

THE MEDIA AND
ENTERTAINMENT
LAW REVIEW

THIRD EDITION

Editor
Benjamin E Marks

THE LAWREVIEWS

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PREFACE

I am pleased to serve as editor and US chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

The year 2021, like 2020, has been an unusual and challenging one, as the media and entertainment industries continue to adapt to the ravaging effects of the covid-19 pandemic. While there has been some degree of recovery in many countries, with lockdowns abating and the return of live music, festivals, theatrical performances and live sporting events, attendance at in-person events remains well below the norm. Concert promoters, touring artists and theatre and venue operators remain hard hit by the ongoing effects of the pandemic, but other parts of the media and entertainment industries have fared quite well. Bolstered by the continued growth of on-demand music streaming services, music publishers and record companies are flourishing. The market for on-demand video streaming continues to evolve, with numerous high-profile product launches over the past year, and disruptions to the previously prevailing practice of an exclusive period of theatrical release preceding streaming for high-profile movies. It remains to be seen which changes to the media and entertainment industries in response to the pandemic will prove temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency and more appalling acts of violence against journalists and editors. Around the world, business, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometimes contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve not as an encyclopedic 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. Each of the contributors is a subject field expert and their efforts here are gratefully acknowledged. Each has used his or her best judgement as to the topics to highlight, recognising that space constraints required some selectivity. As will

be plain to the reader, aspects of this legal terrain, particularly those relating to the legal and regulatory treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

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 properly should continue to serve that function.

Benjamin E Marks

Weil, Gotshal & Manges LLP

New York

November 2021

SPAIN

*Yago Vázquez Moraga and Jordi López Batet*¹

I OVERVIEW

In 2021, the health crisis caused by covid-19 is still having a major impact on new technologies and the media and entertainment industry in Spain. The pandemic, which initially forced us to stay at home and thereafter restricted movement and contact, has as a result boosted connectivity in our country. As a result, the trend for increased digital communication initiated in 2020 has continued this year.

The pandemic has shown that Spain has one of the best telecommunication networks in Europe. This has also been acknowledged by the European Commission: in its Digital Economy and Society Index 2020, Spain appears as one of the top performers in the roll-out of very-high-capacity networks as well as in the take-up of ultrafast broadband connections (at least 100Mbps).

New technologies in particular have been playing a highly significant role in the health sector throughout the pandemic. In this regard, Spain has implemented several digital measures to deal with the covid-19 crisis, aimed at guaranteeing the provision of electronic communication services and connectivity. In addition, there are many situations in which technologies are being applied to fight the coronavirus and halt its spread, and the legal system has had to respond to related challenges regarding issues such as data protection and privacy. Cybersecurity is also vital when responding to attacks such as those suffered by public health systems, and artificial intelligence (AI) and the use of big data is helping to analyse and understand the behaviour of the virus and the evolution of the pandemic, as well as helping to control movements and track outbreaks using applications and GPS together with data processing and predictive modelling. Needless to say, teleworking and remote education for students have also been vital this year.

On a separate note, the interruption of sporting competitions because of the covid-19 crisis precipitated many disputes over the fulfilment of agreements related to broadcasting, advertising and sponsorship at sports events between different stakeholders in 2020 as a result of the impossibility of obtaining the economic results and performance originally expected from these agreements, and these are still ongoing. In turn, contractual disputes regarding the existence or non-existence of hardship or *force majeure*, or the necessity of amending the terms of these agreements pursuant to the *rebus sic stantibus* principle, are still currently under way Spain.

Furthermore, it should be also acknowledged that the pandemic has caused a severe crisis in the audiovisual industry, with film shoots and production having to be cancelled

¹ Yago Vázquez Moraga and Jordi López Batet are partners at Pintó Ruiz & Del Valle.

as a result of the implementation of the measures adopted by the government to tackle the health crisis. Notwithstanding this, there has been some resumption of activity in the audiovisual sector in recent months and hopefully normal levels of business will follow shortly. In addition, it is very likely that the enforced digitalisation of practically all sectors of our economy will further boost the trend for exponential growth already seen in the media and entertainment industry in Spain in recent years, therefore this upward trend is expected to continue in the coming years.

