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European Court of Human Rights: Case of Dupuis and Others v. France

In a judgment of 7 June 2007, the European Court of Human Rights expressed the unanimous opinion that the French authorities have violated the freedom of expression of two journalists and a publisher (Fayard). Both journalists were convicted for using confidential information published in their book *Les Oreilles du President* (The Ears of the President). The book focused on the "Elysée eavesdropping operations", an illegal system of telephone tapping and record-keeping, orchestrated by the highest office of the French State and directed against numerous figures of civil society, including journalists and lawyers. The French Courts found the two journalists, Dupuis and Pontaut, guilty of the offence of using information obtained through a breach of the confidentiality of the investigation, or of professional confidentiality. It was also argued that the publication could be detrimental to the presumption of innocence of Mr. G.M., the deputy director of President Mitterrand's private office at the time of the events, who was placed under formal investigation for breach of privacy under suspicion of being the responsible person for the illegal telephone tapping.

The ECHR observed that the subject of the book concerned a debate of considerable public interest, a state affair, which was of interest to public opinion. The Court also referred to the status of Mr. G.M. as a public person, clearly involved in political life at the highest level of the executive wherein the public had a legitimate interest in being informed about the trial, and in particular, about the facts dealt with or revealed in the book. The Court found it legitimate that special protection should be granted to the confidentiality of the judicial investigation, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be pre-

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sumed innocent. However, at the time the book was published, the case had already been widely covered in the media and it was already well known that Mr. G.M. had been placed under investigation in this case. Hence, the protection of the information on account of its confidentiality did not constitute an overriding requirement. The Court also questioned whether there was still an interest in keeping information confidential when it had already been at least partly made public and was likely to be widely known, having regard to the media coverage of the case. The Court further considered that it was necessary to take the greatest care in assessing the need to punish journalists for using information obtained through a breach of the confidentiality of an investigation or of professional confidentiality when those journalists are contributing to a public debate of such importance, thereby playing their role as "watchdogs" of democracy. According to the Court, the journalists had acted in accordance with the standards governing their profession as journalists: the impugned publication was relevant, not only to the subject matter, but also to the credibility of the information supplied. Lastly, the Court underlined the fact that the interference with freedom of expression might have a chilling effect on the exercise of that freedom - an effect that the relatively moderate nature of the fine, as in the present case, would not sufficiently negate. As the conviction of the two journalists had constituted a disproportionate interference with their right to freedom of expression, it was therefore not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention. ■

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● Judgment by the European Court of Human Rights (Third Section), case of Dupuis and others v. France, Application no. 1914/02 of 7 June 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

EUROPEAN UNION

Court of Justice of the European Communities: VAT on Payments Made for Mobile Telecommunications Licences

In two separate judgments delivered on 26 June 2007 (C-284/04 and C-369/04), the European Court of Justice ruled that the award by national regulatory authorities of licences, such as third generation mobile telecommunications licences (known as 'UMTS' or '3G'), did not constitute an economic activity within the meaning of the Sixth Council Directive 77/388/EEC of 17 May 1977 (Sixth VAT Directive). The 3G technology allows the provision of Internet and multimedia services to mobile devices thanks to a greater capacity to transfer data.

These references for a preliminary ruling were made in the course of proceedings before the VAT and Duties Tribunal, London and the *Landesgericht für Zivilsachen* Wien (Regional Civil Court, Vienna). The plaintiffs in these cases were mobile phone firms who were awarded 3G licences in the UK and in Austria in 2000, for a total payment of GBP 22,477,400,000 and EUR 831,595,241 respectively. They had claimed that the sums that they paid must have included value added tax, as the award of these licences fell within the scope of the Sixth VAT Directive. This would have entitled them to a substantial VAT refund (estimated at GBP 3.3bn in the UK).

The Sixth VAT Directive, repealed and recast into Council Directive 2006/112/EC on 28 November 2006, defines a "taxable person" as any person who carries out an economic activity, including the exploitation of intangible property (Article 4(1) and (2)). As for public authorities, Article 4(5) provides that bodies governed by public law shall not be considered taxable persons in respect of the activities in which they engage as public authorities, even where they collect fees or payments. This exemption does not, however, apply to a certain number of activities listed under Annex D of the Directive, which includes telecommunications (as well as activities carried out by radio and television bodies).

According to the Court, the principal issue was whether the activity in question, i.e. the issuing of authorisations, which allow the economic operators who receive them to exploit the resulting frequency use rights, qualified as economic activity. It considered that this activity, while constituting a necessary precondition for the access of economic operators to the mobile communications market, did not amount to a participation in that market. The Court underlined that this was an activity that by definition cannot be carried out by economic operators.

Accordingly, the Court ruled that in granting the licences, the national authorities were not participating in the exploitation of property consisting in rights to use the radio-frequency spectrum, but only controlling and regulating the use of that electromagnetic spectrum. They had exercised that control in accordance with Community law, and in particular with the Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). As the activity does not fall within the meaning of Articles 4(1) and (2) of the Sixth VAT Directive, the Court considered an appraisal under Article 4(5) redundant.

Significantly, the Court decided not to follow the Opinion of Advocate General Kokott, who in both

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cases had argued that the activity in question *did* constitute an economic activity within the meaning of Article 4(1) and (2) of the Sixth VAT Directive, as a form of exploitation of intangible property. The Advocate General had, however, considered that the term 'telecommunications' in Annex D of the Sixth VAT Directive did not include the auctioning of 3G licences and that the awards of these licences therefore fell within the scope of the exemption under Article 4(5). ■

● Judgment of the Court of Justice of the European Communities, 26 June 2007, case C-284/04, T-Mobile Austria GmbH and Others v. Republic of Austria, available at: http://merlin.obs.coe.int/redirect.php?id=10847

● Judgment of the Court of Justice of the European Communities, 26 June 2007, case C-369/04, Hutchison 3G UK Ltd and Others v. Commissioners of Customs & Excise, available at: http://merlin.obs.coe.int/redirect.php?id=10850

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

Council of the European Union / European Parliament: "Rome II" Regulation on Law Applicable to Non-Contractual Obligations Passed Without Media Clause

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At the conciliation meeting of 15 May 2007, the Council and European Parliament have agreed on the "Rome II" Regulation, which sets out rules for determining the applicable law in international civil cases in the area of torts, delicts and other non-contractual obligations. As was reported earlier, there was substantial disagreement between the European Commission, Council and Parliament on how to deal with cross-border defamation and other infringements of personality rights by the media (see IRIS Plus 2006-10).

After the European Parliament had again asked for substantive amendments to the "Rome II" proposal in second reading, the subsequent conciliation procedure produced an agreement to disagree. As a result, "Rome II" now excludes "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation" (art.1(2)(g)). Although the considerations give no guidance on the issue, it would seem that this includes all publicity rights which derive from interests in personality. The right of reply is also outside the scope of "Rome II".

The exclusion means that parties to a dispute over unlawful communications in said areas need to determine under the various private international law rules of the individual Member States whether certain communications are actionable in tort. In some Member States the place of publication is the primary connecting factor to determine the applicable law, whereas in others it is the place of reception or distribution, or that of the common habitual residence of parties. Yet other Member States allow parties varying degrees of freedom to choose the applicable law themselves.

In the other areas of "Rome II" with special significance for actors in information industries, the final text contains no significant changes. For unfair competition and restrictions of competition the applicable law is in principle the law of the country where the market is affected. Infringements of intellectual property rights are governed by the law of the country for which protection is claimed. The generic rule for torts/delicts remains the same: parties to a dispute may choose the applicable law. If no choice has been made, the law of the common habitual residence of plaintiff and injured party applies. If there is no common habitual residence, the *lex loci damni* governs the non-contractual obligation(s), i.e. the governing law is that of the place where the harmful event took place. If the damage caused by the act arises in another jurisdiction, the latter law applies.

The defamation issue is still on the table. By the end of 2008 the European Commission must report on a rule for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation (art. 30(2)). It remains to be seen whether positions change sufficiently to make possible inclusion of such a rule. The "Rome II" Regulation will take effect at the beginning of 2009. ■

● "European Union brings in harmonised rules on law applicable to civil liability ("Rome II" Regulation)", Press release of 16 May 2007, IP/07/679, available at: http://merlin.obs.coe.int/redirect.php?id=10836

DE-EN-FR-IT

● Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (ROME II), available at: http://merlin.obs.coe.int/redirect.php?id=10839

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

● Joint text approved by the Conciliation Committee, of 25 June 2007, provisional version, C6-0142/2007, available at: http://merlin.obs.coe.int/redirect.php?id=10842

EN-FR

European Commission: State Aid Rules for Cinema Extended until 2009

The Commission's 2001 Cinema Communication set out the general and specific conditions for the provision of state aid to the production of cinematographic and other audiovisual works.

In 1997, the Commission received a complaint about the French cinema production aid scheme, which was alleged to have exclusionary effects.

