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Covid-19 and the impact on media and entertainment

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E&Y report predicts consolidation opportunities amid spread of virus and high demand for content to remain

Record demand for content in the media and entertainment industry is expected to remain, according to a report by Ernst & Young published in June.

The report reviews the impact of Covid-19 on the media industry and outlines the resulting challenges and opportunities, including financially stronger brands consolidating weaker brands.

According to the report, there is record demand for content, including video content, gaming and music, which is expected to remain as more than a third of the world's population faces restriction on movement.

Lock-down measures around the world have resulted in a "need for escapism" and the need for news and knowledge.

Media and entertainment are categorised as "essential services" that are permitted to continue in operation, except for theatres and events. Bans on gatherings around the world have resulted in zero intake for some subsectors, with box-office productions either launching direct-to-consumer on streaming services or postponed till 2021.

The report states: 'Rapid changes in consumer behavior and consumption, stoppages in content production, ➔

French court rules against online hate speech law

A French court has ruled against provisions of a law, passed by France's parliament in May, that counter online hate speech.

The French Constitutional Court reversed the law on 18 June, known as Avia Law and passed by the French National Assembly.

The ruling states: 'These provisions would impose on all publishers and hosts subjugations impossible to satisfy and would, in doing so, disregard the principle of equality before public charges.'

The law was intended to restrict hate speech, requiring social media platforms to take down objectionable content within 24 hours, imposing a fine for non-compliance.

The court considered that the new law would disproportionately infringed on freedom of speech.

Free discourse on social media is considered vital for the maintenance of a democratic society, according the French court. The decision also cited The Rights of Man and Citizen (1789), which states that 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.'

Although rejecting most of the Avia Law, the court upheld Article 2, which amends the procedure for reporting illegal content to websites. The ruling also upheld Article 6, which establishes the responsibility and authority of internet platforms to analyse inappropriate content. ■

What's inside

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Major League Baseball agrees new media rights deal with Turner Sports worth USD3.2 bn

Major League Baseball (MLB) has agreed to a seven-year media rights package with WarnerMedia's Turner Sports in a deal worth more than USD3.2 billion.

MLB and the Players Association are yet to finalise arrangements to allow them to play a modified season amid Covid-19.

The agreement is set to cover the 2022-28 seasons, covering the same period as a separate deal worth over USD5 billion that MLB signed in November 2018 with Fox Sport.

Exact contract terms have not been disclosed but sources say the deal is worth more than USD500 million a year. This sum represents more than a 50 per cent increase over the USD325 million per year that Turner Sports currently pays in its eight-year deal, which expires after the 2021 season.

The new deal does not impact this season directly, but demonstrates the financial strength of the game.

In a statement, Tony Clark, head of MLB Players Association, commented: "In recent days, owners have decried the supposed unprofitability of owning a baseball team and the Commissioner has repeatedly threatened to schedule a dramatically shortened season unless players agree to hundreds of millions in further concessions." He added: "Our sport deserves the fullest 2020 season possible." ■

UK's Daily Mail becomes nation's most-read paper

The Daily Mail has made history by becoming Britain's best-selling daily newspaper, surpassing The Sun, for the first time in its 124-year history, according to the latest circulation figures.

The Sun has held the title as the nation's most-read daily title for 42 years, dominating circulation sales now in decline.

The Daily Mail reported sales of 980,000 per day in May. The Sun has stopped publically releasing its figures, with last reported figures in March. Industry agreements mean that the Daily Mail cannot reveal The Sun's latest circulation figures.

The Daily Mail's editor Geordie Grieg, who took on the publication from Paul Dacre, commented: "I am immensely proud and delighted that the Daily Mail has become Britain's biggest-selling newspaper, an historic moment in our history."

Mr Greig added: "It is testament to the relentless drive of the Daily Mail's journalists who continue to set the news agenda with skill, courage and conviction."

