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2006 - 6

INTERNATIONAL

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INTERNATIONAL

WIPO

Draft Basic Proposal for a Treaty on the Protection of Broadcasting Organizations

The WIPO Standing Committee on Copyright and Related Rights (SCCR) convened during the first five days of May and has produced a draft basic treaty on the protection of broadcasting organizations for the WIPO General Assemblies to consider in September of 2006. The objective of this document is to ensure broadcasting organizations are provided with neighbouring rights which acknowledge the organizational, technical and economic effort invested in a programme and its broadcast. The underlying idea is also to protect such organizations from piracy and unfair competition. As the draft treaty specifies in its Article 3, the protection granted under its provisions extends only to signals used for the transmissions and not to works and other protected subject matter carried by such signals. Thus, the content being transmitted remains a matter for copyright law.

The draft treaty defines "broadcasting" in accordance with the traditional meaning of the term. It follows previous copyright and related rights treaties and confines the notion to transmissions by wireless means thereby excluding those transmissions which are operated by wire. This narrow definition of "broadcasting" has prompted the introduction of another term in the draft treaty: "cablecasting" which entails transmissions by wire, including by cable. The definition of "cablecasting" is needed if the notion of traditional broadcasting is adopted in the Treaty as proposed, but would be superfluous if the Treaty were based on a broader notion. Broadcasting and cablecasting organizations, in turn, are to be understood as the legal entities that take the initiative and have the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission.

The critical point of the debates consisted in determining whether transmissions of broadcasts over the internet should be granted protection under the Treaty. This method of transmission is known as

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"webcasting" and forms the object of a non-mandatory Appendix to the Treaty based on the 'opt-in' approach. This means Contracting Parties are free to adhere to this additional document which establishes neighbouring rights for webcasting organizations or they may, on the contrary, choose to ignore it. The Appendix defines webcasting as "the transmission by wire or wireless means over a computer network for the reception by the public, of sounds or of images or of images and sounds or of the representations thereof, by means of a program-carrying signal which is accessible for members of the public at substantially the same time [...]". The explanatory comments included in the Appendix specify that this notion includes "simulcasting", which entails the simultaneous transmission of broadcasts over the internet.

The negotiations for a definitive Treaty on the protection of broadcasting organizations should reach their final stage by the end of 2006. ■

- **Draft basic proposal for the WIPO Treaty on the protection of broadcasting organizations including a non-mandatory Appendix on the protection in relation to webcasting, the Standing Committee on Copyright and Related Rights, fourteenth session, 1-5 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10217**
- **Working Paper for the Preparation of the Basic Proposal for a Treaty on the Protection of Broadcasting Organizations, the Standing Committee on Copyright and Related Rights, fourteenth session, 1-5 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10218**

EN-FR-ES

COUNCIL OF EUROPE

European Court of Human Rights: Case of Stoll v. Switzerland

In December 1996, the Swiss ambassador to the United States drew up a "strategic document", classified as "confidential", concerning the possible strategies regarding the compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks. The document was sent to the Federal Department of Foreign Affairs in Berne and to a limited list of other persons. Martin Stoll, a journalist working for Sonntags-Zeitung, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the initial recipients of such a copy. Soon afterwards, the Sonntags-Zeitung published two articles by Martin Stoll, featuring extracts from the document. Other newspapers soon followed suit. In 1999, Stoll was sentenced to a fine of CHF 800 (EUR 520) for publishing "official confidential deliberations" within the meaning of Article 293 of the Criminal Code. This provision not only targets the person who is responsible for the breach of confidence of official secrets, but also those who were accomplices in giving publicity to such secrets. The Swiss Press Council, to which the case also had been referred in the meantime, found that Stoll had irresponsibly made some extracts appear sensational and shocking by shortening the analysis and failing to sufficiently place the report in context.

In a judgment of 25 April 2006, the European Court of Human Rights held, by four votes to three, that the conviction of Stoll is to be considered as a breach of the journalist's freedom of expression as guaranteed by Article 10 of the Human Rights' Convention. For the Court, it is crucial that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and public watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although justified, could not be secured at any price. The publication of the report did not undermine the very foundations of Switzerland. The Court therefore believes that the interests deriving from freedom of expression in a democratic society could legitimise the public discussion brought about by the document, initially classified as confidential. Fining Stoll for revealing the content of the document had amounted to a kind of censorship which would be likely to discourage him from expressing criticism of that kind again in the future. The Strasbourg Court considers the conviction of Stoll by the Swiss judiciary as liable to hamper the press in performing its task as purveyor of information and public watchdog. Furthermore, as Stoll had only been convicted for publishing parts of the document in the newspaper, the European Court believes the finding by the Swiss Press Council that he had neglected his professional ethics by presenting some extracts in a sensationalist way, should not be taken into account to determine whether or not publishing the document was legitimate. The Court once more underlines that press freedom also covers possible recourse to a degree of exaggeration, or even provocation. The dissenting opinion from Judges Wildhaber, Borrego Borrego and Šikuta emphasises the importance of respecting official secrets and Stoll's lack of professionalism in ignoring some fundamental rules of journalistic ethics. The dissenting judges also consider it as an important element that the articles at hand had not contributed in a useful way to the public debate on the issue of the unclaimed assets deposited in Swiss Banks. The majority of the Court however held that there has been a violation of Article 10 of the Convention, as Stoll's conviction was not necessary in a democratic society, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press. ■

Dirk Voorhoof
Ghent University & Copenhagen University & Flemish Regulator for the Media

- **Judgment by the European Court of Human Rights (Fourth Section), case of Stoll v. Switzerland, Application no. 69698/01 of 25 April 2006, available at: http://merlin.obs.coe.int/redirect.php?id=9237**

FR

IRIS LEGAL OBSERVATIONS
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European Court of Human Rights: Case of Dammann v. Switzerland

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Ghent University & Copenhagen University & Flemish Regulator for the Media

In a judgment of 25 April 2006, the Court unanimously held that the Swiss authorities violated Article 10 of the Convention by convicting a journalist, Viktor Dammann, for inciting an administrative assistant of the public prosecutor's office to disclose confidential data. The assistant had forwarded data relating to criminal records of suspects in a spectacular robbery. By punishing the journalist in this case, a step had been taken prior to publication and such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. It was thus likely to hamper the press in its role as provider of information and public watchdog. Furthermore, no damage had been done to the rights of the persons concerned, as the journalist had himself decided not to publish the data in question. In these circumstances, the Court considered that Dammann's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press. ■

● Judgment by the European Court of Human Rights (Fourth Section), case of Dammann v. Switzerland, Application no. 77551/01, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

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

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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 (for commentary on earlier reports, see IRIS 2005-7: 3). Four of the country reports (Cyprus, Italy, Luxembourg and the Russian Federation) contain specific recommendations concerning the media.

A recurrent, two-fold recommendation entails the ECRI encouraging the State 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 members of any minority groups";
- "engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved".

Slight variations in wording occur: in the report on Cyprus, it is as quoted *supra* (para. 90); in the report on Italy, the "minority groups" are explicitly considered to include "non-EU citizens, Roma, Sinti and Muslims" (para. 79), and in the report on the Russian Federation, "visible minority groups" (the formula that is used instead of "any minority groups") are stated as "including Roma, Chechens and other Caucasians, as well as citizens from CIS countries" (para. 121). In respect of Cyprus and Italy, the double-barrelled recommendation is the only media-specific recommendation. In respect of the Russian Federation, ECRI also expressly reiterates in the context of the media its recommendations elsewhere in the report "concerning the need to ensure that all instances of incitement to racial hatred are thoroughly investigated and punished" (para. 120).

In the report on Luxembourg, the one media-specific recommendation is also two-pronged. The ECRI recommends that the State Government should "help the media to do their job in a spirit of full respect for everyone, by promoting and supporting any initiatives to provide them with training courses on racism, racial discrimination and antisemitism". The second prong of the recommendation is a call on the Government to "ensure a more active implementation of the legislation on discrimination in media circles when this proves necessary" (para. 77).

The country report on Denmark - the fifth in the latest batch of reports to be released by the ECRI - does not contain any recommendations relating specifically to the media. However, it repeatedly addresses topics that could be brought under the banner of "hate speech" and are thus of relevance: proactive prosecution of anyone who makes racist statements (paras. 20 and 107); Holocaust-denial and related anti-Semitic offences (paras. 86 and 87); incitement to racial hatred against Muslims and the need for awareness-raising campaigns (which would include media involvement) "in order to present a more objective and balanced view of Muslims and Islam and to foster a constructive debate on living in a pluralist society" (para. 92). Finally, the ECRI "strongly recommends that the Danish Government should encourage and provide financial support to initiatives aimed at training journalists on issues pertaining to human rights in general and to racism and racial discrimination in particular" (para. 108).

