Hogan Lovells

# Global Media and Communications Quarterly

**Business, legal and regulatory trends on four continents**

## The Future of Television

MAY 2012

## Contents

# On the Origin of Species – Is the future of TV Darwinism in extremis?*

## *and does it matter legally?

Readers of this Journal will be heartily sick of predictions of the "death of TV". With viewing figures telling the opposite story, articles decrying such predictions are now almost as commonplace as the predictions themselves.

But beyond doubt something fundamental is happening in the TV ecosystem.

In its pre-history, TV was characterised by the transience of the live broadcast, the universality of limited choice and the simplicity of the push button. Then, slowly at first, but with increasing speed, those characteristics began to erode.

Recordings and repeats followed by VCRs, DVDs and PVRs started a trend away from "live" and towards the potentially infinite flexibility of VOD.

Digitisation exponentially increased the capacity of broadcast platforms and reduced the cost both of basic production and distribution enabling an explosion of content. An ever increasing range of formats, from handheld to home cinema, provides content providers, distributors and consumers with a sometimes bewildering array of decisions.

Simplicity replaced it seems by Complexity. Uniformity by diversity.

The defining characteristic of this change is technology. Technology enables an explosion in the ways content can be accessed, distributed and shared. Technology enables the capturing of high quality images at extraordinarily low unit cost. Technology provides the opportunity for universal connectivity and puts affordable second (and third and fourth) screens in the hands of millions of viewers enabling mass interactivity.

In the not too distant future these themes, flexibility, portability and connectivity, are set to provide every individual on the planet with the potential to access, interact with and manipulate any content anywhere at any time.

The result will be an infinite, unpredictable, variety of ways in which content is exploited. From set piece 3D to viral clip; from second screen interactivity to viewing content split screen whilst gaming on a connected TV. Each of these contexts in which content will be accessed will effectively become a micro-medium in which it will surely be as true as ever that the "medium is the message".

After all, the same content can produce a fundamentally different message if presented in a simple linear feed or with a full plethora of interactivity including additional camera angles, supplementary editorial content and social media.

In short, these changes will create an immense diversity in the environments which TV content will inhabit. And, just as Darwin hypothesised, different habitats will support and reward different characteristics.

We already see this change. High end distribution creates the right conditions for big ticket, appointment to view, events. Smaller scale niche content thrives in intimate flexible and interactive environments. But this is only the beginning of the future. In the face of exponential growth in the diversity of TV environments in which content can exist, TV businesses will be driven to make difficult choices in the way they are shaped. Truly Darwinian "natural selection" in a challenging new range of environments.

In short, technology will create conditions which will force TV to evolve rapidly and, critically, this will create ever increasing greater diversity.

This will no more be the death of TV than the evolution of simple primitive single cell organism into multiple and complex flora and fauna we see in our planet today was the end of life on earth. But it will represent a fundamental change in which homogeneity and predictability will be replaced by diversity and chaos raising some fundamental questions for intersection between TV and the law.

Just three examples of many:

**Content Regulation:** A diversity of "micro-media" challenges the basis of traditional regulation.

Effective regulation must be appropriate, proportionate and effective, criteria which can be assessed only in context. Already, for example, appropriate, proportionate and effective regulation for a major peak time live event would almost inevitably be inappropriate, disproportionate and ineffective for a niche interactive environment.

To date the regulatory response has generally been an effort to identify different environments and regulate each. However, it is questionable whether this approach will be sustainable as contexts become infinitely flexible and unpredictable.

One possible response would be to shift the focus of content regulation from broadcaster to producer. Might producers be placed under the primary regulatory obligation to ensure any licensee of their content uses it accordance with some defined principles of "responsible use in context"?

**Rights:** Although under increasing strain, the underlying principle of copyright, that exploitation is restricted unless licensed, remains the cornerstone of TV rights.

It is however questionable whether this is sustainable indefinitely. In the face of TV's ever more diverse future

*"Technology provides the opportunity for universal connectivity and puts affordable second (and third and fourth) screens in the hands of millions"*

*"…just as Darwin hypothesises, different habitats will support and reward different characteristics"*

*"…homogeneity and predictability will be replaced by diversity and chaos"*

*"Will we need to stand back and fundamentally reinvent the rules of copyright?"*

will the courts and commerce be able to cope with splitting hairs ever more finely on questions such as what constitutes a work or a copy? Will we need to stand back and fundamentally reinvent the rules of copyright to focus on substance rather than form?

**Revenue:** The continued strength of TV platforms worldwide and the rise of Google demonstrate the continued strength of advertising and subscription as revenue models for content.

Apple and Amazon show that, in a connected world transactional models can be equally effective.

In a world of ultimate flexibility, finding the right approach becomes ever more difficult. The challenge is not simply identifying and executing individual revenue opportunities. The bigger question is how broader content exploitation strategies should be developed in such a complex world.

How exactly, for example, might a single sports property be exploited across an integrated field of live subscription based events, transactional opportunities to purchase additional content and second screen based interactive advertising?

The questions will be legal as well as commercial. How to shape downstream royalties and associated rights and, working within relevant competition laws, how much influence can a content owner exercise over the activities of its ever more diverse licensors and sub-licensors?

In summary, rapid technological development will drive ever increasing diversity in media and in business models. The question is whether legal solutions founded in the past will be sustainable in this future.

As Darwin himself put it "It is not the strongest of the species that survives, nor the most intelligent, but the one most responsive to change". In the future of TV, that will be true legally as much as it is technically or commercially.

This edition of the GMC Quarterly takes a look at the business, legal and regulatory environment for the new television ecosystem, from "Second Screen" exploitation, to "TV Everywhere" to changes in broadcast spectrum licensing rules.

**Peter Watts**
**T** +44 20 7296 2769
peter.watts@hoganlovells.com

# Video abstracts

**"Introduction to the SuperReturn Conference" by Christoph Wagner**

Christoph provides background on the TMT Private Equity breakfast, and introduces industry experts Harry Hampson and Jay Itzkowitz.


www.hoganlovells.com/super-return

**"M&A environment for Television in Germany" by Harry Hampson**

Harry Hamspon, an investment banker with JP Morgan explores recent transactions in the TMT market, and future challenges that face the sector.


www.hoganlovells.com/TV-MA

**"Over-the-top television" by Jay Itzkowitz**

Jay Itzkowitz, from Cantor Fitzgerald discusses the challenges and opportunities of OTT television.


www.hoganlovells.com/over-the-top

# "Second Screens" unlock new business models

Interactive television has finally arrived! But, interactive TV is not happening on the primary television screen as many in the industry once expected it would – interactivity is happening on "second screens", and it is being fueled by the growth of social media. We are in the very early days of a phenomenon that many in the media and technology sector expect to profoundly influence the future of television. To better understand the "second screen" ecosystem, how traditional industry players and new entrants hope to participate in it, and what challenges might arise as second screen business models evolve, we spoke to a variety of our contacts in the industry.[1] Everyone that we spoke to acknowledged that "second screen" applications ("apps") and business models are in a nascent state of development, with a lot of experimentation taking place by numerous companies seeking to develop second screen strategies to stake out (or preserve) meaningful roles in the converged television landscape of the future.[2]

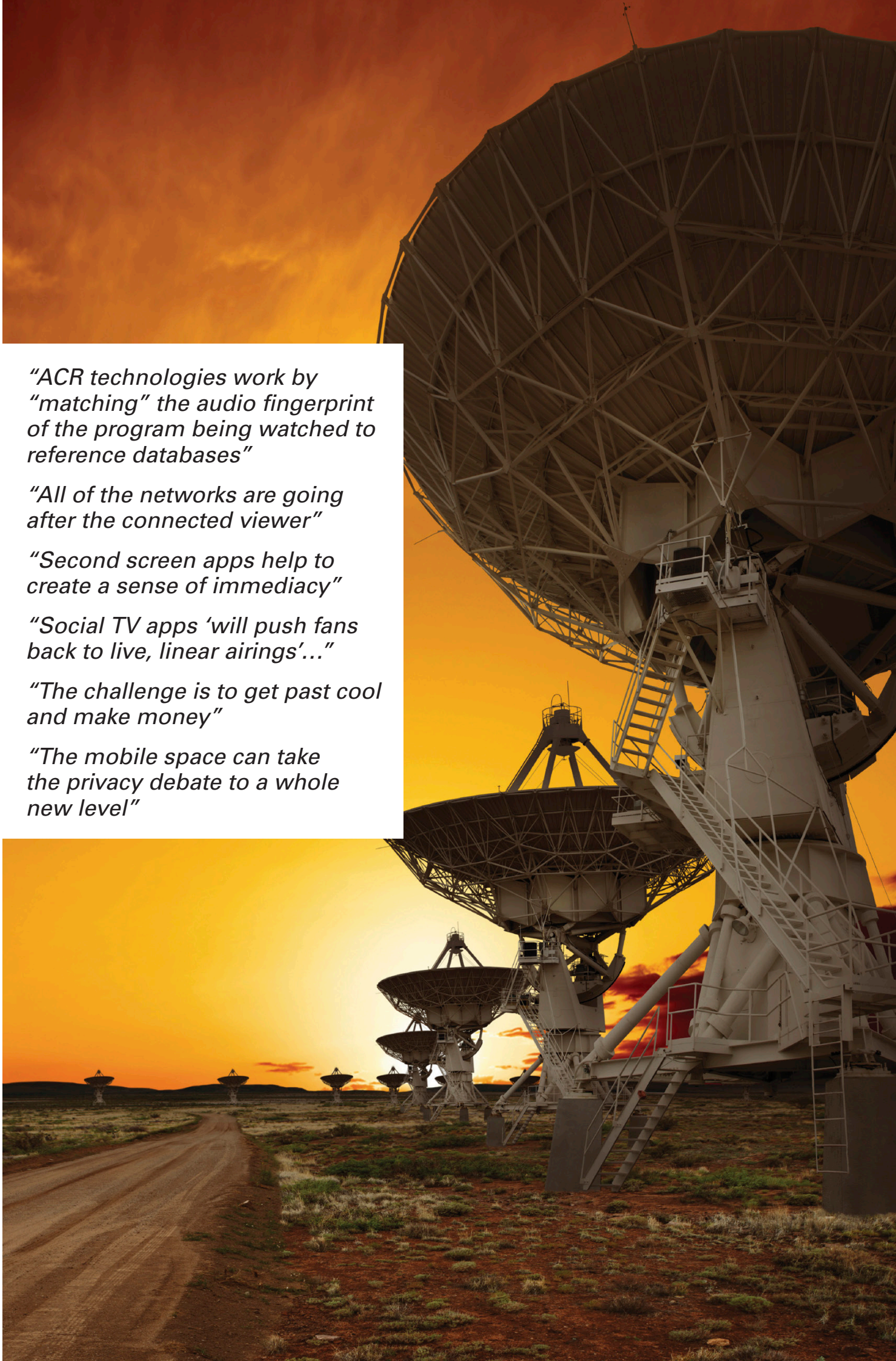
**What are "second screen" apps?**

Second screen apps are downloadable applications that enable TV viewers (or "viewsers" as some like to call them) to use their mobile devices, such as smart phones and tablets, to simultaneously connect to social media platforms and other interactive experiences that are related to the television programming they are watching on their primary TV screens. Second screen apps "enhance" the primary linear television viewing experience by enabling the audience to engage in synchronous interactive activities on their mobile devices. A second screen app might encourage users to instantly let Facebook friends know what they are watching right now, send or read related Twitter updates from program sponsors or others, access additional related content (eg, player statistics during a sporting event or biographical information about the stars of a series), play games that tie in to the program or its branding, participate in instant surveys, or receive targeted advertisements or promotions.

