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INTERNATIONAL

NATIONAL

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INTERNATIONAL

UNESCO

New Convention on Diversity of Cultural Expressions

On 20 October 2005, the General Conference of UNESCO adopted a Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention seeks to protect and promote the diversity of cultural expressions and to create the appropriate climate for cultures to thrive. Other key goals are to strengthen awareness of and respect for such diversity at all levels and to encourage intercultural dialogue. The Convention also aims to stress the linkage "between culture and development for all countries, particularly for developing countries" and to "give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning". It sets itself the task of upholding both State sovereignty and international cooperation in the promotion of cultural diversity.

Article 2 sets out the Convention's "Guiding Principles": respect for human rights and fundamental freedoms; [State] sovereignty; equal dignity and respect for all cultures; international solidarity and cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access, and openness and balance.

The definitional framework for the Convention is provided in Article 4, which describes "cultural expressions" as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content".

The promotion and protection of cultural expressions are each given separate consideration in the context of States Parties' relevant rights and obligations (Articles 7 and 8, respectively). In more general terms, a range of possible measures for States to attain the objectives of the Convention are explored in Article 6 and these measures implicate both the

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regulatory and allocative capacities of States.

A number of procedural priorities are identified as being important for the pursuit of the Convention's goals: information-sharing and transparency; education and public awareness; participation of civil society, and promotion of international cooperation (Articles 9-12, respectively). The Convention also underscores the importance of States Parties' commitment to the integration of culture in their development policies at all levels with a view to maintaining and enhancing the diversity of cultural expressions (Article 13), as well as to "cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector" (Article 14).

Article 18 of the Convention provides for the establishment of an "International Fund for Cultural Diversity" which is to be financed by, *inter alia*, voluntary contributions by States Parties, "funds appropriated for this purpose by the General Conference of UNESCO", contributions from miscellaneous sources and "any interest due on resources of the Fund". The administration of the Fund is one of the tasks to be carried out by an Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, which is to be set up pursuant to Article 23 of the Convention.

In accordance with Article 29, the Convention will enter into force three months after its ratification by 30 States. ■

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● Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9889
EN-ES-FR-RU

OSCE

Representative on Freedom of the Media: Declaration on Pluralism in the Media and the Internet

On 14 October 2005, the OSCE Representative on Freedom of the Media, Miklos Haraszti, issued the "Declaration on Pluralism in the Media and the Internet" at this year's Central Asian Media Conference in Almaty, Kazakhstan.

The annual conference was organized under the auspices of the OSCE Representative on Freedom of the Media and the OSCE Centre in Almaty.

For the seventh time, 150 participants from all five Central Asian countries – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan - gathered to discuss developments in the region in the field of media. The participants included journalists and representatives of non-governmental media organizations, as well as officials, experts and foreign guests. As in previous years, the conference provided a unique opportunity for interaction, an exchange of views among the participants and a creation of new bonds between regional colleagues.

The two main topics this year were Pluralism in the Media and the Internet.

OSCE Media Representative Miklos Haraszti said that "specifically in Central Asia, the Internet has in the last couple of years become in some countries the last resort of pluralism and the only alternative source of pluralistic information compared to television and print press". He added: "In all Central Asian countries it is becoming the future of pluralistic media. International organizations like the OSCE should engage more than ever in protection of freedom of the Internet".

Furthermore, the debates during the Almaty Conference stressed that States should ease state secret and other laws that unnecessarily restrict access to information. States should adopt and implement comprehensive freedom of information laws which maximize media and public access to government-held information.

Also, the conference concluded that further efforts should be made towards decriminalization of offences concerning honour and dignity of individuals. The concepts of distinguishing between criticism of private and public figures should be introduced throughout punitive legislation in order to allow for vivid debate on public-interest issues. ■

Christian Möller & Hanna Vuokko
Office of the OSCE Representative on Freedom of the Media, Vienna

● Almaty Declaration on Pluralism in the Media and the Internet issued during the annual Central Asian Media Conference of 13-14 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9892
EN-RU

COUNCIL OF EUROPE

European Court of Human Rights: Case of I.A. v. Turkey

The European Court of Human Rights in a judgment of 13 September 2005 has come to the conclusion that the Turkish authorities did not violate freedom of expression by convicting a book publisher for publishing insults against "God, the Religion, the Prophet and the Holy Book". The managing director of the Berfin publishing house in France was sen-

tenced to two years' imprisonment, which was later commuted to a fine.

The European Court in Strasbourg is of the opinion that this interference in the applicant's right to freedom of expression had been prescribed by law (art. 175 §§ 3 and 4 of the Turkish Criminal Code) and had pursued the legitimate aims of preventing disorder and protecting morals and the rights of others. The issue for the Court was to determine whether the conviction of the publisher had been necessary in a democratic society. This involved the balancing of the applicant's right to impart his ideas on religious theory to the public, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand. The Court reiterates that religious people have to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. A distinction is to be made however between "provocative" opinions and abusive attacks on one's religion. According to the Court, one part of the book indeed contained an abusive attack on the Prophet of Islam, whereas it is asserted that some of the statements and words of the Prophet were "inspired in a surge of exultation, in Aisha's arms… God's messenger broke his fast trough sexual intercourse, after dinner and before prayer". In the book it is stated that "Mohammed did not forbid sexual intercourse with a dead person or a living animal". The Court accepts that believers could legitimately feel that these passages of the book constituted an unwarranted and offensive attack on them. Hence, the conviction of the publisher was a measure that was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. As the book was not seized and the publisher had only to pay an insignificant fine, the Court comes, by four votes to three, to the conclusion that the Turkish authorities did not violate the right to freedom of expression. According to the three dissenting opinions (of the French, Portuguese and Czech judges) the majority of the Court followed its traditional case law on blasphemy leaving a wide margin of appreciation to the Member States. According to the three dissenters, the Court should reconsider its jurisprudence in the case of Otto-Preminger-Institut v. Austria and Wingrove v. United Kingdom, as this approach gave too much support to conformist speech and to the "*pensée unique*", implying a cold and frightening approach to freedom of expression. The majority of the Court however (the Turkish, Georgian, Hungarian and San Marino judges) argued that the conviction of the book publisher met a pressing social need ie protecting the rights of others. Accordingly there has been no violation of Article 10 of the Convention. ■

Dirk Voorhoof
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● Judgment by the European Court of Human Rights (Second Section), case of I.A. v. Turkey, Application no. 42571/98 of 13 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

EUROPEAN UNION

European Commission: Action Plan to Combat Counterfeiting and Piracy

The European Commission has unveiled a Plan listing a number of operational actions which aim to enhance customs authorities' efficiency in tackling the increase of counterfeiting activities and piracy.

The influx of counterfeit goods such as fake foodstuffs, medicines, games and DVDs has prompted Community action. Not only are the industrial, literary and artistic sectors at stake but also the health and safety of European consumers. The Action Plan seeks to improve the implementation of EU policies and legislation in the field of piracy at customs level and suggests heightened cooperation with business representatives as well as with trade partners.

The proposed measures should converge towards strengthening anti-counterfeit controls by Customs and focus, among others, on the following actions:

- A new business-customs working group to assess the need of elaborating on EU anti-counterfeiting legislation in order to improve the protection of legitimate business at viable costs.
- A Task Force made up of Customs experts from Member States to improve anti-counterfeiting controls.
- The completion of an anti-counterfeiting risk management guide for Member States but also for international trade partners.
- A sophisticated electronic system allowing real-time transmission of information, which would make it particularly easy for rights-holders to transmit information to the competent authorities and for Customs to consult intellectual property databases.
- The Commission will encourage the signature of memoranda of understanding with airlines, shipping companies, and express carriers in order to foster the exchange of information as well as increase awareness of the risks posed by existing illegal activities.
- The Commission will also, together with Member States, consider eventual amendments to the World Trade Organisation Intellectual Property Rights ("TRIPS") Agreement so that anti-counterfeiting controls are not confined to imports but also exports and transit operations. The efforts will con-

centrate on fully implementing, strengthening or developing bilateral Customs cooperation agreements with China, Japan, the USA and other trading partners.