The Sun was launched in 1964 serving as a tabloid, and an extension of Rupert Murdoch's media empire. Amid declining print sales across the sector, and the impact of coronavirus, the paper has been overtaken for the first time in 42 years.

The Daily Mail attributes its success to quality journalism, stating on its site, 'We have never deviated from championing the underdog, the ordinary David being crushed by the State's overweening Goliath.' ■

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← cancellation of live events and sports, and cuts in advertising spend, are impacting companies across the ecosystem.'

The report states that the impact on the industry varies by subsector.

According to the report: 'Publishers and media companies are benefitting from some marketers seeing the opportunity but face advertising revenue losses. Film and TV producers are under pressure to mitigate impact from delayed release schedules, theatre closures, and production stoppages.' Management teams will need to take essential action to mitigate risks.

The report's findings show that revenue and sales leaders will need to create revenue scenarios to understand the impact to financial outcomes. Other key actions listed by the report include to 'Ensure billing and collection operations continue despite shift to digital workforce', 'Conduct research for key ad segments to provide customized packages' and 'incentivize ad continuity'.

Prior to the pandemic, many industry executives were already redesigning their operational modes to enhance efficiency. According to Ernst & Young, the ongoing crisis has forced industry leaders to activate transformation plans and reduce execution timelines at considerable speed. ■

Supreme Court to review media ownership rules

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Chérie R. Kiser outlines developments in media ownership following years of litigation by the FCC as part of its efforts to modernise regulations

On 17 April 2020, the US Solicitor General petitioned the Supreme Court for a writ of certiorari to review the Third Circuit Court of Appeal's decision in Prometheus Radio Project v. FCC (Prometheus IV).

In that decision, dated 23 September 2019, a three-judge panel struck down the FCC's 2017 media ownership rule changes, finding the FCC had failed to adequately consider their effect "on ownership of broadcast media by women and racial minorities."

On 20 November 2019, the FCC's Petition for Rehearing En Banc was denied, clearing the way to an appeal before the Supreme Court.

This action caps years-long litigation over the FCC's attempt to revise its media ownership rules, per the "pro-competitive, de-regulatory national policy framework" established by the Telecommunications Act of 1996. Congress has directed the FCC to review these rules every four years, modifying or repealing those no longer in the public interest.

According to FCC Chairman Ajit Pai, however, the Third Circuit in Prometheus IV "has taken that authority for themselves, blocking any attempt to modernise these regulations to match the obvious realities of the modern media marketplace."

Prometheus IV concerned the FCC's 2017 Order on Reconsideration, which, following the 2014 Quadrennial Regulatory Review, eased or eliminated long-standing cross-ownership restrictions and single-entity ownership caps.

The Third Circuit criticised the FCC for relying on "faulty and insubstantial data" concerning minority and female ownership.

According to the Third Circuit, the FCC's analysis on minority data was "so insubstantial that it would receive a failing grade in any introductory statistics class," and it had not examined any data on gender diversity at all. Consequently, the Court held, the FCC had not provided "a substantial basis and justification for its actions" worthy of judicial deference.

The Court rejected the FCC's new rules and sent the matter back to the FCC for further study.

The Prometheus proceeding has given rise to strong reactions across the communications industry.

Agreeing with the Third Circuit's decision, advocacy group Free Press charges the FCC with "clear[ing] the way for runaway media consolidation," having " weakened its media-ownership limits without so much as a minimal analysis of how that would affect ownership opportunities for women and people of color."

The Benton Institute points to the Media Bureau's February 2020 ownership report, which indicates that majority-voting interests for women (5.3%) and racial minorities (1.9%) in commercial television stations have declined since 2015.

The National Association of Broadcasters (NAB) and a broad coalition of print and broadcast outlets, on the other hand, disagree with the court's decision and have pursued their own appeal of Prometheus IV.

On 17 April, NAB also petitioned for a writ of certiorari, framing it as a matter of "indisputable national importance."

