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The Issue of Passive Sponsorship in the Media

KEY WORDS

sponsorship, media, promotion, broadcaster, sponsor, media law

ABSTRACT

The legal regulation of sponsorship in media does not cover passive sponsorship, but concerns only active sponsorship – a disadvantage to both broadcasters and recipients. Passive sponsorship occurs when media is “used” for promoting a sponsor. However, its party is not the broadcaster, but other entities – the sponsor and e.g. the organizer of the broadcast event. The author proposes criteria for distinguishing between active and passive sponsorship. The first concerns the contractual obligations of the broadcaster, the second is the participation of the broadcaster in the promotion of the sponsor. The basic notion *de lege ferenda* is consistency of the legal regulation concerning promotion in the media with the law on other forms of promotion.

The sponsorship in the media serves an important function both in a social and in an economic sense. Therefore, a legal regulation which concerns it is of significant importance to the interests of both recipients and broadcasters. Some forms of sponsorship, however, remain beyond the scope of the legislator. There are such kinds of sponsoring involvement which can be jointly referred to as so-called passive sponsorship. It is useful to use the term of passive sponsorship to differentiate it from its other forms, which are called active sponsorship. It is the latter which, unlike the former, is regulated under the law of both Poland and the EU.

The purpose of these considerations is to define both the practical and the ensuing legal issues of passive sponsorship. It is meant to draw the attention of those interested in the “world of media”, in particular the legislator and those who adhere to the law, to the object of the issue and its importance. It will also allow making a *de lege ferenda* proposal. For it seems that the legislation in force, both in Poland and in the European Union¹, is incongruous with

¹ A. Jaskiernia, “Ewolucja standardów europejskich relacjonowania ważnych wydarzeń przez media elektroniczne” [Evolution of the European standards of covering important events by the electronic media], *Studia Medioznawcze* 2007, No. 2, p. 12 f.

the problems ensuing from the practice of sponsorship activity in electronic media. These issues are also worth attention due to the functions the sponsorship serves.

Sponsorship in the selected sources of media law

The definitions of sponsorship contained in the Polish (and European Union) legal regulation, pertaining to both media and any other activity, do not specify the notion of sponsorship in the form of an exhaustive designation of key features of this contract relationship *in genere*. They only define which activity will be considered as sponsorship, as defined in a specific act of law, for the purposes of the legal regulation contained therein. So, for instance, the definition of sponsorship incorporated into the Broadcasting Act should be regarded as a definition of “television (radio) sponsorship” only as defined in, and for the purpose of, that act.

The 1992 Broadcasting Act² (BA) contains in art. 4 section 18 a definition of sponsorship, according to which it is “any contribution made by an entity not engaged in providing media services or in the production of programmes, to the financing of a media service or programme with a view to promoting its name, business name, image, activities, product or service, trade mark or any other proprietary identification”.

Some of the treaties ratified by Poland also contain definitions of sponsorship. The European Convention on Transfrontier Television³ (further referred as the Convention) defines sponsorship as “the participation of a natural or legal person, who is not engaged in broadcasting activities or in the production of audiovisual works, in the direct or indirect financing of a programme with a view to promoting the name, trademark or image of that person: (Art. 2 letter g).

A definition of sponsorship is also included in the Directive 2007/65/EC of the European Parliament and of the Council of 2007⁴ amending the Council Directive

² Act on radio and television broadcasting dated 29 December 1992 (Pol. *Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji*), *Dziennik Ustaw* [Journal of Laws] (*Dz.U.*) 2011, No. 43, item 226 (consolidated text); amended: *Dz.U.* 2011, No. 85, item 459, No. 112, item 654, No. 153, item 903, No. 160, item 963. English quotations from: http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/broadcasting_act_28022013.pdf [accessed: 23.09.2013].

³ European Convention on Transfrontier Television (Pol. *Europejska konwencja o telewizji ponadgranicznej*), Strasbourg, 5.05.1989, *Dz.U.* No. 32 item 160; amended: *Dz.U.* 2004, No. 28 item 250; http://www.krrit.gov.pl/Data/Files/_public/Portals/0/regulacje-prawne/rada-europy/1.pdf [accessed: 23.09.2013].

⁴ 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, *Official Journal of the European Union (OJ) L 332/27, 18.12.2007; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF* [accessed: 23.09.2013].

89/552/EEC of 1989, known as the “Television without Frontiers” (TVWF) Directive⁵. According to Art. 1 item k of the 2007 Directive, “‘sponsorship’ means any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products”.

National “media” acts of the countries of continental Europe which belong to the EU include definitions of sponsorship which reflect the definitions contained in the Convention and in the Audiovisual Media Services Directive (AVMSD). It is the result of incorporating the provisions of this directive into the domestic legal orders of member countries.

In the United Kingdom, based on the Section Nine: “Commercial References in Television Programming” of the Ofcom Broadcasting Code⁶, the notion of sponsorship can be derived from the definitions of “sponsored programming”, “sponsor”, “sponsor reference”, and “costs” contained therein. Here, sponsorship is meeting some or all the costs of programming (a programme, block of programmes, channel) by a sponsor, who is “[a]ny public or private undertaking or individual (other than a broadcaster or programme producer)”, in return for “promoting its products, services, trademarks and/or activities”. Costs mean funding “the production or broadcast of the programming” in any part.

