ANEM

ANEM AND ANEM LEGAL DEPARTMENT PROPOSITIONS FOR LEGISLATIVE IMPROVEMENTS

Regulation of satellite broadcasting

At this moment, there are three satellite "direct-to-home" (DTH) platforms in Serbia: SBB's Total TV, Pink Plus, and Digi TV offered by a Romanian telecommunications company, RCS&RDS. While Pink Plus distributes only the channels from Pink's offer in the region, Total TV and Digi TV DTH platforms include a range of channels, from local terrestrial to foreign satellite channels. They are being broadcast in Serbia in the absence of appropriate regulation.

The Broadcasting Law, in its Article 40, stipulates that the Republic Broadcasting Agency is responsible for issuance of licenses for satellite program broadcasting without a public contest and at operator's request. Although the Law was adopted and came into force in 2002, not a single license for satellite broadcasting has been issued. Since the Article 40, paragraph 2 of the Broadcasting Law specifies that the operator applying for the satellite broadcasting license is obliged to fulfill all conditions detailed in a special law that regulates the field of telecommunications with regard to possession of proper licenses, fulfillment of technical conditions and standards for the network and the station used, as well as other conditions required by the law and defined by the relevant regulatory body in the field of telecommunications, the Republic Broadcasting Agency was of the opinion that the issuance of telecommunication licenses for DTH platforms was a necessary precondition for issuance of licenses for individual programs distributed via the platform.

The Law on Telecommunications, on the other side, makes a difference between licenses for public telecommunication networks and public telecommunication services (licenses and permits), licenses for radio stations and technical licenses. With regard to satellite broadcasting, the Republic Agency for Telecommunications, as a regulatory body responsible for the area of telecommunications, failed for a long time to make any steps to regulate the regime and conditions for issuance of licenses relating to the satellite DTH service, as a de facto public telecommunication service. The Republic Agency for Telecommunications is still issuing licenses regarding the satellite broadcasting only in the form of licenses for radio stations (satellite uplink stations), using a procedure which does not take into account whether a public telecommunication service is offered or whether the uplink is used only for own needs (for example, for distribution of a signal to remote terrestrial transmitters).

The key practical problem caused by this situation is related to the impossibility of offering appropriate protection of intellectual property and similar rights, most of all with regard to content producers. Specifically, a member of ANEM, B92, after the termination of a contract with the

Romanian telecommunication company, RCS&RDS, has not been able for two years to effect the removal of its channel from the Digi TV offer, regardless of the relevant court decision that was made by the Commercial Court in Belgrade.

In June 2007, the Republic Agency for Telecommunications published a public invitation for applications to all persons offering or intending to offer the service of satellite distribution of radio and TV program, but later postponed discussion about the required regulations until the second half of 2008.

ANEM representatives, fully aware of the practical problems caused by the lack of appropriate regulation, proposed the following:

- Adoption of the rulebook which would make the offering of a public telecommunication service of satellite distribution of radio and TV program a subject to a regime requiring issuance of permits;
- Issuance of permits should be tied to the existence of appropriate contracts which protect authors' rights as well as similar rights of broadcasting companies whose programs are broadcast by satellite using such platform.

Draft rulebook was published on the web site of the Agency on December 9, 2008. In accordance with the ANEM proposal, the draft states that the public telecommunication service of satellite distribution of radio and TV program is subject to the regime requiring approval. Also, in accordance with the ANEM proposal, submission of the list of contracts which protect author's and similar rights is required as a necessary precondition for issuance of permits. The other provisions are purely technical.

Adoption of the rulebook in the proposed form would achieve the following results:

- Formation of a register of issued and valid permits, which would assist in elimination of piracy in satellite distribution;
- The Republic Agency for Telecommunications would have the right to revoke a permit in the case of repeated or material breach of conditions related to the approval (including the conditions related to respect for author's and similar rights).

The requirement to submit a list of contracts which protect author's and similar rights as a precondition for issuance of an approval would allow the producers of programs distributed by such platforms – if a contract with them is not a part of the list submitted by the operator in the course of applying for the approval – to file charges against the operator and more efficiently protect their rights with regard to judicial proceedings.

