PRAVNI MONITORING MEDIJSKE SCENE U SRBIJI

LEGAL MONITORING OF THE SERBIAN MEDIA SCENE

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PRAVNI MONITORING MEDIJSKE SCENE U SRBIJI

UVOD

Medijska scena Srbije, kojom se ANEM zajedno sa svojim pravnim timom intenzivno, kontinuirano i analitički bavi već dugi niz godina, nije doživela prijatno iznenađenje ni u drugoj polovini 2013. godine. Ponovo je izostala reforma, očekivano se nije desilo, pa tako, s potpuno nepromenjenom situacijom, medijski sektor, opterećen istim problemima, ulazi u još jednu novu godinu.

Ukratko, iz pravne analize dešavanja u drugoj polovini ove godine i nalaza monitoring tima, može se zaključiti sledeće:

Na Medijsku strategiju medijska zajednica je čekala skoro punih 11 godina posle demokratskih promena. Na njeno sprovođenje, po svemu sudeći, čekaće još. Reforma regulatornog okvira u skladu sa Strategijom, koja je Akcionim planom predviđena u ovoj godini, nije se dogodila. Iako su javne rasprave o nacrtima sva tri medijska zakona završene (o Nacrtu Zakona o javnom informisanju i medijima – u prvoj polovini godine a o nacrtima Zakona o elektronskim medijima i Zakona o javnim medijskim servisima – u drugoj polovini), do kraja 2013. godine nijedan od njih nije dostavljen vladi na usvajanje i prosleđivanje parlamentu; zapravo, još uvek se ne zna ni kada ni kakvi tekstovi zakona će biti upućeni vladi jer je postupak njihovog konačnog formulisanja i dalje u toku. Iako nacrti nisu bez mana, kako su pokazale javne rasprave, i bilo bi dobro da se neka njihova rešenja unaprede ili dorade, neusvajanje novog Zakona o javnom informisanju i Zakona o elektronskim medijima za posledicu ima odlaganje primene ključnih rešenja tih zakona koja bi trebalo da doprinesu unapređenju medijskog sistema u Srbiji. Država tako, po ko zna koji put, uspešno odoleva imperativu izlaska iz vlasništva u medijima, za koji se sve vlade od 2001. godine naovamo deklarativno zalažu; odlaže se, takođe, i primena pravila o projektnom finansiranju medija pa tako netransparentno dodeljivanje bužetskih sredstava državnim medijima i medijima bliskim vlasti i izostanak bilo kakve kontrole državne pomoći u medijskoj sferi, slobodno tumačenje javnog interesa u medijskoj sferi, kao i nelojalna konkurencija, ostaju i dalje među najvažnijim problemima medijskog sektora. To rezultira i problemom jačanja političkog i ekonomskog uticaja na medije, imajući u vidu razmere ekonomske krize u medijskom sektoru i izuzetan značaj državne pomoći u takvoj situaciji. Pored toga, i problemi u obezbeđivanju transparentnosti vlasništva nad medijima i sprečavanju nedozvoljene medijske koncentracije ostaju nerešeni. Kada je reč o Zakonu o javnim servisima koji nije od suštinskog značaja za razvoj sektora, njegov nacrt je imao najveći broj primedaba i najmanje je u skladu sa Strategijom, tako da bi pre usvajanja bilo potrebno da pretrpi značajne dorade i poboljšanja rešenja, a posebno onih koja se odnose na finansiranje javnih servisa. Što se ostalih dešavanja u medijskom sektoru tiče, u ovom periodu ni sudska praksa u medijskim sporovima nije bila mnogo drugačija u odnosu na prethodni period. Pojedine presude apelacionih sudova, koje predstavljaju korak napred u zaštiti slobode izražavanja, ipak nisu dovoljne da bi promenile opšti utisak o nedovoljno dobroj sudskoj praksi u medijskim slučajevima kao jednom od bitnih uzroka lošeg položaja medija i novinara a posebno njihove autocenzure. Svojim radom i značajem odluka koje je u ovom periodu doneo, a koje mogu uticati i na veću zaštitu prava novinara i slobode medija, izdvaja se Ustavni sud; te odluke odnose na pitanje prava države da osniva medije na jezicima nacionalnih manjina, pitanje pristupa zadržanim podacima, kao i pitanje klasifikacije i tajnosti podataka a u vezi sa zaštitom prava na slobodan pristup informacijama od javnog značaja. Ostali nadležni organi u ovom periodu nisu svojim radom značajnije doprineli poboljšanju položaja novinara i medija ali se u narednom periodu najviše očekuje od Ministarstva kulture i informisanja. To ministarstvo treba da do kraja iznese reformu medijskog regulatornog okvira a pozitivne personalne promene, do kojih je u njemu došlo u poslednja tri-četiri meseca, trebalo bi da doprinesu ostvarenju tog zadatka. Od tranzicionih procesa, privatizacije medija gotovo da nije bilo u praksi, ali je bila predmet diskusije na javnim raspravama o nacrtima medijskih zakona, koje su nekima poslužile za

osporavanje privatizacije i zalaganje za državno vlasništvo u medijima kako bi zaštitili svoje interese, vlast ili radna mesta; proces digitalizacije zamalo je blokirala Republička radiodifuzna agencija svojim konkursom za dodelu još jedne TV dozvole s nacionalnim pokrivanjem, ali je nakon kompromisnog rešenja, stvoren osnov za njegov nastavak. Međutim, za medije kao direktne aktere ovog procesa, neka ključna pitanja, kao što su pitanje produžetka dozvola, pitanje troškova i ulaganja s jedne strane, i benefita s druge strane, i dalje ostaju bez odgovora, što može imati loše posledice na njihovo funkcionisanje.

Polazeći od nalaza monitoring tima o tome koja su medijska pitanja bila bitna u ovom periodu, za ovaj broj Publikacije opredelili smo se za sledeće teme: sudska praksa u medijskim sporovima – praksa Evropskog suda za ljudska prava i praksa domaćih sudova; medijski pluralizam; etika u medijima. Sadržaj Devete Monitoring Publikacije stoga čine sledeći tekstovi: „Delfi protiv Estonije iz srpske perspektive", autora advokata Slobodana Kremenjaka; „Da li nacrti medijskih zakona pospešuju medijski pluralizam?", autora Miloša Stojkovića, iz advokatske kancelarije „Živković&Samardžić" u Beogradu; „Neka sporna pitanja u sporu između autora fotografija i medija", autorke dr Dragice Popesku, sudije Apelacionog suda u Beogradu; „Etika u medijima: greške, samoregulacija i podizanje standarda", autorke Tamare Skrozze, novinarke i članice Komisije za žalbu Saveta za štampu. Peti tekst predstavlja sažet prikaz dve presude Evropskog suda za ljudska prava koje se odnose na primenu člana 10 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda; prva se odnosi na slobodu izražavanja a druga na slobodu primanja informacija i slobodu saopštavanja informacija.

U Beogradu, decembra 2013. godine

Delfi protiv Estonije iz srpske perspektive

Slobodan Kremenjak[1]

Odluka Evropskog suda za ljudska prava od 10. oktobra 2013. godine, u slučaju *Delfi AS protiv Estonije* izazvala je reakcije kakve presude tog suda ne izazivaju često. Širom Evrope pisalo se kako se tom odlukom nanosi „ozbiljan udarac slobodi izražavanja na internetu" a nisu izostali ni komentari o „zbrci epskih proporcija". Iz perspektive Srbije, interesantno je uočiti kako su sličnu praksu kao Evropski sud za ljudska prava u *Delfi AS protiv Estonije* domaći sudovi imali i pre ovog slučaja. Međutim, iznenađuje da reakcije koje bi odgovarale onome što se u Evropi dešava nakon odluke *Delfi AS protiv Estonije*, na sličnu praksu u Srbiji po pravilu izostaju. Srbija kao da je navikla da se miri sa „ozbiljnim udarcima slobodi izražavanja na internetu" i „zbrkama epskih proporcija" na svom terenu.

O čemu je zapravo reč u ovom slučaju? Delfi AS je vlasnik portala Delfi koji dnevno objavljuje do 330 članaka s vestima. Reč je o jednom od najvećih estonskih portala koji, pored na estonskom, vesti objavljuje i na ruskom. Portal omogućava posetiocima da vesti komentarišu a komentare Delfi AS ne uređuje i ne moderiše. Posetioci portala dnevno postave oko 10.000 komentara, po pravilu pod pseudonimima. Portal poseduje automatizovan sistem za brisanje komentara koji sadrže pojedine nepristojne reči. Takođe, portal poseduje sistem za prijavljivanje neprimerenih komentara pa se prijavljeni komentari brzo uklanjaju. Dodatno, lica pogođena komentarima mogu i direktno da se obrate Delfi AS, u kom slučaju se komentari uklanjaju trenutno. Delfi AS je u „pravilima komentarisanja" istaknutim na portalu, izričito naveo da se komentari ne uređuju, da su za sadržaj komentara odgovorni autori, kao i da postoji praksa estonskih sudova da autorima izriču kazne za sadržaj komentara. U „pravilima komentarisanja" dalje se izričito navodi da Delfi zabranjuje komentare koji sadrže pretnje, uvrede, podstiču netrpeljivost i nasilje, podstiču nezakonite aktivnosti, sadrže opscene i vulgarne izraze te da zadržava pravo da takve komentare ukloni i njihovim autorima ograniči pravo da postavljaju komentare.

U konkretnom slučaju, Delfi je 24. januara 2006. godine objavio članak o tome da *AS Saaremaa Laevakompanii*, brodarska kompanija koja feribotima povezuje kopno sa ostrvima, stoji iza povlačenja plana da se tokom zime do pojedinih ostrva otvore javni putevi preko zaleđenog mora. Tog i narednog dana, tekst je komentarisan 185 puta. Oko 20 komentara sadržalo je pretnje i uvrede usmerene ka tadašnjem članu uprave i većinskom vlasniku brodarske kompanije. Njegovi advokati su nakon mesec i po dana, tražili od Delfi AS da se takvi komentari uklone i stavili odštetni zahtev u visini oko 32.000 evra. Komentari su uklonjeni, a Delfi je zahtev za naknadu štete odbio. Većinski vlasnik brodarske kompanije podneo je tužbu za naknadu štete, koja je u prvom stepenu odbijena. Nakon njegove žalbe i ukidanja prvostepene presude, u ponovljenom postupku, estonski sudovi obavezali su Delfi AS da članu uprave i većinskom vlasniku brodarske kompanije isplati naknadu nematerijalne štete u iznosu 320 evra. Odlukom od 10. oktobra 2013. godine, Evropski sud za ljudska prava našao je da takav zaključak estonskih sudova predstavlja opravdano i srazmerno ograničenje slobode izražavanja.

Ova odluka slična je praksi koja već postoji u Srbiji. Ovde ćemo pomenuti samo slučaj *Bogdan Vla protiv novosadskog Radiodifuznog preduzeća „021"*, u kojem je novosadska radio stanica obavezana da isplati naknadu štete zbog komentara posetilaca svog sajta. Bogdan Vla je, naime, advokat čiji je klijent dobio spor Radija „021", a sud je u tom predmetu mediju, između ostalog,

[1] Advokat; Advokatska kancelarija „Živković&Samardžić", Beograd

naložio i da objavi presudu. Radio „021" je postupio po presudi a Bogdanu Vla se pojedini komentari presude posetilaca sajta nisu dopali te je povodom njih i lično tužio radio stanicu.

I u Srbiji, u predmetu *Bogdan Vla protiv novosadskog Radiodifuznog preduzeća „021",* kao i u Estoniji i pred Evropskim sudom za ljudska prava u slučaju Delfi AS, spor se zapravo vodio oko toga da li su delovi medijskih portala i sajtova koji sadrže komentare korisnika, produžetak samog medija i pod uređivačkom kontrolom izdavača ili je pak omogućivanje korisnicima da komentarišu vesti zapravo usluga informacionog društva, kako su ove usluge definisane evropskom Direktivom o elektronskoj trgovini (2000/31/EC) od 8. juna 2000. godine ali i srpskim Zakonom o elektronskoj trgovini („Službeni glasnik RS", br. 41/2009 i 95/2013) koji se oslanja na navedenu evropsku direktivu.

Naime, članom 14. Direktive, odnosno članom 18. Zakona o elektronskoj trgovini, predviđeno je da pružalac usluga koji skladišti podatke pružene od strane korisnika usluga, na zahtev korisnika usluga, nije odgovoran za sadržaj skladištenog podatka ako nije znao niti je mogao znati za nedopušteno delovanje korisnika usluga ili za sadržaj podatka te ako je odmah nakon saznanja da je reč o nedopuštenom delovanju ili podatku uklonio ili onemogućio pristup tom podatku. Članom 15 Direktive, odnosno članom 20 Zakona o elektronskoj trgovini, dodatno je predviđeno da pružalac usluga informacionog društva, prilikom pružanja usluga, nije dužan da pregleda podatke koje je skladištio, preneo ili učinio dostupnim, odnosno da ispituje okolnosti koje bi upućivale na nedopušteno delovanje korisnika usluga.

Sukob, dakle, postoji između dva stanovišta: jednog, po kojem su, za razliku od pružalaca usluge informacionog društva koji nemaju ni saznanja, niti kontrole nad informacijama koje prenose ili skladište, mediji pružaoci sadržaja koji nad informacijama koje skladište imaju kontrolu, koji integrišu sekcije s komentarima u svoje portale i pozivaju korisnike da vesti komentarišu. Dalje, po ovom stanovištu, broj komentara utiče na broj poseta portalu i na prihode medija od oglašavanja, što medije čini odgovornim za sadržaj komentara u istoj onoj meri u kojoj su odgovorni i za objavljeni sadržaj tekstova svojih novinara. Po drugom stanovištu, medij je samo onaj oblik javnog obaveštavanja koji je podvrgnut određenoj uređivačkoj koncepciji, odnosno koji se uređuje, što komentari nisu, te su izdavači medija u odnosu na komentare korisnika samo pružaoci usluga informacionog društva te samim tim i bez obaveze da pregledaju podatke koje skladište, prenose ili čine dostupnim, odnosno bez obaveze da ispituju okolnosti koje bi upućivale na nedopušteno delovanje korisnika usluga.