In the legal context ensuing from the provisions of the BA, definitions of sponsorship contained within Polish codes of conduct are in use. Thus, e.g., Art. 3 letter c of the Advertising Ethics Code (Pol. *Kodeks Etyki Reklamy*)⁷ stipulates that sponsorship is a “kind of advertising created as a result of an agreement, in which the sponsor provides, for its own benefit and that of the sponsored entity, by agreement, any support or co-support for the purpose of ensuring a positive connection between the image of the sponsor, its brands and other identifying marks and products, and a sponsored event, activity, product or a specific

⁵ 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 amended by the Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, *OJ L 298*, 17.10.1989; L 202, 30.07.1997.

⁶ Issued by The Office of Communications (Ofcom) which is also the regulator of electronic media in the United Kingdom. Therefore the broadcasting activity code it drew up is known in the UK as The Ofcom Broadcasting Code. The Section Nine: “Commercial References in Television Programming” of this Code contains a legal regulation of radio and television sponsorship. Adopted for use by the Ofcom in February 2011; see: www.ofcom.org.uk [accessed: 27.11.2012; 23.09.2013].

⁷ *Kodeks Etyki Reklamy*, p. 3, adopted for use on 4 June 2004 by the Union of Advertising Associations (Pol. *Związek Stowarzyszeń Reklamy*) based in Warsaw, and recommended by the Chapter of International Advertising Association (IAA) in Poland; http://iaa.org.pl/public/themes/iaa/data/kodeks_etyki_reklamy.pdf [accessed: 27.11.2012; 23.09.2013].

entity; media patronage is not sponsorship within the meaning of the Code if it is limited solely to the information about a given event”. In general, however, codes of conduct which are in use in Poland contain broad definitions of advertising, covering all forms of promotion, including sponsorship and – more precisely – sponsorship statements. For example, the Code of Conduct in the Field of Advertising (Pol. *Kodeks postępowania w dziedzinie reklamy*) states in its introductory provision that “the term advertising is used in its broadest meaning, encompassing all forms of advertising products, services, or institutions regardless of the medium used”⁸.

In conclusion, it has to be assumed that in the view of the provisions of the BA and the Convention, the interesting for us sponsorship in media is funding a media service by a sponsor who is not the broadcaster, understood as a media service provider, or producer of the object of that service, or programme, broadcast, or other message, in return for the promotion of the sponsor by the media service provider (broadcaster)⁹.

The issue of active and passive sponsorship

The acts of law indicated above define and regulate that form of sponsorship which is sometimes called active sponsorship that is, sponsoring a broadcast (media service) or other message. Its key aspect is that the broadcaster is a party to a sponsorship agreement. A television (radio) station is an active participant of the sponsorship process, one who takes a direct part, resulting from its own initiative, in the creation of this process. Whereas it is a non-essential circumstance if a programme distributed under the sponsorship agreement was produced by the station that is a party to that agreement by means of its own staff or entities external to that station which it employed¹⁰. What counts here is the fact itself of a sponsored broadcasting of a programme (e.g., emission of a serial produced by another TV station, the purchase of which is sponsored in return for mutual services). Therefore, the notion of “active sponsorship” should be understood as sponsoring of media services, such as programmes,

⁸ *Kodeks postępowania w dziedzinie reklamy*, document adopted for use by the Chapter of IAA in Poland. Its content is based on the provisions of the International Chamber of Commerce (ICC) Code; <http://iaa.org.pl/o-reklamie/kodeksy/kodeks-postepowania-w-dziedzinie-reklamy.html> [accessed: 27.11.2012; 23.09.2013].

⁹ For more see: I.B. Mika, *Sponsorowanie w radiu i telewizji* [Sponsorship in radio and television], Kraków 2005, p. 25 f.

¹⁰ L. Stecki recognises as one of the constitutive elements of active sponsorship the fact that that “a radio or television station, which is directly involved in sponsorship, broadcasts or emits a programme stipulated in the sponsorship agreement that it produced by means of its own personnel and/or employed outsiders”; cf. L. Stecki, *Sponsoring* [Sponsorship], Toruń 1999, pp. 462–463.

transmitted by a television (radio) station, performed by an entity (the sponsor) different than the media service provider (broadcaster)¹¹.

It is different in the case of passive sponsorship in the media, the best example of which is a transmission of a sponsored event. The subject of the sponsorship agreement itself is the promotion of the sponsor's marks at the location of the event such as a sporting or cultural event, which will be subsequently transmitted or covered by the television (radio) station. The subject may also be a service by the holder of the broadcasting rights who "inserts" a statement promoting the sponsor into the message (signal) of such a transmission, or the so-called virtual sponsorship which will be discussed below.

A crucial difference between passive and active sponsorship lies in the parties to the sponsorship agreement. They are the sponsor and the organiser of the event, or the entity which makes broadcasting rights available to the broadcasters. The latter, not being a party to the sponsorship agreement, becomes a passive participant of the process of promoting the person of the sponsor.

Practical and legal aspects of passive sponsorship and its significance

An expected transmission is usually the reason for sponsoring a given event¹². Quite often it becomes a subject of an additional agreement, either between the sponsor of the event and the broadcaster, or between its organiser and the latter. Such additional agreements sometimes remain in a peculiar relationship with the sponsorship agreement itself, which is known as so-called bundle of agreements. Within such a bundle, reaching the objectives of individual agreements is interdependent. The nature and way of presence of the sponsor's marks in the broadcast is, in such a case, a subject of detailed contractual reservations between the organiser of the event and the broadcaster.

