iris
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

2005 - 7

INTERNATIONAL

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

COUNCIL OF EUROPE

Ministerial Conference on Mass Media Policy

In March 2005, the 7th European Ministerial Conference on Mass Media Policy was held in Kyiv (Ukraine). Its central theme was: "Integration and diversity: the new frontiers of European media and communications policy". It led to the adoption of a Political Declaration, three Resolutions on the Conference's main themes, an Action Plan and a Resolution on the media in Ukraine.

The Political Declaration welcomed the activities carried out by the Council of Europe in the media field since the previous Ministerial Conference on Mass Media Policy in Cracow in June 2000. It sketched the priority issues addressed in the aforementioned Resolutions and invited the Committee of Ministers of the Council of Europe to implement the Action Plan adopted at the Conference. "[F]or this purpose," it also requested the Committee of Ministers to "redefine the mandate of the Steering Committee on the Mass Media (CDMM) so that it can fully encompass the new information and communication technologies and, accordingly, to rename it the Steering Committee on the Media and New Communication Services (CDMC)".

In Resolution No. 1, entitled, "Freedom of expression and information in times of crisis", the Ministers of participating States reaffirmed the need to uphold the right to freedom of expression during times of crisis. In such circumstances, there must be particular concern for the "free and unhindered exercise of journalism and the physical integrity of journalists". The Ministers therefore agreed that "all cases of violence against journalists or media be fully and independently investigated" and that appropriate assistance be given to the media to reduce the risks facing media professionals. The Ministers furthermore agreed, *inter alia*, that inter-State cooperation should be strengthened at the European level, "in order to remedy situations where media professionals of a member State encounter a threat to their safety or their freedom when covering crisis situa-

• **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, Coordinator – 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 – France Courrèges – Paul Green – Marco Polo Sàrl – Katherine Parsons – Stefan Pooth – Patricia Priss – Erwin Rohwer – 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

tions on the territory of another member State". Earlier undertakings to respect and implement existing Council of Europe standards on safeguarding freedom of expression and information in times of crisis were reaffirmed.

As its title would suggest, a central aim of Resolution No. 2, "Cultural diversity and media pluralism in times of globalisation", is to promote cultural and linguistic diversity in the media as an end in itself, but also to foster intercultural dialogue and tolerance. In this vein, it highlights the interests of persons belonging to minority groups and of minority community media, and secures the Ministers' agreement to "encourage access to the media by persons belonging to national minorities". It reiterates the conviction that it is necessary to "safeguard in the digital environment the essential public interest objectives, which are cultural diversity and media pluralism". It also recognises the "particularly important role of public service broadcasting in the digital environment, as an element of social cohesion, a reflection of cultural diversity and an essential factor for pluralistic communication accessible to all". The participating Ministers were therefore prepared to undertake to "ensure the legal, financial and technical conditions to enable public service broadcasters to accomplish their mission in an effective manner". Finally, the Ministers restated their commitment to implement Recommendation (2003) 9 of the Committee of Ministers on measures to promote the democratic and social contribution of digital broadcasting, and agreed to inform the Council of Europe about the measures pursuant thereto.

In Resolution No. 3, "Human rights and regulation of the media and new communications services in the Information Society", reference is made to the Declaration of the World Summit on the Information Society (see IRIS 2004-2: 1) and the political message from the Committee of Ministers to the Summit. Reference is equally made to the Committee of Ministers' Declaration on freedom of communication on the Internet (see IRIS 2003-7: 3). The Resolution condemns "attempts to limit public access to communications networks and their content or to interfere with communications for motives contrary to democratic principles", stressing that limitations are only permissible if they comply with Articles 8 and 10 of the European Convention on Human Rights (ECHR). Under the Resolution, participating Ministers undertake to:

- ensure that regulatory measures governing media and new communications services respect pluralism, diversity, human rights and non-discriminatory access;
- increase efforts to guarantee effective and equitable access for everyone to new communications services, skills and knowledge, thereby countering digital exclusion;
- adopt measures to improve public access to official documents and information through new communications services, thereby enhancing transparency in public life and promoting democratic decision-making;
- increase measures and cooperation to reduce the risks for minors of the dissemination of harmful content on new communications services;
- make greater efforts to combat the use of new communications services for disseminating content prohibited by the Cybercrime Convention and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (see IRIS 2003-1: 3).

The accompanying Action Plan sets out an array of detailed measures to further the objectives of the three Resolutions.

The Resolution on the Media in Ukraine welcomes that country's efforts to bring its standards of freedom of expression, information, pluralism and media independence into line with those developed under the ECHR. It calls on the Council of Europe and its Member States to step up their cooperation with Ukraine in the media field, *inter alia*, through the adoption and implementation of a new media action plan for the country. ■

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

● Texts adopted at the 7th European Ministerial Conference on Mass Media Policy, Kyiv (Ukraine), 10-11 March 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9735

EN-FR

European Commission against Racism and Intolerance: Media Provisions in New Country Reports on Racism

The European Commission against Racism and Intolerance (ECRI) recently made public five new reports as part of the third cycle of its monitoring process of the laws, policies and practices to combat racism in the Member States of the Council of Europe. Four of the country reports (Albania, Croatia, Poland and the United Kingdom) contain specific recommendations concerning the media.

Following a precedent in some of its previous country reports (see IRIS 2003-5: 3), ECRI pronounces itself in favour of the adoption in Albania of self-regulatory codes "to combat reporting that fuels racism, discrimination and intolerance". It calls on the Albanian authorities to exhort the media to promote balanced, impartial coverage that would promote "an atmosphere of appreciation of diversity" (para. 70). The report stresses the need for the media to give "adequate coverage to the daily lives, problems and concerns of members of minority com-

munities" (para. 71). It also recommends that "members of minority groups be given adequate opportunities for access to the electronic and print media" (para. 72).

In its reports on Croatia and Poland, ECRI recommends that the State authorities set about raising awareness in the media sector of the dangers of racism and intolerance (paras. 82 and 79, respectively). It "strongly encourages" the State authorities in both countries to "make every effort to prosecute and punish" those responsible for the publication of racist articles.

ECRI encourages the UK authorities to: "impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards asylum seekers, refugees and immigrants or members of any minority group, including Roma/Gypsies, Travellers and Muslims, and the need to play a proactive role in countering such an atmosphere." It is suggested that the advancement of this aim should involve dialogue between the State authorities, the media and civil society. The report also advocates the replication at national level of successful local initiatives in this area.

The country report on Sweden - the fifth in the latest batch of reports to be released by ECRI - does not contain any recommendations relating specifically to the media. However, one recommendation does deal with freedom of expression in more general terms, *viz.*, that the Swedish authorities should ensure that the dissemination of hate speech is "effectively countered". In this connection, it draws attention to ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. ■

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

● All five of the ECRI country reports mentioned in the article are available at: http://merlin.obs.coe.int/redirect.php?id=9739

● "Council of Europe: Reports on racism in Albania, Croatia, Poland, Sweden and the United Kingdom", Press Release of 14 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9737

EN-FR

EUROPEAN UNION

European Court of Justice: Case Mediakabel BV / Commissariaat voor de Media

On 2 June 2005, the European Court of Justice has, in a case taken by the Dutch company Mediakabel against the *Commissariaat voor de Media* (Dutch Media Regulatory Authority), rendered a decision with implications as to the scope of the Television without Frontiers Directive 89/552/EEC (as amended by Directive 97/36/EC).

Aside from a regular subscription service called Mr. Zap, which allows reception of television broadcasts by means of a decoder and a smartcard, Mediakabel also offers a pay- per-view service by the name of Filmtime. This service offers a catalogue of films, from which subscribers can choose by telephone or by remote control, which are decrypted only after the provider has received identification and payment from the subscriber. Filmtime has been at the heart of a dispute between the Dutch Media Authority and Mediakabel dating back to the end of 1999. The conflicting views concern the definition of such a service and reflect different stakes: the question is whether it should be considered a television broadcasting service or an interactive service. Defining it as a television broadcasting service would not only mean Filmtime is subject to the requirements of the TWF Directive, in particular the obligation to reserve a certain percentage of time to European works, but also that it lies within the Media Authority's scope of competence.

According to Mediakabel, Filmtime should be classified as an information society service because it is only accessible upon individual request by means of an individual key. Although it recognizes Filmtime presents certain characteristics of an interactive service (it is offered at a distance, using partly electronic transmission), the Court has dismissed this argument. The Court notes such a service is not commanded individually by an isolated recipient who has free choice of programmes in an interactive setting, rather it is the service provider who establishes the list of films available and broadcasts it at the same time and on the same terms to an indeterminate number of viewers. The individual key is merely a tool to "unencode the images" simultaneously broadcast to all subscribers.

