II MONITORING OF THE IMPLEMENTATION OF EXISTING LAWS

1. Public Information Law

1.1. The implementation of the Public Information Law is partially elaborated on in the section on freedom of expression.

1.2. The Constitutional Court ruled on July 22, 2010 that most of the provisions of the Law on Amendments to the Public Information Law, adopted on August 31, 2009, are not in line with the Constitution and ratified international treaties. At long last, this decision was published in the Official Gazette of the Republic of Serbia no. 89/2010 dated November 29, 2010, although it was made available to readers in December. The Court ruled the following provisions to be unconstitutional:

- The first sentence in Article 14, paragraph 1 of the Law, saying that "a public media may be founded by a domestic legal person (founder of the public media)". The Constitutional Court found that such provision was not line with the provisions of Article 50, paragraph 1 of the Constitution, stipulating, among other things, that everyone (and not only domestic legal persons) shall be free to establish newspapers and other means of public information;

- Paragraphs 5, 6 and 7 of Article 14a are unconstitutional, namely the procedural norms they contain, which prescribe that, in the case of a breach of the ban on: the founding of a public media under the same or similar name to the one of a public media that has been removed from the Public Media Register or has ceased to operate in some other way/ceased to be printed or published; as well as in the case of publishing a public media that is not registered with the Public Media Register; the competent public prosecutor shall without delay initiate commercial infraction proceedings before the competent court of law and request a temporary ban of the publishing on the public media (paragraph 5); that the court will, within 12 hours from the submission of the motion by the public prosecutor and in accordance with the Law, pronounce against the founder a temporary ban of the publishing of the public media until the completion of the proceedings with a final verdict (Article 6) and that in the said proceedings for pronouncing the temporary ban of the publishing of the public media, the provisions of Article 24, paragraph 7 of the Public Information Law will be applied. The Constitutional Court found that the above mentioned norms are in breach of the constitutional principle of the integrity of the legal system, which requests the main principles and legal institutes provided for by laws systemically governing a field of social relations to be also observed in separate laws (which is

not the case here regarding the Law on Commercial Infractions) and especially in the area of penal legislation. The latter bearing in mind that regulating certain institutes of penal legislation differently from the concepts provided by the systemic law governing the same institutes, may seriously compromise the principle of universal equality before the Constitution and the Law referred to in Article 21, paragraph 2 of the Constitution and result in discrimination. The Constitutional Court also found that the said provisions are in disagreement with Article 4, paragraphs 2 and 4 of the Constitution, which stipulate that system is based on a separation of power between the legislative, executive and judiciary branch and that the judiciary shall be independent. The above cited provisions are also in disagreement with Article 142, paragraph 2 of the Constitution, which stipulates, among other things, that the courts of law shall be independent in their work. They are also in disagreement with Article 156, paragraph 1 of the Constitution, under which the Public Prosecutor's Office is an autonomous state body;

- Articles 92a and 92b providing for certain commercial offence have been deemed unconstitutional, as well as the amounts of the fines provided for in Articles 93 and 95 of the Law. The Constitutional Court found that the said articles were violating the constitutional principle of integrity of the legal system and universal equality before the Constitution and the Law, as well as the freedom of media guaranteed by the Constitution. Namely, the provisions of Article 18, paragraphs 1 and 3 of the Law on Commercial Infractions prescribe the so-called general minimum and general maximum of the fine that may be charged for a commercial infraction committed by a legal entity or responsible person in that legal entity. In the Law on Amendments to the Public Information Law, this maximum has been exceeded. Furthermore, by providing for a ban on the activity of publishing public media, namely the ban on the performance of certain duties, as protective measures pronounced in the case of a commercial infraction (the commercial infraction being the failure to register the public media in the Register referred to in Article 92a), the obligation to register a public media is providing the character of an additional condition for establishing and operating a public media, which is precluded by the Constitution. Moreover, the violation of the presumption of innocence, or the violation of the protection of the interests of minors caused by releasing information in public media – as provided for by Article 92b – may not, in the opinion of the Constitutional Court, be considered a commercial infraction. A commercial infraction namely involves a violation of business or financial regulations. The Court has also found unconstitutional the introduction of a fixed fine in paragraphs 2 and 3 of Article 92b of the Law, as well as the concept contained in the provision of paragraph 6 of the same Article, under which the legislator has ordered courts of law to always sentence the first-time perpetrator of the prescribed infractions to a conditional sentence. The above provisions were ruled unconstitutional, since in both cases they restrict the

right of the competent court to rule independently by applying the applicable rules on weighing the penalty.