II LEGAL AND REGULATORY FRAMEWORK

The Spanish legal system does not regulate media and entertainment in a single piece of legislation, 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 more limited scope, all of which are generally governed by the Spanish Constitution and, 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 public administration). This regulatory system is consistent with the international treaties entered into by Spain, and with the relevant EU regulations.

In this context, the Constitution acknowledges, in Article 20, the fundamental rights of all citizens to freedom of expression, 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 in states of alarm, emergency and siege. Similarly, Section 5 of Article 20 stipulates that the seizure of publications, recordings and other means of information can only be executed subject to a judicial decision. However, the exercise of these rights must be coherent and respectful of other rights, such as the right to the protection of honour, privacy and one's own image, and it must respect the protection of youth and children.

In addition to the Constitution, several statutes are of particular relevance in the media and entertainment sector, *inter alia*:

- a* Royal Legislative Decree 1/1996 of 12 April 1996 approving the Intellectual Property Law (the IP Law);
- b* Law 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* Law No. 7/1998 of 13 April 1998 on general contracting conditions;
- d* General Law No. 7/2010 of 31 March 2010 on audiovisual communication (the General Audiovisual Communication Law);
- e* Law No. 9/2014 of 9 May 2014 on telecommunications;
- f* Organic Law No. 3/2018 of 5 December 2018 on the protection of personal data and guarantee of digital rights, which consolidates 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 Law for the Protection of Consumers and Users;
- h* Law No. 3/1991 of 10 January 1991 on unfair competition (the Unfair Competition Law);

- i* General Law No. 34/1988 of 11 November 1988 on advertising (the General Advertising Law);
- j* Law No. 14/1966 of 18 March 1966 on press and printing;
- k* Organic Law No. 1/1982 of 5 May 1982 on civil protection of the right to honour, personal and family intimacy, and one's own image; and
- l* Organic Law 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 and forms of freedom of expression, and the general limits for the exercise of this freedom (see Section II).

In practice, the courts have had to determine the extent of this freedom of expression and resolve conflicts between this fundamental right and other constitutional rights, which are also to be protected. The jurisprudence enacted by the Constitutional Court has defined a system to establish on a case-by-case basis the due balance or weighting of the constitutionally recognised freedom of expression against a conflicting right (usually the right to the protection of honour and privacy). As a general rule, the rights to free speech and media freedom tend to be asserted over these other constitutional rights, and even more so in those cases involving persons who hold a public position or who acquire celebrity status or are otherwise in the public eye.

Commerce- and marketing-related speech and language are 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 language is prohibited. In line with this, restrictions on the promotion of certain products (such as alcohol and tobacco) must 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 requirements of Article 510 of the Criminal Code are met. The public prosecutor's office has a specialised delegation for the prosecution of hate crimes, including hate speech. According to the most recent report published by the Spanish Public Prosecution Service, most crimes related to hate speech in 2020 were committed through the internet (45 per cent), social media (22.8 per cent) and telephone or telecommunications systems (14.3 per cent). As an example, the Spanish Supreme Court in June 2020 confirmed the position already established in recent years that hate speech in social networks does not find protection in freedom of expression. In the case initiated against Spanish rap singer Pablo Hasel, the Supreme Court dismissed an appeal against a judgment handed down by Spanish special court the National Court convicting the singer for the crimes of exaltation of terrorism, with aggravating circumstances of recidivism, insult and slander against the Crown and against institutions of the state, and use of the image of the king. The singer was accused of including in his profile on social networks comments in the form of tweets that included videos inciting violence – comments considered to glorify terrorism and humiliate the Crown and other state institutions, such as Spanish police bodies. In this case, the tweets were not considered susceptible to being interpreted as a product of critical intentionality in the political and social field: they were not about publicising criticism, but rather were merely insulting and about causing offence. In this context, the Supreme Court held that freedom of expression and opinion did not

extend to criminal acts included in Article 578 of the Criminal Code and, given the list of proven facts set out in the case at hand, it decided to maintain the ruling issued by the prior instance court.

ii Newsgathering

The right to communicate freely and to receive truthful information is recognised in Article 20 of the Constitution and, on this basis, media operators in Spain enjoy fair freedom of action in the development of their work activities in providing information, subject to the principles of plurality, transparency, free competition and freedom to provide services. This information must be of public or general interest, but at the same time structural elements of the state such as public order and national defence must be safeguarded and respected, as must other rights (such as the right to the protection of honour and privacy) to the extent appropriate. In addition, journalists must observe a certain duty of diligence regarding the ways in which information is obtained and sources verified.