Ova dilema nije samo teorijska i nemoguće ju je svesti samo na pitanje propisa koji se imaju primeniti na komentare vesti na medijskim portalima – onih koji se odnose na javno informisanje, ili pak onih koji se odnose na elektronsku trgovinu. Ona je, naprotiv, od ključne važnosti za slobodu izražavanja na internetu jer, kao što je ispravno primetio Specijalni izvestilac UN za promociju i zaštitu prava na slobodu mišljenja i izražavanja, Frank La Rue,[2] „odgovornost prenosilaca za sadržaj koji šire ili kreiraju njihovi korisnici, ozbiljno ugrožava ostvarivanje prava na slobodu mišljenja i izražavanja, zbog toga što vodi u odbrambenu i preširoku privatnu cenzuru, cenzuru koja je često netransparentna i pravno neuređena".

[2] http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Da li nacrti medijskih zakona pospešuju medijski pluralizam?

Miloš Stojković[1]

Jedan od ciljeva koje su medijska i novinarska udruženja imala u vidu, zalažući se za usvajanje Medijske strategije, bio je i definisanje jasne medijske politike koja bi morala da pruži okvir za pospešivanje medijskog pluralizma putem definisanja jasnih pravila u pogledu medijske koncentracije. Analizom propisa koji bi uskoro trebalo da budu usvojeni, može se zaključiti da Srbija još uvek nema jasno definisanu politiku a borba za medijski pluralizam temelji se na nejasnim proklamacijama Medijske strategije i problematičnim instrumentima kojima taj nejasan cilj treba da se ostvari.

Pre svega, čini se da država uopšte nije svesna kompleksnosti medijskog pluralizma i da je njena nemogućnost da definiše jasna, transparentna i nedvosmislena pravila u ovoj oblasti posledica nerazumevanja. Pluralizam stavova, mišljenja i ideja podrazumeva interni i eksterni element. Interni element je pokazatelj koliko je pluralizam zastupljen u medijskom sadržaju, dok se eksterni bavi pitanjima poput medijskog vlasništva, broja vlasnika, nezavisnosti uređivačke politike i sl. Čini se da su tvorci nacrta medijskih zakona potpuno prevideli sadržinski element medijskog pluralizma i bavili se samo njegovom kvantifikacijom sa ciljem da nađu odgovarajući brojčani kriterijum koji će navodno da doprinese medijskom pluralizmu. S druge strane, medijska koncentracija ima i svoju tržišnu dimenziju, a pravila o medijskoj koncentraciji moraju da uvaže činjenicu da se vrednost medijskog tržišta smanjuje, da je ukrupnjavanje posledica ekonomske krize, te da ni investitori nisu posebno zainteresovani da ulažu u ovaj sektor. Zato nije jasno šta medijski pluralizam znači na ovakvom tržištu i šta država zapravo želi da postigne.

Nacrt zakona o javnom informisanju i medijima, koji je bio na javnoj raspravi u martu ove godine, predvideo je pragove medijske koncentracije u sektoru štampanih medija na 50% udela u tiražu dnevnih novina u Srbiji na godišnjem nivou, odnosno 35% udela u gledanosti u konkretnoj zoni pokrivanja, u sektoru elektronskih medija, takođe na godišnjem nivou. Nekoliko meseci kasnije, u Nacrtu Zakona o elektronskim medijima, isto Ministarstvo je pragove koncentracije vezalo za broj dozvola za zemaljsko emitovanje. U odnosu na kablovske emitere, što je još čudnije, pragovi su vezani za konkretni sadržaj koji se emituje pa tako isti vlasnik može emitovati neograničen broj specijalizovanih kanala, osim specijalizovanih kanala vesti, ali i ne više od jednog kanala, ako je u pitanju nespecijalizovani kanal opšte namene, odnosno specijalizovani kanal vesti.

Svi dosadašnji nacrti zanemaruju zaštitu pluralizma sadržaja. Da li, na primer, posedovanje dve dozvole za zemaljsko emitovanje na nacionalnom nivou zaista ugrožava taj pluralizam? Da li vlasnik privrednog društva koje ima dve dozvole za zemaljsko emitovanje programa može da ima toliki uticaj na uređivačku politiku u meri koja ugrožava pluralizam sadržaja? Kakva je razlika između zemaljskog i kablovskog emitovanja da opravdava različite pravne režime? Ovo su sve legitimna pitanja na koja nacrti medijskih zakona ne daju odgovor. Odgovore na ova pitanja ne daje u potpunosti ni prva verzija, po kojoj se preovlađujući uticaj na javno mnjenje meri u odnosu na procenat gledanosti/slušanosti u zoni pokrivanja, jer ne postoji jasna veza pluralizma sadržaja s tim ograničenjem. Ipak, ovo rešenje je zasnovano na objektivnom kriterijumu koji je pri tom „tehnološki neutralan" jer je podjednako primenjiv na sve platforme medijske distribucije. Takođe, uvažava i geografsku dimenziju medijskog pluralizma, vezujući se za zonu pokrivanja. Nije na odmet pomenuti da ni u EU nema jedinstvenog modela. Neke od

[1] Advokatska kancelarija „Živković&Samardžić", Beograd

članica EU na ovaj sektor primenjuju samo opšte propise o konkurenciji, druge imaju i sektorsku regulaciju za jedan ili više medijskih sektora i za pitanje unakrsnog medijskog vlasništva. Ne postoje čak ni jedinstveni kriterijumi za ocenu koncentracija – negde je to udeo u čitanosti ili gledanosti, negde udeo u vlasništvu, negde pak udeo u tržištu opredeljen ne prema gledanosti, već prema prihodima itd.

S druge strane, čini se da zakonopisci nisu u dovoljnoj meri uzeli u obzir činjenicu da raznovrsnost medijskog vlasništva ne podrazumeva automatski i zadovoljavajući nivo medijskog pluralizma, jer je poenta ipak u tome da se jasno razgraniče vlasništvo i uređivačka politika a tim aspektom medijskog pluralizma nacrti se uopšte ne bave. Razlozi zbog kojih države ograničavaju medijsku koncentraciju leže u uverenju da visoka koncentrisanost medijskog tržišta deluje negativno na medijski pluralizam. Ovo „uverenje" mora da se bazira na stanju na konkretnom tržištu, uz neophodnu analizu njegove vrednosti i dovođenja u vezu koncentracije sa uređivačkom nezavisnošću, odnosno programskim sadržajem. Pitanje medijske koncentracije se takođe ne može posmatrati ni odvojeno od pravila o transparentnosti medijskog vlasništva. Nivo koncentrisanosti medijskog vlasništva nemoguće je utvrditi ako je to vlasništvo netransparentno. Praksa primene Zakona o radiodifuziji pokazala je da i suviše rigidan režim u pogledu propisivanja medijske koncentracije, koji nije primeren stanju na tržištu, zapravo pospešuje „sivu zonu" i vodi ka netransparentnom medijskom vlasništvu. Umesto promene ovih pravila, poslednji nacrti uvode još rigidniji režim a njihov efekat na transparentnost vlasništva mogao bi da bude pogubniji nego što je bio do sada.

Na kraju je bitno ukazati na to da Medijska strategija propisuje da će *„Republika Srbija ... uskladiti zakone koji se odnose na medije na takav način da medijski pluralizam na nacionalnom, regionalnom i lokalnom nivou ne bude ugrožen*" *te da će „u interesu očuvanja medijskog pluralizama i raznovrsnosti medijskog sadržaja, Republika Srbija ... usklađivanjem domaćeg zakonodavstva sa zakonodavstvom Evropske unije sprečavati nedozvoljenu medijsku koncentraciju*" a takođe da će *„dozvoljenost medijske koncentracije u skladu sa zakonom i na osnovu relevantnih podataka dobijenih od nadležnih tela*" *ocenjivati Komisija za zaštitu konkurencije.* Od ovog poslednjeg odstupa se u oba nacrta zakona. Nesporno je da će Komisija za zaštitu konkurencije ocenjivati i koncentraciju u medijskom sektoru u skladu sa opštim pravilima predviđenim Zakonom o zaštiti konkurencije. Postojaće, međutim, i specifična sektorska pravila, uvedena zarad zaštite medijskog pluralizma, a koja će primenjivati Ministarstvo kulture u odnosu na štampu, odnosno regulatorno telo nadležno za radiodifuziju, u odnosu na elektronske medije. Postavlja se pitanje da li se u propisivanju ovih ovlašćenja razmišljalo o tome da li su Regulator i Ministarstvo zaista sposobni za obavljanje ove funkcije. Evropska regulativa podrazumeva kompatibilnost opštih pravila konkurencije i sektorskih politika. Da li će Regulator i Ministarstvo zaista sprovoditi kompatibilnu politiku sa telom za zaštitu konkurencije ako se čak ni ne konsultuju međusobno?

Zbog rigidnih kriterijuma, nedostatka kapaciteta Regulatora i Ministarstva i zanemarivanja kretanja na srpskom medijskom tržištu, teško je predvideti kakav će efekat imati ove odredbe medijskih zakona. Ipak, čini se da će suštinska zaštita medijskog pluralizma dugo ostati samo deklarativno stremljenje države i neostvareni cilj.

Neka sporna pitanja u sporu između autora fotografija i medija

Dr Dragica Popesku[1]

Autorsko pravo je skup svih prava i ovlašćenja na autorskopravnim dobrima (autorskim delima) kao objektima autorskog prava. Subjekat tog prava, njihov titular, jeste autor koji je uvek fizičko lice ili je to sticalac autorskog prava (fizičko ili pravno lice) koji ovo pravo stiče od autora ili njegovog pravnog sledbenika. U autorska dela, u smislu originalne duhovne tvorevine, spadaju i fotografska dela,[2] koja nastaju fotografisanjem, odnosno snimanjem neke osobe, ambijenta ili drugih prizora, putem fotografskog aparata, kamere (kao posebnog aparata ili u sastavu mobilnog telefona i slično). Međutim, iako ova dela nastaju mehaničkim putem, ona moraju biti originalna duhovna tvorevina autora, u smislu odredbe čl. 2. Zakona o autorskom i srodnim pravima,[3] s tim da estetska i umetnička vrednost fotografija nije opredeljujuća u tom smislu.[4]

1. U sudskoj praksi se kao sporno postavilo pitanje *da li u autorsko delo spada i ona fotografija koja je nastala kao proizvod čisto mehaničkog procesa rada aparata*, ili samo ona u čije stvaranje je autor uneo svoju originalnost, duhovnu kreativnost. Istovremeno, nije presudno da li takva fotografija sadrži i umetničku komponentu (što zavisi od odabira pozicije, svetlosti, kompozicije itd.). U prilivu tužbi iz oblasti autorskopravne zaštite u prvostepenom parničnom odeljenju Višeg suda u Beogradu, preovlađuju one čiji tužioci nisu ni fotografi, niti fotoreporteri, niti se inače bave fotografijom. Određene fotozapise, nastale slučajno ili iz hobija, ta lica postavljaju na svoje blogove, portale, fejsbuk i slično, a mas-mediji ih preko pretraživača „Google" pronalaze i preuzimaju za svoje potrebe, najčešće radi ilustracije određenog novinskog članka, TV emisije, izveštaja itd. U tom smislu, nastaju veoma bizarne situacije kada se traži autorska zaštita i za fotografije popularnih nacionalnih jela, nastale od strane anonimnih domaćica koje su ih kuvale i fotografisale, postavile na blog, odakle ih je preuzelo neko glasilo radi ilustracije jela u okviru rubrike, poput „Kuvamo za vas". Zbog takvih i sličnih situacija usledile su brojne tužbe radi naknade štete zbog povrede imovinskog i moralnog autorskog prava iz oblasti fotografije. Naravno, postoje i veoma ozbiljni sporovi za naknadu štete, zbog neovlašćenog korišćenja nečijeg zapisa u vidu ekskluzivne ili umetničke fotografije, kada se dolazi na teren kako autorskog prava tvorca fotografije, tako i zaštite prava privatnosti, odnosno prava na lik lica na snimku.

U nekim situacijama, tužioci, koji kao autori pretenduju na naknadu štete, kako materijalne tako i nematerijalne, teško mogu dokazati da su baš oni sačinili fotografski, odnosno video zapis. Osim toga, kada im sud kao tvorcima postavi pitanje načina nastanka fotografije, neretko dobija odgovor da je snimak nastao bez njihove prethodne zamisli, prostim pritiskanjem dugmeta za snimanje, isprobavanjem da li i kako aparat radi i sl. Stoga se u postupku ne može saznati koja je bila njihova ideja, motivacija u smislu njene materijalizacije, u čemu se ogleda originalnost ideje potencijalnog autora, što je sve potrebno da bi delo imalo karakter autorskog. Kao predmet povrede autorskog prava prilažu se i fotografije koje se ne izdvajaju originalnošću, deluju kao „već viđene" i ne bude poseban osećaj (prijatan, neprijatan) i slično, kao umetničke. Pored toga

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[1] Sudija Apelacionog suda u Beogradu

[2] Vidi, Besarović, Vesna, *Intelektualna prava – industrijska svojina i autorsko pravo*, TRZ Hrast, Beograd, 1993, str. 267.

[3] Zakon o autorskom i srodnim pravima („Sl. glasnik RS", br. 104/2009), u čl. 2. predviđa da je autorsko delo originalna duhovna tvorevina autora, izražena u određenoj formi, bez obzira na njegovu umetničku, naučnu ili drugu vrednost, njegovu namenu, veličinu, sadržinu i način ispoljavanja, kao i dopuštenost javnog saopštavanja njegove sadržine.

[4] *„Originalno fotografsko delo je ono delo koje odražava individualnost autora, koje proizvodi određen estetski doživljaj na gledaoce i koje se po tom doživljaju razlikuje od ostalih fotografskih dela koja imaju isti objekat*", citat, Besarović, Vesna, *op. cit.* (fusnota*),* str. 267.

