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European Court of Human Rights: Case of Nikowitz and Verlagsgruppe News GmbH v. Austria

In a judgment of 22 February 2007, the European Court of Human Rights (ECHR) considered the convictions of both a journalist and a publishing company as being violations of the right to freedom of expression as guaranteed by Article 10 of the Convention. The case concerned an article in the magazine Profil about a road accident in which the well-known Austrian skiing champion, Hermann Maier, injured his leg. The article, written by the journalist Rainer Nikowitz, suggested that one of Mr. Maier's competitors, the Austrian skiing champion Stephan Eberharter, was pleased with the accident because he would finally be able to win something, and that he even hoped his competitor would break his other leg too. The article was satirical and was written in response to public hysteria following the accident. It was accompanied by a portrait of Mr. Maier together with the caption: "Hero Hermann's leg is causing millions of Austrians pain".

Subsequently, Mr. Eberharter brought a private prosecution for defamation against Mr. Nikowitz and a compensation claim under the *Mediengesetz* (Media Act) against the publishing company. In 2001, the Vienna *Landesgericht* (Regional Criminal Court) found Mr. Nikowitz and the publishing company guilty of defamation. Apart from the order to pay a suspended fine, costs and compensation for damages, the Court also ordered Verlagsgruppe News to publish extracts of the judgment. Mr. Nikowitz and Verlagsgruppe News appealed unsuccessfully to the Vienna Court of Appeal, which found that the satirical meaning of the article would be lost on the average reader, and that the personal interests of Mr. Eberharter outweighed the right to freedom of artistic expression.

The European Court of Human Rights, however, approached the case from another perspective,

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• **Publisher:**
European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG
Tel.: +33 (0)3 88 14 44 00
Fax: +33 (0)3 88 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int/

• **Comments and Contributions to:**
iris@obs.coe.int

• **Executive Director:** Wolfgang Closs

• **Editorial Board:** Susanne Nikoltchev, Co-ordinator – Michael Botein, The Media Center at the New York Law School (USA) – Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) – Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) – Nico A.N.M. van Eijk, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Jan Malinowski, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) – Andrei Richter, Moscow Media Law and Policy Center (MMLPC) (Russian Federation)

• **Council to the Editorial Board:**
Amélie Blocman, *Victoires Éditions*

• **Documentation:** Alison Hindhaugh

• **Translations:** Michelle Ganter (co-ordination) – Brigitte Auel – Véronique Campillo – Paul Green – Marco Polo Sàrl – Manuella Martins – Katherine Parsons – Patricia Priss – Erwin Rohwer – Nathalie-Anne Sturlèse – Catherine Vacherat

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Géraldine Pilard-Murray, post graduate diploma in *Droit du Multimédia et des Systèmes d'Information*, University R. Schuman, Strasbourg (France) – Caroline Bletterer, post graduate diploma in Intellectual Property, *Centre d'Etudes Internationales de la Propriété Intellectuelle*, Strasbourg (France) – Deirdre Kevin, Media Researcher, Düsseldorf, Germany – Mara Rossini, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Nicola Lamprecht-Weißenborn, Institute of European Media Law (EMR), Saarbrücken (Germany) – Britta Probol, Logoskop media, Hamburg (Germany)

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Dirk Voorhoof
Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

emphasising that the article in question dealt with an incident that had already attracted the attention of the Austrian media, and that it was written in an ironic and satirical style and intended as a humorous commentary. The article also sought to make a critical contribution to an issue of general interest, namely the attitude of society towards a sports star. It could, at most, be understood as the author's value judgment of Mr. Eberharter's character, expressed in the form of a joke. According to the ECHR, the article remained within the limits of acceptable satirical comment in a democratic society. The Court was also of the opinion that the Austrian courts showed no moderation in interfering with the applicant's rights by convicting the journalist of defamation and ordering him to pay a fine, and by ordering the publishing company to pay compensation and to publish the judgment. It followed that the interference under complaint was not "necessary in a democratic society" and therefore there had been a violation of Article 10. ■

● Judgment by the European Court of Human Rights (First Section), case of Nikowitz and Verlagsgruppe News GmbH v. Austria, Application no. 5266/03 of 22 February 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=9237

EN

EUROPEAN UNION

European Commission: Strategy for Flexible Use of the Radio Spectrum

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

Throughout 2005 and 2006, the European Commission issued communications on radio spectrum in which it proposed a more efficient approach to spectrum management. After a Communication on a market-based approach for the management of radio spectrum, the Commission has now presented a strategy for rapid access to spectrum for wireless electronic communications services, the keyword being flexibility. It is proposed that a flexible non-restrictive approach to the use of radio resources for electronic communications services, which allows the spectrum user to choose services and technology, should from now on be the rule. Within the scope of "electronic communications services" as defined in the Framework Directive, exclusive use by a particular service, such as mobile and broadcasting should be removed. An important segment of the European industry relies on spectrum for electronic communication services and the scarcity of the resource requires judicious management. The radio spectrum is defined as all the waves operating at frequencies between 3 KHz and 300 GHz. It is divided into "bands", i.e. ranges of frequencies. Different applications use different bands: terrestrial TV is between 400 and 800 MHz, mobile phones around 900, 1800 and 2000 MHz, cordless phones below 1900 MHz, WiFi "hot-spots" at 2.4 or 5 GHz and satellite communications often at even higher frequencies. The radio spectrum accommodates a growing number of applications (TV, mobiles, GPS, civil and military radars, earth observation and weather satellites, telemetry, radio astronomy, medical implants, hearing aids, sensors, "smart" tags...).

Market-based spectrum management combined with flexible spectrum usage rights are estimated to bring a net gain of EUR 8 to 9 billion per year across Europe. Though the review of the current EU regulatory framework for electronic communications networks and services deals with spectrum management, an updated version of the framework is not due to be implemented until 2010. The measures taken by the Commission now are meant to pave the way and introduce the practical means to achieve flexible spectrum management in bands with individual rights of use. For now, the steps to be taken entail:

- identifying particular spectrum bands in which regulatory restrictions can be lifted, thereby introducing more competition (the Communication proposes to re-examine the legal restrictions concerning a set of bands, 1350 MHz in total, currently being used by the broadcasting, mobile and IT sectors);
- agreeing a Community-wide set of rights and authorisation conditions to be applied in the selected spectrum bands (these conditions will serve as a reference to gradually adjust "legacy" rights i.e. rights acquired in the bands by operators under previous national rules and would be the minimum necessary to achieve flexible and efficient usage while avoiding interference);
- reviewing the validity of the GSM Directive which reserves the 900 MHz band for GSM mobile services;
- applying the new approach to the frequencies that are made available as a result of the introduction of digital broadcasting (the so-called "digital dividend").

Market players also have a role to play in this approach: they will need to assume greater responsibilities in a flexible environment to avoid interference and they will be encouraged to engage in a dialogue so that broadcasting, mobile and IT industries no longer operate as separate industrial sectors. ■

● Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions on rapid access to spectrum for wireless electronic communications services through more flexibility, 8 February 2007, COM (2007) 50 final, available at:
http://merlin.obs.coe.int/redirect.php?id=10697

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

● European Parliament Resolution towards a European Policy on the radio spectrum, 14 February 2007, provisional edition, available at:
http://merlin.obs.coe.int/redirect.php?id=10700

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

IRIS LEGAL OBSERVATIONS
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European Commission: Early Retirement Scheme for Spanish Public Broadcaster Endorsed

On 20 April 2005, the Commission closed the procedures it had initiated, under the EC Treaty State aid rules (Article 88(1)), with regard to the funding system of the Spanish public broadcaster RTVE. It did so after having found that the commitments given by the Spanish authorities ensured a sufficient degree of transparency and proportionality in RTVE's financing scheme, which ensured the latter's compatibility with the Single Market for the purposes of Article 86(2) EC. Following the implementation of those commitments (elimination of the unlimited State guarantee and of the exception from corporate income tax), RTVE started operating from 1 January 2007 in the form of a public company financed by annual contributions from the Spanish government.

More recently, the Commission scrutinised an early retirement scheme, which formed part of the reconstruction plan of RTVE. According to the Spanish State Budget of 2006, the annual contribution to RTVE was dependent upon the implementation of measures intended to guarantee the economic viability of the undertaking. A study commissioned by the Spanish State suggested financial viability entailed the reduction of RTVE's workforce. A collective lay-off involving 4150 employees was negotiated and agreed. This is to be implemented mainly through an early retirement scheme, the overall cost of which amounts to EUR 1.3 billion over a period of 15 years and is to be financed by the State. The Commission found that the measures in question constituted state aid. It nevertheless concluded that the scheme was compatible with Article 86(2) EC in view of the fact that it was proportional to the objective pursued – notably the more cost-effective performance of the public service by the RTVE – and would result in a reduction of the overall burden on the public finances.

The Commission's decision draws from its consistently held view – as was also expressed in its Communication on the application of state aid rules to public service broadcasting – that the financing of public service broadcasters, although falling under the prohibition of Article 87(1) EC, may well be justified in light of Article 86(2) EC, in so far as it is necessary for the performance of a public service, as the latter is defined by the Member State concerned. ■

Katerina Maniadaki
Institute for Information Law (IViR), University of Amsterdam

● "State aid: Commission endorses measures to finance early retirement scheme for Spanish public broadcaster RTVE", press release of 7 March 2007, IP/07/291, available at:
http://merlin.obs.coe.int/redirect.php?id=10678

DE-EN-ES-FR

European Commission: Subsidies for Digital Decoders in Italy Endorsed

The European Commission has concluded that the subsidies for digital decoders granted by Italy in 2006 do not violate EC Treaty state aid rules (Article 87(1)). In reaching this decision, the Commission considered the fact that the subsidies were offered for all decoders, regardless of the transmission platforms. In essence, the subsidies were technology-neutral and proportional to the objective of promoting the transition to digital TV and interoperability. However, subsidies granted in 2004 and 2005 (see IRIS 2006-2: 6) did not pass the test of technological neutrality, they were found to have unduly distorted competition by excluding satellite technology and providing an indirect advantage to the incumbent terrestrial television broadcasters and to cable operators. The latter were able to develop their digital audience, a crucial part for the business for a pay-TV or for a broadcaster wishing to develop pay-TV services. The broadcasters having benefited the most from the subsidies must reimburse the aid received from the State.