¹¹ Although E. Traple, when defining the active sponsorship in radio and TV, speaks about sponsoring "radio or television transmissions", the quoted terms mean sponsoring the result (transmission of a programme), that is, influencing the final cost of transmitting the programme met by the broadcaster. Therefore, this definition addresses subsidizing, which may pertain to any element whatsoever in the process of production of the programme. E. Traple, "Prawne ramy sponsoring w środkach masowego komunikowania" [Legal framework of sponsorship in the means of mass communication], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej* Vol. 62 (1993), p. 75. Yet another formula is used by J. Jacyszyn, "financing the activities of specific radio and television stations", see *idem*, *Nowe formy prowadzenia działalności gospodarczej* [New forms of conducting business activities], Gdańsk 1993, p. 131.

¹² According to E. Traple, a "sponsor may fully achieve his goal only by employing the means of mass communication, since only they can spread sufficiently fast the information about this form of its activity"; see *idem*, *Prawne ramy...*, p. 74. This is where we can see a significant, and underestimated by our legislators, role of passive sponsorship in Poland.

More often, however, the issue of the presence of the sponsor's marks in a TV transmission is a subject of provisions in a contract between the sponsor of the event and its organiser. Sponsors of particular events always want to appear in the consciousness of the viewers who receive the transmitted event. For the sponsor, the rationale for providing a material benefit towards the organisation of such an event may be both the expected transmission in general and the way it is conducted. These elements are subjects of a contractual obligation of the sponsored party, who is bound to provide a service from a third party (broadcaster). The expected event transmission may even become an essential element of an agreement, on the fulfilment of which the service of the sponsor depends.

From the sponsors' point of view, using the passive sponsorship formula is even more attractive for the following reasons, among others:

- appearing in the consciousness of the viewers watching a transmission of a sponsored event may be much cheaper than in the case of sponsoring television broadcasts, not to mention the advertisement itself;
- the passive sponsorship formula is sometimes used to circumvent the limiting regulations for sponsorship (and advertising) in media. For instance, the Polish BA contains a prohibition of sponsoring of programmes by certain entities (Art. 17 paragraphs 5–6a)¹³. These are mainly the entities whose “principal activity consists in the production or sale of products or the provision of services” advertising which is prohibited under Art. 16 section 1¹⁴ (Art. 17

¹³ The provisions of Art. 17 section 5–6a of the BA: “5. Subject to the reservations contained in paragraph 6, programmes or other broadcasts may not be sponsored by: 1) political parties, 2) trade unions, 3) employers' organisations, 4) natural or legal persons whose principal activity consists in the production or sale of products or the provision of services referred to in Article 16b paragraph 1. 6. Sports events coverage may not be sponsored by entities referred to in paragraph 5 subparagraphs 1-3 and by business operators whose principal activity consists in the production, sale or other form of supply of products or services, the advertising of which is prohibited by virtue of Article 16b paragraph 1, subparagraphs 1 and 2, subject to the stipulations of Article 131 paragraphs 5 and 6, of the Act on Upbringing in Sobriety and Counteracting Alcoholism. 6a. Sponsorship of programmes or other broadcasts by entities that pursue business in the area of cylindrical games, card games, dice, mutual betting and slot machines shall be prohibited”.

¹⁴ According to Art. 16b section 1 of the BA, “1. It shall be prohibited to broadcast commercial communications for following goods and services: 1) tobacco products, tobacco accessories, products imitating tobacco products or accessories and symbols related to the use of tobacco, to the extent regulated in the Act of 9 November, 1995 on Protection of Health Against the Effects of Use of Tobacco and Tobacco Products (official journal *Dz.U.* of 1996, No. 10, item 55, as further amended1)), 2) alcoholic beverages, to the extent regulated in the Act of 26 October, 1982 on Upbringing in Sobriety and Counteracting Alcoholism (official journal *Dz.U.* of 2007, No. 70, item 473, as further amended2)), 3) health benefits as defined in regulations on medical treatments provided only on prescription, 4) medicinal products, to the extent regulated in the Act of 6 September, 2001 – “Pharmaceutical Law” (official journal *Dz.U.* of 2008, No. 45, item 271 as further amended3)), 5) cylindrical games, card games, dice, mutual bets, slot machines, to the extent regulated in the Gambling Act of 19 November, 2009 (official journal *Dz.U.* No. 201, item 1540; and of 2010, No. 127, item 857)), 6) psychoactive drugs or narcotics and foods or other products, to the extent governed by the Act of 29 July, 2005 on Counteracting Drug Addiction (official journal *Dz.U.* No. 179, item 1485, as further amended).

section 5 subsection 4). An entity that is forbidden to advertise tries to appear in the consciousness of the viewers watching the transmission of a sponsored event;

- new technological ways of showing the sponsor marks in the content of a television transmission facilitate attaining the above results and, due to their nature, come close to commercials in their efficiency. These are most of all the displays of a sponsor's marks which are "addressed" to a specific TV audience. They are virtually "inserted", for instance, on the fence of a playing field, regardless of the geographical location of the event, local language, etc. These marks are actually in the form of an electronic, virtual overlay on a chosen element of the background of the event, such as the aforementioned fence. The content of this virtual message, and therefore the marks of the sponsor which are displayed, depends on the audience to which the particular transmission sent by the given TV station is addressed. Moreover, the way in which the sponsor's marks are displayed in the background of the transmitted message may improve the promotional effect. Moving, colour-changing, or "popping out" sponsor's marks may attract the viewer's attention to such extent that calling them the "background" of the event does not seem appropriate anymore.

