

The Spanish Audiovisual Sector facing digital technologies

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Abstract. The audiovisual sector is complex because it involves the activity of different industries related to content production, telecommunications, media, as well as the Internet and services of the Information Society. The emergence of new technological changes resulting from the digitization process and the convergence of information technologies and telecommunications in connection with the storage, processing and distribution of information are creating new challenges within this sector. The *EU Audiovisual Media Services Directive*, as the main instrument of the European audiovisual regulatory policy, calls on Member States to reform their legislation on this field with the aim of harmonizing the different regulations regarding audiovisual sector. Until December 2009, Spain has time to transpose into national law the EU Audiovisual Media Services Directive. The regulatory framework of the audiovisual sector in Spain could be defined as huge, disperse and obsolete. However, the Spanish government is going to present in a few days a general regulation on that issue. This article pretends to provide an overview of the major challenges of the Spanish audiovisual sector as a result of the convergence of platforms, services and operators in light of new regulatory changes.

Keywords: Audiovisual Media, digital content, intellectual property.

1 The EU Audiovisual Media Services Directive

The *EU Audiovisual Media Services Directive¹ (AVMSD)*, as the main instrument of the European audiovisual regulatory policy, calls on Member States to reform their legislation on this field with the aim of harmonizing and reforming the different regulations regarding audiovisual sector. The Audiovisual Media Services Directive provides a more flexible but general regulation in comparison with Television

¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Without Frontiers Directive (TWF)². The new rules respond to technological developments and represent the opportunity to improve common minimum standards in Europe for traditional broadcasting³ and emerging on-demand audiovisual media services. It is crucial, especially in order to avoid distortions of competition, to improve legal certainty, to help the internal market, and also to safeguard certain public interest.

In this regard, the directive attempts to preserve cultural diversity, protect children and consumers, safeguard media pluralism, combat racial and religious hatred and guarantee the independence of national media regulators.

The directive maintains the basic principles of the TWF directive⁴, although it modifies the following aspects [1]:

- includes new media services, such as video-on-demand, commercial services provided over the Internet or mobile phones. But it excludes: any form of private correspondence (e-mails), electronic versions of newspapers and magazines or services whose principal purpose is not the provision of programmes (websites that contain audiovisual content in an accessory manner);
- facilitates more flexibility in the timing and scope of advertising spots, establishing a limit of twelve minutes per hour with the possibility of more frequent but shorter breaks; and
- allows product placement in a programme. Only three exceptions to product placement are fixed by the directive: news, current affairs broadcast and children's programmes.

In short, the AVMSD Directive provides the key concepts on audiovisual regulation, based on the objective of convergence of technologies, businesses, contents and services.

2 The Spanish Audiovisual Sector

2.1 Legal framework

There is not in Spain a general law regulating audiovisual communication services. Spain has until December 2009 to transpose into national law the EU Audiovisual Media Services Directive (AVMSD). The regulatory framework of the audiovisual

² Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (updated in 1997 and 2007).

³ Television broadcasting includes: analogue and digital television, live streaming, webcasting and near-video-on-demand.

⁴ Concerning to: principles of jurisdiction, freedom of reception and retransmission, stricter rules possible, access of the public to major events, promoting the production and distribution of European Works, protection of minors and right of reply.

sector in Spain could be defined as huge, disperse and obsolete. Historically, regulations concerning broadcasting have been produced under governmental control, and it is almost impossible to obtain agreements of all the parties involved in order to pass a general law for the audiovisual sector [2].

The most important Spanish acts covering the audiovisual sector are:

- Act 25/94 of 7 June modifying law 22/1999 on the implementation of the TVWF Directive.
- Act 10/2005, on urgent measures for the promotion of digital terrestrial TV, liberalization of cable, and promotion of media pluralism.
- Act 22/2005, on Catalan Audiovisual Communication.
- Act 17/2006, on national public radio and TV.
- Act 55/2007, on the Cinema Law
- Decree 1/2009, on urgent measures for the telecommunications sector.

For the purposes of this paper, we would like to comment briefly three of them:

The Act 17/2006, on national and public radio and TV

With this regulation, the Spanish government lost the opportunity to reshape the Public Service Broadcasting (traditionally based on a public service mandate). In practice, this regulation involved a “Dismissal Program” (ERE) in RTVE, affecting more than 1.000 public broadcasting workers.

Act 22/2005, on Catalan Audiovisual Communication

Within the sphere of Autonomous Regions, Catalonia has done its homework in terms of regulating the audiovisual sector by proposing a mixed model of public service broadcasting (public and private broadcasters coexist). On the one hand, private broadcasters develop their activity under provisions made by art. 20 of the Spanish Constitution (audiovisual communication freedom) and not for being concessionnaire of a public service mandate [3].

