THE MEDIA AND ENTERTAINMENT LAW REVIEW

SECOND 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.

By any measure, 2020 has been a highly unusual and especially challenging year, particularly for the media and entertainment industries, with large sectors devastated by the effects of the covid-19 pandemic. In many countries, live music, festivals, theatrical performances and sporting events were shut down entirely for much of the year (and, in many cases, remain so), ravaging the businesses that depend on in-person events for their success and the individuals that depend on them for their livelihoods. For other parts of the media and entertainment industries, the results have been uneven. The largest online distributors of books, for example, have generally fared quite well, while many independent bookstores that depend on foot traffic are in dire straits. In the music industry, touring artists, concert promoters, and theatre and venue operators have been particularly hard hit, but most streaming services, music publishers and record companies are continuing to flourish. It remains to be seen which changes to the media and entertainment industries are 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, businesses, 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 sometime 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 judgment as to the topics to highlight, recognising that space constraints require some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly as 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 2020

Chapter 11

SPAIN

Yago Vázquez Moraga and Jordi López Batet[1]

I OVERVIEW

In 2020, the health crisis caused by covid-19 is having a major impact on new technologies and the media and entertainment industry in Spain. The pandemic, which has forced us to stay at home, has boosted connectivity in our country. As a result, digital communication has been exponentially increasing in the past few months in Spain.

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 rollout of very-high-capacity networks as well as in the take-up of ultrafast broadband connections of at least 100 Mbps.

New technologies are particularly playing a highly relevant role in the health sector this year. In this regard, Spain has enforced 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 the fight against the virus and to halting its spread, and the legal system has had to respond to some 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, 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 from applications and GPS through data processing and prediction models. Needless to say, teleworking and remote education for students have also been vital this year.

On a separate note, as a result of the interruption of sporting competitions due to the covid crisis, many disputes and controversies with regard to the fulfilment of agreements related to broadcasting, advertising and sponsorship at sports events have arisen among different stakeholders as a result of the impossibility of obtaining the same economic results and performance from these agreements. 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 currently being held in Spain.

Furthermore, it should be also acknowledged that the pandemic has caused a severe crisis in the audiovisual industry, where film shoots and production have had to be cancelled as a result of the implementation of the measures adopted by the government to fight the sanitary crisis. Notwithstanding this, in recent months audiovisual activity is being resumed, and hopefully normal activity will be resumed soon. In addition, it is very likely that this

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

enforced digitalisation of practically all sectors of our economy will help the exponential upward trend that the media and entertainment industry has been facing in recent years in Spain, and that this trend is expected to keep growing in upcoming years.

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 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 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 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 in states of alarm, emergency and siege. In this same sense, Section 5 of Article 20 stipulates that the seizure of publications, recordings and 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 to other rights, such as the rights to honour, privacy and self-image, and for 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 (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 another conflicted right (normally the right to honour and privacy) shall be performed on a case-by-case basis. As a general rule, the rights 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 on 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 2019) of the public prosecutor's office, in 2019, crimes related to hate speech increased by 6.8 per cent compared to 2018, with most of these being committed through the internet (54.9 per cent), social media (17.2 per cent) and telephone or telecommunication systems (16.2 per cent). As an example, the Spanish Supreme Court has recently confirmed a position that had already been established in recent years: the hate speech in social networks does not find protection in freedom of expression. In the case initiated against the Spanish rap singer Pablo Hasel, the Supreme Court dismissed an appeal filed against a judgment handed down by the National Court that condemned the singer for the crimes of exaltation of terrorism, with the aggravating circumstances of recidivism, insult and slander against the Crown and use of the image of the King, and insult and slander against institutions of the state. The singer was accused of including comments in the form of tweets in his profile on social networks that included videos inciting violence – comments considered to be glorifying terrorism and humiliating for the crown and other state institutions such as Spanish police bodies. In this case, the tweets were considered as not susceptible to being interpreted as a product of critical intentionality in the political and social field: they were not about exposing criticism, but were rather merely insulting and about causing offence. In such a state of affairs, the Supreme Court considered that freedom of expression and opinion are not covered by conducts included in the criminal offence of Article 578 Criminal Code and, with a list of proven facts such as those set forth in the case at hand, it decided to maintain the ruling issued in the prior instance.

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 fair freedom of action in the development of their information-giving 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 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 involves the extent and limits of the right to information, and that is still pending before the courts, relates a conflict between the Spanish football league and radio broadcasters. At the beginning of the dispute, the broadcasters claimed that they were entitled to enter into 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 radio broadcasters were entitled to enter into 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 Constitutional Court admitted the question of unconstitutionally, and is yet to decide whether this legal provision is constitutional.