This Plan concentrates on operational actions at Customs level and will work in conjunction with other EU legal instruments. The "Enforcement" Directive (Directive 2004/48/EC) prescribes that Member States should apply, as of 2006, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting activities and piracy (see IRIS 2004-4: 5 and IRIS 2004-6: 4). Another proposed Directive would align national criminal law provisions against infringements of intellectual property rights and piracy (see IRIS 2005-8: 7) and in November 2004, the Commission adopted a strategy for the enforcement of intellectual property rights in third countries (see IRIS 2005-1: 5). ■

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● "Commission launches action plan to combat counterfeiting and piracy", press release IP/05/1247 of 11 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9866
EN-FR-DE

European Commission: Recommendation on Management of Online Rights in Musical Works

In July 2005, the European Commission proposed in the staff working document "Study on a community initiative on the cross border collective management of copyright" (see IRIS 2005-8: 8) three options to improve the cross-border licensing of music to online music stores: 1) do nothing; 2) suggest ways in which cross-border cooperation between national collecting societies in the 25 Member States can be improved; 3) give rights-holders the additional choice to authorise a collective rights manager for the online use of their musical works across the entire EU.

In the Study, the European Commission favoured option 3 for two main reasons: firstly, option 3 enables rightsholders to choose which collecting society they want to join; secondly, this option enables competition between collecting societies, and, as a result, would lead to the improvement of services offered by collecting societies.

In the Impact Assessment (October 2005), the European Commission collected the opinions of 85 stakeholders who submitted their opinions on the Study. The stakeholders agree that option 1 is not an feasible option. However, when considering options 2 and 3, not all stakeholders favour the same option. According to the Impact Assessment, Option 2 is favoured by major record companies, record producer societies, radio broadcasters, niche European cross-border television channels (e.g. MTV), online music providers and the European Consumers' Organisation (BEUC). The majority of collective rights managers favour modified versions of Option 2. Option 3 is favoured by the music publishers' community, the independent record labels and certain collective rights managers.

In the Recommendation, the European Commission recommends a reform package that enables the parallel deployment of the business models embedded in options 2 and 3. The Recommendation proposes to eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements. Furthermore, rightsholders who do not wish to make use of reciprocal agreements to manage their repertoire would be offered the additional option to tender their repertoire for EU-wide direct licensing. The Recommendation also introduces rules on governance, transparency, equitable distribution of royalties, non-discrimination of representation, dispute settlement and accountability of collective rights managers, whether they manage rights according to Option 2 or Option 3. Transparency could be achieved by introducing governance rules setting out the duties that collective rights managers owe to both rightsholders and users. ■

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● Recommendation of the European Commission on collective cross-border management of copyright and related rights for legitimate online music services, 30 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9870
EN-FR-DE

● Commission Staff Working Document - Annex to the Recommendation of the European Commission on collective cross-border management of copyright and related rights for legitimate online music services - Impact Assessment {C(2005)3764 final} SEC(2005) 1254, available at: http://merlin.obs.coe.int/redirect.php?id=9873
EN

European Commission: Strategy for European Digital Libraries

As part of the "i2010-a European Information Society for growth and jobs" initiative (see IRIS 2005-7: 5), the Commission has now adopted a Communication setting out its strategy with regard to European digital libraries. The aim is to make Europe's written and audiovisual heritage available on the Internet. It is thought that transferring Europe's historic and cultural heritage onto digital content will be beneficial to European citizens in their daily occupations but will also provide innovators, artists and entrepreneurs with the material they need for increased creativity. The task at hand will be arduous as the three key areas for action, namely digitisation,

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online accessibility and digital preservation will be dealing with all manner of content: books, film fragments, photographs, manuscripts, music… which entail billions of books in European libraries and millions of hours of film and video in broadcasting archives. Private involvement and public/private partnerships are deemed paramount towards achieving this goal and for its part the Commission will have a coordinating role and contribute funding through its research programmes and through the *e*content*plus* programme (see IRIS 2005-3: 5).

The results of an online consultation on digitisation and digital preservation issues to be held this year will feed into a Commission proposal for a Recommendation to appear on this very matter in 2006. The results will also support other projects such as the review of EU copyright rules (2006) and the implementation of the Community R&D programmes (2007). In addition, a High Level Group on digital libraries will advise the Commission on how to address this endeavour at European level. Collaboration among Member States will be facilitated by an update of the Lund action plan, providing operational guidelines on digitisation (2005) and the Commission will also ensure coordination by working alongside cultural institutions such as national libraries. ■

- **"Commission unveils plans for European digital libraries", press release IP/05/1202 of 30 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9860**

EN-FR-DE

- **Communication of 30 September 2005 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - i2010 : Digital libraries, COM/2005/0465 final, available at: http://merlin.obs.coe.int/redirect.php?id=9863**

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

European Commission: Irish Broadcasting Funding Scheme Approved

Marie McGonagle
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On 10 October 2005, the Irish Minister for Communications received notification from the EU Commission that the broadcasting funding scheme established under the Broadcasting (Funding) Act 2003 is compatible with EU state aid and competition rules. The scheme, which has been devised by the Broadcasting Commission of Ireland (BCI) in accordance with the Act, is called "Sound and Vision". "Sound and Vision" is a production grant scheme designed to support new television and radio programmes in the areas of Irish culture, heritage and experience and adult literacy. All broadcasters in the State, both public service and private commercial, will be entitled to apply for grants from the fund. The fund is made possible by setting aside 5% of the monies for the television licence fee collected from the public. It is estimated that the fund will have an annual value in excess of EUR 8 million. The implementation of the scheme was delayed by the need to obtain the approval of the EU Commission. As a result a total of EUR 23 million has already accumulated in the fund. The BCI has been ready to put the scheme into operation for some time now and should therefore be in a position to begin the process of allocating funding immediately. ■

- **Broadcasting (Funding) Act 2003, available at: http://merlin.obs.coe.int/redirect.php?id=9883**
- **Details of funding scheme, available at: http://merlin.obs.coe.int/redirect.php?id=9884**
- **Announcement of EU Commission approval, available at: http://merlin.obs.coe.int/redirect.php?id=9885**

EN

European Parliament: Report on the Proposal for a Decision Relating to MEDIA 2007

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Following the European Commission's proposal for a decision concerning the implementation of the MEDIA 2007 support programme intended for the European audiovisual sector (see IRIS 2004-9: 5), the European Parliament has taken up the dossier. MEDIA 2007 (which is to run through to 2013) aims to significantly strengthen the European audiovisual sector's competitiveness. The report sums up the three main priorities as follows:

- Strengthening of cooperation at all programme levels of MEDIA (training, development, distribution and promotion) to provide a basis for cross-border cooperation in order to counter the fragmentation of national markets in this sector.
- Facilitating access to funding for SMEs through specialised financial institutes (undercapitalisation of the European audiovisual sector must indeed be overcome through the availability of special financial services specifically geared towards SMEs).
- Contributing, through MEDIA 2007, to the digitisation of the European audiovisual sector and to the development and distribution of audiovisual works.

The proposed total budget for MEDIA 2007 is EUR 1055 million and it will integrate the previously separate training and development/distribution programmes (MEDIA Training and Media Plus – see IRIS 2004-6: 4). The report is due to be on the Parliament's agenda on 24 October 2005. ■

- **Report from the Committee on Culture and Education of 28 September 2005 on the proposal for a decision of the European Parliament and of the Council concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), available at: http://merlin.obs.coe.int/redirect.php?id=9874**

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

IRIS LEGAL OBSERVATIONS
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NATIONAL

AT – Law on Transmitters Tax before the Constitutional Court

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During the summer of 2005, the *Land* of Lower Austria enacted a law according to which transmitters for mobile phone networks on private property are to be taxed. The law will enter into force on 1 January 2006. The tax will be levied for every transmitter and will be lower the more transmitters there are on a mast. The *Land* has justified the tax in terms of health, locality and countryside protection. According to its own estimates, it expects to make around EUR 45 million per year.

The tax is, in political terms, extremely controversial. The Federal Minister for Traffic, Innovation and Technology spoke out against the *Land*-level law, as he feared it would damage the telecommunications industry. The federal government could have prevented the law being passed, but raised no objection.

Mobile phone operators filed a petition with the Constitutional Court to declare the law unconstitutional or to find that it contravenes Community law. The European Union has unofficially announced its desire to instigate proceedings against the Republic of Austria for breaching the Community treaty. The affair is at the current time in the hands of the legal service of the Commission where, in consultation with other Commission offices, it is being finally reviewed. ■

● **Transmitters tax law of Lower Austria, 3615-0 *Stammgesetz* 72/05 2005-08-31, issued on 31 August 2005**

DE

AT – Federal Communications Court on Unauthorised Advertising

Kathrin Berger
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In its ruling of 6 September 2005 the Federal Communications Court (BKS) issued two decisions on unauthorised advertising on the Austrian Broadcasting channel (ORF), the public service broadcaster.