što tužioci, kao pretpostavljeni autori, ne uspevaju da objasne šta ih je inspirisalo da nešto snime i u čemu se ogleda posebnost tog snimka, osim što u odbranu svog tužbenog zahteva navode da su upravo oni koristili fotoaparat datom prilikom, teško je utvrditi i da li je osoba koja se predstavlja kao tvorac fotografije (čak i pod pretpostavkom da je u pitanju autorsko delo), taj snimak, odnosno digitalni fajl, sačinila ili ga je pozajmila od pravog tvorca, uz njegovu saglasnost, ili bez nje. No, najteže je u postupku, kada se od tužioca – pretpostavljenog autora fotografije, zatraži da objasni na koji način je odmerio zahtevani iznos novčane naknade štete. Mogu se čuti odgovori da je visina naknade obračunata odmeravanjem trostrukog iznosa cene za koju bi tužilac inače naplatio korišćenje, ili čak prodao istu fotografiju, premda je tužbeni zahtev postavljen za naknadu materijalne štete a ne za plaćanje naknade u smislu čl. 206. Zakona o autorskom i srodnim pravima. Naime, tužilac može da u slučaju kada je povreda imovinskog autorskog prava učinjena namerno ili krajnjom nepažnjom, *umesto nadoknade materijalne štete* zahteva *naknadu do trostrukog iznosa uobičajene naknade* koju bi primio za konkretan oblik korišćenja predmeta zaštite, da je to korišćenje bilo zakonito. Ova naknada se ne može izjednačiti s materijalnom štetom, čije se postojanje, počinilac, protivpravnost štetne radnje i uzročna veza između štetne radnje i posledice, moraju dokazati pred sudom u svakom konkretnom slučaju. S druge strane, kod postavljanja zahteva za isplatu do trostrukog iznosa uobičajene naknade, utvrđuje se *zla namera ili krajnja nepažnja* povredioca prava (dakle, ne štetnika), kao i iznos uobičajene naknade, spram samog autorskog dela i njegovog autora. Ovde je važno podsetiti se da svaka naknada ne mora predstavljati pun iznos trostruke uobičajene, već može biti u rasponu od uobičajene naknade, do tog limita, što bi trebalo da zavisi od krivice povredioca prava (*dolus, culpa lata*),[5] koji se tu ne posmatra kao štetnik.

2. Velika nedoumica u postupku nastaje i kod zahteva za naknadu štete zbog povrede moralnog autorskog prava; mora biti u korelaciji s povredom prava ličnosti jer ima osnov u *nepovredivosti psihičkog integriteta* pojedinca, kao fizičkog lica (što je garantovano članom 25. Ustava Republike Srbije). Stoga, u slučaju povrede nekog od autorskopravnih ovlašćenja koja proizlaze iz moralnog autorskog prava, neće biti štetna sama povreda autorskopravnog dobra, već psihičkog integriteta, kao ličnog dobra i objekta prava ličnosti. Ovo stoga što su u našem pravu *pravnopriznati vidovi nematerijalne štete kod povrede prava ličnosti* (identitet, dostojanstvo, psihički integritet, privatnost i druga), ali i kod povrede drugih nematerijalnih prava, samo i jedino *pretrpljeni* duševni *bolovi i/ili strah* (čl. 200. ZOO). Ovo su ujedno i oblici povređivanja prava ličnosti na psihički integritet, koji su zajednički sadržatelj za svaku nastalu nematerijalnu štetu, jer se to pravo nužno povređuje povredom bilo kog od napred navedenih prava ličnosti. Stoga je nužno da bolove i/ili strah pretrpi i autor koji zbog povrede moralnog autorskog prava pretenduje na naknadu ove štete.

3. Zakon o obligacionim odnosima (ZOO) u čl. 199. predviđa *povredu* prava ličnosti kao uslov za objavljivanje presude, ispravke, opoziva ili čega drugog, čime se može ostvariti svrha koja se postiže novčanom naknadom. Navedeno implicira da se prema toj odredbi nematerijalna šteta izjednačava s povredom prava ličnosti. S druge strane, već u sledećem čl. 200. ZOO, bolovi i strah su predviđeni kao jedini vidovi nematerijalne štete. Iz toga proizlazi da se duševni bolovi i strah (kao nematerijalna šteta koja je nastala povredom prava ličnosti na čast i ugled, privatnost, identitet i druga prava i slobode) mogu otkloniti nenovčanom naknadom, tj. naturalnom restitucijom, odnosno povraćajem u pređašnje stanje[6] – ispravkom informacije, opozivom (povlačenjem izjave), objavljivanjem presude (u krivičnom ili parničnom postupku, naročito u slučaju povrede časti i ugleda). Nenovčana naknada nematerijalne štete može se sastojati i u nečem drugom ako se time može ostvariti njena svrha. Ove radnje idu po nalogu suda na trošak štetnika, shodno članu 199. ZOO. Budući da zakon pominje štetnika, to se pretpostavlja šteta kao

[5] Vidi, Babić, Ilija, *Leksikon obligacionog prava*, Službeni glasnik, Beograd, 2008, str. 158, 159.
[6] Petrović, Zdravko, „Novčana naknada nematerijalne štete i prava ličnosti", *Pravni život*, 1/1989, *naturalna restitucija* je moguća i kod naknade materijalne i nematerijalne štete (objavljivanje presude, ispravke, javno izvinjenje u slučaju povrede časti i ugleda i dr.), str. 67–68, uporedi: *id.*, – *Naknada nematerijalne štete zbog povrede prava ličnosti*, Beograd, 1996, str. 73–79.

posledica povrede prava ličnosti, što znači da sama povreda prava nije dovoljna da bi se koristila navedena sredstva restitucije.[7] Prema Zaključku zajedničke sednice Saveznog suda, Vrhovnih sudova republika, pokrajinskih i Vrhovnog vojnog suda, koji je objavljen 15.10.1986. godine, koji stav se još uvek primenjuje u sudskoj praksi, novčana naknada nematerijalne štete može se dosuditi oštećenom samo ako nastane u jednom od priznatih vidova nematerijalne štete (pretrpljeni fizički i/ili duševni bolovi i/ili strah) i ako je opravdavaju intenzivni i/ili dugotrajni bolovi i strah. Zbog masovnosti korišćenja zapisa lika na fotografijama, filmovima i zbog zloupotrebe ostalih zapisa, gde putem mas-medija dolazi do povreda kako ličnih tako i autorskopravnih dobara, sve se manje poštuju pravno priznati oblici nematerijalne štete. Današnja sudska praksa u medijskim sporovima sve češće samu povredu ličnog dobra izjednačava s nematerijalnom štetom. To se dešava i u autorskim sporovima, gde je mas-medij tužen kao štetnik, što je pomak u odnosu na situaciju *de lege lata*, s tim da bi i tom prilikom novčanu naknadu trebalo ceniti prema intenzitetu i trajanju, tj. prema konkretnim okolnostima. Kako inače utvrditi visinu novčane naknade, ukoliko parametar nije intenzitet i trajanje duševnih bolova i straha, što se odnosi i na autorskopravne sporove zbog neovlašćenog korišćenja fotografije, tj. povrede moralnog prava autora?[8] Dokazivanje da je povreda prava nastala jeste na titularu prava, u medijskim sporovima, a ZOO u čl. 199. posebno ne statuira trenutak koji će opredeliti kada povreda prava ličnosti nastaje, već je stvar suda da to utvrdi. Tako odluka u pogledu zahteva za povlačenje izjave (opoziva), prema čl. 199. ZOO, zavisi od procene suda da li su informacijom u medijima objektivno mogli biti narušeni osećaj časti ili društveni ugled tužioca, a ne da li se to zaista i dogodilo,[9] dok ukoliko je štetna posledica uslov za opoziv prema čl. 199. ZOO, onda je krivica štetnika prilikom izvršenja štetne radnje, tj. davanja, odnosno objavljivanja lezione informacije u medijima, uslov za njegovu odgovornost i obavezu da opozove prvobitnu izjavu. Imajući u vidu da je Zakon o javnom informisanju Republike Srbije predvideo objavljivanje opoziva informacije kao razlog zbog kojeg odgovorni urednik nije dužan da objavi odgovor na informaciju, odnosno zbog kojeg sud presudom neće naložiti odgovornom uredniku objavljivanje odgovora ili ispravke informacije, trebalo bi *de lege ferenda* predvideti da krivica nije uslov ni za ostvarivanje prava na opoziv informacije u medijima.

[7] *Komentar Zakona o obligacionim odnosima*, redaktori, Blagojević, Borislav, Krulj, Vrleta, Savremena administracija IŠKRO, Beograd, 1983, polazeći od koncepcije povraćaja u pređašnje stanje, kao najadekvatnijeg oblika naknade štete nanesene u obliku uvrede ili klevete, navodi se da je ZOO propisao objavljivanje presude ili ispravke, kao isključivi oblik naknade, pri čemu oštećeni ne može da traži novčanu naknadu umesto naturalne restitucije ili pored nje, str. 738.

[8] Prema Zakonu o autorskom i srodnim pravima („Sl. glasnik RS", br. 104/2009), moralna (neimovinska) prava autora čini pravo paterniteta; pravo na naznačenje imena autora na svakom primerku dela i prilikom svakog javnog saopštavanja dela; pravo objavljivanja dela i određivanja načina njegovog objavljivanja; pravo na zaštitu integriteta dela i pravo na suprotstavljanje nedostojnom iskorišćavanju dela, tj. onom koje mu može ugroziti ili mu ugrožava čast i ugled.

[9] Nikolić, Dušan, „Pravno relevantne povrede časti i ugleda", *Pravni život*, br. 9–10/1992, Beograd, str. 2060.

Etika u medijima:
greške, samoregulacija i podizanje standarda

Tamara Skrozza[1]

Nepoštovanje profesionalne etike jedan je od najkompleksnijih problema medija u Srbiji. Ne zato što su drugi problemi manje važni ili manje teški, već zbog toga što konstantno kršenje etičkih normi ne može da se iskoreni dok sve ostalo što muči ovdašnje medije ne bude ili rešeno ili nadomak rešenja. Između ostalog, etika u medijima podrazumeva zdravo medijsko okruženje: funkcionalnu zakonsku regulativu, visok nivo obrazovanja novinara, njihovu ekonomsku stabilnost i nezavisnost, kao i finansijsku stabilnost i nezavisnost medijskih kuća u kojima rade. Osim toga, kao njen preduslov podrazumeva se i etika u drugim oblastima s kojima su mediji u neposrednoj vezi – etika u politici, u zdravstvu, u školstvu, u sudstvu, u praktično svim segmentima društva. Ukoliko u drugim oblastima ne postoje čvrsti moralni standardi, teško da od medija može da se očekuje da budu avangarda ili perjanica eventualnih promena; mediji su, sviđalo nam se to ili ne, ipak samo ogledalo društva u kojem funkcionišu.

Uslovi u kojima domaći mediji trenutno rade, kao i situacija unutar većine ovdašnjih medijskih kuća, svakako nisu okruženje koje pruža nadu za skoro uspostavljanje iole etičnijeg, pristojnijeg i različitih uticaja oslobođenog novinarstva. Borba za opstanak ili za što veću zaradu, borba za prestiž i moć, učinili su da tokom 2013. godine neki mediji postanu otvoreni zagovornici ove ili one političke opcije a organizovane medijske kampanje protiv pojedinaca, grupa ljudi ili kompanija postale su svakodnevica.

Činjenica da u Srbiji već dve godine uspešno deluje Savet za štampu, kao samoregulatorno telo koje se bavi poštovanjem etičkih normi u medijima, svakako ukazuje na pozitivne tendencije. Međutim, priroda žalbi koje su upućene Komisiji za žalbe Saveta za štampu ali i njihov sve veći broj, takođe dokazuju da kod nas za profesionalnu etiku malo ko mari.

OPŠTA MESTA NEMORALA

Već godinama, u domaćim medijima prisutno je nekoliko pojava koje su najstrože zabranjene u svim etičkim kodeksima na svetu pa i Kodeksu novinara Srbije. Neke od njih direktno utiču na život pojedinaca o kojima se izveštava, neke imaju dugoročan i dalekosežan uticaj na društvo a neke su posledica nedozvoljenog uticaja na novinare i pokušaj proturanja sadržaja koji su u nečijem ličnom interesu. Bilo da ih definišemo kao blaže ili kao maligne i vrlo ozbiljne, svi ovi prekršaji protivni su osnovnom razlogu zbog kojih postoje etički kodeksi novinarstva – da se moć medija pravilno kanališe i ne zloupotrebi.

Sektor u kojem novinari najčešće prelaze granice koje su im postavljene različitim regulatornim i samoregulatornim mehanizmima jeste pravosuđe; osim prava na pretpostavku nevinosti osumnjičenih lica, često se „zaboravlja" zabrana otkrivanja identiteta žrtava krivičnih dela, kao i zabrana opisivanja krivičnih dela koja bi mogla da imaju uticaj na medijske konzumente. U trci za što „sočnijim" i publici što zanimljivijim sadržajima, mediji često sprovode sopstvene istrage, upirući prstom u osobe o čijoj krivici spekulišu, detaljno prenoseći sve što potiče od nepouzdanih izvora.

Diskriminacija različitih osetljivih grupa poseban je problem. Iako Kodeks novinara Srbije to eksplicitno zabranjuje, mediji često generalizuju pojave o kojima pišu, olako inkriminišući sve

[1] Novinarka nedeljnika „Vreme" i članica Komisije za žalbe Saveta za štampu

pripadnike određenih zajednica; naslovi tipa „Romi otimaju naše kuće" ili „Hrvati Milanu otimaju sina", i dalje su karakteristični za tabloide, ali se slične teze povremeno pojavljuju i u ozbiljnijim medijima. Osim poslovično targetiranih Roma i Hrvata, na listi medijski najčešće loše ili pogrešno predstavljenih svakako su i žene, osobe LGBT orijentacije, osobe sa invaliditetom, HIV inficirani. Iako su ponekad u pitanju ozbiljna kršenja Kodeksa, a ponekad tek loše upotrebljena terminologija, u svim ovim slučajevima primetna je nezainteresovanost medija za posledice koje bi njihovo izveštavanje eventualno moglo da ima.

U korenu više različitih kršenja profesionalnih etičkih standarda svakako je loš odnos sa izvorima informacija. Dozvoljavajući da izvori, uz davanje probranih podataka, preko medija lično profitiraju ili ostvare neki svoj cilj, novinari često nisu ni svesni manipulacije kojoj su izloženi. Slepa vera u jedan izvor informacija, otvorena ili prikrivena korupcija novinara, kao i nedopušteno prisni odnosi sa izvorima, takođe su elementi koji na svakodnevnom nivou urušavaju ne samo integritet jednog novinara i jednog medija, već profesije u celini. Pri tom, naravno, ne možemo izjednačiti situaciju u kojoj novinar slepo veruje činovniku insajderu, a od neke kompanije na poklon dobije mobilni telefon, i situaciju u kojoj je medijski vlasnik/urednik blizak prijatelj ili savetnik multimilijardera, za šta dobija velike pozajmice, honorare ili kredite. Dalekosežnost posledica jedne i druge situacije veoma se razlikuju – ali i jedna i druga nedopuštene su u kontekstu profesionalne etike.

Jedan od najvećih problema sigurno je međusobna uslovljenost informativnog i marketinškog sadržaja medija, odnosno prihvatanje političko-ekonomskog diktata agencija koje zastupaju platežne klijente. Iako to niko nije priznao, primetno je da neki mediji i te kako vode računa da ono što će evenutalno objaviti ne ugrozi, ne povredi ili se naprosto ne dopadne kompaniji ili pojedincu od čijih reklama zavisi iduća plata ili štampanje idućeg izdanja.

