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IRIS LEGAL OBSERVATIONS
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INTERNATIONAL

Riga Ministerial Declaration: EU Ministers Commit to Making e-Inclusion a Reality

On 12 June 2006, Ministers from 34 European countries convened in Riga and committed to steering the use of information and communication technologies to counter economic, social, educational, territorial or disability-related disadvantages. It was noted that many Europeans benefit too little from these technologies and many are at risk of being left behind. Beyond the social necessity of enabling Europeans to participate on equal terms in the information society there are significant economic opportunities for the industry to seize. "e-Inclusion" targets have therefore been set and the aim is to halve the gap in Internet usage by groups at risk of exclusion, to boost broadband coverage in Europe to at least 90 % and to make all public websites accessible by 2010.

The Riga Ministerial Declaration, signed by ministers from EU Member States, accession and candidate countries, and EFTA/EEA countries, lists the following targets:

- Halve the gap in Internet usage by 2010 for groups at risk of exclusion (i.e older people, people with disabilities, the unemployed...);
- Increase broadband coverage, thus infrastructure, in Europe to at least 90% by 2010. In 2005, broadband was available to approximately 60% of businesses and households in remote and rural areas of the 15 EU Member States and to more than 90% in urban areas;
- Ensure accessibility of all public websites by 2010;
- Deploy plans to encourage digital literacy by 2008 in order to significantly reduce gaps for groups at risk of exclusion by 2010;
- Make recommendations on accessibility standards and common approaches by 2007 with a view to making the latter mandatory by 2010;
- Assess the necessity for legislative measures in the field of e-Accessibility and take into consideration the accessibility requirements in the review of the electronic communications regulatory framework beginning in June 2006.

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

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Measures to promote user-recommended best practices, industry-led provision of accessible technology, innovative EU research, national e-inclusion plans, and voluntary agreements between stakeholders can all be cited as means to achieving these targets.

30 to 40 percent of Europeans do not benefit from the information society and broadband penetration stagnates at 13% of the EU population with significant differences between rural and urban areas. EU authorities therefore intend to intensify the application of EU telecom rules in the next few years to enhance competition in the internal market and to achieve broadband penetration of at least 50% of households by 2010. It is felt cooperation between public authorities at all levels, industry and users will also prove instrumental and should therefore be encouraged. ■

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● **"Internet for all: EU ministers commit to an inclusive and barrier-free information society", press release of 12 June 2006, IP/06/769, available at: http://merlin.obs.coe.int/redirect.php?id=10250**

DE-EN-FR-LV

COUNCIL OF EUROPE

European Court of Human Rights: Case of Tatlav v. Turkey

In 1992, Erdoğan Aydin Tatlav, a journalist living in Istanbul, published a five volume book under the title *Islamiyet Gerçeği* (The Reality of Islam). In the first volume of the book he criticised Islam as a religion legitimising social injustice by portraying it as "God's will". Following a complaint on the occasion of the fifth edition of the book in 1996, the journalist was prosecuted for publishing a work intended to defile one of the religions (Art. 175 of the Criminal Code). He was sentenced to one year's imprisonment, which was reduced to a fine.

Tatlav complained before the European Court of Human Rights that this conviction was in breach of Article 10 of the Convention, referring to the right of freedom of expression "without interference by public authority". Essentially, the Court assessed whether the interference in the applicant's right in view of protecting the morals and the rights of others could be legitimised as "necessary in a democratic society". The Court is of the opinion that certain passages of the book contained strong criticism of religion in a socio-political context, but that these passages had no insulting tone and did not contain an abusive attack on Muslims or on sacred symbols of Muslim religion (see IRIS 2005-10: 3). The Court did not exclude that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered to be a sufficient reason to justify the criminal conviction of the author of the book. The Court also took account of the fact that although the book had first been published in 1992, no proceedings had been instituted until 1996, when the fifth edition was published. It was only following a complaint by an individual that proceedings had been brought against the journalist. With regard the punishment imposed on Tatlav, the Court is of the opinion that a criminal conviction involving, moreover, the risk of a custodial sentence, could have the effect of discouraging authors and editors from publishing opinions about religion that are non-conformist and could impede the protection of pluralism, which is indispensable for the healthy development of a democratic society. Taking into consideration all these elements of the case, the Strasbourg Court considers the interference by the Turkish authorities disproportionate to the aims pursued. Consequently, the Court holds unanimously that there has been a violation of Article 10 of the Convention (see IRIS 2006-4: 2). ■

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● **Judgment by the European Court of Human Rights (Second Section), case of Aydin Tatlav v. Turkey, n. 50692/99, 2 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=9237**

FR

EUROPEAN UNION

Court of Justice of the European Communities: Collecting Societies' Power to Grant a Retransmission Permission to Cable Operators

On 1 June 2006, the Court of Justice issued its judgment on case C-169/05 (Uradex). The reference for a preliminary ruling concerned the interpretation of Article 9(2) of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. The reference was made in the course of proceedings before the Belgian Court of Cassation between Uradex and the *Union Professionnelle de la Radio et de la Télédistribution* (RTD) and the *Société Intercommunale pour la Diffusion de la Télévision* (BRUTELE). In the main proceedings the former body, a collecting society for the related rights of performers, sought a ruling that RTD and BRUTELE be ordered to cease their unauthorised retransmission by cable of the performances

comprised in its catalogue.

According to the 27th recital in the preamble of the Directive, "cable operators must obtain authorisation from every holder of rights in each part of the programme retransmitted". In this respect, with a view to simplifying the respective negotiation process and introducing legal certainty, Article 9(1) of Directive 93/83/EEC (as transposed into Belgian law under Article 53 of the Law of 30 June 1994 on copyright and related rights) requires that the right of copyright owners and holders of related rights to grant or refuse such authorisation be exercised collectively, by way of compulsory recourse to a collecting society, such as Uradex. Article 9(2) of the Directive also deals with the case of a rightsholder who has not transferred the management of his rights to any collecting society. In that event, "the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights".

The Court that made the reference was uncertain as to whether the right to grant or to refuse authorisation to retransmit fell within the scope of the "management of rights" task of the collecting society according to Article 9(2) of the Directive. In this respect, the Belgian court adjudicating on appeal had found that such "management of rights" essentially consisted in collecting the remuneration paid by cable operators and in passing it on to rightsholders. Thus, it did not follow from Article 9(2) that Uradex could not exercise the right to authorise or to prohibit cable retransmission with regard to those artists who had not mandated it to manage their rights. Conversely, Uradex held that from a reading of Article 9 of the Directive in conjunction with Article 53 of the Belgian law it was quite apparent that the collecting society could also exercise the right of retransmission, its attributions not being limited to the financial aspects of the rights in question.

On the substance of the preliminary ruling, the Court of Justice essentially upheld Uradex's conclusions. Namely, the Court first observed that Article 9(2) of the Directive merely gave concrete expression to the exclusive collective exercise of the right of retransmission rule set out in Article 9(1) with regard to the particular situation of a rightsholder who had not transferred the management of his rights to a collecting society. Furthermore, the Court noted that Article 9(2) contained no limitations as to the scope of the attributions of the collective society, thus it followed that the management of rights thereunder was not limited to the financial aspects of such rights and that it did include the power to authorise and prohibit retransmission by cable operators. Finally, the Court held that such findings were further supported by the wording of the heading of Article 9 of the Directive, "Exercise of the cable retransmission right", which made it clear that all the provisions of that article concerned precisely such a right.

In addition, the Court of Justice further adjudicated on one point which, albeit not expressly included in the question for a preliminary ruling referred by the Belgian Court of Cassation, was raised in the main proceedings. The Court of Justice held that, pursuant to the 28th recital in the preamble of the Directive, Directive 93/83/EEC did not preclude the assignment of the retransmission right from performers to third parties on the basis either of a contract or of a legal presumption. This is the case of Article 36(1) of the Belgian Law of 30 June 1994, according to which unless otherwise agreed performers assign to producers the exclusive right of exploitation of their performances. Therefore, if such a presumption is not rebutted, performers lose their status of "rightsholders" within the meaning of Article 9(2) of the Directive. As a consequence, all legal links existing thereunder between performers and the collecting society should be deemed as severed.

In view of the above, the Court of Justice ruled that Article 9(2) of the Directive 93/83/EEC is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightsholder's right to grant or refuse authorisation to a cable operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights. ■

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● Judgment of the Court of Justice of the European Communities, 1 June 2006, on case C-169/05 Uradex SCRL v. Union Professionnelle de la Radio et de la Télédistribution (RTD) and Société Intercommunale pour la Diffusion de la Télévision (BRUTELE), available at :
http://merlin.obs.coe.int/redirect.php?id=10238

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

Court of Justice of the European Communities: Advocate General's Opinion in Case C-380/03 (Tobacco Advertising Directive)

Advocate General Léger has argued in his closing submissions that the claim lodged by Germany against the Directive on advertising and sponsorship of tobacco products in media other than television (2003/33/EC) should be dismissed (Case C-380/03) (see IRIS 2005-7: 10).

