IRIS
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

2005 - 6

INTERNATIONAL

ICC

COUNCIL OF EUROPE

EUROPEAN UNION

NATIONAL

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

INTERNATIONAL

ICC

Guidelines on Marketing and Advertising Using Electronic Media Updated

The International Chamber of Commerce (ICC) has issued a new set of Guidelines on Marketing and Advertising Using Electronic Media formerly called ICC Guidelines on Advertising using the Internet. This latest version covers a wide array of electronic media besides the internet, like digital radio and television, telephone use and MMS/SMS. The Guidelines aim to provide the business community with a code of conduct for ethical marketing and complement applicable national and international laws.

The ICC notes that in the ever-developing communications environment it is in the interest of businesses and consumers alike to have a flexible and dynamic normative framework. According to the ICC, self-regulation such as the issued Guidelines, would bring about the involvement of all parties in marketing and minimize more rigid (inter-) governmental legislation. That is also one of the objectives of the Guidelines, which according to the ICC are designed to:

- Increase public confidence that the marketing and advertising material over the interactive systems is legal, decent and honest;
- Safeguard an optimum of freedom of expression for advertisers and marketers;
- Provide practical and flexible solutions;
- Minimize the need for governmental and/or intergovernmental legislation or regulations;
- Meet reasonable consumer privacy expectations.

Specific issues relating to consumers covered by the articles of the Guidelines include:

- The disclosure of the advertisers'/marketers' identity and clear identification of commercial communications (articles 3 and 4)
- Respect for public groups (article 7)
- Data and privacy rules (article 8)
- Unsolicited commercial messages (article 9)

The objective of IRIS is to publish information on all legal and law related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content of IRIS, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as to represent the views of any organizations participating in its editorial board.

• **Publisher:**
European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG
Tel.: +33 (0)3 88 14 44 00
Fax: +33 (0)3 88 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int/

• **Comments and Contributions to:**
iris@obs.coe.int

• **Executive Director:** Wolfgang Closs

• **Editorial Board:** Susanne Nikoltchev, Co-ordinator – Michael Botein, The Media Center at the New York Law School (USA) – Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) – Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) – Bernt Hugenholtz, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Jan Malinowski, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) – Andrei Richter, Moscow Media Law and Policy Center (MMLPC) (Russian Federation)

• **Council to the Editorial Board:**
Amélie Blocman, *Victoires Éditions*

• **Documentation:** Alison Hindhaugh

• **Translations:** Michelle Ganter (co-ordination) – Brigitte Auel – Véronique Campillo – Paul Green – Isabelle Herold-Vieuxblé – Marco Polo Sàrl – Britta Probol – Katherine Parsons – Stefan Pooth – Patricia Priss – Nathalie-Anne Sturlèse

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Florence Lapérou & Géraldine Pilard-Murray, post graduate diploma in *Droit du Multimédia et des Systèmes d'Information*, University R. Schuman, Strasbourg (France) – Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) – Mara Rossini, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Natali Helberger, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Kathrin Berger, Institute of European Media Law (EMR), Saarbrücken (Germany)

• **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

Chris Sent
Institute for Information Law (IViR)
University of Amsterdam

- Responsible advertising to children (article 11)
- Respect for the potential sensitivities of a global audience (article 12)

The Guidelines are an extension of existing ICC regulations and should be read in conjunction with the ICC International Code of Advertising Practice and the ICC International Code of Direct Marketing. ■

● ICC Guidelines on Marketing and Advertising Using Electronic Media, available at: http://merlin.obs.coe.int/redirect.php?id=9648

EN

COUNCIL OF EUROPE

Committee of Ministers: Declaration on Human Rights in Information Society

On 13 May, the Committee of Ministers of the Council of Europe adopted a Declaration on human rights and the rule of law in the Information Society. The Declaration will be submitted as a Council of Europe contribution to the Tunis Phase of the World Summit on the Information Society (WSIS, see IRIS 2004-2: 2) in November 2005.

The first section of the Declaration is entitled "Human Rights in the Information Society". Its treatment of "the right to freedom of expression, information and communication" includes the assertion that existing standards of protection should apply in digital and non-digital environments alike and that any restrictions on the right should not exceed those provided for in Article 10 of the European Convention on Human Rights (ECHR). It calls for the prevention of state and private forms of censorship and for the scope of national measures combating illegal content (e.g. racism, racial discrimination and child pornography) to include offences committed using information and communications technologies (ICTs). In this connection, greater compliance with the Additional Protocol to the Cybercrime Convention (see IRIS 2003-1: 3) is also urged.

Similarly, notwithstanding any relevant consequences of ICT-usage, the right to private life and private correspondence may not be subjected to restrictions other than those permitted under Article 8, ECHR. This also applies to the content and traffic data of electronic communications, both of which are covered by Article 8, according to the Declaration. The automatic processing of personal data, on the other hand, is governed by the provisions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Furthermore, the first section of the Declaration stresses the importance of: the right to education and the promotion of non-discriminatory access to new information technologies; the prohibition of slavery, forced labour and trafficking in human beings; the right to a fair trial and to "no punishment without law"; the protection of property; the right to free elections and freedom of assembly. In respect of each of the foregoing, the particular impact of ICTs is given special consideration.

The second section of the Declaration concerns the shaping of "an inclusive Information Society". As such, it details the various roles and responsibilities of relevant parties in the "multi-stakeholder governance approach" which it sets out. The parties charged with the task of helping to develop "agendas and devise new regulatory and non-regulatory models that will account for challenges and problems arising from the rapid development of the Information Society" are identified as: Council of Europe Member States; civil society; private sector actors and the Council of Europe. As regards the last-named party, explicit reference was made to, inter alia, the Action Plan adopted by the 7th European Ministerial Conference on Mass Media Policy (Kyiv, March 2005).

The Declaration was drafted by the Council of Europe's Multidisciplinary Ad-hoc Committee of Experts on the Information Society (CAHSI) (see IRIS 2005-5: 17). ■

Tarlach McGonagle
Institute for Information Law (IViR)
University of Amsterdam

● Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society, 13 May 2005, CM(2005)56 final, available at: http://merlin.obs.coe.int/redirect.php?id=9663

EN-FR

EUROPEAN UNION

Council of the European Union: Adoption of a Directive on Unfair Commercial Practices

On 11 May 2005 the European Parliament and the Council signed a Directive prohibiting unfair commercial practices (see IRIS 2005-4: 5, IRIS 2004-7: 3 and IRIS 2003-8: 5). In so doing, EU authorities have taken the protection of consumers' interests a step further. This Directive is an amending addition to several others covering the same field: the protection of consumers in respect of distance contracts (Direc-

tives 84/450/EEC and 97/7/EC), injunctions for the protection of consumers' interests (Directive 98/27/EC) and the distance marketing of consumer financial services (Directive 2002/65/EC).

The new Directive offers criteria to identify commercial practices which could be considered as unfair and in particular targets misleading and aggressive practices as unfair practices.

Annexed to the Directive is a blacklist of practices considered unfair in all circumstances, these are:
- Including in an advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them;
- Claiming that a product has been approved, endorsed or authorized by a public or private body when it has not;
- Falsely stating that the product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
- Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not;
- Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer;
- Creating the false impression that after-sales service in relation to the product is available in a Member State other than the one in which the product is sold;
- Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or systematically failing to reply to related correspondence;
- Creating the false impression that the consumer has won, is to win or will on doing a particular act win a prize, when in fact either there is no prize or taking any action in relation to claiming the prize is subject to the consumer paying money or incurring a cost;

The Directive is meant to eliminate barriers to cross-border trade in the Internal Market while protecting consumers' interests by establishing an EU framework for the regulation of unfair business-to-consumer practices (notably advertising and marketing).

Member States must ensure that this Directive is implemented within two and a half years of its publication in the Official journal of the European Union. ■

Mara Rossini
Institute for Information Law (IViR)
University of Amsterdam

● Directive 2005/29/EC of the European Parliament and of the Council on unfair commercial practices, available at:
http://merlin.obs.coe.int/redirect.php?id=9665
CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-SL-SK-SV

European Commission: Clarification of the Directive on the Enforcement of Intellectual Property Rights

The Commission has published a statement concerning Article 2 of the Directive on the enforcement of intellectual property rights. Article 2(1) of the Directive states that it is applicable to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned. The Commission deemed it necessary to clarify exactly which intellectual property rights it considers to lie within the scope of the Directive and lists the following:
- Copyright and rights related to copyright;
- *Sui generis* right of a database maker;
- Rights of the creator of the topographies of a semiconductor product;
- Trademark, design and patent rights (for the latter, rights derived from supplementary protection certificates are to be included);
- Geographical indications;
- Utility model rights;
- Plant variety rights;
- Trade names, in so far as these are protected as exclusive property rights in the national law concerned;

The Directive on the enforcement of intellectual property rights stems from an initial proposal by the Commission meant to harmonise national legislations in this very field (see IRIS 2003-3: 8). The main objective was to counter infringement of intellectual property rights thriving on the differences of approach existing in Member States. The Directive was finally adopted after much controversy as to its scope: the Commission's proposal initially targeted infringements committed for commercial purposes or causing significant harm to the rightsholder, the European Parliament on the other hand was concerned with the rights of end-consumers and sought to protect acts committed in good faith, such as downloading music from the internet for personal use, from being considered as infringements of a commercial nature (see IRIS 2004-4: 5). There was also much debate as to the criminal sanctions which could be taken against fraudsters. The Commission's

Mara Rossini
Institute for Information Law (IViR)
University of Amsterdam

original proposal contained such provisions but the final version of the Directive allows Member States to deal with criminal sanctions as they deem appropriate. ■

● Statement by the Commission concerning Article 2 of Directive 2004/48/EC on the enforcement of intellectual property rights, Official Journal of the European Union L 94, 13/04/2005, p 0037, available at:
http://merlin.obs.coe.int/redirect.php?id=9676

● Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Official journal of the European Union L 157, 30/04/2004, p 0045 – 0086, available at:
http://merlin.obs.coe.int/redirect.php?id=9673
CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-SL-SK-SV

European Commission: Inquiry into Financing of Public Broadcasters Closed

Mara Rossini
Institute for Information Law (IViR)
University of Amsterdam

The European Commission has formally closed procedures under EC Treaty State aid rules (article 88) probing into the financing mechanisms of public service broadcasters in three Member States. Italy, France and Spain have been the object of the Commission's scrutiny since the end of 2003. Its main concern was to ensure that no market distortion could arise from state aid granted to national broadcasters entrusted with the fulfilment of a public service mission.

