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THE LEGAL STATUS OF PERSONALIZED RADIO IN EUROPE, AS EXEMPLIFIED BY THE NETRADIO PROJECT IN POLAND

ABSTRACT

This presentation is focused on introducing the concept behind the NET-RADIO project, developed by regional broadcasting stations of the Polish Radio Company, Poznan Centre Computer Super-Net and The Press Systems and Media Law Department of the Political Science and Journalism Institute, Adam Mickiewicz University, Poznan, Poland. The basic idea behind this project is the introduction of an automatic system of individual creation of a broadcasting programme in real-time, corresponding with expectations of listeners who thereby create the programmes themselves, and according to the manner of transmission of a given programme. This project will enable everyone to take advantage of the rich stock of archives situated in regional Polish radio broadcasting stations and top-class content of news and political commentary journalism, continuously produced by radio stations. In this way, NETRADIO is a practical realisation of the concept of radio on-demand. Moreover, it will probably become an important alternative for traditional broadcasting.

The system functions in the following manner. From the base of archival recordings (news, political commentary journalism and recorded music are divided into thematic categories) - the content goes to a database, which generate for instance a programme "x", through a system of electronic controllers defined by listeners. Each broadcast programme is addressed for one radio set (one terminal computer, a mobile phone in UMTS standard, one radio set in a car – also acting as a UMTS terminal). The use of this technology by a single listener or client, does not exclude many formatted thematic radio programs for the listeners at large, according to the music profile created (e.g. jazz radio, radio for business).

Against this background, a comparative analysis will be presented, concerning regulations by law defining the legal status of radio on-demand in the European Union, particularly in the context of the Audiovisual Media Services Directive. For example, the Broadcasting Act of 29 December, 1992 in Poland excludes audio services offered by radio on-demand as out of its scope. The question then arises, which judicial norms actually define the legal status of radio on-demand? It may be worth asking if this new form of radio transmission is to be interpreted as just services sent by electronic route or still as classic broadcasting.

KEYWORDS

Regulation; law; regional radio

A dynamic development of media-related digital technologies has been observed throughout the recent decades. In particular, the emergence of Internet brought about a whole digital revolution. Those technologies result in media convergence but – paradoxically – they also lead to their simultaneous divergence. The phenomena are conducive to significant social, economic, political and also legal transformations. The hitherto separate sectors, such as telecommunications, radio and television broadcasting as well as information technologies (ITC) (Hart, 2004, p. 2) combine, and this is what media convergence is all about. As a consequence, the previous barriers between the, until recently, separate social, economical and legal entities disappear. Media divergence, in turn, means that, due to technological possibilities, the same content reaches the consumer at diverse reception levels, i.e., radio and television broadcasting, satellite/cable transmissions, mobile phone network or other portable devices and Internet (Jedrzejewski, 2009, p. 44). That is why previous legal regulations concerning the media sector proved insufficient. First of all, they failed to embrace new technological advances. Secondly, doubts about both the objectives and the means of media policies began to arise. Thus, new media technologies have become a challenge to the lawmaker (Salter & Odartey-Wellington, 2008, pp. 16-22).

During the analogue era a model of vertical regulation dominated, comprising all phases of creation and delivery of the transmitted content. It took place through State organs defining, for example, the so called programme quotas, principles of minors' protection, pluralism but also through a system of licences and permits, antitrust law and property rights, and finally through the establishment of technical standards regarding transmitting and receiving equipment. Now, in the digital era, a different regulatory approach is possible (Jakubowicz, 2011, pp. 15-19). It is the consequence of digital media being interactive, and thus enabling everyone to transmit specific content. Moreover, individualisation (personalisation) of broadcasting is beginning to take place now, which means that everyone can decide whether to transmit specific content to the general public (in the "one-to-many" model) or to transmit it exclusively to selected consumers.

In consequence, the competencies of State organs in regulating transmitted content have become dubious. Additionally, personalisation of broadcasting has become possible in the digital era nowadays. The recipient is in a position to shape the programme he/she receives on his/her own. Finally, it is worth stressing that digital media provides asynchronous communication. Content may be accessed in the place and time freely chosen by the recipient (Jakubowicz, 2000).

This is why non-linear, pull-type media are being mentioned, in contrast to linear, push-type ones. The digital era is characterised by diverse forms and shapes of rendered services. Aside from the above-mentioned types of services, there are also personalised transmissions, which constitute a certain combination of linear and non-linear services. A *one-to-one* communication diagram, i.e. from the sender to the specific recipient is one of the features of *personalised media*. As mentioned above, the latter also combines both linear and non-linear services. It is an enormous advantage but, at the same time, a challenge to the lawmaker.