An interesting case that involves the extent and limits of the right to information, and which is still pending in the courts, concerns a dispute between the Spanish football league and radio broadcasters. At the beginning of the dispute, the broadcasters claimed that they were entitled to enter football stadiums and broadcast matches using the clubs' facilities for this purpose on the basis of the right to information, whereas the league objected that:

- a* the broadcasters' right to information does not prevail over the league's right to property and freedom of entrepreneurship (also recognised in the Constitution);
- b* the exercise of the broadcasters' rights is not unlimited; and
- c* ultimately, the radio rights for football competitions could be marketed.

To resolve this dispute, the government amended the General Audiovisual Communication Law and established that radio broadcasters are entitled to enter stadiums to broadcast sport competitions live, entirely and for free except for a small amount of compensation to be paid to the sports event organisers to cover the direct costs incurred from the broadcasters' exercise of this 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 the amended Law. On 20 October 2018, the Constitutional Court admitted the question of constitutionality, but it has yet to issue its decision on the matter.

Also of relevance in this context, Article 7 of Organic Law No. 1/1982 defines 'illegitimate intrusions' in the sphere of privacy, which is to be respected in newsgathering and publishing; however, Article 7 also includes a list of cases that are generally not considered to be intrusions of this kind.

Article 18.2 of the Constitution guarantees the inviolability of a 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 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 set out in Article 197 *et seq.* of the Criminal Code.

iii Freedom of access to government information

Article 105 of the 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 the media.

Under Law No. 19/2013 of 9 December 2013 on transparency, access to public information and compliance rules on the right of access to public information, the latter right does not have any temporal limitation and can be also enforced in relation to facts and issues that took place before the entry into force of the Law. Article 14 of Law No. 19/2013 establishes that the right of access can be limited if, as a result of access, 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 interests;
- 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 access.

The exercise of this right of access and the procedure to be followed is provided for in Article 17 *et seq.* of Law No. 19/2013. According to records published in the press since the enactment of Law No. 19/2013, up to 120 court proceedings have been opened with regard to the government and public 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 enshrined within the professional secrecy provided for in Article 20 of the Constitution. In addition, journalists' codes of conduct also stipulate the protection of sources as a duty that can only be infringed in very limited cases (for instance, when it appears clear that a source has deliberately faked information or when disclosing a source is deemed to be the only way to prevent serious or imminent harm to 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 preclude further future disclosures not being made for fear of the possible consequences.

As regards these protections, in December 2018, the news agency Europa Press and the Spanish newspaper *Diario de Mallorca* filed a criminal complaint against a judge for having ordered the police to enter a newsroom to seize the mobile phones, computers and

documentation of certain journalists to determine the origin of certain information that they had published. The judge, who faced a possible 42-year disqualification, was exonerated by the Supreme Court of Justice of Balears of the crimes of prevarication, illegal interception of communications and violation of professional secrecy, among other things, despite the Supreme Court finding it proven that the judge's resolutions had made 'no reference to the right of journalists to professional secrecy'.

v Private action against publication

The Spanish legal system foresees several ways of acting against undue or illegitimate publications of either a civil or a criminal nature.

In the civil field, persons can pursue the actions set out in Organic Law No. 1/1982 to protect themselves against illegitimate infringements of their honour, privacy and own 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 Constitution or, where necessary, a writ of *amparo* before the Constitutional Court. The relief that may be sought by a claimant comprises any and all measures necessary to stop an illegitimate intrusion and to restore the claimant's full rights, as well as those measures tending to prevent or impede future intrusions. Damage will be presumed if the illegitimate intrusion is formally recognised. Precautionary measures (including the provisional seizure of a 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 the protection of his honour. However, this court order was later set aside by the High Court.