The Court also observes that the difficulty Filmtime faces in complying with the obligation to reserve a certain percentage of programming time to European works can in no way preclude its classification as a television broadcasting service. Adverse consequences service providers may face in complying with the TWF Directive cannot serve as a pretext for not abiding by it. All the more so because the Directive only prescribes an obligation to reserve a certain percentage of transmission time to European works, not an obligation for the viewers to actually watch these works. ■

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

● Judgment of the European Court of Justice of 2 June 2005, Mediakabel BV v. *Commissariaat voor de Media*, case C-89/04, available at: http://merlin.obs.coe.int/redirect.php?id=9720

CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-SL-SK-SV

European Commission: Revised Offer on Access to Services Market

Wolfgang Sakulin
Institute for Information Law (IViR) University of Amsterdam

On 2 June 2005, the European Union issued a Conditional Revised Services Offer to members of the World Trade Organisation (WTO) in the process of ongoing negotiations under the General Agreement in Trade in Services (GATS) and the Doha Development Agenda. The EU's initial offer had been tabled in April 2003. This revised offer was issued in response to requests submitted by other WTO Members and it is conditional upon other WTO members making substantive offers in sectors where the EU has made requests. One of the service sectors that is covered by the offer is telecommunications services. No commitments have been made with respect to the areas of education, health and audiovisual services.

Under the offer telecommunications services are defined as "all services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting". Content services, which require telecommunications services for their transport, are expressly excluded.

Attachment C of the offer spells out regulatory principles for telecommunications services. These relate to competitive safeguards, interconnection, universal service, the public availability of licensing criteria, independent regulators and the allocation and use of scarce resources.

With the current offer the EU claims to grant practically full market access to the sector of telecommunications services. However, restrictions that relate to public participation in certain telecommunications operators have been maintained. Other restrictions apply to the four modes of delivering services. No restrictions have been proposed on the cross-border provision of services (mode 1) nor on consumption of services abroad (mode 2), but certain restrictions on foreign commercial presence (mode 3) have been proposed. Furthermore extensive restrictions on the (temporary) presence of natural persons (mode 4) with respect to certain sub-sectors of telecommunications are proposed.

The offer will not change the current regime with regard to audiovisual services. The sector will remain uncommitted and the MFN (Most Favoured Nation) exemptions to cover cultural policies such as privileged treatment for EU productions and co-production agreements will be maintained. ■

- **"EU tables revised services offer in Doha Round negotiations", Press Release of the European Commission IP/05/654, 2 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9697**

EN-FR-DE

- **"Communication from the European Communities and their Member States, Conditional Revised Offer", 1 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9700**
- **"Summary of the EU's revised services offer in the Doha negotiations", 2 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9701**

EN

European Commission: Communication on a European Information Society for Growth and Employment

On 1 June 2005, the European Commission adopted the first communication "i2010: European Information Society 2010". The Commission proposes a strategic framework for the information society and media industries and sets three priorities. Firstly, a Single European Information Space. Secondly, the strengthening of Innovation and Investment in ICT research and by doing so closing the gap with Europe's leading competitors, and lastly, the achievement of an Inclusive European Information Society that provides high quality public services and promotes quality of life.

Because of the economic importance of ICT developments in information society and media as a whole, a proactive approach is necessary. Digital convergence of communications networks, media, content, services and devices increase the need for a Single European Information Space. Affordable and secure high bandwidth communications, rich content, interoperability and security are the keywords. Digital convergence calls for consistent rules. Some of the current rules, among them the Television Without Frontiers Directive, need to be reviewed and the Community acquis have to be analysed and adjusted with regard to the topic. The TWF Directive should be modernised by the end of 2005 and the acquis should be adjusted by 2007. The eventual framework has to be implemented quickly and efficiently. Special attention should be paid to bottlenecks which currently delay access to faster, more innovative and competitive broadband services.

Measures for access to the spectrum across the EU are part of the plan for reasons of demand for radio spectrum. Next to research and innovation, deployment and adaptation of ICT and e-business solutions will be part of the strategy for efficient spectrum

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

management to be defined in 2005 and implemented in 2006. Interoperability will be stimulated with the same toolset the Commission used for the European mobile telephony.

As far as research and innovation in ICT is concerned, according to the Commission, Community ICT research has to be increased by 80% and the Member States have to be stimulated to do the same. Further down on the agenda are, amongst others, strategic research on the FP7 pillars and research to overcome technological bottlenecks such as interoperability, measures to encourage private investment and proposals on the Information Society for all.

The Inclusive Information Society should benefit all citizens, improve public services, be more efficient and improve quality of life. Benefit for all can be reached by making ICT systems user friendly. The Commission intends to propose an initiative on this topic by 2008. ■

- **"i2010 – A European Information Society for growth and employment", Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM(2005) 229 final, Brussels, 1 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9702**
- **"Commission launches five-year Strategy to boost the Digital Economy", Press Release of the European Commission of 1 June 2005, IP/05/643, available at: http://merlin.obs.coe.int/redirect.php?id=9705**

EN-FR-DE

- **"i2010 – A European Information Society for growth and employment", Q&A I 2010 of the European Commission of 1 June 2005, MEMO/05/184, available at: http://merlin.obs.coe.int/redirect.php?id=9708**

EN

European Commission: Communication on Accelerating the Transition from Analogue to Digital Broadcasting

On 24 May 2005, the European Commission adopted a Communication which sets out a roadmap guiding Member States through the transition from analogue to digital broadcasting. The communication is an analysis of the switchover plans of Member States published during the *e*Europe 2005 Action Plan (see IRIS 2003-3: 3) and a recent opinion of the Radio Spectrum Policy Group (RSPG). It builds on the 2003 Communication COM(2003) 541 (see IRIS 2003-10: 4).

According to the Commission there is not enough coordination on switchover plans in the Member States at the moment. Not all Member States have announced a switch-off date and those who have can be divided in two groups: those who plan to switch off by 2010 and those who will before 2012. Due to the lack of political decisions and the financial risks perceived by consumers in making the switch, progress on this front has been slow. The Commission states that the market drive is important but broadcaster coordination is also needed. Consumers should get more information about possibilities on digital platforms and about the necessary equipment.

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

Furthermore, the switchover will stimulate innovation and both the economy and consumers will profit from it. Consumers will benefit from a wider choice in programmes, channels, services and better quality in resolution as well as in sound. Operators of broadcasting networks can reduce their costs and increase sales by targeting more recipients. Spectrum capacity will be released which opens up possibilities like new or improved broadcast services and convergent services. On a pan-European level, learning effects and promotion of positive examples will stimulate new technologies and services. For many of the technologies and services a critical technological infrastructure throughout Europe is necessary.

Only a rapid and fast switchover will make these benefits possible which does not mean that until that time the vacant spectrum bands should remain unused. Flexible spectrum plans which do not delay introduction of the new services are welcome. For this reason flexibility should be a main topic during the Regional Radio Communication Conference in 2006 and the World Radio Conference in 2007. Only with a complete European switch-off can the whole range of pan European and cross border services be fully used.

The switchover process in all EU Member States should be well advanced in Europe by 2010 as a whole and the Commission proposes a deadline set at the beginning of 2012 for a complete analogue switch-off in all EU Member States. ■

- **"Commission expects most Broadcasting in the EU to be digital by 2010", Press Release of the European Commission of 24 May 2005, IP/05/595, available at: http://merlin.obs.coe.int/redirect.php?id=9709**
- **Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Accelerating the Transition from Analogue to Digital Broadcasting, COM(2005) 204 final, Brussels, 24 May 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9712**

EN-FR-DE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

European Commission: State Aid for the *Chaîne Française d'Information Internationale* Approved

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

The European Commission has recently approved a financing scheme involving state aid for the *Chaîne Française d'information internationale* (French Channel for International News - FCII). In making the decision, the Commission observed that the EC Treaty rules on state aid (Article 87) were being complied with. These rules prohibit the granting of aid or subsidies which distorts or threatens to distort competition within the EU single market. However, as an exception to these rules, the treaty allows state aid for the operation of services of general economic interest, provided the aid does not have a disproportionate impact on the market. FCII is deemed to be such a service of general economic interest as it aims to bring the French point of view on international news to audiences around the world. France télévisions and TF1 are the main shareholders in this joint venture and the Commission is satisfied with the conditions surrounding the mechanism of FCII's financing: the risk of overcompensation for the public service costs is averted as the profits of one financial year are reinvested in the following year. In addition, the channel will apply market conditions to all commercial operations. ■

● "State Aids: the Commission approves financing for the *Chaîne Française d'information internationale*", Press release of the European Commission IP/05/689 of 7 June 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9741

DE-FR-EN

European Commission: Irish Broadcast Fund Promotes "Cultural and Regional Identity"

David Goldberg
DeeGee research/ Consultancy

In June 2005, the European Commission decided the question whether the Irish Language Broadcast Fund would be authorized as a legitimate form of state aid. In approving the Fund, the Commission said that "The fund meets the criteria for aid to be compatible under state aid rules set out in the Commission's Communication on certain legal aspects relating to cinematographic and other audiovisual works" (see IRIS 2001-9: 6 and IRIS 2004-4: 4). Aid to promote culture may be authorised where such aid does not unduly distort competition, according to EC Treaty state aid rules (Article 87(3)(d)).

The background to the Fund lies in the 1998 agreement (popularly known as the "Good Friday Agreement"), reached between the United Kingdom and Republic of Ireland in the context of the "peace process" involving Ireland.