In the latter case, we can observe an example of the so-called virtual sponsorship. It is done so sponsor's marks are inserted into the signal of a TV transmission by an entity different than the broadcaster; in general it is a holder of the broadcasting rights who is also involved in making those rights available. There arises a problem that the autonomy of the senders is being limited, as they often have to agree to a transmission so "enhanced" with marks of a sponsor, if they want to acquire rights to it. Due to the digitisation of media technology, what is pointed out in the doctrine are the technologically new forms of transmission¹⁵, with additional emphasis on the virtual messages among them which simulate for the viewer a sensation of real things¹⁶; it makes it possible to reach to the consciousness of the TV audience in a situation where using a commercial becomes inefficient due to the technological progress in the field of media. The viewers have plenty of opportunities to avoid commercials (commercial blocks). They can switch channels with a remote control for the time of the block and if they use the so-called picture in picture (PiP) function, which allows

¹⁵ J. Skrzypczak lists and describes so-called hypertextuality, networkisation, virtuality and simulationality. J. Skrzypczak, *Polityka medialna w okresie konwersji cyfrowej radiofonii i telewizji* [Media policy in the period of digital conversion of radio and television], Poznań 2011, p. 55.

¹⁶ So in: *Nowe media. Wprowadzenie* [New media: Introduction], auth. by M. Lister et al. For more see, among others: D. Inglik-Dziak, "Rzeczywistość wirtualna – rola mediów w pośredniczeniu doświadczenia rzeczywistości w społeczeństwie masowym i ponowoczesnym" [Virtual reality – the role of media in mediating the experience of reality in a mass post-modern society], *Studia Medioznawcze* 2007, No. 4, p. 36 f. Therein also an analysis of the problem stressing the significance and the influence of virtual messages on the recipient.

them to monitor channels, they do not risk losing any of the original programme. Some new technologies enable the recipient to “delete” commercial blocks, either manually or automatically, even during live transmission, by using a delay function. Using the passive form of sponsorship “condemns” the viewer to the obligatory watching of the marks of the sponsor of the event during the TV transmission.

Proposed position on the subject of passive sponsorship in media

There were critical voices raised about the terminology I had proposed which differentiates between active and passive sponsorship in the field of radio and television¹⁷. For instance, Jacek Sobczak states that the suggestions of Leopold Stecki, who posits the criterion of the intensity of sponsor’s involvement as the basis of distinction between active and passive sponsorship, “seem more precise and convincing”¹⁸. As Sobczak notices, however, the author he quotes differentiates between the forms of sponsorship in the field of radio and television in a separate way, using the terms of “activity” and “passivity” in a way which is consistent with this paper¹⁹. The dispute on terminology seems to be purely academic in nature, without much significance. Besides, there are no other terminological suggestions in the doctrine. What is crucial for the application of law is to notice various sponsoring phenomena, that is, actual states in the area of media, which are associated with different legal regulations. In order to determine this regulation, it is necessary to define these phenomena. Then it is possible to formulate proposals *de lege ferenda*. Obviously, such actions are meaningful only if it has a practical significance²⁰.

¹⁷ M. Grabowski, “Sponsorowanie przez prowadzących działalność związaną z produktami (usługami) objętymi zakazem reklamy” [Sponsorship by business operators dealing with products the advertising of which is prohibited], *Studia Prawnicze* 1995, Vol. 1/4, pp. 75–76; *idem*, “W sprawie działalności sponsorskiej w radiofonii i telewizji” [On the sponsorship activity in radio and television], *Rejent* 1997, No. 2, pp. 39–41.

¹⁸ J. Sobczak, *Radiofonia i telewizja. Komentarz do ustawy* [Radio and Television: Commentary on the Act], Kraków 2001, pp. 101–102.

¹⁹ L. Stecki says that in the field of radio and TV, it is possible to use the notion of active sponsorship when the “transmitted (...) programme is directly sponsored by the marked entity (...), sponsorship is a direct reflection of a certain legal relation of sponsorship, established directly between the sponsor and the management of the given radio or television station. The performer of the sponsored activity is then the radio or television station that is the exclusive partner of the concluded sponsorship agreement”; whereas passive sponsorship is “when the transmission covers an event sponsored under a sponsorship agreement to which the television station is not a party; it is not, therefore, a sponsored entity, neither directly or indirectly”; see also *idem*, *Sponsoring...*, p. 173.

²⁰ This significance issue is raised in relation to the division of sponsorship in media into active and passive. So in, e.g., M. Ożóg, “Reklama radiowa i telewizyjna” [Radio and TV advertising], in: *Prawo reklamy i promocji* [Law of media and promotion], auth. by E. Traple et al., Warszawa 2007, p. 287. Similarly, D.E. Harasimiuk, discussing various kinds of sponsorship, states that “an important division, especially in the case of television and radio activity, is the division into direct sponsorship and indirect (informing about sponsorship)”. D.E. Harasimiuk, *Zakazy reklamy towarów w prawie europejskim i polskim* [Prohibitions on advertising of products in European and Polish law], Warszawa 2011, p. 41.

