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Blog Registration in the Light of the Constitutional Right of Freedom to Disseminate Information²

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Słowa kluczowe: nowe media, wolność słowa, regulacja nowych mediów, blog, wolność gospodarcza

Abstract

The constitutional system in Poland covers one of the most important values which is freedom of speech. Due to the regulatory dualism treating the media market also as an important element of the creative industry, freedom of economic activity becomes important in this area. Currently, the implementation of both of these values is influenced by the development of new technologies, which determine the need to adapt legal regulations to them. The basis for the operation of the media is the freedom of speech referred to in the Art. 14 and 54 of the Constitution of the Republic of Poland³. The exercise of these freedoms may be limited in strictly defined situations and must be provided for by law (Art. 31 (3) of the Polish Constitution). Therefore, one cannot speak of an un-

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³ Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483), hereinafter referred to as the “Polish Constitution”.

hampered freedom of action by the media. However, is this rule relevant to the challenges of the changing world and developing virtual reality? In view of modern changes in the principles of creating and using information, the existing rules of media functioning should be verified, without excluding legal instruments which task is to ensure a balance in the relationship between the use of freedom of speech and the protection of its beneficiaries against unauthorized actions. The article presents the issue of the application of the legal instrument of the press title register on the example of a blog⁴.

Streszczenie

Rejestracja bloga w świetle konstytucyjnego prawa rozpowszechniania informacji

System konstytucyjny w Polsce obejmuje swoim zakresem jedną z najważniejszych wartości jaką jest wolność słowa. Ze względu na dualizm regulacyjny traktujący rynek mediów także jako ważny element przemysłu kreatywnego istotna staje się w tym obszarze wolność działalności gospodarczej. Obecnie na realizację obu tych wartości wpływa rozwój nowych technologii, które determinują potrzebę dostosowania do nich regulacji prawnych. Podstawą działania mediów jest wolność słowa, o której mowa w art. 14 i 54 Konstytucji RP. Korzystanie z tych wolności może podlegać ograniczeniom w ściśle określonych sytuacjach i musi być przewidziane przez ustawę (art. 31 ust. 3 Konstytucji RP). Nie można zatem mówić o nieskrępowanej swobodzie działania mediów. Jednak czy ta reguła jest aktualna wobec wyzwań zmieniającego się świata i rozwijającej rzeczywistości wirtualnej? Wobec współczesnych zmian w zasadach tworzenia i korzystania z informacji należy poddać weryfikacji dotychczasowe reguły funkcjonowania mediów, nie wykluczając instrumentów prawnych, których zadaniem jest zapewnienie równowagi w relacji korzystania z wolności słowa i ochrony jej beneficjentów przed nieuprawnionymi działaniami. W artykule zaprezentowano zagadnienie stosowania instrumentu prawnego, jakim jest rejestr tytułu prasowego na przykładzie bloga.

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⁴ The subject matter was analyzed in the work K. Chałubińska-Jentkiewicz, *Cyberodpowiedzialność*, Toruń 2019.

I. Introduction

The institution of the register is primarily associated with the process of market regulation. As mentioned in the literature, the principle of freedom of speech, obtaining and disseminating information, referred to in the Art. 14 and 54 of the Polish Constitution and in Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁵ is in opposition to the legal regulation on access to online media services. Registration of media activity is aimed (as with any other) to introduce, above all, a certain information order, in this case with regard to the emerging new titles, i.e. new labels individualizing magazines or journals⁶. The freedom in question, as well as other freedoms (e.g. running a business), may be limited, although in compliance with statutory procedures and rules. Thus, a media service provider or publisher that enters the market must go through certain formal procedures in order to legally enter the market. The legal regulation regarding registration is therefore related to the completion of formalities by the applicant and the need to protect the rights of other people. According to the Constitutional Tribunal, “this is the implementation of such a registration model which, in a preventive manner, aims at creating an information order and the related economic order (publishing a journal or a magazine is an economic undertaking)”⁷. A question arises here about the validity of this type of legal solutions in the media activity conducted electronically.

II. Register of Regulated Activity and Register of Publishing Activity

Public authorities have become obliged to supervise electronic services covering both the areas of functioning of traditional means of social communication, as well as completely new forms of communication, not excluding those that have arisen from the development of the telecommunication network (Internet). Depending on the nature of the service, this obligation is connected

⁵ Dz.U. 1993, No. 61, item 284 hereinafter referred to as “the Convention”.