In its 2001 Communication on applying state aid rules to public service broadcasting, the Commission has clarified both what is to be defined as public service broadcasting and the extent to which state aid is acceptable. The financing of public broadcasters must not be detrimental to competition and ultimately the public and the private sector must compete on equal terms in such commercial activities as television advertising and the acquisition of television programme rights. Also, funding by the state must be transparent and should not exceed what is necessary for the fulfilment of public service obligations. The latter was a point of contention in the procedure concerning Spain: by providing an unlimited guarantee to its public service broadcaster, RTVE, the Spanish authorities were de facto committed to paying all of its debts. The Commission therefore formally requested Spain to abolish this guarantee which the Spanish authorities have agreed to do.

As for the Italian and French authorities, both have either implemented the recommendations issued by the Commission since 2003 or have given a firm commitment to do so in the immediate future. ■

● "State Aid: Commission closes inquiries into French, Italian and Spanish Public Broadcasters following commitments to amend funding systems", press release of 20 April 2005 available at:
http://merlin.obs.coe.int/redirect.php?id=9668
EN-FR-DE-ES-IT

European Commission: Infringement Proceedings on EU Rules on Electronic Communications

Anne-Jel Hoelen
Institute for Information Law (IViR)
University of Amsterdam

The European Commission has opened infringement proceedings (art. 266 of the EC Treaty) yet again as regards the EU Rules on Electronic Communications . At an earlier stage, the main concern of the European Commission was the full implementation of the EU framework for electronic communications which resulted in several decisions rendered by the Court of Justice on 10 March 2005 against Belgium and Luxembourg. The Court ruled that these countries had neglected to take the appropriate legal and administrative measures to implement the EC legislation at hand. This time the procedures are against Austria, Germany, Finland, Italy, Latvia, Malta, the Netherlands, Poland, Portugal and Slovakia and the main concern is the incorrect practical implementation and other shortcomings in national law regarding the European legislative framework for Electronic Communications.

The correct and full implementation of the package of directives is of vital importance for the realisation of a competitive electronic communications sector within the EU and transposing these rules should have been completed by 24 July 2003 as regards the core directives (see IRIS 2003-10: 5). As a negative effect of the incorrect implementation it has proved difficult to safeguard full competition and consumer protection. The proceedings have been initiated by points of concern raised in the 9th and 10th Commission's Implementation Reports.

Member States have two months to respond to the Commission's letter of formal notice and by doing so might prevent further legal steps, i.e. receiving an official request in the form of a 'reasoned opinion'. This excludes Germany, which already faces the second phase of the legal procedure. ■

● "EU rules on electronic communications - Commission launches infringement proceedings against ten Member States", Press Release of the European Commission, IP/05/430, 14 April 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9680
DE-EN-FI-FR-IT-LV-MT-NL-PT-PL-SK

● Judgment of the Court of Justice of 10 March 2003, case C-236/04, European Commission v. Luxembourg, available at:
http://merlin.obs.coe.int/redirect.php?id=9685
FR

● Judgment of the Court of Justice of 10 March 2003, case C-240/04, European Commission v. Belgium, available at:
http://merlin.obs.coe.int/redirect.php?id=9686
FR

European Commission: Infringement Procedure Relating to the Greek Law on the Incompatibility between Media Companies and Public Contracts

Alexandros Economou
National Audiovisual Council

On 27 April 2005 the European Commission issued a "reasoned opinion" against Greece (second stage of the infringement procedure) over the controversial law 3310/2005 preventing companies "interconnected" with mass media businesses from obtaining public contracts (see IRIS 2005-3: 13). The Commission considers that the law "is contrary to both secondary Community law (the Directives on public procurement), in that it lays down exclusion criteria that are not provided for in the Directives, and primary Community law (the EC Treaty), in that it lays down measures that impede, or render less attractive, the exercise of almost all the fundamental freedoms acknowledged by the EC Treaty." The Commission has rejected the Greek government's argument that the media could use their power in order to wield influence over the procedures of public procurement, which, according to the Commission, are to be conducted in a way that is not politically tainted. The second stage of the infringement procedure follows a threat, voiced a fortnight ago by the Commission's directorate general for regional policy, to freeze all EU funding for major public works in Greece after the end of May unless the law is changed.

In its response sent on 10 May to Brussels the Greek government announces that it will table a legislative amendment in Parliament by the end of May to postpone the implementation of the above law on public tenders for four months so that government officials can discuss this controversial legislation with the European Commission.

One must remember that in its first letter sent to the Commission on 6 April (further to the Commissions letter of formal notice), the Greek government claimed that threats to pluralism and objectivity of the media led to the introduction of law 3310/2005 and that the national legislator has sovereign power in this field. The Greek government considered that the aim of the incompatibility provision (which exists also in the Constitution, as amended in 2001) is to prevent the creation of conditions that could endanger the essential legal principles prescribing transparency.

Its final position not only creates many legal problems concerning future legislation but can also be considered as a political defeat threatening to undermine the broader campaign against entangled interests. ■

● "Public procurement: Commission takes further action on Greek legislation excluding certain companies from public contracts", Press Release of the European Commission IP/05/492 of 27 April 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9645

EN-FR-DE-EL

European Commission: Acquisition of MGM Cleared

Sabina Gorini
Institute for Information Law (IViR)

At the end of March, the European Commission gave the green light (under the EC Merger Regulation) to the proposed acquisition of the film studio Metro-Goldwyn-Mayer Inc. (MGM) by the Sony Corporation, US cable operator Comcast and a group of US financial investors (Providence Equity, Texas Pacific Group and DLJ Merchant Banking).

MGM is one of the Hollywood Majors and is involved in the production, acquisition and distribution of films. Compared to other studios though, it releases a relatively small number of large budget films per year, its main asset being its film catalogue. Sony is involved, *inter alia*, in the production, acquisition and licensing of films, television programmes and Home Entertainment products and also has a large catalogue of films and television titles. Following the acquisition, MGM's film production and distribution business will be run by Sony Pictures Entertainment (Sony's wholly-owned subsidiary which is also a Major).

The Commission examined the impact of the proposed concentration on the various markets where Sony and MGM are active, namely Theatrical Release, Home Entertainment and Television Licensing. Following a wide market investigation in all Member States covering "production, distribution, licensing and retailing within the industry" the Commission came to the conclusion that the operation "would neither create nor strengthen a dominant position or otherwise impede effective competition". Each relevant market "shows evidence of competition and choice, given the presence of a sufficient number of alternative suppliers" ■

● "Mergers: Commission approves acquisition of MGM by Sony, Comcast and group of investors", Press Release of the European Commission IP/05/369 of 31 March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9600

DE-EN-FR

European Parliament: Resolution on Film Heritage and Related Industrial Activities

On 10 May 2005, the European Parliament adopted a first reading legislative resolution on the Proposal for a Parliament and Council Recommendation on film heritage and the competitiveness of related industrial activities put forward by the Commission in March 2004 (see IRIS 2004-4: 4 and IRIS plus 2004-8). The proposed Recommendation aims to encourage better preservation and exploitation of the European film heritage and to this end calls on

Member States to introduce appropriate measures to ensure the systematic collection, cataloguing, preservation, restoration and making available of cinema works forming part of their national heritage.

In its resolution, Parliament approves the Recommendation subject to a number of amendments to the Commission's text. As regards the collection of films, while the Commission's proposal calls on Member States to undertake the systematic collection of works "through a legal or contractual obligation", Parliament proposes a stronger wording, i.e. that collection be ensured "through a mandatory legal or contractual deposit of at least one high quality copy of cinematographic works in designated bodies" (it should be noted that the draft resolution, as proposed by Parliament's Committee on Culture and Education, was more ambitious, calling for legal deposit of a master copy and an additional copy). Also, while the Commission's text recommends that deposit should cover at least works that have received public funding, Parliament proposes that this should be the case only for a transitional period, after which deposit should cover as far as practicable all productions, including those that did not receive public funding.

