Interview with Miranda Cole

Originally from Australia, Covington's Miranda Cole has a particularly strong interest in the technology, communications and media worlds

Q: Why did you want to become a lawyer and then a competition lawyer?
A: It's probably worth giving you some background. When I went through high school in Australia, you decided, at the grand old age of 15, which courses you were going to take for the last two years of school, and that choice framed what you could and could not study at university. So, to some extent, you actually rule out certain career options at the age of 15. For example, if you didn't study biology in those last couple of years you couldn't study medicine at university.

That, in turn, meant that, within the educational system, there was a fairly strong emphasis on things like work experience. The schools actually worked quite hard to place you in an area where you thought you had an interest in the year when you chose your courses, so that you didn't make some horrendous mistake in your early teenage years and shut doors for the rest of your life. As a result, I spent some time as a 14 and 15-year-old in both a barrister's chambers and in a law firm. And I think what attracted me most to being a lawyer is that, in essence, what we do is problem solve. On top of that, there's an advocacy element and also an economic element, which I thought was an exciting combination that played to my strengths.

Q:: Did the political element of it attract you?
A: No, as a 15-year-old, I don't think I actually appreciated the political element of it. But it was a different story when I went into practice. After I finished my law degree, I joined Mallesons (now King & Wood Mallesons) and I became a member of what was colloquially known as "the Telstra Group". This was basically the competition and communications group, which owed a lot to the fact that Telstra (the incumbent telecoms operator in Australia) was an anchor client of the firm. It was at that point that I started to understand some of the policy aspects of the work, and the relationship between competition law and ex ante regulation, for example.

Q: But what persuaded you to come and work in Europe rather than, say, Australia, the Far East or the US?
A: Well, we're talking almost 20 years ago when quite a lot of Australians used to come through London for a couple of years to get experience on big matters and deals. Part of the reason for that – and part of the reason why I left – was that Australia is a wonderful place to live, but the market is fairly limited in size. There's a limited number of really big things happening, in any given timeframe. Australia has something like 24 million people, compared to Europe which has a population of something like 500 million-plus people. All of that creates a very different dynamic in the sense of what's happening, how frequently it happens, how large the things are that happen, and so on.

Also, if we go back to the late 1990s, there was (with the exception of Hong Kong) less opportunity for foreign lawyers to work in Asia. There weren't foreign firms in China or Korea, for instance. In addition, over the last 20 years, many of these countries introduced competition regimes for the first

time – there was a much smaller number of countries with competition regimes in the region some 20-odd years ago. We sometimes forget just how young some of those agencies (and the laws that they implement) are.

Q: Do you regard Brussels as your home now or is there still some emotional part of you to be found in Australia?
A: Well, I'm based in Brussels now, although I'm in London a couple of times a month at least. I do see Brussels rather than Australia as my home now. I left Australia in 1996, so I've been gone a long time. That said, there's no way in the world that I'd give up my Australian passport, and I still keep an eye on what's happening in Australian politics (not least because it can be surreal – perhaps that's the Belgian influence on me coming through).

Q: What's the best and the worst part of living in Brussels?
A: Well, there is certainly an odd dynamic in the city as there are probably a good couple of hundred thousand outsiders living and working in the place simply because they are attached to one or other of the various international institutions or companies in Brussels. Even amongst the Belgians who live in Brussels, many of them aren't Bruxellois.

Against this background, it can sometimes feel as though few people feel any particular attachment to the city.

The upside of this, of course, is that the place is a real melting pot, and that makes it a very interesting place to be. There's such a mix of people, of cultures, of work – and of course there's fantastic food and drink.

Q: And the worst bit?
A: Thinking about that, and trying not to sound facetious, the traffic – it can be a free-for-all. I cycle to work – this means that, on a daily basis, I see an attitude that I think comes from the lack of connection to the city that many seem to feel. The

traffic really is more aggressive than in many other places. I do wonder whether the fact that a certain number of people (or at least drivers) don't feel like they have a stake in the city affects the way they behave.

Q: If you weren't a lawyer, what would you be?
A: Well, my husband is currently in the process of setting up a distillery – it's been an interest for about 10 years but now he and some partners have decided to try and set something up. So if you asked me what would I do today instead of being a lawyer, then I guess I could quite possibly get involved in that business.

But if you take me back to when I was a teenager, it is much harder to answer the question. Basically in my peer group, everybody did either law or medicine – and I would have been a terrible doctor.