Germany had already challenged a previous, similarly entitled Directive of 6 July 1998 (98/43/EC) in the ECJ on the grounds that its legal basis was incorrect (Case C-367/98) and had succeeded in having it completely annulled. In September 2003 Germany made a fresh application

for annulment of the follow-up Tobacco Advertising Directive of 23 May 2003. Germany argued firstly that the choice of Article 95 EC as a legal basis for the contested Directive was incorrect. It contended that the adoption of Articles 3 and 4 of the Directive failed to comply with Article 95 – empowering the Community to take measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market. In its view, none of the prohibitions listed in these Articles actually contributed to eliminating obstacles to the free movement of goods and freedom to provide services or to removing appreciable distortions of competition.

The Advocate General argued, however, that existing obstacles in the internal market entirely justified the choice of the legal basis. He made the point, in his Opinion, that when the contested Directive was adopted there remained significant differences between the Member States' rules on tobacco advertising and sponsorship. Because they were often concerned with a prohibition or restriction, these differences in the press sector would inevitably have had the effect of impeding not only the free movement of goods, but also the freedom to provide services. Such national prohibitions or restrictions were also likely to preclude the circulation of radio programmes and electronic communications. The same was true with regard to sponsorship.

The Advocate General therefore considered that Article 95 EC was a suitable basis on which to seek to end this significant fragmentation of the internal market. He also pointed out that, in accordance with the principle of the free movement of goods, the Directive did not allow the Member States to impose more stringent provisions in relation to advertising or sponsorship on the grounds that they were necessary in order to protect public health. ■

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• Advocate General's Opinion in Case C-380/03, 13 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10226

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

Council of the European Union: Tax Arrangements Applicable to Radio and TV Broadcasting Services and Certain Electronically Supplied Services

The Council of the European Union has adopted a Directive amending Council Directive 2002/38/EC relating to value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services. This amendment extends the provisions as laid down in 2002 to 31 December 2006 and obliges Member States to bring into force the laws, regulations and administrative provisions necessary to comply with this extension as per 1 July 2006.

In a review carried out by the Commission, Council Directive 2002/38/EC had been found to have operated in a satisfactory manner and to have achieved its objective, however, the Commission has since proposed a new Directive on the place of supply between taxable persons in order to include supplies by taxable persons to non-taxable customers. This proposal was put forward for the first time at the end of 2003 and was amended in July 2005. Under the amended proposal all broadcasting and electronically supplied services will be taxed at the place of consumption.

In addition to this recent proposal, the Commission presented another proposal, in November 2004, for a Directive on the simplification of VAT obligations which sets out a more general electronic mechanism than that provided for in Council Directive 2002/38/EC in order to facilitate compliance with fiscal obligations where cross-border services are concerned.

Because the proposals containing these broader measures have not reached the final stage of adoption yet, it is a practical necessity to extend the provisions of the existing framework so as to ensure the proper functioning of the internal market and the continued elimination of distortion. Such an extension is necessary to prevent a legal void resulting from the fact one Directive would expire before a new one covering the situation is adopted. ■

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• Council Directive 2006/58/EC of 27 June 2006, amending Council Directive 2002/38/EC as regards the period of application of the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, available at: http://merlin.obs.coe.int/redirect.php?id=10260

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

Council of the European Union: Common Position on Rome II Excludes Defamation by Media

The Council has reached a common position on the proposal for a Regulation on the law applicable to non-contractual obligations ("Rome II"). Rome II deals, inter alia, with cross-border torts. These include infringements of intellectual property rights, acts of unfair competition, and to an uncertain extent, infringements of privacy and other personality rights.

At the heart of the proposal lies a three tier solution, variations of which are already in place in a number of Member States. The governing law is:

1. the law chosen by the parties, lacking a choice;

2. the law of the common habitual residence of plaintiff and injured party; lacking that

3. the law of the country where the damaging act took place.

In a case where the damage caused by the act arises in another jurisdiction, the latter applies (*lex loci delicti*, Article 5(3)). The latter will typically be the case in cross-border media, especially over the Internet, but also in broadcasting and in the print media.

The idea behind steps 2 and 3 is that these rules will normally identify the law of the country most closely connected with the dispute. In any case where they clearly do not, there is an escape clause in Article 5(4), which allows courts to apply the law of a country manifestly more closely connected. Infringements of intellectual property are governed by the law of the country under which protection is claimed (Article 9). In practice, this *lex protectionis* rule will point towards the same law as *the lex loci delicti* rule. It leads to the same problems including notably communication via the Internet: such communication will be simultaneously governed by the law of the country from where the communication originated and the laws of all the countries where it is received. Why disputes involving intellectual property cannot be subjected to the general rules is not explained in any way, other than that it "does not appear to be compatible with the specific requirements in the field of intellectual property" (see Rome II proposal COM 2003(427), p. 20). The Commission has taken the position that the *lex loci protectionis* is laid down in the Berne Convention and other international treaties on intellectual property. That point of view is not undisputed.

Violations of privacy and of personal rights by the media proved to be too controversial an issue. The problem is basically framed in terms of free speech versus privacy but it is also related to the media's reservations about the application of foreign laws to publications distributed abroad. The media favour application of the law of the country where the publisher or broadcaster is established; this will normally be the country where the communication is initiated, i.e. where the infringing act takes place. As it stands, many national laws also allow application of the law of the country where a publication is circulated or broadcast (reception), as this is regarded as one of the places where damage of the infringing act manifests itself. From that perspective, submitting defamation and similar violations to the general rule of the Rome II proposal would not appear to disfavour media interests much.

Because it did not expect an agreement, the Commission has taken violations of privacy and personality rights "by the media" out of the proposal it sent to the Council, to the dismay of the European Parliament. Rapporteur Wallis has already declared that a regulation not covering defamation and the like is unacceptable. It is therefore unlikely that the Rome II proposal will pass through Parliament in second reading smoothly. ■

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- **Press release of the Council of the European Union, 2725th Council Meeting, Justice and Home Affairs, Luxembourg 27-28 April 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10239**

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

- **Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), 27 June 2005, available at: http://merlin.obs.coe.int/redirect.php?id=10240**

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

European Commission: Communication on a Strategy for a Secure Information Society

The European Commission has issued a Communication outlining a strategy to improve network and information security in Europe. It notes businesses, individuals and public administrations underestimate the risks of insufficiently protecting networks and information as only 5 to 13% of IT expenditure is currently allocated to security. The Commission believes this rate of investment is alarmingly low and is promoting greater awareness through an open multi-stakeholder dialogue. Member States, the IT industry and users as well as the European Network and Information Security Agency, ENISA, should lead the way to more secure information and communication technologies by working together more closely.

An open dialogue involving all stakeholders is believed to be essential in building consumer trust, thus promoting widespread use of digital services. The main aim is to raise awareness of IT security matters and educate people and organisations on the actions that need to be taken in order to protect their own information and equipment. For users - be they public entities, private organisations or households - to be truly empowered, they must be provided with the necessary information relating to security "incidents" and analyses offering solutions and best practices. It is stressed public authorities play an important part in promoting awareness but it is ultimately up to the private sector to provide solutions.

Specific proposals of the Commission point to benchmarking national policies on network and information security in order to improve the dialogue between public authorities, to identify best practices and to raise the security awareness of end-users. ENISA will be entrusted with developing an appropriate data collection framework to store security incidents and surveys of EU consumer confi-

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dence. Member States and the private sector are for their part invited to play a more prominent role in this strategy for a secure information society.

The Commission is also carrying out a public consultation on the security and privacy implications of RFID (Radio frequency Identification) and is scheduled to present its conclusions later this year. These initiatives are part of a European policy on network and information security which covers spam and spyware, cybercrime, the integrity and protection of critical communication infrastructures as well. ■

● "Commission seeks to improve network and information security in Europe", press release of 31 May 2006, IP/06/701, available at: http://merlin.obs.coe.int/redirect.php?id=10243
DE-EN-FR

● Communication on a strategy for a Secure Information Society- "Dialogue, partnership and empowerment" COM(2006)251, available at: http://merlin.obs.coe.int/redirect.php?id=10246
CS-DA-DE-EL-EN-ES-ET-FR-HU-IT-LV-LT-MT-NL-PL-PT-FI-SK-SL-SV

European Commission: Public Funding for Broadband Initiative in Latvia Endorsed

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The European Commission has endorsed Latvian public funding plans intended to increase broadband access in remote regions. The aim of the initiative is to bring broadband communications within reach of citizens and businesses in order to help them reap the economic benefits of the information society. EC Treaty state aid rules allow subsidies for the development of certain economic activities or of certain economic areas on condition that there is no overall negative effect on competition (Article 87(3)c). The Commission concluded that the aid intended to support these plans is not likely to cause undue distortion of competition within the single market and is therefore compatible with the state aid rules as laid down in the EC Treaty.