These effects were later confirmed by the Commission's assessment of the French scheme. The anti-competitive effects were the result of provisions making the aid conditional on the realisation of certain filmmaking activities in the Member State (so-called "territorialisation"). In its subsequent decision, the Commission set out four specific compatibility criteria to authorise aid to cinema and TV production in accordance with the "culture derogation" contained in Article 87(3)(d) of the EC Treaty. These ciriteria, initially introduced for the French aid scheme, were applied to all other national schemes and incorporated in the Commission's "Cinema Communication".

Thus, when looking into national aid schemes the Commission first verifies whether the aid scheme respects the "general legality" principle, i. e. the Commission verifies that the scheme does not contain clauses that would be contrary to provisions of the EC Treaty in fields other than state aid (including its fiscal provisions); it then determines whether the scheme fulfils the specific compatibility criteria for aid, set out in its 1998 decision on the French automatic aid scheme.

The four criteria that state aid must meet in order to qualify as cultural aid are as follows:
- Aid must benefit a cultural product;
- The producer must be free to spend at least 20% of the production budget in other Member States without suffering any reduction in the aid provided for under the scheme;
- The level of aid, in principle, must be limited to 50% of the production budget (except for difficult and low budget films);
- Aid supplements for specific filmmaking activities are not allowed.

The provisions contained in the 2001 Cinema Communication will continue to be applied until 31 December 2009 by the Commission when assessing the EC compatibility of the aid schemes of the Member States. This is the second time that the 2001 provisions have been extended: the Commission's 2004 Communication on the follow-up to the Cinema Communication had already once extended its validity (until 30 June 2007). The second extension was deemed necessary as part of the preparation of the revision of the current rules: such a revision entails a complete review of the existing situation. A study into the effects of the current state aid systems was launched in the summer of 2006 and the Commission considers the results of the study as valuable input for its planned revision of the current rules. It is therefore intent on waiting for the completion of the study and has in the meantime extended the 2001 rules. ■

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- **Commission communication of 16 June 2007 concerning the prolongation of the application of the Communication on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (cinema communication) of 26 September 2001, available at: http://merlin.obs.coe.int/redirect.php?id=10822**
- **Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works of 26 September 2001, available at: http://merlin.obs.coe.int/redirect.php?id=10825**

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

NATIONAL

AT – BKS Decisions on Teleshopping and Self-advertising under the ORF Act

At its meeting on 26 April 2007, the *Bundeskommunikationssenat* (Federal Communications Board – BKS)) took decisions on two different issues relating to advertising in programmes broadcast by the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation – ORF).

The first concerned the broadcast of a programme on ORF 2 in which the audience's attention was drawn to the musical event "Starnacht in Montafon" wherein the number of the ticket sales hotline was faded in on screen, and an announcement was made concerning the broadcasting of the recorded programme. The BKS ruled that this was a breach of section 13(2) of the *ORF-Gesetz* (ORF Act), according to which the ORF is not allowed to sell airtime for teleshopping. Additionally, the court stated that directly initiating an ordering process by making contact details available constituted a direct offer to the public within the meaning of this provision, with the consequent need to protect the viewer from taking overly hasty action. It considered that this had happened here and hence that the limits of a mere programme announcement had been exceeded.

Another issue on which the BKS had to rule concerned the broadcasting of self-advertising in the regional programming of ORF 2. Under section 13(7) of the *ORF-Gesetz*, commercials may only be broadcast nationwide. In its decision, the *BKS* now applied this rule to self-advertising by basing the interpretation of the term *Werbesendung* ("commercial") on the definition of "commercial advertising" contained in section 13(1) of the *ORF-Gesetz*. The court found that, contrary to the view put forward by the ORF, section 13(5) of the *ORF-Gesetz*, according to which references to a broadcaster's own programmes are not taken into account when calculating the total advertising time, did not preclude the interpretation of

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the BKS. Rather, section 5 was a *lex specialis* for the calculation of the total permissible advertising time (which is also laid down in section 13(7) of the *ORF-Gesetz*). In addition, a logical argument supported the interpretation adopted, because the aim of section 13(1) of the *ORF-Gesetz* with regard to the regionalisation of advertising was similar to that of the ban on cross-promotion in section 13(9). ■

• BKS decision of 26 April 2007 (Ref.: 611.009/0012-BKS/2007), available at: http://merlin.obs.coe.int/redirect.php?id=10814

DE

AT – Amendment Act concerning DVB-H

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On 30 May 2007, the Austrian Council of Ministers forwarded a Bill to Parliament with the purpose of amending the *Privatfernsehgesetz* (Private Television Act), the *ORF-Gesetz* (Austrian Broadcasting Corporation Act) and the *KommAustria-Gesetz* (KommAustria Act). The purpose of the Bill is to create the legal basis for the introduction of mobile terrestrial television in Austria.

The Act does not specify a preference for a particular standard, such as DVB-H or DMB. Instead, the only criterion for deciding on the selection of a standard will concern its user-friendliness (such as the prices of receivers, and distribution costs).

The Bill has sparked debate and disagreement, especially with regard to the position of the public broadcaster ORF, which is now going to be able to participate in mobile broadcasting with its own programmes, although a cross-subsidy from licence fees will not be permitted.

In the context of the overall plan for mobile digital broadcasting, the Bill differentiates between basic and premium packages. The basic package will comprise programmes that can be received – for a fee – by subscribers to all so-called "programme aggregators" (broadcasters with a contract to supply mobile broadcasting) in the form of a "common programme bouquet". On the other hand, it will be possible to distribute additional premium packages on the basis of exclusive contracts with programme aggregators.

It is anticipated that the Bill will be passed this summer and the Act will enter into force as early as the beginning of August. In view of the forthcoming Euro 2008 football championships, invitations to tender for the first frequencies are due to be issued this autumn. ■

• Government Bill, Federal Act amending the *Privatfernsehgesetz*, the *ORF-Gesetz* and the *KommAustria-Gesetz*, available at: http://merlin.obs.coe.int/redirect.php?id=10806

DE

BA – Draft Rules on Licensing for Content Providers and Distributors

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The Council of the *Regulatorna agencija za komunikacije* (Communications Regulatory Agency - RAK) has made available the following documents for public consultation: a Draft Rule on Methods for Licensing and on Licence Conditions for Content Providers in the Audiovisual Sector, as well as a Draft Rule on Methods of Licensing and Conditions of the License for the Distribution of Radio and TV Programmes.

The main aim of the new Rules is to establish separate regulations for both cable distributors of radio and television programmes, and radio and television content providers in accordance with the EU regulations and with practice in the EU Member States. Currently, the licensing regime includes both cable distributors and radio and television content providers (cable TV stations).

Further, the new regulations aim to create a so-called technology neutral regulation that will apply to all radio and television contents irrespective of the mode of transmission (cable, satellite, mobile telephony, Internet, digital terrestrial television, etc.). In brief, only the content/message shall be the determining factor for regulation, and not the mode of transmission. At the same time, the new rule implies that editorial responsibility lies with the licencees for distributed radio and television contents with regard to possible violations of RAK rules and regulations or other legal acts relevant to programme broadcast and distribution.

All legal entities registered for broadcasting will be able to apply for a content provider licence. Included in this are future applicants as well as all cable TV stations in Bosnia-Herzegovina that currently hold a licence for the distribution of radio and television programmes via cable and which are broadcasting own programmes within these cable systems.

An application for a licence for the distribution of radio and television programmes can be submitted by all entities registered for telecommunications. The new rules will apply to future applicants as well as to all existing licencees having a licence for the cable distribution of radio and television programmes.

Comments and suggestions on the draft can be submitted up until 13 July 2007 as regards licences for content providers, and up until 11 August 2007 as regards licences for programme distribution. ■

• *Nacrt Pravila o načinu dodjele i uslovima Dozvole za RTV sadržaj u audiovizuelnom sektoru* (Draft Rules on Methods of Licensing and Licence Conditions for Content Providers in Audiovisual Sector)

• *Nacrt Pravila o načinu dodjele i uslovima dozvole za distribuciju radio i televizijskih programa* (Draft Rules on Methods of Licensing and License Conditions for Distribution of Radio and Television Programmes). Both Draft Rules are available at: http://merlin.obs.coe.int/redirect.php?id=10734

BS

BA – Internet Penetration Rate in Bosnia and Herzegovina

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The Communications Regulatory Agency (*Regulatorna agencija za komunikacije* - RAK) recently published its research on the market of Internet Service Providers (ISPs) in Bosnia and Herzegovina in 2006.

The research questionnaire results were based on the sample of 43 licensed ISPs, showing that in 2006 in Bosnia and Herzegovina there were 237,660 Internet subscribers. An Internet user is, according to the International Telecommunications Union's (ITU) definition, any person aged 16-74 using the Internet during the year. Following this definition, the RAK assessed that the country had 950,000 Internet users in 2006. The Agency also estimates that the Internet penetration rate in Bosnia and Herzegovina in 2006 was 24.5%.

