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INTERNATIONAL

EFTA

Surveillance Authority: New Guidelines for State Aid to Public Service Broadcasting Adopted

Frank Büchel
Brussels

The EFTA Surveillance Authority has adopted new Guidelines on the application of the State Aid rules of the EEA Agreement to public service broadcasting in Iceland, Liechtenstein and Norway. The Guidelines clarify the principles applied by the Authority when it assesses State Aid cases in this sector and provide guidance to public authorities and operators.

The introduction of a new chapter into the Authority's State Aid Guidelines follows a similar Communication by the European Commission at the end of 2001 (see IRIS 2001-10: 4). The Authority's new Guidelines are to a large extent based on the Commission's Communication. The Authority's adoption of the Guidelines, however, waited for the judgment of the European Court of Justice of 24 July 2003 in Altmark Trans GmbH, [2003] ECR I-7747, which is relevant to public service broadcasting also. The judgment clarifies under which conditions compensation payments for the discharge of a public service obligation are not considered to be State Aid.

The Guidelines focus on the application of Article 59(2) of the EEA Agreement which states that measures classified as State Aid might still be justified, based on the need to perform a service of general economic interest. In this context, the Authority adopts the following approach:

The EFTA States are free to define the public service remit for broadcasting covering a broad programme spectrum. The Authority will not question the nature or the quality of a specific product, but the definition of the public service cannot extend to activities which cannot be reasonably considered as meeting the democratic, social and cultural needs of each society. It is the Authority's duty to ensure that the definition does not contain any manifest errors in that respect. In its assessment, the Authority will verify whether the following three conditions are respected.

Firstly, the definition of public services in broadcasting must be clear and precise and should leave no doubt as to whether a specific activity by an operator is intended to be included in the public service remit or not. Secondly, the entrustment of the public service mission to one or more operators must be done by means of an official act. Thirdly, the public funding for the service must be limited to what is necessary for the fulfilment of the public service mission and not result in any overcompensation (proportionality). Finally, the Authority assesses compliance with the Transparency Directive 80/723/EEC, which imposes a separation of accounts for non-public activities of public service broadcasters. The Guidelines stipulate further criteria to this end. ■

● **EFTA Surveillance Authority's State Aid Guidelines, available at:**
http://merlin.obs.coe.int/redirect.php?id=9335

EN

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COUNCIL OF EUROPE

European Court of Human Rights: Application by *Österreichischer Rundfunk* Declared Inadmissible

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The European Court of Human Rights, in a decision of 25 May 2004, has come to the conclusion that Austria has not violated Article 10 of the Convention by prohibiting in 1999 the *Österreichischer Rundfunk* (ORF) from publishing pictures of a person (B.) showing him as an accused during the well known letter-bomb campaign proceedings of some years before. B. had started proceedings in 1998 against the ORF requesting that the broadcasting company be prohibited from publishing without his consent pictures showing him as an accused in the courtroom, referring to the letter-bomb campaign without mentioning his final acquittal or if the impression was created that he was a neo-Nazi, was convicted of offences under the National Socialism Prohibition Act without mentioning that the imposed sentence had already been served or that he had been released on parole in the meanwhile. The Vienna Commercial Court and the Vienna Court of Appeal dismissed B.'s claims, arguing that B's interests were not infringed by the neutral disclosure of his picture, that no impression was given that he had been convicted of participating in the letter-bomb assassinations, and that he had indeed been convicted of a serious crime. Therefore, B. could not enjoy unlimited protection of his identity. On 1 June 1999, the Supreme Court however was of the opinion that the publication of B.'s picture by ORF had obviously interfered with his interests as it reminded the public of B.'s court appearance three years after his trial and his release on parole. The Supreme Court decided that there was no longer a public interest in having B.'s picture published and ordered the ORF to refrain from publishing or disseminating B.'s pictures without his consent showing him in the courtroom in the circumstances mentioned above.

The ORF complained under Article 10 of the Convention that the Supreme Court's judgment violated its right to freedom of expression. Without deciding on the Government's interesting preliminary objection contesting the ORF's *locus standi* within the meaning of Article 34 of the Convention (the applicant as a public broadcasting organisation being a governmental organisation), the Court unanimously reached the conclusion that the imposed measure by the Austrian Supreme Court did not violate Article 10 of the Convention and declared the application by the ORF inadmissible. The Court emphasizes the difference between the present case and the findings in the case of News Verlags GmbH & CoKG v. Austria (ECourtHR 11 January 2000, Appl. 31457/96, see IRIS 2000-2: 2), as the Austrian courts in that case had issued a total prohibition on publication of B.'s picture by News Verlags, whereas in the present case the ORF was only prohibited from doing so in a specific context. Furthermore, the report in the News Verlags case was published at a time when the pending criminal proceedings against B. were to be considered as a matter of great public interest. In the present case there was no public interest involved in the publication of the picture of B. and there was no need for another public stigmatisation. The Court is of the opinion that the private interest of B. in seeking to reintegrate himself into society after having been released on parole outweighed the public interest in the disclosure of his picture by the media. The Court also found that the prohibition at issue could not be described as amounting to a general prohibition against publishing B.'s picture and therefore found that the measure was also proportionate to the aim pursued within the meaning of Article 10 of the Convention. The complaint by ORF was considered manifestly ill-founded and hence declared inadmissible. ■

● Decision of 25 May 2004 by the European Court of Human Rights (Fourth Section), as to the admissibility of Application no. 57597/00 by Österreichischer Rundfunk against Austria, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

EN

European Court of Human Rights: Case of Plon v. France

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This case concerns the prohibition of the distribution of the book written by Dr. Gubler "*Le Grand Secret*", about the former president Mitterrand and how his cancer had been diagnosed and medically treated. The central question is: was the prohibition of the distribution of the book in 1996 to be considered as necessary in a democratic society in order to protect the deceased president's honour, his reputation and the intimacy of his private life? Many items of information revealed in the book were indeed legally confidential and were capable of infringing the rights of the deceased and his family. But was this a sufficient reason to legitimise a blanket ban of the book?

As to whether the interference by the French courts ordering the prohibition of the distribution of Dr. Gubler's book at the request of Mitterrand's widow and children met a pressing social need, the European Court emphasises in the first place that the publication of the book had taken place in the context of a general-interest debate. This debate had already been going on for some time in France and was related to the right of the public to be informed about the president's serious illnesses and his capacity to hold that office, being aware that he was seriously ill.

The European Court considered that the interim ban on the distribution of "*Le Grand Secret*" a few days after Mitterrand's death and until the relevant courts had ruled on its compatibility with medical confidentiality and the rights of others as necessary in a democratic society for the protection of the rights of President Mitterrand and his heirs and successors.

The ruling however, more than nine months after Mitterrand's death, to keep the ban on the book, is considered as a violation of Article 10 of the Convention. Moreover, at the time when the French court ruled on the merits of the case 40,000 copies of the book had already been sold, the book had been published on the internet and it had been the subject of much comment in the media. Accordingly, preserving medical confidentiality could no longer constitute a major imperative. The Strasbourg Court consequently considered that when the French court gave judgment there was no longer a pressing social need justifying the continuation in force of the ban on distribution of "*Le Grand Secret*". While the Court found no violation in regard to the injunction prohibiting distribution of the book issued as an interim measure by the urgent applications judge (summary proceedings), the European Court comes to the conclusion that there has been a violation of Article 10 of the Convention in regard to the order maintaining that prohibition in force made by the civil court which ruled on the merits. ■

● Judgment by the European Court of Human Rights (Second Section), case of Plon (*Société*) v. France, Application no. 56148/00 of 18 May 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

FR

Standing Committee on Transfrontier Television: Recommendation on the Protection of Minors from Pornographic Programmes

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At its 37th meeting, on 11 and 12 October 2004, the Standing Committee on Transfrontier Television issued a Recommendation on the protection of minors from pornographic programmes.

In its Recommendation the Standing Committee noted that, as a result of growing competition, an increase in pornographic programme services could be observed in some countries. The Standing Committee found this phenomenon particularly worrying with respect to free-to-air programme services which could be easily accessed by minors and could seriously impair their development.

Referring to the ban on pornographic content laid down in Article 7, paragraph 1, letter a) of the Convention [on Transfrontier Television], the Standing Committee invited the parties to the Convention to assess to what extent broadcasters under their jurisdiction complied with this ban and, if this were not the case, to take measures to do so, to ensure that minors were prevented from accessing programme services and broadcasts with pornographic content. The Standing Committee also invited the parties to the Convention to promote cooperation among their regulatory authorities in order to implement the measures envisaged. Lastly, the parties to the Convention were invited to report to the Standing Committee within one year on the measures they introduced.

This Recommendation came about because of a question put to the Standing Committee by the Bulgarian delegation in March 2003, concerning the unencrypted broadcasting of foreign pornographic channels by Bulgarian operators. The Bulgarian delegation asked for the Standing Committee's opinion in the light of the blanket ban on pornographic content contained in Article 7, paragraph 1, letter a) of the Convention on Transfrontier Television, Bulgaria's main concern being to protect minors from pornographic programmes.