Again within the civil jurisdiction, it is possible to exercise the right to rectification in accordance with Organic Law No. 2/1984. A person is entitled to rectification of media disclosure of facts that he or she considers inexact and that may cause him or her damage. This right is to be exercised in writing and addressed to 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 this written communication, the aggrieved person can start civil proceedings aimed at achieving a judicial decision ordering the publication to rectify the incorrect information.

In the area of criminal law, the Criminal Code penalises certain conduct relating to publication. The Code provides for the offences of insult and defamation and an aggrieved party can seek redress for these through the law if it considers all the elements of an offence to be present.² The offences of disclosure of secrets³ or domicile violation may also be deemed to have been committed at the newsgathering stage, if the relevant prerequisites in the Criminal Code are met. A publication may also be deemed to constitute or contribute to a hate crime.

Other actions may be taken on the basis of other legal provisions if a breach of any of these takes place in a publication (in relation to data protection, advertising, unfair competition, etc.); however, the aforementioned actions are the most commonly used.

2 Articles 205 to 216 of the Criminal Code.

3 Article 197 *et seq.* of the Criminal Code.

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 power of seizure must be exercised with utmost caution and in respect of other rights. There are not a great number of cases in recent jurisprudence in which a seizure of this kind has been granted at the request of the government. The public prosecutor's offices are entitled to request seizure of a publication through the courts, but it is for the competent judge to decide.

One of the leading cases of this kind in Spain was the publication in the satirical magazine *El Jueves* of a comic strip featuring images of the current king and queen of Spain, which the public prosecutor's office held to be defamatory. The publication's seizure was requested and finally agreed by a judge. The prosecutor's initiative and the judge's decision were not exempt from criticism, reigniting extensive debate on the coexistence of freedom of expression and the right to the protection of honour, and on the limits of satirical jokes and publications.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Royal Legislative Decree 1/1996, approving the IP Law, is the main tool in the Spanish system concerning the protection of copyright. This Law has been successively modified, with Law No. 2/2019 of 1 March 2019 being the most recent important amendment. This modification transposed the EU Collective Rights Management Directive⁴ and the EU directive on copyright exceptions for disability⁵ into the Spanish legal system.

The Law deals with, inter alia:

- a* the nature, content and limits of authors' personal and wealth-related rights;
- b* the kinds of works worthy of protection;
- c* 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 (e.g., management agreements);
- h* audiovisual works, software and data file protection;
- i* rights of producers and radio broadcasters;
- j* photographic rights;
- k* the collective management of rights;

4 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

5 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.

- l* the IP register; and
- m* actions for protecting IP rights.

Apart from the civil actions specifically provided for in Article 138 *et seq.* of the IP Law, in some cases, the infringement of IP rights is considered a criminal offence under Spanish law.⁶

ii Personality rights

The General Advertising Law aims to guide advertising practices to prevent infringements of the dignity of individuals and the values and rights recognised in the Constitution, and to protect certain groups whose inexperience or credulity (e.g., minors) makes them potentially vulnerable to exploitation or abuse. Conduct such as subliminal, deceptive, unfair and aggressive advertising is prohibited and specific actions to seek protection in the event of infringement also exist (by reference to those established by the Unfair Competition Law). Rules on advertising-related agreements are also provided in the General Advertising Law.

The provisions of the General Advertising Law apply without prejudice to those of the Unfair Competition Law, which will apply supplementarily.

Other specific provisions apply regarding advertising rules on specific sectors and areas of activity, such as tobacco and alcohol. In addition, the codes of conduct approved by the self-regulation of publicity organisations should also be considered.

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 context, a judgment issued by the Supreme Court on 26 February 2018 annulled the Spanish Competition Authority (CNMC) resolution 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 various television (TV) programme broadcasts. The Supreme Court therefore allowed the use of these techniques, subject to some conditions. While the CNMC held that compliance with the principles of identification, separation and transparency enshrined in the General Audiovisual Communication Law require that advertising message broadcasts interrupt the TV programme in which they are inserted, the Court held that European regulations do not require a temporary separation between the beginning of a programme and the beginning of advertising, rather it is sufficient that difference is marked on a merely spatial, acoustic or optical basis. The Court concluded therefore that the General Audiovisual Communication Law demands that advertising messages be differentiated, not separated, from programmes through acoustic and optical mechanisms, and this judgment has implications that could result in important changes to TV publicity techniques.

