
LEGAL FRAMEWORKS FOR THE PHYGITAL CONCEPT

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Abstract

This paper is providing an author's view on possible legal basis for the phygital concept with the aim to identify specific issues in application and define relevant legal relationships. With regard to their professional specialisation the authors have chosen the analysis of legal regulations governing the areas of public interest and their relation to scientific activities. The secondary aim of the authors is also to highlight the importance of defining the corresponding legal basis of the new phygital concept, also with regard to the content of legislation, which should correspond to the basic principles of protection of human dignity and social good, in accordance with the position of the Roman Catholic Church, which was expressed, for example, in the Pastoral Instruction on Social Communicative Tools – *Communio et Progressio*, quoting the Encyclical *Miranda Prorsus* of the Pope Pius XII. Selection of relevant legal acts was based upon particular principles of the phygital concept even though these do not need to be directly linked to other legal concepts. Our main aim was to prepare a legal analysis in relation to the overall dispute using a marginal index when choosing the governing law.

Keywords: jurisdiction, phygital, copyright protection, marginal index

1. Introduction

The basic assumption which can be applied to describe the phygital concept in the legal environment is directly linked to use of Internet technologies or digital space and new (online) ways of use of subjects of copyright protection. Literary works, scientific works, works of art, audible and visual recordings are being processed in a non-traditional way (designed for a third party). The suggested premise is more complicated because the use of the Internet, i.e. the general use of means of social communication intervene substantially in the field of legal and social development of humanity and seeks to change it according to the opinions of various interest groups, often deviating from the traditional values protected by the Roman Catholic Church. The Roman Catholic Church sees the social communicative means as cultural factors that have a role in history especially in the form of introducing revolutionary changes to trade,

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education, politics, journalism or inter-national relations. The purpose of using social media should be, in particular, to promote the good of human development, justice and peace in behalf of protecting traditional values, as it is stated in the Catechism of the Catholic Church, 2494, specifically the quote from the Second Vatican Council, *Inter mirifica*, no. 11. In view of the fact that the overwhelming majority of state institutions are based on civil law, the Roman Catholic Church seeks to influence at least the debate in the drafting of legal standards so that the future legislation would respect, in the spirit of the conclusions of the Second Vatican Council, the human dignity and the right to freedom of expression, religion and faith. The phygital concept cannot be perceived only by way of copyright protection as amended by the newly-enacted Copyright Act № 185/2015 Coll. with effect from January 1, 2016. In addition, other legal regulations will serve as a relevant legal basis especially when the phygital concept is applied in the 4th industrial revolution or in other business fields. In these cases the individual legal framework will be supplemented by the Labour Code № 311/2001 Coll., the Act on Collective Bargaining № 2/1991 Coll. or the Commercial Code № 513/1991, etc. In relation hereto we will have to be particularly careful when determining the governing law either in the field of copyright protection, employment law or commercial law, especially with regard to a multinational character of the phygital concept. Such a process might involve certain controversies when it comes to determining the governing law for a particular legal relationship including a third party. Therefore we are going to carry out a case study in order to specify a marginal index e.g. in the field of labour relations when a so-called virtual lawyer is entering in an employment agreement with a third party.

2. Determining the governing law for institutes of the phygital concept

There is a point of controversy occurring between the phygital concept and contemporary principles of national jurisdictions as national legal regulations are mostly based on a territorial principle. The phygital is about creating an ecosystem between the brand and consumer across physical and digital spaces, then drawing on the best from both in order to expand beyond a one-dimensional brand communication. The phygital concept is not limited by the state borders, political structures or physical nature of objects. There are already available various technology-driven phygital devices that users can use for the interaction, for instance QR codes, augmented reality, 3D, Sixth Sense, Google Glass, Apple Watch. By the theory of state and territorial application of legal regulations, the phygital concept promotes creation of a unique digital market and digital society. A unique digital market and products implementing the phygital concept are based upon mutual relations across national boundaries or national legal regulations. Therefore they preclude automatic use of a presumed national jurisdiction causing ambiguities in relation to a relevant marginal index and the governing law. The phygital concept challenges traditional understanding of legal application given by the above mentioned territorial effect of jurisdiction