The Agreement addresses the issue of minority languages; it sets up the North/South Language Body (known in Irish as *An Foras Teanga* or in Ulster-Scots as *Tha Boord o Leid*) as one of the original six North-South Implementation Bodies. The Agreement, in particular, commits the UK Government, having signed the Council of Europe Charter for Regional or Minority Languages, to "…in relation to the Irish language, where appropriate and where people so desire it […] seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland". To facilitate such production, the UK Government in Northern Ireland established the Irish Language Broadcast Fund.

The Fund is worth GBP 12 million over five years and will "deliver at least 90 hours of Irish language broadcasting per year, to an audience of 25,000 people in Northern Ireland. It will also enable at least 15 people to be trained each year in production and broadcasting skills". Another GBP 12 million is being made available for the Ulster-Scots Academy. The fund is administered by the Northern Ireland Film and Television Commission and whilst it "will grant aid to a wide range of production activities capable of being delivered by present and developing delivery platforms – including analogue, digital, online and interactive" it should be noted that "radio broadcasting is not within the remit of this fund".

The criteria for funding are: a minimum of 60% of the spoken word within the production must be in Irish, every production must be subtitled in English. The product must be of artistic quality and should be capable of being delivered by present and developing delivery platforms – including analogue, digital, online and interactive platforms. It should reach a substantial audience in Northern Ireland.

Aid beneficiaries will be independent, audiovisual production companies and in exceptional cases broadcasters. ■

● "State aid: Commission endorses Northern Irish Language Broadcast Fund", Press Release of the European Commission IP/05/691 of 8 June 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9725

EN-FR-DE

● Irish Language Broadcast Fund for the production of Irish Language moving image programmes in Northern Ireland – Guidelines, 5 November 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9728

● Irish Language Broadcast Fund Priorities, 30 November 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9729

EN

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

NATIONAL

AL – Bill on Digital Broadcasting Rejected

Hamdi Jupe
Albanian Parliament

On 19 May 2005 the Parliament of the Republic of Albania rejected a bill on digital terrestrial and satellite broadcasting in Albania, presented by a group of Members of Parliament. Experts from the OSCE and the Council of Europe had offered their expertise to prepare and approve a temporary law on digital broadcasting. This expertise has not been taken into consideration by the authors of the bill.

In July 2004, the private Albanian broadcasting company, "Digit-alb", started broadcasting digitally, using four frequencies without the authorization of the *Keshilli Kombetar i Radios dhe Televizioneve* (National Council of Radio and Television). This caused serious irritation in the market of the electronic media.

The representatives of the OSCE, the Council of Europe and European Union in Tirana published a joint statement and appreciated the decision of the Albanian Parliament on the rejection of the bill. They declared that they will be ready to contribute to the preparation of a new bill in accordance with European standards for digital broadcasting. ■

- **Decision of the Albanian Parliament on the rejection of the draft-law on digital broadcasting, dated 19 May 2005**
- **Joint statement of the OSCE Presence, CoE office and EU Delegation in Tirana, dated 19 May 2005.**

SQ

AT – Constitutional Court Rejects Complaints on Short Reporting Rights

Robert Rittler
Freshfields Bruckhaus Deringer
Vienna

The *Verfassungsgerichtshof* (Constitutional Court) has thrown out two complaints against a decision of the *Bundeskommunikationssenat* (Federal Communications Office) concerning short reporting of football matches.

The Pay-TV broadcaster *Premiere* had acquired the exclusive right to broadcast the T-Mobile-Bundesliga and the Stiegl Cup in 2004. The Austrian private TV company *ATV+* had then purchased the secondary exploitation rights. *Österreichische Rundfunk* (the Austrian public service broadcaster - *ORF*) had obtained from the *Bundeskommunikationssenat* the right to broadcast short 90-second reports on each match day (see IRIS 2005-1: 7).

Both *ORF* and *ATV+* complained about this decision to the Constitutional Court, which decided not to allow the complaints to have suspensive effect (see IRIS 2005-2: 6).

The Constitutional Court threw out both the complaints on the grounds that there was little prospect of them being upheld. *ORF* and *ATV+* could now ask the *Verwaltungsgerichtshof* (Administrative Court) to examine whether the decision complies with the *Fernseh-Exklusivrechtegesetz* (Exclusive Television Rights Act). ■

- **Decision B 1317/04-20 of the *Verfassungsgerichtshof* (Constitutional Court), available at:**
http://merlin.obs.coe.int/redirect.php?id=9688
- **Decision B 1599/04-17 of the *Verfassungsgerichtshof* (Constitutional Court), available at:**
http://merlin.obs.coe.int/redirect.php?id=9689
- **Decision B 1602/04-9 of the *Verfassungsgerichtshof* (Constitutional Court), available at:**
http://merlin.obs.coe.int/redirect.php?id=9690

DE

AT – Invitation of Tenders for Multiplex Platform

Robert Rittler
Freshfields Bruckhaus Deringer, Vienna

KommAustria, the regulatory authority for Austrian private broadcasters, issued an invitation to tender for the creation and operation of a terrestrial multiplex platform in May 2005.

This followed extensive consultations, during which a digitisation plan was published in December 2003 (see IRIS 2004-3: 5). The plan comprises four stages, by the end of which all TV signals will be broadcast digitally. Following comprehensive testing of DVB-T (see IRIS 2003-8: 7), stage 1 of the digitisation plan will be completed when a licence is issued for the operation of the multiplex platform.

Applicants will have to show that they fulfil the technical, financial and organisational criteria for continuous transmission of digital channels and additional services. All applicants meeting these conditions will be considered in the selection procedure. *KommAustria* issued the *MUX-Auswahlgrundsätzeverordnung 2005* (2005 Multiplex Selection Criteria Decree), which sets out the legal selection criteria. Preference will be given to applicants who can quickly achieve a high level of population coverage, offer excellent signal quality, include the broadcasting companies, offer a consumer-friendly service, submit a strategy for promoting the distribution of suitable receivers and offer a range of digital channels that best serves diversity of opinion. ■

- **Invitation to tender for the creation and operation of a national terrestrial multiplex platform in accordance with Art. 23.1 PrTV-G (KOA 4.200/05-05), available at:**
http://merlin.obs.coe.int/redirect.php?id=9691
- **7th Decree of the *Kommunikationsbehörde Austria* (Austrian communications authority - *KommAustria*) laying down more detailed selection criteria for the award of a terrestrial multiplex licence in 2005 (2005 Multiplex Selection Criteria Decree – *MUX-AG-V 2005*), available at:**
http://merlin.obs.coe.int/redirect.php?id=9692

DE

BE – Implementation of Copyright Directive

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

After long parliamentary preparations and debate, the Belgian Copyright Act of 30 June 1994 has been modified in order to implement the EC Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. As the Directive 2001/29/EC should have been transposed into national law by the EC Member States before 22 December 2002, the European Commission had started the next step in the infringement procedure against Belgium for failing to comply with the 2004 rulings of the European Court of Justice (Case C-143/04, Commission v Belgium, 18 November 2004) requiring Belgium (as well as Finland and Sweden) to implement the Directive 2001/29/EC (see IRIS 2003-8: 6, IRIS 2004-2: 5 and IRIS 2005-5: 5).

The law modifying the Copyright Act 1994 was published in the Official Gazette (*Moniteur Belge/Belgisch Staatsblad*) of 27 May 2005 and entered into force the same day. Some modified articles however will only enter into force on the day indicated by Royal Decree.

The law of 22 May 2005 in its title explicitly refers to the transposition of the Directive 2001/29/EC and indeed reflects the basic provisions of this Directive, introducing inter alia an exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction, an exclusive distribution right and an exclusive right of communication to the public for interactive on-demand distribution. The new provisions contain modified and extended exceptions on copyright and neighbouring rights, such as exceptions for the use made by public libraries, museums and archives, private copying, copying for educational purposes and scientific research, reproductions of broadcasts by social institutions with a non-commercial purpose, such as hospitals and prisons, and reporting on actual events. The exception to the right of communication to the public for acts of communication within the family circle has been broadened to include those made free of charge within the realm of school activities. Other articles of the new law aim to implement the provisions with regard to the protection of technical measures for works and other materials, as well as the obligations concerning (the protection of electronic) rights-management information. ■

● ***Wet van 22 mei 2005 houdende omzetting in het Belgisch recht van de Europese richtlijn 2001/29/EC van 22 mei 2001 betreffende de harmonisatie van bepaalde aspecten van het auteursrecht en de naburige rechten in de informatiemaatschappij, Belgisch Staatsblad 27 mei 2005 / Loi du 22 mai 2005 transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information,*** **(Belgian Law of 22 May 2005 implementing Directive 2001/29/EC of 22 May 2001) *Moniteur Belge* of 27 May 2005 available at: http://merlin.obs.coe.int/redirect.php?id=9715**

NL-FR-DE

CS – Management Board of the Telecommunications Agency Elected

Miloš Živković
Belgrade University School of Law Živković & Samardžić Law offices

At its session held on 23 May 2005, The National Assembly of Serbia has elected the President and the members of the Management Board of the Telecommunications Agency. This long-awaited election shall finally make possible the implementation of the 2003 Serbian Telecommunications Act (see IRIS 2003-6: 15). This Act contained a transitional provision defining that most of its provisions shall enter into force three months after the decision on the election of members of the Management Board of the Telecommunications Agency is published in the Official gazette. That decision was published on 27 May 2005, so the provisions will enter into force on 27 August 2005.