On the other hand, the Constitutional Court found the following provisions to be in accordance with the Constitution:

- Provisions introducing the Public Media Register and stipulating that the same will be administered by the Business Registers Agency and that the Minister of Culture shall regulate more closely the manner in which the Register will be administered;
- Provisions restricting the right to assign or otherwise dispose with the right to a public media or the right to publish a public media, which also deem null and void any contract or transaction involving such assignment or disposal;
- Provisions prohibiting the founding of a public media under the same or similar name to the one of a public media that has been removed from the Public Media Register or has ceased to operate in some other way/ceased to be printed or published, within a year from the release of the last copy of the public media that has ceased to exist/be printed/published;
- Provisions regulating the submission of data from the Public Media Register to the line ministry and other competent authorities of the state administration.

Particularly interesting is the fact that, even relative to the provisions restricting the right to assign or otherwise dispose with the right to a public media or the right to publish a public media, which also deem null and void any contract or transaction involving such assignment or disposal, the Constitutional Court found that the public media itself may not be the subject of a transaction, but that the said provisions do not exclude the right of the founder to dispose with his/her founding right by the means of a contract or other transaction in accordance with the applicable regulations. It would be logical then to question the purpose of the norms that were found by the Constitutional Court to be in disagreement with the Constitution.

The only reproach the Constitutional Court might be liable to is the failure to designate as unconstitutional those provisions that seem to have no purpose at all. More specifically, the Amendments to the Public Information Law that have remained effective are merely a burden for the text of the Law, without having any deeper or meaningful purpose. The Public Media Register remains in place, without offering any new information relative to previous concepts in the Business Registers Agency or in the masthead of public media. The restriction remains as to the right to assign or dispose with a right to a public media and relative to the right to publish a

public media, in relation to which restriction the Constitutional Court said it had not excluded the right of the founder to dispose with his/her founding right by the means of a contract or other transaction, in accordance with the applicable regulations. The Constitutional Court also left intact the ban on the founding of a public media under the same or similar name to the one of a public media that has been removed from the Public Media Register or has ceased to operate in some other way/ceased to be printed or published. That provision bears little practical value, since the names of public media were already and much more efficiently protected in the past under regulations governing the protection of intellectual property. Finally, what was also left untouched by the Constitutional Court is the obligation to submit data from the Public Media Register to the relevant ministry and other competent authorities from the state administration. This provision makes no sense, as the Law stops short of prescribing what the relevant ministry and other competent authorities are supposed to do with the data furnished to them.

Is there a reason for media professionals to celebrate? In the opinion of the authors of this Report, they unfortunately have no reason to rejoice, since the Constitutional Court's decision returned things to square one. It is now even more obvious that both legislators and the competent ministries lack the capacity to meaningfully regulate, in a socially acceptable manner, some of the most important aspects of social relations in the media sphere.

2. The Broadcasting Law

2.1. Back in December, the Republic Broadcasting Agency (RBA) Council called yet another open competition for the issuance of broadcasting licenses. The competition concerns the issuance of 20 broadcasting licenses for local radio coverage. The RBA Council invoked in its advertisement its obligation contained in Article 49 of the Broadcasting Law, which stipulates that an open competition shall be called when, under the Radio Frequencies Allocation Plan, there is a possibility to issue new broadcasting licenses. This provision of the Broadcasting Law has been harshly criticized because it allegedly leads to an "inflation" of broadcasters in Serbia. At the same time, the Media Study – that was prepared by European experts and that was the topic of a series of round tables last autumn discussing future media regulations in Serbia – has conclude one of the key problems of the Serbian media scene to be the artificially generated abundance of media. The new competition that was recently called is yet another proof of the necessity to urgently adopt a media strategy. In the absence thereof, the situation on the media

scene shall remain unchanged, which means that we are continuing with practices we have all agreed to be deeply wrong.