Regarding the *modus operandi* of Internet access, the Integrated Services Digital Network (ISDN), i.e. a system designed to allow digital transmission of voice and data via traditional telephone lines, was the dominant type. It represents 83.3% out of the total number of Internet subscribers, followed by 16.7% of broadband subscribers. As regards broadband Internet access, Asymmetric Digital Subscriber Line (ADSL), which is enabling faster data transmission via traditional telephone lines, attracts, so far, only 9.32% subscribers.

When compared to its neighbours - Croatia, Serbia and Montenegro - Bosnia and Herzegovina has substantially improved its Internet penetration rate, currently ranking next to Croatia (32.9%), and before Montenegro (17.6%) and Serbia (13.9 %).

These results differ from figures collected by Internet World Stats (IWS), an international website featuring free, up to date, worldwide Internet usage, population statistics and market research data for over 233 countries and territories (www.internetworldstats.com). According to the IWS, the Internet penetration rate in Bosnia and Herzegovina is 17.3%, however, this is based on there being 4,672,165 inhabitants, which is probably not a correct number. Despite the fact that there are no available facts (the last census was conducted in 1991), local estimations speculate that the total population in the country is less than 4 million. ■

● **RAK research, available at:**
http://merlin.obs.coe.int/redirect.php?id=10734

BS

BG – Legislative Changes Concerning Distribution of Pornographic Materials

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Наказателен кодекс (the Bulgarian Criminal Code) has recently been amended. One of the amendments concerns the introduction of a new criminal offence for the distribution of pornographic materials by all types of media operating in the territory of Bulgaria.

A new definition of "pornographic material" has been added to Article 93, item 28 of the Criminal Act. Namely, "Pornographic material" is defined as a material which is indecent, unacceptable or incompatible with public morals and which depicts in an open manner a sexual conduct. Such conduct shall be action, which expresses real or simulated sexual intercourse between persons of the same or different gender, sodomy, masturbation, sexual sadism or masochism, or lascivious demonstration of the sexual organs of a person.

The provisions of Article 159 of the Criminal Act have also been amended and supplemented. The current text of Article 159 now reads as follows:

(1) A person who produces, displays, presents, broadcasts, distributes, sells, rents or otherwise circulates pornographic material, shall be punished by imprisonment for up to one year and a fine of BGN 1,000 to BGN 3,000.

(2) A person who distributes pornographic material via the Internet, shall be punished by imprisonment for up to two years and a fine of BGN 1,000 to BGN 3,000.

(3) An individual who displays, presents, offers, sells, rents, or distributes in another manner, pornographic material to a person under the age of 16 years, shall be punished by imprisonment for up to three years and a fine of up to BGN 5,000.

(4) Regarding acts described under para. 1-3, where a person under the age of 18 years or one who has the appearance of such a person, was used for the creation of the pornographic material, the punishment shall be imprisonment for up to six years and a fine of up to BGN 8,000.

(5) Where acts described under para. 1-4 are conducted by order of, or under the decision-making of an organised crime group, punishment shall be imprisonment from two to eight years and a fine of up to BGN 10,000; the court are also competent to order confiscation of some or all the possessions of the perpetrator.

(6) A person who possesses or provides pornographic material for himself or for another person through a computer system or via other means, material that has featured a person who has not turned 18 years of age or one who has the appearance of such a person, shall be punished by imprisonment of up to one year or a fine of up to BGN 2,000.

(7) The material property gained from criminal activity shall be confiscated by the state; where these profits cannot be found or have already been disposed of, an equivalent sum of money shall be charged. ■

● **Amendment to *Наказателен кодекс* (the Bulgarian Criminal Code), State Gazette No. 38, 11 May 2007**

BG

CZ – Incorrect implementation of the Tobacco Advertising Directive

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In the Czech Republic, advertising is regulated by Act No. 40/1995 (Advertising Regulation Act), according to which, subject to a few exceptions, tobacco advertising and sponsorship by tobacco products/companies is generally prohibited (see IRIS 2002-9: 14 and IRIS 2003-6: 12). Such advertising is only allowed in the press and other printed matter that is exclusively intended for persons working in the tobacco trade and in publications printed and published in third countries, provided that they are not primarily intended for the Community market. The Act does not exclude the possibility of tobacco companies sponsoring motorcycle sport.

In October 2006, the European Commission sent the Czech Republic a reasoned opinion in accordance with Article 226 of the EC Treaty. If a state fails to respond by the deadline set by the Commission, the latter can bring the matter before the Court. The treaty violation proceedings had been instigated in response to the complaint that the sponsorship of a number of sports events in the Czech Republic had not taken place in accordance with Directive 2003/33/EC on Tobacco Advertising and Sponsorship. According to the opinion, the "Grand Prix Brno" car race had been described as the "Gauloises Grand Prix" and the drivers and staff had worn suits in the Gauloises colours and with the Gauloises logo. The race was broadcast throughout Europe, which was possible because the Czech Advertising Regulation Act does not prohibit the sponsorship of events or activities that involve or take place in several member states or have other cross-border effects (see, however, Article 5 of the directive).

The Czech Republic recognised the justification of the Commission's objections and remedied the situation by amending the Advertising Regulation Act. ■

● ***Zákon č. 109 ze dne 12. dubna 2007, kterým se mění zákon č. 40/1995 o regulaci reklamy* (Act No.109 of 12 April 2007 amending the Advertising Regulation Act), available at:**
http://merlin.obs.coe.int/redirect.php?id=10820
CS

DE – Copyright Dispute between Author and Cartoon Figure Artist

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On 24 May 2007, the *Landgericht München I* (Munich District Court I) dismissed an application for temporary legal protection that was filed by the creator of the well-known television and children's literature figure "Pumuckl" against the artist who draws the cartoon.

In a contribution to a television programme concerning a children's painting competition on the subject of "A friend for Pumuckl", the respondent (the artist) had said that Pumuckl deserved to have a girlfriend. The competition organiser also promoted this by announcing that the winner could visit the artist's studio and attend the wedding of Pumuckl and his girlfriend.

The plaintiff claimed that her moral rights had been violated and applied for an injunction prohibiting the respondent from, *inter alia*, being involved in the painting competition, from saying that Pumuckl deserved to have a girlfriend and from stage-managing his wedding.

The court first of all considered that no proof had been provided that the respondent had helped to initiate the invitation to organise the wedding or that she had been able to examine or prevent the invitation in advance. In any case, the court did not consider that the plaintiff's rights had been violated. Although the plot, the characteristic features, the performers' roles and the arrangement of scenes were protected, there was no indication in the television programme that the respondent intended to continue the Pumuckl story. The respondent's statement was protected under freedom of expression. Moreover, anyone would be free to make public reference to the idea that Pumuckl could have a relationship with a woman in his private life. As no additional episode had been produced, the work had not been distorted. The court also pointed out that since one of the Pumuckl stories was about his unrequited love for a girl, the statement that he had a girlfriend should in principle be accepted. The respondent, being the artist who drew Pumuckl, was entitled to discuss her work. ■

● **Press release of the *Landgericht München I* (Ref.: 7 O 6358/07) of 24 May 2007, available at:**
http://merlin.obs.coe.int/redirect.php?id=10692
DE

DE – News Texts not Subject to Copyright

In a judgment of 25 April 2007, the *Landgericht Düsseldorf* (Düsseldorf District Court) was required to rule on whether news items and texts developed in the context of journalism may be duplicated, distributed, published in an edited form, or otherwise made available to the public by third parties, either in whole or in part.

A company that distributes such texts to organisations like television and radio stations and the press had sued a non-profit-making association and its chairman, claiming that its news items had been taken and published either unchanged, or in modified form, at the association's website.

The court ruled that the news texts lacked the

element of creativity required by section 2(2) of the *Urheberrechtsgesetz* (Copyright Act) and accordingly did not enjoy the copyright protection afforded by section 2(1)(1) of the *Urheberrechtsgesetz*. There was thus no restriction on the duplication and distribution of the news published by the plaintiff.

The court went on to say that written works were only subject to copyright protection if they involved the formation of the author's own creative thoughts with regard to the content concerned, i.e. if they demonstrated a particularly imaginative process of collecting, organising and arranging the subject-matter presented. The plaintiff's texts, on the other hand, had been basically limited to a description of actual events and had merely originated as a result of the nature of the subject matter. Moreover, their entire presentation had been based on custom and considerations of expediency. The texts involved a "factual news presentation that does not go beyond the scope of normal reporting in this area and is not a manifestation of a creative and characteristic thought process".

Furthermore, the court continued, only a few sentences had been taken from the plaintiff's news items, and hence they also failed to meet the legal requirements for the copyright protection of a linguistic work.

