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The Spanish Media Market: A Brief Overview

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The media sector in Spain started recovering in 2015 and, thanks to a more favorable economic environment, is growing again. This new and positive tendency has been boosted by the technological progress of the last years, such as broadband, increase of the mobile phone internet penetration and the emerging expansion of LTE and NGA.



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The information provided by the Spanish National Commission for Markets and Competition ("CNMC") on the audio-visual sector in its last annual report (2015) predicts an upward trend in the market for the upcoming years.

A relevant increase in the turnover of the audio-visual sector took place in 2015. In particular, incomes of television and radio broadcasting companies increased by 4,8 per cent. This is linked with the correlative growth of advertising investment, which also increased by 8 per cent during 2015. The promising fact that the number of pay television subscribers has exceed 5 million for the first time is also to be highlighted in this respect.

The market has also seen how the concentration process of corporations is now coming to an end. In this regard, after the mergers and acquisitions of 2014, in 2015 the CNMC approved the takeover of Canal+ by Movistar and the acquisition of Jazztel by Orange, both were subjected to the fulfillment of several conditions imposed the Spanish Regulatory Authorities.

In this context, probably the most concerning uncertainty for the sector, which can bring some troublesome instability, is the current situation of the DTT (Digital Terrestrial Television) channels in Spain. After nine DTT channels were shut down in 2014 as a result of a judgement from the Spanish Supreme Court from 2012, the Spanish government awarded six new DTT channels on 16 October 2015 to several broadcasting companies. However, this decision has been challenged before the courts. Therefore it is still not clear what the definitive DTT landscape will be in Spain.

This being said, the current state of play of the market in our country from a legal perspective will be summarised in the subsequent sections.

1. Legal Developments

2.1. Intellectual Property Act's reform

An important modification of the Spanish Intellectual Property Act entered into force on 01 January 2015, by means of Act 21/2014, of 04 November.

The main topics that became affected by the reform refer to private copies, the aggregation right and its relevant compensation - the so called "Google Tax" or "AEDE fee"-, collective management entities and the limit of illustration with education or scientific investigation purposes.

It shall also be highlighted that by means of the reform, some EU directives have been implemented within Spanish Law, such as Directive 2012/28/EU (with regards to orphan works) and Directive 2011/77/EU modifying the Directive 2006/116/EU (concerning the term of protection of copyright and certain related rights).

The changes and amendments brought by the referred Act 21/2014 are apparently the first step of a very relevant reform that shall take place in this area, or at least this is what arises out of its Final Provision 4, which refers to an "integral reform" of the IP Act that adjusts to the needs and opportunities of the knowledge society. Issues such as the collective management of rights, the system of compensation of private copies and the faculties and nature of the supervisor are to be examined in the frame of this major projected reform. This may explain why the reform remained silent on some recent and significant issues, such as the treatment of website links and the doctrine arising out of the ECJ decisions in the cases Svensson (C-466/12, Judgement of 13 February 2014) and Bestwater (C-348/13 Judgement of 21 October 2014) on acts of communication to the public.

2.2. New regulation on the selling model of the football broadcasting rights

The exploitation of the broadcasting rights of sporting events in Spain has been very controversial, constantly suffering huge disputes between the different actors at stake. This has particularly been a constant feature in football, where continuous "Wars of Football" have taken place (i.e. conflicts and disputes between the stakeholders for the exploitation of the football broadcasting rights).

From the last 15 years a large debate about the selling model of those rights has been held (i.e. proposing to pass from a model based on the individual sale of the rights to a joint sale model), concluding that the market demanded a specific regulation in this matter. There is a consensus among most of the stakeholders that the implementation of a joint selling system (i) would avoid these cyclical disputes among the rights' holders, (ii) would increase the value of the broadcasting rights and (iii) would improve the economic resources of all the participants of the competition, narrowing the gap between the "rich" and the "poor" clubs.

In this context, just when the expiration of the last cycle of broadcasting agreements was about to take place, the government passed the Royal Decree-Law 5/2015, of 30 April, on urgent measures in connection with the commercialisation of broadcasting rights of professional football competitions. Pursuant to these new regulations the participating clubs, which are the individual holders of the broadcasting rights, are obliged to assign their collective trading faculties to the organisers of the professional football competitions (i.e. the Spanish League and the Spanish Federation), which will be in charge of selling the competition rights as a whole. In addition, the regulations establish a new system for the allocation of the revenues obtained from this joint commercialisation, introducing a corrective criterion aimed at limiting the economic gap between the clubs at stake.

Although it is still premature to draw a valid conclusion on the potential effectiveness of this system, there is a broad consensus about the fact that the new selling system will significantly increase the revenues coming from the sale of the football broadcasting rights, reaching in the mid-term an amount up to EUR 1,500 million per season.