Furthermore, in recent years, online and digital marketing and advertising have experienced significant growth (on all platforms and devices – internet, mobile, etc.), especially following the implementation of AI and data analytics, which allow messages to be customised for very specific target audiences.

⁶ See Article 270 *et seq.* of the Criminal Code.

iii Unfair business practices

Protection against unfair business practices is found in the Unfair Competition Law. The Law mainly aims to protect fair and honest competition within the market and provides for several types of prohibited conduct (inter alia, imitation, confusion, selling at a loss, deception, 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 the Law.

The provisions of the Unfair Competition Law apply without prejudice to:

- a the provisions of Law 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 Law if copyright issues are also involved; and
- c the provisions of the General Advertising Law.

Cases of plagiarism in works created by politicians during their time at university have recently come to public attention (including works by the Prime Minister, who is officially the President of the government, and by the President of the Senate); however, no judicial proceedings have been commenced in respect of these.

V COMPETITION AND CONSUMER RIGHTS

Competition issues are regulated in the Spanish Competition Law⁷ and its implementing regulations,⁸ as well as in the Unfair Competition Law, referred to in Section IV.iii.

With regard to consumers' rights, the main piece of legislation is Royal Legislative Decree 1/2007 approving the consolidated text of the General Law for the Protection of Consumers and Users.

In the media and entertainment area, the General Audiovisual Communication Law is also taken into account. These ordinances provide certain protections for TV and other media consumers, especially in terms of advertising messages and content, and in the prevention of abuses. The CNMC has responsibility for protecting market interests and therefore prosecutes conduct that may violate competition rules. As an example, in 2019, the CNMC imposed sanctions on Spain's two biggest audiovisual groups, Mediaset (valued at €38.9 million) and Atresmedia (€38.2 million), for violating free competition with their advertising practices. The CNMC found that the commercial policies of both companies in the sale of TV advertising infringed the competition regulations and had the effect of limiting the ability of other broadcasters to compete effectively in attracting advertising revenues. The regulatory authority stated in its resolution that, among other things, a 'television duopoly' cannot impose an obligation on advertisers to contract advertising packages on those groups' various channels. The audiovisual groups concerned have filed an appeal against these sanctions with the National Court, and this is pending resolution at the time of writing.

In addition, in this sector, deals affecting company concentrations that have taken place over the past few years have led the CNMC to check compliance with competition provisions,

7 Law No. 15/2007 of 3 July 2007 on the defence of competition.

8 Royal Decree 261/2008 of 22 February 2008.

issue relevant authorisations and sanction some of these companies concerned for breaching 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 with TV channel La Sexta, authorised in 2012. Moreover, restrictions on the sale of TV football broadcasting rights (in terms of agreement duration, packages, etc.) have also been highlighted in connection with competition issues.

VI DIGITAL CONTENT

From a regulatory point of view, without prejudice to the regulations contained in the IP Law and diverse regulations on this matter (e.g., data protection), 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 in the near future. This will bring more clarity to rulings about digital content in an environment subject to continuous evolution and change.

European Court of Justice jurisprudence will also be considered in this respect, such as the decisions in *Svensson*⁹ and *BestWater*¹⁰ 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 illicit advertising, or infringes personality or consumer rights, the relevant provisions on advertising, unfair competition and consumers would apply.

Furthermore, in accordance with applicable Spanish law¹¹ and jurisprudence, internet service providers and social media platforms may be liable for hosting, aggregating and linking to digital content when they have actual knowledge or awareness of the illegality of content, and the Supreme Court has found such liability in certain circumstances; for example, in Supreme Court judgment 128/2013 of 26 February 2013, the digital newspaper *El Economista* was convicted for having published in a news article certain comments that were offensive and infringed the personality rights of a popular singer, and for not having removed those comments despite the singer’s express request to do so. The Supreme Court judgment ordered the newspaper to remove all the offensive comments, publish the judgment on the front page of its website for 10 days and pay compensation of €10,000 to the affected person.