The court ruled out the application of section 49(2) of the *Urheberrechtsgesetz* (which relates to the permissible duplication of daily news from the press). ■

Nicola Lamprecht-Weissenborn
Institute for European Media Law (EMR), Saarbrücken/Brussels

- **Judgment of the *Landgericht Düsseldorf* of 25 April 2007 (Ref.: 12 O 194/06), available at: http://merlin.obs.coe.int/redirect.php?id=10815**

DE

DE – On-demand Service not Comparable to a Radio Station

Recent reports reveal that, on 21 February 2007, the *Landgericht Hamburg* (Hamburg District Court) confirmed an interim injunction issued in December last year prohibiting the company Impressions Future Media from using certain music recordings for its on-demand service known as StayTuned.de.

At the StayTuned.de platform, music titles can be selected and played for a fee. The service also comprises a choice of radio programmes and offers the possibility of "borrowing" downloads. The *Deutsche Phonoverbände* (German Phonographic Associations, which include the German section of the IFPI), representing the interests of the German music industry, had sued the operators of StayTuned.de on the grounds that the company did not have the relevant licences.

According to the phonographic associations, the court states in the reasoning of its judgment that "the on-demand use is a separate use and thus requires specific contractual arrangements for the grant of exploitation rights".

In the proceedings, the company was evidently unable to prove the existence of such contractual arrangements. ■

Nicola Lamprecht-Weissenborn
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- **Decision of the *Landgericht Hamburg* of 21 February 2007 (Ref.: 308 O 791/06)**
- **Press release of the IFPI, available at: http://merlin.obs.coe.int/redirect.php?id=10818**

DE

DE – Partial Success in Dispute concerning WDR Film on Contergan

In the legal dispute concerning a television film produced on the Contergan scandal by the *Westdeutscher Rundfunk* (West German Broadcasting Corporation – WDR), the *Oberlandesgericht Hamburg* (Hamburg Court of Appeal) largely set aside four judgments on 10 April 2007 against the broadcasting of the film. In July 2006, Grünenthal GmbH, the former manufacturer of the drug Contergan (thalidomide) and the lawyer who represented the victims at that time obtained an interim injunction against the broadcasting of the film (see IRIS 2006-8: 12). The *Landgericht Hamburg* (Hamburg District Court) had regarded several parts of the script as a distortion of the historical facts and, and accordingly, a violation of the privacy rights of the applicants. The court was of the opinion that the public could not distinguish between truth and fiction.

The Court of Appeal, on the other hand, primarily considered the film to be a work of art that did not claim to portray all the details of the events at that time in documentary form. Unlike the lower court, it did not base its decision on the script but on the film itself, which had been produced from the script where a number of contentious scenes had already been removed or changed.

In mid-May, the *Landgericht Hamburg* set aside two other interim injunctions against the WDR, the station that had commissioned the film, and the production company Zeitsprung. The dispute is likely to continue for some time as the proceedings on the merits of the case have only just begun before the *Landgericht Hamburg*. ■

Jacqueline Krohn
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- **Decision of the *Hanseatisches Oberlandesgericht*, Civil Chamber 7, Press Chamber, Ref. 7 U 141/06 (324 O 14/06) Grünenthal v. Zeitsprung – Interim injunction of 14 February 2006**
- **Decision of the *Hanseatisches Oberlandesgericht*, Civil Chamber 7, Press Chamber, Ref. 7 U 142/06 (324 O 62/06) (Schulte-Hillen v. Zeitsprung) – Interim injunction of 9 February 2006**
- **Decision of the *Hanseatisches Oberlandesgericht*, Civil Chamber 7, Press Chamber, Ref. 7 U 143/06 (324 O 15/06) Grünenthal v. WDR – Interim injunction of March 2006**
- **Decision of the *Hanseatisches Oberlandesgericht*, Civil Chamber 7, Press Chamber, Ref. 7 U 144/06 (324 O 63/06) (Schulte-Hillen v. WDR) – Interim injunction of March 2006**

DE

DE – BSkyB obtains interim injunction in dispute concerning "Premiere Sky"

Harald Evers
Institute for European Media Law (EMR), Saarbrücken/Brussels

According to press reports, in response to an application by the television broadcasting group BSkyB, the *Landgericht Berlin* (Berlin District Court) issued an interim injunction on 6 June 2007 prohibiting the broadcaster Premiere from either using the word "Sky" as part of the "Premiere Sky" satellite TV package that it has announced or as part of the name of the subsidiary company that operates the package (Premiere Sky GmbH), due to the risk of confusion, and pending a decision on the merits of the case. The same applies to the distribution of programmes in Germany and Austria.

BSkyB has had the "Sky" brand protected in Europe for its TV business. Premiere intends to appeal against this decision of the *Landgericht Berlin* on the grounds that "Sky" is a general term and therefore, despite the existence of the registered trademark, cannot be protected. As an alternative, however, the company is considering other names for the new product. ■

DE – Amendment to the Hessian Private Broadcasting Act

Harald Evers
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On 30 May 2007, the Hessian Parliament adopted a decision amending the *Hessisches Privatrundfunkgesetz* (Hessian Private Broadcasting Act – HPRG), which is the legal basis for the rights of the private electronic media in the *Land* of Hesse. The amendment extended the Act's scope of application to telemedia comparable to broadcasting (i.e., telemedia directed at the public). This is reflected in the new name of the supervisory authority: *Hessische Landesanstalt für privaten Rundfunk und neue Medien* (Hesse State Authority for Commercial Broadcasting and New Media). The amendment, in particular the modification of the frequency allocation provisions contained in section 3 of the HPRG and the modification of the provision concerning the possession of analogue and digital cable installations (sections 42 and 43 of the HPRG) is in response to the changeover from analogue to digital broadcasting technology. Thus, for example, operators should realise that they are under an obligation to introduce digitisation by being told that the purpose of the frequency allocation is also to promote the digitisation of frequencies that up intil now have been used for analogue broadcasting. In addition, they will be required, by the new provisions of section 3(10) of the HPRG, to provide information at the request of the highest Land authority, in this case the Hessian State Chancellery, on the current situation regarding the use of frequencies. If a frequency is not used for a long time, its allocation can be revoked. The new version of section 42 of the HPRG also takes into account the requirements of Article 31(1) ("Must carry" obligations) of the Universal Services Directive 2002/22/EC. The extent to which cable network operators can occupy frequencies has been extended. At the same time, however, a guarantee has been provided that they will distribute programming that reflects diversity of opinion and the range of choice available. The interests of the broadcasters and telemedia comparable to broadcasters will be met by enabling them to participate in the relevant procedures. ■

● ***Gesetz zur Änderung des Hessischen Privatrundfunkgesetzes und des Gesetzes über den Hessischen Rundfunk*** **(Act amending the Hessian Private Broadcasting Act and the Hessian Broadcasting Act), of 5 June 2007, available at: http://merlin.obs.coe.int/redirect.php?id=10821**

DE

ES – Court Obliges TVE to Broadcast a Communiqué from a Journalist

In February 2007, the Spanish national public service broadcaster TVE had widely advertised a programme to be shown during its primetime: an interview conducted by journalist Jesús Quintero, who had a weekly show on TVE, with another journalist, José María García, formerly one of the most popular and controversial Spanish journalists who had been out of the spotlight for several years due to illness. The interview had already been recorded, and TVE used some clips from this in the advertising for the programme.

However, shortly before the beginning of the programme, TVE decided not to broadcast the interview because the channel considered that it included insults and denigration of several prominent personalities. TVE only showed a fragment of the interview in which José María García criticised the newly appointed Director of RTVE. TVE said that by showing that part of the interview, it wanted to demonstrate that TVE was not removing the programme to prevent the airing of this criticism, but to protect the reputation of other people allegedly insulted during the interview.

TVE' s decision was very controversial and strongly contested by both the interviewer, Jesús Quintero (who decided to end his collaboration with TVE a few days later) and by the interviewee José María García. Mr. García had been condemned several times during his career for insulting public people, but he insisted that it was obvious in this instance that while he had expressed strong opinions about

different politicians, that those opinions could not in any case be considered as insults.

The interview was later shown by el mundo.es, the online version of one of Spain's most popular newspapers, El Mundo. There were no subsequent press reports that would indicate that any of those persons who allegedly were insulted had started proceedings against Mr. García for any of the opinions he expressed during the programme. After these images were shown, there was an intense public debate over whether or not the criticisms of José María García amounted to insults, and as to whether or not the decision of TVE had been justified.

José María García decided to exercise his right of reply, as regulated in Spain by the Organic Law 2/1984, of 26 March 1984. In May 2007, the relevant Court upheld his request, so TVE was obliged to broadcast, during its primetime, the reading of a communiqué from José María García in which he rebutted the accusations of TVE and denied having insulted anyone. TVE has appealed that judgment and insists that the right of reply only implies giving that the other party has the right to express their view, but that it does not mean that their claims are accepted, which is an issue that still remains undecided. ■

Alberto Pérez Gómez
Entidad pública empresarial RED.ES

● ***Sentencia 71/2007 del Juzgado de Primera Instancia e Instrucción nº 2 de Pozuelo de Alarcón, José María García c. TVE, S.A. y Javier Pons* (Judgment 71/2007 of the Tribunal of First Instance and Inquiry n 2 of Pozuelo de Alarcón, José María García c. TVE, S.A. y Javier Pons), available at: http://merlin.obs.coe.int/redirect.php?id=10805**

ES

FI – List of Events of Major Importance to Society Adopted

On 22 February 2007, *Valtioneuvoston asetus yhteiskunnallisesti merkittävien tapahtumien televisioinnista* (Government Decree concerning the broadcasting of events of major importance to society) was adopted. The Decree entered into force on 1 March 2007.

