²⁴ The BGH emphasised in a further case concerning an online archive that all relevant aspects must be considered, including the public interest that may exist in the matter and whether the identifying report could be found through Google.²⁵

Finally, commercial speech and commercial advertising can also be protected. A car rental company was permitted to use the image of a union leader during a railway strike for a commercial advertisement with the title 'Our employee of the month' as a satirical reference to the effects of the strike, which is covered by the freedom of speech.²⁶

ii Newsgathering

As a general rule, also for investigative purposes, the use of illegal means to obtain information is not permitted, although there are exceptions. Entering property against the will of the owner is a criminal act (Section 123 German Criminal Act (StGB)), unless the owner specifically or implicitly consented, even if said consent was fraudulently obtained. Secret recordings of private conversations and the use of eavesdropping devices (Section 201 StGB), as well as accessing data without authorisation (Section 202a, 202b StGB) constitute criminal acts, although these rights can only be asserted by the respective persons and not an employer.²⁷

Journalists are generally allowed to film and take pictures of people in public spaces, as background or part of a meeting, parade, etc. (Sections 22 and 23 Act on Protection of Copyrights in Works of Art and Photographs (KUG)).²⁸ Since the introduction of the General Data Protection Regulation (GDPR), there has been discussion on whether the KUG is still applicable. Referring to the media privilege in Article 85 of the GDPR, the Cologne Court of Appeal²⁹ considered the KUG as applicable for journalistic purposes, but possibly not for advertising. However, where a recording was not made for, but later used for, journalistic purposes, the collection of data could be justified based on Article 6(1)f of the GDPR, whereby it might not be necessary to provide the generally required information to the data subject according to Articles 11(1) and 15(5)b of the GDPR, as this was usually impossible.³⁰

22 CJEU, Case C-469/17, judgment of 29 July 2019.

23 Section 130 German Criminal Act.

24 ECHR, Cases 60798/10 and 65599/10, judgments of 28 June 2018.

25 BGH, Case VI ZR 439/17, judgment of 18 December 2018.

26 OLG Dresden, Case 4 U 1822/17, judgment of 21 August 2018.

27 BVerfG, Case 1 BvR 2252/04, judgment of 18 November 2004.

28 www.gesetze-im-internet.de/kunsturhg/.

29 OLG Cologne, Case 15 U 110/18, judgment of 10 October 2018.

30 Not binding legal analysis by the Hamburg Data Protection Authority, www.filmverband-suedwest.de/wp-content/uploads/2018/05/Vermerk_DSGVO.pdf.

Still, as the BGH recently confirmed in the *Organic chicken* ruling,³¹ unlawfully obtained information may also be published in specific circumstances where public interest prevails over the interest of a commercial entity. An association of ecologically working companies sued a German broadcaster for broadcasting video recordings that were made illegally by an animal protection activist. These recordings showed the miserable conditions under which chickens sold under the 'organic' label were kept. It was criticised that the law permitted the labelling of products as organic, even though the actual animal housing conditions were contrary to consumer expectations. The BGH considered the broadcast report legitimate as an accurate documentation based on public interest. Any restrictions would impair the function of the press as a watchdog. The Court also considered it relevant that not the broadcaster but the animal activist had committed the illegal act. The broadcaster had only made use of it.

The Karlsruhe Court of Appeal similarly rejected an application for a preliminary injunction³² against the publication of a private chat protocol that contained extremist statements of an employee of a right-wing MP. It was unclear whether the newspaper or a third party had illegally obtained the information. In light of the discussion around right-wing extremist efforts in connection with right-wing parties, the criticised press articles contributed to a discussion essentially affecting the public, and its publication was therefore legitimate.

New legislation on trade secrets (Section 5(1) German Trade Secrets Act (GeschGehG))³³ clarifies that the use or the publication of trade secrets for legitimate purposes, including media freedom, is permitted. Generally, only the use of trade secrets for legitimate purposes is relevant, not whether a payment was involved. Trade secrets are also only protected where the owner has a legitimate interest in secrecy (Section 2(1) GeschGehG).

iii Freedom of access to government information

The right of access to information by the media is guaranteed by the German Constitution (Article 5(I)2 GG).³⁴ Access to German federal government information³⁵ is regulated by the Freedom of Information Act (IFG);³⁶ a legal basis for access by the media is also provided by the Press and Media Acts and the Interstate Broadcasting Treaty (RStV).³⁷ Based on a legitimate interest, access to court files must be granted.³⁸ The right of access according to the IFG is limited (Sections 3 to 6 IFG) where special public interest, the decision-making process, personal data and IP rights and trade secrets are affected. A narrow interpretation of these limitations is required. According to the *Afghanistan Papiere* ruling of the CJEU, limiting access to, or publication of, government information by the media based on copyright will generally be difficult.

The administration may levy charges, but they cannot have a prohibitive effect and must be appropriate.³⁹

31 BGH, Case VI ZR 396/16, judgment of 10 April 2018.

32 OLG Karlsruhe, Case 6 U 105/18, judgment of 13 February 2019.

33 www.gesetze-im-internet.de/geschgehg/_5.html.

34 German Federal Administrative Supreme Court (BVerwG), Case 6 A 2/12, judgment of 20 February 2013.

35 German states have enacted corresponding legislation granting access to the information of their administrations.

36 https://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.html.

37 Section 9a RStV for broadcasters and Section 55, Paragraphs 3 and 9a RStV for telemedia services.

38 Section 299, Paragraph 2 German Civil Procedural Act (ZPO).

39 BVerwG, Case 7 C 6/15, judgment of 20 October 2016.

The German Federal Administrative Supreme Court rejected access to a protocol of a Cabinet meeting of the federal government.⁴⁰ However, the Court granted a disclosure request of a newspaper against the Bavarian Parliament concerning the amounts paid to an MP's wife who was employed by him as an assistant. Referring also to Section 6(1)f of the GDPR, the Court granted access arguing that, for disclosure requests, it was also relevant whether this affected the inner personal, private or less protected social sphere. Thus, as it only affected the social sphere, the public interest in obtaining information on family members employed by MPs prevailed over the interest of the MP and his family.⁴¹

iv Protection of sources

Press and media freedom (Article 5I, Section 2 GG) also grants protection for sources. Accordingly, professional media representatives have a right to refuse information in a criminal proceeding.⁴² According to the German Constitutional Court, communication data is not protected by press or media freedom, but by the constitutional right protecting telecommunication secrecy. Thus, based on court orders in respect of severe criminal acts, access to communication data by criminal prosecution authorities remains possible.⁴³ Correspondingly, press and media freedom also limits the right of the prosecution authorities to seize documents (Section 97, Paragraph 5S1 German Criminal Procedure Act).

v Private action against publication

The majority of claims are based on the violation of the individual's personality right. Based on the German Constitution, the personality right grants broad protection of private life and beyond. The German Federal Supreme Court developed the concept of protection zones to provide some contours for the protection granted. The following are protected:

- a* the social, private and intimate sphere of a person against indiscretions;
- b* a person's honour and reputation;
- c* the truthful presentation of a person in public; and
- d* finally, as the most recent addition, the right to defend against a commercial exploitation of a person's characteristic attributes.⁴⁴

The protection granted by the personality right is not limited to private individuals, but also covers commercial and other entities.⁴⁵ Commercial entities can also rely on the right to the established and exercised business enterprise, particularly in respect to illegitimate product reviews and calls for boycott.

Preliminary injunctions are typical for German legal proceedings, particularly in media law. Regularly granted by the court *ex parte*, this remains an effective tool allowing applicants to obtain a ruling or withdraw the application without the adverse party necessarily becoming aware of it. Preliminary injunctions require a particular urgency, so that applications generally

40 BVerwG, Case 7 C 19/17, judgment of 12 December 2018.

41 BVerwG, Case 7 C 5/17, judgment of 27 December 2018.

42 Section 53, Paragraph 1(5) German Criminal Procedural Act; www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0229.

43 BVerfG, Cases 1 BvR 330/96 and 1 BvR 348/99, judgment of 12 March 2003.

44 Wenzel-Burkhardt and Pfeifer, *Das Recht der Wort- und Bildberichterstattung*, 6th edition, p. 193 et seq.

45 Personality rights for legal entities are also addressed by the CJEU in Case C-194/16, judgment of 17 October 2017.

have to be filed within one month after notice of the infringement.⁴⁶ Specifically, the Hamburg and Cologne courts, handling the majority of German media cases together with Berlin,⁴⁷ regularly grant *ex parte* preliminary injunctions.⁴⁸ The German Constitutional Court made clear that a fair trial required a hearing of the other side.⁴⁹ Still, when the application is filed swiftly, courts may grant *ex parte* injunctions, provided that the other side had the chance to respond to a warning letter, and the preliminary injunction corresponds with the scope of said warning letter.

Remedies are a claim for publication of a counterstatement⁵⁰ or correction in respect to an incorrect publication of facts. However, these require the initial incorrect statement to be republished. Thus, cease-and-desist claims are generally more appropriate. Finally, there are also claims for damages and compensation for immaterial damage, which can only be asserted in a main proceeding. Damage claims can also be calculated on the basis of the licence fee that would have become due for a legitimate use of a picture, as the Cologne Court of Appeal recently decided in a case concerning the use of a picture of a prominent person for the purpose of directing users to an unrelated article.⁵¹ In cases of otherwise severe, culpable, non-recompensable violations of a person's personality rights, compensation claims become due not to compensate a loss, but to satisfy the party concerned. Their dissuasive effect must also be explicitly accepted.⁵² The compensation claim expires with death. Accordingly, the Cologne Court of Appeal lifted a ruling awarding compensation of €1 million for the personality right-infringing publication of a biography of the former German chancellor Helmut Kohl, who died while the proceeding was pending.⁵³

vi Government action against publication

In the *Böhmernann* matter, discussed in Section III.i, not only civil but also criminal and administrative courts were employed. Following a criminal complaint from the Turkish President, criminal investigations against the comedian were started, but later dropped by the prosecution. German parliament repealed the criminal provision regarding insults against foreign heads of state.⁵⁴ The Berlin Administrative Court rejected a complaint regarding a statement of the German chancellor Angela Merkel who had referred to the poem as 'deliberately violating', since Merkel had distanced herself from her previous statement so that a repetition of said statement was not to be expected.⁵⁵

46 There is no unanimous practice; some courts grant up to two months.

47 Between 2010 and 2012, almost two-thirds of appeal court rulings were decided by the Berlin (29 per cent), Hamburg (22 per cent) and Cologne (12 per cent) courts. Munich passed 7 per cent and Frankfurt passed 2 per cent of court rulings during this period (Jürgens, *NJW* 2014, 3061, 3064).

48 According to Section 32 ZPO, the court where the effect of the infringement occurs (i.e., where the content can be accessed by internet users) is also competent (known as the 'flying jurisdiction').

49 BVerfG, Case 1 BvR 2421/17, judgment of 30 September 2018.

50 Based on states' media acts (e.g., Article 10 Bavarian Act on the Press) and Section 56 RStV 'TV/radio and journalistic telemedia'.

51 OLG Köln, Case 15 U 160/18, judgment of 28 May 2019, awarding €20,000, currently under appeal before the BGH, Case I ZR 120/19.

52 BGH, Case VI ZR 323/95, judgment of 26 November 2016.

53 OLG Cologne, Case 15 U 64/17, judgment of 29 May 2018, currently under appeal before the BGH.

54 A chronology is available at www.ndr.de/kultur/Der-Fall-Boehmernann-eine-Chronologie,boehmernann212.html.

55 Berlin Administrative Court, Case 6 K 13.19, judgment of 16 April 2019.

The NetzDG requirement for social media platforms to remove illegal content within seven days, or within 24 hours for extreme cases, also creates a risk that legitimate journalistic content is removed. The *Afghanistan Papiere* case in which the German government unsuccessfully tried to prevent publication of military documents based on copyright is discussed in Section III.i.

A proceeding before the German Constitutional Court filed by Reporters Sans Frontières and other investigative journalists against an act granting broad supervisory powers in respect of foreign media and journalists to the German Foreign Intelligence Service (BND)⁵⁶ is still pending.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

German copyright law is largely harmonised with EU law. Accordingly, the case law of the CJEU plays a significant role, whereby German courts also refer a significant number of cases.⁵⁷ The German law surrounding protected work as a result of an author's intellectual creation,⁵⁸ exploitation of work and the related exceptions and limitations is particularly harmonised with EU law.

Several recent cases concern the act of public communication. Following a ruling of the CJEU, the BGH confirmed⁵⁹ that uploading a picture on a website, even if it had been made available on another website with the rights owner's consent without protection against download, constituted an act of public communication. Merely providing TV sets for hotel guests did not qualify as act of public communication, unless the hotel was involved in the transmission of the signal,⁶⁰ contrary to a hospital that provided not only radio sets, but also transmitted the signals via its internal cable network.⁶¹ Another public communication ruling by the Cologne Court of Appeal⁶² concerned a TV show using content of mishaps in other shows. The Court held that the producers could not rely on limitations and exceptions, since unaltered use of the original material would neither qualify as parody nor could it rely on the quotation exception, as said exception requires a discussion of the quoted content.

The question of whether use of a two-second sound sample without a licence was legitimate ignited a 20-year legal battle that led to a ruling of the German Constitutional Court⁶³ overturning the BGH as not having sufficiently considered freedom of art, and referring the matter back. The BGH, dealing with the case for the third time, referred the

56 BVerfG, Case 1 BvR 2835/17, concerning the BND Act.

57 For example, the following three judgments of 29 July 2019: CJEU, Case C-469/17, *Afghanistan Papiere*; Case C-516/17, *Spiegel Online*, on limitations for the media's quotation right; and Case C-476/17, *Metall auf Metall*, on sampling.

58 CJEU, Case C-310/17, *Levola v. Smilde Foods BV*, judgment of 13 November 2018.

59 BGH, Case I ZR 267/15, *Cordoba II*, judgment of 10 January 2019, based on CJEU, Case C-161/17, judgment of 7 August 2018.

60 BGH, Case I ZR 127/17, judgment of 19 July 2018.

61 BGH, Case I ZR 85/17, judgment of 11 January 2018.

62 OLG Cologne, Case 6 U 116/17, judgment of 20 April 2018, referring in respect of parody to BGH, Case I ZR 9/15, *Auffett getrimmt*, judgment of 28 July 2016 – and quotation limitation to BGH, Case I ZR 42/05, *TV-Total*, judgment of 20 December 2007.

63 BVerfG, Case 1 BvR 1585/13, judgment of 31 May 2016.

matter to the CJEU. The CJEU⁶⁴ has now clarified that this was not within the scope of the distribution right. It accepted that the reproduction right could be affected, unless the modified use in the new work is unrecognisable to the ear. Even if the use of the sample was recognisable, the quotation limitation might apply, requiring a user to enter into ‘dialogue’ with the original work (i.e., an interaction between the quoting work and the work quoted is necessary). Finally, the CJEU made clear that no other exceptions and limitations than those contained in Article 5 of the InfoSoc Directive⁶⁵ can be applied, rejecting the free use exception provided by German law in Section 24 of the UrhG.

The implementation of the Directive on Copyright in the Digital Single Market⁶⁶ is imminent. Germany and the German reporter Axel Voss supported the Directive, despite the broad controversy created among the public and legal experts by Articles 15 and 17.⁶⁷ Germany had agreed to the Directive with a protocol note that the implementation shall make upload filters as far as possible unnecessary.⁶⁸ Based on a consultation process, it is intended that the European Commission will publish guidelines for the implementation of the Directive, which is due by 7 June 2021 (i.e., shortly before German federal elections in autumn 2021).

ii Personality rights

The concept of personality rights under German law is broad (see Section II.v), and also covers the commercialisation of an individual’s identity.

In a recent ruling, the BGH highlighted that different standards must be applied in respect to word and photojournalism.⁶⁹ The plaintiff, the husband of a Swedish princess, sued regarding publication of an article that included a photo of the family feeding their baby in a public park. The Court accepted a legitimate interest in the daily life of public persons, but argued that the care of the parents for their child was specifically protected by the parents’ personality rights, and that the parents had a legitimate interest that the details were not fixed in a photo and presented to the public. However, the very general text of the article would only affect the outer private sphere and was so general that the public interest prevailed against the personality rights, so that the publication was considered legitimate.

iii Unfair business practices

Technical solutions allowing users to block advertisements in TV recordings (‘spot-stop functionality’) had already been permitted by the BGH in its first ad blocker ruling.⁷⁰ The issue returned with the popularity of ad blocker tools, allowing users to block advertisements on websites. The BGH accepted⁷¹ that an ad blocker that permitted advertising matching certain criteria that was accordingly whitelisted against a payment neither constituted an act of unfair hindrance nor an aggressive commercial practice, or otherwise infringed the

64 CJEU, Case C-476/17, *Metall auf Metall*, judgment of 29 July 2019.

65 Directive 2001/29/EC.

66 Directive (EU) 2019/790.

67 Article 15 (Protection of press publications concerning online uses) and Article 17 (Use of protected content by online content-sharing service providers).

68 www.urheberrecht.org/news/w/richtlinie/p/1/i/6221/.

69 BGH, Case VI ZR 56/17, judgment of 29 May 2018.

70 BGH, Case I ZR 26/02, *Werbeblocker I*, judgment of 24 June 2004.

71 BGH, Case I ZR 154/16, *Werbeblocker II*, judgment of 19 April 2019.

German Unfair Competition Act.⁷² A further case is currently pending before the BGH, where claims are, in particular, based on the German Competition Act.⁷³ The Munich Court of Appeal rejected an abuse of a dominant market position and also saw no agreement restricting competition.⁷⁴

V COMPETITION AND CONSUMER RIGHTS

An increasing number of influencer marketing cases are reaching German courts,⁷⁵ concerning the question of whether and how postings concerning a certain product have to be designated as commercial advertisements, as well as the liability of the company whose products are advertised.

Net neutrality is addressed by Article 3 et seq. of Regulation (EU) 2015/2020, as well as in German law by Section 41 of the German Telecommunications Act, which provides a legal basis for technical regulation. German courts also have to deal with net neutrality. A German mobile phone provider offered the 'stream on' product, allowing users in Germany to stream content of certain media partners without data traffic limitations (zero-rating) but with a limited bandwidth (1.7 Mb/s). The German regulator prohibited the product. Because the bandwidth limitation was incompliant with net neutrality and only available within Germany, it violated European roaming regulations. The Münster Administrative Appeal Court confirmed this in a second instance ruling in a preliminary proceeding.⁷⁶ The Regional Court of Düsseldorf, in a civil law case, prohibited a similar product of a competitor applying zero-rating only to specific apps of media partners, whereby the Court indicated that a zero-rating offer might comply with net neutrality should the range of media partners be sufficiently broad.⁷⁷

VI DIGITAL CONTENT

The BGH developed the concept of liability as a vicarious infringer to address liability of internet service providers in respect of third-party infringements. Accordingly, an internet service provider could be held liable as a vicarious infringer should this not be stopped (and future infringements prevented) after receipt of a notice of an obvious infringement, whereby the provider violates reasonable examination obligations. Cases have concerned access and hosting providers, particularly file-sharing and social media platforms, whereby liability is limited for cease-and-desist claims. A vicarious infringer is not liable for damages. In terms of linking, the criteria developed by the CJEU in *GS-Media*⁷⁸ apply (i.e., links to legitimate content are permitted). Should the referenced content be unauthorised, the person responsible

72 www.gesetze-im-internet.de/englisch_uwg/index.html.

73 www.gesetze-im-internet.de/englisch_gwb/index.html.

74 OLG Munich, Case U 2225/15 Kart, judgment of 17 August 2017; BGH, Case I ZR 158/17, pending.

75 Regional Court (LG) Berlin, Case 52 O 101/18, judgment of 24 May 2018; OLG Braunschweig, Case 2 U 89/18, judgment of 8 January 2019; LG Heilbronn, Case 21 O 14/18 KfH, judgment of 8 May 2018; OLG Frankfurt, Case 6 W 35/19, judgment of 28 June 2019; KG Berlin, Case 5 W 149/18, judgment of 27 July 2018.

76 Münster Administrative Appeal Court, Case 13 B 1734/18, judgment of 12 July 2019.

77 LG Düsseldorf, Case 12 O 158/18, judgment of 8 May 2019.

78 CJEU, Case C-160/15, *GS-Media v. Sanoma*, judgment of 8 September 2016.

for the link can be held directly liable under specific circumstances (i.e., in respect of a search engine only if it knew or reasonably should have known that a picture was published without the consent of the rights owner).⁷⁹

VII CONTRACTUAL DISPUTES

Disputes regularly concern adequate remuneration for artists and authors. According to Section 32 of the UrhG, authors have a claim for appropriate remuneration. Should the contractually agreed remuneration be inadequate, authors can claim a change of contract to provide for an appropriate remuneration. An inadequate remuneration, in particular in a 'buy-out' contract, will not affect validity of the transfer of rights⁸⁰ but might lead to supplemental claims.⁸¹

VIII YEAR IN REVIEW

The years 2018 and 2019 were dominated by new legislation. The GDPR and the NetzDG have already had, and the Copyright Directive will have, a significant impact on the media and entertainment industry. Lessons can be learned from the implementation of the GDPR. Seemingly minor details, such as the media privilege of Article 85 of the GDPR, can have a profound impact on long-established industry practices. What is the legal basis for publishing pictures of individuals? Does the KUG, a law enacted in 1907 following disputes about pictures of Bismarck on his death bed,⁸² still apply or can publication be based on legitimate interests (Article 6(1)(f) GDPR)? If so, how can the information obligations (Article 12 GDPR) be fulfilled? Certainly, these questions can be resolved by the courts,⁸³ but the legal uncertainty and associated costs created by even a minor issue, can be substantial. The discussion about Article 17 of the Copyright Directive, particularly on the effects of filtering on free speech, illustrates a far more significant and complex upcoming issue with the implementation of the Directive. Of course, the Copyright Directive makes perfectly clear that it does not affect freedom of speech or other exceptions or limitations to copyright law,⁸⁴ although it is unclear how this can be technically achieved. The European Commission is aware of this and has commenced a stakeholder dialogue,⁸⁵ which shall establish best practices and eventually lead to guidelines for the implementation of the Directive into national law.

79 BGH, Case I ZR 11/16, *Vorschaubilder III*, judgment of 21 September 2017.

80 BGH, Case I ZR 73/10, judgment of 31 May 2012, *Honorarbedingungen Freie Journalisten*; BGH, Case I ZR 41/12, judgment of 17 October 2013.

81 OLG Stuttgart, Case 4 U 2/18, judgment of 26 September 2018, on participation of a cameraman; Federal Labour Court, Case 5 AZR 71/18, judgment of 27 March 2019, regarding additional payment for use of articles in a database.

82 www.spiegel.de/spiegel/print/d-7933529.html.

83 LG Frankfurt, Case 2-03 O 454/18, judgment of 29 August 2019; OLG Cologne, Case 15 W 27/18, judgment of 18 June 2018.

84 Article 17, Paragraphs 7, 9 and 10 referring to works covered by an exception or limitation that are not affected by the Directive.

85 <https://ec.europa.eu/digital-single-market/en/news/organisation-stakeholder-dialogue-application-article-17-directive-copyright-digital-single>.

IX OUTLOOK

Digitalisation will remain the driving force. In addition to the implementation of the Copyright Directive, the Interstate Media Treaty that will replace and develop the Interstate Broadcasting Treaty further, is about to be concluded.⁸⁶ The Interstate Media Treaty shall implement the Audiovisual Media Services Directive⁸⁷ and provide a modern legal framework for broadcasting and telemedia services. An interesting ruling can also be expected from the CJEU, which will have to decide, based on a referral from the BGH,⁸⁸ whether the YouTube service qualifies as an act of public communication, and therefore, YouTube may potentially be directly liable for an infringement of copyright law. Should the CJEU reject this, it will need to clarify whether the hosting privilege (Article 14 E-Commerce Directive) applies to YouTube.

86 www.heise.de/newsticker/meldung/Staatssekretaerin-Medienstaatsvertrag-ist-kurz-vor-dem-Abschluss-4536236.html.

87 Directive (EU) 2018/1808.

88 BGH, Case I ZR 140/15, judgment of 13 September 2018.

ITALY

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I OVERVIEW

The Italian media landscape is characterised by the dominant role of television in comparison with other media platforms; television consumption is still very high, while press circulation is limited. A rise in the provision of information and entertainment services on the internet, which is becoming increasingly popular among users, has recently been observed.²

As happens in other countries, video on demand subscriptions are increasing, and the number of subscriptions is getting closer (exceeding it in the forecasts) to that of pay-TV.³ Many traditional media companies are looking to consolidate and collaborate as they battle against Netflix and Amazon's rapidly growing audiences.⁴

The latest and most prominent legal developments in the media and entertainment sectors in Italy are as follows:

- a* the introduction of Law No. 220 of 14 November 2016, 'Regulation of cinema and audiovisual works', which achieved a reform that had been expected in Italy for over 50 years, with the creation of an autonomous fund for the support of the film and audiovisual industry. The implementation of the reform required the issuing of various acts on the numerous aspects of the Law, from the management of the cinema and audiovisual fund to the regulation of tax credits, which required the consultation with

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2 According to Reuters Institute Digital News Report 2019, since 2013, the printed press in Italy alone has lost 34 per cent in opposition to a substantial doubling of the use of social media. In Italy, the use of television for information remains significant and, at the same time, 'online news' consumption has not increased as it has abroad.

3 According to a research commissioned by Sky, Mediaset, Discovery and Vodafone, and developed by Ernst & Young in 2018, subscriptions to online services will soon exceed those to pay-TV.

4 In 2018, after a bidding war that included the Walt Disney Company, US media and telecoms conglomerate Comcast acquired the entirety of Sky. Moreover, the two historic competitors, Sky and Mediaset Premium, entered into an agreement providing that all Sky subscribers will be able to access with their subscription, and without additional costs, Mediaset Premium's nine pay channels. In June 2019, Mediaset announced that it planned to merge with Mediaset España and create a new Dutch-listed company called Media for Europe.

or the agreement of other administrations.⁵ The most recent interventions for cinema and audiovisual are contained in the 2019 Budget Law and in Decree-Law No. 59/2019 (then converted into Law No. 81/2019);⁶

- b* within this framework, on 12 December 2018, the Communication Regulatory Authority (AGCOM), by way of Resolution No. 595/18/CONS, issued the Regulation governing programming and investment obligations for the promotion of European works and works by independent producers.⁷ On 22 January 2019, the Regulation was amended by AGCOM Resolution No. 24/19/CONS to take into account the modifications provided for by the 2019 Budget Law,⁸ which had delayed the entry into force of some of the obligations;
- c* following the liberalisation of the copyright intermediation market,⁹ the Italian Competition Authority (AGCM), with a decision of 25 September 2018, held the Italian Society of Authors and Publishers (SIAE) liable for abuse of dominant position for its conduct following the controversial entry into the Italian market of its competitor Soundreef;¹⁰ and
- d* the EU General Data Protection Regulation 2016/679 (GDPR) became applicable in all Member States on 25 May 2018. Legislative Decree No. 101 of 10 August 2018 was published in the Italian Official Gazette on 4 September 2018, and entered into force on 19 September 2018. The Legislative Decree intends to align the Italian data protection framework with the provisions of the GDPR and therefore introduces substantial changes to Legislative Decree No. 196 of 30 June 2003 (the Italian Privacy Code).

5 The reform entered into force in September 2017 and is still ongoing. To date, it has required three legislative decrees, 20 implementing decrees, a protocol of understanding between the Ministry of Cultural Heritage and Activities and Tourism (MiBAC) and the Ministry of Education, University and Research, and an act of understanding between MiBAC and the Unified Conference to implement its provisions.

6 In particular, the resources for the fund for the development of investment in the cinema and audiovisual sectors have been increased in 2019, and such increase has been allocated to incentives and tax benefits through the instrument of tax credits. New provisions have been introduced concerning selective contributions for cinematographic and audiovisual works and contributions for film and audiovisual promotional initiatives; and the composition of the Committee for the classification of cinematographic works and the rules governing the promotion of European and Italian works by providers of audiovisual media services have been redefined.

7 The Regulation was adopted pursuant to Article 44 *quinquies* of the Audiovisual Media Services Code (Legislative Decree No. 177 of 31 July 2005), as recently amended by Legislative Decree No. 204 of 7 December 2017 as part of the reform provided by Law No. 220 of 14 November 2016.

8 Law No. 145 of 30 December 2018.

9 A limited liberalisation in the market of copyright intermediation marked was provided by Legislative Decree 35/2017.

10 Competition Authority, Resolution of 25 September 2018 in proceeding A508, *SIAE Copyright Intermediation Services*.

II LEGAL AND REGULATORY FRAMEWORK

The general legislation on radio and television services is contained in the Consolidated Text of Audiovisual Media Services (AVMS Code), as amended by Legislative Decree No. 44/2010, which implemented Directive 2007/65/EC, which was subsequently replaced by Directive 2010/13/EU and by Legislative Decree No. 204 of 7 December 2017, which amended the provisions concerning promotion of European works.¹¹

In view of the value of competition and pluralism in the media sector, Italian legislation prohibits achieving and maintaining dominant positions, considering the resources included in the integrated communications system (SIC). The SIC is defined in Article 43 of the AVMS Code as the economic sector determined by the process of convergence between traditional broadcasting, newspapers and magazines, publishing (also via the internet), radio and audiovisual media services, and cinema and advertising, both above and below the line. Companies registered as communications operators may not amass, either directly or indirectly, more than 20 per cent of the total revenue of the SIC.¹²

The public service broadcasting framework in Italy is represented by several legal provisions,¹³ according to which the public service is entrusted to a concessionaire on the basis of a 20-year agreement between the state, represented by the Ministry for Economic Development, and the broadcaster, namely Radiotelevisione Italiana (RAI).¹⁴ The agreement provides a general framework, while further provisions on duties and rights of the concessionaire are provided by the AVMS Code and the contract of public service, signed every three years by the Ministry and the public service broadcaster, on the basis of guidelines determined by AGCOM.¹⁵ The contract of service is very specific and detailed, defined every three years in relation to the development of the market, the technological progress and the changing needs on a cultural, national and local level.

On 28 December 2015, the Italian parliament passed Law No. 220 of 2015, reforming the statutory framework for the official broadcasting agency of the Italian government and the public broadcasting and television service in Italy.

11 This refers to Legislative Decree No. 177/2005 as amended in 2010, 2012, 2015 and 2017, which is also the national legal framework implementing the AVMS Directive, Directive 2007/65/EC, later replaced by Directive 2010/13/EU.

12 On 10 January 2019, AGCOM released Decision No. 9/19/CONS concerning the closure of the procedure for the assessment of economic dimensions of the SIC for 2017. Pursuant to Article 43 of the AVMS Code, AGCOM must periodically conduct a specific analysis to estimate the resources included in the SIC.

13 The main part of the provisions are in the AVMS Code, at Articles 45 to 49 *quater*, which were amended in December 2015 by the Stability Law, the yearly financial act, while other binding provisions can be found in Law No. 249/97, establishing AGCOM and its competencies, including public service broadcasting; a few articles of Law No. 223/90 on public service broadcasting fees; Law No. 103/75 regarding the right of access to programmes and protection for linguistic minorities; and Law No. 28/2000 regulating political communication and election campaigns.

14 RAI is the Italian state-owned public service broadcaster controlled by the Italian Ministry of Economy and Finance.

15 Pursuant to Article 25, Paragraph 3 of the service contract (as renewed for 2018 to 2022) between the Italian Ministry of Economic Development and the Italian public service broadcaster, RAI, a Commission composed of members of the Ministry and members of RAI was established with the task of drafting guidelines aimed at underpinning negotiations between RAI and representative associations of producers on the extension and the scope of the exploitation rights of audiovisual works for radio, television and multimedia platforms. The final version of the guidelines was approved in July 2019.

For print media, the reference regulatory framework is the same as online-only news outlets. The most relevant acts are Law No. 416/1981 (first organic act), later modified and complemented with Laws Nos. 67/1987, 250/1990 and 62/2001. This set of laws, together with other acts, also supports the press by providing for a funding system (direct or indirect) that was recently improved with Law No. 198 of 26 October 2016. This Law defines online newspapers with well-defined requirements for the first time. Moreover, Legislative Decree No. 70 of 15 May 2017 redefined the regulation on direct funding for newspaper and periodical publishers.¹⁶

Another important reference is the AVMS Code, which provides for online advertising revenues, which are the main source of income for online publishers. On an annual basis, AGCOM analyses advertising revenues as part of its activities for the protection of pluralism.¹⁷

Freedom of expression and freedom of the press are protected by the Italian Constitution of 1948 in its Article 21, which sets forth: 'Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication'.

Article 10 of the European Convention of Human Rights provides the right to freedom of expression and information, subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'. This right includes the freedom to hold opinions, and to receive and impart information and ideas.¹⁸

The Italian Constitution does not specifically provide for copyright protection. However, the constitutional protection of copyright can be inferred from the combined provisions of Articles 2, 9, 21, 33 and 42. Some rules concerning copyright also appear in Articles 2575 to 2583 of the Italian Civil Code, which, however, reproduce the key rules contained in Copyright Law No. 1941/633. The Copyright Law has been amended several times upon approval of new international conventions and EU Directives relating to the protection of copyright and related rights.

Italy is a party to several international treaties and conventions on the national treatment of foreign works.¹⁹

16 Now partially modified by the 2019 Budget Law (Law No. 145/2018, Article 1, Paragraph 90), providing, pending an organic review of sector discipline, for the abolition, or gradual reduction until abolition, of direct contributions in favour of certain categories of radio companies and newspaper and periodical publishers.

17 The regional administrative court of Lazio, in a judgment dated 14 February 2018 on Appeal No. 7964/2013 presented by Google Ireland Ltd and Google Italy Srl, underlined that the lawmaker provided that '... revenues from online advertising are to be considered among those relevant for the verification of pluralism in the advertising market'.