The prevalence of second screen use is much higher than one might imagine. Over a year ago, a Nielsen/ Yahoo study revealed that 86% of mobile phone users access the internet on their handset while watching television, with 40% using social networking sites and 24% looking at content related to the TV program.[3] More recently, a Nielsen study found that 70% of tablet users and 64% of smart phone owners use their devices while watching television daily or several times a week.[4] A study of 1,300 people under the age of 25 in the United Kingdom reportedly found that 80% of respondents communicate with friends using a mobile device while watching TV, including 72% who use Twitter, Facebook or mobile applications to actively comment on shows as they are watching them.[5] As these statistics indicate, there are a lot of people watching TV with second screens in their hands, and they are not just waiting for their mobile phones to ring! Not surprisingly, it is also evident that the prevalence of these viewing habits is even higher among younger audiences.[6]

**How does it work?**

The technology underlying second screen applications and businesses is critical, because the quality of the experience is dependent upon the ability of the second screen apps to quickly and accurately identify what programming is being presented on the primary TV screen, and to simultaneously deliver related content or interactivity on the second screen device. As Stacy Jolna, CMO and a Co-founder of ConnecTV explained to us, ConnecTV has been developing their own algorithms to increase the "accuracy, relevancy and speed of synchronization." The technological foundation for most second screen applications is some form of "automatic content recognition" or ACR.[7] Some second screen apps involve "tagging" or "watermarking" the audio track of a television broadcast with meta-data that can be recognized by the app. Other ACR technologies work by "matching" the audio fingerprint of the program being watched to reference databases, allowing the application to instantly recognize the television program and its associated meta-data to "enhance" the viewing experience by delivering related media to the second screen. Significantly, these types of audio content recognition systems do not require any alteration of the audio feed at the source, nor do they require the television set to communicate directly with the second



*"ACR technologies work by "matching" the audio fingerprint of the program being watched to reference databases"*

*"All of the networks are going after the connected viewer"*

*"Second screen apps help to create a sense of immediacy"*

*"Social TV apps 'will push fans back to live, linear airings'..."*

*"The challenge is to get past cool and make money"*

*"The mobile space can take the privacy debate to a whole new level"*

screen device using a shared Wi-Fi connection.[8] Audible Magic has developed and patented ACR technology for recognizing content in applications, devices, and networks that is being used in the second screen world. According to Vance Ikezoye, the company's CEO, Audible Magic's second screen strategy is to be an ACR vendor, and license others to use its technology to reach end users. In this regard, Audible Magic's business strategy reflects the widely shared view that at this stage of the game, it is hard to know what roles various participants in the television ecosystem will play as second screen TV business models evolve in the future.

**Who lives in the second screen ecosystem?**

There are many participants jockeying for position in the second screen world, including broadcasters, film studios, television manufacturers, advertisers, social networks, device makers, and technology companies. Christine Frank of Compass Advisers views the major players in the second screen world as being "content owners, distributors, app developers and advertisers." In hailing the potential for second screen applications to increase viewer engagement with television programming, Stacy Jolna asserts that "everybody benefits – distributors, broadcasters, CE companies, content owners, and advertisers." However, as Marcelino Ford-Livene of Intel Media notes, "All of the networks are going after the connected viewer, seeking to connect them with shows, and producers are seeking to connect viewers with their own second screen experience." Sarah Bachman, the head of mobile strategy for Horizon Media, describes second screen applications as "an engagement tool" that can "really change the way consumers interact with brands, and marketers are beginning to see that." The second screen environment can combine viewing, sharing, participation and embedded marketing to enable content owners, distributors and advertisers to achieve deeper engagement with consumers. In an environment where multiple participants are all trying to engage the same audience, using various technology solutions to deliver compelling content and functionality, the potential for intellectual property rights issues related to the use of copyrighted materials, trade marks and patented inventions are lurking beneath the surface. Of course, to some extent these concerns can be addressed through commercial arrangements such as Audible Magic's licensing model, or ConnecTV's strategic alliances with some of the largest local television station ownership groups in the U.S.

**Renewing the value of live TV viewing vs. time shifting**

Currently, live viewing is how a network makes the most money, because live audiences are the primary yard stick used by Nielsen and advertisers. However, time-shifted viewing has become a significant trend with the advent of TiVo and other digital video recording devices, with the number of people watching time-shifted television up nearly 20% from last year.[9] Second screen apps help drive the audience to watch live, and not time-shift. As Christine Frank explained to us, second screen apps help to "create a sense of immediacy by establishing a real time, live event, social atmosphere" around television broadcasts. Many apps only work during the live broadcast, or are at least optimized for use during the live broadcast.[10] Perhaps more importantly, the communal aspect of joining others in a simultaneous "social TV" experience using second screen devices and apps can only be achieved if participants are watching the same programming at the same time. Second screen apps developed for the recent telecasts of the Oscars and the Super Bowl allowed users to interact in real time with other fans with the goal of building community and motivating audiences to view the events during the live television broadcast, rather than recording them on a DVR for time-shifted viewing.[11] This vital aspect of the second screen phenomenon is not lost on Stacy Jolna, who was an executive at TiVo in its early days. Stacy believes that social TV apps "will push fans back to live, linear airings, away from video on demand and time shifted viewing, especially for 'water cooler' shows like American Idol, the Voice and the Bachelor."

**How does second screen TV make money?**

As Marcelino Ford-Livene told us, "the challenge is to get past cool and make money [from second screen apps]." The good news is that second screens apps are connected to a well-funded market place, in which tens of billions of dollars are being spent annually on television, digital and mobile advertising. Television advertising alone is currently estimated at

approximately $60 billion annually in the U.S.[12] and is continuing to grow. Sarah Bachman believes that advertising on the second screen will complement, not replace, the ads that appear on the primary screen. Second screens have the potential to generate additional value for advertisers because they promote the viral spread of advertising messages and enable these impressions to be tracked and measured in new ways. To marketers, there is tremendous value associated with ads that lead consumers to tweet about a show or product. As Marcelino-Ford Livene puts it, "Viral promotion is critical to this generation, which is why social media analytics are highly valuable." Accordingly, developing broadly accepted tools and metrics for measuring advertising effectiveness in the second screen world will become more important over time.

**Heightened concerns over user privacy**

A recent article in *The Atlantic* noted that "Companies' ability to track people online has significantly outpaced the cultural norms and expectations of privacy… [This is] because what they can do is so, *so different."*[13] As Sarah Bachman observes, the potential for tracking people is even greater when we enter the world of mobile devices. She told us, "The mobile space can take the privacy debate to a whole new level." Marcelino Ford-Livene also sees second screen applications as potentially fueling a "data mining bonanza." As has been the case in browser-based targeted advertising initiatives, those seeking to harness the power of the user data that is being assembled and analyzed will need to pay close attention to the developing regulations, and social norms, around the gathering and use of consumer data. While younger people seem to have a relatively higher tolerance for "trading" information about themselves in exchange for receiving "free" services and content, along with more personally relevant advertising and promotions, government regulators and consumer advocates have been seeking to establish appropriate boundaries that must be observed. The industry participants who we spoke to about second screens generally acknowledged that significant legal issues involving privacy concerns and intellectual property rights are likely to be present as second screen technologies and business models continue to evolve.

**Stephen Kay**
**T** +1 31 0785 4747
stephen.kay@hoganlovells.com

1 We would like to thank the following individuals for taking the time to share their insights and perspectives regarding the second screen phenomenon with us: **Sarah Bachman** (Associate Director, Mobile Strategy, Horizon Media, Inc., an independent media services company), **Marcelino Ford-Livene** (General Manager Advanced Advertising and Affiliate Marketing, Intel Media), **Christine Frank** (Managing Director, Technology, Media and Telecommunications, Compass Advisers, an independent strategic advisory firm specializing in cross border transactions), **Vance Ikezoye** (CEO, Audible Magic), **Stacy Jolna** (CMO and Co-founder, ConnecTV, a social TV network), and **Dr. Laura M. Zenter** for contributing to the research and writing of this article.

2 See, "Video Content at 'the Beginning of the Future'", The New York Times, February 16, 2012, http://www.nytimes.com/2012/02/17/business/media/video-content-at-the-beginning-of-the-future.html.

3 Study of January 29, 2011, http://www.intomobile.com/2011/01/29/nielsenyahoo-86-of-mobile-users-fire-up-their-phone-while-watching-tv/, http://www.bbc.co.uk/news/technology-12809388.

4 Nielsen Study of October 13, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/40-of-tablet-and-smartphone-owners-use-them-while-watching-tv/. See, "Using Another Screen to Interact with the TV", http://allthingsd.com/20111220/using-another-screen-to-interact-with-the-tv/, and "Second Screens and Social TV – Making Waves in the Broadcast World", http://digital2disc.com/index.php/news/article/second-screens-and-social-tv-making-waves-in-the-broadcast-world.

5 See, "Tweeting with the Telly on", http://www.bbc.co.uk/news/technology-12809388 and "Second Screens and Social TV", infra.

6 See, http://www.intomobile.com/2011/01/29/nielsenyahoo-86-of-mobile-users-fire-up-their-phone-while-watching-tv/ and http://www.wired.co.uk/news/archive/2012-02/02/the-battle-for-dominance-in-web-tv?page=all.

7 See, "Second Screens and Social TV", infra.

8 Some consumer electronics and game console makers are using wi-fi based synchronization systems to deliver content to second screens, while others application developers are not focusing on synchronization at all. See, "Second Screens and Social TV", infra.

9 See, http://www.nielsen.com/us/en/industries/media-entertainment/television.html?gclid=CJTA0rHn4a4CFcwc6wodQXv8fw.

10 In a recent Wall Street Journal article about second screens, Katherine Boehert notes that "some aspects of these apps aren't designed to work with pre-recorded shows", see, "Using Another Screen to Interact With the TV", The Wall Street Journal, December 21, 2011, http://online.wsj.com/article/SB10001424052970204879004577110550202740674.html.

11 See, "How Apps Are Making the 'Third Screen' a Primary Screen for Historical TV," http://www.pbs.org/mediashift/2012/02/how-apps-are-making-the-third-screen-a-primary-screen-for-historical-tv038.html.

12 See, http://articles.businessinsider.com/2011-07-07/tech/30048336_1_ad-spending-online-advertising-ad-business; http://www.investopedia.com/financial-edge/1211/Where-Are-Advertisers-Spending-Their-Money.aspx#axzz1ovW76E5X.

13 "I'm Being Followed: How Google – and 104 Other Companies – Are Tracking Me on the Web", The Atlantic, February 29, 2012, http://www.theatlantic.com/technology/archive/2012/02/im-being-followed-how-google-151-and-104-other-companies-151-are-tracking-me-on-the-web/253758/ (emphasis in original).

# Connected TV: A challenge for market players and regulators

**What is Connected TV?**
Connected TV is a TV set that connects to the Internet. It enables the consumer to access all forms of non-linear web content via a form of remote control. App-like portals with large icons are easily accessible, and movies and video games are now only a few clicks away from the sofa.

Connected or "smart" TV will replace linear TVs, just like smart phones have replaced original mobile phones. About 1 million TV sets in Germany are connected today and estimates suggest that by 2016 more than 50% of all TVs will be connectable. It is expected that many consumers will buy "hybrid" devices, but won´t actually **connect** them to the internet until there is a "killer application" in the market.

New television services are consumed through mobile as well as fixed devices. Services can be interactive to a state where it is hard to distinguish between "video games" and "television". Programming comes through all kinds of channels: terrestrial broadcast, cable, satellite, and, of course the Internet. A "Connected TV" device is able to show "classic" TV channels as well as other media from the internet, and assemble them in one place. A modern TV device can show pictures from several sources on the same screen, at the same time – for example, placing a YouTube video stream directly next to the TV signal from a regular public broadcaster.

There are different players in the market, using different distribution channels and pursuing different business models. From a European perspective, however, one should keep an eye out for HbbTV: This is an open standard for "hybrid", or respectively, "connected" TV. HbbTV is supported by a wide coalition of broadcasters and manufacturers in Germany and has a good chance of becoming the main brand in Europe.

