

Digital divide in times of merging law



Michael Schmittmann
Heuking Kühn Lüer
Wojtek
Düsseldorf

Parents of adolescents have known for quite some time what analysts are now providing statistical evidence for: This generation of young adults no longer joins their elders in front of the television set, at one point considered the traditional family meeting place, which had replaced the bonfires of our ancestors. They do not read their parents' newspapers, either. The so-called churn rate, that is the cancellations to subscriptions of cable network providers and newspaper publishers, remains at the same level, for example in Germany at between 3% to 5% per year. The network generation gets their knowledge from the Internet; they receive their TV content through IPTV, as in the case of Swiss IPTV service Zattoo that started out in quite sensational manner; knowledge is found online at Wikipedia, while Encyclopedia Britannica or Brockhaus – both traditional print market products – have become a thing of

the past and which have both in the meantime discontinued operations. Preset series of programmes, meaning somebody else's choice, are no longer accepted. This social phenomenon is called the digital divide, even though, because of current demographics, users of the old media (baby boomers) will remain strong for decades to come. In addition, mobile mass communication, including entertainment (mobile TV) is becoming a converged product.

The social divide, which presents a number of educational and social problems – none of which can be discussed here – also presents some extremely difficult legal challenges for enforcement of laws. If each and every web TV provider would need to be licensed before they could begin operations, if the content were to be subject to regulations even more stringent than they are already – who would care in a global, virtual Internet world that can simply not be filtered technically? All the same: Our legal framework has seen a few improvements over the last few months, which are attempts at staying abreast of the technical and social development. However, initially they relate to traditional media technology.

1. European level: new Directive on audiovisual media services

For one, on a European level the Directive regarding audiovisual media services must be mentioned, which was adopted by the European Parliament on November 29 2007 (AVMSD).

The scope of application of the Directive is defined by the term audiovisual media service. European legislators thus decided to take a technology-neutral approach, because for an audiovisual media service the technology used for the transmission is no longer the main concern. The new Directive includes services provided by electronic communications networks within the meaning of Article 2 (a) of the Framework Directive (2002/21/EC) the content of which is moving images, and thus, in particular, relates to new opportunities in broadcasting such as IPTV or webcasting. Few audio services such as radio services, however, continue to be excluded from the scope of application of the new Directive. Within the audiovisual media services, the Directive distinguishes between television broadcast and on-demand audiovisual media service (Article 1 (e) and (g)). Television broadcasts fall under the scope of the Television Directive that has been in effect until now, meaning classic television broadcasts. As opposed to the Television Directive, the new Directive introduced new content criteria with the intent of categorising a service in the regulatory structure and no longer applies technical criteria. Audiovisual media services on demand are at the same time most likely characterized as being video on demand services, but it is conceivable that in future even more application models will become available.

Media

Following up on the new scope of the application, the Directive now provides for graduated regulation. Along with the transmitting state principal (country of origin) and the general requirements as they concern advertising, the general provisions governing all audiovisual media services also include new rules such as the application of media service providers to make information accessible (Article 3 (a)) and the widely controversial product placement rule (Article 3 (g)).

These are followed by special provisions for audiovisual media services on demand and for television programmes. There are only basic rules when it comes to defining the content of audiovisual media services on demand, which are limited to the protection of minors and promoting European works. In comparison, television broadcasts are subject to significantly more stringent rules, such as the majority of those known from the Television Directive. The rules governing advertising have been deregulated to a great extent. In addition, the much debated product placement ruling only partly found its way into the new Directive. As opposed to the total ban of surreptitious advertising in case of product placement, the viewer must be informed of the existence of product placement and the product being advertised may neither be disproportionately emphasized nor may there be any direct invitation to purchase the product. However, the basic principle of prohibiting product placement remains in place. The Member States merely provided for the possibility to allow product placement in certain very specific exceptions.

2. National level: platform regulation

A second important example for the pending improvements is that for the first time platform providers are being regulated outside of regulations purely meant for the telecommunications industry. The idea is to assure that the rules governing plurality and safeguarding the competition on a horizontal as well as on a vertical level are not drawn out to the point of absurdity by today's decisive players, which the law traditionally reserves for application to content providers. The individual programme provider, when compared to the platform provider with its sales and distribution infrastructure, its packaged services options and its means of controlling access, has in the meantime taken on a much weaker position. In Germany, the new Interstate Broadcasting Treaty applicable for the German states has for the first time addressed national rules concerning platform operators:

Included are all platforms, irrespective of their technical transmission type and capacity, meaning it includes satellite, terrestrial receivers, broadband cable and IPTV. Suppliers of online software-based platforms offering IPTV without a guaranteed band with DTH, however, are now only included if they hold a dominant market position. In future, it will still be permitted to operate a platform without a licence. What is new, however, is that the platform must be registered with the competent state media authority at least one month prior to going into operation. In addition, the platform operator must at least satisfy the same requirements as broadcasting stations. Also, the platform operator is no longer completely at liberty when it comes to allocating its transmission capacities, since it will be required to observe certain allocation requirements which are meant to ensure plurality of opinion.

The new Article 52c Interstate Broadcasting Treaty ensures that platform operation is non-discriminatory. In this manner, any broadcasting station is to be guaranteed access to the platforms as essential facilities. What is new is the expanded area of protection which includes manufacturers of digital broadcast receivers. Often, they depend on their set-top boxes being certified by the platform operators in order to be able to compete in the market. In the past, such certification had in some cases been denied by platform operators or been drafted in a discriminatory manner (for example, in the pending case SES-Astra / entavio brought before the Federal Cartel Office in Germany). The amended Interstate Treaty can now be applied to such cases of discrimination of set-top box manufacturers in media law. What can now be expected is that this additional legal path will enhance the manufacturers' prospects of success, because the competent state media authorities are especially obligated to ensure plurality in the field of media and know exactly how strong the influence of technical requirements on fair competition can be.

These examples demonstrate: Media lawmakers are doing their utmost to find answers to the latest questions. This shows yet again that media law in all of its diversity can certainly not be considered static or still-standing subject matter.