Passive sponsorship in media essentially remains, as said above, outside of Polish and European legal regulation of radio and television²¹. In the case of its traditional forms, that is, classic sponsoring of transmitted events, as opposed to virtual sponsorship, general rules concerning the agreements between the sponsor and the event organiser apply. Benefits from such agreements will fall under the legal regulation pertaining, e.g., to the question of the presence of statements promoting the sponsor at the location of the transmitted event. In this case, the passive sponsorship is essentially outside of the regulation of the BA or the Convention, with the reservations made below, concerning the participation of the sender in displaying the sponsor's marks.

Whereas when it comes to virtual sponsorship, the question is controversial. The acceptability of virtual sponsorship is being questioned in the doctrine on the grounds of Art. 16 and 16a of the BA²². The validity of this position appears to hold also in relation to virtual sponsorship. Two accusations levelled in the doctrine apply here: the illegality due to the lack of marking of the virtual communication, and the illegality caused by the lack of appropriate separation of this communication²³. According to the wording of Art. 16 section 1 of the BA, the nature of commercial communications, and marking of a sponsor is such, should be easily recognisable. The breach of obligation to differentiate between commercial communication and editorial content will be a breach of the prohibition against surreptitious media communications (Art. 16c, section 1), and the general principle of separating and marking communications in order to be able (from the viewer's point of view), to distinguish them from editorial content (Art. 14 section 2). The provision of Art. 17 section 1 of the BA contains an absolute injunction to clearly inform about sponsoring.

Moreover, as stated above, the editorial autonomy of the broadcasters may be violated. It will be so if the broadcasters are forced to actively or passively consent to the enhancement of the signal with virtual content. The illegality of this practice is clear under the rule of Art. 13 section 1 of the BA, which stipulates that a sender shall determine the content of its programme independently, of Art. 14 section 1 of the BA, according to which an obligation to transmit a particular broadcast may be imposed upon a broadcaster only by statute, and most of all regarding the constitutional provisions expressing the principles of freedom of the

²¹ I.B. Mika, "Sponsoring" [Sponsorship], in: *Prawo mediów* [Media law], ed. by J. Barta, R. Markiewicz, A. Matlak, 2nd ed., Warszawa 2008, p. 362.

²² So do, among others, M. Ożóg, *Reklama...*, p. 318–319; E. Nowińska, "Ocena zgodności z prawem nowych form reklamy" [Evaluation of accordance with the law of new forms of advertising], *Biuletyn Informacyjny KRRiT* 2003, No. 10/12.

²³ *Ibidem*.

media (Art. 14 of the Constitution) and freedom of speech (Art. 54 section 1 of the Constitution) in terms of the freedom to acquire and disseminate information²⁴. The provisions of Art. 13 section 1 and Art. 14 section 1 of the BA expand on the adduced constitutional principles.

Under the Union law, the use of virtual forms of promotion in media, including virtual sponsorship, is deemed acceptable. This position was adopted by the European Commission when still under the rule of the already mentioned “Television without Frontiers” Directive amended by the Audiovisual Media Services Directive. In the interpretative communication it issued²⁵, the Commission stated that this form of promotion is acceptable provided that the following specific requirements are met: 1) the integrity and the value of the programme must be respected, as well as copyright and undisturbed (comfortable) reception (section 67 of the Communication); 2) an imperative obligation to inform the broadcasters and recipients in advance of the presence of virtual promotion (section 68); 3) the insertion of a virtual promotion requires a prior permission of the organisers of the transmitted event and the holders of broadcasting rights (section 68). Whereas if the broadcaster has any control of the insertion of virtual advertising into the signal, and when this insertion is in return for payment of any kind, e.g. rights to the transmission, to the broadcaster, such advertising qualifies as sponsorship in the terms of the Directive, with all the consequences. Moreover, a virtual message may be used only in such a way as if it was a material (actual) promotion at the site of the transmitted event and should not be more conspicuous than an advertising materially displayed on site (section 69).

The position of the Commission concurs with the Recommendation of the Standing Committee on Transfrontier Television²⁶. The Committee assumed that virtual advertising must comply with the provisions of the Convention. It noted that this type of promotion may serve, among others, to circumvent the bans on advertising, imposed both by the Convention and by the legislation of the country where the transmission is received, and constitute covert,

²⁴ In the discussed case, we are talking about the constitutional freedoms of both the sender and the recipient, since the latter has the right to be informed about the fact of sponsoring.

²⁵ Commission interpretative communication on certain aspects of the provisions on televised advertising in the “Television without frontiers” Directive, *OJ C* 102/2, 28.04.2004. In this the Commission refers to the earlier Broadcasting Union Memorandum on virtual advertising, http://www.ebu.ch/departments/legal/pdf/leg_virtual_advertising.pdf?display=EN, and regulations contained within the ITC guidance note on virtual advertising, issued by the British Independent Television Commission (ITC) which was the licensor and regulator of commercial television services; http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/adv_spon/rules_amount_scheduling_adv/va_note?a=87101 [accessed: 27.11.2012].