⁶ Cf. J. Sobczak, *Ustawa Prawo prasowe. Komentarz*, Warsaw 1999, pp. 276–277; J. Marzałek-Kawa (ed.), *Współczesne oblicza mediów*, Toruń 2005.

⁷ File ref. act P 1/06, Dz.U. 2007, No. 36, item 234.

to a varying degree with the media market regulation process. Depending on the method of transmission, individual electronic press services will be regulated in a completely different way. This diversity results from the restrictions on the freedom of speech referred to in the Art. 54 of the Constitution of the Republic of Poland. Provision of the Art. 54 of the Constitution of the Republic of Poland states, inter alia, that everyone is guaranteed freedom of expression, and preventive censorship of the media and licensing of the press are prohibited. A similar regulation is contained in the Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The states – parties to the Convention, including the Republic of Poland, which ratified it in 1993, provide everyone with the right of freedom of expression, including freedom to express opinions, as well as receive and disseminate information and ideas, without interference of the public authorities and regardless of the state borders. However, the use of these freedoms may be subject to restrictions in strictly defined situations and must be provided for by the Act. The free press is to serve man and citizen by fulfilling, above all, an informational function. It is widely believed that the press gives citizens access to reliable, credible information. However, freedom of the press is one of the “political freedoms” which in practice may be restricted because of the necessity to ensure the rights and freedoms of an individual. Therefore, one cannot speak of its absolute character and unrestricted freedom of action. However, is this rule relevant to the challenges of a changing world and developing virtual reality? In view of contemporary changes in the rules of creating and using information, the current rules of the media market should be verified, without excluding legal instruments which task was to ensure balance in the use of freedom of expression and protection of its beneficiaries against unauthorized activities. The publishing activity of newspapers or magazines requires registration with the district court competent for the registered office of the publisher (registration authority). Therefore, unlike other registers of media activity, the registration authority is the court, not the public administration body, which in the case of the register of television and radio programmes is the Chairman of the National Broadcasting Council.

Thus, the subject of the regulation of the media market using the register includes:

1. newspapers and magazines – publishing the title – Press office,

2. television programmes distributed only in ICT networks – broadcasting activities – recording – the Broadcasting Act,
3. distributed television programmes – retransmission – recording – the Broadcasting Act.

In the judgment of February 20, 2007, the Constitutional Tribunal⁸ established that the registration procedure is a variation of the broadly understood notification system, is in no way related to the concession system, but rather opposed to it, because its purpose is “to inform the authorities about the decision to conduct a project. Therefore, the role of the authority is passive here and the application itself does not confer any decision-making powers on the public authority, as it only causes registration of the application after checking the necessary formalities (eg whether there is another identical, identical or identical registered press title)”. According to the Constitutional Tribunal, “registration is also a confirmation that the applicant who has made a decision to act in the media space is acting correctly. The legality of the action depends on the submission of the declaration, and failure to comply with it or failure to comply may result in sanctions. As standard, in registration procedures, the very decision on entry into the register is not constitutive, but should be assessed as an act of a declarative nature. This is due to the fact that the lack of statutory conditions required to run a business makes it impossible to undertake it”⁹.

III. The Right to a Press Title. What is a Blog?

In the Art. 24 of the Press Act¹⁰, a distinct separation of the registration of the publishing activities from the activities of the media service providers has been introduced, to which the provisions of the Press Law in the area of registration do not apply. It should be emphasized, however, that the publishing activities covered by the register are limited only to the publishing of news-

⁸ Judgment Constitutional Tribunal, file ref. act P 1/06, OTK-A 2007/2/11.

⁹ M. Strzelbicki, *Wpis do rejestru działalności regulowanej*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2005, No. 4, p. 5.

¹⁰ The Act of January 26, 1984, the Press Law, i.e. (Dz.U. 2018, item 1914), hereinafter referred to as the “Press Law”.

papers and magazines. Journals and magazines appearing in the form of an online transmission will meet the requirements of the publishing registration both when the online transmission accompanies the printed transmission, as its electronic form in the online system, as well as when the transmission is only in the electronic form on the Internet, but appears periodically, meeting the statutory requirements by definition. The mentioned position is firmly based on the doctrine¹¹.