Especially that now, in the digital era, various regulatory approaches in media politics are possible (Buckley, Duer, Mendel & O'Siochru, 2008, p. 5). Firstly, a model of minimal regulation, with the assumption that market mechanisms shall completely suffice, for a given media system to function properly, whereas the State's intervention should only concentrate on preventing unfair competition. Secondly, a regulation that opens the market, with the State liberalising the media sector, leading to its privatisation and abolishing monopoly. Thirdly, it is possible to introduce a model of self-regulation or, if need be, co-regulation of market participants and the State (McQuail, 2005). It is hoped, in the latter case, that market entities will reach an appropriate agreement themselves. It is, however, of utmost importance that they consistently abide by and enforce these norms. Another concept provides for a regulation correcting market mechanisms. Still, another one accepts a market-shaping regulation, with the assumption that market mechanisms alone will not suffice in reaching the established objectives, with the State's intervention necessary, even through the creation of separate entities, participating in market competition for the consumer and the advertiser. Finally, the last possible approach provides for a regulation intervening in the market, with a view to convince anyone concerned that it is the State's duty to provide the citizens with the access to appropriate content. It is thereby assumed that if the market players will fail to create satisfactory solutions, it will be necessary for the State organs to regulate their activities by stepping in (Jakubowicz, 2011, pp. 180-183).

Furthermore, there has been a proposal to introduce, of necessity, a regulatory divergence, depending on the types of transmission. And so, a full regulation has been suggested, with reference to the open-access terrestrial programmes. As far as satellite platforms are concerned, with paid access, and with the consumers fully aware of their preferences – the regulation would be limited only to, for example, moral issues¹. Finally, in the case of transmissions accessible via the internet, an introduction of self-regulatory mechanisms has only been postulated (Tambini, Leonardi, & Marsden, 2008).

Such an approach was included in the *Communication from the Commission to the Council, The European Parliament, Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age*². The document postulates proportionality, i.e., limitation of regulation to the extent necessary to achieve the established objective, its technical neutrality, separation of infrastructure regulation from regulation of the content of communication process, preservation of policy and regulation at the European level, the acknowledgement of the public role played by radio and television broadcasting, and the necessity of transparency in their financing, and self-regulation as the complement of regulation (Iosifidis, 2014, pp. 19-29). The document emphasises that the principle of proportionality should mean that the degree of regulation ought to be dependent on, and adjusted to, the media type. It is also necessary to provide separate regulations concerning the content of media transmissions, as well as the transmission technology. The postulate of technological neutrality regulation means that while the content may be delivered using different technologies – such content should be equally regulated. It is the model of the, so called, horizontal regulation which means that the vertical regulation is abandoned, and with it legal provisions separate for each level, typical in the analogue era. Such diverse regulatory approach is exemplified by the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. In the Preamble to this document, it was stressed that

¹ See more *BBC Response to the EU Green Paper, The Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation*, 1998 May, www.ispo.cec.be/convergencegp/bbc.html

² Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Principles and guidelines for the Community's audiovisual policy in the digital age (COM/99/0657 final). Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999DCo657&from=EN>.

Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.

The evident, two-stage, diverse approach to the regulated matter is particularly interesting. A solution was adopted in which less challenging demands are placed on non-linear services while undoubtedly higher ones on linear transmissions. It was argued that

On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.³

This is why the solution was accepted in which the first-stage regulations concern all services. However, in the second-stage regulations, the diversity relating to linear and non-linear services is already clearly discernible⁴. In the latter case, one group of provisions is applicable only to non-linear services (Chapter IV of the quoted Directive), whereas the other separate one refers to linear television transmissions (Chapter V) (Castendyk, Dommering & Scheuer, 2008, p. 797).

It needs to be emphasised, however, that the directive mentioned above applies only to audio-visual services. It is, after all, only an amendment to the European Convention on Transfrontier Television. Radio transmissions (audio) had been clearly excluded from the scope of this legal act. Thus, within the European Union's law there are no regulations concerning radio broadcasting, and particularly those related to personalised radio transmissions, radio on-demand, and internet radio⁵. Similarly, explicit di-

³ Recital 58 of *Preamble to directive 2010/13/UE*. See also Judgment of the Court (Third Chamber) of 2 June 2005 in Case C-89/04: Reference for a preliminary ruling from the Raad van State in *Mediakabel BV v Commissariaat voor de Media* (Directive 89/552/CEE) (2005/C 182/30), O.J. C 182/16 z 23.7.2005.

⁴ M. Pająk, *Nowe podejście regulacyjne do usług audiowizualnych w prawie wspólnotowym – w świetle zmian wprowadzonych dyrektywą o audiowizualnych usługach medialnych*.