The Standing Committee discussed the matter at five meetings, and realised that the problem also concerned other States that were parties to the Convention.

The Standing Committee therefore decided to adopt a Recommendation directed to all parties to the Convention so that specific measures could be adopted for the protection of minors. ■

● Recommendation on the protection of minors from pornographic programmes (adopted by the Standing Committee on Transfrontier Television at its 37th meeting on 11 and 12 October 2004), available at:
http://merlin.obs.coe.int/redirect.php?id=9354

EN-FR

European Commission against Racism and Intolerance: Media Provisions in Recent Recommendations

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In recent months, the European Commission against Racism and Intolerance (ECRI) adopted two new General Policy Recommendations ("on combating racism while fighting terrorism" and "on the fight against anti-Semitism"), both of which contain provisions concerning the media. ECRI is a monitoring body of the Council of Europe that is committed to the advancement of the struggle against racism, xenophobia, anti-Semitism and other forms of intolerance in Europe (see also: IRIS 2002-7: 3).

ECRI General Policy Recommendation No. 8 on combating racism while fighting terrorism, published in June, strongly condemns terrorism as "an extreme form of intolerance", but also calls on States authorities to ensure that anti-terrorist legislative and other measures do not have discriminatory effects, either directly or indirectly. Specifically regarding the media, the Recommendation urges Governments:

- "to encourage debate within the media profession on the image that they convey of minority groups in connection with the fight against terrorism and on the particular responsibility of the media professions, in this connection, to avoid perpetuating prejudices and spreading biased information;
- to support the positive role the media can play in promoting mutual respect and countering racist stereotypes and prejudices"

Similarly, ECRI General Policy Recommendation No. 9 on the fight against anti-Semitism, presented in September, draws attention to the "particular responsibility of media professionals" to endeavour to "report on all world events in a manner that avoids perpetuating prejudices". It calls on Governments to "support the positive role the media can play in promoting mutual respect and countering anti-Semitic stereotypes and prejudices". It also urges Governments to ensure that criminal legislation extends to cover "anti-Semitic crimes committed via the internet, satellite television and other modern means of information and communication". ■

● ECRI General Policy Recommendation No. 8 on combating racism while fighting terrorism, adopted on 17 March 2004 and published on 8 June 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9338

● ECRI General Policy Recommendation No. 9 on the fight against anti-Semitism, adopted on 25 June 2004 and presented in public on 20 September 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9336

EN-FR

EUROPEAN UNION

European Court of Justice: Human Dignity Is a Basic Right Protected by the Constitution

In its judgment of 14 October 2004 in the case of Omega GmbH v. Bundesstadt Bonn, the Court of Justice of the European Communities answered the questions referred to it for a preliminary ruling by the *Bundesverwaltungsgericht* (Federal Administrative Court).

The main proceedings concern the question whether the service provided by Omega Spielhallen- und Automatenaufstellungs GmbH could be prohibited on the grounds that it violated human dignity (for a detailed description of the "Laserdrome" installation, see IRIS 2004-6: 3). The *Bundesverwaltungsgericht* raised the question in light of the fact that the prohibition order issued by the *Oberbürgermeisterin* of Bonn was based on grounds of public order, which, in the area of freedom of services relevant in this case, are subject to control in relation to Community law. The specific question referred

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to the ECJ was whether a common legal conception in all Member States was a precondition for one of those States being enabled to restrict the basic freedom. The ECJ followed the line of argument of the Advocate General, namely that human dignity was one of the general principles of law recognised by the Community as in need of protection, and that the measure taken in this context fulfilled the conditions for justifying the service restriction. According to the ECJ, this finding was not incompatible with the fact that the activity in question, which involved using laser guns to simulate homicide, was not subject to any restrictions in the United Kingdom. Omega had imported the Laserdrome concept as a service provider from a firm in the United Kingdom. ■

● Court of Justice of the European Communities, Judgment of 14 October 2004, C-36/02, Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, available at:
http://merlin.obs.coe.int/redirect.php?id=9358

DE

European Commission: Greece Faces Court Action for Imposing Ban on Games

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On 14 October 2004, the European Commission announced its decision to take Greece to the European Court of Justice for imposing a ban on the installation and operation of electrical, electromechanical and electronic games, including computer games, in all public and private places (including cyber cafés).

According to the Commission, the Greek law of 29 July 2002 is incompatible with the provisions of the EC Treaty on the free movement of goods and services and the freedom of establishment. On the one hand, it breaches the free movement of goods included in Article 28 of the EC Treaty by denying the games themselves access to the Greek market. On the other hand, it infringes the freedom to provide services and the freedom of establishment, included in Article 49 and 43 of the EC Treaty respectively, by prohibiting the provision of services relating to electronic games in Greece.

Given the fact that the Greek law contains rules on electronic and mechanical devices and governs the activities of Internet service providers, the Commission also considers that Greece has infringed the provisions of Directive 98/34/EC, which require prior notification of national regulations laying down technical rules for online goods and services. ■

● "Free Movement of Goods and Services: Greece referred to Court over obstacles to importing and marketing games", Press Release of the European Commission IP/04/1227 of 14 October 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9342

EN-FR-DE-EL

NATIONAL

AL – Bill "On Copyrights"

Hamdi Jupe
Albanian Parliament

On 8 October 2004 the Albanian Government passed the new bill "On copyrights and related rights".

The aim of the new bill is to enforce measures against piracy of intellectual property in accordance with the market economy.

For the first time the law "On copyrights" had been approved by the Albanian Parliament in 1992. Numerous changes have been made to this law during the 12 years of its implementation. But despite this, respect for copyrights in practice is still a big concern in the country.

The new law is expected to better regulate the relations between rightsholders and users. According to it, the Government will take over the responsibility for achieving acceptance of the law in practice. A government body, the Office for the Protection of Copyrights will be established to monitor the implementation of the law and to take appropriate decisions in case of violations of the law. ■

● Decision of the Albanian Government for the approval of the bill "On copyrights and related rights", dated 8 October 2004.

SQ

BE – Tax Shelter for Investments in Audiovisual Works

Belgium has set up a tax shelter to encourage investment in Belgian audiovisual works by Belgian companies. These fiscal measures were first introduced by the program law of 2 August 2002 and amended by the program law of 22 December 2003 and the law of 17 May 2004.

When investing in a Belgian audiovisual production, a Belgian company or a foreign company to which the Belgian income tax regulation is applicable can receive a tax benefit. The investing company can deduct 150% of the investment from its taxable profits. However, the maximum tax-deductible amount must not exceed EUR 750,000 in one fiscal year; this corresponds to an investment of EUR 500,000. Furthermore, the tax-deductible amount itself must not exceed 50% of the company profits in one fiscal year.

The investing company itself cannot be a production company or a television company. Nor can the production company be a television company.

Investment according to these tax shelter rules can be done in two different ways: one can grant a loan for the production or one can invest/participate in the production (and in the benefits it would generate). The total budget raised from this tax shelter financing can consist of a maximum of 40% from loans. This means that a minimum of 60% of the budget raised from tax shelter financing needs to contributed in the form of investment/participation in the production. The production budget can only be 50% funded from tax shelter investment. The other 50% of the budget has to be raised by the production companies themselves.

In order for the tax shelter to be granted, the production company is obliged to spend 150% of the amount that was contributed by the investor as a tax shelter participation investment in Belgium in production or

Peter Marx & Herman Croux
Marx Van Ranst Vermeersch & Partners

exploitation costs within 18 months of the signing of the financing agreement. Moreover, the general financing agreement between the parties must at least mention the following matters:
- The name and corporate object of the production company and the investor;
- The amount of investment by each party;
- The identification of the audiovisual production;
- A budget plan with division between "normal investment" – "tax shelter investment";
- The way for recuperating the amounts granted in the tax shelter;
- The guarantee that the tax shelter investor is not a production company, television company or banking company;
- The guarantee that the production company will spend 150% in Belgium of the amount granted as a tax shelter participation investment in production or exploitation costs, that the total production budget will only be funded by tax shelter financing for a maximum of 50% and that the tax shelter budget itself will only consist of a maximum of 40% from loans.