Other amendments introduced by Parliament include recommendations to Member States to:
- adopt appropriate measures to increase the use of digital and new technologies in the collection, cataloguing, preservation and restoration of films;
- explore the possibility of establishing a network of databases encompassing the European audiovisual heritage in collaboration with the relevant organizations, in particular the Council of Europe (through Eurimages and the European Audiovisual Observatory);
- take appropriate measures to ensure access for people with disabilities to deposited cinema works;
- promote the use of film heritage in education and generally foster visual education, film studies and media literacy in education and in professional training and European programmes;
- promote cooperation between producers, distributors, broadcasters and film institutes for educational purposes.

As regards the introduction of provisions into national law to permit the reproduction of deposited works for the purposes of restoration (see IRIS plus 2004-08), Parliament specifies that this should be done "while allowing rightsholders to benefit from the improved industrial potential of their works resulting from that restoration on the basis of an agreement between all interested parties". ■

Sabina Gorini
Institute for Information Law (IViR)
University of Amsterdam

● **European Parliament legislative resolution on the proposal for a recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, adopted on 10 May 2005, provisional version available at:**
http://merlin.obs.coe.int/redirect.php?id=9653
CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-SK-SL-SV

NATIONAL

AL – New Act on Copyrights Approved

The Parliament of the Republic of Albania approved on 28 April 2005 the new Act "on copyrights and related rights". The prior Act on copyrights of 1992 had been amended many times, but it did not succeed in protecting intellectual property rights effectively, so there was a need for new legislation.

The whole field of intellectual property rights is the subject of the new law. It defines amongst others the relations between authors and radio and television broadcasting.

The establishment of independent associations for the protection of copyrights is envisaged. Nevertheless, the responsibility for the protection of copyrights and the prosecution of infringements is the duty of the state. A new Office of copyrights that will be established at the Ministry of Culture will monitor the implementation of the act in practice.

With the new act it will be easier for the courts to judge in cases of conflicts over copyright infringements. ■

Hamdi Jupe
Albanian Parliament

● **Act "on copyrights and related rights", passed by the Albanian Parliament, dated 28 April 28 2005**
SQ

AT – New Funding System for Broadcasting Regulators

The legal basis for the funding of the broadcasting regulator *KommAustria* and its partner *RTR-GmbH* was rescinded by the Constitutional Court at the end of 2004 (see IRIS 2005-2: 6). As a result, the legislature decided in April 2005 to introduce a new funding system by amending the *KommAustria-Gesetz* (*KommAustria* Act). Each year, the Federal Government will now contribute EUR 2,000,000 to the regulator's telecommunications operations and EUR 750,000 to its broadcasting-related activities. The latter sum will be financed through income from the licence fee, an existing tax on the use of radio and

Robert Rittler
Freshfields Bruckhaus Deringer
Vienna

TV receivers. The contributions to be paid by companies in the industry will be limited to EUR 6,000,000 for telecommunications companies and EUR 2,250,000 for broadcasters. Broadcasters with particularly low turnovers will not have to pay anything. Expenditure on *RTR-GmbH* will in future be capped at 10% of total annual outgoings. The amendment was backdated to 1 January 2005. ■

● **Federal Act amending the *KommAustria-Gesetz* (*KommAustria* Act) (NR: GP XXII IA 544/A AB 837 S. 99. BR: 7231 AB 7233 S. 720.), Federal Gazette of the Republic of Austria, 27 April 2005, Part I**

DE

AT – *ORF* Phone-In Programme Under the Spotlight

Österreichische Rundfunk (the Austrian public service broadcaster - *ORF*) currently broadcasts the programme "Quiz Express" four times a week during its night-time schedule. Viewers can call a premium rate number to win money and other prizes if they get through to take part in the programme and correctly answer general knowledge questions. Callers are chosen at random to take part in the programme. Those who are not chosen still have to pay the cost of the phone call.

In March 2005, the *Publikumsrat*, the *ORF* body that is meant to protect the interests of viewers and listeners, submitted a recommendation to the *ORF* management. It asked for an explanation of the role that phone-in programmes would play in the *ORF's* future programming and business strategy and requested that the quality criteria applicable to these programmes be made public. The *Publikumsrat* also recommended that an international comparative study be conducted into the use of phone-in programmes by public service broadcasters and that the programme "Quiz Express" be made less financially-oriented.

Robert Rittler
Freshfields Bruckhaus Deringer
Vienna

The Director General of the *ORF* defended the programme by arguing that the broadcaster needed additional funds, since it could not finance itself purely through licence fees and its advertising potential was limited. She did not think any legal provisions had been breached. The German broadcaster *RTL II*, which can be received in Austria via cable, recently reinstated a similar programme following complaints from viewers. ■

BA – Act on Public Broadcasting System still in Draft

The Act on the Public Broadcasting System (PBS) of Bosnia and Herzegovina is still in draft version (see IRIS 2004-1: 9). The House of Representatives of the Bosnia-Herzegovina Parliamentary Assembly rejected the report of the House of Representatives' Commission for Traffic and Communications on the draft Law on PBS.

The changes in the act should bring new provisions concerning TV licence fees and the appointment of the members of the Board of Governors. It should ensure that the management and editorial team are appointed in a way that will not threaten the independence of the PBS, as well as the autonomy of editors and reporters.

Dusan Babic,
media researcher and analyst,
Sarajevo

One point of discussion is the demand of the ruling political party of Bosnian Croats for a separate Croat-language channel. Currently, PBS consists of BHT1 (set up to be a state-level and countrywide broadcaster), Federal Radio and Television (FTVBiH), and Radio Televison of Republika Srpska (RTRS). Representatives of the international organizations in Bosnia-Herzegovina meanwhile offered a compromise solution: to establish three TV centres in Sarajevo, Mostar and Banjaluka, which should produce ethnically balanced programmes. ■

BE – Towards a Reorganisation of the Media Authorities

The Flemish government has taken the initiative of reorganising the authorities currently licensing and/or supervising radio- and television broadcasting, cable networks and radio- and television services in the Flemish Community. The idea is to unite the existing authorities into one agency, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - FRM). The draft bill integrates the competences of the *Vlaams Commissariaat voor de Media* (Flemish Media Authority), the *Vlaamse Geschillenraad voor Radio en Televisie* (Flemish Council of Disputes for Radio and Television) and the *Vlaamse Kijk- en Luisterraad* (Flemish Listening and Viewing Council) into what is called "a public law-founded external autonomous agency", the FRM. The establishment of the FRM implies the abolition of the Flemish Media Authority, the Council for Disputes and the Listening and Viewing Council. The objective is to make the monitoring function of the new media regulator in the Flemish Community more transparent, more accessible and more effective. According to the explanatory memorandum the structure of the new FRM also implements the obligations, policy objectives and regulatory principles of EC-Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive), especially with regard the National Regulatory Authorities.

According to the draft bill the FRM will have two separate and independent chambers, a general chamber and a chamber for ethics (*Kamer deontologie en ethiek*). All its members will be appointed by decision of the Flemish Government. The general chamber will be composed of 5 members: 2 judges and 3 media experts, independent of any media enterprise or media institution. This chamber will have a whole set of competences, such as the monitoring of most of

the provisions of the Flemish Broadcasting Act, the licensing of broadcasting providers and broadcasting networks, the analysis of the relevant markets, the reporting of whether a relevant market is effectively competitive or the identification of undertakings with significant market power, eventually imposing the necessary specific regulatory obligations. The general chamber will also monitor concentrations in the audiovisual media and print media. The chamber for ethics will be composed of 9 members (judges, professional journalists and academics) and will deal with such issues as journalistic ethics, editorial independence, impartiality, discrimination, incitement to hatred on the grounds of race, gender, religion or nationality and the protection of minors on radio and television.

In its advisory opinion of 9 May 2005 the *Vlaamse Mediaraad* (Flemish Media Council) has proposed some modifications to the draft bill. The Media Council's main suggestion is to withdraw the supervisory competence on journalistic ethics from the chamber of ethics, as this aspect of professional ethics is sufficiently guaranteed by the Council for Journalism (*Raad voor de Journalistiek*), a self-regulatory body for journalistic ethics established by the media sector in the Flemish Community (see IRIS 2003-6: 7). ■

Dirk Voorhoof
Media Law Section of the Communication Sciences Department Ghent University, Belgium

- ***Voorontwerp van Decreet houdende oprichting van het publiekrechtelijk vormgegeven extern verzelfstandigd agentschap Vlaamse Regulator voor de Media en houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 4 maart 2005*** **(Draft Bill on the establishment of the Flemish Regulator for the Media and modifying the Broadcasting Act 2005)**
- ***Advies 2005/2 van de Vlaamse Mediaraad betreffende het voorontwerp van decreet houdende de oprichting van het publiekrechtelijke vormgegeven extern verzelfstandigd agentschap Vlaamse Regulator voor de Media en houdende wijziging van sommige bepalingen van de decreten betreffende de radio en televisie*** **(Advisory opinion 2005/2 of the Flemish Media Council of 9 May 2005), available at: http://merlin.obs.coe.int/redirect.php?id=9651**

NL

DE – Personality Rights Violated by Manipulated Photos

The publication of technically manipulated pictures which appear to be authentic images of a person is not covered by the freedom of speech protected by Art. 5.1 of the German *Grundgesetz* (Basic Law). This was made clear in a decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) amending a ruling of the *Bundesgerichtshof* (Federal Supreme Court), the highest German civil court, and referring back to it the case in question.

The case began with a complaint lodged by the former Chair of the board of directors of a telecommunications company against a business magazine. In 2000, the magazine had, alongside reports of the company's financial situation, printed a picture collage showing the plaintiff sitting on a crumbling company symbol. In the picture, his head was placed on somebody else's body and his facial features were somewhat elongated.