⁵ European University Institute, Robert Schuman Centre for Advanced Studies, THE CENTRE FOR MEDIA PLURALISM AND MEDIA FREEDOM RSCAS Policy Paper 2013/01 Robert Schuman Centre for Advanced Studies, The Centre for Media Pluralism and Media Freedom European Union Competencies in Respect of Media Pluralism and Media Freedom, CMPF, 2013.

rections within the European Union's law as to principles of media policies on its territory are clearly lacking. The Union's Member States have different solutions in this sphere. Poland and the NETRADIO project may serve as an example here.

NETRADIO is a project developed and introduced by regional broadcasting stations of the Polish Radio Company (17 separate companies), Poznań Supercomputing and Networking Centre, affiliated to the Institute of Bioorganic Chemistry of Polish Academy of Sciences and The Press Systems and Media Law Department of the Political Science and Journalism Institute, Adam Mickiewicz University, Poznań, Poland. The basic idea behind this project is the introduction of an automatic system of individual creation of a broadcasting programme in real-time, according to expectations of listeners who, thereby create the programmes themselves, and according to the manner of transmission of a given programme. Technically, it will be indistinguishable from a "normal" broadcasting programme live. This project allows everyone to take advantage of the rich stock of archives situated in regional Polish Radio broadcasting stations and top-class content of news and political commentary journalism, continuously produced by radio stations. In this way, NETRADIO is a practical realisation of the concept of personalized radio.

The system functions in the following manner. The base of archival recordings contains news, political commentary by journalists and recorded music which is divided into thematic categories, the content goes to a database, repository, which generates for instance, a programme "x", through a system of electronic controllers defined by listeners. Each of the broadcast programmes is addressed for one radio set (one terminal computer, a smart phone, one radio set in a car acting as a UMTS terminal). The use of this technology by a single listener, offers many formatted thematic radio programmes for listeners at large, according to the music profile created (e.g. jazz radio, radio for business).

NETRADIO is a common venture of many broadcasters. Diverse content is produced according to established standards, and then sent to a common database. The listener chooses a range of themes which interests him/her, and then defines the mode of automatic programme creation. The operating principle for this system is to broadcast the most current content, continuously created by cooperating entities. The choice can be expressed in practice through a simplified user interface, making it possible to distinguish diverse thematic categories, types of transmissions and the type of music. In consequence, the programme will comprise programmed

elements in these categories. The user can additionally specify proportions of his/her programme. For example, the listener can demand information from his city not every hour, but every three hours. It means also, that different “typical” elements of the broadcast programme will appear at different hours. First of all, this flexibility results from the manner in which the data is supplied. The system does not enable the transmission of signal in real-time, but transmission is packed or provided in advance, guaranteeing the unbroken flow of the programme. The packed character of transmission will allow better use of infrastructure for broadcasting, by no means degrading programme quality. The system must ensure the supply of proper content to the receiver for the coming 12 minutes of the broadcast programme. This portion of time provides sufficient amount of news and simultaneously lets the server to work more optimally. Downloading 12 minutes of sufficient quality sound should not take more than 10 seconds. This complements the current regional Polish Radio Stations offer in its traditional output and/or its internet transmission, based on the same material produced for „normal” programmes. In this way, each listener can receive an attractive broadcast product destined for him only (Skrzypczak, 2007, pp. 185-188).

The introduction of such a revolutionary channel of distribution of broadcast programmes will not require a revolution in the organisation of work and techniques used by journalists. Only minor technical modifications will be needed. It is expected that editorials will allow the new technology to develop slowly, enabling the traditional structure to adopt it. Thus, all it requires is the precise criteria of content classification. Programmes created traditionally will only be differently distributed. NETRADIO at once ceases to be a radio system and paradoxically, it still remains one. It is worth stressing, that regional radio companies did themselves initiate this project, and what is more according to of the Polish Broadcasting Act of 29 December, 1992⁶, one of the public mission tasks of these companies is to work on new technologies of production and transmission of radio programme services⁷.

As mentioned above, this project gives birth to numerous technical, organisational and legal challenges. It is worth stressing uncertain legal status of such a broadcasting service. According to Broadcasting Act, similar to AMSD, radio on-demand and radio on internet are excluded from the scope of this regulation. It means that any provision and obligations from this

⁶ The Broadcasting Act of December 29, 1992, consolidated text Dz. U. 2011, No 43, p. 226. http://www.krrit.gov.pl/Data/Files/_public/Portals/o/angielska/Documents/Regulations/broadcasting_act_28022013.pdf.

⁷ See article 21.1a.5 the Polish Broadcasting Act.