One thing I did from about the age of seven until I was 20 was that I played the piano. But I realised at about the age of 15 that my hands weren't going to be big enough, that there are whole pieces of the repertoire that I simply could not play – Liszt, Chopin, even a lot of Beethoven. But if genetics had been kinder to me, then I might pursued a musical career.

Q: Is there a particular part of your practice that you enjoy more – or are more naturally attuned to – than others?
A: The bit that I enjoy most is essentially the rapid pace of change, especially in tech and life sciences fields. There's usually a new issue bubbling along somewhere that we need to start trying to get our heads around and address. Does a particular theory of harm apply here? Why or why not? Is there an issue with this particular development or proposal? What are the elements that make it potentially problematic or not under competition law? And the speed of change in tech and life sciences means that our thinking as lawyers has to change equally quickly – and I really like that.

Q: A number of judges have told me that they don't really trust the use of the counterfactual because everyone knows that in other walks of life the "what if" test is ultimately unanswerable. Do you find it strange that judges are being asked to apply a test they don't trust?
A: Well, counterfactuals are clearly open to interpretation and argument. I think that's fair comment. But in the end, I guess it also depends on what sort of analysis is being run – whether it's forward looking or backward looking. Forward looking is what we do, for example, in the context of mergers – what might happen without this transaction? You don't have the benefit of what has happened in the past – unless you are lucky enough to find a natural experiment somewhere. The speculative nature of this analysis is clear, but it at least imposes the discipline of identifying alternative competitive situations for comparison.

When you're looking at things like alleged abuse of dominance, you are looking at behaviour that has already happened. Now sometimes, yes, it's hard to quantify precisely what would have happened without the behaviour of the company under investigation. Nevertheless, I think there are ways of getting to the extent to which new entry or innovation (or whatever the harm is) has been stifled. It can be difficult to quantify lost growth, in the sense of "but for this conduct", how much more would the dominant entity's competitors have grown, for example. However, I think you can generally get there in a backward-looking analysis.

Q: Are there particular competition challenges in the technology and media worlds that are different from those in other sectors?
A: I think markets in these sectors can have characteristics that you may not see in other fields. We routinely deal with things like network effects, tipping (where a particular player's market position causes the market to "tip" to them), scale economies and effect, and the dynamics of multisided markets (where something might be "free" to users because it's funded by something else, like advertising, that is paid for by others). These sorts of dynamics are very common in the tech sector, in particular.

Part of our job is identifying which markets have which particular sets of characteristics. Not infrequently, when acting for some of our tech clients, we run into people who make arguments where we say, "Great theory, shame it doesn't fit the facts". People sometimes get a little bit carried away and say "Well, it's a tech market, therefore it must have this laundry list of characteristics". And often the answer is, "We've got some of the characteristics you mention but not all of them, and that has significant implications for the theory of harm being run". You have to take a good solid look at the facts of the particular case in front of you. So, to give you an example, when we were doing Facebook /WhatsApp, all sorts of arguments were being run about network effects. But the reality was that the "network" was contacts on the user's handset. Every other app that you chose to download had the same access to the same set of contacts, so where was the problem?

Q: What do you see as the particular challenges in 2016 for competition lawyers working in the tech sector?
A: There are various issues where people have a theory of harm and are searching for a fact pattern to attach it to. As you're probably aware, there's been lots of chatter about "big data" – certainly it's an issue that comes back regularly and about which lots of people have been talking for a long time. I must admit, though, I still think it would have to be a very particular set of facts where control of one data set becomes a problem. It would need to be indispensable as an "input" for others.

With cloud services, the thing that will need some serious thought is that there's a proposal in the context of the digital single marketing initiative about a common standard. The challenge is to make sure that, in a creative environment where lots of people can interoperate, we don't create a lowest common denominator situation where we foreclose innovation and development.

Geoblocking is an interesting area too, given the ongoing ecommerce sector inquiry, the copyright proposals and the ongoing cases. For example, we have the statement of objections that was issued in the Sky and movie majors case. If you actually go back and look at the law from *Coditel I* and *II* and from the *Murphy* case (the publican who had the Greek set-top box), the current SO becomes very interesting.

Coditel I was about merely granting someone an exclusive right to distribute in a particular member state, and the Court was very clear that there's nothing inherently anticompetitive about that. They reiterated that point in *Murphy* and essentially went on to say that, if you take additional measures or steps that inhibit cross-border reception – and the step they pointed to

there was restricting supply of the set-top box cards – you have a restriction of free movement of goods. If you're looking at geoblocking, you're not restricting movements of goods. It's an interesting question – if I block something on the basis of an IP address, for example, is that an "additional measure"?

