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2005 - 4

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European Court of Human Rights: Case of Steel and Morris v. the United Kingdom

The European Court of Human Rights in a judgment of 15 February 2005 has come unanimously to the conclusion that the United Kingdom has violated Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention on Human Rights in a libel case opposing the McDonald's Corporation against two United Kingdom nationals, Helen Steel and David Morris, who had distributed leaflets as part of an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" was distributed by Steel and Morris and in 1990 McDonald's issued a writ against them claiming damages for libel. The trial took place before a judge sitting alone from June 1994 until December 1996. It was the longest trial in English legal history. On appeal the judgment of the trial judge was upheld in substance, the damages awarded were reduced by the Court of Appeal from a total of GBP 60,000 to a total of GBP 40,000 and leave to appeal to the House of Lords was refused. Throughout the trial and appeal proceedings Steel and Morris were refused legal aid: they represented themselves only with some help from volunteer lawyers. Steel and Morris applied to the European Court on 20 September 2000, complaining that the proceedings were unfair, principally because they were denied legal aid, although they were unwaged and dependant on income support. The applicants also complained that the outcome of the proceedings constituted a disproportionate interference with their freedom of expression. With regard to the first complaint, under Article 6 para. 1 the Court is of the opinion that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the Court and contributed to an unacceptable inequality of arms with McDonald's, who in this complex case, lasting 313 court days and involving 40,000 pages of documentation, had been represented by leading and junior counsel, experienced in defamation law and by two solicitors and other assistants. With regard to the second complaint, the Court reaches the conclusion that there has been a

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• **Marketing Manager:** Markus Booms

• **Typesetting:** Pointillés, Hoenheim (France)

• **Print:** Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76350 Baden-Baden (Germany)

• **Layout:** Victoires Éditions

ISSN 1023-8565

violation of Article 10 of the Convention. Although it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements, it is considered essential by the Court that when a legal remedy is offered to a large multinational company to defend itself against defamatory allegations, also the countervailing interest in free expression and open debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case. The Court also emphasizes the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, as well as the potential "chilling" effect on others an award of damages for defamation in this context may have. Moreover, according to the Strasbourg Court, the award of damages was disproportionate to the legitimate aim served in order to protect the right and reputation of McDonalds, as the sum of GBP 40,000 was not in a reasonable relation of proportionality to the injury to reputation suffered. Given the lack of procedural fairness and the disproportionate award of damages, the Court found that there had been a violation of Article 10 in this case, which in the media has been labelled as the "McLibel" case. The United Kingdom is ordered to pay EUR 35,000 to the applicants in respect of non-pecuniary damages and EUR 47,311 in respect of costs and expenses related to the Strasbourg proceedings. ■

Dirk Voorhoof
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● Judgment by the European Court of Human Rights (Fourth Section), case of Steel and Morris v. the United Kingdom, Application no. 68416/01 of 15 February 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

EN

EUROPEAN UNION

European Court of Justice: Decision in max.mobil Case

The European Court of Justice, ruling on an appeal, has confirmed the general principle that a refusal by the European Commission to bring proceedings against a Member State cannot be legally challenged.

The background to the decision lies in the transfer of radio frequencies to Mobilkom Austria, which formerly had a monopoly on mobile telephony in Austria, when it was privatised in 1996. Austria's second GSM network operator, max.mobil (currently trading as T-Mobile Austria GmbH) had lodged a complaint with the Commission in 1997 asking for the allocation of frequencies to be reviewed. Max.mobil argued that the Republic of Austria had breached EC regulations by unlawfully giving preference to its competitor Mobilkom. For example, no distinction had been drawn between the amount of the concession fee charged to max.mobil and that charged to Mobilkom. Max.mobil contended that Austria had, *inter alia*, infringed the provisions of the EC Treaty on state measures favouring public undertakings or undertakings to which special or exclusive rights had been granted.

The Commission rejected the complaint. Max.mobil thereupon brought an action before the Court of First Instance (CFI) of the European Communities seeking to have the rejection set aside. The Court of First Instance found that the appeal was admissible but rejected it on its substance.

Although this decision was in its favour, the Commission appealed against the ruling on admissibility, taking the view that its decision not to proceed against Austria was not open to legal challenge. The Commission argued that the CFI ought to have rejected max.mobil's appeal as inadmissible.

That view has now been upheld by the Court of Justice. In its ruling the Court referred to the Commission's functions in relation to competition law. The Commission is empowered to decide that specific measures taken by Member States infringe Community law. It may also decide what measures a Member State needs to take in order to rectify such an infringement. It does not follow, however, that an individual can require the Commission to take a position one way or another. A refusal by the Commission to bring proceedings has no binding legal effect and thus cannot be the subject of an action for annulment. The ECJ therefore set aside the CFI's judgment. ■

Stefanie Mattes
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● Judgment of the European Court of Justice of 22 February 2005, case C-141/02 P

DE

European Commission: Statement on Services Directive

In his statement to the European Parliament of 8 March 2005, European Commissioner for Internal Market and Services Charles Mc Greevy, confirmed that it is not the intention of the Commission to withdraw its proposal for a Directive on Services in the Internal Market. Launched in early 2004, the proposal sets out a general legal framework to reduce barriers to cross-border provision of services within the European Union. Given the broad scope of the proposal, its content has direct repercussions on the provision of audiovisual services.

The proposal indeed covers all activities involving services except services provided by the state for no remuneration in fulfillment of its social, cultural, educational and legal obligations. Some specific services, such as electronic communications services, are excluded from the proposal on the basis of the argument that they are already governed by specific

Community legislation. In his recent statement, Commissioner Mc Greevy has now indicated that specific sensitive sectors, such as health and publicly funded services of general interest should also be excluded from the Directive. As to audiovisual services, several voices within the European Parliament have pointed out the specificity of the audiovisual sector and stressed the need to deal with the uncertainty about the relation between the proposal and existing sectoral directives, such as the Television Without Frontiers Directive.

The core of the Commission's proposal relates to the two services-related fundamental freedoms protected by the EC Treaty. On the one hand, it introduces measures to eliminate restrictions to the freedom of establishment, such as the establishment of single points of contact and the application of a major screening operation to national authorisation schemes. On the other hand, it stimulates the free movement of services by applying the country of origin principle. This means that a service provider established in one Member State who provides services on a temporary basis in another Member State, is only subject to the law of the country in which he/she is established. In his statement, Commissioner Mc Greevy stressed the importance of reducing bureaucracy to stimulate cross-border service provision. At the same time, he admitted that concerns about the operation of the country of origin principle should be addressed and he reassured that the proposal does not intend to endanger workers' rights neither to create social dumping.

In accordance with the co-decision procedure, it is now up to the European Parliament to give its opinion on the proposal in first reading. Parliament is expected to pass amendments in plenary session at the earliest by the middle of this year. Commissioner Mc Greevy committed his loyalty to this procedure. ■

Wouter Gekiere
Legal Adviser
European Parliament

- **"Statement to the European Parliament on Services Directive", Speech 05/149 of 8 March 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9586

EN

- **Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2 final/3, available at:**
http://merlin.obs.coe.int/redirect.php?id=9585

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

European Commission: Financing of Public Service Broadcasters

The European Commission announced on 3 March 2005 that it had reached preliminary conclusions on the financing of public service broadcasting in Germany, Ireland and the Netherlands. The Member States had been informed, pursuant to Article 17 of Regulation (EC) 659/1999, of the Commission's preliminary view following its investigation of their respective financing regimes in the light of subsidy rules.

Insofar as the Commission's press release explains them, the points at issue, at least with regard to Germany and the Netherlands, include the absence of an adequate definition of the public service remit in relation to on-line activities. The Commission has called for legal measures to be taken in this respect, clearly deeming that the question cannot simply be determined by the public broadcasters themselves. It also stressed the requirement for separate bookkeeping so that a clear distinction can be made in any investigation between commercial activities and those that fall within the public service remit as defined by the respective Member State. Appropriate procedures must be in place for checking that public service broadcasters are not over-compensated. The broadcasters' commercial activities must be conducted in accordance with market principles and, finally, there should be an independent (national) authority checking compliance with these rules. The Commission made the point that it was generally acceptable for public service broadcasters to offer access to the Internet as an information medium, as part of their public-service remit.

Ireland was also asked to clarify the role of public service broadcasters and arrangements for their financing by clearly defining their basic mission, implementing separate bookkeeping and introducing machinery to prevent over-compensation, ensure that market principles were adhered to and check compliance. The Commission referred here to its previously issued conclusions on other Member States' rules in these areas.

On the same day the Commission published a list of frequently asked questions (FAQ), outlining in more detail its approach to investigations of the way that broadcasting is financed. In the FAQ document the Commission mentions its objections to the practice of certain broadcasters, when acquiring rights for the televised transmission of sports events, of acquiring Pay TV rights as well, thus distorting competition.