The election is very significant for the further development of telecommunications in Serbia in consideration of the fact that the Government has issued an invitation to tender for the advisors and consultants in this area in view of the future privatization of mobile operator(s). Also some other, currently non-regulated telecommunications services, such as internet service provision and cable distribution networks, shall be regulated.

Moreover, this election shall have a strong impact on implementation of broadcasting regulations, because the Telecommunications Agency, now finally established, has some competencies in the process of adopting the frequency allocation plans. Therefore, it might be expected that the re-composition of the Serbian telecommunications market, as well as the definite putting in order of the broadcasting market shall happen in the following twelve months. ■

DE – Ruling on Undercover Investigation of Surreptitious Advertising

On 20 January 2005, the Munich *Oberlandesgericht* (Court of Appeal - *OLG*) dismissed a complaint by a management consultancy company against a journalist. The plaintiff had made a claim for an injunction, information and damages because the defendant, while investigating an allegation of surreptitious advertising in an *ARD* evening series, had used business documents belonging to the plaintiff and a secretly filmed video. The video shows a female employee of the plaintiff in a sales meeting with syndicate representatives, offering to place certain themes or products in the series in return for payment.

In May 2004, the *Landgericht München* (Munich District Court) had ruled that the defendant should not use the plaintiff's business documents and the video recording. The *OLG* lifted this decision and dismissed all the plaintiff's claims.

The Court decided that the allegation of surreptitious advertising could only be substantiated by means of an undercover investigation. Furthermore, the plaintiff could not claim that a confidentiality agreement had been breached because such an agreement was invalid under Art. 138 of the Civil Code (*BGB*) and the plaintiff therefore had no right to protection. The illegal nature of such an agreement was clear from the fact that surreptitious TV advertising constituted a breach of Art. 7.6 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*) and Art. 10.4 of the Television Without Frontiers Directive. Furthermore, surreptitious advertising also infringed Art. 1 of the *Gesetz gegen unlauteren Wettbewerb* (Unfair Competition Act). Even an offer to sell surreptitious advertising was an illegal act. The plaintiff's activities were not simply advisory in nature, but constituted an unambiguous offer to deliberately incorporate products in the TV series in return for payment. The claim for an injunction should be rejected because the freedom of the press, which was a basic right, held more weight than the rights of the plaintiff. In situations where there was no other way of veryifing a suspicion, the scope of protection enshrined in Art. 5.1 of the Basic Law (*GG*) covered unlawfully researched information. Since public service broadcasting was financed by means of the licence fee, it was particularly important for the public interest that abuses connected with illegal surreptitious advertising should be brought to light.

As a result of the journalist's research, which has now been published, the illegal practice of product placement on television has come under public scrutiny. The placement of particular brands and products in programmes is illegal if it is done for advertising purposes. Such a purpose exists if money changes hands or if the product is given a degree of prominence that cannot be justified by editorial considerations. ■

Sonnia Wüst
Institute of European Media Law (EMR), Saarbrücken/Brussels

• *OLG München* (Munich Court of Appeal), ruling of 20.1.05 – case no.: 6 U 3236/04. Available at:
http://merlin.obs.coe.int/redirect.php?id=9694

DE

DE – *Bundestag* Passes Freedom of Information Act

With majority support from the Government coalition, the German *Bundestag* (lower house of parliament) passed the so-called *Informationsfreiheitsgesetz* (Freedom of Information Act - *IFG*) on 3 June 2005. The Act is designed to give citizens the right to access official information held by the federal authorities. Opponents of the Act fear it could lead to a heavier workload for the administrative authorities and courts. On the other hand, some people think the Act does not go far enough, particularly in view of the extensive list of exceptions to the right to information.

Now it is up to the *Bundesrat* (upper house of parliament) to adopt the Act. If it refuses to do so, the whole legislative process will automatically fail. Although the Government coalition could vote down the *Bundesrat's* veto in the *Bundestag*, the fact that the latter is soon to be dissolved means that there would not be time for the process to be completed.

Germany is one of the few remaining European countries in which the right of access to information (at state level) is not enshrined in law (see IRIS plus 2005-02, particularly concerning the importance of freedom of information for the media). However, freedom of information laws already exist at regional level in Berlin, Brandenburg, Schleswig-Holstein and North Rhine-Westphalia. ■

Thorsten Ader
Institute of European Media Law (EMR), Saarbrücken/Brussels

• Information on the legislative procedure is available at:
http://merlin.obs.coe.int/redirect.php?id=9750

DE

DE – Bill Banning Tobacco Advertising

The Federal Government has passed a Bill banning tobacco advertising, which is designed to implement the EC Directive of 26 May 2003 on the European regulation of tobacco advertising.

The Bill makes provision for a complete ban on advertising of tobacco products in broadcasting, the press and the Internet. Sponsorship by tobacco companies is also prohibited. The Directive must be transposed into German law by 31 July 2005.

A complaint from Germany about the EC Tobacco Advertising Directive has been pending with the ECJ since September 2003. In the complaint, the Federal Government is particularly critical of the ban on advertising in the printed media and information society services, as well as the ban on advertising and sponsorship of broadcast programmes. In the Government's opinion, the EU is not entitled to impose such a ban, since it also prohibits advertising in media that are aimed solely at the domestic market. However, the ECJ is not expected to rule on the complaint until the end of 2005 at the earliest. ■

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

• Press release of the Federal Government, 18 May 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9749

DE

DK – Complaint of the Turkish Embassy against the Kurdish ROJ TV

The Turkish Embassy in Denmark has on 12 January 2005 lodged a complaint against ROJ TV, a Kurdish satellite television channel registered in Denmark, before the Danish *Radio- og TV-Nævnet* (Radio and Television Board). The Turkish embassy asserts firstly that ROJ TV has maintained relations with illegal

organisations and persons, secondly that it has violated sections 114 and 114 a-d of the Danish Criminal Code, thirdly that it has maintained relations with organisations registered on the EU terror list, and that it has violated the *Bekendtgørelse nr. 1174 af 17.12.2002 om radio- og fjernsynsvirksomhed ved hjælp af satellit eller kabel, samt om programvirksomhed ved hjælp af kortbølgesendemuligheder* (Executive Order no. 1174 of 17 December 2002 on radio and television activities by means of satellite or cable and on programme activities by means of possibilities of short wave transmission - referred to as the Order), section 11, para. 3, by broadcasting programmes which incite to hatred based on race, sex, religion, nationality or sexual orientation. ROJ TV has dismissed the entire complaint.

On 21 April 2005, the Board made the following decision:

- The first and third points of the complaint have been rejected as the Board is not competent to make decisions concerning relations between broadcasters and organisations. The Board is not competent either to decide on offences of the Criminal Code and on matters concerning the EU terror list. All these complaints have to be reported to the police.
- Concerning the last point, the Turkish Embassy wants the Board to withdraw the registration – and consequently the broadcast permission – of ROJ TV on the grounds of violation of the Order section 11, paragraph 3. The Turkish Embassy has annexed two videotapes to the Complaint. Having seen the videotapes the Board has found that all the news presented in the programme concerns fights between Kurdish guerrillas and the Turkish military, Turkish troop movements and Kurdish guerrilla attacks on different targets. The discourse following the movies consists of reading of texts. There are no interviews or guest speakers.

Interpreting the expression "incitement to hatred" (*tilskyndelse til had*) the Board emphasizes that the fact that an organisation or person etc.... holds a certain opinion does not in itself involve an incitement. Furthermore, the information capable of being understood as an incitement has to be given with the purpose of inciting to hatred. The mere passing on of information does not in itself constitute the notion of "incitement" (*tilskyndelse*). It is completely legal for the free press to give relevant information on these matters. The mere transfer of information is expected to affect people with various preconceived opinions differently. This does not violate section 11, paragraph 3 of the Order.