The Decree is based on Section 20 of the Act on Television and Radio Operations (744/1998) as amended by Act 394/2003, and implements Article 3a of the Television without Frontiers Directive (89/552/EEC). With this Decree a list of events has been decided upon, namely those events that are considered to be of such importance to society in Finland that they "shall be broadcast in the area of Finland so that a substantial proportion of the public can follow the coverage of the events free via live coverage or deferred coverage. A television broadcast of an event that is of importance to society as referred to in this subsection is deemed to have reached a substantial proportion of the public, if 90 percent of the population is able to receive the broadcast without a separate charge" (extract from Section 20 in Act 744/1998).

The list of events of major importance to society contains the following:
- Summer and Winter Olympic Games;
- FIFA World Cup (Opening, Quarter-finals, Semi-finals and Finals and all of Finland's matches);
- UEFA European Football Championship (Opening, Quarter-finals, Semi-finals and Finals and all of Finland's matches);
- Ice Hockey World Championship (entirely);
- FIS Nordic World Ski Championships;
- World and European Championships in Athletics.

It is also established that the following events shall be provided live: the Opening, Semi-finals and Finals and all of Finland's matches in the World and European Football Championships and Men's Ice Hockey World Championship Semi-finals, Finals and all of Finland's matches.

During the deliberations, discussions also took place with regard to adding women's top tournaments and Paraolympic Games to the list. However, this was not done, since these events do not attract as wide an audience group as the ones now on the list. ■

Marina Österlund-Karinkanta
Finnish Broadcasting Company YLE, EU and Media Unit

● **Decree No. 199/2007 of 22 February 2007**

FI

FR – Reclassification of a Work Originally Made in the French Language

Under Article 6-1 of the Decree of 17 January 1990 laying down the general principles for the broadcasting of cinematographic and audiovisual works, the qualification of a work as a "work of European origin" and a "work originally made in the French language" and the monitoring of compliance of the channels with production quotas fall under the authority of the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulator – CSA) under the supervision of the *Conseil d'Etat*, as confirmed in a recent decision of this supreme administrative court.

Under the terms of its convention, concluded with the CSA, the channel M6 is supposed to devote "1% of its annual net turnover for the previous financial year to commissioning animated works of European origin or originally made in the French language". It has to "communicate to the regulatory authority no later than 31 May a report on the conditions for fulfilling its obligations and undertakings of the previous financial year". In January 2002, as in each year, the channel therefore submitted its report on the conditions for fulfilling its

obligations for the year 2001. The CSA then drew up the "Balance sheet for the company M6 – Financial year 2001", comprising a list of the works classified as audiovisual works originally made in the French language, broadcast over the year by the channel. The report was adopted by the CSA meeting in plenary on 8 October 2002, resulting in the production of a "Communiqué concerning the company M6 for the financial year 2001". On 10 February 2004, in the light of information sent by the *Conseil National de la Cinématographie*, the CSA decided to withdraw the classification of "an audiovisual work originally made in the French language" from the cartoon entitled "Evolution", and hence to remove the work from the calculation of the channel's production obligations for the financial year 2001. Consequently, the CSA required the channel to invest a further EUR 540,000 in the production of animated works before the end of the financial year 2005. Contesting the decision, M6 applied to the Chairman of the CSA for a review, but this was turned down. It therefore took the matter before the *Conseil d'Etat*, which stated quite clearly the principle according to which the communiqué concerning a channel's previous financial year (including a table setting out its quantitative obligations and undertakings and their level of achievement), adopted by the CSA after examination by its relevant departments, constituted a decision creating a right in favour of the channel, as it specified a list of the works classified as works of European origin and works originally made in the French language for the purpose of calculating the service's production and broadcasting obligations for the financial year referred to in the balance sheet. According to the Court, "Although the CSA may modify the classification of an audiovisual work for the future in the case of receipt of new information indicating that the work did not meet the relevant conditions, it may only withdraw the classification given for a financial year in the four months following adoption of the channel's balance sheet for that year, unless the classification was obtained fraudulently", which was not the case here. The *Conseil d'Etat* therefore held that the CSA was not lawfully capable of withdrawing its decision concerning the classification of the disputed cartoon, and to require the channel to reinvest the corresponding amounts. ■

Amélie Blocman
Légipresse

● Conseil d'Etat (5th and 4th sub-sections together), 27 April 2007, the company Métropole Télévision

FR

FR – The End of "Significant Airtime" for M6

Article 27 of the Act of 30 September 1986 on audiovisual communication provides that a decree (in this case the Decree of 17 January 1990) shall lay down the general principles concerning "the broadcasting, particularly during peak air time, in proportions at least equal to 60% of cinematographic and audiovisual works of European origin and in proportions at least equal to 40% of cinematographic and audiovisual works originally made in the French language". The French audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA) is allowed to use, instead of "peak air time" (6 to 11 p.m. every day and 2 to 11 p.m. on Wednesdays), the alternative category "significant air time" for channels observing these quotas. Significant air time is "defined each year for each service, more particularly according to the characteristics of its audience and its programming, and the importance and nature of its contribution to production". This provision was originally intended to make it easier to comply with quotas, particularly for the newer channels, since the time windows applied by the CSA can be wider but not narrower than those of common law. Thus, as for local television, the terrestrially broadcast channel M6 which was launched twenty years ago, has always had the benefit of the CSA's special "significant air time" scheme because of its audience (young - 15-34 years age bracket) and its programming (mainly music), and this gave the channel a broader window in which to meet the quotas. This airtime has remained unchanged since 1996 at 5 to 11 pm every day and 2 to 11 pm on Wednesdays, i.e. one hour more than the ordinary scheme applicable to the other terrestrially broadcast channels. The decision to maintain the special hours is reviewed by the CSA each year, according to the development of the underlying criteria. Meeting in plenary on 12 June 2007, the CSA decided not to retain M6's "significant air time" scheme for 2008, on the grounds that the general evolution of the channel and its current situation no longer justified retention. The channel has, in fact, clearly evolved away from its original definition as young with a musical specialisation towards a more generalist format. Thus the advantage given to M6 until the end of the year, and seriously criticised by its competitors, enables it to programme American series in prime time and at the same time more easily meet its quota for French series, which generate much smaller audiences. M6 could also ask the CSA to review its music obligations: up until now channels have had to devote 30% of their broadcasting to music and to produce 150 music videos, during schedule times of their choice. ■

Amélie Blocman
Légipresse

● Application to M6 of the "peak air time" scheme for 2008 – CSA press release of 12 June 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=10835

FR

FR – CSA Announcement on Listing and Numbering of Cable and Satellite Channels

The *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory authority – CSA) has delivered its first decisions in the procedure for settling differences between editors and distributors of services as organised by the Decree of 29 August 2006, in application of Article 17-1 of the Act of 30 September 1986 on the freedom of communication. The CSA had received fourteen applications from editors of channels broadcast on terrestrially broadcast digital television concerning their numbering on the cable and satellite distribution networks. The channels at issue (including NRJ12, BFM TV, LCP-AN) wanted to be listed for cable and satellite under the same numbers as those used for terrestrially broadcast digital television. NRJ12, for example, was on channel 12 for digital television, 112 on CanalSat, and 217 on the cable operator Noos. The CSA turned down these requests, however, on the grounds that the digital television channels were intended to fit into themes corresponding to their programming. The CSA held that the principle of organising services schedules by theme was in the viewer's interest. Viewers chose the programme they wanted to watch mainly because of the type of content (news, sport or cinema, for example). Thus, a theme included channels that were competing for the same audience, enabling the editors presenting similar content to compete on a fair basis.