According to NAB, "the Third Circuit's misguided interpretation and unworkable evidentiary standards will continue to distort every future quadrennial review of the FCC's ownership rules," having already caused "a concrete and negative impacton America's broadcast and newspaper industries . . . by hampering their ability to compete with existing and emerging media sources."

The Government's Petition for Certiorari

The government's petition for Supreme Court review challenges the Third Circuit's treatment of "minority and female ownership as a threshold, dispositive consideration in all FCC quadrennial-review proceedings"

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as inconsistent with statute and FCC precedent, "which emphasises competition and viewpoint diversity while also taking into account a broad range of additional considerations, including localism and other types of diversity."

Prometheus IV, the government charges, improperly subsumes Congressionally prescribed agency authority "to a single discretionary consideration."

Supreme Court review is warranted, the government contends, on several grounds. First, frequent remands have disrupted the four-year "iterative process" envisioned by Congress, such that the "dynamic media marketplace" may "quickly outpace the existing regulatory structure."

Second, there are ownership rules "frozen in place . . . that have indisputably outlived their competitive usefulness," such as the 1975 Newspaper/Broadcast Cross-Ownership Rule, which prohibits a company from owning a daily newspaper and full-power broadcast station serving the same community.

Such rules may actively harm broadcast markets, by preventing news outlets from pooling resources in the face of competition from cable and online entities.

The Third Circuit's decision, the government contends, improperly thwarts the FCC's attempts to modernise such rules. In addition, the government contends the Third Circuit's remand, which instructed the FCC to conduct "new empirical research" on minority and female ownership, is inconsistent with the Administrative Procedure Act (APA).

According to the FCC, it "solicited extensive public input" to no avail; it therefore "adopted policies that reasonably accommodated competing interests" in accordance with the APA, "taking account of both the record and the agency's own extensive experience."

The Third Circuit had failed to specify an alternative to relying on fractured and outdated data sets when newer information was unavailable. Accordingly, "a more sophisticated statistical analysis of the available minority-ownership data. . . . would have been futile." The petition also highlights the FCC's longstanding focus on increasing ownership opportunities for "eligible entities," defined according to "applicant size designed to foster entry into the broadcasting sector by entrepreneurs and small businesses."

The Third Circuit's exclusive focus on minority and female ownership is contrary to the FCC's goal, particularly as the FCC had previously concluded that a race- or gender-conscious definition of "eligible entity" was unlikely to stand constitutional scrutiny.

The pre-2017 ownership rules were reinstituted on 29 November 2019, following the Third Circuit's issuance of a mandate. They will remain in effect during the pendency of any Supreme Court appeal. As discussed in the November/December 2019 issue of Media Law International, this will have profound effects on the scope and structure of media mergers for the foreseeable future.

Terrier Media, for example, announced its plans to cut the publication run for the Dayton Daily News, Hamilton-Middletown Journal-News, and the Springfield News-Sun to three days a week, following its acquisition of broadcast and print assets from Cox Media Group and NBI Holdings in November 2019, per the resuscitated Newspaper/Broadcast Cross-Ownership Rule.

On 15 January 2020, the Media Bureau granted Terrier a 60-day grace period to operate the newspapers on a daily schedule while seeking an unaffiliated buyer, finding that "continuous daily readership" would advance the FCC's goal of localism.

The papers were then sold to Cox Enterprises, which is separate from Cox Media Group, on 10 February 2020; as of 01 March 2020, they now serve their readership seven days a week.

Convoluted transactions of this sort may become the rule, rather than the exception, as the 2017 media ownership rules remain in limbo.

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Sinclair Broadcasting Group's attempted merger with Tribune Media is another case in point. Initiated under the relaxed ownership rules, it was abandoned in mid-2018 after release of a Hearing Designation Order signaling FCC concerns.