Although the five country reports were only made public on 16 May 2006, they had been adopted by ECRI on 16 December 2005. ■

● "Council of Europe: Reports on racism in Cyprus, Denmark, Italy, Luxembourg and the Russian Federation", Press Release of 16 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10189

EN-FR

● All five of the ECRI country reports mentioned in the article are available at: http://merlin.obs.coe.int/redirect.php?id=1478

EN-FR

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EUROPEAN UNION

European Commission: Renewed Proposal for Criminal Law Provisions Against Intellectual Property Offences

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On 26 April 2006, the Commission adopted a proposal for a Directive to combat intellectual property offences that amends a proposal it had initially approved on 12 July 2005 (see IRIS 2005-8: 7). This new proposal stems from a European Court of Justice ruling which held that the criminal law provisions necessary for the implementation of Community policy are a matter for Community law. Thus, the proposal for a Council framework decision to reinforce the criminal law framework against infringements of intellectual property rights has been withdrawn and its provisions incorporated into the new version of the proposal for a Directive.

The Commission hopes to effectively combat counterfeiting and pirating activities, which have steadily been on the rise over the last years, by approximating Member States' criminal legislation. The assaults on intellectual property rights the EU must contend with not only cause serious harm to the European economy but also undermine innovation and pose a threat to public health and safety.

The Directive treats all intentional infringements of intellectual property rights on a commercial scale, including attempting, aiding and abetting such infringements, as criminal offences. The minimum sentence is four years of incarceration where the infringement is the result of organized crime or involves a serious threat to public health and safety. Fines will vary between a minimum of EUR 100,000 and EUR 300,000, where the offence has been committed within the context of organized crime or has endangered public health and safety. ■

- **"Counterfeiting and piracy: Commission proposes criminal law provisions to combat intellectual property offences", press release of 26 April 2006, IP/06/532, available at: http://merlin.obs.coe.int/redirect.php?id=10207**

DE-EN-FR-IT

- **ECJ ruling of 13 September 2005, Case C-176/03, available at: http://merlin.obs.coe.int/redirect.php?id=10213**

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

- **Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, 26 April 2006, COM(2006)0168 Final, available at: http://merlin.obs.coe.int/redirect.php?id=10210**

DE-EN-FR

European Commission: Go-Ahead to Media Support Schemes in Denmark, France, Ireland and Poland

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The European Commission recently approved under EC Treaty state aid rules four aid schemes meant to support film making in Poland and Ireland, music recordings by new talent in France and newspaper distribution in Denmark. All four schemes were found to entail no undue distortion of competition within the Single Market.

The Danish plans sought to give publishers of certain newspaper-like publications direct grants totalling EUR 1.3 million. The aid will enable publishers to freely choose their distributors in their efforts to distribute these publications. In deciding to favour this scheme, the Commission took into account such elements as the promotion of media pluralism and the propagation of socio-political news to Danish citizens.

The French aid scheme takes the form of a tax break for music producers. It provides aid of an estimated total of EUR 10 million per year and covers part of the costs of production and promotion of albums of new talents and instrumental music. The measure is directed at albums which are considered to be cultural products. The scheme also ensures that the aid granted is confined to the necessary minimum and is mainly meant for small- and medium-sized enterprises.

The Irish and Polish schemes are intended to support cinematographic activities. In Ireland, film production companies can expect an 80% tax relief on investments of up to EUR 35 million or 80% of the production budget of a single film. As for the Polish Audiovisual Fund and the Polish Film Institute, they were established at the beginning of the year 2006. A total of EUR 25.4 million per year will be awarded by the Polish Film Institute to support film projects, film production, film distribution and dissemination, the promotion of Polish film making and the dissemination of film culture, including the production of films by Polish expatriate centres. Both the Irish and the Polish schemes have been revised before reaching a final stage. In the case of the Irish plans, the scheme amends an earlier scheme which the Commission had also approved. The Approval of the Polish aid followed an amendment to the legislation made on 5 May 2006 to reduce the scope of the territorial conditions and of the amounts included in the original legal provisions.

Because they are based on cultural objectives and do not distort competition within the Single Market, the Commission concluded the French, Irish and Polish schemes are compatible with Article 87(3)(d) of the EC Treaty. The Danish scheme was, for its part, approved under Article 87(3)(c) which allows aid to certain economic activities, provided it does not distort or affect trade between EU Member States. ■

- **"State aid: Commission endorses media support schemes in Poland, Ireland, France and Denmark", press release of 17 May 2006, IP/06/641, available at: http://merlin.obs.coe.int/redirect.php?id=10192**

DA-DE-EN-FR-PL-PT

European Commission: Charter for Film Online Welcomed by Major Industry Players

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In May 2005, the European Commission launched plans for a Film Online Charter designed to support Europe's growing ambitions for a strong digital economy and a thriving content industry. The aim is to encourage the development and use of online film services in the EU. Such services could allow for a wider circulation of European films thereby creating a more competitive film sector and driving broadband connection in Europe. This Charter has now, a year after its conception, been endorsed by major representatives of the film and content industry, of Internet service providers and of telecom operators from the EU and the US. The Commission was careful to consult these representatives while drawing up the Charter in its efforts to identify the preconditions for enabling content and infrastructure providers to make online film services a commercial success.

There are four elements which the European Film Online Charter singles out as being paramount for Film Online to launch successfully and become the point of reference for the entire film and broadband industry: an extensive online supply of interesting films, consumer-friendly online services, adequate protection of copyright works and close cooperation in the fight against piracy. The Charter also enumerates a number of commendable practices for putting audiovisual content online via legitimate services and in a consumer-friendly way.

The following points are included in the Charter and reflect the consensus reached by its signatories and authors:

- The principle of availability of films online on a fair and economically sound basis;
- The recognition of the significant advantages that Europe-wide or multi-territory licences and clearances entail;
- The need for film producers, rightsholders and online distributors to agree on a suitable online release window without neglecting the public interest;
- The recognition of peer-to-peer technology for the exchange of properly secured content as a driver for the industry's development;
- The need to create a culture embracing creativity and effective protection of copyright;
- The commitment of online service providers to avoid showing advertisements of entities engaged in or inducing piracy and to block these advertisements following adequate notification;
- The need for cooperation between content providers and online service providers to develop technologies in order to protect copyright material. Such technologies should be cost-effective, interoperable and ideally based on open standards;
- The need for schemes (such as Media 2007 and the eContent programme) to reduce the costs of digital distribution and multilingual versions of European works online.

In line with the efforts pursued by the European Film Online Charter, the Commission is set to present a Communication on a broader Content Online policy in Autumn 2006. ■

● "European Charter for Film Online endorsed by major industry players", press release of 23 may 2006, IP/06/672, available at:
http://merlin.obs.coe.int/redirect.php?id=10195
DE-EN-ES-FR-IT-PL

● Full text of the European Charter for Film Online and list of signatories, available at:
http://merlin.obs.coe.int/redirect.php?id=10198
DE-EN-FR

NATIONAL

AT – Amendments to the Use of ORF Analogue Transmission Capacities for Television

Robert Rittler
Freshfields Bruckhaus Deringer, Vienna

The Austrian Parliament has adopted amendments to the law entitling holders of non-national private TV broadcasting licences to use certain analogue transmission capacities of *Österreichische Rundfunk* (ORF) at certain times. This right was granted to private broadcasters in order to support private television and thus to promote diversity of opinion and media in Austria.

The provision covers frequencies mentioned in the *Privatfernsehgesetz* (Private Television Act), which give ORF double coverage in certain areas. In a change to the previous legal situation, the regulatory body will no longer be able to issue decrees identifying further frequencies that can be taken over by private TV companies.

In any case, ORF should be allowed to use the transferred frequency to broadcast regional channels alongside its national channel.

The owner of a non-national licence to broadcast private television must first ask ORF for permission to use the transmission capacities. If no contractual agreement has been reached within six weeks, the broadcaster can appeal to the *Kommunikationsbehörde Austria* (Austrian communications regulator - *KommAustria*), which will decide for how long the capacity may be used and how much the broadcaster should pay.

The revised law states that the private broadcaster must pay ORF any costs incurred by the latter due to the allocation and use of the transmission capacity, as well as costs resulting directly from the necessary technical adjustments. The new provisions have been made retrospective as from 1 August 2001 so that they can be applied in cases that are already pending. ■

● *Initiativantrag 799/A BlgNR 22. GP*, available at:
http://merlin.obs.coe.int/redirect.php?id=10160
DE

CZ – Cinematography Fund Act Vetoed

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In April 2006, the Chamber of Deputies of the Czech Parliament adopted the law amending the Cinematography Fund Act (Act No. 241/1992 Coll. on the Cinematography Fund).

The amending act should have entered into force on 1 July 2006. On 12 May 2006, however, the President of the Czech Republic vetoed the law. Therefore, the amending act could only enter into effect if a qualified majority of the Czech Parliament (i.e., 101 deputies) overrides the veto. This was not the case, so finally the amending act did not enter into force. ■

CZ – Switchover to DVB

Jan Fučík
Broadcasting Council, Prague

The decision on the allocation of the first Czech multiplexes has been taken. The invitation for tenders for two digital networks in the Czech Republic was issued about 16 months ago. However, before a decision was taken, the findings made during the DVB-T trials concerning public acceptance and the technical functionality of digital terrestrial television had to be included in the practical planning process. Indeed, part of the responsibility that falls to the regulatory body in its efforts to drive forward the introduction of DVB-T is to deal with the commercial and financial framework for digitisation. Six licences were granted. Existing channels covering the whole of the Czech Republic were automatically included in one of the two multiplexes. The new broadcasters also include several specialist channels (music, news, film, regional). A third multiplex is reserved for public service broadcasters.

