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INTERNATIONAL

UN / OSCE / OAS

2004 Joint Declaration by the Three Special Mandates for Protecting Freedom of Expression

On 6 December 2004, the three special mandates for protecting freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – adopted a Joint Declaration which focuses on two issues, access to publicly held information and secrecy legislation.

The three special mandates have adopted a Joint Declaration with the assistance of ARTICLE 19, Global Campaign for Free Expression, every year since 1999. Each year, the Joint Declaration focuses on different thematic issues, such as defamation, broadcast regulation, attacks on journalists and the like.

The 2004 Joint Declaration includes a number of important standard-setting norms regarding access to information. It states unequivocally that, “access to information held by public authorities is a funda-

mental human right which should be given effect at the national level through comprehensive legislation [...] based on the principle of maximum disclosure”. Exceptions to this right should be narrowly and carefully tailored, and apply only in the context of a risk of substantial harm to a protected interest, which outweighs the public interest in disclosure.

The Joint Declaration also recommends that a number of steps be taken to promote effective respect for this right. Procedures for requesting information that are “simple, rapid and free or low-cost” should be put in place. Public authorities should pro-actively publish information of significant public interest. Record management systems should be put in place to ensure that requested information can be located easily. An appeal to an independent body should lie from any refusal to disclose information. Importantly, active steps should be taken to address the culture of secrecy that frequently prevails within the public sector.

The Joint Declaration also sets out a number of

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standards relating to secrecy legislation. Perhaps the most important of these is that public authorities and their staff, "bear sole responsibility for protecting the confidentiality of legitimately secret information under their control." In other words, journalists are free to publish even secret information which has been leaked to them. The Joint Declaration also calls for clear criteria and procedures for classifying information, to prevent abuse of classification to prevent the disclosure of information.

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● **Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=8868>

EN

OSCE

Representative on Freedom of the Media: The Media Freedom Internet Cookbook

On 16 December 2004, the Representative for Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) presented his latest publication, *The Media Freedom Internet Cookbook*, to all 55 OSCE states in Vienna.

The OSCE Media Representative is monitoring the situation of journalists and media in 55 OSCE participating states between Vancouver and Vladivostok, including all EU Member States and all succession states of the former Soviet Union. Since 2002, he has been addressing dangers to freedom of expression and freedom of the media on the Internet, *inter alia* at the annual Amsterdam Internet Conference.

The *Cookbook* combines results from the 2nd Amsterdam Internet Conference that took place in August 2004 and brought together more than 20 speakers and 80 experts from IGOs, NGOs, industry, media and academia.

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● **OSCE Representative for Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9500>

EN

COUNCIL OF EUROPE

European Court of Human Rights: Final Judgment in the Case of Pedersen and Baadsgaard v. Denmark

In Strasbourg, two journalists of *Danmarks Radio* (Danish National television) complained about their conviction for defamation of a Chief Superintendent. The journalists, Pedersen and Baadsgaard, had produced two programmes about a murder trial in which they had criticised the police's handling of the investigation. At the end of the programmes, the question

Secrecy laws should be reviewed urgently, to bring them into line with international standards in this area. Finally, whistleblowers – individuals disclosing information on wrongdoing or serious threats to public well-being – should be protected against sanction as long as they acted in good faith.

The Joint Declarations, while clearly not formally legally binding documents, carry significant weight as standard-setting documents for the elaboration of international standards. They are relied upon extensively by NGOs, lawyers and others trying to promote respect for freedom of expression and information. The 2004 Joint Declaration makes an important contribution to understanding emerging international standards relating to access to information and secrecy. ■

Some of the main topics that are addressed in this publication are:

- What media freedoms or even media types can get lost in the hands of uninformed or uncaring legislators;
- How good intentions by uninformed or uncaring legislators result only in loss of freedom rather than helping to fight "bad content";
- What are the unexplored non-regulatory ways of fighting "bad content" that use the potential of the Internet itself and of communities that create and consume media on the Internet.

The book consists of two parts: the first part contains the Recommendations of the OSCE Media Representative (the *Recipes*) that address governments and legislators in the whole OSCE area.

The second part adds essays and legal analysis to further elaborate on the Recommendations and to report on the situation of media freedom on the Internet and future developments in this field. The topics include legislation and jurisdiction; self-regulation, co-regulation and state regulation; access to information as well as questions of hate speech on the Internet and education and the development of Internet literacy. ■

was raised if it was the Chief Superintendent who had decided that a report should not be included in the case or who concealed a witness's statement from the defence, the judges and the jury. Both journalists were charged with defamation and convicted and sentenced to 20 day-fines of DKK 400, amounting to DKK 8,000 (equivalent to approximately EUR 1,078) and ordered to pay compensation to the estate of the deceased Chief Superintendent of DKK 100,000 (equivalent to approximately EUR 13,469). The domestic courts came to the conclusion that the

journalists lacked a sufficient factual basis for the allegation that the named Chief Superintendent had deliberately suppressed a vital piece of evidence in the murder case.

In a Chamber judgment of 19 June 2003, the Court held by four votes to three, that there had been no violation of Article 10 (see IRIS 2003-9: 2). On 3 December 2003, the panel of the Grand Chamber accepted a request by the applicants for the case to be referred to the Grand Chamber. The Danish Union of Journalists was given leave to submit written comments.

The Grand Chamber of the European Court of Human Rights in its judgment of 17 December 2004 has now also come to the conclusion, by nine votes to eight, that there had been no violation of Article 10. The Court emphasised that the accusation against the named Chief Superintendent was an allegation of fact susceptible of proof, while the applicants never endeavoured to provide any justification for their allegation, and its veracity had never been proven. The applicants also relied on just one witness. The allegation of deliberate interference with evidence, made at peak viewing time on a national

TV station, was very serious for the named Chief Superintendent and would have entailed criminal prosecution had it been true. The offence alleged was punishable by up to nine years' imprisonment. It inevitably not only undermined public confidence in him, but also disregarded his right to be presumed innocent until proven guilty according to law. In the Court's view, the finding of a procedural failure in the conduct of the investigation in the murder case as such could not provide a sufficient factual basis for the applicants' accusation that the Chief Superintendent had actively tampered with evidence. The Court reached the conclusion that the interference in the applicants' freedom of expression did not violate Article 10 of the Convention, as the conviction was necessary for the protection of the reputation and the rights of others. Eight of the 17 judges of the Grand Chamber Court dissented, emphasizing the vital role of the press as public watchdog in imparting information of serious public concern and the fact that the applicants had conducted a large-scale search for witnesses when preparing their programmes and that they had a sufficient factual basis to believe that a report did not contain the full statement of an important witness. According to the minority of the judges, a chief superintendent of police must accept that his acts and omissions in an important case should be subject to close and indeed rigorous scrutiny. ■

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● Judgment by the European Court of Human Rights (Grand Chamber), case of **Pedersen and Baadsgaard v. Denmark**, Application no. 49017/99 of 17 December 2004, available at:

<http://merlin.obs.coe.int/redirect.php?id=9237>

EN

European Court of Human Rights: Final Judgment in Case **Cumpănă and Mazăre v. Romania**

Constantin Cumpănă and Radu Mazăre are both professional journalists who have been convicted in Romania of insult and defamation. In April 1994 they published an article in the *Telegraf* newspaper questioning the legality of a contract in which the Constanța City Council had authorised a commercial company, Vinalex, to perform the service of towing away illegally parked vehicles. The article, which appeared under the headline "Former Deputy Mayor D.M. and serving judge R.M. responsible for series of offences in Vinalex scam", was accompanied by a cartoon showing the judge, Mrs R.M., on the former deputy mayor's arm, carrying a bag marked "Vinalex" containing banknotes. Mrs R.M., who had signed the contract with Vinalex on behalf of the city council while employed by the council as a legal expert, brought proceedings against Cumpănă and Mazăre. She submitted that the cartoon had led readers to believe that she had had intimate relations with the former deputy mayor, despite the fact that they were both married. In 1995 both journalists were convicted of insult and defamation and sentenced to seven months' imprisonment. They were also disqualified from exercising certain civil rights and prohibited from working as journalists for one year.

In addition, they were ordered to pay Mrs R.M. a specified sum for non-pecuniary damage. In November 1996 the applicants were granted a presidential pardon releasing them from their custodial sentence.

In a Chamber judgment of 10 June 2003 the Strasbourg Court held by five votes to two that there had been no violation of Article 10 of the Convention, emphasizing that the article and the cartoon were indeed damaging the authority, reputation and private life of judge R.M., overstepping the bounds of acceptable criticism.