Broadcasting Act like limitation of adverts or product placement, programme quotas of European programs, programmes of independent producers, regulations banning child pornography, etc., are excluded from this service.

The next issue is the legal status of such a service in the scope of the Polish Press Law. According to this regulation, every daily newspaper, periodical, radio or TV channels has to have an editor-in-chief who is legally responsible for a content e.g. in the case of defamation. According to the Polish law, the editor-in-chief takes legal responsibility for the broadcast programme. Nonetheless, the current media law does not indicate who will be responsible for the right to release corrigenda in the media. In this project, however, the question is whether we need only one editor-in-chief or many, because we have many channels. Secondly, who will be legally responsible for broadcast contents, whether a separate new legal entity (created by Units of the Polish Radio Company) or all regional broadcasting stations of the Polish Radio as a whole.

Furthermore, there are problems concerning the copyright law in the digital age (Haggart, 2014, pp. 13-14). Article 50 points to 3 Polish Copyright⁸, which create a separate field of exploitation of copyright when artistic work may be available to members of the public who may access them from a place and at a time individually chosen by them. Similar solutions apply to performers, phonogram producers and broadcasting organisations. Also, digital broadcasting gives birth to other new challenges in the sphere of copyright and related rights. It particularly requires a redefinition of such notions as: communication to the public, especially in the case of technology on-demand, the right to make available to the public other subject-matter lists of exceptions or limitations to the reproduction right, especially concerning reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes into account the application or non-application of technological measures.

It appears that personalised radio programmes should be regarded as “information society services”, in the context of the Act of 18 [...] July 2002 on electronic services, promulgated in this country, and modelled on the European Directive on electronic commerce⁹. Under this regulation the wording “information society services” is supposed to mean “any service,

⁸ See article 21.1a.5 the Polish Broadcasting Act.

⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. L 178 , 17/07/2000, p.1 -16.

normally provided for remuneration, at a distance, by electronic means, including digital compression and data storage, at the individual request of a recipient of services, and which is, in its entirety, broadcast, received or transmitted by means of a telecommunications network. It is thus expected that the basic principles, expressed in the said directive, and in the Polish legal provision, are followed. It needs to be emphasised, however, that those regulations are typical for electronic commerce, and not necessarily for the transmission of programmes. And so in Article 4 of Directive 2000/31/EC the principle excluding prior authorisation was established. Under this provision, member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect. In Articles 5 and 6, the principle providing for the obligatory information on the provider of the given service and on the service itself was contained. The legal provisions, determining the principles of legal liability resting on the provider of such services merit, however, particular attention. And so in Article 12, legal responsibility in the case of the, so called, “Mere conduit”¹⁰ is regulated. So is, in Article 13¹¹, “Caching”, and in Article 14 “Hosting”¹². No

¹⁰ According to article 12 Directive 2000/31/EC “Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission. 2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

¹¹ See Article 13 of Directive 2000/31/EC “Caching” 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

¹² According to Article 14.1 Directive 2000/31/EC “Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which

general obligation to monitor such services, expressed in Article 15¹³ should also be borne in mind. Apparently, this is merely a minimal level of intervention on the part of the lawmaker into activities of the provider of services. Media divergence is, as mentioned above, one of the characteristic features of digital transmissions. Since the same content reaches recipients through diverse channels, it is difficult to accept that – paradoxically – it is merely the issue of the technical manner of transmitting such content, which dictates the scope of the legal regulation concerned. It appears that it is not enough. Self-regulation could possibly be a fitting solution in this area. It needs underscoring here, however, that in a number of countries, as, for example in this one, self-regulation does not have a long tradition.

The advantages of the project have already been mentioned earlier. Among its drawbacks, however, the business model should have been listed, and particularly sources of funding for NET-RADIO: public or commercial. The latter still lacks decision and poor management of the project. Certainly, a decision of the Polish Regulatory body for media market activities is required. Accountability for this project should be shared by A17 Company – a separate entity of 17 regional Polish radio companies. Now, the main task of this entity is to collect adverts on the national level for regional stations. The entity could thereby become a splendid coordinator of the project discussed in question, which assembles 17 separate radio stations.

From a technical point of view, it is optimistic that the NETRADIO project is feasible. As of today, technical possibilities allow for the production of hundreds of thousands of separate broadcasting programmes. However, it is pessimistic that the project was completed in 2008. Also, there has been a complete lack of key decisions for seven years. Despite the years gone by, the idea to set up such an initiative is still innovative and looks promising. The technical side of the project was funded by the National Research and Development Centre. The future of the project is still questionable. Clearly, so are also its legal foundations.

the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”.

¹³ See Article 15 Directive 2000/31/EC “Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements”.

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