

# TAIWAN

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The days of strict state regulation and control of the media in Taiwan have fallen to the wayside. The regulation of the media industry now generally would be what one would expect from a vibrant democratic society<sup>(1)</sup>. Freedom House consistently ranks the media environment as one of the freest in Asia, with competition now driving the liberalised, open, and boisterous media sector.



Marcus Clinch

## Navigating the New Media with the Old: Social Media and the Law in Taiwan

The media industry has adapted quickly and gone online and mobile so as to keep pace with demands of consumers and technology. The industry now though must also compete with, while participating in, the growing prevalence and importance social media plays in day-to-day life in Taiwan<sup>(2)</sup>. And amid criticism, however, over corporate and outside influences on the media sector in Taiwan, social media looks to play an increasingly more significant role in how Taiwan receives information. This may best be demonstrated by the recent use of social media by the so-called Sun-

flower Student Movement to disseminate information to the public as well as to traditional media in real time.

Social media, however, does not operate in a legal vacuum and its use - whether by the media industry other industries, social groups, or individuals - to disseminate information must address a number of issues also faced by the traditional media sector in Taiwan. For example, the Central Election Commission fined current President Ma Ying-jeou in 2012 for a Facebook post he made on Election Day before the polls closed. His post had

violated a prohibition on campaigning by candidates after 10 pm the day before an election. This article will provide an overview of a number of key issues for both social and traditional media in Taiwan.

### **Defamation, Insults, and Reputation as Swords and Shields**

Chapter 27 of Taiwan's Criminal Code covers offenses against an individual's reputation. This includes the offences of public insult and of defamation. Article 195 of Taiwan's Civil Code establishes civil liability for, among other things, damage to an individual's reputation or privacy. These represent existing protections within society distinct from the sphere of media or social media. Chapter 27 and Article 195 have been used both as a sword and shield.

Article 309 of the Criminal Code sets out that an individual who publicly insults another can face detention, (short-term imprisonment) or a fine. There have been numerous calls for this Article to be scrapped or reformed as there have been prosecutions and convictions (including with sentences of detention) over the use of foul or harsh language. Cases typically arise from verbal altercations or disputes between individuals, but social media also provides for an applicable medium for the Article to find increased use, especially where facts may not constitute defamation.

Article 310 of the Criminal Code sets out the offense of defamation<sup>(3)</sup>. The elements of the offence will be satisfied when an individual raises or circulates a fact that will harm the reputation of another and does so with the intent

that the fact be communicated to the public. The offense is punishable by one year imprisonment, detention, or a fine. The offense is punishable by two years' imprisonment, detention, or a larger fine when the information has been circulated by way of written word or a drawing.

There has been no shortage of high-profile cases involving Article 310. Politicians, celebrities, and those in the public eye frequently rely on it - both as a sword and shield - to counter a real or perceived wrong by the media or another party. It is often used in conjunction with a suit under Article 195 of the Civil Code for damages to reputation or privacy - the practice being to file a criminal complaint along with a civil request for a public apology. Its use as a sword has often been criticised.

A blogger ran afoul of Article 310 after posting a critical review of a restaurant's food and sanitary conditions in 2008. The restaurant's owner filed a criminal complaint and sought civil damages. The dispute ended up before Taiwan's High Court where the defendant received a sentence of 30 days detention, though suspended for two years, and an order to pay damages. Judges at both the District Court and High Court indicated that reasonable bounds had been exceeded by the review though for differing reasons.

A high profile case in 2013 saw an environmental engineer acquitted of criminal defamation as well as seeing a corresponding civil suit determined in his favour. The defendant had presented

evidence establishing a connection between a company's emissions in Taiwan and cancer at a scientific conference and later at a press conference. The company sought civil damages as well as a criminal conviction. The court ruled that the defendant's comments had been "a fair comment on a matter open to public criticism" - one of the valid defences to Article 310.

It will be a valid defense to Article 310 to establish the truth of the information as fact unless that fact relates to the personal life of the victim and is not of public concern. Article 311, however, also provides for four further defences if the individual who made the statement did so with good intent under the following circumstances:

1. in the protection of a legal interest, self defence, self justification
2. as a public official reporting in their official capacity
3. as a fair comment on a matter open to public criticism or
4. as a fair comment on a political proceedings, legal proceedings or a public meeting

It should also be noted that under Article 312 of the Criminal Code that an individual who publicly insults a deceased person can face detention or a fine and that the offense of defamation committed against a deceased person can be punished by one year imprisonment, detention, or a fine<sup>(4)</sup>.