**The current legal framework in the EU**
EU media law is not ready for Connected TV. Whilst the EU has tried to maintain the legal framework as "technologically neutral", going as far as renaming the former "Television without Frontiers Directive" as the "Audiovisual Media Services Directive" one must remember the framework was created in a different media landscape, with different issues and participants in mind.

At the European level the current legal framework is made from a collection of different directives:

- the **telecoms package** (including, inter alia, the framework directive, the access directive and the universal services directive) aims to regulate the **transport** of data through various networks. There are still aspects of the package which touch on the regulation of content, such as the rules directed at electronic program guides in Art. 5 (2) of the Access Directive, or Art. 31 of the Universal Services Directive, which governs "must carry" obligations in the Member States

- the **Audiovisual Media Services Directive** ("AVMSD") regulates media services. The directive defines two categories: "Television broadcasting" as a linear audiovisual media service, and "on-demand audiovisual media services" as non-linear services, meaning a service "provided by a media service provider for the viewing of programs at the time chosen by the user and at their individual request." Different regulation applies depending on what service the viewer chooses

- the **E-Commerce Directive** regulates "information society services" – these are usually traditional Internet services, such as access providers and hosting providers. The directive grants safe harbor provisions, but also sets a framework for electronic commerce.

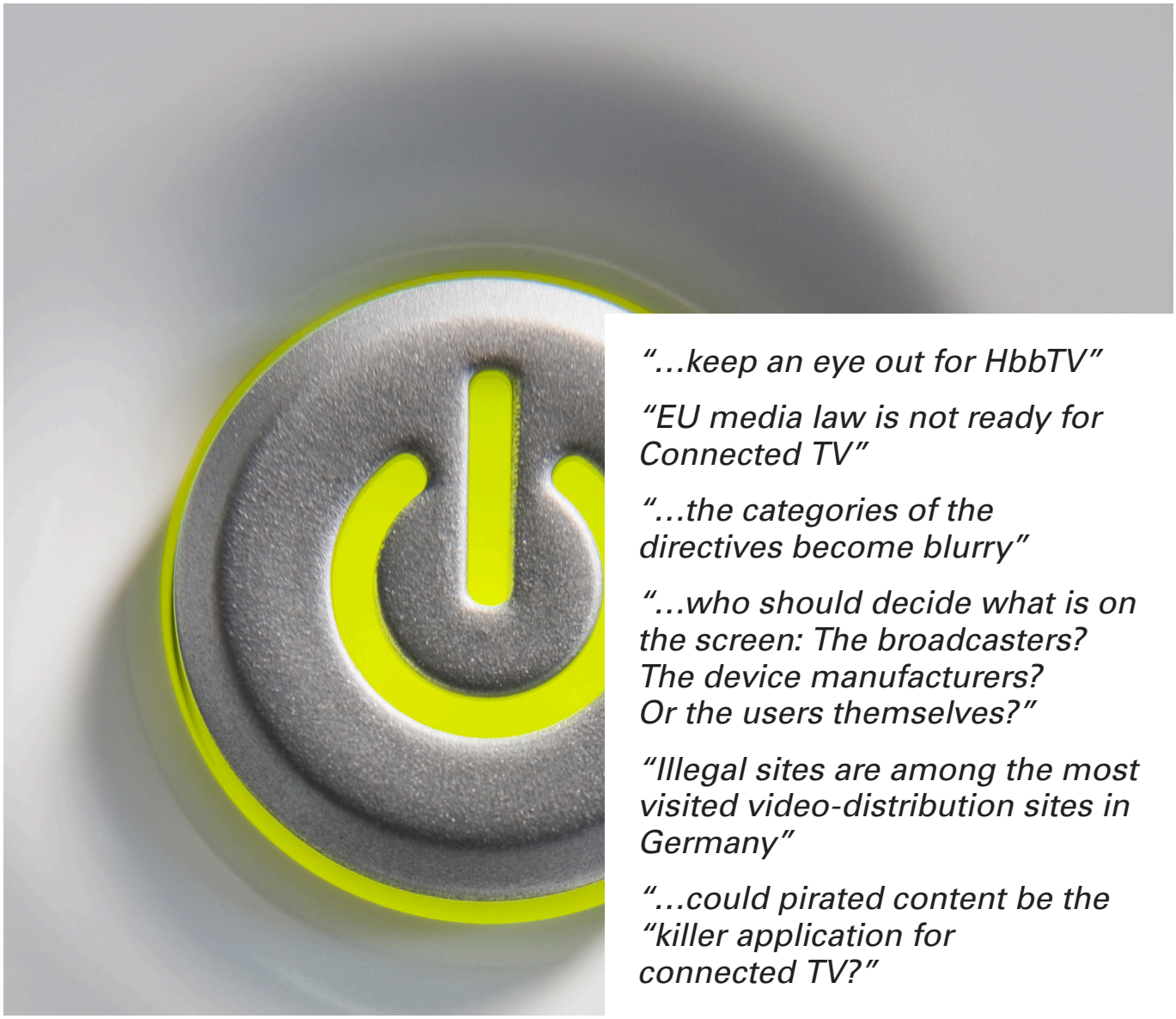
When it comes to Connected TV, the categories of the directives become blurry. Different directives apply to content that appears simultaneously on one TV screen. Within the AVMSD, the relaxed rules for non-linear services and the stricter rules for linear services apply to content on one screen. For example, linear TV news must not be interrupted by commercials. However with Connected TV, the commercials could appear on the same screen at the same time as a news show. While certain erotic content is permitted on the non-linear part of the screen, the same content would be

prohibited and sanctioned on the linear part. Evidently, this does not make much sense.

**Legal uncertainties**

Connected TV will include linear TV, which would be deemed a television service under the regime of the AVMSD. It will include non-linear TV, classified as an on-demand audiovisual media service with more freedoms. It could also include an information society service, caught by the scope of the E-Commerce Directive. It could of course be all of this at the same time. How does one regulate this in a legislative environment that was essentially built on the idea that there are different types of services that can be addressed by different regulatory frameworks?

Broadcasters worry a lot about their share of advertising revenues. Previously, when a channel was switched "on", the channel operator had full control over what the user could see on the screen. In the age



*"…keep an eye out for HbbTV"*

*"EU media law is not ready for Connected TV"*

*"…the categories of the directives become blurry"*

*"…who should decide what is on the screen: The broadcasters? The device manufacturers? Or the users themselves?"*

*"Illegal sites are among the most visited video-distribution sites in Germany"*

*"…could pirated content be the "killer application for connected TV?"*

of the split screen and "intelligent" displaying devices, this is no longer the case. Users "skip" advertising by using intelligent recording software. In addition platform providers might use layover ads to replace the ads of others with their own. Therefore, at the center of the discussion on Connected TV is the question of who should decide what is on the screen: The broadcasters? The device manufacturers? Or the users themselves?

There is another interesting aspect. Connected TV enables the broadcasters to monitor an audience regionally and is much more accurate than the methods that are used to allocate advertising revenues today. This will change the world of existing oligopolies and present new opportunities for smaller niche players.

**Opening the gate for piracy?**

So far, the discussion of Connected TV has focused mainly on questions of media law. However, this is only half of the picture. Illegal sites are among the most-visited video-distribution sites in Germany, generating revenues via the streaming of pirated movies. Some of them offer adult entertainment without sufficient youth protection. If TV sets have full access to the Internet, these sites are now only one click away from people's living rooms. Consuming pirated content might become very convenient for the viewers – could pirated content be the "killer application" for connected TV?

How could legal companies offering video downloads compete with these organized criminals? Even though these groups ignore copyright law, tax law, and youth protection law, they are permitted to operate freely through the Internet. If there is no level playing field, legal providers of content for Connected TV stand no chance.

**An opportunity, but also a challenge**

Viewed from a legal point of view, there are both dangers and opportunities. Both the EU and domestic media law will have to adapt quickly. However, Connected TV means more freedom of choice for the consumers and more competition in the market. It will pave the way for new business models, which will increase competition and innovation. Embracing this challenge in the future, will be essential for everyone involved.

**Christoph Wagner**
**T** +49 30 726 115 211
christoph.wagner@hoganlovells.com

# Congress green lights incentive auctions; but will they ever happen?

On 22 February 2012, President Obama signed into law the Middle Class Tax Relief and Job Creation Act of 2012 (HR-3630) and effected one of the most significant reforms to U.S. spectrum policy in recent history. Although the law principally serves to extend certain payroll tax exemptions and unemployment benefits through the end of 2012, Title VI of the Act will substantially impact the future use of broadcast television spectrum in the United States.

The legislation implements a core recommendation from the FCC's National Broadband Plan, released in 2010, by authorizing the FCC to acquire underutilized TV broadcast spectrum through incentive auctions and resell it to wireless operators for deployment to meet the country's growing wireless demands. To acquire the broadcast spectrum, the Act directs the FCC to "conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights." A broadcaster may "relinquish" spectrum by (i) giving up a broadcast channel without receiving any rights in return; (ii) giving up a UHF channel in return for the right to use a VHF channel; or (iii) giving up a broadcast channel to share a 6 MHz channel with another station. Licensees that participate in reverse auctions will be kept confidential.

The process is expected to raise billions of dollars for the Treasury, and help fund the development of a nationwide interoperable public safety network. However, if the incentive auctions fail to raise the minimum proceeds necessary to compensate broadcasters and cover the costs of relocating broadcast licensees displaced by the reorganization of the TV spectrum, then no spectrum transfers will occur and broadcasters will retain their spectrum.

Although the Act received bipartisan support and praise, it raises a number of questions that have no clear answers, and the law has received lukewarm support from the wireless and broadcast industries. Despite the significance of the following questions, they are likely to remain unanswered for the foreseeable future.

**When will the FCC conduct the incentive auctions?**
One source of uncertainty concerns when the Commission will conduct the incentive auctions. While the Act prohibits the FCC from conducting incentive auctions after 2022, this deadline offers no guidance on when the next steps must or will occur. The FCC has suggested that it will take the steps necessary to carry out the incentive auctions quickly, and is striving to develop procedures for formulating and submitting the reserve price for broadcast stations that wish to participate within 18 months. However, the likelihood of a swift implementation remains in doubt. Industry insiders generally believe that it will be four to six years before any broadcast spectrum repurposed through the incentive auctions is actually used for wireless service.

**How will the FCC implement the incentive auctions?**
In addition to identifying when the FCC will likely commence the incentive auction process, it is not clear how the Commission will do so. The incentive auctions authorized in the Act are likely to be even more expensive and time-consuming than the most complex auctions previously conducted by the FCC. In effect, an incentive auction will consist of two separate auctions: a "reverse" auction, in which TV licensees express an interest to relinquish their spectrum, and a "forward" auction, in which the Commission auctions the relinquished spectrum to eligible buyers. The Commission has never before conducted an auction that requires an incumbent licensee to surrender spectrum in exchange for auction proceeds, and will be operating in an environment of unprecedented legal, commercial, and practical uncertainty.

Of particular concern is whether the FCC will allow all wireless carriers, including AT&T and Verizon, to acquire spectrum in the incentive auctions. Although the FCC may not prevent any entity from participating as a competitive bidder if the entity complies with the auction procedures and otherwise is authorized to hold a license, it retains authority to adopt and enforce rules

of "general applicability, including rules concerning spectrum aggregation that promote competition." If the Commission imposes spectrum aggregation limits that effectively exclude the nation's largest wireless operators from participating in the auction, a protracted legal battle will certainly follow.

Uncertainty regarding the implementation is magnified in light of the 700 MHz auction conducted by the FCC in 2008. In that auction, the Commission attempted to influence who participated in the auction and what applications the spectrum could ultimately support. For example, the FCC adopted rules to increase the number of smaller wireless competitors that could participate in the auction and designated a portion of the spectrum (the Upper 700 MHz D Block) for a nationwide public safety network. Those rules have not had their intended effect, however. Smaller carriers, particularly those who acquired licenses in the Lower 700 MHz A Block, have faced a number of commercial and regulatory obstacles in deploying their networks. Likewise, the Commission was never able to successfully sell the Upper 700 MHz D Block spectrum (which has been reallocated for public safety use as part of the Act). For that reason, FCC Commissioner Robert McDowell has publicly expressed his hope that the FCC refrains from imposing onerous restrictions on the eligibility and use of the broadcast spectrum.