The Commission's decision rests on the premise that State intervention can be beneficial in the process of switchover to digital technology and in facilitating the adoption of interactive decoders with an open API, providing it does not undermine the availability of different technological platforms by skewing consumers' choice towards a particular platform. ■

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

● "State aid: Commission endorses subsidies for digital decoders in Italy, but only where technology-neutral", press release of 24/01/2007, IP/07/73, available at:
http://merlin.obs.coe.int/redirect.php?id=10694

DE-EN-FR-IT

European Commission: Sale of ProSiebenSat.1 to KKR and Permira Approved

The sale of the majority of the shares in German television company ProSiebenSat.1 Media AG to Lavena Holding 4 GmbH, an investment company controlled by equity funds KKR (Kohlberg Kravis Roberts & Co.) and Permira, has been approved by the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission for the investigation of media concentrations - KEK) and the European Commission. Permira and KKR are private investment fund companies. In the media sector, they control the Dutch SBS television group, mainly active in Scandinavia, the Netherlands, Belgium and Central and Eastern Europe. Permira also controls All3Media, a British television production company and distributor of television broadcast rights.

While the KEK analysed the takeover in terms of specific aspects of media concentration law (Art. 26 of the *Rundfunkstaatsvertrag* – Inter-State Broadcasting Agreement), the European Commission examined whether it conformed with general European competition law, in this case the Merger Regulation.

Both concluded that the takeover was legally valid.

In its investigations, the KEK also took into account Permira's shareholding in the mobile service provider debitel AG. Despite the resulting vertical overlap with the mobile television services market, which could give the channels run by ProSiebenSat.1 advantages over other providers, the KEK ruled that, since the market penetration of mobile television was still small, it was unlikely that its market share would be large enough, in the foreseeable future, to infringe the media concentration rules that cover all television services throughout the country. Since Permira and KKR currently had no other holdings in national television companies, there was no cause for concern. It was the opinion of the KEK that the international activities of the SBS broadcasting group would not affect the formation of opinion in Germany, since SBS was not currently active in the German media market. Such activities were more likely to have an impact at international level than on private television in Germany.

After examining the effects of the transaction at European level, the European Commission concluded that the proposed merger would not significantly impede effective competition in the European Economic Area (EEA) or in any substantial part of it. There were no horizontal overlaps between the activities of ProSiebenSat.1 and SBS. As regards the vertical relationship between All3Media and ProSiebenSat.1 in the area of marketing of television content, the negligible volume of sales in Germany meant that there were no competition concerns. The Commission also analysed the potential effects of the proposed transaction arising from the fact that ProSiebenSat.1 and SBS were among the larger television broadcasters in their respective regions. It concluded that there was no risk that the merger would enable the new company to drive competitors out of the market or to discriminate against them. ■

Carmen Palzer
Institute of European Media Law (EMR), Saarbrücken/Brussels

- **European Commission press release of 22 February 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10682**

EN-FR-DE

- **KEK press release of 6 February 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10685**

DE

NATIONAL

AM – Obligation to Broadcast Parliamentary Sessions Contradicts Constitution

On 16 February 2007, the Constitutional Court of Armenia heard the complaint concerning the compliance of a number of provisions of the statute of the Republic of Armenia "Rules of procedure of the National Assembly", with the national Constitution. This refers to the provisions obliging public TV and radio to broadcast sessions and other programmes on the National Assembly (the parliament). An appeal on the matter was made on 28 December 2006 by President Robert Kocharian of Armenia.

As reported by the Yerevan Press Club, the issue of covering parliamentary activities was raised in March 2006 when the Chairman of the Council of the Public TV and Radio Company (PTRC), Alexan Harutiunian, made a written request to the National Assembly's Chairman with a proposal to reconsider the relations between PTRC and the parliament. In the opinion of the Chairman of the PTRC Council, the need to abolish this legislative obligation was due to the controversial situation in which the Public TV and Radio Company found itself, after it became a fully-fledged member of the European Broadcasting Union in July 2005. On the one hand, the statute of the organisation obliges the national broadcaster to retain editorial independence and the right to use the frequencies at its own discretion. On the other, the provisions of the Rules (adopted on 20 February 2002) actually impede the implementation of these requirements. The request was discussed at the meeting of the speaker of the parliament with the representatives of parliamentary factions and groups, where it was decided that no amendments would be introduced to the Rules regarding the broadcasts of parliamentary sessions.

The Constitutional Court recognised the following provisions of the statute of the Republic of Armenia "Rules of procedure of the National Assembly", to be in contradiction with the Constitution: on mandatory broadcasting of the weekly statements by the deputies in parliament, as well as weekly question-and-answer sessions with the Prime-Minister and the ministers of the Government on specific days and hours on the First Channel of Public Television of Armenia (PTA) (clauses 3 and 4 of Article 35); on broadcasting of the open sessions of the National Assembly (NA) live on the Public Radio of Armenia; on the obligatory transmission of "Parliamentary Week" TV programmes on Sundays at 9 p.m. on the PTA's First Channel; and on the production by the Public TV and Radio Company of the parliamentary programmes to be broadcast (clauses 2, 4 and 5 of Article 112).

Additionally, clause "e" of Article 49 was recognised as being in contradiction with the Constitution. The clause lists the decision of whether to broadcast parliamentary sessions live or recorded, as being among the decisions that the parliament is entitled to make in organising its affairs.

In the justification of the Court decision it is noted, in particular, that the amended Constitution (adopted in a referendum of 27 November 2005, see

IRIS 2006-2: 7) "posed new demands upon the guarantees of freedom and independent activities of the media". Ensuring these guarantees imposes on the National Assembly the task of "reconsidering the context of and harmonising with the Constitution" the statutes "On Television and Radio", "On the Mass Communication", "Rules of procedure of the National Assembly" and relevant provisions of other statutes, referring to this issue. According to the Constitutional Court, in the selection of any of the possible ways of solving the issue of covering the parliamentary activities "legal guarantees should be created so as not to endanger the insurance of transparency and political plurality in the practice of public service broadcasting". The Court believes that in the resolution of this issue, the NA should primarily be guided by Articles 27, 83.2 of the Constitution, as well as the stipulations of Recommendation R(96)10 of the Council of Europe's Committee of Ministers, and the Explanatory Memorandum to it, and by the "Public Service Broadcasting" Recommendation 1641(2004)1 of the Parliamentary Assembly of the Council of Europe. ■

Andrei Richter
Media Law and Policy Centre

● Statute of the Republic of Armenia "Rules of procedure of the National Assembly", available at:
http://merlin.obs.coe.int/redirect.php?id=10657
EN

BE – Courts Uphold Sentence against Google for Violating the Copyright of Journalists

On 5 September 2006, the presiding judge at the court of first instance in Brussels, where termination proceedings were brought on the basis of the Act of 30 June 1994 on copyright and neighbouring rights, had upheld the case of the company Copiepresse, responsible for the collective management of the copyright held by Belgian journalists. The judge had considered that, by using articles and photographs that had appeared in the Belgian press without first obtaining authorisation, Google – and more particularly its 'Google News' service and its cache sites – was violating the copyright of journalists. The presiding judge had ordered Google to publish this judgment on its "google.be" site, and above all to withdraw from all its sites "all articles, photographs and graphic representations by Belgian daily newspaper editors represented by the company Copiepresse", with the imposition of a fine of EUR 1,000,000 per day of delay in doing so.

Somewhat surprisingly, Google had failed to respond to the various summonses to court issued by the Belgian courts, and the decision of 5 September 2006 had been delivered in the company's absence. This was widely reported in the international media, with references to the victory of a small Belgian "David" against the great global "Goliath" of the Internet.

Fifteen days later, Google appealed against the judgment. In the first instance, on 22 September 2006, the judge in Brussels returned to the earlier order and refused to lift the obligation of the injunction to publish the judgement of 5 September 2006. The judgment was therefore published for five days on Google's Internet site. In retaliation, however, Google decided to erase from its search engine all direct links to the sites of the newspapers, which had been involved in the proceedings.

It remained for the judge to pronounce on the merits of the case further to Google's appeal, this time after hearing the American giant's arguments. This has now been done, and the result is a 44-page order, which was pronounced on 13 February 2007. The main outcome is that the presiding judge of the court of first instance has upheld the previous order. While the amount of the fine has been reduced from EUR 1,000,000 to EUR 25,000 per day of delay, and the judge has based his decision solely on the law on copyright and neighbouring rights (the initial judgment also made reference to the law on databases), the judgement confirms nonetheless that the activities of Google News and the use of the Google cache, by reproducing articles without first obtaining authorisation from the economic beneficiaries, constituted a violation of copyright.