In the meantime the legal framework for DVB-T has also been established. The Czech Parliament has adopted a proposal to amend the Media Act in order to clear the way for the switchover to DVB in the Czech Republic. The Act contains new definitions, including legal definitions of the terms "full programme", "EPG", "electronic communication network" and "broadcasting services". Internet broadcasting is not regarded as a form of broadcasting. New guidelines concerning broadcasting concentration in the digital sector are also added. Broadcasters who give back their analogue capacities in accordance with a technical switchover plan will be given an additional licence for digital broadcasting. The responsibilities of the Broadcasting Council and the Telecommunications Office have been redistributed in order to separate completely the regulation of content and regulation of transmission. An exact switch-off date has not yet been set. ■

● **Press release of the Czech Broadcasting Council concerning the amendment of the Broadcasting Act, available at:**
http://merlin.obs.coe.int/redirect.php?id=10161

CS

DE – No Tax Reduction for Pay-TV

In a ruling of 26 January 2006, the *Bundesfinanzhof* (Federal Court of Finance - BFH) confirmed that the standard rate of taxation applies to the turnover of pay-TV companies. Pay-TV providers cannot benefit from the tax reduction for cinemas provided for in Art. 12 para. 2 no. 7b of the *Umsatzsteuergesetz* (Turnover Tax Act - UStG 1980). The broadcast of a television programme is not the same as a film presentation in the sense of the aforementioned Act.

The plaintiff is a pay-TV provider whose customers can watch an encrypted television channel in return for a fixed monthly fee. In the year of the dispute, 1990, the plaintiff argued that its turnover should be subject to the lower taxation rate specified in Art. 12 para. 2 no. 7b of the UStG 1980. The tax office concerned rejected this application, as well as a subsequent protest, with reference to Section 167.2.2 of the *Umsatzsteuer-Richtlinien* (Turnover Tax Guidelines - UStR 1996/2005) The *Finanzgericht München* (Munich Financial Tribunal - FG) dismissed a further appeal.

In its appeal to the BFH, the plaintiff claimed (i) that the FG had misinterpreted the concept of film presentation; (ii) that it also showed films and was in competition with cinema operators whose film presentations benefited from the reduced rate of taxation; and (iii) that Community law suggested that television programmes should be included in the definition of public film presentations. The plaintiff added that its ability to compete with public and private TV providers was restricted by the application of the standard rate of taxation.

The plaintiff proposed as an alternative solution that an application be made to the ECJ for a preliminary ruling. The ECJ could then clarify the compatibility of the different taxation levels for public and private TV broadcasters with the Community law principle of VAT neutrality.

The BFH dismissed this appeal as unfounded.

Art. 12 para. 2 no. 7b of the UStG 1980 lays down a preferential taxation rate for cinemas. The rate is reduced to 7% for "the sale of films to be used or shown, as well as film presentations". Television programmes are not film presentations in the sense of this provision, as illustrated by copyright law, where the concept of film presentations in Art. 19.4.1 UrhG (Copyright Act) is distinguished from that of broadcasts in Art. 20 UrhG.

In addition, the different tax rates applicable to film presentations and TV programmes do not infringe the principle of equal treatment enshrined in Art. 3 of the Basic Law because watching a film on television at home is different in many ways from a film screening

in a cinema. For example, films are never broadcast on television until they have been shown in cinemas.

Similarly, the remit of public service broadcasters, who are exempt from paying turnover tax, is not comparable with that of private TV companies, who have to pay the tax. Public service TV is not pay-TV, but a non-commercial activity. It is required by law to deliver programmes which would not be broadcast on a commercial channel or meet the required quality standards.

Even the principle of neutrality enshrined in Community law does not mean that pay-TV should be taxed at a lower rate. TV programmes are different from film presentations, just as pay-TV is different from public service TV, so they do not need to be taxed in the same way. Public service broadcasters should not be taxed, while commercial TV channels are liable to tax.

Since the Panel did not agree with the plaintiff's interpretation of Community law, it was not necessary to refer her questions to the ECJ because of a lack of relevance to the issues of the case. ■

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● **Ruling of the *Bundesfinanzhof* (Federal Court of Finance), case no. VR 70/03 of 26 January 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10168**

DE

DE – Forum Operators Responsible for User Submissions

The *Landgericht Hamburg* (Hamburg District Court - LG) ruled in a recently published judgment that operators of Internet forums are responsible for illegal content posted on their fora from the moment it becomes accessible to the public rather than when it is actually read.

The defendant in the case at hand was the on-line news service Heise, which regularly publishes articles relevant to the IT sector and operates Internet fora in which readers can post their views on current issues. Following an article concerning the business practices of a particular company, several forum participants had encouraged readers to download a program that was suspected of containing a camouflage program from the company's website in order to disrupt the company's server and prevent the program from being distributed. After the company concerned had obtained a temporary injunction, Heise argued, *inter alia*, that the enormous number of postings meant it was impossible to bring any influence to bear on the forum's content. However, the on-line news service did not consider such content to be its own.

The *Landgericht Hamburg* confirmed the temporary injunction obtained by the company and accepted a claim for an injunction under Articles 823.1 and 1004.1.2 of the BGB (Civil Code).

This decision was based on the notion that anyone who provides a service by which large numbers of comments can be disseminated is maintaining a source of danger which, because it is difficult to control, is subject to increased liability.

The court decided that the provider of such a platform remained liable, even if it was unable to control the content posted on the forum concerned. In principle, it was technically possible to exercise such control, since fora could be set up in such a way that the legality of its content was verified before being published. In fact, the LG Hamburg stressed, there was an obligation to carry out such controls, since the providers of services by which content was distributed in press format were obliged to take precautions to ensure that no illegal content was distributed via these services.

The Court ruled that companies running Internet fora must be structured in such a way that their material and human resources were sufficient to control their business activities. According to the LG, this meant in practice that, if the number of fora and postings was so large that the forum operator did not have sufficient staff or technical means to verify the legality of these postings before they were published, it should either increase its means or scale down its activities, such as by reducing the number of fora or limiting the number of postings. ■

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● **Ruling of the *LG Hamburg* (Hamburg District Court - LG), case no. 324 O 721/05, 2 December 2005, available at: http://merlin.obs.coe.int/redirect.php?id=10167**

DE

DE – Discussion on Advertising Restrictions for Private Betting Services

After the ruling on the lottery by the German *Bundesverfassungsgericht* (Constitutional Court - BVerfG), interested parties are now debating its consequences for advertising law. The *Landesmedienanstalten* (*Land* media authorities), as the regulators of private broadcasting, are currently discussing the different versions of the ruling with private broadcasters.

In its decision of 28 March 2006, the *Bundesverfassungsgericht* had ruled that the state's sports betting monopoly in the *Bundesland* of Bavaria was incompatible with the basic right to the freedom of occupation. Under the *Gesetz über die vom Freistaat Bayern veranstalteten Lotterien und Wetten* (Act on lotteries and betting organised by the Free State of Bavaria - *Staatslotteriegesetz*) of 29 April 1999, commercial betting services may not be provided by private betting companies. The reasons for the ban include the need to fight gambling and betting addiction, to prevent gamblers from being cheated by betting companies and to protect them from misleading advertising.

However, the BVerfG decided that the ban on private companies could only be justified under constitutional law if the Act did in practice provide an

effective means of combating addiction and gave the legislator until 31 December 2007 to revise the relevant provisions.

If the legislator wanted to retain a state betting monopoly, the law needed to be more clearly aimed at fighting gambling addiction and limiting people's obsession with betting. For example, the marketing of betting services should be restricted. In particular, advertising for such services should only provide information about the service rather than make it sound attractive. However, the Court ruled that, rather than a betting monopoly, if private betting companies were allowed to operate under certain legislative standards and controls, such a system would be in conformity with the Constitution.

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Until new rules were adopted, the BVerfG stated that commercial betting services offered by private betting companies and agencies should remain prohibited by law.

At its meeting on 16 May 2006, the *Direktorenkonferenz der Landesmedienanstalten* (Conference of Directors of *Land* media authorities - DLM) said that it would only consider intervention by the *Land* media authorities against private broadcasters who broadcast advertising for private betting services as possible if the responsible administrative body had previously issued an enforceable order. Talks on this subject with the responsible *Land* authorities were under way.