18 The European Court of Human Rights has shaped, in its numerous decisions on the present subject matter, basic principles and requirements with regard to Article 10 of the European Convention on Human Rights, which widely influenced today's European media landscape.

19 In particular:

- the Berne Convention (ratified by Law No. 1978/399);
- the Rome Convention (ratified by Law No. 1963/866);
- the Geneva Convention for the Protection of Producers of Phonograms;
- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (ratified by Law No. 1977/771);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (ratified by Law No. 1994/747);
- the World Intellectual Property Organization (WIPO) Copyright Treaty; and
- the WIPO Performances and Phonograms Treaty.

With respect to digital and online content, the E-Commerce Act implements the EU E-Commerce Directive in Italy.²⁰ Articles 14 to 17 of the Act govern, among other things, the internet operators' liability. More generally, Article 1 of the Copyright Law grants protection to all intellectual works of a creative nature, whatever their means or form of expression. The publication of works online is believed to require a level of protection equal to publication in traditional media. Moreover, the Copyright Act, as amended, incorporates the provisions of the EU Copyright Directive (2001/29/EC).²¹

The main regulators entrusted with the media and entertainment sectors in Italy are:

- a* AGCOM, an independent and 'convergent' authority. AGCOM has authority to regulate and monitor the press, broadcasting, electronic media and telecommunications sectors. The profound changes brought about by the digitalisation process, which has ensured the uniform broadcast of audio (including voice), video (including television) and data (including internet access), are the basis for the choice of convergent model, as adopted by the Italian legislator and shared by other sector authorities, such as the Office of Communications in the UK and the Federal Communications Commission in the United States;
- b* the Ministry for Cultural Heritage and Activities (MiBAC) General Directorate for Film with jurisdiction over the cinema and audiovisual sectors and responsible for all public functions relating to the development, production and distribution of films and audiovisual works. It administers the fund for the development of investment in the cinema and audiovisual sectors, providing support in the form of tax credit schemes, automatic subsidies, promotion subsidies and selective subsidies for film production, distribution and promotion; and
- c* the Italian Data Protection Authority, an independent authority dealing with the protection of personal data of individuals.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

The constitutional right (Article 21) of the individual to express his or her own thoughts 'by any means' has traditionally been interpreted, on the one hand, as the 'active' right of the individual to have access to any form of mass media in order to express any thought that he or she might deem worthy of diffusion and, on the other hand, as the 'passive' protection of the same freedom; that is, the right of everyone to have access to information that is as correct, impartial and complete as possible. In other words, depending on the standpoint of the subject of reference, the right of expression can be conceived as freedom to inform, freedom to seek information and right to be informed.

The interpretation of Article 21 gives rise to the following principles:

- a* the right includes the expression of opinions in any form and through any media without limitation, unless constitutional values are jeopardised;

20 Legislative Decree No. 70 of 9 April 2003 transposed Directive No. 2000/31/EC into Italian legislation.

21 The Directive on the harmonisation of certain aspects of copyright and related rights in the information society has been recently amended by Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, intending to ensure a well-functioning marketplace for the exploitation of works and other subject matter, taking into account in particular digital and cross-border uses of protected content.

- b* there is a 'negative' side of this right: the right not to express thoughts and opinions against one's own will is provided for; limits to this negative freedom exist in case they become necessary to guarantee public order; and
- c* the 'active' side of right or freedom to inform, is the principle that guarantees the dissemination of information and opinions, and it includes:
 - right to report;²²
 - right of criticism;²³
 - right to satire;²⁴ and
 - right of access to administrative documents.

The limits to the freedom of expression are those expressly declared or referable to the Constitutional Charter and are:

- a* morality, the only limit expressly provided for by the Constitution for all manifestations of thought (including those relating to shows, such as theatre and film), enunciated in the last Paragraph of Article 21 of the Constitution;²⁵
- b* the right to confidentiality, to be applied indiscriminately to all media, as well as social networks or private forums;²⁶
- c* secrets, such as state, official, investigation, professional and industrial secrets; and
- d* honour, to be understood both as dignity (the violation of which gives rise to insult) and as reputation (which, if violated, gives rise to defamation).²⁷

22 According to consolidated case law, the right to report is legitimately exercised when the following conditions are met: the objective truth of the published information; the public interest in the knowledge of the fact (relevance); and the formal correctness of the exhibition (self-restraint).

23 With regard to the boundaries between the right to report and the right to criticism, see the judgments of the Court of Rome Section I, No. 16689 of 29 August 2018, and No. 3941 of 22 February 2018.

24 With regard to the definition of right to satire and its limits, see the recent judgment of the Court of Cassation, civil court, Section I, No. 6919 of 20 March 2018.

25 Paragraph 6 of Article 21 of the Constitution reads: 'Printed publications, shows and all other events contrary to morality are prohibited. The law establishes adequate measures to prevent and suppress violations.' The concept of morality should be understood as referring to the definition of 'obscene acts and objects' provided by Article 529 of the Italian Criminal Code: acts and objects are considered 'obscene' if, according to common sentiments, they offend the sense of decency (excluding works of art and science, in reference to Article 33 of the Criminal Code).

26 The joint sections of the Court of Cassation (No. 19681 of 22 July 2019) have recently stated that, on the subject of the relationship between the right to confidentiality (in its particular connotation of the 'right to be forgotten') and the right to chronicle relating to events of the past, the judge – without prejudice to the freedom of editorial choice, which is an expression of the freedom of the press protected and guaranteed by Article 21 of the Italian Constitution – should evaluate the concrete and current public interest in mentioning the identifying elements of the people who were the protagonists of those facts and events. This mention must be considered lawful only if it refers to people who have the interest of the community in the present moment, both for reasons of notoriety and for the public role played; otherwise, the right of those concerned to confidentiality prevails with respect to events of the past that hurt their dignity and honour and of which the collective memory has been extinguished.

27 Article 595 of the Italian Criminal Code defines defamation as injuring the reputation of an absent person via communication with others. The penalty is imprisonment for up to one year. If the act of insult or defamation consists in the allegation of a specific fact, the potential penalty is increased to imprisonment for up to two years or a fine. If committed by means of the press or otherwise publicly, the penalty is a fine of at least €516 or imprisonment of from six months to three years. Penalties are also increased if the defamatory statement is directed at a political, administrative or judicial body or at a representative

Hate speech is an issue of growing concern in Italy, which is further exacerbated by a number of factors: the spread of comments in online forums and on articles and social media platforms that incite hatred and violence; the surge in migrants and refugees arriving from different countries; and the strong tones used by political parties and movements within public debates.

There are several relevant laws that can be used to respond to hate speech in the media, but the application and interpretation of the existing hate speech provisions contained in criminal law are also inconsistent. Italian courts often consider the racial or ethnic bias as an aggravating circumstance in cases of criminal defamation, or consider them under the crime of ‘criminal conspiracy’ carried out by organised groups on the internet via blogs or social media. Despite strong protection of both the right to freedom of expression and equality in Italian law, the existing legal framework on hate speech does not fully comply with international human rights standards.²⁸ In addition to protections available under criminal law, victims of hate speech can either initiate proceedings within the criminal trial to claim compensation for damages or pursue a separate civil defamation lawsuit. Administrative pecuniary sanctions are imposed in cases of defamation of religion or blasphemy, and a system of police warnings was established by a recent law protecting minors against cyberbullying.²⁹

The applicable media legislation prohibits all content that contains ‘incitement to hatred in any way motivated by’ or that ‘instigate intolerant behaviours based on’ differences of race, sex, religion or nationality.³⁰

On 22 January 2019, AGCOM launched a public consultation on a draft regulation aimed at fostering the protection of human dignity and the principle of non-discrimination, as well as combating hate speech. The scope of the application of the draft regulation includes both audiovisual media service providers and video-sharing service providers.³¹

ii Newsgathering

The rights of journalists to gather information in order to inform the public on matters of general interest should be balanced with other rights protected by the Constitution.

The ‘Consolidated text of the duties of the journalist’ is aimed at harmonising the previous documents on ethical rules relating to the exercise of the profession of journalism, and entered into force on 3 February 2016 (the text was updated on 22 January 2019).³²

thereof or an authority constituted in college. Defamation is also considered a criminal offence under Law No. 47/1948 (the Press Law). According to Article 13 of the Press Law, defamation committed by the press is punishable by a fine or imprisonment of from one to six years. In order for defamation to be liable under the Press Law, it must involve an accusation of a fact.

28 In particular, the characteristics exhaustively listed in criminal law concerning the most serious forms of hate speech are limited to race, ethnic origin, nationality, or religion, and proposals to expand this protection have stalled in parliament.

29 Law No. 71 of 29 May 2017, ‘Provision to protect minors and to prevent and combat cyberbullying acts’.

30 See Article 32, Paragraph 5 of the AVMS Code. Special provisions on the protection of minors are established in the Code on TV and Minors, and incorporated by law. AGCOM is tasked with enforcing these provisions; however, it has limited powers to intervene and issue sanctions. For the most part, AGCOM only intervenes when violations regard the special provisions for the protection of minors.

31 AGCOM Decision No. 157/19/CONS of 15 May 2019.

32 Article 4 of the ‘Consolidated text of the duties of the journalist’ states that journalist shall apply the ‘Rules of ethics relating to the processing of personal data in the exercise of journalistic activities published, pursuant to Article 20, Paragraph 4 of Legislative Decree No. 101 of 10 August 2018 (Decision No.

The processing of data by journalists is free. The journalist may also process and publish particular and judicial data without having to obtain the consent of the person concerned, provided that two essential requirements are met:

- a* the data has been collected in a lawful and correct manner (principle of lawfulness); and
- b* the dissemination of data shall take place within the limits of the essentiality (principle of essentiality) of the information concerning facts of public interest.

The journalist must avoid any artifice and undue pressure when collecting information and ambiguities in the drafting of the article.³³

In assessing the legitimacy of the publication of the news, it is also important ‘how’ the news was sought. At the point of collecting information, journalists must advise interlocutors or interested parties of his or her identity, profession (the journalist may not reveal his or her profession if this may endanger his or her own safety or the performance of the information function) and the purpose of collecting the information. This assumption must be assessed on a case-by-case basis, verifying whether the methods of collection and dissemination are proportionate with respect to the information purpose pursued and not otherwise achievable.

The Italian Criminal Code, after Articles 614 and 615 (respectively, violation of domicile and violation of domicile committed by a public official), regulates, under Article 615 *bis*, ‘illicit interference in private life’, to deal with new types of aggression made possible by new technologies, protecting ‘home confidentiality’. The aim is to safeguard the privacy that would be disturbed in the case of disclosure of what is happening in the home environment.

In particular, Article 615 *bis* of the Criminal Code contemplates two distinct cases, corresponding to two different types of aggression against home privacy: indiscretion and disclosure.³⁴

491)’, provided for by Legislative Decree 196/2003 and subsequent amendments on the protection of personal data, which form an integral part of the Consolidated law on the duties of journalists to which it is attached. The rules have been recently verified by the Italian Data Protection Authority to assess their conformity with Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). The rules of the codes of conduct constitute real secondary rules (soft law) of the legal system, on the basis of which the judges also decide on the legitimacy of the processing of personal data carried out for journalistic purposes or manifestation of thought.

33 See Court of Cassation Judgment No. 18006 of 9 July 2018.

34 The indiscretion consists in ‘whoever, through the use of instruments of visual or sound recording, unduly obtains news or images pertaining to private life taking place in the places indicated in Article 614’ (Article 615 *bis*, Paragraph 1, Criminal Code). Therefore, a criminal prosecution will be imposed on the photographer who, by means of telephoto lenses or similar means, captures the images of others when the persons portrayed are in their own home, or in their closed and fenced garden, or in another place not visible from the public street. Equally, it is punishable to use special microphones or bugs to capture news or conversations that take place in private places. The second case, much more interesting for the purposes of this chapter, consists in ‘whoever reveals or spreads, by any means of information to the public, the news or images obtained in the manner indicated in Paragraph 1 of Article 615 *bis* of the Criminal Code’ (Article 615 *bis*, Paragraph 2, Criminal Code). Therefore, each journalist who buys photographs or receives confidential information must ascertain that it has not been taken with the means prohibited by Article 615 *bis* of the Italian Criminal Code, otherwise he or she may also be indicted.

It is, however, worth mentioning further incriminating cases that may concern the journalist, such as Articles 617,³⁵ 617 *bis* and 618 of the Criminal Code, which punish ‘anyone who, except in the cases permitted by law, installs apparatus, instruments, parts of apparatus or instruments in order to intercept or prevent communications or telegraphic or telephone conversations between other persons’.³⁶

iii Freedom of access to government information

The right to access administrative documents was introduced in 1990, but required a ‘legal interest’, meaning it was often difficult for journalists to get information needed for investigative reporting.³⁷ The Freedom of Information Act came into force in December 2016.³⁸

The new legal framework follows the general principle of free access to information and the possibility of appealing a negative response from the administration with a fast and free procedure. Nevertheless, concerns remain as exceptions to access to information foreseen by the law are very general and could be broadly interpreted. As a consequence, Italian journalists mainly rely on procedural acts from trials and investigations in reporting.

In December 2017, a controversial law that forbids the publication of wiretapped conversations unless they are deemed ‘relevant’ for a criminal trial was introduced.³⁹

Police must seal any ‘irrelevant’ excerpts, however newsworthy they may be, as secret. Journalists complained that the new law would hamper their ability to investigate and publish stories in the public interest.

According to the law, individuals can request information from public bodies without charge. If public bodies deny access to any piece of information, they must provide a reason. An independent monitoring observatory will be tasked with overseeing the law’s implementation, and the country’s independent anticorruption authority will issue guidelines, including for cases where public bodies may provide summary information instead of full data.⁴⁰

35 Punishing respectively: ‘the person who, having come to the knowledge of the contents of a correspondence not directed to him, which had to remain secret, without just cause, reveals it, in whole or in part’ and ‘the fact of whoever, fraudulently, takes cognition of a communication or conversation, by telephone or telegraph, between other persons or in any case not directed at him, or interrupts or prevents them’.

36 In addition, Legislative Decree No. 216 of 29 December 2017, which is aimed at strengthening the protection of the right to privacy of the aggrieved person from any third parties’ interference through the use of new technologies introducing Article 617 *septies* of the Criminal Code. The offence introduced by the Legislative Decree only covers the conduct of circulating audio and video recording, while the act of recording is not relevant per se from a criminal law perspective.

37 The general discipline on the right of access to administrative documents is provided by Law No. 241/1990, which was often misapplied, and resulted in frequent claims to administrative courts, which were time-consuming and costly.

38 Legislative Decree No. 97 of 2016, ‘Revision and simplification of the provisions on the prevention of corruption, publicity and transparency’, amending Law No. 190 of 6 November 2012 and Legislative Decree No. 33 of 14 March 2013, pursuant to Article 7 of Law No. 124 of 7 August 2015, on the reorganisation of public administrations, is an integral part of the process of public administration reform.

39 Legislative Decree No. 216 of 29 December 2017.

40 Watchdogs and rights groups noted that the law lists wide exemptions for information that may compromise state secrets, public order, national defence, international relations, the state’s economic and financial stability, or ongoing criminal investigations, and urged the government to refine this aspect. Furthermore, they noted that the law does not prescribe sanctions for public entities that refuse to answer requests.

iv Protection of sources

The right or duty of journalists to protect their confidential sources is provided by Article 2, Paragraph 3 of Law No. 69 of 1963 on the Organisation of the Journalistic Profession, and by the Consolidated text of the duties of the journalist. The violation of the professional duty entails the disciplinary liability of the journalist.⁴¹ Moreover, the Data Protection Code acknowledges journalists' right not to disclose their sources as a prevalent right in respect of the right of the persons to know the origin of personal data related to them.

According to Paragraph 3 of Article 200 of the Code of Criminal Procedure, the professional secrecy is limited to the name of the persons from whom the journalist has received fiduciary information, with the particularity, compared with other categories protected by secrecy, that the judge may order the journalist to indicate the source of the information in his or her possession where such information is essential for the investigation and where it is necessary to ascertain the identity of the source.

The right of journalists not to disclose their sources is also ensured by other provisions. Article 271, Paragraph 2 of the Code of Criminal Procedure establishes the discipline of wiretapping for journalists. The provision prohibits the use of the content of conversations concerning information or facts known by reason of profession or office, unless the person of interest disclosed the information in a deposition or in other ways. In relation to invasive measures ordered by the judicial authority, journalists are entitled to oppose the professional secrecy towards the request of public authorities to produce acts, documents, computer programs, data and information.⁴²

As recently affirmed by the Criminal Court of Cassation, evidential seizure of memory of a personal computer belonging to a journalist who has objected to professional secrecy is permitted only where it is considered that the secrecy is unfounded and that the acquisition is necessary for the investigation; however, the investigative activity must be conducted in such a way as not to compromise the journalist's right to the confidentiality of his or her correspondence and sources.⁴³

v Private action against publication

Anyone who considers him or herself defamed by a newspaper article or by a piece of news published on the web (whether it be information sites, blogs, social networks or other) is faced with a not always easy alternative, between the two different forms of protection offered by the Italian legal system: the injured party can submit a criminal complaint and ask the judge to prosecute the alleged offender, with the aim of then asserting his or her claim for damages in a criminal trial; or he or she can act directly against the offender, suing him or her before the civil judge and asking for compensation of damages.

Each choice has its pros and cons; for example, filing a complaint and bringing the alleged offender before a criminal judge may constitute for the latter a reason of serious concern, which could lead more easily to a settlement, at least initially. The path of criminal

41 According to Article 48 of Law No. 69 of 1963: 'Anyone registered on the list or on the registry, guilty of facts inconsistent with the decorum and the professional dignity, or guilty of facts compromising its reputation or the dignity of the Association, shall be subject to the disciplinary procedure. The procedure starts *ex officio* by the regional or the inter-regional Council or also on request of the general prosecutor competent according to Article 44.'

42 Article 256 of the Code of Criminal Procedure.

43 Criminal Court of Cassation, Section VI, No. 9989 of 1 September 2018.

prosecution is the most economical remedy for the complainant because there is no cost to be paid to the state to initiate the proceedings. The criminal choice also appears simpler as regards the burden of proof because it is substantially limited to the complainant exposing his or her version of the facts in the complaint, which the public prosecutor in fact makes his or her own decision on, while it is up to the alleged offender to defend him or herself by proving either the absence of the offence or that what is being communicated, although defamatory, has a cause of justification (including, normally, the right to report or the right to criticise).

On the other hand, the choice of criminal procedure is not without risk for the injured party. First of all, there is the danger that there will never be a trial because the public prosecutor in charge of the investigation could consider that there is no offence in the concrete case and, therefore, formulate a request for filing (which submits the case to the scrutiny of the judge); or it may be that the actual trial will start only after a long time because the same public prosecutor has had other emergencies or has shown very little interest in prosecuting that kind of crime: in this case, in addition to the prescription, the risk is that the judgment on the offence is in some way influenced by a diminished perception of the offence after a long time, which may result in a lower compensation recognised by the judge.⁴⁴ However, a possibility is that, at the end of the trial, the judge limits him or herself to pronouncing a criminal judgment against the offender without quantifying the damage in favour of the civil plaintiff, leaving the parties to a new and further trial limited only to the quantification of the damages before the civil court, entailing an additional economic burden for the offended party and a significant lengthening of time. Finally, the criminal judge may define not only the penalty imposed on the offender but also the amount of compensation due to the injured party, but may advise that the judgement is not enforceable and therefore remains suspended pending further appeal.⁴⁵

No option, therefore, is preferable to the other, nor free from risks and side effects.

The only exception to the principle of the autonomy of the two proceedings is represented by the possibility that the injured party first constitutes a civil party in the criminal proceedings and, subsequently and without revoking this constitution, initiates an independent case: only in this case will the civil proceedings necessarily remain suspended pending the definition of the criminal proceedings.⁴⁶

Italy remains the only EU country to sentence journalists to imprisonment for defamation.⁴⁷

44 On this specific aspect, see the judgment of the Court of Cassation, Section III, No. 28084 of 26 June 2018.

45 On the other hand, acting in a civil court allows, first of all, a greater control over the course of the trial and its timing: besides unforeseeable events and depending on the different organisation of the various judicial offices, the duration of the trial can be predicted. From another point of view, there is no risk of the public prosecutor not adopting the accusatory approach put forward by the plaintiff and there is the certainty that a judge will rule on the case submitted to his or her examination. On the other hand, it is true that, in the event of an unsuccessful outcome, the economic risk is much greater because both the costs of the proceedings (the 'unified contribution', which must be paid at the time of registering a case and the value of which depends on the amount of compensation requested) and those incurred by the accused party to defend him or herself (i.e., the legal costs of the other party) are normally borne by those who brought, and lost, the case.

46 Civil Court of Cassation, Section VI, No. 28499 of 30 October 2017.

47 The review of the defamation legislation was prompted by several defamation cases in which journalists and editors received prison sentences. Recently, the Court of Salerno upheld the objection of unconstitutionality raised by the Campania Journalists' Union in the trial for defamation against a

In several recent defamation cases, the European Court of Human Rights found Italy in violation of Article 10 of the European Convention on Human Rights.⁴⁸

In the case of publication of unauthorised material, the interested party has the right, following the entry into force of the GDPR,⁴⁹ to oppose the treatment, and also to request:

- a* the right to oblige or delete: this right allows the interested party to also obtain the cancellation of his or her data from historical archives and web pages; and
- b* the right to the updating of data concerning him or her, especially when, following the conclusion of a trial or preliminary investigation, the accused or investigated person is acquitted of the charges against him or her, which provides for ‘cleaning up’ his or her name in terms of the unpleasant association with events recorded in the judicial chronicle.

vi Government action against publication

Rather than engaging in direct bans of specific content, the Italian government has recently encouraged initiatives of soft censorship with the objective of influencing news coverage of state bodies and officials and their policies.

The former vice president of the Italian Council of Ministers and leader of the 5-star Movement, Luigi Di Maio, wrote on Facebook on 12 September 2018 that he was planning ‘a reduction of indirect public contributions’ to the press in the next state budget.⁵⁰ He added that he was ‘preparing a letter to state-owned companies to ask them to stop paying newspapers’ by buying advertising space. The National Federation of Italian Journalists denounced the minister’s announcement, saying his proposal amounted to intimidation and was aimed at establishing a ‘one-track thinking’ favourable to the government in the media.⁵¹

Italian journalist and writer Roberto Saviano was sued on 20 July 2018 by the former Italian Minister of Interior and leader of right-wing League party, Matteo Salvini, on defamation. The Minister accused Saviano of accusing him of an alleged support for the mafia. Earlier, Salvini called on Twitter for reviewing current police protection for journalists, to which Saviano responded in calling Salvini ‘a buffoon’ and ‘minister of the underworld’, followed by criticism of his immigration policies.⁵² The journalist has been critical towards current migration policy applied by the current office of the Minister of Interior and the League party.

journalist. According to the Union’s view, which the judge adopted, the imprisonment of journalists provided for in Article 13 of the Press Law and Article 595(3) of the Criminal Code (defamation by the press) is in breach of Articles 3, 21, 25, 27 and 117(1) of the Constitution in relation to Article 10 of the European Convention on Human Rights.

48 See for example, the judgment by the European Court of Human Rights (Second Section), *Belpietro v. Italy*, Appeal No. 43612/10 of 24 September 2013.

49 And the consequent amendments made to Legislative Decree 196/03 by Legislative Decree 101/18.

50 On 29 December 2018, the Italian parliament confirmed the government’s 2019 budget. Among other things, the budget includes a progressive reduction of direct subsidies to safeguard media pluralism (minus 20 per cent in 2019, minus 50 per cent in 2020 and minus 75 per cent in 2021). The public funding to media pluralism is supposed to be totally abolished by 2022.

51 Source: Council of Europe Platform to promote the protection of journalism and safety of journalists.

52 In his work, Saviano exposed the influence of the Camorra mafia in the Campania region of Italy in a publication *Gomorrah* (2006). Saviano has collaborated with local and international newspapers in line with his work on the Camorra crime syndicate and organised crime in general. Due to the numerous death threats Saviano received because of his work, he is under regular police protection.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The Copyright Law provides that protection should concern all the intellectual creative works belonging to literature, music, figurative arts, architecture, theatre and cinematography, no matter the way and type of expression (Article 1, Copyright Law).⁵³

Under Italian law, the authors of copyrighted works are granted with moral and economic rights.

Moral rights are enjoyed by the author of the work personally, and cannot be waived, licensed or assigned. In fact, the author has the right to be identified as the author and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work that would be prejudicial to his or her honour or reputation. Moreover, the Italian law gives the author the choice to withdraw his or her work from the market whenever serious moral reasons arise.

Generally speaking, the one who claims to be the author is such unless it is proven otherwise.

Under Article 3 of the Copyright Law, daily newspapers and periodicals enjoy protection as collective works,⁵⁴ which are protected as original works. The author of a collective work is, according to Article 7 of the Copyright Law, 'the person who organises and directs its creation'; that is, with specific regard to journalism, the director, whose creative contribution consists in the work of selecting and coordinating the elements that constitute the newspaper or the magazine for which he or she is responsible. Article 38 of the Copyright Law reserves the right of economical exploitation of the collective work to the publisher, without prejudice to the status of author attributed to the director (chief editor) as stated in Article 7 or to the right of individual contributors to use their own work for publication in other newspapers or magazines, provided that they observe existing agreements with the publisher of the collective work and, in any case, Articles 39 to 43 of the Copyright Law.

The right of economic use of a work lasts for the author's whole life and for the 70 years following his or her death (Article 25, Copyright Law).⁵⁵

For some types of works, the duration of copyright varies; in particular, for work that benefits from related or *sui generis* rights.

The most important related rights include:

- a* the rights of the producer of cinematographic or audiovisual work;⁵⁶
- b* the rights of performers;⁵⁷

53 'Even a work that is the product of a "creative act", also a minimum one . . . can be protected.' To be protected, the work needs to have a form of expression. Simple ideas are not protected. Ideas are freely appropriable and there is no need to ask for an author's permission..

54 Defined as those works formed by the 'assembling of works or parts of works, and possessing the character of a self-contained creation resulting from the selection and coordination with a specific literary, scientific, didactic, religious, political or artistic aim, such as encyclopedias, dictionaries, anthologies, magazines and newspapers'.

55 Even if the rights in works were assigned on the basis of a publishing contract with a publishing house, aside from the fact that the longest duration of such contract is 20 years (Article 122, Copyright Law), it has, as its object, the rights of use belonging to the author 'with the content and the duration decided by the law' (Article 119, Copyright Law), therefore, according to Article 25 of the Copyright Law, it cannot exceed the copyright's duration.

56 See Article 78 *ter*, Copyright Law.

57 See Articles 80 to 85 *bis*, Copyright Law.

- c* the rights of those who practice radio or television broadcasting activity; and
- d* the rights of the music producer.⁵⁸

On 16 October 2018, AGCOM approved Deliberation No. 490/18/CONS, which introduces some modifications and integrations to the Regulation on copyright enforcement in electronic communications networks.⁵⁹

These were introduced according to the new powers attributed to AGCOM on the basis of Article 2 of Law No. 167/2017, to further combat copyright infringement with interim protective measures and measures for preventing reiteration of the offences.

According to the changes introduced by the Deliberation, rights holders can also apply for interim protective measures, under a procedure with tighter deadlines and based on a preliminary assessment of facts, where there is an alleged threat of imminent, serious and irreparable harm; and measures against the reiteration of violations already declared by AGCOM, applicable after the issuing of AGCOM orders under an ordinary or special procedure, on the basis of a mere notice and without the need to start a new procedure.

The targets of AGCOM's intervention – in cases of online copyright infringement – are service providers, uploaders of infringing content and website operators hosting infringing material, rather than users. Rights holders are entitled to file – through online forms – complaints of online copyright infringement with AGCOM.

ii Personality rights

Under Italian statute law, a person's name and image pertain to an individual's personal sphere, which prevents any unauthorised use. These publicity and image rights benefit from severe protection granted by both the Civil Code and the Copyright Law.⁶⁰ In addition, unauthorised use may easily result in a criminal offence.⁶¹

Hence, the rule of law is that a person's image may be used only on the interested individual's consent.

Use without consent may occur (as an exception) only if set by law and on condition that such use does not prove prejudicial to the dignity or reputation of the represented person.⁶² While an individual's 'personality rights' are not disposable (i.e., may not be transferred to others or cannot be the object of contractual transactions (e.g., you cannot sell your name)), economic aspects relating to the use of a person's name or image obviously imply the involved individual's consent, which is usually achieved through contractual agreement (and against compensation).

These economic aspects related to personality rights quite frequently end up before courts, especially when a non-authorised use for advertising – or in a broader sense,

⁵⁸ See Articles 72 to 75, Copyright Law.

⁵⁹ The AGCOM Regulation was introduced with Deliberation No. 680/13/CONS, and entered into force on 1 April 2014. The Regulation allows AGCOM to order, following a short administrative procedure, that internet service providers selectively remove or block access to websites hosting allegedly copyright infringing materials, and AVMS and on-demand providers remove illegal content from their catalogues and refrain from retransmitting illegal works in their future schedules.

⁶⁰ Article 10 of the Italian Civil Code and Articles 96 and 97 of Law No. 633 of 1941.

⁶¹ For example, defamation and illicit treatment of personal data.

⁶² In particular, the Copyright Law allows the unauthorised exhibition, reproduction or sale of an individual's image only if such use is justified by his or her notoriety and by a general interest (e.g., for purposes of information to the public (right to freedom of the press)).

commercial – purposes occurred, determining such use as prejudice and having damaging effects, as the represented person is deprived of the remuneration that he or she could have achieved by giving consent. In addition, a significant number of lawsuits originate from reports of a nosy press dwelling deep into a celebrity's privacy sphere.

The Court of Cassation, with Judgement No. 1875 of 2019, upheld the appeal of a well-known showman against a publishing house for the publication of some photos 'stolen' while he was with his partner inside his villa. With the above sentence, the Supreme Court traces the principles of case law on the right to the image of celebrities.

The Court clarified that the abusive publication, when it leads to the loss, by the right holder, of the right to offer to the market the use of his or her own portrait, gives rise to the corresponding prejudice. This prejudice is not excluded by the possible refusal of the injured party to allow anyone to publish the specific portraits illegally used, since this refusal cannot be equated to a kind of abandonment of the right, with consequent fall into the public domain.

V COMPETITION AND CONSUMER RIGHTS

Some of the latest enforcement activities in the competition and consumer protection regime affecting the media and entertainment sector include:

- a* an AGCM decision of 7 December 2018, following an investigation launched in April 2018 that fined Facebook Ireland Ltd, and its parent company Facebook Inc, for engaging in two unfair commercial practices in violation of the Italian Consumer Code.⁶³ This decision is likely to open a debate about the relationship between data protection laws and consumer protection laws and how far the competition authorities can go in scrutinising business models based on the processing and profiling of personal data. The commercial practices challenged by the AGCM concerned:
 - the way Facebook presents its social network service to prospective users who are in the process of registering in the service that was considered as misleading for consumers in regard to the free nature of the service, without properly informing them about the fact that Facebook collects, processes and uses their personal data for commercial purposes; and
 - Facebook's transmission of registered users' data, without their prior express consent, from the social network platform to third-party websites or apps and vice versa, for the use of such data for profiling and commercial purposes. This mechanism was considered in violation of the Italian Consumer Code, prohibiting the adoption of aggressive commercial practices by the professional, because it may, through undue influence, significantly impair the average consumer's freedom of choice, thus causing him or her to make a transactional decision he or she would not have taken otherwise; and
- b* an AGCM decision of 20 May 2019 concluding its investigation into the acquisition, by Sky Italia, of the digital terrestrial television (DTT) technical platform, R2, from Mediaset Premium.⁶⁴ R2 provides technical and administrative services for the DTT broadcasting of pay-TV channels, which enable the packaging of a retail pay-TV offer, such as the cryptography of the signal, and administrative services. According to the

63 Decision of the Italian Competition Authority No. 27432 of 29 November 2018.

64 Decision of the Italian Competition Authority No. 27784 of 20 May 2019.

AGCM, the acquisition of R2 was economically and functionally intertwined with a set of commercial agreements that were entered into between the two parties in March 2018. These related, in particular, to the licensing of MP's pay-TV channels to Sky, and the transfer to Sky of the rights to the use of DTT's logical channel numbering, in addition to transitory agreements for the de facto exclusive provision of the technical platform services. Considering these interconnected agreements, the AGCM maintained that, overall, this concentration was equivalent in its substance to the suppression of Mediaset Premium as a competitor.

VI DIGITAL CONTENT

Pursuant to Article 16 of the Italian E-Commerce Act, hosting service providers are exempt from liability where third-party rights are violated on their online platforms as long as the hosting service provider:

- a* has no knowledge of the illegal activity or information; and
- b* acts immediately to remove the illegal material once made aware of its infringing nature.

Italian courts have shown a controversial attitude regarding the legal regime governing liability of hosting providers. Some courts (especially the Court of Milan and the Court of Turin) have maintained that elements such as the organisation of content or the arrangement of internal search engines by internet service providers (ISPs) do not imply an editorial activity; therefore, there would be no reason for excluding liability exceptions as provided for in the E-Commerce Directive. Other courts (most notably, the Court of Rome) have endorsed a different approach, considering ISPs as active providers; that is, providers that, being 'more sensitive' to third-party content, would have access to a limited exemption from liability.

On 19 March 2019, the Court of Cassation issued its judgment in the appeal filed by RTI, one of the main Italian broadcasters, against the landmark Milan Court of Appeals' decision issued in January 2015 in the *RTI v. Yahoo!* case.⁶⁵

The Court of Cassation, taking into consideration the prevailing interpretation of the Court of Justice of the European Union (CJEU), recognised the existence of a distinction between active and passive hosting providers. The court established the principle of law according to which an active hosting provider is the provider of information society services that carries out an activity beyond a mere technical, automatic and passive service and, on the contrary, carries out an active conduct, cooperating with others in the commission of the illicit activity; thus, the active hosting provider cannot benefit from the safe harbour liability regime established by Article 16 of the E-Commerce Act and its liability shall be ascertained on the basis of the general rules on liability.

