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OSCE

Representative on Freedom of the Media: Report on Achievements in the Decriminalization of Defamation

The OSCE Representative on Freedom of the Media has campaigned against oppressive defamation laws since this media freedom watchdog mandate was established in 1997.

Activities in this sphere have intensified since 2004, after the Office of the Representative on Freedom of the Media (OSCE/FOM) prepared a comprehensive survey of criminal and civil defamation legislation and practice in the OSCE region. The survey facilitated a more targeted approach to campaigning. It allowed the Representative to identify the States and parts of legislation where reform was highly desirable. In parallel, a database on criminal and civil defamation provisions as well as court practices in the OSCE region continues serving as a tool for researchers, local and international media lawyers (and other stakeholders) and those involved in promoting reform of these most challenging pieces of legislation, which still exert an immense "chilling effect" on the media in many OSCE participating States.

An increased understanding of the need for reform among governments and legislators, and a growing number of nations who are reforming their defamation legislation are the main achievements of the campaign:

- Seven OSCE participating States – Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Moldova, Ukraine, and the United States – have removed criminal libel and insult provisions from their penal codes (though certain narrowly-defined defamation provisions remain in some of these participating States' criminal codes. In the United States, 17 states and two territories have retained local criminal defamation provisions, however there are no Federal criminal defamation laws);

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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- Some participating States – including Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania, and Serbia – have removed imprisonment as a form of punishment for defamation;
- Most recently, Croatia, the Former Yugoslav Republic of Macedonia, Serbia and Kosovo have liberalized their defamation legislation;
- In February 2006, the OSCE/FOM and the OSCE Spillover Monitor Mission to Skopje held an international conference in the Former Yugoslav Republic of Macedonia, in support of decriminalization of libel and insult. As a result, the Government elaborated and approved amendments to the Criminal Code, which were passed by Parliament on 10 May 2006 by a unanimous vote;
- On 28 June 2006, the amendments to the Criminal Code of Croatia removing imprisonment as an option for punishment for defamation entered into force thanks to joint efforts taken by the Government, the OSCE Mission to Croatia and the OSCE/FOM;
- In the Republic of Serbia, a new Criminal Code, which came into force on 1 January 2006, excluded imprisonment as a sanction for libel and insult. The OSCE/FOM had also been supporting the reform of the defamation legislation there;
- In Kosovo, the Assembly adopted a new civil law on defamation in June 2006. Still, the existing UNMIK penal code criminalizes defamation. The media, however, are exempted from insult charges. Upon the Government's 2005 initiative, experts from the Prime Minister's Office, the OSCE, and the Temporary Media Commissioner elaborated a civil Law on Defamation and Insult. Adopted in June 2006, the law is generally in line with modern concepts of decriminalizing speech offences. The law regards only "untrue" statements of facts as defamatory. The media's complying with recommendations of the Press Council is a mitigating factor for setting damages in defamation lawsuits. Public figures have to accept stronger criticism than ordinary citizens. The new law has yet to be promulgated by the SRSG;
- However, in Kosovo there is scope for further improvements as the new law does not exempt the media from liability for insult, unlike the penal code. This raises anxiety among media experts of a potential wave of media-related insult cases in Kosovo courts. Besides, defamation provisions should still be removed from the penal code;
- In Albania, amendments to the Criminal and the Civil Codes were prepared by nongovernmental organisations, and proposed for discussion in Parliament by a group of MPs. The amendments would almost completely decriminalize defamation, and improve handling of libel and insult cases under the civil law. The OSCE/FOM commented on them and suggested further changes. At the time of writing, these amendments were pending approval by the Albanian Parliament;

Decriminalizing defamation and promoting adequate mechanisms of compensating moral damage in the civil legislation will remain the focus of the OSCE/FOM. ■

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● Libel And Insult Laws: A Matrix On Where We Stand And What We Would Like To Achieve - A comprehensive database on criminal and civil defamation provisions and court practices in the OSCE region, available at: http://merlin.obs.coe.int/redirect.php?id=10445

● The representative on freedom of the media regular report to the OSCE Permanent Council, 13 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10446

EN

COUNCIL OF EUROPE

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

In a judgment of 21 September 2006, the European Court of Human Rights has come to the conclusion that the Swiss authorities have violated the freedom of expression of a journalist by placing a programme broadcast by the Swiss Public Broadcasting Corporation SSR under a legal embargo. In 1997, the SSR broadcast a critical documentary on the position of Switzerland during the Second World War. The documentary was part of a news programme, entitled "*Temps présent*" ("Present time"), for which the applicant, Daniel Monnat, was then responsible. The programme described the attitude of Switzerland and of its leaders, emphasising their alleged affinity with the far right and their penchant for a rapprochement with Germany. It also contained an analysis of the question of anti-Semitism in Switzerland and of its economic relations with Germany, focusing on the laundering of Nazi money by Switzerland and on the role of Swiss banks and insurance companies in the matter of unclaimed Jewish assets. The programme elicited reactions from members of the public. Viewers' complaints, within the meaning of section 4 of the Federal Broadcasting Act, were filed with the *Autorité indépendante d'examen des plaintes en matière de radio-télévision* (Independent Broadcasting Complaints Commission). The Complaints Commission was of the opinion that the programme had breached the duty to report objectively in such a way as to reflect the plurality and diversity of opinion. The Complaints Commission found against the SSR and requested the broadcasting company to take appropriate measures. The Commission particularly found that the method used, namely politically engaged journalism, had not been identified as such. The News Editors' Conference of SSR informed the

Complaints Commission that it had taken note of its decisions and would take them into account when dealing with sensitive issues. Being satisfied with the measures, the Commission declared the proceedings closed. In the meantime, the registry of the court of Geneva decided to place the programme under a legal embargo, which led to the suspension of the sale of videotapes of the programme.

Mr. Monnat alleged before the European Court of Human Rights that the programme scrutiny introduced by Swiss law and the decision of the Complaints Commission, upheld by the Federal Court, had hampered him in the exercise of his freedom of expression, as provided for by Article 10 of the European Convention on Human Rights. The Court dismissed the applicant's complaint as to the inappropriateness of the programme scrutiny introduced by the Federal Broadcasting Act, because he was challenging general legal arrangements in abstract terms. However, in his capacity as a programme-maker he could claim to be the victim of a violation of the Convention because of the legal embargo.

The Strasbourg Court noted that the impugned programme had undoubtedly raised a question of major public interest, at a time when Switzerland's role in the Second World War was a popular subject in the Swiss media and divided public opinion in that country. As regards the journalist's duties and responsibilities, the Court was not convinced that the grounds given by the Federal Court had been "relevant and sufficient" to justify the admission of the complaints, even in the case of information imparted in a televised documentary on a state-owned television channel. As to the sanctions imposed in this case, the Court noted that whilst they had not prevented the applicant from expressing himself, the admission of the complaints had nonetheless amounted to a kind of censorship, which would be likely to discourage him from making criticisms of that kind again in future. In the context of debate on a subject of major public interest, such a sanction would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it was liable to hamper the media in performing their task as purveyor of information and public watchdog. Moreover, the censorship had subsequently taken on the form of a legal embargo on the documentary, formally prohibiting the sale of the product in question. For these reasons, the Court considered that there had been a violation of Article 10 of the Convention. ■

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● Judgment by the European Court of Human Rights (Third Section), case of Monnat v. Switzerland, Application no. 73604/01 of 21 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

European Court of Human Rights: Case of White v. Sweden

In 1996, the two main evening newspapers in Sweden, *Expressen* and *Aftonbladet*, published a series of articles in which various criminal offences were ascribed to Anthony White, a British citizen residing in Mozambique. The articles also included an assertion that he had murdered Olof Palme, the Swedish Prime Minister, in 1986. Mr White was a well-known figure whose alleged illegal activities had already been at the centre of media attention. The newspapers also reported statements of individuals who rejected the allegations made against Mr White. In an interview published in *Expressen*, Mr White denied any involvement in the alleged offences.

Mr White brought a private prosecution against the editors of the newspapers for defamation under the Freedom of Press Act and the Swedish Criminal Code. The District Court of Stockholm acquitted the editors and found that it was justifiable to publish the statements and pictures, given that there was considerable public interest in the allegations. It further considered that the newspapers had a reasonable basis for the assertions and that they had performed the checks that were called for in the given circumstances, taking into regard the constraints of a fast news service. The Court of Appeal upheld the District Court's decision.