Thus, the Board has not found any incitement to hatred of any sort expressed in the information passed on by ROJ TV and has concluded that section 11, para. 3, of the Order has not been violated. ■

Elisabeth Thuesen
Law Department
Copenhagen Business School

• *Radio- og TV-Nævnets afgørelse om klage over ROJ TV, af 21. april 2005* (Decision by the Radio- and TV-Board on complaint against ROJ TV, of 21 April 2005), available at:
http://merlin.obs.coe.int/redirect.php?id=9716

• *Bekendtgørelse nr. 1174 af 17.12.2002 om radio- og fjernsynsvirksomhed ved hjælp af satellit eller kabel, samt om programvirksomhed ved hjælp af kortbølgesendemuligheder* (Executive Order no. 1174 of 17 December 2002 on radio and television activities by means of satellite or cable, and on programme activities by means of possibilities of short wave transmission), available at:
http://merlin.obs.coe.int/redirect.php?id=9717

DA

ES – New Act on the Promotion of Digital Terrestrial Television

The Spanish Parliament has approved a new Act on the promotion of digital terrestrial TV, which also includes some provisions related to cable TV and media concentration. This new Act partially amends some previous Acts:

- Act 31/1987, on the Regulation of Telecommunications: The new Act establishes the sanction that must be imposed upon broadcasters that provide TV or radio services without having been granted a concession prior to broadcasting (art. 25 of the Act 31/1987). The new Act also amends the ownership limits in the radio sector (Sixth Additional Provision of the Act 31/1987): a natural or legal person may control up to 50% of the radio concessions available in a certain area, insofar the total number of overlapping radio concessions controlled in that area is not above five. A person can also control up to a third of the radio concessions with total or partial coverage of the State.
- Act 10/1988, on Private TV: The new Act abrogates article 4.3 of the Act 10/1988, which limited the number of national analogue terrestrial TV concessions to three. Now, the Government may grant new national analogue terrestrial TV concessions, if there are frequencies available. Some opposition parties and existing broadcasters have argued that creating new national analogue terrestrial TV broadcasters will be detrimental to the implementation of digital terrestrial TV in Spain. The Government does not share this view, and it considers that this decision may have positive consequences, such as the increase of competition and pluralism. The new Act has also amended the Third Additional Provision of Act 10/1988, which now establishes that it will be possible to simultaneously hold a national analogue terrestrial TV concession and a digital one until the analogue switch-off takes place.
- Act 41/1995, on Local Terrestrial TV: The new Act allows regional governments to reserve local governments up to two digital terrestrial TV programme services in a local multiplex (art. 9.1). It also allows regional governments to make it easier

for current local broadcasters to obtain a DTT license compared with new entrants (art. 9.3). The duration of the local terrestrial TV concessions is extended from 5 to 10 years (art. 14). The deadline established by the Act 41/1995 for the granting of these concessions by the regional Governments is extended until 31 December 2005 (Second Transitional Provision, third paragraph). Those which were lawfully providing local terrestrial TV services using analogue technology will have to provide the service using digital technology, but may keep providing the analogue service until 2008, provided there are frequencies available ((Second Transitional Provision, Fifth paragraph). No legal or natural person may own more than one concession in a certain area.

- Act 32/2003, Telecommunications Act: The Act 32/2003 had liberalized the cable TV market, but had established that this liberalization would only be effective after a transitional period. The new Act amends the Tenth Transitional Provision of the Act 32/2003, and it establishes that the liberalization will be effective as soon as the Government approves a Decree regulating how the new cable TV licences will be granted.

The new Act also amends other legal provisions (e.g., the Decree-Law 1/1998, on common telecommunications infrastructure in new buildings); it grants regional Governments a second regional DTTV multiplex; and it includes some new provisions related to the access to digital terrestrial TV by disabled people and to the promotion of the use of regional languages by the digital terrestrial public broadcasters.

The approval of this Act has been quite controversial. The Government considered it necessary to approve it using the procedure established for urgent measures, but some opposition parties were of the opinion that the Government was trying to avoid an in-depth parliamentary debate on the regulation of this area, and that allowing for the creation of new national analogue TV broadcasters was a negative move for the implementation of DTTV. Some opposition parties have also claimed that the ownership levels established for the radio sector do not limit media concentration in that sector, but rather encourage the opposite. The Government considers that it was necessary to put an end to the uncertainty created by a Judgment of the Supreme Court related to this issue, and which, four years later, had not yet been enforced by the former Government.

In any case, all parties agree that it is necessary to draft a new general bill on radio and TV, which should unify the existing regulation of the audiovisual sector; set up the basic principles concerning licensing, public broadcasting and safeguarding of pluralism; and create a national independent audiovisual regulatory authority. The Government expects to present this bill to the Parliament in the next few months, and it also intends to re-allocate the concessions for the management of the DTTV multiplexes that are currently not being used after the failure of Quiero TV. ■

Alberto Pérez Gómez
Entidad pública empresarial Red.es

● ***Ley 10/2005, de 14 de junio, de medidas urgentes de impulso de la televisión digital terrestre, de liberalización de la televisión por cable y de fomento del pluralismo, Boletín Oficial del Estado n. 142, de 15.06.2005*** **(Act 10/2005, on urgent measures for the promotion of digital terrestrial TV, liberalization of cable TV and promotion of media pluralism), available at: http://merlin.obs.coe.int/redirect.php?id=9734**

ES

FR – Access Providers Obliged for the First Time to Filter Access to a Racist Site

On 13 June, the senior assistant presiding judge of the regional court in Paris delivered a particularly high-profile order in an urgent matter which, for the first time, required Internet access providers (IAPs) to prevent access from France to a site with anti-Semitic and revisionist content. In previous cases involving similar disputes as urgent matters, the courts had refused to order filtering of this kind, invoking the principle of neutrality incumbent on the IAPs.

On 8 March, eight anti-racist associations had embarked on an urgent procedure before the courts against the providers hosting the disputed site, all of them American; the providers neither appeared at the hearing nor revealed the name of the site's editor (orders in urgent matters delivered on 25 March and 20 April 2005). The applicant associations then decided to turn to the access providers, a possibility provided by Article 6-I-8 of the Act of 21 June 2004 on confidence in the digital economy. This authorises the courts to issue an order under an urgent procedure requiring access providers to put a stop to damage if applicants are not able to obtain this from the host providers.

Before making his decision, the judge was careful to consider specifically if there were an objective possibility of taking effective action against the site's hosts. On this point he noted that the applicant associations had from the start of proceedings emphasised that there was a risk of not being able to implement the measure requested as the other parties carry out their activity in the United States. The defendant access providers claimed no injunction could be made against them as they believed the means of action directed against the host providers had not been exhausted, an argument that the judge qualified as "unreasonable and out of proportion". The access providers also claimed that the measure ordered by the judge dealing with the case as an

urgent matter (namely, filtering access to the site) should abide by the principle of proportionality and be stated in detail, whereas there was only a limited number of possible methods for preventing access to the site. Some even asserted that there were no techniques available for achieving this. The court, however, felt that technology had moved on since the Act of 21 June 2004 had been adopted; although a study pointed out the disadvantages inherent in any particular method that might be adopted, these could not be held to be insuperable. Nor did the court agree with the defendants that there was a risk of the site's successive removals to "digital havens". In the end, noting the "exhaustion" of the possible means of redress against the host providers and/or the authors of the disputed site, the judge in the urgent proceedings therefore ordered the access providers to implement "every measure" capable of interrupting access to the content of the site in question from France, without any obligation regarding result or monetary penalty for failure to perform. Each of them will have to provide justification to the applicant parties, within a period of ten days of the decision being announced, of the arrangements actually implemented. Although a number of the access providers denounced the decision, claiming that filtering measures could easily be circumvented, other commentators feel that the judge has been careful to not remove responsibility from content authors by respecting "a principle of subsidiarity according to which each service provider could be held responsible to some degree". ■

Amélie Blocman
Légipresse

● Regional Court of Paris (order in urgent proceedings), 13 June 2005, UEJF, SOS Racisme et al. v. The Planet.com, France Télécom et al

FR

FR – Cancellation of Approval for *Un long dimanche de fiançailles* Upheld

On 31 May the administrative court of appeal in Paris upheld the cancellation of the approval issued by the national cinematographic centre (*Centre national de la cinématographie* – CNC), thereby denying the film *Un long dimanche de fiançailles* access to public aid for production, on the grounds that the producer is not European (see IRIS 2005-1: 13). According to Article 7.II of Decree No. 99-130 of 24 February 1999 on financial support for the cinematographic industry, in order to be eligible for such support, "Production companies must also meet the following conditions: (...) 2. Not be controlled, within the meaning of Article 355-1 of the Act of 24 July referred to above, by one or more natural or legal persons with the nationality of a state other than those European states referred to in paragraph 1". It should be borne in mind that 32% of the capital of 2003 Productions, the company producing the film, is held by the company Warner Bros. France, a subsidiary of the American company Warner Bros. Entertainment Inc., which holds 97% of its capital, and 16% by the managing director of Warner Bros. France; the remainder of the capital is held by employees. The administrative court of appeal began by rejecting the argument raised by the appellant production company, as the provisions of the regulations in force neither prevented American companies from carrying out cinematographic production activities in France nor imposed on them conditions that differed from those applicable to French companies. They therefore did not infringe the principle of freedom of establishment embodied in the Franco-American agreement signed on 25 November 1959 and rendered public by Decree No. 60-1330 of 7 December 1960.

The court then turned to the more specific features of the case, particularly the structure of the production company's capital. It found that the natural persons holding shares in 2003 Productions, all senior managers at Warner France, should be considered to be acting in concert with the company in terms of decision-making on the part of the board of directors and general meetings of shareholders of the applicant production company. Thus Warner Bros. France, the parent company of 2003 Productions and 97%-owned subsidiary of the American company Warner Bros., should be considered as controlling the applicant company for the purposes of the works in question. The court therefore found that the CNC and 2003 Productions were not justified in claiming that the administrative court had erred in cancelling the decision to grant approval to the full-length film *Un long dimanche de fiançailles*.