**How many TV broadcasters will participate in the auction?**

The success of the new law rests largely with the broadcasters, who ultimately decide whether or not to participate in the incentive auctions. In the recent past, the National Association of Broadcasters has indicated that few broadcasters have an interest in relinquishing their spectrum. However, since the law has been passed, some broadcasters have indicated that they may be willing to part with their airwaves depending on market demand and the amount of money that the spectrum will ultimately fetch.

**How will the incentive auctions impact TV broadcasters?**

Regardless of the number of broadcast licensees that participate in the auction, the Act is likely to have a major impact on all TV licensees. Even those that elect not to relinquish their spectrum may face reassignment when the FCC reorganizes the TV broadcast band. Some notable limits apply to the FCC's ability to relocate TV licensees, however: The FCC (i) must make "all reasonable efforts" to preserve the coverage areas and population served of each broadcast licensee, (ii) may not involuntarily reassign a TV station from a UHF channel to a VHF channel, and (iii) must reimburse TV licensees for the costs reasonably incurred with reassignment (using a $1.75 billion relocation fund). A broadcast licensee may elect to forego reimbursement and instead obtain a waiver to use its spectrum to provide "services other than broadcast television services," provided that the licensee maintains at least one free over-the-air signal to the public. Of course, the specifics concerning reassignment, the sufficiency of the relocation fund, and the number of broadcast licensees that choose to forego reimbursement, remain unclear.

**How much additional spectrum will the incentive auctions yield?**

The amount of spectrum that will become available for wireless services in the future will depend on a variety of factors, including how many broadcasters choose to relinquish their spectrum, how efficiently the remaining TV spectrum can be repacked, and what efforts are necessary to maintain the coverage and population areas currently served. Although the National Broadband Plan indicated that incentive auctions could yield 120 MHz of spectrum held by TV broadcasters, the enacted legislation is likely to yield only 60-80 MHz. Shortly after the law passed, Commissioner McDowell estimated that the incentive auctions will yield 80 MHz for consumer use. Industry experts, however, generally believe the auctions will yield less, around 60 MHz of additional spectrum.

**Chris Termini**
**T** +1 202 637 5437
christopher.termini@hoganlovells.com

*"…one of the most significant reforms to U.S. spectrum policy in recent history"*

*"…it will be four to six years before any broadcast spectrum… is actually used for wireless service"*

*"…unprecedented legal, commercial, and practical uncertainty"*

*"…some broadcasters… may be willing to part with their airwarves"*

*"…the enacted legislation is likely to yield only 60-80 MHz"*

# "TV Everywhere" key to cable operator strategy

*"Comcast, the largest cable operator in the United States has partnerships with both Samsung and Microsoft"*

*"Despite these recent successes, all is not rosy"*

*"It is imperative…to establish a television ratings system that can measure audience viewing figures regardless of the device"*

*"Viacom filed a lawsuit against Cablevision to prevent it from distributing Viacom video content on… Apple's iPad"*

*"A significant gating factor…is the current inability of Neilsen to measure television viewing audiences on these devices"*

Today's consumers of video programming have a myriad of viewing options available on an array of devices. Now multichannel video programming distributors ("**MVPDs**"[1]) are looking to add value and provide viewing flexibility by offering their subscribers the ability to access their respective offerings on multiple screens and from multiple platforms.

The TV Everywhere initiative in the United States allows MVPD subscribers that have been authorised to receive the content from a programming network as part of their underlying MVPD subscription to access that content on a streaming basis on various devices such as laptops, desktop computers, tablets, game consoles, connected TVs and smartphones. The subscribers gain access to the program network operators and the MVPD websites via software applications that are either already installed or alternatively can be downloaded onto the device.

The success of the concept of TV Everywhere hinges on the ability of MVPDs, programming networks and consumer electronics manufacturers to forge mutually beneficial agreements. Some programming networks like Turner (which owns CNN, TNT, TBS and Cartoon Network) embrace TV Everywhere, while other program providers are more reticent, with many wishing to seek incremental value in order to grant these additional rights. MVPDs, which have not historically embraced the availability of video content from programming networks on the Internet, are supporting authenticated access to their video offerings by subscribers using Internet-connected TVs (Samsung), set-top boxes (Roku, TiVO), Blu-ray players, and game consoles (Xbox 360, PlayStation 3).

Comcast, the largest cable operator in the United States has partnerships with both Samsung and Microsoft. These relationships are expected over time to provide Comcast's digital video subscribers with the ability to browse, find, sort and access video content from Comcast's Xfinity TV service on Samsung Smart TVs, the Samsung Galaxy Tab and the Xbox 360. In addition, Comcast and Disney recently announced a long-term, and comprehensive distribution agreement

that for the first time ever, will permit Comcast's Xfinity TV customers to watch ESPN, ABC or Disney shows live or on demand across multiple screens.

Despite these recent successes, all is not rosy. Last year, Viacom (which owns MTV, BET, Nickelodeon and Spike TV) filed a lawsuit against Cablevision to prevent it from distributing Viacom video content to Cablevision subscribers for use in-home viewing on Apple's iPad. Viacom settled its lawsuit with Cablevision on undisclosed terms that permitted Cablevision to make the Viacom channels available to its subscribers via internet-connected devices for in-home use.

Viacom is also embroiled in a dispute with Time Warner Cable ("**TWC**") regarding the same issue. After receiving a cease and desist letter from Viacom, TWC removed the Viacom content from its in-home iPad application. However, TWC filed for a declaratory judgment against Viacom contending that delivery of the Viacom channels does not infringe Viacom's copyright and therefore that TWC's existing carriage agreements permit it to deliver Viacom programming to subscribers viewing in the home.

While TV Everywhere does continue to progress, problems persist. A significant gating factor to the widespread deployment of live linear television on tablet devices is the current inability of Nielsen to measure television viewing audiences on these devices. Programming networks depend on Nielsen ratings to sell advertising; consequently it is imperative to the future growth of TV Everywhere to establish a television ratings system that can measure audience viewing figures regardless of the device on which the program is watched. Intellectual property rights issues also play a critical role in the expansion of TV Everywhere. When acquiring content for their channels, programming networks need to be vigilant in acquiring the panoply of rights that will enable them to license their channels to MVPDs. MVPDs expect to have the rights to make the content available to authenticated subscribers on a variety of devices and platforms. As programming networks and MVPDs enter into agreements that expressly address the concept of TV Everywhere, we can expect these agreements to address (in addition to the scope of rights and content to be made available) the authentication process, content delivery, promotion and branding, content protection, privacy, user data, advertising and traffic measurement. Of course these issues will be subject to negotiation, many of which will require the resolution between competing interests.

Providing subscribers with access to video content on their screen of choice is critical to MVPDs as they seek to combat competition from Internet-based distributors like Netflix, hulu plus and Google TV. While undoubtedly many obstacles still exist, and programming networks continue to license more content to online video distributors, the recent alliances between MVPDs, programming networks and device manufacturers bodes well for the continued implementation of TV Everywhere in the United States.

**Niki Tuttle**
**T** +1 303 899 7363
niki.tuttle@hoganlovells.com

1 MVPDs include cable, IPTV and satellite distributors.

# Zeroing in on the U.S. digital one-ders: incentive auctions, cable digitization, and basic tier encryption

Since the 2010 National Broadband Plan, the FCC has sought to convert little used TV spectrum to broadband usage. Last month Congress gave the FCC authority to conduct incentive auctions. Broadcasters can, but don't have to, sell their underutilized spectrum and keep some of the proceeds. Meanwhile, customer demand continues to fuel the cable industry's migration to full digital systems, freeing bandwidth on the cable plant for faster broadband internet and other advanced cable services. To that end, the FCC appears likely to allow cable operators to fully encrypt their digital channel line-ups. Taken together, these actions signal another phase in the digital transition. The U.S. "digital dividend"? More regulation.

**Incentive auction legislation**

In February, as part of a bill to extend payroll tax benefits, Congress granted the FCC authority to conduct voluntary incentive auctions.[1] The FCC will conduct two-sided auctions of previously assigned (yet underutilized) TV spectrum. Broadcasters can voluntarily sell their spectrum back to the FCC. The FCC will then, in turn, auction the freed spectrum, putting the bandwidth to new uses – namely more wireless spectrum for broadband.

Participation in the incentive auctions is voluntary – broadcasters will not be forced to vacate their spectrum. Instead, they can decide whether it is more profitable to sell their spectrum and exit the business. Less dramatically, a broadcaster can put its own spectrum up for bid and agree to find a broadcast partner to share the latter's 6 megahertz of channel capacity. If each uses 3 MHz, they can both still broadcast high definition signals and pocket some of the proceeds of the first broadcaster's sale. Broadcasters who elect to share channel capacity retain their call letters and channel guide numbers, even though they will be mapped to the old number (as digital stations are today). Remaining broadcasters will also be repacked to clear swaths of spectrum for wireless. Congress set aside money from the auctions for this transition.

The legislation has been criticized by broadband proponents as insufficiently aggressive in reallocating TV spectrum, which is lightly used given the 85+% of U.S. households that receive broadcast TV via cable or satellite and do not depend on over-the-air transmissions. The National Broadband Plan projected that the FCC could reallocate approximately 120 MHz of broadcast spectrum for mobile broadband use. The legislation results in an incentive auction that will likely yield only 60-80 MHz. The shortfall comes about because of statutory language obtained by the National Association of Broadcasters to protect stations close to the Canadian and Mexican borders.

Another complication: broadcasters obtained a promise in the law that if they participate, their service areas won't shrink.[2] This places an additional engineering hurdle on FCC auction planners and creates a nurturing environment for endless administrative disputes over whether a broadcaster has lost part of its territory.

Given President Obama's desire to obtain an additional 500 MHz for wireless broadband, the new authority is a good start – especially for a Congress that has passed few consensus bills in this Session – but not as good as it could be. Meanwhile, the FCC will need to adopt auction rules to meet all the statutory requirements, a heavy burden given the law's restrictions.

**Increased digitization of cable**

As with wireless broadband, consumer demand is pushing cable operators to retrofit their "spectrum", that is the 750 MHz or so of capacity on a modern cable system. To do that, cable operators need to clear channels used for linear video channels to be redeployed for cable modem broadband service. The solution is to digitize the remaining 6 MHz analog program services to free up space. At this point, cable providers are offering some digital channels in most of their systems. For instance, it's been true for decades that a 6 MHz channel that carries CNN in analog can be converted to up to 10 digital channels. This is how systems that used to be 78 channels are now 300 to 400 channels. But many systems remain hybrids – some analog channels, some digital simulcasts of those

channels, even some high definition versions of the same channels.

Operators were reluctant to go all-digital because of the legacy analog TV sets in subscribers' homes. So long as their signals were in analog, the customer could "plug and play", without the need for a set-top box or digital adapter. That convenience made cable an easy solution when over the air broadcasters went all-digital in 2009. Cable subscribers did not need to have any additional boxes – as over-the-air customers did – to view broadcast signals.

With digital sets commonplace and at price points that make replacement likely, some operators are taking their entire systems digital. Eliminating the analog channels frees bandwidth to provide faster broadband speeds as well as advanced cable services such as video-on-demand and HD channels. Digital sets can be plug-and-play, too, at least for any unencrypted signals.

According to research firm SNL Kagan, the industry-wide transition is "a relatively long process," and we are still "very early in this process." Cablevision and Comcast appear furthest along in the digital transition, having moved more systems entirely digital. One technique these operators are employing is switched digital – only delivering the channels that subscribers are actually watching rather than carrying all 300 channels in linear form.