Mr White complained before the European Court of Human Rights in Strasbourg that the Swedish courts had failed to provide due protection for his name and reputation. He relied on Article 8 (right to respect for private and family life) of the Convention. The European Court found that a fair balance must be struck between the competing interests, namely freedom of expression (Article 10) and the right to respect for privacy (Article 8), also taking into account that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty in accordance with the law. The Court first noted that as such the information published in both newspapers was defamatory. The statements clearly tarnished his reputation and disregarded his right to be presumed innocent until proven guilty as it appeared that Mr. White had not been convicted of any of the offences ascribed to him. However in the series of articles, the newspapers had endeavoured to present an account of the various allegations made which was as balanced as possible and the journalists had acted in good faith. Moreover, the unsolved murder of the former Swedish Prime Minister Olof Palme and the ongoing criminal investigations were matters of serious public interest and concern. The Strasbourg Court considered that the domestic courts made a thorough examination of the case and balanced the opposing interests involved in conformity with Con-

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vention standards. The European Court found that the Swedish courts were justified in finding that the public interest in publishing the information in question outweighed Mr White's right to the protection of his reputation. Consequently, there had been no failure on the part of the Swedish State to afford adequate protection of the applicant's rights. For these reasons, the Court considered that there had been no violation of Article 8. ■

● Judgment by the European Court of Human Rights (Second Section), case of White v. Sweden, Application no. 42435/02 of 19 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=9237

EN

Committee of Ministers: Recommendation on Empowering Children in the New Information and Communications Environment

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The lives of children and young people are changing. Demographic trends, varying family structures, flexible working conditions and so on are evidence that modern European childhood is shifting. Considering the number of hours that an average child spends in front of various screens is far higher than the time they spend in front of their educators or their parents, children and young people are clearly moving away from the consumption of traditional forms of media towards more creative and personal (peer-to-peer) forms of communication to express and inform themselves.

In this context, and in response to a call for action by the 46 Heads of State and Government of the Council of Europe during their Third Summit in Warsaw in May 2005 to step up action on children's media literacy, and in particular their active and critical use of all media as well as their protection against harmful content, the Council of Europe prepared a Recommendation on empowering children in the new information and communications environment (adopted by the Committee of Ministers on 27 September 2006).

One of the underlying features of this Recommendation is that Internet technologies and services are positive tools which should not be feared (especially by educators such as teachers and parents) but rather embraced. This is why the Recommendation underlines the importance of ensuring that children become familiarised and skilled regarding these technologies and services from an early stage in their lives as an integral part of their school education.

The Recommendation stresses that the process of learning and skilling children to be active, critical and discerning in their use of these technologies and services must be done hand-in-hand with learning about how to exercise (and enjoy) their rights and freedoms on the Internet. The human rights context of this learning and skilling process is of key importance in helping children to understand how to communicate in a manner which is both responsible and respectful to others.

By acquiring knowledge and skills in this way the Recommendation asserts that children will be able to better understand and deal with content (for example violence and self-harm, pornography, discrimination and racism) and behaviours (such as grooming, bullying, harassment or stalking) carrying a risk of harm, thereby promoting a greater sense of confidence and well-being.

In developing and facilitating information/media literacy and training strategies to empower children in the ways mentioned above, member states are encouraged to work together with other key non-state actors, namely civil society, the private sector and the media, in order to better understand the motivations and conduct of children on the Internet and to help children's educators (parents and teachers) to recognise and to react responsibly when faced with content and behaviour carrying a risk of harm. ■

● Recommendation Rec(2006)12 of the Committee of Ministers to member states on empowering children in the new information and communications environment (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies), available at: http://merlin.obs.coe.int/redirect.php?id=10466

EN-FR

Committee of Ministers: Declaration on Guaranteeing the Independence of Public Service Broadcasting in the Member States

On 27 September the Committee of Ministers adopted a Declaration on guaranteeing the independence of public service broadcasting in the Member States. This had been prepared by the Steering Committee on the Media and New Communication Services (CDMC), as a logical follow-up to the Action Plan adopted at the 7th European Ministerial Conference on mass communication policy (Kiev, March 2005). This provides for monitoring of the implementation by the Member States of the Committee of Ministers' Recommendation No. R (96) 10 on guaranteeing the independence of public service broadcasting so that, if necessary, the Member States may be given additional guidelines on ways of ensuring this independence.

The Committee of Ministers noted that the situation is satisfactory in certain Member States but leaves much to be desired in others – an appendix to the Declaration gives an overview of the situation in the Member States. The Delegates expressed their concern at the slow or inadequate progress made in a number of other Member States in ensuring the

independence of public service broadcasting resulting from the absence of suitable regulations or the inability to apply legislation and regulations already in force.

The Committee of Ministers therefore called on Member States to guarantee the independence of public service broadcasting by taking advantage of both the benefits and challenges provided by the information society and the political, economic and technological changes that have taken place in Europe. The Delegates encouraged Member States to provide the public service broadcasting bodies with the legal, political, financial, technical and other resources they need to ensure their genuine autonomy and editorial independence so that any risk of political or economic interference may be eliminated. ■

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● Declaration by the Committee of Ministers on guaranteeing the independence of public service broadcasting in the Member States (adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Delegates)
http://merlin.obs.coe.int/redirect.php?id=10423
EN-FR

Parliamentary Assembly: Image of Asylum-Seekers, Migrants and Refugees in Media

On 5 October 2006, the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 1768 (2006), "The image of asylum-seekers, migrants and refugees in the media", which is based on a more extensive, identically-titled report.

The Recommendation is anchored in Article 10 of the European Convention on Human Rights (ECHR) and it specifically recalls one of the central points of PACE Resolution 1510 (2006), "Freedom of expression and respect for religious beliefs" (see IRIS 2006-8: 2), *viz*. that freedom of expression "should not be further restricted to meet increasing sensitivities of certain religious groups". In addition, it refers to the media's responsibility not only to reflect the positive contribution which asylum-seekers, migrants and refugees make to society, but also to protect them from negative stereotyping. In this connection, the Recommendation recalls PACE's own work on relevant issues, that of the European Commission against Racism and Intolerance (ECRI), as well as the Committee of Ministers' twin Recommendations on "Hate Speech" (Recommendation R (97) 20) and on the media and the promotion of a culture of tolerance (Recommendation R (97) 21) (see IRIS 1997-10: 4). It also underscores the importance of media representation for asylum-seekers, migrants and refugees and of coverage of their views and of issues which are likely to be of interest and concern to them.

A series of recommendations are addressed to a number of parties. First, it is recommended that the Committee of Ministers:

- invite the Steering Committee on the Media and New Communication Services (CDMC) to examine and make recommendations on the operation of media complaints bodies and procedures in Member States, including a focus on any difficulties involved in securing redress;
- provide "full support and adequate resources" for ECRI and its monitoring work and invite it to: examine Member States' policies and legislation affecting racism and intolerance in the media; carry out a "media watch study, reporting on xenophobia, racism and intolerance in the media", and prepare a report on the effectiveness of legislation prohibiting incitement to hatred;
- promote "through the Eurimage [*sic*] Fund and the European Convention on Cinematographic Co-Production, the production of films dealing with issues relevant to migrants, refugees and asylum seekers and produced by persons coming from these groups".

Second, Member States of the Council of Europe are invited to uphold standards of freedom of expression, as developed pursuant to Article 10 ECHR, and at the same time to enforce legislation prohibiting incitement to hatred, violence or discrimination (and to first adopt such legislation where it does not already exist). Member States are also invited to "adopt and implement penal legislation against, *inter alia*, the public dissemination or public distribution, or the production or storage of material with a racist content or purpose, and also to adopt and implement legislation penalising leaders of groups promoting racism, and suppress public financing of organisations carrying out or supporting such activities". Other encouraged measures include: the adoption and/or implementation of national legislation to prevent excessive media concentrations; (where relevant) the signature and ratification of the European Convention on Transfrontier Television, the European Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems; the adoption or reaffirmation by all democratic parties of the Charter of European Political Parties for a non-racist society.

For their part, the media are invited to develop codes of conduct with specific guidelines for tackling stereotyping and intolerance; to strengthen the practice of including clauses of conscience in journalists' contracts; to establish effective national complaints procedures which would be competent to deal with claims about media output that fosters "intolerant, racist or xenophobic attitudes towards migrants, asylum seekers or refugees"; to obtain the consent of refugees or asylum-seekers prior to using material that could lead to the identification of their status as refugees or asylum-seekers, and to refrain from refer-

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ring to the ethnic origin or nationality of subjects of crime-related reporting, except when justified on the basis of relevance.

Finally, Member States and the media are invited to: encourage the employment of migrants and refugees in the media, including by providing specialised training programmes for them; "facilitate, fund and encourage the training and sensitisation of media professionals to issues linked with multiculturalism, pluralism and the importance of tolerance, integration and equality for all"; support competitions and awards for best reporting practices relating to relevant issues, and "promote and fund the production and broadcasting of programmes for and by migrants and refugees, including in their own languages, as well as promote the visibility of migrants and refugees in society by their inclusion in mainstream television programmes and at peak viewing times". The importance of local media in promoting integration and of cooperation between youth and the media to promote awareness of multiculturalism and pluralism, are also adverted to. ■

● The image of asylum-seekers, migrants and refugees in the media, Recommendation 1768 (2006) (Provisional edition), Parliamentary Assembly of the Council of Europe, 5 October 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10476
EN-FR

● The image of asylum-seekers, migrants and refugees in the media, Report by the Committee on Migration, Refugees and Population (Rapporteur: Mrs Tana de Zulueta), Parliamentary Assembly of the Council of Europe, Doc. 11011, 10 July 2006, available at:
http://merlin.obs.coe.int/redirect.php?id=10478
EN-FR

EUROPEAN UNION

Court of Justice of the European Communities: Legality of Collective Comparative Advertising

In its ruling in case C-356/04 the Court of Justice sheds light on the compatibility of advertisements comparing ranges of products with the Misleading and Comparative Advertising Directive.