The plaintiff had claimed that the elongation in particular constituted a subliminal and negative manipulation of his facial features, but his complaint was rejected by the *Bundesgerichtshof*, which classified the picture as satirical. In the opinion of the Constitutional Court judge, insufficient consideration had been given to the fact that, according to the general personality rights enshrined in Art. 2.1 in connection with Art. 1.1 of the German *Grundgesetz*, photographic images that were made accessible to third parties should not be manipulated. The Court ruled that manipulations that were not denoted as such suggested that the person depicted actually looked how they appeared in the technically altered image. This therefore constituted a falsehood which harmed personality rights and was not protected by freedom of speech. This also applied to satirical images if there was no indication of the fact that they had been manipulated. ■

Max Schoenthal
Institute of European Media Law (EMR), Saarbrücken/Brussels

- **Decision of the *Bundesverfassungsgericht* (Federal Constitutional Court), 14 February 2005, case no. 1 BvR 240/04, available at: http://merlin.obs.coe.int/redirect.php?id=9628**

DE

DE – Federal Supreme Court on DVD Reproduction Rights

In a ruling of 19 May 2005, the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) decided that old feature film marketing contracts cover marketing of DVDs as well as video cassettes.

According to Art. 31.4 of the *Urhebergesetz* (Copyright Act - *UrhG*), exploitation rights may not be granted for as yet unknown types of use. In old contracts, film manufacturers often granted video reproduction rights. In Germany, storage of films on DVD has only become common since the 1990s. Reproduction on DVD might therefore have been classified as a new type of use, distinct from video. That would have meant that companies entitled to produce videos of numerous films would not have held the equivalent rights for DVDs.

The *BGH* did not consider DVD to be a new type of use. It stated that, as well as technical innovation, a new type of use should be financially independent. However, in relation to the traditional marketing of video cassettes, DVD reproduction did not represent an economically independent form of exploitation. It did not create a new market, but was replacing video reproduction. It was likely that, in the longer term, video cassettes would simply be replaced by the DVD format. ■

Kathrin Berger
Institute of European Media Law (EMR), Saarbrücken/Brussels

- **Ruling of the *Bundesgerichtshof* (Federal Supreme Court - *BGH*), 19 May 2005, case no. I ZR 285/02**
- ***BGH* press release, available at: http://merlin.obs.coe.int/redirect.php?id=9660**

DE

DE – Ruling on ISP's Information Obligations

In a ruling of 28 April 2005 (case no. 5 U 156/04), the *Hanseatische Oberlandesgericht* (Hanseatic Appeal Court - *OLG*) discussed the obligation of Internet Service Providers (ISPs) to provide information to copyright holders.

The case concerned a request submitted by a large phonogram manufacturer ("applicant") to an ISP ("respondent") for information concerning a customer's personal details. The respondent's customer runs a so-called FTP server using an IP address allocated by the respondent. The applicant claimed that the server was being used to store digital musical recordings, in which it owned exclusive public access rights. The respondent allocates to its customers dynamic IP addresses, which in the present case were linked to a fixed domain by a third company. The court of first instance had upheld the applicant's request for information.

Kathrin Berger
Institute of European Media Law (EMR), Saarbrücken/Brussels

The Appeal Court decided that the applicant has no right under Art. 101 a of the *Urhebergesetz* (Copyright Act - *UrhG*) to demand information about the customer's name and address. According to Art. 101 a *UrhG*, any person who unlawfully manufactures or distributes copies in the course of business may be required to give the injured party information without delay. The Court acknowledged that Art. 101 a *UrhG* could not be directly applied because the respondent had not acted unlawfully. The respondent was not guilty of storing the music on the FTP server, since it had no control over the server. Neither could it be accused of distributing the music, since the downloading of music from the FTP server only led to incorporeal distribution.

In addition, the Court ruled that the ISP itself had not breached copyright law either directly or indirectly. For the ISP to be held responsible, it was not sufficient to suggest that it had knowingly collaborated in the offence by providing Internet access. Although under other rules on ISPs' liability the respondent could be obliged to erase illegal content, it was not obliged to disclose information. ■

● ***Urteil des Hanseatischen Oberlandesgerichts (OLG) vom 28. April 2005 (Az.: 5 U 156/04)* (Decision of the Hanseatic Appeal Courof of 28 April 2005)**

DE

DE – Temporary Injunction against Software for Free TV Stream

On 26 April 2005, a large German pay-TV broadcaster was granted a temporary injunction by the *Landgericht Hamburg* (Hamburg District Court - *LG*) against a consumer electronics company, banning it from marketing software which allows the exchange of TV programmes via the Internet.

The program works in a similar way to well-known music and video file-swapping systems. TV programmes can be exchanged all over the world with no time delay and viewed either on the computer monitor itself or on a connected TV set.

In the court's view, the company may not, for copyright reasons, offer technology that makes it possible to receive pay-TV programmes free of charge via the Internet. The company was also prohibited from advertising the software.

Max Schoenthal
Institute of European Media Law (EMR), Saarbrücken/Brussels

The company had argued that the technology only involved the transmission of data and that the manufacturers of data exchange software could not be held responsible for possible copyright infringements by users of file-swapping websites.

The consumer electronics company had won a legal dispute against a private broadcaster brought before the *Bundesgerichtshof* (Federal Supreme Court) in June 2004, in which the broadcaster sought a ban on the sale of another of the company's products, a so-called advertising blocker, which can cut out TV advertising (see IRIS 2004-7: 7). ■

DE – Film Support Guidelines in Force

In April 2005, new film support guidelines laid down by the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government's representatives for culture and media) entered into force. The guidelines contain provisions on individual film support measures. For example, they introduce support for screenplay and project development for children's and youth films. The categories for the German Film Prize are also slightly amended, as well as other details concerning the award of the prize.

Kathrin Berger
Institute of European Media Law (EMR), Saarbrücken/Brussels

The amendment brings the guidelines into line with the *Filmförderungsgesetz* (Film Support Act) of 1 January 2004 (see IRIS 2004-1: 10). ■

● **Film support guidelines laid down by the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government's representatives for culture and media), 30 March 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9659

DE

DE – Ring Tone Adverts Under Scrutiny

According to a programme analysis currently being conducted on behalf of the *Gemeinsame Stelle Programm, Werbung und Medienkompetenz* (Joint Body on programming, advertising and media competence - *GSPWM*) of the *Landesmedienanstalten* (regional media authorities), ring tones are the subject of the overwhelming majority of advertisements broadcast by the four music channels in Germany. In some cases, more than 90% of airtime that can be used for advertising is devoted exclusively to this type of product. At its meeting of 16 March 2005, the Joint Body also concluded that two of the broad-

casters had, in isolated cases, exceeded the legal limit of 12 minutes of advertising per hour; in one case, more than 18 minutes of advertising per hour had been broadcast. In this connection, the Joint Body recommended that the responsible regional media authorities take legal action against the broadcasters concerned. This means that both broadcasters now have the opportunity to submit a statement.

However, no breaches of the provisions of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement) or advertising directives have been observed. The fact that broadcasters advertise ring tones so heavily is not in itself a breach of media law.

Nevertheless, the *Kommission für Jugendmedienschutz* (Commission for youth protection in the media - *KJM*) will now investigate the extent to which ring tone advertisements exploit the inexperience of children and young people. According to the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on youth protection in the media), advertising must not appeal directly to children or young people in a way that exploits their inexperience and gullibility. The dangers linked to ring tone advertisements are thought to include, in particular, that children and young people might underestimate the cost of downloading ring tones because the information given on prices or subscription conditions is far too inconspicuous. ■

Max Schoenthal
Institute of European Media Law (EMR), Saarbrücken/Brussels

● ***GSPWM* press release of 16 March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9627**

DE

DE – Ring Tone Advertising Banned

At its meeting in Saarbrücken on 30 March 2005, the *Gemeinsame Stelle Programm, Werbung und Medienkompetenz* (Joint Body on Programming, Advertising and Media Competence - *GSPWM*) of the *Landesmedienanstalten* (regional media authorities) discussed the issue of advertising for mobile phone ring tone downloads on a private TV channel. The *GSPWM* recommended that the media authority responsible for the broadcaster concerned should take legal measures on account of a breach of advertising rules.

The TV broadcaster advertises ring tones containing excerpts from the theme music of several of its programmes. During the programmes concerned, a rolling message appears at the bottom of the screen, inviting viewers to download these ring tones.

Surreptitious advertising is banned under the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RfStV*), in accordance with the provisions of the EC Television Without Frontiers Directive. There are also provisions, in line with the Directive, concerning the admissibility of TV advertising breaks. The *RfStV* also contains a specific rule allowing split-screen advertising under certain conditions (see IRIS 2004-3: 7).

It was questionable whether, in this case, the message concerned could be classified as a reference to material accompanying the programme. Under Art. 45.3 *RfStV*, such references are allowed and should not be included in the maximum daily or hourly advertising quota if they refer to materials directly derived from the programme concerned. This rule is explained as follows in Article 15 paras. 4 and 5 of the *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen* (Common Guidelines of the regional media authorities on advertising, the separation of advertising and programme content and sponsorship on television), as amended on 10 February 2000:

"References to ways of purchasing copies of the broadcaster's TV programmes on audio and video cassette, record and similar pictograms and phonograms shall not be subject to the advertising regulations.