With the adoption of the rulebook, the Republic Broadcasting Agency would be deprived of an excuse for failure to regulate the procedure of issuance of program licenses for satellite program broadcasting during the period of seven years after the adoption of the Law on Broadcasting. This would allow ANEM, as well as all other stakeholders, including the end users and their associations, to exert pressure on the Republic Broadcasting Agency to fully regulate this area – specifically, the program conditions for issuance of licenses.

In the meantime, the public debate ended and we expect that the draft rulebook with the aforementioned provisions proposed by ANEM will be adopted.

Collective Societies

There are two important things that happened in the last year with regard to the relationship between the media, collective organizations and the Intellectual Property Office concerning the fees for the use of intellectual property rights and similar rights.

In accordance with the Article 125, paragraph 2 of the Copyright and Related Rights Law, users are charged with the fee for the producers of sound recordings and the fee for the performers in the form of a single fee collected by the producer of the sound recording. The Law states that, unless otherwise specified in a contract concluded between the producer of the sound recording and the performers, the producer of the sound recording is obliged to immediately deliver half of the collected fee to the performer whose interpretation is a part of the producer's sound recording.

This provision was included in the law at the time when no collective organizations for protection of performers' rights existed, but only Sokoj and OFPS. In the meantime, the Intellectual Property Office has issued licenses to two collective organizations for protection of performers' rights as well, Pragus i PI.

OFPS has never set aside half of the collected fee for performers, nor has it ever exhibited the will to share the collected fee with PI and Pragus. PI and Pragus have published their tariffs and began delivering the broadcasters proposed contracts in which they insisted on direct collection of performing fees. In July 2008, ANEM legal service prepared a letter used by its members, previously contacted by PI, to reply to this request. The letter states the following:

> "With regard to the proposed contract concerning the use of performing acts from your repertoire and the fee for such use, with due respect for copyright and related rights in general and performers' rights in particular, we inform you that at this time we cannot accept the contract that you have proposed.
> The reason for this is the fact that the proposed contract you have delivered us envisions direct collection of performing fee, aside from and in addition to the fee we already pay to the organization for collective implementation of producers of sound recordings – the Organization of Phonogram Producers of Serbia – OFPS from Belgrade.
> In our opinion and interpretation of the meaning and scope of provisions of the Article 115, paragraph 2 and the Article 125, paragraph 2 of the Copyright and Related Rights Law ("Official Gazette of Serbia and Montenegro", No. 61/2004), the fee collected by the Organization of Phonogram Producers of Serbia, OFPS, is an integral fee which, aside from the fee for producers of sound recordings, also includes the performers' fee, and therefore, if we agreed to sign the proposed contract with the Organization for Collective Administration of Performing Rights (PI) – considering the aforementioned interpretation of provisions of the Copyright and Related Rights Law – we would practically agree and oblige ourselves to pay the performing fee twice.
> We expect the collective organizations for protection of copyright and related rights to find and agree among themselves – with support from the Intellectual Property Office, as an institution that supervises their work – a solution which would be in full conformance with the law but would not entail double collection of fees for the same category of rights nor an unacceptable burden to broadcasters, taking into account the undeniable importance of broadcasters for freedom of expression in the democratic society, not only with regard to the

media's role to transfer information and ideas about things of public interest, but also with regard to the right of the public to receive information and ideas about things of public interest."

ANEM opinion was accepted and PI has not demanded signing of the said contract anymore.

After PI and Pragus published their tariffs, Sokoj came to a correct conclusion that further increase in users' obligations would result in reduced payment, and that they would suffer because of that; for this reason, they urged the Intellectual Property Office to initiate negotiations on harmonization of fees which would set a practical limit to the increase in the fees that the organizations for protection of related rights are allowed to charge in addition to Sokoj's charge. Sokoj, which has slightly reduced its tariff by the end of 2007, insisted on harmonization of tariffs, e.g. for radio using 10:3:3 ratio (10:0.8:0.8 for television) meaning that for each 10 dinars collected from a radio station by Sokoj, OFPS should be allowed to collect 3 dinars from the same station, while all the organizations for protection of performers' rights should also be allowed to collect 3 dinars in total from the same station. This ratio was acceptable to organizations for protection of performers' rights, but not to OFPS. In the end, the agreement was not reached.