Within the meaning of the Press Law: “the press means periodical publications that do not form a closed, homogeneous whole, appearing at least once a year, bearing a permanent title or name, current number and date, in particular newspapers and magazines; the press also includes all existing and resulting mass media that disseminate periodical publications by means of print, vision, sound or other dissemination techniques” (Art. 7 sec. 2 point 1). According to the journalists participating in the study, blogs are a source of knowledge about political and social issues for 40% of the respondents. J. Wright, when analyzing company blogs, prepared a typology of authors of online dailies. He distinguished seven types of people running blogs, claiming at the same time that under the so-called “blog-newspapers” a lot of information is published about a given industry, while maintaining objectivity¹².

The Supreme Court also ruled on the issue of classifying the Internet activity as the press and on the registration obligations in the decision of July 26, 2007¹³. The subject of the analysis was the publication of the “Szyciepoprzemysku” online magazine without the required registration. The court decided that in the assessment of the registration obligation, the provision of the Act is unequivocal which states that a daily is a general information periodic publication or transmission by means of sound, sound and image appearing more often than once a week (Art. 7 sec. 2 point 2 of the Press Act). A similar rule applies to magazines (Art. 7 sec. 2 point 3 of the Press Act). Accord-

¹¹ J. Sobczak, *Ustawa...*, pp. 113, 273–274; J. Barta, R. Markiewicz, *Internet a prawo*, Cracow 1999, pp. 35–41; J. Barta, R. Markiewicz, A. Matlak, *Prawo mediów*, Warsaw 2005, p. 95; E. Nowińska, M. du Vall, *Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji*, Warsaw 2001, p. 184; E. Nowińska, *Nieuczciwa reklama w Internecie*, [in:] *Internet – problemy prawne*, ed. R. Skubisz, Lublin 1998, p. 51.

¹² J. Wright, *Blogowania w biznesie. Rewolucyjny sposób na zwiększenie sprzedaży, zbudowanie marki i osiągnięcie spektakularnych sukcesów*, Warsaw 2007.

¹³ File ref. act IV KK 174/07, OSP 2008, z. 6 item. 60.

ing to the court, the Internet itself is not subject to registration, because “the Internet is only a medium like a ream of paper. No one can register paper as such, and in principle, it is not paper alone that is subject to the registration, but the activity of printing on the paper and issuing it in the form of a daily or a magazine, and thus – the press. The Internet is a means of communication through which correspondence is exchanged, similar to a written correspondence on paper. The transmission of correspondence on the Internet is not subject to registration, while publishing in the form of an electronic press available on the Internet must be registered”. Thus, the message via the Internet, if it meets the requirements of the Act is the press, and the issue of periodicity only determines whether it is a daily newspaper within the meaning of Art. 7 sec. 2 point 2 of the Press Act, or a magazine within the meaning of the Art. 7 sec. 2 point 2 of this Act¹⁴. The issue of frequency of publishing new content should be considered taking into account the date of the so-called update, i.e. of the “last modification”, which is treated as the date of the last edition of the originally transmitted message¹⁵. According to the court, “since the role and task of the press is to disseminate information, it is the periodicity of the message, i.e. cyclical information communicated to the public about specific social, economic, political, educational and cultural facts, under a specific title, name, address or even a link, will indicate the purpose pursued by the editors, publishers or author of a given electronic publication”¹⁶.

According to the thesis of the judgment of the Court of Appeal of May 25, 2005, even a website about aquarium fish may be considered by the court as a magazine, and running it without registration will be an offense¹⁷. In the context of the cited jurisprudence, another issue that raises doubts in the ap-

¹⁴ Gdańsk Court of Appeal judgment of 30 December 2014, file ref. act I ACa 654/14, LEX No. 1587224; the decision of the Supreme Court of 15 December 2010, file ref. act III KK 250/10, OSP 2011/10/101.

¹⁵ Decision of the Court of Appeal in Łódź of 18 January 2013, file ref. act I ACa 1032/12 OSNC 2003/7–8/111.