The full court is scheduled to meet on 1 July to consider the appeal against the cancellation of the approval granted to the film *L'ex-femme de ma vie* for the same reasons. The think-tank set in motion by the Ministry of Culture to consider the possibility of extending production aid to non-European companies has not yet published the results of its work, although this was due on 15 June. ■

Amélie Blocman
Légipresse

● Administrative court of appeal in Paris, (4th chamber, A division), 31 May 2005; the company 2003 Productions and the CNC

FR

FR – Reform of the Public Cinematographic Register

The public cinematographic register was created in 1944 to ensure the legal security of the production and exploitation of cinematographic works by making public the contracts made in this field. The register gives full effect to the financial guarantees specific to the sector, such as security contracts and

allocation of revenue. Producers are thus able to obtain from specialist banks the financing needed for the production and post-production stages, and the register is recognised both in France and abroad as a particularly useful instrument of legal security that spares professionals having to resort to multiple, and expensive, contractual guarantees. Sixty years after it was set up, concerted efforts among the professional organisations in the cinematographic industry and audiovisual production has made it possible to determine the direction it now needs. In consequence, the Government has just passed an order amending the provisions of the code governing the cinematographic industry that concern the public cinematographic and audiovisual register and creating a register of options. The major innovation of the reform lies in the extension of the benefit of the register of options to non-cinematographic audiovisual works. Section III of the code governing the cinematographic industry has also been amended to allow publication in the register of certain documents that were previously not allowed, the formalities for lodging documents for inclusion or publication where they are in a foreign language have been simplified, and the nullity of unlisted clauses providing for the voiding of a contract under specific circumstances cancelled. The possibility of creating an optional register of options has also been introduced; this will ensure that option contracts covering the purchase of rights to adapt pre-existing literary works are public. To allow enough time for implementing the changes required by the reform, it will not come into force until 1 March 2006. ■

Amélie Blocman
Légipresse

● Order No. 2005-652 of 6 June 2005 concerning the public cinematographic and audiovisual register and creating a register of options, available at: http://merlin.obs.coe.int/redirect.php?id=8885

FR

GB – Regulator Publishes New Broadcasting Code

The Communications Act 2003 established a new unified regulator for communications, Ofcom (see IRIS 2003-8: 10). The Act requires Ofcom to draw up a code for television and radio which covers standards in programmes, sponsorship, fairness and privacy, replacing the six codes of its predecessor bodies (sec. 319). The Code also gives continuing effect to the content requirements of the Television Without Frontiers Directive (see Appendix 2 of the Code). The new Code has now been published and comes into force on 25 July 2005. The matters it covers are: Protecting the Under-Eighteens, Harm and Offence, Crime, Impartiality and Accuracy, Elections and Referendums, Fairness, Privacy, Sponsorship, and Commercial References.

The major changes included in the new Code are as follows. First, there is a new emphasis on freedom of expression by broadcasters, reflecting Article 10 of the European Convention on Human Rights. Thus the Code gives greater scope for audiences to exercise informed choice on what to view through the provision of information by broadcasters on what is to be broadcast; more explicit information is also given to broadcasters on the context of broadcasts which may be taken into account in applying the code. Challenging material may be broadcast even if it is considered offensive by some if it is editorially justified, appropriate information is given to the audience, and children may not be expected to be watching.

There is greater emphasis in the new Code on the protection of those under 18, and particularly children (under 15) as they are too young to exercise fully informed choice for themselves. Children must be protected by appropriate scheduling (notably the 9pm 'watershed' before which explicit material may not be broadcast) and, for premium subscription film services, a mandatory PIN mechanism. However, adult material classified as 18R by the British Board of Film Classification (hard-core pornography) may not be broadcast even with protection by PIN numbers.

There has also been some deregulation in relation to sponsorship and commercial references through the simplification of the rules. The ban on product placement is retained, but further consultation will take place on this. ■

Tony Prosser
School of Law
University of Bristol

● Ofcom Broadcasting Code, May 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9723

● Non-binding guidance notes on the Code, available at: http://merlin.obs.coe.int/redirect.php?id=9724

EN

GB – Regulator Responds to Green Paper on the BBC Royal Charter

The UK Government is now consulting on its plans for the issue of a new Royal Charter for the BBC in 2006 (see IRIS 2005-4: 11). Ofcom, the regulator for the commercial sector of broadcasting (which has some powers in relation to the BBC) has now published its response to the Government's proposals; these build on its broader review of public service broadcasting (see IRIS 2005-4: 10).

Ofcom stresses its support for the continuing role of the BBC as the cornerstone of the public service broadcasting system; it should be properly funded

and focused on providing public service programming and content, rather than directly competing with commercial broadcasters. However, other suppliers of public service programming and content should be supported to ensure that the BBC does not become isolated from the commercial sector as a monopoly supplier of public service broadcasting. The Government should explore potential sources of funding for public service broadcasting apart from that provided by the BBC; these could include an enhanced licence fee providing additional funding on top of that required by the BBC. New models of accountability and governance would also be required, with the Government's proposed BBC Trust (to replace the Corporation's Board of Governors) evolving into an independent body external to the BBC with responsibilities beyond the BBC.

The Ofcom response also deals with the question of the applicability of competition law to the BBC. Although it can apply general competition law to the Corporation, Ofcom does not have licensing powers over the BBC which would enable it to impose *ex ante* conditions to secure fair competition. Ofcom thus proposes a strengthened BBC Fair Trading Commitment which covers licence fee-funded as well as commercial services and which is subject to independent approval and oversight by Ofcom. The Agreement between the BBC and the minister should also contain a requirement that the Corporation has due regard to its effect on competition. Ofcom should also acquire the role of undertaking assessments of the effect on the market of new BBC services and of changes to existing ones. ■

Tony Prosser
School of Law
The University of Bristol

● Ofcom, Review of the BBC's Royal Charter: Ofcom Response to the Green Paper, 8 June 2005, available at:
http://merlin.obs.coe.int/redirect.php?id=9730

EN

GE – Statute on Broadcasting Adopted

On 23 December 2004 the Statute of the Republic of Georgia "On Broadcasting" was passed. The Statute has 11 chapters and consists of 77 articles.

The Statute regulates relations in the sphere of the organisation of public, commercial and communal broadcasting, formation, as well as functions of the independent regulatory body, licensing rules and procedures, and liability of broadcasters. It also includes provisions concerning ownership and transparency of mass media entities, as well as advertising.

Chapter 2 of the Statute deals with the principles of formation, financing, competence and status of the independent regulatory body – the National Telecommunications Commission of Georgia. Members of the Commission shall be appointed by the Parliament of Georgia. It shall be funded by licensees – broadcasters hand over 1 per cent of their annual income to the regulatory body. The Commission shall have the following powers: to approve the priorities in the sphere of broadcasting, to stipulate broadcasting license conditions, to issue, modify, suspend and withdraw licenses, to decide on complaints concerning the activities of broadcasters, to oversee compliance with the mass media, advertising, copyright, protection of minors' and consumers' rights legislation of licensees and the public broadcaster.

Chapter 3 of the Statute is devoted to public broadcasting in Georgia. According to its provisions such broadcasting shall be provided by the integrated independent public broadcasting company established on the basis of a state body, financed by and accountable to society. The public broadcaster shall be obliged to provide complete, objective and timely information, to respect political and ideological diversity, and to grant access to minorities (including political and ethnic ones) in its programming. At least 25 per cent of air time shall be devoted to broadcasting by independent programmers (Article 16). According to Article 17 public broadcasting shall be transmitted on two television and three radio channels. Article 36 stipulates that the public broadcaster shall not obtain a broadcasting license. The main source of funding of public broadcasting according to Article 33 shall be the license fee. The said provision shall enter into legal force as soon as special acts establishing the amount of the fee are adopted. Until that time public broadcasting shall be financed from the state budget. The public broadcaster is allowed to raise money by virtue of advertising placement.

Rules regarding advertising can be found in Chapter 8. Advertising shall be prohibited in the public broadcaster's programmes on week-ends and holidays, the amount of advertising on weekdays shall be limited to 30 minutes per day and 10 per cent (six minutes) per hour. The amount of advertising by commercial broadcasters shall be regulated in detail too. The Statute establishes some additional requirements regarding the content of television commercials. For instance, journalists of news and public affairs programmes shall not be allowed to participate in commercials (Article 63). The Statute establishes its prevalence over the Statute "On Advertising. ■

Dmitry Golovanov
The Moscow Media Law and Policy Center

● Statute of the Republic of Georgia "On Broadcasting", officially published in Georgian on 18 January 2005 in *Sakartvelos sakanonmdeblo matsne* (Legal Herald of Georgia). Available in Russian at:
http://merlin.obs.coe.int/redirect.php?id=9693

KA-RU

LV – Amendment of the Radio and Television Law Planned

Saeima, the Parliament of Latvia, is planning to make a short, but important amendment to the Radio and Television law, stipulating that the prohibition of harmful content is in force in the period between 07.00 – 24.00, instead of the current period of 07.00 – 22.00.