and leading to a future conception of multinational legal regulations. While the standard legal approach stems from physical understanding of the world, the phigital concept respects its ambivalent part and these missing (national) restrictions without time and space limitations [1]. Unless relevant multinational regulations are enacted – outlining legal framework of multinational legislation while respecting a new vision of the world on a unique digital market also with regard to the principles that are protected by the Roman Catholic Church – we need to apply traditional and accurate legal regulations. Therefore we will have to determine a relevant criteria to identify a marginal index and apply it to particular legal relations. Such a procedure shall take into consideration specific features of particular legal relations, i.e. it would be easier to determine the governing law when dealing with labour relations rather than the Internet and digital (non-tangible) services. The search for the envisaged necessary legal framework has one more significance in the very nature of the relevant legislation. It is the form of its approach to the protection of the fundamental human rights and freedoms of the individual, e.g. protection of the rights of a natural person in the performance of work for the employer. Videlicet, the determination of the corresponding legal framework allows the Roman Catholic Church and the individual themselves to invoke the protection of their rights when violated. Doubts about the applicable legal order not only lead to the loss of their own rights but also to doubts about their own conduct and the correctness of their conviction. Already thirty years ago, the *Communio et Progressio* – the Pastoral Instruction stated that „*the latest inventions in the field of social communication open up new possibilities for the people which are beneficial for the evangelical mission*“, and, at the same time, while using social media the Roman Catholic Church reminds us that it is „*not enough to only use them to disseminate the Christian message, but the message itself must be integrated into this new culture, created by the modern communication*“. We therefore consider it very important to ensure that the legislation and morals (Christian faith) are in harmony, because the social communication means not only strongly affect what people think about life, but to a great extent, also the human experience itself has become a media-driven experience.

Determination of the governing law stems from application of the provisions of the Article 3 of the Regulation ROME I in the matter of selection of the governing law (Art. 3 and 4) as amended by further national legal regulations (e.g. the Slovak Act № 97/1963 Coll. on the international civil law). Contractual parties may select a specific legal regulation with certain restrictions while respecting cogent provisions the validity of which cannot be excluded [2]. Selection of the governing law shall not result in labour protection of an employee being neglected. Such selection may be implied or express (depending on a case) and contractual parties can proceed hereto upon signing the agreement or later. We also distinguish so-called *dépeçage* when contractual parties opt for a specific law being applied to the whole contract or a part hereof (autonomous contractual obligations). Providing a specific governing law cannot be applied. Contractual parties are advised to use marginal indices when selecting an

appropriate law order as amended by the Art. 4 s2 (governing jurisdiction of a contractual party which shall perform contractual obligations), i.e. the company seat of the provider of digital services. It is also recommended to apply the Art 4 s4 of the Regulations ROME I. A product within the phygital concept is specific for its particular features and therefore the governing jurisdiction shall be determined by the closest relations with the given country. Such relations are closely linked to multinational features of the phygital concept. Even though various factors may be taken into consideration (e.g. nationality, residence, place of signing, etc.), the seat of the company providing digital services is considered as a key marginal index (depending upon circumstances of the case and ruling of the national court) [3].

2.1. Case study in determination of the governing law for a virtual lawyer

A so-called virtual lawyer or virtual provision of legal services is based upon non-existence of the company seat, i.e. a place (a lawyer's office) where the legal services are being provided by an advocate or authorised persons (a trainee) in accordance with law (e.g. law on advocacy). Such provision of services is being carried out solely through an online platform. There is no personal contact between a client and an advocate, but the overall legal proceeding, i.e. submitting a case, problem solving, collection of evidence or any legal advice is being provided through IT services. Thanks to multinational digital services, the legal profession does not focus only on national clients but deals with different types of multinational contracts. For example, a virtual lawyer enters into an employment agreement on a national level in order to ensure administrative collaboration (e.g. dealing with national governmental bodies and institutions). There is certain legal ambiguity with regard to the jurisdiction governing the given labour relation (i.e. which jurisdiction will prevail in case of disputes).