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 2016, the High Court of Madrid¹² partially upheld a first instance judgment accepting a claim filed by UK producer and distributor ITV Global Entertainment Limited against the Spanish TV channel Telecinco alleging that by

9 Case C-466/12, *Svensson*; decision of 13 February 2014.

10 Case C-348/13, *BestWater*; decision of 21 October 2014.

11 Law No. 34/2002 on information society services and electronic commerce, and the Criminal Code.

12 Judgment 30/2016 of 20 September 201.

broadcasting a TV show called *Pasapalabra* the Spanish broadcaster was violating ITV's exclusive rights over the TV show format and name. In its judgment, the High Court ordered Telecinco to pay ITV very substantial compensation (around €7 million) and to cease the use, broadcast, or exploitation of any kind, of the *Pasapalabra* TV format. Telecinco appealed this judgment to the Supreme Court, which, on 30 September 2019, confirmed the second instance decision.

VIII YEAR IN REVIEW

As mentioned already, the pandemic has continued to cause a severe crisis in the audiovisual industry in Spain in 2021. Despite a certain improvement in the pandemic situation compared with 2020 as a result of the vaccination campaign, mobility restrictions have continued to affect the audiovisual sector. For this reason, the government has approved public investment of more than €1,600 million over the next four years with the intention of mitigating the impact of covid-19 on the economy and providing temporary compensation for certain expenses regarding the mandatory population coverage of digital terrestrial TV services, and also with a view to increasing the audiovisual production carried out in Spain by 30 per cent by 2024. That is the target of the government plan to promote the audiovisual sector and, in the words of Prime Minister Pedro Sánchez, make Spain the main audiovisual hub of Europe. The financial resources for this plan will come from the General State Budget and EU funds (mainly the EU Recovery and Resilience Facility, the European Regional Development Fund and the Creative Europe 2021–2027 programme). Most of the promised public investment (€1,330 million, or 83 per cent of available resources) will be allocated to measures related to the improvement of financial and fiscal instruments supporting Spanish audiovisual production projects and companies. Among other measures, this budget is expected to expand the base of audiovisual projects eligible for reimbursable financing.

Of the funds, €240 million (15 per cent of the total resources) will be used to finance the support and promotion of audiovisual production and audiovisual promotion, the integration of digital technologies and the internationalisation of the industry and promotion of local talent in the global environment.

Finally, it is also planned to allocate €33 million to actions aimed at supporting the development of highly qualified professionals with the digital skills demanded by the audiovisual industry and the digitalisation of administrative procedures related to audiovisual production activity in Spain.

In any event, all these measures are likely to be subject to ongoing review throughout the coming months, as the effects of the pandemic may continue to be felt for some time into the immediate future, despite the vaccination campaign.

IX OUTLOOK

New trends in the media and entertainment sector are driven by the current generation's preferences and the way they establish and conduct their relationships, as well as by technological progress.

The covid-19 pandemic has certainly precipitated an increase in the use of social networks and the need for immediate connectivity through electronic devices (computers, mobile phones, tablets, smart TVs, smart watches and other wearable devices), and the

emergence of new products (such as videoconferencing apps, because of the accelerated embedding of teleworking) has forced companies to adapt and provide services swiftly, smoothly and more directly to access these new potential customers.

Traditional information access channels now face big challenges in trying to stave off obsolescence in an industry where the one predominantly constant element is change itself. Simultaneously, with the seemingly unstoppable influence of big data, new media are developing very quickly.

The speed at which the sector is evolving will test not only companies' ability to adapt to pandemic-related changes in the industry, but also the current legal system itself, which is unlikely to be able to adapt to these new realities in an all-encompassing manner. The law always follows reality, especially when our society faces a situation of the magnitude of the one currently affecting the entire world. Digitalisation is no longer something that will arrive in the future, as it has already burst into our society and become the present, the present to which all economic sectors – without exception – will have to adapt.

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