Colruyt, a company operating a chain of supermarket stores in Belgium, availed itself of two methods of comparative advertising. The first consisted in comparing general price levels in various supermarkets on the basis of prices charged in respect of a wide range of identical or similar basic consumables offered by itself and its competitors. As a second tactic, Colruyt advertised a line of products asserting that the individual products of that line are all cheaper than their counterparts offered by competitors. In order to stop Colruyt's marketing practices Lidl, one of Colruyt's competitors, brought proceedings before the Brussels *Rechtbank van Koophandel* (Commercial Court). That court referred a number of questions to the ECJ for a preliminary ruling.

The ECJ first confirms that such comparative advertising can in principle meet the criterion of Article 3a(1)(b) of the Directive that the advertising must "compare goods or services meeting the same needs or intended for the same purpose". The provision's wording does not exclude that the ability to compare "comparable" product ranges is part of the advertiser's economic freedom. Besides, the disputed methods of comparative advertising stimulate competition to the consumer's advantage and provide that same consumer with useful information. Especially in the case of supermarket products, consumers rather base their price preferences on how much a basket of groceries costs than on comparative information limited to prices of some individual product or other. It is against this background that the ECJ sanctions the methods of comparative advertising at issue, provided the selections compared consist of individual products which, when viewed in pairs, individually satisfy the "comparability" requirement.

Secondly, the Court denies that in order to be "objective" (pursuant to Article 3a(1)(c) of the Directive), advertising consisting in price comparisons based on selections of products must expressly mention all products and prices compared. The objectivity criterion merely intends "to preclude comparisons that result form the subjective assessment of their author rather than from an objective finding". Whether or not individual products and prices are expressly listed is irrelevant for the objectivity of the advertisements at issue. Interestingly, to come to this conclusion the Court had to distinguish the context of the present case (basic consumables) from that of *Pippig Augenoptik* (spectacles) in which presentation of price differences did matter to the objectivity of the advertising concerned.

The third question answered by the Court was whether prices of products and general price levels constitute "verifiable" features for comparison (pursuant to Article 3a(1)(c) of the Directive). The Court referred to earlier case law to confirm that a product's price is a verifiable feature. As to the verifiability of comparisons of general price levels, it is a necessary precondition that the goods whose prices form part of the comparison be individually and specifically identifiable on the basis of the information contained in the advertisement.

Fourthly, the ECJ makes clear that the verifiability criterion requires the addressees of the advertising to be placed in a position allowing them to verify the accuracy of the advertising themselves. It is true that from a competition point of view it suffices that the advertiser is capable, in a short period of time, of supplying evidence of the factual correctness of his comparison. However, in accordance with

the consumer protection objective pursued by the Directive, an obligation to indicate how the addressees of the advertisements can verify the accuracy of the comparison is crucial so as to enable them to ensure that they have been well-informed as regards the purchases they are prompted to make.

Lastly, the ECJ examines the question whether general price level comparisons must be considered misleading pursuant to Article 3a(1)(a) of the Directive when the price levels are determined on the basis of only some of the products sold by the advertiser, because consumers might otherwise assume the advertiser to be cheaper over the full product range. According to the Court, such collective comparative advertising may be misleading when it:

- does not reveal that the comparison relates only to a sample and not all products;
- does not identify the details of the comparison or communicate to the addressees the information source where identification is possible;
- contains a collective reference to a range of amounts that may be saved without specifying individually the general level of the prices charged by every competitor and the amount that consumers are liable to save by making their purchases from the advertiser. ■

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● Court of Justice of the European Communities, Lidl Belgium V. Etablissementen Franz Colruyt, C-356/04, judgment of 19 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10442

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

European Commission: Steps against Member States in Breach of the Tobacco Sponsorship Ban

The European Commission has decided to initiate infringement procedures against Member States violating the EU tobacco advertising ban as contained in the Tobacco Advertising Directive 2003/33/EC. This Directive bans tobacco advertising in printed media, on radio and over the internet. It also prohibits tobacco sponsorship of cross-border events or activities. It only targets advertising and sponsorship with a cross-border dimension and does not allow exemptions regarding the entry into force of the prescribed measures and prohibitions. However, exemptions delaying implementation beyond the prescribed date of 31 July 2005, found in Czech, Spanish and Hungarian transposition provisions have prompted the Commission to send reasoned opinions to the first two Member States and an additional reasoned opinion to Hungary. Because Italy failed to give a timely reply to a reasoned opinion, the procedure against it has been taken a step further as the Commission has decided to refer it to the European Court of Justice. The Italian law to ban tobacco sponsorship does not apply to events which take place exclusively on Italian soil. However, such an event can have cross-border effects when it is transmitted to other countries.

There remain pending cases on the failure to communicate transposition measures. So far, 24 Member States have communicated these measures to the Commission. Germany was recently referred to the ECJ for failing to communicate its transposition measures, the United Kingdom has now complied with this communication obligation and Luxembourg recently informed the Commission of its measures, as a consequence, the case against it has been closed. ■

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● "Commission takes action against Member States breaking the tobacco sponsorship ban", press release of 12 October 2006, IP/06/1374, available at: http://merlin.obs.coe.int/redirect.php?id=10456

DE-EL-EN-FR

European Commission: New Infringement Cases Regarding Telecom Rules

Marking a new round of proceedings against infringements of EU telecom rules, the European Commission has opened nine new infringement cases against Member States. Eight other Member States have been sent a reasoned opinion which takes the procedure a step further in their pending cases. The failure to complete market reviews to assess competition in national telecom markets or the lack of caller location information to emergency authorities (depending on the Member State involved) prompted the Commission to take action. Not all Member States have completed the first round of market reviews under the 2002 regulatory framework and letters of formal notice are being sent to Denmark, Germany, Malta and Portugal. Estonia and Luxembourg who have partly complied with this market review obligation are being sent a reasoned opinion. National regulators were obliged to analyse the 18 markets relevant for electronic communications as soon as possible after the EU regulatory framework entered into force (2003 for "old" Member States and 2004 for the new entrants to the EU) as a means to oversee effective competition in the field. Previous action undertaken by the European Commission has ensured that a majority of Member States have now completed the prescribed review of the 18 relevant markets, the case against the Czech republic, for example, is now being closed as this Member State has recently completed its markets analysis.

The Commission will also send a reasoned opinion to six Member States where caller location information is not provided for all calls to the Single European Emergency Number 112 (Greece, Lithuania, the Netherlands, Slovakia, Italy and Portugal), and may on the contrary close proceedings against Ireland,

Cyprus and Luxembourg as soon as they have complied with this obligation.

In the case of number portability, this is now available in Malta, Poland and Slovenia which marks the end of the case against these Member States. Slovakia, however, will be sent a letter of formal notice on this issue. Two other countries which will be receiving such a letter are Germany and Belgium. The former because the must-carry rules in various federal states are not in conformity with the requirements of the Universal Service Directive, the latter because of issues relating to the financing of the universal service. Greece, in turn, has formally communicated to the Commission its transposition measures relating to the ePrivacy Directive and will therefore not face any proceedings regarding this matter. ■

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● **"EU telecoms rules: 9 new infringement cases opened, while 8 cases go into the second round", press release of 12 October 2006, IP/06/1358, available at: http://merlin.obs.coe.int/redirect.php?id=10463**

CS-DA-DE-EL-EN-ES-ET-FR-IT-LT-MT-PL-PT-NL-SK-SL-SW

European Commission: Greece Must Take Measures to Implement Liberalisation Directive for Broadcasting Transmission Services

Commission Directive 2002/77/EC of 16 September 2002 aims at ensuring competitive conditions in the markets for electronic communications networks and services across the European Union. The Directive prescribes that Member States must inform the Commission of the measures taken to comply with it (including for broadcasting transmission services) before 24 July 2003. Unlike all other Member States, Greece has failed to inform the Commission of measures taken to transpose the Directive. On 14 February 2006, the Hellenic Republic notified its new law on electronic communications to the Commission, however, this was to no avail because broadcasting transmission services fall outside the scope of this law.