Secondly, they designed a public broadcasting sector based on the general interest, and common values such as freedom of expression and information, the right of reply, pluralism, protection of copyright, promotion of cultural and human diversity, minors and consumers. Finally, they have an independent regulatory authority: the Catalan Audiovisual Council-CAC.

Decree 1/2009, on urgent measures for the telecommunications sector

The Spanish government approved this new legal instrument to manage the introduction of Digital Terrestrial TV (DTTV) and to limit media ownership. The switch-off of analogue terrestrial TV in Spain is planned at the beginning of April 2010. Apart from that, the government considered absolutely necessary to establish new limits regarding media ownership. The main objective is to perform companies

which could be adapted to the new scenario built by the decrease in advertising as a consequence of the transition from analogue to digital terrestrial television.

On 29 May 2009, the Spanish government approved a bill law on the funding scheme of RTVE. Nowadays, this fact is raising a wide debate within broadcasting sector because of the new rules concerning: (i) choosing a dual funding scheme: suppression of advertising spaces on public service broadcasting and establishing economic contributions for free-to view TV (3%), Pay TV and conditional access TV (1,5%); (ii) and avoiding TV operators to loose their license if they do not contribute with their taxes. They will be punished with general sanctions according to the tax system established in Spain.

Some problems could appear in case that private TV operators decide to increase their functions regarding public service mandate to the detriment of public broadcasting services.

However, the Spanish government led by R. Zapatero is going to present within a few days a general law regulating this field. The Ministry of the Presidency and the Ministry of Industry, Tourism and Trade are preparing the final legislative document to present it in the Spanish Parliament at the end of June 2009. Recently, some Spanish political parties, such as PSOE, PP, CiU and PNV supported some aspects of a motion proposed by ERC, IU and ICV. The aim is to force the Spanish government to present a General Law on Audiovisual specially taking in consideration the obligation to transpose the above mentioned AVMSD Directive.

The new legislative proposal will focus on the following aspects:

- reformulating public service broadcasting and its adequate funding;
- licensing procedures for broadcasters (automatic renovation of licenses after 15 years);
- private broadcasters may sell or lease their licenses (only 50%);
- fines around 1 million euros when: (i) public or private channels do not comply with the economic obligation to support Cinema without justification, (ii) channels exceed the period of time established for advertising (no more than twelve minutes per hour), (iii) channels modify their TV program schedule without a clear justification to do it (three days before, they should communicate TV programming changes to the public); and
- creation of the independent regulator authority to govern the audiovisual scene.

Looking at this picture offered by the audiovisual sector, we can conclude that successive governments have approved diverse regulations over the sector in order to solve concrete situations as a consequence of new technological changes occurred during the past years. Therefore, it seems to be clear the need to design Spanish audiovisual and media regulatory policy in order to avoid wrong and interested regulations on that field under government control. We cannot either forget the importance of this sector for societies, democracy, education and culture; in fact, it is one of the main arguments to justify the need of specific regulation.

3 Principal challenges regarding digital content production of the audiovisual sector in Spain

In Spain, almost two thirds of the population already access digital content as stated by the White Paper on Digital Content in Spain 2008 [4]. New ways of using network content are performing new business opportunities beyond the traditional models.

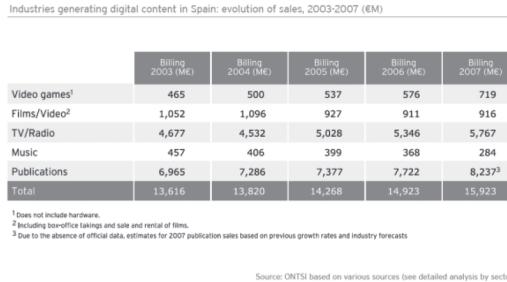


Figure 1: Industries generating digital content in Spain: evolution of sales, 2003-2007 (€M).
Source: White Paper on Digital Content in Spain 2008.

Figure 1 shows how a general growth in relation to the evolution of sales occurred from 2003 to 2007 regarding industries generating digital content in Spain. In general, foreign multinational companies are dominating the digital content industry in Spain. There is an international uncertainty with regard to new digital business models in the future as it is unpredictable to determine how patterns of use and consume will take place, specially linked with the use of the Internet.