Some analysts question whether cable operators will have incentives to switch their entire systems to digital once they have freed up sufficient bandwidth. The extra cost of taking the last analog channels digital may simply not be worth it. One incentive to make the switch is…

**Encryption of basic cable**

Cable operators that completely digitize systems would prefer to encrypt all services. Current FCC policy says that basic service – the tier that simulcasts over–the-air broadcast signals – must remain unencrypted. This policy goes back to 1992, when the FCC wanted to keep basic rates low (they remain regulated in some communities); the cost of a box would have increased the low rate. With a digital TV, customers can still plug-and-play the basic tier – no box required – though the expanded tier of cable networks (most customers subscribe to this) requires a box on many systems.

The FCC has allowed encryption on a case-by-case waiver basis. Based on the success of such waivers, including notably Cablevision's experience in New York, the FCC is poised to allow all operators who digitize their systems the right to encrypt the basic tier. Cable operators will, however, have to ensure that customers who depend on an unencrypted basic tier are not left in the dark – the FCC may require operators to provide low cost digital set-top boxes or Cable CARDS for TVs hooked up to TiVo-like devices.

Encryption is desirable to prevent video theft and to discourage hackers who use the unencrypted signal to steal internet service. Encryption also introduces efficiencies in cable installations and disconnections. Without encryption, cable operators have to send technicians out to connect and disconnect customers. With encryption, operators can connect and disconnect customers remotely and skip the truck roll. 99.5% of Cablevision disconnections in New York City are now performed remotely. Operators argue fewer service calls also means less trucks on the road and consequently less air pollution.

So who is against encryption? Over-the top-companies, like Boxee, that mold unencrypted basic service with an internet-based on-demand and other nonbroadcast video package. Getting broadcast signals integrated into products like Boxee's Box is essential because major sports events, news programming, and top-rated TV broadcast series are not widely available on line. Furthermore, the current version of the Box doesn't have a Cable CARD slot to work around the issue.

In sum, like the technology itself, the 2009 U.S. broadcast digital transition was only the first sequence of a long string of ones and zeros.

**Daniel Brenner**
**T** +1 202 637 5532
daniel.brenner@hoganlovells.com

**A. J. Burton**
**T** +1 202 637 5766
alton.burton@hoganlovells.com

**German perspective**

Auctions of broadcast spectrum as well as the digitalization of cable networks are also hot topics in **Germany**. Basic encryption in cable was deemed a means for the two leading groups of private broadcasters to align their interest against smaller channels, and has thus been under competition scrutiny for years. This has only recently seen a dramatic turn when Liberty Global committed to abandon the encryption of basic ("free TV") channels on its network to achieve merger approval for the acquisition of Kabel BW, creating the second largest cable operator in the country. On spectrum, Germany already completed the analog switch-off and auctioned the respective "digital dividend" for broadband uses, so there is no more room to further incentivize the abandoning of analog frequencies. Asking broadcasters to give up digital terrestrial spectrum, by contrast, would likely only work in exchange for granting a must carry status on cable.

**Andreas Grünwald**
**T** +49 30 726 115 357
andreas.gruenwald@hoganlovells.com

*"Broadcasters can voluntarily sell their spectrum back to the FCC"*

*"Operators were reluctant to go all-digital because of the legacy analog TV sets"*

*"With encryption, operators can connect and disconnect customers remotely and skip the truck roll"*

1 Middle Class Tax Relief and Job Creation Act of 2012, H.R. 3630, 112th Cong. (2012).

2 Service area means the area that a broadcast station or other transmission covers via radio waves. It is generally the area in which a station's signal strength is sufficient for most receivers to decode it, however this also depends on interference from other stations.

3 Basic Service Tier Encryption, FCC Docket No. 11-153, Notice of Proposed Rulemaking, 26 FCC Rcd. 14870 (Oct. 14, 2011).

# Privacy a major challenge for mobile video

Mobile device applications ("**apps**") have come a long way in just a few years, and the app industry's growth has been nothing short of staggering. There are now more than a million apps available for consumers, and more than 1 billion apps were downloaded worldwide during the last week of 2011 alone. As a reflection of this growth, smartphones are now outselling traditional personal computers. Smart phones and tablets will form a key part of tomorrow's television ecosystem. While not necessarily replacing the main television, smart phones and tablets will become the connected "Second Screen."

Despite the growth of the app ecosystem, media reports in recent months have highlighted a number of concerns over how many apps use their users' personal information, including sharing the information with third parties. Some apps are reportedly sharing address book contents, photo libraries, precise location information, and other information without specific permission from users. Although several recent industry efforts – such as an agreement with the California Attorney General, new guidelines from GSMA, and a template app privacy policy from The Mobile Marketing Association ("**MMA**") – will help address some user concerns, new challenges lie ahead. Specifically, as wireless providers deploy 4G networks and mobile TV services and a variety of companies attempt to turn mobile devices into the new "second screen" for video content, all members of the app ecosystem will need to remain vigilant in addressing data privacy and security issues under a fast-evolving regulatory landscape.

**California agreement**

In February, six leading mobile app platform operators – Amazon, Apple, Google, Hewlett-Packard, Microsoft, and Research in Motion – agreed to a "Joint Statement of Principles" with the Attorney General of California. The agreement was announced after a series of recent headlines raising questions about the sufficiency of current app privacy practices, and is designed to promote transparency and consumer control over personal data, as well as compliance with existing privacy laws. It also effectively creates enforceable, nationwide mobile app privacy standards.

"By ensuring that mobile apps have privacy policies, we create more transparency and give mobile users more informed control over who accesses their personal information and how it is used," Attorney General Harris stated.

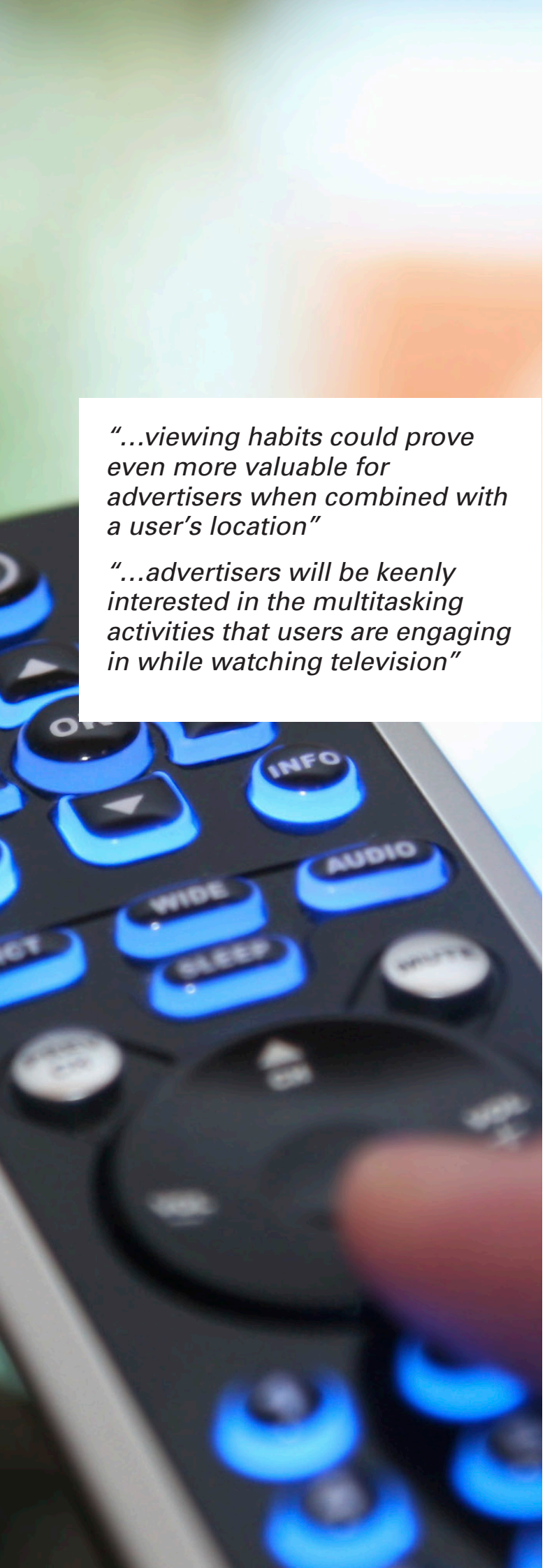
To promote transparency, the six app platform operators agreed to include, as part of their app submission process, optional fields for app developers to describe an app's privacy practices or provide a link to a privacy policy. When developers provide this information, the platform operators agreed to make it available to consumers in their app store. As a result, consumers (and privacy advocates) will now be able to learn about an app's privacy practices before downloading and installing the app. In addition, they will be able to compare the stated policies against actual practices for compliance with the California act and other existing laws.

Under the agreement, the platform operators will also provide a mechanism for app store users to report apps that do not comply with applicable laws or terms of service. They will also develop a process for addressing such non-compliance, facilitating a self-regulatory enforcement regime to help promote improved privacy practices.

Finally, the platform operators agreed to continue collaborating with the Attorney General on mobile privacy best practices. The parties are scheduled to meet again with six months to evaluate the state of mobile privacy.

**GSMA guidelines and MMA privacy policy**

Privacy enhancements are also occurring globally. Earlier this week at the Mobile World Congress in Barcelona, the GSMA published global privacy guidelines for mobile apps. The guidelines are intended to improve user trust and confidence through increased transparency and consumer choice. Leading mobile carriers in Europe are starting to implement the guidelines on their own branded apps, and others are expected to follow their lead.




*"...viewing habits could prove even more valuable for advertisers when combined with a user's location"*

*"...advertisers will be keenly interested in the multitasking activities that users are engaging in while watching television"*

The MMA also released a template mobile app privacy policy earlier this year. The template is designed to address key privacy issues that arise under many mobile apps.

**Mobile data privacy and security issues on the horizon**

The deployment of 4G wireless networks will enable a host of innovative new streaming video services and, with them, new data privacy and security issues that will need to be addressed. For example, content and service providers will have access to additional information about users' viewing habits, which could spur new targeted advertising models and social network platforms. In addition, these viewing habits could prove even more valuable for advertisers when combined with a user's location. Moreover, to the extent mobile devices increasingly become the "second screen" used to supplement traditional at-home television viewing, content and service providers – and advertisers – will be keenly interested in the multitasking activities that users are engaging in while watching television. In light of these looming issues, carriers, equipment manufacturers, content providers, app developers, app store owners, and other members of the mobile app ecosystem should continue educating themselves about the importance of protecting users' privacy and data security, and they should continue to monitor developments in this area.

**Mark Brennan**
**T** +1 202 637 6409
mark.brennan@hoganlovells.com

# EU and U.S. privacy proposals converge on principles, diverge on method

Privacy has never mattered as much as it does today. In an era of rapidly-evolving technology capable of collecting, storing, sharing (and potentially, mishandling) personal data about every aspect of our lives, the privacy stakes are high. And with almost daily headlines about privacy abuses and mistakes, it is not surprising that policymakers around the world are re-examining the legal frameworks in place to protect personal privacy.

The privacy problem is not restricted to any one jurisdiction. The problem is a global one. The Internet, social media and Cloud computing cross national borders. Indeed, the wonder of modern technology is the ability of people to access information and entertainment from virtually anywhere, and to send information globally. Thus, one would expect nations of the world to come together to propose a global standard of protection.

In that connection, at a recent conference held simultaneously in Washington and in Brussels, the EU's Minister of Justice and the U.S. Secretary of Commerce issued a joint statement declaring that "This is a defining moment for global personal data protection and privacy policy and for achieving further interoperability of our systems on a high level of protection."

One basis for the hoped-for interoperability is the wide agreement around the world, as there has been for decades, on the basics of what it means to protect privacy in an information age. The so-called "Fair Information Practice Principles," or "FIPPs", focus on empowerment of people to control their personal information and on safeguards to ensure adequate data security. FIPPs form the core of the 1980 OECD privacy guidelines on which both the U.S. and European models are based.