The Grand Chamber of the European Court in its judgment of 17 December 2004 has now unanimously come to the conclusion that there has been a violation of Article 10. As the allegations and insinuations in the article did not have a sufficient factual basis, the Court is of the opinion that the Romanian authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that their conviction for insult and defamation had accordingly met a "pressing social need". However, the Court observes that the sanctions imposed on the applicants have been very severe and disproportionate. In regulating the exercise of freedom of expression in order to ensure adequate protection by law of individuals' reputations, States should avoid taking measures that

might deter the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. The imposition of a prison sentence for a press offence is compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights had been seriously impaired, as, for example, in the case of hate speech or incitement to violence. In a classic case of defamation, such as the present case, imposing a prison sentence inevitably has a chilling effect. The order disqualifying the applicants from exercising certain civil rights is also to be considered par-

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● **Judgment by the European Court of Human Rights (Grand Chamber). Case of Cumpănă and Mazăre v. Romania, Application no. 33348/96 of 17 December 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9237>

EN-FR

EUROPEAN UNION

European Commission: Communication on European Electronic Communications Regulation and Markets 2004

The Communication on European electronic communications regulation and markets (the so-called 'tenth implementation report'), adopted on 6 December 2004, provides a concise overview of major market developments and the main persisting regulatory issues since the last implementation report. It is based on extensive and detailed market data analysis and assessments of the implementation of regulation in all twenty-five Member States, laid down in an annexed Commission Staff Working Paper.

The Communication identifies the following developments: traditional fixed line telephony has declined in terms of value, as increased competition results in lower prices; broadband penetration has increased significantly, due to lower prices and intensified infrastructure-based competition; and mobile penetration continues to increase.

According to the Commission, delays and ineffective application in some Member States could hinder competition, innovation and investment. The Com-

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● **Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'European Electronic Communications Regulation and Markets 2004', COM(2004) 759 final, 2 December 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9489>

EN-FR-DE-DA-EL-ES-FI-IT-NL-PT-SV

● **"EU electronic communications markets: outlook good, but more progress needed on regulatory reform", Press Release of the European Commission IP/04/1438 of 6 December 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9492>

EN-FR-DE

● **Commission Staff Working Paper, Annex to the European Electronic Communications Regulation and Markets 2004 (10th Report), COM(2004) 759 final, 2 December 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9495>

EN

ticularly inappropriate and is not justified by the nature of the offences for which both journalists have been held criminally liable. The order prohibiting the applicants from working as journalists for one year is considered as a preventive measure of general scope contravening the principle that the press must be able to perform the role of public watchdog in a democratic society.

The Court comes to the conclusion that, although the interference with both journalists' right to freedom of expression might have been justified as such, the criminal sanction and the accompanying prohibitions imposed on them by the Romanian courts have been manifestly disproportionate in their nature and severity to the legitimate aim pursued. The Court therefore holds that there has been a violation of Article 10 of the Convention. ■

mission stresses the importance of full and effective implementation of the new regulatory framework. Twenty Member States have adopted the necessary primary legislation. Five Member States still need to adopt primary legislation to transpose the framework: Belgium, Czech Republic, Estonia, Greece and Luxembourg. The Commission has launched infringement proceedings for non-notification of these laws, and proceedings are pending before the European Court of Justice against Belgium, Greece and Luxembourg (see IRIS 2004-6: 6). In order to give full effect to primary legislation, secondary legislation is still to be adopted in eight Member States: Spain, France, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia.

Under Article 7 of the Framework Directive, national regulatory authorities (NRAs) have to notify draft measures on market definition and market analysis to the Commission for assessment prior to adoption, to ensure that these are executed in accordance with EC competition rules. The assessment of notifications shows that regulation puts more emphasis on addressing market failures.

Despite the overall positive prospect, the Commission has identified a number of important areas where regulation in the Member States has to be improved. These include the observation of the independence and impartiality of NRAs; the length of the procedures for appeals against NRA decisions; charges for authorisation of services; rights of way, collocation and facility sharing; provision of universal service and unsolicited commercial communications.

The main conclusions are that Europe is at a crucial point in the development of a new and dynamic economy and that full and correct implementation of the regulatory framework and effective application of EC competition rules are essential for the development of the electronic communications market. ■

NATIONAL

AL – Broadcasting License of Shijak TV Withdrawn

On 23 December 2004 the *Keshilli Kombetar i Radiotelevizivoe* (National Council of Radio and Television, NCRT), the highest regulatory authority for private radio and TV stations, decided to withdraw the broadcasting license of the private TV station Shijak TV.

Shijak TV is the first private TV station in Albania. It is owned by the Company Media + and it started broadcasting on 20 December 1995. It was also the first Albanian private TV station that could be received in Europe on satellite since July 2003.

Hamdi Jupe
Albanian Parliament

● Decision of the National Council of Radio and Television of the Republic of Albania to withdraw of the TV license of Shijak TV, 23 December 2004

SQ

AT – ORF Need Not Pay For Broadcasting Regulator

Austrian-based broadcasters are obliged to make financial contributions to the national broadcasting and telecommunications regulator *Rundfunk- und Telekom Regulierungs-GmbH* (RTR-GmbH). RTR-GmbH uses this income to cover its own costs and those of *KommAustria*, the first instance regulatory body for private broadcasters. Only companies with particularly small turnovers are exempt from making these payments. In principle, RTR-GmbH itself determines its budgetary needs, although these decisions are monitored by the *Bundeskommunikationssenat* (Federal Communications Office). The amount to be paid by the individual broadcasters depends on their turnover from broadcasting activities. Under this system, the public service broadcaster ORF should contribute the vast majority (approx. 80%) of the funds needed to support the broadcasting-related operations of RTR-GmbH and *KommAustria*. ORF com-

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Freshfields Bruckhaus
Deringer
Vienna

● Decision of the *Verfassungsgerichtshof* (Constitutional Court), 7 October 2004, G 3/04, available at:
<http://merlin.obs.coe.int/redirect.php?id=9507>

DE

AT – Constitutional Court Allows Bundesliga Short Reporting

In December 2004, the Austrian *Verfassungsgerichtshof* (Constitutional Court - VfGH) decided not to allow a complaint from *ATV-Privatfernseh GmbH* (ATV) to have suspensive effect. As a result, *Öster-*

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● Decision of the *Bundeskommunikationssenat* (Federal Communications Office - BKS) of 9 September 2004, GZ 611.003/0023-BKS/2004, available at:
<http://merlin.obs.coe.int/redirect.php?id=9506>

● Decision of the Austrian Constitutional Court of 14 January 2005, Case B1599/04, available at:
<http://merlin.obs.coe.int/redirect.php?id=9506>

DE

The Press Release of the NCRT stated that the license was withdrawn due to repeated broadcasting of different pirate TV programs taken from foreign TV stations, as well as for the non-payment of the fee for the broadcasting license during 2003. Shijak TV, though it had been the subject of penalties, continued transmitting pirate programs. The President of Shijak TV declared that the station will take court action against the decision of the Albanian NCRT. The decisions taken by the Albanian NCRT can be appealed in court.

The Albanian Forum for Free Media, a local association for the protection of the rights of journalists, publicly declared that it considered the decision of the Albanian NCRT a "tendentious decision", taken just before the parliamentary elections in Albania. ■

plained about this situation to the *Verfassungsgerichtshof* (Constitutional Court - VfGH).

The Court upheld ORF's complaint and rescinded parts of the *KommAustria-Gesetz* (*KommAustria Act*) on the following grounds. Firstly, the *KommAustria-Gesetz* only requires broadcasters to contribute to the costs of the supervisory bodies. However, some of these bodies' activities relate to broadcasting policy and, as such, are not performed for the benefit of broadcasters, but of society in general. They should therefore be funded through tax revenue. The fact that they are funded exclusively by market participants was therefore found inappropriate and unfair. Secondly, the Act stipulates that RTR-GmbH should act as a central authority for audiovisual media and telecommunications. Although it is obliged to carry out this role in an economical, efficient way, nothing is mentioned about how large this authority should be. Since RTR-GmbH can determine this point itself, it has a significant say in how much funding it needs. As no provision is made for other mechanisms to limit expenditure, the Act is too vague and therefore unconstitutional. This decision refers only to funding for 2001-2003. A new, similar provision is now in force. ■

reichische Rundfunk (the Austrian public service broadcaster - ORF) may continue broadcasting short reports about the Austrian Bundesliga football matches for the time being. ATV had complained about the decision of the *Bundeskommunikationssenat* (Federal Communications Office - BKS), to allow ORF to broadcast a 90-second report on each matchday (see IRIS 2005-1: 7), and requested that the effect of the decision be deferred. However, the Court did not grant this request on the grounds that the public interest in the fulfilment of the ORF's legal programming remit, which includes sports reporting, outweighed the disadvantages cited by ATV, which were based on a contract it had signed with pay-TV broadcaster *Premiere*. ■

BA – Fines for Inflammatory Reporting

The Communications Regulatory Agency (CRA), responsible for the regulation of the telecommunications and electronic media sector in Bosnia-Herzegovina, has imposed fines on several broadcasters.