The CSA did, however, realise that there were serious difficulties in connection with numbering in the relationship between distributors and editors, which could have unfavourable consequences for the financial balance of editors. From the viewer's perspective, it was important to be able to access the desired channels easily. For editors, numbering should enable them to reach the widest possible audience and present a degree of stability. For distributors, numbering should contribute to their commercial strategy by enabling them to adapt their offers to the expectations of subscribers and maximise the exposure of their affiliated channels. With this in mind, the CSA has decided to adopt a global approach making it possible to define the rules for numbering. It has therefore submitted, for public consultation, a draft deliberation based on Article 3-1 of the Act of 30 September 1986, according to which the CSA is to ensure the "equitable, transparent, homogeneous and non-discriminatory nature of the numbering of television services in the programmes offered by the services distributors". Apart from the pertinence of organising services schedules by theme, the draft seeks responses concerning the definition of themes and their organisation, the criteria by which a channel is categorised under a theme, and the order of the channels within a given theme. The replies to the CSA's consultation are to be received by 12 July 2007. ■

Amélie Blocman
Légipresse

● CSA, Press release no. 637 of 6 June 2007, Settlement of differences concerning the numbering of channels on cable and satellite, available at: http://merlin.obs.coe.int/redirect.php?id=10833

● Draft deliberation concerning the numbering of television services in the programmes offered by distributors of services on electronic communications networks not using frequencies allocated by the CSA, available at: http://merlin.obs.coe.int/redirect.php?id=10834

FR

GB – "Celebrity Big Brother" in Breach of Broadcasting Code

Ofcom, the UK communications regulator, has decided that the fifth series of "Celebrity Big Brother", produced by Brighter Pictures (part of Endemol) and broadcast by Channel Four, was in breach of the Broadcasting Code. The Code requires that broadcasters, who are required by the Communications Act 2003 to apply "generally accepted standards", must ensure that material which may cause offence is justified by the context, and that children must be protected from unsuitable material by means of appropriate scheduling.

Ofcom had received 44,500 complaints about comments made about, and alleged bullying of, the Indian actress Shilpa Shetty by three of her housemates. These concerned a number of different incidents. In relation to some of these Ofcom found there to be no breach of the Code, but in three cases Channel Four had failed to handle the material appropriately so as to protect members of the public from offensive material. These three incidents concerned remarks showing racial stereotyping about cooking in India, the comment "Fuck off home" made to the actress, and a reference to her as "Shilpa Poppadom".

Channel Four had submitted that the incidents had been responsibly handled, appropriately scheduled and justified by the context, being within the expectations of the Big Brother audience. It also took the view that important freedom of expression issues were at stake, and that the debate stimulated by the comments had been of "undeniable public value".

Ofcom recognised that the Code does not prohibit the broadcast of potentially offensive or harmful material; the question was whether the material had been appropriately handled by Channel Four. Ofcom examined untransmitted footage, recorded before the broadcast of the incidents, which had been logged as "racist" by the producer. Channel

Four was not aware of this because of a breakdown in communications with the producer. Ofcom found that there had been a serious breakdown in Channel Four's compliance procedures for the series so that the broadcaster was not fully aware of events in the Big Brother House and so could not handle potentially offensive material through its editorial mechanisms. If Channel Four had seen the untransmitted material it would have handled the unfolding situation in the House very differently to ensure compliance with the Code. The broadcaster had also failed to take account of the cumulative effects of the events in the house where the alleged racist bullying made otherwise borderline comments much more offensive.

Ofcom thus concluded that the breaches of the Code showed a serious failure to apply generally accepted standards, justifying the application of a statutory sanction. A fine was not imposed as Channel Four had acted promptly when it became aware of the untransmitted material and had undertaken a full review of its compliance programme; moreover, the failure represented a serious error of judgment rather than deliberate, reckless or grossly negligent action. Channel Four was thus required to broadcast a statement of Ofcom's findings in a form determined by the regulator at the start of the first programme of the new series of "Big Brother", at the start of the re-versioned programme the following morning and at the start of the first eviction show, thereby reaching the highest number of viewers. ■

Tony Prosser
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- **Ofcom Content Sanctions Committee, "Consideration of Sanction Against Channel Four Television Corporation in Respect of its Service Channel 4", available at: http://merlin.obs.coe.int/redirect.php?id=10804**

EN

GB – Videogame Refused Rating

"Manhunt 2", made by Rockstar Games for PS2 and Nintendo Wii consoles, cannot be legally supplied for the time being within the UK. This follows the decision by the British Board of Film Classification - BBFC not to give it a classification. In 2003, "Manhunt 1" was classified "18", i.e., no-one under 18 may rent or buy it.

The BBFC stated that the principal reasons underlying its decision included:

- The unrelenting focus on stalking and brutal slaying;
- The sustained and cumulative casual sadism in the way in which killings are committed; and
- its unremitting bleakness and callousness of tone.

In general, the BBFC seems to have been persuaded by the:

- sheer lack of alternative pleasures on offer to the gamer combined with,
- the overall narrative context.

The BBFC was concerned that classifying "Manhunt 2" for supply would involve "a range of unjustifiable harm risks, to both adults and minors, …and that its availability, even if statutorily confined to adults, would be unacceptable to the public". The parents of a young man who was stabbed and beaten to death have blamed "Manhunt 1", claiming that it influenced his killer – although this opinion was not shared by the police.

Rockstar Games may ask for a formal "reconsideration" from the BBFC and/or an appeal, within six weeks, to the independent Video Appeal Committee. The VAC was set up by the BBFC under the Video Recordings Act 1984.

In 1997 (the last time the BBFC decided to refuse a classification), "Carmageddon" was refused a rating – but the decision was overturned on appeal.

Information on appeals and the composition of the committee can be found in BBFC Annual Reports. Appeal decisions are also the subject of BBFC press releases. ■

David Goldberg
deeJgee
Research/Consultancy

- **BBFC Annual Reports, available at: http://merlin.obs.coe.int/redirect.php?id=10816**
- **Video Appeal Committee- VAC Terms and Conditions, available at: http://merlin.obs.coe.int/redirect.php?id=10817**

EN

IT – "Russian-Doll Programmes" Outlawed by the Italian Communications Authority

At the end of 2006, the Italian Communications Authority (AGCOM) adopted two decisions (no.169/06/CSP and no.170/06/CSP) imposing fines on two Italian commercial television broadcasters, Retequattro and Italia 1, which were found to have acted in breach of the rules governing the number of advertising breaks allowed in the course of audiovisual works. To this effect, Article 37(4) of the Italian Broadcasting Code (Legislative Decree, 31 July 2005, no. 177) transposes Article 11(3) of the Television Without Frontiers Directive insofar as it stipulates that audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries) of at least 45 minutes may be interrupted by advertising breaks once for each period of 45 minutes, plus one extra break if the work is at least 20 minutes longer than two or more complete periods of 45 minutes.

The main focus of the decisions in question was the practice of these Italian broadcasters of broadcasting so-called "Russian-doll programmes". Just like a Matryoshka doll, a "Russian-doll programme" consists of a main broadcast (such as a film) and a number of smaller broadcasts (e.g. the news, the weather forecast, etc.) that are inserted within the main programme; one or more advertising breaks are broadcast between these smaller programmes. According to the two Italian broadcasters, for the purposes of the rules on the number of advertising breaks allowed in the course of audiovisual works, the advertising breaks inserted between the smaller programmes should be related to, and calculated on the basis these short broadcasts, rather than to the main programme. As a result, in the course of a film of e.g. 100 minutes the Italian broadcasters would show two advertising breaks during the film – which is in accordance with Article 37(4) of the Italian Broadcasting Code, as this programme comprises two complete periods of 45 minutes – and one or more advertising breaks between the smaller programmes that are broadcast during the film.

Contrary to the broadcasters' view, however, in 2003 the Italian Supreme Administrative Court (*Consiglio di Stato,* Sixth Ordinary Chamber, Judgment no. 2949/2003) had ruled that "the circumstance that a film is interrupted by a short programme cannot justify [...] the exceeding of the maximum allowed number of advertising breaks" thus implying that, irrespective of the interruption by the smaller programmes, all advertising breaks that are broadcast between the beginning and the end of a film must be calculated with relation to the film itself for the purposes of Article 37(4) of the Italian Broadcasting Code.

Likewise, in the present case AGCOM took the view that inserting in a film an artificial interval composed of short programmes and advertising breaks entails, as a 'direct and immediate consequence', the violation of Article 37(4) of the Italian Broadcasting Code. Accordingly, the Italian Communications Authority established a total of 68 infringements of the rule on the number of advertising breaks and imposed fines on the two Italian broadcasters.

