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European Court of Human Rights: Case of Filatenko v. Russia

In the year 2000, the journalist Aleksandr Grigoryevich Filatenko was convicted of defamation. The reason behind the defamation proceedings was a critical question he formulated during a broadcast live show he was presenting as a journalist working for Tyva, the regional state television and radio broadcasting company in the Tyva Republic of the Russian Federation. The controversial question, based on a question raised by a viewer phoning in, referred to an incident during which the Tyva Republic flag had been torn off a car, which was campaigning in support of the Otechestvo Party candidate. It was a matter of disagreement as to how Filatenko had worded that question during the programme. The opinion of the plaintiff was that Filatenko had presented the incident as if the Tyva flag had been torn down and stamped on by people from the Edinstvo Campaign Headquarters. Filatenko denied having made any such allegation: he only admitted to having specified that the incident had taken place near the Edinstvo Campaign Headquarters. In the defamation proceedings brought against Filatenko and the broadcasting company by members of the Edinstvo Movement, the Kyzyl District Court accepted the plaintiff's version as to how the question had been worded. As the video recording of the show had been lost, the district court relied solely on witness testimonies confirming the plaintiff's version of Filatenko's wording of the question. Filatenko was found guilty of defamation and ordered to pay approximately EUR 347 compensation for damages. Tyva was ordered to broadcast a rectification in the same time slot as the original show.

In a judgment of 6 December 2007, the European Court of Human Rights was of the opinion that this conviction and court order violate Article 10 of the European Convention on Human Rights. The Court reiterated that, as a general rule, any opinions and information aired during an electoral campaign should be considered part of a debate on questions of

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public interest and that there is little scope under Article 10 for restrictions on such debate. Similarly, punishing a journalist for having worded a question in a certain way, thus seriously hampering the contribution of the press to a matter of public interest, should not be envisaged unless there is a particularly strong justification. Therefore, the timing (just before elections) and format of the show (live and aimed at encouraging lively political debate), required very good reasons for any kind of restriction on its participants' freedom of expression. The European Court found that the Russian courts have failed to make an acceptable assessment of the relevant facts and have not given sufficient reasons for finding that Filatenko's wording of the question had been defamatory. Furthermore, there was no indication that the assumed allegation contained in Filatenko's question had represented an attack on anyone's personal reputation. The Court was also of the opinion that there could be no serious doubts about Filatenko's good faith. He had merely requested a reaction from the show's participants on an event of major public concern, without making any affirmations. According to the European Court Filatenko could not be criticised for having failed to verify facts, given the obvious constraints of a live television show, while a representative of the Edinstvo political movement had been present and invited to respond to the question. The Court therefore concluded that the interference with Filatenko's freedom of expression had not been sufficiently justified, and hence violated Article 10 of the Convention. ■

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● Judgment of the European Court of Human Rights, case of Filatenko v. Russia, Application no. 73219/01 of 6 December 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237

EN

European Court of Human Rights: Grand Chamber Judgment in Case of Stoll v. Switzerland

In December 1996 the Swiss ambassador to the United States drew up a "strategic document", classified as "confidential", concerning possible strategies with regard the compensations due to Holocaust victims for unclaimed assets deposited in Swiss banks. The report was sent to the Federal Department of Foreign Affairs in Bern and to a limited list of other persons. Martin Stoll, a journalist working for the Sonntags-Zeitung, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the persons who had received a copy of this strategic paper. Shortly afterwards the Sonntags-Zeitung published two articles by Martin Stoll, accompanied by extracts from the document. In the following days other newspapers also published extracts from the report. In 1999, Stoll was sentenced to a fine of CHF 800 (EUR 520) for publishing "official confidential deliberations" within the meaning of Article 293 of the Criminal Code. This provision not only punishes the person who is responsible for the breach of confidence of official secrets, but also those who helped, as an accomplice, to publish such secrets. The Swiss Press Council, to which the case had also been referred in the meantime, found that the way in which Stoll had focused on the confidential report, by shortening the analysis and failing to place the report sufficiently into context, had irresponsibly made some extracts appear sensational and shocking. In a judgment of 25 April 2006, the Strasbourg Court of Human Rights held, by four votes to three, that the conviction of Stoll was to be considered as a breach of the journalist's freedom of expression as guaranteed by Article 10 of the Human Rights Convention. For the Court, it was of crucial importance that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although a justified principle, could not be protected at any price. Furthermore, as Stoll had only been convicted because he published parts of the document in the newspaper, the European Court was of the opinion that the finding by the Swiss Press Council that he had neglected his professional ethics by focusing on some extracts in a sensationalist way, should not be taken into account to determine whether or not the publishing of the document was legitimate.