A subsequent FCC investigation resulted in a USD48 million civil penalty against Sinclair on 06 May 2020, for, among other violations, Sinclair's failure to disclose material facts concerning the transaction. Any attempt in the near future to resuscitate this acquisition would be subject to the pre-2017 ownership rules, greatly limiting its potential scope.

Whether or not the Supreme Court will grant certiorari in Prometheus IV is unclear. What is clear, however, is that certainty, for both established media operators and new entrants, is badly needed.

* The views expressed are those of the author and not necessarily the firm or its clients.

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Chérie's clients include cable companies; competitive local exchange carriers; Internet, VoIP, Cloud, and Telehealth service providers relying on broadband, wireline and wireless networks. She acts as regulatory counsel for clients before the Federal Communications Commission and state regulatory agencies; represents clients in complex litigation involving regulatory, contract, and taxation issues; acts as corporate regulatory counsel in connection with initial public offerings, mergers and acquisitions, debt issuances and financing, and other transactions; and provides advice and representation concerning state and federal legislative actions affecting communications and related industries.

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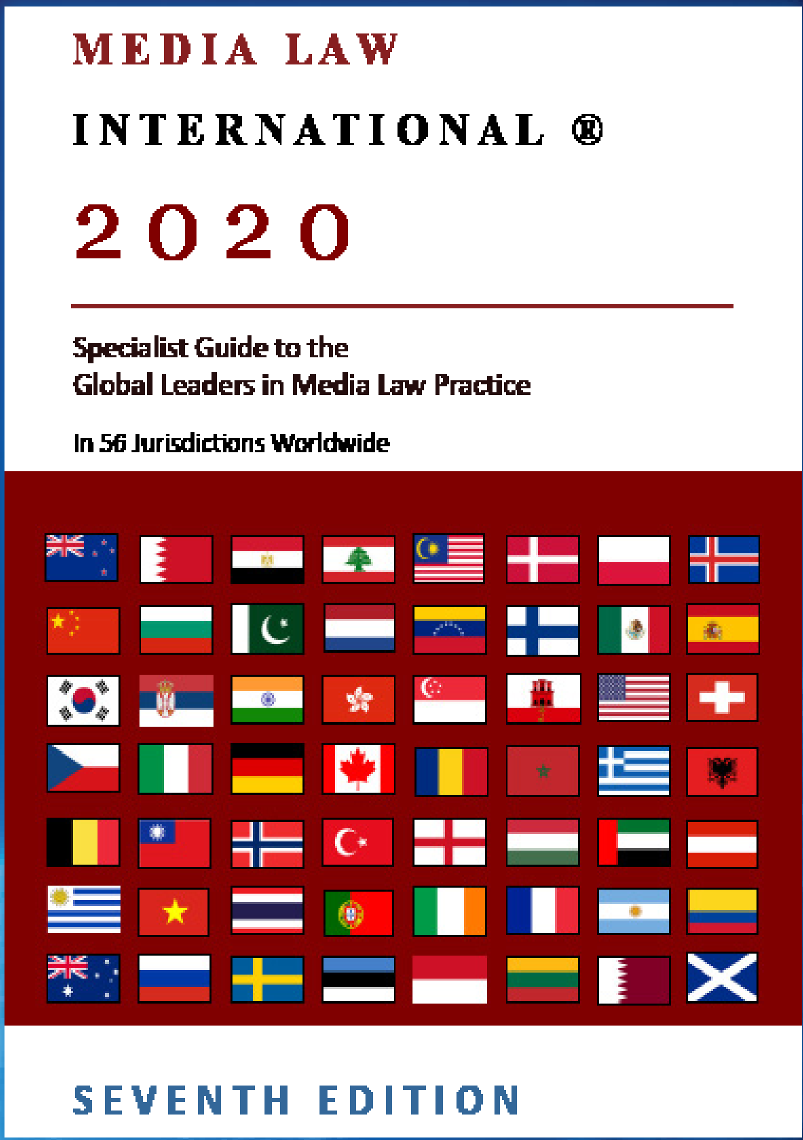
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