It must be observed, however, that the two decisions in question are but the last of a series of measures of analogous content aimed at curbing the practice of broadcasting "Russian-doll programmes". Indeed, Retequattro and Italia 1 had already been cautioned against engaging in such a practice in 2004 and 2005 (Decision no. 276/04/CSP and no. 165/04/CSP) and in early 2006 the channels were even subjected to fines of EUR 15,000 and EUR 35,000, respectively (Decision no. 67/06/CSP and no. 68/06/CSP). Most recently, the European Commission issued a pre-infringement letter concerning, *inter alia*, the Italian government's alleged failure to ensure compliance with the provisions on the number of advertising breaks laid down in Article 11(3) of the Television Without Frontiers Directive. ■

Amedeo Arena
University of Naples "Federico II"

- **AGCOM Decision no. 169/06/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10807**
- **AGCOM Decision no. 170/06/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10808**
- **AGCOM Decision no. 276/04/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10809**
- **AGCOM Decision no. 165/04/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10810**
- **AGCOM Decision no. 67/06/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10811**
- **AGCOM Decision no. 68/06/CSP, available at: http://merlin.obs.coe.int/redirect.php?id=10812**
- **Legislative Decree of 31 July 2005, no. 177, establishing the Code for radio and television available at: http://merlin.obs.coe.int/redirect.php?id=10813**

IT

MT – New Rules for Immovable Property Programmes

Following a consultation process carried out by the Broadcasting Authority at the beginning of this year (see IRIS 2007-5: 15) and after having gone through the feedback it received, the Authority is requesting programmes concerning immovable property to conform, with effect from 1 October 2007, to the following:

a) The programme in question does not contain surreptitious advertising;
b) No logos or shop fronts of estate agents may be shown during the programme;
c) The person who describes the immovable property should not be an employee or a representative of an estate agency;
d) The specific location and the name of the street, square, road etc. where the immovable property is situated shall not be identified at any stage of the programme, either visually or orally. It is, of course, permitted to refer to the city, town or village where the property is situated;
e) No mention of the immovable property's price shall be allowed. ■

Kevin Aquilina
Malta Broadcasting Authority

- **Broadcasting Authority Interpretation concerning Immovable Property Programmes, available at: http://merlin.obs.coe.int/redirect.php?id=10828**

EN

MT – New Rules for Programmes on Motor Vehicles

Following a consultation process earlier this year (see IRIS 2007-5: 15), the Broadcasting Authority has discussed the feedback it has received to its consultation document on programmes dealing with motor vehicles (hereinafter referred to as "vehicles"). The Authority has emphasised that this type of programme should not be of an advertising nature but of an informative and educational nature. Naturally, the current laws will still apply to such programmes but these programmes should in particular conform, with effect from 1 October 2007, to the following:

a) Programmes dealing with vehicles will not be considered in breach of the advertising regulations if several types or brands of vehicles produced, imported, retailed or hired by different vehicle manufacturers, importers, sellers or hirers are presented during the same series of the same programme;
b) It is permitted to mention the brand name of the vehicle and to sum up the positive as well as negative aspects of the vehicle in question. However, it shall not be acceptable to mention only the positive aspects of the said vehicle or to have repeated close-ups of the vehicle's brand name or any close-ups of the showroom from where the vehicle is exhibited, sold or hired. The producer shall ensure that the programme is balanced when dealing with such positive and negative vehicle features;
c) It shall not be permissible to invite viewers or listeners to buy such vehicles during these programmes;
d) Whilst subject to the overriding provision of paragraph (a) above, sponsorship of a programme on vehicles by an importer, seller, agent, hirer etc… is allowed, it shall not be permissible for a sponsor to advertise in that programme/s which s/he is sponsoring;
e) When the price of a vehicle is given, this shall not be used for marketing / sale purposes but only for analytical or comparative purposes in relation to other vehicles even if such other vehicles have not been tested during the same programme;
f) The review of a vehicle's features should be conducted by a competent person such as a mechanic or vehicle enthusiast with the provision that if the competent person is an employee or a representative of the firm importing, retailing or hiring such vehicles s/he is not introduced accordingly during the said programme;
g) Promotional material should be avoided. Promotional material includes foreign promotional material supplied by the vehicle's manufacturer or producer and which contains details of an advertising nature; or when the vehicle is given undue prominence beyond the aim of providing information. Undue prominence is given when the address, telephone number or other contact details of the importer or agent are supplied, any website of the importer or agent are displayed or when the vehicle is filmed in the showroom and the name of the importer or agent or other details of the showroom are given so as to identify from which importer or agent that vehicle can be purchased;
h) "Vehicle" includes cars, buses, trucks, motorcycles and other means of transport of any class or description intended for the conveyance of persons or goods. ■

Kevin Aquilina
Malta Broadcasting Authority

● Broadcasting Authority Interpretation concerning Programmes on Motor Vehicles, available at:
http://merlin.obs.coe.int/redirect.php?id=10829

EN

NL – Inclusion of Several Fragments of a Documentary in a PSB News Programme not in Breach of Copyright

The public service broadcaster TROS had included nine fragments, lasting a total of three minutes and 12 seconds, of a documentary entitled "China Blue" in one of its news programmes. The Dutch Film Fund, which holds an exclusive licence in respect of the documentary, took TROS to court claiming its copyright had been infringed.

TROS argued before the court, on the grounds of several articles of the Dutch Copyright Act, that it had not acted in breach of the Fund's rights in the documentary. The decisive argument was based on Article 15a of the Dutch Copyright Act, which allows a work to be quoted under specific circumstances. Quoting a work is permissible *inter alia* if it is aimed at announcing the work so as to draw attention to it, or to an event relating to it. This was the case since China Blue was scheduled to *première* during the time at which it was referred to in the news programme. The court also held that TROS had not made a disproportionate use of documentary fragments in its news programme.

The ruling therefore concluded that the broadcasting by TROS of its news programme, containing several extracts of the documentary, did not constitute an infringement of copyright. Although the matter is settled with regard to the copyright infringement claim, the dispute is not entirely resolved as the complainant is intent on proving that an agreement it concluded with TROS contractually prohibited the broadcaster from making use of the documentary extracts in this manner. ■

Mara Rossini
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● Judgment of 6 June 2007, Dutch Film Fund v. TROS, available at:
http://merlin.obs.coe.int/redirect.php?id=10832

NL

NL – Liberalisation and Clarification of Sponsorship Rules for Commercial and Public Service Broadcasters

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The Dutch Media Authority is *inter alia* responsible for the practical implementation of broadcasting legislation. It fulfils this duty by means of instruments such as "policy rules". It has recently amended existing policy rules concerning sponsorship of both commercial and public service broadcasters.

Where commercial broadcasters are concerned, the Media Authority is seeking to create and promote a level playing field for the commercial television market. A number of innovations include the following:

- The inclusion of the name or trademark (the latter includes logos) of a sponsor in the title of a sponsored programme is permitted provided the broadcaster can prove that editorial and commercial material are separated. It is now also permissible to display the sponsor's products and services if this is done in a neutral manner.
- In order to facilitate cross-media cooperation between companies that produce and distribute media content, the Media Authority is allowing commercial channels to incorporate the name of, for example, a magazine in the commercial channel's name provided the magazine is the broadcaster's own publication.
- Slogans may now also be displayed on billboards carrying the name of the sponsor. Such slogans should only serve to popularise the sponsor's name and may not serve to encourage the purchase of products. With regard to sporting events, the billboards may be displayed at the beginning of three different stages of programmes reporting sports matches: during the introduction session, the actual reporting of the match and the summary session.

Where public service broadcasters are concerned, the interpretation of the definition of "cultural programmes" has been clarified. The confusion surrounding the definition has spurred the Media Authority to step in. In practice, it was not clear whether informational programmes about museums, exhibitions, books etc. could lawfully benefit from sponsoring as they fall under the category "cultural programmes". Article 52 (2) of the Media Act allows cultural programmes to be sponsored, purely informational programmes are however excluded from this possibility. The Media Authority has issued a list of programmes and descriptions of programmes intended to illustrate what can be considered as a "cultural programme". ■

● "Rules for commercial broadcasters liberalised", press release of 31 May 2007, available at:
http://merlin.obs.coe.int/redirect.php?id=10830

● Letter of 3 May 2007 clarifying the definition of "cultural programme", available at:
http://merlin.obs.coe.int/redirect.php?id=10831

NL

RO – Compulsory Recording of Programmes

Mariana Stoican
Radio Romania International, Bucharest

According to a new decision, adopted at the beginning of May by the Romanian *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA), all broadcasters in Romania are obliged to guarantee that the programmes they broadcast are recorded in full and in real time at the same time as they are broadcast. The recordings must be preserved for thirty days from the date of the broadcast. A compulsory period of at least 45 days applies to the preservation of programmes in respect of which broadcasters have received requests for the right to reply to, or requests that correction statements be made.

At the CNA's request, broadcasters are obliged to make the recordings of certain programmes available in the following formats: analogue recordings on VHS cassettes at normal or long play speed or digital recordings on CD/DVD in a standard format, such as AVI, MPEG-2 or MPEG-4. An analogue recording on a standard audiocassette or a digital recording on CD is prescribed for radio programmes.

Under the provisions of section 91 of Audiovisual Act no. 504/2002, if the Romanian broadcasters concerned do not comply with this Decision they will be sent reminders calling on them to implement the provisions by specified deadlines, failing which they face fines of between RON 2,500 and RON 25,000 (approximately EUR 777 to EUR 7,772).