U uskoj vezi s tim je i nedozvoljeni uticaj koji određeni političari uspevaju da ostvare među odabranim krugom novinara, urednika i medija. „Odabrani" od političara dobijaju ekskluzivne informacije a za uzvrat izveštavaju blagonaklono, ili bar nedovoljno kritično, o njegovim ili aktivnostima njegove stranke.

INOVACIJE

Iako se tokom 2013. situacija bar malo popravila kada je u pitanju izveštavanje o osetljivim grupama ili zaštiti identiteta maloletnika i osumnjičenih počinilaca krivičnih dela, na drugim (dugoročno mnogo značajnijim) planovima svedoci smo svojevrsnih „inovacija" u načinu kršenja medijske etike.

Najočiglednije su bile kampanje protiv pojedinaca – nizovi priloga bazirani na neimenovanim svedocima, nejasnim faksimilima i izvodima s bankovnih računa, grubim rečima i flagrantnim zalaženjem u oblast privatnosti. Na meti su bili viđeni političari iz prethodne vlasti, estradne zvezde a u krajnje mučnom primeru i porodica Ognjenović čije je dete umrlo a za čije je lečenje prikupljen veliki novčani iznos. Možemo samo da spekulišemo da li iza ovih kampanja stoji novac, politički interes ili puka antipatija novinara/urednika prema nekome, ali to na duže staze nije ni važno. Važno je da se ovakvim načinom „izveštavanja" uništavaju nečiji životi, da se dodatno urušava opšti nivo kulture građanstva, da se podilazi najnižim porivima šire publike i na potpuno neprimeren i (čak i zakonski) nedozvoljen način utiče na javno mnjenje.

Novinari bi po opisu svog posla trebalo da budu svesni posledica koje njihovo izveštavanje može da ima i da u svom medijskom nastupu ostave po strani lične preference i interese. Pre i iznad svega, na njihovo izveštavanje ne sme da utiče bilo koja forma podmićivanja, ucenjivanja i vlasničkog pritiska.

Iako su se u ovom kontekstu naročito „istakli" tabloidi, u antologiju kršenja etičkih standarda i medijskih zakona verovatno ulazi slučaj Željka Mitrovića, vlasnika „Pinka", koji je preko svojih medija najpre vodio kampanju protiv Dragana Đilasa a potom protiv dnevnika „Blic". I jedna i druga obilovale su uvredama daleko ispod nivoa dozvoljenog ne samo u javnom, već i u privatnom obraćanju; i jedna i druga bile su očigledno zasnovane na ličnim sukobima glavnih aktera; i jedna i druga predstavljale su zloupotrebu nacionalne frekvencije i kršenje pravila o zabrani zloupotrebe medija u privatne svrhe.

Naročito je zanimljiva kampanja protiv „Blica", pošto je i sama uzrokovana kršenjem etičkih standarda. Nakon što je sin Željka Mitrovića osumnjičen da je pregazio devojku na pešačkom prelazu, „Blic" je o tom slučaju izveštavao na krajnje neprimeren način, ističući u prvi plan poreklo osumnjičenog. Vlasnik „Pinka" uzvratio je medijskom paljbom koja je trajala praktično čitavo leto i s vremenom poprimala veoma živopisne forme. Jedna od takvih bilo je objavljivanje poruka s Fejsbuk profila „Promenimo ime lista 'Blic' u smrdljive novine", kreiranog od strane NN lica. Predstavljajući ih kao „vox populi", novinari udarnih informativnih emisija „Pinka", svakodnevno su po više minuta čitali optužbe i uvrede koje su na račun „Blica" ostavljali navodni „obični čitaoci". Čak je i epilog ovog slučaja bio živopisan. Nakon što je Savet Republičke radiodifuzne agencije na sednici 7. avgusta izrekao meru upozorenja TV „Pink" zbog kršenja medijskih zakona i Kodeksa ponašanja emitera, zabranivši joj da vodi „kampanje protiv bilo kog pojedinca ili organizacije", ovu „štafetu" preuzeo je dnevnik „Informer". Iako je samom „Pinku" to bilo zabranjeno, urednik „Informera" je u udarnim emisijama „Pinka" kao svoje teze prepričavao ono što je samo nekoliko dana ranije bilo autorsko delo vlasnika i urednika te televizije. Pošto je sa sličnom praksom nastavio i u sopstvenim novinama, „Blic" je uputio žalbu Komisiji za žalbe Saveta za štampu, gde je konstatovano da je prekršen Kodeks novinara Srbije.

Drugi slučaj s dalekosežnim posledicama bilo je izveštavanje o bolesti Jovanke Broz. Nakon što je Titova udovica 23. avgusta prebačena u Urgentni centar, zvaničnici te ustanove iz dana u dan su obaveštavali javnost o najsitnijim i najintimnijim detaljima ne samo njene bolesti, već i načina njenog života. Objavljeno je desetak različitih dijagnoza, konstatovano da je gospođa Broz „u veoma zapuštenom stanju, i fizički i higijenski", da „danima nije jela ni pila tečnost i nije se kupala". Nakon što je reagovao Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, s ovakvom se praksom prestalo, ali to ipak ne menja činjenicu da su mediji prekršili sve odredbe Kodeksa novinara koje se tiču zaštite prava privatnosti, objavljivanja informacija od javnog značaja pa čak i one koje se tiču objavljivanja uznemirujućih sadržaja.

Zanimljivo je da je glavni novinarski argument bila činjenica da su podatke dobijali od zvaničnih izvora, s punim imenom i prezimenom. Novinari su i inače skloni da se prema takvim informacijama nekritički odnose i da *a priori* objavljuju ono što su „zvanično dobili". To ih, međutim, ne abolira. Za razliku od lekara (pa i sudija, policajaca, vaspitača, socijalnih radnika i predstavnika različitih ustanova i institucija), novinari bi u svakom trenutku trebalo da budu svesni moći kojom raspolažu i posledica koje to može da izazove. Čak ni „najsočnija" informacija, potekla iz zvaničnog izvora, ne sme da bude objavljena ako nije u javnom interesu ili predstavlja kršenje etičkih standarda.

Slična situacija dogodila se u martu 2013, kada je u Bečeju ubijen jedan maloletnik. Želeći da demantuju priče o tome da im je sin umro nesrećnim slučajem, njegovi roditelji su „Blicu" ustupili fotografiju mrtvog dečaka s vidnim podlivima po licu. „Blic" je tu fotografiju objavio na naslovnoj strani, uz obrazloženje da je to u interesu javnosti i da doprinosi istrazi. Posle žalbe Centra za prava deteta, Komisija za žalbe odlučila je da čak ni pristanak roditelja ne opravdava postupak tiražnog dnevnog lista, odnosno da je objavljivanjem uznemirujuće fotografije (kao i pratećim tekstom) prekršeno više tačaka Kodeksa novinara Srbije.

KOMISIJA ZA ŽALBE

Slučaj maloletnika iz Bečeja samo je jedan od mnogih koji su dospeli u Komisiju za žalbe Saveta za štampu a koji će sasvim sigurno predstavljati bazu za uspostavljanje standarda u ovdašnjem novinarstvu. Iz meseca u mesec, takvih slučajeva je sve više; svojom kompleksnošću, dugoročnim posledicama i višeslojnošću, svaki od ovih slučajeva zapravo pokazuje kako u medijskoj etici ne postoje za sva vremena definisana uputstva i kako je to oblast koja zahteva konstantna poboljšanja i usavršavanja. Upravo zahvaljujući radu Komisije za žalbe, Kodeks novinara Srbije je tokom 2013. dobio dva nova poglavlja koja se tiču korupcije i izveštavanja o korupciji a Statut Saveta za štampu i Poslovnik Komisije promenjeni su i usmereni ka širenju nadležnosti ovih tela na onlajn medije, kao i medije koji se nisu zvanično obavezali na poštovanje Kodeksa.

Najveću pažnju javnosti do sada je verovatno privukao jedini slučaj u kojem Komisija nije mogla da donese odluku. U pitanju je bio prilog u „Politici", koji se odnosio na krađu telefonskih kablova i limova s krovova. Navodilo se, između ostalog: *„Kradljivci ove 'robe' su gotovo po pravilu, otvoreno treba reći, romske nacionalnosti. Sudijska 'bolećivost' može da se nasluti: oglasiće se neka NVO ili 'faktor' koji štiti njihova manjinska prava i 'prozvaće' sudiju. Činjenica je da je ova nacionalna manjina, u veoma teškoj materijalnoj situaciji, da živi u bedi, ali i da se ogromna sredstva troše na njihovu 'inkluziju', što im ne daje za pravo da imaju popust pred boginjom pravde*". Regionalni centar za manjine, kao podnosilac žalbe, smatrao je da su ovim tekstom prekršene odredbe Kodeksa koje se odnose na zaštitu prava i dostojanstvo ugroženih grupa, kao i zabranu diskriminacije. Na sednici održanoj 26. aprila 2012, članovi Komisije pre svega su diskutovali o odredbi Kodeksa po kojoj je u izveštavanju o krivičnim delima dopušteno pominjati nacionalnu, versku, ideološku ili političku pripadnost, ali samo ako je to u neposrednoj vezi s vrstom krivičnog dela. Članovi su najpre pokušali da utvrde da li je u ovom slučaju postojala takva veza, ali su ostali podeljeni, baš kao i prilikom konačnog odlučivanja o povredi Kodeksa. Ova diskusija možda je najbolji primer kompleksnosti rada Komisije za žalbe, kao i kompleksnosti izveštavanja o osetljivim grupama.

Inače, Komisija za žalbe aktivno radi od jeseni 2011. i do sada je primila 104 žalbe: od toga, 15 su podnele institucije ili udruženja, 5 političari, 7 mediji jedni protiv drugih, a ostatak građani i građanke. Tokom dve godine, doneto je ukupno 53 odluke, od čega šest javnih opomena a tri žalbe rešene su dogovorom. Ostatak žalbi ili nije ispunjavao formalne uslove, ili je istekao rok u kome su mogle da budu podnete, ili se odnosio na medije nad kojima (prema ranije važećem poslovniku) Komisija nije imala nadležnost.

U ukupno 29 slučajeva odlučeno je da je bilo kršenja Kodeksa novinara Srbije – u 6 slučajeva prekršena je jedna odredba a u svim ostalim više njih. Pri tom, najčešeće su kršene odredbe o poštovanju privatnosti (8 puta), istinitosti izveštavanja (13 puta), novinarskoj pažnji (takođe 13 puta) i novinarskoj odgovornosti (5 puta) – ostale odredbe daleko manje. Broj žalbi se tokom 2013. drastično povećao u odnosu na situaciju prethodnih godina: primljene su čak 64 žalbe, što je više od polovine ukupnog broja žalbi, i doneto je 28 odluka – opet više od polovine ukupnog broja odluka.

Statistički gledano, Komisija za žalbe predstavlja telo kojem je budućnost osigurana. Međutim, baš u trenutku kada se povećava broj žalbi i one postaju mnogo kompleksnije, postavlja se pitanje pukog opstanka. Tokom dve godine, rad Saveta i Komisije finansijski je podržavala Ambasada Norveške, ali je taj izvor finansiranja prekinut od 15. decembra, pa novca jednostavno više nema. Iako je bilo predviđeno da se, dok traje ta saradnja, nađu i drugi izvori finansiranja, u tome se nije uspelo i trenutno je na osnivačima – Nezavisnom udruženju medija Srbije, Udruženju medija Srbije, Asocijaciji medija i Lokal presu – da odluče da li će i kako će Savet za štampu dalje funkcionisati. Trebalo bi pri tom naglasiti da je Komisija za žalbe ključni organ

Saveta za štampu – onaj koji definiše rad Saveta i da je od suštinskog značaja da nastavi sa sednicama na kojima se odlučuje o žalbama.

Osim novca kao glavnog problema, ključni izazovi za Komisiju biće definisanje odnosa sa izdavačima. Iako troje od ukupno 11 članova Komisije dolaze iz Asocijacije medija, utisak je da medijske kuće žele da se „odbrane" pred Komisijom, ne shvatajući pri tom dugoročni značaj odluka i ne pokušavajući da svoje sadržaje prilagode etičkim standardima. Događalo se, naime, da mediji krše odredbe Kodeksa koje su i ranije kršili, iako su bili opomenuti i čak objavili odluku Komisije. U tom smislu, članovi Komisije se na različite načine trude da – nezavisno od različitih komentara i reakcija samih izdavača – ojačaju respektabilnost svojih odluka i tako održe dostignuti standard.

Na početku funkcionisanja bilo je problema s obavezom medija da objave odluku Komisije koja se na njih odnosi, međutim, i dalje se sporadično događa da se te odluke objave na neadekvatnom mestu, selektivno ili samo u štampanom izdanju (a ne i u onlajn verziji, što ima daleko veću čitanost).

Jedan od najvećih izazova biće i već jeste, odlučivanje o žalbama koje se odnose na onlajn medije. Pre svega, ponekad je teško odlučiti koji onlajn sadržaj uopšte može da se smatra medijskim (redakcijskim, uredničkim); takođe, vrlo je osetljivo i još nedefinisano pitanje samoregulacije čitalačkih komentara. U ovom kontekstu, Komisija za žalbe sasvim je u trendu s evropskim tokovima jer se i na nivou evropskih saveta za štampu već godinama lome koplja o načinu odlučivanja u tim situacijama. Izazov će takođe biti odluke koje se tiču tekstova zasnovanih isključivo na internetu kao izvoru informacija i odluke koje dotiču međusobne odnose između onlajn i „tradicionalnih" medija.

Imajući u vidu gore navedene primere kršenja etičkih standarda, važnost poštovanja profesionalne etike i posledice koje ponašanje medija može da ima (setimo se samo ne tako davne ratne prošlosti), nesporno je da bi neki red trebalo da se uvede. Komisija za žalbe samo je jedan korak u tom pravcu i bilo bi više nego kontraproduktivno da oni koji o tome odlučuju dozvole da se i taj korak izbriše.