### **Privacy Protection**

Chapter 28 of the Criminal Code sets out offences against privacy. Articles 315-1 makes it an offence to use instruments/equipment without cause to peep or eavesdrop on another individual's private activities or to use means by which to record an individual's private activities. Article 315-2 establishes liability on the part of those who furnish a location or instruments/equipment to commit the offence in Article 315-1. Articles 316 through 318 cover the unauthorised disclosure of the information of others by specified professionals, public officials, and access to computers. Article 318-2 allows for the sentence to be increased by 50 per cent where disclosure under Articles 316 through 318 took place by computer. This obviously has specific implications with respect to social media and the dissemination of information. The high profile "online" cases, however, have mostly been around photos illegally obtained from an individual's computer or other devices and then distributed via social media. Also noted above, Article 195 of the Civil Code establishes liability for damages to privacy.

Taiwan's amended Personal Information Protection Act also came into force in October 2012. Sufficient exceptions have been established to cover the lawful collection, processing, and use of personal information by the media in accordance with the Act.

### **'Blurring' the Lines between Advertising, Content, and Comment**

Media and entertainment industries in Taiwan face prohibitions and restrictions on embedded marketing, product placement, and the like. Recent developments

include a prohibition on public funds being used for embedded marketing (paid domestic news stories) and, in the opposite direction, a relaxing of restrictions on product placements and sponsorship in broadcast media. A high profile case, however, in 2013 brought attention to embedded marketing in social media and online platforms when Taiwan's Fair Trade Commission fined Samsung and two local agencies for "astroturfing" - the deceptive practice of presenting a marketing campaign in the guise of unsolicited comments from members of the public so as to provide credibility to those comments by withholding the fact that they had been paid for.

The Fair Trade Commission found that Samsung had engaged in "astroturfing" - by paying for negative online user and blogger reviews of competitors' products, favourable reviews of its own products, and rebuttals to negative reviews of its own products - and that this constituted a violation of the Fair Trade Act. This was the first case where the Fair Trade Commission addressed the practice of "astroturfing" online. After the decision, the Fair Trade Commission further clarified through amendments to its "Disposal Directions (Policy Statements) on Use of Endorsements and Testimonials in Advertising" that where a party has an interest - some expected benefit or compensation from another that the public would not otherwise expect - in endorsing or reviewing a product online that the interest must be disclosed. The endorsement or review must also otherwise comply with the Disposal Directions and relevant provisions of the Fair Trade Act.

### **Content and the Protection of Children and Youths Welfare and Rights Act**

The Protection of Children and Youths Welfare and Rights Act is becoming increasingly more significant for media, online platforms and social media - especially so after further amendments came into force in 2011. A comprehensive review is beyond the scope of this article but the takeaway should be that content providers, both traditional media as well as online, have a responsibility to prevent youth from being exposed to certain types of content - including broadly 'content that could be harmful to their mental health'. Several ratings systems have now been established for content based on the medium. The Act also places reporting restrictions on the names and personal information of youth - including those found to be victims of offences under specific provisions of the Act.

It should also be noted that Taiwan's Criminal Code sets out a number of offences applicable to media content for general audiences - both traditional and social. These include matters from the distribution of obscene material through to enticing others by writing, pictures, word of mouth, or other public means to commit a criminal offence, violate the law, or disobey a legal order.

The legal and regulatory environment for media as well as the market itself has changed dramatically over the last 20 plus years. It is clear that it will continue to do so as social media continues to gain importance as a means to both receive and disseminate information on a real time basis. Further legislation and regulation will be likely but old issues

will likely remain relevant for some time.

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Constitution recognizes both freedom of the press and freedom of speech.

(2) Taiwan's Central News Agency reported in February 2014 that active Facebook users in Taiwan reached 15 million per month in the fourth quarter of 2013, or approximately 65 percent of the country's population; and reported in April 2014 that the number of registered users of the messaging application Line in Taiwan exceeded 17 million.

(3) The Article was reinstated by Taiwan's Supreme Court in 2000 with a finding that it did not breach an individual's freedom of expression.

It is also an offense under Article 246 of the Criminal Code to publicly insult a temple, shrine, church, grave, or public memorial. Offenders face up to six months' imprisonment, detention, or a fine.

## BIOGRAPHY

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