

## II MONITORING OF THE IMPLEMENTATION OF EXISTING REGULATIONS

### 1. *Public Information Law*

1.1. The implementation of the Public Information Law was elaborated on in the section about freedom of expression.

### 2. *Broadcasting Law*

2.1. On May 7, the Council of the Republic Broadcasting Agency (RBA) adopted the binding interpretation of article 16 of the General Binding Instructions (GBI) to radio and television stations (broadcasters) in the election campaign for local, provincial and national parliamentary elections, presidential elections and elections for the Ethnic Minorities' National Councils, as a response to the many queries received from broadcasters about how to interpret the said Article. In the interpretations, the Council insists that content of the election advertisements and paid air time must be true and verifiable; that only publicly aired audiovisual footage must be used in these advertisements and paid air time; the use of secretly recorded footage is prohibited, as is the use of unacceptable symbols and the like. It is also prohibited to use the name, image, voice or part of the face of persons that are not participating in the electoral process, without the consent of those persons; to disclose information or allegations against any person, unless this information is not publicly available from the competent state authorities; to use claims from the investigative proceedings against a particular person, if that person has been cleared of such accusations with a final verdict, if the charges have been rejected or if the proceedings have been terminated; to air content that could encourage discrimination, hate or violence against a person or group of persons due to their different political affiliation, including content offending the honor, reputation and privacy of citizens, especially of those citizens that are not participants in the electoral process. Finally, it is prohibited to spin statements, press releases and similar content with the aim of changing their basic meaning (malicious editing, shortening or removing key parts of the content and the like), which, in the RBA Council's opinion, represents a breach of the principles of truthfulness, completeness and distinctness of the advertisement.

Article 16 of the GBI stipulates that, under Article 38 of the Public Information Law and Article 21 of the Broadcasting Law, a broadcaster may refuse to air an advertisement or a program, if

the latter is estimated to promote discrimination, hate or violence or offend the honor, reputation and privacy of citizens or other participants in the electoral process. Article 38 of the Public Information Law prohibits hate speech, while Article 21 of the Broadcasting Law provides for the competences and powers of the RBA in suppressing hate speech. In that context, we are able to recognize the key omission of Article 16 of the GBI: it has taken a ban provided for by law and a power of an authority to enforce it and “lower it” to the level of the broadcaster’s right to refuse to air content. The binding interpretation only complicates the whole matter without solving anything. Namely, in its efforts to regulate political advertising (primarily on television), the Council has failed to take into consideration the difference between the ban of hate speech on one hand and freedom of advertising on the other. The ban of hate speech is absolute and involves the release of ideas, information and opinions promoting discrimination, hate or violence against a person or several persons over their affiliation (or lack thereof) to a particular race, religion, nation, ethnic group, sex or over their sexual orientation, regardless if such release/publication amounted to the commission of a criminal offense. Such ban may not be reduced to the broadcasters’ right to refuse to air something. On the other hand, freedom of advertising from Article 3 of the Advertising Law involves the need for advertising to be carried out in accordance with the law, other regulations, good business practice and professional ethics. In any case, the mere fact that the Council was forced to pass a binding interpretation of its GBI is evidence of the lack of clarity thereof. The second problem unfortunately lies in the fact that the binding interpretation has also failed to meet this objective. The Council should seek for a solution somewhere else: it should finally pass – in accordance with Article 103 of the Advertising Law – more detailed rules on advertising and sponsorship on television and radio, in order to regulate advertising in the electoral campaign more precisely. The broadening of the concept of hate speech, so as to include cases of mere violation of the advertising principles, is not good either for suppressing hate speech or for having a sustainable regulation of TV and radio advertising.

### **3. *Copyright and Related Rights Law***

3.1. At an extraordinary session on May 11, the RBA Council reviewed the request by Aleksandar Stankovic, the editor and journalist of the Croatian national television (HRT) for the protection of his copyright in relation to the misuse of the footage of his talk show originally aired on HRT during the electoral campaign in Serbia. The RBA Council forwarded the copy of Stankovic’s letter to all broadcasters for them to consider when deciding if they would air the content indicated in the said letter.