Evropski sud za ljudska prava
Informatori o praksi Suda[1]

Informator br. 165 jul 2013

ČLAN 10
Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda

Sloboda izražavanja _____

Odbijanje novina da objave plaćenu oglasnu poruku: *nema povrede*

Remuško protiv Poljske - 1562/10
Presuda od 16. 7. 2013 [Sekcija IV]

Činjenice – Podnosilac predstavke, novinar, objavio je knjigu koja u nepovoljnom svetlu govori o nastanku *Gazete viborče,* jednog od najpoznatijih dnevnih listova u Poljskoj*,* o njegovim novinarima i finansijskim poslovima njegovog izdavača. Novinar je potom tražio od sedam dnevnih i nedeljnih novina da objave plaćene oglase za knjigu. Svi su odbili. Podnosilac predstavke je pokrenuo postupak protiv tih novina. Konačno, dva lista su obavezana da objave te oglasne poruke. Pred Evropskim sudom za ljudska prava, podnosilac predstavke se žalio da su domaći sudovi odobrili odbijanje lista *Žečpospolita* (jedan od listova) da objavi plaćene oglase za knjigu, nakon što je utvrđeno da to oglašavanje nije u skladu sa uređivačkom politikom i da bi ono moglo da stvori sumnju da urednici lista *Žečpospolita* pokušavaju da ocrne konkurenta, *Gazetu viborču,* u očima javnosti.

Pravo – Član 10: Pravo na koje se podnosilac poziva treba da bude bude tumačeno i primenjeno uz dužno uvažavanje prava štampe. Privatni listovi moraju biti slobodni u pogledu uredničke odluke o tome da li da objave članke, komentare i pisma podnete od strane pojedinaca pa čak i od sopstvenih reportera ili novinara. Obaveza države da obezbedi slobodu izražavanja ne daje građanima ili organizacijama neograničeno pravo na pristup medijima kako bi iznosili mišljenja. Ovi principi se primenjuju i na objavljivanje oglasnih poruka. Efikasno ostvarivanje slobode štampe pretpostavlja pravo novina da uspostave i primenjuju sopstvena pravila u vezi sa sadržajem oglasnih poruka.

U konkretnom slučaju nije bilo diskutabilno, niti navedeno kao sporno, da je podnosilac imao bilo kakvih teškoća da objavi svoju knjigu ili da su državni organi pokušali da ga na bilo koji način spreče ili odvrate od objavljivanja, ili, još šire, da na medijskom tržištu Poljske nema pluralizma. Dok pitanja kojima se knjiga bavi mogu da doprinesu debati o ulozi štampe u poljskom društvu, plaćene oglasne poruke predložene od strane podnosioca bile su suštinski namenjene promociji distribucije i prodaji i stoga prevashodno podržavaju podnosiočeve poslovne interese. Ni u jednom trenutku podnosilac nije bio sprečen da širi informacije o knjizi bilo kojim sredstvima koje želi. Zapravo, on je napravio sopstvenu internet prezentaciju, preko koje je informisao javnost o knjizi, njenom sadržaju i njenom mogućem značaju za javnu debatu. Domaće pravo obezbedilo je efikasan procesni okvir unutar kog je podnosilac mogao da zatraži da o suštinskim pitanjima u vezi s njegovim slučajem odluče pravosudni organi. Sudovi su pažljivo izvagali interes podnosioca protiv legitimnih prava izdavača, kao što su njihova sloboda

[1] Izvodi iz zvaničnih „Informatora o praksi Suda" Evropskog suda za ljudska prava, dostupnih na Internet prezentaciji Suda; prevod uradila advokatska kancelarija „Živković&Samardžić", Beograd

izražavanja i ekonomska sloboda. Njihov zaključak da, na medijskom tržištu na kome postoji pluralizam, štampa i izdavači ne bi trebalo da budu obavezani da objavljuju oglasne poruke predložene od strane privatnih stranaka, u skladu je sa standardima slobode izražavanja u okviru Konvencije. Stoga, država nije propustila da izvrši svoju obavezu da zaštiti podnosiočevu slobodu izražavanja.

Zaključak: nema povrede (jednoglasno).

(Takođe videti *Eplbi i ostali protiv Ujedinjenog Kraljevstva,* 44306/98, 6. maj 2003, Informator br. 53)

Sloboda primanja informacija
Sloboda saopštavanja informacija

Hitan pretres novinarkine kuće, uključujući i zaplenu uređaja za skladištenje podataka koji su sadržali njene novinarske izvore: *povreda*

Nagla protiv Litvanije - 73469/10
Presuda od 16. 7. 2013 [Sekcija IV]

Činjenice – Podnositeljka predstavke je radila na nacionalnoj televiziji gde je proizvodila i vodila nedeljni program istraživačkih vesti *De Facto*. U februaru 2010. godine kontaktirao ju je anonimni izvor koji joj je otkrio postojanje ozbiljnog sigurnosnog propusta u bazi podataka državne Uprave prihoda (VID). Ona je obavestila VID o mogućem sigurnosnom propustu i zatim javno to objavila tokom emitovanja programa *De Facto.* Nedelju dana kasnije, njen izvor, predstavljajući se kao „Neo", počeo je da koristi Tviter kako bi objavio informacije u vezi sa zaradama državnih službenika u raznim javnim institucijama i nastavio je s tim do sredine aprila 2010. VID je inicirao pokretanje krivičnog postupka i u februaru 2010. istražni organi su saslušali podnositeljku kao svedoka. Podnositeljka je odbila da otkrije identitet svog izvora. U maju 2010. istražni organi su utvrdili da je lice I. P. bilo povezano s bazom podataka VID-a i da je više puta pozivalo podnositeljkin telefonski broj. Lice I. P. je uhapšeno u toku krivičnog postupka. Istog dana izvršen je pretres podnositeljkinog stana; i prenosni računar, prenosni hard disk, memorijska kartica i četiri fleš drajva zaplenjeni su nakon što je nalog za pretres izdat od strane istražitelja i odobren od strane javnog tužioca.

Pravo – Član 10: Zaplenjeni uređaji za skladištenje podataka sadržali su ne samo informacije podobne da otkriju novinarkin izvor u ovom slučaju, već i informacije podobne da otkriju i njene ostale izvore. Saglasno tome, pretres podnositeljkinog stana i informacije koje mogu biti otkrivene spadaju u sferu zaštite koju pruža član 10 Konvencije. U ovom slučaju bilo je mešanja u podnositeljkinu slobodu da prima i saopštava informacije; mešanje je zakonom predviđeno sa ciljem sprečavanja nereda ili zločina i radi zaštite prava drugih.

Nalog za pretres sadržao je široka ovlašćenja, kao što je zaplena „bilo kakvih informacija" koje se odnose na navodno krivično delo učinjeno od strane podnositeljkinog izvora i bio je donet po hitnom postupku od strane istražitelja koji je bio suočen sa obavezom da pravno kvalifikuje delo, navodno izvršeno od strane I. P, i utvrdi podnositeljkinu ulogu. Ti razlozi, međutim, nisu bili „relevantni" i „dovoljni" niti su odgovarali „gorućoj društvenoj potrebi".

Tema o kojoj je podnositeljka izveštavala i u vezi s kojom je izvršen pretres u njenom stanu, dvostruko je doprinela javnoj debati: javnost je bila informisana o zaradama u javnom sektoru u vreme ekonomske krize, kao i o bazi VID-a koju je otkrio njen izvor. Iako je bilo tačno da su radnje njenog izvora bile predmet krivične istrage, pravo novinara da ne otkriju svoje izvore ne može biti posmatrano kao puko pravo koje se daje ili uskraćuje u zavisnosti od zakonitosti ili nezakonitosti radnji njihovih izvora, već kao deo prava na informisanje, prema kojem se treba odnositi sa najvećom pažnjom.

Kada su, tri meseca nakon emitovanja, istražni organi odlučili da je pretres podnositeljkinog stana neophodan, oni su postupili po hitnom postupku, bez učešća bilo kakvih sudskih organa koji bi utvrdili proporcionalnost između javnog interesa u istrazi i zaštite novinarske slobode izražavanja. U skladu s nacionalnim pravom, takav pretres može biti određen jedino ako bi u slučaju odlaganja moglo doći do uništenja, sakrivanja, oštećenja relevantnih dokumenata ili stvari ili ako postoji opasnost od bekstva. Pravni osnov dat za hitan pretres, naveden u nalogu, bio je „sprečavanje uništenja, sakrivanja ili oštećenja dokaza", bez dodatnog obrazloženja. Informacija je dobijena povezivanjem podnositeljke, u svojstvu novinarke, s licem I. P. Podnositeljkin poslednji kontakt s licem I. P. bio je na dan emitovanja. U tim okolnostima, samo ozbiljni razlozi mogli su da opravdaju hitan pretres. Međutim, razmatranje od strane istražnog sudije izvršeno je dan nakon obavljenog pretresa i sudije koje su naknadno razmatrale podnositeljkinu žalbu protiv ove odluke istražnog sudije ograničile su se na nalaz da se pretres uopšte nije odnosio na novinarske izvore, bez vaganja suprotstavljenih interesa.

Iako je naknadno učešće istražnog sudije predviđeno zakonom, on nije utvrdio da su interesi istrage da osigura dokaze bili dovoljni da prevagnu nad javnim interesom u oblasti zaštite novinarske slobode izražavanja, uključujući zaštitu izvora i zaštitu od oduzimanja materijala. Sudski zaključak u vezi s generalnom nepostojanošću dokaza povezanih sa sajber zločinima, ne može biti dovoljan ako se ima u vidu kašnjenje istražnih organa s vršenjem uviđaja i odsustvo bilo kakve naznake o pretećem uništenju dokaza. Nije bilo ni naznaka da je podnositeljka bila odgovorna za objavljivanje ličnih podataka ili da je bila umešana u neke događaje osim onih u kojima je postupala kao novinar; ona je ostala „svedok" u ovom krivičnom postupku. Sve u svemu, domaći organi nisu dali „relevantne i dovoljne" razloge za mešanje zbog kojeg je podneta predstavka.

***Zaključak*:** povreda (jednoglasno).

Član 41: 10.000 evra na ime nematerijalne štete.

LEGAL MONITORING OF THE SERBIAN MEDIA SCENE

INTRODUCTION

The Serbian media scene, which ANEM has been monitoring and analyzing for years together with its legal team, hasn't seen a pleasant surprise in the second half of 2013 either. The reforms didn't come, the expected didn't happen and hence, the media sector with unchanged media situation will enter yet another new year burdened with the same problems.

In short, from the legal analysis of the developments in the second half of the year and the findings of the monitoring team it can be concluded the following:

The Serbian media community waited for the Media Strategy for almost 11 years after the democratic changes. As it currently stands, it will also wait for quite some time before the Strategy is implemented. The reform of the regulatory framework in accordance with the Strategy, which reform is foreseen by the Action Plan for this year, hasn't happened. While the public debates about the drafts of all three media laws have been completed (on the Draft Law on Public Information and Media – in the first half of the year, while about the Draft Law on Electronic Media and the Draft Law on Public Service Broadcasters in the second half of the year), by the end of 2013 not a single of these draft laws has been tabled to the Government for adoption and submission to Parliament; it remains unclear when and what kind of legislative texts will be sent to the Government, since the final formulation of these texts is still underway. While the draft texts are not flawless (as the public debates have shown) and should be improved or perfected, the failure to adopt a new Law on Public Information and Law on Electronic media has resulted in delaying the implementation of key concepts (contained in these laws) supposed to enhance the media system in Serbia. In such a way, the state continues to successfully resist to the imperative of withdrawing from media ownership, which has been a declarative goal of all governments since 2001; it has also delayed the application of the rules about project-based financing of the media; consequently, state media and those close to the government will continue receiving funds from the budget in a non-transparent way and state aid to the media will remain without control, public interest in the media field will remain arbitrary and unfair competition will still be there. The continued existence of these main problems burdening the media sector will result in an even stronger political and economic influence on the media, bearing in mind the proportions of the economic problems of the media and the crucial significance of state aid in such an environment. Moreover, the problems related to transparency of media ownership and unlawful media concentration remain unsolved. As regards the Law on Public Service Broadcasters, which is not crucial for the development of the media sector, it nonetheless was the legislation with the most objections and the least compliant with the Strategy. Hence, it was supposed to undergo major adjustments and improvements before adoption, especially in relation to concepts concerning the financing of PSB's.

Concerning other developments on the media landscape, the case law in media-related disputes didn't change much either. Some verdicts of appellate courts, while constituting a step forward for the protection of freedom of expression, are nonetheless not sufficient to change the general impression they are one of the main causes of the poor position of the media and journalists, especially when it comes to self-censorship. The good news is the work of the Constitutional Court, the decisions of which could improve the protection of journalists and media freedoms. In this period the Court adopted certain important decisions concerning the right of the state to establish media in minority languages; the issue of access to withheld data, as well as the question of classification of data related to the protection of the right to free access to information of public interest. Unlike the Constitutional Court, other competent authorities haven't contributed much to improving the position of journalists and media. Nonetheless, the media community has high expectations from the Ministry of Culture and Media; the latter is supposed to enable the completion of the reforms of the regulatory framework and the personal

changes it has undergone in the previous period should contribute to the realization of that task. As regards the transition processes, privatization of media didn't happen in practice, but it was the topic of discussion on public hearings about draft media laws, during which hearings some parties have criticized privatization and advocated for state ownership in order to protect their interests, power or jobs. While the digital switchover was almost blocked by the RBA with its open competition for the issuance of yet another national TV license, a compromise was ultimately reached for the process to continue. Nonetheless, the key questions, such as the extension of the licenses, as well the cost-effectiveness (the cost of the required investments vs. the benefits), remain to media unanswered, which may affect their position and operations.

Starting from the findings of the monitoring team about which media issues were important in this period, in this edition of the Publication we opted for the following topics: case law in media disputes – the case law of national courts and that of the ECHR; media pluralism; and ethics in the media. Accordingly, the 9th edition of the Monitoring Publication consists of the following texts: "Delfi v. Estonia from the Serbian Perspective" by Attorney at Law Slobodan Kremenjak; "Do Draft Media Laws Foster Media Pluralism?", by Milos Stojkovic from the "Živković&Samardžić" Law Office in Belgrade; "Some Debatable Issues in Disputes between Authors of Photographs and the Media", by Dragica Popesku, PhD, a Judge of the Appellate Court in Belgrade; "Ethics in the Media: Mistakes, Self-Regulation and Raising the Standards", by Tamara Skrozza, journalist and member of the self-regulatory body for the print media. The fifth text is an summary of two decisions by the ECHR pertaining to the application of Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms: the first concerns freedom of expression and the second is about the freedom to receive information and freedom to impart information.