With regard to new regulations governing advertising for betting services, the *Verband Privater Rundfunk und Telekommunikation e.V.* (Private Broadcasting and Telecommunications Union - VPRT) expressed reservations about a total advertising ban, since currently licensed betting services were important advertising partners for private media companies, spending well over EUR 10 million on advertising. ■

- **Ruling of the BVerfG (Federal Constitutional Court), 28 March 2006, 1 BvR 1054/01, available at:**
http://merlin.obs.coe.int/redirect.php?id=10170
- **DLM press release 07/2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10171

DE

DE – Decisions on Bundesliga Broadcasts

The *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK) has raised no objections to the granting of a broadcasting licence to Arena. This decision was announced on 12 April 2006. However, the KEK added that Arena's parent company, Unity Media, would have to be monitored in order to ensure that this combination of content provision and network operation did not form an obstacle to other pay-TV providers. When the broadcasting rights for the football Bundesliga were sold, Arena had been awarded the pay-TV rights, leaving the previous rightsholder, Premiere, empty-handed (see IRIS 2006-4: 11).

Meanwhile, the *Landgericht Dortmund* (Dortmund District Court) has rejected an application by *Arena* for a temporary injunction which would have given it the right to use Premiere's decoders. Arena was therefore forced to reach an agreement with Premiere or offer its own set-top boxes. Arena has now decided to opt for the latter solution (see IRIS 2006-5: 11).

Meanwhile, Deutsche Telekom, which acquired the Internet rights for the Bundesliga, is planning to provide an IPTV service, i.e. transmission of television services via Internet protocol, to be operated by its subsidiary T-Online and launched in the second half of 2006. The service will include around 100 channels, with matches in the German football Bundesliga as one of the key attractions. In this connection, a dispute has recently flared up between Deutsche Telekom and the German Football League (DFL) concerning the scope of these football rights. Whereas Deutsche Telekom believes that IPTV broadcasting, which can divert signals directly to existing Premiere decoders and can therefore be viewed on a traditional TV set, is covered by the rights it has acquired, the DFL claims that Internet rights should not be used for transmissions to television sets, as this would reduce the value of the pay-TV rights purchased by Arena. ■

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- **KEK press release, 6 June 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10169

DE

DE – Networks Office Opens Consultation on Market No. 18

On 22 February 2006, the *Bundesnetzagentur* (Federal Networks Office - BNetzA) published a draft market definition and analysis for broadcasting transmission services (Market no. 18 in the Commission Recommendation). The BNetzA is responsible for regulating the electricity, gas, telecommunications, postal and railway networks. In Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector liable for *ex ante* regulation, the European Commission had recommended that the national regulatory authorities analyse the identification of various markets, including a relevant market for broadcasting transmission services to deliver broadcast content to end users (market no. 18).

The BNetzA published the results of this analysis in the aforementioned draft consultation document. It stated that, in Germany, 33 major wholesale markets (as defined in the European regulations) were relevant to the distribution of broadcast signals via cable, satellite and terrestrial means or functionally comparable media. This number comprised 10 cable markets and 23 markets in the terrestrial sector, dis-

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tinguished according to practical and spatial criteria. In the satellite sector, no markets were identified, since the BNetzA concluded that this was an international market for which the European Commission was responsible. The BNetzA considered that only 11 of the wholesale markets defined were liable for regulation, i.e. the cable markets and one terrestrial market. The latter was the market for analogue terrestrial FM radio broadcasting, in which T-Systems had considerable market power.

The cable markets are subdivided into cable input markets and signal delivery markets, the latter being a specifically German concept since it arises from the existence of a level 4 network, whose operators are dependent on the signals delivered by level 3 providers.

Comments on the draft could be made as part of the consultation process within one month of its publication. ■

- **Draft consultation document of the *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (Federal Networks Office for electricity, gas, telecommunications, post and railways): broadcasting transmission services delivering broadcast content to end users, market no. 18 of Recommendation 2003/311/EC, available at: http://merlin.obs.coe.int/redirect.php?id=10162**
- **Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/311/EC), available at: http://merlin.obs.coe.int/redirect.php?id=10164**

DE

DE – Green Light for RTL Group's Takeover of News Channel n-tv

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On 12 April 2006, the *Bundeskartellamt* (Federal Cartels Office) decided to allow RTL Television GmbH Deutschland (RTL) to acquire sole ownership of news channel n-tv Nachrichtenfernsehen GmbH & Co. KG (n-tv).

In February, the *Bundeskartellamt* had expressed reservations about the planned takeover on the grounds that it would protect and strengthen the collective dominant market position held by the Luxembourg-based RTL Group and ProSiebenSat.1 Media AG in the television advertising market. According to the Cartels Office President, this threat to competition remains. However, investigations had shown that, even if the merger were prohibited, n-tv's market potential and advertising customers would remain with the duopoly, since the channel would be closed down if the merger did not go through. Therefore, the takeover was permitted as a rescue merger.

On 8 May 2006, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK) also reached a positive verdict relating to RTL's acquisition of all shares in n-tv. The planned takeover did not raise any concerns regarding diversity of opinion, since neither the purchaser nor the group to which it belonged would achieve dominant power of opinion as a result of the planned acquisition. ■

- **Press release of the *Bundeskartellamt* (Federal Cartels Office) of 12 April 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10165**
- ***KEK* press release 07/06, available at: http://merlin.obs.coe.int/redirect.php?id=10166**

DE

DE – Discussion on Funding of Public Service Broadcasters Continues

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In a letter dated 27 April 2006, the German Federal Government issued its response to the request for further information about the financing and remit of public service broadcasters (doc. E 3/2005) sent by the Competition Directorate-General of the European Commission on 10 February 2006.

The Federal Government agreed the content of the document with the *Bundesländer*, who are responsible for broadcasting and could access information from ARD, ZDF and DeutschlandRadio. It stressed that, in its reply to the previous request for information sent on 6 May 2005, it had already answered a series of questions which had now been raised once again. It also pointed out that the promised amendments to legal provisions applicable to public service broadcasters would be carried through if this would result in the investigation being abandoned.

The 44-page document deals with issues connected with additional digital channels, "new media services", the separation of the public service remit and purely commercial activities, the monitoring, acquisition and exploitation of sports rights, special tax benefits and the state financing strategy.

It essentially describes the respective procedures for determining the remit and financing of public service broadcasters, and lists the control and sanction mechanisms in place with regard to the practical implementation of the standards required. ■

ES – Major Film Distributors Sanctioned by Spanish Competition Court

On 10 May 2006, the Spanish Competition Court sanctioned 5 major film distributors. Walt Disney Company Iberia (Buenavista International Spain), Sony Pictures, Hispano Foxfilm, United International Pictures and Warner Sogefilms were fined EUR 2.4 million each. The Spanish Competition Court also imposed a EUR 900,000 fine on the Spanish Federation of Film Distributors.

The Spanish Competition Service opened an inves-

tigation into alleged price-fixing and the abuse of a dominant position by these film distributors and also probed the actions of the Spanish Federation of Film Distributors, following a complaint lodged by the *Federación de Empresarios de Cine de España* (Federation of Spanish Cinema Entrepreneurs).

According to the Spanish Competition Court, the said film distributors had concerted their commercial practices vis-à-vis the film exhibitors and had thus shared amongst themselves a substantial part of the film distribution market. More specifically, the Spanish Competition Court concluded that these film distributors had concerted their practices as to the prices they set for exhibitors, as well as with regard to other commercial terms and conditions imposed on the exhibitors.

The prices which the 5 film distributors set for the film exhibitors were practically identical. In most cases, for the most popular films, the agreement reached between the film distributor and the film exhibitors consisted of a percentage of box office earnings. The maximum was 60% of the amounts collected during the first week of exhibition of the film, decreasing by 5 points each week thereafter. All five film distributors engaged in the same conduct from 1978 to 2004.

Furthermore, copies of the agreements signed between the indicated film distributors and film exhibitors demonstrated that the film distributors used almost the same conditions with regard to the essential elements of their contractual relations with the film distributors: selection of the theatres and length of run, weekly payments to be made by the film exhibitors to the film distributors, payment terms, conditions for collecting the films, exclusion of discounts by the film distributors (even if exhibitors did offer such discounts), and the mechanism used to monitor the box office take.

The Spanish Competition Court found the contractual clauses included in the standard agreements used by the film distributors and the price conditions applied to the film exhibitors to be similar. This led the Competition Court to conclude that the film distributors had concerted their practices, either tacitly or expressly, thus they were not competing with each other when negotiating the commercial conditions for the exhibition of their films. Such conduct caused serious prejudice not only to the film exhibitors but also to consumers.

The Spanish Federation of Film Distributors, of which all the accused film distributors are members, was fined EUR 900,000 for having prepared data based on sensitive commercial information, such as box office take and run lengths. Also, it was through the Federation of Film Distributors that the film distributors exchanged information regarding the planned dates for releases. This enabled them to avoid scheduling first showings of popular films on the same date. ■

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● ***Tribunal de Defensa de la Competencia, Resolución de 10 de mayo de 2006, Expediente 588/05*** **(decision of the Spanish Competition Court of 10 May 2006, case 588/05), available at:**
http://merlin.obs.coe.int/redirect.php?id=10183

ES

ES – New Act on National Public Radio and Television

The Spanish Parliament has recently approved a new Act on National Public Radio and TV (see IRIS 2005-9: 10). This approval brings to finality a procedure that started in April 2004, when the recently elected Government created a Council for the Reform of State-owned Media, which delivered its final report in February 2005.