Tax shelter investments can only be done in the production of movies, feature length television fiction movies, documentaries or animated movies destined for movie theatres, and animated series or documentaries which are European works, as stipulated in Article 6 of the "Television without Frontiers" Directive. ■

● ***Artikel 194ter en 416, paragraaf 2 Wetboek Inkomstenbelastingen 1992, zoals gewijzigd*** **(Articles 194ter and 416 paragraph 2 of the 1992 Income Tax Code, as amended), available at:**
http://merlin.obs.coe.int/redirect.php?id=9345

● ***Artikel 128 en 129 van de Programmawet van 2 Augustus 2002 tot invoering van artikel 194ter en 416 paragraaf 2 in het Wetboek Inkomstenbelasting 1992, B.S. 29 Augustus 2002, err B.S. 13 November 2002*** **(Articles 128 and 129 of the Act of 2 August 2002 introducing articles 194ter and 416 paragraph 2 in the 1992 Income Tax Code, *Moniteur* 29 August 2002, *err Moniteur* 13 November 2002), available at:**
http://merlin.obs.coe.int/redirect.php?id=9352

● ***Artikel 291-293 van de Programmawet van 22 December 2002 tot wijziging van artikel 194ter en 416 paragraaf 2 van het Wetboek Inkomstenbelasting 1992 , B.S. 31 December 2003*** **(Articles 291-293 of the Act of 22 December 2002 amending articles 194ter and 416 paragraph 2 of the 1992 Income Tax Code, *Moniteur* 31 December 2003), available at:**
http://merlin.obs.coe.int/redirect.php?id=9352

● ***Wet van 17 mei 2004*** **tot wijziging van artikel 194ter van het wetboek van de inkomstenbelastingen 1992 betreffende de tax shelter-regeling ten gunste van de audiovisuele productie, B.S. 4 juni 2004 (Act of 17 May 2004 amending article 194ter of the 1992 Income Tax Code on the tax shelter regime for audiovisual works, Moniteur 4 June 2004), available at:**
http://merlin.obs.coe.int/redirect.php?id=9352

FR-NL

BE – New Telecom Decree Implementing Electronic Communications Framework

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By its Decree of 5 May 2004, the Flemish Parliament has implemented the European Electronic Communications Framework (see IRIS 2002-3: 4). The Decree was adopted more than ten months after the deadline for implementation provided by the framework. In April 2004, the European Commission had announced its decision to refer to the European Court of Justice six Member States, including Belgium, for failing to fully implement the framework (see IRIS 2004-6: 6).

The new Decree introduces a new general definition of "electronic communications networks", which is inspired by the Framework Directive and modifies the existing definitions included in the Broadcasting Act of 1995 accordingly.

It also substantially extends the power of the *Vlaams Commissariaat voor de Media* (Flemish Media Authority). It entitles the Media Authority to determine the relevant geographical markets for products and services as regards electronic communications networks and services and to investigate whether they are effectively subject to competition. These markets correspond to the 18 markets that have been defined by the Commission in its Recommendation on Relevant Product and Service Markets (see IRIS 2003-3: 7). Furthermore, the Decree replaces the existing licensing requirement for cable networks by a simple notification requirement to the Media Authority and it introduces a new licensing system for so called digital broadcast networks.

Finally, in accordance with Article 31 of the Universal Service Directive, the must carry obligations for cable television networks have been weakened. They will henceforth only apply to the public broadcaster (VRT) and regional broadcasters that have obtained a license from the Flemish Community. No remuneration will provided for these must-carry obligations.

The French-speaking Community of Belgium has already adapted its legislation to the Electronic Communications Framework last year (see IRIS 2003-7: 7). The federal Government, which is responsible for telecommunications, recently started the implementation process by adopting a Draft Bill on Telecommunications on 7 May 2004. ■

● ***Decreet Vl. Parl. 5 mei 2004 houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995, en van sommige andere bepalingen betreffende de radio-omroep en de televisie, B.S. 9 augustus 2004*** **(Decree of the Flemish Parliament of 7 May 2004 amending some provisions of the Broadcasting Act 1995 and some other provisions on broadcasting, *Moniteur* 9 August 2004), available at:**
http://merlin.obs.coe.int/redirect.php?id=9352

FR-NL

CH – Adapting Copyright to the Information Society

The Swiss Federal Council has given the cantons, the political parties and the organisations concerned until the end of January 2005 to consider its draft revision of part of the Federal Act of 9 October 1992 on copyright and neighbouring rights (LDA). The main aim of the revision is to adapt the protection afforded to literary and artistic works to the new technologies for communication and digital transmission. According to the Federal Council, the measures proposed are intended to maintain a fair balance between the interests of the various parties involved (creators, the cultural economy and users).

The new provisions would authorise the setting up of technical measures for protection (mechanisms to prevent copying and for locking) in order to protect works and services circulated in digital form either through interactive services or on physical media such as CDs and DVDs. In order to protect the holders of rights against piracy in the digital environment, the draft revision includes the prohibition of circumventing these protective measures. Nevertheless, to ensure that protection does not hamper authorised use (and particularly use for private purposes), the draft includes a number of exceptions that would protect consumers and users from the wrongful use of technical methods of supervision.

The draft revision also provides that making works available on the Internet through on-demand services is to be the exclusive prerogative of the originator. This exclusive right would be extended to performing artists, the producers of phonograms and videograms, and broadcasting bodies. The draft also recognises the moral rights of performing artists in respect of their performances.

Patrice Aubry
Télévision Suisse Romande (Geneva)

People with disabilities would also be able to benefit from new copyright waivers – a protected work could be reproduced in a form making it accessible to such people where this was justified. On the other hand, a proposal to introduce a right to follow-up for the originators of art works has been deleted from the draft, as it proved impossible to reach agreement on this point either within art circles or with art dealers.

Revision of its copyright law should enable Switzerland to ratify the two "Internet treaties" drawn up by the World Intellectual Property Organisation (WIPO) – the WIPO Copyright Treaty (WCT) (see IRIS 2002-1: 2, IRIS 2000-2: 15 and IRIS 1997-1: 5) and the WIPO Performances and Phonograms Treaty (WPPT) (see IRIS 2000-2: 15 and IRIS 1997-1: 5). The proposed provisions are also based on Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (see IRIS 2001-5: 3). ■

● **Preliminary draft revision and explanatory report on amendment of federal legislation on copyright and neighbouring rights, available at:**
http://merlin.obs.coe.int/redirect.php?id=9329 (DE)
http://merlin.obs.coe.int/redirect.php?id=9330 (FR)

FR-DE-IT

CH – New Rules for the Swiss Cinema Prize

On 30 September 2004 the *Département fédéral de l'intérieur* (Federal Department of Home Affairs - DFI) adopted an order regulating the conditions for awarding the Swiss Cinema Prize. The order specifically covers the conditions for participation, the procedure for nominating candidates, and the designation of prize-winners. The Swiss Cinema Prize was created in 1998 on the joint initiative of the *Office fédéral de la culture* (Federal Office of Culture - OFC), the Locarno International Film Festival, the "*Journées Cinématographiques*" in Solothurn, the "*Visions du Réel*" international cinema festival, the Swiss radio and television broadcasting company (SRG SSR idée suisse) and the Swiss cinema centre (Swiss Films). Since the start of 2004, responsibility for the Prize has been entirely in the hands of the OFC.

The Swiss Cinema Prize is founded on Article 7 of the Federal Law of 14 December 2001 on cinematographic culture and production (see IRIS 2002-2: 12 and IRIS 2002-8: 12), under which the Swiss Confederation may award prizes or other distinctions for outstanding contribution to cinema. According to Article 2 of the DFI's Order of 30 September 2004, the aim of the Prize is to reward quality Swiss films and to generate interest in Swiss cinema in the media and among the general public. The scheme is open to Swiss films and official coproductions involving a producer of Swiss nationality or domiciled in Switzerland. Films may only be considered for the Prize if they have been selected for a Swiss or foreign cinema festival, or have been shown in a cinema in Switzerland. Television films by independent producers may also be considered for the prize if they have been shown in cinemas in Switzerland. Performing artists of Swiss nationality or domiciled in Switzerland are also eligible.

Patrice Aubry
Télévision Suisse Romande (Geneva)

The Swiss Cinema Prize is awarded annually by the OFC. In a decision made public on 1 October 2004, the OFC defined the rules for the 2005 edition of the Prize, in which it lists the prize categories and the sums of money to be awarded to nominees and winners, and lays down the conditions for participation. In 2005, the Swiss Cinema Prize will be awarded in seven categories – full-length fiction film, full-length documentary, short film, animated film, performance in a leading role, performance in a supporting role, and the Jury's Prize for an outstanding artistic contribution. According to Article 11 of the DFI's Order of 30 September 2004, the prizes awarded to films are, unless agreed otherwise, divided equally between the producer and the director. ■

● **Order of 30 September 2004 by the DFI on the Swiss Cinema Prize, available at:**
http://merlin.obs.coe.int/redirect.php?id=9325 (FR)
http://merlin.obs.coe.int/redirect.php?id=9326 (DE)

● **Decision of 1 October 2004 by the OFC on the conditions for the Swiss Cinema Prize, available at:**
http://merlin.obs.coe.int/redirect.php?id=9327 (FR)
http://merlin.obs.coe.int/redirect.php?id=9328 (DE)

FR-DE-IT

CZ – Protection of Minors

Under Article 32 of Act No. 231/2001 on radio and television broadcasting, the Czech Republic's Council for Radio and Television ensures the protection of minors in respect of broadcast programmes.