Google has already announced its intention to appeal against the decision of 13 February 2007. ■

François Jongen
Professor at the Catholic University of Louvain

● Decision of the Court of First Instance in Brussels of 13 February 2007, n. 06/10.928/C, available at:
http://merlin.obs.coe.int/redirect.php?id=10705
FR

BE – Only Under Strict Conditions Can the Judiciary Impose Restrictions on Journalistic Coverage of a Murder Case

On 8 February 2007, the Flemish Council for Journalism declared two complaints by the public prosecutor of Antwerp against two newspapers to be ill-founded. Referring to its *Embargorichtlijn* (Embargo directive) of 10 July 2003, the Council stated that the public prosecutor's office cannot unilaterally impose restrictions on journalistic coverage of a judicial reconstruction of a murder case, unless such an embargo is pertinently motivated and the editors-in-chief of the media have been properly informed.

The case concerns the judicial reconstruction of a triple murder case, which attracted massive media attention because of its obvious racist character. The media were given access to the area where the reconstruction of the murder, in the city centre of Antwerp, took place. During a press briefing the journalists were requested by the public prosecutor's office not to publish or broadcast pictures of the sus-

pect. This request was reiterated during a press briefing after the reconstruction and was also communicated to the press agency Belga. Two newspapers, De Standaard and Het Nieuwsblad, however, did publish pictures in which the suspect could be clearly identified. The public prosecutor's office filed a complaint against the newspapers and their editors-in-chief, arguing that the publication of the pictures of the suspect was in violation of the principles of journalistic ethics as it disregarded an agreement with the judiciary, as well as the presumption of innocence, and the right to the privacy of the person concerned.

The Council was of the opinion that the request not to publish any pictures of the suspect, was unilaterally imposed and could not be considered as a consensual agreement between the judiciary and the press. Being an imposed restriction, the Council was of the opinion that such a measure can only be legitimate in exceptional circumstances and under the dual condition that such a request is pertinently motivated and that the editors-in-chief of the media are informed of this request. According to the Council, none of these conditions were met in this case. The Council also emphasised that the murder case concerned a case of important public interest and that the media have not only the right, but also the duty, to report on such a matter, as the public also has the right to be properly informed. Restrictions to the right to information are only possible under strict conditions, which were not met in this case. With regard to the alleged breach of privacy of the suspect, the Council is of the opinion that only the person directly concerned can file a complaint on this matter. The Council declared both complaints as being ill-founded. ■

Dirk Voorhoof
Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

- ***Beslissing van de Raad voor de Journalistiek over de klacht van het parket van de procureur des Konings in Antwerpen tegen de hoofdredacteur van Het Nieuwsblad, 8 februari 2007*** **(Council for Journalism, 8 February 2007, Public Prosecutor Antwerp v. editor-in-chief of Het Nieuwsblad), available at: http://merlin.obs.coe.int/redirect.php?id=10673**
- ***Beslissing van de Raad voor de Journalistiek over de klacht van het parket van de procureur des Konings in Antwerpen tegen de hoofdredacteur van De Standaard, 8 februari 2007*** **(Council for Journalism, 8 February 2007, Public Prosecutor Antwerp v. editor-in-chief of De Standaard), available at: http://merlin.obs.coe.int/redirect.php?id=10672**

NL

BG – Affiliation of Public Persons from the Media Sector with the State Security Service

Art. 26, para. 3 of the *Zakon za Radioto i Televiziata* (Bulgarian Radio and Television Act, see IRIS 2002-2: 3) stipulates that any person who has been an informer of the former State Security, whether full-time or part-time is not eligible for membership of the Council for Electronic Media. The same requirement applies to the members of the management boards and the general directors of the public broadcasters, which are the Bulgarian National Radio and the Bulgarian National Television (Art. 59, para. 2, subpara. 3 and Art. 66, para. 1 of the Radio and Television Act). However, these provisions have not been efficient enough to ensure the stability of the media sector because other important elements, such as the commercial radio and television broadcasters, the press, the advertising agencies etc., did not fall into the scope of the said provisions of the Radio and Television Act.

At the end of last year, the Parliament passed a very important bill relevant to this, the "Access to, and Disclosure of, the Documents and Announcement of the Affiliation of Bulgarian Citizens with the State Security Service and the Intelligence Services of the Bulgarian Popular Army Act". The Act governs the procedure for the access, disclosure, use and storage of documents of the State Security Service as well as the Intelligence Services of the Bulgarian Popular Army, including those of their predecessors and successors for the period from 9 September 1944 until 16 July 1991. It also stipulates the procedure for the announcement of the affiliation of Bulgarian citizens holding public posts or performing public activities with the aforementioned bodies.

The following public posts within the media and telecommunications sectors are covered by the Act:
1. The chairman, the deputy chairman and the members of the Communications Regulation Commission (Art. 3, para. 1, subpara. 10); and
2. the chairman, the deputy chairmen, the directors general, the members of managing boards, the members of controlling bodies, the members, the editors-in-chief (of directorates), the heads of departments and the heads of sectors at the Council for Electronic Media, the Bulgarian National Television, the Bulgarian National Radio and the Bulgarian News Agency (Art. 3, para. 1, subpara. 19).

The Act explicitly lists the public posts within the media and telecommunications sector, which are subject to preliminary checks for any affiliation with the State Security Service, namely:
1. The owners, the directors, the deputy directors, the editors-in-chief, the deputy editors-in-chief, the members of editorial councils, the political commentators, the anchors of broadcasting programmes and shows, the authors of columns in printed publications or electronic media, the owners and heads of sociological agencies, the owners and heads of advertising agencies, the owners of public relations agencies and companies (Art. 3, para. 2, subpara. 1);
2. the sole proprietors that are telecommunications operators, the members of managing, controlling and supervisory bodies and the procurators of legal persons that are telecommunications operators (Art. 3, para. 2, subpara. 11); and
3. the sole proprietors that are radio and television operators, the members of managing, controlling and supervisory bodies and the procurators of legal persons that are radio and television opera-

tors (Art. 3, para. 2, subpara. 12).

A special Commission for the disclosure of the documents and for the disclosure of affiliations with the named Services has been set up. The Commission is an independent body, consisting of nine members elected by the National Assembly. The Commission is still in the process of formation. The main functions of the Commission are *inter alia*:

1. To track down, collect, examine, analyse and assess documents containing information about the activity of the State Security Service and the Intelligence Services for the Bulgarian Popular Army;
2. to disclose and announce the names of Bulgarian citizens who occupied or occupy public posts, or who performed or perform public activities and who were found to have had an affiliation with the relevant Services;
3. to provide natural persons with access to the information collected; and
4. to issue documents as regards the affiliation of natural persons with the State Security Service and the Intelligence Services.

An affiliation is established as given if the respective person performed activities as a salaried or a non-salaried employee or as an informal collaborator (Art. 24 of the Act).

The verification of an affiliation with the State Security Service and the Intelligence Services for the Bulgarian Popular Army is mandatory for:

1. persons who occupied public posts from 10 November 1989 until the date of entry into effect of the Act; and
2. persons who occupy public posts or who perform public activities as of the date of entry into effect of the Act.

Persons born after 16 July 1973 are not to be subjected to checks (Art. 26, para. 4). ■

Rayna Nikolova
Council for Electronic Media, Sofia

● *Zakon za Dostap i Razkrivane na Dokumentite i za Obyavyavane na Prinadlezhnost na Balgarski Grazhdani kam Darzhavna Sigurnost i Razuznavatelnite Sluzhbi na Balgarskata Narodna Armiya* (Access to and Disclosure of the Documents and Announcement of the Affiliation of Bulgarian Citizens with the State Security Service and the Intelligence Services of the Bulgarian Popular Army Act), published in the State Gazette No 102 of 19 December 2006

CZ – Fee Payable for Restaurant Broadcasting Devices

On 6 March 2007, the Supreme Administrative Court of the Czech Republic issued its verdict in a case concerning the use of television and radio receivers in restaurants. The plaintiff was the owner of a restaurant in Prague who had set up radio and television receivers on her premises. The Prague municipal authorities had fined her because she had not paid a fee to the *Ochranný svaz autorský pro práva k dílům hudebním* (copyright collecting company – OSA), which was responsible for protecting copyright in the Czech Republic, thus infringing the Copyright Act. The plaintiff argued that radio and television services were only part of the services offered by the restaurant and that similar services were offered in many other places, such as shops, doctors' surgeries or on public transport.

The court considered that the use of television receivers in the restaurant represented a public showing of protected works and was therefore subject to a fee. The argument that it formed a part of other services was irrelevant, as was the fact that the broadcaster already paid a fee to the authors, since this was a different form of exploitation and authors had the exclusive right to permit or forbid the public showing of their work. The court also ruled that the right to approve public showings included the right to determine whether works should be made accessible to the public in a restaurant.

The court of lower instance, the Prague City Court and the Supreme Administrative Court of the Czech Republic upheld the fine imposed upon the restaurant owner. ■

Jan Fučík
Broadcasting Council, Prague

● Ruling of the Supreme Administrative Court of the Czech Republic (case no.: 1 As 36/2006) of 6 March 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10681

CS

DE – Constitutional Court Strengthens Rights of Journalists

In a ruling of 27 February 2007, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) strengthened the freedom of the press and the protection of sources, as enshrined in Art. 5.1.2 of the *Grundgesetz* (Basic Law - GG). In their decision, the judges declared that both a search of the editorial offices of political magazine *Cicero*, and the confiscation of computer data in September 2005 were actions that were unconstitutional.