The measures at hand promote investment in broadband infrastructure capable of providing retail broadband services. The latter will carry information at a minimum speed of 256 kbps downstream, with a possibility to upgrade to 2 Mbps, and at least 128 kbps upstream. It is hoped that remote and rural areas of Latvia, struggling with low levels of economic activity, below-average per capita income and high unemployment, will significantly benefit from increased access to broadband.

The Commission has expressed its satisfaction with such initiatives and has underlined such projects are fully in line with its policy to promote broadband in the European Union's rural and remote areas. In fact, the Latvian plans are expected to be co-financed by EU structural funds. ■

● "State aid: Commission endorses public funding to bridge broadband communications gap in Latvia", press release of 8 June 2006, IP/06/755, available at: http://merlin.obs.coe.int/redirect.php?id=10247
DE-EN-FR-LV

European Commission: Hessen's Film Subsidies Approved

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On 7 June 2006 the European Commission approved the EUR 20 million film subsidies programme of the Hessian government – the biggest in the Land's history. Until 2009, using the Film Financing Fund Hessen-Invest – a citizens' programme of the Land Hessen – EUR 5 million of soft loans will be allocated on an annual basis for financing film productions.

The main focus is to be on small and medium sized companies in the film industry. In this way the Land of Hessen wishes to invest in projects which are likely to be an economic success. Decisions on financing are taken with due regard to risk estimates and potential profitability of the film projects as well as the soundness of the applicants. Appropriate analysis is carried out by the Hessen Investment Bank (IBH). Interest rate payments of 2% are payable on the loans. The Fund which has a four year lifespan will come under the aegis of the IBH, which as the institute of the Land responsible for managing subsidies, is refinancing the EUR 20 million through the capital markets.

According to a statement of the Minister for Arts and Science, the objective of such subsidies is to generate profits in order to enable the cultural good of German and European films to compete at an international level as well as boost the standing of Hessen as a film production and media location. Moreover, in this manner the quality of film and television production is to be raised so as to guarantee a diverse cultural landscape.

The allocation of state aid has to be approved by the European Commission. This includes loans from state financial institutes, if similarly to the IBH they offer interest below market rates. Since the subsidies are flowing into the cultural sector and since firms outside Hessen may be considered for funding, the European Commission has given it the green light. The Film fund may finance up to a maximum of half the cost of the project, the subsidised share of which is to be fully spent in Hessen. The EU Commissioner Neelie Kroes said: "This example shows how seriously the European Commission takes the promotion of the regional film industry." ■

● Press communiqué of the European Commission, available at: http://merlin.obs.coe.int/redirect.php?id=10219
DE

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NATIONAL

AT – Product Placement and Self-advertising on the ORF Television Channel

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The Federal Communications Commission (BKS) established in May 2003 that ORF had on several occasions during the television programme "Starmania" violated the ORF law on advertising limitations (see IRIS 2003-7: 6). With regard to the appeal of ORF against this decision, the Administrative Court ruled as follows:

1. The BKS had established that ORF had repeatedly shown crisp packages, mineral water bottles, a one metre high tube as well as plasma television screens, which all clearly bore a brand name. It considered that this constituted a violation of the ban on product placement in that such a practice was always banned on ORF, when it was not necessary to the broadcast or report. The BKS asserted that there was no such necessity in this particular context.

The VwGH did not agree with the interpretation of the ORF law. In its opinion the admissibility of product placement is not to be guided by establishing necessity. Product placement is on the contrary allowed on ORF, when the consideration that it receives in exchange is only of little value, as is explicitly provided in § 14 paragraph 5 of the ORF law. According to the court, the assessment of the value of the consideration did not depend solely on the actually agreed service but on the objective value of the mention or the presentation of the brand or product. On this point the VwGH overruled the initial decision.

2. The BKS had furthermore established that on television ORF had broadcast an advertisement for a game awarding prizes on the ORF radio station Ö3 and therefore had identified a violation of the ban on ORF advertising its radio stations on its television channels.

ORF argued in its appeal that references to mere individual items of programme content were excluded from the ban on self-advertising and an advertising feature was a necessary component of each basically allowed reference to programme content on other channels.

The VwGH therefore confirmed the observation of the BKS. The advertisement contained an original presentation and action, in which well-known ORF television presenters took part. Due to these circumstances, argued the Court, the advertising aspect was in the foreground and the informative, editorial content in the background. The BKS was therefore right to find a violation of the ban on self-advertising. ■

● Ruling of 27th January 2006 (2004/04/0114), available at: http://merlin.obs.coe.int/redirect.php?id=10220

DE

BA – FIFA World Cup and Cable Distributors

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The broadcasting sector in Bosnia and Herzegovina is very complex and financially poor, and besides it is oversaturated. None of the broadcasters cover the entire country's territory or population. Spillover of programming from the neighbouring countries is also present together with brodcasting piracy. This aspect has been additionally complicated by the still unregulated position of cable distributors in the country. However, the Communications Regulatory Agency (CRA), which is responsible for both broadcasting and telecommunications is trying to regulate this sector.

Seemingly the first visible move relates to the FIFA 2006 World Cup in Germany. Namely, BHT1, as an umbrella like public broadcaster, it was awarded an exclusive right to broadcast the World Football Cup. In order to prevent unauthorized broadcasting, the CRA issued an order informing cable operators that they should strictly respect the license for cable distribution of RTV programmes. In this particular case, it is the FIFA 2006 World Cup broadcast via the BHT1 only. None of the nationwide broadcasters, either public or commercial from the neighboring countries, i.e., Croatia, Serbia and Montenegro with programming relating to the World Football Cup should be accessible via cable operators in Bosnia and Herzegovina.

The Public Broadcasting System in Bosnia and Herzegovina, consisting of BHT1 and two entity broadcasters - Federal RTV and RTRS -, is a member of the European Broadcasting Union (EBU), the largest association of national broadcasters in the world, which is also responsible for programming in sport events, according to its mission aiming to ensure plurality of information. ■

CY – News Bulletins for the Deaf

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Television broadcasters are under an obligation to include in their programmes news bulletins for deaf persons. This is provided in the amending law L.84(I)2006 of the Law on Radio and Television Stations of 1998, published in the official Gazette on 20 April 2006.

The special bulletins must be at least five minutes long and broadcast at least on half screen between 18:00h and 22:00h.

Special bulletins for persons with hearing difficulties were broadcast on television channels long before the introduction of the above amendment of the law. ■

● Amending law L.84(I)2006 of the Law on Radio and Television Stations of 1998, Official Gazette of 20 April 2006

EL

CY – New Provisions on Political Advertising

Political parties and presidential candidates can place paid political advertisements on radio and television during the campaign period for parliamentary and presidential elections respectively. The amending law L.85(I)2006 of the Law on Radio and Television Stations of 1998, published in the official Gazette on 20 April 2006 provides that political advertising is allowed during the 40 days preceding the elections and must stop 55 hours before the start of voting. Their total duration can not exceed 100 minutes, which is limited to 30 minutes in the case of independent candidates to the parliament. The respective time for radio broadcasts is 60 and 12 minutes. In the case of presidential elections, 25 minutes is allowed on radio and 25 minutes on television for the week between the two rounds.

The Law provides for the obligation of the broadcasters to offer political advertising under the same terms and conditions for all, ensuring if possible equal time and equal distribution of advertisements for all both in and outside the family viewing period.

The schedule for placement of advertisements must be deposited with the Cyprus Radio and Television Authority both by the parties/candidates and the broadcasters at least five days before the first broadcast is made.

A ban on broadcast political advertising imposed under regulations 10/2000 of the Law on Radio and Television Stations of 1998 was declared by the Supreme Court as *ultra vires* of the Law and as a violation of the right to free speech in 2002. The House of Representatives amended the Law in January 2003 and allowed political advertising in presidential elections. The new amendment of 2006 extends political advertising to parliamentary elections. ■

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● **Amending law L.85(I)2006 of the Law on Radio and Television Stations of 1998, Official Gazette of 20 April 2006**

EL

DE – Internet Demonstration Does Not Constitute Violence

The Court of Appeal (OLG) of Frankfurt am Main in its decision of 22 May (Az: 1 Ss 319/05) overturned a ruling of the Frankfurt Magistrate's Court (AG) of 1st July 2005, in which it had sentenced the instigator of an online demonstration against Lufthansa to paying a fine. Using software that they had themselves designed, the demonstrators intended to bring down Lufthansa's server, so as to protest against the airline's involvement in deportations.

In its ruling the Frankfurt AG considered that the online demonstration constituted an act of intimidation (§ 240 StGB) against Lufthansa as a web site operator as well as against other Internet users. The instigator of the protest action was sentenced for inciting intimidation.