Specifically, the Council must ensure that no programme likely to be detrimental to the physical, mental or moral development of minors is broadcast on radio or television except where it is deliberately broadcast at a time when minors would not normally hear or see it.

Thus no sound radio programme may be broadcast between the hours of 6 am and 10 pm if it might be offensive to minors. The Council has noted an evolution in the programmes of a number of radio stations concerning phone-ins. Editorial control is frequently lost in these programmes, which then veer towards pornography. Sexuality is sometimes handled in an overtly obscene manner and sexual practices, including various types of perversion, are described in detail to listeners.

Jan Fučík
Council for Radio and Television Prague

The Czech Republic's Act No. 231/2001 on radio and television broadcasting bans the broadcasting of programmes likely to seriously damage the dignity of the human person or impair the physical, mental or moral development of minors. Each operator is required to ensure that its broadcasts show respect for the human person and equality between men and women, and protect children and young people. The Council served formal notice on Radio Frekvence 1 to respect its obligations in respect of broadcasting its programmes because of its failure to observe these provisions in a programme called "Sexy live", but this had no effect – the broadcasts containing pornographic sequences continued.

On 29 April 2004, the Council fined the operator the sum of CZK 20,000 (EUR 660). The Council has proposed that operators make stricter undertakings in respect of their code of practice, particularly in connection with the protection of minors. ■

● ***Rozhodnutí Rady č. Rpo/13/04*, (Decision No. Rpo/13/04 by the Council for Radio and Television of 29 April 2004)**

CS

DE – Binding Effect of Judgments of the European Court of Human Rights

Thorsten Ader
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In a decision of 14 October 2004, the *Bundesverfassungsgericht* (Federal Constitutional Court) declared that judgments handed down by the European Court of Human Rights are not always binding on German courts.

The *Bundesverfassungsgericht* referred the case back to the *Oberlandesgericht* (Court of Appeal), which, it ruled, was not bound by the earlier judgment by the ECHR. International agreements were incorporated into German law by formal enactment of legislation and had the status of a federal law. German courts should therefore observe and apply the European Convention on Human Rights (ECHR) when interpreting national legislation and in particular when defining the content and scope of fundamental rights. However, the Convention and its additional protocols "were not a direct constitutional basis for a court's review".

According to the *Bundesverfassungsgericht*, ECHR judgments were binding, but only insofar as compliance was possible without violating the binding effect of statute and law. The extent to which judgments of the Court were to be observed depended therefore on the latitude available in domestic law. Compliance with a judgment of the ECHR must neither restrict nor reduce the protection of fundamental rights under the Basic Law. If a violation of fundamental principles of the constitution could not otherwise be averted, there was no contradiction with the aim of commitment to international law if the legislature, exceptionally, did not comply with the law established by international treaties. In particular when the relevant national law was intended to achieve an equilibrium between differing fundamental rights, the possible effects of ECHR judgments for this balanced system must be taken into account.

This decision is of particular significance in connection with the ECHR's recent "Caroline judgment" (see IRIS 2004-8: 2), where the Court found that Princess Caroline von Hannover was right to have complained about publication of photographs of her private life taken without her knowledge. One of the reasons given by the Federal Government for not appealing against the ECHR judgment was that German courts were not bound by the decision of the ECHR. ■

● **Decision of the *Bundesverfassungsgericht* of 14 October 2004 (Az.: 2 BvR 1481/04), available at: http://merlin.obs.coe.int/redirect.php?id=9356**

DE

DE – Right to Information from an Internet Provider

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Hamburg *Landgericht* (Regional Court) has ruled that an author who believed his copyright had been infringed has a right to information from an Internet provider under Art. 101a of the Copyright Act.

The applicant, a firm operating in the sound recording industry, claimed that sound recordings were unlawfully available for downloading from the server of the respondent, an Internet provider. The applicant requested information about the particulars of one of the respondent's customers who manages this FTP server and supplies the storage and computer capacity needed for the content. The FTP server is connected to the Internet via access made available by the respondent but is managed exclusively by the respondent's customer, not the respondent himself. The respondent has no administrative access to the disputed content. Uploading is done without any involvement on his part. He is, however, able to identify the customer by means of his user identification.

The Court ruled that the unambiguous wording of Art. 101a of the Copyright Act establishes no right to disclosure of the information. The supply of music ready for downloading via the Internet means making the music accessible to the public within the meaning of Art. 19a of the Copyright Act, not multiplication or dissemination within the meaning of Arts. 16, 17 of the said Act.

The applicant does have a right to information, however, as a result of an unforeseen legal loophole which can only be overcome by applying Art. 101a of the Copyright Act by analogy. It was not the deliberate intention of the legislator to deprive third parties of the right to information. Furthermore, the purpose of Art. 101a of the Copyright Act argues in favour of its application by analogy, since this should enable the injured party, in this case the applicant, to investigate past violations and prevent any further violations in the future.

In arranging technical Internet access for the infringing party, the respondent knowlingly opened up the possibility of copyright infringement. Other interests, such as data protection obligations, could be adequately covered in the context of the proportionality test under Art. 101a of the Copyright Act. The request for information concerned personal data within the meaning of the Federal Data Protection Act, but did not affect the secrecy of telecommunications within the meaning of Art. 88 para.2 of the Telecommunications Act (TKG), insofar as the protection afforded applies only to "connection data" in a communications process, whereas the information requested by the applicant concerned the name and address of the server operator, in other words the "inventory data" within the meaning of Art. 95 of the Telecommunications Act, which are not protected by the right to telecommunications secrecy. ■

● **Decision of Hamburg *Landesgericht* of 7 September 2004, Az. 308 O 264/04**

DE

DE – Agreement on the 8th Amendment to the Inter-State Broadcasting Agreement

At their annual conference in October 2004 the prime ministers of the different German *Länder* "took note" of their approval of the draft 8th Amendment to the Inter-State Broadcasting Agreement, subject to certain conditions.

The key point was the decision concerning the level of the broadcasting licence for the coming licence period. The heads of the *Länder* governments are of the opinion that a smaller increase in the licence than the one called for by the KEF, the Commission set up to identify the financing needs of the public broadcasting companies, will have to suffice, in view of the clearly very difficult financial situation of all sectors of the population and the untapped potential for further savings.

In addition, there will be no change in the number of TV programmes transmitted by the public broadcasting companies at the level of the *Länder*. In future, public

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broadcasters wanting to transmit new satellite programmes will have to accept a corresponding reduction in their current programming. For the first time, a standard must-carry rule with respect to the digital cable network will apply to all nationwide private broadcasters with regional windows. Under the revised Art. 53 communications service providers are banned from using access entitlement systems, APIs, navigators and special payment systems to restrict the freedom of access of providers of broadcast and similar tele-media services or to discriminate against other providers. The use of such systems must be notified to the media authorities of each *Land*, who then monitor their use.

In the appended minutes some of the *Länder* asked the public broadcasters to examine whether and to what extent ZDF could be given sole responsibility for the joint programme 3sat (however, this possibility was rejected by Baden-Württemberg however in a further minute). Statements made by the public broadcasting companies on the issue of structural autonomy are appended to the draft inter-state agreement. The 8th Amendment now has to be approved by the parliament of each *Land*. It is expected to enter into force on 1 April 2005. ■

● **Draft 8th Amendement to the Inter-State Broadcasting Agreements (*Achter Rundfunkänderungsstaatsvertrag*), available at:**
http://merlin.obs.coe.int/redirect.php?id=9357
DE

ES – Amendments to the Criminal Code to Fight against Piracy

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On 1 October 2004 Act 15/2003 of 25 November 2003 amending the Criminal Code entered into force. It introduces reinforced measures (with increased fines and terms of imprisonment) to fight against piracy offences, which also concern unauthorised file-sharing activities. Since in Spain the sharing of music files is very popular (it is estimated that 43% of the illegal copying through P2P systems in Europe is done from Spain), different sectors of the Internet community have voiced their opposition to the amendments.

The main purpose of the new Criminal Code is to fight against:
- Big organisations with an extended piracy network;
- Those who market devices used to break the protection of works;
- Those who upload music, films or computer programmes to the Internet and make them available through a file-sharing programme to multiple users;
- Those selling illegal products through Internet, e-mail or special servers, as well as websites offering the illegal downloading of protected works.

From now on, the following activities shall be considered offences:
- To manufacture, import or introduce onto the market any instrument or device specifically designed to facilitate the unauthorised suppression of a technical mechanism used to protect computer programmes or a work protected by copyright;
- To reproduce, communicate or copy an artistic, literary or scientific work through any media without the authorisation of the copyright owners. In this case there must be a profit motive and harm caused to a third party.

For both offences, there are specific aggravating circumstances in the event that the offence has a particular impact due to its economic significance or harm caused. Furthermore, the offences are now a crime against the State, so these offences can be persecuted *ex officio* without a formal complaint by the rightsholder.