These actions were taken following the publication of an article by a freelance journalist concerning the terrorist Abu Mussab al Sarkawi in April 2005. In a description of the background and life story of al Sarkawi and the attacks for which he had been responsible, a "classified" report of the *Bundeskriminalamt* (Federal Criminal Police Office - BKA) was referred to – in great detail in places – and also cited. Charges were then brought by the BKA for a suspected violation of official secrecy in accordance with Art. 353b of the *Strafgesetzbuch* (Criminal Code - StGB). The responsible public prosecutor's office also instigated preliminary proceedings against the chief editor of the magazine and the author of the article for aiding and abetting in the commission of this offence. As part of the investigation, the editorial offices of *Cicero* were searched and computer data was seized. The magazine's chief editor complained to the Constitutional Court, arguing that the freedom of the press, a fundamental right, had been breached.

The *1. Senat* (1st Chamber) of the BVerfG expressly stated that the mere publication by a journalist of an official secret within the meaning of Art. 353b StGB was not sufficient, in view of Art. 5.1.2 GG, to justify the suspicion that the said journalist had aided and abetted a breach of official secrecy. The searches and confiscation of material had been based on such a suspicion. Rather, specific factual evidence was required to show that the person concerned had deliberately published the secret and thus committed the offence of aiding and abetting a breach of official secrecy. Otherwise, as the judges further stated, there was a risk that public prosecutors could instigate preliminary proceedings against editors or journalists solely, or mainly, in order to discover the identity of the source and chief culprit. This, however, would infringe the right of sources to protection, enshrined in constitutional law, with the result that searches and seizures as part of preliminary proceedings against members of the press should, in principle, be considered unconstitutional if they were solely, or mainly, aimed at establishing a source's identity.

The Court concluded that the measures that had been taken were not justified under the Constitution for the reason that when the searches and seizures took place, the publication of the report had been the only clue that official secrecy might have been breached. Furthermore, nothing had been known about the identity of the culprit, let alone his motive. Rather, the wording of the decision to conduct the searches itself had suggested that the main purpose was to discover the identity of the suspected *BKA* source. ■

Caroline Hilger
Saarbrücken

- ***BVerfG* ruling of 27 February 2007 (case no. 1 BvR 538/06, 1 BvR 2045/06), available at:**
http://merlin.obs.coe.int/redirect.php?id=10691

DE

DE – Evidence Concerning Disputed Film Rights

In a judgement of 15 February 2007 (case no. 7 O 21384/03), the *Landgericht München I* (Munich District Court I) ruled on a case in which one of the German public service broadcasters had been accused by a film distributor of broadcasting its films without permission. It was alleged that, between 1995 and 2001, the broadcaster had shown 10 classic films from the 1950s and 1960s on its own channel and had broadcast them a total of 38 times in co-operation with other broadcasters on two other channels without obtaining the necessary permission.

The Court upheld the complaint and ruled in the plaintiff's favour.

The judgement contains, in particular, some interesting points concerning evidence law. For example, the broadcaster had disputed the plaintiff's right to sue, i.e. the right to submit the claim before the Court in the first place, even though the broadcaster's own broadcasting rights were based on a series of agreements to transfer rights, which had been fully or partly instigated by the plaintiff. Hence, although the broadcaster had obtained permission to broadcast the films from the plaintiff, it also disputed the plaintiff's rights over the films. The Court allowed this defence, even though it was contradictory. It ruled that there had not been any abuse of the law pursuant to Art. 242 of the German Civil Code (BGB) (performance in good faith) since in the "very confused film rights industry, particularly where older films are concerned, it is normal, in the Court's experience, that within film packages covering several hundred individual films, individual broadcasting rights are (deliberately or accidentally) sold without permission". The plaintiff must therefore begin by offering full proof of ownership of the rights, which the defendant claims to have obtained from the plaintiff.

In the end, the Court considered that the proof had been provided in the present case. On the other hand, the broadcaster was unable to convince the Court that it had acquired the rights. The Court granted the plaintiff's claim under Articles 97.1 and 97.20 of the *Urhebergesetz* (Copyright Act) and under the principle of unjustified financial benefit enshrined in Art. 812.1 of the *Bürgerliches Gesetzbuch* (Civil Code). The plaintiff is claiming the entitlement to the sum of EUR 1.66 million, an issue which will not be considered until later in the proceedings. ■

Nicola Lamprecht-Weißenborn
Institute of European Media Law (EMR), Saarbrücken/Brussels

- ***Landgericht München I* (Munich District Court I), ruling of 15 February 2007 (case no.: 7 O 21384/03)**
- **Press release of the Court, available at:**
http://merlin.obs.coe.int/redirect.php?id=10692

DE

DE – *"bereits18.de"* Age Verification System Deemed Unsuitable Under the JMStV

In an urgent procedure, the *Bayerische Verwaltungsgericht* (Bavarian Administrative Court - BayVG) in Munich was asked to rule on the suitability of the "*bereits18.de*" age verification system under the terms of Art. 4.2.2 of the *Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien* (Inter-State Agreement on the protection of human dignity and minors in broadcasting and telemedia - JMStV).

According to Art. 4.2.1 of the JMStV, broadcast and telemedia content is unlawful in principle if it is pornographic (No. 1), if it is included in certain lists of media that pose a threat to young people or is similar to such media (No. 2), or if it is clearly likely to seriously impede the development of children and young people or their growth into independent people capable of living in society, taking into account the particular nature of the medium concerned (No. 3).

Art. 4.2.2 stipulates that telemedia content, which

does not meet these requirements may be lawful as long as the provider ensures that it is only accessible to adults, i.e. it is available only to a closed user group.

In its decision of 31 January 2007, the *BayVG* ruled that the "*bereits18.de*" system did not meet the required standards since, just like the similarly functioning "*ueber18.de*" system, it was only based on the input of an identity card number. Numerous court decisions had already been issued concerning "*ueber18.de*", declaring that this system did not provide an effective barrier since it failed to offer sufficient security against minors gaining access to protected websites. The conclusion that the "*bereits18.de*" system would probably prove to be inadequate was not affected by the claimant's reference to the complaint pending with the *Bundesverfassungsgericht* (Federal Constitutional Court, case no. 1 BvR 710/05) concerning the "*ueber18.de*" system. On the one hand, the BayVG was unaware of such a complaint and, on the other, it had no doubt that the relevant provisions of the JMStV were constitutional. ■

Carmen Palzer
Institute of European Media Law (EMR), Saarbrücken/Brussels

DE – 9th Amendment to Inter-State Broadcasting Agreement Enters Into Force

The *Neunte Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (9th Inter-State Agreement Amending Inter-State Broadcasting Agreements - *9. Rundfunkänderungsstaatsvertrag* – RÄStV) entered into force on 1 March 2007.

The Minister-Presidents of the *Länder* and the Mayors of Berlin, Hamburg and Bremen had already approved the new amendment on 22 June 2006, which subsequently required the agreement of the parliaments of the *Bundesländer*.

The *9. Rundfunkänderungsstaatsvertrag* represents another important step in the reorganisation of the legal framework governing the media in Germany (see IRIS 2005-2: 9). One significant development is the fact that provisions on different electronic media services have been brought together within the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV). The title of the Agreement will therefore be changed to "*Staatsvertrag für Rundfunk und Telemedien*" (Inter-State Agreement on Broadcasting and Telemedia). It deals with both broadcasting (television and radio) and content-related aspects of telemedia. Rules on the protection of minors and human dignity have been taken out; these will remain part of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the protection of minors in the media - JMStV) (see IRIS 2002-9: 15).

The new Agreement defines "telemedia" as all electronic information and communication services except telecommunications services and broadcasting. Therefore, the separate categories of tele-services, which were previously covered by a Federal Act, and media services, which were governed by a separate Inter-State Agreement between the *Länder*, have been combined – a development that was also part of the reason for creating the JMStV. The *Mediendienste-Staatsvertrag* (Inter-State Media Services Agreement - MDStV) has been repealed, with its most important provisions concerning the "electronic press" transferred into the RStV (Section VI).

Art. 60 of the RStV deals with the relationship between the Inter-State Agreement's provisions, on the one hand, and the Federal Government's *Telemediengesetz* (Telemedia Act - TMG; see IRIS 2007-3: 12 and IRIS 2006-7: 9) on the other; incidentally, the TMG applies to telemedia which are governed by the RStV and other inter-state broadcasting agreements between the *Länder*. This covers the general and business law demands on telemedia, many of which are set out in the E-Commerce Directive 2000/31/EC and regulated in the TMG because they are the responsibility of the Federal Government.

The textual amendments relating to the use of the term "telemedia" have been included in the ARD-, ZDF, DeutschlandRadio-, *Rundfunkgebühren- und -finanzierungs-Staatsvertrag* (Inter-State Agreement on the ARD, ZDF, DeutschlandRadio, broadcasting licence fees and the financing of broadcasting) and the JMStV.

For the first time, where joint broadcasting law provisions between the *Länder* are concerned, Art. 9a of the RStV gives broadcasters the right to information held by state authorities. Previously, such rights were enshrined in relevant laws or inter-state agreements between the *Länder* on public and/or private broadcasting, in *Land* press laws or in so-called "freedom of information" laws. They are granted equally to broadcasters and to providers of telemedia services with editorial or journalistic content (Art. 55.3 RStV).

The Agreement makes direct reference to the Federal Government's TMG, whose data protection provisions will apply to broadcasters in the future. One amendment to the *ARD-Staatsvertrag* (ARD Inter-State Agreement - ARD-StV) concerns the strengthening of internal controls by the ARD's managing bodies. Art. 7.2 ARD-StV states, for example, that the conference of chairpersons of the broadcasting and administrative councils should coordinate the control of the managing bodies of the regional broadcasting corporations that make up the ARD.

