

News Disruption and Digital Content

News Disruption – market challenges, opportunities and legal issues for digital content

The way we get news has been revolutionised by digital media. News is available on mobile devices, via newsfeeds, Twitter, email alerts, from online versions of traditional news media to digital-only publications such as [The Huffington Post](#), the Australian edition of [The Guardian](#) and, from the end of March 2016, [The Independent](#) (UK). [Media ownership laws](#) and [copyright laws](#) are under reform in Australia and the UK's consultation relating to [media plurality](#) continues with online content forming part of the assessment.

The nature of content is also changing, with original content, curated content, sponsored content, video, news aggregation, bloggers, live blogging, live tweets, re-tweets, link-outs, link-exchanges and even robot journalism.

Monetising digital news and legally protecting it to retain value remain material challenges for online news ventures. As traditional print media struggles with declining advertising revenues, we are now witnessing (after a slow start) a significant change with online advertising revenue eclipsing print media and predicted to eclipse television in the near future.¹

The challenges of widely disbursed digital news content for traditional media players is well understood and reflected in significant value decline in their traditional media assets – classified advertising is in a death spiral. To effectively monetise news, both traditional media and digital media rely on scale... yet the audience is now highly fragmented across multiple news sources available on multiple devices, where paid content competes with free content and where original content very often competes with its copied form.

We believe there are lessons to be learned from the market challenges, opportunities and legal treatment of online content. In this report, we look at the:

- (A) changing nature of digital content;
- (B) the rise of multi-platform, bundled offerings; and
- (C) the sorts of issues that risk management and rights enforcement strategies should have in their sights.

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¹ See, amongst others, PwC's 2015 Entertainment and Media Outlook.

A. The changing nature of digital content

(i) Not all content is equal

Democratisation of information has defined the internet. Digitisation of the media has created a platform where all digital content *appears* to be freely available. But not all content is “created equal”.

Enhancing the value of content is critical. The way online publishers are enhancing their content propositions are by:

- the **multi-media** nature of their content, combining text, photos, graphics, user-interaction and video offerings in order to grow online traffic, increase user engagement and in turn enhance the value of their online advertising inventory. This is no longer a trend: this is now a minimum requirement for survival.
- the **reliability** of content which is peer-reviewed, fact-checked and targeted content which in turn builds brand loyalty and encourages people to pay for online news in preference to free, aggregated alternatives (that may or may not be as reliable).
- offering a superior, time-saving **user experience**, free from busy advertising.

(ii) Monetisation models

Enhanced content propositions allow for monetisation either through online advertising within the content itself or via a paywall or subscriptions. The use of paywalls and content-blocking are common among online platforms developed by traditional media owners. This approach is typical of a first response to the need to move into an online model but also to defend traditional media assets. The News Limited print mastheads have taken this path and Fairfax has followed. More generally we are seeing a significant push to paywalled content and enhanced user-experiences, diversified with multi-platform offerings through building alliances with subscription-based music streaming, on-demand/user-controlled video and film services and catch-up television.

B. The trend toward multi-platform offerings, collaboration and alliances

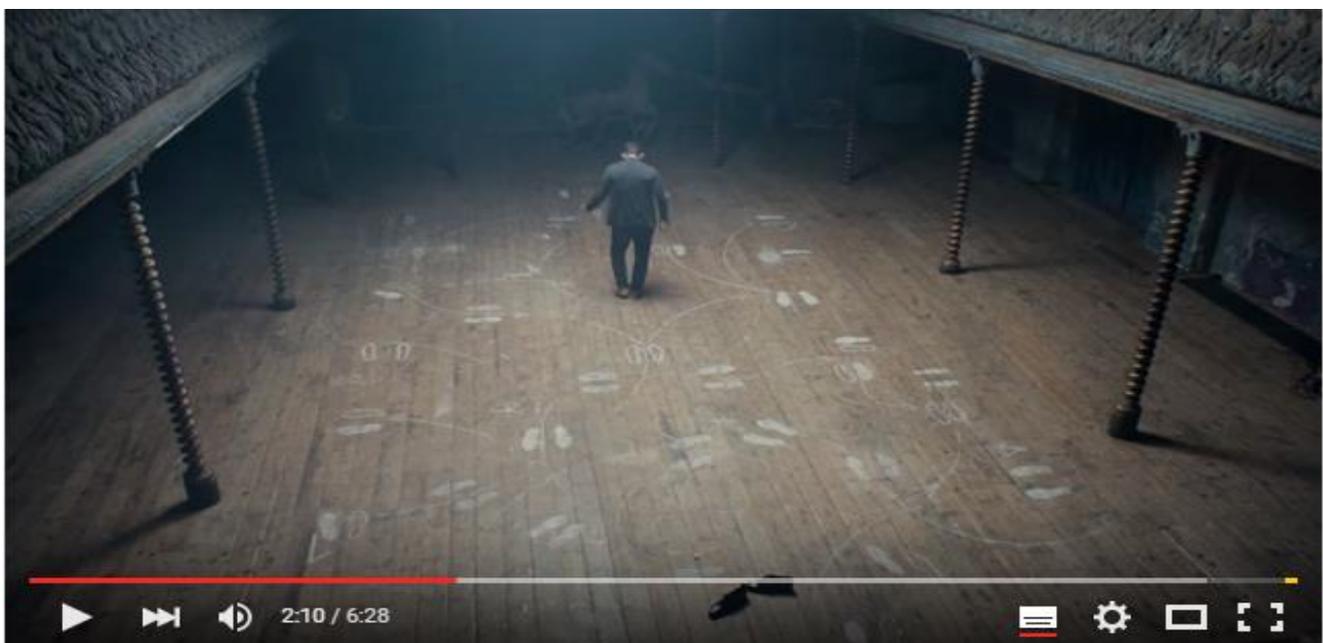
The recent launch of an Australian edition of *The Huffington Post* in joint-venture with Fairfax is one example of emerging alliances, leveraging the strengths of traditional media structures with an established global online audience. Mobile phone and broadband providers are also offering a range of music, news and video “entertainment” options or trials with their services. It remains to be seen whether alliances such as these go deeper in the future but it seems reasonable to expect they might, particularly in Australia given the proposed relaxing of media ownership laws.