In one instance the ORF had broadcast two CD adverts without distinguishing them from the preceding or subsequent programme content being shown. In the opinion of the BKS, this constituted an infringement of § 13 paragraph 3 of the Austrian Broadcasting Act, whereby advertising must be clearly recognisable as such, and by using visual and acoustic effects must be clearly distinguishable from other parts of the programme. The fact that these were adverts was indicated by the fading-in of the insert "ORF Advertising". However there was no distinctive acoustic and visual separation from the programme content being broadcast before and after.

In its second decision, the BKS established that there had been a violation of the ban on surreptitious advertising under § 14 paragraph 2 of the Austrian Broadcasting Act. The Austrian public service broadcaster had, after the general weather forecast, shown the "skiing weather", which was introduced with words by the weather forecast presenter. During the "skiing weather", shots of mountains and skiers were displayed. At the bottom end of the screen an insert with the name of an Austrian skiing region was faded in. The text read out which accompanied the images also referred to this skiing region. Finally a still was faded in, on which, amongst other things, reference was made to the support of a tourist association.

The BKS ruled that the preconditions for inadmissible surreptitious advertising were present. The advert had been intentionally earmarked by the ORF for advertising purposes. It emerged, amongst other things, that the broadcasting had been offered for sale through the advertising firm of the company and local authority interested in the ORF. There was, however, no tangible concrete agreement with the ORF. Moreover the advert was so camouflaged that it was not recognisable as such to the general public. Given the way it was broadcast, as well the editorial transition involved, the impression was given that this was a special part of the weather forecast. Consequently the television audience was led to believe that purely information was being broadcast and it was unaware that it was being subjected to advertising features.

Regarding the violations, the ORF was required to broadcast the decisions during the time slot reserved for the programme criticised.

The ORF was free, within six weeks of notification, to lodge a complaint against the ruling with the Administrative Court and/or the Constitutional Court. ■

● **Ruling of the Federal Communications Court of 6 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9846**

DE

BA – Law on Public Radio Television System Adopted

Dusan Babic
Media researcher and analyst, Sarajevo

The House of Peoples of the Bosnia and Herzegovina Parliamentary Assembly has adopted the draft Act on the Public Radio and Television System in Bosnia and Herzegovina, in the form adopted by the House of Representatives of the State Parliament (see IRIS 2004-1: 9 and IRIS 2005-6: 8).

Bosnian Croat deputies at the House of Peoples voted against the law, since they had earlier declared this law detrimental to the vital interests of the Croat people in Bosnia and Herzegovina. But the Bosnia and Herzegovina Constitutional Court ruled that the law was not unfavourable for the vital interests of the Bosnian Croats.

The adoption of this law was one of the obligations deriving from the European Union Feasibility Study, whose fulfillment was a precondition to the start of negotiations for acceding to the EU.

The Act regulates the Public Radio-Television System in Bosnia and Herzegovina and the relations between the three public Radio Television services and a corporation intended to serve as an entity responsible for infrastructural and logistical support to the three public broadcasters, as well as its activities and organization.

According to this act, the Bosnia and Herzegovina Public Broadcasting System is made up of: B-H Radio Television, as the umbrella body, which is a country-wide public broadcaster, the Federation of Radio Television and Serb Republic Radio Television and the Corporation of the Public Radio Television Services of Bosnia and Herzegovina.

The next step is the adoption of the Act on the Public Broadcasting Service in Bosnia and Herzegovina, which should then enter into force after 60 days. ■

CY – Supreme Court on Ban on Political Advertising

Christophoros Christophorou
Media and political analyst, Council of Europe expert in Media and Elections

The Supreme Court (judicial review jurisdiction) decided in September 2005 that the ban on (paid) political advertising is in breach of the law because the relevant provision in the regulations on Radio and Television Broadcasting 10/2000 was adopted beyond the scope of the law (*ultra vires*). The Supreme Court upheld thereby a first instance Court decision, challenged by the Cyprus Radio and Television Authority. The Supreme Court has first instance, appellate and revisional jurisdiction. It exercises revisional jurisdiction on decisions of Assize and District Courts as well as on first instance Supreme Court decisions.

The issue was first brought before the Supreme Court (first instance) by Antenna TV, in late 2001. The broadcaster appealed against heavy sanctions imposed on it by the Cyprus Radio and Television Authority for screening political advertisements during the municipal elections of 2001. In its ruling, issued in October 2002, the first instance Court said that the regulation banning political advertising had been *ultra vires*.

The Cyprus Radio and Television Authority appealed against the first instance decision on the ground that the ban was not in breach of the law because political advertising is of peculiar nature and it does not relate to freedom of expression.

In exercising its judicial review jurisdiction, the Supreme Court decided that the Law on Radio and Television Stations, L7(I)/1998 does not confer the power to issue regulations banning political advertising and added the following: Political advertising falls within the scope of free expression and the regulation banning this right is in breach of article 19 of the Constitution, on freedom of expression.

In the same decision, the Supreme Court deliberated on a counter-appeal by the defendant. It decided that the ban on political advertising imposed on broadcasters, but not on the print media did not constitute a violation of article 28 of the Constitution on equal protection and treatment; the different nature of the broadcast and the print media allows a distinct treatment in their exercise of the right to advertising.

It is worth noting that after the first instance decision, the Parliament promulgated in January 2003 an amendment to the law on Radio and Television Broadcasting; it eventually allowed political advertising for a period of 40 days preceding presidential elections with a ceiling of 100 minutes per candidate. No provision has been made for other elections. ■

● **Case 3540, Cyprus Radio Television Authority v. Antenna Ltd, 20 September 2005**

EL

CZ – Financial Penalties for Broadcasting a TV Reality Show

The Broadcasting Council of the Czech Republic has fined the management of the channels NOVA and PRIMA around CZK 4 million and CZK 5 million respectively (approximately EUR 130,000 and EUR 160,000) for broadcasting the TV Reality Show *Big Brother*.

The broadcasting of the show infringed § 32 paragraph 2 g) of the Broadcasting Act, whereby programmes which are likely to adversely affect the physical, intellectual and emotional well-being of children or young people may not be broadcast between 06:00 h and 22:00 h.

These programmes may have a problematic effect on children and young people as well as an impact on

society. The Broadcasting Council established that in several sequences of the programme there were infringements of provisions on youth protection in terms of adversely affecting development. Children and young people, in comparison to adults, are far less grounded in terms of their personality and value development and are dependent on examples and role-models. During such sequences, societal values such as respect and sympathy as well as regard for a person's integrity in their practical sense are undermined. If antisocial forms of behaviour are publicly cultivated, this may in the eyes of children and young people legitimise or reinforce existing trends of excluding and disparaging people.

The financial penalties imposed are not yet legally binding. The possibility of an appeal at the Administrative Court exists (and this is what will probably happen). ■

Jan Fučík
Broadcasting Council, Prague

- **Decision of the Broadcasting Council of the Czech Republic N° Rpo/109/02 and Rpo/110/05**
- **Broadcasting Council press release of 6 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9847**

CS

DE – Constitutional Complaint concerning Copy-protected DVDs and CDs Inadmissible

The Constitutional Court (BVerfG) refused to issue a ruling concerning a constitutional complaint on the ban on producing private back-up copies of legally acquired but copy-protected DVDs and CDs (AZ: 1BVR 2182/04).

The complainant asserted that as a result of the ban on circumventing copy-protected systems in articles §§ 95a and 95b of the UrhG his personal right of ownership was violated.

So as to protect data, he regularly made a digital copy of newly acquired CDs and DVDs. More recently he was banned from making a back-up copy, when the original product came with a copy-protection system. Furthermore, because of the ban on equipment able to get round copy-protection systems, it was no longer possible in Germany to obtain software which could be used to produce back-up copies.

The court viewed the constitutional complaint as inadmissible. It did not fulfil the principle of subsidiarity of the constitutional complaint, since the private rights of the complainant had not been immediately affected.

For the complainant there would be no discernible legal effects from the ban on circumventing copy protection. Furthermore individual private copies were admissible. What was more, the circumventing of copy-protection for private purposes was not subject to warnings of penalties or fines; only civil proceedings could be instigated. The possibility of recourse to civil proceedings however did not justify the admissibility of a constitutional complaint immediately directed at the law.