To this end, the court listed some elements that suggest that the hosting provider is carrying out an active role.

The court then dealt with the issue of liability, laying down the principle that in the context of the information society services, the hosting provider's liability exists upon the provider that failed to immediately remove the unlawful pieces of content as well as when it kept hosting them, when all the following conditions are met:

- a* the provider is aware of the illicit activity committed by the recipient of the service because it received notice from the rights holder or from third sources;

⁶⁵ Judgment 7708/3019, *RTI v. Yahoo! Inc.*, 19 March 2019.

- b the unlawfulness of the recipient's conduct is reasonably verifiable with the same degree of diligence that it is reasonable to expect from a professional internet operator in a certain historical moment, inasmuch as the provider is grossly negligent if it fails to ascertain the unlawfulness of the content; and
- c the provider has the possibility to usefully act because it was made aware in a sufficiently specific way of the unlawful pieces of content that should be removed.

In a different proceeding, the Court of Rome established another important principle by ruling that platforms can be held liable for 'culpable cooperation by omission, for the violation of copyright' in the event that they fail to take immediate action and comply with the specific obligation of 'immediate removal'. In such cases, platforms will be subject to a penalty for any future infringement subsequent to the judgment itself.⁶⁶

The Court of Rome has also recently upheld the orientation of the CJEU regarding violations of authors' rights committed through the linking technique.⁶⁷ The Court recognised that the publication of hyperlinks without specific authorisation from the owner must be regarded as unlawful, as it constitutes an act of communication of the work 'to a new public other than that originally authorised by the plaintiff'. Therefore, even the 'passive hosting provider' must take action as soon as it receives the news of the wrongdoing committed by the users of its service in order to allow the prompt removal of the illegal information entered on the site or to prevent access to such, as it is required to conduct its business with the diligence reasonably expected to detect and prevent the illegal activities reported.⁶⁸

VII CONTRACTUAL DISPUTES

The main legal issues and areas of litigation in the cinema and TV production market typically relate to the ownership of intellectual property rights in the underlying work, the unauthorised use of works or unlawful exploitation of the economic rights over the work, and the contractual relationships between producers, distributors and film theatre sights over communication of the programme and broadcasting.

For print and electronic publishing, the main legal issues concern the ownership of rights, infringement of reprographic rights and the liability of authors and publishers for content.

Many legal issues arising in contracts for the exploitation of rights concern the fulfilment of contracts; in particular, producers paying correct royalties to the artists, and publishers paying correct royalties to authors.

In a recent judgment, the Court of Rome ruled with particular rigor about compensation for the damage paid to the producer, with regard to one of the main obligations provided for in the contracts for the distribution of cinematographic works, namely that relating to the minimum number of theatres – or screens – in which the screening must take place.

⁶⁶ Judgment 693/2019, *RTI v. Vimeo*, 10 January 2019.

⁶⁷ Judgment 3512/2019, *RTI v. Facebook*, 15 February 2019.

⁶⁸ In this respect, the Court of Cassation underlined that the liability of a hosting provider is based on two specific elements, namely the unlawfulness of the content hosted, which, in turn, derives from the infringement of others' rights by means of a civil or criminal offence; for example, a copyright infringement; and the knowledge of this unlawfulness, meaning that the hosting provider's liability can exist only if the latter culpably omits to take down the unlawful information or disable access to its service, thus failing to stop the infringement of third parties' rights.

With reference to the Italian distribution of the film *Dracula di Dario Argento*, the producer had accused the distributor of having failed to fulfil its contractual obligation to screen the film in Italy on at least 200 screens in the ‘città capozona’,⁶⁹ as well as to deliver the accounting statements and pay the amounts due within the terms provided for in the contract.⁷⁰

VIII YEAR IN REVIEW

On 14 November 2018, MiBaC announced an upcoming Ministerial Decree adopted pursuant to Law No. 220/2016, representing the first law intervention in Italy on theatrical windows.⁷¹ Previously, this matter had been ruled in accordance with a well-established practice, which the Decree enshrines, basically, into law. The scope of the Decree is limited to Italian works and does not include foreign productions, for which the aforementioned gentlemen’s agreement remains applicable. Between a film’s first screening in theatres and its availability on other platforms, a time lag of 105 days is to be respected. However, the Decree introduces some exceptions to this period.⁷² In the case of violations of these provisions, the productions might not be admitted for tax credit or other fiscal or financial benefits that exist for cinematographic productions.

On 6 March 2019, AGCOM adopted Resolution No. 74/19/CONS, by which, in accordance with Law No. 220/2016, it established the criteria to categorise audiovisual works delivered via the internet and video games, to protect minors from inappropriate content.⁷³ Categorisation is a prerequisite for the audiovisual works delivered via the internet and video games to be distributed through electronic communication services and networks.

It is the responsibility of the relevant providers to ensure that audiovisual works delivered via the internet and video games conform to the categorisation and to the relevant criteria established by AGCOM.⁷⁴

On 1 February 2018, AGCOM published on its website the guidelines to ensure equal treatment of parties or candidates on online platforms in view of the general election that took place on 4 March 2018. The guidelines were the result of activities carried out by the working group set up by AGCOM, with the participation of major stakeholders, including representatives from online platforms and newspapers.

69 Regional capitals, as defined according to Legislative Decree 28/2004, now abrogated by the new Cinema Law No. 220/2016.

70 Judgment of the Court of Rome No. 1580 of 9 January 2018.

71 Ministerial Decree No. 531 of 29 November 2018.

72 The first case is that of films released in less than 80 theatres and having gained less than 50,000 viewers within the first 21 days: in this case, the Decree allows a shortening of the time lag to 60 days. The second hypothesis is short-time released films (three days or less in theatres, excluding the weekend): in this case, the window’s length is reduced to only 10 days. These reductions are intended to allow smaller (Italian) productions to circulate more quickly and easily on other platforms while possibly reducing the opportunity for piracy.

73 AGCOM, Annex A, Regulation on the classification of audiovisual works intended for the web and video games referred to in Article 10, Paragraphs 1 and 2 of Legislative Decree No. 203 of 7 December 2017, on ‘Reform of the legislative provisions on the protection of minors in the film and audiovisual sector, pursuant to Article 33 of Law No. 220 of 14 November 2016’.

74 The categorisation of audiovisual works primarily delivered via the internet is based on two factors, namely the definition of different age groups and the adoption of thematic descriptions. The thematic descriptions

With a landmark decision, the Court of Appeals of Rome clarified ISPs' liability limits in the case of online defamatory content.⁷⁵ If no order is issued by the competent administrative or judicial authority, there cannot be any liability under the provisions of Legislative Decree No. 70 of 2003 that implemented the E-Commerce Directive in Italy.⁷⁶ The Court of Appeals draws a clear and specific distinctive line between copyright infringement cases and defamation cases. When a suit is filed for libellous contents, the determination on the validity of the infringer's claim is more difficult than in a copyright infringement, making the intervention of a third party necessary (i.e., the competent judicial or administrative authority considered by the E-Commerce Decree).

IX OUTLOOK

In the near future, Italy will face a delicate process of transposition of European legislation in the media sector:

- a* the new European Directive (EU) 2018/1808, which amends and updates the EU's Audiovisual Media Services Directive, entered into force on 18 December 2018 and must be implemented into the national legislation of EU Member States by 18 September 2020; and
- b* on 26 March 2019, the European Parliament approved the new European Directive on copyright in the Digital Single Market. This Directive must be transposed in Italy by 7 July 2021.⁷⁷

The challenges of AI⁷⁸ and e-privacy will also be faced by the Italian legislators in coming years.

for categorising audiovisual works include the following: discrimination and incitement to hatred, drugs, dangerous and easily imitable conduct, language, nudity, sex, threats and violence. Furthermore, video games are subject to categorisation depending on different age groups and, similar to audiovisual works, are categorised on the basis of a variety of thematic descriptions, including profanity, discrimination and incitement to hatred, drugs, fear, gambling, sex, violence and in-game purchases.

75 Court of Appeal of Rome, Section I, No. 1065 of 19 February 2018, *Previti Cesare v. Wikimedia Foundation Inc.*

76 The Court of Appeals found that hosting providers can be deemed liable for defamatory statements present on their services providing that they are served with a take-down order issued by the competent authority under the E-Commerce Decree; or receive an *ex-parte* notice sufficiently detailed and highlighting the presence on their services of defamatory statements severe enough to deem the provider 'on notice' even without a proper take-down order.

77 According to Recital 61 of the Directive, the transposition shall be made with the aim of 'promoting the development of the market for the granting of licences between rights holders and providers of online content sharing services' to allow rights holders to 'receive adequate remuneration for the use of their works or other materials'.

78 In September 2017, Italy launched an AI task force through the Agency for Digital Italy. The task force includes 30 direct members and around 450 community members from many sectors. One initiative of the task force is the Observatory on Artificial Intelligence, which aims to analyse AI-related public conversations on social networks through technology.

KOREA

Hyun Ho Eun and Sung Uk Park¹

I OVERVIEW

i Overview of the Korean media and entertainment industry

The Korean media and entertainment industry comprises different branches that include print and visual media.

The Korean commercial broadcasting industry is broadly categorised into terrestrial broadcasters, cable TV broadcasters, internet TV provided by telecommunications operators and satellite broadcasting operators. In the past, terrestrial broadcasters and cable TV broadcasters held a dominant share of the Korean commercial broadcasting market, but this landscape is rapidly changing with the growth of internet TV broadcasters.

In the area of print media, the newspaper industry is considered to be the largest and most significant sector, although the size of this market continues to decrease with the development of visual broadcast media.

Finally, the Korean entertainment industry encompasses different forms of media, including films, videos, music, games and cartoons, and is currently thriving with the rise of K-pop and the growing interest in Korean films. Domestically, businesses involving Korean games and internet cartoons (or ‘webtoons’)² have also seen substantial growth.

ii Recent market trends and policy developments

Growth of programme providers

Programme providers are businesses that provide programmes to broadcasters that either exclusively air only those programmes on channels or air those programmes on channels at certain allotted time slots. Multi-programme providers (programme providers that service multiple broadcasting channels) have recently experienced significant growth in the broadcasting industry.

Acquisition of cable TV businesses by telecommunications operators

The top three telecommunications operators in Korea, SK Telecom (SKT), KT and LG U Plus (LG), are all attempting to enter the rapidly expanding commercial broadcasting market by acquiring cable TV businesses. Currently, SKT (for the acquisition of T-Broad) and LG (for the acquisition of CJ Hello) are awaiting approval from the Korea Communications Commission (KCC) and the Korea Fair Trade Commission (KFTC). By tapping into the

¹ Hyun Ho Eun is a senior attorney and Sung Uk Park is a senior foreign attorney at Kim & Chang.

² ‘Webtoon’ is a combination of the words ‘web’ and ‘cartoon’, and refers to cartoons published on web media platforms.

commercial broadcasting market, telecommunications operators are striving to diversify their businesses in the face of a shrinking domestic telecommunications market that has resulted from market saturation.

Growth of and debate on over-the-top media

The over-the-top (OTT) media market, led by global service providers, such as Google's YouTube and Netflix, is dramatically expanding in Korea. As there are no specific laws or regulations that presently apply to the OTT media industry, this industry has become a hot point of contention among the Korean National Assembly and various government agencies. An amendment bill to treat OTT media businesses as 'broadcasting system operators' (thereby making the Broadcasting Act applicable to these businesses) was introduced in the Korean National Assembly on 12 January 2019, and is currently being reviewed.

II LEGAL AND REGULATORY FRAMEWORK

In Korea, the different forms of media are regulated by different laws and regulations.

i Newspapers

The Act on the Promotion of Newspapers, etc. (the Newspaper Act), which is regulated by the Ministry of Culture, Sports and Tourism, governs newspapers. Among other things, the Newspaper Act regulates business registration for newspaper businesses and prohibits foreigners or foreign entities from publishing newspapers in Korea.

To publish and distribute newspapers (including online newspapers), a business must complete registration with the corresponding local government. Furthermore, foreign newspaper businesses are required to establish and register a local Korean office or branch.

The Newspaper Act prohibits the publishing of any newspapers by foreign governments, companies or organisations; companies or organisations whose representative executive officer is a foreigner; and companies or organisations whose shares or equities are held by foreigners or foreign entities in excess of a threshold rate. Furthermore, the Newspaper Act prohibits the publishing of online newspapers by foreigners.

ii Broadcast communications

Broadcast communications are governed by the Broadcasting Act and the Internet Multimedia Broadcast Services Act, the latter of which governs businesses delivering broadcasts through internet protocols, and both of which are regulated by the KCC and the Ministry of Science and ICT (MSIT). Among other things, the acts regulate broadcasting operator licences and rating systems.

Broadcasting operators must either obtain a licence from the KCC, or obtain a licence or an approval or file a registration with the MSIT.

Korean television broadcasters are required to self-rate their programmes based on five elements that may be harmful to viewers (theme, violence, sexuality, imitation risk and language) before broadcasting the programmes, and must display the rating throughout the broadcast. The ratings categories are: 'for all', 'viewers 7 and up', 'viewers 12 and up', 'viewers 15 and up' and 'viewers 19 and up'. The KCC assesses the appropriateness of the rating after the programme is broadcast.

iii Online media

Although there are no laws that specifically govern OTT or online media, the Telecommunications Business Act (TBA), regulated by the MSIT and the KCC, generally governs services provided through telecommunications technology. Among other things, the TBA imposes restrictions on telecommunication business operators, which includes value-added service providers (VSPs). There are also laws that regulate the management of personal information relevant to online media, which are not covered in this chapter.

VSPs must obtain approval from or file a report with the MSIT before operation. VSPs broadly include telecommunications service providers that provide telecommunications services using facilities leased from facilities-based telecommunications service providers (i.e., internet service providers (ISPs)). Online media services are normally required to report to the MSIT as VSPs.

The TBA generally prohibits certain types of conduct by telecommunication service providers that can harm consumers or fair trade.

iv Films

Films are governed by the Promotion of the Motion Pictures and Video Products Act (the Motion Pictures Act). Among other things, the Motion Pictures Act regulates the film rating system and imposes a quota of Korean films on film theatres (called the screen quota system).

The Korea Media Rating Board (KMRB) rates films based on content. Unrated films cannot be screened in theatres. There are five ratings: 'for all', '12 and up', '15 and up', 'restricted for teenagers (under 18)' and 'restricted'.

Film theatres are required to screen Korean films for at least 20 per cent of each business day.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Free speech

Freedom of expression is a right recognised by the Constitution of Korea. In Korea, freedom of expression encompasses the freedom of speech and press. The Korean Constitutional Court has held that all forms and channels for communication and expression are protected by the right.³ Nevertheless, this right may be restricted based on the content of expression, including those that harm another party's reputation or infringe upon another party's rights.

Restrictions on freedom of expression

There are some restrictions on freedom of expression that are particular to certain forms of communications.

Broadcast communications

The KCC publishes the Regulations on Broadcasting Standards, and reviews broadcast communications after they have aired. The KCC also publishes the Regulations on Broadcast Advertisement Standards for advertisements. After a review of the content that was aired, the

3 Constitutional Court decision, 29 January 2004, 2001 Heon-Ma 894.

KCC may impose sanctions on the relevant broadcasting companies, programme providers or production companies when the content, as a whole or in part, is not compliant with the above regulations.

Ratings

The KMRB requires films and videos to be rated by it before they are distributed through various channels. While there are broad exceptions to this requirement (e.g., free videos open to the public provided through telecommunications network are exempt from this requirement), if a person screens films or videos without a rating, or provides these films or videos in a way that is not compliant with the rating, that person may be subject to criminal sanctions. As mentioned in Section II.ii, broadcasters are required to rate their broadcast programmes and indicate the rating while broadcasting the programme.

Online regulations

The Act on Promotion of Information and Communications Network Utilisation and Information Protection, etc. (the Network Act) prohibits the distribution of illegal content, including content that is obscene, injures another's reputation, or is greatly harmful to teenagers and juveniles. The KCC regulates accordingly by establishing content standards and conducting an *ex post* review of the content. After the review, the KCC may issue a corrective order to the telecommunications service operator or the publisher of the content.

Regulations on hate speech

To date, there are no laws in Korea that regulate hate speech (i.e., speech that spurs *animus* towards a particular race, nationality or class of people). While Section 2 of the National Human Rights Commission Act considers any discriminatory actions against another party because of their sex, religion, etc., to be an infringement on their right to equality (as protected by the Korean Constitution), this law has little practical effect as there are no sanctions against violators under the law. In response, there have recently been moves to submit bills that regulate hate speech.⁴

General civil and criminal regulations

Any infringements on another party's rights, such as reputation, privacy, or image, may be subject to criminal and civil liabilities.

ii Newsgathering

There are no laws that provide immunity to liability for newsgathering. A recent lower court decision held that, notwithstanding the freedom of press, any actions by the press that are in violation of express laws are not protected, and that the legality of an investigative action by the press can only be determined after a balancing of the legitimacy of the purpose behind the action, the rights protected by the act, the rights infringed by the act, the commonality of the action, and the exigency of the situation.⁵ A person who trespasses, secretly records a third party's conversation or commits other violations of law (or causes another person to commit

4 National Assembly Research Service, Global Trends on Regulations on Hate Speech and Legislative Agendas.

5 Uijeongbu District Court, 20 October 2011, 2011 Na 6848.

any of the foregoing violations) for the purpose of newsgathering may be criminally liable. Under current law, a party to a conversation may legally record the conversation without the other parties' consent, but on 27 June 2019, a new bill was introduced that criminalises the act of recording a conversation without the other parties' consent.

A recent lower court decision found a person who replayed a secretly recorded conversation (in which the person was a participant) civilly liable for violating the other party's voice rights (portrait rights).⁶ This case is considered noteworthy because, although secretly recording conversation is not illegal in Korea as noted above, the court found the party civilly liable because the person replayed the recording without modification or alteration (consequently holding that this replaying of the recording infringed upon the subject's portrait rights).

iii Freedom of access to government information

There are no laws that provide the media with special access to information. However, under the Official Information Disclosure Act, any Korean citizen, company or entity can request disclosure of any information held or managed by national or state agencies, local governments and local public enterprises (together, public agencies). A foreign individual can request information held or managed by public agencies only if he or she is domiciled in Korea, or is temporarily in Korea for academic research. A foreign company or entity can make the same request only if it has a domestic office or presence. In the case of companies or entities, the request should be filed by an authorised representative. Even then, in certain circumstances, such requests may be denied based on eight express exceptions specified under the law (e.g., infringements on an individual's or company's trade secrets that may materially harm that entity), in which case, administrative action (administrative suit, administrative appeal or objection) must be filed to reverse the decision.

Cases pertaining to information disclosure (and denials of requests thereof) are not all made public. Accordingly, only portions of a small number of court cases and appeals to the denial of requests for information are accessible. The most recent high-profile court case involving the issue of information disclosure was the denial of access to documents, such as reports on rescue activities, pertaining to the Sewol Ferry incident that claimed the lives of 304 people. On 16 April 2014, the National Archives of Korea denied a request for disclosure of documents produced by the Blue House (the President's office) when the Sewol Ferry sank. On 21 February 2019, the Seoul High Court held that the documents should be kept confidential because they were part of the Presidential Archives designated under the Act on the Management of Presidential Archives and did not fall under an exception category specified thereunder.⁷

6 Seoul Central District Court, 10 July 2019, 2018 Na 68478.

7 Son, Hyun-Soo, '[Decision] Documents Made During the 7 Hours of Sewol Held Presidential Archives ... Lower Court Decision Reversed', *Law Times*, 21 February 2019.

iv Protection of sources

Any express laws that provided journalists with the right to remain silent to protect their sources have been abolished. Currently, there are no laws that expressly allow journalists to protect their sources and it is unclear whether source protection falls under the umbrella of the constitutional right of freedom of expression (which encompasses the freedom of press and publication).

v Private action against publication

Main claims filed against the press

Under the Act on Press Arbitration and Remedies, etc. for Damages Caused by Press Reports (the Press Arbitration Act), injured parties can file a claim against a media company for correction, counter statement or further reporting. Correction requests are made to correct untrue statements published by the company. Counter statements are available irrespective of the truthfulness of the report. Further reporting requests are claims that can be filed by a person that was suspected of or prosecuted for a crime on the fact that he or she was later deemed to be innocent or had had his or her charges dropped. These claims can be resolved by direct claim against the media company, mediation through the Press Arbitration Commission or litigation. If a report is false or materially harms the reputation of the subject and does not promote public interest, the injured subject can file for a request to delete the report.

Mediation through the Press Arbitration Commission

The Press Arbitration Commission is an alternative dispute resolution body that specialises in disputes involving press reports. The arbitration department is composed of judges, attorneys and ex-media personnel. A successful agreement between the aggrieved party (the petitioner) and the media company (the respondent) is legally binding under Korean law.

Civil suits

If a media company acts illegally, the aggrieved party can file for damages for economic harm or emotional distress, which needs to be proved by such party. Unlike the Press Arbitration Act, these suits can be filed against individual reporters.

Criminal suits

In Korea, if an aggrieved party's reputation is injured because of a media report, a criminal suit can be filed against the publisher and individual reporter regardless of whether the report is false or not. However, in the case of reports that are truthful, statutory criminal sanctions are relatively lower. Additionally, potential safe harbours may exist for the publisher and individual reporter if the report can be proven to be both truthful and in the service of public interest (i.e., the publisher and the individual reporter may not be held criminally liable). For false reports, such safe harbour rule does not apply.

Defences for the press

Regardless of the truthfulness of a report, if a report harms an aggrieved party's reputation, the aggrieved party may take civil and criminal action against the publisher. The aggrieved party must prove that he or she was defamed by the report. However, if the report is found to be truthful and in the service of public interest, then the publisher may not be criminally

liable. Furthermore, even if some information in the report is false, if the publisher believed the information to be true (and had reasonable grounds to believe so), and the report was published for the public good (i.e., in the interest of society or large groups or members of society), the publisher may not be held criminally liable.⁸ However, the burden is on the publisher to prove their beliefs.⁹ Both the Constitutional Court and the Supreme Court have held that the level of protection for a public figure or a case involving social issues is lower,¹⁰ which means that the report involving such figure or case is likely to be recognised as servicing the public good.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Copyright law of Korea and its comparison to the Berne Convention

Under the Korean Copyright Act, both Korean and foreign copyrighted works are protected upon their creation in accordance with treaties that Korea has acceded to, which include the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Berne Convention was ratified by Korea on 2 August 1996.

The Copyright Act has since been amended several times, and recent notable changes were intended to make the Copyright Act compliant with free trade agreements entered into respectively with the European Union and with the United States (together, the FTAs). One significant change includes the extension of the protection of neighbouring rights (excluding broadcasts) from 50 years after the creator's death to 70 years thereafter.

Korea is also a member of the World Intellectual Property Organization (WIPO), and is subject to the WIPO Copyright Treaty (WCT). Korea has complied with its duties under the WCT by reflecting necessary obligations in the Copyright Act (e.g., adopting the right of communication to the public).

Recent developments in copyright law

As mentioned above, recent notable changes were intended to make the Copyright Act comply with the requirements under the FTAs. First, the act was amended to re-establish indemnification requirements for the secondary liability of online service providers (OSPs). Second, the scope of permitted reproduction was expanded to include temporary reproduction in accordance with the FTA entered into with the United States.

The expansion of the scope of copyrighted work is also a recent development in Korea's copyright regime. For instance, the Korean Supreme Court recently recognised that television programme formats can be regarded as work product and are thus protected by copyright law for their distinct creativity in the particular selection and sequencing of programme elements (e.g., stage, background, props, music).¹¹ Similarly, the Supreme Court held that the rules of

8 Supreme Court decision, 23 August 1996, 94 Do 3191.

9 Supreme Court decision, 8 May 1998, 97 Da 34563.

10 Constitutional Court decision, 24 June 1999, 97 Heon-Ma 265; Supreme Court decision, 27 February 2004, 2001 Da 53387.

11 Korean Supreme Court, 11 November 2017, Case Ref. 2014Da49180.

games (an element that comprises the game, and that were previously viewed as ‘ideas’ and not recognised as ‘expressions’ protected by copyright) can be considered in determining the ‘creativity’ of a work, which is a key element for copyrighted work.¹²

ii Publicity rights

There are no laws or regulations in Korea that expressly recognise publicity rights for public figures, such as celebrities. There are no Korean Supreme Court cases that provide guidance on this issue, and there is a split in lower court decisions on the recognition of publicity rights (some courts have recognised damages for the unauthorised use of celebrities’ images and names). Whether publicity rights should be recognised is a frequently debated issue in Korea.

iii Unfair business practices

Lack of protection for ‘hot news’

Coverage of ‘hot news’ is not expressly protected under current copyright law or other relevant regulations. There are different views on whether hot news should be protected. In addition, the issue of whether the distribution of ‘fake news’ should be regulated, and which authority should be responsible, is also actively debated in Korea.

Current regulations regarding news articles

In Korea, news reports on current events are generally not protected under copyright law. However, in some exceptional circumstances, news articles may be protected for their creativity or originality. A news article can be recognised as work product protected by copyright law for its creativity and originality based upon its unique content, style and vocabulary. The Supreme Court has, therefore, held that the unauthorised publication of a news article by another third-party media company can be a violation of the Copyright Act.¹³

V COMPETITION AND CONSUMER RIGHTS

i Overview

There are no laws or regulations that specifically govern competition and consumer protection in the media and entertainment industry. These industries are, however, subject to general competition and consumer rights laws and regulation, including the Monopoly Regulation and Fair Trade Law, which regulates trade among businesses, the Regulation on Standardised Contract Act (RSCA), which regulates standard contracts between consumers and business providers, and the Act on Consumer Protection in Electronic Commerce Transactions, which applies to online business providers and consumers.

ii Regulation of the film exhibition market

The Korean film market is driven by a few major multiplex theatres. The KFTC has regulated the industry to ensure that such major companies do not commit any unfair market practices against third-party film distributors, such as the favouring of affiliates in the distribution, screening or screening duration for films.

12 Korean Supreme Court, 21 June 2019, Case Ref. 2017Da212095.

13 Korean Supreme Court, 14 September 2009, Case Ref. 2004Do5350.

iii Consumer protection

There has been a recent surge in the KFTC's intervention of large businesses in their contracts with counterparties and end users; for example:

- a* entertainment industry: in 2007, the KFTC reviewed and regulated contracts between entertainers (e.g., singers and actors) and their management agencies for potential violations of the RSCA arising from such agencies' unfair treatment of the entertainers. In 2017, the KFTC further amended the contracts between eight major management agencies and their trainees for similar violations, expanding the scope of protection for entertainers;¹⁴
- b* webtoon industry: in 2018, the KFTC examined 26 contracts executed between webtoon service providers and their artists, and ordered an amendment of any unfair provisions.¹⁵ For example, before the KFTC's involvement, the price of webtoon content was deliberately fixed, and some provisions even allowed for the right to create derivative work; and
- c* gaming industry: in 2019, the KFTC examined the terms and conditions of 10 major game services, and ordered amendments of any terms that were unfair to users, including the disabling of cancellations for purchased game item gifts between users, even when such gifts were not recognised or received by the recipient user.

iv Net neutrality and recent development

In Korea, there are no express laws or regulations that mandate net neutrality of OSPs. However, the MSIT has published the Guidelines for Net Neutrality and Internet Traffic Control.

Views on net neutrality differ between the OSPs and the content and application providers. The advent of 5G networks has fuelled this already heated discussion. To foster discussion on net neutrality, in 2018, the KCC created the Internet Cooperation and Development Committee, composed of relevant government authorities, online-based companies, telecommunications service providers, non-governmental organisations and experts. The Committee is currently preparing a guideline on network usage fees to prevent unfair discrimination in the collection of network usage fees between domestic and foreign businesses, and to protect consumers during the process of network usage fee negotiations.

VI DIGITAL CONTENT

Where it is clear that defamatory content posted on a website is illegal, the website operator has the duty to take down the content and further deny access so that similar content cannot be posted, if the website operator received a request to take down specific content, or even in the absence of such request, if the website operator knew of, or if it is clear that the website operator could have known of, such content having been posted, unless the website operator, technically and economically, is not able to manage or control such content.

Under the Copyright Act, both civil liability and criminal penalty may result from copyright infringement. Separately, under the Network Act, anyone who distributes illegal content, such as obscene content or defamatory content, through communication networks (such as the internet) may be subject to criminal liability. OSPs can be held secondarily

¹⁴ See KFTC media publication, 17 March 2017.

¹⁵ See KFTC media publication, 28 March 2018.

liable for the aforementioned illegal activities by their users. However, OSPs will be exempt from such civil and criminal liability if the violation occurs without the website operator's knowledge, and notice and takedown actions are implemented pursuant to the Copyright Act's safe harbour provision or the Network Act.

VII CONTRACTUAL DISPUTES

i Disputes regarding exclusive contracts for entertainers

Recently, the number of disputes involving exclusive contracts between entertainers and their management companies has increased. One type of common dispute involves the validity of allegedly unfair contracts; however, since the KFTC began introducing sample standard contracts following notable disputes between famous K-pop singers and their agencies, this type of dispute has become less common. Another type of dispute involves the claim of a party's rescission of the exclusive contract based on the other party's violation of such contract.

ii Disputes between broadcasters and content providers

Disputes often occur between terrestrial broadcasters and content providers (CPs) (in particular, production companies). In most cases, however, the disputes fall short of litigation because broadcasters leverage their market dominant positions to settle with the production companies. The most common issue is the attribution of copyright of cinematographic productions.

Because of the KCC's publishing of different guidelines (such as a guideline regarding the process of outsourcing production of broadcasting programmes) and the growing interests in copyright, the number of such disputes is expected to increase along with the number of programme providers and CPs.¹⁶ The aforementioned guideline published by the KCC sets forth regulations, including the requirement of written contracts before the commencement of shooting, the calculation of production costs based on provided payment standards and reasonable estimated costs, and clear indications of entitlement of relevant property rights.

iii Venues and resolutions

Petitioners generally seek damages and often challenge the validity of contracts in disputes involving the media and entertainment industry. In cases where copyright or trademark infringement is recognised, the infringing party may be held criminally liable. While parties mainly seek help from the court system in such situations, for minor disputes with consumers another possible venue is the Dispute Resolution Committee of the Korea Creative Content Agency. If the issues are deemed confidential, the Korean Commercial Arbitration Board is another preferred venue. Parties have increasingly been using these two options in recent years; a decision from the Korean Commercial Arbitration Board is as effective as a court decision.

For entertainment work products, such as films or recordings, taking preventive measures is crucial because the timing of release is often crucial in determining the success of a product. As such, preliminary injunctions are frequently sought, and during the development of the case for the injunction, the merits of the case are often reviewed thoroughly, which often leads to settlements of the dispute.

16 Sungsoo Park, *A Study on the Contract-Related Disputes of the Media Entertainment Industry* (2016).

VIII YEAR IN REVIEW

The biggest issue of 2019 may be the growth of OTT businesses. Local regulators are beginning to focus their attention on major global OTT operators, such as Netflix, YouTube and Facebook. In particular, there has been significant debate on the issue of free-riding by global OTT businesses as they do not pay network fees for their use of online networks. While discussions on how to regulate these businesses are ongoing, there does not yet seem to be any clear consensus on the types of policies that should be implemented to manage these businesses.

The KCC has announced that it will prepare a network use guideline by the end of 2019 to obligate CPs to pay network fees. However, a notable lower court decision was recently rendered that held that the management and regulation of the quality of internet-connected services must be conducted by ISPs and not CPs, and that CPs have no obligation under current law to ensure a certain level of network connection quality. While this case is still pending, this decision is expected to have an effect on the network usage fee guideline and the overall regulation of OTT businesses.

In addition, with major changes in the market, such as the KFTC's conditional approval of the business combination of the OTT business run by the three largest domestic terrestrial broadcaster and SKB's OTT business, it is hard to predict how the regulatory scheme of OTT businesses will develop in the future.

Another big issue of 2019 was fake news. While the Korean government expressed at the end of 2018 its intent to prevent fake news from spreading through the media and the internet, it has not yet taken any particular measures. The main reason behind the lack of initiative is growing concerns over the potential infringements of the freedom of expression, which is considered a fundamental right. As national elections are planned in 2020, fake news will likely remain a hot issue in the upcoming year.

IX OUTLOOK

i Expansion of copyright protection

The number of disputes involving different broadcast programmes, films, games, webtoons and songs has increased significantly in 2019, and copyright holders have become more active in protecting their rights. In light of this, the courts have slowly been expanding the scope of copyright protection by recognising, for instance, that television programme formats can be protected under copyright law and that game rules can be considered as a factor for determining the creativity of a game. We predict that the number of copyright-related disputes will increase.

ii Regulations involving net neutrality, hate speech and fake news

In line with global trends, discussions on net neutrality, hate speech and fake news will likely continue in Korea. Despite this trend, it is likely that it will take some time until any significant relevant laws or regulations are passed due to the complexity of issues and the conflicting interests of major players in the media and entertainment industry.

iii Increase of M&A transactions in the entertainment industry

In addition to the two mergers and acquisitions described in Section I, M&A transactions in the media and entertainment industry appear to be on the rise. We believe that one of the reasons behind this trend is an increase in content production costs, which have made it more difficult for small to medium-sized production companies to survive. As such, the ecosystem of the Korean media and entertainment sector has developed in a way that makes it beneficial for businesses with more resources (i.e., content, intellectual property and entertainers) to thrive. We predict that the number of M&A transactions in the media and entertainment industry will continue to increase.

LATVIA

Madara Meļņika and Andris Tauriņš¹

I OVERVIEW

The media in Latvia have won the recognition of their rights and privileges in opposition to the state and individuals. Investigative journalists working in print, online, radio and TV have managed to reveal ground-breaking violations and crimes. Public media, mainly owing to its digital presence, has been recognised as a legitimate, trustworthy and useful source of information. However, financial instability endangers its existence. Additionally, fake news, particularly, in terms of social networks, is an ever-growing problem. These issues diminish the overall image of the media in the eyes of society. Another issue is Russian-language TV channels, originating in Russia, which often violate the limitations of freedom of expression, distribute hate speech or ignore other principles of a free and responsible media.