This amendment seems to exclude Internet users who download a copy of a work for private use. However, in this case the line that separates what is, or is not, considered "profit motive" or "economic significance" is very thin. ■

● ***Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* (Act 15/2003 of 25 November 2003 amending the Criminal Code 10/1995 of 23 November 1995), available at:**
http://merlin.obs.coe.int/redirect.php?id=9348
ES

FI – New Act on Data Protection in Electronic Communications

Marina Österlund-Karinkanta
Finnish Broadcasting Company YLE, EU and Media Unit

On 16 June 2004, the *Sähköisen viestinnän tietosuojalaki* (Act on Data Protection in Electronic Communications) was ratified. It entered into force on 1 September 2004. The Act repeals the *Laki yksityisyyden suojasta televiestinnässä ja teletominnan tietoturvasta, 565/1999* (Act on the Protection of Privacy and Data Security in Telecommunications).

The new Act aims at safeguarding confidentiality and protection of privacy in electronic communications. It extends the protection of privacy and the confidentiality of communications from the telecoms sector alone to every activity of the information society. All enterprises and associations that process confidential data in their telecommunications networks are subject to the rights and obligations set out in the Act. The Act clarifies the rules for processing confidential identification and location data and provides new means to prevent spam and viruses. Electronic direct marketing may not be addressed to consumers without their prior consent. Users' rights to access data concerning their own communications and e.g. location data are extended. Rules are defined concerning the use of cookies and the police are given better access to information on the possessors of dynamic IP addresses and IMEI codes of mobile phones.

What specifically matters to the audiovisual sector is that content providers will have the right to obtain invoicing data concerning their own customers from the telecommunications operator. A telecommunications operator is obliged to give a provider of information society services, e.g. providers of audiovisual content, news, timetables, weather information or ringing tones to a mobile phone, the data necessary for billing purposes. Thus, content service providers can bill the subscriber or user directly for their services instead of billing through a telecommunications operator. The data can be given only with the prior consent of the subscriber or user.

Compliance with the Act on Data Protection in Electronic Communications and regulations issued under it will be mainly monitored by the Finnish Communications Regulatory Authority, FICORA (see IRIS 2001-8: 14). The processing of location data and provisions on direct marketing will be monitored by the Data Protection Ombudsman. ■

● **Act No. 516/2004 of 16 June 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9285
FI-SV

FR – Another Setback for Terrestrially-broadcast Digital Television

On 20 October the *Conseil d'État*, in response to an application brought by TF1, cancelled the last six of the twenty-three authorisations issued in June 2003 by the CSA (*Conseil supérieur de l'audiovisuel* – audiovisual regulatory body) to editors of television services intended for terrestrial broadcasting in digital mode. The authorisations had been allocated to the channels MCM, Canal J, Sport +, I-Télévision, Ciné-Cinéma Câble and Planète Câble, held by Canal+ and Lagardère. Referring to the joint control exercised by the two companies on the channels MCM and Canal J, TF1 felt that the authorisations allocated to these channels brought the total number of authorisations allocated to Canal+ up to seven, whereas at the time the maximum number any one operator was permitted to hold either directly or through companies it controlled, according to Article 41 of the Act of 30 September 1986, was five. Under Article L. 233-3 of the Commercial Code, one company was deemed to control another company if it owned the majority of the voting rights. Moreover, if two or more persons, working together, jointly determined the decisions made by the general meetings of shareholders of a third company, such persons were deemed to exercise "joint control" of that company.

Looking into the financial structures of the companies Canal+ and Lagardère in the light of these principles, the *Conseil d'État* found firstly that the company Lagardère Thématiques, since it held their entire capital, controlled the companies Canal J and MCM, which each held an authorisation to broadcast. Moreover, the companies Canal+ and Lagardère Images themselves had joint control of the company Lagardère Thématiques, as they held 49% and 51% of its shares respectively and had agreed in writing to define the strategy of their subsidiary by mutual agreement. The *Conseil d'État* inferred from this that the company Canal+ was joint holder, with the Lagardère Group, of the authorisations attributed to the companies MCM and Canal J. Canal+ already had the indirect benefit of the authorisations attributed to each of its subsidiaries Sport+, I-Télévision, Ciné-Cinéma Câble and Planète Câble, in addition to the authorisation attributed to it for the full, simultaneous broadcasting on terrestrially-broadcast digital television of its own terrestrially-broadcast programmes. The procedure organised by the CSA had indeed resulted in Canal+ holding, directly or indirectly, alone or jointly, seven authorisations to broadcast. It did not matter that the Act of 9 July 2004 had amended by the Act of 30 September 1986 by raising the ceiling to seven authorisations; the *Conseil d'État* cancelled the six authorisations at issue. The following day, the CSA launched a public consultation with a view to a further call for applications for the six invalidated frequencies. Although, according to the CSA, this should not result in any delay in launching terrestrially-broadcast digital television (scheduled in March 2005 for channels for which no charge is made and September 2005 for pay channels), the schedule is nevertheless seriously threatened by the choice of the standard for digital broadcasting (Mpeg 2 or Mpeg4), currently subject to the Prime Minister's decision. ■

Amélie Blocman
Légipresse

● ***Conseil d'État*** **(5th and 4th sub-sections combined), 20 October 2004 - TF1, available at: http://merlin.obs.coe.int/redirect.php?id=9353**

FR

FR – Histoire Channel Authorised to Broadcast the Papon Court Case

Court cases concerning crimes against humanity are of historic interest, within the meaning of Article 1 of the Act of 11 July 1985 in favour of the constitution of audiovisual court archives (currently Article 2221 of the Heritage Code) and as such may be broadcast by audiovisual means. Under Article 8(2) of the same text, broadcasting a court case of this kind is possible if it is authorised by the Presiding Judge of the Regional Court on condition that a final judgment has been delivered and the case has been closed. Thus in 2002 and 2003 the Histoire theme channel had been refused authorisation to broadcast programmes on the case involving Maurice Papon before the *Cour d'assises* of the Gironde *département* in 1998, as at the time his conviction could not be considered final until there was no further possibility of reconsideration.

On 11 June 2004 the Court of Cassation rejected the appeal lodged by the party concerned, thereby rendering his sentence to ten years imprisonment final, and Histoire renewed its application to the Presiding Judge of the Regional Court of Paris. In an order in an urgent matter delivered on 18 October, noting that "it ceased to be necessary to maintain the presumption of innocence in respect of a person who had been found guilty definitively", the Court found that the principle of allowing the broadcasting requested was established. Maurice Papon nevertheless contested the fairness of the channel's continuity editing, condensing the 475 hours of recorded proceedings into forty broadcasts each lasting two hours. The Presiding Judge noted that the editorial committee, comprising well-known historians and jurists, had carried out its work conscientiously, adding that "Mr Papon [was] not legally entitled to any right of supervision of the editorial direction adopted in the series of broadcasts proposed by the channel". It also took note that Histoire had undertaken to re-establish the balance between the respective points of view by allowing each party to express itself during a studio broadcast which would follow immediately after the broadcasting of the final images of the court proceedings. ■

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● **Regional Court of Paris (order in an urgent matter), 18 October 2004, Histoire S.A. v Maurice Papon et al**

FR

FR – Video Pirate Acquitted

On 13 October 2004 the Regional Court in Rodez delivered a decision that has attracted a lot of attention in the present climate of intense consideration of peer-to-peer technology. To date, there have been very few cases on the downloading and exchange of works that are protected by copyright and neighbouring rights that would provide precedent, which means that the matter is not clearly settled. On 29 April, the Regional Court in Vannes imposed a suspended sentence of three months imprisonment and a fine in respect of six Internet users who had downloaded films, music, games and software and then copied them onto CDs and DVDs which they subsequently exchanged. They were found guilty of infringement of copyright under Article L. 122-4 of the Intellectual Property Code (CPI), as they had no authorisation from the originators or their beneficiaries to download and circulate the works in question.

In the case brought before the criminal section of the

Regional Court in Rodez, a private individual was accused of having "edited a production, more specifically by reproducing 488 CDROMs, printed or recorded in full or in part in disregard of the rights of their originators". These were films and cartoons that the accused had in part downloaded from the Internet using his computer, or copied onto CDROMs for his personal use, in some cases lending them to other people but never selling or exchanging them. The Court found that the fact that only a single copy of each of the films in question had been discovered confirmed these declarations, and decided that no attempt had been made to sell or exchange the CDROMs. Recalling the exception of private copying allowed by Article L. 122-5 of the CPI, under which an originator may not prohibit "copies or reproductions strictly reserved for the use of the person making the copy", and the levy on blank recording media and reproduction equipment (Article L. 311-1 of the CPI), the Court acquitted the accused, on the grounds that there was "no proof of any use of the copies he had made other than strictly private use as provided for in Article L. 122-5 of the CPI.