The regulations coming under criticism did not lead to the complainant suffering an actual loss. As a matter of fact, it could be assumed that he still had in his possession equipment enabling him to circumvent copy-protection. Furthermore, the downloading of such software from the Internet was neither subject to fines nor penalties, as long it was only used for private purposes.

The court finally pointed out that on account of the inadmissibility of the constitutional complaint the question, whether there was a right to a private digital copy, did not have to be debated. However it spoke volumes that regarding the digital copy, even a ban backed up by a penalty would not constitute a violation of ownership law but only a violation of the content and limits provision within the meaning of ownership law from article 14 Paragraph 1 line 2 of the Basic Law. ■

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- **Decision of the Constitutional Court, 1 BvR 2182/04 of 25th July 2005, paragraph n° (1 - 21), available at: http://merlin.obs.coe.int/redirect.php?id=9849**

DE

DE – Radio Reporting from Football Stadiums

In an appeal procedure (case no. KRZ 37/03), the *Kartellsenat* (Cartels Chamber) of the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) decided on 8 November 2005 that football clubs could charge a special fee to radio broadcasters reporting inside their stadiums.

The judges of the *BGH* therefore upheld the earlier decisions of the *Landgericht Hamburg* (Hamburg District Court) of 26 April 2002 and *Oberlandesgericht Hamburg* (Hamburg Court of Appeal) of 12 June 2003. The radio broadcaster had lodged a complaint against the Hamburg-based football clubs HSV and FC St. Pauli and the *DFL Deutsche Fußball Liga GmbH* (German Football League - *DFL*), claiming that the clubs did not own any radio broadcasting rights over their home *Bundesliga* matches. The broadcaster also wanted to know whether the football clubs concerned were entitled to charge more than the normal entrance fee and more than cost price for the use of press facilities, participation in press conferences, access to mixed zones and use of a workspace and technical services.

According to the *BGH's* decision, the football clubs concerned, as match organisers, could decide that the purchase of a match ticket did not include authorisation to broadcast reports from the stadium. There was nothing in competition law to contradict

this principle. The right to make access to the stadium – including as a condition for radio reporting – dependent on conditions such as the payment of a fee formed part of the football clubs' rights as "householders". The *BGH* considered that the clubs were entitled to charge more than the normal entrance fee because radio broadcasters made more intensive use of access and required workspaces and technical services, for example, that were not used by other spectators or press representatives.

The freedom to broadcast (Art. 5.1.2 of the Basic Law) did not entitle radio broadcasters to enter and use a stadium at cost price. Otherwise, the organisers of *Bundesliga* matches would be denied part of the economic benefit from the service they provided, which was subject to the constitutional protection of the occupational freedom (Art. 12.1 Basic Law).

However, the chamber added that the marketing of radio broadcasting rights should not result – through a contractual obligation to disseminate football reports, for example - in restrictions to radio broadcasters' programming freedom and their right to provide their listeners with up-to-date information uninfluenced by third parties.

The radio broadcaster is now considering appealing to the *Bundesverfassungsgericht* (Federal Constitutional Court). ■

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- **Ruling of the *Kartellsenat* (Cartels Chamber) of the *Bundesgerichtshof* (Federal Supreme Court), 8 November 2005 – case no. KZR 37/03**
- **Press release of the *Bundesgerichtshof*, available at: http://merlin.obs.coe.int/redirect.php?id=9893**

DE

DE – *ARD* Appeals Against Broadcasting Licence Fee

In November 2005, the *Landesrundfunkanstalten* (Regional Broadcasting Authorities) of the *ARD* lodged a complaint with the *Bundesverfassungsgericht* (Federal Constitutional Court - *BVerfG*) against the fixing of the broadcasting licence fee in the *8. Rundfunkänderungsstaatsvertrag* (8th Amendment to the Inter-State Broadcasting Agreement - *RÄndStV*). They claim that the latest procedure for fixing the licence fee breaches their freedom to broadcast as described in Art. 5.2.1 of the Basic Law. A EUR 0.88 fee increase was laid down by the regional parliaments and included in the *8. RÄndStV*, EUR 0.21 less than the increase recommended by the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Committee for the Establishment of the Financial Needs of the Broadcasting Authorities - *KEF*). The reasons given for this discrepancy were the "extremely tight financial situation" and the inappropriateness of the *KEF's* recommendation in view of the additional burden on licence fee payers. Potential savings referred to in the 14th *KEF* report had also been taken into account. The broadcasting authorities considered this decision to be a breach of their broadcasting freedom, since the provisions of the *BVerfG's* so-called 8th broadcasting ruling of 1994 had been disregarded. In this ruling, the court had laid down the principles under which licence fees should be set in consultation with the KEF, as well as the conditions in which a deviation from the *KEF's* recommendation was permissible. According to the *BVerfG*, the only verifiable grounds for such a deviation were linked essentially to "aspects of access to information and the appropriate burden on viewers/listeners". In the *ARD's* opinion, these conditions were not met in the grounds given in the *8. RÄndStV*. The *ARD's* decision to ask the country's highest court to clarify the issue has caused controversy. *ZDF*, which is equally affected by the fixing of the licence fee, has so far resisted taking the matter to the Karlsruhe-based court and is hoping a political solution will be found in consultation with the *Bundesländer*. *ZDF* has also sent to the Minister-Presidents a proposal for a new procedure for fixing the licence fee, which retains the essential elements of the *KEF* procedure, but does not involve the regional parliaments once the *KEF's* investigation is complete. Rather, identical decrees would be issued by the regional governments, which would be bound to adopt the fee recommended by the *KEF*. According to this proposal, the parliaments would only have to deal with the official remit of the public service broadcasters. ■

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- **Grounds for the *8. RändStV*, available at: http://merlin.obs.coe.int/redirect.php?id=9895**
- ***ZDF* proposal, available at: http://merlin.obs.coe.int/redirect.php?id=9894**
- **Decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 22 February 1994, case no.: 1 BvL 30/88 (BVerfGE 90, 60), available at: http://merlin.obs.coe.int/redirect.php?id=9896**

DE

DE – Rulings on the Transmission of Party Political Broadcasts

In the run-up to the German parliamentary elections in October 2005 several rulings were issued in the German courts on the requirement for television broadcasters to transmit party political broadcasts.

The subject was the party political broadcast of a small party that had anarchy as part of its political programme. The public service broadcasters ARD and ZDF had refused to broadcast it on the grounds of protecting young people. The verbal content of the broadcast comprised the party's candidate for Chancellor shouting out his "address". The final fade-in

ran: "Your vote for the garbage". Otherwise the advert showed in short succession shots of an excessive gathering of intoxicated, violent and partly-naked people. The broadcasting institutes viewed this party political broadcast as an infringement of § 4 paragraph 1 line 1 N° 8 and paragraph 2 line 1 N° 3 of the youth media protection treaty (JMStV), since it violated human dignity and was clearly intended to seriously threaten the development of children and young people. Since it did not take a legally admissible form, they were justified in refusing it. They offered, however, the possibility of broadcasting an altered party political broadcast. The appeals against this lodged by the party led to different rulings from the higher administrative courts (OVG) handling them: whilst the OVG for Rhineland-Palatinate having jurisdiction over ZDF found the appeal for the broadcasting of the whole sequence unfounded, ARD had to follow an order from the OVG of Northrhine-Westphalia (NRW) and broadcast the full-length version. In the view of the judge in Rhineland-Palatinate, the party political broadcast without doubt constituted a public and grave violation of human dignity as well as of § 4 paragraph 2 line 1 N° 3 of the JMStV, as it presented the image of a nihilistic and perverted society in which the individual is disparaged. The party lodged a constitutional complaint against this ruling and argued that it was a violation of the principle of equality of opportunity for political parties. Before the parliamentary elections an associated complaint on the issue of a provisional order had been turned down by the Constitutional Court. The judges of the OVG in Northrhine-Westphalia considered the party political broadcast to be tasteless and saw in it no serious contribution to the political debate, however they did not rule that it was a violation of youth protection regulations, i.e. it did not, through the nakedness displayed, constitute pornography punishable by law. ■

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- **Ruling of the Constitutional Court *BVerfG* 2 BvR 1545/05 v. 12.9.2005, available at: http://merlin.obs.coe.int/redirect.php?id=9848**
- **Ruling of the Higher Administrative Court of *Rhineland-Palatinate* RP/U/1249 of 7 September 2005**

DE

DE – KJM Evaluates Partial Solutions for Age Verification Systems as Positive

The Commission for Youth Media Protection (KJM) has for the first time positively evaluated two partial solutions to age verification systems (AVS) for securing closed user groups on the Internet as defined by § 4 paragraph 2 line 2 of the Youth Media Protection Treaty. (JMStV). The modules are based on the plans of "fun SmartPay AVS" of fun communications ltd and "Identity Check with Q-Bit" of the SCHUFA Holding AG (an organisation involved with loans).