Finally, according to the explanatory memorandum to the *9. Rundfunkänderungsstaatsvertrag*, an incentive for the merger of *Landesmedienanstalten* (*Land* media authorities) is to be introduced, that will help to offset financial losses that result from the reduction in broadcasting licence revenue when one or more *Land* media authorities merge. ■

Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

● ***Staatsvertrag für Rundfunk und Telemedien*** **(Inter-State Agreement on Broadcasting and Telemedia – RStV) of 31 August 1991, last amended through Art. 1 of the *Neunte Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (9th Inter-State Agreement Amending Inter-State Broadcasting Agreements - *Neunter Rundfunkänderungsstaatsvertrag*) of 31 July to 10 October 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10686**

DE

DE – Agreement on Merger of Two *Land* Media Authorities Enters into Force

Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 1 March 2007, the joint Media Law Agreement between the *Länder* of Hamburg and Schleswig-Holstein (*Medienstaatsvertrag HSH*) entered into force.

The Agreement concerns, in particular, the merger between the *Landesmedienanstalten* (media authorities) of two *Bundesländer*, the *Hamburgische Anstalt für neue Medien* (Hamburg New Media Office - HAM) and Schleswig-Holstein's *Unabhängige Landesanstalt für Rundfunk und neue Medien* (Independent State Broadcasting and New Media Office - ULR) (see IRIS 2006-7: 10 and IRIS 2006-4: 11). The new joint supervisory authority is called the *Medienanstalt Hamburg/Schleswig-Holstein* (Hamburg/Schleswig-Holstein Media Office - MA HSH). The 16 German *Bundesländer*, therefore, now have a total of 14 *Landesmedienanstalten*; the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Office) is also a joint body for the *Bundesländer* of Berlin und Brandenburg. The Agreement also sets out the details of common media law between the two *Länder*.

The future of the Agreement, which had been signed by the Minister-Presidents in June 2006, had been clouded in uncertainty for a long time after the *Landtag* (state parliament) in Schleswig-Holstein had decided there was no reason to adopt the agreement. However, following several amendments, particularly those concerning the funding of the MA HSH and its responsibilities in terms of media competence and education, which were included in an amendment adopted on 13 February 2007, the necessary consent was secured. This Agreement should enter into force on 1 July 2007; if it is not ratified, it will be abolished completely.

On 1 October 2006, the so-called *Offene Kanal* (Open Channel) in Schleswig-Holstein was removed from the control of the ULR and became an autonomous body under a *Land* law; it is now a legally responsible public law body known as "*Offener Kanal Schleswig-Holstein*" and supervised by the Director of the MA HSH. ■

● ***Staatsvertrag über das Medienrecht in Hamburg und Schleswig-Holstein*** **(Inter-State Agreement on media law in Hamburg and Schleswig-Holstein), available at: http://merlin.obs.coe.int/redirect.php?id=10687**

● ***Gesetz über den Offenen Kanal Schleswig-Holstein*** **(*Offener Kanal* Schleswig-Holstein Act), available at: http://merlin.obs.coe.int/redirect.php?id=10688**

DE

DE – Draft Discussion Paper on Navigators and Electronic Programme Guides

Paul Göttlich
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 2 February 2007, the *Gemeinsame Stelle Digitaler Zugang der Landesmedienanstalten* (joint digital access office of the *Land* media authorities - GSDZ) presented a new draft discussion paper on navigators and electronic programme guides (EPGs) (see IRIS 2007-1: 7).

The paper states that there is no competition between the different programme lists currently available, independently of set-top boxes, and that this could lead to discrimination between different services. In order to guarantee freedom of access as required under Art. 53 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) when such navigators are used, the following navigator standards are proposed. As far as is technically possible, all available channels must be listed and identified. The description of different "services offered via the system" must not only be complete, but should also be equal and free from discrimination where the different services are concerned. Comparable services may not therefore be treated or identified differently. In addition, according to Art. 13.1.3 of the *Zugangssatzung* (Statute on freedom of access to digital services), viewers should be able to use other navigators and EPGs as far as this is technically feasible.

The paper concludes that a variety of forms of channel identification would, in principle, be more likely to provide equality than a standard list. The use of navigators must be reported to the *Landesmedienanstalten* (*Land* media authorities), unless there is no particular potential for discrimination, e.g. for services provided to less than 1,000 households. In these circumstances, a complaints mechanism is sufficient.

Remote controls equipped with a so-called "Hot-Key" are also covered by Art. 53 RStV, if this function can be used to call up certain channels in preference to others. If this button is functionally linked to the navigator, it represents discrimination.

Since this area is not regulated in the *Rundfunkstaatsvertrag*, advertising on navigator user interfaces is permitted in principle, as long as it does not give preferential treatment to any particular channel. Therefore, the promotion of a particular channel is problematic in view of the need to treat all channels equally. The way in which admissible product advertising appears should not therefore discriminate against listed channels (e.g. by concealing them or pushing them further down the list).

Once the feedback, which had to be submitted by 1 March 2007, has been evaluated and another has been workshop held, the GSDZ will further develop the requirements of the *Land* media authorities for navigators in accordance with Art. 13.5 of the *Zugangssatzung* and draw up proposed amendments to the *Rundfunkstaatsvertrag*. ■

● ***GSDZ*** **draft paper on navigation, available at: http://merlin.obs.coe.int/redirect.php?id=10689**

DE

FR – Difficulty in Determining whether a Programme Concept Has Been Used by a Competitor

The Court of Appeal in Paris has just delivered a judgment that illustrates just how difficult it is to appreciate whether or not the concept of a television programme has been used by a competitor, and how necessary it is to be subjective. In the case at issue, two journalists had created a concept for a programme entitled *"Crise en direct"*, consisting of

a prospective political news magazine. After filing it with the SACD (Society of Dramatic Authors and Composers, a collecting society), they submitted their project to a number of production companies and broadcasters, including Canal+. Some months later, this channel – which had terminated the discussions on the project – broadcast a political programme entitled *2020 c'est déjà demain* which, according to the journalists who had conceived the original project, took up many features of their project virtually word for word. They therefore filed a case against the channel, the production company and the co-author journalist on the basis of unfair parasitic competition. On 7 September 2005, the regional court in Paris ordered the payment of EUR 150,000 in damages and banned the exploitation and broadcasting of the disputed programme, after establishing the offence, characterised by the deliberate use of major features of the programme concept. An appeal was lodged against the decision. In its judgment delivered on 21 February, the Court of appeal recalled firstly that the applicants were not invoking any intellectual property right, and were therefore acting solely and exclusively on the basis of civil liability (Article 1382 of the French Civil Code), in terms of unfair competition and parasitic activities. The Court referred to the principle according to which commercial freedom implied that a service, which was not, or no longer, subject to intellectual property rights could be reproduced freely, subject to certain conditions, in particular with regard to the observance of fair commercial practices. It therefore considered whether the appellants had acted unfairly, which was characteristic of misconduct, towards the originators of the programme concept and if they had caused them prejudice. In its analysis of the programme broadcast by Canal+, the Court noted that it was structured in four main parts and that its aim was to enable the politicians invited to take part in order to make proposals that could be criticised by a political opponent or contested by specialists and members of civil society, with a view to avoiding or at least foreseeing crisis situations. The Court held that the original programme idea, as lodged with the SACD, adopted a different approach, involving judgment of the behaviour of politicians facing a crisis situation, presented as if it were happening live at the time that the programme was being broadcast. It was proposed in the form of a news broadcast with a definite rhythm, simulating the processing of information as it occurs during a period of crisis, with the intervention of outside correspondents alternating with the participation of people in the studio. The Court also noted that both the initial project and the programme broadcast were part of a more general trend of broadcasts aimed at dealing with contemporary questions and anxieties. The concept referred to by the respondents was therefore part of the current climate and the programme broadcast was different from this concept; the Court therefore held that the appellants could not be considered as having acted unfairly in such a manner as to characterise a misdemeanour constituting unfair competition or parasitic activity. The judgment was therefore overturned. ■

Amélie Blocman
Légipresse

● Court of appeal in Paris (4th section A), 21 February 2007, Sàrl 'Pourquoi pas la lune', Ruth Elkrief and others v. Ms Saranga Drai, Canal+ and others
FR

FR – Peer-to-peer - a Return to Graduated Sanctions

The system of "graduated sanctions" against users and suppliers of peer-to-peer networks, proposed by the Government and adopted by Parliament as part of the DADVSI Act, but later set aside by the Constitutional Council in July 2006 (see IRIS 2006-8: 13), have nevertheless returned. On 3 January 2007 the Minister of Justice sent a circular to principal state prosecutors and magistrates "presenting and commenting on the criminal provisions of the Act of 1 August 2006 on copyright and neighbouring rights in the information society", concerning in particular the circumvention of protective measures and the supply of means of unlawfully exchanging protected works and objects. The text also sets out guidelines for criminal policy concerning, not only the provisions presented, but also illegal downloading practices. It should be borne in mind that a circular is not legally binding – the text merely gives indications to magistrates, who retain their sovereign powers of assessment.

The text distinguishes between several levels of responsibility, ranging from the editors of peer-to-peer software to users, according to whether they make protected files available via the Internet without authorisation ("uploading"), or download works illegally. According to the circular, "the severity of the punishment exercised against such people ought to be graduated in due proportion". Thus the text recalls that, by virtue of Article L. 335-2-1 of the Intellectual Property Code introduced by the DADVSI Act of 1 August 2006, an editor who makes exchange software available, or incites people to use it, faces a sentence of "three years of imprisonment and a fine of EUR 300,000". The circular prescribes that public prosecutors should call for "highly dissuasive sentences" to be passed against such

people, as well as appropriate additional penalties (confiscation of income earned from the infringements, closure of the establishment that has committed them, and even a ban on carrying out the activity of editing or distributing software).