The European Commission referred Greece to the Court of Justice on 14 April 2005 for failing to communicate the measures taken in order to transpose the Directive and the Court then ruled Greece had indeed not complied with its obligation to implement the Directive. Almost exactly a year later, the Commission sent Greece a letter of formal notice requesting further information on the state of its law; the Hellenic Republic's response was that a new law on media would implement the liberalisation Directive for broadcasting transmission services. However, one-and-a-half years after the Court ruling, Greece has still not notified any implementing measures to the Commission. ■

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

● **"Competition: Commission requests Greece to adopt new framework for broadcasting services", Press Release of 16 October 2006, IP/06/1401, available at: http://merlin.obs.coe.int/redirect.php?id=10470**

DE-EN-FR-EL

European Commission: Sweden Taken to Court for Failing to End Broadcasting Services Monopoly

Commission Directive 2002/77/EC of 16 September 2002 aims to liberalise the markets for electronic communication networks and services across the European Union. The Directive applies to networks for radio and television broadcasting and for transmission and broadcasting services. The Directive requires Member States to ensure that any company is entitled to operate such networks and provide such services.

However, Swedish broadcasters using digital terrestrial broadcasting and transmission technology are obliged to acquire access control services exclusively from Boxer giving this company a monopoly for these services. Access control services include the encryption and decryption of TV-signals (pay-TV) and the provision of decoders, set-top boxes, smart cards and other devices.

The European Competition Commissioner, Neelie Kroes, regretted having to resort to the Court of justice but argued that Swedish viewers should not be denied their right to choose digital terrestrial TV suppliers any longer. ■

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

● **"Competition: Commission takes Sweden to Court for failure to end broadcasting services monopoly", Press Release of 17 October 2006, IP/06/1411, available at: http://merlin.obs.coe.int/redirect.php?id=10473**

DE-EN-FR-SW

NATIONAL

AM – New Law on Copyright

On 15 June 2006 the National Assembly of Armenia adopted in the third and final reading the new Statute "On Copyright and Related Rights". The Statute contains a number of provisions on media activities that are mostly similar to the stipulations of the previous law of 8 December 1999 and international covenants.

Article 51 of the Statute ("Rights of Broadcasting Organization") stipulates that the broadcasting organization has a right to use its programme in any form and to receive remuneration for any form of use of a programme except in the cases provided for by this

Statute. The broadcasting organization has an exclusive right to authorize or prohibit third parties the following actions: the fixation of the programme; the direct or indirect reproduction of the fixed programme; the distribution of copies of the fixed programme including their import; the rebroadcast of the programme; the communication of the programme in places accessible to the public against payment of an entrance fee; making the programme available to the public.

The broadcasting organization may transfer its economic rights to a third party in whole or in part by a contract.

The economic rights of a broadcasting organization in respect of the programme emanate from the date of first broadcast and shall run for 50 years (Article 61. "Term of Protection of Related Rights"). ■

Andrei Richter
Moscow Media Law and Policy Institute

● **Statute "On Copyright and Related Rights"**
HY

DE – Collection of Fees for Retransmission of Programmes to Hotel Bedrooms

On 2 August 2006 the District Court of Cologne confirmed the fundamental legality of charging for retransmission of television programmes to bedrooms in a hotel.

The plaintiff in the underlying legal dispute runs a hotel in which she transmits programme signals received via cable through the cellar to her distributor, amplifies them and distributes them to the hotel rooms. She additionally offered both hotel information and videos via the television sets. The programmes were transmitted under a cable connection contract between the plaintiff and a cable operator, under which the right was granted to the plaintiff to make the channels supplied accessible to customers.

The defendant, an exploitation company for copyright and performance protection rights concluded, for its part, with various cable network operators what is known as the Regio contract, a contract for the payment of the use of terrestrial and satellite programmes broadcast by radio and television stations over the broadband cable networks of cable operators. The contract contained the clause that the transfer of rights of use to third parties was only admissible if the cable operators delivered the programmes of the broadcasting companies of other cable operators over the level 4 network (part of the broadband cable network set up for signal transmission over real estate and in buildings) and where a corresponding contract concerning signal delivery existed or would be concluded. Moreover, under an overall contract with the Federal Association of Music Promoters on the retransmission of private television and radio programmes to bedrooms in hotels, the defendant had concluded an individual contract with the plaintiff.

What was at issue now was whether and to what degree the defendant was entitled to retransmit within the hotel free of charge.

The Court established firstly that there would no doubt be chargeable use of copyright protected works by the plaintiff if she transmitted television programmes via her internal cable network to the individual bedrooms. This would constitute retransmission within the meaning of §§ 20, 20b, 87 copyright law (UrhG) and accordingly an infringement of broadcasting rights.

In so doing, the court based itself on a decision of the Federal High Court of Justice (BGH) dating from 1993, in which it had issued a ruling regarding the transmission of programmes via distribution facilities in prisons. It had based itself on the criterion that the transmission of works via broadcasting facilities came under broadcasting rights, when the operator of the installation did not limit himself to receiving and transmitting material broadcast via aerial and cable, but also provided reception facilities, with which the users – at their own discretion - could make use of the broadcast works. Such circumstances, in the view of the BGH, distinguished the activity from mere reception via communal aerial facilities and at the same time rendered it comparable in its meaning to other uses of works reserved by law to the creator through public reproduction. The decisive point in the ruling was the actual use, not the technology involved, i.e. that for instance that reception facilities were also suitable for individual reception.

The District Court accepted this line of argument and saw in the current case a comparable situation. Neither the fact that the defendant rented out the reception facilities nor the provision of additional videos or, in comparison to prison establishments, the limited amount of accommodation, allowed for a different ruling.

Thus the legal case was successfully made to refuse the fee requirement vis-à-vis the defendant. The hotel owner was exempt from any additional fee requirement, as long as the cable network operator concerned under the Regio-contract was entitled to transfer rights of use. This was the case since the internal hotel cable network of the plaintiff was to be classified as part of the level 4 network. The court ruled out the fact that sub-licensing in Hotels and similar establishments was not covered by the rights transfer clause of the Regio contract. ■

Nicola Weißenborn
Institute for European Media Law (EMR), Saarbrücken/Brussels

● **Ruling of the District Court of Cologne dated 2 August 2006, Az.: 28 O 3/06, available at:**
http://merlin.obs.coe.int/redirect.php?id=10428
DE

DE – Rights regarding the Cartoon Figure "Pumuckl"

Nicola Weißenborn
Institute for European Media Law (EMR), Saarbrücken/Brussels

With the Munich 1 District Court's ruling of 13th September 2006, Bavarian broadcasting as well as the production company Infafilm Gmbh have been banned from making use of the cartoon figure Pumuckl without the express admission of the rights of its creator. Indeed the creator of Pumuckl had in 1978 granted the right to the production company of using the figure for the creation of a television series of 30-minute long episodes. In following productions however, such as the first feature film or the use of the figure on the Internet and on corporate stationery, the court established that a licence had not been granted to the production company. Furthermore, authorisation for a series of a one-hour long children's programme, which had been designed around the figure of Pumuckl, had run out at the end of 2005, yet the programme continued to be broadcast during 2006. The 21st Civil Chamber held that, in accordance with § 32a of copyright law (what are referred to as the "bestseller paragraphs"), the conditions for fairness compensation were met, according to which the creator may request that a change be made to the contract, if agreed remuneration is subsequently disproportionately small in relation to the proceeds flowing from use. In order to be able to determine appropriate post compensation, the District Court instructed that information on the extent of use of the figure and the resulting proceeds should be made available. ■

• Ruling of the Munich 1 Regional Court dated 13 September 2006, Az.: 21 O 553/03

DE

DE – Advertisements with Jingles Criticised

Carmen Palzer
Institute for European Media law (EMR), Saarbrücken/Brussels

The Hamburg Institute for New Media (HAM) has objected to some jingle-based advertisements shown on the MTV 2 Pop programme. By broadcasting twelve jingle-based adverts on this programme between 6 am and 8 pm MTV Networks violated Youth Protection provisions. What is objectionable, according to the decision of the HAM, is that the broadcast adverts encouraged children and young people to make a purchase, such encouragement exploiting their lack of experience and gullibility. In accordance with § 6 paragraph 2 of the Youth Media Protection State Agreement (JMStV), advertising may not contain any direct appeal to purchase aimed at children or young people, which exploits their inexperience or gullibility; according to § 6 paragraph 6 of the JMStV this also applies to Teleshopping. Moreover Teleshopping may not encourage children or young people to enter into purchase or rental contracts for goods and services (§ 6 paragraph 6 JMStV); there was also a violation of this provision. This was the result of observations made by the Commission for Youth Media Protection (KJM) responsible for youth protection in broadcasting and telemedia which, in its review of 13 June 2006, dealt with 53 jingle-based adverts and unanimously pronounced itself in favour of supervisory measures for all the adverts concerned. The decisions of the KJM are to be implemented by the *Land* Media Institute responsible for the broadcasting company concerned.

According to the results of the KJM's review, other broadcasters had been identified in this connection, which did not however fall under the supervision of the HAM. ■

• Press release of the HAM dated 10 October 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10427

DE

DE – Amendment to Broadcasting Laws in Hessen

Alexander Scheuer
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With the planned change to the law on private broadcasting as well as to the law on Hessian broadcasting, the regional government is striving, as it has explained, to modernise the legal framework regarding electronic media.