In the KJM's opinion, an age verification system can only fulfil the requirements of the JMStv treaty, if firstly, the user's age may be verified through a personal identity check and secondly, if such a check takes places each time the system is used. These criteria remain unchanged; what is new is that under certain conditions there may be recourse to a further personal identity check.

"fun SmartPay AVS", for example, makes use of the personal identity check made when opening a bank account. The latest version of electronic bank cards are equipped with chips authorising the bank customer to use various functions via information on their age. This is the youth protection feature used by "fun SmartPay AVS". The identity of users of closed user groups on the Internet is verified using a chip card-reader, where the data stored in the chip on the bank card is checked out. The "Identity-Check with Q-Bit" of the SCHUFA uses an alternative, already-used approach to identifying the user. ■

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- **Press release of the KJM of 22 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9851**
- **Details on the requirements for AVS, available at: http://merlin.obs.coe.int/redirect.php?id=9852**

DE

DE – Rebuttal of Surreptitious Advertising Rejected

On 10 October 2005, the Assembly of the Bureau for Media and Communication (LMK) for the *Land* Rhineland-Palatinate rejected the rebuttal by the private television company Sat 1 of a complaint concerning surreptitious advertising.

The company has been accused of violating the principle whereby television programmes and advertising remain separate. Fault was found with a television game, where the rabbit figure of a sweet manufacturer was faded into television series, films and entertainment shows. Television spectators were supposed to count the number of rabbits and could win prizes. This, in the view of the LMK, was inadmissible in that advertising and television were being mixed together.

As a sanction, the broadcaster must inform spectators of the violation by announcing it during the evening news. ■

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- **Press release of the LMK N° 24/2005 of 10 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9850**

DE

DE – Testing of Digital-Multimedia-Broadcasting ("Handy-TV")

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The Institute for Communication of the *Land* Baden-Württemberg (LFK) has, by a recently initiated invitation to tender for the allocation of broadcasting capacity, launched a nationwide pilot project for mobile broadcasting services ("Handy-TV") and in so doing was the first *Land* Media Institute to implement a decision of the Directors' Conference of the *Land* Media Institutes. At the end of August 2005, the aforementioned institutes had recommended taking the necessary steps for the implementation of the project. The objective of the project, as identified by the LFK, was essentially the acquisition of knowledge through the technical and economic feasibility of playing television, radio and media services over mobile phones.

The transmission of mobile broadcasting is to occur in what is known as the DMB standard. *Digital-Multimedia-Broadcasting* (DMB) is an internationally standardised transmission procedure making it possible to receive television, radio and media services on a mobile phone. Unused capacity, in what is referred to as the L-Band, is currently available for the introduction of DMB in Germany.

In the invitation to tender, which is also to take place in the other Federal *Länder* by the end of November 2005, "platform operators" are being sought who can put together three to four television channels or television formats suitable for a mobile phone, and along with mobile phone operators bring them on to the market. A pre-requisite for such an operation is the setting-up of a new nationwide transmission network for DMB. This requires more substantial investment.

The other *Land* media institutes plan to launch their invitations to tender by 30 November 2005.

After the invitations to tender have been concluded, the *Land* media institutes involved want to select, through a co-ordinated procedure, those applicants for project participants who seem to be most suited to realising the project's objectives. ■

● **Press release of the LFK Baden-Württemberg of 17 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9854**

DE

ES – Intersectorial Commission on the Infringement of Intellectual Property Rights

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On 13 October 2005 the Royal Decree 1228/2005 setting up the Intersectorial Commission on the infringement of Intellectual Property Rights entered into force. The creation of this Commission is one of the measures included in the Integral Plan of the Spanish Government against Piracy, which was adopted on 26 April 2005 (see IRIS 2005-6: 12).

The Commission's main objective is to coordinate operations among the public administration, organisations defending Intellectual Property Rights and organisations defending social interests, who together will carry out studies and activities aimed at implementing the Integral Plan against Piracy. The Commission will be composed of representatives fom the national government, Autonomous Communities, local entities, consumers' organisations, the communications and technology industry and collecting societies.

Some of the functions of the Commission are to:
- establish activities and measures to implement the Integral Plan against Piracy;
- collaborate with public and private organisations at national and international levels;
- create institutional campaigns to raise awareness about the need to protect Intellectual Property Rights;
- elaborate educational programmes aimed at public and private agents responsible for law enforcement;
- be informed about statistics on activities carried out against the infringement of Intellectual Property rights. ■

● ***Real Decreto 1228/2005, de 13 de octubre, por el que se crea y regula la Comisión intersectorial para actuar contra las actividades vulneradoras de los derechos de propiedad intelectual* (Royal Decree 1228/2005 setting up the Intersectorial Commission on the infringement of Intellectual Property Rights), BOE (Official Journal) núm. 258 of 28 October 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9890**

ES

FR – Canal Plus Fined for Using a Programme Concept without the Originators' Authorisation

In a judgment on 7 September 2005, the regional court in Paris ordered the encrypted channel Canal Plus, the production company 2P2L and the journalist Ruth Elkrief to pay EUR 150 000 in damages as compensation for the financial losses suffered by two journalists who had created a new concept for a political programme used, virtually unaltered, by the channel without their authorisation. The concept involves presenting a plausible major crisis in the form of fictional coverage and asking specialists and politicians to comment on how the situation should be dealt with; it was lodged with the French society of dramatic authors and composers (*Société des auteurs et compositeurs dramatiques* - SACD) before being presented by its originators to a number of producers and broadcasting companies, including Canal Plus. The channel eventually decided to break

off negotiations, but a few months later, during early evening viewing, it broadcast a new political programme produced by the company 2P2L and presented by Ruth Elkrief, who was mentioned as being one of the co-originators. After searching unsuccessfully in the documents submitted for elements that would establish the nature and state of progress of work on the latters' project for a broadcast, the judge held that by knowingly appropriating this television concept and using it in the broadcast entitled "*C'est déjà demain*" the broadcasting company, the production company and the journalist, all three involved in the case, had committed a wrong incurring their civil liability. The judge found that, despite a number of differences, it appeared that the project that had resulted in the programme "*C'est déjà demain*" was the same as the project lodged with the SACD by the two originators "on condition that it is the concepts that are compared and not the concepts for a programme as broadcast". No-one could reasonably claim that a programme concept does not have an economic value. In the same way, once the debate is not based on the matter of copyright, there is no need to consider the original nature of the programme in question in relation to either French- or English-language anticipatory political programmes. To put a stop to the prejudice being suffered by the originators, who were being deprived of the possibility of proposing this programme concept to another broadcaster, the defendants were prohibited from exploiting and broadcasting any further broadcasts in the series.