The existing regulation is as follows: Article 18 section 4 of Radio and Television Act envisages that "[B]roadcasting organisations may not distribute programmes and broadcasts with such content as may be harmful to the normal physical, mental and moral development of children and adolescents, except in cases when a specific broadcasting time is designated for such broadcasts (between the hours 22.00 and 07.00) or technical blocking devices are used (coding of broadcasts) (..)", and Section 5 of the same Article stipulates that "[B]etween the hours of 07:00 and 22:00, broadcasts containing physical or psychological violence (in visual or verbal form), bloody or horror scenes, as well as scenes relating to the use of narcotics, may not be distributed. The text may not contain vulgar or rude expressions and must not refer to sexual acts. This provision is not applicable to cable television if technical blocking devices are used." So, after the amendment instead of "22.00" it would read "24.00".

Ieva Bērziņa
Legal Counsellor
National Broadcasting Council of Latvia

On 26 May 2005 the *Saeima* adopted the amendments in the first reading (there are three readings necessary). In addition, amendments to the Latvian Codex of Administrative Violations are proposed envisaging the increase of maximum penalties that may be imposed on broadcasters. These events were immediately followed by fierce criticism by the broadcasting organizations. An NGO Association of Latvian Broadcasters sent a letter to *Saeima* and to the President claiming that the proposed amendment would hinder the development of electronic media in Latvia and cause unfair competition. The Association also objected to the fact that the amendments to the existing law are proposed instead of adopting the new Radio and Television Law, the draft of which had not even been officially submitted in Parliament.

As a response, in the following days one of the Parties at the *Saeima* submitted the prepared draft of the new Radio and Television law, as well as the draft Public Service Broadcasting law in the Presidium of *Saeima*. On 9 June 2005 the *Saeima* voted for transferring the drafts to the Committee of Human Rights and Social Issues of *Saeima* in order to prepare them for the first reading.

Currently it is difficult to assess whether the amendments to the existing law will be submitted for the second reading despite the broadcasters' criticism and the new drafts. There is a possibility that the amendment will be integrated directly into the new law. ■

NO – Case Concerning Political Advertising on Television

In the autumn of 2003, the Norwegian Media Authority sanctioned the national commercial broadcaster, TV2, and a local television company with fines for having broadcast political advertising in breach of the ban. The Norwegian Broadcasting Act prohibits political and religious advertising on television. The advertising in question was for a political party in connection with an election campaign.

The local broadcaster brought the case before the municipal court, claiming that the Authority's decision, and thus also the ban, represented an infringement of the fundamental right of freedom of speech as laid down in the Norwegian Constitution and in Article 10 of the European Convention on Human Rights. The Court upheld the decision made by the Authority.

The case was then brought before the Norwegian Supreme Court, which handed down its ruling in November 2004. The Supreme Court found that the authority's decision did not represent an infringement of Section 100 of the Norwegian Constitution with regard to freedom of speech. The Supreme Court also made an assessment in relation to Article 10 of the European Convention on Human Rights, and found that the decision was not in violation of the Convention. The Court also considered the ECHR judgements VgT v Switzerland and Murphy v Ireland (see IRIS 2001-7: 2 and IRIS 2003-9: 3). The Norwegian Supreme Court's ruling was not unanimous; one of the five judges cast a dissenting vote.

In May this year, the broadcaster in question, TVVest, announced that the case has been brought before the European Court of Human Rights.

At the end of 2004, a publicly-appointed commission submitted a proposal to relax the general ban on political and religious advertising as laid down in the Norwegian Broadcasting Act, choosing instead to introduce a time-limited exception to the ban before elections.

The proposal also contained more detailed alternatives regarding limitations on the amount of advertising. These limitations were based on both cost and time. The Norwegian Ministry of Culture and Church Affairs announced this spring that it will also circulate for public comment an alternative proposal, i.e. political advertising will only be banned for a limited period before elections. A legal proposition on this matter is expected later this year or next year. ■

Lars Winsvold
Norwegian Media Authority

- **Supreme Court Ruling on Political Advertising on TV, available at: http://merlin.obs.coe.int/redirect.php?id=9744**
- **Consultation document on Political Advertising on TV, available at: http://merlin.obs.coe.int/redirect.php?id=9745**

NO

PL – Strategy for Switch-over Adopted

Małgorzata Pek
National Broadcasting Council
Warsaw

On 4 May 2005 the Council of Ministers adopted a Strategy for the switch-over from analogue to digital technology on terrestrial television.

The introduction of digital terrestrial television (DVB-T) will be based on the standard EN 300 744 elaborated by ETSI.

The model of accelerated conversion was described as the most appropriate for Poland. It envisages introducing digital terrestrial television region by region. In any region where DVB-T will have been introduced the simulcast period should be relatively short; in general it should not exceed 12 months. However, this period will be set more precisely on the basis of the experience gained during simulcast transmission of the first launched multiplexes. It was pointed out that a decision on the switch-off of analogue transmission should be based on two criteria: achieving 95% accessibility (range criterion) and achieving 90% saturation (reception criterion). Fulfillment of both criteria would enable the switch-off of analogue transmission. Than the process would be launched in the next regions.

It is proposed that this strategy should be realized over a 10-year period. The final date for the switch-off of the analogue frequencies in the whole territory of Poland would be 31 December 2014.

It was stressed that due to conversion of the transmission technology the current amount of programme services offered via terrestrial mode in analogue mode (7 channels) cannot be reduced.

The model of accelerated conversion provides that in the first phase 2 multiplexes would be launched, that would enable digital transmission of 8 – 10 television programme services. It would cover all existing terrestrial nationwide, regional and cross-regional channels, plus some additional Polish satellite channels. The reception of programmes transmitted on the first two multiplexes shall be free of charge.

The strategy also includes the timetable for the follow-up steps to be taken within the process of its realization. It will also subject to evaluation and update. ■

- ***Strategia przejscia z techniki analogowej na cyfrową w zakresie telewizji naziemnej* (Strategy for the switch-over from analogue to digital technology on terrestrial television), available at:**
http://merlin.obs.coe.int/redirect.php?id=9687

PL

PT – New Media Regulatory Body Proposed

Luis Antonio Santos
Department of Communication Sciences
University of Minho

The Portuguese government has presented to Parliament a proposal for a Law to create a new media regulatory body. Given the Socialist Party's absolute majority in the Chamber the project, which is now under discussion, should be approved without significant changes.

The new media regulatory entity will – according to the proposal – be composed of a five member regulatory council (four of them to be nominated by Parliament) article 14, an executive board (where two of its three members will be the president and the vice-president of the regulatory council) article 32, and a fiscal member (also nominated by Parliament) article 34. Its income will result from a combination of sources: national budget provision, taxes to be charged to media operators, fines, and "any other subsidies or financial support provisions" (article 45, g).

The *Entidade Reguladora para a Comunicação Social* (Media Regulatory Entity) will in effect replace the High Authority for Media (thus revoking Law 43/98 of 6 August 1998) and it is presented by the government as the first step towards an all-encompassing reform of the media regulation sector. Announcing this proposal to Parliament, the Portuguese minister for Parliamentary Affairs, Augusto Santos Silva, has also put forward the proposed creation of two new figures - a viewers' ombudsperson and a listeners' ombudsperson -, whilst indicating his intention to present to Parliament, before the end of 2005, a new radio law, a new television law, and revisions of the public service concession contract with RTP (Portuguese Radio and Television), the journalists entitlement regulation, and the incentives system for local and regional media. ■

- ***Proposta de Lei que cria a Entidade Reguladora para a Comunicação Social* (Proposal for an Act creating a Media Regulatory Entity) of 28 May 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9718

- **Proposal for an Act creating a viewers' ombudsperson and a listeners' ombudsperson of 28 May 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9719

PT

RO – TV Press Reviews Must Follow Advertising Rules

At the end of May 2005, the *Consiliul Național al Audiovizualului* (Romanian regulatory body for electronic media – CNA) instructed Romanian TV companies to comply more closely with the provisions of CNA Decision No. 254/2004 on sponsorship, advertising and teleshopping (*Decizia CNA nr. 254/2004 privind sponsorizarea, publicitatea și teleshoppingul*), particularly in TV press review programmes. According to the decision, this step was necessitated by the fact that "certain television programmes illegally advertise particular publications, which has a negative impact on free competition in the printed media market" (*Instrucțiunea CNA din 23 mai 2005*). As a result, on the basis of Art. 17 (d) and (e) of CNA Act No. 504/2002, the CNA stipulated the following:
- Particular printed media or other broadcasters may

not be advertised in TV sports programmes or discussion shows (no lists of contents, newspaper pages, titles or logos may be shown).
- Independent journalists may be invited to appear in such TV programmes in order to give their opinions on events of public interest. If a particular subject is dealt with by a publication or if certain accusations are made by a publication, this source should be mentioned.
- During TV press review programmes, the articles that are discussed and the titles of the publications concerned may be quoted and shown, although care should be taken not to give particular attention to one publication at the expense of others.
- The CNA requires that press review programmes should refer to articles published in national minority publications when dealing with subjects and events of particular public interest. ■

Mariana Stoican
Radio Romania International
Bucharest

● ***Instrucţiunea CNA din 23 mai 2005*, available at:**
http://merlin.obs.coe.int/redirect.php?id=9695
RO

SK – Draft Amendment of Advertising Act

In March 2005, the Slovakian Ministry of Trade and Commerce prepared an amendment to Advertising Act No. 147/2001 (*zákon o reklame*). If the new instrument is adopted by the National Assembly of the Republic of Slovakia, it will result in an explicit ban on sponsorship and more stringent restrictions on advertising for tobacco products on all forms of data carrier and in all types of commercial communication, as required by Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. According to Art. 2.1 (d) of the Act, sponsorship is defined as a financial or material contribution to a natural or legal person for an event or activity carried out for the purpose or effect of advertising. Advertising and sponsorship of tobacco products on TV and radio has been banned since 4 October 2000 under Broadcasting and Retransmission Act No. 308/2000 (*zákon o vysielaní a retransmisii*). ■

Jana Markechova
Freshfields Bruckhaus Deringer
Bratislava

TR – Regulatory Body Attacks Erotic TV

On 6 May 2005, the Turkish broadcasting regulator (*RTÜK*) announced that it planned to remove four channels showing erotic content from the list of channels transmitted by the satellite company *Digitürk*. The channels concerned - Adult Channel, Exotica TV, Playboy TV and Rouge TV - are all broadcast from abroad and have about 12,000 subscribers in Turkey. They will no longer be available in Turkey because the regulator claims they infringe "the moral values of the nation". *Digitürk* has already said it will appeal against the ban.