The field of labour relations as amended by the Article 8 of the Directive ROME I shall be governed by the jurisdiction of the state where an employee carries out his/her work duties. The dispute may arise, however, if these duties shall not explicitly be related to a particular state, i.e. both parties would have chosen a different jurisdiction for a given labour relation (or work duties in different states with regard to a national character of work or a product including the phygital concept) in contrast to application of the Article 8 of the Directive ROME I. It would be necessary to consider what jurisdiction shall be finally applied while respecting the principle of employee's protection. It is worth noting that the Directive ROME I enables splitting of a contractual state. The employment agreement may be regulated by different laws. Possible disputes could be prevented or handled by appropriate selection of the governing law in accordance with the Article 3 of the above mentioned Regulation. It is feasible to apply arbitrary law for different parts of the contract while selecting such governing law for the essential part hereof to correspond with the majority of individual employment agreements as the phygital concept can be used

simultaneously in different states. There are two relevant facts. The Regulation ROME I shall be generally applied. It can be implemented in labour relations with high probability of legal disputes. It has extensive application as it exceeds a traditional definition of 'a foreign element'. As amended by the Article 3 s3 of the Regulation such can be applied to agreements or labour relations where any other elements are situated in a different country as the prevailing jurisdiction (single country contracts) [4]; a possibility to amend or modify the selected governing law and a possibility to split a contractual statute. The provision of the Article 3 s3 of the Regulation ROME I enables modification of the governing law at any time. It enables settling of any disputes arising out of different jurisdictions. Contractual parties to an individual employment agreement could possibly modify the governing jurisdiction of the given agreement by mutual consent and *post facto* select a different jurisdiction for specific parts of the agreement to eliminate any disputes.

Nevertheless it is worth noting two provisions of the Regulation ROME I: (i) as amended by the Article 3 s3 the governing jurisdiction does not apply to cogent law in case of single country contracts (see above) where all the contractual elements are bound hereby apart from the selected governing jurisdiction and (ii) as amended by the Article 8 s1 selection of jurisdiction in individual employment agreements cannot preclude employee's protection ensured by cogent law which would have been applied in case of absence of law pursuant to the Article 8. As selection of governing law is restricted by application of cogent law which may differ from country to country, it is not possible to prevent any legal disputes resulting from different jurisdictions. Therefore it would be recommended to implement the provision of the Article 8 s1 of the Regulation ROME I as *lex specialis* to guarantee the principle of employee's security.

2.2. Determining the governing jurisdiction on the Internet

When determining the governing material law on the Internet, the literature states various theories. By the emission theory the place where a physical server is located, i.e. a subject matter of protection through which the content is being communicated, determines the jurisdiction [5]. By the communication theory, however, the jurisdiction is determined by the place the Internet content is being made accessible [6]. It is challenging to prefer one of the theories as each of them contains several unsolved issues. In case of the former, we are facing a phenomenon of data delocalisation, i.e. only one data file can be physically present on different servers at once. Every server can download only a part of the file (e.g. back-up on different servers at once). The communication theory states that any territory or any state where the subject matter of protection is perceived could be regarded as a point of accessibility. Therefore this theory can easily be 'out of reach' and abused for a speculative claim [6].

In decision-making we can use the court ruling of the European Court of Justice in the matter of Titus A. J. Donner (C-5/11 from June 21, 2012). The case dealt with determining the governing law in the matter of non-authorized distribution of a copyrighted work. The European Court of Justice ruled that „*public distribution is characterised by a series of operations which stems from signing a Contract of Purchase to performance for the benefit of wide public.*” Although the European Court of Justice ruling does not draw an unambiguous answer when determining the governing law, it helped to define a certain premise and that is „*traders are liable for any operation they carry out by themselves or on their account and which generates public distribution*” in a member state where the goods are protected by copyright. Sellers can also be held liable for any operation of the same character but carried out by a third party if they could have been aware of acting of a third party. When determining the governing law the European Court of Justice also applied the Article 8 of the Regulation of the European Parliament and the Council of Europe ROME II (№ 864/2007 from July 11, 2007) along with the Article 5 of the Bern Convention on protection of literary works and works of art (from September 9, 1886) which set forth that norm collisions are governed by *lex loci protectionis* principle. The Court alleged that ‘public distribution’ is amended by the Article 4 s1 of the Regulation of the European Parliament and The Council of Europe (№ 2004/48/EU from April 29, 2004) on enforceability of intellectual property rights.

Based upon the above mentioned legal analysis we can assume that the primary issue of the phygital concept emerges when choosing law rule to govern a given relation. Consequently national jurisdictions of states can be applied with regard to specificities of a given product (a digital service).