¹⁶ Decision of the Supreme Court of 15 December 2010, file ref. act III KK 250/10, OSP 2011/10/101.

¹⁷ Judgment of the Court of Appeal in Rzeszów of May 25, 2005, file ref. No. I ACa 277/2005, LexPolonica No. 1275504; the decision of the Supreme Court of 15 December 2010, file ref. No. III KK 250/10, KZS 2011 No. 4, item 16, decision of the Court of Appeal in Łódź of 18 January 2013, file ref. No. I ACa 1032/12, OSA / Łdz. 2013 No. 3, item 23.

plication of the registration of a press title is determination of the legal status of a publication in the form of a blog¹⁸.

Since the catalogue of publications indicated for registration is not closed, it can be assumed *a priori* that as a web message – in the situation of meeting the statutory premises of a definition of the press – a blog will require registration. Due to the number of authors, blogs can be divided into two types: individual blogs, i.e. edited by one person, and collective blogs with several authors (such blogs usually take the form of a press). Journalists publish their works in the latter, and consequently this type of message will not always be private, but rather professional, covering the category of the press understood as news newspapers or thematic magazines. Recognizing this diversity, the doctrine emphasizes that some blogs, due to their periodicity and meeting other conditions specified in the Art. 7, sec. 2 point 1 of the Press Act, will have to be treated as press, and thus – will be subject to registration according with the Art. 20 sec. 1 of Press Act¹⁹. This requirement, however, will not apply to blogs related to specific press titles, published as their electronic versions, or to those which, due to their content, are literary works²⁰. It should be noted that the website itself may, after meeting the definition conditions, constitute a work, which does not conflict with the registration obligation of such publication if the conditions of registration referred to in the Art. 20, sec. 1 of Press Act are met. As in the case of any other publication, the basic feature of the registration obligation is the periodicity of the transmission, its general information purpose, as well as the editorial preparation process preceding the publication. The essence of the registration procedure also implies the already mentioned formal nature of the control by the court of the registration of the press title. By legislature, the registration authority always relies only on the publisher's declaration as to the described attributes of the press title. This will also be the case for a blog or other form of sharing information on the web. Therefore, if the application for the registration contains all the required data and the press title does not infringe the right to protec-

¹⁸ The similar problem applies to vertical, i.e. thematic, portals.

¹⁹ The decision of the Supreme Court of December 15, 2010, file ref. No. III KK 250/10, KZS 2011 No. 4, item 16.

²⁰ J. Sobczak, *Komentarz do art. 7, [in:] Prawo prasowe. Komentarz*, ed. J. Sobczak, Warsaw 2008, thesis 3.

tion of a previously registered title, the registration authority carries out the registration²¹.

The provisions requiring the registration of press titles are controversial due to the lack of clear criteria determining such an obligation and their failure to adapt to problems arising in connection with the variety of forms of publishing content on the Internet. This issue has another aspect related to the regulation relating to the activities of entities providing electronic services. Article 3 of the Act on rendering electronic services specifies the scope of application of its provisions. They do not exclude publishing activity. At the same time, the register of publishing activities – in the light of the foregoing court interpretation – has become a type of regulation of the electronically provided services, provided that they meet the definition premises of the press²².

However, importantly, especially for determining the matter of the publishing responsibility, Art. 24 of the Press Act stipulates that the provisions regarding the registration of the press activities do not apply to the activities of media services providers within the meaning of the Broadcasting Act. According to the Art. 4 point 4 of the Act on radio and television broadcasting a media services provider is a “natural person, legal person or personal commercial company bearing editorial responsibility for the choice of content of a media service and deciding on the method of presenting this content, being a broadcaster or an entity providing audiovisual media services on demand”, whereas an audiovisual on-demand media service is a media service provided as part of business activities carried out within this scope, consisting in providing public access to audiovisual programmes based on a directory established by the entity providing the service. Given the often mixed, multi-medial nature of the information services, made available electronically, the application of the principles of preventive control of the publishing activities within registration or the principles of responsibility for the same services as provided electronically, determining the responsibility for a given area of operation will require the use of detailed analysis in each individual case, which

²¹ J. Chwalba, *Prawo prasowe a publikacje internetowe*, “Zeszyty Naukowe Uniwersytetu Jagiellońskiego” 2010, No. 3, p. 87.