The OLG, in its ruling, particularly called into question the concept of violence used as a basis by the Magistrate's court.

The online protest was neither to be described as violence or a threat involving considerable harm, since its main objective was to influence opinion. For the assumption of violence within the meaning of § 240 StGB there was, despite operating the computer mouse, no display of the required show of strength, for physical strength had to be aimed at bringing about physical harm. The effect of clicking with a mouse was however restricted to the field of the Internet. Moreover the physical action required for the presumption of violence was missing, for action on a network could not be equated with action on a person or object. The fact that the victim, the user, could not, under certain circumstances, call up the Internet page, did not in itself constitute physical impairment. The intention of creating a negative image was likewise not directed at a particular action, creating harm or a specific omission, but pursued the objective of shaping opinion. This was however comparable to the mere removal of property, an action which could not be interpreted as violent.

Since the accused did not for instance make the implementation of the Internet blockade dependent on Lufthansa ending its involvement in deportations, as the action was limited in time and moreover was not accompanied by conditions, the assertion of harm as the intention of the instigator required for a threat of grievous harm did not exist. ■

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● **Press communiqué of the Frankfurt OLG Frankfurt of 1 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10221**

DE

DE – Draft Telemedia Bill Approved

The Federal Government has set the course for an overhaul of German media law. On 14 June 2006 the Cabinet approved the text of a Bill drafted by the Ministry of Economics, which aims to standardise statutory provisions for a range of information and communication services.

The main component of the legislative package is the new *Telemediengesetz* (Telemedia Act – TMG) (see IRIS 2005-2: 9). The concept of telemedia embraces both tele- and media services - previously covered by separate regulatory systems. Teleservices were provided for at federal level in the *Teledienstegesetz* (Teleservices Act), while media services came under the *Mediendienstestaatsvertrag* (Inter-State Agreement on Media Services).

Abolition of the distinction between tele- and media services, which dates back to a regulatory compromise between the Federal government and the *Länder* in 1996, is intended to take account of media convergence.

Teleservices are specific information services for personal use, whereas media services are directed at the general public and, as a rule, differ from teleservices in that they are produced by journalists.

The planned comprehensive overhaul of German media law will include complete abolition of the existing *Mediendienstestaatsvertrag*. The first evidence of the new approach came with the conclusion of the *Jugendmedienschutzstaatsvertrag* (Inter-State Agreement on the Protection of [...] Young Persons in Broad-

Max Schoenthal
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casting and Telemedia – JMStV) in 2003 (see IRIS 2002-6: 13). Then at the end of 2004 the Federal Government and the *Länder* agreed further steps in the development of media regulation. In future, media related provisions will apply irrespective of means of transmission, will be framed to allow for new developments and will be simplified. Responsibilities will be allocated according to the substantive purpose of the provisions, rather than the type of transmission or the transmission technology. While provisions for teleservices and media services will be standardised, separate provisions will continue to apply to telemedia and broadcasting on the basis that their respective functions in relation to the formation of opinion are different. ■

- **Federal Ministry of Economics and Technology press release, available at: http://merlin.obs.coe.int/redirect.php?id=10222**
- **Bill concerning the standardisation of provisions in relation to specific electronic information and communication services (*Elektronischer-Geschäftsverkehr-Vereinheitlichungsgesetz* – ElGVG) 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10223**

DE

DE – Inter-State Agreement Aims to Boost North Germany as a Location for Media Business

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The North German *Länder* of Schleswig-Holstein and Hamburg intend in future to cooperate more closely on strengthening North Germany's position as a location for media business. To that end, the Prime Minister of Schleswig-Holstein and Hamburg's Governing Mayor met in Kiel on 13 June to sign a new Inter-State Media Agreement.

In particular the Agreement provides for the private-broadcasting supervisory authorities of the two *Länder* – the *Hamburgische Anstalt für die neuen Medien* (Hamburg New Media Office – HAM) and Schleswig-Holstein's *Unabhängige Landesanstalt für Rundfunk und neue Medien* (Independent State Broadcasting and New Media Office) to merge. The new joint supervisory authority, the *Medienanstalt Hamburg Schleswig-Holstein* (Hamburg Schleswig-Holstein Media Office – HSH), will in future implement common media rules for both *Länder*.

The merger is intended not only to give North Germany an edge in competition with other parts of the country as a location for media business, but also to strengthen the hand of the two *Länder* when it comes to sharing responsibilities in the course of cooperation with other German media authorities.

The government's draft of the Inter-State Agreement now has to be approved by the parliaments of both *Länder*. A first reading was due to take place in late June. It is planned that the new HSH will start work 1 May 2007 when the Agreement comes into force.

The programme of closer cooperation agreed by the two *Länder* will also include the establishment of a joint film aid agency. In the field of education, too, there are plans for improvement, with closer networking among media education and training bodies. ■

- **Regional Government of Schleswig-Holstein press release, 13 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10224**
- **Background information, 13 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10225**

DE

DE – Advertising for Private Betting Services

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The question as to the admissibility of advertising for private betting agencies in Germany is still not completely resolved. Even after the decision handed down by the Federal Constitutional Court (see IRIS 2006-6: 8), court rulings on the consequences that flow from the decision still differ.

The regional court of Hamburg (LG Hamburg), for instance, issued an injunction on 14 June 2006 preventing the broadcasting company RTL from continuing to broadcast advertisements for a private sports betting agency. This was followed on 19 June 2006 by a decision of the first regional court of Munich (LG München I) against the broadcasting company Live TV. The case before the Munich court had been brought by the State Lotteries Office of Bavaria and resulted in a decision banning the broadcasting of advertisements for any betting services that had not been officially approved by the government of the Free State of Bavaria or the government of one of the other German federal states.

There is still some dispute, however, as to whether the betting agencies are in fact to be considered illegal. In over 100 summary proceedings, the administrative court (VG) of Gelsenkirchen failed to grant sports betting agents temporary relief against the enforcement of injunctions that had been issued against them. A different position was adopted, however, in the ruling made on 26 May 2006 by the administrative court of Minden and the ruling made on 23 May 2006 by the administrative court of Arnsberg, which reestablished the suspensive effect of appeals against such administrative orders.

By its decision of 21 June 2006 the Federal Constitutional Court has now once again upheld an injunction issued in 2002 against a betting office to prohibit it from offering sports betting services. Due to the lack of clarity of the situation the Directors' Conference of the German State Regulatory Authorities for Broadcasting (DLM) has announced that it will hold discussions at the end of June with representatives of the private broadcasting stations on what conclusions should be drawn, and will coordinate any possible measures with public service broadcasters. Germany's second public sector broadcasting network, ZDF, has already announced that it will not broadcast any more advertisements for betting services. ■

- **Press release of the DLM of 23 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10256**
- **Press release of the Federal Administrative Court (BVerwG) of 22 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10258**
- **Press release of the Administrative Court of Gelsenkirchen of 1 June 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10264**
- **Ruling of the Administrative Court of Minden of 26 May 2006 and of the Administrative Court of Arnsberg of 23 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10265**

DE – Agreement on Soccer Rights

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Germany's national soccer association (DFB) and Deutsche Telekom have reached an agreement on broadcasting rights for German Bundesliga soccer matches for the next three years. When Arena, a subsidiary of the cable operator Unity Media, acquired the Pay TV rights and the previous rightsholder Premiere was left empty-handed, there was disagreement about whether Deutsche Telekom, which holds the rights in respect of internet broadcasting, was also permitted to broadcast the games via internet protocol on cable and satellite, in cooperation with Premiere. This would have meant that all current Premiere customers could have been catered for, and two competing Pay TV operators would *de facto* have been vying with each other. In return for agreeing to forego this alternative, Telekom has been awarded the rights to the Bundesliga name as well as the broadcasting rights for mobile end devices.

In the meantime, a decision has also been made concerning the granting of broadcasting rights for pubs and restaurants. These rights, too, will be exercised by Arena, which means that Premiere will largely have to withdraw from this field as well. ■

FR – Court of Cassation Makes No Decision on Private Copying

Amélie Blocman
Légipresse

The position of the Court of Cassation on the difficult matter of the applicability of the exception for private copying set out in paragraph 2 of Article L. 122-5 of the French Intellectual Property Code to the downloading of protected works was much awaited. Yet although it seemed to be an ideal opportunity, the Court reversed a court of appeal's decision which had discharged an Internet user who had downloaded cinematographic works … merely on questions of procedure, leaving the matter still not settled.