The Commission further explains that it applies the criteria set out in the ECJ's Altmark ruling to determine whether state financing amounts to a subsidy, before investigating whether such a situation might be justified. It checks first whether there is a clear public-service remit with a formal basis in law, secondly whether there is a national body tasked with ensuring compliance and thirdly whether the level of financing is equivalent to the actual costs incurred.

The three Member States now have an opportunity to comment on the Commission's views and, in particular, to proposes remedial measures. ■

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- **European Commission press release IP/05/250 of 3 March 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9587

- **Public service broadcasting and state aid – frequently asked questions, European Commission FAQ document MEMO/05/73 of 3 March 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9588

EN

European Commission: Merger between French Cable Operators Cleared

The European Commission has decided to clear the proposed acquisition by the UK investment group Cinven of the French cable operators France Télécom Câble (a subsidiary of France Télécom SA) and NC Numéricâble (a subsidiary of Canal+). The two cable companies currently operate respectively 20 and 46 cable networks in France and are both active in the French pay-TV market. The other main cable operator in France is UPC-Noos, an entity that resulted from the merger between the two cable companies UPC and Noos in 2004.

The Commission's analysis focused on the effects of the proposed concentration on: 1) the upstream market for the acquisition of distribution rights for pay-TV channels and 2) the downstream market for the distribution of pay-TV in France. As regards the first market, the Commission came to the conclusion "that the new entity would not be in a position to exercise market power over pay-TV channel broadcasters because its share of total sales of distribution rights for these channels was relatively small, particularly compared with the two French satellite platform operators (TPS and CanalSatellite)". Also, the Commission concluded that the reduction in the number of major buyers which would result from the concentration "would not increase the incentive for collusion between them, mainly because of their differing degrees of vertical integration".

As regards the market for pay-TV distribution, the Commission took the view that the merger would not significantly restrict effective competition on this market since each operator "already held a *de facto* monopoly position in the geographical area covered by its cable network and since combining the networks within the new entity would not result in any real reduction of choice for consumers".

In light of the above the Commission gave green light to the transaction. ■

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● "Mergers: Commission clears acquisition of France Télécom Câble and NC Numéricâble by Cinven", Press Release of the European Commission IP/05/262 of 4 March 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9574
DE-EN-FR

European Parliament: Approval of Unfair Commercial Practices Directive

On 24 February, the European Parliament approved in second reading, subject to a number of amendments, the proposed Directive on Unfair Commercial Practices, which was put forward by the Commission in June 2003 (see IRIS 2003-8: 5 and IRIS 2004-7: 3). Parliament's amendments have been endorsed by both the Commission and the Council and the Directive should now be formally adopted at the Competitiveness Council in June 2005.

The aim of the Directive is to ensure a high level of consumer protection across Europe while contributing to the proper functioning of the internal market facilitating cross-border trade. In order to achieve this, the Directive sets out a common EC framework for regulating unfair commercial practices (such as advertising and marketing), which is to replace the maze of existing national laws and court judgments in this field. The Directive covers business-to-consumer commercial practices, which harm the economic interests of the consumer (it does not cover aspects of health and safety, taste or decency or contract law and does not cover business-to-business transactions).

The Directive lays down a general prohibition on unfair commercial practices and sets out the criteria for determining when a practice is to be regarded as unfair (the test is whether the practice is contrary to the requirements of professional diligence and whether it would unfairly distort the behaviour of the average consumer, although provision is also made to protect particularly vulnerable consumers, such as children). It then sets out more detailed provisions on two specific categories of unfair practices, misleading and aggressive practices, and in its Annex 1 lists a number of practices which are to be considered unfair in all cases and are therefore prohibited up-front. Following Parliament's latest amendments, one of the prohibited practices in Annex 1 covers "including in an advertisement a direct exhortation to children to buy or to persuade their parents or other adults to buy advertised products for them [this provision is without prejudice to Article 16 of the Television without Frontiers Directive]".

It should be noted that Parliament has accepted the Council's amendment to delete the country of origin principle from the Directive, as it is satisfied that it is no longer necessary to include it in light of the high level of harmonization of consumer protection achieved in the Directive.

Member States will have to adopt the necessary legislation to implement the Directive within 24 months of its entry into force. They will then be allowed to continue to apply for a further six years existing national provisions more restrictive than the Directive which implement previous directives containing minimum harmonization clauses. ■

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● European Parliament legislative resolution on the Council common position for adopting a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (11630/2/2004-C6-0190/2004-2003/0134(COD)), 24 February 2004
CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-SK-SL-SV

● "Unfair commercial practices: Commission welcomes Parliament's approval of new law", Press Release of the European Commission IP/05/213, 24 February 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9595
DE-EL-EN-FR

IRIS LEGAL OBSERVATIONS
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NATIONAL

AL – Parliament Approves NCRT-Report 2005

Hamdi Jupe
Albanian Parliament

111 private radio and television stations are presently offering their services in Albania. The condition that allows broadcasting is a licence given by the *Keshilli Kombetar i Radiotelevizioneve* (National Council of Radio and Television - NCRT). During 2004, the Albanian market of the electronic media was seriously shocked by the unlicensed presence of a new operator for the terrestrial and digital satellite broadcasting to which the NCRT objected. On 17 February 2005, the Parliament of the Republic of Albania approved the Annual Report 2004 of the NCRT. According to the Law "On public and private radio and television in the Republic of Albania", the parliament discusses at the beginning of each year the regulatory authority´s activities of the previous year and also approves the plan of activities for the next year. The dispraise of this Report for two consecutive years, leads to the automatic dismissal of the NCRT, and to the responsibility to set up a new one (See IRIS 2004-4: 6 and IRIS 2002-4: 4). ■

AT – Supreme Court Rules on "Originating State" Principle for Radio

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The Supreme Court (OGH) has clearly ruled (decision of 4 May 2004, 4 Ob 82/04v) that the "originating State" principle should extend to sound radio, although there is no explicit provision to this effect in either Community or Austrian law.

The ruling is thus of interest to the media sector generally in relation to discussion of the Commission's proposal for a directive on services in the internal market (COM (2004) 2 final) (see IRIS 2005-4: 3).

In the case before the court a private radio broadcaster established and transmitting in the Tyrol region of Austria had brought an action against a radio broadcaster based in South Tyrol (Italy). Following the installation of transmission equipment which at certain times broadcast a stronger signal in the direction of Austria, the respondent's programmes could also be received over a wide area of North Tyrol. One advertisement broadcast by the respondent concerned a technology and business park in Austria. The applicant had sought an injunction to prevent the respondent transmitting its radio programmes in Austria on the grounds that, not having a licence for radio broadcasting in Austria, it was creating a competitive advantage for itself by unlawful means.

The Austrian Private-Sector Radio Act does not stipulate whether a foreign radio broadcaster deliberately transmitting to Austria requires a licence. The Private-Sector Television Act, by contrast, imposes a licensing requirement on broadcasters whose registered office is in Austria and who take editorial programming decisions in Austria. Licences are also required by broadcasters who lawfully use transmission capacity allocated to Austria under international broadcasting law or whose signals are transmitted in Austria via a satellite link.

In its ruling, the Supreme Court applied this provision by analogy to sound radio. In effect, the respondent, whose registered office was in Italy, was not obliged to apply for a radio broadcasting licence under the Austrian Private-Sector Radio Act. There had thus been no breach of the prohibition on unfair competition. ■

● **Supreme Court decision of 4 May 2004, 4 Ob 82/04v**

DE

BA – Allocation of available Frequencies for Terrestrial Broadcasting

Dusan Babic
media researcher and analyst
Sarajevo

The Communications Regulatory Agency (RAK) has conducted a public opening for the allocation of available frequency resources for terrestrial broadcasting of RTV programmes.

The RAK is an independent state-level institution, with responsibility for the regulation of the telecommunications and electronic media sector, but it also has the remit to manage the frequency spectrum in Bosnia and Herzegovina.

In January 2005 the Agency announced a public invitation for the allocation of the available frequencies for terrestrial broadcasting of RTV programmes, along with the list for terrestrial broadcasting of radio programmes in VHF range 87.5 - 108 MHz, and a list for terrestrial broadcasting of TV programmes in UHF range 470 - 786 MHz.

This proceeding was in accordance with the Geneva 1984 and Stockholm 1961 Agreements that specify the usage of these frequencies. It should be remembered that the Stockholm Agreement has established for Europe television plans in bands I, III, IV/V, and an FM radio plan in band II. These plans also include an indication of the agreed technical characteristics and modalities, such as transmitter site, frequency, etc. The Geneva Agreement was intended to revise the Stockholm Agreement, which is going to be further modified in the light and context of Digital Audio Broadcasting (DAB) expansion.