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 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 foreseen 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 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, this right of access to information does not have any temporary limitation and can be also enforced regarding facts and issues that took place before the entry into force of Act No. 19/2013. Article 14 of the Act No. 19/2013 establishes that 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 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 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 Constitution. In addition, journalists' conduct codes also rule on 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 the sole way to prevent 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 such disclosure's 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 faced a 42-year disqualification for having ordered the police to enter into the 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. The Supreme Court of Justice of Baleares exonerated the judge from the crimes of prevarication, illegal interception of communications and violation of professional secrecy, among other things, despite considering it proven that in its resolutions, the judge 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, 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 into 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 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 that are necessary to cease 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 accredited. 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 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 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 an aggrieved party that considers that all the elements of an offence concur (see Articles 205 to 216 of the Criminal Code). The offences 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. A 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 being defamatory. The publication's seizure was requested and finally agreed to by a judge. The decision of the judge and the initiative of the prosecutor were not exempt from criticism and, again, brought about 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 have been transposed into 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 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 agreements, 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 to avoid contravening the dignity of individuals, and the values and rights recognised in the Constitution, and to protect certain groups against potential abuses taking advantage of their inexperience or credulity (e.g., minors). Conduct such as subliminal, deceptive, unfair and aggressive advertising is 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 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 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 regarding general audiovisual communications 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 advertising messages are differentiated, not separated, from 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 (on 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

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. The CNMC takes care of protecting market interests and therefore prosecutes conducts that may violate competition rules. As an example, in 2019 the CNMC imposed sanctions on the two biggest audiovisual groups in Spain, Mediaset (€38.9 million) and Atresmedia (€38.2 million), for violating free competition with their advertising practices. The CNMC considered that the commercial policies of both companies in the sale of television advertising infringed the competition regulations, and had the effect of limiting the ability of other broadcasters to compete in terms of attracting advertising revenues. In its resolution, and among other things, the CNMC considered that a 'television duopoly' cannot impose on advertisers the obligation to contract advertising packages on various channels of groups. The aforementioned audiovisual groups have appealed these sanctions before the National Court, and this appeal is pending resolution at the time of writing.

In addition, in this sector, deals affecting companies' concentration have taken place in the past few years that have led the CNMC to check compliance with the defence of competition provisions, issue relevant authorisations and sanction some of these companies for breach of 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 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 dispersed 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 clarity to rulings about digital content in an environment in continuous evolution and change.

The European Court of Justice's jurisprudence shall also be considered in this respect, such as the decisions of 13 February 2014[2] and 21 October 2014[3] 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.

2 Case C-466/12, *Svensson*.

3 Case C-348/13, *BestWater*.

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 actual knowledge or awareness of the illegality of 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 that were offensive and infringed the personality rights of a popular singer, and for not having removed these comments despite the express request of the singer. In this judgment, the Supreme Court 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 to the affected person in an 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 a 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 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

As has already been mentioned, in 2020 the pandemic has caused a severe crisis in the audiovisual industry. For this reason, the government, through several royal decrees, has approved different economic aid measures to mitigate the economic impact that the pandemic is creating in the media and entertainment sector. Among other things, the government has allocated €15 million to private television companies as part of urgent aid to mitigate the impact of covid-19 on the economy and as temporary compensation for certain expenses regarding the mandatory population coverage of digital terrestrial television services.

The government has also enabled companies that provide services considered essential during the state of alarm (as is the case for some media companies) to present labour force adjustment plans due to force majeure for 'that part of the activity or that part of the workforce that is not affected by the nature of essential activity'. In addition, the government

has also lowered VAT on digital publications from 21 to 4 per cent to address the economic impact generated by covid-19. This includes digital press and electronic books, which have been equated with paper publications.

In any event, due attention shall be paid to these kinds of exceptional measures in the coming months, as the effects of the pandemic do not seem likely to cease in the short term.

IX OUTLOOK

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

The covid-19 pandemic has certainly accelerated an increase in the use of social networks, and 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 videoconference apps due to the implantation of teleworking) has forced companies to adapt and provide services in a more direct, swift and smooth manner in order 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 due to the existing pandemic, 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 when our society is facing a situation like the one that is affecting the entire world. Digitisation is no longer something that will arrive in the future, as it has burst into our society to become the present to which all economic sectors, without exceptions, will have to adapt.

Appendix 1

ABOUT THE AUTHORS

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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 (inter alia, IT, broadcasting rights, advertising, competition and 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 (ISDE), where he teaches sports broadcasting rights.

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Jordi López Batet has been a partner at Pintó Ruiz & Del Valle since 2008, and managing partner of the firm since 2015. Jordi focuses on advising national and international clients of the corporate and sports law department of the firm in, among other areas, IT, media and data privacy. He is an arbitrator at the Barcelona Arbitral Court, the Court of Arbitration for Sport (CAS) and the Arbitration Tribunal for Football, a member of the Union Cycliste Internationale Anti-doping Tribunal, (UCI-ADT) and a professor, teaching on several courses and master's degrees in several universities.

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