But, historically, the EU and U.S. have taken divergent approaches to implementing the FIPPs. In the U.S., where privacy interests are balanced with the right to free expression and commerce, and in recognition of the fact that – as a practical matter – not every piece of personal information can be protected and policed, the framework provides highest levels of protection for sensitive personal information, such as financial, health and children's data. In addition, targeted enforcement actions against bad (or negligent) actors– principally by the U.S. Federal Trade Commission – have created a "common law" of what is expected from business when it comes to the collection, use and protection of personal information. In addition, Chief Privacy Officers are proliferating and gaining in importance in U.S. businesses, adding to the level of American privacy protection. Data security breach notification laws are credited with creating a negative incentive for businesses to buttress the protection of personal data (to avoid having to report breaches to regulators and to the public).

In the EU, by contrast, a region-wide Directive, with national laws in 27 jurisdictions to implement the requirements of the Directive, purports to regulate every piece of personal information, and is predicated on the notion that privacy is a fundamental human right. Thus, under the approach of across-the-board regulation, there are strict limits on the collection and use of information, although enforcement of those limits has been episodic. Some of the enforcement actions have been criticized, such as the criminal case against Google executives for the posting by a YouTube user of a video showing an invasion of privacy – a video that Google took down when notified about it.

Still, the EU firmly believes its framework is superior to that of the U.S., and it has been steadfast in the belief that because the U.S. does not have an across-the-board privacy law, its protections are inadequate and transfers of personal data from the EU to the U.S. must be controlled and subject to special regulation.

Is 2012 a time for hope that the tensions between the EU and the U.S. over their respective approaches to privacy will subside? Will the fact that both jurisdictions are working to revise their privacy frameworks mean that there will be convergence and greater cooperation?

.

In January, the European Commission unveiled its bold new vision for privacy in the EU, calling for a region-wide Regulation to sweep away the inconsistencies of national laws passed to implement the 1995 Directive on Data Protection and proposing strict new privacy rules (and penalties for violating those rules). The proposed rules are intended to take into account the pervasive new technologies capable of collecting and sharing information about people, and to give individuals more control over their personal information. One month later, in the United States, the Obama Administration announced its "Privacy Blueprint" for the United States, calling for legislation containing a Privacy Bill of Rights and proposing enforceable codes of conduct developed through a so-called "Multi-stakeholder Process." The independent U.S. Federal Trade Commission followed shortly thereafter with a report on privacy containing that agency's expectations and hopes for the collection of personal information.

There are indeed common aspects to the EU and U.S. proposals. Both call for implementation of the "Privacy by Design" concept intended to build in privacy sensitivity and consideration into every stage of the development of products and services. Both recognize the importance of accountability by those who collect and use personal data. Both reflect the principle that people should not be surprised by the use of their personal data collected for one purpose but used for another purpose. There is no disagreement about the need for informed consent about the collection and use of personal information (although the kind of consent envisioned in each place differs as to various categories of data).

Big differences in approach emerge from the fact the U.S., while proposing a first-ever federal privacy law with a "Privacy Bill of Rights," still intends to rely on a variety of self-regulation (more precisely, co-regulation since self-regulatory rules could enforced by law enforcement). And the U.S. proposed rules do not contemplate a "right to be forgotten," a major feature of the EU proposal and one that First Amendment scholar Professor Jeffrey Rosen has labeled "the biggest threat to free speech on the Internet in the coming decade." Similarly, there is no right to "data portability" in the U.S. proposals as there is in the EU plan. The EU proposal contemplates broad jurisdiction to enforce its law, even to U.S. businesses without a physical presence in the EU, under certain circumstances. And even though the EU has borrowed the data breach notification idea from the U.S., it proposes a presumptive obligation to provide notice within 24 hours of a breach, a time frame widely regarded as wholly unworkable by those who have worked under the U.S. data breach laws. Finally, the EU proposes a schedule of monetary fines of up to 2% of an entity's global world-wide turnover for violations of the proposed Regulation – an amount viewed as wildly unreasonable in light of the potential for abuse by enforcers.

The period ahead will be one for adjustments to the proposed EU Regulation to make it acceptable to the European Parliament and to the Council of the European Union, the bodies responsible for the co-decisioning process required to adopt the Regulation. Input can be expected from businesses in Europe concerned about the practicality and the effect on trade of the proposed more-restrictive privacy rules. Likewise, in the U.S., the exact shape of the new privacy framework is still to be determined, on Capitol Hill and through the work of the Executive Branch.

But as things now stand, there is a big gap to bridge between the two trans-Atlantic approaches. In many ways, so close. Yet, very far apart in fundamental respects.

**Christopher Wolf**
**T** +1 202 637 8834
christopher.wolf@hoganlovells.com

**Winston Maxwell**
**T** +33 (1) 5367 4847
winston.maxwell@hoganlovells.com

*"the right to be forgotten is the biggest threat to free speech on the internet in the coming decade."*

*"... a defining moment for global personal data protection."*

# Global reform trends of broadcasting regulation

*"...services provided at the specific request of individual consumers can be regulated less strictly"*

Countries all around the world are examining how to reform their broadcasting regulatory systems, and have been doing so essentially ever since the move towards digital media began. With the global shift towards digital television ("DTT") firmly underway, together with enormous growth in alternatives to broadcast media, the mainly hypothetical "convergence" concept has become reality. Regulators are struggling to keep up.

We can find examples in numerous contexts, particularly among the earliest countries to achieve the digital transition for standard broadcasting, such as examples in Australia, Canada, France, the United Kingdom and Europe as a whole.

**Australia** initiated its digital transition as early as 1999, with the switchover from analogue to digital television starting in 2011 and have set a deadline for total switchover by 2013. As early as March 2006 the government issued a "Digital challenge" paper, leading to a Convergence Review in December 2010 and a series of committee papers throughout 2011. It also initiated an independent media review to look at future broadcasting policy. A final report was to be issued by the Convergence Review Committee by the end of March 2012 to explore how government policy should respond to the changing landscape.

**Canada** established its first DTT station in January 2003, with the total switchover first scheduled for August 2011 but this has now been extended to the end of this year. The Canadian regulator the CRTC initiated a "new media" proceeding in May 1999, leading to a decision not to license new forms of television distribution. By 2006, the government ordered a review of the future of the broadcasting environment, leading to numerous CRTC reviews, including "Navigating Convergence 1" in February 2010 and "Navigating Conference II" in August 2011. The CRTC issued a paper earlier in 2011 on shaping regulatory approaches for the future while the Canadian Parliament issued a report on future policy in June 2011.

**France** has always been a leader in devising future television policy, as demonstrated when it adopted a law on "Television of the Future" in March 2007. The country planned the final date for the digital transition to DTT to be November 2011 under the "France Numérique 2012" plan. The government called on the head of the broadcast regulator the CSA to develop a report on future policy, called the "Boyon Report" which was issued in September 2011, and named after the head of the CSA.

For its part, the **UK** re-launched the DTT transition in October 2002, leading to a final switchover date planned for October 2012. The regulator Ofcom as well as the UK government have held numerous consultations on various aspects of future broadcasting, such as a regulation on video on demand which was concluded in December 2009. The government issued a paper on "Digital Britain" in June 2009, followed by a communication review initiated in May 2011 which remains pending.

Both of these **European Union** member states have adopted policies against the backdrop of the binding EU set of rules published in 2007, the Audiovisual Media Services Directive ("AVMS"), which substantially amended and changed the focus of the previous Television Without Frontiers directive.[1] The AVMS Directive sets out the EU-wide regulations for traditional broadcasting, as well as certain rules for services that are 'like TV' but not your standard broadcasting, with different levels of strictness depending on whether the service is "on-demand" or not – the theory being that services provided at the specific request of individual consumers can be regulated less strictly.

Under Article 33, of the AVMS Directive, the European Commission was supposed to issue a report not later than 19 December 2011 on the application of the directive and any necessary proposals to update it. Curiously, we are yet to hear anything from the Commission on this report, and the deadline they previously set seems to have been overlooked.

The common theme in the above is that governments are constantly seeking to keep up with the fast paced developments of the broadcast sector. This cannot even be called broadcasting any longer, as so many new services are being developed. For instance, the UK Competition Commission had to reopen a proceeding in March this year on competition in the market for pay to view TV movies, based on the impact of recent services supplied via the Internet. We expect these consultations, reviews, reports and other proceedings will continue, as the media marketplace continues to evolve.

**Gerald Oberst**
**T** +32 2 505 0921
gerald.oberst@hoganlovells.com

1 The 2007 AVMS Directive amended two earlier legislative instruments, making a messy set of provisions difficult to parse through. The entire set of legislation was "codified", ie, combined into a single document, in Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010.

# Murphy case continues to haunt TV licensing models

In October 2011, the Court of Justice handed down its ruling in the combined cases of *Football Association Premier League v QC Leisure* and *Murphy v Media Protection Services*[1] (reported in our November GMCQ).

The first case[2] centred on whether Football Association Premier League ("**FAPL**") was entitled to prohibit the importation and use of foreign satellite decoder cards in the UK. The cards had been issued by broadcasters authorised by FAPL to broadcast English football matches in their respective territories only (such as Greece).

In the second case,[3] Ms Murphy was challenging her conviction under the Copyright, Designs and Patents Act 1988 ("**CDPA**") for dishonestly receiving a broadcast with the intention of avoiding payment of applicable charges.[4] A BSkyB commercial subscription was available at a much higher cost than the Greek subscription charges Ms Murphy had paid.

The CJEU's ruling confirmed that foreign decoder cards issued by authorised broadcasters are not the same as pirate decoder cards which legislation is intended to address. To the extent that licensing arrangements and national legislation prohibit the use of legitimate decoder cards, this is inconsistent with the EU concept of the freedom to provide services. The CJEU also confirmed that when a pub plays out a television broadcast, this involves a "communication to the public", which is an act restricted by copyright.

Applying this ruling to the first case, Lord Justice Kitchin found[5] that by displaying foreign broadcast signals to customers, the defendant pubs had infringed, and the suppliers of the cards had authorised the infringement of, certain copyright works incorporated in the broadcast and owned by FAPL.[6] However, the defendants were entitled to rely in part on the defence in section 72 CDPA which states that it is not an infringement of broadcasts, certain sound recordings or films to show a broadcast in public provided the audience has not paid for admission. This left only the underlying literary and musical works incorporated in the broadcast for which appropriate licences had not been obtained (ie the FAPL logo and other graphics and the FAPL anthem which formed part of the programmes). Further, it was only an infringement of those works because they had been communicated to the public; domestic use of the decoder cards would not so infringe. The matter has now been referred to the Patents County Court for an inquiry as to the appropriate sum of damages.

Ms Murphy's criminal conviction was quashed on 24 February 2012.[7] Lord Justice Stanley Burton and Justice Barling noted that their judgment has no bearing on issues relating to infringement of copyright or other intellectual property rights. Accordingly, Ms Murphy could still face a civil action should she continue to use the foreign decoder cards in her pub.

**Danielle Amor**
**T** +44 20 7296 5376
danielle.amor@hoganlovells.com

1 Football Association Premier League Ltd and others v QC Leisure and others; and Karen Murphy v Media Protection Services Ltd Joined Cases C-403/08 and C-429/08, 4 October 2011.

2 Football Association Premier League Ltd v QC Leisure (No. 2) [2008] EWHC 1411 (Ch).

3 Karen Murphy v Media Protection Services Ltd [2007] EWHC 3091 and [2008] EWHC 1666.

4 Section 297(1) CDPA.

5 Football Association Premier League Ltd v QC Leisure [2012] EWHC 108 (Ch).

6 Sections 20 and 16(2) CDPA respectively.

7 Murphy v Media Protection Services Limited (unreported) Queen's Bench Division (Administrative Court), 24 February 2012.