²⁶ Recommendation (97) 1 concerning the use of virtual advertising notably during the broadcast of sport events (adopted by the Standing Committee on Transfrontier Television at its 12th meeting, 20–21 March 1997), www.coe.int/t/dghl/standardsetting/media/t-tt/t-tt%282006%29012rev_EN.asp [accessed: 27.11.2012].

and therefore unacceptable, advertising. For the rules of the Convention concerning advertising (including sponsorship), broadcasters must stay in control of the insertion of virtual messages. The Committee underlined the same obligations, as the Commission did, for the way of inserting a virtual message, its impact on the quality of the programme, and indicating its presence to the viewers.

What is interesting, for practical reasons, is the self-regulating position of the International Federation of Association Football (FIFA)²⁷, imposing relatively less restrictive limitations on the forms and techniques of virtual advertising. It is worth noticing that application of virtual advertising is restricted only to the analogues of existing flat surfaces which can be used for advertising on the site of the transmitted event. The exception is that advertising (sponsor's marks) may be "applied to appear on the field of play" but only when the players are not in the field, before and after each half of the match. All mobile objects and all people are under the prohibition (the players in particular).

The internal national legislation of the member countries of the European Union may be more restrictive than the Directive in terms of regulating the acceptable forms of promotion. Such is also the relationship of the national law with the provisions of the Convention.

Virtual advertising, including sponsorship, is expressly forbidden in some European countries. This is the case of, e.g., Italy, Norway, Portugal, France, and Sweden, since the requirement to separate it from editorial content was not met and the prohibition against applying it during the course of programmes was breached²⁸. In turn, it is acceptable in Greece, Spain, and Germany²⁹, as well as in the United Kingdom³⁰ and Ireland³¹.

The British *Virtual Advertising Guidance Note*³² provides, in particular, that: 1) the fact and purpose of the use of virtual advertising must be made transparent to the viewers,

²⁷ *Regulations for the Use of Virtual Advertising*, www.fifa.com/mm/document/affederation/marketing/51/54/71/virtualregs_e_1810.pdf [accessed: 27.11.2012].

²⁸ Cf. M. Ożóg, *Reklama...*, p. 317.

²⁹ *Ibidem*.

³⁰ Cf. *The Ofcom Broadcasting Code* (n. 6) and the detailed, still applicable rules for virtual advertising defined in the *Virtual Advertising Guidance Note – Electronic imaging systems or "virtual" advertising* adopted by the Ofcom, www.ofcom.org.uk/static/archive/itc/itc_publications/codes_guidance/programme_sponsorship/virtual_ad_guidance.asp.html [accessed: 27.11.2012], which constitutes an interpretation of *The ITC Code of Programme Sponsorship* (section 19.2.4), www.ofcom.org.uk/static/archive/itc/itc_publications/codes_guidance/programme_sponsorship/index.asp.html [accessed: 27.11.2012].

³¹ According to the *General Commercial Communications Code*, a document issued by the Broadcasting Authority of Ireland, which contains the Guidance Notes, or interpretation of the legislation in force in Ireland, mainly in the terms of their Broadcasting Act and other media-related legal acts, www.bai.ie/wordpress/wp-content/uploads/General-Commercial-Communications-Code-Guidance-Notes.pdf [accessed: 27.11.2012].

³² See n. 30.

both before and after the programme; 2) the quality and integrity of the programme must be respected; 3) acceptable virtual messages may only replace the actual advertising forms of promotion; 4) virtual advertising for tobacco products is prohibited; 5) the broadcaster's right to refuse to carry a signal electronically enhanced with virtual advertising must be respected. The latter is an interesting way of ensuring editorial autonomy of broadcasters. It is also associated with the accepted principle of accountability of broadcasters for all programmes, and there are only few exceptions to this principle. Moreover, the adopted document provides a prohibition on selling virtual advertising services by a broadcaster. This virtual form of active sponsorship is thus ruled out.

In terms of the German Federal statute Rundfunkstaatsvertrag³³ (RStV), virtual advertising is acceptable, provided that viewers are informed of the fact before and after the programme. The virtual message itself must be applied only so as if it replaced an actually existing advertisement³⁴. Failing to meet these requirements for advertising, in addition to the general ones, constitutes a breach of the imperative obligation to separate the advertising message from editorial content and shall be deemed covert advertising³⁵.

In Ireland, similarly to the United Kingdom, virtual advertising is acceptable; the obligation to separate new promotional techniques from editorial content, ensure the editorial autonomy of broadcasters, and respect the general rules governing advertising (such as bans on commercials) contained in the Irish Broadcasting Act, European Union law, and the Convention³⁶. In particular, a promotion must not compromise the integrity or quality of the programme³⁷. Modern advertising techniques, such as virtual and interactive advertising, and split-screen are strictly prohibited in programmes for children³⁸. According to section 2 of the General Communications Code, virtual advertising is an advertising technique which allows the broadcaster to apply virtual promotional messages and sponsor's marks in TV programmes by enhancing the transmitted signal.

³³ Staatsvertrag für Rundfunk und Telemedien of 31 August 1991 (December 2010 version), GVBl., p. 478.

³⁴ Cf. M. Ożóg, *Reklama...*, p. 317.

³⁵ Cf. § 7 section 3 subsection 1 and § 58 section 1 of RStV. The separation imperative is repeated in the media acts of the federal states and, in terms of commercial information, in § 6 section 1 and 2 of the Telemediengesetz Act of 26 February 2007, BGBl. I., p. 179. As in: M. Namysłowska, K. Sztobryn, "Zwalczanie nieuczciwej reklamy ukrytej w prawie polskim i niemieckim" [Fight against dishonest covert advertising in Polish and German legislature], in: *Reklama. Aspekty prawne* [Advertising: Legal aspects], sci. ed. M. Namysłowska, Warszawa 2012, p. 219.