In the field of entertainment, there have been cases of consumer rights infringements. However, the ongoing work of the Consumer Rights Protection Bureau, through both cooperation and law enforcement, has helped to improve the situation. In September 2019, one of Latvia's three mobile operators, Bite, announced the acquisition of the major cable TV operator Baltcom, thus, following the trend of consolidating telecoms businesses with content creation and entertainment businesses.

One of the key milestones in Latvia in 2019 was the establishment of the Latvian Media Ethics Council, which is a self-regulatory, collegial mechanism for monitoring Latvian media ethics, consisting of media companies and professional members of the Latvian Civic Alliance.²

1 Madara Meļņika is an associate and Andris Tauriņš is a senior associate at Sorainen. The authors express their gratitude to Ērika Bužinska, Gunvaldis Leitens and Krista Niklase for their help in the research process.

2 Latvian Media Ethics Council, available at www.lmepadome.lv/home/.

II LEGAL AND REGULATORY FRAMEWORK

i Legal framework

Freedom of the press is established in Article 100 of the Constitution of Latvia.³

The main umbrella law for the media in Latvia is the Press Law (1990).⁴ Electronic media is regulated by the Law on Electronic Media (2000),⁵ which, inter alia, implements the EU Audiovisual Media Services Directive.⁶ The Electronic Communications Law (2004)⁷ regulates internet and intellectual property-based services, and provides the legal basis for the powers of the Public Utilities Commission (the Regulator).⁸ Specific norms of the Law on Information Society Services (2004)⁹ apply to internet service providers.

Intellectual property issues are mainly regulated by the Copyright Law (2000).¹⁰

The sector is also regulated by general regulations, such as the Consumer Protection Law (1999), as well as Cabinet of Ministers regulations or decisions by the Regulator, relating to the above-mentioned laws.

ii Relevant regulators and their powers

The media and entertainment field is mainly regulated by the Regulator and the National Electronic Mass Media Council (NEMMC).¹¹

The Regulator is an institutionally and functionally independent autonomous body of public law, which regulates business activities in the electronic communications sector and protects users' rights from a technological perspective. The Regulator's actions are based on the Law On Regulators of Public Utilities (2001),¹² as well as on other legal acts covering specific regulated sectors. In the field of electronic communications, the Regulator monitors the services provided by electronic communications companies, including voice telephony, the transmission of data and electronic messages and internet access.

The NEMMC is an independent, autonomous institution that represents the public interest in the field of electronic mass media. The NEMMC supervises the compliance of the operations of electronic mass media with the Constitution, the Law on Electronic Mass Media (LEMM) and other relevant legislation. The NEMMC is responsible for producing the National Strategy for the Development of the Electronic Mass Media.

3 15 February 1922. Latvijas Vēstnesis (Official Gazette). Available at <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia>.

4 20 December 1990. Ziņotājs (Official Gazette). Available at <https://likumi.lv/ta/en/id/64879-on-the-press-and-other-mass-media>.

5 11 August 2010. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/en/id/214039-electronic-mass-media-law>.

6 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0013>.

7 28 October 2004. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/en/id/96611-electronic-communications-law>.

8 www.sprk.gov.lv/en.

9 1 December 2004. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/en/id/96619-law-on-information-society-services>.

10 11 May 2000. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/id/5138-autortiesibu-likums>.

11 www.neppladome.lv/en.

12 19 October 2000. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/id/12483-on-regulators-of-public-utilities>.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

At the national level, the right to freedom of expression is enshrined in Article 100 of the Constitution. The Constitutional Court of Latvia has concluded that the term ‘freedom of expression’ includes the term ‘freedom of the press’ (in its wider definition) and the right of the public to receive information.¹³ This right covers, inter alia, the right of citizens to choose the language in which they would like to receive information or express their opinion,¹⁴ as well as the right to pre-election campaigning.¹⁵

However, this right is not absolute. Article 116 of the Constitution, interpreted in light of Article 10 of the European Convention on Human Rights, stipulates that these rights may be subject to restrictions in circumstances provided for by law in order to protect specific legitimate interests.¹⁶

Hate speech is absolutely excluded from protection under Article 100. The punishment for triggering national, ethnic or racial hatred can include imprisonment for a period of three to 10 years.¹⁷ Zero tolerance towards hate speech was highlighted by the NEMMC decision of 31 January 2019, which suspended the retransmission of Russian-language channel Rossija RTR for three months. The decision was based on hostile statements against some Ukrainian nationals and the calls of Vladimir Zhirinovskiy, a Russian politician, for military action against the territory of Ukraine.¹⁸

In other cases, such as infringement of privacy, the colliding principles of freedom of expression and right to privacy must be balanced by the journalist before the publication of an infringing article, and by the court, if it needs to evaluate the case.

Commercial speech receives less protection. Here the regulations of the Law on Advertising (1999)¹⁹ and the Unfair Commercial Practices Prohibition Law (2007)²⁰ (regarding business-to-customer advertising) apply.

13 ‘On the compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Constitution’. Constitutional Court of Latvia, Case No. 2003-05-01, 29 October 2003, Point 31.

14 ‘On the compliance of Article 19(5) of the Radio and Television Law with Articles 89, 91, 100 and 114 of the Constitution of the Republic of Latvia, Articles 10 and 14 in conjunction with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 19 and 27 of the International Covenant on Civil and Political Rights’. Constitutional Court of Latvia, Case No. 2003-02-0106, 5 June 2003, Point 3.

15 ‘On the compliance of Article 33 of the Law on Pre-Election Campaigns Before Local Government Elections with Article 100 of the Constitution’. Constitutional Court of Latvia, Case No. 2009-45-01, 22 February 2010.

16 ‘On the compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Constitution’. Constitutional Court of Latvia, Case No. 2003-05-01, 29 October 2003, Point 22.

17 Criminal Law (Article 78). 1 April 1999. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/id/88966-the-criminal-law>.

18 Petrova, A, ‘NEPLP aizliedz retranslēt “Rossija RTR” Latvijas teritorijā, Latvian Public Media, 31 January 2019, www.lsm.lv/raksts/zinas/latvija/neplp-aizliedz-retranslet-rossija-rtr-latvijas-teritorija.a307935/.

19 20 December 1999. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/id/163-advertising-law>.

20 22 November 2007. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/id/167759-unfair-commercial-practices-prohibition-law>.

ii Newsgathering

The Press Law states that a journalist has the right to gather information by any method not prohibited by law and from any source of information not prohibited by law.

First, this statement means that the privilege of newsgathering is reserved specifically to journalists – persons who, in accordance with the institutional legal framework provided by the law, prepare materials for a mass medium and who have entered into an employment contract or perform such work upon the instruction of a mass medium, or are members of the Journalists' Union. Second, the law does not specify what journalistic methods, experiments and technical equipment are permitted or prohibited. However, any action must be proportionate to the privacy, data protection and public interest of the individual. Additionally, the journalist must take into consideration the prohibitions stated in the Criminal Law, such as the prohibition to illegally open or destroy mail.

It has been recognised that a journalist may use hidden camera or audio recordings, if:

- a* the issue is of public interest;²¹
- b* this is the last resort and it is not possible to obtain the information otherwise; or
- c* the journalist respects ethics; for example, by masking the interviewee's face or changing his or her voice by technical means.

Journalists may enter private property without permission only if they have reasonable suspicion of illegal activity. In private property, the procedures for taking photographs or filming should normally be determined by the owner or legal user of the equipment.

The use of drones is regulated by Cabinet regulations.²² It is essential that flights do not endanger human life, health, privacy or property, the environment or the interests of national security. In certain situations, permission to use drones is needed.

In terms of balancing the need to gather news with the duty to respect others' rights, a 2013 decision by the Supreme Court is considered important.²³ In that case, a photographer took photos in an Orthodox church during the baptism of a child, and publicised these photos in a newspaper with a circulation of 60,000. The Court decided that the journalist violated the law and the code of ethics, taking into account that the church specifically prohibits the media from intruding on ceremonies.

There has recently been a debate on journalists' rights to gather personal data under the General Data Protection Regulation (GDPR). Even though Article 32 of the Personal Data Processing Law (2018)²⁴ states journalistic work as one of the examples from the GDPR, the lack of understanding of the norms has led to some misunderstandings, such as prohibitions on journalists from taking photos at public events.²⁵

21 Court decision of City of Riga Latgale District Court in Case No. C29776714, 27 January 2016, available at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/266270.pdf>.

22 Cabinet of Ministers Regulation No. 368 'Procedures on Flights of Unmanned Aircraft or Movement of Other Types of Airship', available at <https://likumi.lv/ta/id/308732-kartiba-kada-veicami-bezpilota-gaisa-kugu-un-cita-veida-lidaparatu-lidojumi>.

23 Supreme Court of Latvia, Case No. SKC-11/2013, available at www.at.gov.lv/downloadlawfile/3035.

24 5 July 2018. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/en/en/id/300099-personal-data-processing-law>.

25 Barisa-Sermule, L, 'Aizbildinoties ar jauno datu aizsardzības regulu, cenzas ietekmēt žurnālistus', Latvian Public Media, 21 May 2018, available at www.lsm.lv/raksts/zinas/latvija/aizbildinoties-ar-jauno-datu-aizsardzibas-regulu-censas-ietekmet-zurnalistus.a279188/; Data State Inspectorate, 27 September 2016,

iii Freedom of access to government information

The Press Law provides the media with the privilege to receive information from national and public organisations. It is obligatory for state officials to provide this information unless it falls under the scope of information not to be published as defined in the Law.

The Law states that the press cannot publish (and, therefore, neither receive) the following information:

- a* state secrets or any other secrets explicitly protected by law;
- b* materials from pretrial investigations without the written permission of the prosecutor or the investigator;
- c* the content of written correspondence or telephone calls without the consent of the person who received the message and the author of the message;
- d* information that injures the honour and dignity of natural persons and legal persons or slanders them;
- e* information concerning the state of health of citizens, unless they have provided their consent; and
- f* business secrets and patent secrets, unless their owners have provided consent.

In a recent case, the Supreme Court dealt with the question of the rights of a journalist to receive information about the state budget and its use. The journalist had asked the local municipality to provide data about the use of financial resources in one of its foundations. The municipality refused to provide the requested information, justifying its conduct with confidentiality requirements. The Court emphasised that journalists have a 'great and fundamental impact' since society receives information about matters relevant to each individual from and through the media. Inter alia, the media must give citizens a chance to follow the state's fulfilment of its public functions and how it deals with public funds.²⁶ Therefore, this information had to be disclosed.

Recent amendments to the Criminal Procedure Law (Article 3751) were made to clarify journalists' rights to obtain information from the materials of a criminal case.²⁷ These amendments provide that journalists may obtain material from criminal proceedings after a reasoned request, but only if this is necessary for public interest. Journalists may analyse material only after the criminal proceedings have concluded.

iv Protection of sources

The Constitution of Latvia does not explicitly recognise the right to source protection. However, this privilege is provided in Article 22 of the Press Law, which states that 'A mass medium may choose to not indicate the source of information. . . . For the purpose of protecting vital interests of other persons or the public, only a court, in accordance with the principle of proportionality, may request to produce the source of information.' Additionally, Paragraph 1 of Article 154 of the Criminal Procedure Law indicates a broader understanding of the right to source protection, applying it not only to the mass media but also to the

available at <https://lvportals.lv/e-konsultacijas/10239-personas-dati-jaapstrada-godpratigi-likumigi-un-atbilstosim-merkim-2016>; Grinvalde-Iruka, A, 'Ar datu aizsardzību joprojām pārspīle', Aluksnesiem, 14 March 2019, available at www.aluksnesiem.lv/vietejas-zinas/latvijas-zinas/ar-datu-aizsardzibu-joprojam-parspile-129268.

26 Supreme Court of Latvia, Case No. SKA-917/2019, available at www.at.gov.lv/downloadlawfile/5791.

27 1 October 2005. Latvijas Vēstnesis. Available at <https://likumi.lv/ta/id/107820>.

journalist and editor. The state authorities are prohibited from arbitrarily interfering with human rights when conducting criminal proceedings. The right to source protection may be restricted only according to the law.

Domestic courts case law also shows that journalists themselves may directly rely on Article 22 of the Press Law and claim the right to source protection.²⁸ However, Latvian law does not provide the right to source protection to persons who are not considered journalists (i.e., those who do not fall under the scope of the institutional definition (see Section III.ii)).

One of the most prominent European Court of Human Rights (ECHR) cases dealing with journalists' rights to the protection of sources, where the state police had overstepped its borders – the *Nagla* case²⁹ – comes from Latvia. However, this situation should not be seen as a norm, but rather an isolated misunderstanding, as there have been no similar matters in recent years.

In 2017, the head of the Corruption Prevention and Combatting Bureau wanted to access information acquired by a Latvian magazine; however, the Journalists' Association condemned this action.³⁰

v Private action against publication

Latvian law provides civil remedies against the publishers of unlawful content. While protection against defamation and privacy breaches is provided in the Civil Law (1992),³¹ the protection of trade secrets is regulated according to the Law On Trade Secret Protection (2019).³²

The protection against defamation is enjoyed not only by natural persons but also by legal entities.³³ The circumstance that information is false itself is not sufficient for commencing defamation proceedings³⁴ and the attitude and actions taken since the first appearance of the information in question is also taken into account.³⁵ The remedies offered by the Civil Law are withdrawal of information and payment of non-pecuniary damages. If the content is disseminated by mass media, actions for withdrawal of information must be brought against the disseminator of the information, not the source providing it.³⁶

Defamation is also punishable as a crime under Article 157 of the Criminal Law. Usually, the author him or herself can be held liable for the defamatory content. The only exception is when there is adequate proof of a publisher's intent to harm reputation.³⁷

28 European Court of Human Rights decision. Application No. 8283/07. *Uldis Dreiblats v. Latvia*, available at www.at.gov.lv/downloadclawfile/858.

29 European Court of Human Rights: *Nagla v. Latvia*, available at <http://hudoc.echr.coe.int/eng?i=001-122374>.

30 'LŽA: Izmeklēšanas iestādēm pilnā mērā jārespektē žurnālistu avotu aizsardzība', *Diena*, 05 July 2017, available at www.diena.lv/raksts/latvija/zinas/lza-izmeklesanas-iestadem-pilna-mera-jarespekte-zurnalistu-avotu-aizsardziba-14175711.

31 1 September 1992. Valdis Vēstnesis. Available at <https://likumi.lv/doc.php?id=225418>.

32 1 April 2019, available at <https://likumi.lv/ta/id/305532-komercnoslepuma-aizsardzibas-likums>.

33 Supreme Court of Latvia, Case No. SKC-40/2019, available at www.at.gov.lv/downloadlawfile/5945.

34 Supreme Court of Latvia, Case No. SKC-61/2018, available at www.at.gov.lv/downloadlawfile/5471.

35 Supreme Court of Latvia, Case No. SKC-233/2017, available at www.at.gov.lv/downloadlawfile/5381.

36 Supreme Court of Latvia, Case No. SKC-86/2018, available at www.at.gov.lv/downloadlawfile/5405.

37 Supreme Court of Latvia, Case No. SKK-270/2007, available at www.at.gov.lv/downloadlawfile/4151.

Regarding trade secrets, the court emphasises the responsibilities of the operators themselves to take reasonable steps for protecting secrets and preventing their disclosure.³⁸ Although detailed argumentation is required, the court holds the right to decide whether the information should not be considered and protected as a trade secret.³⁹

vi Government action against publication

In recent years, there have not been any publicly discussed cases regarding governmental attempts to suppress publications or retaliate against journalists. Article 4 of the Press Law prohibits any interference in the operations of the mass media.

Yet, the concerns of the public arose in May 2019, when the media supervisor, the NEMMC, initiated an administrative case against private channel TV3, arguing that it had breached the duty to distribute only true facts.⁴⁰ As this case was initiated as a response to a news broadcast that repeated the criticism expressed by the State Audit Office on the work of the NEMMC itself, it seemed that the NEMMC used the norms of the Law on Electronic Media to revenge the criticism expressed against it. After this decision and the motivation underlying it was criticised by several ministers,⁴¹ the NEMMC terminated the proceedings. This situation has led to debates regarding the actions of the NEMMC having a censoring nature and the Council itself being politically influenced.⁴²

Nevertheless, not all NEMMC decisions towards the media can be seen as arbitrary.

Some Russian-connected media have expressed an opinion that the prohibition to retransmit the channel Rossiya RTR has been censorship;⁴³ however, this NEMMC decision was taken because of repeated expressions of hate speech.

From another point of view, the government can influence the media without any specific attacks, but rather by inaction (i.e., non-allocation of funds). In 2019, public media, particularly Latvian Radio, announced a financial crisis.⁴⁴ Without sufficient budget, investigative work and the creation of new content cannot continue, and there is a risk that the Latvian media sector will start to collapse.⁴⁵ Many participants believe this issue must be resolved at the highest political levels.

38 Supreme Court of Latvia, Case No. SKA-168/2010, available at www.at.gov.lv/downloadlawfile/4729.

39 Supreme Court of Latvia, Case No. SKA-29/2017, available at www.at.gov.lv/downloadlawfile/5224.

40 'NEPLP sākusī administratīvo lietu pret "TV3"', *LA.lv*, 3 May 2019, available at www.la.lv/neplp-sakusi-administrativo-lietu-pret-tv3.

41 For example, 'Rinkēvičs: Pēc NEPLP vērsšanās pret TV3 jāizvērtē izmaiņas mediju uzrauga darbā', *Apollo*, 4 May 2019, available at www.apollo.lv/6675496/rinkevics-pec-neplp-versanas-pret-tv3-jaizverte-izmainas-mediju-uzrauga-darba.

42 Kupčs, E, 'Žurnālistu asociācija par NEPLP un kritisko situāciju mediju vidē sūdzēsies EBU', Latvian Public Media, 16 May 2019, available at www.lsm.lv/raksts/zinas/latvija/zurnalistu-asociacija-par-neplp-un-kritisko-situaciju-mediju-vide-sudzesies-ebu.a319236/.

43 'VGTRK: Latvija no mums pieprasa iepriekšēju tiešā ētera cenzūru', *Sputnik News*, 1 February 2019, available at <https://sputniknews.lv/Latvia/20190201/10810370/Neplp-aizliedz-rossija-rtr-ep-velesanu-prieksvakara.html>.

44 Letter of the board of Latvian Radio on 15 July 2019, available at <https://static.lsm.lv/documents/p1.pdf>.

45 'Žurnālistu asociācijas vadītāja ceļ trauksmi – mediju ekonomiskie modeļi grūst', Latvian Public Media, 11 April 2019, available at www.lsm.lv/raksts/zinas/latvija/zurnalistu-asociacijas-vaditaja-cel-trauksmi-mediju-ekonomiskie-modeli-grust.a325278/.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The Latvian copyright regime generally corresponds to the regime provided under the Berne Convention. In Latvia, copyright does not need to be registered, nor does it depend on the fulfilment of any other formality to be effective. Copyright arises automatically upon creation of work once it is fixed in a material form, regardless of whether it has been completed. Neighbouring rights also do not require any formalities to be valid. The rights protected under the Latvian copyright regime can be divided into economic and moral rights.

The most notable divergence between Latvian legislation and the Berne Convention is with regard to the term of copyright. As a general rule, copyright is valid until the death of the author and 70 years after his or her death. However, for authors whose works were prohibited in Latvia or the use of which was restricted from June 1940 to May 1990, the years of prohibition or restriction are excluded from the term of the copyright.

Recent changes to Latvia's regulation were made to comply with EU Directive 2017/1564;⁴⁶ specifically, amendments to the Copyright Law in 2013 and 2018 include permission to make and distribute copies in a customised format without the permission of, or payment to, an author in the interests of persons who are blind, visually impaired or otherwise print-disabled.

ii Personality rights

Article 96 of the Constitution states that everyone has the right to respect for their private life. In accordance with ECHR case law, this right also includes the right of an individual to determine whether or how he or she would like his or her identity to be commercialised.⁴⁷ However, Latvian law does not explicitly provide the rights of a person to object to commercialisation of his or her image.

The grounds for opposing such activities arise from the Personal Data Processing Law. Publishing a photo is data processing that must be done in accordance with this Law (i.e., with a legitimate reason for the processing). If such does not exist (e.g., the data subject has not given consent or the processing is not based on a contract between both sides), the person whose image has been commercialised has the rights to turn, at first, to the infringer and then to the Data State Inspectorate. In any case, the right to privacy and the right to freedom of expression will be balanced, inter alia, on the basis of ECHR case law.

In 2017, a second-hand clothing store network carried out an advertising campaign in women's magazines in Latvia featuring photos of several famous persons without their consent. As a result, the individuals, without their knowledge, became the faces of second-hand clothing advertising.⁴⁸ Not only does such an act infringe upon the right to use one's own

⁴⁶ Directive (EU) 2017/1564 of the European Parliament and of the Council, of 13 September 2017, on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L1564&from=LV>.

⁴⁷ ECHR, *Reklos and Davourlis v. Greece*, available at <http://at.gov.lv/files/files/reklos-un-davourlispret-griekiju-15042009.docx>.

⁴⁸ 'Sabiedribas dāmas, pašām to nezīnot, reklamē uzņēmuma "Humana" drēbes', *Delfi*, 26 May 2013, available at www.delfi.lv/bizness/biznesa_vidē/sabiedribas-damas-pasam-to-nezinot-reklame-uznemuma-humana-drebes.d?id=43347103.

image, but it can damage a person's reputation by causing moral harm. In this situation, the individuals had both the right to stop the use of their image and to claim compensation for the non-material damage suffered.

In 2019, the name of a popular theatre director was used in advertisements for cryptocurrency trading programs.⁴⁹ The advertisements contained the confusing statement, 'It is all over for Mr X'. Although the director expressed his outrage in social media, it is not known whether he used any legal remedy against the advertiser.

iii Unfair business practices

Most cases involving unfair business practice in Latvia have been infringements of personality rights or clickbait articles, the content of which, in most cases, is fake news. In light of this, the Centre of Investigative Journalism, Re:Baltica, created a blacklist of fake news generators with three categories of false information found in Latvia:⁵⁰

- a* fake news and disinformation;
- b* clickbait news with intriguing 'You will never believe what happened afterwards . . . ' headlines; and
- c* news with a political orientation.

Under all categories, Re:Baltica provides examples and explanations regarding the well-known Latvian internet sites. This list should help internet users to understand whether or not they can trust the published information.

It is a tough challenge to fight against these websites because there is not always a legal ground to do so. To date, there has only been one case of the police stopping the publication of fake news: in 2018, criminal proceedings were initiated against the owner of several websites who intentionally published fake news about subjects who are important to the citizens of Latvia. Where fake news is seen as infringing the personal rights of an individual, it should be possible to initiate a private action against the infringing publication.

An interesting case concerned the false attribution of fake news. The news broadcaster TV3 had created a news story in which it explained to viewers the necessity of re-checking the news because stories can be false and defamatory. In addition to the use of images from multiple Facebook sites, which should have been recognised as fake news distribution channels, TV3 inserted a screenshot of the Rīta Kafija Facebook page, which had not posted any falsifications. However, by connecting this news broadcast with other fake news sites, the channel made viewers think that Rīta Kafija is a source of fake news.

The defendant did not provide any evidence that the news site ritakafija.lv had ever circulated any false information, fiction, rumours or defamation. Therefore, the Court ordered TV3 to retract this news without delay.⁵¹

49 "Alvim viss ir beidzies" režisora Alvja Hermaņa vārdu nelietīgi izmanto melīgās kriptovalūtas reklāmās', *Jauns*, 11 May 2019, available at <https://jauns.lv/raksts/zinas/330763-alvim-viss-ir-beidzies-rezisora-alvja-hermana-vardu-nelietigi-izmanto-meligas-kriptovalutas-reklamas>.

50 Žilde-Krēvica, K, Vīlčāns, R M, 'Viltus ziņas. Tu nekad neticēsi, kas notika pēc tam . . .', Re:Baltica, 20 August 2018, available at <https://rebaltica.lv/2018/08/tu-nekad-neticesi-kas-notika-pec-tam/>; black list: https://docs.google.com/document/d/1HMTYCxlqFtaAW3v_QfDWvjbdKOsl-8sz3eQ2xiVhWM/edit.

51 Judgment of City of Riga Vidzeme District Court, Case Archive No. C-1849-18/5, available at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355193.pdf>.

Outside the digital world, there has been a recent controversy that could also be considered as unfair practice. In 2018, J K Rowling's agent pointed out that there should be no Latvian-translated *Harry Potter* books in Latvian bookstores because the licence term of the Latvian publisher, Jumava, had ended. However, the bookstores were full of the books, which were still being bought by fans. The competing publishing house was economically hindered in publishing these translations, despite being offered this by the agent.⁵²

While debating how to solve this situation, it was concluded that the Copyright and Communications Consulting Agency/Authors' Union of Latvia (AKKA/LAA)⁵³ deals with the reuse of works and, therefore, did not have the right to intervene in this situation. Publishing houses organise translation and book publishing rights themselves; this was, therefore, a matter between the two sides. Whether there will be legal proceedings depends on the activity of J K Rowling's agent, but there has been no news regarding any legal dispute as yet.⁵⁴

In light of these events, the Association of Latvian Book Publishers had to analyse whether Jumava should be allowed to participate in national stands at big industry events focused on the foreign market. It came to the conclusion that there is no legal basis for rejecting Jumava's participation in the London Book Fair, but rather, that the objection was of an ethical nature.⁵⁵ On 26 November 2019, new publications of *Harry Potter* books started being sold by the approached publishing house, Zvaigzne ABC.⁵⁶

V COMPETITION AND CONSUMER RIGHTS

i Competition

The general Latvian merger control framework applies to the technology, media and telecommunications sector. The Competition Council must be notified about every merger, and provisions on market participant mergers can be found in the Competition Law; mergers are considered to be transactions that result in the acquisition of influence in another undertaking, or even only of the assets of a company or the right to use them. Specific rules apply to electronic mass media, which state that they may not abuse their dominant position. Within the meaning of the LEMM, a dominant position is created when the market share of an electronic mass medium in a particular Latvian market exceeds 35 per cent.

One of the leading cases of 2019 was the cooperation between two telecommunications providers, Bite and Tele2, which established a common company for the development of 5G networks. This cooperation is being scrutinised by the competition authorities.

52 'Zvaigzne ABC: Harija Potera grāmatu tirgošana Latvijā ir nelicencēta', *Diena*, 2 February 2018, available at www.diena.lv/raksts/latvija/zinas/_zvaigzne-abc_-harija-potera-gramatu-tirgosana-latvija-irnelicenceta-14190267.

53 www.akka-laa.lv/en/about-akka-laa/about-us/who-are-we/.

54 'Zvaigzne ABC: Harija Potera grāmatu tirgošana Latvijā ir nelicencēta', *Diena*, 2 February 2018, available at www.diena.lv/raksts/latvija/zinas/_zvaigzne-abc_-harija-potera-gramatu-tirgosana-latvija-irnelicenceta-14190267.

55 'Potera skandāla dēļ apdraudēta "Jumavas" dalība Londonas grāmatu izstādē', *Jauns*, 13 February 2018, available at <https://jauns.lv/raksts/zinas/269795-potera-skandala-del-apdraudeta-jumavas-daliba-londonas-gramatu-izstade>.

56 'Latvijā klajā nāk jauns Harija Potera grāmatu sēriju izdevums', LSM.lv, 3 October 2019, available at www.lsm.lv/raksts/dzive--stils/vecaki-un-berni/latvija-klaja-nak-jauns-harija-potera-gramatu-seriju-izdevums.a333957/.

In September 2019, telecommunications company Bite announced that it had signed a purchase contract to acquire cable TV company Baltcom.⁵⁷ As a result of this, the company would be able to provide not only mobile communication services and information and communications technology solutions, but also home internet and a variety of TV channels. However, the company still needs to receive permission for the purchase from the Competition Council.

Therefore, a tendency towards concentration of service provision can be observed.

ii Consumer protection

The Consumer Rights Protection Centre (CRPC) is active in protecting the rights of consumers in all digital media. Retail websites are under particular scrutiny. Most concerns relate to the lack of information or problems with information being understandable (i.e., in the national language).

In the field of entertainment, in 2019, the CRPC signed a memorandum with the Ministry of Economy, the Latvian Event Producers' Association and industry merchants with the goal of eradicating unfair commercial practices within the organisation of events and ticket purchasing. The CRPC provides information to the industry regarding cases of unfair commercial practice and industry members are then able to stop any cooperation with the offending merchant. This can be seen as a good example of a state institution that chooses cooperation rather than penalties only.

An interesting decision with long-reaching consequences relates to the amendments to the Consumer Protection Law, which prohibit public broadcasting institutions from gaining any income from advertising connected to consumer loans. The amendments were intended to protect consumers from hot-headed borrowing that might put them in financial difficulty. However, in addition to other factors, these amendments have contributed to the very poor financial situation of the public media.⁵⁸

iii Net neutrality

To meet the requirements of the Regulation on Open Internet Access,⁵⁹ the General Authorisation Regulations in the Electronic Communications Sector entered into force on 1 January 2019. The Regulations control:

- a* sending of registration or termination notifications regarding activities of electronic communications merchants;
- b* prevention of violations of the General Authorisation Regulations; and
- c* discontinuation of the provision of electronic communications networks or the provision of electronic communications services in case of violations.

The rules regulate connection speeds in more detail than in the Regulation on Open Internet Access.

57 www.bite.lv/lv/bite-latvija-nosledz-ligumu-par-uznemuma-sia-baltcom-kapitaldal-u-iegadi.

58 'Aicina atbalstīt priekšlikumus LR un sabiedrisko mediju situācijas stabilizēšanai', NEMMC, 14 August 2019, available at <https://lvportals.lv/dienaskartiba/307044-aicina-atbalst-it-priekšlikumus-lr-un-sabiedrisko-mediju-situācijas-stabilizēšanai-2019>.

59 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015.

The Regulator ensures compliance with the principles of the open internet and, therefore, monitors the compliance of the internet service provided by merchants with the requirements of the Regulation. The Regulator's quality report for electronic communications services for 2018 concludes that to ensure open internet requirements monitoring, the Regulator:

- a* sets minimum quality requirements for internet service;
- b* provides technical supervision of quality of services;
- c* analyses user complaints; and
- d* conducts merchant surveys on the compliance of operations with the requirements of the Regulation on Open Internet Access.

VI DIGITAL CONTENT

According to the Law on Information Society Services,⁶⁰ intermediary service providers do not have a duty to supervise the information that the provider transmits or stores, or to actively search for the facts and conditions that indicate possible violations of the law. Legal liability for digital content rests with the author or the person who posts the content.⁶¹ All major news portals in their terms of use put the liability for created content on the user. However, if news portals show gross negligence and do not take down offending commentary even after they have been informed of its illegal content, the conclusions established by the ECHR in the *Delfi* case would apply.

Additionally, internet websites may be registered as mass media to acquire the journalistic privileges provided in the Press Law. However, even if a website is not registered as mass media, the restrictions provided in the Press Law might still apply if, in its activities, the website is identical to a mass media provider, as established by the Supreme Court in 2012.⁶² Therefore, websites could theoretically be prosecuted for the distribution of fake news. In practice, this judge-made-law has only been applied regarding defamation.

Deliberate publishing of disinformation is recognised as hooliganism under the Criminal Law. One of most recent cases still pending relates to criminal proceedings against the owner of a website who knowingly published disinformation and disseminated it on social media.⁶³ No proceedings were initiated against any of the social media platforms that were used for spreading the information, as there were no grounds for actions; however, the question regarding the fight against fake news websites is brought to light every couple of months.

Since 2018, the owners of electronic media have a new obligation to disclose the ultimate beneficial owners of legal persons. This obligation is carried out within the process of obtaining a broadcasting and retransmission authorisation. In this way, the state tries to control the Latvian information space and to protect it from propaganda.

60 1 December 2004, Latvijas Vēstnesis. Available at www.likumi.lv/doc.php?id=96619.

61 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, available at <https://eur-lex.europa.eu/legal-content/LV/TXT/PDF/?uri=CELEX:32019L0770&from=EN>.

62 Supreme Court of Latvia, Case No. SKC-637/2012, available at www.at.gov.lv/downloadlawfile/3096.

63 'Lietu par viltus ziņu portālu uzturēšanu nodod tiesai', *Delfi*, 18 July 2019, available at www.delfi.lv/news/national/criminal/lietu-par-viltus-zinu-portalu-uzturesanu-nodod-tiesai.d?id=51289067.

VII CONTRACTUAL DISPUTES

Many contractual disputes are solved between the parties themselves. If the issue cannot be solved in such a way, it gets brought before the court. The procedure for adjudication of civil cases, including licensing disputes, royalty disputes, supplier–distributor disputes, contractual disputes with artists and performers and other disputes, is specified in the Civil Procedure Law (1998) and the Law On Judicial Power (1992). Chapter 3 of the Civil Procedure Law determines which court is to be served with the documents for the settlement of a civil dispute, while Chapter 4 sets out the exact amount of expenses, the principles for determining expenses, the reimbursement of legal costs and the exemptions from payment.

Most of the publicly debated contractual disputes in Latvia so far have been connected to intellectual property rights.

An interesting decision was taken in 2017 by the Supreme Court. The Court stated that the copyright of films produced by Riga Film Studio during the Soviet era is owned neither by the state nor the film studio. Copyright belonging to legal persons had ceased to exist in 1993 with the Latvian legislator's failure to adopt a law that would ensure the continued existence of these rights. The rights of authors – individual persons whose creative work resulted in the production of films mentioned above – continue to exist, and protection of these rights can be implemented according to general procedures.⁶⁴ This decision solved decades-long debates on these rights.