²² W. Lis, *Procedura rejestracji tytułu prasowego. Problemy regulacyjne*, “Rocznik Bibliologiczno-Prasoznawczy” 2013, vol. 5/16, pp. 149–150.

neither guarantees legal certainty nor has a positive effect on the protection of the rights and freedoms of an individual.

Although – with the development of new media – the space where the press operates, where the borders cannot be crossed, in particular those related to the protection of the reputation and rights of others, shrinks dramatically, its basic duty still remains to convey information and ideas, which is primarily dictated by reasons of public interest²³. At the same time, in the relationship of modern technological solutions and new ways of exchanging ideas, society still retains the right to be informed. In any other case, the press would not be able to play its basic function of “social court dog”²⁴. The institution of the register of publishing activities should be treated in a similar way, which as an element of the old legal order in media activity apparently loses its usefulness, especially in the light of the rules governing the new virtual space. At the same time, this institution, due to its “liberal” character in the area of rationing, still remains an attractive way of regulating the press market, dictated by public interest considerations²⁵.

IV. Conclusions

The institution of the register of publishing activities should be treated in a similar way, which, as an element of the old legal order in media activity, seems to lose its usefulness, especially in relation to the rules governing the new virtual space. At the same time, this institution, due to its “liberal” nature in the area of rationing, remains an attractive way of regulating the press market, dictated by reasons of the public interest.

²³ *De Haes and Gijssels v. Belgium*, judgment of the European Court of Human Rights of 24 February 1997, Reports 1997-I, pp. 233–234, § 37.

²⁴ *Thorgeir Thorgeirson v. Iceland*, European Court of Human Rights judgment of 25 June 1992, Series A No. 239, p. 28, § 63; *Bladet Tromsø and Stensaas v. Norway*, [GC], No. 21980/93, Reports 1999-II, § 62.

²⁵ K. Chałubińska-Jentkiewicz, *Rejestracja jako źródło prawa do prowadzenia działalności wydawniczej w nowych warunkach technologicznych*, [in:] *Między Klio a Themis. Księga dedykowana Profesorowi Jackowi Sobczakowi*, eds. K. Kakareko, T. Wallas, J.W. Adamowski, Warsaw 2016.

The rapid development of modern technologies of processing and transmitting information has created opportunities to offer and provide services through ICT devices. Any attempt to normalize some issues related to the provision of electronic services, which are associated with the development of new technologies, is associated with the opposition justified by the freedom of speech and the means of social communication. Legislation encounters difficulties in defining the concepts and responsibilities of the entities providing such services. The dynamic development of services specific for the information society requires constant updates and adaptation procedures. Nevertheless, the basic term used to determine the scope of application of the Act is an “electronically supplied service” or “information society service”. Generally speaking, this term covers all services provided by means of ICT systems, without the need for the simultaneous presence of entities involved in this process. Data transmission between these entities, the service provider and the recipient, takes place via public telecommunications networks. Services provided electronically include a wide catalogue of economic activities carried out in the mode of connection with an IT (on-line) network. These can also be search engine services, hosting services in the form of a *Computing Cloud* or creating a blog. As part of this transmission, digital content is often processed. Therefore, in such conditions, it seems necessary to specify the rules determining the scope of liability depending on the service or its subject. While the technical aspect of the service provided should not be decisive for this distinction due to the principle of technological neutrality, interference in the subject of the service, its nature and type of impact on the transmitted content – the information – will shape different rules of responsibility. It should be noted that if a specific issue is not regulated by the provisions of the Act on the provision of electronic services, the general provisions regarding contractual obligations shall be applicable. However, in the light of the ever-new obligations of telecommunications entrepreneurs (e.g. search engine operators, *Computing Cloud* operators or other digital service providers) related to the development of the regulatory sphere of cyberspace, there is a tendency to disperse responsibility for network activities of a different nature to the intermediary service providers. Then we deal with the so-called Secondary Liability of Internet Service Providers (which term covers many different types of claims) which not only may become a way of resolv-

ing the issue of determining responsibility for online activities, but it may be a new approach in determining what cyber responsibility is at all. Thus, the blog register becomes justified in the light of the Art. 31 sec. 3 of the Polish Constitution.

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