³⁶ *General Commercial Communications Code*, section 5.1.

³⁷ *Ibidem*, section 4.3.

³⁸ Under the *Children's Code on Commercial Communications* (preamble to section 5 of the *General Commercial Communications Code*). It also contains detailed regulations of split-screen (section 5.2–5.4) and interactive advertising (section 5.5); however, these forms of advertising lie beyond the scope of this article.

In view of the above considerations, it should be assumed that it is necessary to determine the active or passive nature of sponsorship in each studied case. If active sponsorship is ascertained, the legal regulation of the BA or Convention is applied directly, along with all objective and subjective limitations to sponsorship.

The participation of the broadcaster in displaying messages promoting the sponsor, its product, or service is a major issue in passive sponsorship, and a point of interest for the sponsors as well. It is not only significant for the promotional interests of the sponsor, but also to the broadcaster; e.g., whether or not the broadcast breached the ban on advertising for a specific product, another legal provision, or their own financial interests.

What is important for making the difference between passive and active sponsorship is the method used by the broadcaster to apply the marks of the sponsor of the event. The question is if the broadcaster transmitting the event conveys these messages as elements which cannot be omitted in the broadcast, since they constitute, among many others, the setting of the event, i.e., its background. If it is so, the scope of legal regulation, including the problem of prohibitions on sponsorship, is reduced to sponsoring the event only, and thus to a sponsor – event organiser relation, for example. All limitations and prohibitions concerning the possible content of the sponsor's marks are considered in the context of their presence at the location of the event, and not in relation to the TV transmission. The particular legal regulation of TV (radio) sponsorship is not applied then.

However, if the broadcaster, in a way that is excessive and not justified by the needs of the transmission, enhances in its content elements promoting the sponsor of the event, such activity should be treated as active sponsorship with all its consequences. The “media” legal regulation concerning sponsorship should be applied in this case. The broadcasters themselves usually make sure that the sponsor's marks do not exceed the necessary minimum. It is mostly done for mercantile reasons.

In practice, the evaluation of the broadcaster's participation in applying the messages promoting a sponsor is not always simple. A significant element in this assessment should be the feelings of an average viewer.

The issue of virtual sponsorship should be treated in a similar way, although in its case, for obvious (technological) reasons, the subject of the analysis will be not the broadcaster's participation in showing the sponsor's marks, but the consent of the former to enhancing the signal with virtual content.

What may prove decisive in the assessment of the nature of sponsorship may be, in both cases discussed above, the presence and nature of certain contractual provisions between the organiser of the event and the broadcaster, or between the broadcaster and the sponsor of the event. It is also the case of agreements between the holder of broadcasting rights and the broadcaster. The very existence of such provisions, in which the broadcaster at least voluntarily consents to apply the sponsor's marks, should be enough to draw a conclusion about active sponsorship. It may be additionally supported by the analysis of the content of those provisions indicating the obligations of the broadcaster including, in particular, the extent of its involvement in such applications. The issue of voluntariness was invoked here, in spite of the obvious principle of freedom of contract, because of the abovementioned problem of violating the editorial autonomy of broadcasters in the practice of virtual sponsorship.

To conclude the above considerations, it should be stated as follows:

- the current legal regulation does not befit modern challenges and problems on the media plane, caused by technological progress. The evidence is that it does not contain references to the mentioned above forms of passive sponsorship;
- the lack of such a reference constitutes a loophole that, unfortunately, as it has been proven in the article, is not unimportant for both the vital interests of the broadcasters (such as their autonomy) and the interests of the viewers (such as protection from covert or forbidden sponsorship);
- it is justified to distinguish and define in the doctrine passive sponsorship, both for the purpose of the application of the law and of prospective legislative postulates.

The author's proposal is to adopt two described above criteria of differentiation between active and passive sponsorship. The first is the presence and nature of contractual obligations on the part of the broadcaster. The second is the actual participation of the broadcaster in the promotion of the marks of the sponsor, or its products or services.

In the light of the above considerations, a number of postulates *de lege ferenda* comes to mind. First of all, the issue of the "incapacitation" of broadcasters who acquire the rights to broadcast a prepared signal, "enhanced" with the advertisement of the its sponsor, should be regulated in such a way that the autonomy of broadcasters is not violated. The fact that such a violation is illegal is not enough by itself, which is clear in view of the practice described above. Legal regulations of international nature seem necessary. An obligation to obtain each time an explicit consent of the broadcaster to virtual advertising would be a minimum. This

solution, however, may prove insufficient. Then, perhaps, it would be appropriate to adopt a more radical solution that would give to the broadcaster (media service provider) absolute and full control over the signal components, so that enhancing it with additional content could not be done by other entities at all. On the other hand, what merits imitation is the British solution which protects the right of the broadcaster to refuse virtual sponsorship.

Second, the loophole pointed out above has to be filled also to provide adequate protection to the viewers. Regardless of the issue of acceptability of virtual advertising in national legislations, the obligation to inform the viewers about the very fact of virtual sponsorship seems to be a necessary minimum, especially significant in the situation where the broadcaster has no influence over it.