Thinking of “traditional media” and “digital media” less as polar opposites and more as points on a spectrum of information distribution models, is also important when developing monetisation strategies. They needn’t be mutually exclusive or necessarily competing for advertising or subscription revenue. The “traditional” and “digital” bundled offering remains popular and each form part of the revenue streams emerging across the industry.

(ii) The value of premium video advertising



Enhancing consumer experience with a focus on premium news content may, at first, seem irreconcilable with online advertising, particularly with pop-up advertising that seems to shout and refuse to go away. However, premium video advertising that is engaging, innovative and entertaining for the audience can still be premium content despite the commoditisation, and its particular value may lie in its potential to become a vehicle itself for spreading third party content (which then links to, eg, “breaking news”).

Being able to “skip” an ad has a powerful ameliorating influence on poor user experience. However, content that is worthwhile consuming in full in the first place is the objective of premium advertising. Such content can be as

much about the story-telling and high production values as the underlying product, and it is content that does not usually reach the consumer as an interstitial (embedded within other content). Rather, it travels to the consumer via newsfeeds when someone shares it with their trusted network of friends or colleagues.

Premium video advertising that has achieved global scale is demonstrated by [Volvo's epic splits](#) with 80 million views, the [Old Spice](#) with 50 million views, [Johnnie Walker Blue Label The Gentleman's Wager](#) with 11.5 million views and counting, not to mention [Sainsbury's Christmas Advert 2015 \(Mog's Christmas Calamity\)](#) with 29 million views and [John Lewis's Christmas Advert 2015 \(Man on the Moon\)](#) which notched up 24 million views.

This sponsored content that bypasses traditional media altogether, relying on viral dissemination, is further disrupting traditional media revenue sources. In this way, focusing on premium content alone may prove to be limiting

C. Legal issues in digital content: the need for agile, innovative strategy

(i) Partnering legal rights with technology

The core underlying rationale for the plethora of disputes between the traditional rights holder (such as the music industry and film industry) remains. Those industries remain fiercely determined to protect their rights from what they see as value theft, while at the same time trying to position themselves in the new digital distribution chain. Interestingly, technology itself is providing tools to assist. Tracking software and services that can detect “word for word” reproductions of textual works, such as [Copyscape](#), mean that the scale of copyright infringement can be monitored and informed decisions made about how to enforce take-down (removal) and how to make strategic compensation claims. If this sort of technology can facilitate the removal of the infringing copy through the assertion of copyright, this alone can restore the value and ability to monetise the content (especially continually relevant content).

However, “rights management” requires aggressive copyright enforcement strategies and international collaboration, as recent [joint studies](#) between Australian and UK governments conclude. Moreover, the *form* enforcement strategies take is likely to benefit from regular scrutiny and testing in light of case law such as the [Dallas Buyers Club](#) case in Australia and recent [copyright law reform proposals](#), again in Australia, aimed at balancing the needs of rights holders with innovation, in step with the broader US “safe harbour” provisions under the *Digital Millennium Copyright Act 1998 (DMCA)*.