This new Act, which abrogates the Statute of Radio and Television (Act 4/1980), seeks to update the basic principles which apply to public radio and television. The Act defines the role of the national public broadcaster:

- It shall produce and broadcast several radio and TV programmes for all sections of the population, including programmes catering to special interests. It shall also guarantee access by all citizens to quality information, culture, education and entertainment;
- The national public broadcaster shall balance social profitability and economic efficiency, and it shall promote constitutional values, respect for human dignity and cultural diversity;
- It shall offer programmes intended to be broadcast abroad, with the aim of promoting Spanish culture and catering to Spaniards travelling abroad or living in foreign countries. It shall also actively promote the development of the Information Society. For this purpose, it shall use new production and broadcasting technologies, and it shall offer digital and online services.

The national public broadcasting service will still be provided by the same company, although the former *Ente Público RTVE* has become the *Corporación de Radio y Televisión Española* (Spanish Radio and Television Corporation - *Corporación* RTVE), a public entity which manages two companies, *Sociedad Mercantil Estatal Televisión Española* (Spanish Television Trading State Company -TVE) and *Sociedad Mercantil Estatal Radio Nacional de España* (Spanish National Radio Trading State Company - RNE).

The main governing body of the Corporación RTVE is the Management Board, which has twelve members, eight appointed by Congress and four by the Senate, for a non-renewable mandate of six years. Two of the members appointed by the Congress will be elected among candidates proposed by the main trade unions. The members of the Management Board can be dismissed for several reasons, including a decision by the Congress adopted by two-thirds of its members. All of them would be dismissed if the Corporación RTVE incurs an excessive debt.

The Bill proposed that the Director of the Corporación RTVE be appointed by the Management Board,

but the final version of the Act has established that he/she will be elected by Congress, which can also dismiss him/her by a two-thirds decision.

There is also an Advisory Committee, formed by fifteen members appointed by several public organizations and associations, and a News Council, formed by RTVE journalists.

As regards the programming of the Corporación RTVE, the Parliament shall approve framework programmes, valid for nine years, which shall be implemented by means of programme contracts, renewable every three years, signed by the Government and the Corporación RTVE.

These texts are expected to define the goals of the Corporación RTVE, and shall determine how its service will be financed, taking into account that the public subsidies should only cover the cost of public service radio and TV programmes, and that the Corporación RTVE will not be allowed in future to incur an excessive debt, as has been the case in the past.

The Corporación RTVE would be under the external control of Parliament, of a new independent audiovisual regulatory authority (to which the Acts refers, but which has yet to be created) and of the Court of Auditors.

The Government is now expected to present to the Parliament Bills on the regulation of the new audiovisual authority and on a new general legal framework for broadcasting. ■

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● ***Ley de la radio y la televisión de titularidad estatal, Boletín de las Cortes Generales – Congreso de los Diputados, Serie A – nº 52-15, de 23.05.2006*** **(Act on National Public Radio and TV, Official Journal of the Spanish Parliament – Congress, A 52-15, 23 May 2006), available at:**
http://merlin.obs.coe.int/redirect.php?id=10214

ES

FR – Legal Fright at the Cannes Festival

The idea behind the film "*Paris je t'aime*" was for twenty film producers (including Joel and Ethan Coen, Olivier Assayas, Wes Craven, Fred Auburtin and Gérard Depardieu, and Gus Van Sant) to write and produce a five-minute film illustrating the theme of a lovers' meeting in one specific area of Paris, which were then to be put together to make a full-length film; the film was selected for the opening of the *Un certain regard* section of the Cannes Film Festival on 18 May.

Two days before the screening, however, the presiding judge of the regional court in Paris, deliberating in an urgent matter, banned the delegated producer from having the film shown, on pain of payment of a penalty of EUR 180,000. In the end, only eighteen of the short films included in the festival were to be screened, and the breaks between the films planned at the outset have not been included. The author and originator of the film in its full-length format, who is also the main scriptwriter and screenwriter of the introductory sequences, the transitions and the epilogue, had been elbowed out of completing the film as a result of a disagreement with the delegated producer. As he had not agreed to the editing of the film in violation of the producer's contractual undertakings, and therefore in violation of his moral right to respect for the work, he had appealed to the courts under the urgent procedure, calling for the ban in order to prevent the incomplete work being shown. The presiding judge of the regional court upheld his claim, recalling that under Article L. 125-5 of the French Intellectual Property Code, "the producer may not, without the consent of the co-authors, proceed with establishing the final version of an audiovisual work and exploiting the same". The contractual undertakings entered into by the parties, which were not contested, acknowledged both the author status of the applicant and his specific prerogatives, which included establishment of the final version of the film. The court took note that the editing resulting in the film which it was intended to screen included only eighteen short films, without the twenty-one sequences originally intended to ensure the unity and character of the full-length film; this constituted a distortion of the original project and a violation of the contractual undertakings entered into by the delegated producer. The court found the requested ban in proportion to the infringement and delivered its judgment accordingly, including a mediation requirement with a view to establishing a version of the film with which both parties could agree. After a long period of suspense and the threat of intervention by a bailiff, the film was finally shown at Cannes without a hitch. Apparently the author had withdrawn his legal action and at the last minute signed an agreement with the co-producer, according to which he accepted the disputed version as being final. The film should be in French cinemas from 21 June. ■

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● **Regional court in Paris (order in an urgent matter), 16 May 2006, E. Benbihi v. S.A. Victoires International**

FR

FR – Finding against Pink TV for Infringement of a Registered Brand Name

In a judgment delivered on 27 April, the regional court in Paris declared null the brand names registered by the channel Pink TV and banned it from using its title. The channel, which has been broadcasting by cable and satellite since October 2004, was summoned to appear in court by an audiovisual production company that had registered the brand name "P.I.N.K." (*Programmes d'Information Non Konformiste*) in December 1999 in order to designate the production and broadcasting of television programmes. The company had used the brand name in producing a pro-

gramme entitled "P.I.N.K", with seven broadcasts shown on the France 2 channel from January 2000 onwards. The channel, for its part, had registered seventeen brand names January 2001 and July 2004 based on the word "pink", including Pink TV.

The court was asked to deal with a case of infringement of a registered brand name and copyright, and it took note that the signs at the root of the dispute had in common the four letters P, I, N and K, presented in the form of an acronym and separated by full stops in the applicant company's brand name, and presented as one word in the other brand name. The court noted, however, that this minimal visual difference in fact disappeared when the names were used phonetically. Moreover, the dominant feature of the Pink TV brand name was without a doubt constituted by the first word in the phrase, as the letters "TV" were purely descriptive of the products and services under consideration. Indeed the channel was referred to in the press as just "Pink", as was the applicant's brand name. As the identity of the products to which the brand names refer was not contested, the court therefore had to reach a decision on the risk of confusion. In doing so, it recalled that such a risk existed where there was imitation of an earlier brand name, and included the risk of association, meaning the risk of consumers being led to believe that the two brand names belonged to the same undertaking. This was indeed the case here; thus if the applicant production company wanted to produce a new broadcast or launch a magazine using its brand name, the ordinary, normally attentive consumer would be led to think that they were by the company Pink TV. The court therefore held that infringement by imitation was established, as well as infringement of the production company's copyright in respect of the title P.I.N.K. to designate a television broadcast, declared null the brand names registered by the company Pink TV on the basis of Article L. 711-14 of the French Intellectual Property Code, and ordered it to pay EUR 20,000 to the applicant company as compensation for the loss of value of its brand name which it was now impossible to use because of the intensive use made of it by the company Pink TV. The channel has therefore been banned from using the term "pink" in any form whatsoever, subject to payment of a penalty of EUR 10,000 per day of delay two months after notification of the judgment. It is therefore still too soon to know what the channel will call itself in future. ■

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● **Regional court in Paris (3rd chamber, 2nd section), 27 April 2005, S.A.R.L. Fovea v. S.A.S. Pink TV**

FR

FR – Public Consultation with a View to Launching HDTV and Mobile TV

On 4 May 2006 the French President set up the Digital Strategy Committee, which is responsible for assisting the changeover of the whole country from analog television to digital television by 2011. At the same time, Mr Renaud Donnedieu de Vabres, Minister for Culture and Communication, launched a procedure for consulting with professionals in the sector on proposals for amending the Act of 30 September 1986, with a view to the launch of terrestrially-broadcast high-definition digital television and mobile television. Two alternative procedures were suggested for mobile television – one procedure consisting of selection by services editors (which would favour existing terrestrially-broadcast digital television), and another by content distributor (which would favour channel packages), with the possibility of a hybrid combination. Under both procedures, the intention is that the editors and distributors of mobile TV services should be required to pay a fee, the proceeds of which could contribute to financing creation and the operations necessary for the introduction of "all-digital" TV. For high-definition television, account needs to be taken of the scarcity of radio-electric resources in terrestrially-broadcast digital television – high-definition broadcasting for all the services editors already authorised is not a possibility. The purpose of the legislative amendments proposed by the Government is therefore to enable the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) to organise a call for tenders with the criteria for issuing authorisations adapted to the specific features of HDTV, so that the CSA would be able to take into account applicants' undertakings as regards the production and broadcasting of such programmes.