The RAK has announced that 21 applications were received by the end of the deadline at the end of February 2005. The results of this public tender will be announced publicly, and each applicant will be informed separately, in writing, including a note regarding a legal remedy against the decision. This is in line with the Agency's policy guidelines, which order it to perform its duty, role and mandate in a legal, fair and transparent manner. ■

CS – Members of the Broadcasting Council Elected

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At its session held on 17 February 2005, the National Assembly of Serbia has elected eight out of nine members of the Council of the Broadcasting Agency of Serbia. The ninth member shall be proposed by the eight already elected, and voted in the parliament within the next 30 days. The election comes after the adoption of amendments to the 2002 Broadcasting Act (see IRIS 2004-9: 7), by which the new Government of Serbia decided to remedy the illegalities which occurred when the first Council election took place in 2003 (see IRIS 2003-6: 10 and IRIS 2003-9: 7). However, three members of the 2003 Council have been re-elected

Due to the imprecise nature of the 2004 amendments, there is currently a problem with determining the length of tenure of the eight members. The term of office should have been regulated by a drawing prior to the election. The Broadcasting Act provides that the tenure of the first nine members of the Council lasts two years for three of them, four years for another three and six years for the last three, whereas the term of office is six years for members which are going to be elected in the future. Further the Act provides that the drawing, aimed at determining the duration of the tenure, is to be made by drawing the name of the nominator of every member. The problem is caused by the fact that, under the Broadcasting Act as amended, the parliamentary Committee on Culture and Information nominates candidates for three members. Thus the duration of the tenure of the members proposed by the Committee is uncertain – it seems they will all have the same term, or there is going to be a new drawing based upon clearer criteria. Regardless of these formal problems, the election of the Council members may, in the near future, finally enable the implementation of the 2002 Broadcasting Act, especially bearing in mind that there were no obvious breaches of the rule of law during this election. As a result it could be possible that the first tenders for national coverage will take place in the Autumn of 2005. ■

CZ – Czech Television Act Amended

Jan Fučík
Broadcasting Council Prague

On 21 January 2005 the Parliament of the Czech Republic voted to amend the Czech Television (CT) Act with effect from 1 April 2005.

The main thrust of the amendments is to implement Directive 2000/52/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (the Transparency Directive). The Transparency Directive's aim is to ensure disclosure of information about public funds and their use by public undertakings.

The Directive requires that separate accounts be kept by any undertaking granted special or exclusive rights under Article 86(1) of the EC Treaty that is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, receives state aid in any form whatsoever, including any grant, support or compensation, in relation to such a service, and carries on different activities. The term "different activities" here means, on the one hand, all products or services in respect of which a special or exclusive right is granted to an undertaking or all services of general economic interest with which an undertaking is entrusted and, on the other hand, each of the undertaking's other separate products or services. Czech Television is now covered by this rule.

The Bill as originally drafted had also proposed other amendments. It had called for the members of the Czech Television Council to be selected by three bodies. The First Chamber of Parliament, the Second Chamber and the President would each have determined part of the membership. These amendments were not, however, adopted, so the Council will continue to be selected exclusively by the Second Chamber. ■

● ***Zákon č. 82/2005 Sb., kterým se mění zákon č. 483/1991 Sb. o České televizi*** **(Law No 82/2005 – Amending Law No 483/1991 on Czech Television)**
CS

DE – Interstate Broadcasting Agreement Amended

A "yes" vote by the State Parliament of Baden-Württemberg on 16 March 2005 signals completion of the process of ratification of the Eighth Agreement Amending the Interstate Broadcasting Agreement (8 RfÄStV) by the German *Bundesländer*. The amendments affect the Interstate Agreements on Broadcasting; Television and Radio Licence Fees; Funding; the ARD; the ZDF; Deutschlandradio; Media Services; and the Protection of Young Persons in the Media. Completion of the ratification process means they can take effect as planned from 1 April 2005. The new Amending Agreement also transposes Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive) insofar as it provides specifically for broadcasting and the relevant matters fall within the legislative competence of the Federal States.

This updating of German media law was preceded by intensive debate, particularly on two questions. The first concerned tighter definition of the role of

public service broadcasting – as, for example, through limitation of the number of radio and television programmes that the broadcasters could produce. New programmes may now be broadcast only to replace previous output, with 1 April 2004 as the reference date for determining the number of programmes permissible. The second issue concerned the fact that licence fees had to be reviewed following expiry of the last licensing period. Any alteration in the level of fees is fixed by the independent Committee for Determining Broadcasters' Financing Requirements (KEF), on the basis of figures supplied by the public-service broadcasters. This time, however, there was a change of procedure. The KEF had already decided that the broadcasters' requirements were considerably less than they claimed. Thereupon and for the first time, the Minister Presidents of the Federal States stepped in to adjust the level proposed by the KEF, fixing on a reduction of around 20%. No decision has yet been taken on whether the broadcasters will challenge the decision in the Federal Constitutional Court. ■

Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

● ***Achter Staatsvertrag zur Anderung rundfunkrechtlicher Staatsverträge (Achter Rundfunkanderungsstaatsvertrag)*** **(Eighth Agreement Amending the Interstate Broadcasting Agreement), of 8 bis 15 October 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9598
DE

DE – Press Code Extended

The German Press Council, meeting in plenary session on 2 March 2005, voted to incorporate into the Press Code a ban on discrimination on grounds of disability. Thus Article 12 of the Press Code now reads: "There must be no discrimination against anyone on grounds of sex, *disability*, race, ethnic background, religion, social group or nationality." The Press Council decision came in response to pressure from associations representing people with disabilities and concerned individuals who had mounted a campaign entitled "Initiative 12" to have the Press Code amended.

The stipulation on equal treatment for people with disabilities – also explicitly required under Article 3 of the Basic Law [Constitution] – is intended to underscore the specific responsibility that the media bears in this regard. In particular it aims to ensure that journalists report on people with disabilities and/or chronic illnesses in a non-discriminatory manner.

Meeting on 1 and 3 March, the Press Council also issued four public reprimands for breaches of Article 7 of the Press Code, which requires that editorial matter and advertising be clearly separated. Several editorial items in the Munich *Abendzeitung*, for example, were found to contain surreptitious advertising and the *Augsburger News* had breached the principle of separation through an offer to publish editorial coverage as a quid pro quo for the purchase of advertising space. The Press Council announced that it is to hold a public hearing on the theme this autumn, inviting editors, academics and PR people to discuss the highly topical problem of mixing editorial and advertising.

The Press Council's bi-cameral Complaints Committee processed a total of 96 complaints, issuing 19 notices of censure and 16 comments as well as 12 public reprimands. It rejected 38 complaints as unfounded. The Editorial Data Protection Chamber of the Committee rejected one complaint as unfounded. ■

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● **Press release on extension of the Press Code:**
http://merlin.obs.coe.int/redirect.php?id=9581

● **Press release on Press Council reprimands:**
http://merlin.obs.coe.int/redirect.php?id=9582
DE

DE – Opinion on GATS and Cultural Policy and Subsidies

Against the background of work on an international standard-setting instrument on cultural diversity, the German Commission for UNESCO has obtained a legal opinion on the impact of the General Agreement on Trade in Services (GATS) on German cultural policy. The opinion begins by outlining the structure of the World Trade Organisation (WTO) and the GATS and goes on to consider the compatibility of various state support measures – such as fees and charges imposed under public law, quotas for film or broadcasting or the system of social security for self-employed artists – with the GATS rules. Also explored are the implications of the ongoing GATS negotiations, in which the European Union's trade partners are urging it to introduce further deregulation in the area of cultural services. The opinion also includes a chapter on the relationship between the planned UNESCO agreement on cultural diversity and the GATS, considering various possible conflicts between the two sets of norms and how these might be addressed under international law. It concludes with a series of proposals for taking appropriate account of cultural concerns in WTO arbitration procedures. ■

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● ***"Auswirkungen des GATS auf Instrumente der Kulturpolitik und Kulturförderung in Deutschland"*****, legal opinion prepared for the German Commission for UNESCO by Professor Markus Krajeswki, University of Potsdam, with Sarah Bormann and Christina Deckwirth, available at:**
http://merlin.obs.coe.int/redirect.php?id=9580
DE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

FR – *Conseil d'Etat* Upholds the Formal Notice Served on Eutelsat

In a decision on 10 February 2005, the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body – CSA) served formal notice on Eutelsat, the satellite telecom network on which the Iranian channel Sahar 1 is carried, to stop broadcasting the channel within one month. The channel had not concluded an agreement with the CSA and had broadcast programmes that were manifestly anti-Semitic (see IRIS 2005-2: 12). Eutelsat made an urgent application to the *Conseil d'Etat* for enforcement of the decision to be suspended on the grounds that the Act of 30 September 1986 on freedom of communication, as amended, did not require satellite carriers to check that the channels broadcast using their satellite capacity had honoured their obligation to conclude an agreement with the CSA and were not broadcasting programmes contrary to the principles of French law. The *Conseil d'Etat* rejected the application on 3 March.