"References to books, records, videos and other publications, such as games, and where they can be acquired, shall not be subject to the advertising regulations if they explain, reinforce or follow up the content of the programme."

The *GSPWM* decided unanimously that none of the aforementioned conditions had been met and that an advertisement had therefore been broadcast. However, this could not be allowed under Art. 7.4 *RfStV*, which deals with split-screen advertising, since there had been no clear visual separation between the programme and the advertisement. ■

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

DE – *GSPWM* and *LMK* Complain About Surreptitious Advertising on Private TV

The *Landesmedienanstalten* (regional media authorities) are currently investigating several alleged cases of surreptitious advertising by private TV broadcasters. After a meeting on 30 March 2005, the *Gemeinsame Stelle Programm, Werbung und Medienkompetenz* (Joint Body on Programming, Advertising and Media Competence - *GSPWM*) announced that it had found a number of infringements of current advertising rules by various TV broadcasters: SAT. 1, Vox, Super RTL, MTV and n-tv.

For example, music channel MTV had excessively lauded a new games console. In a Vox programme, a particular brand of gravy thickeners and frozen food products was clearly shown on the screen and verbally recommended. The *GSPWM* also complained that a new car had been presented on news channel n-tv in a format similar to an advertisement.

In a children's programme on Super RTL, flags advertising a travel company were shown flying in the background of a music video, whose title proved to be the brand name of a new children's product

developed by the broadcaster. It was therefore deemed to bear a "direct connection" to a commercial product. The title could not therefore be justified by the programme's dramatic content.

The *GSPWM* has recommended that the regional media authorities responsible in each case should take legal action. This means that the broadcasters should first be given the opportunity to submit a statement, following which it should be decided whether official complaints should be lodged against them.

Under Art. 7.6 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*), surreptitious advertising and similar practices are prohibited. According to Art. 49.1.6 *RStV*, breaches of this rule are considered as finable offences which, under Art. 49.2 *RStV* may incur a fine of up to EUR 500,000.

Meanwhile, at its meeting of 18 April 2005, the group of *Landeszentrale für Medien und Kommunikation* (regional media and communications offices - *LMK*) of Rhineland-Palatinate issued a complaint concerning an infringement of the ban on surreptitious advertising. A report on a SAT.1 news programme dealing with the chasteberry plant had only mentioned one medicine containing this herb, even though numerous similar medicines were also available. The *LMK* considered the reference to a single product to have a very strong advertising effect and therefore considered it was proven that it had been mentioned deliberately for advertising purposes and as such represented a breach of the ban on surreptitious advertising. ■

Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/Brussels

- ***GSPWM* press release, available at: http://merlin.obs.coe.int/redirect.php?id=9661**
- ***LMK* press release, available at: http://merlin.obs.coe.int/redirect.php?id=9662**

DE

DE – Youth Protection Commission Publishes Activity Report

Two years after it was set up, the *Kommission für Jugendschutz der Landesmedienanstalten* (Youth Protection Commission of the regional media authorities - *KJM*) published an activity report at the beginning of April 2005. Since being established in 2003, the *KJM* has identified a total of 49 infringements of the provisions of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on youth protection in the media - *JMStV*) in the programmes of private broadcasters. More than half of the 91 complaints it has dealt with have therefore been upheld. At present, the courts are examining the programme content of music channel *MTV* in six different cases.

According to its report, the *KJM* has identified breaches of the *JMStV* in 79 of the 82 cases it has examined involving multimedia providers. In particular, it has discovered freely accessible pornography and extreme right-wing propaganda on the Internet.

The *KJM* was established on 2 April 2003. It comprises six directors of the *Landesmedienanstalten* (regional media authorities), four experts appointed by the *Länder* and two by the Federal Government. It functions, according to the *JMStV,* as the central supervisory body for youth protection in private broadcasting and telemedia (Internet). The *KJM* can impose fines of up to EUR 500,000 for breaches of youth protection rules.

However, the *KJM's* tasks include not only monitoring and assessing possible infringements of the *Jugendmedienschutz-Staatsvertrag*, but also dealing with applications from private broadcasters for special dispensations to show films before the prescribed watershed times. In the past two years, private TV broadcasters have made 81 such applications, two-thirds of which have been granted by the *KJM*. ■

Ingo Beckendorff
Institute of European Media Law (EMR), Saarbrücken/Brussels

- ***KJM* press release on the activity report of 8 April 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9629**

DE

ES – The Spanish Government Approves Anti Piracy Plan

On 26 April 2005, the Spanish government published in the Official Journal (BOE) the Order approving an Integral Plan for the decrease and the elimination of Intellectual Property damaging activities. This plan is an ambitious project which involves 11 Ministries, as well as the Autonomous and Local Administrations.

The Plan has two main objectives: to establish punitive measures to stop the offences against intellectual property and to raise awareness in Spanish society about the damaging consequences that piracy causes nowadays to culture and the different sectors involved. To achieve this objective and try to eliminate piracy, the Plan introduces the following five sets of measures, which are developed through different actions:

- Cooperation and collaboration measures
- Preventive measures
- Measures encouraging social awareness
- Legal measures
- Measures geared towards training public officials

The first set of measures concentrates on cooperation and collaboration, the main action in this field is the creation of an inter-sectoral commission, composed of representatives of the Public Administration, the organizations protecting intellectual property rights (collecting cooperatives), the technology industry, and consumers' associations. This commission shall be a forum in which to discuss different points of view and to make decisions.

Secondly, preventive measures are put in place.

The idea is to create a platform from which the Piracy concept is analysed and studied, trying to discover its future trends. The preventive actions try to detect the following points about piracy: What is infringed? Who is infringing? Who are the consumers of illegal products? Why do people consume illegal products?

Thirdly, the plan introduces measures seeking to raise awareness through institutional campaigns. The objective is to make the population aware of how damaging breaching intellectual property rights can be, not only culturally, but also economically and socially. These campaigns shall be aimed at the entire population, but will especially target the younger generations. The measures can be developed through specific activities such as: informing society about the concept of intellectual property, explanation of the cultural and economic value of intellectual property, contributions of the media, etc.

Fourthly, a legal basis is given to this plan. The government shall adapt the different laws to the circumstances and shall use all the tools to prosecute the offences related to piracy. The collaboration of many institutions, including the autonomous and local administrations, the police and other security bodies, the courts and judges shall be essential to achieving that aim.

The last set of measures focuses on training the public officials responsible for implementing the law. The idea is to enhance their theoretical and practical capacity to develop their functions, making them aware of the significance of the offences against intellectual property. These measures shall also be implemented in schools and universities.

The gravity of the problem entails that some measures shall be taken with urgency, for instance, the foundation of a police group specialized in intellectual property, development of campaigns for consumers, reinforcement of international cooperation, etc.

As the piracy problem shall not disappear in a short period of time, the Plan is not conceived as a static instrument, but as a method that should be updated from time to time in accordance with the experiences and conclusions drawn in time. ■

Cristina Troya – Enric Enrich
Enrich Advocats, Barcelona

● ***Plan Integral para la Disminución y la Eliminación de las Actividades Vulneradoras de la Propiedad Intelectual*** **(Integral Plan of the Government for the Decrease and the Elimination of Intellectual Property Damaging Activities), available at : http://merlin.obs.coe.int/redirect.php?id=9652**

ES

FR – Anti-copying Devices vs. the Private Copy

In a much-noted decision adopted on 27 April, the Court of Appeal in Paris deliberated on the legality of using technical means to prevent the copying of protected works (anti-copying device on a digital medium) in view of the private copy exception. The original case had been brought by a private individual, backed by a consumer group, who complained that he had not been able to make a video copy of the DVD of the film *Mulholland Drive* because the digital medium included technical protective devices that were not clearly indicated on the box. In support of their case, the applicants claimed that this constituted an infringement of the private copy exception contained in Articles L. 122-5 and L. 211-3 of the French intellectual property code (*Code de la propriété intellectuelle* – CPI), and of Article L. 111-1 of the Consumer Code, which obliged the vendor to inform the consumer of the essential features of the goods or service being sold.

In the initial proceedings, the Regional Court in Paris held that the anti-copying device did not infringe the private copy exception (see IRIS 2004-7: 9).

In its decision, the Court of Appeal upheld firstly that the exception allowing a private copy to be made was intended to apply to digital media, since "no distinction should be applied where none is included in the legislation". The Court of Appeal agreed with the Regional Court that the scope of the exception could only be appreciated in the light of the "three-stage test" contained in Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and neighbouring rights in the information society, which has not yet been transposed into national law, and the Bern Convention.

After examining the matter, the Court found that making a private copy of a work on a digital medium did indeed constitute a special case (1st stage). Unlike the initial court, it found that the existence of a private copy neither prevented the normal commercial exploitation of the work, which was the source of the income necessary to amortise the cost of production (2nd stage), nor caused prejudice to the rightholders (3rd stage). Consequently, the Court found that the use of technical means preventing all copying for private purposes constituted wrongful behaviour that caused prejudice to the consumer. The Court also held that the indication "CP" ("*copie prohibée*" – 'no copying') shown on the DVD was not enough to inform the consumer about the essential features of the medium. The judgment in the initial proceedings was therefore overturned and the film's producers and distributors ordered to pay the applicant consumer EUR 1 000 in damages. They were also prohibited from using any technical means on the disputed DVD that were incompatible with the private copy exception.