Changes to the allocation of radio and television frequencies should lead in future to these being organised as economically as possible. Changes are also planned to the provisions referring to utilisation of analogue and digital cable facilities. The proposals submitted in a first draft for hearing were however received by the Association of Private Broadcasting and Telecommunications (VPRT) with some scepticism, since the risk existed of the concerns of private broadcasters not being sufficiently taken into account. Regarding the media supervisory authority and the use of financial resources resulting from broadcasting fees and tax, expenditure for the promotion of media expertise has been cut and funding for promoting infrastructure and the media economy increased. This planned change has already been criticised by the Assembly of the Hessian Regional Institute for Private Broadcasting.

Such an intended change to the law on Hessian Broadcasting has enabled the Federal Audit Office to audit subsidiaries of the company in which it, directly, indirectly or together with other public broadcasters, has a majority stakeholding. ■

• Press release of 5 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10425

• View of the VPRT of 13 July 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10426

DE

DE – Further Legislative Procedures on Copyright Law

On the recommendation of its legal committee, the Bundesrat (Upper House of the German Parliament), during its plenary session on 22 September 2006, did not propose to summon a meeting of a mediation committee in accordance with Art. 77 Abs. 2 GG of the fifth law on the amendment of the

copyright law (publication 811/06). The bill introduced into Parliament by the government and approved on 29 June 2006 in slightly amended form is accordingly passed into law.

The law serves to transpose Directive 2001/84/EC of the European Parliament and Council dated 27 September 2001 on the resale right of the creator of the original of a work of art, which should actually have been completed by 1 January 2006. The purpose of the regulation is the harmonisation of the legal claim of the creator to a share of the proceeds of the resale of his work. The bill thus provides in particular for amendments to § 26 of the Copyright Law. The idea is that each claim by the creator against the seller under the resale right would in future be set between 0.25% and 4%, depending on the sale price, with a maximum set at EUR 12,500. The threshold for the accrual of a resale right claim is increased from EUR 50 to EUR 400 and the time limit for the creator to assert his claim concerning the resale of the work extended to three years.

Furthermore, the arrangement under § 52a of the Copyright Law currently time-limited to 31 December 2006, under which public access to works for purposes of education and research is deemed permissible under certain circumstances, is extended to 31 December 2008. ■

Nicola Weißenborn
Institute for European Media Law (EMR), Saarbrücken/Brussels

- **Minutes of Bundesrat Plenary Session of 22 September 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10431**
- **Draft law of the Federal Government, available at: http://merlin.obs.coe.int/redirect.php?id=10432**
- **Legal ruling of the German Parliament, available at: http://merlin.obs.coe.int/redirect.php?id=10433**

DE

FR – Unremunerated Exploitation of a Television Presenter's Personality Rights

In a judgment delivered on 28 September, the regional court in Paris ordered the production company of a popular television programme ("C'est mon choix") to pay damages to its presenter, Evelyne Thomas, for having broadcast 62 broadcasts from the previous season over the summer of 2004 without her authorisation. Ms Thomas was an employee of the company until June 2003, when she created a company to "manage, exploit and promote the image, on any media, of Ms Evelyne Thomas". In July 2003 the two companies concluded an agreement under which Ms Thomas's company would be entitled to receive payment from the production company in respect of exploitation of the programme, broadcast daily. In the summer of 2004, Ms Thomas noted that 64 programmes from the previous season had been shown, although she had not given her consent. She therefore held that the production company had used her image, name and voice unlawfully. The company claimed in its defence that she had agreed to such use from the outset of their contractual relations.

The court, however, recalled that "the subject's consent to the broadcasting of his or her image must, in principle, be stipulated specifically or at the very least be unequivocally deducible from the circumstances of the matter". This was not the case here. It was true that the successive employment contracts between the production company and the presenter authorised the employer to make use of her recorded image, voice and name anywhere for an unlimited period of time, in return for payment to her of proportionate remuneration in addition to her salary. The production company was wrong, however, in thinking that it could deduce from the agreement concluded with Ms Thomas's company in July 2003 that it had been tacitly authorised to show repeats of the broadcasts – the agreement did not refer to any conditions for repeat showings of the broadcast.

The court found that the parties had clearly intended to confer a pecuniary value on the image and voice of the applicant party. Unremunerated exploitation of her personality in this way therefore constituted a prejudice, for which compensation could be claimed on the basis of Article 1382 of the Civil Code. In order to evaluate the prejudice suffered, the court referred to the number of repeat showings of the broadcast and to the fact that the earlier contracts made provision for remuneration amounting to 5% of net revenue in favour of the applicant party. As the production company had sold the broadcasts to the France 3 channel for EUR 15,000 each, the court awarded the presenter EUR 46,500 in damages – substantially less than the EUR 4.65 million claimed! ■

Amélie Blocman
Légipresse

- **Regional Court of Paris (3rd chamber, 2nd division), 28 September 2006, Evelyne Thomas and 2 Secondes Production v. Réservoir Production**

FR

FR – Docu-fiction on a Criminal Case and the Privacy of the People Involved

As the public service channel France 3 is preparing to broadcast a docu-fiction on the murder of "Little Grégory", a legal case in the 1980s that attracted much attention from the media and which was never elucidated, court action to preserve the privacy of the people involved in the case continues. A judge in Paris sitting in urgent matters has already dismissed an application from one of the witnesses in the case (see IRIS 2006-3: 13), and now the regional court in Nancy has received applications from other parties in the case.

The wife and children of Bernard Laroche, Grégory's uncle, who was suspected at one point of having been the murderer and was subsequently killed by the child's father, and one of the child's

uncles felt that the docu-fiction constituted an invasion of their privacy and infringed the presumption of innocence. Because of the urgency of the matter, they applied to the courts for an order to have the screenplay handed over to them and the broadcast banned.

In its judgment on 3 October, the court in Nancy began by recalling that the entitlement to privacy lapsed with the death of the person concerned, but found that the applicants were justified in taking action out of concern for the way in which their lives with their father and husband would be presented. Infringement of the presumption of innocence, however, constituted moral prejudice in respect of the victim alone; heirs could not take action in the place of that person unless the action had already been commenced before the person's death. The court therefore considered the application only in respect of the entitlement to privacy, and recalled established precedent at the Court of Cassation according to which the relation of facts that were publicly known and had already been divulged could not on its own constitute an invasion of privacy.

Such a revelation made to the public may not prevent the production of a fiction document which it is not certain, as it is based on the progression of established events, will bring to light any elements not already revealed previously. Thus the court in Nancy found that, since the facts of the case had been widely reported in the media, there was nothing to prevent them being used as the basis of a work of fiction. In the present case, matters involving people's private lives had been brought to the public's attention lawfully by means of reports of court proceedings printed in the local press. The applicants could not therefore claim the discomfort of going over the facts of the case yet again as grounds for preventing such a broadcast. Thus, however painful it might be to be reminded of difficult events, the applicants were not in the present case justified in claiming that broadcasting the film infringed their right to privacy; prior control could only be considered in extreme cases, and was not appropriate here. The applications were therefore dismissed. ■

Amélie Blocman
Légipresse

● Regional Court of Nancy (9th chamber), decision made on 3 October 2006, M.-A. Bolle, Laroche's widow, et al. v. France 3 et al

FR

FR – CSA Withdraws Broadcasting Authorisation without Prior Formal Notification

In a decision adopted on 27 September, the *Conseil d'Etat* has now laid down the way in which the procedure instituted by Article 42-3 of the Act of 30 September 1986, as amended, is to be implemented.

According to this text, the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority – CSA) may, without prior formal notification, withdraw a radio or television station's broadcasting authorisation in the event of a substantial change in the information on the basis of which the authorisation had been issued, more particularly as the result of changes in the composition of company capital or management bodies, or in methods of financing. This procedure departs from the traditional sanctions procedure available to the CSA under Article 42-1 of the Act, which requires prior formal notification to be made before any authorisation is suspended, shortened or withdrawn.

Fréquence Mistral, a radio station operating under an agreement with the CSA and run by an association broadcasting in the Marseille area, had its broadcasting authorisation withdrawn, without prior formal notification, after the CSA had noted a continuous absence of broadcasting of the programme covered by the station's agreement. The CSA felt that the absence of the programme constituted a "substantial modification of the information on the basis of which the authorisation had been issued", within the meaning of Article 42-3 of the 1986 Act. The radio station, however, appealed to the *Conseil d'Etat* to have the heavy penalty cancelled. The *Conseil d'Etat*, the highest administrative court in the country, found that, according to Article 42-3, and in the light of parliamentary work, the purpose of the procedure it provided for was to enable the CSA to withdraw an authorisation to operate a radio or television broadcasting service if, under court supervision, it felt that the information used as the foundation for issuing the authorisation, particularly resulting from changes in the composition of company capital or in the management bodies or in financing methods, had been substantially altered, thereby casting doubt on the choices made at the time of issuing of the authorisation. The *Conseil d'Etat*, however, felt that it was not the purpose of this procedure to enable the CSA to check whether the holder of an authorisation was fulfilling the obligations incumbent on it under the terms of its agreement or regulations or statutory provisions and sanction any failings that could, after prior formal notification, result in the penalties provided for by Article 42-1 of the Act. In the present case, by inflicting on the radio station, for disregarding its obligations in respect of broadcasting contained in the agreement it had signed with the CSA, the penalty of withdrawing its authorisation on the basis of Article 42-3 of the Act of 30 September 1986, as amended, the CSA had misunderstood the scope of the Act. The withdrawal of the authorisation was therefore cancelled.