Indeed it noted that since the amendment of the Act of 30 September 1986 by the Act of 9 July 2004, the specific purpose of which was to provide a framework for the broadcasting of non-European channels by satellite operators falling under French jurisdiction, operators were required to ensure that the contracts they concluded with the television services to which, either directly or through other operators, they conceded use of their network included a clause making application conditional on the obligations incumbent on such services under French law. In this respect the *Conseil d'Etat* recalled the obligation to conclude an agreement with the CSA, in compliance with Article 33-1 of the Act, and the prohibition of any incitement to hatred or violence on the grounds of race, gender, morality, religion or nationality in the programmes shown. Consequently it was for the CSA, to which Article 42 of the Act of 30 September 1986 gave the power to serve formal notice on satellite operators, to use this procedure, which did not constitute a penalty, to prescribe for French satellite operators measures proportionate to the nature and the gravity of their failings and such as would ensure compliance with their obligations. In the present case, in view of the patently anti-Semitic connotation of the programmes broadcast by the channel Sahar 1 and its failure to have concluded an agreement with the CSA, the *Conseil d'Etat* found that it was not established that the CSA had exceeded its powers by serving formal notice on Eutelsat to stop broadcasting the channel within one month. ■

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● ***Conseil d'Etat*** **(order in an urgent matter), 3 March 2005, the company Eutelsat, available at:**
http://merlin.obs.coe.int/redirect.php?id=9583

FR

FR – Collective Aerials Are Subject to Copyright Royalties

In two notable decisions, the Court of Cassation has now clearly stated that the installation by a syndicate of co-owners of a collective aerial in a residential building constitutes an act of exploiting protected works separate from their broadcasting and as such gives rise to the payment of royalties.

The disputes arose between a syndicate of co-owners of a block of flats and various societies for the collective management of rights (SACEM, SCAM, SACD, ADAGP and ANGOA) whose catalogues included the works being circulated. The syndicate of co-owners felt that by installing the collective aerial allowing the reception of terrestrially broadcast and satellite channels it was merely enabling the co-owners to receive the programmes in their respective homes; the collective aerial was merely an extension of the individual aerial to which they were entitled, and the residents could not be considered as constituting "the public" within the meaning of Article L. 1222 of the *Code de la propriété intellectuelle* (French intellectual property code - CPI). According to this text, "representation consists of the communication of a work to the public using any process, and more specifically (…) 2) by broadcasting". Broadcasting a work, if it permits contact with a new audience, requires further authorisation and the payment of a further fee. The individual user of a television set, however, is not *a priori* required to pay anything since he/she is within the "family circle". The syndicate claimed application of the exception set out in Article L. 122-5 of the CPI, according to which "where the work has been made public, the originator may not prohibit: 1) private representations for which no charge is made and which take place exclusively within the family circle". The Court of Cassation, however, settled the matter by noting that, unlike the individual aerial, the collective aerial allowed the circulation of protected works to as many homes as the building in question contained. It concluded that the syndicate was thus effecting a representation of audiovisual works by communication to an audience comprising all the residents, who formed a group that reached beyond "the family circle"; it was irrelevant that there was no intention to make a profit and that the aerial was owned indivisibly.

Under paragraph 2 of Article L. 13220 of the CPI, "authorisation to broadcast the work is not tantamount to authorisation to communicate the broadcasting of the work in a place to which the public has access". As used in hotels, lifts, shopping malls, shops, etc, collective aerials now clearly entitle rightsholders to receive remuneration. ■

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● **Court of Cassation (1st civil chamber), 1 March 2005, Syndicate of co-owners of the residential building Parly II vs. SACEM, SCAM, SACD and ADAGP, available at:**
http://merlin.obs.coe.int/redirect.php?id=8885

● **Court of Cassation (1st civil chamber), 1 March 2005, Syndicate of co-owners of the residential building Parly II vs. ANGOA, available at:**
http://merlin.obs.coe.int/redirect.php?id=8885

FR

FR – Acquittal of a Video Pirate Upheld

The court of appeal in Montpellier has upheld the acquittal by the regional court in Rodez (see IRIS 2004-10: 10) of an Internet user who downloaded one-third of the 488 CDROMs seized at his home from peer-to-peer networks and copied the remaining two-thirds from CDROMs lent to him by friends. The defendant said he had made the copies exclusively for his own private use and that he knew it was against the law to copy films using the Internet. He also said that he had never sold or exchanged any of the CDs he had copied. On the basis of Articles L. 122-3, L. 122-4 and L. 122-5 of the *Code de la propriété intellectuelle* (French intellectual property code - CPI), the Court recalled that, once a work has been made public, its originator may not prohibit copying or reproduction that is strictly for the private use of the person making the copy and not intended for any collective use. The court held that no collective use had been established. At the most the defendant admitted that he had watched one of the copies in the presence of one or two friends and had lent CDROMs to a number of other friends. The court found that this was not sufficient to deduce that the copies had been made for any purpose other than the private use referred to in the CPI. The acquittal of the defendant was therefore upheld.

In this case the court does not make a clear statement on "uploading", ie making works available on a peer-to-peer network, contrary to two other notable judgments (regional court of Vannes on 29 April 2004 and the regional court of Pontoise on 2 February 2005). The court had been asked whether an Internet user who downloads such works is able to benefit from the private copying exception. Contrary to the opinion held by a substantial body of legal opinion, the court appears to be confirming that the mere operation of downloading and reproducing downloaded works on an external medium (CD or DVD), without the authorisation of the rightsholders, may benefit from the private copying exception regardless of the origin of the works (downloaded *a priori* illegally using peer-to-peer networks). The parties whose claims for damages were rejected – companies producing and editing videos, and professional syndicates – have announced that they will appeal to the Court of Cassation, and its decision on the matter is awaited with much interest. ■

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● Court of appeal of Montpellier (3rd chamber dealing with minor offences), 10 March 2005, Buena Vista Home Entertainment et al. v D.A.C., available at: http://merlin.obs.coe.int/redirect.php?id=9594

FR

GB – Final Stage of Review of Public Service Broadcasting

The British communications regulator, the Office of Communications (Ofcom) has now issued the third and final stage of its review of public service broadcasting (see IRIS 2004-6: 12 and IRIS 2004-10: 12). This stage builds on the previous two and the consultations undertaken on them, and sets out proposals in greater detail.

According to the review, we are facing the end of the old model of public service broadcasting because of the growth of competition for advertising revenue and the decline in the scarcity value of the analogue spectrum. Both of these developments will make it impossible to ensure the delivery of a wide range of obligations by commercial public service broadcasters, as has been part of the British system in the past. A new definition of public service broadcasting is developed for a commercial marketplace, its purposes being informing ourselves through news and analysis of current events and ideas; stimulating interest in arts, science and history; reflecting cultural identity through original programming, and making us aware of different cultures and alternative viewpoints. The characteristics of such broadcasting will be that it is of high quality, original, innovative, challenging, engaging and widely available.

Current levels of public funding for public service broadcasting should be maintained at least in the short term. Delivery should be for a range of providers, especially the BBC but also through limited obligations on commercial broadcasters and through a new Public Service Publisher. However, obligations requiring commercial broadcasters to provide non-news regional programming will be reduced, initially to 1.5 hours per week and at switchover to 0.5 hours. Regional news obligations will be retained.

The Public Service Publisher will provide a free-to-air content service of high-quality drama, quality and factual content, and local and communities services. Its purpose will be to provide competition with the BBC for public service provision, so the BBC will be prohibited from bidding for it, although it may be linked to Channel 4. Establishment of the Publisher will of course depend on funding decisions to be taken by the government.

The review also comments on the regulation of the BBC, although this is largely outside Ofcom's remit. The latter does not seek to take over governance and oversight of the BBC, but recommends common competition rules across the sector and that impact on assessments of new BBC services should be carried out by Ofcom rather than the government. The position of the BBC is further discussed in IRIS 2005-4: 11 in the context of the Green Paper on the review of its charter. ■

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● Office of Communications, "Ofcom Review of Public Service Television Broadcasting: Phase 3 – Competition for Quality", February 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9566

EN

GB – Government Publishes Plans for the Future of the BBC

The UK Department for Culture, Media and Sport has published a Green Paper on its review of the BBC's Charter. This precedes further consultation before the issue of a new charter in 2006, but a number of the most important proposals are now set out clearly in the Paper.

The Paper commits the Government to keeping the BBC as a cornerstone of public service broadcasting, and the new Charter will cover a period of ten years from the end of 2006. The Government has rejected proposals that an Act of Parliament be used instead of a Royal Charter, as that would bring the BBC closer to Government and Parliament, thereby threatening its independence. The BBC will remain "a cultural institution of real size and scope", not merely a broadcaster of minority interest programmes, and there are no plans to shut down or privatise any of its services.

Funding will continue to be through a licence fee; however there will be reviews towards the end of the digital switchover process (in 2012) to establish whether new types of funding will be needed to supplement or replace the licence fee from 2016, and whether public funding should be used to support public service broadcasting other than by the BBC.

The BBC's remit to "inform, educate and entertain" will be developed to include five distinctive purposes in all services. These are: sustaining citizenship and civil society; promoting education and learning; stimulating creativity and cultural excellence; representing the UK, its Nations, regions and communities; and "bringing the UK to the world and the world to the UK". A further purpose will be to play a leading role in the switch from analogue to digital television.