Among them the Sarajevo-based RTV Alfa, which has meanwhile been sold to another local media company, has been fined BAM 50,000 (aprox. EUR 25,000), due to a violation of the Broadcasting Code of Practice, and of the general terms and conditions concerning the issuing of licenses. This is the highest fine that one broadcaster has had to pay since the establishment of the CRA in 1998.

Representatives of the Agency argued, that the reasons for such a high fine were partly due to the

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*Media researcher
and analyst,
Sarajevo*

● The decisions of the Enforcement Panel of the CRA are available at:
<http://merlin.obs.coe.int/redirect.php?id=9217>

BS

BE – Battling over Peer-to-peer Activities

On 26 November 2004 the presiding judge of the regional court in Brussels delivered an order with so far considerable effect in the world of copyright and Internet service providers. It is the latest episode in the battling between rightholders and ISPs over software (such as KaZaA) for downloading musical works in peer-to-peer mode, ie from one computer to another without passing through a centralised server, and without payment.

Belgian copyright law allows a complainant to apply to the courts to have a stop put to infringements of copyright in the accelerated “urgent matter” form but with a decision on the merits of the case. Thus on 24 June 2004 SABAM, the main society for the collective management of royalties due to composers and writers of music, had an order served on Tiscali, one of the main ISPs on the Belgian mar-

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Catholic University*

● Order by the presiding judge of the regional court in Brussels, 26 November 2004, 04/8975/A; available at:
<http://merlin.obs.coe.int/redirect.php?id=9511>

FR

CH – Legislation on Electronic Signature Comes into Force

National legislation on certification services with regard to electronic signature (Electronic Signature Act - SCSE) adopted by the Federal Parliament on 19 December 2003 came into force on 1 January 2005 (see IRIS 2001-7: 11 and IRIS 2000-10: 9). The new legislation is in line with the regulations in force in the European Union (see IRIS 2000-1: 5 and IRIS 1999-7: 10), and its purpose is to facilitate commercial transactions carried out electronically and to create conditions that guarantee security. The SCSE

is completed by an enforcement order adopted by the Federal Council on 3 December 2004 repealing the interim pilot scheme instituted by an earlier Federal Council order of 12 April 2000. The new statutory provisions are also completed by technical and administrative prescriptions decreed by the Federal Office of Communications (OFCOM).

The SCSE defines the conditions under which certification services providers may, on a voluntary basis, be recognised. Recognition is issued by bodies accredited by the Swiss Accreditation Service (SAS) of the Federal Office of Metrology and Accreditation. Recognition means that the supplier in question

several violations of the CRA's rules by this broadcaster, but particularly its inflammatory reporting with elements of overt antisemitism. The programme in question contained a religious sermon. According to the CRA this sermon had a clear inflammatory message and belittled the religious principles of other peoples that live in the country, in this particular case – Jewish people. The host in the studio, an Islamic preacher, was reading lines from Koran, calling Jewish people “our enemies which have to be annihilated”.

Therefore the programme had breached Art.1.3 of the Broadcasting Code of Practice, that states: “The belief and practice of religious groups must not be misrepresented, and every effort must be made to ensure that programmes about religion are accurate and fair. Programmes must not denigrate the religious beliefs of others”. ■

ket, ordering the company to make it impossible for its clients to send or receive files containing musical works, or to block such messages.

The order of 26 November 2004 confirms firstly that the exchange of music files using peer-to-peer technology does indeed constitute infringement of copyright, since it infringes the exclusive right of reproduction and the exclusive right of communication to the public held by the rightholders, and secondly that Tiscali, although it did not itself commit a breach, provided assistance in committing the infringement. The court nevertheless refrained from demanding cessation, as it held that SABAM had not produced evidence that the order it was requesting would produce an effective result, and that there were in fact technical ways of preventing infringement of copyright.

The court therefore ordered the preparation of a report by an inter partes expert to see whether effective technical measures could in fact be envisaged to put an end to the infringement of copyright being committed by Internet users. ■

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Télévision
Suisse Romande
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satisfies the statutory requirements, more particularly as regards the identification of holders of electronic certificates. Certification services providers are authorised to issue qualified digital certificates attesting that a public key is related to a given person. The combination of private and public keys

● National legislation of 19 December 2003 on certification services with regard to electronic signature (Electronic Signature Act - SCSE), available at:
<http://merlin.obs.coe.int/redirect.php?id=9478> (FR)
<http://merlin.obs.coe.int/redirect.php?id=9479> (DE)

● Federal Council Order of 3 December 2004 on certification services with regard to electronic signature, available at:
<http://merlin.obs.coe.int/redirect.php?id=9480> (FR)
<http://merlin.obs.coe.int/redirect.php?id=9481> (DE)

FR-DE

CZ – Switch to DVB - T

The Czech Republic is planning to introduce digital terrestrial television in the near future (see IRIS 2004-3: 6). In November 2004, the Broadcasting Council invited tenders for two DVB-T networks.

Previously, temporary licences to provide DVB-T services on a trial basis in the Prague and Brno areas had been granted to the *Czech Digital Group*, *Ceske Radiokomunikace* and *Cesky Telecom*.

By the end of 2004, three multiplexes for digital terrestrial television had been established. The call for tenders relates to two multiplexes, each carrying four TV channels and several radio stations. The third multiplex is reserved for public service broadcasters.

Under the current technical transmission infrastructure, the first multiplex covers 65% of the population, while the other two each cover around 50%. These coverage rates will increase and could all

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● Broadcasting Council press release, available at:
<http://merlin.obs.coe.int/redirect.php?id=9520>

CS

DE – Federal Cartels Office Authorises SES Astra's Takeover of Digital Playout Center

On 30 December 2004 the *Bundeskartellamt* (Federal Cartels Office) authorised the acquisition by SES Global Europe S.A. (SES Astra) of shares in DPC Digital Playout Center GmbH (DPC) owned by *Premiere Fernsehen GmbH & Co. KG* (Premiere) on condition that SES Astra acquires 100% of the shares. SES Astra had originally planned to purchase 72.5% of the shares in DPC, but now, through a corresponding increase in the overall price, it will own all the shares. According to the *Bundeskartellamt*, the

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● *Bundeskartellamt* (Federal Cartels Office) press release, 30 December 2004, available at:
<http://merlin.obs.coe.int/redirect.php?id=9508>

DE

makes it possible to identify the sender of a document bearing an electronic signature and to determine whether any alteration has been made to the document since it was signed.

Under this new national legislation, electronic signature is assimilated to handwritten signature if it is backed by a certificate issued by a recognised certification services provider. The SCSE also regulates the responsibility of certification services providers, recognition bodies and holders of signature keys. More specifically, it provides that the holder of a private signature key may be held responsible for the wrongful use of the key if the holder fails to take the necessary steps to ensure its confidentiality. ■

reach up to 70% in 2006. Radio channels will be dealt with at a later date, since they require less preparation time. The Czech Republic has a relatively high proportion of terrestrial connection points. Less than 20% of households can receive cable and satellite channels. This situation has contributed to the rapid development of digital terrestrial TV.

Digital terrestrial transmission capacities will be allocated by the Broadcasting Council as the regulatory body. The deadline for applications was 21 December 2004. More than 30 candidates applied, representing over 50 channels. The authority will grant licences in accordance with criteria set out in the Broadcasting Act, taking into account diversity of opinion across the whole range of channels. No company has a legal right to a licence. Licences will be valid for 12 years. Frequencies are due to be allocated at the end of February 2005. The successful companies should begin broadcasting no later than 360 days after being granted their licence. The switch to DVB-T is expected to be made in the Czech Republic by the end of 2005 or early 2006. ■

merger will strengthen SES Astra's dominant position in the national DTH transponder market. Nevertheless, it was authorised because the break-up of Premiere's digital pay-TV platform will improve competition. The *Bundeskartellamt* thought that these improvements outweighed the strengthening of SES Astra's dominant market position, since Premiere's sale of DPC would loosen its hold over an important part of the infrastructure of the pay-TV end consumer market, in which Premiere held a dominant position. Experiences in the network-based telecommunications, energy and transport industries suggested that competition-related advantages of unbundling (bottleneck) upstream and downstream (end customer) services outweigh the disadvantages of bundling two upstream components with one operator. ■

DE – MTV “Freak Show” Harmful to Minors

In a ruling of 4 November 2004, the *Bayerische Verwaltungsgericht München* (Bavarian Administrative Court, Munich - *BayVG*) annulled most of the provisions of a decision of the *Bayerische Landeszentrale für Neue Medien* (Bavarian New Media Office - *BLM*) banning the repeat transmission of six episodes of MTV’s “Freak Show”. On 28 June 2002, the *BLM* had banned MTV from showing repeats of these programmes, which had already been broadcast, and declared the decision immediately enforceable. MTV’s request to the *BayVG* to delay the enforceability of the decision was granted because the Court did not believe that the programmes were obviously capable of seriously endangering minors in the sense of Article 3.1.3 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*) (see IRIS 2002-9: 8).