The broadcasting company, the production company and the journalist involved in the case claim that the programme was created in response to a call for tenders on the part of the channel and affirm that they had no knowledge at any time of the other projects submitted to the channel; they are therefore appealing against the decision. ■

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● Regional court of Paris, 3rd chamber, 7 September 2005; K. Saranga-Drai, G. Malaurie and SARL Saranga Production v. SA Canal Plus, SARL Pourquoi pas la lune, R. Elkrief and J. Cazaumayou

FR

FR – Internet User Fined for Making Music Files Available to the Public on a Peer-to-peer Network

The regional court in Le Havre has fined an Internet user EUR 500 for making music files available to the public on a peer-to-peer network. This was in line with the sentence proposed by the State prosecutor under the "court appearance with prior admission of guilt" procedure – more commonly called the "pleading guilty" procedure – introduced by the Act of 9 March 2004 adapting court procedure to changes in criminality, under which the person admits the facts held against him and accepts the sentence(s) proposed by the State prosecutor. In the present case, the accused admitted having offered to share 14,797 files and agreed to pay the EUR 500 fine. In view of the very large number of files involved, the court also ordered the Internet user to pay EUR 3,000 in damages to the *Société des auteurs, compositeurs et éditeurs de musique* (French society of music authors, composers and editors - SACEM) and to have an announcement placed in two newspapers or magazines, for a total cost not exceeding EUR 2,000. It is important to note that the State prosecutor in Le Havre did not refer to the offence of reproducing the files (downloading), but only to the offence of making them available (uploading). In a judgment on 2 February 2005, the regional court in Pontoise, however, fined an Internet user EUR 3,000 in his capacity as both the administrator of a server dedicated to the sharing of files of musical works (uploading) and the originator of the reproduction of works in the absence of the originals (downloading), for counterfeiting by editing and reproducing musical works with no regard for copyright. This is one of the matters that will be covered when the bill on copyright and neighbouring rights in the information society is debated in Parliament in December. Lively discussions are already under way at the *Conseil supérieur de la propriété littéraire et artistique* (council for literary and artistic property). ■

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● Regional court in Le Havre, court appearance with prior admission of guilt – ratification order of 20 September 2005; available at: http://merlin.obs.coe.int/redirect.php?id=9856

● Regional court in Pontoise, 6th chamber (3 – collegiate – financial), judgment of 2 February 2005, Alain O. v. SACEM, SDRM, SPPF and SCPP; available at: http://merlin.obs.coe.int/redirect.php?id=9855

FR

FR – Canal Plus Ordered to Keep to Quotas for Broadcasting Audiovisual Works

On 20 September, the *Conseil supérieur de l'audiovisuel* (French audiovisual regulatory authority – CSA) served formal notice on the television channel Canal Plus to keep to the obligations incumbent on it under the legislative and regulatory texts. According to these, the editor of television services must, in the total time devoted annually to the broadcasting of audiovisual works, earmark at least 60% for the broadcasting of European works and 40% for the broadcasting of works originally in the French language. The CSA had noted in the balance sheet of performance of the channel's obligations for the financial year 2004 a deficit in respect of Canal Plus'

obligations to broadcast audiovisual works originally in the French language (34.4% instead of 40%) and European works (56% instead of 60%) over their programming as a whole.

On 10 October 2005 the CSA also launched another consultation on the definition of an audiovisual work, at the instigation of Michèle Reiser, a consultant responsible for chairing the working party on audiovisual production. Decree No. 90-66 of 17 January 1990, as amended, lays down the general principles for the broadcasting of audiovisual works by service editors and constitutes the reference for all the channels, whatever the media used (see IRIS 2005-2: 14). One of the purposes of this text is to determine a stricter definition of the concept of an audiovisual work than the one used in the "Television Without Frontiers" Directive. It is for the CSA to ensure that this definition is respected and to give its opinion on the qualification of the programmes proposed by the broadcasters as audiovisual works. This definition raises a number of questions; in January 2002 the CSA launched a think tank on the relevance of the definition of an audiovisual work, particularly with regard to new programme concepts. ■

Philie Marcangelo-Leos
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● CSA Decision No. 2005-758 of 20 September 2005, serving formal notice on the company Canal Plus, JO n° 240 of 14 October 2005 - text no. 85

FR

FR – Public Consultation on Digital Local Television in the Ile-de-France Region

At its plenary meeting on 11 October 2005, the *Conseil supérieur de l'audiovisuel* (French audiovisual regulatory body – CSA) decided to launch a public consultation on the terrestrial broadcasting of local television services in digital mode in the Ile-de-France region. The purpose of this consultation is to discover the expectations and projects of the players in the market, and it is based on Article 31 of the Act of 30 September 1986, as amended, according to which decisions on using radio-electric resources likely to substantially alter the market in question must, before a call for applications is put out, be the subject of a public consultation. This consultation will make it possible to gather the relevant replies; it will end on 6 January 2006. Through the information gathered in this way, the regulatory authority is seeking to determine what coverage will be envisaged for the local digital multiplex and in particular if it will be appropriate to limit the technical characteristics of the frequency in order to remain below the threshold of ten million inhabitants, in view of the legal implications of this threshold. The same applies to application of the arrangements to prevent concentration and for production obligations. The people concerned will have to give their opinion on the need to take steps to facilitate reception in portable or mobile mode, on the technical characteristics of the services envisaged, and on the number of channels that should be opened within the multiplex. Local television stations are extremely varied in terms of broadcasting medium, coverage area, type of content, production origin, sources of financing and budgets. The difficulty lies in defining what should be understood by "local television". The debate on the place of local television in the broadcasting networks has come to the fore in the light of the prospects opened up by digital technology. But in fact the emergence of terrestrial digital television has not yet lived up to its promises in terms of the development of local television, and France is lagging far behind the rest of Europe in this field. ■

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● CSA press release no. 587 of 14 October 2005; available at: http://merlin.obs.coe.int/redirect.php?id=9877

● Decisions of the CSA in plenary assembly on 11 October 2005 http://merlin.obs.coe.int/redirect.php?id=9878

FR

HU – Amendment to the Code of Conduct for the Hungarian Advertising Industry

On 29 September 2005 the representatives of the *Magyar Reklámszövetség* (Hungarian Advertising Association – *MRSz*), the *Önszabályozó Reklám Testület* (Hungarian Advertising Self-regulatory Board – *ÖRT*) – the two main self-regulatory organisations of the national advertising industry – and of further 20 professional associations involved in matters of advertising — signed the amendment to the *Magyar Reklámetikai Kódex* (Hungarian Code of Advertising Ethics).

This code of conduct serves as the common basis of self-regulatory practices in the Hungarian advertising industry. Its original version was adopted in 1981, being the first document of such a nature in the Central-Eastern European region. The code is applied both by the Committee of Ethics of the *MRSz* and by the *ÖRT*.

The general purpose of the code is twofold. Some of its rules are of a clear consumer protection nature. In this respect the document:

- sets up general standards of advertising ethics, such as the protection of natural, cultural and historical values, the protection of the Hungarian language, the protection of religious belief, the prohibition of discrimination among ethnic groups, the

protection of health, etc.;
- provides detailed rules concerning comparative advertising, and prohibits misleading advertising and
- gives guidance on questions relating to the protection of minors and human dignity.

On the other hand the code is also aimed at solving the occasional internal conflicts of the advertising industry: in this respect it also provides rules *inter alia* on the prohibition of illicit use of brands and on the protection of advertising ideas.

In relation to the existing statutory regulation, the code has a clear complementary nature; its conceptual basis is provided by Act LVIII. of 1997 on commercial advertising activities (Advertising Act), and it contains mainly more detailed rules than the act.

By the most recent amendment the Code of Advertising Ethics was completed by a series of new provisions relating *inter alia* to
- advertising beverages and foodstuffs;
- advertising on the Internet or via any other means of electronic communication (i.e. sms, mms, e-mail);
- social advertisement.

In addition to these major changes the rules of the code relating to misleading and comparative advertising, advertising aimed at children or including references to warranty were also subject of amendments.

The amendments to the code entered into force on the date of its signature. ■

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● ***Magyar Reklámetikai Kódex*** **(Code of Advertising Ethics), available at:**
http://merlin.obs.coe.int/redirect.php?id=9853

HU

IE – First Ruling of New Electronic Communications Appeal Body

In 2004 the Irish Government established ECAP, the Electronic Communications Appeals Panel. It is a statutory body appointed by the Minister for Communications. Its purpose is to try to fast-track appeals by the telecommunications industry against decisions of the Commission for Communications Regulation (ComReg). The first appeal heard by ECAP was taken by Hutchison 3G Ireland against a decision of ComReg to designate it with significant market power (SMP), even before it had launched its operation. ECAP ruled on 27 September 2005 that ComReg did not undertake a proper economic analysis before making its decision. It did not take into account Hutchison's position as a new entrant and did not do a complete analysis of the market. ECAP pointed out that in establishing whether a business has SMP the regulator must examine fully all the relevant factors. An SMP designation could allow ComReg to cap fees charged by a company to other operators for use of its network or to monitor the company's accounts.