As regards regulation and management of the BBC, the Board of Governors currently has to carry out the conflicting roles of both running the BBC and assessing how well it is performing. It will be replaced by a new BBC Trust separate from management which will approve a specific licence for each BBC service. A separate Executive Board will be responsible for the delivery of services. The Trust will hold the BBC accountable to its distinctive public purposes; proposed new services will be tested for market impact by the Office of Communications. A clearer distinction will be made in relation to the BBC's commercial businesses between external competition regulation and internal rules of BBC behaviour. ■

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● Department for Culture, Media and Sport, "Review of the BBC's Royal Charter: A Strong BBC, Independent of Government", March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9567

EN

HR – Amendments to Media Laws

The Government of the Republic of Croatia, has on its 12th session introduced a proposal of the plan of an adjustment of the national legislature with the legal framework of the European Union for the year 2005. Item 3.20 of the said proposal is entitled "Culture and audio-visual politics in the year 2005". It provides amendments to the Law 122/03 on electronic media (see IRIS 2003-9: 9) and to the Law 25/03 on Croatian Radio and Television (see IRIS 2003-2: 10). The alterations were announced for the third quarter of 2005.

In regard to media law, the existing manner of electing members of the HRT Program Council had been criticized especially. In Article 54, paragraph 3 of the Law on Electronic Media it is stipulated that members of the Council are appointed by the Croatian Parliament pursuant to the proposal of the Government of the Republic of Croatia, for the period of 5 years. The said members may be reappointed. One objection can be made that there is room for political influence over the HRT. By its alterations and amendments to the Law on Electronic Media, the Government of the Republic of Croatia shall set up provisions that refer to the Council for Electronic Media as an independent regulatory body in the area of electronic media (as stipulated in the Directive on Television without Frontiers 89/552/EEC, altered and amended by the Directive 97/36/EC, and the Council of Europe´s Recommendation No. (2000) 23 on independence and functions of regulatory bodies in the sector of broadcasting).

But it is also worth mentioning that modifications to the law on HRT should not destabilize this public institution, since the said amendments should enter into force before the mandate of the present Program Council members expires. The final decision on alterations to the Law on HRT shall be reached after controlling if it is in line with European laws. ■

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● Proposal of the plan for the adjustment of the Republic of Croatia legislature to harmonise with the European union for the year 2005 – Amendment A to the national program of the Republic of Croatia for joining to the European Union, *Narodne novine* – the Offical Gazette of the Republic of Croatia, 14/02, February 2003

● Law on Croatian Radio and Television, *Narodne novine* – the Official Gazette of the Republic of Croatia, 25/03, February 2003

● Law on Electronic Media, *Narodne novine* – the Official Gazette of the Republic of Croatia, 122/03 dated 30 July 2003

HU – Constitutional Court Rules on Powers of the Media Authority

On 10 February 2005 the Constitutional Court issued a decision concerning the power of the *Országos Rádió és Televízió Testület* (National Radio and Television Commission, the independent Hungarian regulatory authority for the media) to deliver official general interpretations of the law. The request for the decision of the forum was submitted by a judge of the *Fővárosi Bíróság* (Metropolitan Court) a few years ago in a case of an appeal against decision no. 1331/2002. (IX.12.) of the ORTT.

The background of the case can be summarised as follows: Act I of 1996 on radio and television broadcasting (Broadcasting Act) originally defined one sixth of the population of the country (approx. 650.000 households) as the largest possible area of service for a programme distributor. This limitation has been eased to one third by an amendment of the Broadcasting Act at the end of 2003. By the contested decision – brought before this amendment – the ORTT has established that the UPC Magyarország Kft., the largest Hungarian cable operator, had reached the legal maximum of its service area and the enterprise has been called to refrain from further extension. The cable operator submitted an appeal to the court against the decision. The judge turned to the Constitutional Court for guidance in this context.

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The Constitutional Court analysed the relevant provisions of the Broadcasting Act and the corresponding practice of the regulatory authority. It found that the method for defining the actual area of service used in the case was set out by a separate decision – No. 1294/2001 (IX.28.) - of the ORTT. This decision provided detailed rules for calculating the relevant number of households in a general manner. The Constitutional Court also noted that under Act XI of 1987 on Legislation the ORTT has no power to adopt positions, guidelines, or any other general interpretations of the law. In regard to this the body also expressed in its ruling that such guidelines –issued by state organisations without the proper legal empowerment– are jeopardising legal certainty, since they might mislead the parties concerned by creating the false impression of having any binding force.

Drawing the conclusions the Constitutional Court has declared decision 1294/2001 (IX.28.) of the ORTT null and void, and emphasised that the role of the ORTT is to deliver decisions – being themselves subjects of judicial review - in individual cases.

The ruling of the Constitutional Court has provided the requested constitutional grounds for the Metropolitan Court enabling it to deliver a judgment in the near future concerning the merit of the appeal against decision 1331/2002 (IX.12) of the ORTT. Moreover the ruling has far-reaching implications regarding the practice of the ORTT. The broadcasting authority has already adopted a number of general interpretations concerning several provisions of the Broadcasting Act. These decisions lay down guidelines for broadcasters mainly in questions of advertising and sponsorship. The validity of these opinions is also called into question by the decision of the Constitutional Court. ■

● **Ruling of the Constitutional Court: 2/2005. (II.10.) AB *határozat Magyar Közlöny 15. szám 2005. február 10.* (Official Journal No. 10 of 10 February 2005)**

HU

IE – Film Censor Publishes Report on Adolescents and Film

On 1 February 2005 the Irish Film Censor's Office (IFCO) published a report on adolescent film usage and attitudes. This is the second phase of a research project commissioned by IFCO. The results of the first phase on Parental Usage and Attitudes to Film Classification was published in September 2004 (See IRIS 2004-9: 13).The report details the findings of a survey conduced among 1,045 adolescents (aged 12-17 years), as well as small-group interviews with twenty-four adolescents. Key findings of the research were as follows:

- A large percentage of adolescents (up to 87%) watch films on a regular basis, whether in the cinema or on television, DVD or video, usually in the company of family or friends. They reported that parents played quite an active role in their film viewing. Adolescents frequently discussed films with their parents, especially after viewing, rather than prior to viewing. Many parents checked the classification certificate of films
- A large number of adolescents consider film classification a good idea, and use it when selecting films. More than half felt that the IFCO classification is too strict while a small minority felt that it was sometimes too lenient. However there were conflicting opinions on which films were wrongly classified. Some changes have in fact been made to film classification since the research was conducted last summer (see IRIS 2005-2: 17).- Adolescents had a good grasp of the classification system; the earlier survey of parents had found some confusion about the terminology involved.
- Adolescents were most concerned about the depiction of hard drugs in films: this coincides with the survey of parents. Stylised violence (as distinct from realistic violence) and the use of swear words caused adolescents the least offence.
- A large percentage said they had seen films for age groups older than their own. This usually took

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place in the domestic environment rather than in the cinema.
- A sizeable minority said they had seen a film that had scared them and that they wished they had not seen. Of these adolescents, a large majority said they would find a grid system giving more information on the type of film helpful. Such a grid system is now available on the Office's website. ■

● "Film Censor publishes survey of adolescents", available on the news section of the website of the Irish Film Censor's Office at: http://merlin.obs.coe.int/redirect.php?id=9569

EN

IT – Agreement between the Italian Government and ISPs

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On 2 March 2005 the Italian Government signed a document of understanding containing specific guidelines aimed at enhancing the control of digital contents by redefining the tasks and obligations of operators and providers. The agreement, called "*Patto di Sanremo*", from the city hosting the meeting, was signed by different ministries (among others the Ministries of Industry, Justice, Foreign Affairs and Education) on one side, and access providers, platform operators, producers and right-owners on the other. The "*Patto*" is founded on the "Digital Rights Management-Information Report", a report which was recently produced by the *ad hoc* interdepartmental commission on digital content: the "*Commissione Interministeriale sui contenuti digitali nell'era di Internet*". By signing the agreement the Italian Government hopes to take a step in the right direction in order to create a "safer" digital environment, capable of encouraging right-owners to use the net without facing the dangers of an unregulated digital "Far West". This document is intended as a joint effort in order to create a net-proof set of rules regulating the on-line world. Its main goal is to lead the different categories of Internet providers and operators towards self-regulation by the adoption of codes of conduct. Moreover, ISPs (Internet service providers) are asked to give impulse to a campaign aimed at discouraging non-authorized diffusion of digital contents by users on the Internet as well as to implement contractual measures providing for cancellation of the contractual relationship with the user in case of breach of copyrights rules. ■

***● Linee guida per l'adozione di codici di condotta ed azioni per la diffusione dei contenuti digitali nell'era di internet*, (Guidelines for the adoption of codes of conduct and actions for the distribution of digital content in the Internet age), available at: http://merlin.obs.coe.int/redirect.php?id=9572**

IT

NL – Judgment on the Sideline Activities of Public Service Broadcasters

On 10 February 2005 the Dutch Court of Appeal reversed a judgment taken by the Court of Amsterdam in interlocutory proceedings.