The consultation ended on 19 May, and it shows that there appears to be a consensus among the channels and the operators on mobile TV – all would be in favour of selection by service editor and opposed to the payment of a fee. There is no such consensus regarding HDTV. One side, which includes France Télécom and TF1, is in favour of allocating authorisation for high definition to those major national terrestrially-broadcast channels prepared to bear the cost of the technology, and on the other side there are the new free channels in terrestrially-broadcast digital television which feel that high definition should be reserved solely for those pay channels already using MPEG-4 decoders. Further to this consultation, the Government should be drafting a bill early in June for presentation to the council of ministers on 19 July, before it is discussed in Parliament in September. In addition, the CSA has just authorised TF1, M6, Canal+, Arte, and the France Télévisions channels to broadcast their programmes in high definition experimentally between 29 May and 17 July 2006, according to a precise schedule. ■

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● **Public consultation on amending the Act of 30 September 1986 with a view to enabling the launch of high definition broadcasting on terrestrially-broadcast digital television and personal digital television; available at: http://merlin.obs.coe.int/redirect.php?id=10215**

FR

FR – Fox Life is Indeed an Italian Channel

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The *Société des auteurs et des compositeurs dramatiques* (French society of dramatic authors and composers - SACD), the *Syndicat des producteurs indépendants* (French syndicate of independent producers - SPI) and the *Chambre syndicale des producteurs de films* (French syndicate of film producers - CSPF), considering the channel Fox Life, launched in France in 2005 and directed mainly at the French market, had artificially relocated its registered office to Italy in order to escape the constraints of French legislation, referred the matter to the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority – CSA) last February. The applicant parties claim this location is misleading, creates unfair competition with the other French theme channels available on cable, and is prejudicial to French and European audiovisual creation, as they are being deprived of the resources and air time that would apply under the application of French law. At its plenary session on 4 April, the CSA replied that the management of Fox Life had assured it that all strategic decisions concerning the channel's programming were made in Rome, where the editorial line was decided. This was where the programme director was located; this person ensures the consistency of the various national versions of Fox Life and receives proposals for broadcasting local programmes. The channel was therefore well and truly an Italian channel. The CSA nevertheless stated that it realised the importance of such matters and what they represented in terms of audiovisual and cinematographic creation, and that it was concerned about this in the context of the process of the revision the Directive Television Without Frontiers. The fact of a channel establishing itself in a country other than the country in which it broadcast in order to avoid legislation deemed too constricting was one of the cases quoted by Viviane Reding as an abuse of the principle of country of origin, which is the fundamental basis of the TWF Directive. Ways of combating abusive relocations of this kind are in fact included in the revised text of the Directive, which is currently under discussion. ■

● Status of the channel Fox Life – the CSA's answer to the SACD, the SPI and the CSPF, available at:
http://merlin.obs.coe.int/redirect.php?id=10216
FR

GB – Co-production Treaty with South Africa

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In 2004 and 2005 the Department for Culture, Media and Sport undertook an 18 month review of existing co-production treaties in consultation with the UK Film Council and the UK film industry. Based on this review, on 28 February 2005, it was announced the UK intended to develop a new series of bilateral co-production agreements designed to bolster economic and/or cultural benefits for the UK. Negotiation of new treaties or renegotiation of existing treaties were on the agenda for such countries as India, China, Morocco, Jamaica, Australia, new Zealand, Canada and France. The agreements enable films made jointly by UK producers and their foreign counterparts to qualify as films with national status in both the UK and the other country. Provided the relevant criteria are met, such films could be eligible for national incentives.

In line with these efforts, the UK signed a co-production agreement with South Africa on 24 May 2006. The agreement seeks to encourage South African filmmakers to invest in British talent and locations. The South African film industry, in turn, should benefit from UK film making expertise. The British Culture Secretary and the South African Culture Minister have both expressed their satisfaction in establishing this partnership. The former underlined the importance of joining forces through co-productions and observed "the pooling of talent, finance and expertise" is increasingly important in modern film making. The latter believes such an agreement will strengthen an already thriving indigenous African film.

Both representatives stressed their countries have much to offer and receive in return. British film is vibrant, as award-winning director Ken Loach recently demonstrated at this year's Cannes festival, and South African film is an emerging force with films such as *Tsotsi* to prove it. British facilities and expertise, they conclude, will combine well with the talent and unique "world in one country" which characterize South Africa. Thus, cultural and financial benefits as well as the production of top-class cinema lie ahead for both partners. ■

● "UK film industry joins forces with South Africa", press release of 24 may 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10185
EN

GB – Regulator Clarifies the Definition of "Control" of Media Companies

The UK regulator, Ofcom, has issued new guidance to clarify the circumstances in which a person (or company) controls another. The guidance applies in relation to the question of *de facto* control; in other words, where the basic test of either 50% ownership of share capital or 50% of voting power is not satisfied. The concept of control (which is different from that in the general competition legislation) is important to secure that licence appli-

cations from companies comply with media ownership rules (including those on cross-ownership); to ensure that existing licensees are not in breach of these rules after there has been a change in control; and to decide whether, in the case of the major terrestrial broadcasters, a change of control has taken place which will result in a review of the effects of the change by the regulator.

The Broadcasting Act 1990 provides that de facto control will exist where a person or company can, in most cases or in significant respects, achieve the result that the affairs of the media company are conducted in accordance with his (or its) wishes (Schedule 2, Part 1, para. 1(3)(b) as amended by the Communications Act 2003). The guidance states de facto control will be presumed where a shareholder holds at least 30% of the shares, is the largest shareholder and can outvote each of the next two largest shareholders. There is, however, no minimum level of shareholding below which de facto control cannot exist; indeed in an extreme case such control may exist even without a shareholding or representation on the company's board. Relevant circumstances in the regulator's assessment include shareholding and voting rights, constitution and management of the media company (including rights of veto, board representation, and patterns of attendance, voting and conduct at meetings) and funding arrangements (including the nature and terms of any loans). The guidelines clarify these issues, whilst making it clear that each case will depend on its individual circumstances and that it is not possible to set out an exhaustive list of relevant factors. They also clarify the procedures Ofcom will adopt for investigating the question of control, and state that informal guidance may be sought from the regulator in advance, although it will not give advice on hypothetical transactions nor assist in structuring a deal to secure compliance. ■

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● **Ofcom, 'Ofcom Guidance on the Definition of Control of Media Companies', 27 April 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10186
EN

GB – Regulator Reviews Cross-Promotion Rules

Cross-promotion rules apply to all private broadcasters licensed in the UK. Cross-promotion means the promotion on one television channel of another channel or service under the same or linked ownership, for example ITV1 promoting programmes available on ITV3, or Channel 4 promoting its digital services or their availability on cable, satellite and Freeview. It is thus to be distinguished from self-promotion, which is the promotion of programmes on the same channel. The importance of cross-promotion has increased considerably with the fragmentation of channels. It is also important as it does not qualify as advertising, thus cross-promotion is used to fill gaps between the length of programmes and the amount of advertising permitted under the Television Without Frontiers Directive. It is also distinct from promotions within programmes, which are subject to the normal rules relating to commercial references in programmes.

The UK regulator, Ofcom, has reviewed the rules relating to cross-promotion. It concluded that it was appropriate in a new Code to de-regulate and to remove the rules, subject to two exceptions. The first is a requirement that all broadcasting licensees limit the subject of cross-promotions to broadcasting-related services. This was considered necessary to protect consumers from promotions that provide no benefit to their viewing experience, and to ensure the separation of programmes from advertising. The second rule is a requirement that the commercial terrestrial broadcasters (Channels 3, 4 and 5) maintain neutrality between different digital retail TV services and digital platforms. This is to ensure an appropriate competitive environment in the run-up to full digital switchover. The new code will also replace the 30% shareholding requirement applying to the different concerns involved in the cross-promotion with non-binding guidance based on 30% shareholding or voting power relationships.

This change does not apply to the BBC as its cross-promotional activities are not regulated by Ofcom. However, the regulator has indicated that the BBC should develop a code based on similar principles. The new Cross-promotion Code comes into effect on 10 July 2006. ■

Tony Prosser
School of Law,
University of Bristol

● **Ofcom, 'Review of the Cross-Promotion Rules: Statement', 9 May 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10184
EN

LT – LRT Will Broadcast its Programmes via Satellite

On 26 April 2006, the Radio and Television Commission of Lithuania (RTCL) decided to give authorisation to the Lithuanian Public Service Broadcaster to transmit its programmes via satellite. The said authorisations will give the right to the Public Service Broadcaster to broadcast two television programmes and two radio programmes via satellite SIRIUS 3.

