US-CARIBBEAN MEDIA RELATIONS: INSIGHTS

CORDEL GREEN and **RICHARDO WILLIAMS** discuss media ownership and content licensing – and consider broader cultural implications for all

This article examines two main issues that are very much interconnected: regulations governing foreign ownership of broadcast media, and copyright laws:

1. Does the US Federal Communications Commission's (FCC) clarification of the interpretation of its broadcasting ownership rules represent new economic opportunities for Caribbean media?

2. Does the continued reluctance of US media entities to license certain media content to authorised broadcasters in the Caribbean implicate global copyright and IPR (intellectual property right) regimes in increasing regulatory enforcement costs in these jurisdictions?

INTRODUCTION

The US has been Jamaica's dominant trading partner in goods and services, including that of media content. This arises mainly on account of the geographical proximity of the two countries and also the fairly large Jamaican diaspora domiciled in the US. For many decades, there has been a process of cultural exchange between the two nations, directly through tourism interactions, cultural immersion and dispersion among the Jamaican diaspora and through the cultural industries, especially sports, entertainment and media.
It is to the latter aspect that this paper devotes considerable attention as we explore mutually beneficial opportunities in trade in media content and propose solutions for redressing some of the more pressing challenges staving off the growth of Caribbean media enterprises, specifically the low penetration of media markets in the US.

FCC'S CLARIFICATION OF BROADCASTING OWNERSHIP REGULATIONS

In a Declaratory Ruling, released on 14 November 2013, the FCC sought to clarify its interpretation of Section 310(b)(4) of the Communications Act of 1934. Over the years, that section of the Act has been interpreted by investors and other stakeholders in the broadcasting industry as a 'presumptive limit', of 25%, on the ownership or voting interests of aliens in broadcasting entities registered in the US. Faced with strong advocacy from groups such as the Coalition for Broadcast Investment (CBI), the Minority Media and Telecommunications Council (MMTC) and the National Association of Media Brokers (NAMB), the FCC clarified its position, as follows:

"Section 310(B)(4) of the Act authorizes us to evaluate whether or not, in a particular situation, it is in the public interest to permit an entity to obtain or to hold a station license notwithstanding the fact that the alien in the U.S. parent of the station licensee would exceed the statutory benchmark – and to make such determinations on a case-by-case basis. Congress' directive is that 25% alien ownership is the point at which the Commission must act and exercise its discretion in making a public interest determination on proposed ownership arrangements that would exceed this level. Congress entrusts to the Commission the discretion to reject alien voting or ownership above the benchmark if the Commission finds that the public interest would be served by the refusal of the transaction which would confer a greater than 25% alien interest in the controlling US parent of a domestic broadcast license or by the revocation of the licenses involved." (FCC, 2013)

From the foregoing, it is clear that non-Americans can hold voting interests or ownership in broadcast entities in the US that exceed 25%, but only with the explicit approval of the FCC. And the FCC arrives at its approval through a process of testing whether alien ownership above 25% could possibly impair American public interest.

We are of the view that this clarification by the FCC signals a fresh and welcome opportunity for investments in minority media in the US and most importantly, by media investors and companies from developing regions such as the Caribbean, which has a large diaspora domiciled in the US.

This seemingly 'heterogeneous' group is in reality a natural, near homogenous pool, portending natural prospective business partnerships, as well as a lucrative market for media content that bears similarities to their own cultural expressions back home. The potential for doing lucrative business is not without theoretical support and insight, for example by Horst (2010), who draws on Gilroy's (1993) concept of 'rooting' and 'routing' to demonstrate how Jamaican diasporas in the UK, Canada and the US are using ICT, including traditional broadcasting media such as television and radio, to better understand their roots. Horst notes that in areas heavily populated by Jamaicans, such as New York, London and South Florida, local shop vendors often sell traditional media such as the Jamaican newspapers, the Jamaica Observer, the Star and the Gleaner, and also radio stations such as Caribbean Vibes Radio play Jamaican

music and provide Jamaican focused news and current affairs.

But, for many second generation Caribbean people, the online medium represents their most accessible space for content that is reflective of and steeped in their familial culture. Based on the US census of 2012, there were about 2.34 million British West Indians living in the US, with 48% and 44% of those individuals residing in northeastern and southern parts of the US, respectively. Of that total, Jamaicans represented the largest group, with 951,000, followed by Haitians with 830,000.

One Caribbean oriented broadcasting entity operating in the tri-state area (New York, New Jersey, Connecticut), Caribbean International Network (CIN), which focuses on Caribbean culture, news, sports and opinion, is already drawing in more than half of Caribbean nationals on the two channels on which it broadcasts. Its viewership is actually higher than that of other top ranked channels such as Fox, CBS, ABC and Discovery Channel (Henry 2014). There is clearly a basis for more Caribbean investment in US based broadcasting entities. But some lingering issues need to be addressed with respect to the FCC's clarification.

One remaining issue concerns the methodological treatment of applications by aliens for ownership in broadcasting entities that exceed the 25% threshold. The FCC has not outlined or made public a substantive and objective rubric for determination of whether such applications could impair the public interest. Also, it needs to be clarified whether the FCC will require an additional application for further increased ownership share above an already approved level exceeding 25%.

We now turn to another but not mutually exclusive issue relating to US-Caribbean trade in audiovisual services.

LICENSABLE MEDIA CONTENT IN THE CARIBBEAN

The Caribbean exists in what can be loosely called the North American satellite footprint, which means that the islands receive, incidentally, US cable/satellite programmes. Over the years, some cable operators in Jamaica have retransmitted these signals, on a paid basis, to their 'subscribers', without having obtained licences from the channel owners. In several of these instances, the Jamaican cable operators, like their counterparts in say the Bahamas, have expressed an interest in doing business with the channel owners but are rebuffed either because the individual market on the island is considered insignificant or because the channel owner has no rights clearance beyond the US territory – although in reality everybody knows that the content is being delivered to neighbouring territories in the region.