In December 2003 the *Nederlandse Omroep Stichting* (Dutch Broadcasting Foundation, *NOS*) – an umbrella organisation coordinating national public broadcasting – and the *Nederlandse Programma Stichting* (Programme Service Foundation of the Netherlands, *NPS*) – an organisation which complements the programming of national public broadcasters – jointly acquired a former commercial radio station called "Colorful Radio". Following the acquisition, the *Vereniging voor Commerciële Radio* (Association for Commercial Radio, *VCR*) started interlocutory proceedings. They considered Colorful Radio to be a sideline activity of *NOS* and *NPS* in violation of section 57a, subsection 1, sub a and b of the *Mediawet* (Dutch Media Act), which led to unfair competition. According to *VCR*, Colorful Radio would compete with commercial radio stations and would also attract the same advertisers.

Section 13c of the Dutch Media Act states that the main task of public broadcasting is to provide a varied and high-quality range of programme services for general broadcasting purposes in the fields of information, culture, education and entertainment on open networks. According to section 57a of the Dutch Media Act, public service establishments that have been granted broadcasting time are allowed to perform sideline activities when this does not have a detrimental effect on the performance of their main task. Also, the sideline activities have to be connected with or have to support the main task. Finally, the sideline activity may not lead to unfair competition in relation to other parties offering the same or comparable products or services.

The *Commissariaat voor de Media* (Dutch Media Authority, *CvdM*) supported *VCR*'s view. It stated that Colorful radio was an ordinary music station, which did not meet the conditions in section 57a. The Court of Amsterdam accepted this point of view and *VCR* succeeded in its action. The Court of Amsterdam judged that the running of Colorful Radio by *NPS* and *NOS* was indeed a violation of the Dutch Media Act and that they had to cease broadcasting and exploitation of the radio station within four weeks.

NOS and *NPS* appealed against this judgment. They stated that Colorful Radio was a thematic radio

station focussed on a minority, namely multicultural youth. Therefore the radio station supported the performance of their main task and was a legitimate sideline activity.

The Court of Appeal judged that Colorful radio is not necessarily an ordinary music radio station, but may be qualified as a broadcasting station focussed on minorities. The fact that the programming of a radio station consists entirely of music does not mean that this cannot also serve cultural and social purposes. A music station can focus on certain groups of people and this can serve a useful goal, for example when such a group is not easy to reach. Stopping the exploitation of a radio station is a drastic measure that can easily have irreversible consequences, all the more so as the radio station in question targeted a group that is particularly difficult to reach. On the other hand, the Court weighs *VCR*'s interest, which it considers not to be very significant, because Colorful Radio's audience is quite small. In addition, the Court considers that it is likely that a proceeding on the merits of the case will be concluded before Colorful Radio's audience will have increased substantially, so that a full judgment in such a procedure can be awaited. Also, the Court takes into account that *NOS* has had very little time to realise its targets regarding Colorful Radio. Though the key question whether Colorful Radio can be qualified as a radio station for minorities remains unanswered in this case, the balance of interests results in the rejection of *VCR*'s claim. ■

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● ***Rechtbank Amsterdam*** **(Court of Amsterdam), Summary judgment of 14 October 2004, *LJN* AR4653, available at: http://merlin.obs.coe.int/redirect.php?id=9027**

● ***Gerechtshof Amsterdam*** **(Amsterdam Court of Appeal), Summary judgment of 10 February 2005, *LJN* AS5931, available at http://merlin.obs.coe.int/redirect.php?id=9027**

NL

NL – Judgment on Regional Televisions' Refusal to Broadcast an Advertisement

On 25 January 2005 the *Rechtbank Utrecht* (District Court of Utrecht) concluded in summary judgment that two regional television broadcasters were not obliged to broadcast a television commercial.

The plaintiff in the case was the author of a book entitled "Judas", which he described as an erotic thriller. The book contains three stories that all address the relationship between Christianity and homosexuality. The plaintiff developed a television commercial to promote his book. The commercial shows images of Jesus and Judas while a voice-over poses a number of questions on the relationship between Christianity and homosexuality, such as "Where does Christianity's hatred against homosexuals come from?" and "Was Jesus homosexual?". Then the plaintiff's book is shown and the voice over says: "Read Judas, the exciting erotic thriller by [the plaintiff]".

Two regional television broadcasters, *RTV Utrecht* and *Omroep West*, refused to broadcast the commercial. Both broadcasters claimed they had a right to refuse a commercial because of its content, nature, import or form. The author claimed in interlocutory proceedings that both broadcasters should be ordered to broadcast the commercial, failing which they should have to pay a fine.

The plaintiff stated that the broadcasters did not have legitimate reasons to refuse to broadcast the commercial, as the commercial was not unnecessarily grievous, no shocking pictures were shown and no offensive expressions were made. He stated that the refusal violated his right of freedom of expression as stated both in Article 7 of the *Grondwet* (Dutch Constitution) and in Article 10 of the European Convention on Human Rights (ECHR). Also, he claimed that a regional broadcaster, like the government, serves a public interest, which should be taken into account when the broadcaster carries out private agreements. Therefore, according to the plaintiff, both broadcasters have the duty to serve the public interest as regards their advertisement contracts.

The plaintiff did not succeed in his claim. According to the judge, broadcasters are in principle free to refuse advertisements or programmes. The judge considered that it was not likely that the broadcasters in question had a monopoly position as providers of broadcasting time for advertising. The plaintiff could offer his commercial to other regional broadcasters. Therefore his freedom of expression had not been restricted. Also, the judge did not accept the plaintiff's argument that he had the right to have his commercial broadcast under Article 7 of the *Grondwet* because of the non-commercial nature of the advertisement. Indeed the commercial aimed at promoting the sale of the book and thus served the interests of the advertiser. Finally, the plaintiff's claim that the broadcasters were obliged to act like the government in private contracts was rejected. The judge considered that there was no reason why these broadcasters, that fulfil a public task, should not be allowed to pursue a programme policy. The judge stated that the television channels in question do not have to function as a platform for anybody who wishes to express their opinion. ■

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● ***Voorzieningenrechter Rechtbank Utrecht*** **(District Court of Utrecht), Summary judgment of 25 January 2005, Plato Publishers v. RTV Utrecht, Omroep West & Samenwerkende Omroepen Midden-Nederland, LJN No: AS3745, available at: http://merlin.obs.coe.int/redirect.php?id=9027**

NL

NL – Ayaan Hirsi Ali Can Make Submission Part II

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On 15 March 2005 the *Rechtbank's Gravenhage* (District Court of the Hague) concluded in summary judgment that there is no reason to prevent Ayaan Hirsi Ali from making another documentary like Submission Part I.

Hirsi Ali is a member of the *Tweede Kamer* (the Dutch Lower House) who fights against the oppression and abuse of women, in particular Islamic women. She wrote two books on this theme and made a film entitled "Submission Part I" in cooperation with Theo van Gogh, who was murdered in November 2004. Hirsi Ali claims that the oppression and abuse of women result from Islamic thinking and its role as a guide through everyday life. Also, she states that horrifying practices, resulting from the Islamic cult of virginity, are a result of the view, commonly spread among Muslims, that the Koran and Hadith prescribe rules that cannot be subject to interpretation or debate.

In interlocutory proceedings four Islamic plaintiffs claimed that Hirsi Ali should be prevented from publicly making expressions grievous to Islamic believers, such as "the prophet Mohammed is a paedophile" and "Islamic marriage equals approved rape". In particular, the plaintiffs claimed that Hirsi Ali should be prevented from making a second part of the film "Submission Part I" or a similar film, for the film suggests that there is a direct relation between the Islamic religion and abuse of women.

The judge stated that only in exceptional cases is it necessary to limit freedom of expression as stated in Article 10 of the European Convention on Human Rights (ECHR). Hirsi Ali's criticism on wrongs, that she has mostly experienced herself or in her environment, should be viewed in their context. Hirsi Ali chooses in her fight against the oppression and abuse of women a method that provokes a debate on the reform of Islam. The judge considered that she used the term paedophile at the most a couple of times and has therefore not exceeded the limits of what is allowed. It is possible though that multiple use of these or similar words would exceed the limits of proportionality and subsidiarity. The judge concluded that Hirsi Ali has not acted illegitimately against the plaintiffs and that there is no reason to prevent her from making another film like Submission Part I. ■

● ***Voorzieningenrechter Rechtbank 's Gravenhage*** **(District Court of the Hague), Summary judgment of 15 March 2005, LJN no. AT0303, available at: http://merlin.obs.coe.int/redirect.php?id=9027**

NL

NL – Proposed Modifications to the Public Broadcasting System

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On 7 February 2005 the government proposed a modification of the *Mediawet* (Dutch Media Act) referred to as *Wetsvoorstel strategie en sturing publieke omroep* (Legislative proposal on the strategy and control of the public broadcasting system).