The activity of the Public Service Broadcaster is regulated by the Law on the National Radio and Tele-

vision of Lithuania (LRT) (see IRIS 2006-2: 17) and the Law on Provision of Information to the Public. The procedure for issuing authorisations, which grant the right to the public broadcaster to broadcast, is laid down in Article 31 of the Law on Provision of Information to the Public. According to this Law broadcasting and re-broadcasting activities in the Republic of Lithuania are licensed, except for the activities carried out by the public broadcaster. The Radio and Television Commission issues the broadcasting and re-broadcasting licences for persons who wish to engage in those activities.

Due to the fact that LRT activities are not licensed as mentioned above, the RTCL issues authorisations in order to ensure that the LRT programmes can be broadcast. These authorisations are essentially analogous to the licences but they are less detailed. They indicate the programme to be broadcast, the name of the satellite and the frequency.

The Law on Provision of Information to the Public foresees a priority right of LRT to get frequencies for broadcasting its programmes in a procedure which does not require tendering in order to ensure the broad dissemination of the LRT programmes in the whole country.

This priority right is also set out in the "Model for the Implementation of Digital Terrestrial Television in Lithuania", which was approved by the Government on 25 November 2004 (see IRIS Merlin 2005-1: Extra). According to the Model, two positions are reserved for the programmes of the LRT, which is granted the right to broadcast two programmes without a rival.

LRT is the only public broadcaster in Lithuania. It has been broadcasting radio programmes since 1926 and television programmes since 1957. Lithuanian Television programme is being broadcast 18 hours per day on average and is receivable throughout the whole country. The programme is comprised of informational, analytical and educational items, arts and sport broadcasts as well as various films.

Foreign citizens of Lithuanian origin were in particular looking forward to the possibility of viewing LRT programmes via satellite, because they had never had any opportunity to watch those programmes in real time. The possibility to watch Lithuanian programmes will allow the Lithuanian Community abroad to keep their identity and also to follow the developments in their homeland.

LRT is planning to start broadcasting its programmes via satellite by May this year. ■

Jurgita Lėsmantaitė
Radio and Television Commission of Lithuania

- **Decisions of the RTCL on the issuing of the authorisations, dated 26 April 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10174
LT
- **Law on Provision of Information to the Public, available at:**
http://merlin.obs.coe.int/redirect.php?id=10175
EN-LT
- **Law on the National Radio and Television of Lithuania, available at:**
http://merlin.obs.coe.int/redirect.php?id=10176
LT

NL – No Copyright in Recorded Conversations with Extortion Victim

The District Court of Amsterdam recently ruled that official reports, based on transcriptions of recorded conversations between a victim of extortion (Dutch real estate tycoon, Willem Endstra) and an intelligence agent, are not protected by copyright.

In the period of May 2003 to January 2004, Endstra had fifteen conversations with agents of the *Criminele Inlichtingen Eenheid* (Criminal Intelligence Unit - CIE). In these conversations, which were being recorded as they took place, the businessman indicated that he was being extorted by Willem Holleeder. Endstra was murdered in May 2004.

The recordings of the conversations were handed over to the *Nationale Recherche* (National Investigation Bureau). It made an official report of the recordings in January 2006. A few days later, Willem Holleeder and his associates were arrested for the extortion of Willem Endstra and other real estate entrepreneurs. Endstra's assassination, the recordings and the arrest of Holleeder constituted important news topics and two reporters were able to obtain a copy of this official report of the recordings. They subsequently published it in several articles in *Het Parool*, a Dutch daily newspaper, as well as in a best-selling book entitled "*De Endstra-tapes*" (the Endstra tapes). The official report eventually also made its way onto the Internet and was available on the website of *Quote* magazine.

Endstra's heirs took legal action seeking to prohibit publication of the book. They argued that the conversations are interviews, and are therefore protected by copyright. In addition, they contended that publishing the book amounts to an illegal breach of their privacy which poses a significant threat to their lives.

The district court of Amsterdam declared that for a conversation to be protected by copyright, creative choices in the manner such a conversation is led must be made. The only purpose of the conversations with Endstra, however, was to provide information in order to enable the police to take action against Holleeder's criminal activities. The interviews can therefore not qualify for copyright protection.

The judge finds it implausible that the heirs of the victim should be endangered as a result of the publication of the book. Their names are not mentioned in the book. Moreover, Holleeder and his associates already know the content of the official

Brenda van der Wal
Institute for Information Law (IViR), University of Amsterdam

reports of the recordings due to the criminal proceedings, which are based on the Endstra tapes. The report had also already been published in other media prior to the book.

In this case, the judge decided that the public interest should prevail over the interests of Endstra's heirs. The recordings are an important public topic and they provide useful insight into the way the CIE handled the Endstra case. The possibility that commercial gain could be derived from the publication is irrelevant. The victim's heirs have announced that they will lodge an appeal against the judgment. ■

• Endstra tapes Court decision of 11 May 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10179

NL

NL – Media Authority Issues Warnings to Two Public Broadcasting Organisations

Brenda van der Wal
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Dutch public broadcasting organisations VARA and TROS have both received official warnings from the *Commissariaat voor de Media* (Media Authority). The consumer programmes of these two networks were found to have cooperated with providers of Internet sites that offer a scheme to compare different insurance policies enabling consumers to make an informed choice. In doing so, they were in breach of the Media Act which prohibits public broadcasting organisations to serve the profit-making activities of third parties.

The Internet site of VARA's consumer programme *Kassa* provided consumers with information relating to health insurance and a simplified free version of the scheme to compare insurance policies offered by another site: *Verzekeringssite* (Insurance Site). In addition, a hyperlink on the *Kassa*-site offered consumers the possibility to request an offer from *Verzekeringssite*.

According to the Media Authority, the comparison scheme itself is a good service for a public consumer programme to offer to its viewers. In this case, however, the public broadcasting organisation violated the prohibition to engage in commercial activities. VARA generated increased profits for *Verzekeringssite* and offered it a possibility to sell its products within the public realm. VARA should also have included clauses upholding the commercial prohibition it must observe in the contract with *Verzekeringssite,* but failed to do so.

The Media Authority understands that public broadcasting organisations are still experimenting with the Internet to explore more efficient ways to support and enhance their programmes. This prompted the media Authority to issue a warning rather than a fine.

TROS received a warning for similar reasons. Their consumer programme *Radar* also unduly benefited a commercial Internet site *(Independer*) offering software that would compare insurance companies. ■

• *Waarschuwing voor VARA en TROS wegens 'het dienstbaar zijn aan het maken van winst door derden'* (Warning for VARA and TROS for 'serving profit-making activities of third parties'), press release of 2 May 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10180

• Warning letter of the *Commissariaat voor de Media* to VARA, 27 April 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10181

• Warning letter of the *Commissariaat voor de Media* to TROS, 27 April 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10182

NL

NO – Amendments to the Act on Film and Video

On 5 May 2006, the Norwegian Government tabled a legal proposal allowing for substantial amendments to the *Lov om Film- og Videogram* (the Act on Film and Video - AFV).

Abolishing censorship of cinema films aimed at adults is one of the crucial changes. Accordingly, only films with an audience including children (below 18 years) intended for public showing at cinemas need approval by the Media Authority. The Media Authority is authorized to determine age classifications, which remain at four levels in Norway: "for all", above 7 years, above 11 years and above 15 years (in the event that an adult accompanies the child, the age limit approved for children will automatically be 3 years below the limit set). There is currently no obligation for approval of films and other audiovisual content on distribution platforms other than cinema. The film distributors may nevertheless on a voluntary basis request guidance from the Media Authority on suitable age classification of videos, DVDs, etc… as well as on the subject of lawfulness of films targeting adults.

The proposal was introduced as a result of recent changes in the Norwegian constitution (2004) regarding the protection of freedom of expression (see IRIS 2005-3: 17). *Stortinget* (the Norwegian Parliament) has approved a new constitutional provision, which now reads: "Pre-publication censorship and other preventive measures may not be exercised, except with the aim of protecting children and young people from the harmful effects of moving pictures" (unofficial translation of the fourth sentence of the amended Article 100). The Media Authority introduced the said principle ahead of the changes proposed on this matter in the AFV.

Another proposed amendment to the AFV is the

establishment of a ban on all public exhibition of films containing explicit pornography. According to the traditional interpretation of the General Penal Code (Article 204), there has until recently been such a ban on explicit pornography both with respect to the public showing and the sale of films and video films, etc... However, this spring (12 March 2006) *Klagenemda for film og videogram* (the Complaints Council for Film and Video) decided to brush aside this traditional interpretation which warranted a ban on video films containing explicit pornography (so-called hard-core pornography). In doing so, it followed a recent Supreme Court decision (7 December 2005), by which the Norwegian Supreme Court broadened the traditional interpretation regarding explicit pornography by excluding magazine pictures from the ban. The proposed ban in the AFV will be limited to public showing at cinemas (and the like). Distribution of video films and the exploitation of audiovisual content on other platforms than those meant for public exhibition will remain subject to more permissive rules in accordance with the newly formulated interpretation of the Penal Code's provisions. A Parliamentary vote on the proposed amendments is expected later this year. ■

Lars Winsvold
Norwegian Media Authority

● ***Lov om Film- og Videogram*** **(the Act on Film and Video - AFV), unofficial English translation available at:**
http://merlin.obs.coe.int/redirect.php?id=10187
EN

● ***Odelstingsproposisjon no. 72 (2005-2006) Om lov om endringar i lov 15. mai 1987 nr. 21 om film og videogram*** **(Legal Proposal on Amendments to the Act on Film and Video), available at:**
http://merlin.obs.coe.int/redirect.php?id=10188
NO

PL – Amendment of the Polish Broadcasting Act Due to a Decision of the Constitutional Tribunal

The Broadcasting Act of 29 December 1992 (Journal of Laws of 2001 No. 101, Item 1114 with subsequent amendments), which mainly governs the audio-visual sector in Poland, has been most recently amended on 29 December 2005. Some of those amendments caused legal reservations and a lot of discussions, e.g. the fact that the Chairman of the National Broadcasting Council (NBC) should be appointed and dismissed by the President of the Republic of Poland.