The activities of the AKKA/LAA, which has filed several complaints against the media regarding unauthorised use of copyrighted music and other materials, are also noteworthy. In 2015, the AKKA/LAA won a case against Latvian Television, recovering €644,732 for copyright infringement and damages.⁶⁵ In 2019, however, the Supreme Court annulled the judgment of the Riga Regional Court, which upheld the claim of the AKKA/LAA against the foreign merchant Viasat AS for copyright damages, copyright infringement and a ban on the use of copyright works.⁶⁶ This case will be reviewed again in the court of appeals.

VIII YEAR IN REVIEW

The developments in the fields of media and entertainment in 2018 and 2019 emphasise the connection between both sectors and digitalisation, as the following examples show.

The NEMMC has started a major screening of internet sites to reveal illegal channels that disseminate illegal content in Latvia. On the basis of the newly amended LEMM, the NEMMC has the right to limit access to websites that retransmit audiovisual programmes without receiving a retransmission permit. First administrative procedures on the basis of these norms were initiated in August 2019.

⁶⁴ Supreme Court of Latvia, Case No. SKC-69/17.

⁶⁵ Žukova, K, 'LTV saņems pusmiljonu eiro, lai segtu zaudējumus strīdā par autortiesību pārkāpumu', *Delfi*, 21 March 2017, available at www.delfi.lv/news/national/politics/ltv-sanems-pusmiljonu-eiro-lai-segtu-zaudejumus-strida-par-autortiesibu-parkapumu.d?id=48647927.

⁶⁶ Tomšone, D, 'AKKA/LAA ar "TV Play Baltics" tiesājas par autoru darbu satelīta apraidi', *Delfi*, 19 August 2019, available at www.delfi.lv/news/national/politics/akkalaa-ar-tv-play-baltics-tiesajas-par-autoru-darbu-satelita-apraidi.d?id=51380969&fbclid=IwAR3vgo5-RYIPGS6tHnS4Mxw3_1OMwWZRu76XgtZaKOPDjIAffBUi5nHqJ5k.

On 12 April 2018, the NEMMC unanimously adopted the National Media Strategy for the Electronic Media Sector for 2018 to 2022.⁶⁷ The new strategy foresees the creation of a single public media platform (uniting Latvian Radio, Latvian Television and internet webpage lsm.lv, with all three companies creating their content in cooperation), which will include a strong digital presence.

In July 2019, All Media Baltics, the largest media group in the Baltic countries, and Atende Software entered into a multi-jurisdictional cooperation agreement for the launch of the next-generation of over-the-top platform services across Lithuania, Latvia and Estonia. The new service will feature the widest range of local and international sports and entertainment content in the Baltics, including live TV channels, news, premium sports, original films and series and exclusive access to All Media Baltics' flagship TV shows for subscribers to view on smartphones, tablets, Android set-top boxes and smart TVs.⁶⁸

However, this is only one side of the coin. In 2019, the Latvian public media announced a crisis, and if there is no action regarding sufficient financing, the situation in the field of media will deteriorate. Disagreements between Latvian Radio's employees and its board are an example of the problematic situation within the media.⁶⁹ This proves that attention must be paid towards financial and organisational issues.

IX OUTLOOK

As 2019 has been the year of crisis in public media, in terms of finance, cooperation with the NEMMC and inner conflicts, it is clear that the policymakers need to actively work on this issue. Without strong public media and with the fabrications distributed both by fake news websites and propaganda channels, the independence and integrity of the state may also be endangered. Therefore, there is a need to establish the public media's financial independence, especially after it has left the advertising market. The public media budget must not be connected to the political party in power. The competencies of the NEMMC and other institutions must be better divided. Some of these ideas are already included in draft laws and it is hoped that the situation will improve. However, only the coming year will show how the plans will look in practice.

From another perspective, even more developments in 5G technologies are expected in coming years. It is presumed that the first devices to use this technology will be sold in 2020.

Additionally, the field of entertainment will become even more diverse. Currently, Latvia can be proud of a variety of theatres, concert venues and other entertainment facilities, which are affordable to citizens. This diversity has explicitly grown within recent years. However, the challenge is to ensure the balance of development and opportunity throughout Latvia, not only in the capital city of Riga.

67 The National Media Strategy for the Electronic Media Sector for 2018 to 2022, available at https://neplpadome.lv/lv/assets/documents/Normativie%20Akti/Strategija/EPL%20strate%CC%84g%CC%A7ija_120418.pdf.

68 'All Media Baltics chooses red Galaxy for their next generation OTT platform', available at <https://allmediabaltics.eu/newsstream/all-media-baltics-chooses-redgalaxy-for-their-next-generation-ott-platform/>.

69 'Latvijas Radio Ziņu dienests izsaka neuzticību radio valdei', Latvian Public Media, 10 July 2019, available at www.lsm.lv/raksts/zinas/latvija/latvijas-radio-zinu-dienests-izsaka-neuzticibu-radio-valdei.a325190/#3.

LITHUANIA

Stasys Drazdauskas and Paulius Mockevičius¹

I OVERVIEW

In Lithuania, the media and entertainment industry enjoys an adequate level of freedom, a well-balanced legal regulation and an overall environment conducive to innovation and development.

Television, radio and news websites are the most popular forms of media, whereas the consumption of print media is undergoing the global downward trend. In June 2019, there were 2.6 million internet users – almost 91 per cent of the population.² The large number of internet users has led to a rapid growth of alternative forms of media, such as social networks, streaming portals and crowdfunded projects.

Media companies operate under market economy conditions. The ownership of national and regional media is concentrated among a small number of domestic and foreign companies. Private broadcasters compete with the public networks run by Lithuanian National Radio and Television. The state supports media by providing partial financing for cultural, media security, media literacy and educational projects.

In 2019, Lithuania ranked 30th out of 180 countries in the Press Freedom Index,³ outranking such states as France, the United Kingdom and the United States. Although the media are free and operate independently of the state, anti-Western rhetoric from Russian media targeting the Baltic states has prompted tighter controls.⁴

II LEGAL AND REGULATORY FRAMEWORK

In Lithuania, legislation concerning the media is primarily represented by the Law on the Provision of Information to the Public (LPIP)⁵ and the Law on Electronic Communications.⁶

The LPIP establishes the procedure for collecting, producing, publishing and disseminating public information and the rights, duties and liability of producers and

1 Stasys Drazdauskas is a counsel and Paulius Mockevičius is a legal assistant at Sorainen.

2 <https://internetworldstats.com/stats4.htm>.

3 https://rsf.org/en/ranking_table.

4 www.bbc.com/news/world-europe-17536870.

5 Lithuanian version, as amended, available at www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E/UJIFyNIPJ. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/2865241206f511e687e0fbad81d55a7c?jfwid=1clcwosx33>.

6 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232036/fcaHrjiztL>. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7092f502c43811e5a141fec4d4d3d786?jfwid=-fxdp786k>.

disseminators of public information, their participants, journalists and institutions regulating their activities. The law establishes licensing and notification requirements for broadcasting (TV, radio) organisations, limitations on ownership, requirements for media content, programme composition, language, advertising restrictions, ethics, etc.

Other relevant provisions reside in:

- a* the Constitution;⁷
- b* the Civil Code;⁸
- c* the Law on Copyright and Related Rights;⁹
- d* the Law on Information Society Services;¹⁰
- e* the Law on the Right to Obtain Information From State and Municipal Institutions and Agencies;¹¹
- f* the Law on Legal Protection of Personal Data¹² (in conjunction with the General Data Protection Regulation (GDPR));¹³
- g* the Law on the Protection of Minors Against the Detrimental Effect of Public Information;¹⁴ and
- h* the Code of Ethics of Lithuanian Journalists and Publishers.¹⁵

The Law on the Protection of Minors against the Detrimental Effect of Public Information is sometimes seen as a tool for censorship, and the amendment to the LPIP introducing penalties for spreading information that is considered war propaganda, encouragement to change the country's constitutional order, or an encroachment on the country's sovereignty, may also be considered as non-typical regulation.

To ensure the freedom of information, the LPIP prohibits exerting pressure on the producer or disseminator of public information, their participant or a journalist, to present

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- 7 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.1890/asr>. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.275302?jfwid=-wd7z8ivg5>.
 - 8 Lithuanian version, as amended, available at www.e-tar.lt/portal/lt/legalAct/TAR.8A39C83848CB/htnZUIRbvd. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.404614?jfwid=pffih3t2r>.
 - 9 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.81676/GJrgHCUrve>. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5a34cbb04fe611e5a4ad9dd3e7d17706?jfwid=9tq147ogj>.
 - 10 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.277491/FGVmSopPwK>.
 - 11 Lithuanian version, as amended, available at www.e-tar.lt/portal/lt/legalAct/TAR.FA13E28615F6/QwCYWKrpeY. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.440732?jfwid=rivwzvpvg>.
 - 12 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/bc0837f27f9511e89188e16a6495e98c>. English version, as amended (substantially different from the latest version), available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.435305?jfwid=nz8qn7vvf>.
 - 13 <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.
 - 14 Lithuanian version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.183129/asr>. English version, as amended, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.410974?jfwid=pffih3unx>.
 - 15 Lithuanian version, as adopted on 29 February 2016, available at <http://www.zeit.lt/lt/teisine-informacija/visuomenes-informavimo-etikos-kodeksas/41>.

information in the media in an incorrect and biased manner. The producer, disseminator of public information, their participants and journalists have the right to keep the confidentiality of the source of information and not to disclose it, except where a court orders disclosure.

In terms of intellectual property, journalists enjoy both economic and moral rights regarding their articles, publications, audiovisual works, and radio and television broadcasts as provided in the Law on Copyright and Related Rights. Pursuant to Article 9 of the Law, an author's economic rights in a work created by him or her as an employee in the execution of his or her duties or fulfilment of work functions is transferred to the employer for a period of five years, unless otherwise provided for by an agreement.

The media is supervised by an independent regulatory authority – the Radio and Television Commission (RTC). The RTC is responsible for the licensing of radio and television broadcasting and rebroadcasting activities, notification procedures, approval of ownership transfers, monitoring and supervision of content control, and advertising requirements.

Other regulatory bodies that may exercise supervision over electronic communication service providers pursuant to their competence include (not exhaustively) the State Consumer Rights Protection Authority, the State Data Protection Inspectorate, the Competition Council and the Inspector of Journalist Ethics.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Article 25 of the Constitution of the Republic of Lithuania provides that everyone shall have the right to have his or her own convictions and freely express them; no one must be hindered from seeking, receiving or imparting information and ideas.

To ensure the freedom of the media, Article 44 of the Constitution adds that the censorship of mass information is prohibited. The state, political parties, political and public organisations, and other institutions or persons are not allowed to monopolise the mass media.

The freedom to express beliefs, as well as to receive and spread information, may be limited only by law when:

- a* this is necessary to protect human health, honour or dignity, private life or morals;
- b* this is necessary to defend the constitutional order; and
- c* it concerns incitement to national, racial, religious or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation.

The LPIP specifies that publication in the media of information is prohibited when it:

- a* incites change to the constitutional order of the Republic of Lithuania through the use of force;
- b* instigates attempts against the sovereignty of the Republic of Lithuania, its territorial integrity and political independence;
- c* spreads war propaganda, instigates war or hatred, ridicule, humiliation, discrimination, violence or physical violent treatment of a group of people or a person belonging thereto on grounds of age, sex, sexual orientation, ethnic origin, race, nationality, citizenship, language, origin, social status, belief, convictions, views or religion;
- d* disseminates, promotes or advertises pornography or propagates or advertises sexual services and paraphilias;
- e* promotes or advertises addictions and narcotic or psychotropic substances;

- f* is slanderous and offensive to a person or degrades his or her honour and dignity; or
- g* violates the presumption of innocence and impedes the impartiality of judicial authorities.

The Law on the Protection of Minors against the Detrimental Effect of Public Information imposes additional restrictions on the dissemination of information that has a 'detrimental effect on minors'. Such information includes, for instance, information that:

- a* encourages 'aggressiveness and disrespect for life' or 'destruction or damage of property';
- b* 'shows close-ups of the body of a deceased, dying or cruelly mutilated person';
- c* 'promotes gambling, encourages or offers participation in gambling and other games that create an impression of an easy gain';
- d* 'demonstrates staged paranormal phenomena creating an impression that these phenomena are real';
- e* 'promotes bad eating and hygiene habits and lack of physical exercise';
- f* 'shows mass hypnosis sessions in which the influenced object is the audience of a mass medium'; or
- g* 'expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania'.

The latter provisions serve as the main tool to prohibit positive information relating to LGBT+ people from being displayed in places accessible to minors.

Advertising and commercial communications are also subject to certain restrictions imposed by special laws (mainly in the field of customer protection).

In practice, the most common problems involve the questionable balance between the freedom of expression and the individual's right to dignity and privacy. The case law regarding these matters is exceptionally broad, though not heterogeneous enough.

ii Newsgathering

As the LPIP reads, every person has the right to collect information and publish it in the media. However, to avoid violation of a person's rights and to protect his or her honour and dignity, in collecting and publishing information, it is prohibited to:

- a* film, photograph or make audio or video recordings without a person's consent within the residential premises of the natural person, the private domain of the natural person and a fenced or otherwise clearly marked territory belonging thereto, regardless of whether that person is present in the aforementioned places;
- b* film, photograph or make audio or video recordings during non-public events without the consent of organisers who have the right to hold the events;
- c* film or photograph a person and use his or her images for advertising purposes in the media without the consent of that person;
- d* film or photograph a person with evident physical disabilities without that person's consent or to film or photograph a person in a helpless state due to a health impairment;
- e* film or photograph a child or to make audio or video recordings of him or her without the consent of at least one of the parents, guardians or custodians and the child himself or herself. It shall be prohibited to use photographs, audio or video recordings of children in the information of an erotic, pornographic or violent nature; and

- f* film or photograph close-ups of a deceased or fatal casualty without the consent of the family members of the deceased or the fatal casualty or to make video recordings of him or her.

In producing and disseminating public information, a person's right to protection of information of a private nature must be ensured. Information about a person's private life may be published only with the consent of that person, except for the following cases, where:

- a* the publication of such information contributes to revealing violations of law or criminal acts;
- b* the information is presented in open court proceedings; or
- c* the information discloses the circumstances of the aforementioned person's private life or his or her personal characteristics, which are of public importance.

In any case, the collecting and processing of personal data must meet the strict requirements of the Law on Legal Protection of Personal Data in conjunction with the GDPR.

The following acts form the basis for bringing an action for repairing the property and non-pecuniary damage incurred by the acts:

- a* making public announcements of facts of private life, however truthful they may be;
- b* making private correspondence public in violation of the procedure prescribed above;
- c* invasion of a person's dwelling without his or her consent;
- d* keeping a person's private life under observation or gathering information about him or her in violation of law; and
- e* other unlawful acts that infringe the right to privacy.

In addition, criminal liability may be imposed in the event of an unlawful violation of a person's private life.

iii Freedom of access to government information

The Law on the Right to Obtain Information From State and Municipal Institutions and Agencies ensures the right of persons to obtain information from state and municipal institutions and agencies, defines the procedure for the implementation of the right and regulates actions of state and municipal institutions and agencies in relation to the provision of information to persons.

Generally, institutions (i.e., representative, executive and judiciary authorities, as well as the institution of the head of state, law enforcement institutions and agencies, institutions and agencies exercising audit and control (supervision), and other state and municipal institutions and agencies financed from the state or municipal budgets and state monetary funds) are obliged to provide applicants with information upon their request. Information is provided free of charge, except for the cases where either a state levy or fee defined by laws is charged for the provision of information. Laws and other legal acts may define distinct conditions of the provision and use of information for commercial or non-commercial purposes; however, they shall not be discriminatory in respect of applicants using information for the same purpose.

The institution may refuse to provide information if:

- a* the request of the applicant would necessitate creating documents or information files, which would entail disproportionately large amounts of work and time;
- b* the content of the request is not specific;

- c* the same information is requested by the same applicant for the second time;
- d* the requested information has already been published; in this case, the institution, within five working days of receipt of the request, shall inform the applicant of the source of publication; or
- e* the institution discontinues the collection and processing of certain information as a result of a change of its functions.

In the event of the refusal of an institution to provide information, the applicant shall be given a notice thereof specifying the reason for the refusal and the procedure for appealing against the decision.

In the most prominent recent case regarding access to government information, the Lithuanian Journalists' Union and journalists from several media outlets sued the government after it refused to release the audio recording of a Cabinet meeting in which ministers discussed legislative amendments to give the media free access to public registry data. The plaintiffs asked the court to rule that the government's refusal to provide the audio recording was unfounded and to order it to recover the deleted recording and release it to journalists. The first instance dismissed the journalists' complaint; however, the plaintiffs have appealed the ruling. Following the row with the media, the government initiated amendments to make all Cabinet meetings public. These amendments came into force in January 2019.

iv Protection of sources

According to the LPIP, the producer, disseminator of public information, their participants and journalists have the right to maintain the confidentiality of the source of information and not to disclose it, unless a court decision orders disclosure of the source of information for vitally important or otherwise significant public reasons, or to ensure that the constitutional rights and freedoms of a person are protected and that justice is served.

The Code of Ethics of Lithuanian Journalists and Publishers adds that protecting the confidentiality of the source shall be considered not only the journalist's right, but rather his or her obligation. If the source of information requests a journalist not to disclose his or her name, the journalist and public information organiser has no right to disclose it. In this case, the journalist and public information organiser assume legal and moral responsibility for the published information.

There is no recent case law regarding this matter.

v Private action against publication

In terms of defamation, a person has the right to demand refutation in judicial proceedings of the publicised data that abased his or her honour and dignity and that are erroneous, as well as redress of the property and non-pecuniary damage incurred by the public announcement of the said data. Case law to date has imposed a very low ceiling on compensation for non-pecuniary damage; the amounts awarded by courts rarely exceed €5,000.

The data that was made public is presumed to be erroneous unless the person who publicised them proves the opposite.

Where erroneous data is publicised by a mass medium (press, television, radio, etc.), the person about whom the data was publicised has the right to file a refutation and demand the given mass medium to publish the said refutation free of charge or make it public in some other way.

Infringing the right to privacy forms the basis for bringing an action for repairing the property and non-pecuniary damage incurred by the unlawful acts. If the breach concerns the violation of the GDPR rules, penalties including administrative fines may be imposed. Criminal liability may also be applied in certain cases.

Breach of confidentiality gives rise to a civil claim. A successful claimant is entitled to either an inquiry into damages and possibly injunctive relief, prohibiting further use or disclosure of the information. It is possible for a trade secret holder to apply to court for an injunction prohibiting the alleged or potential infringer from using or disclosing the trade secret or requiring them to cease any such activities on a provisional basis.

vi Government action against publication

There have been no recent state attempts to suppress publication or retaliate against journalists or publishers.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The protection of copyright and related rights is regulated by the Law of the Republic of Lithuania on Copyright and Related Rights, which is harmonised with international and European Union legal acts. Its last revision came into effect on 1 January 2019. The Law defines the authors' economic and moral rights, establishes the objects and subjects of copyright and related rights, the terms of protection of copyright and related rights and the functions of collective administration association supervision by the Ministry of Culture. The liability for the breach of copyright and related rights is also established by the Criminal Code of the Republic of Lithuania and the Administrative Code of the Republic of Lithuania.

Under Lithuanian legislation, authors' moral rights cannot be waived, transferred to other persons or inherited.

The Law on Copyright and Related Rights provides an exhaustive list of limitations on authors' economic rights. The list includes:

- a* the reproduction of works for personal use;
- b* quotation;
- c* the reproduction of works for teaching or scientific research purposes;
- d* the use of works for information purposes (including the reproduction by the press, communication to the public or making available published articles on current economic, political or religious topics or of broadcast works of the same character, in cases where such use is not expressly reserved by the authors or other owners of copyright in such works, and as long as the source, including the author's name, is indicated); and
- e* the use of works for the purpose of caricature or parody, etc.

As for the duration of copyright, authors' economic rights run for the life of the author and for 70 years after his or her death, irrespective of the date when the work was lawfully made available to the public. The protection of the author's moral rights is of unlimited duration.

During the past year, no significant developments in copyright law have taken place.

ii Personality rights

Lithuanian law provides for protection of personality rights of physical persons; namely, the right to a person's name, the right to image, the right to inviolability and integrity of the body, the right to private life, and the right to protection of honour and dignity. As regards Lithuanian law, personality rights belong in the sphere of civil law; however (in contrast to some other jurisdictions), they are not considered as intellectual property rights.

iii Unfair business practices

There is no recent noteworthy case law regarding this matter. However, these practices usually consist of unlawful reproductions of work and failures to pay authors' remuneration.

V COMPETITION AND CONSUMER RIGHTS

It is assumed that an open internet and net neutrality that guarantee fair competition and stimulate innovation are essential principles. To ensure the end users' right to open internet access services, the Communications Regulatory Authority of the Republic of Lithuania has performed numerous actions during the past year, including an assessment of current practices. The completed assessment indicates no major concerns or restrictions for end users' rights to distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service. Most internet service providers (ISPs) provided the required transparency information in their contracts or informed their customers about the changes to the terms of provision of internet access. Almost all ISPs ensured the end users' right to apply via email, post or directly to the office. ISPs have an obligation established in the Law on Electronic Communications of the Republic of Lithuania to respond to complaints within 14 days of the complaint being received.

In the scope of competition law, controlling the mergers or acquisitions in the media and telecommunications sector is a prerogative of the Competition Council of the Republic of Lithuania.

VI DIGITAL CONTENT

As a general rule, it is prohibited to use any content without the owner's permission. The owner has exclusive rights to authorise or to prohibit any mode of the exploitation of his or her work, including broadcasting and retransmission of a work, as well as communication to the public of a work in any other way, including making a work available (hosting, aggregating, linking, etc.) to the public via computer networks (on the internet).

Owners of copyright, related rights and *sui generis* rights, with the aim of defending their rights, are entitled to apply to court to demand:

- a* recognition of rights;
- b* an injunction with the aim of prohibiting the continuation of unlawful acts;
- c* prevention from carrying out acts due to which rights may be infringed or damage may be caused;
- d* redress of the infringed moral rights (injunction to make appropriate amendments, to announce the infringement in the press, or any other way);

- e* exaction of unpaid remuneration for unlawful use of a work, objects of related rights or *sui generis* rights;
- f* compensation for property damage, including lost income and other expenses, and, in certain cases, non-pecuniary damage;
- g* payment of compensation; and
- h* application of other measures for defence of the rights, provided for by the Law on Copyright and Related Rights and other laws.

There is no law that directly deals with ISPs' or social media platforms' civil liability in Lithuania. Certain aspects of it are regulated by the Law on Electronic Communication; however, this Law relates exclusively to the technological side of the intermediation process and vaguely addresses the relationships between the ISPs and other parties; for instance, the owners of the content transmitted through the networks. Certain exceptions regarding ISPs' liability are set out in the Law on Information Society Services. The case law concerning this matter also lacks clarity; the liability of ISPs is applied based on different criteria, such as activity of an intermediary, the context of content and effectiveness of measures taken.

In terms of linking and aggregating, there has been no case law as yet; therefore, the law of the Court of Justice of the European Union should be applied.

The most prominent case in terms of digital content refers to Linkomanija.net, the most visited torrent (peer-to-peer) site in Lithuania. For more than 10 years, the site has been a major force in the sharing of unlicensed content. The Lithuanian Copyright Protection Association began taking legal measures against Linkomanija in 2016, when it filed a lawsuit at the Regional Court of Vilnius demanding that several local ISPs prevent their subscribers from accessing the site. In 2017, the Court issued an order that required the country's largest internet providers, including Telia, Bitė, LRTC, Cgates, Init and Balticum TV, to start blocking access to the popular torrent tracker. Following an appeal, the Supreme Court took the final decision that ISPs must begin blocking Linkomanija with immediate effect.

VII CONTRACTUAL DISPUTES

Contractual disputes in the media and entertainment sector are infrequent. The disputes typically involve copyright infringements (licensing and royalty disputes) and contractual disputes with artists and performers.

Disputes are usually settled through bilateral negotiation or judicial institutions (the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and district courts are the courts of general jurisdiction dealing with civil and criminal cases). Although alternative dispute resolution methods, such as mediation and arbitration, continue to grow in popularity, they are still relatively rare.

VIII YEAR IN REVIEW

The past year has not been productive in terms of legal regulatory, judicial practice or general developments in the media and entertainment sector in Lithuania. The most important innovation concerns enabling RTC to block sites administratively.

IX OUTLOOK

In the coming year, the main legal issues will regard the implementation of the following European Union directives:

- a* Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC; and
- b* Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

SPAIN

Yago Vázquez Moraga and Jordi López Batet¹

I OVERVIEW

In 2019, the media and entertainment industry in Spain maintained the upward trend of recent years, and is expected to keep growing in the coming years. Matters such as the exploitation of broadcasting rights, the significant evolution and expansion of new technologies (i.e., artificial intelligence and virtual reality) and, in particular, the total connectivity that consumers currently have thanks to the development of mobile broadband have significantly contributed to this.

Together with this expansion, the industry is undergoing a very significant change with the phenomenon of digitalisation, and the prevision is that these winds of change will continue over the next few years. 5G networks have just arrived in Spain and will entail big changes in the media and entertainment sector, including a significant challenge for existing stakeholders whose role in the industry may be threatened by new players if they do not adapt their businesses to the new trends and circumstances of the market.

II LEGAL AND REGULATORY FRAMEWORK

The Spanish legal system does not rule on media and entertainment in a single code, which would probably help in terms of systematisation and efficiency. The industry is regulated by means of several sectoral sets of rules dealing with its different branches and activities. This regulatory framework is made up of a wide range of laws, royal decrees and regulations of lower range, which are generally governed by the Spanish Constitution; in particular, by those provisions that refer to the exercise and guarantee of fundamental rights (information, honour, privacy, etc.) and other liberties (such as the freedom of entrepreneurship, or the facilitation of proper use of leisure time by the administration). This regulatory system is consistent with the international treaties entered into by Spain, as well as with the relevant EU regulations.

In this regard, the Spanish Constitution acknowledges, in Article 20, the fundamental rights of all citizens to the freedom of expression, the freedom of literary, artistic, scientific and technical creation, the right to academic freedom and freedom of the press. The exercise of these rights cannot be restricted by any type of prior censorship and may only be generally limited in very exceptional cases, such as the states of alarm, emergency and siege. In this same sense, Section 5 of Article 20 stipulates that the seizure of publications, recordings and

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other means of information can only be executed by virtue of a judicial decision. However, the exercise of these rights shall be coherent and respectful with other rights, such as the right to honour, privacy and self-image and with the protection of youth and children.

Below the Constitution, several regulations are to be taken into account in the media and entertainment sector; inter alia:

- a* Royal Legislative Decree 1/1996 of 12 April 1996 approving the Intellectual Property Act (the IP Act);
- b* Act No. 34/2002 of 11 July 2002 on services of the information society and electronic commerce, which transposed EU Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000;
- c* Act No. 7/1998 of 13 April 1998 on general contracting conditions;
- d* Act No. 7/2010 of 31 March 2010 on audiovisual communication;
- e* Act No. 9/2014 of 9 May 2014 on telecommunications;
- f* Organic Act No. 3/2018 of 5 December 2018 on the protection of personal data and guarantee of digital rights, which gathers and develops the provisions and principles of the EU General Data Protection Regulation;
- g* Royal Legislative Decree 1/2007 of 16 November 2007 approving the consolidated text of the General Act for the Protection of Consumers and Users;
- h* Act No. 3/1991 of 10 January 1991 on unfair competition;
- i* Act No. 34/1988 of 11 November 1988 on advertising;
- j* Act No. 14/1966 of 18 March 1966 on press and printing;
- k* Organic Act No. 1/1982 of 5 May 1982 on the civil protection of honour, personal and family intimacy and self-image; and
- l* Organic Act No. 2/1984 of 26 March 1984 on the right to rectification.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Article 20 of the Constitution lays down the different rights or forms with regard to freedom of expression, and the general limits for the exercise of this freedom. See Section II.

It has been for the courts to determine the extension of this freedom of expression and to resolve the collision of this fundamental right with other constitutional rights that are also worth protecting. The jurisprudence enacted by the Spanish Constitutional Court has defined a system in which a due balance or weight between the constitutionally recognised freedom of expression and the other conflicted right (normally the right to honour and privacy) shall be performed on a case-by-case basis. As a general rule, the right to free speech and media freedom tend to hold a preferred position with respect to these other constitutional rights, and even more in those cases that involve persons who hold a public position, or who develop a profession of notoriety or are subject to public exposure.

Commercial speech is permitted under Spanish law, provided that other relevant provisions (such as those on consumer protection, advertising or unfair competition) are respected. In any case, misleading commercial speech is prohibited. In line with this, restrictions in the promotion of some products (such as alcohol and tobacco) shall be observed, as well as advertising aimed at minors and other vulnerable groups. Companies are thus entitled to promote their products and services using this kind of commercial language within the aforementioned limits.

Hate speech can be criminally prosecuted in Spain provided that the elements foreseen in Article 510 of the Criminal Code are met. The Spanish public prosecutor's office has a special delegation specialised in the prosecution of hate crimes, including hate speech. According to the last published report (dated 2017)² of the public prosecutor's office, in 2017, crimes related to hate speech increased by 26.8 per cent compared with 2016, with most of these being committed through the internet (36.5 per cent), social media (17.9 per cent) and telephone or telecommunication systems (15.4 per cent). As an example, on 9 February 2018, the Spanish Supreme Court confirmed a judgment rendered by the Spanish National High Court that punished a Twitter user to imprisonment for two years and a half for publishing several hate messages against female victims of gender-based murders. In addition, civil protection against hate speech can also be sought by means of the provisions of Organic Act No. 1/1982 if the circumstances so require and warrant it.

ii Newsgathering

The right to freely communicate and to receive truthful information is recognised in the Constitution (Article 20), and on this basis, media operators in Spain enjoy a fair freedom of action in the development of their information tasks, which is guided by the principles of plurality, transparency, free competition and freedom to provide services. This information shall be of public or general interest, and other structural elements of the state, such as the safeguarding of public order or national defence, must be respected, as well as other rights, such as honour and privacy, to the extent appropriate. In addition, there is a certain duty of diligence on journalists regarding how to obtain information and verify sources.

An interesting case that currently involves the extent and limits of the right to information and that is still pending before the courts relates a conflict held between the Spanish Football League and radio broadcasters. At the beginning of the dispute, the broadcasters claimed that they were entitled to enter into the football stadiums and to broadcast matches using the clubs' facilities for such purpose, on the basis of the right to information, while the League sustained that:

- a* this right cannot overcome the League's right to property and freedom of entrepreneurship (also recognised in the Constitution);
- b* the exercise of the broadcasters rights' shall not be unlimited; and
- c* ultimately, the radio rights of football competitions could be marketed.

To bring this dispute to an end, the government amended Act No. 7/2010 on general audiovisual communication and established that the radio broadcasters were entitled to enter into the stadiums to broadcast sport competitions live, entirely and for free, by paying a small amount of compensation to cover the sport event organisers' direct costs resulting from the exercise of such right. This dispute is being dealt with by the Supreme Court, which admitted a claim from the Spanish Football League to file a request to the Spanish Constitutional Court for a preliminary ruling on the potential unconstitutionality of this Act. On 20 October 2018, the Spanish Constitutional Court admitted the question of unconstitutionality, and is yet to decide whether this legal provision is constitutional or not.

2 www.mitramiss.gob.es/oberaxe/ficheros/documentos/Inf_Evol_Incidentes_DelOdio_2017.pdf (in Spanish).

On the other hand, it shall be taken into consideration that Organic Act No. 1/1982 defines ‘illegitimate intrusions’ in the sphere of privacy (Article 7), which shall be respected in newsgathering and publication, and also includes a list of cases that are generally not considered as such kind of intrusion on a general basis.

Article 18.2 of the Spanish Constitution guarantees the inviolability of the personal domicile and restricts access to it subject to the owner or legitimate tenant’s consent, unless a court orders otherwise. In addition, the Criminal Code punishes the entry into a property without due permission, provided that the prerequisites of Article 202 et seq. of the Code are met.

Secrecy of communications is also constitutionally guaranteed, as stipulated in Article 18.3 of the Constitution, with particular emphasis on post and telephone communications, and subject to court decisions. The disclosure of secrets can also be considered a criminal offence in Spain, in the terms foreseen in Article 197 et seq. of the Criminal Code.

iii Freedom of access to government information

Article 105 of the Spanish Constitution recognises the right of citizens to access and know of administrative files and records as long as this does not violate the defence and security of the state, the privacy of persons and prosecution in criminal investigations. This general right is also extended to media.

Act No. 19/2013 of 9 December 2013 on transparency, access to public information and compliance rules on the right of access to public information, and outlines the limits of such right in Article 14. In particular, the right of access can be limited if damage can be caused to:

- a* national security or defence;
- b* external relationships;
- c* public security;
- d* criminal, administrative or disciplinary prosecution files;
- e* due process;
- f* administrative and inspection control;
- g* economic and commercial interest;
- h* economic and monetary policies;
- i* professional secrecy or intellectual property (IP);
- j* confidentiality or secrecy guarantees in decision-making processes;
- k* the environment; or
- l* data privacy.

The application of these limits must be justified and proportionate and must take into account the circumstances of each case, especially the existence of a public or private interest justifying the access.

The exercise of this right of access and the procedure to be followed is foreseen in Article 17 et seq. of Act No. 19/2013. In accordance with the records that have been published in the press, following the enactment of Act No. 19/2013 up to 120 court proceedings have been opened with regard to the government and administration’s refusal to give access to information. These disputes relate to very different issues, such as the disclosure of costs relating to the national TV channel (managers’ salaries and costs of certain productions or the acquisition of rights, etc.) or the disclosure of the President’s travel expenses.

iv Protection of sources

The protection of sources is to be embodied within the professional secrecy foreseen in Article 20 of the Spanish Constitution. In addition, the journalists' conduct codes also rule on the protection of sources as a duty, which can only be infringed in very limited cases (for instance, when it appears clear that the source has deliberately faked the information or when disclosing the source is the sole way to prevent a serious or imminent harm on persons). The basis for this protection is precisely the general interest and the right to information, as well as the need to preserve the discloser's identity, to avoid that, in the future, further disclosures are not made for fear of its consequences.