There was the high-profile decision of the court of appeal of Montpellier (see IRIS 2005-4: 10) on 10 March 2005, in which it recognised the exception for private copying and rejected the prosecution for counterfeiting of a man who had recorded 488 films on CD-ROMs – some had been downloaded from the Internet and others had been copied from other CD-ROMs lent to him by friends. In support of his discharge, the court of appeal felt that the defendant could claim the exception for private copying since he had stated that the copies had been made solely for private use. A further appeal against this decision was brought by the public prosecutor as well as the rightsholders and professional organisations in the field of video publishing, on the grounds that the court had not replied to their argument that the unlawful nature of the source of the copies (meaning downloading from the Internet) excluded the possibility of the exception provided for by Article L. 122-5 (2) of the CPI. The law is silent on this – vital – point of whether or not the source of the copy must be lawful in order to be able to claim exception, and experts are divided. Thus the Court of Cassation had a good opportunity for providing an answer. However, it merely overturned the appeal decision on the basis of Article 593 of the Code of Criminal Procedure, according to which "any judgment or order must include the reasons justifying the decision and answer the peremptory points contained in the parties' submissions. Insufficient or contradictory reasons are equivalent to their absence". The Court of Cassation held that the court of appeal had discharged the defendant party without any explanation about the circumstances in which the works had been made available to him, and without answering the complainants' submissions that the exception for private copying was dependent on the source being lawful. In other words, the court of appeal in Montpellier had not properly justified its decision. It was therefore for the court of appeal in Aix-en-Provence, to which the case was referred, to do so. In the meantime, the legislation on copyright and neighbouring rights in the information society has been adopted *(see infra)*. This text takes unauthorised downloading out of the range of criminal counterfeiting and makes it merely an offence. The position adopted by the court of appeal in Aix-en-Provence and the applicability of private copying to downloading is therefore of little importance. ■

● Court of Cassation (criminal chamber), 30 May 2006, public prosecutor at the court of appeal in Montpellier et al; available at: http://merlin.obs.coe.int/redirect.php?id=10255

FR

FR – Adoption of the Act on Copyright and Neighbouring Rights in the Information Society

On 30 June, after a legislative marathon and on the last day of the parliamentary session, the members of both chambers of parliament finally adopted the Act "on copyright and neighbouring rights in the information society" (referred to as the "DADVSI Act"), thereby transposing into national legislation the Directive of 22 May 2001 (see IRIS 2001-5: 3). Despite the Government having made the text subject to the urgent procedure (with a single reading in each chamber), the parliamentary debate, begun last December, has been lengthy, stormy and affected by a number of new developments and protests (see IRIS 2006-2: 11). Pressure groups have been very much in

evidence, and both chambers have made extensive changes to the bill originally tabled by the Government, which was severely criticised by the opposition and even by some of its own supporters, mainly because the urgent procedure was not lifted despite a number of requests.

Firstly, the new Act complements Article L. 122-5 of the [French] Intellectual Property Code, introducing a further five exceptions to pecuniary copyright – the exception of provisional or accessory "technical" reproduction on line, an exception in favour of the handicapped, an exception to cover the conservation or preservation for the purpose of on-the-spot consultation for libraries, museums and archives, an exception in the context of education and research, and an exception for the written, audiovisual or on-line press concerning news only. The Act also sets up a "three-stage test", stating that "the exceptions listed in the present Article may not infringe the normal exploitation of the work or cause unjustified prejudice to the legitimate interests of the author". The Minister for Culture was particularly concerned with combating peer-to-peer activities. Having abandoned the legal licence system that was being considered at one point, the text sets up a coercive system of a "graduated response". Thus a software editor or anyone else knowingly encouraging, including by advertising, the use of software "manifestly intended to make protected works or objects available to the public without authorisation" risks a sentence of three years in prison and a fine of EUR 30,000. The Act makes an offence rather than a crime of counterfeiting resulting from the unauthorised reproduction, for personal use, of a work protected by copyright or a neighbouring right accessed using peer-to-peer software; the arrangements for sanctions will need to be defined by decree. The Government has already let it be understood that an Internet user downloading works in this way would risk paying a EUR 38 fine, and the person making works available in this way would risk a fine of EUR 150. The new Act also includes a definition of the technical means for protecting works and sanctions their circumvention (ranging from a fine of EUR 750 for an individual to a six-month prison sentence and a fine of EUR 30,000 for an editor, distributor or other person promoting means of circumvention). Furthermore, "the technical means must not have the effect of preventing the effective implementation of interoperability, while respecting copyright. Suppliers of technical means shall provide access to the information essential for interoperability"; there was debate on the conditions for this. After the lower chamber had included the possibility of anyone requesting such information before the regional courts, the upper chamber and the mixed joint committee responsible for drawing up the final text changed their minds about it; in the end, a "regulatory authority for technical means" was entrusted with "ensuring that the technical means do not, by their mutual incompatibility or their inability to interoperate, result in further limitations on the use of a work in addition to those decided on by the right-holder". Matters may be referred to this independent administrative authority, comprising six members (magistrates and qualified individuals), by "any software editor, technical system manufacturer or service operator" to obtain the guarantee and the information necessary for interoperability that may have been refused through a conciliation procedure and, as appropriate, sanctions (injunction and/or fine). This authority is also responsible for determining the minimum number of copies authorised for private copying, according to the type of work or object that is protected. Similarly, it is to ensure that the implementation of technical protective measures does not have the effect of depriving the beneficiaries of certain exceptions (including private copying). These are the main innovations contained in the Act transposing Community Directive 2001/29 into national legislation. The provisions of new Act also cover, *inter alia*, copyright entitlement on the part of public officials, the formal deposit of a work with the appropriate institution, and the entitlement to produce a sequel. The text still has to be examined by the Constitutional Council, as opposition MPs have announced their intention to refer the text to the Council. ■

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• Act on copyright and neighbouring rights in the information society, available at: http://merlin.obs.coe.int/redirect.php?id=10259

FR

FR – *Conseil d'Etat's* Opinion on Ceasing Analog Broadcasting

On 23 May the *Conseil d'Etat* delivered its opinion on the way analog broadcasting is to cease. The French audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) had put the matter to the *Conseil d'Etat* as the highest administrative jurisdiction in the country to determine whether it could amend or revoke a current authorisation for terrestrial broadcasting in order to carry out the necessary reorganisation of frequencies for the introduction of terrestrially-broadcast digital television (TDT). The reply from the *Conseil d'Etat* is clear – only the legislator may authorise and organise the early ceasing of services broadcast in analog mode. It explained that, while the CSA could, by means of unilateral decisions, amend authorisations for the use of radio-electric frequencies in order to ensure the development of television networks, this did not lawfully extend to allowing it to stop services broadcast in analog mode, even in areas of limited reception,

even if they were to be partly or totally replaced by services broadcast in digital mode, for which different technical and economic conditions and capacities for use applied. It also recalled that Article 127 of the Act of 9 July 2004 on electronic communications and audiovisual communication services and Articles 26 and 30-III of the Act of 30 September 1986 guaranteed the maintenance of the communication service in analog mode for holders of authorisations. Furthermore, the *Conseil d'Etat* pointed out that while it was for the legislator to take the necessary action to organise the end of analog broadcasting, it was obliged to take proper account of the rights of both service editors and viewers. In regard to the former, the law would permit the reconsideration of current authorisations, making their holders responsible for any changes in frequency and the cost resulting from their contractual relationships with service distributors. In regard to viewers, the *Conseil d'Etat* felt that it was for the legislator to make the necessary arrangements to maintain the freedom of audiovisual communication and to uphold the principle of the continuity of the public service. The *Conseil d'Etat* also pointed out that in order to ensure nationwide digital coverage, other replacement procedures, particularly using satellite, should be guaranteed in order to cover less definite areas. These services must be accessible at a reasonable cost. The *Conseil d'Etat* indeed referred to "arrangements for modulated financial support" for those viewers who needed it. In the light of these recommendations, the Government is sending to the *Conseil d'Etat*, to the CSA and to the Regulatory Authority for Electronic Communications and Postal Services the bill on modernising audiovisual broadcasting and the television of the future, amending the Freedom of Communication Act of 30 September 1986. ■

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● Opinion of the *Conseil d'Etat* of 23 May 2006, available at the following address: http://merlin.obs.coe.int/redirect.php?id=10254

FR

FR – Status of the Arte Channel

The *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory authority - CSA) has written to the French Prime Minister asking him to refer to the Conseil d'Etat the matter of applicable law in respect of the Franco-German television channel and the authorities it comes under. Under the terms of the treaty creating the European culture channel, signed on 2 October 1990, which came into force on 11 July 1992, the CSA has no authority over the channel. It nevertheless regularly receives correspondence concerning the channel's programming, and wished to have its status clarified. On the basis of Article 2 of the "Television Without Frontiers" Directive, the CSA felt that, since the channel's headquarters were in Strasbourg and programming decisions were not made in a different State, Arte ought to come under the jurisdiction of France and be subject to compliance with the Act of 30 September 1986 and its implementing decrees. The CSA explained in its letter that this ambiguity caused difficulties. For example, the absence of the signage required by the CSA in application of Article 15 of the Act of 30 September 1986 might be harmful to young viewers. Similarly, Arte was not bound by the rules laid down by the CSA regarding pluralism outside electoral periods or by the recommendations it issued prior to each electoral period, even though the channel broadcast information programmes, including a daily news programme, covering current political affairs in France. The CSA was also unsure about which authority could require the channel to abide by the Public Health Code, following the channel's broadcast on 14 October last year of a documentary promoting vodka. The CSA therefore felt it was "essential to clarify the definition of which authorities were competent in respect of the channel so that the CSA could turn to them when it received a complaint about Arte's programming". The channel said it was "surprised" by this correspondence addressed to the French Prime Minister, recalling that a number of legal specialists had studied the matter in the previous fifteen years and had regularly reaffirmed the channel's independence, guaranteed by the inter-State treaty between France and Germany. Will the French Prime Minister follow up this call from the CSA? ■