In the most recent decision, the Court ruled that only one of the six disputed programmes was obviously capable of seriously endangering minors. The *BayVG* based its ruling on the law that was in force at the time of the hearing, ie the *Jugendmedienschutz-Staatvertrag* (Inter-State Agreement on Protection of Youth in the Media - *JMStV*), on the grounds that the ban was an administrative act with permanent effect. According to Article 4.2.3 *JMStV*, programmes are unlawful if they are obviously capa-

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● Ruling of the *Bayerische Verwaltungsgericht München* (Bavarian Administrative Court, Munich - *BayVG*), case no.: M 17 K 02.5297

DE

DE – Amendment of Transmission Time Directive

At their meetings in December 2004, the *Landeszentrale für private Rundfunkveranstalter Rheinland-Pfalz* (Rhineland-Palatinate Regional Office for Private Broadcasters - *LPR*) and the Media Council of the *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office - *BLM*) approved the amendment of the *Drittensendezeitrichtlinie* (Third-Party Transmission Time Directive - *DSZR*).

The *DSZR* regulates the conditions under which the private TV broadcasters *SAT 1* and *RTL* must make transmission time available to independent third parties. The amendment concerns the provisions for regional programmes in Art. 3.5 *DSZR*. If the broad-

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● Directive amending the Land media authorities’ joint directive on transmission time for independent third parties in accordance with Art. 31 *RStV* (*Drittensendezeitrichtlinie* - *DSZR*), 16 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9509>

DE – Telemedia Law Reforms

The Federal Government and the *Länder*, who agreed in 1996 to distinguish between tele- and media services, have decided to abolish the distinction in favour of a common regulatory system in

order to take into account media convergence. It was announced at the telecommunications day organised by the industry association *Bitkom* in Berlin on 14 December 2004 that draft reforms of the law on tele- and media services should be put down for discussion in April 2005. They will include the

ble of seriously endangering the development of children and teenagers or their upbringing as responsible members of the community, taking into account how they are disseminated. In evaluating the likelihood of children imitating individual scenes, the Court took into account whether the depicted situation corresponded to children’s everyday life and whether young people could tell that it was not real. If either of these conditions were not met, the Court ruled that the scene was not obviously capable of seriously endangering minors. It decided that there was no danger of imitation if, for example, it thought minors were incapable of copying the scene (eg felling of a tree) or if the sequence involved objects that were generally inaccessible to minors. The dramatic content of individual scenes was also considered; if they were either dragged out in a long-winded way or if they were short, the *BayVG* assumed that they would not leave any lasting impression on young people and therefore were not obviously capable of causing them serious harm. The Court ruled that, in general, the programmes’ potential influence on minors was limited because they were of moderate technical and creative quality. Further aspects of the evaluation process included whether the “victims” voluntarily subjected themselves to the tests and physical injuries, whether they acted under group pressure or whether third parties were used, and whether the negative consequences of the actions shown were depicted. ■

casters themselves transmit regional programmes of a certain length, they must now offer 180 minutes rather than 260 minutes of airtime per week to independent third parties. The new provisions are meant to clarify the criteria for the classification of a programme as a regional programme. At least 20 minutes of total transmission time must be devoted to editorially produced content on political, economic, social and cultural themes from the region. An average of at least 10 minutes per week must be news-related content. Programmes must be devised, produced and presented in the region concerned. The draft amendment also stresses that the main broadcaster must finance the regional programme window. Nevertheless, the regional programme must remain editorially independent of the main channel.

The amended *DSZR* will not enter into force until all the *Land* media authorities have approved it. ■

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total abolition of the current *Mediendienste-staatsvertrag* (Inter-State Agreement on Media Services) and its replacement with a new *Telemediengesetz* (Telemedia Act - *TMG*). The new Act will include data protection provisions for providers and e-commerce companies. The Government will take responsibility for these areas as a second step towards a general reform of the legal framework for media policy. The first step was the adoption in 2003 of the *Jugendschutzmediensstaatsvertrag* (Inter-State Agreement on Protection of Youth in the Media - *JMStV*), which transferred responsibility for youth protection in broadcasting and telemedia to the *Länder*. Although the *Länder* are therefore responsible for youth protection, data protection will in future be a matter for the Federal Government. Under the

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DE / ZA – Film Agreement Signed

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An agreement between Germany and South Africa on audiovisual co-productions was signed in Cape Town on 17 November 2004. The purpose of the agreement is to strengthen the film industry in both

• **Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Südafrika über audiovisuelle Gemeinschaftsproduktionen (agreement between Germany and South Africa on audiovisual co-productions) of 7 January 2005**

DE

DK – Amendment to the Broadcasting Act regarding Political Advertising

On 1 January 2005, Act No 1437/2004 amending the Danish Broadcasting Act entered into force. The Act amends the provisions regarding political advertising in order to ensure accordance with the European Convention on Human Rights.

Television advertising has been permitted in Denmark since 1986, with Article 76, Section 3 of the Broadcasting Act stating: "Advertisements for employers' organisations or trade unions or for religious movements or political parties are not allowed on television". However, Act No 439/2003 significantly expanded the scope of the prohibition as the wording "political parties" was changed to "political opinions". This amendment has never entered into force due to the uncertainty as to whether it was in accordance with Article 10 of the European Convention on Human Rights regarding freedom of expression, pursuant to which everyone has the right to hold opinions and to receive and impart information and ideas.

A scrutiny carried out by the Ministry of Culture together with the Ministry of Justice concluded that the wording "political opinions" was not in accordance with the Convention and rulings under the Conven-

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• **Act No 1437/2004 amending the Danish Broadcasting Act, available at: <http://merlin.obs.coe.int/redirect.php?id=9488>**

DK

reforms currently envisaged, the *Länder* will nonetheless remain responsible for broadcasting in the narrow sense and for implementing the Telemedia Act at *Land* level. However, it is likely that certain difficulties will remain in terms of distinguishing between broadcasting services and telemedia on the one hand and telemedia and telecommunications on the other. The companies concerned have not been particularly eager to see the introduction of a form of so-called regulated self-regulation in the data protection field (similar to that brought in through the youth protection reforms). As before, they prefer to discuss with the *Land* data protection agencies the possible creation of a body similar to the *Kommission für den Jugendsmedienschutz* (Commission for Protection of Youth in the Media). ■

countries and promote economic and cultural exchange through film co-production. The agreement defines the term "audiovisual co-production" and names the bodies responsible for its implementation. Films produced under the agreement qualify as national films and are entitled to all state aid available to the film and video industry. Producers and all other parties involved must fulfil certain conditions in order to qualify (eg concerning their country of origin or level of involvement). ■

tion made by the European Court of Human Rights.

The ministries argued that a prohibition against "political opinions" was a restriction on the kinds of advertisement that can legally be broadcast and thus a restriction of the television enterprises' possibility of imparting information and ideas on television. In addition, the prohibition was found to be a restriction of private parties' access to advertise on television and thus their access to impart information and ideas on this medium.

The ministries also addressed the question whether the broad prohibition against political opinions could be regarded as necessary in a democratic society and thus covered by the exceptions to the freedom of expression, re Article 10, section 2 of the Convention. However, as the prohibition concerned political expressions (as opposed to commercial expressions) this was not deemed to be the case.

Therefore, Act No 1437/2004 has now changed the wording of Article 76, section 3 of the Danish Broadcasting Act back to the previous wording "political parties" (however it now also covers political movements and elected members or candidates for political assemblies). A new section 4 does, however, prohibit advertisements for political opinions from the moment an election period is announced until the elections have been held (with a maximum period of 3 months). This – specific – prohibition is considered to be in accordance with the Convention. ■

ES – Decree Amending the National Technical Plan for Local Terrestrial TV

In Spain, local terrestrial TV has been regulated since 1995, by means of Act 41/1995. However, this Act has had almost no effect, because it lacked the necessary implementation measures. Many broadcasters took advantage of this situation to enter the market without the required license. In March 2004, the Government put an end to this legal vacuum by approving Decree 439/2004, on the National Technical Plan for local terrestrial TV (see IRIS 2004-7: 8). In accordance with an amendment of Act 41/1995 introduced by Parliament in 2003, local terrestrial TV shall be broadcast using digital technology.

The new Government that resulted from March's election has now decided to approve a new Decree that introduces some amendments to the framework established by the Decree 439/2004.

- The Government has decided to increase the number of local terrestrial TV digital multiplexes in

some regions, in response to demands of several regional Governments. There will now be 281 digital multiplexes reserved for local terrestrial TV (if divided into 4 TV channels each, there would be 1124 local digital terrestrial TV channels to be allocated).