Upon appeal the Constitutional Tribunal, which is authorised to review norms in the context of the principles laid down in the Constitution of the Republic of Poland, delivered its judgment in March 2006. The Tribunal found *inter alia* the above-mentioned competence of the President incompatible with constitutional principles. The Tribunal stated that such competencies were not included in the constitutional catalogue of the President's authorisations. Moreover, the Tribunal stipulated that from the date of the announcement of the sentence the present Chairman of NBC would not be allowed to hold her functions.

On 14 April 2006, due to the Tribunal's verdict, the President of the Republic of Poland passed amendments to the Broadcasting Act as follows: "The Chairman of the NBC shall be appointed and dismissed by and from the members of the Council" (Art. 7.2). The President argued that direct consequence of the Tribunal's sentence was the removal of the Chairman of NBC from her function and that from the same time the legal basis for the presidential nomination did not exist. As there was no regulation in this respect, the NBC could not act in a proper way, because of the exclusive rights of the Chairman – the organ indispensable for executing the NBC's public duties. Due to Art. 213 of the Constitution the NBC shall safeguard freedom of speech, the right to information as well as safeguarding the public interest regarding radio broadcasting and television. Therefore, NBC issues regulations and, in individual cases, adopts resolutions. The Chairman directs the NBC's works, represents it, and plays a fundamental role in the administrative procedures.

Therefore, immediate legal amendments were required. The Polish parliament enacted the above-mentioned changes on 25 April 2006 and the President countersigned them. Just after their announcement in the Journal of Laws in May 2006, NBC appointed a new Chairman. ■

Katarzyna B. Masłowska
Warschau

● **Judgment of the Constitutional Tribunal, 23 March 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10177
PL

RO – CNA Exemption for Donating Companies

Following the tragic scale of this year's floods in Romania's Danube region and the large number of families affected, the *Consiliul Național al Audiovizualului* (regulatory body for electronic media in Romania – CNA) granted special permission to broadcasters in a communiqué dated 18 April 2006: if they were willing to organise relief action to help those affected, they would be allowed, in reports on such action, to name those who were making donations, including the names of any goods that were offered as aid. ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Comunicat CNA din 18 aprilie 2006*** **(CNA communiqué, 18 April 2006), available at:**
http://merlin.obs.coe.int/redirect.php?id=10172
RO

RO – Advertising for Spirits in Football Stadiums Prohibited

Mariana Stoican
Radio Romania International, Bucharest

The *Consiliul Naţional al Audiovizualului* (regulatory body for electronic media in Romania – CNA) has ruled that, during the TV broadcast of the football match between Bucharest's top division teams Steaua und Dinamo on 9 April this year, banners advertising alcoholic beverages had been displayed at Dinamo's stadium, infringing the *Legea privind publicitatea* (Advertising Act no. 148/2000), amended by the *Ordonanţa de guvern* (Government Order) no. 90/2004. The CNA sent a written complaint to the *Liga Profesionistă de Fotbal* (Romania's professional football league) and to the municipal authority of Bucharest's second district, which was responsible for punishing the football club for this breach of the law. By taking this step, the CNA is hoping to protect broadcasters from being deemed guilty of a criminal offence in the future. Art. 132 of the *Codul de reglementare a conţinutului audiovizual* (regulatory code for audiovisual content) prohibits the broadcast of sports events held in Romania at which advertising for tobacco products or alcoholic beverages constitutes a violation of Act No. 148/2000. ■

● ***Comunicat CNA din 11 aprilie 2006*** **(CNA communiqué, 11 April 2006), available at:**
http://merlin.obs.coe.int/redirect.php?id=10173

RO

TR – Commercial Radio and TV Stations Start Broadcasting in Kurdish

Mine Gencel Bek
Universität Ankara

Until 2002 the Turkish laws prohibited the broadcasting of programmes in languages or dialects (in particular Kurdish) other than Turkish. In the reform programmes for the European Union accession process the demand for permission to broadcast in other languages and dialects had been taken into account. The third EU adjustment package was approved by the Turkish parliament on 3 August 2002. It allowed inter alia constitutional and legal arrangements for broadcasting and education in mother tongues. The provisions on broadcasting are included in the Law concerning the Establishment of Radio and Television Channels (Law no: 3954).

The basic principle of Turkish as a broadcasting language had been amended and now broadcasting in different languages and dialects "used by Turkish citizens traditionally in their daily life" is allowed. In accordance with the law, RTÜK, the Radio and Television Authority, was entitled to prepare regulations before broadcasting in other languages could commence.

The first progamme in Kurdish had been broadcast by the public channel TRT in June 2004, six months after the approval of the RTÜK regulation. In March 2006 commercial channels followed with programmes in Kurdish.

12 commercial TV and radio broadcasters applied for permission to broadcast programmes in dialects. Three of them received permission: Gün TV, Söz TV and for radio Medya FM.

According broadcasters the permission to broadcast in dialects has a symbolic importance. Nevertheless the limits for such programmes have been criticized. There are time limits (five hours per week for radio channels with not more than 60 minutes per day, and four hours per week for TV channels with not more than 45 minutes per day) and the obligation to broadcast subtitles in Turkish. However, this liberalisation is important. Before the adoption of the law, broadcasting programmes which were not in Turkish (and especially in Kurdish) had been faced with criminal investigation. ■

US – Publishers Score "Hat Trick" Against Apple

In November 2004, the online news magazines PowerPage and Apple Insider published detailed information about Apple Computer's forthcoming release of a "new FireWire breakout box for GarageBand" to facilitate the digital recording of live audio performances. In December 2004, Apple brought suit in California state court, alleging that certain unnamed defendants, presumably some of its own employees, had disclosed its trade secrets in violation of their confidentiality agreements. Though the online magazines were not named as defendants in the suit, Apple obtained permission to serve sweeping civil subpoenas against the publishers and the email service provider of one of the publishers, requiring the disclosure of all documents that might lead to the identification of the "proper defendants" in the lawsuit. These documents included, among other things, emails sent to and from PowerPage that contained the word "Asteroid", the code name for the new Apple product.

In an opinion that alarmed many legal observers, the district court denied the publishers' motion for a protective order against disclosure of the emails or their sources. In a resounding defeat for Apple, the appellate court on 26 May 2006, reversed the district court, decisively supporting publishers on each of their three major arguments.

The appellate court held that (1) the subpoena to the email service provider was barred by the plain terms of the federal Stored Communications Act, protecting "the contents of a communication while in electronic storage" by a service provider. While there are specific exceptions set forth in the Act, the court held that they did not include the "implied" excep-

tion for civil discovery sought by Apple. (2) The subpoenas were unenforceable under California's shield law, protecting publishers and reporters against disclosure of confidential sources. (3) The subpoenas were also barred by the journalists' constitutional privilege. While that privilege is not absolute, the court considered the five factors identified in the California case of Mitchell v. Superior Court, 37 Cal.3d 268 (1984), and found that the factors overwhelmingly weighed against Apple.

Some of the early reaction to the case overstates its applicability, suggesting, for example, that it protects casual "bloggers" as well as more serious journalists. It is true that the court "decline[d] the implicit invitation to embroil ourselves in questions of what constitutes 'legitimate journalis[m].'" But the court conceded that "the deposit of information, opinion, or fabrication by a casual visitor to an open forum" "may indeed constitute something other than the publication of news"; and it avoided the term "blog" because of "its rapidly evolving and currently amorphous meaning."

In weighing the Mitchell factors, the court seemed unimpressed by the degree of harm allegedly resulting from disclosure of the particular trade secret at the heart of the case, where "no proprietary technology was exposed or compromised". Perhaps the protection of a more valuable trade secret, or patent or copyright, might affect the weighing of the factors.

In the case before it, the court decisively aligned itself with the privacy and public interest concerns raised by the petitioners, and set the hurdle quite high for any plaintiff, like Apple, who attempts too broad a discovery of confidential information. ■

Edward Samuels
New York

● O'Grady v. Superior Court of Santa Clara County; Apple Computer, Inc., Real Party in Interest, No. H028579, Ct. App. Calif., 6th App. Dist., 26 May 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10178
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