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Légipresse

● Law applicable to the Arte television channel – the CSA asks the Government to refer to the Conseil d'Etat; plenary assembly of the CSA held on 23 May 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10253

FR

GB – Regulator Clarifies Procedures for Privacy and Fairness Complaints

Ofcom, the UK communications regulator, has clarified its procedures for handling complaints about unfair treatment in programmes and unwarrantable infringement of privacy in the making and broadcasting of programmes. It is required by the s.328 of the Communications Act 2003 to establish procedures for the consideration and adjudication of such complaints. Ofcom handles such complaints about both private broadcasters and the BBC. Its new statement takes into account comments made in an earlier consultation process.

The most important changes are as follows:

There will be a process of "Appropriate Resolution" by which some complaints will be resolved before a formal Ofcom investigation takes place. This will only be used if both parties agree to it. There were requests in the consultation that a process be established for the appeal of formal decisions of the Ofcom Fairness Committee; currently the only means by which such a decision can be challenged is judicial review in the courts. Ofcom had received legal advice that this would be unlawful as no provision is made for appeal in the Communications Act. Instead, a two stage process will be introduced by which the Fairness Committee will reach a provisional decision; this will be communicated to the parties who will have the opportunity to make final representations. Only then will the final adjudication be made by the Committee. In view of representations that current deadlines for statements from broadcasters responding to complaints are unrealistic, they will be changed so that the deadline for lodging first round statements by broadcasters will be 20 working days and, where there is a second round of statements, 10 working days. Finally, where a complaint is made on behalf of the person affected, the complaint form is being amended to ensure that the necessary authorisation is obtained from that person. ■

Tony Prosser
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● Ofcom, "Statement on the Fairness and Privacy Complaints Handling Consultation", 14 June 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10237

EN

GB – Digital Rights Management Report Published by Parliamentary Group

The All Party Parliamentary Internet Group (APIG) is a "discussion forum between new media industries and Parliamentarians for the mutual benefit of both parties." APIG currently has over 50 members, in addition to a team of officers.

APIG has previously produced reports into data retention; spam and the Computer Misuse Act.

In November 2005, APIG launched an inquiry into the issues surrounding Digital Rights Management. Written submissions were received from more than 90 individuals and organisations and an oral evidence session was held at the House of Commons (February 2006).

As reported on APIG's website, the key points of the Inquiry Report are:

1. A recommendation that the Office of Fair Trading (OFT) bring forward appropriate labelling regulations so that it will become clear to consumers what they will and will not be able to do with digital content that they purchase;

2. A recommendation that OFCOM publish guidance to make it clear that companies distributing Technical Protection Measures systems in the UK would, if they have features such as those in Sony-BMG's MediaMax and XCP systems, run a significant risk of being prosecuted for criminal actions;

3. A recommendation that the Department of Trade and Industry investigate the single-market issues that were raised during the Inquiry, with a view to addressing the issue at the European level;

4. A recommendation that the government do not legislate to make DRM systems mandatory;

5. A recommendation that the Department for Culture, Media and Sport review the level of funding for pilot projects that address access to eBooks by those with visual disabilities and that action be taken if they are failing to achieve positive results;

6. A recommendation that the Department of Trade and Industry revisit the results of their review into their moribund "IP Advisory Committee" and reconstitute it as several more focused forums. One of these should be a "UK Stakeholders Group" to be chaired by the British Library;

7. A recommendation that the Government consider granting a much wider-ranging exemption to the anti-circumvention measures in the 1988 Copyright, Designs and Patents Act for genuine academic research;

8. A recommendation that having taken advice from the Legal Deposit Advisory Panel, the Department for Culture, Media and Sport hold a formal public consultation, not only on the technical details, but also on the general principles that have been established. ■

David Goldberg
deeJgee Research/Consultancy

● "Digital Rights Management: Report of an Inquiry by the All Party Internet Group", June 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10235

● APIG DRM Inquiry - Written Evidence, available at:
http://merlin.obs.coe.int/redirect.php?id=10236

EN

HR – Amendments to the Criminal Code

The issue of libel is regulated by Section 200 of the Criminal Code of the Republic of Croatia. Paragraph 2 of the above Section stipulates that a person who makes or publishes a false statement about another person that may cause harm to the character or reputation of the other person, whether the statement is made before several other people, or published in the press or broadcast on radio or television, or made at a public gathering or in some other way which results in making it available to a large number of people, shall be punished by a fine or a sentence of a maximum term of one year's imprisonment.

At the moment the Croatian Parliament is dis-

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cussing the amendments to the Criminal Code, and the Government of the Republic of Croatia has put forward its amendment to the above Section 200 of the Criminal Code proposing that the words "or a sentence of a maximum term of one year's imprisonment" be deleted from the provisions of the Code. The above amendments to the Criminal Code were adopted on 9 June 2006. ■

● Criminal Code, Official Gazette No. 100/97, 27/98, 129/00, 51/01, 111/03, available at:
http://merlin.obs.coe.int/redirect.php?id=9658

HR

IT – AGCOM Action Plan for the Management of DTT Frequencies

On 22 March 2006, the *Autorità per le garanzie nelle comunicazioni* (Italian communications authority– AGCOM) adopted an Action Plan concerning the management of frequencies for digital terrestrial television broadcasting.

The first aim is to amend the existing regulatory framework for the assignment of spectrum capacity on the multiplexes (see IRIS 2001-4: 9), according to which independent content providers benefit by law from a 40 % quota of the DTT capacity available on the multiplexes managed by the different network operators. This is to be achieved by introducing a transparent selection procedure monitored by AGCOM.

Another purpose is to revise the existing DVB-T frequency plan (see IRIS 2003-4: 9) according to the results of the Geneva negotiations of the Stockholm plan of 1961, maintaining the destination of one-third of available multiplexes to local broadcasters and ensuring a rational and efficient exploitation of the spectrum. A prerequisite for the revision of the plan is the exact knowledge of the frequencies that are used by Italian operators.

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

The action lines of AGCOM will thus be as follows:
- Realisation of a national database of available and employed frequencies in cooperation with the Ministry of Communications;
- Revision of the existing frequency plan in order to increase the number of national networks, taking into consideration the frequencies that must be reserved to local broadcasting;
- Resolution of interference problems in the various geographical areas, including those deriving from the spill-over from other countries;
- Survey of the difficulties originating from international coordination;
- Approval of the digitisation of the analogue networks managed by RAI and Mediaset (see IRIS 2005-5: 16) within the limits of 80% of the population and with the obligation to give exceeding frequencies back to the State;
- Introduction of a transparent procedure for the assignment of capacity to content providers, capable of ensuring the interoperability of the services;
- Adoption of a white paper on contents delivered through digital technology. ■

● AGCOM Deliberation no. 163/06/CONS, *Approvazione di un programma di interventi volto a favorire l'utilizzazione razionale delle frequenze destinate ai servizi radiotelevisivi nella prospettiva della conversione alla tecnica digitale* (Approval of an action plan designed to optimise the rational use of TV frequencies in light of the digital switch-over), available at:
http://merlin.obs.coe.int/redirect.php?id=10231

IT

NL – Copyright in the Scent of Perfume

On 16 June 2006, the Dutch Supreme Court rendered its decision in the Lancôme – Kecofa case. Lancôme had sued Kecofa for, amongst others, copyright infringement of its perfume "Trésor".

With this ruling, the Supreme Court has confirmed the finding of the Court of Appeal of 's-Hertogenbosch issued on 8 June 2004. In its judgment, the Supreme Court acknowledged that the scent of a perfume may qualify for protection under copyright law. However, this does require, as is always the case for protection under copyright law, that the scent be original. It added it is the scent itself which is protected and not the liquid from which it originates. The fact that not all provisions of the Dutch Copyright Act can directly be applied to scents does not hinder the principle that the creator of an original scent may invoke copyright law for protection against imitation. Also, the mere fact that a perfume fits within a certain tradition or style of scents, does not exclude it from copyright protection.

Margreet Groenenboom
NautaDutilh N.V.