The principal trends concerning audiovisual digital content are:

- The DTT development process is modifying the audiovisual market considering the extension of the technical distribution possibilities of television and the extension of contents and services that are accessible free of charge.
- The content of broadcast on the Spanish television is home-produced. The growth of foreign series and the migration to the Internet are affecting Spanish production. It has to deal with new online media and cheaper foreign products.
- The audience fragmentation is expected as soon as more channels are available to citizens. This situation will affect public operators on the market, as we mention above.
 - A strong growth is expected in television via mobile modality.
 - The migration to the Internet is affecting TV companies, aware of the interest of this channel and its possibilities. They are increasing offers of specific Internet services (theme videos and TV series broadcast via specific portals).
 - There are important challenges regarding infrastructure developments (extension of broadband, HDTV, the interoperability of devices...)
 - Consumers are expecting easy access and cross-platform availability.

4 The Pablo Soto's case: peer-to-peer technology on trial

During the last years, file sharing of copyright protected material, particularly peer-to-peer networks, has been an important threat to the established business models of the content industry. An increasing civil and criminal pressure against users of the Internet seems to be the strategy of the traditional content industry to face copyright issues as a consequence of new technological changes resulting from the digitization process and the convergence of information technologies and telecommunications. Peer-to-peer networks allow millions of users to share their music and film files through the Internet. Most of these files are copyright protected material, and their authors (music and film creators, software developers, publishers...) cannot protect their property from piracy. Some governments from several countries have taken different types of measures in order to fight against piracy⁵.

The US Congress Committee put Spain on its 2009 Piracy Watch⁶ list of countries with "alarming" levels of illegal file-sharing.

The Spanish Courts have ruled repeatedly that free music and film downloading is not illegal if it is not for commercial use. Music downloads for personal use is permitted. Spaniards pay special taxes on CDs, DVDs, memory cards... to compensate the music industry for its losses. In our country, the debate on that issue is performed by collecting societies led by SGAE or PROMUSICAE – to mention two of the most important ones – and service providers (Telefónica, Vodafone...). Spanish collecting societies demand a set of measures regarding the effective protection of the intellectual property in our country. Specially, they claim: (i) legislative changes to protect intellectual property against piracy; (ii) an agreement with service providers to fight piracy; (iii) respect for intellectual property from users using media educational campaigns; and (iv) governmental action leading piracy fight.

On the other side, interesting questions regarding the neutrality of the Internet and privacy are pointed out by users in order to preserve freedom over the use of the Internet. The perception that all the information available in the Internet is in the public domain, and so everyone can copy and use these materials – even when they are copyright protected –, seems to be a complicate challenge to deal with in the digital age.

4.1 Pablo Soto's⁷ case

Major music labels (Warner, EMI, Universal and Sony) under the umbrella of one of the most important Spanish collecting societies (Promusicae) went to court claiming 13M Euros from a Spaniard P2P programmer. For the very first time, the majors went

⁵ In Spain, the government worked on a code of good practices regarding piracy in the Internet and offenses against intellectual property law. Available at: <http://www.mcu.es/propiedadInt/MC/Mbp/index.html>

⁶ Available at: http://schiff.house.gov/antipiracycaucus/pdf/IAPC_2009_Watch_List.pdf

⁷ For further information about the case, see Pablo Soto's blog: <http://www.pablosoto.com/>

against a P2P software designer and not against users, performing a new strategy to tackle P2P file sharing. Civil and criminal courts in Spain are ruling decriminalizing illicit downloads on the basis of the existence or not of commercial purposes.

The main arguments of the majors were:

- His software (Piolet, Manolito, Blubster) allows people to share files over the Internet causing a loss of a substantial amount of earnings. In addition, this practice could be considered “unfair competition”.
- His software includes advertising, so he is getting benefits from them.

On the contrary, the arguments of Pablo’s legal team were:

- “He merely created software” but he cannot control what people do using these tools.
- He always accepted that he created the applications for commercial purposes, but without destructive intentions against the music industry.
- Majors music labels do not identify clearly which files are under copyright protection and why they do not use measures to protect these files.
- Business groups are trying to target program designers after several failed cases against users who downloaded music for personal use.

This case points out the existence of a decriminalized illicit P2P file sharing policy in our country.

5 Conclusions

The audiovisual sector in Spain continues reshaping public broadcasting and it is also implementing the digital transition process according to the convergence of technologies, platforms and services (traditional TV, internet TV, IPTV, web TV, TV on mobile phones and other mobile devices).

It is time to avoid the high control performed by the government in the public sphere regarding the audiovisual sector through a concrete regulatory framework for that field. We should keep in mind that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.

With regard to digital content, the main issue is the lower cost of online distribution. How to deal with this matter with respect to hard copy distribution, management of copyright online, piracy, protection of minors and cultural diversity are some of the most important challenges for the audiovisual sector.

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