Since 2000, the Dutch Media Act provides for an evaluation of the performances of public broadcasting associations by an independent visitation commission. The evaluation is to be held every five years. On 2 April 2004 the first visitation commission, under the chairmanship of Mr. Rinnooy Kan, carried out its evaluation and presented a report on the functioning of public broadcasting associations during the first half of the concession period 2000 - 2005. The commission stated that, looking at each public broadcasting association individually, performance ranges from reasonable to good. Mutual cooperation however is seriously inadequate. As a result the programme-offer and the public reach falls short of target. Broadcasting associations are more focused on internal affairs than on the demands of the viewing and listening public.

According to the commission, the inadequacy of the performances can partly be explained by the complicated structure of the decision-making process within each association. The cabinet accepts this conclusion and considers an alteration of the organisation and control of public broadcasting associations necessary. Therefore it has put forward this legislative proposal. The proposal does not affect the foundations of the current public broadcasting system. It envisages the development of a collective strategy for public broadcasting associations through agreements on performance both mutual and with the government. Also, the role of the board of directors will be strengthened to secure a clear direction of the programming on radio and television channels. Finally, the management of the associations will be reformed. A supervisory board, independent of the executive of the broadcasting associations, will be set up. Broadcasting associations will be able to put forward their views and contribute to shaping policy through a board of broadcasting associations, which will be newly established. ■

● ***Kamerstukken II*** **2004/05, 29 991, nr. 1-4, available at: http://merlin.obs.coe.int/redirect.php?id=8992**

NL

NL – Investigation into the Acquisition of Canal+ by UPC

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The *Nederlandse Mededingingsautoriteit* (Dutch Competition Authority – *NMa*) has decided that a license is required for the acquisition of Canal+ by the cable company UPC. Following a preliminary investigation, the *Nma* has come to the conclusion that a dominant position of UPC may arise or be strengthened as a result of the acquisition, with possible restrictive effects on competition.

UPC operates a large cable network in the Netherlands and offers television, broadband Internet and telephone services through its cable network. Canal+ is the largest provider of pay-TV in the Netherlands. The *NMa* has come to the preliminary conclusion that the acquisition would result in UPC (which after the acquisition would become almost a monopolist on the pay-TV market) being in a position to prevent other pay-TV providers from developing activities on this market. UPC's purchase power on the market for premium films, which would be strengthened by the takeover, could also contribute to this. Also, UPC would be in a position to refuse to offer Canal+'s programmes or offer them under unfavourable conditions to providers of competing infrastructures (satellite, wireless, xDSL) within UPC's coverage area. All this may restrict competition on the pay-TV market and limit consumers' freedom of choice.

At this stage, if UPC and Canal+ apply for a license, the *NMa* will carry out an in depth investigation into the Dutch pay-TV market (e.g. looking at the development of alternative infrastructures, such as satellite, wireless and xDSL). If UPC and Canal+ put forward proposals which would solve the competition problems identified, these will be taken into account in *NMa*'s investigation. ■

● **Press release of the *NMa* of 1 March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9593**

EN

NO – White Paper Proposes Implementation of EC Copyright Directive

On 11 February this year the Norwegian Ministry of Culture and Church Affairs submitted its long awaited white paper on amendments to the Norwegian Copyright Act. The purpose of this white paper is primarily to implement the changes needed, in order to bring Norwegian copyright law into line with the EC Copyright Directive (EUCD – see IRIS 2001-5: 3) and hence fulfil Norway's obligations as an EEA-state. This will at the same time make Norwegian copyright law conform with the two WIPO treaties of 1996.

The proposal includes some minor adjustments to the definitions of the copyright holder's exclusive rights, including a clarification that the reproduction right also includes temporary reproductions (see Articles 2 and 5.1 EUCD). It is also established that the mere act of rendering computer equipment at users' disposal (e.g. in Internet cafes) shall not be regarded as making available to the public the works that can be downloaded and accessed through the use of such equipment. It is further proposed that the neighbouring rights of performing artists and film and phonogram producers be amended so that the holders of such rights are given equivalent exclusive rights as copyright holders have. Also, several new extended statutory licenses are proposed, e.g. regarding the use of works contained in broadcasters' archives.

The existing freedom of the user, under Norwegian law, to make copies of works for private use purposes, is upheld. However, like in the other Nordic countries, it is made subject to one additional qualification, not expressly dealt with by the EUCD: Private-use-copying shall be allowed only where based on a so-called "lawful source of copying". This means that the copy or transmission, upon which the private use reproduction is based, must be lawful; it must have been produced or made available in accordance with permission by law or by the right holder(s) concerned. In the absence of such authorisation, for instance if a work has been illegally uploaded to the Internet or made available through a p2p-network, the source will not be "lawful" and may hence not serve as the basis for (lawful) private-use-copying.

With regard to the requirement of a "fair compensation" in the EUCD Article 5.2 (b), the Ministry proposes to finance lawful private-use-copying through the national budget. In the original (green paper) proposal, two alternative models were introduced; one based on levies on copying devices; one based on allocations through the national budget. In the white paper, the latter has been given preference. The allocated funds shall be used to compensate right holders individually, i.e. based on the amounts of copies actually being made for private use purposes. Thus, the Ministry assumes that it will be possible to map which works are being copied for such purposes, and to what extent. It is delegated to subordinate legislation to work out in detail the system of distribution, but the Ministry presupposes that the administration be carried out by a collecting society. The proposed system of individual compensation shall complement a system of collective compensation (for private-

use-copying) already provided for under Norwegian copyright law.

On the basis of Articles 6 and 7 of the EUCD, the white paper proposes a general protection of technological measures and rights-management information. However, anti-circumvention protection shall only apply to technological measures that are used to control so-called "copyright-relevant acts". Basically, this means that only measures that control the copying or making available to the public of works are protected. Measures that merely control the private enjoyment of works, as for instance the zone-coding of DVD-movies, shall not be protected. Measures that control both "copyright-relevant acts" and private enjoyment shall still be protected. Further, measures that are easily circumvented, for instance by applying ink on a disc or by pressing the "shift" button of the computer while loading, shall not be regarded as "effective" and hence not be protected (see Article 6.3 EUCD).

Another innovative element, compared to the EUCD, is the proposed exception for certain acts of circumvention where technological measures also hinder playback within the private sphere: To the extent that technological measures hinder the private enjoyment of works on what is called "relevant playback-equipment", the user shall be allowed to circumvent. Thus, if the user has purchased a CD, she may lawfully circumvent any technological measure that hinders playback of the CD on for instance her car stereo. Further, if, in such cases, it is necessary to make a copy of the work, in order to facilitate playback on "relevant playback-equipment", also such copying shall be allowed. It is stressed by the Ministry, however, that the limits for what shall be deemed "relevant" equipment in this relation, must be drawn narrowly. While considering relevance of a given device, a central factor will be which reasonable expectations a user may have while purchasing a product: When purchasing a CD, a reasonable expectation must be that the CD can be played on any CD-player, regardless of whether the context is a living-room stereo, car stereo or a PC etc. However, according to the Norwegian Ministry, it cannot be considered a reasonable expectation of a CD-buyer, that the tracks on the CD are convertible into MP3-files. Thus, circumventing a copy control mechanism on a CD, in order to convert the music into MP3-files, shall not be allowed under this statutory exception. Naturally, this latter delimitation has already caused severe criticism (even though MP3-players of course will be regarded as "relevant" where the purchased product is an MP3-file). ■

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● ***Ot.prp. nr. 46 (2004.2005) Om lov om endringer i andsverkloven m.m.*** **(White Paper on amendments to the Norwegian Copyright Act) available at:**
http://merlin.obs.coe.int/redirect.php?id=9571

NO

RO – Act on the Use of the Romanian Language

Romania's new Act on the Use of the Romanian Language was published in the parliamentary gazette on 12 November 2004 and entered into force 30 days later.

It had taken several years and numerous amendments for the highly controversial Bill to pass into law in its current and substantially diluted form. Article 1 of the Act provides that any written or spoken Romanian text intended for the public must comply with current grammar and spelling rules. Any public written or spoken text in a foreign language must be accompanied by a Romanian translation or explanation. Article 2 of the Act defines the term "text of public interest" as any text used for an official purpose – whether printed on a poster, displayed, transmitted or spoken in public places or broadcast via the mass media and intended to notify or inform the public or to make them aware of any message with direct or indirect advertising content.

Under Article 3 of the Act, television broadcasts in foreign languages must be subtitled in Romanian. It is further stipulated that simultaneous interpretation is permissible where the pressure of events requires it.