In this regard, it is worth mentioning that, in December 2018, the news agency Europa Press and the Spanish newspaper *Diario de Mallorca* filed a criminal complaint against a judge who had ordered the police to enter into their newsroom to seize the mobile phones, computers and some documentation of certain journalists, in order to determine the origin of certain information that they had published. This case has not yet been decided and is still under investigation.

v Private action against publication

The Spanish legal system foresees several ways of acting against undue or illegitimate publications, either of a civil or criminal nature.

In the civil field, persons can exercise the actions arising out of Organic Act No. 1/1982, to protect themselves against illegitimate intrusions in their honour, privacy and self-image arising from a publication. They can use ordinary proceedings before the civil courts, the special procedure referred to in Article 53.2 of the Spanish Constitution or, where necessary, the 'writ of *amparo*' before the Constitutional Court. The relief that may be sought by the claimant comprises any and all measures that are necessary to cease the illegitimate intrusion and to restore the claimants full rights, as well as those measures tending to prevent or impede future intrusions. Damages will be presumed if the illegitimate intrusion is accredited. Precautionary measures (including the provisional seizure of the publication) can also be requested. A recent case involving the famous novel *Fariña* is proof of this. The novel was seized by a court, which granted the provisional measure requested by a town mayor, one of the book's real-life characters, who claimed that the novel infringed his right to honour. However, this court order was later set aside by the High Court.

Also within the civil jurisdiction, it is possible to exercise the right to rectification in accordance with Organic Act No. 2/1984. A person is entitled to receive rectification of information disclosed in media of facts that he or she considers inexact and that may cause him or her damage. This right is to be exercised in writing before the director of the publication within seven days of the date of publication. If the rectification does not take place within three days of receipt of the aforementioned communication, the aggrieved person can start civil proceedings aimed at achieving a judicial decision ordering the publication to rectify.

Concerning criminal law, the Criminal Code penalises some conduct relating to a publication. The offences of insult and defamation are foreseen in the Code and can be exercised by the aggrieved party that considers that all the elements of the offence concur (see Articles 205 to 216 of the Criminal Code). The offence of disclosure of secrets (Article 197 et seq. of the Criminal Code) or domicile violation can also be committed at the newsgathering stage, provided that the relevant prerequisites foreseen in the Criminal Code are met. The hate crime may also arise out of the publication.

Other actions may be exercised on the basis of other legal provisions if a breach of any of these takes place in a publication (data protection, advertising, unfair competition, etc.); however, the aforementioned actions are the most commonly used.

vi Government action against publication

This is feasible in Spain if the relevant circumstances and conditions allow. In fact, Article 20 of the Constitution enables the seizure of publications if a court so declares. However, the seizure shall be exercised with utmost caution and in respect of other rights. There is not a vast number of cases in recent jurisprudence in which a seizure of this kind at the request of the government has been granted. The public prosecutor's office is entitled to request the seizure of a publication to the courts, but it is for the competent judge to decide.

One of the leading cases in actions of this kind in Spain was the publication in the satirical magazine *El Jueves* of a comic strip with images of the current king and queen of Spain, which were held by the public prosecutor's office as defamatory. The publication's seizure was requested and finally agreed by the judge. The decision of the judge and the initiative of the prosecutor were not exempt from criticism and, again, brought an extensive debate on the coexistence of the freedom of expression and the right to honour, and on the limits of satirical jokes and publications.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Royal Legislative Decree 1/1996, which approves the IP Act, is the main tool in the Spanish system concerning the protection of copyright. This Act has been successively modified, with the most recent important modification being that arising out of Act No. 2/2019 of 1 March 2019. With this modification, Directive 2014/26/EU of the European Parliament and Council of 26 February 2014, and Directive (EU) 2017/1564 of the European Parliament and Council of 13 September 2017, are transposed to the Spanish legal system.

These regulations deal with, inter alia:

- a* the nature, content and limits of authors' personal and wealth-related rights;
- b* the kind of works worthy of protection;
- c* the rights of exploitation;
- d* compensation for private copies;
- e* the duration of IP-related rights;
- f* the transfer of rights on an exclusive and non-exclusive basis;
- g* IP-related agreements (management agreement, etc.);
- h* audiovisual works, software and data file protection;
- i* rights of producers and radio broadcasters;
- j* photographic rights;
- k* the collective management of rights;
- l* the IP register; and
- m* actions for protecting IP rights.

Apart from the civil actions specifically foreseen in the IP Act (Article 138 et seq.), in some cases, the infringement of IP rights is considered as a criminal offence under Spanish law (see Article 270 et seq. of the Criminal Code).

ii Personality rights

Act No. 34/1988 on advertising, aims to guide advertising practices in avoiding contravening the dignity of individuals, the values and rights recognised in the Constitution, and protecting certain groups against potential abuses taking advantage of their inexperience or credulity (e.g., minors). Conduct such as subliminal, deceptive, unfair and aggressive advertising are prohibited, and specific actions to seek protection in the case of infringement also exist (by reference to those established by Act No. 3/1991 on unfair competition). Rules on advertising-related agreements are also envisaged in said Act.

The provisions of Act No. 34/1988 are understood without detriment to those of Act No. 3/1991 on unfair competition, which will additionally apply.

Other specific provisions on advertising rule on specific sectors and areas of activity, such as tobacco or alcohol. In addition, the codes of conduct approved by the self-regulation of publicity organisations should also be considered.

The fast-moving technical evolution, owing to digitalisation, is also affecting the advertising sector, with the appearance of new publicity forms, such as overprints, transparencies and virtual advertising. In this respect, a judgment issued by the Spanish Supreme Court on 26 February 2018 annulled the resolution of the Spanish Competition Authority (CNMC) of 1 October 2015, in which a sanction of almost €500,000 was imposed on the broadcaster Mediaset for the use of overprints and advertising transparencies during the broadcast of different television programmes; therefore, allowing these with some conditions. While the CNMC understood that compliance with the principles of identification, separation and transparency foreseen in Act No. 7/2010 on general audiovisual communication require that the broadcast of advertising messages interrupts the TV programme in which it is inserted, the Supreme Court considered that European regulations do not require a temporary separation between the beginning of a programme and the beginning of advertising; rather, that it is sufficient that such difference is made on a merely spatial, acoustic or optical basis, and therefore concluded that Act No. 7/2010 demands that the advertising messages are differentiated, not separated, from the programmes through acoustic and optical mechanisms. Therefore, this judgment implies an important change in television publicity techniques.

Furthermore, in recent years, online and digital marketing and advertising have experienced significant growth (in all platforms and devices: internet, mobile, etc.), especially thanks to the implementation of artificial intelligence and data analytics, which allow for the customisation of messages to a very specific target audience.

iii Unfair business practices

The protection against unfair business practices is found in Act No. 3/1991 on unfair competition. These regulations, mainly aimed at protecting fair and loyal competition within the market, foresee several prohibited conducts (inter alia, imitation, confusion, selling at a loss, defeat, aggressive practices, denigration, comparison, exploitation of others' reputation, violation of rules or secrets, discrimination and economic dependence, illegal advertising) and the actions that can be taken against them. A specific chapter devoted to unfair business practices with regard to consumers is also included in these regulations.

- The provisions of Act No. 3/1991 are to be understood and applied without detriment to:
- a* the provisions of Act No. 17/2001 of 7 December 2001 on trademarks, if a violation of a trademark or other protected sign takes place on the occasion of the relevant unfair business practice;
 - b* the provisions of the IP Act if copyright issues are also involved; and
 - c* the provisions of Act No. 34/1988 on advertising.

Cases of plagiarism in works created by politicians (including the President of the government and the President of the senate) during their time at university have recently come to public attention; however, no judicial proceedings have been commenced in this respect.

V COMPETITION AND CONSUMER RIGHTS

Competition issues are regulated in Act No. 15/2007 of 3 July 2007 on the defence of competition, and the regulations developing this Act (Royal Decree 261/2008 of 22 February 2008), as well as in Act No. 3/1991 referred to in Section IV.iii.

With regard to consumers' rights, the main rule to consider is Royal Legislative Decree 1/2007, approving the consolidated text of the General Act for the Protection of Consumers and Users.

In the media and entertainment area, Act No. 7/2010 on general audiovisual communication is also taken into account. These regulations provide for certain protection to TV and other media consumers, especially in terms of advertising messages and content and the prevention of abuses. In addition, in this sector, deals affecting companies' concentration have taken place in past years, which have led the CNMC to check compliance with the defence of competition provisions, to issue the relevant authorisations, and to sanction some of these companies for breach of its conditions. This was the case with the broadcaster Atresmedia, which was sanctioned for the infringement of certain conditions imposed on the merger of its TV channel, Antena 3, and La Sexta, authorised in 2012. Moreover, restrictions on the sale of TV football broadcasting rights (in terms of agreements' duration, packages, etc.) are also to be highlighted in this respect.

VI DIGITAL CONTENT

From a regulatory point of view, without detriment to the regulations contained in the IP Act and other disperse regulations on this matter (data protection, etc.), the transposition and implementation of the recent Directive (EU) 2019/770, on certain aspects concerning contracts for the supply of digital content and digital services, is expected. This will bring more light to the ruling of digital content in an environment in continuous evolution and change.

The European Court of Justice's jurisprudence shall also be considered in this respect. For instance, the Decisions of 13 February 2014 (Case C-466/12, *Svensson*) and 21 October 2014 (Case C-348/13, *BestWater*) on the use of hyperlinks, which declared that an 'act of communication to the public' within the meaning of Article 3.1 of Directive 2001/29/EC only exists if the works at stake are communicated to a 'new public'. If there is no new public, the authorisation of the copyright holder is not required.

In addition, the use of hyperlinks may also imply other risks in terms of advertising or commercial communications regulations. If the content posted is to be considered as illicit advertising, or infringes personality or consumers' rights, the relevant provisions on advertising, unfair competition and consumers would apply.

On the other hand, in accordance with Spanish law (i.e., Act No. 34/2002, on services of the information society and electronic commerce, and the Criminal Code) and jurisprudence, in some circumstances, internet service providers and social media platforms may be liable for hosting, aggregating and linking to digital content when they have an actual knowledge or awareness of the illegality of the content. In this regard, in certain circumstances, the Supreme Court has declared such liability; for example, in its judgment 128/2013 of 26 February 2013, a digital newspaper (*El Economista*) was condemned for having published certain comments in one of its news articles, which were offensive and infringed the personality rights of a popular singer and for not having removed these comments despite the express request of the latter. In this judgment, the Supreme Court ordered the newspaper to remove all the offensive comments, to publish the judgment on the front page of its website for 10 days, and to pay a compensation to the affected person in the amount of €10,000.

VII CONTRACTUAL DISPUTES

In Spain, contractual disputes in the media and entertainment industry are quite common, especially those concerning the ownership and exploitation of TV or radio formats and programmes. As an example, in its judgment 30/2016 of 20 September 2016, the High Court of Madrid partially upheld a first instance judgment that admitted the claim filed by a UK producer and distributor (ITV Global Entertainment Limited) against a Spanish TV channel (Telecinco) by means of which it claimed that by broadcasting a TV show called *Pasapalabra*, the Spanish broadcaster (that had unilaterally terminated a licence agreement with ITV) was violating the exclusivity rights that it had over the show's TV format and its name. In this judgment, the Court ordered Telecinco to pay a very substantial compensation to ITV (around €7 million) and to cease in the use, broadcast or exploitation of any kind of the TV format of *Pasapalabra*. This judgment was appealed by Telecinco to the Supreme Court, which, on 30 September 2019, confirmed the second instance decision.

VIII YEAR IN REVIEW

In 2019, no notable regulatory developments have taken place in the field of media and entertainment; most of the developments relate to case law and jurisprudence. However, the near future should bring a new regulatory framework to comply with recent EU directives. Due attention shall, therefore, be paid to this in the coming months.

IX OUTLOOK

New trends in the sector are driven by the new generation's preferences and by the way they establish and conduct their relationships, as well as by technological progress.

The increase of social networks, the need for an immediate connection through electronic devices (computers, mobile phones, tablets, smart TVs, smart watches and other

wearable devices) and the emergence of new 'products' (such as virtual reality or e-sports) forces companies to adapt and provide services in a more direct, swift and smooth manner, to access these new potential customers.

Traditional information access channels are facing the big challenge of not falling into obsolescence in an industry where the main constant is change. In line with this, new media are developing quickly, and the influence of big data is apparently unstoppable.

The speed at which the sector is evolving will test not only companies' ability to adapt to the industry's changes, but the current legal system itself, which will most probably not adapt to the new realities in an encompassed manner. Law always comes behind reality, especially in these areas of activity, which are complex by nature.

SWITZERLAND

*Dirk Spacek*¹

I OVERVIEW

The Swiss media landscape faces fundamental structural changes owing to the worldwide digitalisation trend. The population is increasingly informing itself through alternative online media offerings, such as Google, YouTube or individually tailored online content offerings, with a rather low willingness to pay. Against this background, the Swiss Federal Council issued a preliminary draft of a new Electronic Media Act (EMA)² in June 2018. The EMA aimed to widen the scope of regulation from traditional media providers (such as radio and television broadcasters as regulated under the current of the Swiss Federal Act on Radio and Television of 24 March 2006 (RTVA))³ to online media offerings with similar audio or audiovisual programmes. However, the outcome of the consultation proceedings on the EMA turned out to be so controversial that the Swiss Federal Council decided, on 28 August 2019, that it will not propose the enactment of the EMA, but will instead revise the RTVA. Stakeholders claimed that the EMA did not improve the difficult economic situation of the press and that it lacked a constitutional basis.⁴ In this context, the Swiss Federal Council announced the will to implement measures to financially support online media with editorial content providing high journalistic standards and newspapers, owing to the ‘digital shift’. A package of recommended measures will be submitted to parliament in the first half of 2020.

Radio and television broadcasters with a public licence are under a constitutional obligation to contribute to education, cultural development, opinion forming and entertainment in Switzerland (public service). Since self-financing through advertising is not considered sufficient to fulfil this mandate in an independent manner, a public radio and television fee is charged in Switzerland. Prior to 2019, this fee had to be paid by every holder of a television or radio device. In the course of the revision of the RTVA, this fee has been detached from the ownership of a television or radio device. The underlying rationale of the enacted statute was that almost every other electrical device (such as mobile phones or computers) is now capable of receiving and viewing broadcasted content. The new

1 Dirk Spacek is a partner at CMS von Erlach Poncet Ltd. The author thanks his colleague Sergej Schenker for gathering substantial material for, contributing to, and critically reviewing, this chapter.

2 Available at www.bakom.admin.ch/bakom/de/home/das-bakom/organisation/rechtliche-grundlagen/vernehmlassungen/vernehmlassung-zum-neuen-bundesgesetz-ueber-elektronische-medien.html.

3 Available at www.admin.ch/opc/en/classified-compilation/20001794/index.html.

4 See Mirjam Teitler, ‘Keine Verfassungsgrundlage für eine Bundeskompetenz im Online-Bereich’, *Medialex*, 2018, p. 18; other opinion expressed by Martin Dummermuth, ‘Die Zuständigkeit des Bundes im Bereich der elektronischen Medien nach Article 93 BV’, *ZBl* 117/2016, p. 347.

radio and television fee amounts to 365 Swiss francs for each private household per year and, for businesses with an annual turnover of over 500,000 Swiss francs, it ranges from 365 to 35,590 Swiss francs per year, depending on the turnover.

II LEGAL AND REGULATORY FRAMEWORK

In Switzerland, the media and entertainment sector is not governed by a uniform regulation due to its multidisciplinary nature.⁵ Various legal provisions, which are part of both private and public law, do affect the realm of media and entertainment.

The fundamental right to freedom of media is expressly guaranteed in Article 17 of the Swiss Federal Constitution of 18 April 1999 (FC),⁶ which concretises the fundamental right to freedom of expression (Article 16 FC) and specifically deals with mass communication. The FC applies equally to press, radio, television and other forms of information dissemination.⁷ At its core, it prohibits any kind of censorship.

Radio and television broadcasters are regulated by the Federal Office of Communications (OFCOM), which acts as a supervisory authority. Any person or entity offering a sequence of programmes disseminated continuously to the public is considered a television or radio broadcaster and subject to a notification duty to OFCOM,⁸ or to a public licence if it assumes a public service mandate (such as the Swiss national public broadcaster, SRG SSR).⁹ The Independent Complaints Authority for Radio and Television is competent to deal with complaints against editorial publication or against refusal to grant access to the programme services of Swiss broadcasters.

Telecommunication service providers (TSPs) are regulated under the Swiss Federal Act on Telecommunications of 30 April 1997 (FAT).¹⁰ Unlike broadcasters addressing public audiences, TSPs are in charge of individual communications channelled through their telecommunication networks. They are generally subject to a notification duty¹¹ to, or require a public licence from, OFCOM if they procure universal services or want to make use of the radioco frequency spectrum.¹²

In addition, the Swiss media and entertainment industry is characterised by its well-developed self-regulation. In the area of journalism, the Swiss Press Council (SPC) monitors compliance with ethical principles, which are set out in its Code of Conduct.

Finally, content created or disseminated by different players in the media and entertainment industry, such as producers or broadcasters, is protected by copyright as set out in the Federal Act on Copyright and Neighbouring Rights of 9 October 1992 (FACN),¹³ which is currently subject to a substantial revision, and the Regulation on Copyright and Neighbouring Rights of 26 April 1993 (RCN).¹⁴

5 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 20.

6 Available at www.admin.ch/opc/en/classified-compilation/19995395/index.html.

7 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 108.

8 Article 3(a), RTVA.

9 Article 3(b), RTVA.

10 Available at www.admin.ch/opc/en/classified-compilation/19970160/index.html.

11 Article 4, FAT.

12 Articles 14 and 22, FAT.

13 Available at www.admin.ch/opc/en/classified-compilation/19920251/index.html.

14 Available, in German, at www.admin.ch/opc/de/classified-compilation/19930114/index.html.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of media guaranteeing the unhindered flow of news and the free exchange of opinion and expression form the basis of freedom of speech. Media freedom is considered a fundamental right as provided in the FC.¹⁵ However, even fundamental rights are subject to various restrictions, which are set out in various Swiss federal statutes:

- a Freedom of speech and media freedom finds its limits in publications that, without just cause, contain untrue factual claims or libellous value judgements.¹⁶ These publications may violate the social integrity of the addressed person and trigger manifold claims, such as injunctive relief, damages and equity-based compensation.¹⁷ Publications infringing the economic reputation of a business and, therefore, interfering with fair competition law principles may violate the Federal Act against Unfair Competition of 19 December 1986¹⁸ (UCA).¹⁹
- b Defamatory public statements violating the ethical integrity of a person may also constitute a criminal act under the Swiss Criminal Code of 21 December 1937²⁰ (SCC).²¹ Swiss criminal law provides for a multitude of provisions restricting free speech.²² One prominent example is the prohibition to publicly incite hatred or discrimination against a person or a group of persons on the grounds of race, ethnic origin or religion.²³
- c Broadcasters must comply with certain minimum requirements for editorial and advertisement content based on statutory provisions in the RTVA;²⁴ for instance, they must present facts in editorial programmes (i.e., news programmes) in a fair and well-balanced manner.²⁵ Furthermore, editorial content and advertisement content must be clearly separated from each other and labelled as such.²⁶ Finally, broadcasters are banned from advertising tobacco goods, alcoholic beverages, political parties, religious beliefs and institutions, and therapeutic products and medical treatments.²⁷ In addition to these duties, broadcasters subject to a public licence (e.g., SRG SSR) must appropriately express the variety of events and opinions in the totality of their editorial programmes (public service).²⁸

15 Articles 16, 17 and 27, FC.

16 Federal Supreme Court Decision (FSCD) 126 III 305 of 7 July 2010, p. 308.

17 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 173.

18 Available, in German, at www.admin.ch/opc/de/classified-compilation/19860391/.

19 Article 2, UCA; Article 3, Paragraph 1(a), UCA.

20 Available at www.admin.ch/opc/en/classified-compilation/19370083/index.html.

21 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 173.

22 Article 173 et seq., SCC.

23 Article 261 *bis*, SCC.

24 Article 4 and Article 9 et seq., RTVA.

25 Article 4, Paragraph 2, RTVA.

26 Article 9, Paragraph 1, RTVA.

27 Article 10, RTVA.

28 Article 4, Paragraph 4, RTVA.

ii Newsgathering

Research activities of journalists editing news are protected by the fundamental right to freedom of media.²⁹ The Swiss Federal Supreme Court (FSC) has confirmed, in principle, that journalists must be granted access not only to general public sources but also to sources that are not publicly available³⁰ and that information gathering of journalists may only be limited if there is a legal basis to it (e.g., based on third-party rights that could be at stake).³¹

As regards journalists' access to documents of public agencies, the Swiss Freedom of Information Act of 17 December 2004 (FAP)³² provides that anyone must be granted access to documents of the Swiss Federal Administration.³³ However, this right to access may be limited based on several grounds, such as the impairment of the privacy of individuals, the implementation of official measures, the protection of professional or trade secrets or the endangerment of security in Switzerland.³⁴ However, the incitement to breach official secrecy³⁵ and to bribe public officials³⁶ is strictly prohibited.

Furthermore, when gathering news, journalists should refrain from any breach of privacy or integrity of personality under private or criminal law statutes. In particular, it is considered a criminal offence under Swiss law to listen in on or record private conversations by using a listening or recording device or to disclose information gathered in such a manner without the permission of the participants.³⁷ Finally, unlawful entry of a building, apartment or demarcated proprietary area can be prosecuted.³⁸

iii Freedom of access to government information

Court hearings and the delivery of judgments are generally public in Switzerland.³⁹ However, they may be declared as secret where the personality rights of the involved participants, especially victims, are at stake. Furthermore, the pretrial phase is generally not considered public.⁴⁰

Legislative procedures are considered public in Switzerland. Parliamentary sittings can therefore be accessed by journalists.⁴¹ However, in some cases, the public can be excluded in order to protect personality rights or for security reasons. Furthermore, discussions in committees are confidential.⁴² However, the committees must inform the general public of the results of their deliberations.

29 Article 16, Paragraphs 3 and 17, FC.

30 FSCD 1B_292/2010 of 23 December 2010.

31 id., with reference to Article 36, FC.

32 Available at www.admin.ch/opc/en/classified-compilation/20022540/index.html.

33 Article 6, FAP.

34 Article 7, FAP.

35 Article 320, SCC.

36 Article 322 *ter* et seq., SCC.

37 Article 179 *bis* et seq., SCC.

38 Article 186, SCC.

39 Article 30, Paragraph 3, FC.

40 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 265.

41 id., p. 275.

42 Article 47 of the Federal Act on the Federal Assembly of 13 December 2002, available at www.admin.ch/opc/en/classified-compilation/20010664/index.html.

Traditionally, the activities of government agencies were considered confidential in Switzerland;⁴³ however, in recent years, a shift towards more transparency can be observed under the FAP.⁴⁴

iv Protection of sources

Swiss law provides for the protection of sources. Persons who are professionally active in the publishing of information in the content section of periodically disseminated media may refuse to disclose the identity, author, content or sources of their information and are not liable to any criminal sanctions or subject to any procedural law enforcement powers.⁴⁵ However, the protection of sources does not apply if a court holds that disclosure is required to save a person from immediate danger to life or limb or in the event of homicide or offences of a certain gravity that may not otherwise be resolved or where suspects may not otherwise be apprehended.⁴⁶

v Private action against publication

Both natural and legal persons have legal remedies available against defamatory media coverage or media coverage infringing their privacy rights as provided for in the Swiss Civil Code of 10 December 1907 (CC).⁴⁷ They may ask local courts or the courts at the seat of the defendant to prohibit a threatened infringement, to order that an existing infringement ceases or to make a declaration that an infringement is unlawful if it continues to have an offensive effect. In addition, such persons may claim damages and satisfaction and the handing over of profits.⁴⁸

Furthermore, persons whose personality rights are directly affected by a representation of events in periodically appearing media, especially the press, radio or television, have a right to reply.⁴⁹

vi Government action against publication

No public cases are known of the Swiss federal governments or governmental agencies of Swiss cantons having officially intervened against Swiss media on publishing-specific content. ‘Censorship’ is institutionally considered unlawful under the FC and radio and television must be independent from the state.⁵⁰

43 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 278.

44 See Annina Keller, Daniel Kämpfer, ‘Öffentlichkeitsgesetz: Gerichte stärken das Recht auf Zugang zu Verwaltungsakten’, *Medialex*, 2018, p. 75.

45 Article 28a, SCC.

46 id.

47 Available at www.admin.ch/opc/en/classified-compilation/19070042/index.html.

48 Article 28, CC.

49 Article 28g, CC.

50 Article 17, Paragraph 2, FC; Article 3a, RTVA.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Overview

Swiss copyright legislation essentially consists of the FACN and the RCN. The RCN provides more details on matters not governed specifically by the FACN.

Switzerland is a member of many multilateral international conventions on copyright and neighbouring rights law; in particular, the revised Berne Convention for the Protection of Literary and Artistic Works (Paris version of 1971) and the International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961). Based on the majority of Swiss scholarly opinions, all obligations brought forward in the mentioned treaties have been implemented into Swiss national law.

Copyright essentially provides for protection of literary, artistic intellectual creations with an individual character, irrespective of their value or purpose;⁵¹ in particular, literary, scientific and other works of language, musical works, fine art, works with scientific or technical content, works of architecture or applied art, photographic, cinematographic and other visual or audiovisual works. The FACN protects authors by providing them with exclusive rights to the use of their copyrighted work and to authorise such use by others; in particular, the right to publish, reproduce or perform or make their work available.⁵² Furthermore, an author has the exclusive right to allow modification of his or her work, such as adaptations or derivative works (e.g., a film version of a copyrighted novel).⁵³ At the same time, the FACN provides for a limited amount of copyright restrictions enumerated in the FACN to strike a balance between interests of copyright owners and the user community (among which media providers are an important factor or pillar). In contrast to the Anglo-American copyright system, Swiss copyright does not provide an equity-based exception for use of copyrighted works as, for example, under the 'fair use' doctrine. Only limited copyright restrictions enumerated in the FACN apply. The following restrictions to copyrights are noteworthy: restrictions may apply to the use of published works in the private or domestic sphere, within enterprises or for educational purposes.⁵⁴ The FACN also provides for other restrictions; for example, concerning citations (short excerpt references) or news reporting on current events.⁵⁵

Recent noteworthy cases in the media sector

On 8 February 2019, in a recent landmark ruling, the FSC held that internet access provider Swisscom cannot be obliged to block copyright infringing content (via IP blocking, domain name server blocking or URL blocking) that is unlawfully uploaded by third parties on its online portals.⁵⁶ In its decision, the FSC made it clear that the existence of a technical infrastructure, which makes access to the world wide web possible and is the core function

51 Article 2, FACN.

52 Article 10, FACN.

53 Article 3, FACN.

54 Article 19, FACN.

55 Article 25, FACN (for citations) and Article 28, FACN (for news reporting).

56 FSCD 4A_433/2018 of 8 February 2019.

of access providers, cannot be deemed an adequate causal contribution to copyright infringements over a particular hosted online platform. This decision is certainly one of the most important recent decisions in the digital media law field.

New legislation ahead

The FACN is currently subject to a major legislative revision. Driven by an expressed need to adjust Swiss copyright to the realities of the new digital age, the revised Swiss Federal Act on Copyright and Neighbouring Rights (NFACN)⁵⁷ has been discussed by the Swiss parliament. The remaining differences on the NFACN will be discussed in the parliamentary autumn session. If differences between the two parliamentary chambers can be resolved and a final vote in both houses goes forward, the NFACN could come into force in 2020. A strong focus of the NFACN is to improve anti-piracy measures available to copyright owners. At the same time, the NFACN aims to remain sufficiently flexible to facilitate the use of content among researchers and libraries and provide a more efficient management of video-on-demand rights. In particular, new rules on collective copyright management have been introduced to facilitate the exchange of digital content.⁵⁸

ii Right of publicity

Overview

The right of personality is a considered a fundamental human right guaranteed in Article 13 of the FC. Swiss statutory law provides protection for the right of personality in Article 28 et seq. of the CC, which aims at protecting one's personality from unlawful exploitation and disparagement. In particular, it comprises the right to keep one's identity traits from being exploited without consent (e.g., published without permission).

In the past, the 'commercialisation' of personality rights (i.e., the active use of personality rights for marketing and commercialisation purposes and whether this enjoys protection under Article 28 CC) has been controversially discussed. According to the older Swiss doctrine, personality rights were viewed as mere 'defence rights' against unlawful exploitation or disparagement of one's personality. Nevertheless, scholarly opinions and courts have meanwhile shaped more modern arguments that even 'defence rights' can be used to secure active exploitation interests and should also serve the economic interests of a person.⁵⁹ Based on this more progressive notion, the Swiss right of personality can be viewed as comprising a less commercial-driven defence component (which may be called the right of privacy) and a more commercial claim component (which may be called the right of publicity). The 'right of publicity' is therefore indirectly recognised in Switzerland as the right to actively control the exploitation of the commercial value of someone's personality or identity traits. The enforcement of a right of publicity under Article 28 of the CC requires an individual display of infringement and damages, which can prove cumbersome in practice (although this can work and has been shown in practice; for example, in FSC Decision 133 II 153, where a

57 Available at www.ejpd.admin.ch/dam/data/ejpd/aktuell/news/2017/2017-11-22/entw-d.pdf.

58 For further detailed information, see Dirk Spacek and Sergej Schenker, 'Switzerland set to pass a revision of its federal copyright act', 20 May 2019, available at www.cms-lawnow.com/ealerts/2019/05/switzerland-set-to-pass-a-revision-of-its-federal-copyright-act.

59 See Andrea Büchler, 'Personality goods as a contract subject? The power of the factual and dogmatic order', in: Honsell Heinrich, Portmann Wolfgang, Zäch Roger and Zobl Dieter (editors), *Aktuelle Aspekte des Schuld- und Sachenrechts: Festschrift für Heinz Rey*, Zurich 2003, 177 et seq. with numerous references.

famous Swiss tennis player (Patty Schnyder) successfully obtained approval of remedies). Therefore, in the daily business field, further legal means are frequently put into place to make this right more easily enforceable, such as the undertaking of contracts (personality merchandising) or other intellectual property rights (such as the registering of personality traits as trademarks).

Statutory provisions and remedies

According to Article 28 of the CC, any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement. An infringement is unlawful, unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law (see information on available remedies in Section III.v).⁶⁰ Article 29 of the CC provides for claims against the specific use of an individual's name.

In general, all discernible aspects of a person's identity are protectable under the personality right of Article 28 et seq. of the CC. 'Discernible' means that an average addressee must be able to recognise the person portrayed as such. Pursuant to consistent Swiss case law, the right of publicity also covers characteristic voices or linguistic expressions, provided they are outstanding features of well-known personalities. However, publicly known personalities must, to a larger extent, tolerate being portrayed, commented on or criticised in the public media.

Personality rights in general are only protected for the lifetime duration of an individual under Article 28 et seq. CC. After death, these rights extinguish (there is no post-mortem personality right recognised in Switzerland). However, the relatives of a deceased person can, in certain cases, claim that their personality rights are indirectly infringed if comments on the deceased have an impact on their own personality.

Other statutory personality rights

The FACN recognises specific personality rights attributable to authors of copyrighted works. An author has the exclusive right to his or her own work and the right to recognition of his or her authorship (i.e., to be mentioned by name as an author).⁶¹ Furthermore, an author has the exclusive right to decide whether, where and how his or her work may be altered and how the work may be used to create a derivative work.⁶²

Swiss criminal law also provides for protection against defamation, disparagement, violation of intimate privacy (see Section III.ii). Infringement of such criminal privacy law provisions is generally sanctioned with fines, but only 'upon request' (not *ex officio*).⁶³

60 Article 28, CC.

61 Article 9, FACN.

62 Article 11, FACN.

63 See Article 173 et seq., SCC.

iii Unfair business practices

Unfair business practices in general

Business practices among competitors in the market may generally not be 'unfair' (against good faith principles) or misleading. Unfair practices include (but are not limited to) any behaviour that is misleading, aggressive, offensive or harmful to competitors (see the general clause in Article 2 UCA).⁶⁴ Article 3 of the UCA provides for a specific list of unfair competition practice cases.

In addition to the statutory rules, Swiss unfair competition law is governed by self-regulatory codes of practice issued by organisations. The key principles of such codes are widely similar to the principles established in the UCA. The organisations cannot issue binding decisions, but merely recommendations. However, their recommendations are widely respected by their members and are also often followed by the reasoning of the courts.

Select unfair business practices in the context of the media sector

In the context of media, internet and online entertainment, the following cases have shed some light on unfair competition practices in this sector.

Digital influencer marketing

Digital influencer marketing is a new subtle form for reaching target online audiences with the help of intermediary opinion leaders (influencers) able to reach broad audiences. Influencers can be celebrities, such as actors or football players, but also other individuals with strong communicative engagement. They usually act through blogs, online fora or social media networks, mostly in the form of product reviews (e.g., 'my new Omega watch is the best there is, I love it!'). Where influencing amounts to misleading people in their informed decision-making, such behaviour is forbidden under the UCA. On 22 January 2014, the SPC took a position on a complaint against a post with contextual advertising in the online newspaper *Watson*. The SPC held that professional ethics in journalism require a strict separation of editorial and advertising content and advertisements should be disclosed with terms such as 'ad', 'advertisement' and 'publicity spot', and by being labelled with 'paid by'.