The question of whether the actual process of downloading and the reproduction of works on external media (CD or DVD) without authorisation may benefit from the exception of private copying, as formulated in the analog era, is the subject of fierce debate. The judgment of the Regional Court in Vannes makes no comment on the matter; the terse judgment of the Court in Rodez seems to take no account of the origin of the works, viz. that they were downloaded unlawfully on peer-to-peer networks. This is at any rate the opinion of the lawyers acting for the parties claiming damages (producers, distributors and video editors) who, following the advice of the Public Prosecutor, have decided to appeal against the judgment. ■

Amélie Blocman
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● **Regional Court in Rodez, 13 October 2004, French national federation of film distributors et al v A. Delicourt**

FR

FR – The Rights of the Central Figure in a Documentary

On 27 September the Regional Court in Paris delivered a much-awaited judgment on the rights of the "hero" of a documentary. Mr Lopez, the "star" teacher of the single-class rural school featured in the successful full-length documentary film "Être et avoir" (1.3 million tickets sold to 31 December 2002, after six months' operation), claimed "infringement of copyright by the unauthorised use of his rights as an originator and as a performer, and infringement of his exclusive rights in respect of his image, his name and his voice" and claimed compensation from the film's director, co-producer and distributors.

Mr Lopez felt firstly that, under Article L. 1122(2) of the French intellectual property code (*Code de la propriété intellectuelle* – CPI), he held copyright in respect of his lessons, which constituted 80% of the film. The Court, recalling that such protection was conditional on the provision of proof of originality reflecting the personality of the originator, rejected the application on the grounds that, although the teacher was powerfully present throughout the film, the fact remained that none of his teaching or any teaching method were reproduced in the film. Mr Lopez then claimed that he was the co-author of the film, in application of Article L. 113-7 of the CPI, because of his participation in the creation of the documentary. The Court recalled, however, that the teacher, in the interviews given when the film was released, constantly indicated that he had not intervened in the filming and that no document had been produced that supported his claim to have truly participated in the production operations or in the choice of shots and sequences. Nor was the applicant entitled to protection under the neighbouring rights of a performing artist in respect of his performance of lessons. The Court recalled that the mere fact of being filmed did not confer on the person who had been filmed the status of performing artist, and went on to state clearly that "the documentary, by its relationship with reality, as defined in the cinematographic arts, excluded the notion of a performance".

Lastly, the teacher claimed infringement of his rights in respect of his image, his name and his voice, protected by Article 9 of the Civil Code, claiming that he had never given his "specific" consent to their use either in the film or in the various advertising and commercial supports. Recalling that the proof of such authorisation may be "specific or tacit, and take any form", the Court noted that Mr Lopez had told journalists that he had agreed to the film being made, that he had followed the various stages of recognition of the film and taken part in its promotion (more particularly at the 2002 Cannes Film Festival). He could not, therefore, claim lack of consent on his part to the use of his image, name and voice in the film. Thus the Court rejected every claim brought by the "hero" of the documentary. ■

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● **Regional Court in Paris, 3rd chamber, 1st section, 27 September 2004, G. Lopez v N. Philibert et al**

FR

GB – Copyright Infringement Action Leads to Order against ISPs

The global legal battle by international and national bodies representing the phonographic industry against allegedly illegal file-sharers has moved to the UK.

So far, actions against P2P file-sharing networks sharers have been pursued in the USA by the RIAA and in Denmark, Germany, and Italy by the IFPI or its affiliates. Networks involved include KaZaA, WinMX, eMule and iMesh.

At the beginning of October, British Phonographic Industry (the IFPI's UK affiliate) announced it was taking legal action against 28 UK-based files-sharers using e.g., the KaZaA, Imesh, Grokster, Bearshare and WinMX networks. BPI argues that the users are "engaged in copying and making available large numbers of music tracks on the internet in breach of copyright. They will face civil action for an injunction and damages."

In an interesting development on 14 October, Mr. Justice Blackburne in the High Court ordered UK ISPs (e.g., AOL, Wanadoo and BT) to disclose the identities (names and addresses) of the 28 unknown persons. It has been noted that some of these might be children or young persons. The ISPs have 14 days to comply with the order.

The BPI has said that once the identities have been revealed, it will write to each person offering the opportunity of an out-of-court settlement.

Justifying his order, the judge said, "On the face of it this appears to be a powerful case of copyright infringement." ■

David Goldberg
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● **High Court, order issued by Mr Justice Blackburne, 14 October 2004**

GB – New Arrangement for Tax Relief for British Films

David Goldberg
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As already noted (see IRIS 2004-4: 10), the UK Chancellor announced in his 2004 Budget speech that the so-called "Section 48 relief" was going to be abolished on its expiry in July 2005.

A new system of tax relief for "qualifying British films" was announced during September 2004. It will take effect from July 2005 and the legal basis will be the Finance Act 2005. Transitional arrangements will apply to films in production on 2 July 2005.

The new arrangements mean that "The production company will be entitled to a deduction of 150% of total production expenditure which it can offset against income when computing its business profits." Furthermore, "The company will be able to surrender losses, up to a limit of 100% of production expenditure, to the Inland Revenue for a cash payment equal to 20% of the amount of the loss surrendered."

In comparison with the old "Section 48 relief" the new system will mean that (i) the relief is paid directly to the film-makers and not through third parties as before; (ii) will cover 20% of "production costs" (previously 15%); (iii) films which qualify may have a budget of GBP 20 million (up from GBP 15 milllion), so relief may be claimed on up to GBP 4 million of expenditure rather than GBP 2.25 million; (iv) there will be an incentive for the film to be profitable; (v) the relief applies to all production expenditure (i.e. not just as regards money spent in the UK); and (vi) the maximum relief could be around GBP 4.5million. ■

● Tax relief for the production of low-cost British films, available at: http://merlin.obs.coe.int/redirect.php?id=9333

● Treasury announces new tax relief for British films, available at: http://merlin.obs.coe.int/redirect.php?id=9334

GB – New Code on Electronic Programme Guides

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The Office of Communications (Ofcom) has completed consultation regarding the Code on electronic programme guides (EPGs) required by the Communications Act 2003, and has issued a final version. The Act requires that the Code gives appropriate prominence to public service channels, includes provision for people with disabilities affecting their sight and hearing (see IRIS 2004-8: 9), and it is also covered by the regulator's general duty to secure fair and effective competition (Sections 310, 316).

The Code is general in nature and is deliberately limited in its degree of direct prescription. In relation to appropriate prominence for public service channels, it requires that the approach adopted is objectively justifiable and that the EPG provider publishes a statement setting out its approach. Viewers in the regions should be able to select regional versions of public service channels through primary listings, and it would be justified to position public service channels only one click from the home page.

EPGs should be appropriately adjusted to facilitate their use by disabled people, and provision for this should be an integral part of planning for their future development. Information should be provided in the EPG on which programmes are accompanied by access services for the disabled, and on how to use the EPG itself.

The Code requires that the providers of EPGs ensure that any agreement with broadcasters is made on fair, reasonable and non-discriminatory terms. An objectively justifiable method of allocating listings must be published; this could be 'first-come first served', alphabetical or based on audience shares. They must not give undue prominence to any channel to which they are connected and must ensure that viewers are able to access all services included in the EPG on the same basis. Free-to-air services must be at least as accessible as pay TV services, and no condition may be imposed between the EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature. EPG operators which are also channel providers must ensure that access to all services in the EPG is easily available to all viewers using it who are equipped to receive the service. ■

● Ofcom, "Statement on Code on Electronic Programme Guides" including the text of the Code and analysis of the consultation responses, available at: http://merlin.obs.coe.int/redirect.php?id=9252

GB – Second Stage of Review of Public Service Broadcasting

The Office of Communications (Ofcom) has now issued the second phase of its review of public service broadcasting, as required by the Communications Act 2003 (for the first phase, see IRIS 2004-6: 12). Final conclusions will be issued after further consultation.

According to the Review, the move into the digital age will destroy the current balance of institutions, funding and regulation which has up to now supported public service broadcasting. The latter has depended on hidden subsidies through the free use of analogue spectrum which will become valueless; this should be replaced by explicit and transparent public funding.

The purposes of public service broadcasting should be to inform ourselves and others and to increase our understanding of the world; to stimulate interest in arts, science, history and other topics; to reflect and strengthen our cultural identity through original programming; and to make us aware of different cultures and alternative viewpoints. Public service programmes should be of high quality, original, innovative, challenging, engaging and widely available.

The BBC should remain the cornerstone of public service television, and should be properly funded by a TV licence fee, as at present, though in future this may be supplemented by limited subscription services. The proposal in the first phase review for some top-slicing of the proceeds to fund other broadcasters is now rejected. The BBC should strive to ensure that all its programmes reflect the purposes and characteristics of public service broadcasting. ITV1 will continue to be subject to public service obligations, but those relating to regional programmes will be relaxed except in relation to news, and a more flexible approach taken to content regulation. Channel 4 should continue to be a public service broadcaster, though after digital switchover it may not be able to provide the same range of public service programming as it does today. Channel Five will be expected to invest more in original programming in the run-up to switchover, but a more flexible approach will be taken to its other public service obligations.