The *RTÜK* also issued warnings to eight private broadcasters for showing a perfume advertisement which had damaged the "sense of shame" of Turkish people. The regulator did not indicate which particular advertisement had caused offence.

The *RTÜK* had only recently caused uproar with its announcement that it wanted to set up a separate body to monitor reality shows. It had described these programmes as a product of "brutal capitalism". ■

Thorsten Ader
Institute of European Media Law (EMR), Saarbrücken/Brussels

● ***RTÜK* press releases of 6 May 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=9696
TR

US – Non-Telecom Carrier Status for Cable Modem Service Upheld

On 27 June 2005, the United States Supreme Court affirmed a Federal Communications Commission ("FCC") March 2002 Declaratory Ruling that high-speed cable modems constituted an "information service" rather than a "telecommunications service". This effectively held that telco but not cable broadband lines were subject to common carrier regulation. Telco providers must provide services on a traditional common carrier, first-come first served non-discriminatory basis; information providers need not.

Under the decision, cable operators do not need to make channel capacity availability to competing internet service providers ("ISPs") offering broadband internet access. The decision may prevent independent ISPs from entering the high-speed cable modem market unless affiliated with major cable operators.

In an opinion by Justice Thomas, a 6-3 majority of the Court relied upon the language of the US 1996 Telecommunications Act. 47 U.S.C. ' 153(20), which defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…" In turn, 47 U.S.C. ' 153(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public…regardless of the facilities used".

The Court did not interpret the statutory terms on its own. Instead, it relied upon a precedent, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). That case held that where ambiguities exist in a statute, an administrative agency rather than a court has the primary responsibility for construing the law, since the agency has greater expertise than a reviewing court. Justice Thomas stated that the 1996 Telecoms Act definitions were ambiguous and that the FCC had applied a "reasonable" construction. He pointed out that the agency did not need to create "the best reading", but rather just a "permissible reading" - spending more than a dozen pages on whether the Commission's definition of the term "offer" of service was reasonable (the point on which the dissenters differed). The Court seemed to be somewhat uncomfortable, however, with the fact that the FCC's holding imposed common carrier obligations on high-speed digital subscriber line ("DSL") offerings by telephone companies, but not cable modem services–which compete head-to-head in the US internet access market.

This leaves some intriguing questions, particularly as cable and telephone companies offer similar services through 'triple-play" offerings of video, voice, and data. Cable operators sell telephony through voice over internet protocol ("VOIP") sharing precisely the same bandwidth as for modems. And telephone companies propose offering fibre-optic lines for digital television. The Court noted that policies as to both industries might change with time, however, and emphasized that the FCC already was considering application of an information services classification to telephone companies.

Since the Commission is not likely to change its deregulatory policy, in the near future any change in the Court's result presumably would have to come from Congress. ■

Michael Botein
Media Center
New York Law School
Visiting Professor
Southern Illinois
University
Law School

● Decision of the US Supreme Court, National Cable & Telecommunications Association v. Brand X Internet Services, No. 04-277, 27 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9747

EN

US – Filesharing Software Distributors May Be Liable for Inducing Infringement

On 27 June 2005, the entertainment industry won an important battle against filesharing, but the war is certain to continue. In Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd, Case No. 04-480, the Court reversed a lower court decision that had excused filesharing software companies from liability for copyright infringement (see IRIS 2005-2: 19, IRIS 2004-8: 15 and IRIS 2003-6: 14). In doing so, the Court introduced the doctrine of "inducement", a new basis for imposing liability on product and software providers whose end users commit copyright infringement. The Court defined inducement as "distribut[ing] a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement". The Court remanded the case to the trial court for further proceedings, sending what most commentators see as a strong signal that the trial court should hold the defendants liable.

Although U.S. courts have long used the term "inducement" in connection with derivative or contributory liability for copyright infringement, the Grokster opinion's "inducement" test for contributory copyright infringement is arguably new and certainly significant. Just this past year, the entertainment industry lobbied the U.S. Congress to amend the U.S. Copyright Act to include such a doctrine. The Court's action makes this proposed amendment unnecessary.

Until now, most discussions of contributory liability for copyright infringement focused on the capabilities of the technology in question. This focus was a result of the Court's landmark decision in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), which held that "the sale of copying equipment... does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses". The Grokster case moves the focus away from the capabilities of products to the intent and actions of their manufacturers and distributors.

Neither side in Grokster received everything it wanted from the Court. The entertainment industry hoped for a new interpretation of *Sony* that imposed liability for distributing a product whose infringing uses outweighed its non-infringing uses. Filesharing software distributors hoped for a reinterpretation of *Sony* that created an absolute shield from liability if the product had *any* potential non-infringing use.

The unanimous opinion in Grokster represents a sort of compromise between these two positions, as it introduces a new and additional theory of liability for inducement instead of changing Sony. The unanimous Grokster opinion declined to address Sony, but two concurring opinions showed that the Court was deeply split on Sony. (Three of the nine justices shared the entertainment industry's preference for a weakened interpretation of Sony and three justices favored the strong version advocated by the filesharing companies.) The end result is that the defendants in Grokster, as well as other technology companies, are not liable merely for distributing a product that may enable infringement, but they still may be liable if their words or actions actively promote or encourage infringement.

Mark Schultz
Southern Illinois University School of Law

As a consequence of this decision, most commentators agree that Grokster and Streamcast are almost certainly doomed to lose the case and be driven to bankruptcy. This decision does not, however, ban technology that enables filesharing. Lawyers will advise future developers and distributors of such technology to be very careful to avoid promoting or encouraging infringement in their words and actions, both privately and to consumers. Major legislative action against filesharing is now unlikely to occur in the near future. There will be further court battles regarding filesharing, as the Grokster decision leaves much room for further dispute and interpretation. ■

● **Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd, Case No. 04-480. (US Supreme Court 27 June 2005), available at: http://merlin.obs.coe.int/redirect.php?id=9748**

EN

PUBLICATIONS

Draughn, G., Withers, E.,
Advertising self-regulation in Europe
Order : http://www.easa-alliance.org/
EUR 175

Fosbrook, D., Laing, A. C.,
Media Contracts Handbook
GB, London
October 2005, Thomson Sweet & Maxwell
ISBN 0 421 92020 3

Barendt, E.,
Freedom of Speech
GB, Oxford,
August 2005, Oxford University Press
ISBN 0199244510

Crabb, K.,
The Movie Business: The Definitive Guide to the Legal and Financial Secrets of Getting Your Movie Made
2005, Simon & Schuster
ISBN 0743264924

Ra Plog, Ph.,
Zugang zum digitalen Fernsehen in Frankreich
DE, Baden Baden
2005, Nomos Verlag
ISBN 3-8329-1123-5
EUR 39

Claus, Ch.,
Hyperlinks und die Nutzung und Verwertung von geschützten Inhalten im Internet
DE, Berlin
2004, Verlag für Wissenschaft und Forschung
EUR 49,90

Jakobshagen, P.,
Filmrecht – die Verträge
2005, Ppv Medien
ISBN 393784113X

Rehbock K.,
Medien- und Presserecht
Deutschland, München
2005, Beckverlag
ISBN 3406535771

Pollaud-Dulian, F.,
Le droit d'auteur
FR, Paris
2004, Economica (collection Corpus)
ISBN 2717849262

Hoebeke, S.,
Le droit de la presse : Presse écrite, Presse audiovisuelle, Presse électronique
FR, Paris
2005, Academia-Bruylant
ISBN 2872097708

Fougea, J-P., Rogard, P.,
Les aides au financement : Cinéma et télévision
FR, Paris
2004, Editions DIXIT
ISBN 2844810853

AGENDA

Protecting the Media
15 September 2005
Organiser: IBC UK Conferences
Venue: London
Information & Registration:
Tel.: +44(0)20 7017 5505
Fax: +44(0)20 7017 4746
E-mail: cust.serv@informa.com
http://www.ibclegal.com/media2005