# German Court: online video recorders infringe broadcasters' rights

This case, which is reviewed below went before the German Federal Court in 2009. Whilst the Court gave their opinion on two issues in connection with the legal admissibility of online video recorders, it referred the case back to the previous Court, the Higher Regional Court of Dresden. The Dresden Court recently published its judgment which strengthened the rights of TV broadcasters against operators of online video recorders. The court's decision was based on a number of interesting technical details.

**Circumstances of the case**
The defendant offered services as an online video recorder via the Internet. The online video recorder operated as follows: the online user could choose telecasts from a wide range of digital TV programs. The selected telecasts then were automatically recorded, without the need for any further interventions or arrangements by the service provider. Subsequent to the recording, the taped telecast was transmitted to the respective user's private online account. Thus, the user was able to watch the telecast from any web-enabled terminal device, such as their personal computer.

The claimant was a TV station who claimed that the online video recorder infringed the ancillary copyright for broadcasters under section 87 of the German Copyright Act ("GCA"). The claimant argued in particular that the recording service breached the rule of undue reproduction (section 16 GCA) and should be classified as an unpermitted act of making a telecast available to the public (section 19a GCA). Finally, the plaintiff argued that the online recorder infringed the TV station's exclusive rights to broadcast particular programs (section 20 GCA).

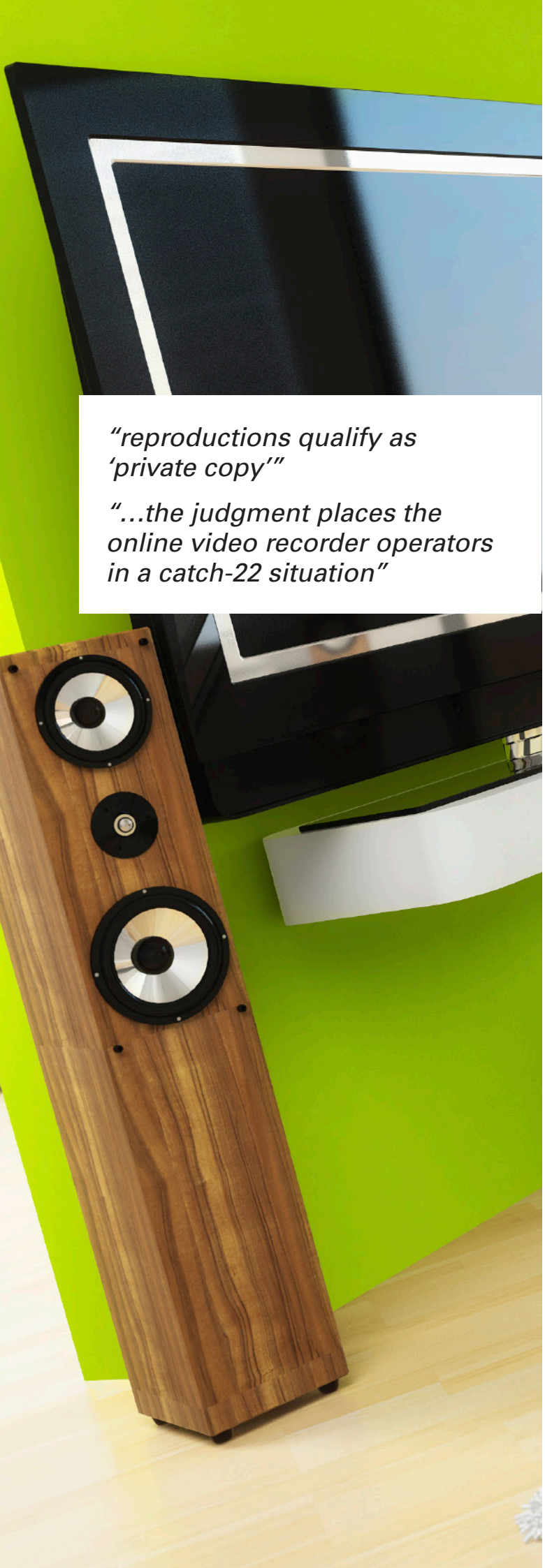
The Court ruled that the online video recorder had infringed the exclusivity rights of the broadcaster – certainly in regard to the particular operational design underlying the case.

**The Court's judgement**
The Dresden Higher Regional Court began its judgment by assessing the question of whether the recording via the online recorder was an undue reproduction under the terms of the GCA. The Court confirmed that the online recorder had reproducing qualities. However, the judges came to the decision that these reproductions were permitted under the category of a so called private copy ("Privatkopie") which is legal under section 53 GCA. In their view it was not the provider of the recording service who must be thought of as the reproducer, but rather the private end-user. The court based their concluding judgments on the specific operational design of the online recorder. According to the court, the reproducing process happened automatically after the customer had initiated the recording. Following this logic, according to the court, the online video recorder was, only an auxiliary device which supported the production of a private copy by the end-user.

Secondly, the Court did not agree with the claimant's argument in which they suggested there had been an infringement of the right to make the broadcasts available to the public. This argument floundered on issues relating to the technical set-up of the internet-recorder in question. The court ruled that the recorded telecasts were not made available to sufficient numbers of the public via the recording service, on the basis that the copies were only transmitted to a single end-user's private online account.

However, the judges did agree with the plaintiff on the issue of whether there had been an infringement of the broadcaster's exclusive rights to broadcast the recorded telecasts. The claimant was able to prove that TV signals were transmitted to at least ten different end-users at the same time. According the Court's judgment, this forwarding of a television signal via the online recorder to a multiplicity of members at the same time must be viewed as the exploitation and breach of the TV station's broadcasting right.

**Conclusion**
The verdict from the Dresden Higher Regional Court certainly strengthens the rights of broadcasters in Germany. It places an obligation on the online video recorders to set up a prior licensing arrangement with the broadcasting companies. This at least applies for



*"reproductions qualify as 'private copy'"*

*"...the judgment places the online video recorder operators in a catch-22 situation"*

service providers which operate on the same or similar technical setups as in the present case. At the same time, the judgment places the online video recorder operators in a catch-22 situation. On the one hand, they need a licence from the broadcasters to allow them to legally operate. At the same time, it remains uncertain whether the online recorders have to be seen as a cable retransmission service in terms of section 20b GCA for this obligation to apply. Only to the extent that the online video recorders fall into the scope of this section 20b GCA, would the broadcasters be constrained to grant a (compulsory) licence on market-based terms and conditions ("Zwangslizenz").

Against this background, it is hardly surprising that the first provider of online recording services has recently filed a claim against a major broadcasting company requesting a compulsory licence. However, the ultimate legal solution for these emerging media service companies will only be concluded in the course of the much-anticipated modernisation of the German Copyright Act.

**Nils Rauer**
**T** +49 (69) 96236 334
nils.rauer@hoganlovells.com

**Fabian Pfuhl**
**T** +49 (69) 96236 336
fabian.pfuhl@hoganlovells.com

# Copyright protection of TV characters in Germany

The protection of TV characters like Micky Mouse, Batman and Homer Simpson is not only important for making movies but also for marketing and merchandising. Many imaginary characters have been the object of German court decisions, for example Harry Potter[1], Bill[2] (a dog character) and Pumuckl[3].

For some time now, the imaginary character Pippi Langstrumpf has been at the centre of many court decisions.[4] Well known in the U.S under the name Pippi Longstocking, Pippi Langstrumpf is a freckle faced nine year girl with red hair pigtails, unusual clothes and a superhuman strength. Even though her mother is dead and her father is far away sailing, she is happy, rich, and fearless. Recently[5], the copyright holder of the Pippi Langstrumpf character sued various retailers who were selling carnival costumes of Pippi Langstrumpf. Although the retailers had changed some small details, there could be little doubt that the costumes were designed to represent Pippi Langstrumpf. The courts had to decide whether this constituted an infringement of the author's copyright.

**Copyright protection of TV characters**

Sec. 2 of the German Copyright Act defines works which are protected under German Copyright Law.

*"…a distinctive imaginary personality with an unmistakeable combination of external features, qualities, and recognisable behavioural trends"*

*"…the character Pippi Langstrumpf was protected"*

Cinematographic works are explicitly mentioned. Therefore, the concrete form of a film is undoubtedly protected by German Copyright Law. The script and plot of the story is also protected. In contrast, TV characters are not explicitly mentioned in that list. However, the list is not totally inflexible but open to the interpretation by the courts. In the case of Asterix-Parodies[6] the German Federal Supreme Court decided that "famous cartoon characters enjoy comprehensive copyright protection which is not limited to their concrete graphic representations in certain stories". It would seem that to ensure protection under German copyright law it is necessary to create a distinctive imaginary personality with an unmistakable combination of external features, qualities, and recognisable behavioural trends.

**Fair use**

An exemption to the normal copyright protection is regulated by Sec. 24 of the German Copyright Act. A new work can be published and used without acquiring permission from the original author if it is independent from the pre-existing work. This is defined as "fair use". However, case law shows that the necessary criteria to rely on this exemption can be very stringent. Fair use requires that the pre-existing work has faded significantly enough into the background, so that the new work appears independent from the original. Nevertheless, it is not necessary that in the new work the copyrighted character only "shimmers through weakly". This, it is argued would be too restrictive for the "fair use" exemption to apply. The similarity permitted to the pre-existing work depends on what extent it is necessary to borrow the copyright.

For example, if the pre-existing work is an object of a parody, the secondary work must remain recognizable to achieve the same comedic effect. However, it should be noted that there is no specific exemption in the legislation that says that parodies may utilize works without acquiring permission from the author. Therefore, it is necessary that the new work remains independent in the sense of Sec. 24 of the German Copyright Act from the original piece.

**Pippi Longstocking**

In the Pippi Langstrumpf costume case mentioned above, both the Cologne District Court and the Cologne Court of Appeal agreed with the jurisdiction of the German Federal Supreme Court that the character Pippi Langstrumpf was protected under the German Copyright Act. The courts noted that the character has a high level of creativity due to her extraordinary features. Furthermore, the courts decided that the sale of the carnival costumes could not be considered to fall under the exemption of "fair use". Since the general impression created by the costumes was the same, it was irrelevant that some minor details were different from the original character. Additionally, the carnival costumes were neither parodies of the character nor did they have an sufficiently independent threshold of originality.

**Conclusion**

These recent judgements show that the degree of copyright protection for TV characters in Germany remains high. It seems that utilizing the original character in a predominantly unchanged format or exploiting the character in another guise or creative work will in most cases be found to be an infringement of the author's copyright.

**Morten Petersenn**
**T** +49 (40) 41993 291
morten.petersenn@hoganlovells.com

1 Hamburg District Court, Decision of December 12th 2003 - Case No. 308 O 57/03.

2 Federal Supreme Court, Decision of July 8th 2004 - Case No. I ZR 25/02 ("Dog Character").

3 Munich District Court, Decision of May 24th 2007 - Case No. 7 O 6358/07; Decision of January 10th 2008 - Case No. 7 O 8427/07.

4 Hamburg District Court, Decision of June 24th 2009 - Case No. 308 O 200/09; Berlin District Court, Decision of August 11th 2009 - Case No. 16 O 752/07.

5 Cologne District Court, Decision of August 10th 2011 - Case No. 28 O 117/11; Cologne Court of Appeals, Decision of October 14th 2011 - Case No. 6 O 128/11.

6 Federal Supreme Court, Decision of March 11th 1993 - Case No. I ZR 264/91 ("Asterix-Parodies").

# Court clarifies rules on cross-media mergers

In a landmark ruling of February 15, 2012, the Bavarian Higher Administrative Court delivered an interpretation of the German cross-media ownership restrictions. For the first time ever, these provisions had been subject to juridical review. The lawsuit was brought by Axel Springer, Europe's largest publishing house, which in 2005 had attempted to acquire ProSiebenSat.1, Germany's leading private broadcaster. This would have been a €4 billion cross-media merger, the largest so far in German history. However, the acquisition was blocked for both competition reasons (by the Federal Cartel Office, "**FCO**") and for media plurality reasons (by the German media ownership Commission, "**KEK**"). Axel Springer had challenged both vetoes in court. The FCO veto was eventually upheld by the German Federal Supreme Court in June 2010, whereas the KEK veto has now been declared unlawful by the Bavarian court.