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In view of the loosening of obligations on the commercial channels, the BBC could become the only public service broadcaster of any scale. To provide a plurality of outlets for such broadcasting, a new Public Service Publisher should be established using public funds to commission and publish public service content. The right to set up and run it would be awarded by competitive bidding, the only current broadcaster excluded from bidding being the BBC. Funding could come from tax revenues, an enhanced licence fee or a tax on other broadcasters. ■

● **"Ofcom Review of Public Service Television Broadcasting: Phase 2 – Meeting the Digital Challenge", available at: http://merlin.obs.coe.int/redirect.php?id=9331**

HU – Restructuring of Media Enterprises Ahead

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In accordance with the Radio and Television Act No. I/1996 (Broadcasting Act), one of the responsibilities of *Országos Rádió és Televízió Testület* (the national radio and television board - ORTT) is to ensure diversity of opinion in the media.

Pursuant to Chapter 8 (§§ 125, 126) of the Media Act No. I/1996, which lays down rules on media ownership, cross-ownership (in the sense of a controlling interest) of a daily with nationwide coverage and broadcasters (concerning the various grades of participation) is prohibited.

In late September ORTT announced to press representatives that according to current estimates, coverage by the regional commercial broadcaster Viasat3 could be assumed to extend to more than half of the population of Hungary. The programme broadcast by the firm, which is owned by the Viacom conglomerate, can be received terrestrially in the capital Budapest and via cable networks in other parts of the country. With the development and extension of the cable networks the technical range of several regional radio broadcasters has increased significantly. ORTT has therefore embarked on a general investigation to determine which firms must be considered in future as national broadcasters.

One of the factors relevant in the case of Viasat3 is the rule according to which at least 26 % of the shares in a national commercial broadcaster must be owned by Hungarian natural or legal persons, whereas 95 % of the shares in Viasat3 are currently held by the Swedish company MTG Broadcasting AB, which is part of the Modern Times Group (MTG). As regards ownership of a national daily newspaper, the free daily Metro is published by MTG Metro Gratis Kft, also part of the MTG Group.

ORTT hopes to have completed its study by the beginning of December 2004 and will then prepare its decision on the matter. ■

IE – Conference on Child Safety and New Media

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The Internet Advisory Board ["the Board"] has published the results of research on children and the use of new media, presented by the Board at its annual conference on 18 October 2004. The Board was set up on the recommendation of a government report in 1998 on "Illegal and Harmful Use of the Internet" (see IRIS 2000-3: 28). Its task is to facilitate the self-regulation of the Internet in Ireland and to monitor developments.

The latest research carried out among parents and children to ascertain patterns regarding access and use of new technological media by children shows that although children have access to a growing number of new media, parents still associate risks and other issues with access to Internet by computer. Despite the availability of access to Internet by mobile phone, only 13% of parents consider a mobile phone to be a high risk, compared with 47% for Internet-accessible computer.

There has been a significant rise in both the availability and number of technologies used by children, such as mobile phones, video recorders, cable TV and DVD, but surprisingly, weekly access to the Internet by children has dropped more than 20% since 2001.

Almost half the parents surveyed saw the Internet as a potential source of access to pornography and unsuitable material, compared with 28% for digital television.

A high percentage of children said that there was considerable supervision and monitoring of their Internet use by their parents, as well as discussion regarding the potential dangers associated with the Internet. ■

● **Press Release "Internet Advisory Board Publishes Research on Children and Use of New Media", 18 October 2004. Available on the website of the Internet Advisory Board at: http://merlin.obs.coe.int/redirect.php?id=9332**

IT – New Rules Implementing the Reform of Cinema

Three *decreti ministeriali* (Ministerial Decrees) have been published in the *Gazzetta Ufficiale* (Italian Official Gazette) of 8 October 2004. Together with six other Ministerial Decrees previously published, they implement the provisions laid down in the main Legislative Decree of 22 January 2004 (see IRIS 2004-3: 12).

The Decrees aim to provide new specific rules reforming the law on cinema in Italy. In particular, these Decrees provide rules on financial contributions towards the production, distribution and promotion of movies, rules for the composition and functioning of the newly created *Commissione per la Cinematografia* (Commission for Cinematography), and a list of indicators for the recognition of the status of 'film-work of cultural interest', which represent a necessary condition for the eligibility of the work to financial contribution. Financing is limited to a maximum of 70% of the total cost of the movie. The management of the rights with regard to government-financed movies is in the hands of Cinecittà Holding s.p.a. The new rules offer the possibility of government co-financing for cultural interest movies made by private companies with a minimum capital of EUR 40,000. Contribution and financing can be made towards the production, distribution, promotion and exploitation of Italian-made movies and short films provided they are of cultural interest. The Commission for Cinematography is composed of 2 sub-commissions which

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are divided into different units dealing with various aspects, such as promotion, scenario evaluation, cultural interest evaluation and similar areas. The producer and the director will be questioned in order to decide whether a movie is eligible for financial contribution. No state contribution is possible for productions which are made solely by public entities. The commission that will decide *inter alia* on issues concerning 'cultural interest' will be composed of film-directors, actors, experts in the field, producers, distributors, legal and financial advisors. A temporary commission will evaluate all proposals pending under the former rules. ■

● ***Decreti Ministeriali 27 Settembre 2004*** **(Ministerial Decrees of 27 September 2004) published in the *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette of the Italian Republic) no. 237 of 8 October 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9349

IT

IT – AGCOM Will Monitor on Conflict of Interests in the Broadcasting Sector

Maja Cappello
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On 20 July 2004, the Italian Parliament approved provisions on the resolution of conflict of interests. According to these general rules, any person who holds a government post (eg, President of the Council of Ministers, Ministers, Deputy Ministers) has to devote him/herself to the protection of the public interest and abstain from voting in situations that may generate a conflict of interests. This situation occurs when the holder of a government post participates in the adoption of an act, or suggests its adoption or omits to adopt it, and this act has a specific or beneficial effect for the person involved or his relatives, with consequent damage to the public interest.

The Competition Authority – AGCM (*Autorità garante della concorrenza e del mercato*) is in charge of monitoring these situations and intervening in order to fix them, while the Communications Authority – AGCOM (*Autorità per le garanzie nelle comunicazioni*) has to ascertain that these persons or their relatives who own or control companies operating in the integrated communications system as defined in the so-called Gasparri Law (see IRIS 2004-6: 12) do not behave in a manner that gives a "privileged support" to the holder of the government post, violating the provisions on political and electoral communications laid down in Act no. 28/2000 (see IRIS 2000-3: 9). If such behaviour occurs, AGCOM orders the company in question to stop this behaviour and adopt any necessary corrective measure. In case of non-compliance with this order, AGCOM may impose pecuniary sanctions which are up to 1/3 higher than ordinary pecuniary sanctions according to the gravity of the behaviour. When such procedures have been activated, AGCOM informs the Parliament about the type of "privileged support" that has been given by any company operating in the communications system, the consequences deriving from this support and the sanctions that have been applied.

Within 90 days of the entry into force of the Act, AGCOM will decide on the procedures and the criteria according to which these provisions will be applied in practice. ■

● ***Legge 20 luglio 2004, n. 215 "Norme in materia di risoluzione dei conflitti di interessi", pubblicata nella Gazzetta Ufficiale n. 193 del 18 agosto 2004*** **(Law of 30 July 2004, no. 215 on the resolution of conflict of interests published in the Official Journal of 18 August 2004, n. 193), available at:**
http://merlin.obs.coe.int/redirect.php?id=9350

IT

IT – Minispots Allowed only During the Breaks in Football Games

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On 6 October 2004, the Communications Authority – AGCOM (Autorità per le garanzie nelle comunicazioni) decided to amend the regulation concerning commercial advertising, in particular the provision concerning the insertion of advertising during the broadcasting of football games. Regulation no. 538/01/CSP (see IRIS 2001-9: 11) provided that during the transmission of sports events, advertising and teleshopping spots shall only be inserted during the intervals which are foreseen by the official regulations of the event being broadcast or during pauses in the game, provided that the advertising break does not interrupt the transmission of the sports action in progress. This formulation had provoked an infringement procedure by the European Commission, who considered it to be incompatible with article 11, paragraph 2, of the "Television without Frontiers" Directive. With Regulation no. 250/04/CSP the reference to the pauses in the game has now been replaced with one referring to the periods of break in the game that may be added to the prescribed duration, according to what is stated in the Italian version of paragraph 23 of the Interpretative Communication of the Commission on televised advertising (see IRIS 2004-6: 4). ■

● ***Delibera n. 250/04/CSP Modifiche al Regolamento in materia di pubblicità radiotelevisiva e televendite, di cui alla delibera n. 538/01/CSP del 26 luglio 2001*** **(Regulation no. 250/04/CSP amending Regulation no. 538/01/CSP of 26 July 2001 on commercial advertising and teleshopping), available at:**
http://merlin.obs.coe.int/redirect.php?id=9351

IT

KZ – New Telecommunications Law

On 5 July 2004 the President of Kazakhstan signed into law the Statute on Telecommunications. The new Act replaces the Statute on Telecommunications of 18 May 1999. The Statute comprises 42 Articles divided into 10 chapters.