Representing the interests of its members, ANEM has insisted at several meetings with representatives of OFPS and Sokoj during the course of 2008 that their tariffs should be reduced. Using well-substantiated demands, ANEM has achieved the following:

1. In May 2008, OFPS has adopted new, lower tariff reducing the fee from 4% to 3% of the total revenue for commercial radio stations, while with regard to commercial television stations, the range was reduced from the previous level of 1.25%-2% (depending on the amount of the music used) to the current level of 0.7%-1.25% (also depending on the amount of the music used), while the ratio between OFPS and Sokoj tariffs remained at the level of 10:10 for radio and 10:4 for television.

2. Also, at ANEM request, Sokoj has agreed – beginning in 2009 – to reduce the base for calculation of the fee by 10% in the same vein as standard bonuses approved to marketing agencies. With regard to the Sokoj tariff which was reduced in 2007 to the level of 2.5% of the total revenue of commercial stations, we have secured the possibility for the stations to further reduce the base on which this percentage is applied by another 10%; the bonuses do not have to be documented, and the reduction is performed automatically.

With regard to amendments to the Copyright and Related Rights Law, it is clear that there was no political will to modify the Law in a way which would increase Intellectual Property Office's authorization to control the amount and the manner in which collective organizations define their tariffs. The Office has proposed the arrangement in which representative associations of users (in this case, broadcasters) and collective organizations would mutually agree on the tariff, while in the case of inability to reach agreement, the final decision on the tariff would be made by an arbiter. However, this proposal was withdrawn. At the same time, ANEM is working on proposed amendments to the Law, which would regulate all important or disputable issues, in order to provide for adequate solution to the problems.

Separation of the broadcasting facilities from Radio Television of Serbia (RTS)

One of the numerous ways in which the media policy and regulations could have been used to influence the creation of a more favorable environment for media, was to separate the key broadcasting facilities and their corresponding infrastructure currently owned and controlled by RTS. The fact the high altitude positions of key importance for the nation-wide coverage of all the national broadcasters, both commercial and public, are used and managed by the RTS, represents an adverse vertical concentration and also allows for the abuse of the dominating position in terms of the provisions of the Law on the Protection of Competition.

The 2002 Broadcasting Law, which anticipated the transformation of the RTS into two carriers of the public service, stipulated that broadcasting infrastructure facilities (buildings, masts, antennas, etc.) should be used by future public service only in compliance with the agreement concluded with the Republic Directorate for Property of the Republic of Serbia. However, information on such agreement and its content has never been made public. The practice in the field shows that the Republic Directorate for Property failed to limit the scope of utilization of the broadcasting infrastructure facilities by the public broadcasters to the needs related to the number of networks on which public service is broadcasting, as set by the law.

Separation of the broadcasting facilities and infrastructure has been recognized as a necessity already in the 2005 Broadcasting Development Strategy. Republican Broadcasting Agency stated that the situation in which one broadcaster (RTS) holds the key broadcasting facilities and infrastructure does not guarantee an equal position of all electronic media. Agency has concluded that it is necessary to separate the broadcasting system and the signal transmission system from the organization of the current RTS (the future public service), as well as from the organization of the commercial broadcasters who now own such facilities.

The position of the Agency, expressed in the Broadcasting Development Strategy, was that the issue is to be solved by setting up a public enterprise that will guarantee to all the broadcasters who receive the license equal access to the broadcasting facilities.

However, public enterprise was not set up, due to obstructions from RTS itself and the position of the Ministry of Culture that separation and setting up of the new public enterprise requires legislative intervention and in particular the changes of the Law on Telecommunications.

ANEM, in its propositions, insisted on separation of the broadcasting facilities and infrastructure. ANEM representatives indicated problems that the deadlock shall cause with regards to the pending digitalization and explained that it would be impossible to call public tender for the digital broadcasting network operators prior to the separation. ANEM required in particular the Ministry of Telecommunications to tackle the issue as an obstacle for digitalization.

ANEM request was fully understood and accepted by the Ministry of Telecommunications and proposed to the Government a decision on the separation of the broadcasting facilities and infrastructure. Decision, entitling Ministry of Telecommunications to call a tender for the advisor to be appointed for the separation was passed and subsequently the advisor with experience in separation of public enterprises was appointed. Currently the advisor is gathering data and their report and opinion is due in April 2009.