German media concentration law provides that no company may obtain "predominant power of opinion" (*vorherrschende Meinungsmacht*) in nationwide television. Such predominance is legally assumed to be in excess of 30% audience share, or – alternatively – when exceeding a 25% audience share threshold where a broadcaster also has relevant activities in other media markets.

In the case at hand, ProSiebenSat.1 accounted for only 22% audience share, but at the same time, Axel Springer was very strong in the newspaper market (with its flagship tabloid "**BILD**") and in other media markets such as online media and program guides. KEK therefore added ProSiebenSat.1's actual audience share (22%) to Axel Springer's "virtual" television audience share of 25%. The latter was determined by applying a certain coefficient to Axel Springer's share in other media (eg, 26% share in the newspaper market were considered to resemble 17% of television audience share). KEK then assessed the result of this calculation (22% + 25% = 47%) under the statutory 30% threshold as the ultimate limit on television audience share – and blocked the merger on that basis.

The case was therefore about the meaning of the statutory 25% audience share threshold: is it a binding minimum for the KEK to consider other media activities in its assessment at all, or is the KEK generally free to apply an overall plurality test even if the audience share threshold is not met. Not surprisingly, KEK took the latter position, whereas Axel Springer argued in favor of a binding minimum threshold. This underlying legal question had already been discussed in a prior ruling by the Federal Administrative Court on the same matter which set the grounds for the Bavarian court to now decide on the merits of the case. The Federal Administrative Court held that the 25% threshold is not absolutely binding, but that the KEK may only undercut it if (a) the broadcasters' actual audience share is at least "close" to the statutory threshold, and if (b) the KEK must explicitly justify why the facts of the actual case are so special that it required a decision beyond the statutory audience share limits.

The Bavarian court applied this ruling to the actual case – and ruled that KEK's decision failed to meet either requirement. At 22%, ProSiebenSat.1's actual audience share was too far away from the 25% threshold so for this reason, KEK would not have been entitled to take Axel Springer's other media activities into account for its decision. And moreover, KEK did not sufficiently explain why this particular case had required it to render a veto beyond the audience share thresholds. The court therefore concluded that KEK exceeded its powers in multiple ways.

The ruling sends a clear message to investors in the German media market. German media concentration law is in fact not as unpredictable as it seemed after the Springer/ProSieben case. Quite the contrary: There is no general plurality clause, but statutory law provides for clear limits – and opportunities – to allow cross-media mergers.

**Andreas Grünwald**
**T** +49 30 726 115 357
andreas.gruenwald@hoganlovells.com

# Russian Authors' Society determined as royalty collector for re-broadcast Russian copyrighted music on TV channels

The Russian Authors Society's ("**RAO**") traditional function is to manage the copyright issues for authors on any relevant license agreements, part of which involves collecting the royalty payments due to the owners of the copyright. Recently RAO appears to have changed its position regarding the collection of royalty payments owed for music used in films broadcast in Russia. Several large foreign channels have recently received letters from RAO requesting that license agreements be signed with RAO and that all subsequent royalty payments are made to RAO for any music used in films which are broadcast.

Russian law does not legislate on the issue of who is liable to pay royalties to collective management organisations such as RAO. Part IV of the Russian Civil Code ("**RCC**") (which regulates all IP issues in Russia) came into effect in 2008. Prior to this, the situation that existed was reliant on RAO's own development and interpretation of the existing legal provisions.

Since 2008 the general function of RAO has been to collect payments due to its members from cable TV operators who were considered liable to pay the royalties incurred from use of any music when they transmitted their films by cable. This is specified by the Russian Civil Code as one of the legal ways to use this copyright protected material. In 2010 this was confirmed as the correct approach by the court in the much publicized case of Broadcasting Company Pioneer TV v RAO. RAO's approach was also supported by the Russian Federal Surveillance Service for Compliance with the Law in Mass Communications and Cultural Heritage Protection (Rosokhrankultura). They were responsible for monitoring and enforcing compliance with copyright law in Russia, which included the licensing of copyright management agencies.

A lack of legal definitions for "broadcaster" and "cable operator" in the RCC led to the situation in which RAO could collect payments from both broadcasters and cable operators simultaneously.

More recently, the approach of the Russian Authors Society seems to be changing. The cable operators are now divided into two groups, depending on the type of agreement concluded between the respective TV channel and the cable operator. Based on this classification, the cable operator may now only be considered responsible for the payments to RAO in situations when the agreement with the respective broadcaster is a license agreement to use audio-visual works. If the agreement with the cable operator is only for the provision of telecommunication services, then it is the TV channel (broadcaster) who is responsible for paying any necessary royalties.

The media market is currently following RAO's approach. It is hoped that it will be confirmed by the court as the correct practice going forward.

**Ksenia Andreeva**
**T** +7 (495) 933 3000
ksenia.andreeva@hoganlovells.com

# Hollywood in Belgium – Hogan Lovells panel brings Belgium filmmakers to the Berlin Film Festival

Within the context of the Berlin International Film Festival, Hogan Lovells, in cooperation with the government of the German-speaking community of Belgium, again hosted its film-related panel and reception this year on the topic "Movie goes Belgium" on 10 February 2012, in the offices of Hogan Lovells Berlin. Thanks to the participation of high ranking representatives from the Belgian Government, film authorities, film Producers and film financiers, this event provided comprehensive information about cooperation possibilities in Belgium and the use of the so-called Belgium Tax Shelter.

**Small country, big investments**

Recently, Belgium garnered attention through Steven Spielberg's screen adaptation of the Belgian Comic "Tintin" and the successful Belgian-French 2010 co-production "Nothing to Declare", which to date has made more than $90 million at the box office, many times its budget. Focus has also been on Belgium for many other productions, as well as its constantly rising number of international co-productions. The reason is the Belgian so-called tax shelter model, introduced in 2003, which provides incentives for investment in movie productions in Belgium.

The tax shelter model has truly boosted production and since its launch provided for a production volume of €700 million of films using the shelter. In 2006, three years after its introduction, 46 feature-length movies were produced in Belgium. In 2009, that number had almost doubled to 87 – with an upward trend. Each year, over 1,000 Belgian companies make available money for movie production.

The tax shelter model is mostly used for co-productions with neighbor France. Movies such as "My Worst Nightmare" starring Benoît Poelvoorde, which premiered in Germany on January 19th, or "Les enfants de Timpelbach", produced in the German speaking part of Belgium with a budget of €13.7 million, are merely a few examples for the active Belgian-French co-production industry.

Only a handful of German co-productions have so far made use of the tax shelter model. German-Belgian co-productions such as "Goodbye Bafana", "Joeyeux Noël", or "Heute bin ich blond" (original title: "La fille aux neuf perruques"), shot recently by Marc Rothemund in Belgium and Germany, are exceptions. This is surprising since the model is just as applicable to German co-productions. Also, a German-Belgian co-production treaty – in place since 1964 – has become newly relevant under the tax shelter model. Lastly, with one of Belgium's official languages being German, there is no language barrier.

**Production and funding**

As a federal state, Belgium has several public film funds supporting movie production in the Flemish, the francophone, and German speaking parts of the country. The tax shelter model exists in addition to, and can be combined with, these regional programs. It serves as the main motor for the increasing number of international co-productions.

Tax Shelter: Funding for all of Belgium

In contrast to the existing regional funds, the tax shelter model is financed exclusively from private investments. Working as a tax relief, the model allows tax paying investors to offset up to 150% of their investment in movie production. Since investors also enjoy the other benefits of investment, like interest and profit sharing, companies are increasingly interested to participate and, in 2009, contributed more than €100 million to movie production.

Unlike some German film funds, which were made possible in early 2000 by a tax law loophole (resulting in many investors not receiving, or still suing to receive, the tax break), the tax shelter model was specifically codified in the Belgian income tax law. Art. 194 of the income tax law expressly provides for the shelter and its rules, assuring reliable implementation by the involved parties.

**How does the producer benefit?**
The introduction of the tax shelter aimed at strengthening Belgium's movie industry and supplementing the existing regional funding programs.

In accordance with the tax shelter model, the producer receives co-financing by an investor (or a group of investors), mostly bundled by an investment company and involving the Belgian co-production partner. The producer is free to win over an unlimited number of investors, as long as the combined tax shelter amount does not exceed 50% of the production budget.

The investor's contribution is in practice split into a loan and a direct investment by way of participation in the co-production. The tax shelter model requires that the loan only amounts to 40% of the investment; the remaining 60% have to be co-production participation.

As compensation for the participation in the co-production, the investor is granted pro rata rights in the commercial exploitation of the movie. Many times, the investor is granted territorial exploitation rights for Belgium. Usually, the head producer has the option to buy these rights back before exploitation. Thus, all rights can stay with one producer, if this is desired.

The producer has to ratably spend at least 1.5 times of the investor's financial participation for the production in Belgium. However, the law provides for some flexibility. For example, the production costs do not necessarily have to be spent in Belgium, as long as they are subject to Belgian tax law. Thus, a service provider established in Belgium can provide his services to the production in other countries, as long as the payments he receives are taxable in Belgium. The same applies to actors' salaries.

**Co-production is key**
Shortly after introduction of the tax shelter model, companies formed to support foreign producers who wanted to benefit from the Belgian funding programs. They look for investors and internally enter into contracts with them, so the producer does not have to.

Photo left: The audience eager to learn more about the Belgium Tax Shelter

Such a partner is of great value to foreign producers and necessary to fully and easily take advantage of the tax shelter model.

As the tax shelter's most important requirement, a Belgian company (or a foreign company established in Belgium) has to be involved in the project as a co-producer. Fortunately, the number of contracts that must be entered into is small, and usually merely includes a co-production agreement and a loan agreement (if desired).

Fund initiators Scope Invest, uMedia and Dexia Bank are constants in the Belgian co-production industry. Scope co-produces eight to 12 movies per year and was involved in "Nothing to Declare" and "Mr. Nobody", to date the most expensive Belgian co-production with a budget of €35 million. uMedia has co-produced or financed more than 100 movies over the years, among them prominent titles such as Paul Verhoeven's "Black Book" and "Sammy's Adventures".

**Combination with other funding programs**

It is not merely the big funding amounts that make the tax shelter model interesting, but also the possibility to combine it with numerous other programs in Belgium and other countries. In contrast to other tax incentives and funds, it does not require the movie to be shot in Belgium or exclusively cast Belgian actors. Rather, the production costs have to be mainly taxable in Belgium. This makes it possible to involve a foreign actor via a Belgian agency or a Belgian co-producer working not only in Belgium, but also in other countries.

**Regional Funding Programs**

Since 1995, the CCAV (Centre du Cinéma et de l'Audiovisuel) funds the movie industry in the Walloon part of the country (southern Belgium) with roughly three million inhabitants. VAF (Vlaams Audiovisueel Fonds) offers funding for the bigger Flemish part of the country (Northern Belgium) with approximately 6 million inhabitants. CCAV has an annual budget of roughly €14 million, VAF of €12 million. In addition, the fund Wallimage disposes of €2.5 million per year. Most recent Wallimage subsidiary is the fund Bruxellimage, which provides €2 million for shooting in Brussels.

**Christiane Stützle**
**T** +49 30 726 115 234
christiane.stuetzle@hoganlovells.com

The Fox Team

# Notes

# Notes

**www.hoganlovells.com**

Hogan Lovells has offices in:

Abu Dhabi
Alicante
Amsterdam
Baltimore
Beijing
Berlin
Brussels
Budapest*
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Jeddah*
London
Los Angeles
Madrid
Miami
Milan
Moscow
Munich
New York
Northern Virginia
Paris
Philadelphia
Prague
Riyadh*
Rome
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Ulaanbaatar
Warsaw
Washington, DC
Zagreb*



* Associated offices