The Statute establishes the competences of government bodies in the telecommunications sphere, stipulates the procedure for allocation of frequencies, and provides for functioning, development and cooperation of telecommunication networks, sets up procedures for the protection of telecommunication devices, structures and networks, guaranties security of radio-frequency spectra and orbital slots for telecommunication satellites.

According to the Statute, the government engages in law-making, licensing and control over compliance with the law in the sphere of telecommunications. Use of the radio spectrum shall be exercised in accordance with the following rules: licensing of frequencies, payment for the use of frequencies, inadmissibility of a frequency assignment without time limitation, openness of the procedures concerning allocation and use of frequencies (Article 12 para 1). The Statute stipulates compulsory competition procedures for the licensing of television and radio broadcasting. Unlike other telecommunications licenses, those in radio and television broadcasting are to be granted by the authorized body in the sphere of mass media, *ie* by the Ministry of Information (Article 19 para 1). The government body authorized in the telecommunications sphere shall grant - in coordination with the Ministry of Information - permission to use a frequency reserved for radio or television broadcasting to an entity holding a television or a radio broadcasting license. The Statute includes the exhaustive list of grounds for a refusal to grant such a permission (Article 12 para 7).

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The Statute introduces a number of measures aimed at the intensification of control over telecommunications security. All telecommunications networks in the Republic of Kazakhstan shall be considered as a united telecommunications network (Article 21). Unified rules for interaction between all telecommunications networks within this united network shall be adopted. Investigatory bodies of law enforcement agencies are authorized to suspend activities of telecommunications networks or means of communication without an order granted by a prosecutor or a court where the networks and means are used for criminal purposes (Article 15).

Chapter 7 of the Statute is devoted to universal telecommunication services. Such services shall be provided at affordable prices, irrespectively of place of residence of users, and with a view to the on-going development of telecom facilities. The list of and tariffs for these universal services shall be adopted by the Government of the Republic of Kazakhstan. ■

● **Statute of the Republic of Kazakhstan "O svyazi" ("On Telecommunications"), published in *Kazakhstanskaya pravda* official daily journal on 10 July 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9321**

RU

LV – Cable Broadcaster Starts Digital Broadcasting

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SIA Baltkom TV, one of the largest cable broadcasters in Latvia, has recently started broadcasting in digital format. In May 2004 the company had launched already digital broadcasting programs in its cable networks in Riga. On 24 September 2004 the company switched its MMDS (Multichanel Multipoint Distribution System) broadcasting technology to the digital format. Digital television can be received within a 50 km range of Riga, where the television broadcasting tower is located. The offer includes 49 television channels and 6 radio channels. In order to access the new service consumers must become subscribers of SIA Baltkom TV, and have to purchase the decoding device. Currently the number of subscribers of the new service totals up to 2000 households, but the company hopes that this number will increase to 15,000 within the year 2005.

Digital broadcasting services with MMDS technology are not considered as terrestrial television although they do not involve cable. This is due to the Latvian legislation that provides that for DVB-T the COFDM standard shall be used.

SIA Baltkom TV has received its license as a cable television broadcaster. The National Broadcasting Council is currently of the opinion that there are no changes needed as regards the digital format, for the frequency resources that are used are the same as for the analog format. ■

RO – New Rules Governing Personality Rights

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On 1 July 2004 Romania's *Consiliul Național al Audiovizualului*, the regulatory authority for electronic media, adopted a decision that sets out detailed rules concerning the freedom of opinion of journalists and the restrictions imposed on such freedom as a result of personality rights (*Decizia CNA privind protecția demnității umane și a dreptului la propria imagine Nr. 248 din 1 iulie 2004)*.

Article 1 of the Decision defines freedom of opinion and information. It states that restrictions on such freedom are possible in the interests of a democratic society, national security, territorial integrity and public order. Permitted grounds for interference with this right also include the protection of health or morals and the good reputation of others. Under Article 2 of the Decision, broadcasters are therefore required to respect the right to protection of human dignity and an individual's reputation. Under no circumstances may they take advantage of a person's ignorance or credulity.

The aforementioned interests are also subject to a restriction, however, insofar as in the case of events deemed to be in the public interest, freedom of expression may take precedence.

The decision also lays down rules governing the reporting of crimes committed. In principle, a person is presumed to be innocent until proven guilty according to law. The publication of photographs of suspects without their permission and of photographs of crimes without the consent of the victim or the victim's family members is prohibited. According to Article 8, everyone is entitled to protection of privacy. Publication in the electronic media of reports about a person's private life without the person's consent is therefore not permitted. Here too, exceptions may be allowed in cases deemed to be in the public interest, for example if the publication of a report or photographs can be used in order to prevent a crime or secure evidence.

Other rules are concerned with photographs taken with concealed cameras and anti-discrimination provisions, as well as the right of individuals to their own image.

Concerning violations of the rules set out in the Decision, Article 19 describes the situations where high fines may be imposed on a case-by-case basis in accordance with Articles 90, 91 and 95 of the Audiovisual Act No. 504/2002. ■

● ***Decizia CNA privind protecția demnității umane și a dreptului la propria imagine Nr. 248 din 1 iulie 2004)* (Decision No. 248 of 1 July 2004), *Monitorul oficial al României, Partea I, Nr. 668/26.VII.2004***

RO

US – FCC Expands Broadcast Indecency Liability

On 22 September 2004, the Federal Communications Commission ("FCC" or "Commission") issued a USD 550,000 Notice of Apparent Liability against Viacom, Inc.–owner of the CBS and MTV networks–for airing a program with a half-second picture of a woman's breast (see IRIS 2004-4: 15). The Commission's action expanded its campaign against indecency, by imposing liability for negligent rather than wilful broadcasting of sexual material. Procedurally, Viacom must pay or challenge the proposed fine within 30 days of the FCC's decision.

The material in question came during the "halftime show" at the 38th annual Super Bowl, the high point of the US football season. Airing in the middle of the game, the program features performances by well-known celebrities–this year including Ms. Janet Jackson and Mr. Justin Timberlake. During a dance routine at the show's climax, Mr. Timberlake removed "a portion of Ms. Jackson's bustier, exposing her breast to the camera" for 19/32 of a second.

The FCC found the incident to be indecent under its revised two-part test. First, it held Ms. Jackson's breast to be a "sexual organ" under agency precedent. Second, the Commission found that the half-second exposure "pandered" to viewers. The Commission fleetingly noted that many children probably were in the audience.

Both of the FCC's conclusions were consistent with its current crackdown on indecency, as set forth most recently in its Golden Globes (NBC) decision (see IRIS 2004-4: 15). There the singer Bono had shouted that winning an award was "fucking unbelievable," and the Commission had held that any sexual display or language was actionable indecency, no matter how "fleeting."

The agency had somewhat more difficulty in establishing Viacom's responsibility for the material. Both Ms. Jackson and Mr. Timberlake stated that they had informed neither CBS nor MTV (the show's producer) of the planned "costume reveal". The Commission found only that CBS and MTV "were well aware of the overall sexual nature of the Jackson/Timberlake segment and took no action to prevent possible indecency."

If a broadcaster had any reason to suspect that a performer might behave indecently, it presumably would have to take prophylactic measures. Based upon the Golden Globes (NBC) decision, notice might be nothing more than an actor's previous conduct.

The Commission thus based indecency liability on negligent rather than intentional conduct. Aside from introducing a new and unfamiliar basis for liability, the FCC did not define due diligence as to potential indecency. For example, it did not specify whether a broadcaster was on notice if a program involved romantic relationships or other thematic elements.

The only safe course for a broadcaster seems to be implementing a video as well as audio delay system–such as the five-minute video delay which CBS installed after the Super Bowl. But this equipment is fairly expensive–more than USD 250,000 – and unaffordable for many small stations, particularly public ones.

The Commission obviously was concerned about the financial effect of its decision, since it imposed the fine only on 20 Viacom-owned stations; for the moment, it absolved roughly 200 separately owned CBS affiliates – many serving small markets from Altoona, Pennsylvania or Minot, North Dakota.

Indeed, had the FCC proposed fining all CBS affiliates, the total amount would have been USD 5,500,000. And since Congress recently raised the maximum FCC fine from USD 27,500 to USD 32,500, under the new statute the fine for the Viacom stations alone could total USD 650,000 and for all affiliates USD 6,500,000. ■

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● **In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, FCC 04-209, 22 September 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9324

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