The viewers in general are not aware of such forms of advertising. This fact often strengthens the advertising effect assumed by the sponsor, since the viewer treats him/her as more serious and attractive³⁹. Thus it appears that the British obligation to inform about virtual promotion and, at the same time, explain its nature, or “virtuality”, is just.

On the other hand, the validity of possible information about the sponsor should be put into consideration, taking into account the postulate to make no effort for additional and free of charge promotion of the sponsor’s marks.

What else could be considered is information from the broadcaster about the fact of virtual sponsorship, accompanied by a statement whether the broadcaster has any control over such advertising. However, as long as virtual advertising is not consistently regulated by international and national legislations, such obligation might very well be fictitious and contribute to further violations of the broadcasters’ rights, and consequently the viewers, too, due to the already pointed out practice of limiting editorial autonomy.

It is a postulate addressed to the legislature to preserve the consistency of the legal regulation of advertising in the media with the legal regime concerning advertising outside of the media (at the event location), at least so far as it includes the cases of transmissions from the site.

The subject of a possible regulation also causes some difficulties, since a transmission often goes beyond the area of a single country. Therefore, it would be appropriate to strive for consistent changes in international law and in national legislations in the scope of media operation. The possible fulfilment of the latter postulate is the condition on which depends the

³⁹ E.g., according to the following stereotypical notion: “It must be a very serious producer if he/she runs his/her promotion in the viewer’s language, even though it takes place far abroad from the viewer’s country”.

usefulness of such efforts. The point is that the indicated above postulates to subject passive sponsorship to an appropriate legal framework were realised not only in the area of national transmissions, but first of all international ones. It is the former which gather the largest groups of viewers, after all.

When it comes to a conflict caused by the differences in national regulations concerning advertising in media between the countries of the broadcaster and the viewers, a substitute for the latter postulate can be found in Art. 16 section 1 of the Convention. Under its wording, to protect the competitiveness and regulations of the recipient country, advertising “which [is] specifically and with some frequency directed to audiences in a single Party” cannot violate the legal regime of that Party⁴⁰. Virtual advertising which consists of placing content “dedicated” to a specific audience in the signal of a transmission, should be deemed *de lege ferenda* as *directly* addressed to that audience. Although it is raised in the doctrine that translation or dubbing do not decide on this directness by themselves⁴¹, it seems advisable that a future international legal regulation should be the basis for a prohibition on virtual advertising which violates the law of the recipient country. It is also supported by the fact, that it is possible to make a “dedicated split” of virtual content in the signal of the transmission.

Yet another practical difficulty in the realisation of the above postulates, which has to be legally regulated, is revealed in the course of the discussion about the appropriate jurisdiction regarding media (electronic) services which constitute advertising that crosses the borders of countries⁴². It also pertains to the copyright-law aspects of the so-called rights to

⁴⁰ The Convention, however, provides major exceptions to this principle (Art. 16 section 2): it does not apply where there is a difference in the regulations between the forms of advertising in the territory of the Parties to the Convention, or if the Parties have concluded an agreement in that area. Additionally, as M. Świerczyński states, “the scope of application of the convention, including the regulations concerning the jurisdiction, [...] has no influence on the application of the national regulation of the Parties. Also the collision norms applied by those countries remain outside the scope of application of the Convention”; see *idem*, “Reklama internetowa o zasięgu międzynarodowym. Zagadnienia kolizyjnoprawne” [Internet advertising of international scope. Conflictual and legal questions], in: *Kolizyjne aspekty zobowiązań elektronicznych. Materiały z konferencji* [Conflictual aspects of electronic obligations. Conference materials], ed. by J. Gołaczyński, Warszawa 2008, p. 198.

⁴¹ *Ibidem*, p. 197.

⁴² See, for example, the application of the territorialism principle to the criterion of the effect of advertising (M. Świerczyński, *Reklama internetowa...*, pp. 193–198); considerations in the area of the law applicable to “electronic” advertising which contain a postulate *de lege ferenda* that the country of the advertiser should be expressly declared as the proper jurisdiction for obligations of promotional nature (*idem*, *Delikty internetowe w prawie prywatnym międzynarodowym* [Internet torts in private international law], Kraków 2006, pp. 291–304); the characteristics of European discussion on this matter with a postulate *de lege ferenda* (draft of a directive on services) that the country of origin should be accepted as a rule regarding services provided in the territory of the EU (I. Kawka, *Telekomunikacyjne organy regulacyjne w Unii Europejskiej. Problematyka prawna* [Telecommunication regulators in the European Union. Legal issues], Kraków 2006, p. 59).

the signal (emission), rights to broadcasts, including their integrity⁴³, in terms of, among others, the European Union principle of the free movement of services⁴⁴. These issues go beyond the scope of this article.

Another serious obstacle, since it is a practical one, is that such a possible regulation would not interest the sponsors, organisers of the transmitted event, or the “mediating” participants of media communication who hold the broadcasting rights. On the other hand, such important values as the independence (good) of broadcasters or, above all, the good of the viewers themselves should be strong enough arguments to justify the presented postulates.

⁴³ Cf., e.g., K. Klafkowska-Waśniowska, *Prawa do nadań programów radiowych i telewizyjnych w prawie autorskim* [Rights to broadcasts of radio and television programmes in copyright law], Warszawa 2008, p. 53 f.

⁴⁴ *Ibidem*, p. 167 f., and in the references cited there.