The second level, that of making files available ("uploading"), constitutes the offence of counterfeiting under the application of Article L. 335-3 of the Intellectual Property Code. Such behaviour is deemed to be "gravely reprehensible" inasmuch as it takes place upstream and enables a large number of illegal downloads to be made downstream. The circular refers to a graduation of the sanctions inflicted, depending on whether the works made available are more or less recent (i.e. whether: cinematographic works being made available before their release in cinemas or in the form of videograms which, furthermore, violates the media release schedules; broadcasts made shortly after the commercial release of the work; and works that are not recent, etc).

Lastly, whereas the Constitutional Council had cancelled the provisions of the DADVSI Act aimed at making downloading a petty offence, and therefore one less severely penalised, the circular goes some way towards returning to the text first adopted. According to the text, acts of this kind are "undeniably at a lower level of responsibility", and penalties of a purely pecuniary nature were "totally suitable". The corresponding fine could be modulated according to specific aggravating criteria (repeated offending, the number of works downloaded, whether or not media release schedules were observed, etc). Finally, it should be noted that the text emphasises that the exception related to making a private copy could not be claimed with respect to illegal downloading. It now remains to be seen how the magistrates will interpret the text. ■

Amélie Blocman
Légipresse

● Circular presenting and commenting on the criminal provisions of Act No. 2006-961 of 1 August 2006 on copyright and neighbouring rights in the information society and public action in the field of combating infringements of intellectual property rights using new computer technologies, available at: http://merlin.obs.coe.int/redirect.php?id=10703

FR – Development of Digital Radio and Personal Mobile Television

"The machinery is now in place for digital radio to reach French homes within a year", declared the Minister for Industry on 13 March at a demonstration of new applications of digital radio, held at the invitation of the main French operators. On the previous day, the Minister for Culture and Communication, Renaud Donnedieu de Vabres, had referred four draft decrees concerning the development of digital radio and personal mobile television to the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) for its opinion. The drafts, drawn up jointly with the Minister with responsibility for Industry, were the result of public consultations carried out in November 2006. The first two draft "signal" decrees lay down the characteristics of the signals emitted for the supply of, firstly, digital radio services and, secondly, personal mobile television, in application of Article 12 of the Act of 30 September 1986. The two remaining draft decrees – "final decrees" – lay down the characteristics of equipment for receiving the signals. For digital radio, the draft adopts, in particular, the DRM standard for the wavebands currently used for FM and the T-DMB broadcasting standard, with almost unanimous support from radio operators. This would allow the availability of very rich associated services (information scrolling on a screen, such as the title of the programme being broadcast, programme times, a map of France while the weather forecast was being broadcast, and so on). The Minister for Culture and Communication had also questioned the CSA on the advisability of adding another standard, more particularly DAB+, adopted as a global standard by the European Committee for Standardization (CEN) last February. It should be noted that the T-DMB solution would require the replacement of receivers, and this would be expensive for households, as each household in France has, on average, between five and six analogue radios. Regarding personal mobile television, the draft adopts the DVB-H standard for terrestrial systems and DVB-SH for mixed terrestrial/satellite systems. The CSA should deliver its opinion within a month. The decrees could then be published at the end of April, after the European Commission has been notified. ■

Amélie Blocman
Légipresse

● Draft decrees on the development of digital radio and personal mobile television, available at: http://merlin.obs.coe.int/redirect.php?id=10704

FR

GB – Accuracy, Tony Blair and God

The UK media regulator, Ofcom, has found ITV to be in breach of the Ofcom standards code in relation to its news reporting on 3 March 2006 of an interview with the Prime Minister concerning the role of God in his decision to go to war in Iraq. Rule 5.1 of the Broadcasting Code requires that news must be

reported "with due accuracy and presented with due impartiality", and complaints had been made by ten viewers that this rule had been breached.

The Prime Minister had been interviewed by Michael Parkinson, a veteran chat show host, for the Parkinson programme. Clips from the interview were supplied in advance to ITV news. One of these included a question from Parkinson as to whether Mr Blair would pray to God before making a decision such as that of going to war. The answer was confused, with both the Prime Minister and the interviewer talking simultaneously, and was recorded as "but it's…yeah, I…you, you, but you…, of course…, it's … you, you struggle with your own conscience about it because people's lives are affected". This was interpreted by ITV news as meaning that the Prime Minister had linked his decision to go to war with God and that he had prayed before taking military action. The news broadcast did not refer to other possible interpretations of the answer, and stated that such a statement was provocative and inflammatory in the context of the Middle East; it used the terms "Holy War" and "Act of Faith". ITV accepted that some of its reporting should have been in less provocative terms, but argued that its analysis was within the terms of reasonable editorial discretion.

Ofcom considered that it is particularly important that a controversial issue such as the Iraq war is reported with due accuracy. It noted that other interpretations of the remarks, in the context of the rest of the interview were possible, for example, that the Prime Minister was stating that his decision would be judged by God and the people, and that he had struggled with his own conscience before taking it. There was no certainty that the words "yeah" and "of course" referred directly to Parkinson's question; they may only have been "punctuations in Mr Blair's thought process, as he considered how to answer the question". ITV News had not mentioned other possible interpretations, and so the statements made in the news broadcast had not been reported with "due accuracy". This was compounded by the strident presentation of the story.

Ofcom also considered whether there had been a breach of Rule 3.1 prohibiting the broadcasting of material likely to encourage or incite crime or disorder. Although the reporting should have been less provocative and strident, Ofcom did not consider that ITV had breached this rule.

As ITV had voluntarily decided to carry a summary of Ofcom's finding, the regulator considered further formal sanctions to be unnecessary. ■

Tony Prosser
School of Law,
University of Bristol

- **Ofcom, Broadcast Bulletin No. 79, 26 February 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10662**

EN

GB – Controlled Premium Rate Services Scope Extended

It is part of Ofcom's duty to protect vulnerable consumers and to regulate inappropriate behaviour by some providers. The regulation of Premium Rate Services falls into this category, as provided for by the Communications Act 2003, Sections 120 – 124. In non-statutory language, PRS "offer consumers some form of content, product or service accessed via fixed or mobile telephones and charged to the user's telephone bill".

The "Premium Rate Services Condition" regulates the provision, content, promotion and marketing of PRS and the providers have to comply with directions made by the code's enforcement authority. The authority is ICSTIS, the Independent Committee for the Supervision of Standards in the Telephone Information Services. The current "Approved Code" contains a subset of services known as "Controlled Premium Rate Services" (CPRS). Up until now, such services did not expressly include Sexual Entertainment Services (SES).

Ofcom published a consultation document during November 2006, entitled "Conditions regulating Sexual Entertainment Services". The main proposal was to extend the definition of CPRS to all SES regardless of price. Importantly, "adult services" has been given the meaning to include "gambling services". The six stakeholder responses were broadly supportive. Consequently, the PRS Condition has been modified from 8 March 2007.

ICSTIS is the UK's premium rate services regulator. It has become more prominent recently because of issues affecting "participation TV". ICSTIS held a "Participation TV Summit" on 8 March and subsequently wrote to all broadcasters to confirm the actions that were agreed in order for broadcasters to restore consumer trust and confidence in the sector. ■

David Goldberg
deeJgee
Research/Consultancy

- **Regulation of premium rate services, Sections 120 – 124 Communications Act 2003, available at: http://merlin.obs.coe.int/redirect.php?id=10658**
- **Ofcom Consultation and Statement: "Regulating Sexual Entertainment Services", available at: http://merlin.obs.coe.int/redirect.php?id=10659**
- **Industry Notice: Conditions Regulating Sexual Entertainment Services, available at: http://merlin.obs.coe.int/redirect.php?id=10660**
- **ICSTIS' Code of Practice (11th edition), available at: http://merlin.obs.coe.int/redirect.php?id=10447**
- **ICSTIS Letter to broadcasters, available at: http://merlin.obs.coe.int/redirect.php?id=10661**

EN

HR – Introduction of DVB-T

Nives Zvonarić
Council for Electronic Media, Zagreb

For the purpose of implementing DVB-T (Digital Video Broadcasting - Terrestrial) in the Republic of Croatia, two working groups have been established.

One is the "Working Group for the Preparation of the Implementation and Application of the DVB Technology and Services in the Republic of Croatia", which was established by the Ministry of the Sea, Tourism, Transport and Development and whose primary task is to prepare and propose the relevant documents to the Government of the Republic of Croatia.

The second is the "DVB-T Forum", established by the Croatian Telecommunication Agency and which is composed of experts from various relevant sectors. On the basis of their professional experience, knowledge and organisational skills, they advise the responsible institutions and bodies on the requirements and possibilities that the DVB services may present for the broadcasting market of the Republic of Croatia. The Forum's task is to propose a National Strategy for the Transition from Analogue to Digital Broadcasting, a final date for the complete switch-off of the terrestrial analogue television broadcasting, as well as an appropriate regulatory framework for the impending use of DVB.