Q: But how does the law keep up with the astonishing pace of change in the technology and media worlds?
A: Well, that's what makes it so much fun. A lot of the issues that we're dealing with most of the time are new. Common principles underpin it all, and there are, of course, cases that we work from by analogy. But it's almost always by analogy, as the chances are that the problem hasn't been dealt with before because, if it had, we wouldn't be concerned about it now.

Q: What I had in mind here, I think, was the difficulty in finding a global answer to certain competition law problems, especially when (like airlines) they involve industries that straddle the world.
A: Which is a really interesting issue when you think about it. Let's take, for example, the recent cases in relation to hotel bookings and the most favoured nation clauses that were run at member state level. You have this interesting situation where I may be looking for a hotel in the UK, Germany or somewhere else. Should what the online travel agent shows me (for the same hotels) differ depending on whether I go to the .co.uk or .de, rather than .be, version of their site? As a result of the various cases, I may well get a different offer depending on the domain. Beyond that, and this is where the political dimension we discussed earlier is overtly in play, there were settlements reached in France and Italy, and the French have adopted a law that more or less overturns the settlement and the Italians are on the road to doing the same thing.

When we are dealing with markets that are at least regional and potentially global, it does (as you say) get very difficult when you get divergent results in different member states, particularly where we are talking about online services. All I have to do is change the top level domain name to a "dot something else", and all of a sudden I'm seeing something very different.

Q: Are there some cases that in commercial reality are just too big for a single regulator to deal with. Many of the IT disputes between, say, Apple and Samsung or Microsoft and Google seem never-ending and therefore curiously unresolved.
A: It is important to remember that many of these types of cases involve different areas of law that interact. So, take the example you've given of Apple and Samsung: that's a combination of at least patent law and competition law. As a result, you end up with the US International Trade Commission and various federal courts in the US dealing with aspects of the issues. In Europe, you end up with national courts dealing with it. So I think the difficulty you mention is partly because there are different areas of law that apply simultaneously, such that a solution has to straddle both multiple areas of law and their interpretation and application in multiple jurisdictions.

That may create an impression that an issue is too big for one entity to handle because actually there isn't a single entity or a single jurisdiction that is able to completely resolve the issue. Legal institutions are better able to handle this than you might think, though. A US federal court judge, for example, stayed an order from a European court that would have stopped imports of allegedly infringing software into Europe at least in part because he considered the applicant to be forum shopping.

Q: How far (if at all) do you think that people still trust regulators? As long as they have the power to force their decisions on market participants, does it matter very much if people (including the public) don't trust regulators?
A: This is an interesting question. Looking at it narrowly, I think that if we were to stop someone outside that window and ask them what they thought about, for example, what the CMA or DG Competition have been up to in the last couple of months, I suspect that many of them would have no idea what the agency was, let alone what it has been doing. Even when you talk to other lawyers who are not competition lawyers, they often don't know what I do or what the regulators are up to – unless you're talking about an issue that's all over the press

However, once the press picks up the story and runs with whatever it is – whether it is the health sector or the investigations into certain financial services companies – then it can develop a life of its own and people put their own spin on it, depending what their sources of information are telling them. It's often not first-hand knowledge, though.

Q: Why are lawyers seemingly less capable now of dealing with the political dimension to a case than they once were? Is it because they know or perhaps care less than in the past?
A: I'm not quite sure how to answer this. My circle in Brussels is very politically aware. I don't just mean about what's happening in Europe but also in the US. Maybe that's partly because we're largely a bunch of ex-pats, so we all actually pay quite a lot of attention to politics because, in Brussels anyway, you know the tone, the nature, of the governments in the big jurisdictions makes a difference. It affects the investment climate. It affects deals. It affects what companies are prepared to do. So we have to pay attention to it.

Maybe your question throws up a generational difference, but in my experience competition lawyers are well aware of real politik in at least some member states. For example, if we are handling a merger that could be referred from multiple member states to Brussels, careful consideration is given (by lawyers and client alike) to whether it would be better to have the transaction dealt with in Brussels rather than at member state level because of domestic politics in one or more countries with jurisdiction.

Q: What do you do outside work?
A: I asked my husband that question and he just looked at me and said "Well, let's see, you got married in May 2010". And I thought "Ouch".

What else? We've renovated an old water mill down in the Ardennes and we're about to start on the land around it. It's been quite a project already, but it was worth it. We can literally step off our land and go hiking up into the Haut Fagnes reserve.

I do all sorts of various thing to switch off when I have the time. I read as much history and other things as I can – things that have nothing to do with the law - and I travel (outside work) as much as I can.