- The new Decree extends until August 2005 the deadline imposed upon the regional Governments regarding the granting of the local terrestrial TV licences. After the approval of Decree 439/2004, some regional Governments have already granted their local terrestrial TV licences or have invited public tenders to grant them, but other regional Governments had asked for this extension.
- The new Decree also postpones the local analogue TV switch-over until 2008. Local digital terrestrial TV broadcasters are required to start digital transmissions by 2006.

The Government has also announced that it intends to approve a bill on urgent measures for the promotion of digital terrestrial TV. This bill, which would also include some provisions related to cable TV and media concentration, should be presented to Parliament in the next few weeks, and it is expected to be approved by summer. The Government is also drafting a new general bill on radio and TV, whose main aims would be to unify the existing regulation of the audio-visual sector; to set up the basic principles concerning licensing, public broadcasting and safeguarding of pluralism; and to create a national independent audio-visual regulatory authority. ■

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● **Real Decreto 2268/2004, de 3 de diciembre, por el que se modifica el Real Decreto 439/2004, de 12 de marzo, por el que se aprueba el Plan técnico nacional de la televisión digital local, Boletín Oficial del Estado n. 292, de 04.12.2004.** (Decree 2268/2004, amending Decree 439/2004, on the National Technical Plan on Local Terrestrial Television - 03.12.2004), available at: <http://merlin.obs.coe.int/redirect.php?id=9514>

● **Anteproyecto de Ley de medidas urgentes de impulso de la televisión digital terrenal, de liberalización de la televisión por cable y de fomento del pluralismo, Consejo de Ministros de 30.12.2004** (Draft Bill on urgent measures on the promotion of digital terrestrial TV, liberalization of cable TV and promotion of media pluralism - Council of Ministers, 30.12.2004), available at: <http://merlin.obs.coe.int/redirect.php?id=9515>

ES

ES – Government and TV Channels Agree to Set up Co-regulatory Code for the Protection of Minors

During the last general elections (March 2004), the quality of Spanish TV programmes was hotly debated. Many argued that there are too many gossip programmes, full of artificial debates and shouting. This kind of programming, which is known as *telebasa* (telerubbish), is also shown at times in which many children may see such broadcasts.

The Spanish Government has decided to try to tackle this problem. One of the measures adopted has been to set-up, together with the main national TV broadcasters, a co-regulatory code on the protec-

tion of minors. On 9 December 2004, this code was signed by the Spanish Government and the broadcasters TVE, Antena 3, Telecinco and Sogecable.

The code complements the Spanish legislation, which already forbids broadcasters from showing programmes which are likely to impair the development of minors, unless they are broadcast between 22:00 and 06:00. Broadcasters are also required to label their programmes according to age groups.

The code establishes a new watershed, in order to provide additional protection to minors under 13 years. The broadcasters, by signing the code, commit themselves not to show programmes which are likely to be harmful for children under 13 during the following hours: a) from Monday to Friday: between 08:00 and 09:00, and between 17:00 to 20:00; and b) on Saturdays, Sundays and national holidays: from 09:00 to 12:00.

The code also includes some additional measures concerning labelling of TV programmes, as well as the setting up of a Committee that will monitor the application of the co-regulatory code by the signatories. ■

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● **Código de autorregulación sobre contenidos televisivos e infancia, 09.12.2004** (co-regulatory code on TV programming and minors), 9 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9512>

● **Acuerdo para el fomento de la autorregulación sobre contenidos televisivos e infancia, 09.12.2004** (Agreement on the promotion of co-regulation on TV programming and minors) of 9 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9513>

ES

FR – Eutelsat Must Stop Broadcasting Al Manar TV

Does the order in an urgent matter issued by the *Conseil d'État* on 13 December 2004 ordering Eutelsat to stop broadcasting the television channel Al Manar mark the end of the channel being broadcast in Europe? This is not the first time that the regulatory authority (*Conseil supérieur de l'audiovisuel* - CSA) has applied to the *Conseil d'État*, on the basis of the new Article 42-10 of the amended Act of 30 September 1986 introduced by the Act of 9 July 2004, on this subject, because of the Lebanese channel's broadcasting of programmes of an anti-Semitic nature (see IRIS 2004-9: 11). The television channel had seemed to want to "fall into line" with the national regulatory prescriptions, as demonstrated by its signature of a very strict agreement with the CSA on 19 November. Less than two weeks later, however, the CSA, identified a number of broadcasts that constituted serious breaches of the agreement, and served notice on it to abide by its obligations. The CSA also referred the matter urgently once again to the *Conseil d'État* (see IRIS 2005-1: 12).

This second order is instructive, firstly because it sets out clearly the scope of the new procedure made available to the CSA's Chairman by Article 42-10 for applying to the courts in an urgent matter against operators of satellites broadcasting extra-European channels. The company that produces Al Manar TV claimed in its defence that the signature of the agreement with the CSA barred use of the procedure in an urgent matter. It also claimed that, since the CSA had instigated administrative sanction proceed-

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● *Conseil d'État (order in an urgent matter), 13 December 2004, CSA v. Al Manar TV (Lebanese Communication Group) et al., available at: <http://merlin.obs.coe.int/redirect.php?id=8885>*

FR

FR – New CSA Recommendation on Violent or Pornographic Programmes

In a recommendation of 15 December 2004, the *Conseil supérieur de l'audiovisuel* (official regulatory authority - CSA) strengthened the measures that apply to editors and distributors of television services broadcasting "Category V" programmes, in cinematographic works that may not be shown to anyone under the age of 18 years and pornographic or extremely violent programmes. This recommendation cancels and replaces previous recommendations on the subject (see IRIS 2003-4: 9 and IRIS 2003-10: 7).

The CSA recalled the principles that are already established, according to which only "cinema" channels, pay-per-view services and channels that have undertaken substantial obligations in terms of contribution to audiovisual and cinematographic pro-

duction are authorised to broadcast this type of programmes, and even then only between midnight and 5 am. It also recalled a number of principles regarding the commercialisation of these programmes. Firstly, they may not be accessible as part of promotional offers made to people who have not chosen to subscribe to the service and have access to the programmes. Secondly, where a commercial offer includes one or more services broadcasting more than 208 Category V films per year, the same offer without the service(s) must be offered under conditions that are not to the advantage of the overall offer that includes the Category V programmes.

After setting aside the procedural arguments put forward by the TV channel, the *Conseil d'État* noted that, despite the warnings issued by the CSA and after its signature of the agreement with the CSA, Al Manar had continued to edit a number of broadcasts with content that was blatantly in contradiction with the provisions of Article 15 of the Act of 30 September 1986 prohibiting the broadcasting of any programme containing incitement to hatred or violence on the basis of religion or nationality. In view of the risk this constituted for maintaining public order, the presiding officer of the *Conseil d'État's* disputes board therefore enjoined the company Eutelsat, whose satellite capacity was being used for broadcasting Al Manar, to stop such broadcasting within 48 hours. At the same time the CSA, noting that the official notice it had served on the channel to abide by its agreed undertakings had had no effect, embarked on a sanction procedure that resulted in the termination of the agreement on 17 December 2004. The following day, the United States announced that it was classifying the channel as a terrorist organisation, and as a result it was immediately removed from American screens. ■

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For services in digital mode, the CSA lists, as in its earlier recommendation, the essential requirements for protecting minors and more particularly the conditions required to effectively lock the programmes in question - control of access to the service by entering a personal code comprising at

least four digits that is not visible on the screen and is dedicated to this use exclusively, re-locking whenever the viewing parameters are altered, total synchronisation of the locking system with the programme, and the impossibility of the subscriber being able to disable the locking system. Distributors must abide by these criteria from now on, apart from the requirement concerning firstly the exclusive use of the personal code, which must be operational no later than 2008, and secondly the impossibility of disabling the locking system, which must be set up by next year.