There will probably be clarification of the matter since, more than two years late, the French Parliament is scheduled to examine the bill to transpose the Directive of 22 May 2001 into national law on 6 June. ■

Amélie Blocman
Légipresse

● **Court of Appeal in Paris, (4th chamber, B section), 22 April 2005 – S. Perquin and the association *Que Choisir* v. Universal Pictures Vidéo France S.A., Films Alain Sarde, et al.**

FR

FR – Does *Finding Nemo* Infringe Copyright in a Pre-existing Work?

Clown fish can sometimes be real sharks! That seems to be the only conclusion to be drawn from the lawsuit brought by the French company publishing an illustrated children's book entitled *Pierrot le poisson clown* (Pierrot the clown fish) against the companies Walt Disney, Pixar and Disney Hachette Edition. The former, claiming copyright in respect of its book and ownership of the semi-figurative trade name *Pierrot le poisson clown*, brought its case against the latter under the urgent procedure and then on the merits of the case when the film *Finding Nemo* came out.

The Regional Court of Paris, deliberating on the merits of the case on 20 April, agreed with the judges who had deliberated on the case as an urgent matter and decided that the applicant company did not have copyright in respect of either the work *Pierrot le poisson clown* and its cover or the character itself. According to Article L. 113-1 of the French intellectual property code (*Code de la propriété intellectuelle* – CPI), "The qualification of author, unless proven otherwise, lies with the person(s) under whose name(s) the work is made known". But no proof had been brought in the present case that the co-authors of the work, comprising authors, illustrators and an artistic director formally identified and presented as such in the printed book, had assigned their rights to the applicant publishing company, and consequently it could not claim copyright in respect of the book. The Court applied the same reasoning to the rights claimed by the company in respect of the clown fish.

Amélie Blocman
Légipresse

On the point concerning infringement of copyright concerning the cover as claimed against *Nemo's World*, the court rejected the company's claim as here again it failed to provide proof that it held the rights of the initial designer of the character.

In answer to the claims based on infringement of copyright in the semi-figurative trade name registered by the company, comprising both the name *Pierrot le poisson clown* and the figurative representation of the character moving about in its sea environment, the companies Walt Disney and Pixar claimed nullity of the said trade name on the grounds of fraudulent registration, under Article L. 712-6 of the CPI. The Court noted, after careful examination of the chronology of the events and circumstances, that the applicant company had had knowledge of the plans for the film *Finding Nemo* and its distribution (the trailer, for example, had been shown in France as early as September 2002) before the trade name was registered on 18 February 2003 and indeed before the company itself was registered … Thus it was demonstrated that the applicant company's manager had been able to complete the graphic illustration of Pierrot after he had seen the graphic image of Nemo, as the illustrations produced prior to 2002 were very different from those finally registered for the Pierrot character. The Court, noting furthermore that the applicant company claimed infringement of copyright more than four months before the trade name was registered, found that the registration had been made solely with a view to preventing the companies Disney and Pixar from registering the trade name and commercially exploiting their spin-offs. Malicious intent of this kind constitutes fraudulent action and this affects the validity of the registration of a trade name; the Court therefore declared the registration of *Pierrot le poisson clown* null. ■

● Regional Court of Paris, 3rd chamber, 1st section, 20 April 2005, Flaven Scene Sàrl v. Walt Disney Pictures, Société Pixar, et al.

FR

FR – Canal + Receives First Official Notice for *Les Guignols de l'Info*

On 10 May, the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory authority – CSA) sent official notice to the channel Canal + after it had broadcast a sequence referring to the election of the new Pope, Benedict XVI, on 20 April in its humoristic, satirical programme *Les Guignols de l'Info*, referring to the new Pope's childhood in Germany and his enrolment in the Hitler youth movement. In the disputed sequence, which began with a banner on the screen bearing the words "Adolf II", the puppet representing the new Pope blessed the faithful "in the name of the Father, the Son and the Third Reich".

In response to the complaints the CSA received from French bishops and private individuals, it insisted on reminding the channel that, firstly, it was required under Article 10 of its Convention, to ensure respect in its broadcasts for the various political, cultural and religious sensitivities of the public and to refrain from encouraging discrimination on the basis of race, gender, religion or nationality. Secondly, under Article 11 of its Convention, the channel undertook to respect personal rights concerning privacy, image, honour and reputation as recognised by both legislation and case law. The CSA felt that assimilating Pope Benedict XVI to a supporter of the Nazi regime infringed his image, his honour and his reputation. The CSA also considered that the company had not respected the various religious sensitivities of its public and had encouraged discrimination on the basis of religion and nationality, and for these reasons it ordered the channel to comply with Articles 10 and 11 of its Convention.

This is the first time the channel has received formal notice concerning the daily *Les Guignols de l'Info* programme. ■

Amélie Blocman
Légipresse

● *Les Guignols de l'info* – Canal + receives formal notice, available at: http://merlin.obs.coe.int/redirect.php?id=9679

FR

HR – Dispute about Animated Serial *Zlikavci*

Nives Zvonaric
Council for Eletronic Media

At the end of 2004 the Croatian Television (HTV) started broadcasting the animated serial *Zlikavci* (Evil Guys) – a satiric review of daily events in Croatia and the rest of the world.

Immediately after the beginning of broadcasting, Catholic youth associations demanded that HTV should stop the programme due to insult to religious beliefs.

Thereupon the Program Council of HRT (Croatian Radio and Television) discussed the issue. The main task of the Council is to supervise implementation of program principles and obligations stipulated by the law. In case of breaches the Council has to inform in writing the Head Director of HRT, the director of the organizational unit and the director of programs. The Program Council decided that *Zlikavci* is a satirical show and as such does not violate program principles and obligations stipulated by the Law on Croatian Radio-Television.

The issue has been raised again as the Association Radio Marija collected about 40,000 signatures against the broadcasting of *Zlikavci*. On this occasion it has been requested to, at least temporary, discontinue broadcasting of *Zlikavci*, until it is finally determined if it is an insulting show or not. Furthermore, an expert review and HRT's apology for mentioning of the Association's name in one of the shows are requested. ■

● The Law on Croatian Radio-Television, *Narodne novine* – Official Gazette of the Republic of Croatia, number 25/03 from 19 February 2003, available at: http://merlin.obs.coe.int/redirect.php?id=9658

HR

IT – Investigations into Sports Rights and Abuse of Dominant Position by Mediaset

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

On 22 March 2005 the *Autorità garante della concorrenza e del mercato* (Italian Competition Authority– *AGCM*) opened an investigation in order to ascertain whether Mediaset abuses its dominant position in the broadcasting market with regard to the negotiation of sports rights.

In the summer of 2004, Mediaset bought the exclusive rights to broadcast the home football matches of the following teams of the Italian *Serie A* and *Serie B* tournaments: Milan, Inter, Sampdoria, Livorno, Messina, Roma, Atalanta, Juventus from July 2004 to June 2007. In addition to the sports rights, Mediaset also bought connected rights, such as advertising (billboards, spots and mini spots) to be broadcast together with the matches, the promotional and sponsoring activities, the interactive services, the t-commerce/games and the televoting. From January 2005, the matches have been broadcast in pay-per-view on digital terrestrial channels carried by the Multiplex of Mediaset.

Closing contracts with exclusive rights on behalf of a company having a dominant position on a certain market can lead to an abuse of a dominant position due to the risk of restricting competition: the AGCM considered that the Italian broadcasting market is already highly concentrated, both on FTA analogue terrestrial (the duo RAI-Mediaset, with Mediaset, made up of RTI and its advertising agency Publitalia, holding 64.7% of the market) and on satellite Pay-TV (monopoly of Sky Italia). The AGCM also considered that the purchase of exclusive rights to premium events with very high audience figures (such as football matches of the Italian Championship) is a strong source of advertising revenues both for FTA and Pay-TV broadcasters and is also particularly attractive for advertising agencies.

The purpose of the investigation is to establish whether or not Mediaset has abused its dominant position in purchasing the above-mentioned exclusive rights for a period spanning three seasons. ■

● AGCM deliberation of 22 March 2005, no. 14137 – C362, *Diritti calcistici*, published in the AGCM weekly Bulletin of 11 April 2005 no. 12, available at: http://merlin.obs.coe.int/redirect.php?id=9656

IT

IT – New Rules on Teleshopping

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

On 8 March 2005 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority – *AGCOM*) amended the Regulation on advertising (see IRIS 2001-9: 11) introducing new provisions on teleshopping. All products/services on sale must be accurately described and the price must be exactly explained according to the distance marketing directive. Astrology services, games, lotteries, etc... charging fee additional to the ordinary cost of phone calls cannot be marketed via teleshopping. Any spot or telepromotion requiring a phone call charging an additional fee must clearly inform the viewers about the effective price of the call. ■

● AGCOM deliberation of 8 March 2005, no. 34/05/CSP, *Modifiche al Regolamento in materia di pubblicità radiotelevisiva e televendite, di cui alla delibera n. 538/01/CSP del 26 luglio 2001* (Amendments to the Regulation on Advertising and Teleshopping), published in the Official Gazette of 11 March 2005, s.o. no. 72, available at: http://merlin.obs.coe.int/redirect.php?id=9657

IT

LV – Drafts of new Radio and Television Law and Public Service Broadcasting Law

Since the beginning of 2004 two new legislative acts in the media field are being drafted in Latvia. The Radio and Television Law and a new Public Service Broadcasting Law are intended to replace the existing Radio and Television Law of 1995. However, because this issue is both politically and economically sensitive (regarding the legal status and powers of the regulatory authority and the financing of public service broadcasters), the drafting has still to be completed.

