

III MONITORING OF THE PROCESS OF ADOPTION OF NEW LAWS

1. *Law on Special Powers for the Efficient Protection of Intellectual Property Rights*

In June 2013, the Ministry of Education, Science and Technological Development opened the public debate on the Draft Law on Special Powers for the Efficient Protection of Intellectual Property Rights. Although the basis of the Draft is the legitimate interest to consolidate the regulations in the field of intellectual property protection, some of its concepts are questionable, since they introduce disproportional restrictions of the right to freedom of expression, in addition to being utterly restrictive for electronic media. Most importantly, the Draft disregards the powers the regulatory bodies have under their governing laws. The RBA is obligated to tend to the electronic media's compliance with copyright and related rights. However, the way in which this is regulated in the aforementioned Draft Law on Special Powers for the Efficient Protection of Intellectual Property Rights far exceeds the jurisdiction and competences of the RBA under the Broadcasting Law. Firstly, the introduction of the RBA's jurisdiction over electronic communications network operators is questionable, since these operators have their own regulator, the Republic Electronic Communication Agency (RATEL). The Draft disregards RATEL's competences, under the Law on Electronic Communications, to decide about the rights and obligations of operators engaged in electronic communication activities. Under the Law on Electronic Communications, operators are defined as persons authorized to provide electronic communications services, pertaining to the transfer of signal in electronic communications networks, including media content distribution services. However, for the purpose of electronic communications regulations, the latter service does not include editorial control of media content that is distributed. Namely, the operators practically do not provide a media service, but a technical one – transfer of signal. The Draft Law construes a completely new concept – the concept of an operator for the provision of media services; the definition of that new concept is so broad and imprecise that it might include almost all operators of electronic communications networks and services, which is in complete contradiction with the Law on Electronic Communications. It should be said that Europe and the world have gradually started to define the principle that intermediaries in the transfer of works containing copyright or related right may not be responsible for the content they transfer, since the opposite would amount to creating mechanisms of self-censorship or private censorship, which would significantly violate the right to freedom of expression, all under the guise of protecting intellectual property rights.

Such a position is confirmed by the example of the recommendations of the OSCE representatives for freedom of media, concerning Internet services providers, but they may also apply to other operators. The OSCE Media Freedom Representative has expressly said that calling to account the intermediary of the content, conveyed or created by the users, greatly undermines the enjoyment of the right to free thought and expression. The latter, in turn, leads to the creation of self-protective and widespread mechanisms of private censorship, which are opaque and result in arbitrary decisions, ignoring the minimum procedural guarantees.

In addition, the provisions of the Draft Law concerning the powers and the procedure regarding the protection of the right to intellectual property, have been set broadly and vaguely relative to all media. If the Law is adopted in the current text of the Draft, danger looms from arbitrary implementation. Starting from the assumption that the protection of intellectual property rights is priceless, the Draft law disregards the necessity to also weigh, in each particular case, other conflicting interests, which also involve certain rights guaranteed by the Constitution and ratified international conventions, including the right to freedom of expression or right to have one's private and family life respected. Accordingly, the competent authority, in the concrete case the RBA, is entitled to pass a temporary injunction on broadcasting, rebroadcasting, interactively making available programming content containing a copyrighted work or object of related right, if there is "reasonable doubt" that it violates copyrights or related rights. However, the meaning of "reasonable doubt" has not been precisely defined and is completely subject to interpretation by the competent authority. In other words, it opens the door wide to potential abuse of powers. The Draft completely disregards the fact that the transfer of information is a specific service and that only one day of non-broadcasting may lead the ratings to plummet, which, in turn results in less future advertising revenues, in addition to losses that are the direct consequence of non-broadcasting. The Draft stops short of providing for specific provisions that would regulate proceedings related to damages incurred due to an injunction that was later proved as unfounded. A procedure established on such grounds may easily degenerate into an effective means of political censorship.