Belgrade, December 2013

Delfi v. Estonia from the Serbian Perspective

Slobodan Kremenjak[1]

The decision of the European Court of Human Rights (ECHR) dated October 10, 2013 in the case *Delfi AS v. Estonia* has caused unlikely reactions. The European media branded the decision "a serious blow to freedom of expression on the Internet" and a "mess of epic proportions". From Serbia's standpoint, it is interesting to note that the practice of Serbian courts was similar (to that of the ECHR) even before the aforementioned case. What comes a surprise, however, is that there are no reactions in Serbia, which would mirror the buzz ECHR's decision caused in Europe. It seems that Serbia has become accustomed to "serious blows to freedom of expression on the Internet" and "messes of epic proportions" in its own backyard.

So, what was the case *Delfi AS v. Estonia* all about? Delfi AS is the owner of the web portal Delfi, which posts up to 330 news articles on daily basis. It is one of the biggest Estonian portals, which also publishes news in Russian. The portal enables readers to comment on the news, without editing or moderating them in any way whatsoever. The visitors leave about 10000 comments every day, mainly under pseudonyms. Delfi has an automated system for the deletion of comments containing foul language, as well as a system for reporting improper comments, which are promptly deleted. Furthermore, persons affected by the comments may also directly address Delfi AS, in which case the comments are removed instantly. In its "Commenting Rules" posted on the portal, Delfi AS has expressly said that the comments shall not be edited, that the authors bear the responsibility for the content of the comments, as well as that the practice of Estonian courts is to fine the authors in relation to such content. The "Commenting Rules" say that Delfi prohibits comments containing threats, insults, those inciting intolerance and violence, illicit activities, contain obscene and vulgar language, as well as that Delfi reserves the right to remove these comments and restrict the right of their authors to post further comments.

In the concrete case, Delfi posted on January 24, 2006 an article about how *AS Saaremaa Laevakompanii*, a shipping company operating ferryboats linking the islands with the mainland, is behind the withdrawal of the plan to open, during the winter, public roads over the frozen sea. In the first two days, the text was commented on 185 times. About 20 comments contained threats and insults against the then member of the management and the majority owner of the shipping company. After a month and a half, his attorneys demanded that Delfi AS removes these comments and claimed about 32000 euro in damages. The comments were removed and Delfi rejected the damage claim. The majority owner of the shipping company pressed charges for damages, which were rejected in the first instance. After his appeal and the revoking of the first-instance verdict, the Estonian courts in the second instance committed Delfi AS to pay 320 euro in damages. In its decision from October 10, 2013 the ECHR found that such conclusion of Estonian courts represented a reasonable and proportionate restriction to freedom of expression.

The above decision is similar to the already existing practice in Serbia. Here we will mention only the case of *Bogdan Vla against the Novi Sad-based Broadcaster "021"*, where the radio station was committed to pay damages for the reader comments on their website. Bogdan Vla is an attorney at law whose client won in the dispute against Radio "021", while the court also ordered the radio station to release the verdict in public. Radio "021" complied and Bogdan Vla

[1] Attorney at Law; The „Živković&Samardžić" Law Office, Belgrade

disliked certain reader comments about the verdict and went on pressing private charges against the radio station.

In Serbia too, in the case of *Bogdan Vla against the Novi Sad-based Broadcaster "021",* just like in Estonia and before the ECHR in the case of Delfi AS, the substance of the dispute was actually the question if parts of media portals and websites containing user comments constitute an extension of the media itself, under the control of the publisher or does allowing user comments constitute an information society service, as these services are defined in the European E-Commerce Directive (2000/31/EC) from June 8, 2000, but also in the Serbian Law on E-Trade ("Official Gazette of the RS", no. 41/2009 and 95/2013) which relies on the said European Directive.

Article 14 of that Directive, namely Article 18 of the Law on E-Trade, stipulate that the service provider, providing an information society service consisting of the storage of information provided by a recipient of the service, is not liable for the information stored at the request of the recipient of the service, if the provider does not have actual knowledge of illegal activity or information and if the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.

Article 15 of the Directive, namely Article 20 of the Law on E-Commerce, additional stipulates that the information society service provider, when providing the services, is not obligated to monitor the information they transmit or store, namely to actively seek facts or circumstances indicating illegal activity of the service recipient.

Thus, a conflict exists between two standings: under the first, as opposed to information society service providers, which have no knowledge or control over the information they convey or store, content providing media have control over the information they store, while integrating the comment sections with their portals and inviting users to comment the news articles. Furthermore, the number of comments affects the measuring of the number of visitors and thus the advertising revenue of the media, which makes the media responsible for the content of the comments; to the same extent, they are responsible for the content of the texts of their journalists. Under the second standpoint, a media is only such form of public information subject to a certain editorial concept, namely that which is edited and the comments are most definitely not that. Hence, relative to reader's comments, the publishers of the media are merely information society services providers and thus they don't have the obligation to control the data they store, convey or make available or the obligation to investigate the circumstances pointing to illicit activity by the recipient of the service.

This dilemma is not merely theoretical and may not be reduced only to the issue of regulations to be implemented on reader's comments on media portals – those that pertain to public information or those concerning e-commerce. On the contrary, it is of key importance for freedom of expression on the Internet. Because, as rightfully noted by the UN Special Rapporteur on the right to freedom of opinion and expression Frank La Rue,[2] "the responsibility of the provider of content for the content disseminated or created by its recipients, seriously undermines the realization of the right to freedom of opinions and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of law".

[2] http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Do Draft Media Laws Foster Media Pluralism?

Miloš Stojković[1]

One of the goals the media and journalist associations had in mind when advocating for the adoption of the Media Strategy was to define a clear media policy, which should provide a framework for fostering media pluralism by defining clear rules about media concentration. Analyzing the regulations that will soon be adopted, one may conclude that Serbia still lacks a clearly defined policy, while the struggle for media pluralism is based on unclear statements in the Media Strategy and problematic instruments that are supposed to achieve that unclear goal.

First and foremost, it seems the state isn't conscious of the complexity of media pluralism and that its inability to define clear, transparent and unambiguous rules in this field is the consequence of a lack of understanding. Pluralism of views, opinions and ideas includes an internal and an external element. The internal element is an indicator of the extent to which pluralism is present in media content, while the external one addresses issues such as media ownership, the number of owners, editorial policy independence, etc. It seems that the creators of draft media laws have completely neglected the content element of media pluralism, while attempting to merely quantify it, in order to find numeric criteria that will supposedly contribute to media pluralism. On the other hand, media concentration also has its market dimension, whereas the rules on media concentration must factor-in the fact that the value of the media market is decreasing, that the consolidations are the outcome of the economic downturn and that the investors aren't particularly interesting in investing in that sector either. Hence, the meaning of media pluralism on this market is unclear, as is what the state really wants to achieve.

The Draft Law on Public Information and Media, which was discussed at the public debate last March, set the thresholds of media concentration in the print media sector at 50% of the share in the circulation of daily newspapers in Serbia (at the annual level), namely 35% of the share of the ratings in a specific coverage zone in the electronic media sector, also at annual level. Several months later, the same Ministry connected the concentration thresholds in the Draft Law on Electronic Media to the number of licenses for terrestrial broadcasting. Even more strange, relative to cable broadcasters, the thresholds are tied to the concrete content that is aired and hence the same owner may broadcast an unlimited number of specialized channels, excluding specialized news channels, but not more than one specialized general purpose channel, namely a specialized news channel.

All the former draft laws disregarded the need to protect content pluralism. Does, for example, possessing two terrestrial broadcasting licenses at the national level, really a threat to such pluralism? Does the owner of a company holding two terrestrial broadcasting licenses really have such an influence on editorial policy to jeopardize content pluralism? Can the difference between terrestrial and cable broadcasting really justify different legal regimes which they are subject to? These are all legitimate questions the draft media laws didn't answer. The responses aren't contained in the first version either, under which the dominant influence on the public opinion is measured relative to the percentage of ratings (television/radio) in the coverage zone, since there is no clear connection between content pluralism and that restriction. Nonetheless, that concept is based on an objective criterion, which is also "technically neutral", since it may be applied to all platforms of media distribution. Moreover, it also takes into account the

[1] „Živković&Samardžić"Law Office, Belgrade

geographic dimension of media pluralism, relating itself to the coverage zone. It ought to be mentioned that there is no single model in the EU. In some EU member countries, this sector is subject only to general competition rules; others also have sectoral regulation for one or several media sectors, as well as for the subject of cross media ownership. There are no unique criteria either for assessing concentrations – somewhere it's the share of readers or viewers, sometimes it's the ownership share or market share relative to profit and not ratings, ect.

On the other hand, it seems that the legislators did not sufficiently consider the fact that the diversity of media ownership does not automatically result in a satisfactory level of media pluralism, since the point is to clearly distinguish ownership and editorial policy and the draft media laws have disregarded completely that aspect of media pluralism. The reasons why states restrict media concentration lie in the conviction that high concentration of a media market undermines media pluralism. That "conviction" must be based on the reality of the given market, accompanied by the proper analysis of its value and a connection between concentration and editorial independence and programming content. The issue of media concentration may also not be observed separately from the rules on media ownership transparency. The level of media ownership concentration is impossible to determine if the ownership is not transparent. The practical implementation of the Broadcasting Law has shown that the too rigid regime of regulating media concentration, out of sync with market reality, actually enhances the "grey zone" and leads to non-transparent ownership. Instead of changing these rules, the latest draft laws introduce an even more rigid regime, the effects of which on transparency of ownership could be more harmful that it was in the past.

Ultimately, it should be pointed out that the Media Strategy prescribes that "*The Republic of Serbia … (will) harmonize the laws concerning the media so as not to undermine media pluralism at the national, regional and local level",* as well as that *"in the interest of maintaining media pluralism and the pluralism of media content, the Republic of Serbia will harmonize its national legislation with that of the EU and prevent illicit media concentration"* and that *"the permissibility of media concentration under the law and on the basis of relevant data obtained from the competent bodies will be appraised by the Competition Protection Commission (CPC).* The latter is diverged from in both draft laws. The CPC will undoubtedly also assess concentration in the media sector in line with the general rules provided for by the Law on the Protection of Competition. However, there will also exist sector-specific rules, introduced to protect media pluralism, which rules will be implemented by the Ministry of Culture (relative to the print media), and respectively the regulatory body for broadcasting (relative to electronic media). The question here was the ability of the Regulator and the Ministry to really discharge these functions taken into account when these powers were introduced. European regulations involve the compatibility of general competition rules and sectoral policies. Will the Regulator and the Ministry really enforce a policy compatible with the competition protection body, even without consulting each other?

Due to rigid criteria, a lack of capacity of the Regulator and the Ministry and disregarding the trends on the Serbian media market, it is difficult to predict the effects of these provisions on the media laws. Still, it seems that genuine protection of media pluralism will long remain merely a declarative goal of the state and an unachieved goal.

Some Debatable Issues in Disputes between Authors of Photographs and the Media

Dragica Popesku, PhD[1]

Copyright is a set of all the rights to and authorizations for copyrighted assets (copyrighted works) as objects of copyright. The subject of such right, their legal owner, is the author who is always a natural person or the acquirer of the copyright (a natural person or a legal entity) who acquires such right from the author or his/her legal successor. Copyrighted works, in terms of an original intellectual creation, also include photographic works,[2] which are created by taking photographs, or by taking snapshots of a person, a setting or other scenes, using a still camera, a camera (as a separate camera or within a cellular telephone and the like). However, although such works are created mechanically, they must be original intellectual creations of the author, in terms of the provision of Art. 2 of the Law on Copyright and Related Rights,[3] whereby the esthetic and artistic values of photographs are not decisive in these terms.[4]

1. In the judicial practice, the question has been imposed, as a debatable issue, as to *whether a copyright work also includes photographs that have emerged as the product of a purely mechanical process of the operation of a camera*, or only those in the creation of which the author has imbued his/her originality, intellectual creativity. At the same time, it is not decisive whether such a photograph also contains an artistic component (which depends on the selection of the position, light, composition, etc.). Within the inflow of actions/claims in the area of copyright protection into the first-instance Litigation Department of the High Court in Belgrade, prevailing are those in which the plaintiffs are neither photographers, nor news photographers, or those who are otherwise engaged in photography. Such persons post certain photo recordings, created by chance or out of a hobby, on their respective blogs, portals, *Facebook* and the like, and mass media find them through *Google* search engine and take them over for their own requirements, most often to illustrate a certain newspaper article, TV broadcast, report, etc. In this connection, very bizarre situations occur where copyright protection is requested even for photographs of popular national dishes, created by anonymous housewives, who had prepared them and taken photos of them, had posted them on a blog, wherefrom they were taken over by the media for the purpose of illustration of dishes within a section, such as „We Cook for You". Due to such and similar situations, numerous claims have followed for the purpose of damage compensation because of the infringement of proprietary and moral rights under copyright in the field of photography. Naturally, there are also very serious actions/cases for damages because of unauthorized utilization of someone's recordings in the form of an exclusive or artistic photograph, where one gets into the field of both copyright of the creator of a photograph, and the protection of the right to privacy, or the right to the image of the person on the snapshot.

In some situations, plaintiffs, who, as authors, claim compensation, both for material and non-material damages, can hardly prove that they are the ones who have made the photographic, or

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[1] The judge of the Appellate Court in Belgrade

[2] See, Besarović, Vesna, *Intelektualna prava – industrijska svojina and autorsko pravo (Intellectual Property Rights – Patent Rights and Copyright)*, TRZ Hrast, Belgrade, 1993, p. 267.

[3] The Law on Copyright and Related Rights (the *Official Herald of the RoS*, No. 104/2009), Art. 2 thereof, provides that a work of authorship is an author's original intellectual creation, expressed in a certain form, regardless of its artistic, scientific or some other value, its purpose, size, contents and way of manifestation, as well as the permissibility of public communication of its contents.