This decision comes just as the CSA has been notified of the case of the channel TPS Star, a premium channel in the satellite package held by TF1 and M6, whose body of shareholders will be altered following the anticipated merger of CanalSat and TPS (see IRIS 2006-8: 14). Thus, under Article 42-3, in view of this

change in the body of shareholders, the channel must obtain approval from the CSA in order to be able to continue broadcasting. Apart from the matters of shareholders and management of the channel, the CSA will have to decide whether there is also a change in format which could call the station's authorisation into question. Although the CSA has already had to consider cases under Article 42-3 in the past concerning television for which no charge is made, particularly when Suez ceased to hold shares in M6, or when TMC was sold to TF1 and the AB Group, this is the first time a case of this kind has arisen in respect of a pay television channel. The CSA's decision may be issued before completion of the TPS/CanalSat merger, which is expected by December at the latest. ■

Amélie Blocman
Légipresse

● Conseil d'Etat, (5th and 4th sub-divisions combined), 27 September 2005; Association Fréquence Mistral

FR

GB – "Big Brother" Programme Breaches Code of Practice

ICSTIS is the Independent Committee for the Supervision of Standards of Telephone Information Services in the UK. It is the "industry funded regulatory body for all premium rate charged telecommunication services".

In a recent adjudication involving Channel 4 and two service providers, ICSTIS decided that its Code of Practice had been breached. It is the two service providers who actually have the obligations.

The problem arose when a "phone vote" appeared to have resulted in the eviction of a number of "Big Brother House" occupants. However, several were subsequently re-admitted, thus allowing them to be eligible to win prizes.

Following this, 2600 complaints were received by ICSTIS. ICSTIS said that "The unprecedented number of complaints for this type of service, combined with the undoubted strength of feeling of the complainants, clearly indicated that voters genuinely felt that they had been misled over this twist".

Channel 4 and the two service providers concerned, iTouch(UK) Ltd and Minick, were the subject of an investigation. ICSTIS ruled that Channel 4's voting service breached its Code of Practice on the grounds that its viewers had been misled.

The two premium rate phone firms were not fined, but ordered to pay in excess of GBP 40,000 – towards the costs of the investigation. ■

David Goldberg
deeJgee research/Consultancy

● ICSTIS Code of Practice (Tenth Edition, Amended July 2005) came into effect on 15 September 2005, available at: http://merlin.obs.coe.int/redirect.php?id=10447

● iTouch (UK) Ltd & Minick Ltd adjudication, both available at: http://merlin.obs.coe.int/redirect.php?id=10448

EN

HU – Consultation on Strategy for Digital Switchover

On 4 October 2006 the Hungarian National Strategy for Digital Switchover has been published and submitted to public consultation. The elaboration of the national strategy was the consequence of the decision of the Government on the introduction of Digital Terrestrial Television (DTT) of March 2005 (see IRIS 2005-5: 16).

The majority of the preparatory works has been carried out under the aegis of the *Informatikai és Hírközlési Minisztérium* (Ministry of Informatics and Telecommunications), that merged with the *Gazdasági és Közlekedési Minisztérium* (Ministry of Economics and Transport) after the general elections in May. Based on the original blueprint and contribution of several other ministries and authorities the strategy has been finalised and published by the *Miniszterelnöki Hivatal* (Prime Minister's Office).

The scope of the strategy covers both television and radio broadcasting and transmission. The document takes all programme distribution platforms into account: in addition to terrestrial broadcasting it also considers cable, satellite, mobile and broadband content distribution possibilities.

Beside the available examples taken from the various European national practices the findings of the strategy are based on the detailed analysis of the broadcasting landscape of Hungary. According to the description provided by the document, today there are approximately 250,000 digital households in Hungary. They are almost exclusively receivers of satellite DTH ("direct to home") or similar services. An insignificant number of households have access to digital cable programme packages and the introduction of IPTV is also at an embryonic stage in the country.

As regards DTT, the ongoing experimental broadcasting of *Antenna Hungária Zrt.* (the recently privatised national broadcast distribution company) is worth noting.

The document continues with the stocktaking of frequencies available for the purposes of digital broadcasting in the light of the outcome of RRC06 (the Regional Radiocommunication Conference of the ITU held in Geneva from May to June this year).

The strategy also defines an inventory of regulatory tools for encouraging digital switchover. The elements of this toolkit are sorted and evaluated by their nature. In this respect are distinguished:

- public policy interventions (e.g. consumer information campaigns or the definition of the role of the Hungarian public service broadcasters in the process of digitisation);
- regulatory measures (media, telecommunication, or copyright law), and
- financial support mechanisms (on a strictly platform-neutral basis, in line with EC regulation)

Proposals to define a centre among state institutions for addressing the challenges of digital switchover and to implement proper monitoring schemes to evaluate the progress to be made are also included in the strategy.

The general aim of the strategy has been defined as:
- strengthening media pluralism;
- contributing to the development of value-added interactive services;
- promoting sustainable and efficient competition in the market of digital broadcast transmission;
- promoting the efficient use of scarce resources;
- increasing the level of awareness and competence among consumers;
- securing the access of disadvantaged social groups to digital television services;

by means of:
- a clear regulatory framework consistent with EC law;
- unambiguous public policy efforts;
- purposeful subvention policy consistent with the principle of technological neutrality in the course of the digital switchover.

The interested parties (market players, professional associations, academic organisations, other authorities concerned, etc.) are invited to comment the strategy until 11 November 2006. ■

Márk Lengyel
Körmendy-Ékes & Lengyel Consulting

● ***Javaslat a televíziózás és a rádiózás digitális átállásának magyarországi stratégiájára*** **(Proposal for the strategy for the digital switchover of radio and television broadcasting), available at:**
http://merlin.obs.coe.int/redirect.php?id=10437

IE – New Broadcasting Bill

On 5 September 2006, the Department of Communications, Marine and Natural Resources published a new wide-ranging Broadcasting Bill. The Bill consists of 129 sections divided into twelve parts and followed by a Schedule. Its purpose is to update the legal framework for broadcasting in Ireland. Part II of the Bill provides for a single content regulator to be called the Broadcasting Authority of Ireland (BAI), which will encompass the existing regulatory functions of the Broadcasting Commission of Ireland (BCI), the RTÉ Authority and the Broadcasting Complaints Commission (BCC). It will also have a Contract Awards Committee (s.26) and a Compliance Committee (s.27). The latter will take over the role of the BCC and be responsible for the complaints process (s.44). The right of reply contained in s.24(2)(f) of the Broadcasting Act 2001 (see IRIS 2001-4: 9) will be widened (s.45) and enforcement mechanisms will be expanded to include monetary penalties of up to EUR 250,000 for breaches of duties, codes or rules set out in the Bill (s.48). The objectives of the BAI will include upholding democratic values, especially freedom of expression, and the provision of open and pluralistic broadcasting services (s.24). It will be independent in the exercise of its functions (s.28). However, in the case of an emergency, the Minister is to have power to suspend any licence and may operate or require such service to be operated as he directs (s.31). Other provisions include the establishment of the Irish-language station, TG4, independently of RTÉ, and the requirement of a public service broadcasting charter, an annual statement of commitments and the setting-up of an audience council by both RTÉ and TG4 (ss.103, 104, 108). Both RTÉ and TG4 will be established as companies limited by guarantees (s.70) under the Companies Acts 1963-2005. ■

Marie McGonagle and Nicola Barrett,
Faculty of Law, National University of Ireland, Galway

● **Broadcasting Bill 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10449

EN

IT – Increase of Volume Levels in Advertising Breaks Prohibited

On 12 July 2006, the *Autorità per le garanzie nelle comunicazioni* (Communications Authority – AGCOM) adopted an amendment to the Regulation on advertising (see IRIS 2001-9: 11), prohibiting the increase of the volume levels of advertising messages being broadcast during breaks in programmes. This new provision was implemented on 10 October 2006 when AGCOM defined the first urgent technical parameters to be respected by all national and local broadcasters and on all platforms (terrestrial, cable and satellite).

This issue is of importance to Italian broadcasting, both on public and on private channels. Based on the results of the monitoring conducted by a specialised Institute of the Ministry of Communications, AGCOM defined a threshold of 15% of tolerable increase of volume levels, to be calculated on the average results of 30 measurements carried out on 30 second-samples of advertisements and programmes. Should more than 30% of the measurements indicate that the threshold of 15% of increase has been exceeded, AGCOM would be entitled to impose fines ranging from EUR 5,165 to EUR 51,646 for each violation according to Art. 51, para 2, lit. b. of the Broadcasting Code (see IRIS 2005-9: 14).