When this Decision enters into force, it will replace the provisions of Decision no. 234/2003 on the obligation of broadcasting licence holders to record programmes. ■

***● Decizia CNA Nr. 412 din 10 mai 2007 privind obligaţiile ce revin radiodifuzorilor la înregistrarea programelor de radio şi de televiziune* (CNA Decision no. 412 of 10 May 2007), available at:**
http://merlin.obs.coe.int/redirect.php?id=10819

***● Decizia Consiliului Naţional al Audiovizualului Nr. 234/2003 privind obligaţiile ce revin titularilor de licenţă de emisie referitor la înregistrarea programelor de radio şi de televiziune, Monitorul Oficial al României, Partea I, Nr. 517 din 17 iulie 2003* (CNA Decision no. 234/2003 of 17 July 2003)**

RO

RU – Emergence of the Super Authority in the Broadcasting Sector

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On 12 March 2007, the President of the Russian Federation issued a Decree regulating the status of the new authority - the Federal Service for Supervision in the Sphere of Mass Communications, Telecommunications and Protection of Cultural Heritage. The new Service shall be organised on the basis of two different bodies: one authorised to supervise in the sphere of mass communications and protection of cultural heritage, and another authorised to supervise in the telecommunications sphere. The Service shall also obtain some additional powers handed over from other administrative bodies functioning in the mass media and communications sphere. These developments can be viewed as a continuation of the administrative reform that had started in 2004 (see IRIS 2004-5: 15 and IRIS 2004-8: 13).

The Decree defined the status of the new body in general terms. According to para 3 of the Decree the Service shall perform both the legal regulation and supervision and control in the sphere of mass media and mass communications, IT and telecommunications, protection of cultural heritage, copyright and neighbouring rights, and the organisation of radio frequencies distribution. The Government was given the task to work out detailed regulation of the Service activities over the course of two months. On 6 June 2007, the Government approved Ordinance N. 354 providing corresponding regulation.

According to para 2 and 4 of the Presidential Decree and para 2 of Ordinance N. 354 the new Service shall not be under a governmental ministry as was the case with the two services it replaces, it shall fall directly under the command of the Government of the Russian Federation. Firstly, both the Service and the head of the service shall be authorised to pass normative acts concerning issues that are in the Service's competence. In addition, the powers of the Ministry of Culture and Mass Communications to pass normative acts regulating activities of the Federal Competition Commission (a public body conducting broadcasting license competitions) and to establish rules for granting permission to disseminate foreign mass media production were handed over to the new Service. Secondly, the Service shall have the right to introduce bills concerning its sphere of competence.

The Service shall also provide: (1) supervision and control in the sphere of the mass media, television and radio broadcasting, telecommunications, copyright and neighbouring rights, cultural heritage, activities of accredited copyright and neighbouring rights collective management societies; (2) registration of the mass media; (3) licensing of broadcasting and telecommunication activities; (4) accreditation of copyright and neighbouring rights collective management societies; (5) assignment of radio frequencies; (6) administration of the registers of the mass media outlets, broadcasting licenses and major operators of general usage telecommunications networks; (7) organisation and provision of both the Federal Competition Commission and activities on radio frequency services.

- **Decree of the President of the Russian Federation of 12 March 2007 N 320 "*О Федеральной службе по надзору в сфере массовых коммуникаций, связи и охраны культурного наследия*" ("On the Federal Service on Supervision in the Sphere of Mass Communications, Telecommunications and Protection of Cultural Heritage"), available at: http://merlin.obs.coe.int/redirect.php?id=10802**
- **Ordinance of the Government of the Russian Federation of 6 June 2007 N 354 "*Об утверждении Положения о Федеральной службе по надзору в сфере массовых коммуникаций, связи и охраны культурного наследия*" ("On Approving Regulations of the Federal Service on Supervision in the Sphere of Mass Communications, Telecommunications and Protection of Cultural Heritage"), available at: http://merlin.obs.coe.int/redirect.php?id=10803**

RU

SE – File-Sharing Verdict Hailed as a Success

On 12 June 2007, *Hovrätten för västra Sverige* (Court of Appeals for Western Sweden) upheld the country's first verdict in a case concerning the sharing of music files over the Internet (see IRIS 2006-10: 19). This is a verdict that has been claimed as a success both by the music industry, and by representatives of political groups who want Sweden to re-legalise file-sharing.

Jimmy Sjöström, a 45 year-old living in Borås, was convicted and fined SEK 20,000 by *Borås tingsrätt* (Borås District Court) on 16 October 2006 for sharing four music files over the Internet.

Both the prosecution and Mr Sjöström appealed the judgment. The prosecution appealed for a stricter sentence, namely a probation order coupled with a fine. Mr Sjöström moved in his appeal for all charges to be dismissed on grounds that the file-sharing was not made accessible to, or directed at, the general public.

The Court of Appeal found that, although certain requirements had to be fulfilled in order to be able to access the network where Mr Sjöström had made the music files available, the network could not be seen as a closed network. Thus, making music files available within a network is equal to making the files available to the general public.

The music industry hails the conviction as a boost for intellectual property protection. It is also believed that the verdict may act as a deterrent for future file-shares as the verdict shows that illegal file-sharing can become expensive if compared to the legal and cheap alternatives available over the Internet.

Michael Plogell
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The verdict is also hailed as a success by those supporting re-legalisation of file-sharing in Sweden. The verdict confirms that the penalty for file-sharing is a fine. As a consequence, the police will have a more difficult task securing evidence in cases of file-sharing as it is not possible to apply for search warrants in connection with crimes for which the penalty is a fine.

● **Decision of the *Hovrätten för västra Sverige* (Court of Appeals for Western Sweden), 12 June 2007**

SV

TR – Regulation of Crimes Committed via the Internet

On 4 May 2007, the Turkish Parliament adopted the Turkish Code 5651, which regulates Internet contents and stipulates crimes committed via the Internet (see IRIS 2007-5: 19).

The first part of the Code regulates criminal law matters, whereas the second part concerns civil law aspects.

According to the Code, access to a website shall be banned, if there is sufficient suspicion that certain crimes are being committed via that Internet website. Those crimes are: (i) the encouraging of people to commit suicide, (ii) the sexual abuse of children, (iii) the facilitation of the abuse of drugs, (iv) the provision of dangerous substances for health care, (v) obscenity, (vi) prostitution, (vii) gambling as well as (viii) crimes that are regulated in the Turkish Code 5816 which stipulates crimes against Ataturk.

Upon receiving a complaint or as a result of his/her own observations a prosecuting attorney can file an application for a ban on access to the related website to be issued by a judge within 24 hours. In an urgent situation prosecuting attorneys can themselves impose a ban, which then needs to be approved by a judge within 24 hours (the judge's decision has therefore to follow within a period of 24 hours). A given ban has to be applied as soon as possible and the block must be carried out by the Internet service provider within 24 hours following the judicial order. If the judge does not approve the block, then the prosecuting attorney must restore all access to the relevant website.

If the prosecuting attorney comes to the decision that the relevant Internet content does not contain any criminal substance or if it is judged by the court that the content does not constitute a crime, the ban will be removed and access to the website will be restored.

If the Internet service provider or the hosting provider does not block all access to the relevant website, the responsible staff may be punished with a penalty ranging from six months to up to two years imprisonment.

Additionally, the Telecommunication and Transmission Presidency, which is established by this Code to work under the Turkish Telecommunication Council, is entitled to impose a ban without a judge's approval, if (i) a website contains the above mentioned crimes and its content and hosting providers reside outside of Turkey, or (ii) if a website includes content with sexual abuse of children or obscenity and its content and hosting providers reside in Turkey. This ban must then be applied by the Internet service provider. Whenever a perpetrator and his/her residence are identified, the Presidency has to inform the prosecuting attorney in order to start the criminal procedure.

If an individual is of the opinion that a website violates his or her personal rights, he or she can request that the Internet service provider or hosting provider remove this content, and also publish a response within a seven day period covering an area as broad as the original presentation, and in the same place where the offensive content was presented before. Internet service providers or the hosting provider shall comply with the request within two days. If this period is exceeded, the request is deemed to be rejected. In this case, the demand can be filed at the local Criminal Peace Court within 15 days. The Court then has to take a decision within three days without a trial. The Court's decision can be appealed at higher courts. Upon the Court's approval, the Internet service provider or the hosting provider have to remove the content and are obliged to publish a reply from the claimant within two days. If the internet service provider or the hosting provider does not obey the Court's decision, their responsible staff may be punished with a penalty ranging from six months to up to two years imprisonment.

Selcuk Akkas
Akkas & Associates Law Firm, Istanbul

● ***Internet Ortaminda Yapilan Yayinlarin Düzenlenmesi ve Bu Yayinlar Yoluyla Işlenen Suçlarla Mücadele Edilmesi Hakkinda Kanun* (Turkish Code 5651), available at:**
http://merlin.obs.coe.int/redirect.php?id=10855

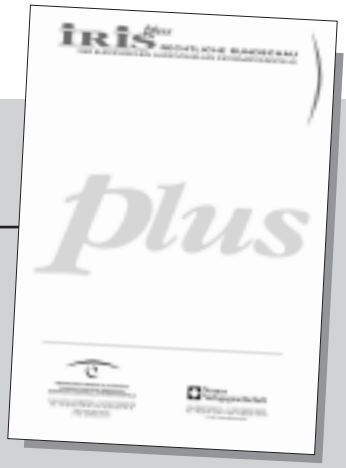
TR

Preview of next month's issue:

IRIS plus 2007-8

Licensing Television and Radio in post-Soviet States

by Andrei Richter
Moscow Media Law and Policy Center (MMLPC)



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