[4] „An o*riginal photographic work is the work that reflects the individuality of the author, which produces a certain esthetic experience in viewers and which, according to such experience, differs from other photographic works that capture the same object*", quotation, Besarović, Vesna, *op. cit.* (footnote*),* p. 267.

the video recording. Moreover, when they are, as creators, asked by the court about the way in which a photograph was created, as often as not the court gets the answer that the snapshot was created without their previous idea, by simple pressing of the recording button, testing whether and how the still camera works, etc. Therefore, in the proceedings, it is not possible to find out what their idea had been, the motivation in terms of its materialization, what the originality of the idea of the potential author is reflected in, which is all that is necessary for a work to have the character of a copyrighted one. As the subject matter of the infringement of a copyright, photographs are also submitted, as artistic ones, which do not stand out for their originality, strike one as „déjà vue", and do not arouse any special feeling (pleasant, unpleasant) and the like. In addition to the fact that plaintiffs, as presumed authors, fail to explain what has inspired them to take a photo of something and what the special quality of that snapshot is reflected in, except for the fact that, in defense of their litigation claims, they state that they were the ones that used the still camera on the given occasion, it is also hard to establish whether the person, who presents himself/herself as the creator of the photograph (even under the assumption that a copyrighted work is in question), has made that snapshot, or the digital file, or has borrowed it from the actual creator, with his/her consent, or without it. But, the most difficult moment in the proceeding is, when the plaintiff – the presumed author of the photograph, is asked to explain in which way he/she has assessed the claimed amount of pecuniary damages. Answers can be heard that the amount of the compensation has been calculated by assessing the threefold amount of the price, which the plaintiff would have otherwise charged for the use, or even at which he/she would have sold the same photograph, although the litigation claim has been put in for compensation of material damage and not for payment of remuneration in terms of Art. 206 of the Law on Copyright and Related Rights. Namely, the plaintiff may demand, in case where the infringement of proprietary copyright is committed willfully or by gross negligence, *instead of* a compensation for *material damage, the compensation up to the threefold amount of the usual compensation*, which he/she would have received for the concrete form of use of the subject matter of protection, had such use been legitimate. Such compensation cannot be equalized with a material damage, the existence of which, the offender, the illegality of the damaging act, and the causal relationship between the damaging act and its effect, must be proven before the court in each concrete case. On the other hand, when putting in claims for payment of up to the threefold amount of the usual compensation, *malicious intent or gross negligence* by the infringer of the rights (so, not by the tortfeasor) is established, as well as the amount of the usual compensation, with respect to the actual copyrighted work and its author. It is important to remember here that not every compensation has to represent the full amount of the threefold usual one, it may instead be within the range from the usual compensation up to that limit, which should depend on the culpability of the infringer of the rights (*dolus, culpa lata*),[5] who is not considered as a tortfeasor in this case.

2. A big dilemma in the proceedings also occurs concerning claims for damages due to the infringement of the moral right under copyright; it must be in correlation with the infringement of the individual right because it has its ground in the *inviolability of mental integrity* of an individual, as a natural person (which is guaranteed by Article 25 of the Constitution of the Republic of Serbia). Therefore, in case of infringement of any copyright authorizations that stem from the moral right under copyright, the actual infringement of a copyrighted asset will not be wrongful, but the infringement of mental integrity, as the personal good and the object of the individual right. This because, in our law, *forms of non-material damage in infringement of the individual rights* (identity, dignity, mental integrity, privacy, and others) that are *legally recognized*, but also in case of the infringement of other non-material rights, are only and exclusively the *suffered* emotional *pains and/or fear* (Art. 200 of the LCT). At the same time, these are the forms of the infringement of the individual right to mental integrity, which are the common denominator of any inflicted non-material damage because that right is necessarily

[5] See, Babić, Ilija, *Leksikon obligacionog prava (Lexicon of the Law of Obligations)*, Službeni glasnik (Official Gazette), Belgrade, 2008, pp. 158, 159.

infringed by the infringement of any of the above specified individual rights. Therefore, it is necessary that pains and/or fear are also suffered by the author who, due to the infringement of the moral right under copyright, claims the compensation for such damage.

3. The Law of Contract and Torts (the Law on Obligations) (the LCT), in Art. 199 thereof, provides for the *infringement* of the individual right as the condition for publishing of a judgment, correction, retraction or whatever, whereby the purpose that is achieved by a pecuniary compensation can be realized. The above stated implies that, according to that provision, non-material damage is equalized with the infringement of the individual rights. On the other hand, already in the next Art. 200 of the LCT, pains and fear are provided for as the only forms of non-material damage. It follows from the above that emotional pains and fear (as non-material damage that has taken place by infringement of the individual rights to dignity and reputation, privacy, identity, and other rights and freedoms) may be eliminated by a non-pecuniary compensation, i.e. by natural restitution, or reinstatement[6] – correction of information, retraction (withdrawal of a statement), by publishing the judgment (in criminal proceedings or in a civil lawsuit, particularly in case of injury to dignity and reputation). A non-pecuniary compensation for a non-material damage may also consist of something else if thereby its purpose can be achieved. Such acts take place upon the order of the court at the expense of the tortfeasor, in line with Article 199 of the LCT. In view of the fact that the law makes reference to the tortfeasor, damage is therefore assumed to be the consequence of the infringement of the individual rights, which means that the actual infringement of rights is not sufficient to make use of the specified means of restitution.[7] According to the Conclusion from the joint session of the Federal Court, the Supreme Courts of the Republics, the Provincial Courts, and the Supreme Military Court, which was published on 15/10/1986, which position is still applied in the judicial practice, a pecuniary compensation for a non-material damage may be adjudicated in favor of the injured party only if it occurs in one of the recognized forms of non-material damage (the suffered physical and/or emotional pains and/or fear) and if it is justified by intensive and/or long-lasting pains and fear. Because of the large-scale use of recordings of images on photographs, films and because of abuse of other recordings, whereby, through mass media, infringements of both personal good-entitlements and copyrighted assets take place, legally recognized forms of non-material damage are less and less observed. Current judicial practice in the media disputes increasingly often equalizes the actual damage to personal good with a non-material damage. This also happens in copyright disputes, where the mass media are sued as tortfeasors, which represents a breakthrough relative to the *de lege lata* situation, whereby even on such an occasion the pecuniary compensation should be valued subject to the intensity and duration, i.e. subject to the concrete circumstances. How to otherwise establish the amount of the pecuniary compensation if the parameter is not the intensity and duration of emotional pains and fear, which is also related to copyright disputes due to unauthorized use of a photograph, i.e. infringement of the moral right of the author?[8] Proving that the infringement of the right has taken place against the holder of the right, in the media disputes, and the LCT in

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[6] Petrović, Zdravko, „Novčana naknada nematerijalne štete i prava ličnosti (Pecuniary Compensation for Non-material Damage and Individual Rights)", *Pravni život (Legal Life)*, 1/1989, *Natural restitution* is also possible in case of compensation of material and non-material damages (publishing of the judgment, correction, public apology in case of injury to dignity and reputation, etc.), pp. 67–68, compare to: *id*., – *Naknada nematerijalne štete zbog povrede prava ličnosti (Compensation for Non-material Damage due to Infringement of Individual Rights)*, Belgrade, 1996, pp. 73–79.

[7] *Komentar Zakona o obligacionim odnosima (Commentary on the Law of Contract and Torts (the Law on Obligations))*, drafters, Blagojević, Borislav, Krulj, Vrleta, Savremena administracija IŠKRO, Belgrade, 1983, Starting from the concept of reinstatement, as the most adequate form of compensation for damage inflicted in the form of insult or defamation, it is stated that the LCT prescribed publishing of the judgment or correction, as the exclusive form of compensation, whereby the injured party may not claim pecuniary compensation instead of natural restitution or in addition to the same, p. 738.

[8] According to the Law on Copyright and Related Rights (the *Official Gazette of the RoS*, No. 104/2009), the moral (non-proprietary) right of an author is the right to paternity; the right to indication of the name of the author on every copy of the work and on the occasion of every public disclosure of the work; the right to publish the work and to determine the method of its publishing; the right to protection of integrity of the work and the right to oppose unbecoming exploitation of the work, i.e. the one that may threaten or threatens his/her dignity and reputation.

Art. 199 does not specifically state the moment that will determine when the infringement of the individual right occurs, is instead the matter of the court to establish it. So, the decision with respect to the request for withdrawal of a statement (retraction), according to Art. 199 of the LCT, depends on the assessment by the court whether the information in the media could have objectively disrupted the feeling of dignity or respect of the plaintiff in the society, and not whether that has actually happened[9] while, if an adverse effect is the condition for retraction according to Art. 199 of the LCT, then the culpability of the tortfeasor, when committing a damaging act, i.e. disclosing, or publishing the harmful information in the media, is the condition for his/her liability and obligation to retract the original statement. Bearing in mind that the Law on Public Information of the Republic of Serbia provides for the publishing of the retraction of a piece of information as the reason due to which the responsible editor is not obliged to publish a reply to the information, or due to which the court shall not order, by the judgment, the responsible editor to publish the reply to or correction of the information, it should be provided for *de lege ferenda* that culpability is not the condition for exercising the right of retraction of information in the media either.

[9] Nikolić, Dušan, „Pravno relevantne povrede časti i ugleda (Legally Relevant Injuries to Dignity and Reputation)", *Pravni život (Legal Life)*, No. 9–10/1992, Belgrade, p. 2060.

Ethics in the Media:
Mistakes, Self-Regulation and Raising the Standards

Tamara Skrozza[1]

The disrespect for ethical standards by media professionals is one of the most complex problems of Serbian media. Not because other problems are less significant or difficult, but because one may not uproot the phenomenon of constant violation of ethical norms until other issues plaguing Serbian media are either principally or fully resolved. Among other things, ethical standards in the media foresee a healthy media environment: a functional legislative framework, highly educated journalists, their economic strength and independence, as well as financially stable and independent media outlets where these journalists work. It also requires ethical standards to be observed in other fields directly related to the media: politics, healthcare, the education system, and the judiciary – practically all segments of society. In the absence of strong moral standards in other areas, it is difficult to expect from the media to be the Avant-garde and the leader of possible change. The media are, whether we like it or not, merely the mirror of the society they operate in.

The current media environment and the financial situation plaguing the majority of Serbian media outlets do not provide much hope for establishing a more ethical, decent journalism, free from various influences. In a struggle for survival or larger profit, struggle for prestige and power, 2013 has seen several media outlets becoming proponents of various political options while media campaigns against individuals, groups and companies have become a daily occurrence.

The fact that in Serbia the Press Council has successfully operated for two years now, as a self-regulatory body dealing with compliances with ethical norms by the media, surely represents a positive tendency. However the nature of complaints sent to the Complaints Commission of the Press Council (CCPC) and their ever increasing number, are also a signal that in Serbia only a few care about professional ethics.

COMMONPLACES OF IMMORALITY

Several phenomena, which are strictly forbidden in all ethical codes in the world (including that of Serbian journalists), have existed in the Serbian media landscape for years. Some of them directly affect the lives of individuals that are reported on; some have a long-lasting and far-reaching effect on society, while others are the consequence of illicit influence on journalists and attempts to promote content benefiting personal interests. Regardless if we define them as “soft” or malign and very serious, all these offences are contrary to the main reason for the existence of a journalist code of ethics – to properly channel the power of the media and prevent abuse.

The judiciary is the sector where the journalists typically cross the boundaries imposed by various regulatory and self-regulatory mechanisms. Apart from ignoring the right to the presumption of innocence of accused individuals, the media often “forget” that the identity of the victims of crime must not be disclosed, as well as that it is forbidden to describe criminal offences that may affect media consumers. In quest of “juicy” for audiences interesting content, the media often conduct their own investigations, pointing the finger on persons whose guilt they speculate about, conveying in detail everything originating from unreliable sources.

[1] A journalist of the weekly “Vreme" and member of the Complaint Commission of the Press Council (CCPC)

The discrimination of various sensitive groups is a particular problem. Despite the fact that it is expressly forbidden by the Code of Serbian Journalists, the media often generalize the phenomena they write about, incriminating all the members of a particular community, as exemplified by tabloid headlines such as "The Roma are Taking Over our Homes" or "Milan's Son Hijacked by the Croats", although similar statements appear occasionally in mainstream media. Apart from the traditionally-targeted Roma and Croats, the list of those who are often negatively or wrongly depicted by the media includes women, LGBT people, disabled persons and HIV infected. In all these cases – which sometimes amount to serious breaches of the Code and, at times, poor use of language – the media are obviously disinterested in the consequences that their reporting may have.

At the heart of these various violations of ethical standards is clearly the poor relationship with sources of information. Allowing these sources to profit personally or achieve their goals through the media, by supplying carefully selected information, journalists are often unaware they are being manipulated. Blind faith in one single information source, overt or covert corruption of journalists, as well as unacceptable close relations with a source, are also elements undermining daily not only the integrity of one journalist and one media outlet, but that of the profession as a whole. At that, a distinction must be made between a situation where a journalist has blind faith in an official insider, while receiving a mobile phone as a gift from a company and the case where the owner/editor of a media outlet is a close friend or advisor of a billionaire, from whom he receives substantial loans, fees or credit lines. While the long term implications of the two situations differ significantly, both are illegitimate in terms of professional ethics.

One of the biggest problems is surely the mutual dependency of news and marketing content, namely the acceptance of the political and economic dictate of agencies representing wealthy clients. Although nobody's admitted it, some media outlets clearly make sure to avoid publishing content that may undermine the interests, or is simply not liked, by a company or individual whose advertisements ensure the next salary or printing costs of the next issue.

Closely related to the above is the illicit influence some politicians are able to exert upon a chosen circle of journalists, editors and media outlets. The "chosen" by politicians receive exclusive information and in return they report favorably, or insufficiently critically, about the activities of that politician or his party.

INNOVATION

While in 2013 the situation improved slightly in terms of reporting about sensitive groups or protection of the identity of minors and alleged perpetrators of criminal offences, we noticed some very innovative ways of breaching journalism ethics in other (much more relevant on the long run) areas.

The most obvious were smear campaigns against individuals, in the forms of a series of articles/stories based on unnamed witnesses testimonies, unclear facsimiles and bank account balances, harsh words and blatant intrusions in people's private lives. The targets were the politicians from the previous government, show business people, while the last despicable example was the targeting of the Ognjenovic family, whose child died from a fatal illness in spite of a large sum of money that was collected for her treatment. We may only speculate whether these campaigns are fueled by money, political interests or mere personal antipathy by a journalist/editor, but that does not matter in the long run. What matters is that such a "style" of reporting is destroying someone's life; at the same time, the general cultural level of the citizens is further undermined, the lowest urges of the general public are pandered to, and the public opinion is subject to illegitimate (an even illegal) influences.

In accordance with their job description, the journalists should be aware of the potential consequences of their reporting and they also should put their personal preferences and interests aside while doing their job. Above all, their reporting must not be influenced by any form of bribes, blackmail or ownership pressure.

While the tabloids lead the way in these smear campaigns, a case in point when it comes to breaching ethical standards and media laws is that of Zeljko Mitrovic, the owner of "Pink", who through his media first waged a smear campaign against Dragan Djilas, followed by an attack on the daily "Blic". Both campaigns abounded with insults that should be intolerable both in the public and the private discourse; both were clearly founded on personal feuds between the main actors; and both constituted abuse of a national frequency and violation of the rules prohibiting the misuse of media for private ends.