Broadcasters will have 30 days after the entry into force of the deliberation to adapt their systems to the new rules, which will apply for six months, until the adoption of permanent parameters after a consultation process to be carried out with the relevant stakeholders. ■

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

● **Regulation no. 132/06/CSP *"Modifiche al Regolamento in materia di pubblicità radiotelevisiva e televendite, di cui alla delibera n. 538/01/CSP del 26 luglio 2001"* (Amendments to the Regulatory Provisions Relating to Television Advertising and Telesales), available at:**
http://merlin.obs.coe.int/redirect.php?id=10450

● **Press Release on Deliberation no. 157/06/CSP *"Misure urgenti per l'osservanza delle disposizioni in materia di livello sonoro delle trasmissioni pubblicitarie"* (Urgent Measures for the Observation of Provisions Relating to the Volume Levels of Advertising), available at:**
http://merlin.obs.coe.int/redirect.php?id=10451

IT

NL – Minister of Education, Culture and Science Responds to Three Reports

In an explanatory letter to Parliament, the minister of Education, Culture and Science has responded to the findings of three different studies that have recently been completed. The first of these studies is a report by TNO (an independent research organisation) about the future of commercials in a digital television landscape. This report concludes that in order to retain their current position and influence, commercial and public broadcasters should expand their activities toward digital services such as on-demand video and search machines. TNO predicts that traditional television commercials will remain the most important source of income for a few years, but that they will lose ground to internet commercials in the long run. However, public broadcasting advertising revenues will remain stable.

The minister has reacted to these findings with optimism. The stable advertising revenues contribute to the continuity of the public broadcasting service. TNO' s advice will be heeded and a share of the annual public broadcasting budget will be reserved to develop and strengthen new activities on the internet.

The second study was conducted by the Dutch Media Authority and deals with regulating the Dutch commercial television market. The Media Authority mainly reports on the position of commercial broadcasters with regard to international regulations. It addresses the current situation in which one of the broadcasters (RTL) operates from Luxembourg, where it is subject to less strict regulations, and the other two broadcasters (SBS and TALPA) operate from the Netherlands, and are thus subject to the stricter Dutch laws. This results in a better negotiating position for RTL and thus gives it an economic advantage over its competitors. The Media Authority advises the removal of some of the stricter regulations so that the Media Act will reach the minimum standards of the Luxembourg legal system (see IRIS 2006-9: 18).

The minister's response is that steps have already been taken to resolve this problem. A draft amendment is being worked on and talks with the broadcasters about expanding advertising possibilities are in progress. More changes can be introduced once the revision of the European TWF Directive has been completed.

The final study deals with cooperation between public broadcasters and private publishers. One of the recommendations in this report by the *Centrum voor Intellectueel Eigendomsrecht* (Centre for Intellectual Property Law - CIER) is to create regulations concerning side tasks for public broadcasters. Most of the recommendations deal with the application of the Media Act by the Media Authority. The researchers are reluctant to change the Media Act because changing the policy guidelines of the Media Authority can lead to the same results, albeit faster. These changes should mainly concern the possibilities of title sponsoring and merchandising. Finally, public-private cooperation can lead to more income for public broadcasting and should therefore be encouraged.

The minister's response to this is that the Media Authority is willing to change its policies in order to be able to expand the possibilities for public-private cooperation. The Media Act only allows sponsoring of public broadcasting on strict conditions. According to the minister, commercial broadcasters are not bound by any such rules and are thus free to cooperate with other private parties. Currently, public broadcasters are not allowed to carry out merchandising activities. However, the minister feels that since merchandising not only generates income, but can also strengthen a programme, it should be allowed with regard to programmes about sport, culture or charity. The Media Authority will revise policy guidelines in order to allow this. ■

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● **Letter of the Minister of Education, Culture and Science, 6 October 2006, available at:**
http://merlin.obs.coe.int/redirect.php?id=10459

NL

PL – Constitutional Tribunal Examines Act on Cinematography

The Polish Constitutional Tribunal held in its judgemnt of 9 October 2006 that the provision of Article 19 paragraph 9 of the Act of 30 June 2005 on cinematography is in conformity with the Constitution of the Republic of Poland.

The Act of 30 June 2005 on cinematography came into force on 19 August 2005; provisions on deductions being an important part of the cinematographic production support system (Article 19) came into force on 1 January 2006 (see IRIS 2006-1: 18)

The Act on cinematography established in its Article 19 an indirect support system aimed at strengthening the domestic cinematographic film market, but also provided additional rules for public service broadcasters referring to direct support. This Act introduces deductions (1,5% of revenues from certain types of activity) made by entrepreneurs whose business activity is connected with using films; i.e. broadcasters, digital platform operators, cable television operators, cinema owners, distributors selling or renting film copies in tangible form. These fees are paid to the Polish Institute of Film Art, which is a State legal person dealing with many tasks referring to the support of Polish film art.

On 27 March 2006 the Commissioner for Civil Rights Protection approached the Constitutional Tribunal with a motion stating that Article 19 paragraph 9 of the Act on cinematography was not in conformity with the Constitution (see IRIS 2006-5: 17).

The provision questioned by the Commissioner for Civil Rights Protection - namely Article 19 paragraph 9 - states that payments described in paragraphs 1-5, 6 and 7 are subject to the application *mutatis mutandis* of the provisions of Part III ("tax obligations") of the Act of 29 August 1997 - Tax Law (*Ordynacja podatkowa*) -, but in this case competencies of fiscal administration are given to the Director of the Polish Institute of Film Art and competencies of the appellate body to the Minister of Culture.

Małgorzata Pęk
National Council of Broadcasting, Warsaw

The Commissioner for Civil Rights Protection raised doubts about whether Article 19 paragraph 9 does not infringe the principle of the correct and rational legislation referring to activities of fiscal administration and the collection of a new tax.

In its judgment the Constitutional Tribunal found that none of the arguments referring to competencies granted to the Director of the Polish Institute of Film in regard to fiscal administration does substantiate a charge of infringement of the Constitution.

In the opinion of the Tribunal no threat to the rights of those entities that are subject to the aforementioned payments exists. Vesting the Director of the Polish Institute of Film with competencies of fiscal administration constitutes a guarantee of the uniformity of the practice of collection payments, as the same central organ is enforcing the payments from all obliged entities. ■

- **Press Release of the Constitutional Tribunal, available at: http://merlin.obs.coe.int/redirect.php?id=10438**
- **Constitutional Tribunal judgement of 9 October 2006 (case K 12/06), available at: http://merlin.obs.coe.int/redirect.php?id=10439**
- ***Ustawa z dnia 30 czerwca 2005 r. o kinematografii, Dz. U. Nr. 132, poz. 1111* (Act of 30 June 2005 on cinematography, Official Journal of 2005, No. 132, item 1111), available at: http://merlin.obs.coe.int/redirect.php?id=10440**

PL

PL – Proposed Changes in the Intellectual Property Rights Regime

The Ministry of Culture has prepared an amendment to the Copyright and Related Rights Act of 4 February 1994, the Code of Civil Procedure of 17 November 1964, as well as the Industrial Property Law of 30 June 2000, the Act of 27 July 2001 on Legal Protection of Databases and the Act of 26 June 2003 on Legal Protection of Plant Species (each with subsequent amendments), aiming to implement the Community law requirements in the area of Intellectual Property Rights into the Polish legal system.

Basically, the bill is targeted at the implementation of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights. The bill aims also at achieving the fine tuning of the transposition of certain provisions of other directives: Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights and Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases.

In regard to the implementation of provisions of the Enforcement Directive which is at the core of the proposed bill the envisaged amendment aims at introducing further measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights into the Polish legal system. These measures include the presumption of authorship or ownership for the purpose of applying enforcement measures in the area of related rights, as well as in the area of database protection.

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Another important part of the Enforcement Directive constitutes provisional and precautionary measures that in the national law are already embraced by the Code of Civil Procedure. The draft bill proposes only a minor amendment in this respect. Also, corrective measures stipulated by the Enforcement Directive are already included in the framework of relevant legal acts; notably Industrial Property Law and the Copyright and Related Rights Act. However, the bill proposes certain changes also in this area aimed at achieving a more flexible application of corrective measures.

Injunctions envisaged in the Enforcement Directive in addition to measures already covered by the Code of Civil Procedure and the Civil Code will be also introduced into Industrial Property Law, the Copyright and Related Rights Act, Act on Legal Protection Databases, and the Act on Legal Protection of Plant Species.

The regulatory approach towards such issues like damages, alternative measures, publication of judicial decisions and evidence, as well as provisions on the right to information on the origin and distribution networks of goods or services which infringe intellectual property rights also was adjusted to *acquis communaitaire* requirements.