Currently the drafts initially prepared by the *Saeima* (Parliament) Commission on Human Rights and Social Issues are dealt with by the Cabinet of Ministers, to which they had been submitted in 2004. The Cabinet amended the drafts substantially and the latest versions became available in March 2005. The draft Radio and Television law entrusts the supervision of commercial broadcasters partly to the Ministry of Culture (programme content issues) and partly to the Commission for Public Utilities (granting of licences in the tender procedure). The draft Public Service Broadcasting Law stipulated that the financing for public service broadcasters would come from the state budget and would be negotiated with the government. No licence fees are envisaged, which is a complete reversal of previous planning policy.

At the end of March 2005 the National Broadcasting Council sent the draft laws to the European Broadcasting Union (EBU) and to the International Press Institute (IPI) for their comments. Both institutions expressed substantial doubts as to whether the new drafts correspond to the requirements of the successful development of electronic media, especially that of public service broadcasting. The IPI had specific concerns over the financing model of public service broadcasting, which they thought might make broadcasters vulnerable to government influence. Also, subjecting broadcasters to the authority of the Ministry of Culture presents worries over potential governmental interference with the independence of the media. On 27 April 2005, the IPI even sent a letter expressing their concerns to the Latvian President and Prime Minister.

It should be stressed that the current versions of the new laws are only drafts, which have not even been submitted to parliament for the first reading. The National Broadcasting Council has publicly expressed its support for the concerns of EBU and IPI, and it is hoped that the drafts will be amended to ensure that they are consistent with the principles of genuine financial and political independence of the electronic media. ■

Ieva Bērziņa
Legal Counsellor
National Broadcasting Council of Latvia

NL – Cable Exploitation Companies and Copyright

On 7 April 2005 the Amsterdam preliminary Court rendered a decision settling a dispute between a consortium of cable operators and the *Bureau voor Muziekauteursrecht* (Mediation Society for Collection of Music Copyright – BUMA). The Court ordered the parties to negotiate the contested payable amount of authors' rights within a frame of time not exceeding 1 October 2005.

In 1985 the cable operators contractually agreed upon the amount of authors' rights payable for the transmission of works represented and protected by BUMA. Television broadcasting organizations in particular (public as well as commercial broadcasters) were party to this so called "Model Agreement". This agreement held that public broadcasting organizations would not charge cable operators for author's rights to which they were entitled. The cable operators however, gave notice to terminate this agreement from 1 March 2005 but continued to transmit these programmes (also partly because they were obligated to do so by virtue of the "must carry" programmes of art. 82i Dutch Media Act). This resulted in a situation whereby cable operators transmitted programmes without any contractual basis to do so and without the explicit permission of the party otherwise entitled to payment of author's rights. Hence, by making the programmes available to the public the cable operators breached the intellectual property rights concerned.

Therefore a provisional arrangement was made regarding the payment for author's rights due from the cable operators and the Model Agreement was extended until 1 October 2005. This date matches the period of six months expressed by the parties as being needed to reach a definitive agreement.

Regarding the Public broadcasters' position the judge remarked that no reason would justify cable operators withholding payment for the author's rights concerned because they were only able to transmit programmes free of charge as a contingency of the very agreement they chose to terminate.

Regarding the commercial broadcasting organizations, the cable companies agreed on "clean" delivery of programmes entailing that the author's rights had already been paid for. ■

Anne-Jel Hoelen
Institute for Information Law (IViR)
University of Amsterdam

- **Decision of the Amsterdam preliminary Court of 7 April 2005**
- ***Brief van de Staatssecretaris van Onderwijs, Cultuur en Wetenschap aan de Voorzitter van de Tweede Kamer der Staten-Generaal*, Den Haag, 3 May 2005, *Kamerstukken II 2004/05, 29 800 VIII, nr. 203*, available at: http://merlin.obs.coe.int/redirect.php?id=9684**

NL

NL – Muslim Organisations Must Share their Allocated Public Broadcasting Time

Anne-Jel Hoelen
Institute for Information Law (IViR)
University of Amsterdam

The *Beleidslijn zendtijdaanvragen van kerkgenootschappen en genootschappen op geestelijke grondslag* (the Policy on applications for broadcasting time from religious and other spiritual organisations) based on Section 39f of the *Mediawet* (the Dutch Media Act), according to which the *Commissariaat voor de Media* (the Dutch Media Authority) may allocate public national broadcasting time to religious and other spiritual organisations once every five years, recognizes Islam as one of the seven main religions and other spiritual organisations (see IRIS 2004-5: 14).

However, it is up to the applicant organisation to prove it best represents one specific religion or spiritual organisation. None of the aspiring Islamic applicants for the allocation period of 2005 – 2010 individually represented the Muslim community in the broadest sense. The Dutch Media Authority rejected the application of *SIK* (*Samenwerkende Islamitische Koepel*) because they do not represent all four movements of Islam and decided to consider the separate applications of *Stichting Moslims en Overheid* (Muslims and Government Foundation - CMO) and the *Nederlandse Moslimraad* (Duth Muslim Council - NMR). The CMO and the NMR collectively represent the Muslim community as much in number as in broadness (i.e. Sunnis, Shiites...etc...). However, in accordance with the policy of the Media Authority in principle only one organisation is entitled to the allocated broadcasting time. That is why the CMO and the NMR had to set up a foundation to apply for joint broadcasting time. To make this possible and easier, the Media Authority gave instructions as to the content of the regulations involved. In the proposed construction, the organisations would be free in their individual programming but would have to cooperate in using available facilities. On 14 March the Media Authority definitively decided to reserve the Islamic Broadcasting time for the foundation that was to be set up. Although the CMO and the NMR pledged to join forces and set up a foundation at first, they failed to reach a consensus and their conciliation attempts became stranded on 15 April 2005.

It would not be an option to allocate the total amount of Islamic broadcasting time to either the CMO or the NMR because only together do they represent the Muslim community in its diversity. That is why the allocated public broadcasting time will need to be divided between these two organisations. This will possibly also have consequences for the financial position of the newly-formed *Nederlandse Moslimomroep* (Dutch Muslim Broadcasting Organisation - NMO). ■

- ***"CMO en NMR moeten Islamzendtijd delen"* (The CMO and the NMR must share Islamic broadcasting time slot), press release of 19 April 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9649**
- ***"Zendtijd Islam gereserveerd voor nieuwe stichting"* (Islamic broadcasting time slot reserved for new foundation), press release of 8 March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9650**

NL

RO – Culture and Religious Affairs Ministry Takes Control of Copyright Authority

Mariana Stoican
Radio Romania International
Bucharest

The *Oficiul Român pentru Drepturile de Autor* (Romanian Copyright Authority – *ORDA*) was founded in 1996 as a specialist body answerable to the Government and was the only national regulatory authority responsible, in partnership with the public monitoring bodies, for protecting copyright by means of national registers.

For a while, the *ORDA* worked under the auspices of the National Control Authority (*Autoritatea Națională de Control)*. However, following the adoption of the "National Copyright Strategy 2003-2007" (*Strategia Națională în domeniul Proprietății Intelectuale în perioada 2003-2007)*, which was monitored by the European Commission, it became clear that the *ORDA* could more easily develop its activities as a regulatory body in close co-operation with the Ministry for Culture and Religious Affairs. Therefore, on the basis of Act No. 25 of 7 March 2005 and as part of a restructuring of the national public administration, the *ORDA* became an authority managed by a Director General appointed by the Romanian Prime Minister at the proposal of the Minister for Culture. All its running costs and capital expenditure are now funded by the state from a specially allocated *ORDA* budget created within the budget of the Ministry for Culture and Religious Affairs. ■

- ***Legea Nr. 25 din 7 martie 2005 privind aprobarea Ordonanței de urgență a Guvernului nr. 140/2004 pentru modificarea Ordonanței de urgență a Guvernului nr. 11/2004 privind stabilirea unor măsuri de reorganizare în cadrul administrației publice centrale, Monitorul Oficial al României, Partea I, Nr. 197/8.III.2005* (Act no. 25 of 7 March 2005)**

RO

RO – *CNA* Bans Glorification of Totalitarian Regimes

In a decision which entered into force in mid-March 2005, the *Consiliul Național al Audiovizualului* (Romania's national broadcasting authority – *CNA)* banned the glorification of crimes committed by totalitarian regimes or the defaming of the victims of such crimes.

Mariana Stoican
Radio Romania International
Bucharest

Decision No. 204, published in the Romanian Official Gazette of 15 March 2005, is based on the premise that "certain historical truths, such as the crimes committed during the Nazi or Communist periods, may not be called into question". It strictly prohibits the trivialisation of the offences committed by totalitarian regimes, the portrayal of the perpetators in a positive light and the expression of disrepect for or defamation of the victims of such crimes in the audiovisual media. The term "glorification" is used in the decision to mean "the extolling of a person or idea, the obsequious or interested defence of a person or action". Under Article 90 of the *Legea audiovizualului* (Broadcasting Act No. 504/2002), broadcasters who break this rule will incur fines of between ROL 50,000,000 and ROL 500,000,000, or after the re-evaluation of the Romanian currency from 1 July 2005, between RON 5,000 and RON 50,000. ■

● ***Monitorul Oficial al României, Partea I, Nr. 246/24.III.2005, Acte ale Consiliului Național al Audiovizualului: Decizia privind interzicerea apologiei crimelor regimurilor totalitare și denigrării victimelor lor* (CNA decision no. 204, Romanian Official Gazette of 15 March 2005)**

RO

SI – Media Bill Tabled

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

On 1 April 2005, the Slovenian Ministry for Culture published a Bill on Slovenian public service broadcasting (*RTV Slovenija*). The original intention was to table the Bill before Parliament as part of an accelerated legislative procedure. However, following protests from various parties, the Ministry decided not to take this route and tabled the Bill in the normal way. On 22 April 2005, the Parliament held an extraordinary sitting to give the Bill its first reading.