Particularly interesting was the campaign against "Blic", since it was itself triggered by a breach of ethical standards. After the son of Zeljko Mitrovic was placed in custody for alleged involvement in a hit-and-run accident in which a 17-year old girl was killed on a pedestrian crossing in Belgrade, "Blic" had been reporting about the case in an utterly improper manner, highlighting the family ties of the driver. The owner of Pink responded with a, at times, very picturesque media campaign that lasted the whole summer, including, among other things, posting messages from a Facebook profile "'Let's rename the daily "Blic" into 'Stinking Newspaper'" (the profile was created by an unknown person). Representing them as "vox populi", the reporters of Pink's prime time TV news read lengthy tirades and insults on daily basis against "Blic", claiming they had been posted by "ordinary readers". Even the epilogue of this case was picturesque. After the Republic Broadcasting Agency (RBA) Council issued a warning against TV Pink at its session held on August 7, over the violation of media laws and the Broadcasters' Code of Conduct (under the warning, Pink was prohibited from "waging campaigns against any individual and organization"), the effort was continued by daily "Informer". In spite of the prohibition against TV Pink, the editor of "Informer" was interviewed on nightly basis in Pink's prime time shows, where he repeated what the owner of that station had "copyrighted" a few days before. After the said editor continued to do the same in his newspaper, "Blic" lodged a complaint with the Complaint Commission of the Press Council, which ruled that the Code of Serbian Journalists had been breached.

The second case with far-reaching consequences was the reporting about the illness of Jovanka Broz. After Tito's widow was moved on August 23 to the emergency room of the Clinical Center, the officials of that institution informed the public for days about the smallest and most intimate details not only of her illness, but of her lifestyle. Ten different diagnosis were released, Mrs. Broz was said to have been "in an extremely neglected state, both physically and in terms of hygiene", that "she hadn't eaten, drank or taken a bath for days". After the reaction by the Commissioner for Information of Public Interest and Personal Data Protection, such practice stopped, but it ultimately doesn't change the fact that the media have violated all the provisions of the Code of Serbian Journalists concerning protection of the right to privacy, releasing information of public interest, as well as even those pertaining to the release of disturbing content.

Interestingly enough, the main argument of the journalists was the fact that they had received information from official sources, under sources` full names. Journalists are inclined to treat such information non-critically and to *a priori* publish what was "officially obtained". However, this may not serve as an excuse. As opposed to medical doctors (as well as judges, the police, daycare teachers, social workers and the representatives of different institutions), the journalists should at all times be aware of the power they have and the consequences it may cause. Even the "juiciest" piece of information obtained from an official source should not be made public if it's not in the public's interest or if it violates ethical standards.

A similar situation happened in March 2013, when a minor was killed in Becej. Wanting to deny that their son died as a result of an accident, his parents gave "Blic" a photograph of the dead boy with visible hematoma on his face. The newspaper published it on its front page, with the explanation it will help the investigation, as well as that the public has the right to know. After the complaint of the Center for the Rights of the Child, the Complaint Commission ruled that not even the parents' consent justifies the action of a high circulation daily, i.e. that by publishing of a disturbing photograph (with the accompanying text) violated several provisions of the Code of Serbian Journalists.

THE COMPLAINTS COMMISSION

The case of the minor from Becej is just one of many that have ended up before the Complaint Commission of the Press Council and which will most certainly constitute the basis for establishing standards in local journalism. The number of such cases is increasing by the month; with their complexity, long-term effects and multilayeredness, each of them shows that no instructions in the field of media ethics are set in stone and how this is an area requiring constant improvements and fine-tuning. Thanks to the work of the Complaint Commission, the Code of Serbian Journalists was amended in 2013 by two new chapters concerning corruption and reporting about corruption, while the Statute of the Press Council and the rules of procedure of the Complaint Commission, were also amended in order to expand the competences of these bodies on online media, as well as those media that didn't officially embraced the Code.

The case that garnered the most public attention has actually been the only one in which the Complaint Commission was unable to pass a decision. It pertained to the article in "Politika" concerning the theft of telephone cables and tin sheets from the roofs. It was noted, among other things: *"Thieves of these goods are almost as a rule, and it should be said openly, of Roma nationality. One may immediately sense that the court will be lenient: some NGO or other "factor" defending Roma rights will jump in and call out the judge. It is a fact that this national minority is in a very difficult material situation, that it lives in poverty, but also that enormous funds are spent for its "inclusion", which should not entitle them to a discount before the Goddess of Justice".* The Regional Center for Minorities, as the plaintiff, believed that the text had violated the provisions of the Code concerning the protection of the rights and the dignity of vulnerable groups, as well as to prohibition of discrimination. At a session held on April 26, 2012 the members of the Commission discussed the provision of the Code under which, while reporting about a criminal offense, it is allowed to mention ethnic, religious, ideological or political affiliation only if it is directly connected to the type of the criminal offense in question. The members first tried to establish if such connection existed in this case, but they remained divided over the issue, just like they were making the final decision on the violation of the Code. That debate best illustrates the complexity of the Complaint Commission work, as well as that of reporting about sensitive groups.

The Complaint Commission has been active since autumn 2011; to date, it has received 104 complaints, of which 15 filed by institutions or associations, 5 by politicians, 7 by media (against each other), while the remainder were lodged by citizens. In two years, a total of 53 decisions were passed, of which six public warnings, while three complaints were resolved by mutual agreement. The remainder either didn't meet formal requirements/the deadline or pertained to media that weren't subject to the Commission`s authority.

In a total of 29 cases it was decided that the Code of Serbian Journalists had been violated (in 6 cases one provision was breached and in all other cases several provisions were violated). The most often violated provisions were those about respect of privacy (8 times), accuracy of reporting (13 times), due journalist care (also 13 times) and journalist responsibility (5 times). Violations of other provisions were far less common. In 2013, the number of complaints

increased dramatically: as much as 64 were received, which is more than half of the overall number of complaints. 28 decisions were passed - which is, again, more than half of the total number of decisions.

From a statistical point of view, the Complaint Commission shouldn't worry about its future. However, just at the time when the number of complaints and complexity is increasing, there is a question of its mere survival. For two years, the work of Complaint Commission and the Press Council was supported by the Norwegian embassy, but this financial source was suspended on 15 December, and the money dried up.

Although it was anticipated that, during this cooperation, other sources of funding be found, it did not work out and is currently on the founders - Independent Association of Journalists of Serbia, the Association of Journalists of Serbia, the Media Association and Local Press - to decide whether and how will the Press Council continues to function. It should be stressed that the Complaints Commission is the key organ of the Press Council – the one that defines the work of the Council and that it is of crucial importance to continue with meetings where decisions on appeals are made.

Apart the money as the main problem, the key challenges for the Commission will be to define its relations with publishers. Although three of the eleven members of the Complaint Commission come from the Media Association, the impression is that the media companies want to "defend" themselves before the Commission, failing to grasp the long-term significance of their decision and to adapt their content to ethical standards. It has namely happened that media continued to violate the provisions of the Code even after having been warned by the Complaint Commission to refrain from doing so and after publishing the Commission's decision about that matter. In that sense, the members of the Commission try in various ways (regardless of various comments and the reactions of the publishers) to boost the respectability of their decisions and maintain the achieved standard.

At first, there were problems with the obligation of the media to publish the decision of the Commission concerning them, while it still sporadically happens that these decisions are published in an inadequate place, selectively or only in print edition (and not in the online version which has much larger readership).

One of the biggest challenges will be, and it already is, to rule upon complaints concerning online media. Before all, it is often difficult to decide which online content may be considered media content at all (news, editorial), while the issue of self-regulation of reader comments remains very sensitive and undefined. In this context, the Complaint Commission is in sync with European trends, since European press councils have been battling for years over to how to decide in such situations. A challenge will also be the decisions concerning texts based solely on the Internet as a source of information and those pertaining to the mutual relations between online and "traditional" media.

Bearing in mind the above-mentioned examples of violation of ethical standards, the importance of respect for professional ethics and the potential consequences of media behavior (lest we forget our recent war past), undoubtedly some order should be introduced. The Complaint Commission is merely one step in that direction and it would be counterproductive, to say the least, for those deciding about it to allow that step to be removed.

European Court of Human Rights
Information Notes on the Court's Case-Law[1]

Information Note No. 165 July 2013

ARTICLE 10
of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Freedom of expression _____

Refusal of newspaper to publish paid advertisement: *no violation*

Remuszko v. Poland - 1562/10
Judgment 16.7.2013 [Section IV]

Facts – The applicant, a journalist, published a book relating, in an unfavourable light, the origins of *Gazeta Wyborcza*, one of the best known Polish daily newspapers, its journalists and the financial dealings of its publisher. He subsequently asked seven daily and weekly newspapers to publish paid advertisements for the book. All refused. The applicant brought proceedings against the newspapers. Eventually, two newspapers were ordered to publish the advertisement concerned. Before the European Court the applicant complained that the domestic courts had endorsed *Rzeczpospolita's* (one of the newspapers) refusal to publish paid advertisements for his book, after finding the advertisement was incompatible with the newspaper's editorial profile and its publication might give rise to suspicion that the editors of *Rzeczpospolita* were trying to denigrate a competitor, *Gazeta Wyborcza*, in the eyes of the public.

Law – Article 10: The right invoked by the applicant had to be interpreted and applied with due consideration for the rights of the press. Privately owned newspapers had to be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State's obligation to ensure freedom of expression did not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. Those principles applied also to the publication of advertisements. An effective exercise of freedom of the press presupposed the right of newspapers to establish and apply their own policies in respect of the content of advertisements.

In the instant case it had not been argued, let alone shown, that the applicant had had any difficulties in publishing his book or that the authorities had tried in any way to prevent or dissuade him from publishing it or, more generally, that the media market in Poland was not pluralistic. While the issues examined in that book might contribute to a debate about the mission of the press in the Polish society, the paid advertisements proposed by the applicant had been essentially aimed at promoting the distribution and his sales and thus had been primarily designed to further the applicant's commercial interests. At no point had the applicant been prevented from disseminating information about the book by any means he wished. Indeed, he

[1] Excerpts from the official "Information Notes on the Court's case-law" of the European Court of Human Rights, available on its web site www.echr.coe.int

had created his own Internet website, through which he had informed the general public about the book, its content and its potential significance for the public debate. The domestic law provided an effective procedural framework within which the applicant could seek to have the substantive issues involved in his case determined by judicial authorities. The courts had carefully weighed the applicant's interests against the legitimate rights of the publishers, such as their own freedom of expression and economic freedom. Their conclusion that, in a pluralistic media market press, publishers should not be obliged to carry advertisements proposed by private parties was compatible with the freedom of expression standards under the Convention. The State had therefore not failed to comply with its obligation to secure the applicant's freedom of expression.

***Conclusion*:** no violation (unanimously).

(See also *Appleby and Others v. the United Kingdom*, 44306/98, 6 May 2003, Information Note 53)

Freedom to receive information
Freedom to impart information

Urgent search at journalist's home involving the seizure of data storage devices containing her sources of information: *violation*

Nagla v. Latvia - 73469/10
Judgment 16.7.2013 [Section IV]

Facts – The applicant worked for the national television broadcaster where she produced and hosted a weekly investigative news programme *De Facto*. In February 2010 she was contacted by an anonymous source who revealed that there were serious security flaws in a database maintained by the State Revenue Service (VID). She informed the VID of a possible security breach and then publicly announced the data leak during a broadcast of *De Facto*. A week later her source, identifying himself as "Neo", began to use Twitter to publish information concerning the salaries of state officials in various public institutions, and continued to do so until mid-April 2010. The VID initiated criminal proceedings and in February 2010 the investigating police interviewed the applicant as a witness. She declined to disclose the identity of her source. In May 2010 the investigating authorities established that one I.P. had been connected to the database and had made several calls to the applicant's phone number. I.P. was arrested in connection with the criminal proceedings. The same day the applicant's home was searched, and a laptop, an external hard drive, a memory card, and four flash drives were seized after a search warrant was drawn up by the investigator and authorised by a public prosecutor.

Law – Article 10: The seized data storage devices contained not only information capable of identifying the journalist's source of information but also information capable of identifying her other sources of information. Accordingly, the search at the applicant's home and the information capable of being discovered therefrom came within the sphere of protection under Article 10. There had been interference with the applicant's freedom to receive and impart information which interference was prescribed by law and pursued the aims of preventing disorder or crime and of protecting the rights of others.

The search warrant was drafted in such vague terms as to allow the seizure of "any information" pertaining to the offence allegedly committed by the journalist's source and was issued under the urgent procedure by an investigator faced with the task of classifying the crime allegedly committed by I.P. and establishing the applicant's role. These reasons were not, however, "relevant" and "sufficient" and did not correspond to a "pressing social need".

The subject-matter on which the applicant reported and in connection with which her home was searched made a twofold contribution to a public debate: keeping the public informed about the salaries paid in the public sector at a time of economic crisis and about the database of the VID which had been discovered by her source. Although it was true that the actions of her source were subject to a pending criminal investigation, the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution.

When, three months after the broadcast, the investigating authorities decided that a search of the applicant's home was necessary, they proceeded under the urgent procedure without any judicial authority having properly examined the proportionality between the public interest in the investigation and the protection of the journalist's freedom of expression. According to the national law, such a search could be envisaged only if delay might allow relevant documents or objects to be destroyed, hidden or damaged or the suspect to abscond. The ground given for an urgent search in the warrant was "to prevent the destruction, concealment or damaging of evidence" without further explanation. Information was acquired linking the applicant to I.P. in her capacity as a journalist. The applicant's last communication with I.P. was on the day of the broadcast. In these circumstances, only weighty reasons could have justified the urgency of the search. However, the assessment was carried out by the investigating judge on the day following the search and the judges who subsequently examined the applicant's complaint against the investigating judge's decision confined themselves to finding that the search did not relate to the journalist's sources at all without weighing up the conflicting interests.

Although the investigating judge's involvement in an immediate *post factum* review was provided for in the law, he failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection and protection against the handover of the research material. The court's reasoning concerning the perishable nature of evidence linked to cybercrimes in general could not be considered sufficient, given the investigating authorities' delay in carrying out the search and the lack of any indication of the impending destruction of evidence. Nor was there any suggestion that the applicant was responsible for disseminating personal data or implicated in the events other than in her capacity as a journalist; she remained "a witness" for the purposes of these criminal proceedings. In sum, the domestic authorities had failed to give "relevant and sufficient" reasons for the interference complained of.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 in respect of non-pecuniary damage.

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