The electoral political advertisements of the presidential candidate Tomislav Nikolic, aired on Serbian television stations during the campaign, included footage of his rival Boris Tadic in the HRT talk show “Nedeljom u 2” (On Sundays at 2) authored and presented by Aleksandar Stankovic. Nikolic’s marketing camp included the segments where Tadic answered, in their opinion, in an undignified or inconsistent way, which was supposed to undermine his credibility. Tadic’s marketing team resorted for the same tactics, using in Tadic’s videos excerpts from Tomislav Nikolic’s interview on Prva TV. The aforementioned advertisements became the cause of great controversy; in the case of the advertisement containing excerpts from Stankovic’s talk show and accusations of malicious editing, Stankovic’s letter attempted to set the record straight and point to the legal issues that such advertisements pose. Namely, according to the Law on Copyright and Related Rights, television works are to be considered author’s works and hence the authors of such works enjoy the proper moral and property rights, which are violated and breached by unauthorized exploitation. The aforementioned situations could be interpreted as violations of the moral right to protection of the work’s integrity, but also of the moral right to oppose undignified use of the work. The Law on Copyright and Related Rights says that the author enjoys the exclusive right to protect the integrity of his work and especially to oppose any changes to his work by unauthorized persons, to oppose public communication of his work in a changed or incomplete form, as well as to grant authorization for any alterations to his work. Furthermore, the author has the exclusive right to oppose any exploitation of his work in a manner that compromises or might compromise the author’s honor or reputation. In relation to property rights, the author has the exclusive right to allow or disallow the recording and copying of his work entirely or partially (shooting a commercial involves recording the author’s work, from which excerpts are taken, on the medium on which the commercial is shot), but also the right to allow or disallow any alterations and modifications. In the concrete case, it is clear from Stankovic’s letter that neither he, as the author, nor HRT as the producer, have consented to the use of excerpts from their talk show, or the modification thereof, for the purpose of making an election advertisement. These advertisements have possibly also violated other personal rights in a way that is in contravention of the provisions of the Public Information Law. Under that Law, the prerequisite for broadcasting someone’s image or voice on television is the consent of that person. At that, under the Law, consent accorded for one release (airing) or for one particular type of release, namely release for a particular purpose, shall not be deemed consent for repeated release, for release in a different form or for other purposes. The exception from the requirement to acquire consent (which is provided for by the Law), which could apply to Boris Tadic as holder of a state or political function (and hence a person of public interest) could hardly apply to Stankovic who, as evidenced by the letter, did not consent to his image and voice to be used in Tomislav Nikolic’s presidential campaign. Identical arguments apply to the authors of the show on Prva TV, excerpts from which were used in Tadic’s campaign. It remains unknown if the RBA, or the authors of the advertisements /owners of the rights to the respective

talk shows, have pressed any charges. It is probable, however, that Stankovic's letter alone, which was disseminated by the RBA among broadcasters, will serve as guidance as to what the latter must focus on when airing political advertisements.

#### **4. The Criminal Code**

4.1. The activist of the organization "Antifascist Action" from Novi Sad Zoran Petakov was sentenced to 100 days in prison for failing to pay a fine for insulting Serbian Orthodox Church's Bishop of Backa Irinej. The insult occurred in the talk show "Klopka" (Trap) on BK Television back in 2005. Petakov was previously fined by the Fourth Municipal Court in Belgrade. The sentence was upheld by the Higher Court in Belgrade in 2008. In an unrelated event, Petakov took part in the said talk show, aired one week after the neo-Nazis from the extremist group "Nacionalni stroj", led by Goran Davidovic "the Fuhrer", had stormed a debate organized on the Faculty of Philosophy in Novi Sad, in the scope of the Day of Combating Fascism. Petakov said back then that the Serbian Orthodox Church propagated an ideology close to right-wing extremists; he called bishops Amfilohije Radovic, Atanasije Jevtic, Artemije Radosavljevic and Irinej Bulovic "the Four Horsemen of the Apocalypse who had more influence in the last 15 years on the formation of (right-wing extremist) groups than the state secret service".

Back at the time, the trial of Zoran Petakov was monitored by the Committee of Lawyers for Human Rights and their reports are still available on the organization's website at <http://www.yucom.org.rs/rest.php?idSek=22&idSubSek=63&tip=vestgalerija&status=prvi>. For the purposes of this Report we will not be examining again a trial conducted between 2006 and 2008; we will only try to point out the paradox that the revoking of prison terms for defamation and insult (in the amendments to the Criminal Code in 2005) now threatens to result in the imprisonment of someone who has offended a public figure, for the first time after 20 years or even more. Namely, before the said amendments were introduced seven years ago, prison sentences for defamation and insult were typically conditional sentences and nobody really went to jail. The amendments were heralded as a leap forward, which would boost freedom of expression in Serbia. Instead, we have a situation where people will be fined for defamation and insult and go to jail if they cannot/do not want to pay. Thus, after having received a decision, ordering him to serve a 100-day prison term, replacing the fine he failed to pay, Zoran Petakov will become the first person in Serbia's recent history that will serve time for having offended someone on television. Petakov's case shows to what extent half-baked solutions in the protection of human rights (including right to freedom of expression) are counter-productive. It also shows how much Serbia lost by refusing to decriminalize defamation and insult. We remind



that full decriminalization is foreseen only in the Draft Law on the Amendments to the Criminal Code, which was tabled by the Government to Parliament for adoption on January 31<sup>st</sup>. Unfortunately, the Parliament did not vote about it before it was dissolved. Hence, the decriminalization of defamation and insult will have to wait for the formation of the new Government. We can only hope that the case of Zoran Petakov will open eyes of those who opposed decriminalization the loudest back in 2005 and that it will contribute to the ultimate removal of defamation and insult from the Serbian criminal legislation.