3. Specific legal regulations in the Slovak jurisdiction

Providing the Slovak jurisdiction is regarded as the governing law, we may take into consideration specific legal regulations and rules. Primarily we are referring to the Constitution of the Slovak Republic – the Act № 462/1992 Coll. (hereinafter referred to as ‘The Slovak Constitution’) as the main source governing all the related topics and issues including basic human rights and freedoms. From this point of view we should certainly apply the Article 19 s3 of the Slovak Constitution governing protection of individual privacy („*Everybody has a right to protection against any unlawful collection, publication or any other abuse of personal data*”) or the Article 43 of the Slovak Constitution defining constitutional protection for freedom of scientific research and protection of its outcomes („*Freedom of scientific research and works of art shall be ensured. The law shall protect all the rights related to any outcomes of creative intellectual activities*”). Furthermore there are other relevant legal regulations, e.g. the Copyright Act № 185/2015 Coll. (hereinafter referred to as ‘Copyright Act’) for the field of copyright protection or the Act № 122/2013 Coll. on protection of personal data (hereinafter referred to as ‘Data Protection

Act') along with the Civil Code № 40/1964 Coll. providing the right to privacy and access to information by third parties (personal data of a natural person).

Nevertheless, tools of copyright protection are being used in a rather contradictory manner, i.e. the copyright regime is adapting new methods to its own normative text. A lot of files which were made available online to wide public included subjects of copyright protection and these were often published without express consent of holders of copyright or any other claims related hereto. Such unlimited and free access to subjects of copyright protection represented considerable danger for the entitled holders of copyright. There were two solutions of any disputes arising out of copyright protection on the Internet. First the concept of fair use enabled copying authors' works on the Internet while sending them from one computer to another by way of PC networks. Secondly copyright protection was extended in order to ensure copying authors' works by way of webpages, blogs or any other publicly accessible places on the Internet [7]. The countries differ considerably in the solutions accepted, also with regard to respect for freedom of expression as part of the Christian faith itself. Many of them including Slovakia enacted a new type of use of copyright works to cover the specific situation (see the new Copyright Act effective on January 1, 2016). Therefore we may assume that copyright protection takes into consideration the phygital concept while respecting rights and obligations of the parties hereto. The new Copyright Act defines new terms from the practice, i.e. the Paragraph § 28 redefines the term of broadcasting or retransmission through electronic communication networks while governing collision of legal regulations of different jurisdictions in the field of duration of property rights as amended by § 32 s 8.

Apart from the Copyright Act the phygital concept will be regulated by the Act on protection of personal data governing not only personal data, but also specific processes including rights and obligations of the parties hereto [8]. In relation to product features, there are other specific legal regulations in the Slovak Republic, e.g. the Act № 435/2001 Coll. on patents or certificates of origin (the Patent Act), the Act № 517/2007 Coll. on utility designs, the Act № 444/2002 Coll. on designs and the Act № 506/2009 Coll. on trademarks, etc. [9].

4. Conclusions

Determining a legal basis for the phygital concept, i.e. products and services which are based upon its principles represents a challenging task as every field of business or services is being governed by specific legal regulations. Therefore the paper identifies application problems in relation to determination of the governing law as basic legal protection while presenting relevant legal regulations in the Slovak jurisdiction. Their implementation is determined by unique features of these products and services [10]. For instance, in case of the above mentioned virtual lawyer the Act on Advocacy is to be applied along with the Act № 311/2001 Coll. of the Labour Code when it comes

to use of biometric data, e.g. employee attendance management by way of DNA, fingerprints or iris recognition.

At the same time, however, we must also draw attention to the incorrect dimension of the issue under consideration. Education and formation in connection with the Internet and new technologies must be part of comprehensive educational programs on social and communication media that focus on members of the Roman Catholic Church. Young people should be educated to become not only good recipients (readers, listeners, viewers), but to be able to actively use all kinds and means of the global language of social communication in accordance with Christian faith for the spreading of good, and, at the same time, be able to accept the possible liability for their actions if they are in conflict with national law (e.g., spreading hoaxes, although in good faith). Therefore in some cases, due to lack of intellectual maturity and education, young people behave in a way that is inconsistent with national law and do not realize their fault (for example damage of a one's reputation), as the Catechism of the Catholic Church reminds in already mentioned 2494. Young people have to learn how to deal with the world of cyberspace, they have to know, according to sound moral criteria, to evaluate everything that they find and learn and to use new technologies for their complex development and for the good of others [11].

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