2.3. The modification of the Criminal Code and its effects in cybercrime

The Spanish Criminal Code was partially modified by means of the Organic Act 1/2015, of 30 March. This reform of the Code contains, among others, significant novelties concerning cybercrime and the prosecution of certain electronic conducts. The Spanish legislator has tried to adapt the Code to the new cybernetic reality, by creating/ foreseeing in the Code new specific offences and by trying to prevent their commission by imposing severe punishments to those behaviours.

Some of the conducts considered from that reform as particular offences are (i) the erasure, damage, detriment, alteration or inaccessibility of electronic data, information or documents from third parties, (ii) the non-authorised obstruction or interruption of a third party computer system in certain circumstances, (iii) the production or non-authorised acquisition of a computer program, password or access code to commit one of the aforementioned offences, and (iv) the publication or assignment to third parties, without the authorisation of the affected party, of images or audio-visual supports taken in his/ her domicile or in another private place, when this publication gravely damages the personal privacy of such affected party (the so-called "sexting").

It should also be stressed that in most cases of these cybercrimes, the new reform of the Code has derived criminal liability to corporate persons or bodies, in line with the legislator's intention to act in a very harsh way against this kind of conducts.

2.4. Data protection news

Among all the recent decisions and policies passed by the Spanish Data Protection Agency ("AEPD"), the following topics may be highlighted:

Cookies Policy

The AEPD continually monitors compliance of companies with cookies regulation. However, the AEPD has softened some of the requirements with regard to the information that companies shall disclose in their cookies policy that, in addition, can now be merged with the privacy policy, in one sole link or section.

Implications of the Safe Harbor Judgment from the ECJ

In November 2015, the AEPD sent a letter to all concerned companies informing them that the safe harbor certifications were no longer valid. The AEPD also requested that they provide information about the mechanisms that have been implemented to ensure there is adequate protection of personal data transferred to importers in the US.

The AEPD and Google's Privacy Policy

In December 2013 the AEPD passed a decision declaring that Google's privacy policy was infringing the Spanish Data Protection regulations. In particular, Google was found to be unlawfully collecting and processing personal information of all type of users. The company was fined with EUR 900,000 and was also requested to implement the necessary measures to comply with Spanish regulations. Recently, Google amended its privacy policy implementing some of the requirements established by the AEPD.

3. Case Law

Judgement No. 235/2014 passed by the First Instance Court No. 22 of Seville (defamation via Twitter)

This judgment settled a dispute in connection with some defamatory statements published in Twitter. This case is relevant because it is the first time that a court orders the publication of the operative part of the judgment in a Twitter account, in particular, for one month in the morning or afternoon time (nine to 14 hours and 17 to 22 hours, respectively).

Judgement No. 545/2015 passed by the Spanish Supreme Court ("right to be forgotten")

On 15 October 2015, the Spanish Supreme Court passed its first judgment on the so-called "right to be forgotten", declaring that the harmful information affecting people without public interest should not be accessible in internet search engines when, over the years, the information is no longer relevant and lacks historical interest.

Judgement No. 634/2014 passed by the Spanish Supreme Court (Mediapro-AVS case)

Further to the considerations made in section 2.2. on the "Wars of football", it is worth mentioning that on 09 January 2015 the Supreme Court issued a decision that resolved the historical contractual dispute between Mediapro and Audiovisual Sport (AVS) concerning football broadcasting rights. After this very lengthy conflict which started in 2006, the decision of "third instance" finally ordered Mediapro to pay AVS the amount of EUR 32.331.350,71 plus interest in respect of the sub-licence of broadcasting rights corresponding to football season 2006/ 2007.

In summary, the aforementioned judgement declared that clause five of the agreement between the parties dated 24 July 2006 (on the basis of which AVS came to found its claim) was considered null and void as it was contrary to Competition Laws (in particular to Article 1 of the Spanish Competition Defense Act and Article 101 of the Treaty on the Functioning of the EU), and thus, the Supreme Court understood that the sole amounts to be awarded to AVS were the ones corresponding to the liquidation of the legal relationship between the parties in the season 2006/ 2007).

CNMC's decision in the conflict Mediaset-Spanish Football League (article 19.3 of Act 7/2010 on General Audiovisual Communication)

CNMC has very recently resolved the file started by Mediaset on 09 September 2015 by virtue of which this broadcaster denounced that the Spanish Football League was limiting the right of access to the stadiums for the exercise of the right to information in accordance with article 19.3 of Act 7/2010, on General Audiovisual Communication.

Pursuant to this decision (which is not definitive and is subject to the relevant recourse before the administrative ordinary courts) (i) the Spanish Football League shall guarantee the access of Mediaset to the spaces (authorised areas) in which the event takes place, (ii) the brief informative summary referred to in the aforementioned Article 19.3 of Act 7/2010 is identified with each event individually considered, (iii) the right of use on these brief informative summaries for free become time-barred 24 hours after the match takes place and (iv) within such period of 24 hours, the broadcasters shall only use the images of the

Biographies

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