The national strategy on the digital switch-over is currently being prepared with respect to the following guidelines and requirements for establishment:

- the dynamics of the transition from analogue to digital broadcasting and the date of the final switch-off of the analogue broadcasting;
- the plan and mode for the switch-off of the analogue broadcasting networks;
- the designation of all agents necessary for the transition;
- the means and methods for the acquisition of various types of Set-Top-Boxes;
- the specification of the spectrum allocated for DVB-H and DVB-T (HDTV) in the sense of the optimal use of frequencies as well as regards the future number of licensed operators;
- the protection of television rights, copyrights and other related rights in the context of television and new technologies (IPTV);
- the proposal of amendments to the relevant laws and subordinate legislation significant for the implementation of the strategy;
- the compilation of an overview of all services, which can be provided via digital television;
- the definition of a method for separating the regulation of content from the regulation of transmission;
- the decision on the methods as to how to communicate the State's Strategy to the public;
- the specification of measures, schedules and agents of the Strategy.

Already, during the last two years, the Croatian Telecommunications Agency has been working on the project in the sense of securing the frequency resources and following the development of the technology. The National Frequency Plan for Digital Television has been developed and harmonised with neighbouring countries. Croatia's goal is to comply with the schedule of the EU and complete the transition to digital broadcasting technology by 2012. ■

● **Information of the *Hrvatska agencija za telekomunikacije* (Croatian Telecommunication Agency - HAT), available at:**
http://merlin.obs.coe.int/redirect.php?id=10663
HR

HU – Government Decision on Digital Switchover

Márk Lengyel
Legal expert, Körmendy-Ékes & Lengyel Consulting, Budapest

Via its decision of 7 March 2007 the Government adopted the Hungarian National Strategy for Digital Switchover and decided to take the regulatory measures necessary for its implementation.

The first version of the strategy was published in early October 2006 as a draft (see IRIS 2006-10: 14). This was followed by two months of public consultation (see IRIS 2007-1: 11). The Prime Minister's Office finalised the strategy in line with the outcome of the consultation, which was transposed into an official policy document, now forming an appendix to the Government's decision.

On the basis of the decision the tasks that the regulator faces can be summarised as follows:

- A bill on digital switchover shall be elaborated. It is expected to be submitted to the Parliament in April this year;
- In parallel, the necessary amendments to the relevant decrees shall also be enacted;
- The financial conditions for the switchover shall be settled by September;
- From March 2008, yearly reports shall be compiled for the Government on the implementation of the strategy and on the budgetary, economic, social and cultural implications of the switchover.

It is worth noting that there have been experimental digital terrestrial television broadcasts in Hungary since 2004. However, the launch of commercial services requires that licences be granted for the multiplex operators. This will be made possible by the adoption of the bill on digital switchover, as the next regulatory step in the process. ■

● **Strategy of Digital Switchover, available at:**
http://merlin.obs.coe.int/redirect.php?id=10668
HU

IE – Communications Regulation (Amendment) Bill 2007

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

On 2 February 2007, a new Communications Regulation (Amendment) Bill, along with an Explanatory and Financial Memorandum, was published. The Bill is intended to amend the Communications Regulation Act 2002, so as to confer additional functions on the Commission for Communications Regulation (ComReg) and to make further provision for the enforcement of the 2002 Act.

The primary purpose of the Bill is to increase the enforcement powers of ComReg in order to promote competition in the Irish telecommunications market. The Bill provides ComReg with powers similar to those of the Competition Authority, which will allow ComReg to investigate (s.31) and take action to address issues such as restrictive agreements and practices, and abuse of dominance.

Section 6 of the Bill amends the 2002 Act by inserting new sections to provide information gathering powers for the Minister and ComReg. The Minister is given information gathering powers in relation to the technical operation and performance of telecommunications networks and infrastructure in the state, while ComReg is given power to gather information from undertakings. Provision is also made for a summary offence for failure to provide information or for providing false information. Section 11 confers on ComReg special powers to require persons to give evidence or produce documents. A new section is also inserted to provide protection for whistleblowers who disclose appropriate information to ComReg (s.7).

The Bill also introduces indictable offences for breaches of enforcement measures imposed by ComReg (s.15). This provision will allow for substantial penalties to be imposed on undertakings for serious offences, with fines of up to EUR 4 million or 10% of turnover (s.15 – 46A (6)). It also provides for additional daily fines of up to EUR 5,000 for offences of a continuing nature (s.15 – 46A (7)). The Bill, as drafted, does not specify particular summary or indictable offences, but rather provides an enabling mechanism whereby the Minister can, via Regulations made under the European Communities Act of 1972, provide for offences to be tried either on indictment or summarily.

It is envisaged that greater competition powers, along with civil and criminal remedies, will give ComReg a strong suite of powers to enforce regulatory decisions and to support the development of competition in the market.

The Bill further provides for the establishment and operation of an Emergency Call Answering Service (s.17). It inserts a new section that provides for the Minister to enter into a contract with an undertaking for the provision of an emergency call answering service. The section also provides for ComReg to regulate the price that the undertaking shall charge for handling emergency calls.

The Bill also contains an amendment to the Electronic Commerce Act 2000, which will transfer responsibility for the oversight and management of the Irish Internet domain name <.ie> to ComReg (s. 21 & 22). ■

- **Communications Regulation (Amendment) Bill, no 8 of 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10674**
- **For more information on the Bill see the Government press release available at: http://merlin.obs.coe.int/redirect.php?id=10675**
- **For the background and context, see also Regulatory Impact Analysis of the Bill, available at: http://merlin.obs.coe.int/redirect.php?id=10676**

EN

IT – Supreme Court Ruling on P2P

Marina Benassi
Attorney-at-law

On 22 January 2007, the Italian *Corte di Cassazione* (Supreme Court) ruled in favour of file sharing activities where no lucrative intent is involved. The decision caused an initial commotion among Italian users because it was first interpreted as being a revolutionary change of stance. It nevertheless quickly became evident that the Supreme Court's decision did not actually present any change of stance, rather it derived from the Court's consideration of the law in force at the time when the events relating to the case occurred. The case concerned the creation, in 1999, on a university (the Turin Polytechnic) computer of an FTP server by two young men. It was through this server that they shared files with other students free of charge. The Supreme Court analysed the actions of the two students in light of the law in force in 1999 and, after finding that the file sharing was clearly not aimed at obtaining any financial profit, it concluded that no illegal act had been committed by the two young men. Italian law has, since 1999, been subject to various modifications, the most recent of which are contained in the *Decreto Urbani* (Law Decree 128/2004) and in Law 43/2005, both of which clearly indicate that file sharing of copyright-protected works is illegal. If the events in the case at hand had taken place under the current law, the decision of the Supreme Court would have been completely different. ■

- **Decision of the Supreme Court of 22 January 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10671**

IT

IT – New Law to Combat Child Pornography on the Web

Marina Benassi
Attorney-at-law

The Italian Ministry for Communications has recently signed a new decree aimed at combating child pornography on the internet by obliging Internet Service Providers to block sites displaying illicit content within 6 hours of notification by the competent organ, the *Centro Nazionale per il contrasto della pedopornografia sulla rete Internet* (the National Centre for combating child pornography on the internet). This organ was created by a previous act (2006), and operates within the Italian Postal and Communications Police, a specialised branch of the Italian Police force. The Centre is invested with the task of gathering information and collecting reports received from the general public and/or from other institutions, concerning websites with child pornography content. The new law fixes a deadline of 60 days from its publication in the Italian Official Journal for the service providers to adopt adequate systems aimed at guaranteeing that sites containing child pornography can be promptly blocked and obscured within the given 6-hour time span. A further deadline of 120 days after the publication in the Official Journal has been fixed for the service providers to implement further systems enabling them to intervene also at IP-address level, thereby allowing the providers to block entire strings of illicit networks instead of individual sites. The new decree was published in the Official Journal of 29 January 2007. Through this decree the Italian legislator aims to further improve the tools that both police and magistrates possess in order to combat the rise of child pornography. ■

● ***Decreto interministeriale - requisiti tecnici degli strumenti di filtraggio che i fornitori di connettività alla rete Internet devono utilizzare al fine di impedire l'accesso ai siti segnalati dal Centro nazionale per il contrasto della pedopornografia, Gazzetta Ufficiale*** **(Official Journal) no. 23 of 29 January 2007, available at:**
http://merlin.obs.coe.int/redirect.php?id=10670

IT

LT – Constitutional Court Examines Acts on Broadcasting

On 21 December 2006 the Constitutional Court of the Republic of Lithuania adopted a ruling on the compliance of certain provisions of the Act on the National Radio and Television of Lithuania, and the Act on the Provision of Information to the Public, with the Constitution of the Republic of Lithuania (see IRIS 2006-2: 17 and IRIS 2006-9: 16).

These acts established the model of financing of the Lithuanian Public Service Broadcaster (LRT) and the method of assigning the newly co-ordinated radio frequencies (channels) for the broadcasting of LRT programmes.

The ruling of the Constitutional Court is important for the Lithuanian audiovisual sector, because all of the disputed legal norms, still exist in the current Law on the LRT. Additionally, the ruling basically ended the debates regarding the legitimacy of advertisements broadcast on the Public Service Broadcaster's channels.

The Court adopted the ruling after it had examined the application of fifty-six members of the *Seimas*, the Lithuanian Parliament. They had criticised two issues:

1. The provisions of the Act on National Radio and Television of Lithuania (Law of 29 June 2000; Art. 5, 6 and 15), which provide that LRT is financed through allocations from the state budget and income obtained from advertising and commercial activity, that LRT has the right to carry out commercial activities (to broadcast advertisements) and that LRT has a priority right to newly co-ordinated radio frequencies (channels); and
2. the provision of the Law on the Provision of Information to the Public (Law of 29 August 2000; Art. 31), which states that newly co-ordinated radio frequencies (channels) for the broadcast of the LRT programmes be assigned on a non-tender basis.