(ii) Ownership and publication responsibility

One of the most interesting legal issues in digital content, and one with the potential to materially disrupt traditional internet freedoms, is the question of ownership and publication responsibility. The recent announcement of media ownership law reform and copyright law reform by the Turnbull government recognises that Australian media now competes globally, and that this competition, and innovation, is limited by current copyright laws and ownership restrictions (eg the two out of three rule in relation to radio, newspapers and TV). Meanwhile, the UK's consultation process regarding [media plurality](#) continues and has positioned online content as being within the scope of any new measurement framework aimed at ensuring a diversity of views, at least within the genre of news and current affairs.

A wide range of questions arise in relation to ownership of the content itself. Who is liable for copyright infringement (or authorising infringement), privacy breaches or breaches of confidentiality? Who can be classified as “the publisher” for the purposes of defamation: the website publisher, the blogger or the person posting a comment? [Can voluntary contributors be characterised as employees?](#) Is user-generated content or a tweet different from other content? What about embedded third party content sitting on an entirely separate server? The questions go on.

We know in Australia that [tweets can be defamatory](#), as demonstrated by former Treasurer Joe Hockey's recent Federal Court victory in relation to a tweet posted by *The Age*/Fairfax. We also know that an ISP's “indifference”

to copyright infringement by third parties using the ISP's services does not equate to authorisation of infringement (and therefore liability), as held by the High Court in the recent case of [Roadshow Films v iiNet](#).

Across jurisdictions (acknowledging that online publishing requires a global lens), there are various legal distinctions made between "ISPs", "IAPs", "carriage service providers", "[intermediaries](#)" and "[website operators](#)", and many of these turn on the level of control actually being exerted over the content by the relevant entity. Many digital publishers, particularly those hosting websites or hosting commenting platforms, can find some exemptions from liability or a "[safe harbour](#)" available if they can prove they are simply hosting (rather than exercising editorial control), or if they follow a certain notice and take down process (in some cases notwithstanding some level of moderation).

Even if it is clear "who" the "publisher" is or where legal liability falls, if there is no easily identifiable news publisher, author, website operator or ISP, then there are layers of privacy and data protection laws to be reckoned with before any remedial action can be taken. There is also the question of the viability of pursuing claims for content that may or may not be evergreen, as well as the seeming discouragement of pursuing "speculative invoicing" in the absence of proving damage, which may be the ultimate impact of the [Dallas Buyers Club](#) case in Australia. The breadth of "safe harbour" protections and their conditions also vary from country to country, again underscoring the critical importance of a rights management strategy that takes this into account (whether you are a publisher, owner or author of copyright works).

(iii) Risk management in digital content

In addition to the commercial arrangements between digital content providers, telcos and/or traditional news media (in the form of joint ventures and licensing arrangements), the table below gives a flavour of the range of legal issues we are dealing with in this space. These issues can feed into rights enforcement and risk management strategies. They are broad and diverse, requiring legal skills across multiple disciplines and jurisdictions.



Copyright in digital assets

- Can you use the digital asset (photo/text/music) on your site?
- Can you link to it without liability?
- Can you stop your digital asset from being used?
- Is there legal immunity/safe harbour protection available to you and what are the conditions you must satisfy?



Defamation

- Who is liable?
- Can a tweet be re-tweeted or "shared" without liability?
- What is the relevant jurisdiction and audience for assessing the risk/damage of online defamation?
- Are blogs "opinion"?



Confidential information

- Are the right processes in place to identify confidential information and limit online disclosure?



Data security

- What data is being collected? For what purpose?
- Are personal information collection notices in place and consent practices adequate?
- Is your privacy policy compliant with the applicable law?

- What is the applicable law?
- Do you need a privacy officer?
- Do you have a process for identifying security breaches and complying with mandatory reporting of personal information security breaches?
- Have you assessed reputational risk in the context of data security?



Contributors

- Do you have a contract setting out who is liable for what?
- Do you moderate content? Does this enhance or encumber your legal protection?
- Do you pay your contributors? Do they/could they get an advertising revenue share? Could they be construed as “employees”?
- Is the content sponsored and legally compliant?



Enforceability of online contracts

- Are all online contracts enforceable?

While we have touched on some of these in this paper, we will be looking at some in more detail in future publications. Stand by...

Conclusions: dealing with digital

While the law that governs the digital content area is far from settled and cross-jurisdictionally diverse, what remains clear is that the law is struggling to keep pace. In this context, the benefits of an agile risk management strategy around digital content (one that recognises the legal risks but finds a way through these in a quick and efficient manner) can create genuine value. We remain of the view that alliances and collaborations that deliver multi-platform, diversified digital strategies are the key (along with legally robust and practical guidance...of course).



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