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The main new feature in this recommendation is the obligation placed on all services broadcasting

● Recommendation No. 2004-7 of 15 December 2004 to editors and distributors of television services broadcasting "Category V" programmes to mainland France and its overseas départements, Official Journal, 23 December 2004; available at: <http://merlin.obs.coe.int/redirect.php?id=8885>

FR

FR – Recommendation on the Handling of International Conflicts

In the light of the numerous international conflicts that television channels and radio stations cover every day, the *Conseil supérieur de l'audiovisuel* (regulatory authority - CSA) adopted on 7 December 2004 a recommendation addressing the repercussions certain international trouble spots could have in France, and calling for particular vigilance in the exercise of editorial responsibility. In doing so, the CSA, as guarantor of the impartiality of information, recalled the need to check the accuracy of the information broadcast or, in the event of uncertainty, to present the information in the conditional tense and quote the source and the date. In the event of inaccurate information being broadcast, all the television and radio services concerned must broadcast a correction as soon as possible and under comparable conditions of exposure. The broadcasting of archive

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● Recommendation No. 2004-8 of 7 December 2004 by the CSA to all radio and television services concerning international conflicts and their possible repercussions in France, available at: <http://merlin.obs.coe.int/redirect.php?id=8885>

FR

FR – Decree on Broadcasting Events of Major Importance

More than four years after the adoption of legislation transposing the Television Without Frontiers Directive into the national Audiovisual Communication Act, and almost two years after the opinion issued by the *Conseil supérieur de l'audiovisuel* (regulatory authority - CSA) on the draft text submitted to it by the Ministry for Culture and Communication (see IRIS 2003-4: 8), the decree laying down

Category V programmes (whether digital or analogue, excluding pay-per-view services) to bar access unless "the subscriber has made the explicit choice, in writing, to receive the overall offer that includes these programmes", which may not be offered under more advantageous commercial conditions. This obligation will become mandatory from 1 January 2006 onwards for all services broadcasting in analogue mode and from 2008 onwards for services in digital mode. According to the CSA, exoneration will however be allowed to those distributors who submit before that date a declaration attesting that all their terminals comply with criteria defining the effectiveness of the locking system (as described above). Lastly, the CSA recalls that editors and distributors of Category V films are required to regularly remind subscribers of the risks facing minors if they have access to such programmes, and of the existence and operation of the locking system. ■

material should be accompanied by a specific, lasting mention during broadcasting.

The CSA is also the guarantor of protection of young people and respect for human dignity by virtue of Articles 1 and 15 of the Act of 30 September 1986, and it has invited the channels to ensure that distressing documents are not used indiscriminately and must always be accompanied by a prior warning to the public before they are shown. Similarly, they may not broadcast documents contrary to the stipulations of the Geneva Convention on prisoners of war. In respect of the preservation of public order, radio stations and television channels are also required to deal in an appropriately even-handed, rigorous way with international conflicts likely to fuel tension and antagonism within the population or to result in attitudes of rejection or xenophobia to the disadvantage of certain communities or countries. The CSA concludes by stating that this vigilance must be applied to all broadcasts of news connected with international conflicts, and more particularly discussion or phone-in programmes where guests and viewers or listeners have access to the air waves. ■

the conditions for assuring the exclusive television broadcasting of events of major importance so that a large section of the public is not deprived of the possibility of following them on a freely accessible television service has finally been adopted. Despite the comments made by the CSA on the list of events given in the draft decree, the final text maintains the original twenty-one sport events (summer and winter Olympic Games, men's Tour de France cycle race, finals and semi-finals of several football and rugby championships, etc); no cultural events are

included. Thus no television service will be able to exercise the exclusive rights it acquires in respect of such events in a way that prevents their full live broadcasting by a freely accessible television service. Such broadcasting may nevertheless be limited to "significant moments" for the men's Tour de France cycle race and to moments "representative of the diversity of the sport disciplines and participant countries and as a pre-recorded broadcast where the events take place simultaneously" for the Olympic Games and the world athletics championship. According to the decree, all the events may also be broadcast as pre-recordings "where the event takes place between midnight and 6 am, French time, on

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● Decree No. 2004-1392 of 22 December 2004 adopted to permit application of Article 20-2 of Act No. 86-1067 of 30 September 1986 on freedom of communication, available at:
<http://merlin.obs.coe.int/redirect.php?id=8885>

FR

FR – Broadcasting Cinematographic Works on Television

The Decree of 17 January 1990, as amended, which lays down the general principles for the broadcasting of cinematographic and audiovisual works by the editors of television services, and the Decree of 28 December 2001 on the contribution of Canal + (terrestrially broadcast analog pay channel) to the development of the production of audiovisual and cinematographic works, has now been amended by two decrees adopted on 23 December 2004. The purpose of these decrees is to take advantage of developments in relations between service editors, and more particularly Canal +, and representatives of the cinema. "First showing" cinema services (see Article 6-3 of the Decree of 17 January 1990) broadcast one or more cinematographic works as an exclusive

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● Decree No. 2004-1482 of 23 December 2004 amending Decree No. 2001-1332 of 28 December 2001 adopted to permit application of Articles 27, 28 and 71 of Act No. 86-1067 of 30 September 1986 and concerning the contribution of editors of television services broadcast terrestrially in analogue mode whose financing involves remuneration from users being devoted to development of the production of cinematographic and audiovisual works

● Decree No. 2004-1481 of 23 December 2004 amending Decree No. 90-66 of 17 January 1990 adopted to permit application of Articles 27, 33 and 70 of Act No. 86-1067 of 30 September 1986 and laying down the general principles for the broadcasting of cinematographic and audiovisual works by television service editors

● Decision of 23 December 2004 adopted to permit application of the second paragraph of Article 11(II) of Decree No. 90-66 of 17 January 1990 adopted to permit application of Act No. 86-1067 of 30 September 1986 and laying down the general principles for the broadcasting of cinematographic and audiovisual works by television service editors

FR

GB – Freedom of Information Act Enters into Force

The right to access information held by public authorities is a significant, albeit indirect, right

condition that its broadcasting in France commences before 10 am". Article 5 of the text states that an editor of a restricted access service holding exclusive broadcasting rights in respect of all or part of an event of major importance may not proceed with broadcasting in restricted access mode unless it receives no suitable offer after having publicly manifested for a "reasonable" period of time its desire to sell these rights subject to market conditions that are "equitable, reasonable and not discriminatory".

Lastly, the decree includes provisions applicable to the broadcasting of events of major importance taking place in other European countries. In this case, "where an editor of television services subject to French jurisdiction broadcasts an event of major importance taking place in a European State, it must satisfy the conditions laid down by that State for the broadcasting of the event by the editor of television services". ■

first television screening excluding pay-per-view or more than two cinematographic works as an exclusive second screening within 36 months of their first cinema screening in France. There is now a sub-category of these services; in return for the special effort they make in terms of financing the cinematographic industry, these services are to be allowed to make their programme schedules a little more flexible. According to the Decree, "first exclusivity cinema service" means a service that broadcasts the first exclusive showing on television apart from pay-per-view of at least seventy-five cinematographic works a year within 36 months of their first cinema screening in France; at least ten of these must be in French in the original version and the corresponding rights acquired before the end of shooting". Although it is established that "other editors of cinema services" may not broadcast or re-broadcast any full-length cinematographic work on a Friday between 6 and 9 pm, on a Saturday between 6 and 11 pm or on a Sunday between 1 and 6 pm, the editors of first exclusivity services may now broadcast or re-broadcast a cinematographic work on a Friday evening or on a Saturday evening in the case of works for which fewer than 1.2 million cinema tickets were sold (and five times a year films that fared better in theatres). While the official regulatory authority (*Conseil supérieur de l'audiovisuel* - CSA) was pleased with this greater flexibility, which would "permit better cinema exposure on television", it nevertheless regretted the increased "complexity of the arrangements of the regulations" caused by the creation of the new sub-category of first exclusivity services. ■

affecting the media industries. It resonates most particularly in the context of gathering information to facilitate news, current affairs and investigative journalism output. Long regarded (whether justifiably or

not) as a very "secret society", five new access to information rights held by public authorities came into force in the UK, including Scotland (a distinct legal jurisdiction) on 1 January 2005. The Council of Europe has long promoted the principle of access to information, most notably in its 2002 Recommendation, "On Access to Official Documents".

The legal sources are:

- the Freedom of Information Act (2000), applying to central government bodies and to English, Welsh and Northern Ireland public authorities and the House of Commons, the House of Lords and to the Welsh and Northern Ireland assemblies;
- the Freedom of Information (Scotland) Act (2002) applying to the Scottish Executive, the Scottish Parliament and Scottish public authorities;
- the Environmental Information Regulations (2004) providing a separate right of access to envi-

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● **UK Freedom of Information Act 2000, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9501>

● **UK Freedom of Information Act 2000, Schedule 1, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9502>

● **Freedom of Information (Scotland) Act 2002, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9503>

● **Environmental Information Regulations 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9504>

● **Environmental Information (Scotland) Regulations 2004, available at:**
<http://merlin.obs.coe.int/redirect.php?id=9505>

EN

ronmental information held by UK public authorities. Wider in scope than the Freedom of Information Acts, the Regulations apply to some private bodies, including utilities and contractors providing environmental services on behalf of authorities;

- the Environmental Information (Scotland) Regulations (2004) provide a similar right of access to environmental information held by Scottish public authorities and certain private bodies;
- amendments (as provided by the Freedom of Information Laws) to the Data Protection Act 1998, improving people's rights to see personal information about themselves held by public authorities throughout the UK, in particular where the data are stored on unstructured paper records.

The laws are promoted and enforced by two separate, independent Information Commissioners.