The members of the Parliament claimed that LRT's financing model (financed from the state budget and at the same time granted the right to engage in commercial activity) contradicts the principal of fair competition (Art. 46 of the Constitution), and furthermore, that such legal regulation violates the principle of equality (Art. 29 of the Constitution). They argued that state support is ensured only for one entity, whereas other entities (private broadcasters) that carry out the same activity, do not receive any support from the State.

The Constitutional Court pointed out that the State is under the constitutional obligation to ensure the activity of the Public Service Broadcaster and to assign sufficient funding for it. Further, the Court noted that the Constitution allows the legislator to choose the financing model of the Public Service Broadcaster at its own discretion. The choice of the financing model was an issue of social, political as well as economical expediency depending exclusively on the competence of the legislator.

The Court states, in the ruling, that the legislator has the right to determine by law the authorisation of, as well as the restrictions on, advertising in the programmes of the Public Service Broadcaster. The restrictions on advertising were a matter of legislation, and not subject to constitutional control. The Court noted that the legislator has the right to forbid advertising on the public service broadcaster only in

the case where both public resources and financial potential made this possible, and if it did not affect the constitutional mission of the PSB.

As regards the legal regulation which provides a priority right for newly co-ordinated radio frequencies (channels) on a non-tender basis for the Public Service Broadcaster's programmes, the Court ruled that this is not in conflict with the Constitution of the Republic of Lithuania, because the state was obligated to create favourable conditions for the Public Service Broadcasters' activity as well as to safeguard the public interest.

According to this reasoning, the Court concluded that the named provisions are not in conflict with the Constitution of the Republic of Lithuania.

The Ruling of the Constitutional Court was final and is not subject to appeal. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania, Vilnius

- **Constitutional Court ruling of 21 December 2006, available at: http://merlin.obs.coe.int/redirect.php?id=10664**

LT

- **Constitution of the Republic of Lithuania, available at: http://merlin.obs.coe.int/redirect.php?id=10665**

EN

MT – Requirements for the Promotion of Racial Equality by Broadcasters

Article 22a of the Television Without Frontiers Directive requires EU Member States to ensure that broadcasts do not contain any incitement to hatred on the grounds of race, sex, religion or nationality. Bearing this provision in mind, the Broadcasting Authority has on 7 March 2007 launched draft "Requirements as to Standards and Practice on the Promotion of Racial Equality" by the broadcast media. These Requirements have been circulated to all broadcasters and to the general public for consultation purposes. Once approved by the Authority, they will become legal mandatory requirements and sanctions will be imposed for their eventual breach.

Essentially these Requirements encourage broadcasters to be proactive by promoting racial equality in their programming, to judiciously select presenters and participants during a programme dealing with racism and to foster a multicultural society. When discussing multicultural issues, broadcasters will have to include the views of persons from different ethnic and religious backgrounds rather than report their views second hand. Broadcasters will be required to take into account the linguistic and cultural differences that may be experienced by the interviewee and all necessary steps must be taken to place the interviewee at ease, and to reflect the interview faithfully.

Viewers and listeners expect that broadcasters assume their responsibility to respect and promote human dignity, in respect of both individuals and individuals as members of groups.

As the Broadcasting Authority had previously decided that a programme had contributed to incitement to racial hatred (the Authority's decision is still subject to judicial review), it is proposed in these draft Requirements that programmes should never stir up racial hatred. Instead, programme schedules should give a fair reflection of the contribution of all races to society. The broadcast media must at all times be aware of the danger that arises when the media, deliberately or inadvertently, encourage discrimination and intolerance. Mindful of this danger, the broadcast media will have to be aware of the fact that they cannot inflame hatred or inequality on grounds of ethnicity, nationality, race or colour, or incite criminal acts of violence. ■

Kevin Aquilina
Malta Broadcasting Authority

- **Broadcasting Authority Requirements as to Standards and Practice on the Promotion of Racial Equality, available at: http://merlin.obs.coe.int/redirect.php?id=10677**

EN-MT

PL – Public Debate on the Proposal of a Regulatory Strategy on the Use of Frequencies

On 16 February 2007, the *Urząd Komunikacji Elektronicznej* (President of the Electronic Communications Office – UKE) organised a public debate on a draft Regulatory Strategy on the use of frequencies.

A proposal for a new strategy was already announced by the UKE on 11 December 2006 and was followed by public consultations. Several interested parties submitted their written observations to the UKE, which on 2 February 2007 announced its position as regards the comments received. Finally, a public debate was organised, during which the results of the consultation process were presented. This was the second frequency debate, the first one being held by the UKE on the 4 July 2006.

The UKE's proposal referred to the strategy for the management of the electromagnetic spectrum for the next two to five years. It aims to achieve maximum advantages for the State, its economy and society. It observes that the national strategy on the use of frequencies should be in line with European policy for the use of radio spectrum. It also notes the importance of international harmonisation of spectrum frequencies.

A separate part of the strategy document (section 4.3) refers to radio and television broadcasting. It tackles *inter alia* issues of digital radio and digital television, outlining key tasks leading to the realisation of strategic goals in this respect. These tasks include, in relation to digital radio:

- the preparation of a strategy for the analogue television switch-off and the launch of digital radio on the VHF band;
- the implementation of analyses and research on the choice of a system for radio broadcasting (T-DAB, DMB);
- the consideration of the need for, and possibility of the use of, the national multiplex DVB-T for the purposes of digital radio;
- the consideration of the need for, and possibility of the use of, band L for digital radio or multimedia services.

There are also a considerable number of tasks mentioned to be completed in the area of digital television. They address, for example:

- a maximum limit on the development of analogue television in relation to the launch of new programme services;
- a restriction on the adjustment process of technical parameters for analogue television stations, allowing only measures that enable the process of introducing digital broadcasting;
- the implementation of analyses on methods and final dates for the analogue television switch-off, as well as carrying out legislative activities to this end;
- further work within the Intergovernmental Group on Digital Radio and Television in Poland aimed at the adoption and implementation of a new strategy for the launch of digital television within the transition period;
- the international coordination of the national digital multiplex;
- the decision on how to use the digital dividend;
- the consideration of the need for, and possibility of, launching DVB-H.

The draft strategy describes in detail the strategic goals in the area of digital broadcasting. ■

Małgorzata Pęk
National Council of Broadcasting, Warsaw

● **Press release of the UKE, available at:**
http://merlin.obs.coe.int/redirect.php?id=10666

● ***Projekt Strategii Regulacyjnej Prezesa UKE w zakresie gospodarki częstotliwościowej* (Draft of a regulatory strategy), available at:**
http://merlin.obs.coe.int/redirect.php?id=10667

PL

RO – New CNA Rules

New regulations have recently been adopted, amending Decision No. 187 of 3 April 2006 on the Regulatory Code for Audiovisual Content. The new Decision No. 194 (*Decizia nr. 194 din 22 februarie 2007 pentru modificarea Deciziei nr. 187 din 3 aprilie 2006 privind Codul de reglementare a conţinutului audiovizual*), adopted by the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) on 22 February 2007, includes a redistribution of the proportion of broadcast transmission time that must be allocated to members of the government and opposition parties. Certain groups of people will, in future, be forbidden from making, or presenting, audiovisual programmes, or from appearing regularly as studio guests (Art. 73.1). These include members of parliament, representatives of the government, of central or local administrations or of the President's office, and other office holders within the structure of political parties or their press officers, as well as persons who have publicly announced their intention to stand in local, parliamentary or presidential elections.

Within news programmes, including sports reports, 60% of the airtime set aside for political statements may be allocated to representatives of the governing parties (senators, MPs, representatives of central and local administrations) and 40% to representatives of the parliamentary opposition, independent MPs, parties not represented in parliament and their local representatives (Art. 74.1). Under Art. 74.2, governing parties and the opposition should be equally represented in televised debates.

For the purposes of accurate information and in order to guarantee the free formation of opinion, programme makers must take into account the size of the parliamentary representation of each party and the importance of the subject under discussion (Art. 74.3). The transmission time mentioned in Art. 74.1 does not include airtime allocated to the Prime Minister (on occasions when he represents Romania at official events), nor that made available for announcements concerning natural disasters or the outbreak of epidemics, or measures designed to combat them. These exceptions do not prevent the opposition from making known their own views on the events concerned and on the measures taken by the authorities (Art. 74.4).

Art. 75 stipulates that the CNA must check the compliance with the provisions set out in Art. 74.1 and 74.2 on a monthly basis. If the CNA discovers a clear imbalance, they must send a reminder to the broadcaster concerned, urging it to restore the correct balance during the following month. If this reminder is ignored, the sanctions listed in Audiovisual Act No. 504/2002 with subsequent amendments and additions (*Legea audiovizualului Nr. 504/2002, cu modificările şi completările ulterioare*) are applicable.

The provisions contained in Articles 73, 74 and 75 will enter into force when the CNA decision is published in Part 1 of the Romanian Official Gazette (*Monitorul Oficial al României, Partea 1*). ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Decizia nr. 194 din 22 februarie 2007 pentru modificarea Deciziei nr. 187 din 3 aprilie 2006 privind Codul de reglementare a conţinutului audiovizual* (Decision No. 194 amending the Regulatory Code for Audiovisual Content), available at:**
http://merlin.obs.coe.int/redirect.php?id=10693

RO

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Veranstalter:
European Audiovisual Observatory
Ort: Cannes
Information & Anmeldung:
Tel.: +33 (0)388 14 44 10
Fax: +33 (0)388 14 44 19
E-mail: alison.hindhaugh@coe.int
http://www.obs.coe.int/about/oea/agenda.html