On 29 July 2005, the High Court ruled on the procedure adopted by ComReg in seeking to enforce directions on the telephone company, Eircom, aimed at advancing local loop unbundling. The Court ruled that ComReg, which had set time limits for compliance, effectively deprived Eircom of its rights of appeal. In June 2004, ComReg had designated Eircom as having significant market power and had drafted a Market Requirements Document, followed by a decision notice (D/105), which included the directions referred to above. Unbundling in Ireland has been beset by long delays and although ECAP seeks to speed up the hearing of appeals it has to be mindful of the fact that its decisions in turn can be judicially reviewed in the High Court. Following the High Court decision in this case, however, ComReg decided to withdraw its instructions to Eircom. Eircom has since pledged to respond to both its competitors and the regulator by 24 October. Other appeals involving Eircom (ECAP6 2005/09 – leased line appeal) and mobile operators, Vodafone and O2 (ECAP6 1005/03-08), which were designated by ComReg as jointly dominant in the telecoms market, are due to be heard before the end of the year. ■

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● **Electronic Communications Appeals Panel website, available at:**
http://merlin.obs.coe.int/redirect.php?id=9886

● **The Irish Times 30 July 2005, 2 August 2005, 5 August 2005, 16 September 2005, 28 September 2005, available on subscription at:**
http://merlin.obs.coe.int/redirect.php?id=9879

EN

IE – Court Decision on Uploading Music from Internet

On 8 July 2005 the High Court ruled that music companies could sue seventeen people they believe are illegally uploading thousands of music tracks onto file-sharing networks. This is the first such decision in Ireland. The judge presiding over the new Commercial Court ordered two telephone companies, Eircom and BT Communications Ireland Ltd, to disclose to four record companies the names, addresses and telephone numbers of the seventeen who are subscribers to their services. The record companies gave an undertaking that the information would be used only for the purpose of seeking redress for

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alleged infringement of copyright. While the telephone companies had obligations to their subscribers under the Data Protection Act, a court order could override those obligations. Some of the seventeen have since settled with the Irish Recorded Music Association (IRMA). ■

- **EMI Records (Ireland) Ltd & Ors v Eircom and Anor, Kelly, J., Commercial Court, 8 July 2005, [2005] IEHC 233, available at: http://merlin.obs.coe.int/redirect.php?id=9859**

EN

IE – Broadcasting Code on Taste and Decency

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The Broadcasting Commission of Ireland (BCI) has launched a public consultation in relation to the drafting of a new code of standards on taste and decency. The BCI is required by the Broadcasting Act 2001, s.19, to compile such a code (see IRIS 2001-4: 9). The code, which is due to be finalized for implementation in Autumn 2006, will apply to all broadcasters in the State. The public consultation ended on 28 October 2005. Earlier this year (April 2005) a complaint against RTÉ's showing of a mentally ill man being led from court in manacles was upheld by the Broadcasting Complaints Commission as contravening the provisions on taste and decency contained in the Broadcasting (Authority) Acts 1960-1976. The Commission took the view that the man's vulnerability outweighed the public interest in including such footage. ■

- **Code on taste and decency, the Irish Times of 8 September 2005, available on subscription at: http://merlin.obs.coe.int/redirect.php?id=9879**
- **Broadcasting (Authority) Acts 1960-1976, s.18 of the 1960 Act as amended, available at: http://merlin.obs.coe.int/redirect.php?id=9880**

EN

IE – Broadcasting Developments Regarding TG4 and DTT

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The Broadcasting Act 2001 (see IRIS 2001-4: 9) made provision for the Irish-language television station, TG4, to become independent of RTÉ, the national public service broadcaster. TG4 had been established under the legislation governing RTÉ. The move towards independence has now begun with the appointment by Government of consultants to develop an implementation plan.

The Government has also announced its plans to pilot Digital Terrestrial Television (DTT) in Ireland. The introduction of DTT in Ireland was provided for in the Broadcasting Act 2001 (see IRIS 2001-8: 11) However, initial attempts to introduce DTT were unsuccessful due to lack of interest and uncertainty as to its viability. The pilot scheme announced in June is limited to Dublin and eastern counties but will later be extended. Due to the delays the Government has not yet given a definite date for the switchover from analogue to digital but is thought to be aiming for 2010-2015. ■

- **Press Release of 29 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=9882**
- **Information on digital television in Ireland, available at: http://merlin.obs.coe.int/redirect.php?id=9881**
- **The Irish Times 1 July 2005 (TG4), 29 June 2005 (DTT), available on subscription at http://merlin.obs.coe.int/redirect.php?id=9879**

EN

NL – New Rules Regarding the Programme Quota System

On 31 December 2003, the new Dutch Media Act came into force. One of the modifications had been the incorporation of some rules of the *Mediabesluit* (Dutch Media Decree), concerning commercial broadcasters, by the *Mediawet* (Dutch Media Act). Given these changes, the *Commissariaat voor de Media* (Dutch Media Authority) had to modify its policy rules, providing for enforcement as well as exemption rules, regarding the assessment of European, independent, recent, Dutch- or Frisian-language programme items (*Beleidsregels programmaquota*). These rules are applicable to public broadcasting services as well as commercial broadcasters, with the exception of local public broadcasting services and commercial broadcasters, providing for television programmes which can only be received by one municipality or a small group of connected municipalities. Having a closer look at the previous policy rules of 18 December 2001 compared to the new policy rules which came into force on 1 October 2005, the following changes are the most eye-catching.

The definition of "news" has been formulated more precisely. "News" is one of the five categories mentioned in article 7, explicitly not to be taken into account when assessing the percentage of European programme items. The previous policy rules define "news" as "daily news programmes and current affairs programmes with news background". The new policy rules define "news" as "professionally edited, topical and universal content that is focused on a Dutch audience". The result of these more

restricted formulations is that some programmes will no longer be regarded as "news programmes" and can therefore from now on be taken into account when assessing the European programme items percentage.

The new policy rules have created the possibility of reducing, in certain cases, the percentage of programme items that have to be in Dutch or Frisian to 0 %. An important condition is that the requesting broadcaster can demonstrate that the programme is almost entirely focused on countries outside the Netherlands. The fact that the programme is receivable in the Netherlands would not be a counter-argument in this context.

Furthermore the policy rules, in some respects, have been modified as a means of clarifying the previous rules and as a means of bringing the new rules into accordance with practice. An example of the latter can be found in a new article 13 para. 3. When a broadcasting service is providing a programme that is almost entirely made up of non-stop video clips, the latter can from now on individually be counted as independent productions unless they are clustered into for example a hitlist. ■

Cathelijne Kolthof
Institute for Information Law (IViR), University of Amsterdam

● ***"Regeling van het Commissariaat voor de Media van 30 augustus 2005 houdende beleidsregels omtrent Europese, onafhankelijke, recente, Nederlandstalige, of Friestalige programmaonderdelen (Beleidsregels programmaquota)"*, (Media Authority provision of 30 August 2005 establishing policy rules concerning European, independent, recent, Dutch- or Frisian-language programme items), available at:**
http://merlin.obs.coe.int/redirect.php?id=9857
NL

NL – Dutch Media Act Amended

As of 1 September 2005, amendments to the *Mediawet* (Dutch Media Act) introduced by a bill adopted in mid-July have entered into force. The bill modifies the organizational infrastructure of the national public broadcasting service with a view to a more efficient coordination of supervisory, administrative and professional procedures. The Supervisory Board has for example been given a new structure (art. 18a) and a new advisory organ has been set up (art. 18c). A "negligence provision" has been introduced (art. 30a) as well as "performance-based" contracts (art. 30b). The former is designed to hold the umbrella organization accountable for any future negligence in overseeing the three main bodies it regroups (the Supervisory Board, the Administrative Board and the new advisory organ) that might fail to adequately fulfil the goals of the public broadcasting service. The latter measures the public broadcasting service's programme supply and audience reach in accordance with predetermined agreements. As far as financial means are concerned, the Administrative Board will dispose of 25 % of the total allocated budget, which can be used to enhance the public broadcasting service's programming in particular with regard to the public service mission it fulfils and cultural considerations (increase of programmes dedicated to theatre, film, opera, classical music…). ■

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

● ***Wet van 16 Juli 2005, houdende wijziging van de Mediawet in verband met het bevorderen van een gezamenlijke strategie en duidelijke regie met betrekking tot de programmering van de landelijke publieke omroep, alsmede het aanbrengen van een helderder afbakening tussen toezicht, bestuur en professionele werkprocessen binnen de organisatie van de landelijke publieke omroep* (Act of 16 July 2005 amending the Media Act with a view to promoting a common strategy and clear direction with regard to public broadcasting service programming, as well as indicating a clearer definition of tasks between supervision, administration and professional procedures within the organization of the national public broadcasting service), available at:**
http://merlin.obs.coe.int/redirect.php?id=9869
NL

NL – Public Broadcasting Service Fined because of Blocks of Advertisements

On 15 September 2005, the *Commissariaat voor de Media* (Dutch Media Authority), sent an official letter to the board of Directors of the Dutch Public Broadcasting Service. In that letter the Authority informed the Board of its intention to impose a fine of EUR 13.500. The Public Broadcasting Service is responsible for the broadcasting time allocated to blocks of advertisements ("STER broadcasting time"). The BNN programme "Top of the Pops" was found to have been illegitimately interrupted by these "STER" blocks of advertisements.