TV quotas

A larger dispute has emerged in recent years surrounding the Swiss company Mediapulse Ltd, which had implemented new applications to measure and publish viewer quotas of television channels. Several broadcasters filed a civil lawsuit against Mediapulse alleging that their data analysis was 'flawed' and, therefore, misleading to the public under the UCA. In a later step, the same proceedings were initiated before the Department of Environment, Transportation, Energy and Communications and appealed to the Swiss Federal Administrative Court to assess compliance under the statutory rules of the RTVA. All legal proceedings have meanwhile been settled. However, it cannot be excluded that similar disputes will arise in the future.

64 Available, in German, at www.admin.ch/opc/de/classified-compilation/19860391/.

TV formats

TV formats are the underlying essence, plot or 'concept' of disseminated TV shows, series or similar forms of entertainment content. Underlying concepts can easily be copied by competitors and adapted to their local requirements, which is unpleasant for the original content producer as he or she has little time to amortise his or her production costs. Under Swiss copyright law, underlying concepts are mostly qualified as mere 'ideas' that do not enjoy copyright protection. Consequently, unauthorised copying of TV formats gives rise to alleged legal claims under the UCA if such act proves particularly unfair. Public cases on TV format disputes are not available in Switzerland, but are frequently settled out of court.

V COMPETITION AND CONSUMER RIGHTS

i Competition law

The Federal Law on Cartels and Other Restraints of Competition of 6 October 1995⁶⁵ is the legislation governing cartels in Switzerland. The regulatory framework is complemented by several federal ordinances. Further, general notices and communications of the Competition Commission (the Commission) are issued from time to time.

On the national Swiss media level, one highly debated topic in past years has been the strategic joint venture entered into between SRG SSR (the Swiss national broadcaster), Swisscom (the Swiss national telecom provider) and Ringier AG (one of the largest Swiss publishers), named Admeira. The main concern was whether Admeira could lead to excessive media concentration in Switzerland, since Swisscom could share telecommunications subscriber data with SRG SSR (broadcaster) and the latter would be in a position to craft personalised content ads for viewers. On 14 December 2015, the Commission approved the joint venture as it did not see impediments under competition law statutes. It remains controversial whether the aforesaid personalisation activities of SRG SSR could be unlawful under the RTVA, since SRG SSR is required to provide TV programmes for the general public⁶⁶ rather than personalised content for individual viewers.

ii Big data analytics and personalised media content

This has become of increasing relevance in online media practice. Personalised content delivery is increasingly used via customers' personal items (e.g., smartphones), personalised content itself, customer-interactive content and the personal smart home (e.g., items such as Amazon's 'Alexa' installed in private homes), all of which provide a suitable basis for collecting personal user data, and analysing and delivering personalised services. The Swiss Federal Act on Data Protection of 19 June 1992⁶⁷ provides that personalisation (as an analytic processing tool) and personalised content delivery must be made transparent to customers and – depending on the manner of conduct – must comply with further data protection

65 Available at www.admin.ch/opc/en/classified-compilation/19950278/index.html.

66 See Section II.

67 Available at www.admin.ch/opc/en/classified-compilation/19920153/index.html.

principles (e.g., automated processing and decision-making). The UCA also provides that personalised media offerings may not be misleading (in the sense of alleging to being addressed equally to the general public).⁶⁸

iii Net neutrality

In the past, Switzerland has not known specific network neutrality obligations. Network neutrality matters were reviewed under general non-discrimination principles established in competition law statutes⁶⁹ and interconnection provisions under the FAT (applicable between interconnecting TSPs).⁷⁰

On 7 March 2019, the Swiss second chamber of parliament approved a new provision titled 'open internet' in the revised FAT (NFAT).⁷¹ Article 12e of the NFAT⁷² provides that internet access providers must convey data irrespective of sender, receiver, content, service, service classes, protocols, applications, programs or end devices (i.e., without applying technical or economic differential treatment to them).⁷³ Differential treatment of data is only permitted if it is required to follow a legal provision or court decision, secure the integrity of the network, follow an explicit request of a customer or combat temporary and unusual network congestion.⁷⁴ Also, differential treatment of data transmission must be made transparent to customers.⁷⁵ The new provision has been sent back to the first chamber of parliament, but changes to the provision are not expected to occur.

VI DIGITAL CONTENT

Digital content is not a distinct Swiss legal area of law. Swiss intellectual property and personality law is generally familiar with the notion of contributory or secondary infringement by third parties.⁷⁶ Online platform providers qualify as third parties and may incur liability if they are causally facilitating intellectual property or, for example, personality law infringements. While injunctive relief can be enforced against online platform providers without the provider's knowledge of infringement, damage claims require some form of knowledge attribution to the provider.⁷⁷ On 14 January 2013, the FSC held that a host provider (that can effectively control uploaded content) is required to take down infringing content and is liable for related court costs.⁷⁸ As regards internet access providers, the FSC has recently rendered a decision according to which no secondary or contributory infringement lies at hand (see Section IV.i).⁷⁹

68 For further information, also see Dirk Spacek, 'Personalisierte Medien und Unterhaltung', *sic!*, 2018, p. 377 et seq.

69 For example, Article 7, FAC.

70 Article 11, FAC.

71 See <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20170058>.

72 See www.parlament.ch/centers/eparl/curia/2017/20170058/S4%20D.pdf.

73 Article 12e, Paragraph 1, NFAT.

74 Article 12e, Paragraph 2, NFAT.

75 Article 12e, Paragraph 3, NFAT.

76 See, e.g., Article 62, FACN.

77 See, e.g., Article 62, Paragraph 2, FACN.

78 FSCD 5A_792/2011 of 14 January 2013.

79 FSCD 4A_433/2018 of 8 February 2019.

VII CONTRACTUAL DISPUTES

Contractual disputes in the media sector can occur in any affected field, such as day-to-day business operations, online distribution and compensation disputes, failed media joint ventures or disputes between artists and producers or publishers. Most of these disputes are not publicly known and there is almost no established case law available. Disputes between artists and producers or publishers are not usually resolved through traditional litigation routes, but, rather, through informal settlements, as the artist's reputation is at stake.

UNITED ARAB EMIRATES

*Fiona Robertson*¹

I OVERVIEW

The past few years have seen continued growth in the media and entertainment sector in the UAE. From what was a small industry that was largely reliant on foreign content, there is a definite move towards audience appreciation of local content and local storytelling. The Abu Dhabi rebate of 30 per cent on local costs, launched several years ago, appears to be taking a foothold and the two powerhouse government bodies of twofour54 and Image Nation are working together on various initiatives and projects, which will hopefully continue to drive production levels up, increase quality and continue to provide a training ground for cast and crew alike.

MBC continues to be the dominant player in free-to-air television. It has entered into a joint content venture with twofour54 and Image Nation that promises to deliver a slate of local content. This initiative should be the driver for an upsurge in local content production, although as a new initiative, we have not seen any content emerge yet.

Netflix opened local subscription in 2016, with Amazon Prime following in 2019. Notwithstanding this increase in competition, the first-to-market operator Starz Play remains the dominant over-the-top (OTT) player in the region, holding a 29 per cent market share and an impressive 31 per cent revenue share.² All of the key OTT operators are expanding their offering into commissioning Arabic language and local English language content. Netflix started strongly with the original Arabic language series *Dollar*, which was distributed with a staggering 20 language subtitle capacity, reflecting the diverse nationalities that call the Gulf region home.

As with most markets, the UAE has seen an exponential increase in the podcast market:

There are 1.3m regular podcast listeners in the UAE, according to markettiers MENA, a broadcast specialist. Supported by podcasting consultancy 4DC, this is claimed to be the first such study on the UAE's podcast landscape. The results have revealed that 16% of the adult population tunes into podcasts at least once a week. Initial results also reveal nine in ten (92%) of regular podcast listeners trust podcasts more than traditional media.³

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2 *Broadcast Pro*, 2 July 2019, www.broadcastpromedia.com/news/starz-play-maintains-lead-with-29-marketshare-ihs-market-report/.

3 *Broadcast Pro*, 30 July 2019, www.broadcastpromedia.com/news/podcast-listeners-in-uae-grow-to-1-3m-markettiers-mena/.

The UAE continues to operate without music collection societies, making operations difficult for music users and the industry generally. Nonetheless, Spotify was able to open itself for local subscriptions in the region by undertaking an extensive licensing programme, and is now offering a large catalogue of Arabic music for local listeners alongside its usual Western catalogue.

In film, we are seeing more local productions being produced and hitting the cinemas – 2018 and 2019 saw the theatrical release of *Rashid and Rajab* and *Shabab Sheyab*, respectively, both of which were produced in the UAE in 2018. Local independent filmmaker Shahad Ameen joined forces with Image Nation and directed the feature film *Scales*, which premiered at the prestigious Venice Film Festival. The Abu Dhabi focused rebate of 30 per cent enticed Cinema Vision to film its new film *Ghost* in the UAE, and it is hoped that further use will be made of this generous incentive over time.

National Geographic has launched several local Arabic content initiatives and is also embracing Arabic language audiences by adding Arabic dubbing to many of its more recognised international series, including Gordon Ramsay's recent food and travel series.

Large global chain Cinepolis has announced that it will open a new cinema in Dubai, perhaps taking its first steps towards the lucrative neighbouring Saudi Arabia market.

From a regulatory perspective, there has been little movement since the 2017 Cabinet Resolution on Media Content (with its corresponding Ministerial Resolution) (2017 Resolutions) and the controversial 2018 Electronic Media Activity Regulation Resolution (the E-Media Law). An advertising guide, launched at the end of 2018, was much commented on but was, in reality, a high-level summary of the 2017 Resolutions and the E-Media Law, adding only some clarifying wording around compliance in relation to social media posts.

II LEGAL AND REGULATORY FRAMEWORK

There are two key regulators in the United Arab Emirates. The large Telecommunications Regulatory Authority (TRA) has, among its many tasks, the ability to regulate content that is carried over its infrastructure, and by its two key telecommunications licensees (Etisalat and du). The more focused National Media Council (NMC) is specifically designated with regulatory control over the media and associated industries; Federal Law No. 11 of 2016 on the Regulation and Powers of National Media Council sets out its key powers. Article 4 sets out the key objectives of the NMC:

- a* drafting the state media policy;
- b* enacting and ensuring implementation of media legislation; and
- c* coordinating the media policy between the member emirates in such a manner that it complies with the policy of the state inside and abroad, supports the federation and highlights the national unity concept.

This broadly means that the NMC has the power to set out, by way of its board, the standards and regulations that it expects to see implemented in the country.

The two regulators tend to divide regulation between them but there is, in some areas, some duplication.

The media industry is mainly controlled by Federal Law No. 15 of 1980 concerning Printing and Publishing (PPL). The PPL, despite predating most commonly used media technology, remains the predominant law, with the regulators both confirming its application across the new media. Outside of establishing the rules applicable to those wishing to run

a printing press or secure a free-to-air broadcast licence, the Law also sets out the basic tenets of content regulation; Section 7 sets out, in simple form, the restrictions that apply to media content.

Augmenting the PPL is Annex 1 of the TRA's Internet Access Management Policy, known as the IAM, which sets out the basis upon which the TRA can block a website (i.e., a list of 17 categories of content that are not permitted to be transmitted over the TRA network, and that will be blocked). The list contains the type of content that might be expected: pornography, promotion of terrorism, criticism of religion and such like. The IAM allows the TRA to block (in practice, to require the telecommunications licensees to block) any such content. UAE residents are familiar with the 'surf safely' message that appears when they try to access content that is blocked.

In 2010 and 2012, the NMC passed further content laws under National Media Council Chairman Resolution No. 20 of 2010 on the Standards of Media Content and the Chairman of the Council Resolution No. 35 of 2012 on the Criteria of Advertisement Content in Media. The status of these remains uncertain as they have since been largely superseded by the 2017 Resolutions. The more important of these for the content industry is Cabinet Resolution No. 23 of 2017 Concerning Media Content and the related Board Resolution No. 26 of 2017 on Media Content. The latter, in particular, is extremely prescriptive as to content regulations and standards, and has expanded the description of prohibited content to enable easier compliance for content producers.

A key associated law is the Federal Decree by Law No. 5 of 2012 on Combating Cyber Crimes (CCL), which is noted as much for the severity of its penalties as the content of the law itself. The fines were increased for several offences late in 2018, reflecting the UAE's concern about material that is related to terrorism or otherwise dangerous to its residents. That obviously incendiary material aside, the CCL also covers areas of more content-focused issues, such as privacy, defamation, pornography and gambling.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of speech and the right of information are protected by the UAE Constitution; however, exercising such rights must not contradict or violate other laws.⁴

The UAE allows all speech except that which is prohibited under the content laws set out above. The basic categories of prohibited speech can be summarised as follows:

- a* respect God, Islamic belief, heavenly or monotheistic religions, prophets and messengers;
- b* respect the ruling regime in the state along with its symbols, organisations and interests;
- c* respect the cultural and civilisation heritage and national identity of the state;
- d* refrain from publishing anything that could be offensive to national unity or incite hatred or acts of terrorism;
- e* respect the policies adopted by the state;
- f* refrain from offending common social values;
- g* refrain from offending the economic, judicial and security system;
- h* do not publish misleading or biased news and rumours;

⁴ Article 30: 'Freedom to hold opinions and express them orally, in writing or by other means of expression shall be guaranteed within the limits of the law.'

- i* avoid offending children and women or any other group in the society;
- j* respect privacy rules and the personal life of individuals;
- k* respect all rights, including intellectual property rights;
- l* refrain from publishing or circulating any content that could induce commitment of crimes;
- m* avoid material violating public morals; and
- n* refrain from publishing false news.

In addition, there is a specific law that prohibits hate speech: Federal Decree by Law No. 2 of 2015 on Combatting Discrimination and Hatred. This law has been much discussed but remains largely untested in the courts. It specifically punishes hate crimes and discrimination with penalties including imprisonment (of from six months to 15 years) and fines of between 50,000 and 2 million UAE dirhams.

ii Newsgathering

There are restrictions on certain areas in the country, which cannot be entered for filming, nor can they be recorded incidentally. These comprise key government buildings and military installations, all of which are protected for security reasons.

In general, commercial cameras will require a permit to be used in public in any location – police are empowered to request a copy of a permit if a person is found to be commercially operating in public spaces. These can be obtained from the relevant film commissions in each emirate. In addition, as is usual globally, permission should be ideally sought from the owners of private property before filming is commenced.

Privacy is revered in the UAE, and this belief is set out as a principle within the Constitution.⁵ Following this principle, it is prohibited to record a conversation, by camera or audio, without the specific consent of the party being recorded. That would be considered to be illegally obtained materials under the Penal Code⁶ and the CCL, if an information technology aspect was present.⁷

Article 2 of the CCL is important. It states that it is prohibited to capture, transfer, copy or keep images that invade a person's privacy. This law is enshrined in the CCL and is taken seriously by the authorities. A local platform found itself in contravention of this law when it was filming a 'candid camera' style programme. Two women had allegedly verbally agreed to take part, but, when they saw the final product, they were not happy and lodged a claim with the public prosecutor. The failure of the producer to secure a written consent from the women was detrimental, and all parties associated with the segment, including the hosts of the programme, were fined.

Generally, news sources secure their information from government sources rather than unofficial sources. The government has released several stories reiterating its distaste for fake news and rumour-mongering – it does not view the use of unofficial sources as appropriate and it has the power to take action if those sources are considered to be incorrect.

5 The UAE Constitution provides that 'freedom of communication by post, telegraph or other means of communication and the secrecy thereof shall be guaranteed in accordance with the law', and this is considered to be intended as a declaration of a right to personal privacy.

6 Article 378 of Federal Law No. 3 of 1987 of the Penal Code.

7 Article 21 of the CCL.

iii Freedom of access to government information

There are no such laws in the United Arab Emirates. The government distributes the information that it wishes to be distributed itself, and provides that information to news gatherers.

iv Protection of sources

There are no such laws or customs in the United Arab Emirates, and no recent cases to report.

As a general note, the government can require information from any entity it deems necessary for its operation and protection.

v Private action against publication

Because two of the key areas where claims might be raised (defamation and breach of privacy) are established under the Penal Code and the CCL, citizens tend to take action by approaching the relevant police department and seeking its assistance. This means that the decision as to whether action is taken tends to fall to the police prosecutor rather than the alleged victim.

Private cases are rare, as they would, on the whole, require proof of damage, and in a jurisdiction where only direct and provable damages will be awarded (that is, no punitive damages or consequential loss are available to claimants), cases such as these tend not to proceed in the civil courts.

Currently, the United Arab Emirates has no universal law covering the area of data protection – there are only two free zones that have developed their own systems. In addition, there are specific laws relating to protection of healthcare data, and a stringent law on protection of data for the finance sector is expected to be passed soon. There are provisions of general application in relation to the processing and transfer of personal data; specifically, Articles 379 and 380 *bis* of the UAE Penal Code, which prohibit the wrongful or unlawful disclosure of a secret, information or data in the course of business or professional activities. While there is no guidance in relation to what a ‘secret’ is in this context, personal data in the context of location may constitute a secret. This is not often used as the basis for a claim.

vi Government action against publication

There are no recent cases to report. The government will be most likely to block material if it wished to take any action.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

The United Arab Emirates is a member of the World Trade Organization, and a signatory to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Federal Law No. 7 of 2002 Pertaining to Copyrights and Neighbouring Rights (the Copyright Law) reflects the Berne Convention in many ways. Some key differences might be:

- a* the limited exceptions for fair use or fair dealing; in the UAE, the key areas would be limited to personal use, a single copy of a computer program required for processing, judicial proceedings, research, criticism and review, and small non-commercial performance;
- b* moral rights are not assignable and do not extinguish;
- c* a licence or assignment of economic rights must be in writing, and must specify the duration and place of exploitation; and

- d* 'work for hire' is not noted within the law, and so all assignments of intellectual property rights should be specifically obtained, where needed.

In practical terms, the UAE does not yet have a collective management organisation for any rights, which can make it difficult to undertake proper licensing regimes.

There are no specialist courts for copyright matters in the UAE. Article 34 of the Copyright Law provides an author with a right to request the court of first instance to issue certain orders with regard to a work that has been reproduced without his or her permission. These orders include the making of a full report, a ban on the illegal activity, an attachment of the original work, and the appointment of an expert to calculate the proceeds resulting from the infringement, and to obtain proof concerning the infringement. If any of the above orders are handed down, the applicant must file a substantive proceeding with the relevant court within 15 days of any such order to prevent it becoming void. Upon the decision of the substantive proceedings, such an order may be made permanent.

It is possible to request criminal action for copyright infringement in the UAE, and this is done by way of application to the Copyright Office, which then liaises with the relevant police prosecution office.

Injunctive relief can be difficult to obtain in the UAE. If requested, the court will decide whether the claiming party has an effective right in the UAE, if there is urgency in the matter, and whether there may be irreparable damage if the order is not handed down.

ii Personality rights

Because the United Arab Emirates has stringent laws relating to the use of the image of any person, the rights associated with personality rights and image rights are tied up in the principles associated with privacy. No separate right exists.

V COMPETITION AND CONSUMER RIGHTS

The two areas of law comprising consumer law and competition law have recently been combined to be regulated by one authority, the UAE Competition Committee, under the Federal Ministry of Economy. Because of this combination of laws and practice, a surge in activity by the regulator has not yet been seen, although there have been a number of interesting developments that may, in future, positively affect a media industry wishing to proactively explore mergers.

It has been reported that the UAE Competition Committee wishes to undertake a market study in the local film industry, and this is expected to take place in the near future. It is understood that the focus will be on the theatrical side of the business.

VI DIGITAL CONTENT

The Copyright Law contains no safe harbour provisions designed to immunise intermediaries from liability for copyright damage. In fact, the Copyright Law contains no provision dealing expressly with secondary liability at all. The issue of liability for contributing to copyright infringement could conceptually be dealt with under general tort law (tort is recognised in the UAE under Federal Law No. 5 of 1985 on Civil Transactions) and principles of joint liability. This has not been seen in practice.

The CCL is directed at both owner and operators of an electronic site or information network, and so may, in theory, have application to a party that hosts user-uploaded content. Article 39 provides:

Any owner or operator of an Electronic Site or Information Network who deliberately and knowingly stores or makes available any illegal content or if he fails to remove or blocks access to this illegal content within the period determined in the written notice addressed to him by the competent authorities that states that content is illegal and is available on the Electronic Site or Information Network shall be punished by imprisonment and a fine or by any of these penalties.

The takedown set out in Article 39 of the CCL means that any party must respond to a written notice that it receives from the competent authorities.

In addition, it is possible to interpret the CCL as stating that any entity acting as an intermediary or service provider could commit an offence if it benefits from or unlawfully facilitates a third party's uses of communication services through its information network. Article 35 of the CCL provides:

Any person who benefited or unlawfully facilitated to a third party the use of communication services or audio or visual transmission channels through the Information Network or the Information Technology Tool shall be punished by imprisonment for a period not less than one year and a fine not less than (AED 250,000) and not exceeding (AED 1,000,000) or by any of these punishments.

There is no clarity on what the authorities might deem to be 'unlawfully facilitating' but arguably this may include leaving up content that is known to be infringing. Again, this has not been seen in practice.

VII CONTRACTUAL DISPUTES

Contract disputes vary widely, as would be expected in any jurisdiction.

i Failure to pay

This is the key area of concern to content producers in the region – a long-standing tradition of working without effective contracts has led to a situation where a supplier might not be able to adequately force payment obligations against a client or licensee. There has been improvement in this area, although contracts that were drafted for another age of media are still encountered – citing telex as a form of available notice methods, seeking delivery on Beta tapes. These have not been updated to reflect the actual transaction.

ii Use of content beyond 'usage rights' granted

This is generally an issue with advertising in the region, although it also sometimes occurs in broadcasting. Producers may acquire third-party content for a limited exploitation window, and that window is exceeded by the platform, client or broadcaster. Often made more difficult by the failure of the contract to adequately address the position if this occurs and the imbalance of negotiating power that might exist between the parties, it can fall to the producer to pay for these rights. There is often a mismatch between the clients' desired usage rights and the rights obtained by the producer.

This issue is further complicated by a small but enduring number of producers who simply do not clear third-party rights at all, in the hope that this small jurisdiction will not draw the attention of the international rights holders.

iii Inability to procure a public performance licence from a collective management organisation

The music industry operates in a manner that is different to most jurisdictions. This issue continues to cause concern to local users of music content and international platforms that rely on collective management organisations to secure public performance rights for them, and to pay foreign artists under their reciprocity arrangements. A complex analysis of technology and law must be undertaken to work out how the rights can be acquired, and locally, it is simply not possible to acquire them except by way of direct licence (generally available only for Arabic language music).

VIII YEAR IN REVIEW

The year 2019 has seen the UAE market continue to mature across several key media sectors. The focus for both producers and distributors seems to be on increasing Arabic language and local English language production. We can see that the market is continuing to allow international platforms to enter while still wishing to maintain the content standards that are expected of foreign content. Finance remained tight in the sector, but with the opening of the large Saudi market to content consumption in 2019, we are expecting things to become more interesting for producers over the next couple of years. In addition, the introduction of a data regime should see marketing teams move to more sophisticated methods of consumer communication, as the widely used short-message service and email targeting becomes problematic from a regulatory perspective.

IX OUTLOOK

There is no doubt that the area currently receiving the most attention is data protection, and it is widely expected that the UAE will add a federal data protection law to its books very shortly. It is understood that a data protection law for the financial service industry will be issued first and then, following the regional trend, a general data protection law will follow. From a media perspective, this will obviously affect direct and online marketing activities, but will also be an issue for the many platforms that interact with consumers directly.

The UAE is seeing, as many countries are, a diversification in the sources of content. International platforms, such as Netflix, have altered the viewing patterns of the population, and this has affected revenue across the board. Local content platforms and broadcasters are now expanding their offerings to other media to counter this influx of content.

There is still optimism that a music collection society may be set up to assist with the collection of, at the very least, public performance revenue. These talks have been ongoing for over a decade, but with several high-profile events coming up in the UAE, it is possible that this will now become a priority.

UNITED STATES

R Bruce Rich and Benjamin E Marks¹

I OVERVIEW

The past year has seen significant judicial and regulatory developments affecting the media and entertainment industries in the United States.

Courts have continued to recognise the robust protections historically available in the United States for free speech and media access to government information in the face of a US Presidential administration more hostile to those ideals than any in recent history, and perhaps ever. Indeed, the news media are not only persisting, but thriving, in the face of efforts by numerous governmental actors to cast doubt on the credibility of professional journalists as reporters of objective facts. Courts have also continued to grapple with the effects of an increasingly interconnected, digital world on distribution and consumption of media and entertainment fare, with numerous decisions in recent years that help to define the contours of copyright law, rights of publicity and other relevant legal doctrines. We continue to see robust debate over whether courts are under- or over-enforcing intellectual property rights in the digital age.

Regulatory agencies have undertaken significant initiatives to ensure that their oversight function and regulatory activities are appropriately tailored for the modern, digital economy. For example, the US Federal Trade Commission (FTC) has undertaken an extensive review of its enforcement of federal antitrust and consumer protection laws, including many days of public hearings with dozens of witnesses and public comments from hundreds of additional stakeholders. While the FTC's review is not limited to the media and entertainment industries, there has been a particular emphasis on the impact of large technology companies, such as Amazon, Apple, Facebook and Google, whose impact on those industries in recent years cannot be overstated. The US Department of Justice is systematically reviewing some 1,300 antitrust consent decrees that regulate conduct across various sectors of the economy, but this review has already resulted in a decision to terminate a long-standing decree governing the practices of certain large film studios with respect to the distribution of films for theatrical release, and the decrees governing the organisations that license the public performance rights for most of the music available in the United States are under intense scrutiny as well.

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II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework that governs the media and entertainment industries in the United States is a patchwork of protections of constitutional dimension, state and federal statutes, government agency oversight and judicially evolved common law doctrines.

Perhaps the most distinguishing feature of US law with respect to media and entertainment is the robust protections for free speech and media freedom afforded under the First Amendment to the US Constitution and state constitution equivalents. While US media are not immune from libel and defamation claims, and there are some restrictions on their ability to gather and report news and information, they enjoy considerably more latitude than is afforded to their counterparts in most other parts of the world.

Another noteworthy feature of the operative legal and regulatory framework in the United States is the mix of state and federal government oversight. The media and entertainment industries are subject to general oversight under many statutes, such as the state and federal laws that protect consumers and competitive markets. In some instances, they are also subject to narrower forms of regulation, such as oversight of broadcasters and other media and entertainment companies, by the Federal Communications Commission, which regulates interstate and international communications by radio, television, wire, satellite and cable. There are manifold issue-specific statutes that affect media and entertainment companies, ranging from online collection of personally identifiable information about children to advertising of alcohol, tobacco and other products, to cite just a few examples. In some areas, such as copyright law, federal jurisdiction is exclusive and state regulation is pre-empted. In others, such as rights of publicity, rights are only provided at the state-law level, and there is no federal protection. And for many areas, such as antitrust and consumer protection, companies may be subject to regulation and oversight at both the state and federal levels. Also worthy of mention is the combination in the United States of statutory and common law. For example, US copyright law is a creature of federal statute, whereas the hot news misappropriation doctrine is a judicially evolved concept derived from general principles of equity.

This at-times overlapping, patchwork approach sometimes leads to disputes over which legal regime governs a challenged entity's conduct. This frequently arises with respect to the pre-emptive reach of federal copyright law, which forecloses certain state law remedies viewed as overlapping with federal copyright law and policy. Varying state regulation (e.g., of rights of publicity) can also create anomalous results for the media and entertainment industries. Rights of publicity, which limit the use of an individual's likeness for commercial purposes without permission, may survive post-mortem for 100 years in one state and not survive post-mortem at all in another. The complications this framework of regulation creates in an increasingly interconnected digital world that blurs geographic borders and traditional lines of demarcation between media industries can be confounding.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

The First Amendment to the US Constitution provides strong (but not absolute) protection for all forms of speech. As a general matter, ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content’.² The few, limited categorical exceptions include obscenity, child pornography, defamation, fraud, incitement, true threats and speech integral to criminal conduct.³ The US Supreme Court has rejected recent legislative efforts to add violent video games, depictions of animal cruelty, lying about military honours and virtual child pornography to the list of unprotected categories.

False speech is protected unless it is made ‘for the purpose of material gain’ or causes ‘legally cognizable harm’.⁴ Hate speech is also protected, reflecting the ‘bedrock principle’ that the government ‘may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable’.⁵ The First Amendment affords ‘special protection’ to ‘even hurtful speech’ when it concerns a public issue to ‘ensure that we do not stifle public debate’.⁶

In addition to rejecting new categories of unprotected speech, the US Supreme Court recently made it harder to restrict protected speech. While it has long been true that the First Amendment requires heightened scrutiny whenever the government creates regulation of speech ‘because of disagreement with the message it conveys’,⁷ the Court more recently held that any law that (either on its face or by design) targets protected speech based on its communicative content is subject to strict scrutiny review ‘regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech’.⁸

Commercial speech, which includes commercial advertising, promises and solicitations, is unprotected if false or misleading, and it is otherwise subject to regulation under an intermediate level of scrutiny.⁹ However, in *Sorrell v. IMS Health Inc.*,¹⁰ the Court applied heightened scrutiny in striking down a Vermont law prohibiting the use of pharmacy records by pharmaceutical companies for marketing purposes on the ground that it unconstitutionally discriminated based on the content of the speech and the identity of the speaker, rejecting the state’s argument that such judicial scrutiny was not warranted because the law was ‘a mere commercial regulation’.¹¹ Media and entertainment products are not ‘commercial speech’ merely because they are distributed or sold as part of for-profit enterprises.

2 *Ashcroft v. Am Civil Liberties Union*, 535 US 564, 573 (2002).

3 See, e.g., *United States v. Stevens*, 559 US 460, 468 (2010).

4 *United States v. Alvarez*, 567 US 709 (2012).

5 *Texas v. Johnson*, 491 US 397, 414 (1989).

6 *Snyder v. Phelps*, 562 US 443, 461 (2011).

7 *Ward v. Rock Against Racism*, 491 US 781, 791 (1989).

8 *Reed v. Town of Gilbert*, 135 S Ct 2218, 2228 (2015).

9 See *Cent Hudson Gas & Elec Corp v. Pub Serv Comm’n of New York*, 447 US 557 (1980).

10 564 US 552 (2011).

11 *id.* at 566.

ii Newsgathering

The enforcement of general laws against the press 'is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations'.¹² Generally applicable laws 'do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news'.¹³ However, a publisher cannot be held liable for the unlawful procuring of information by a source where the publisher was not involved in the illegal conduct and accessed the information lawfully, and the publication is of public concern.¹⁴

Undercover reporting techniques have been the subject of several lawsuits challenging the constitutionality of state 'ag-gag' laws that criminalise the infiltration of agricultural production facilities to document illegal, unsanitary and inhumane conditions. In *ALDF v. Wasden*,¹⁵ the Court struck down the provisions of an Idaho statute prohibiting making misrepresentations to access an agricultural production facility and unauthorised audio or video recording of the facility's operations on the ground that both provisions were content-based restrictions of protected speech that were broader than necessary to protect the property owner's interests.

In private tort actions, the legitimate newsgathering purpose of secret recording often outweighs the plaintiff's asserted privacy interests. In *Medical Laboratory Management Consultants v. American Broadcasting Companies*, for example, the appellate court held that the secret taping of a conversation concerning the business operations of a medical laboratory did not implicate a reasonable expectation of privacy because the information was 'at most, company confidential' and did not involve 'private and personal affairs' of the lab owner. Any 'offensiveness of the alleged intrusion' was 'mitigated by the public interest in the news gathered'.¹⁶ There are limits to this principle, however. Journalists have no 'license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast'.¹⁷

iii Freedom of access to government information

Access to federal government information is governed by the Freedom of Information Act,¹⁸ which, inter alia, directs federal agencies to make records promptly available to any person upon request. The statute exempts from disclosure nine categories of documents, including classified information, trade secrets, privileged inter-agency or intra-agency memoranda or letters, and law enforcement records or information if disclosure could reasonably

12 *Cohen v. Cowles Media Co*, 501 US 663, 670 (1991).

13 id. at 669 (internal quotation marks omitted).

14 *Bartnicki v. Vopper*, 532 US 514, 535 (2001).

15 878 F3d 1184 (Ninth Circuit 2018).

16 306 F3d 806, 814, 819 (Ninth Circuit 2002); see also *Shulman v. Grp W Prods, Inc*, 955 P2d 469, 493 (Cal 1998) ('Information-collecting techniques that may be highly offensive when done . . . for purposes of harassment, blackmail, or prurient curiosity . . . may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.').

17 *Shulman*, 955 P2d at 471.

18 5 USC, Section 552.

be expected to interfere with ongoing enforcement proceedings. States have their own freedom of information laws and processes for obtaining information about the workings of state government.¹⁹

iv Protection of sources

Journalists do not have a First Amendment or common-law right to refuse to comply with a grand jury subpoena,²⁰ even if doing so requires the disclosure of confidential sources.²¹ Courts relying on *Branzburg* have affirmed contempt orders against prominent journalists who refused to reveal their sources in criminal leak prosecutions.²²

Outside the grand jury context, the circuit courts vary in the extent to which they recognise a reporter's privilege. The Second Circuit Court of Appeals, for example, has recognised a qualified privilege for both confidential and non-confidential information,²³ and in both civil and criminal cases,²⁴ but the Fourth Circuit strikes a different balance between newsgathering and law enforcement. It recognises a qualified privilege only in civil cases.²⁵

While there is no federal shield law providing statutory protection to confidential sources, most states have enacted shield laws. The New York Civil Rights Law, Section 79-h, for instance, provides absolute protection for confidential sources and qualified protection for non-confidential sources.

v Private action against publication

Publication-based causes of action available to private persons include defamation, invasion of privacy, and intentional infliction of emotional distress. And companies can sue media entities for defamation, trade libel, breach of a duty of confidentiality, disclosure of trade secrets and tortious interference. These torts, when based on claimed falsehoods, are limited by the First Amendment to the US Constitution, which, as judicially interpreted, imposes the requirement that public official or public figure plaintiffs prove that the statement was made with 'actual malice' (i.e., with knowledge of its falsity or reckless disregard for its truth).²⁶ In private figure cases, states are free to require a lesser showing of fault 'so long as they do not impose liability without fault'.²⁷ To be actionable, a statement must be susceptible to being proved true or false,²⁸ and when the statement is of public concern, the plaintiff bears the burden of proving falsity.²⁹

19 See, e.g., NY Public Officers' Law, Sections 84–90 (New York's Freedom of Information Law).

20 The purpose of a grand jury is to determine whether there is probable cause to believe that a felony has been committed and criminal charges are warranted.