The Supreme Court also confirmed the finding of the Court of Appeal, which was based on a physiochemical report submitted by Lancôme, that Kecofa's perfume "Female Treasure" constitutes a copyright infringement of Lancôme's perfume Trésor. In this physiochemical report, the olfactory components of both perfumes were compared. The report concludes that "Trésor" and "Female Treasure" have 24 olfactory components in common. Taking into account that "Trésor" contains 26 olfactory components, this leads the reporters to believe that the similarity of components is not a coincidence. Moreover, the probability of sharing the same 24 olfactory components can, according to the report, be likened to winning the lottery every day for a century. Kecofa contested the use of the report made by the Court of Appeal before the Supreme Court. The latter, however, found this use to be admissible and held that Kecofa should have contested the admissibility of the report during the proceedings before the Court of Appeal itself. ■

● Judgment of the Dutch Supreme Court, 16 June 2006, LJN AU8940, C04/372HR

● Judgment of the District Court of 's-Hertogenbosch, 8 June 2004, LJN: AP2368, C0200726/MA, both available at:
http://merlin.obs.coe.int/redirect.php?id=9027

NL

NL – Court Puts an End to Exploitation of Mp3 Search Engine

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

The Court of Appeal of Amsterdam has decided that Techno Design's exploitation of the mp3 search engine zoekmp3.nl is unlawful with regard to copyright owners and owners of neighbouring rights. This is the outcome of the appeal Stichting BREIN (BREIN Foundation- an entity representing copyright owners) filed a case against a previous judgment of the District Court.

Zoekmp3.nl facilitates the search for mp3 music files on the World Wide Web. It provides Internet users with a hyperlink or deeplink to the server of the user whose computer contains the requested file. By clicking on the link, the file is downloaded from one user's computer into the other's. Additional information on the searched mp3 files can be found on the website as well. All this information is stored in Techno Design's database.

The District Court had previously decided that zoekmp3.nl did not infringe any copyrights and was therefore not unlawful. The Court of Appeal chose to overturn this judgment. The Court of Appeal decided that, in principle, exploiting an mp3-oriented search engine is not in itself unlawful, even if the provider of the search engine is aware of the fact that users may infringe copyrights and neighbouring rights. In this case, however, Techno Design knew that its search engine systematically and structurally refers to unauthorized material and gives access to copyright and neighbouring rights' protected music files. In fact, Techno Design derives most of its money from this search engine that is mainly based on the availability of unauthorized music files on the World Wide Web. According to the Court, this occurs in breach of the rights held by copyright owners and owners of neighbouring rights. Techno Design's warning on the website, that unauthorized copying is prohibited by law, is insufficient since downloading unauthorized music files is exactly what users are looking to do. They will not be discouraged by a simple warning.

Techno Design had already shut down zoekmp3.nl in June 2004, but is now explicitly forbidden to provide users with hyperlinks to unauthorized music files by means of search engines. The Court ordered Techno Design to pay damages. ■

• Hof Amsterdam, 15 June 2006, Stichting BREIN vs. Techno Design Internet Programming BV, case LJ number AX7579, available at:
http://merlin.obs.coe.int/redirect.php?id=9027

NL

NO – Consumer Ombudsman Bans iTunes' Contractual Terms

Thomas Rieber-Mohn
University of Oslo, Norway

Following a complaint by the Norwegian Consumer Council earlier this year, the Norwegian Consumer Ombudsman, in a letter dated 30 May 2006 to iTunes Music Store Norway (the defendant), declared that several of the terms applied by the online music service in its contracts with consumers were found to be in breach of Norwegian law. Thus, iTunes Music Store Norway has been formally instructed to alter the unlawful terms by 21 June 2006 (the deadline was subsequently extended to 1 August 2006).

The Consumer Ombudsman stated that some of the terms applied by the online music service are to be considered unlawful, and that others are likely to be unlawful. Among the terms which are, according to the Ombudsman, undoubtedly unlawful, the following can be found: the contractual locking of purchased music to the iPod player-unit, the requirement that the consumer accept English law as governing law, the disclaiming of all liability for damage that the iTunes software might cause and the provisions enabling iTunes to alter the rights to the music post-purchase. The said terms have all been found to be in breach of section 9a of the Norwegian Marketing Control Act; a provision targeting the use in trade of contractual terms that are unreasonable.

Among the terms which are likely to be unlawful, the Consumer Ombudsman lists negligence to respect the statutory consumer right to cancel a purchase made by distance-selling within a certain time-limit (cooling-off period) and the geographical restrictions facilitating geographical price discrimination. Also, the Ombudsman is not quite certain whether TPMs as such can be considered as unreasonable terms under section 9a of the Marketing Control Act, which by its wording targets unreasonable contractual terms. As far as these undecided matters are concerned, the defendant has been given an opportunity to express its views before a final conclusion is reached by the Ombudsman.

Non-compliance with the instructions of the Consumer Ombudsman can be sanctioned by fines. Decisions of the Consumer Ombudsman are subject to appeal to the (administrative) Market Council, whose decision can in turn be brought before the ordinary courts. Thus, we are probably far from having heard the last word in the case.

The Norwegian Consumer Ombudsman has cooperated with Swedish and Danish consumer authorities in the case, and similar actions are expected in those countries within a short period of time. ■

• Press release of the Consumer Ombudsman, 7 June 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10232

• Press release of the Consumer Council, available at:
http://merlin.obs.coe.int/redirect.php?id=10233

EN

NO – Ban on Political Advertising on TV Upheld

Ingvil Conradi Andersen
Norwegian Media Authority

On 19 May 2006, the Red-Green Government in Norway informed Parliament that the prohibition on political and religious advertising on TV, as laid down in the Broadcasting Act, will be upheld. The decision reversed the former Government's proposal to repeal the ban.

Last summer, the previous Government in Norway circulated for public review a proposal to allow political and religious advertising on TV except for a period of four weeks before and on Election Day where a total ban should apply. No particular regulation was proposed on such advertising outside this period, even though limitations on volume and expenditure had been discussed. The Government argued that it wanted to gain experience with this form of political communication on TV. In November 2004, the Norwegian Supreme Court upheld a decision by the Norwegian Media Authority to sanction a local TV-station for airing advertisements for a political party in the weeks leading up to the 2003 elections in Norway (see IRIS 2005-7: 16). The Supreme Court held that the general prohibition on political advertising was neither in violation of Section 100 of the Norwegian Constitution, nor of Article 10 of the European Convention on Human Rights with regard to freedom of speech. The Court emphasised that in periods preceding elections there were reasons of significant importance for securing a fair climate of debate.

However, before having an opportunity to send a legal proposal to Parliament on the matter and secure a majority vote for the necessary amendment to the Broadcasting Act, the Government lost office in last fall's elections in Norway. The new Government's decision not to repeal the ban and leave the regulation intact, thereby upholding the status quo, did not come as a surprise. The two largest parties in the new Government indeed expressed their opposition to political advertising on TV when the issue was last debated in Parliament in 2004.

In its report to Parliament, the Government emphasises that allowing political advertising would favour powerful financial groups and that such advertising could have a negative impact on the political debate by simplifying the information available to the voters using commercial language. ■

• Press release of 19 May 2006 and Government's official report to Parliament, available at:
http://merlin.obs.coe.int/redirect.php?id=10234

NO

PL – Constitutional Tribunal on the Amendment of the Broadcasting Act

In its decision of 23 March 2006, the Polish Constitutional Tribunal has found certain regulations of the Polish Broadcasting Act to be unconstitutional. The subjects of the constitutional complaint were the amendments of 29 December 2005 to the Broadcasting Act and other Acts (see IRIS 2006-2: 18) which included some important changes concerning the composition and functioning of the National Broadcasting Council (NBC), the protection of ethics of journalism as a new task of the NBC and the privileged treatment of so-called "social broadcasters".

NBC is one of the constitutional organs of State Control and for the Defence of Rights. It has fundamental regulatory power in the area of electronic media, safeguarding the freedom of speech, public interest and the right to information; it is authorised to issue regulations and, in individual cases, to adopt resolutions. The revisions concerning the above-mentioned issues, including the procedure applied for adopting the amendments, have triggered legal disputes (see IRIS 2006-6: 18) concerning which the Commissioner for Citizens' Rights and two groups of deputies have complained before the Constitutional Tribunal.

1. According to the new provisions, the NBC consists of 5 members while the terms of all the former members have immediately expired. This has raised the question about the fundamental principle of the continuity of functioning of constitutional organs. First, the Tribunal has confirmed that this principle fully applies to the NBC and has stipulated that new provisions have caused an interruption in the functioning and exercising of the tasks of the NBC as a constitutional organ without any "sufficient constitutionally-permissible reasons". Thus, it found non-conformity with the constitutional principles, e.g. a democratic State governed by the rule of law. However, the Tribunal has noticed that it might not constitute the grounds for challenging the expiry of the mandates, because the right to hold an office, a position, or a mandate in organs of public authority does not constitute an "acquired right" in the meaning of the principle of protecting acquired rights.