The Association of Independent Electronic Media (ANEM) has urged the Intellectual Property Institute and other stakeholders to have the provisions of the Draft concerning the media and the powers of the independent regulator reconsidered, in order to adequately satisfy both equally important interests – the interest of protecting the right to intellectual property and that of protecting the right to freedom of expression.

2. Law on Public Information and Media, Law on Electronic Media

On June 5, the Deputy Culture Minister Dragan Kolarevic said that the Draft Law on Public Information and Media would be forwarded to the Government for further procedure, after the completion of the deliberations of the competent ministries expected in 20-some days. Kolarevic stressed that informal consultations with other ministries had practically been underway all the time. In his words, it is still questionable whether the Law on Public Information and Media could put the articles of some other laws out of force, such as the Law on Tanjug, the Law on Local Self-Government or the Law on the Capital City, or its articles would merely initiate amendments to the aforementioned laws. Media and journalists' associations have protested over the fact that, although the public debate about the Law ended back in mid-March, it is still unknown which of the many objections voiced during the debate will be incorporated in the version of the text that would be sent to the Government. Off the record, the opinions in the working group were split over the interventions made in the text after the public debate, without all its members being consulted. The Deputy Minister Kolarevic only confirmed his expectations that the text, to be tabled to the Government, would be changed compared to the one that went through the public debate. We remind that, in the course of the public debate, the contested questions that were subject to different opinions concerned the manner in which the transparency of media ownership was going to be ensured, as well as the mechanisms the state would use to fight against the concentration of media ownership, which could lead to the excessive influence of a publisher or a group of publishers on public opinion, namely the thresholds of concentration, the exceeding of which would be deemed intolerable. Another group of objections came from municipal and city public media, which had continued to oppose the concept from the Draft Law providing for their privatization. On the other hand, the commercial sector was concerned that further delay in adopting the new Law could postpone both the transition to a new model of project-based financing of the media for yet another budget year and, for a certain period of time, the withdrawal of the state from ownership of the media. Relative to the first of two objections, the Draft Law prepared by the working group (that was tabled by the Ministry of Culture for public debate), has provided that the state will, by September 15, call competitions for project-based financing of the media for next year and the suspension of budget financing as of January 1, 2014. Three lost months after the completion of the public debate and the usual summer recess in the Parliament have threatened to make these deadlines even more unrealistic. In the meantime, local governments have continued financing "politically suitable" media. A case in point was the one in Nis, where the funds were allocated in public procurement proceedings opaquely and for shady purposes, looking more like PR by the local government than an attempt to satisfy the citizens' need for objective information. This case was heavily criticized by the most relevant media and journalists' associations.

Although announced to have taken place soon after the debate on the Law on Public Information and Media, the debate on the Draft Law on Electronic Media is still pending. A detail has leaked, however, according to which the TV subscription fee for public service broadcasters (PSBs) was going to be scrapped. Certain members of the working group resisted vehemently such a possibility. The possibility for the subscription to be revoked coincided with the call for help of Radio-Television Vojvodina, which stated, in a press release, that the collection rate of the fee was at a historical minimum. A particular concern is the fact that the collection rate in Vojvodina, prior the hints that the fee will be revoked, was the highest in Serbia. This has demonstrated the harm done by these irresponsible speculations by certain politicians from the very top brass of the state, putting in danger the survival of financially decimated PSBs. This is even more concerning, in view of the fact that a new financing concept is not even on the horizon. It is even unclear if a single Law on Electronic Media will be passed, or a separate Law will govern the organization and operation of PSBs. According to media reports, the European Commission has warned Serbia repeatedly of the delays in implementing the Media Strategy, and especially of the exceeded deadlines provided for by the Action Plan accompanying the Strategy. The Head of the EC Delegation to Serbia reminded that the EU had supported the Media Strategy by allocating 1.2 million Euros for its implementation, which ought not to be further postponed.