In the absence of a Berne Convention-based compulsory licensing regime, which is disliked by US copyright holders, there is no framework for addressing this issue. The result is a vacuum between the organic, culturally and territorially logical demand for content, on the one hand, and intransigent rights holders who hold firmly to long established copyright modalities, albeit with questionable efficacy given the ease with which technology facilitates the circumvention of legal and technical barriers to consumption.

> **"Consumers see no logic in shutting out content from licensed cable services that can easily be accessed via unregulated means."**

This situation is impatient of relief and begs for a solution which balances the legitimate and natural expectations of satellite television consumers and the rights of copyright holders. In this regard, the Jamaican government insists on a licensing regime under which subscription television providers are required to transmit only programming for which they have acquired licences. This is enforced by the Broadcasting Commission, a quasi-independent regulatory body. Applicants for subscription television licences are required under Regulation 4(1)(iv) of the Television and Sound Broadcasting Regulations (1996) to "secure the relevant permission or enter into agreements or arrangements necessary for the operation of [their] businesses". This includes obtaining licences to broadcast the channels carried on their service. Cable operators are also bound by Section 4(i) of the Copyright Act (2000), which prohibits the reception and distribution of encrypted transmissions except where decoding equipment has been made available by, or with the authority of, the person making the transmission, or the person providing the content for the transmission.

Furthermore, Jamaica, by virtue of being a member of the Caribbean Community (CARICOM) trading bloc, is party to the bilateral Trade and Investment Framework Agreement (2013) between the US and CARICOM. This agreement contains specific provisions for the mutual protection of intellectual property rights in each other's territory.

This is the dilemma that Jamaica faces: on the one hand, there is a robust regulatory environment that insists on the broadcast of only licensed content, but on the other hand, there are premium cable channels whose owners refuse to offer distribution in the Caribbean. Opportunistic intermediaries bridge that gap through over-the-top (OTT) services, unregulated satellite television services, illegal cable operations, and sometimes foreign 'grey' content aggregation and signal distribution.

The Broadcasting Commission is bound to act towards protecting the interest of international copyright holders. However, it can only act in relation to cable services, over which it has jurisdiction. In this regard, the Commission has been relentless in its efforts to promote commercial solutions to the programming issues. For example, in 2007 and 2008 the Commission wrote to the chairman of HBO proposing a resolution to access and copyright issues. In response, HBO advised in January 2008 that it had developed a 100% English language feed for the Caribbean. Even as it was seeking to facilitate a commercial solution, the Broadcasting Commission issued directives in September 2007 requiring all cable operators to remove unlicensed HBO and Cinemax channels,

A warning about illegal cable – one of several such messages in a campaign by Jamaica's Broadcasting Commission

based on complaints from HBO that the channels being transmitted in Jamaica were not legally available in the Caribbean and were only licensed for US viewers. HBO subsequently issued a statement acknowledging the Commission's consistent action in relation to copyright.

But this unwavering and relentless drive to secure the interest of copyright holders by the Broadcasting Commission, while improving compliance among cable operators with the provisions of copyright laws, also fosters a high degree of confusion among and even resentment by consumers of US originated television content, who see no logic in shutting out content from licensed cable services that can easily be accessed via currently unregulated satellite and internet-based substitutes. Jamaica's relentless pursuit of copyright compliance in the cable sector therefore comes at a non-trivial cost.

It is our view that the unwillingness, and in some cases inability, of US channel owners to license their products for the Caribbean region, is in effect, driving up the regulatory costs of IPR enforcement in these small island nations, and, regrettably but factually, creating incentives for or unwittingly facilitating continued IPR breaches. Remedies need to be explored, facilitated or created under international trade law and bilateral agreements, since it seems inevitable that the existing frameworks are being trumped by prosumers, technophiles, by-pass technologies and the novel notion of a 'global citizen' in the context of 'rights of access' to broadcasting and digital content.

GLOBAL CITIZENS AND RIGHTS OF THE USER TO CONTENT

Notwithstanding the unquestionable force of Jamaica's accession to international copyright treaties and global trade in services agreements, a new question has arisen whether Jamaicans, as digital citizens in a global space, ought to enjoy, to the extent technology makes possible, unfettered rights of access to content currently being denied to them. To answer this question, we ought to first probe whether in fact rights holders' exclusive rights to their content ought to be treated as infinite or delimited.

There are some legal theorists (Dusollier et al. 2000; Grosheide 2001; Hugenholtz 1997) who suggest that the exclusive rights of copyright holders ought not to be infinite in the extent of their control over access to its use and appropriation, since to confer such infinity of power is tantamount to an erosion of other fundamental rights and liberties, such as freedom of information and the right to circulation of culture. This is a fundamental tenet of the Universal Declaration of Human Rights (UDHR), which states in article 19 that "everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Favale (2012) observes on this point that "information should freely circulate through culture, ideas, thought, speeches, opinions and creativity. While article 27(1) of the UDHR directly protects the circulation of culture, article 19 allows free expression and access to information, and therefore it protects as well the circulation of culture, although indirectly."

Favale notes further that "according to the human rights doctrine, freedom of expression is grounded on several justifications: it brings moral autonomy; it takes to the truth by means of discussion; it enables meaningful participation in democracy and it allows self-fulfillment. A government that suppresses those important liberties, in the absence of any special circumstances, offends the moral dignity of its citizens." This poignant observation can be adapted to the discussion on the continued reluctance of some US programmers to make or facilitate their programming being accessed under licence to