The current law on public service broadcasting dates back to 1994 and was last amended in 2001.

The most controversial aspects of the current law are its provisions on the remit and appeals procedure of the *RTV* organs. The Bill makes provision for a new Programme Council to be created, the majority (21) of whose 29 members would be appointed by the Parliament. Five members would be appointed in accordance with the political representation of the parliamentary parties. The Council would be responsible for electing the Director General. A Supervisory Board would also be created, with nine of its 11 members appointed by the Parliament (5) and Government (4). According to the grounds set out in the Bill, the new rules are mainly designed to guarantee these organs' political independence. It has been suggested that the current Public Service Broadcasting Council is not fully protected from political exploitation. For example, it has been possible to repeatedly elect a political party chairman to this body and appoint him as its president.

On 12 May 2005, a debate was held as part of a round table meeting on the Bill organised by the Peace Institute of Slovenia. Participants included representatives of public service broadcasting, the academic world and groups of experts, as well as a representative from Poland who holds an important position in the expert bodies of the Council of Europe, and the Director of Legal and Public Affairs of the European Broadcasting Union. ■

● **Bill on Slovenian public service broadcasting (*RTV Slovenija*) of 1 April 2005**

SL

US – Broadcast Flag Regulations Overturned

The U.S. entertainment industry now must look elsewhere than the Federal Communications Commission ("FCC") for help in preventing copying of its content after the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in American Library Association v. Federal Communications Commission, No. 04-1037. On 6 May 2005, a unanimous court rebuffed the FCC for overstepping the scope of its authority by requiring equipment manufacturers to include "broadcast flag" technology to prevent the unauthorized copying and redistribution of digital content (see IRIS 2005-4: 19).

The FCC imposed the broadcast flag regime in controversial regulations issued in late 2003. The scheme, scheduled to be effective as of 1 July 2005, would have required all devices capable of receiving a digital broadcast signal (including all Tivo-like personal video recorders, DVD recorders, cable and satellite set-top boxes with recording capabilities, and personal computers equipped with tuner cards) to include technology that restricted consumers' ability to copy and redistribute content. The entertainment industry hoped that the scheme would help to keep digital content off of filesharing networks. The regulations were contested from the very start. The FCC held an extensive rulemaking procedure in which parties submitted thousands of heated comments for and against the broadcast flag. Numerous comments challenged the FCC's jurisdiction, arguing the FCC had no statutory authority to regulate the use of broadcast content after it is received.

The American Library Association's ("ALA") court challenge to the broadcast flag was largely based on less technical concerns, as it claimed that the new

regulatory regime would interfere with educational activities. The ALA asserted that the broadcast flag would interfere with the ability of libraries and schools to copy and share content, activities that U.S. law excuses from infringement under certain circumstances. The D.C. Circuit ignored the ALA's broader, policy-based arguments in favor of jurisdictional grounds.

The FCC had relied on its "ancillary" jurisdiction under the Communications Act of 1934. The Act allows the FCC to regulate activity "reasonably ancillary" to the FCC's mandated responsibilities. Under the Act, the FCC may regulate the transmission of signals through the air or wires. The FCC argued that its ancillary jurisdiction allowed it to regulate devices capable of receiving a transmission, even when they were not engaged in the process of transmission. The court disagreed, stating that "Congress never conferred authority on the FCC to regulate consumers' use of television receiver apparatus after the completion of broadcast transmissions."

The rejection of the FCC's broadcast flag regulations likely moves the fight to Congress, where the Motion Picture Association of America has vowed to once again seek legislation mandating copy protection technology. Of course, the entertainment industry's agenda in the legislature and courts also will be shaped by the U.S. Supreme Court's decision in Metro-Goldwyn-Mayer Studios v. Grokster, No. 04-480, expected soon but not yet issued as of the date of this writing. ■

Mark Schultz
Southern Illinois University School of Law

● Decision of the U.S. Court of Appeals for the District of Columbia Circuit in the case American Library Association v. Federal Communications Commission, No. 04-1037, 6 May 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9672

EN

US – Family Entertainment and Copyright Act of 2005

On 27 April 2005, President George W. Bush signed into law the Family Entertainment and Copyright Act of 2005, P.L. 109-9 ("FECA"). FECA has two major parts. The first part, known as the "Artists Rights and Theft Prevention Act" ("ART Act"), criminalizes certain types of piracy that undermine the impact of the initial commercial release of works of entertainment. The second part, known as the "Family Movie Act of 2005," exempts from infringement third party technology that filters objectionable material from movies played at home. FECA also includes various provisions related to film preservation and orphan works (i.e., copyrighted works whose owners are difficult or even impossible to locate).

The ART Act creates two new Federal criminal copyright offenses. The first is intended to deter "camcorder piracy," where pirates record a newly released movie while it is being played in a movie theater. This type of recording is one of the primary means used by commercial movie pirates to create "bootleg" versions of movies. Under the ART Act, anyone who "knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work" from a performance in "a motion picture facility" can be punished with up to three years in prison for a first offense or six years for a later offense.

The second part of the ART Act addresses a form of infringement even more irksome to the entertainment industry than "camcorder piracy"—pre-release piracy. This phenomenon recently became notorious when a pre-release print of the latest installment of *Star Wars* showed up on filesharing networks the same day it premiered in movie theaters. There is speculation that it was leaked by an industry insider. Under the ART Act, it is now a criminal copyright offense to distribute "a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public." Penalties include imprisonment from up to three years (first offense) to ten years (for subsequent offenses). Although the Act seems to address filesharing, some have noted that proponents of the bill were focused on deterring industry insiders from leaking pre-release works. There is some doubt as to whether the ART Act will have a significant impact on either filesharers or industry "leakers." Many filesharers were probably already covered by criminal copyright laws. Moreover, many are uncertain whether the Act covers an insider who leaks a copy but is not the one to place it on a filesharing network.

The other major part of FECA, the Family Movie Act of 2005 ("FMA"), has a rather different aim, as it shields a class of (arguable) infringers from liability. The FMA protects new technology, most notably a service from Clearplay, Inc., that causes DVD players to skip movie scenes containing sex or violence or to mute objectionable dialogue. The movie industry has objected to Clearplay's service as unauthorized editing, and the Director's Guild of America has sued Clearplay for infringement. The suit is expected to be dismissed now that the FMA is law. ■

Mark Schultz
Southern Illinois University School of Law

● Family Entertainment and Copyright Act (P.L. 109-9) signed 27 April 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9671

EN

PUBLICATIONS

Voß, P.,
Stand und Perspektive des öffentlich-rechtlichen Rundfunks in Deutschland – am Beispiel des SWR
DE, Baden Baden
2005, Nomos Verlag
ISBN 3-8323-1110-3
EUR 46

Klaes, R. L.,
Informationsauftrag und Programmautonomie des Rundfunks unter den Bedingungen der Digitalisierung und im Zeitalter von „Multimedia"
DE, Baden Baden
2005, Nomos Verlag
ISBN 3-8329-1256-8
EUR 78

Institut für Europäisches Medienrecht (EMR)
Die Zukunft der Fernsehrichtlinie – The Future of the 'Television without Frontiers' Directive
DE, Baden Baden
2005, Nomos Verlag
ISBN 3-8329-1135-9
EUR 34

Koenig / Leotz / Neumann
Telekommunikationsrecht
DE, Heidelberg
2004, Verlag Recht und Wirtschaft
UTB Band 2620
ISBN 3825226204
EUR 19,90

Sadler, R.,
Electronic Media Law
2005, Sage publications Ltd.
ISBN 1412905885

Haynes, R.,
Media Rights and Intellectual Property
GB: Edinburgh
2005, Edinburgh University Press
ISBN 0748620621

Parker, N.,
Music Business: Infrastructure Practice and Law
GB: London
2005, Sweet and Maxwell
ISBN 0-421-89930-1

Montero, E.,
Les contrats de l'informatique & de l'Internet
BE : Louvain
2005, Larcier
ISBN 2-8044-1723-9
EUR 164

Ilardi, A.
Propriété intellectuelle : Principes et dimension internationale
FR : Paris
2005, Editions L'Harmattan
ISBN 2747577937
EUR 18,50

Fougea, J-P.,
Les outils de la production cinéma et télévision
FR : Paris
2005, Editions DIXIT
ISBN 2-84481-097-7

AGENDA

Filmwirtschaft im Fokus: Banken, Fiskus und Finanzen
12 July 2005
Organiser: Media Business Academy
Venue: Munich
Information & Regsitration:
Tel.: +44(0)89 4 51 14 3 39
Fax.: +44(0)89 4 51 14 08
E-mail: h.mai@e-media.de
http://www.m-mba.de/