2.2. More than 40 radio stations are currently broadcasting without a license on the territory of Serbia. On the other hand, back in September 2007, when the shutdown of illegal broadcasters began, 161 stations ceased broadcasting, according to statements made on ANEM press conference on December 20, 2010. Of the above number, 11 illegal radio stations are operating on the territory of Belgrade and its surroundings, 8 in Novi Sad and a total of 12 on the territory of Vojvodina excluding Novi Sad. In the remaining part of Serbia, a total of 14 stations are broadcasting illegally. Keynote speakers at the said press conference, which was dedicated to measures that would be taken to effectively address this problem, included ANEM President Sasa Mirkovic, the Deputy President of the RBA Council Goran Karadzic, the Executive Director of RATEL Milan Jankovic, the Head of the Public Prosecutor's High-Tech Crime Department Branko Stamenkovic, Assistant Minister in the Telecommunications and Information Society Ministry Irini Reljin, Assistant Secretary in the Traffic and Telecommunications Sector of the Provincial Secretariat for Commerce Sinisa Isakov, as well as the Head of the General Supervision Department of the Ministry of Trade and Services Goran Macura. It was announced that in the coming period the radio piracy would be fought through prosecutions for the criminal offense provided for in Article 353 of the Penal Code of the Republic of Serbia. The said Article provides for a fine or prison sentence of up to two years for unlawful and lucrative performance of an activity which requires, pursuant to the Law, a permit issued by the competent authority or entity. In the concrete case, according to the general opinion and particularly the one of Branko Stamenkovic from the Public Prosecutor's High-Tech Crime Department, by broadcasting commercial content (commercials and advertisements) without the proper license provided for by the Broadcasting Law, the "pirates" are committing the above mentioned criminal offense. In this way, after years of combating radio piracy without visible success, the state has accepted the new model of curtailing piracy, proposed by ANEM back in February 2010 at a meeting with Deputy Prime Minister, Minister of the Interior Ivica Dacic and the Director of the Police Milorad Veljovic.

3. The Law on Copyright and Related Rights

At the session held on December 9, 2010 the Government of the Republic of Serbia passed the decision appointing the President, Vice-President, members and deputy members of the Commission of Copyright and Related Rights. Slobodan Markovic PhD, professor at the Law

School of the Belgrade University, was appointed President of the Commission, while Katarina Damjanovic PhD, professor at the Law School of the Union University, was appointed Vice-President. The members of the Commission include Miodrag Markovic, Istok Zagor, Zlatan Begovic and Dusan M. Stojkovic. The new deputy members of the Commission are Slobodan Gavrilovic PhD and Ognjen Uzelac.

We remind that ANEM, SOKOJ, OFPS and PI called once again in late November on the Government of the Republic of Serbia to appoint the President and members of the Commission of Copyright and Related Rights. In fact, the Law on Copyright and Related Rights adopted in 2009 could not have been fully implemented without the Commission being appointed. The Law actually provides that, if the talks between collective organizations and the representative users' association should fail to bring about an agreement on determining the tariffs, the Commission of Copyright and Related Rights shall provide an assessment of the proposed tariffs. The Commission's opinion shall determine if a specific tariff proposal will become effective or the talks are to be repeated. If the talks fail again and if the Commission judges that the new tariff proposal is again not conformed with the Law, the Commission shall determine the tariff on its own. Due to the Government's failure to appoint the Commissions, tariffs that have been determined pursuant to the previous Law (which has not been in force for more than a year) are still used. ANEM – as a representative association of radio and television broadcasters in Serbia – but also SOKOJ, OFPS and PI, as organizations that have been issued licenses for collective realization of copyright and related rights by the Intellectual Property Office – were also of the opinion that such situation was unsustainable and that it had a harmful effect on the business of broadcast media and intellectual property protection in Serbia. In addition to requesting the appointment of members of the Commission, ANEM, SOKOJ, OFPS and PI have also called on the Government to opt for experts that are not in any way related to the collective organizations, the users themselves or users' associations or have any interest in the latter. That recommendation was obviously not observed, since one of the elected members of the Commission Vladan Begovic is employed in RTS and hence has an interest in RTS as a user of rights that are subject to collective protection. According to what the authors of this Report have learned, the Commission has held a constitutive session and the first results of the Commission's activities may be expected as soon as in early 2011.