21 *Branzburg v. Hayes*, 408 US 665 (1972).

22 See *United States v. Sterling*, 724 F3d 482 (Fourth Circuit 2013); *In re Grand Jury Subpoena, Judith Miller*, 397 F3d 964 (DC Circuit 2005). Efforts to pass a federal shield law overturning these decisions have failed.

23 See *Gonzales v. Nat'l Broad Co.*, 194 F3d 29 (Second Circuit 1999).

24 See *United States v. Burke*, 700 F2d 70 (Second Circuit 1983).

25 See *Sterling*, 724 F3d 482; *LaRouche v. Nat'l Broad Co.*, 780 F2d 1134 (Fourth Circuit 1986).

26 *New York Times Co v. Sullivan*, 376 US 254 (1964) (libel); see *Time, Inc v. Hill*, 385 US 374 (1967) (false light); *Hustler Magazine, Inc v. Falwell*, 485 US 46 (1988) (intentional infliction of emotional distress).

27 *Gertz v. Robert Welch, Inc.*, 418 US 323, 347 (1974).

28 *Milkovich v. Lorain Journal Co.*, 497 US 1, 20–21 (1990).

29 *Philadelphia Newspapers v. Hepps*, 475 US 767, 776 (1986).

The US Supreme Court has declined to limit the foregoing First Amendment protections to the traditional, institutional media (the boundaries of which have, in any event, become blurred with the advent of the internet). They apply equally to individual speakers, including to bloggers.³⁰

The relief available in defamation actions is generally limited to compensatory damages. The US Supreme Court has never addressed the issue, but most courts ‘adhere to the traditional rule that defamation alone will not justify an injunction against future speech’.³¹

vi Government action against publication

US courts are generally sceptical of government actions to punish the media based on the content of their publications. For example, when the White House has revoked the press passes of journalists based on allegedly disruptive behaviour, federal courts have enjoined those actions on due process grounds.³² In 2019, multiple courts held that the First Amendment was violated when individuals were blocked from accessing official government social media accounts, such as President Trump’s Twitter feed, in a viewpoint discriminatory manner.³³

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Copyright in the United States is governed by the Copyright Act of 1976.³⁴ The Copyright Act, as amended, sets out eight non-exclusive categories of works of authorship that fall within its ambit:

- a* literary works;
- b* musical works;
- c* dramatic works;
- d* pantomimes and choreographic works;
- e* pictorial, graphic and sculptural works;
- f* motion pictures and other audiovisual works;
- g* sounds recordings; and
- h* architectural works.³⁵

An author gains as many as six exclusive rights in a given work immediately upon its creation: the rights of:

- a* reproduction;
- b* distribution;
- c* public performance;
- d* public display;

30 *Obsidian Fin Grp, LLC v. Cox*, 740 F3d 1284 (Ninth Circuit 2014).

31 *Kinney v. Barnes*, 443 SW3d 87 (2014).

32 See, e.g., *Karem v. Trump*, Civ Action No. 19-2514, 2019 WL 4169824 (DDC 3 Sept 2019) (granting preliminary injunction); see also Erik Wemple, ‘Trump-appointed judge: Get CNN’s Acosta back in White House’, *Washington Post*, 16 Nov 2018.

33 See *Knight First Amendment Inst v. Trump*, 928 F3d 226 (Second Circuit 2019); *Davison v. Randall*, 912 F3d 666 (Fourth Circuit 2019); *Robinson v. Hunt Cty*, 921 F3d 440 (Fifth Circuit 2019).

34 17 USC, Section 101 et seq.

35 17 USC, Section 102.

- e* creation of derivative works; and
- f* digital transmission.³⁶

Although the exclusive rights attach immediately, the US Supreme Court recently clarified that a claimant can only commence a copyright lawsuit after the Copyright Office issues a registration for the copyright (a generally ministerial, but not immediate, process); it does not suffice that an application for registration is pending.³⁷ The federal courts have exclusive jurisdiction over copyright lawsuits,³⁸ and lawsuits brought in state court that sound in copyright should be dismissed or removed to federal court.

There are three particularly noteworthy areas of copyright disputes in recent years:

- a* cases implicating the need to harmonise the statutory text of the Copyright Act with rapid technological advancements not contemplated at the time the Act was drafted;
- b* cases implicating the fair use doctrine, which provides an affirmative defence to copyright infringement; and
- c* cases exemplifying a troubling trend toward over-enforcement of copyrights in musical works.

Statutory interpretation in the face of new technologies

A dominant focus in relation to the development of US copyright law in recent years has been the harmonisation of the text of the Copyright Act (as well as judicially evolved doctrines, such as fair use) with rapid technological advancements. It is no exaggeration to say that predicting outcomes in copyright litigation that implicates digital commerce has become quite challenging.

Two recent cases illustrate the complexity of applying a generally pre-internet age copyright statute to current commercial settings. *Capitol Records, LLC v. ReDigi, Inc* addressed whether the first sale doctrine embodied in Section 109 of the Copyright Act,³⁹ which allows the lawful owner of a copyrighted work to sell or otherwise dispose of possession of it without obligation to the copyright owner, protected transactions enabled by an internet service that allowed users to sell legally acquired digital musical files to other subscribers; in the process, relinquishing possession of the seller's own digital music file.⁴⁰ Distinguishing this practice from that of disposition of a tangible, physical CD, the district court answered in the negative, citing the technologically correct fact that digital file transfers implicated not merely potentially qualifying distributions of the files, but also reproductions of copies for which the possessors did not have the copyright owner's permission. The court acknowledged the controversial nature of the issue (and to some, the anomaly of distinguishing the transfer of a physical versus a digital copy of a sound recording where presumably solely one copy remains following the digital transfer), but ruled that it was bound to follow the text of the law. The anomalous result was, the court concluded, a matter for Congress, not the courts, to correct. The decision was affirmed on appeal.⁴¹

³⁶ 17 USC, Section 106.

³⁷ *Fourth Estate Public Benefit Corp v. Wall-Street.com, LLC*, 139 S Ct 881 (2019).

³⁸ 28 USC, Section 1338.

³⁹ 17 USC, Section 109.

⁴⁰ See 934 F Supp 2d 640 (SDNY 2013).

⁴¹ See 910 F3d 649 (Second Circuit 2018).

Goldman v. Breitbart News Network, LLC involved a test of the application of the public display right to ‘embedded’, or in-line linked, images.⁴² The case considered the liability of news organisations for embedding onto their websites a copyrighted photo of US football star Tom Brady that had gone viral. The embedding did not involve any downloading, copying or storage of the photo on the part of the defendants, but instead the defendants coded their websites to direct a user’s browser to Twitter, where the content was hosted, to retrieve the image. The general view of the law up until this decision had been that the entity engaging in a public display is that hosting the content – in this instance, Twitter. The *Goldman* court disagreed, finding that the defendants’ embedding of the photo did constitute a public display within the meaning of the Copyright Act, insofar as they had taken active steps to put in place a process that allowed the image to be shown. In what might be seen as a philosophical departure from the strict adherence to statutory text reflected in *ReDigi*, the court here noted that ‘mere technical distinctions invisible to the user should not be the lynchpin on which copyright lies’.⁴³ Following the court’s decision, most of the media defendants settled prior to trial, and the plaintiff voluntarily dismissed the case as to the remaining two defendants.

Fair use

The function of US copyright law, as grounded in the US Constitution, is to ‘promote the progress of science and useful arts’.⁴⁴ Accomplishing this objective entails striking the proper balance between providing incentives to the creation of works of authorship while not unduly hampering uses of copyrighted materials considered beneficial to society, which thrives on accessing and building upon the storehouse of knowledge and information. The fair use doctrine, codified in Section 107 of the Copyright Act,⁴⁵ serves this balancing function. Acting as copyright’s ‘equitable rule of reason’, the doctrine is applied by the courts on a case-by-case basis, and principally entails an assessment of the four factors identified in Section 107.⁴⁶ Application of the fair use doctrine to particular fact settings has always been challenging and somewhat unpredictable. The advent of the digital age has exponentially complicated the task, as the following examples demonstrate.

In the *Google Books* litigation, authors and publishers challenged Google’s bold initiative of digitally copying without permission of the rights holders the full texts of tens of millions of books for the purpose of enhancing a publicly available search engine that enables an internet user to identify books containing the searched-for terms.⁴⁷ Google provides the user with snippets of actual text from the books containing these terms. Even though Google could have sought, and generally would have been granted, a licence to reproduce and display text from these works in that manner, the reviewing courts found Google’s practice to be a non-infringing fair use. Google’s search function was held to be ‘a transformative use, which augments public knowledge by making available information about Plaintiffs’ books without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the original works or derivatives of them’.⁴⁸

⁴² See 302 F Supp 3d 585 (SDNY 2018).

⁴³ *Goldman*, 302 F Supp at 595.

⁴⁴ US Constitution, Article I, Section 8, Clause 8.

⁴⁵ 17 USC, Section 107.

⁴⁶ *Sony Corp v. Universal Studios, Inc*, 464 US 417, 448 (1984) (quotation omitted).

⁴⁷ See *Authors Guild, Inc v. Google, Inc*, 804 F3d 202 (Second Circuit 2015) (*Google Books*).

⁴⁸ *id.* at 206; see also *Authors Guild, Inc v. HathiTrust*, 755 F3d 87 (Second Circuit 2014).

Fox News Network LLC v. TVEyes, Inc involved application of the fair use doctrine to the activities of an internet media company that, without the copyright holders' consent, recorded the content of numerous broadcast and cable radio and television channels into a database that subscribers could access to view, archive, download and share with others, clips up to 10 minutes in length.⁴⁹ While TVEyes' search functionality was held by the courts to be a fair use, the appellate court found that those aspects of the service enabling subscribers to watch, archive, download and email to others, portions of the videos recorded, exceeded fair use limits. The court found these offerings to be 'somewhat transformative' (i.e., to fulfil a role distinct from that served by the original content), but to be 'radically dissimilar' to the Google Books service insofar as the use of the complaining broadcast network's content was far more extensive and risked impairment of a 'plausibly exploitable market [by the copyright owner] for such access to televised content'.⁵⁰

Also worthy of mention is the decade-long – and still ongoing – litigation between academic book publishers and Georgia State University,⁵¹ which presents the issue of whether the fair use doctrine affords educational institutions protection from infringement liability when they copy in digital format, and distribute to entire classes of students, significant portions of the copyrighted works of publishers whose primary market consists of sales and the licensing of permissions to institutions of higher learning. The case has had a tortured history, featuring to date two lower court opinions generally favourable to the university, each of which has been reversed by the Eleventh Circuit Court of Appeals and remanded for further proceedings. A third decision from the lower court is awaited. The case presents an elemental test of the latitude to be afforded copying in the educational setting, and at what cost to the affected publishers and their authors. It reflects, as do the *Google Books* and *TVEyes* cases, the challenges presented to the courts in the copyright setting of assaying the powerful impact of technology – its conveniences, knowledge expanding capabilities and the like – against the potential cost that undue fair use latitude can incur in terms of creation of works of authorship.

Over-enforcement of music copyright

A recent trio of jury trials involving the copyrights of musical works has signalled a trend towards what critics argue is over-enforcement of copyrights in musical works. In three recent cases, each involving celebrity defendants – Led Zeppelin, Katy Perry and Robin Thicke – juries determined that the defendants had infringed the copyrights of other songwriters.⁵² US copyright experts generally agree that these cases appear to have been decided on the basis of superficial similarities between the works, and reflect either the jury's lack of the requisite musical knowledge to differentiate between protected, original elements of musical works and the unprotected chords and scales that are necessary building blocks to compositions, or the influence of other non-copyright factors on the outcome.

49 See 124 F Supp 3d 325 (SDNY 2015), aff'd in part, rev'd in part, 883 F3d 169 (Second Circuit 2018).

50 *TVEyes, Inc*, 883 F3d at 177–180.

51 See *Cambridge Univ Press v. Albert*, 906 F3d 1290 (Eleventh Circuit 2018) (vacating and remanding district court decision).

52 *Skidmore v. Zeppelin*, 905 F3d 1116 (Ninth Circuit) 28 September 2018; *Gray v. Perry* No. 2:15-cv-05642 (CD Cal 2019) ECF No. 470; *Williams v. Gaye*, 895 F3d 1150 (Ninth Circuit) 11 July 2018.

Williams v. Gaye, a case in which the jury determined that Robin Thicke's hit song *Blurred Lines* infringed Marvin Gaye's *Got to Give it Up*, illuminates this recent trend.⁵³ Thicke acknowledged that he was influenced by Gaye's work and had aimed to create a song with a similar sound, but the compositions have entirely different structures and their harmonies share no chords. Although an appellate court upheld the award given the highly deferential standard on appeal from a jury determination (the finding must be against the 'clear weight of the evidence') and on narrow grounds, the dissenting judge identified a lack of sufficient similarity between the two songs at issue.⁵⁴ The dissenting judge explained that although the songs share the same 'groove', a groove is just an idea and not a protectable element under US copyright law.⁵⁵

Countless artists have been influenced by the works of their peers or predecessors to make works with a similar feel without infringing by copying protectable elements. These creative endeavours should be encouraged, rather than stifled. These recent cases, however, are likely to encourage additional lawsuits by songwriters against popular artists in the hopes of achieving similar victories or securing lucrative settlements from defendants seeking to avoid the uncertainty of a jury trial.

ii Personality rights

In the United States, the right of publicity protects against the misappropriation of an individual's name, image, likeness, voice or some other indicia of identity for a commercial purpose without permission. There is no federal statute governing the right of publicity, but over half of the states have recognised such a right. State laws sometimes contain express 'newsworthiness' exceptions, but even in the absence of such provisions, courts must consider whether the defendant's free-speech rights under the US Constitution's First Amendment outweigh the plaintiff's right of publicity.⁵⁶ State laws vary on the number of years in which publicity rights are recognised post-mortem, ranging from zero at the low end (New York) to 100 at the high end (Indiana).⁵⁷ Remedies also vary by state, but typically include injunctive relief, damages (including statutory damages) and attorneys' fees.

A recent focus of right-of-publicity litigation has involved video game characters. For example, in 2010, three retired National Football League (NFL) players filed a class-action lawsuit against Electronic Arts (EA), alleging that EA, without authorisation, used retired players' likenesses in creating 'historic teams' containing the players' positions, years in the NFL, approximate height and weight, and relative skill levels in different aspects of the game. EA asserted that its use of players' likenesses was entitled to First Amendment protection,

53 See 885 F3d 1150 (Ninth Circuit 2018).

54 See *id.* at 1183–1195.

55 See *id.* at 1185.

56 The test used varies by jurisdiction. The two most commonly used tests are the 'transformative use' test and the 'relatedness' test. The transformative use test provides that the First Amendment protects only uses of a person's likeness that 'add . . . significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation'. *Comedy III Prods, Inc v. Gary Saderup, Inc*, 25 Cal 4th 387, 391 (2001). Under the relatedness test, the use of a person's likeness is protected only if the underlying work is 'wholly unrelated' to the individual or constitutes a disguised advertisement for the sale of goods or services. *Rogers v. Grimaldi*, 875 F2d 994 (Second Circuit 1989). Other courts apply their own variations of balancing tests in determining whether a use is protected by the First Amendment.

57 Compare NY Civ Rights § 50 with IN ST 32-36-1-8 (2019).

but the district court and Ninth Circuit Court of Appeals disagreed.⁵⁸ The appellate court held that EA did not establish that its use of the likeness was permissible because '[n]either the individual players' likenesses nor the graphics and other background content [were] transformed'.⁵⁹ Video game manufacturers have defeated claims, however, where characters are not sufficiently recognisable as the plaintiff, notwithstanding some degree of similarity.⁶⁰ Most recently, a series of plaintiffs, including Alfonso Ribeiro from *The Fresh Prince of Bel-Air* television programme, rapper 2 Milly and Instagram and YouTube star Backpack Kid sued Epic Games, alleging that their rights were infringed as a result of characters in Epic's popular game, *Fortnite*, performing dances popularised by and associated with those performers. These publicity claims have not yet been adjudicated.

iii Unfair business practices

Many states have recognised the tort of 'hot news' misappropriation in media disputes, although litigated outcomes on the merits of a dispute are rare. Hot news misappropriation arises when a publisher invests significant time and resources into gathering facts and data and, after publication, another outlet 'free rides' off of the original producer's work and promptly disseminates that same information to its own customers without incurring the costs associated with gathering the information. First recognised by the US Supreme Court more than 100 years ago in *International News Service v. Associated Press*,⁶¹ the tort of hot news misappropriation has provided important protection to newspapers, wire services and other publishers of time-sensitive information. Efforts to apply the doctrine outside of the context of traditional news publishing have been less successful in recent years.⁶²

V COMPETITION AND CONSUMER RIGHTS

Competition and consumer protection in the United States are protected through a combination of overlapping state and federal laws. The three principal federal laws that protect competition are the Sherman Act, the Clayton Act and the Federal Trade Commission Act (the FTC Act). States have their own counterparts to the federal antitrust laws; those laws generally prohibit the same types of conduct but focus on conduct that occurs solely within the state's own borders. Collectively, these state and federal laws are intended to keep US markets open, free and competitive.⁶³

The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes, among others, agreements among competitors to fix prices, rig bids and allocate customers or territories. The Sherman

58 See *Davis v. Elec Arts, Inc.*, No. 10-03328 RS, 2012 WL 3860819 at *3 (ND Cal, 29 March 2012), *aff'd*, 775 F3d 1172 (Ninth Circuit 2015).

59 775 F3d at 1178.

60 See, e.g., *Hamilton v. Speight*, 2:17-cv-00169-AB, 2019 WL 4697485 at *7 (ED Pa, 26 Sept 2019); *Gravano v. Take-Two Interactive Software, Inc.*, 142 AD3d 776, 37 NYS3d 20 (NY App Div 2016), *aff'd sub nom Lohan v. Take-Two Interactive Software, Inc.*, 97 NE3d 389 (2018), and *aff'd*, 97 NE3d 396 (2018).

61 248 US 215 (1918).

62 See, e.g., *Barclays Capital, Inc v. Theflyonthewall.com*, 650 F3d 876 (Second Circuit 2011) (reversing district court); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F3d 841 (Second Circuit 1997).

63 There is an overlapping network for antitrust enforcement that includes: the Antitrust Division of the US Department of Justice; the FTC; state attorneys general; and aggrieved parties that have been harmed by antitrust violations, as some antitrust laws provide for private rights of action to recover damages.

Act also makes it a crime to monopolise any part of interstate commerce. The Clayton Act prohibits mergers and acquisitions that may substantially lessen competition, and the federal government has the ability to challenge those mergers that it believes are likely to result in higher prices for consumers or present other harms to consumer welfare. The Clayton Act also prohibits certain forms of price discrimination. The FTC Act prohibits unfair methods of competition in interstate commerce and authorises the FTC to police violations of the Act.

There are also a variety of state and federal laws that protect consumers against other unfair trade practices. Section 5(a) of the FTC Act declares that ‘unfair or deceptive acts or practices in or affecting commerce’ are unlawful and, in addition to its general enforcement authority under Section 5, the FTC also has enforcement authority under a variety of specific consumer protection statutes that cover diverse topics, such as unsolicited telephone marketing, children’s online privacy, and credit and lending practices. As with the federal antitrust laws, the FTC Act has state law counterparts that prohibit unfair and deceptive acts and practices and are enforced by state attorneys general. There are also some privacy laws that provide for private rights of action, and some industry self-regulation efforts, that are part of the regulatory framework as well.

The federal government has been particularly active in recent years in re-evaluating the proper role for federal oversight to ensure fair competition affecting the media and entertainment industries. First, the FTC convened a wide-ranging series of public hearings in 2018 and 2019 to consider competition and consumer protection law in the 21st century.⁶⁴ The multi-part, multi-day hearings addressed whether broad-based changes in the economy, evolving business practices, new technologies or international developments require adjustments to competition and consumer protection enforcement law, enforcement priorities and policy.⁶⁵ While the hearings were by no means limited to issues affecting media and entertainment companies, their focus on the economic changes in the era of big tech and big data are of significant consequence to those industries, given the impact of companies such as Amazon, Apple, Facebook and Google on how media and entertainment products are distributed and consumed. In the wake of those hearings, in June 2019, the US Department of Justice announced new antitrust investigations of Apple and Google, and the FTC announced new inquiries into Facebook and Amazon. Those entities have drawn recent scrutiny from state attorneys general as well.

Another significant development from the past year is the US Department of Justice’s commencement of a review of the antitrust consent decrees that govern the practices of ASCAP and BMI, the two largest music performance rights organisations in the United States.⁶⁶ This review is just the most recent in a series of periodic reviews of these decrees over the past 75 years, but any change in that regulatory framework could have significant effects on the marketplace, given the historic and ongoing dominance of those two organisations over music licensing in the US.

A third development worthy of note is the unsuccessful effort of the US Department of Justice to block the merger of AT&T and Time Warner. The federal government had expressed concern that the merger would place too much power over video programming and video distribution in the hands of too few individuals and lead to higher prices and

⁶⁴ See www.ftc.gov/policy/hearings-competition-consumer-protection.

⁶⁵ See *id.*

⁶⁶ See www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

less innovation. The Department of Justice sued to block the merger under the Clayton Act, but the district court refused to enjoin the transaction and the appellate court affirmed the denial.⁶⁷

VI CONTRACTUAL DISPUTES

Contractual disputes in the media and entertainment industry are common in the United States, and frequently litigated issues include underpayment of royalties, breaches of exclusivity, carriage disputes, and other aspects of supplier–distributor relationships. Breaches of contract are governed by state law and frequently litigated in state courts, but they may be litigated in federal court if there is some independent basis for federal jurisdiction over the dispute. Of course, contracting parties frequently include arbitration provisions in their agreements, so media and entertainment disputes are often resolved in private forums.

One area of recent litigation has involved the intersection of copyright law and contract law in cases arising out of claims that a defendant's exploitation of a copyrighted work that goes beyond the scope of a licence from the plaintiff. Because copyright law provides for statutory damages and discretionary awards of attorneys' fees, plaintiffs often try to frame licence disputes as copyright claims, rather than contract claims. If the defendant has merely failed to pay royalties owed under a licence or breached some other contractual covenant, the case sounds in contract law and the plaintiff is remitted to contract remedies.⁶⁸ If the defendant has breached a condition to the licence, however, the plaintiff may seek copyright remedies.⁶⁹

A recent case, *Spinelli v. National Football League*, highlights the interplay between breach of contract claims and copyright infringement claims.⁷⁰ In *Spinelli*, a group of sports photographers sued the NFL, the news agency that licensed photographs of NFL games and other events (the Associated Press (AP)) and an online store that sold NFL photographs, for copyright infringement and breach of contract, among other claims. The plaintiff photographers alleged that AP had exceeded the bounds of its contracts with the photographers by granting a complimentary licence to the NFL that purported to grant the rights to exploit thousands of plaintiffs' photographs without paying royalties for that use. Based on its reading of the complaint and the contract terms at issue, the district court granted the defendants' motion to dismiss for failure to state a claim.⁷¹ The appellate court, however, reversed. The appellate court first found the plaintiffs' theory of contract liability plausible and the lower court's dismissal of the contract claims premature.⁷² Turning to the copyright claims, the appellate court noted that '[i]t is a separate question, however, whether the AP simply violated a contractual promise to pay royalties (a claim for breach of contract) or whether its complimentary license to the NFL exceeded the scope of its sublicensing authority (a claim for copyright infringement)'.⁷³ 'If the former,' the court reasoned, 'AP would be liable for breach of contract, but the NFL's license would be valid, and the NFL would not be liable for copyright infringement. If the latter, the complimentary license itself

67 See *United States v. AT&T, Inc.*, 310 F Supp 3d 161 (DDC 2019), aff'd, 916 F3d 1029 (DC Circuit 2019).

68 See, e.g., *Graham v. James*, 144 F3d 229, 236 (Second Circuit 1998).

69 id. at 237.

70 See 903 F3d 185 (Second Circuit 2018).

71 See *Spinelli v. Nat'l Football League*, 13-cv-7398 (RWS), 2017 WL 9618754 (SDNY, 23 Dec 2016).

72 See 144 F3d at 200–202.

73 id. at 202.

would be invalid, and plaintiffs would have a claim for copyright infringement against AP for impermissibly distributing plaintiffs' photographs and against the NFL for its various displays and reproductions of the photographs.⁷⁴ The appellate court found that plaintiffs had adequately pleaded the latter, restored their infringement claims as well, and remanded the case to the district court for further proceedings.⁷⁵ The potential economic significance of that determination cannot be overstated. The potential contract damages are limited by the applicable royalty rates that AP and the photographers had negotiated, whereas the availability of statutory damages for copyright infringement under US copyright law enabled the plaintiffs to seek up to US\$150,000 per photograph infringed. Following remand, the case settled.

VII YEAR IN REVIEW

The year 2019 has seen intense scrutiny over the interplay between government actors and the media and entertainment industries. The most consequential of these developments have been:

- a* judicial reaffirmation of the robust protections traditionally available in the United States for free speech and a free press;
- b* government investigations into the business practices of certain of the largest technology companies, and hearings on whether existing antitrust and consumer protection laws are adequate to regulate their conduct and impact on the US economy; and
- c* government review of legacy antitrust consent decrees affecting the entertainment industry to determine whether those decrees stifle innovation and, therefore, no longer serve the public interest.

VIII OUTLOOK

For the coming year, we expect to see continued focus on the effects of the increasingly interconnected, digital economy on the media and entertainment industries, and additional consideration of whether legal reforms are needed for those industries to continue to flourish. The long-term trend towards digital distribution of entertainment products will continue, and we anticipate that the significant litigation activity involving both intellectual property and contractual disputes arising out of this trend will continue as well. Music rights and music rates will also be at the forefront in 2020. The recent decisions finding popular songs infringing of older works will likely inspire additional lawsuits, and there are several significant rate-setting disputes with industry-wide impacts headed for trial next year, including a proceeding before the US Copyright Royalty Board to set the royalties paid by internet radio webcasters to the recorded music industry for the right to stream sound recordings, a proceeding in federal court in New York to set the rates paid by the traditional broadcast radio industry to BMI for the right to publicly perform the 10 million-plus copyrighted musical works in BMI's repertory, and another proceeding in federal court in New York involving the nation's leading concert promoters and BMI over the royalties applicable to live music events.

⁷⁴ *id.*

⁷⁵ *id.* at 203–204.

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Kirill is head of the technology, media and telecommunications (TMT) sector group in Belarus, and leads most of the IT-related projects, coordinating the TMT team. Kirill's key areas of expertise include commercial contracts and regulatory matters. He is highly experienced in advising major international clients of the TMT sector in their distinctive projects involving Belarus on complex matters, such as the special regime for residents of Hi-Tech Park (a special economic zone to encourage IT development), including IT-related tax matters, new crypto regulations and blockchain projects, IP matters in IT, legal due diligence for IT companies and dispute resolution in IT, in which he has unique experience. Kirill has advised well-known international clients, including a broadcasting company regarding the international broadcasting of TV channels and a global social network platform regarding potential restriction of access to the parts of the platform in Belarus, and he has represented a major company in the sports sector in a high-profile domain name infringement case.

Kirill is also one of the shortlisted specialists in the country for data protection and privacy matters on both a national level and from an EU perspective. He has a deep understanding of the General Data Protection Regulation. He also represents clients in their relations with higher state authorities in significant projects in the telecoms sector in Belarus.

Kirill is frequently invited as a speaker to IT-related events for lawyers and IT businesses, and writes on the topic of IT law. Due to his reputation as TMT sector group leader and being a key expert in the IT sphere, he has been recognised as one of the 'Next generation lawyers for commercial, corporate and M&A' by *The Legal 500*, along with nominations for arbitration, trade and customs by *Who's Who Legal*.

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She has been recognised by the Legal Community *IP & TMT Report 2018* as having a 'great knowledge of audiovisual laws' and 'excellent technical and legal skills'.

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Ms Madara Meļnika, a Sorainen corporate and regulatory team associate, obtained bachelor's and master's degrees from the University of Latvia Faculty of Law.

During her bachelor's degree studies, on the Erasmus+ mobility programme, Madara spent a semester at the University of Salzburg, and during her master's studies, she used a scholarship from Kurt Hagen to research and study German law for six months at the Free University of Berlin. In addition, Madara represented the University of Latvia in the Price Media Law Moot Court Competition where her team won the regional rounds of North Europe. She has also participated as a co-author in a legal research group on the protection of journalists' sources organised by ELSA International and the Council of Europe, and has been a member of the Index on Censorship's youth advisory board. In 2019, Madara, as the only representative from Latvia, was awarded a place in the International Scholarship Programme of German Parliament, where she took part in a five-month internship, working as the deputy responsible for culture and media issues.

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Mark Peters is a counsel on IT and IP law in the Munich office of Grünecker. Mark has been advising clients, including publishers, social networks and other internet service providers

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Mark is a certified IT and IP attorney. He obtained an LLM on information technology law from the Carl von Ossietzky University of Oldenburg. He regularly holds seminars, with current ones on the new European Trade Secrets Directive and the German Implementation Act for a German legal publisher.

R BRUCE RICH

Weil, Gotshal & Manges LLP

R Bruce Rich, a senior partner and former head of Weil's intellectual property/media practice, is nationally recognised for intellectual property law, concentrating on the problems faced by entertainment, communications and internet industry clients. His areas of concentration include litigating and counselling in the fields of copyright, music licensing, the First Amendment, trademarks and antitrust.

He has built a marquee practice representing book publishers, news organisations, radio and television broadcasters, and internet content hosting platforms, among others, in landmark cases that have established the contours of the law in the media and entertainment sectors – particularly in the music licensing area.

Mr Rich has frequently taught, lectured and written in his field, and in 2018, he was honoured as the first private practitioner to deliver the prestigious Horace Manges Copyright Lecture at Columbia Law School.

Mr Rich is a *magna cum laude* graduate of Dartmouth College, and received his law degree, *cum laude*, from the University of Pennsylvania Law School.

FIONA ROBERTSON

Al Tamimi & Co

With over 25 years' experience, Fiona is recognised for her unmatched knowledge of media and entertainment law in the Middle East, as well as her understanding of the complexities of commercial practice in the extended media sector. She has a comprehensive understanding of content regulatory issues in the region.

Fiona has worked in the UAE for over a decade, providing solution-focused advice to the region's key broadcasters, local and international producers, content platforms, music platforms and entities working at all levels of the media industry. Before coming to the UAE, she worked in-house as counsel for Australia's largest national broadcaster for 10 years, and was counsel for two of the largest independent producers for six years before that.

She works for global and local brands in relation to clearances for advertising and content. Her understanding of the region's content industry has led to public speaking engagements on the subject, including multiple engagements in the United States and Europe. She regularly appears on radio, and has featured in numerous press articles.

Fiona also works on innovation projects – in particular for government entities – and is developing an interest in blockchain and its implication for rights holders.

DIRK SPACEK

CMS von Erlach Poncet Ltd

Dirk Spacek is the partner in charge of the technology, media and communications (TMC) and IP practice groups. He primarily deals with new business models arising in the media, internet and technology sectors, data protection and intellectual property law. He mainly advises clients from the media, technology, industrial and financial services sectors on technology-related legal matters; in particular, IT contract law, outsourcing, data protection, the internet of things, patent research cooperations and traditional intellectual property law. Dirk specialised early with a dissertation in intellectual property law titled 'Protection of TV Formats' and was admitted to the Swiss Bar in 2009. He then gained many years of experience in large, prestigious law firms and as an in-house lawyer during multiple in-house secondments. Dirk regularly publishes on current issues in the TMC and IP field. He is co-chair of the Interactive Media and Entertainment Law Committee of the International Technology Law Association where he is regularly present on an international level. Owing to his earlier experience as a musician in various music groups, he is also familiar with contracts from the entertainment industry and occasionally works on a pro bono basis.

ANDRIS TAURIŅŠ

Sorainen

Mr Andris Tauriņš is head of the Sorainen Latvia technology, media and telecommunications sector group and co-head of the dispute resolution team. His main specialisation is dispute resolution in court and by way of arbitration, intellectual property, information technology and pharmacy law, as well as e-commerce issues. He lectures on topics involving intellectual property rights and has been a lecturer on intellectual property rights at Riga Business School, as well as on copyright matters at Latvian Culture College.

In addition, Andris is a licensed professional patent attorney specialising in trademarks. This qualifies him to represent international clients before the Latvian Patent Authority in trademark-related matters, including international trademark registration applications.

Senior associate Andris Tauriņš appears in *Chambers Europe* rankings as a result of positive market feedback and increased visibility. According to clients, he is dedicated and highly responsive. Andris is also a recommended practitioner by *Best Lawyers in Latvia* for IT law.

YAGO VÁZQUEZ MORAGA

Pintó Ruiz & Del Valle

Yago Vázquez Moraga has been a partner at Pintó Ruiz & Del Valle since 2014. He is the leading partner of the telecommunications, media and technology (TMT) department and one of the firm's leading lawyers in the litigation and arbitration practice. He holds a master's degree in advanced studies in law (DEA) from the University of Barcelona. Yago is focused on advising national and international clients in matters connected with TMT (broadcasting rights, competition, advertising, regulatory issues, e-commerce, licensing, privacy and data protection), and litigation related to these matters. He is a lecturing professor on several master's degrees, including the master's degree in sports law and management at the Higher Institute of Law and Economics, where he teaches sports broadcasting rights.

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