The programme item "Top of the Pops", broadcast on 20 August 2005, had been an event celebrating a jubilee. During that day, a Top 100 of the best performances of the preceeding five years had been presented on Channel 2 from 12.00 h until 18.00 h and from 18.55 h until 19.55 h. From the moment that the Media Authority started monitoring the programme (13.50 h) until its end, the programme had been interrupted five times by STER blocks for approximately five minutes on each occasion.

Pursuant to article 41a para. 1d of the *Mediawet* (Dutch Media Act), a programme item of the Public Broadcasting Service can only be interrupted by advertisements if the event that is covered incorporates pauses. The Authority therefore holds the view that the programme "Top of the Pops", did not comply with these specific standards. On 5 October a hearing was held. The definitive sanction will soon be made public. ■

Cathelijne Kolthof
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● **Press release of the *Commissariaat voor de Media* "Public Broadcasting Service faces fine for *Top of the Pops* advertising practices", press release available at:**
http://merlin.obs.coe.int/redirect.php?id=9858
NL

PT – New Media Regulatory Body Approved

The Portuguese Parliament has approved the creation of a new media regulatory body by a substantial majority. The initial governmental proposal underwent a few changes allowing it to gather the favourable vote of more than two thirds of the Assembly (MPs from the Socialist Party, the Social Democratic Party, and the Popular Party).

The *Entidade Reguladora para a Comunicação Social* (Media Regulatory Entity) will in effect replace the High Authority for Media (the Act 43/98 of 6 August 1998 is revoked by the new act on the Media Regulatory Entity) following the necessary presidential ratification. The new entity will, upon effective creation, assume all pending responsibilities and commitments of the High Authority (articles 2, 3 of the final text of the act, and 44 of the statute).

Luís António Santos
Mediascópio, Comunication & Society Research Centre, University of Minho

The new media regulatory entity will be composed of a five-member Regulatory Council (four of them to be nominated by Parliament- article 14 of the statute), an Executive Board (where two of its three members will be the president and the vice-president of the regulatory council – article 32 of the statute), a Fiscal member (also nominated by Parliament – article 34 of the statute), and a 16-member Consultation Council (article 36b of the statute). Its income will come from a combination of sources: national budget provisions, taxes to be charged on media operators, fines, and "any other subsidies or financial support provisions" (article 45g of the statute).

This new entity is the first of a series of changes in the media regulation arena planned by the Socialist government: still under discussion and/or study are the creation of a television spectators' and a listeners' ombudsperson, 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. ■

● Act on the Media Regulatory Entity – final text (from page 55 onwards), available at:
http://merlin.obs.coe.int/redirect.php?id=9887

● Law proposal for the creation of a spectators' ombudsperson and a listeners' ombudsperson (28 May 2005), available at:
http://merlin.obs.coe.int/redirect.php?id=9888

PT

RO – CNA Decision on Information and Plurality

Basing itself on the conviction that freedom of opinion and the guarantee of unlimited access to information of public interest constitute important bases for a democratic society and that exercising the right to freely express an opinion has as prerequisites duties and responsibilities, the Romanian *Consiliul Național al Audiovizualului* (supervisory body for electronic media – *CNA*) has introduced new rules for guaranteeing accurate information and protecting plurality in Romanian broadcasting channels.

During news broadcasts on matters of public interest the following principles must be respected a) unbiased, balanced reporting promoting freedom of opinion; b) a clear division between facts and opinions and c) the avoidance of any form of discrimination.

These criteria must also then be respected when experts, journalists, representatives of non-parliamentary parties, representatives of minorities, non-governmental organisations, trade-unions or employers are being questioned or quoted. Basically, various viewpoints on an issue are to be expressed during a programme. Should the people addressed refuse to give their opinion, then the journalist must report this refusal.

Mariana Stoican
Radio Rumania International, Bucharest

Broadcasters may not transmit audio-visual programmes which are influenced or moderated by politically active people. Moreover they must respect the 'rule of three": a third of broadcasting time, set aside for the political events of the day, must be granted to the parliamentary opposition, one third is to be allocated to the representatives of the central public administration (Prime Minister, Ministers) and a final third goes to the parties forming the parliamentary majority.

What is more, for informative programmes rigour in reporting, harmony of commentary, shots and titles and exact acknowledgements for imported contributions are stipulated.

The broadcasting institutes are obliged to display their logo throughout the programme on the television screen with the exception of advertisements.

Breaching the aforementioned provisions is sanctioned by fines under article 91 of the Audiovisual Law n° 504/2002.

Moreover appropriate regulations for the publication of opinion polls, reporting on minorities and the presentation of catastrophes were drawn up.

With the publication of CNA decision N° 519 on 27 September 2005, decision N° 40/2004 on the guarantee of accurate information and the preservation of plurality (Official Journal of Romania N° 234 of 17 March 2004) ceased to be in force. ■

● *Decizia nr. 519 din 27/09/2005 privind asigurarea informării corecte și a pluralismului* (CNA decision N° 519 of 27 September 2005), *Monitorul Oficial al României, Partea I nr. 888* of 4 October 2005

RO

IRIS LEGAL OBSERVATIONS
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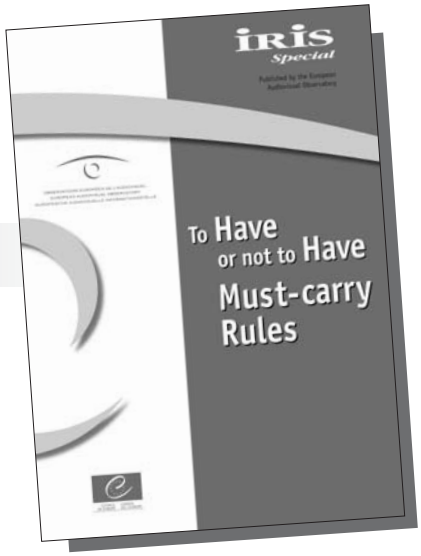

To Have or Not to Have Must-carry Rules

At the heart of the topic dealt with in this latest publication in the *IRIS Special* series is the media policy commitment to ensuring that all viewers have access to certain core television content that is of particular public interest. This policy commitment requires that regulatory bodies take appropriate action to exert influence on the television market. One of the instruments available to regulators for this purpose is the system of must-carry obligations.

This *IRIS Special* is based on the round table organised in April 2005 by the European Audiovisual Observatory and ist partner organisation, the Institute for Information Law (IviR) of the University of Amsterdam, entitled « Must-carry obligations ». It contains a comprehensive discussion of the key aspects of must-carry obligations and consists of 4 main parts.

- The first part summarises **the results of the workshop** at which a high-level group of 24 experts conducted a lively round-table discussion on the topic of must-carry obligations.

- The second part is devoted to **Article 31 of the Universal Service Directive**, which establishes the legal requirements that must be fulfilled in implementing must-carry obligations in national law. *IRIS Special* provides a brief outline of the origin of must-carry obligations within the EU. This is followed by a detailed interpretation of Article 31 with respect to the reasonableness and scope of must-carry obligations, their purposefulness, proportionality, transparency, etc. The analysis is completed by an overview of the EU states conforming to the Article 31 requirements.

- The third part compares the **European and American approaches** to must-carry obligations. The American approach reserves a certain amount of cable network transmission capacity for local terrestrial television channels, irrespective of what content they broadcast. *IRIS Special* presents the controversial debate currently in progress in the USA on this form of must-carry, taking up the economic as well as the constitutional and regulatory policy aspects of the debate. This part concludes with an investigation of how must-carry obligations apply to digital signals and to satellite operators.

- The final part looks at **the future of the must-carry debate**, beginning with a brief overview of the shortcomings of the existing regulations and going on to present suggestions on how the system could be revised in the digital era. This final part concludes with a discussion of the political issues that must be resolved before the instrument of must-carry obligations can undergo further development.

- A **glossary** of key technical terms and legal sources concludes this *IRIS Special*.

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