The provisions of the Act do not apply to registered trademarks, texts of a scientific, artistic/literary, cultural or religious nature, or to publications produced entirely or partly in foreign languages, including publications in the languages of ethnic minorities. Also exempt from the rules are programmes that are broadcast radio-electronically on terrestrial frequencies or via satellite and taken up or transmitted on cable networks. Local and regional broadcasters are permitted to transmit sound radio programmes, live broadcasts, sections of programmes with religious or ethnographic content and entertainment programmes in the languages of Romania's national minorities. Sports terms need not be translated.

In the case of printed texts the graphic appearance of the translation into Romanian must be the same as that of the original. ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Legea privind folosirea limbii române în locuri, relaţii şi instituţii publice"*** **(*Monitorul Oficial al României Nr. 500 din 12 noiembrie 2004*) (Act on the Use of the Romanian Language in Public), available at:**
http://merlin.obs.coe.int/redirect.php?id=9578

RO

RO – New Rules on Tobacco Advertising

Mariana Stoican
Radio Romania International, Bucharest

Act No 457/2004 on the Advertising of Tobacco Products (*Legea privind publicitatea şi sponsorizarea pentru produsele din tutun*), published in parliamentary gazette No 1067 of 17 November 2004, introduces new rules on the advertising of tobacco products and sponsorship by tobacco companies. The Act is modelled on relevant EC texts including Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, and certain provisions of Council Recommendation No 2003/54/EC on the prevention of smoking and on initiatives to improve tobacco control. The aim is to counter the damaging impact of smoking on public health by means of tougher rules in relation to tobacco products of all types (Article 2(a)). The Act imposes restrictions on tobacco advertising and sponsorship that involve the print media and broadcasting, and on the free distribution of tobacco products to potential consumers. Article 2(b) defines "advertising of tobacco products" as "any form of commercial communication" the aim of which is to "directly or indirectly extol tobacco products". "Sponsorship" is defined in Article 2(c) as "any public or private contribution to an event, activity or individual" that may serve "directly or indirectly to extol a tobacco brand". Article 3(1) of the new Act stipulates that advertising for tobacco products is prohibited in the print media and all printed publications with the exception of legally permitted notices. Tobacco advertising is also banned on public and commercial radio and television, in the cinema and on advertising posters, banners and other surfaces intended for advertising purposes and in respect of which advertising charges are imposed. Under Article 3(2) such advertising is permitted only in tobacco industry trade journals and publications that are not printed or published in Romania or another EU Member State, nor intended chiefly for the Romanian or European Community market.

More serious offences under the new Act are punishable by fines of between ROL 25,000,000 and ROL 500,000,000 (at the current exchange rate EUR 1 = ROL 36,000; after revaluation of the Romanian currency in July 2005, EUR 1 = RON 3.60). For lesser offences, fines of between ROL 5,000,000 and ROL 10,000,000 may be imposed.

Article 7 provides that Act No 457/2004 on the Advertising of Tobacco Products will come into force on 31 December 2006. ■

● ***Legea privind publicitatea şi sponsorizarea pentru produsele din tutun, Monitorul Oficial al României Nr. 457*** **(Act No 457/2004 on the Advertising of Tobacco Products), Gazette No 1067 of 17 November 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9579**

RO

RU – Supreme Court on Defamation

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On 24 February 2005 the Supreme Court of the Russian Federation adopted a Resolution "On Judicial Practice Related to Disputes on the Protection of Honour and Dignity of Citizens, as well as of the Business Reputation of Citizens and Legal Entities". Such resolutions explain the statutory norms to the courts having general jurisdiction over particular topical issues of legal practice in Russia.

The Resolution annuls a similar Resolution of the Supreme Court of the Russian Federation of 18 August 1992, No.11. The adopted text accepts the necessity to consider Article 10 of the Convention on Human Rights and the case law of the European Court of Human Rights in defamation law in Russia.

It advances the ideas shared by the Supreme Court of Russia on how all general courts should treat norms of the Civil Code of the Russian Federation on defamation issues. In particular, for the first time at such a high level Russian law states that when dealing with defamation lawsuits against the mass media and journalists, the courts should pay attention not only to whether honour and dignity have really been damaged, but also to whether freedom of expression will be limited as a result of the court's judgment. It is also a requirement now that facts should be separated from opinions: courts should not consider lawsuits against "subjective opinions" since their truthfulness cannot be verified in court. Courts should also take into account that they may not demand apologies from the defendants, as was acceptable before. ■

● **Resolution of the Supreme Court of the Russian Federation No.3** ***"O sudebnoy praktike po delam o zashchite chesti i dostoinstva grazhdan, a takzhe delovoy reputatsii grazhdan i yuridicheskih lits"*** **(On Judicial Practice Relating to Disputes regarding the Protection of the Honour and Dignity of Citizens, as well as of Business Reputation of Citizens and Legal Entities), available at: http://merlin.obs.coe.int/redirect.php?id=9568**

RU

UA – Changes in the Status and Composition of Supreme Audiovisual Body

On 3 March 2005 Supreme Rada (the Parliament) of Ukraine adopted new wording of the statute of Ukraine On the National Council on TV and Radio (NCTR), prepared by the Parliamentary Committee on Freedom of Speech and Information with the amendments suggested by the President of Ukraine. The main features of the statute are: substantial decrease

reasons for dismissal of NCTR members, cancellation of their rotation procedure, the election of the Head of the Council by its members, decrease of the Head's competence, change in the procedure of sanctions application. The statute is to be signed by the President of Ukraine.

On 17 March the Parliament plans to consider resignation of four members of the National Council on TV and Radio appointed by the Parliament. NCTR – licensing and regulative body in audiovisual sphere consisting of 8 members – does not function at present because the President of Ukraine has dismissed 4 members and not appointed the new ones.

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US – FCC's Jurisdiction to Adopt Broadcast Flag Rule Challenged

In order to avoid the "napsterization" of digital television broadcasts, the FCC in November 2003 adopted a new, controversial, and extraordinarily broad regulatory regime (known as the "broadcast flag scheme"). This regulatory regime mandates the use of "authorized" content protection technologies by virtually every consumer electronics product and computer product – including digital television sets, digital cable set-top boxes, direct broadcast satellite ("DBS") receivers, personal video recorders (PVRs), DVD recorders, D-VHS recorders, and computers with tuner cards. (A full-featured tuner card makes a computer into a digital television, PVR, and VCR in one).

The broadcast flag is a set of bits embedded in a digital stream (a standard adopted by the Advanced Television Systems Committee) that signals "the bits following this set of bits are to be protected." The flag is itself a very simple signal. It is the implementation of the flag that matters. Specifically, the order requires that all devices manufactured after July 2005 that can receive TV signals (including PCs equipped with a tuner card) (1) check for the presence of the flag; (2) store and record flagged content using "authorized technologies"; and (3) allow transmissions through digital interfaces (and only protected digital interfaces) only to other devices that have an approved copy-protection system installed. As a practical matter, this means that the flagged digital content is thereafter blocked from distribution (1) to any other electronic device (like a cell phone or PC or DVD recorder) unless that device is itself compliant with the flag scheme, or (2) over the internet. Until the FCC can settle on a new regime for approval of "authorized" technologies, it itself is deciding (with a great deal of input from the content industry) which copy protection technologies manufacturers are allowed to use.

In the course of defending its authority to regulate equipment manufacturers in order to effectuate the flag scheme, the FCC has broadly asserted that it has had jurisdiction since 1934 over any device that is "associated with the overall circuit of messages sent and received over all interstate radio and wire communication." In other words, FCC is claiming that anything that has some relationship with a US wire or radio communication is subject to its design authority. This breathtaking assertion sweeps within its boundaries all computers, car radios, VCRs, portable music devices, and bedside alarm clocks. The FCC's jurisdiction to adopt the flag rule has been challenged in a lawsuit brought by consumer groups before the federal D.C. Circuit Court of Appeals. That court heard arguments in late February 2005, and observers are confident that the FCC will be found to have lacked jurisdiction to enter the rule. The broadcast flag issue will likely be the subject of Congressional legislation in the coming year - and we will begin again at the beginning. ■

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● FCC Report and Order and further Notice of proposed Rulemaking In the matter of Digital Broadcast Content Protection (MB Docket 02-230), 4 November 2003, available at:
http://merlin.obs.coe.int/redirect.php?id=9577

Corrigendum (IRIS 2005-3)

IViR International Copyright Law Summer Course

4 - 9 July 2005

The correct e-mail address for information and registration is:
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European Audiovisual Observatory Morning in Cannes

Partnering Europe

Access to the European market for non-European films
Legal definitions as gateways to accessing support systems in Europe

15 May 2005, 10.00 – 12.30 h
Organiser: European Audiovisual Observatory
Venue: Cannes, Conference room, Village international
Information & Registration:
Tel.: +33 (0)388 14 44 10 - Fax: +33 (0)388 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int/about/oea/agenda.html

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AGENDA

19th Conference on International Audiovisual Law – *"Money Matters for Movie Making: New Sources for Co-production Financing and other Current Issues Affecting Film Producers & Media Companies"*
12 – 13 May 2005
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