Of direct media interest is that, under UK Freedom of Information Law, Schedule 1, both the BBC and Channel4 are specifically listed as bodies covered by the law. However, in both cases, the information only applies if it is held "for purposes other than those of journalism, art or literature." Exactly how this exception will apply in practice and decisions is sure to be an issue of interest over the next months and years. ■

HR – Minimum Standards Adopted for Broadcasters

The Croatian Minister of Culture has laid down a series of conditions for broadcasters that will be taken into account in future licensing procedures.

Broadcasters will need to prove they have enough starting capital to cover their broadcasting costs for the first three months of operation. Business plans will also have to be produced, giving detailed information about broadcasters' sources of income. Broadcasting companies will also have to appoint a chief editor, who may also be a company director or man-

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ager. Broadcasters are obliged to employ journalists on full-time permanent contracts.

There are also detailed provisions on the size of broadcasters' premises. Local radio stations, for example, must have at least 25 m² of floor space, while national channels require at least 90 m². Depending on the size of their transmission area, TV channels need between 50 and 100 m².

As part of future licensing procedures, broadcasters must demonstrate to the Council for Electronic Media (the Croatian regulator) that they meet these conditions. Under transitional provisions, existing licence-holders must conform to these standards within a year. ■

HU – 3G Service Licenses Awarded

On 7 December 2004 the National Communications Authority („Authority") closed the procedure for three of the four frequency blocks (Blocks A - D) offered at the UMTS (3G) mobile telephone service tender invited on 31 August 2004 (See IRIS 2005-1: 16).

According to the Authority's decision, the best bid for Block A was made by T-Mobile Hungary Ltd. and for Block C by Pannon GSM Telecommunications Ltd.. T-Mobile Hungary Ltd. shall pay HUF 17 billion (EUR 1 is HUF 250) net for the 15-year frequency usage license. Pannon GSM Telecommunications Ltd. shall pay HUF 19 billion, and in addition, the latter company shall also acquire the UMTS license for a

DCS (1800 MHz) frequency package. The first installment of HUF 5.5 billion will be paid by both companies in 2005, the outstanding amount will be paid in three installments within three years. As a result of the tender, third generation mobile telephone services shall be launched in 2006.

During December 2004, the Authority also reached a decision with respect to Block B. Accordingly, Vodafone obtained the license for this block, with a sales revenue-proportional payment option. The company will pay at least HUF 16.5 billion for the 15-year license, in line with its revenue generated from the service. According to the deal, Vodafone has to pay HUF 5.5 billion net in 2004, HUF 2.5 billion net in 2005, then in the following years – from 2006 to 2019 – 0.3% of its sales revenue from the UMTS service with a guarantee that, if this

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● Decree 11/2003 (I.30) on rules of frequency auctions and tender

HU

IE – Obligations Imposed on Broadcasting Transmission Service

In April 2004 ComReg (the Commission for Communications Regulation) designated RTÉ Network Transmission Ltd (RTÉNL) as having significant market power in both the radio and television broadcasting transmission services on analogue terrestrial networks (see IRIS 2004-9: 12). Having engaged in a public consultation on the matter, ComReg announced on 17 November 2004 that it proposed to place obligations on RTÉNL. The consultation document followed the market analysis process,

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● ComReg Press Release PR171104, available at:
<http://merlin.obs.coe.int/redirect.php?id=9484>

● Response to Consultation Document ComReg 04/112, available at:
<http://merlin.obs.coe.int/redirect.php?id=9485>

EN

IE – Radio Spectrum Management Strategy

ComReg (the Commission for Communications Regulation) has launched a public consultation on radio spectrum management for the period 2005-7. Research commissioned by ComReg revealed that the contribution made by use of the radio spectrum to the Irish economy in 2003 was almost EUR 2 billion, equivalent to 1.4% of total GDP, and that the number of jobs dependent on its use was over 24,000.

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● Consultation Paper, ComReg 05/01, 9 January 2005, available at:
<http://merlin.obs.coe.int/redirect.php?id=9486>

EN

amount is lower than HUF 8.5 billion the company will add the difference. Vodafone also agreed that there would be no upper limit for the payment amounting to 0.3% of the UMTS sales revenue. The Authority announced that the tender for Block D reserved for new market entrants proved to be unsuccessful, because the bidders were not eligible for registration.

With the entry of UMTS a third broadband internet access technology will appear in Hungary in addition to conventional fixed-line and cable television access. In addition to improving the quality of conventional mobile telephone calls, UMTS will significantly increase the data transmission rate and this way make internet-based multimedia services accessible via mobile telephone.

The tender was invited pursuant to Act C of 2003 on electronic communications and the Government Decree providing for the rules for the use and tender for a frequency. ■

outlined the nature of the potential competition problems identified and sought views on the principles to be applied when selecting the appropriate remedies and the detail of the proposed remedies. The obligations, which follow Articles 9-13 of the Access Directive (Directive 2002/19/EC), include an obligation of transparency, an obligation of non-discrimination and an obligation of accounting separation. This means that RTÉNL must file with ComReg all agreements for the provision of transmission services, publish a schedule of tariffs, provide advance notice of price changes and provide Service Level Agreements for all relevant parties. In accordance with the new regulatory framework procedures, ComReg notified the European Commission and other European regulators before it would make its conclusions final. ■

ComReg's strategy centres around four main objectives, namely facilitating access, particularly for innovative technologies and services; maximizing the economic and social benefits; promoting efficient use of scarce spectrum resources; and ensuring compliance with national and international requirements, as well as avoiding harmful interference. For each of the objectives a number of specific goals have been set and specific actions identified. The consultation period will run until 4 March 2005. Following the consultation, ComReg will publish a report on the responses in April 2005 and then publish its final strategy. ■

IE – Licence Fee Income Examined

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A report commissioned by the Minister for Communications on the effect of RTÉ's licence fee on other broadcasters and on the advertising market was published on 1 December 2004. The report examined the funding of public service and commercial broadcasting and the evolution of competition in advertising in Ireland and across the member states of the EU. Interviews were also conducted with people in various organizations. The report concluded that, while the licence fee could in

● The effect of RTÉ's licence fee income on broadcasters and on the advertising market in Ireland – A report for the Minister for Communications, Marine and Natural Resources, 1 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9487>

EN

IE – Changes to Cinema Film Certificates

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The Irish film censor has announced changes to cinema film certificates that have taken effect from 1 January 2005. This follows consultation with parents, educators, the public, film distributors and cinema managers. It also takes into account the results of a nationwide survey of parents published in September 2004 (see IRIS 2004-9: 13), which found *inter alia* that a significant percentage of parents found some of the classifications too strict.

The censor has introduced a new "16" certificate, which restricts admission to those aged 16 and over.

● Full details of the classifications announced by the Office of the Film Censor, available at: <http://merlin.obs.coe.int/redirect.php?id=9482>

EN

IT – Chart of Services is Mandatory for the Provisions of Pay-TV Services

On 10 December 2004, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority – AGCOM) adopted the Guidelines on the provision of pay-tv services in accordance with article 1, paragraph 6, lit. b), n. 2, of the Communications Act no. 249/97, charging AGCOM with the power to determine the general quality standards of the services in the communications sector and the content of the Chart of services.

According to these Guidelines, any operator offering pay-tv services on terrestrial or satellite frequencies or via cable, both on subscription as with pre-paid cards, has to adopt a Chart of services at least 30 days before the start-up of the provision of

theory give RTÉ an unfair advantage over commercial broadcasters by providing a financial cushion, it did not do so in practice. With regard to advertising, the report concluded that, given the way advertising rates are set, it was highly unlikely that RTÉ was in a position to drive rates up or down unilaterally. Although RTÉ has a 50% share of television advertising, which is likely to be considered dominant under EC competition law, the mechanism whereby advertising rates are set makes it highly unlikely that RTÉ could abuse such market power. Besides, many advertisers and advertising agencies are substantially larger than RTÉ. Overall, therefore, the conclusion was that RTÉ's receipt of licence fee income does not have an adverse or unfair impact on the market for television or radio advertising in Ireland. ■

The censor has also re-designated the former "12PG" and "15PG" certificates as "12A" and "15A", where "A" denotes adult.

The full list of certificate categories is now as follows:

- G [general]: suitable for all ages;
- PG [parental guidance]: suitable for all ages, but parental guidance advised;
- 12A: suitable for those aged 12 and over, but younger children will be admitted if accompanied by an adult;
- 15A: suitable for those aged 15 and over, but younger children will be admitted if accompanied by an adult;
- 16: Restricted to those aged 16 and over;
- 18: Restricted to those aged 18 and over.

Classification certificates for videos remain unchanged. ■

the services and users must be informed accordingly. The Chart has to give the following information: address of the service provider and description of the services, costs, time needed for the activation of the services, duration of the subscription and means of renewal and resolution, customer care, payments, dispute resolution, reimbursements, protection of minors.