Moreover, in regard to the implementation of certain provisions of other Directives, the draft Act envisages certain minor amendments, e.g. it introduces the definitions of 'satellite' and 'communication to the public by satellite', as defined in Directive 93/83/EEC, into the Copyright and Related Rights Act and it specifies the way of establishing the term of protection of phonograms and videograms according to Directive 93/98/EEC. It also provides, according to Directive 96/9/EC, that a *sui generis* right for the maker of a database is applied irrespective of the eligibility of that database for protection by copyright (possibility of cumulative protection). ■

- ***Projekt z dnia 21 sierpnia 2006 r., Ustawa z dnia ... r. o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz o zmianie innych ustaw* (Draft act), available at: http://merlin.obs.coe.int/redirect.php?id=10441**

PL

RS – Amendments to the Broadcasting Act Adopted

The Serbian President signed the amendments to the 2002 Broadcasting Act of Serbia, which he refused to sign in July this year (see IRIS 2006-8: 11), after the Parliament confirmed its decision in the repeated vote held on 29 September 2006. The amendments came into force on 11 October 2006, eight days after publication in the Official Gazette of Serbia.

There are some 16 changes to the Broadcasting Act in these amendments. Some of the changes aim at reserving broader authorities for the Broadcasting Agency in the area of satellite and cable broadcasting, as well as broader control competencies regarding all broadcasters (terrestrial, satellite and cable alike). Others refer to the internal structure of the Agency and its position – some authorised nominators of the members of the Council of the Broadcasting Agency have been changed, and a possibility of suspension of a Council member by decision of six other Council members is introduced. A significant change, earlier opposed by the President of the Republic, is that the Government, rather than the Parliament, shall approve the financial plans of the Broadcasting Agency. The most sensitive changes pertain to the implementation of the Agency's decisions, for which a special execution procedure is introduced. Under this procedure a broadcaster must, without any delay, implement a final Agency decision on licence revocation (until these amendments the general administrative procedure was applied and the Supreme Court had the possibility to delay implementation of the Agency's final decision on licence revocation) and the competencies of the authorised agent of the Agency regarding forced execution are quite significant. Lastly, some changes are of importance for the tender participants, because the deadline for the commencement of broadcasting of programs for new broadcasters is extended to 90 days from the day the licence was issued (formerly 60 days) and the fee for radio broadcasting has been significantly reduced (it used to be 20 % of the TV fee, now it is 5 %, due to the poorer market potential of radio). Other changes are less significant.

The adopted and promulgated amendments seem to offer a swifter procedure for the closing down of radio and TV stations which will not get broadcasting licences in the forthcoming tenders (for regional and local licences). Thus, the new regulations might help to reduce the number of broadcasters from the existing high number of 1200 to some 400 by an Agency provided with a clear and efficient tool to enforce its decisions. The issue is to be monitored of whether the new competencies are at the expense of tender losers, because their resort to legal remedies is reduced. ■

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● **Amendments to the 2002 Broadcasting Act of Serbia**
SR

RU – Statute on Personal Data Adopted

On 29 July 2006 a new Federal Statute "On Personal Data" was adopted (it will come into force on 25 January 2007). This was done to comply with the international obligations of the Russian Federation, since in January 2006 Russia ratified the European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (signed in Strasbourg on 28 January 1981).

The problem of personal data protection had been discussed in Russia since 1997 when the first draft law was worked out. In 1999 the Model Statute on Personal Data of the Commonwealth of Independent States was adopted. Nevertheless, the provisions of that Act did not comply with the provisions of the Convention and needed revision.

The new Statute contains basic notions which are very similar to those that can be found in the Convention. The main concepts of the Act correspond with those set out in the Convention. The Statute clarifies and itemizes the general provisions of the Convention and adapts them to the needs of Russian society.

The Statute provides effective legal mechanisms for the protection of personal data. For example, personal data can normally be used or processed only on condition of confidentiality; it means that the data on a person (in case he/she is identified or identifiable) may not be processed unless the operator had received the person's prior written consent. The cases when data can be used without consent are enumerated in the Statute.

According to the Statute, processing of personal data should comply with the clearly stated legal aims of the processing. The new Statute also provides appropriate safeguards for the processing of special categories of data, such as data revealing racial origin, political opinions, religious or other beliefs, as well as personal data concerning health or sexual life, as well as data relating to criminal convictions.

The Statute contains provisions on transfrontier flow of personal data. According to the Statute, it is possible only in cases where the other state provides the appropriate standard of data protection. In cases where this condition is not fulfilled, the transfer of data is possible if the written consent of the person is obtained, in matters of national security or defense of the Russian Federation, or there is an international obligation of the Russian Federation in the sphere of legal cooperation, or the data concern

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a party of the contract, or in visa affairs, or if the life, health and other key interests of the person or other people need protection and it is impossible to receive the otherwise necessary consent.

According to the Statute, the functions of supervision over compliance with legislation on personal data are fulfilled by the competent governmental agency.

A breach of the Statute would incur in civil, administrative, criminal or disciplinary liability. ■

● *Федеральный Закон "О персональных данных"* **(Federal Statute "On Personal Data") of 27 July 2006 N 152-FZ, adopted by the State Duma on 8 July 2006. Available at: http://merlin.obs.coe.int/redirect.php?id=10436**

RU

SE – Accused File-Sharer Acquitted by Court of Appeal

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On 2 October 2006, the first man ever convicted of file-sharing in Sweden was acquitted by *Svea Hovrätt* (the Svea Court of Appeal) due to faulty technical evidence.

According to the charge, the defendant had committed an offence pursuant to the provisions contained in *upphovsrättslagen* (the Copyright Act) when from his computer and by making use of a file-sharing programme he had made the Swedish film "Hip Hip Hora" available to the public on the internet. The defendant had disputed the claim. The court of first instance, *Västmanlands tingsrätt* (the District Court of Västmanland), had convicted and fined the man.

According to the applicable rules of the Copyright Act, a film may not be reproduced or made available to the public without the authorisation of the producer. Infringement of these rules constitutes a criminal offence which may be punished by a fine or imprisonment for a maximum of two years.

Svenska Antipiratbyrån (the Swedish Antipiracy Agency) had reported the offence to the police. The Agency had via computerised means traced the IP address to the defendant and got access to a download of the film and a screen dump from the computer of the defendant. During the preliminary investigation the defendant admitted that he had downloaded films from the internet.

The district court found that there was proof supporting the fact that the download had been made from the defendant's computer based on the technical evidence and the information the defendant had given the police during the preliminary investigation. The court then came to the conclusion that the defendant had made the film available to the public when he made it accessible through the file-sharing programme.

The Svea Court of Appeal did however not go that far in its argumentation since it rejected the technical evidence. The court noted that there was no indication of time on the screen dump and that the time that the Agency had registered for the download could not be verified. Since, according to the internet supplier, an IP address may belong to different internet users during the course of a day, the court also held that it was not certain that the file-sharing had been made from the defendant's computer, nor could it be excluded that someone else had used the defendant's computer at the relevant time.

This ruling indicates that comprehensive evidence is required in order to prove file-sharing. This may necessitate a search of the premises of the suspect. A warrant may however only be ordered if there is reason to believe that the offence is punishable by imprisonment. So far, the seven file-sharers that have been convicted by district courts in Sweden all have been fined, but the charges have concerned few shared files. Hence, the extent of the file-sharing should reach a more considerable extent in order to allow for a warrant. ■

SK – Promotion of National Films through an Amendment to the Law on Licences

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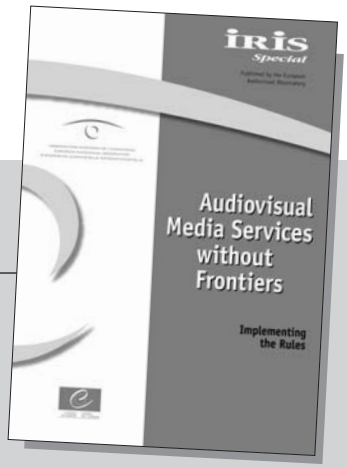
The Slovakian Ministry of Culture intends, by initiating cooperation with Slovakian television (STV), to promote more strongly national film and television production. The plan is to ensure guarantees for joint film productions and also the issue of a new appropriate legal framework. According to the plans of the new Culture Minister, the Ministry for Culture is to submit during the second quarter of 2007 a draft law on an audiovisual fund.

In October the Ministry for Culture was already doing the preparatory work for a draft law on services provided by Slovakian broadcasting to the public. With this new law, which will replace the current law on licence fees, the financial situation of the STV is to be improved. It also will contribute to making STV a significant producer of Slovakian films. The idea of the Minister for Culture is that as early as 2008 at least ten feature films should be produced per year. With the new law another objective is to ensure that fees are also paid by those households which, according to statistical calculations, own a television but do not declare ownership. According to a statement by the legal representative of STV the collection of such fees by the public broadcasting institute would bring in each year an additional SKK 400 to 550 million (this comes to about EUR 11.8-14.8 million). From the additional financial resources, STV would like to invest up to 85% in producing programmes, which also includes the making of Slovakian films. ■



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