2. Concerning the competence of the NBC to initiate and undertake activities within the scope of journalists' ethical rules, the Constitutional Tribunal has indicated that: "In the Polish legal system there is no generally binding or uniform catalogue of principles of journalistic ethics, which would serve as the source of legal norms addressed to journalists. Therefore, the notion of journalistic ethics used in … the challenged Act, refers to non-legal criteria of assessing events in the sphere of the freedom of expression". The Tribunal argues that: "The lack of sufficient precision in defining the terms used in legal provisions may justify the allegation of

infringing the requirements stemming from … the principle of a democratic State governed by the rule of law". Applying ambiguous terms is not prohibited only if it is possible to determine them in a non-arbitrarily manner; special procedural guarantees of transparency and of control bodies (applying the law) are also required.

The Tribunal stipulates that: "Concomitantly, vesting the NBC with this task … reaches beyond the scope corresponding to the role and position of that organ in the system of government" which may infringe the principle of the organs of public authority functioning on the basis and within the limit of law.

The Tribunal indicated that journalistic rights, such as freedom of expression, may be subject to limitations, but only if they are introduced in the form of a statute. They should be formulated in a precise manner and finally their practical exercising ought to be strictly controlled.

3. The privileged treatment of "social broadcasters" in the procedure of so-called renewed licence, which may be denied only in cases explicitly prescribed in the Broadcasting Act, distinguishes the legal situation of social broadcasters from that of all others. The Tribunal stipulates that: "Different treatment by a legal norm of its addressees having a specific common feature does not automatically violate …the principle of equality and prohibition of discrimination, provided that it is based upon a justified criterion of differentiation". In the present case, the Tribunal remarks that: "The differentiation criterion adopted by the legislator - i.e. the fact that a social broadcaster does not pursue an economic activity and, in particular, does not display any advertisements or sponsored communications - may not be recognised as relevant when determining the conditions for licence renewal". Since the statutory tasks of all audiovisual broadcasters are the same and as the conducting of activities in this field is connected with substantial financial and organisational expenses, "less favourable treatment - concerning the conditions for obtaining the renewed licence … - infringes" the principal of equal and non discriminating treatment by public authorities. Moreover, the Tribunal is of the opinion that such unequal treatment of broadcasters also implies unequal treatment within the scope of the freedom of expression, and obtaining and disseminating information. ■

Katarzyna B. Masłowska
Warsaw

● **Decision of the Constitutional Tribunal (K 4/06), available at: http://merlin.obs.coe.int/redirect.php?id=10177**

PL

RO – CNA Recommendations on the Display of Price Information in TV Ads

The *Consiliul Naţional al Audiovizualului* (Romanian National Audiovisual Council – CNA) has stipulated in a recommendation to all Romanian broadcasters that "separate levying of import duties should be subject to a conformity criterion that will in future allow the acceptance of television advertisements using a type size different from that of accompanying text information". The CNA thus accepts that until 1 January 2007, in television advertising for cars "price information that includes all duties and taxes will appear in type half the size of that used for price information omitting these details". Consequently, the latest recommendation issued by the audiovisual regulatory authority to Romanian television companies concludes by advising that the country of origin of cars being advertised – ie whether they were built inside or outside the EU – will not be a deciding factor for the CNA "unless the country of construction requires that customs duties are levied. According to the customs duties criterion, cars built in Turkey will not fall into the exempted category that the CNA is willing to accept until 1 January 2007". ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Recomandarea CNA din 30 mai 2006 în atenţia posturilor de televiziune* (CNA Recommendation of 30 May 2006), available at: http://merlin.obs.coe.int/redirect.php?id=10266**

RO

RO – Licence for Transmission of Channel D Television by Satellite

At the end of May the *Consiliul Naţional al Audiovizualului* (Romanian National Audiovisual Council – CNA) granted Dogan Media International an audiovisual licence to transmit Channel ase of 30 May 2006, Dogan Media International GmbH is a television company operating under German law. It owns the TV Euro T channel which is aimed at members of the Turkish community in Germany.

In Romania the trading company Dogan Media International, which has limited company status, intends in its first year to offer its audience entertainment programmes, including those produced not only in Europe (mainly Italy and Spain) but also in Japan and China. "According to company spokespersons, Channel D's own output will be supplied by independent production houses". Channel D will come into operation in September 2006 and will be available via the cable-TV network. The company's initial investment will total EUR 35 million and it aims to capture 2 % of the market. ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Comunicat CNA din 30 mai 2006* (CNA press release, 30 May 2006), available at: http://merlin.obs.coe.int/redirect.php?id=10267**

RO

SE – TV Commercial Breaks Ruled in Breach of Film Directors' Moral Rights

In 2002, TV4 AB broadcast two cinematographic works which were interrupted for commercials and trailers. The interruptions were for two and three breaks respectively, lasting approximately six minutes each. The two film directors sued TV4 claiming that their moral rights had been violated by the insertion of commercials during their works. TV4 claimed that the commercial breaks were in accordance with European broadcasting practice and that the company had, by the acquisition of the right to broadcast the films, also acquired the right to schedule breaks including commercials.

The District Court as well as the Court of Appeal found that the moral rights of the directors had indeed been violated by TV4. The Court of Appeal held that the commercial breaks constituted an alteration of the cinematographic works rather than a mere interruption of the films. This alteration was not negligible and the directors could therefore not be expected to tolerate it. In addition, the motives for introducing commercial breaks were not of such a nature that they should be allowed to override the interests of the film directors. The Court found that the insertion of commercials had affected the continuity and drama of the cinematographic works, and that the breaks had introduced elements into the films which were foreign and unjustified. It therefore concluded the moral rights of the directors had been violated.

Moral rights cannot be assigned and can only be contractually conceded on condition that a limited and well-defined use of the rights in question has been agreed upon by the parties. The Court found that a general agreement containing a right to interrupt for commercials cannot be understood as a limited and defined concession of the moral rights of the author. The Court held that such an interpretation would result in a situation where the effects of the agreements would be unforeseeable for the author. The moral rights could therefore not be seen as having been conceded to the broadcaster TV4.

TV4 has launched an appeal and will bring the case before the Supreme Court. ■

Helene Hillerström Miksche
TV4 AB

● **Judgment of 12 April 2006 of the Court of appeal**

SV

SK – Law on the Digitisation of Broadcasting Transmissions

In the new electoral period the Slovak government plans to pass a bill to establish a *zákon o digitalizácii vysielania* (Law on the Digitisation of Broadcasting Transmissions). The law is to enter into force on 1 January 2007. The bill incorporates the following principles:

- Regulation of the rights and duties of natural and legal persons with respect to digital broadcasting and other services related to digital transmission;
- Guarantee of a smooth transition from the analogue to the digital transmission route in connection with international obligations that are legally binding upon the Slovak Republic;
- Establishment of a stable environment necessary for the implementation of digital transmission and a guarantee of the conditions for unhindered provision of content services via digital transmission;
- Enablement of a complete suspension of analogue broadcasting of television programmes in the year 2012.

The digitisation of radio broadcasting is planned in the DAB-T system, but no suspension of analogue transmission in the FM frequency range is expected.

Due to the particular geographic features of the Slovak Republic and the availability of frequencies in coordinated ranges, the introduction of digital terrestrial broadcasting is to be based on a system of frequency assignment via public tenders. The law assumes the principle of building up digital coverage via the procedure of calling for tenders (1 frequency per tender), with the possibility of granting multiplex operators several frequencies.

Broadcasters are granted licences by the *Rada pre vysielanie a retransmisiu* (Council for Broadcasting and Retransmission, of the Slovak media regulatory authorities). A licence entitles a broadcaster to compete for a position in the multiplex. The licence will no longer be tied to the frequency. The Council grants only two types of digital terrestrial licences, namely national and regional. ■

Jana Markechová
Freshfields Bruckhaus Deringer, Bratislava

● **Press release of the Ministry, available at:**
http://merlin.obs.coe.int/redirect.php?id=10230

SK

SK – Project for the Restoration of the Audiovisual Heritage

The project for the systematic restoration of the audiovisual heritage of the Slovak Republic, which is aimed at preserving audiovisual works and gradually making them available to the general public, was discussed and approved by the government of the Slovak Republic at its session on 17 May 2006. This project is intended to establish the foundations within the Slovak Republic for the preservation and restoration of the audiovisual heritage in accordance with relevant international agreements. In addition, it is to define the conditions for the extension of that heritage and its preservation for future generations. At the same time, the public is to be guaranteed systematic access. It is planned to carry out the project in a series of stages between now and 2020. ■

Jana Markechová
Freshfields Bruckhaus Deringer, Bratislava

● **Press release on the project, available at:**
http://merlin.obs.coe.int/redirect.php?id=10229

SK

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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