More generally, operators have to ensure equal, transparent and impartial treatment for all customers and all conditions must be interpreted in the light of these principles. All services must be offered on a regular and continuous basis, without interruptions; exception is made for repair or maintenance reasons: in the latter case, users must be duly informed about when the service will be reactivated. Service providers should make an effort to increase the effi-

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ciency of the services, through the adoption of the best technological and organizational solutions.

● **AGCOM Deliberation n. 278/04/CSP, "Approvazione della direttiva in materia di carte dei servizi e qualità dei servizi di televisione a pagamento ai sensi dell'art. 1, comma 6, lett. b), n. 2, della legge 31 luglio 1997, n. 249" (Guidelines on the provision of pay-tv services in accordance with article 1, paragraph 6, lit. b), n. 2, of the Communications Act no. 249/97), 10 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9477>**

IT

MK – Distribution of Licence Fee Revenue

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On 15 December 2004, the Broadcasting Council of the Former Yugoslav Republic of Macedonia announced a provisional decision on the allocation

● **Press release of the Broadcasting Council of the Former Yugoslav Republic of Macedonia, 15 December 2004, available at: <http://merlin.obs.coe.int/redirect.php?id=9509>**

EN

NL – Conviction for Holocaust Denial on Website

On 21 December 2004, the *Rechtbank 's Hertogenbosch* (the District Court of 's Hertogenbosch) convicted a person (hereinafter referred to as "J") to suspended sentence of imprisonment for four weeks (with a probation period of two years) for having deliberately insulted Jews over the internet.

J. had created a website on which he had put several texts denying that the holocaust ever occurred. He had also created links to other texts, one of which was a full-text version of a book entitled "Did six million people really die?", written by Richard E. Harwood. Furthermore, he had translated several chapters of this book into Dutch and had made these translations available on his website.

On the basis of Article 137 of the *Wetboek van Strafrecht* (the Dutch Criminal Code), J. was prosecuted for having incited hatred of, discrimination and/or violence against persons (*in casu* Jews), for

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● ***Rechtbank 's Hertogenbosch* (District Court of 's Hertogenbosch), Judgment of 21 December 2004, LJN No: AR7891, available at: <http://merlin.obs.coe.int/redirect.php?id=9027>**

NL

PL – Adoption of the Act on National and Ethnic Minorities

On 6 January 2005 the Polish Parliament adopted the Act on National and Ethnic Minorities

The procedures for the resolution or amendment of the contract must be clear and easily accessible and customers must be guaranteed access to all their personal information. ■

of licence fee revenue to radio and TV productions of public interest. A total of 167 projects were chosen to receive funding, which will support 56 TV projects, 43 radio projects and 14 film productions. So far, less than 10% of the funds have gone to film productions.

The main beneficiaries will be Macedonian- and Albanian-language productions, although some minority language films will also receive support (Roma, Turkish, Bosnian). ■

having made intentional defamatory statements about Jews and for having made public statements which he knew or should have reasonably suspected to be offensive to Jews (respectively Article 137d, 137c and 137e of the Dutch Criminal Code).

The Court did not consider the allegation of incitement to hatred of Jews as such to be proven. Faced with the alternative allegation of having made defamatory statements, J. relied upon the right of freedom of expression included in Article 10 ECHR by arguing that he did not have the intention to insult people, but only to participate in the public debate about Jews, Palestine, the holocaust and revisionism. The Court dismissed this argument by judging that the statements were both by their nature and in their context needlessly grievous. They could not be considered as statements with no other purpose than participating in the public debate about a social or historical issue.

Therefore, the Court convicted J. for having intentionally made defamatory statements about Jews. In determining the sentence, the Court took into account the fact that J. had not yet been convicted for any offence and that he had removed the website immediately after the police pointed out the offence to him. ■

and on Regional Language. Subsequently, on the following day the Act was sent to the President for signature.

Minorities' rights are already recognized in the Polish Constitution, in ratified international con-

ventions and bilateral treaties, as well as in other national legal acts.

The new Act introduces several important provisions, among them those relevant for public service broadcasters' (PSB) obligations towards national and ethnic minorities.

It defines the terms "national minorities" and "ethnic minorities". Following these definitions it recognises 9 national minorities (Belussians, Czechs, Lithuanians, Germans, Armenians, Russians, Slovaks, Ukrainians, Jews) and 4 ethnic minorities (Karaites [*Karaimi*], Lemkos [*Lemkowie*], Romas, Tatars) in Poland. The Act also introduces a separate category, i.e. a regional language, that in the meaning of this Act is a Kashubian [*Kaszubski*] language, taking into account that - according to Parliamentary expertise - Kashubians are a specific regional group. They cultivate a distinctive cultural and linguistic character, but consider themselves as Polish. It is stressed that State authorities should take appropriate measures to support activities aimed at preserving, maintaining and developing the cultural identity of minorities and persons using a regional language. These actions can include grants e.g. for support of television and radio programmes produced by these groups.

The Broadcasting Act of 29 December 1992 (with

later amendments) already contains some provisions in this respect, that follow from the general definition of the PSB's remit. It imposes the obligation to have regard to the needs of national minorities and ethnic groups. The Broadcasting Act embraces also the institution of the "social broadcaster", which may be for example a minorities' association. Social broadcasters are exempt from fees that have to be paid for awarding or altering the license. Nevertheless it was argued that more detailed provisions referring to the PSB obligation towards minorities in Poland may be useful.

Moreover, the new bill envisages appropriate changes in different laws. It proposes to lay down within the framework of the Broadcasting Act a more specific task of the PSB, that it should "have regard to the needs of national and ethnic minorities, as well as of communities using a regional language, including transmission of news programs in the national and ethnic minorities' languages as well as in the regional language".

Furthermore, it provides rules for the regional branches of public television. These regional broadcasters transmit programmes in the minorities' languages or in the regional language. When there are programme councils appointed, candidates proposed by associations of national and ethnic minorities as well as of communities using regional languages, should be included. The programme council of a public television's regional subsidiary serves as an advisory and consultative body to the director of the branch. ■

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● *Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym (Act on National and Ethnic Minorities and on Regional Language of 6 January 2005)*, available at:
<http://merlin.obs.coe.int/redirect.php?id=9521>

PL

US – Supreme Court to Review Ninth Circuit Peer-to-Peer Decision

On 10 December 2004, the U. S. Supreme Court granted certiorari to review the Ninth Circuit's holding, in *MGM v. Grokster* (see IRIS 2004-8: 15), that the creators of peer-to-peer file sharing systems were not liable for copyright infringements by users of their systems.

In the statement of the Question Presented, the plaintiffs/appellants cite what they describe as the "acknowledged conflict with the Seventh Circuit". The Seventh Circuit, in the *Aimster* case (In re *Aimster Copyright Litigation*, 334 F.3d 643 (June 30, 2003)), held *Aimster* liable for copyright infringement for operating their peer-to-peer file sharing website. Reconciling the cases, however, is not as difficult as the appellants in *Grokster* imply. In the *Aimster* case, Judge Posner described five different types of uses (including the distribution of non-copyrighted works and the authorized distribution of copyrighted works) that might constitute the "substantial noninfringing uses" required under the Supreme Court's reasoning in *Sony v. Universal City*

Studios, 464 U.S. 417 (1984). *Aimster*, however, "failed to produce any evidence that its service has ever been used for a noninfringing use."

The defendants/appellees in *Grokster* apparently took the *Aimster* ruling to heart, submitting declarations by persons who used their system to distribute noncopyrighted or authorized works. Without quantifying the amount of such uses, the Ninth Circuit held that such uses were sufficient to constitute "substantial or commercially significant noninfringing uses."

Even though the cases can be reconciled, they do reflect different sensitivities to the claims of copyright owners and copyright users. In *Aimster*, while Judge Posner technically only required that legitimate noninfringing uses constitute more than zero percent, the tone of the case implies that even ten or twenty percent might not be enough. In *Grokster*, though the Ninth Circuit does not say exactly how many uses constitute "substantial or commercially significant noninfringing use," the implication is that as little as ten or twenty percent is enough.

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Many observers believe it is time for the Supreme Court to adopt a test of infringement better suited to the peer-to-peer environment than the 20-year old Sony ruling which was, after all, a 5-4 decision very much influenced by the particular setting of home videorecording of television programs broadcast for free over the public airwaves. Even if the Court ends

up reaffirming Sony, it will have the opportunity to clarify or quantify precisely how much noninfringing use is required, or how decentralized a file sharing system must be in order to protect the operators of the system under Sony.

It is anticipated that the case will be argued in the spring, with a decision by June 2005. ■

● U.S. Supreme Court, 04-480, *MGM Studios, Inc., et al. v. Grokster, Ltd., et al.*, Cert. Granted 12 October 2004. Available at:
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AGENDA

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