In a judgment of 10 December 2007, the Grand Chamber of the European Court of Human Rights has now, with twelve votes to five, overruled this finding of a violation of Article 10. Although the Grand Chamber recognises that the information contained in the ambassador's paper concerned matters of public interest and that the articles from Stoll were published in the context of an important public, impassioned debate in Switzerland with an international dimension, it is of the opinion that the disclosure of the ambassador's report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations, and of having negative repercussions on the negotiations being conducted by Switzerland. The judgment underlines that the fact that Stoll did not himself act illegally by obtaining the leaked document is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities: as a journalist he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Swiss Criminal Code. Finally the Court emphasised that the impugned articles were written and presented in a sensationalist style, that they suggested inappropri-

ately that the ambassador's remarks were anti-Semitic, that they were of a trivial nature and were also inaccurate and likely to mislead the reader. Similar to the Swiss Press Council, the Court observes a number of shortcomings in the form of the published articles. The Court comes to the conclusion that the "truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate" and that there has been no violation of Article 10 of the Convention. The five dissenting judges expressed the opinion that the majority decision is a "dangerous and unjustified departure from the Court's well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies". The judgment of the Grand Chamber also contrasts remarkably with the principle enshrined in the 19 December 2006 Joint Declaration by the UN, OSCE, OAS and ACHPR according to which "journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it". ■

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● Judgment of the European Court of Human Rights (Grand Chamber), case of Stoll v. Switzerland, Application no. 69698/01 of 10 December 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237

EN-FR

European Court of Human Rights: Cases of Nur Radyo and Özgür Radyo v. Turkey

In two judgments the European Court of Human Rights considered the suspension of broadcasting licences by the *Radio ve Televizyon Üst Kurulu* (Turkish Radio and Television Supreme Council – RTÜK) as a breach of Article 10 of the Convention.

In the case of Nur Radyo Ve Televizyon Yayıncılığı A.Ş. the applicant company complained about the temporary broadcasting ban imposed on it by the RTÜK. In 1999 RTÜK censured Nur Radyo for broadcasting certain comments by a representative of the Mihr religious community, who had described an earthquake in which thousands of people had died in the Izmit region of Turkey (August 1999) as a "warning from Allah" against the "enemies of Allah", who had decided on their "death". The RTÜK found that such comments breached the rule laid down in section 4 (c) of Law no. 3984 prohibiting broadcasting that was contrary to the principles forming part of the general principles laid down in the Constitution, to democratic rules and to human rights. As the applicant company had already received a warning for breaching the same rule, the RTÜK decided to suspend its radio broadcasting licence for 180 days. Nur Radyo challenged this measure in the Turkish courts, but to no avail. Finally it applied before the European Court of Human Rights, alleging a violation of its right to freedom of expression. Nur Radyo argued, in particular, that it had put forward a religious explanation for the earthquake, which all listeners were free to support or oppose. The European Court acknowledged the seriousness of the offending comments and the particularly tragic context in which they were made. It also notes that they were of a proselytising nature in that they accorded religious significance to a natural disaster. However, although the comments might have been shocking and offensive, they did not in any way incite to violence and were not liable to stir up hatred against people. The Court reiterated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of an interference. It therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued, which constitutes a violation of Article 10 of the Convention.

In the other case, the applicant company was Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. The case concerned the 365-day suspension of the company's operating licence on account of a song that it had broadcast. The RTÜK took the view that the words of the offending song infringed the principle set forth in section 4(g) of Law no. 3984, prohibiting the broadcasting of material likely to incite the population to violence, terrorism or ethnic discrimination, and of a nature to arouse feelings of hatred. After exhausting all national remedies, Özgür Radyo-Ses Radyo Televizyon lodged a complaint in Strasbourg under Article 10 of the Convention that the Turkish authorities had interfered with its right to freedom of expression in a manner that could not be regarded as necessary in a democratic society. In its judgment, the European Court considered that the song reflected a political content and criticised the military. The song however referred to events that took place more than 30 years ago. Over and above, the lyrics of the song were very well known in Turkey and the song had been distributed over many years, with the authorisation of the Ministry of Culture. According to the Court the song did present a risk of inciting to hatred or hostility amongst the population. There was no pressing social need for the interference and the sanction suspending the broadcaster's licence for such a long period was not proportionate to the legitimate aim of the protection of public order. The Court found that there had been a violation of Article 10 of the Convention. ■

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● Judgment of the European Court of Human Rights (second section), case of Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey, Application no. 6587/03 of 27 November 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237

● Judgment of the European Court of Human Rights (second section), case of Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey, Application no. 11369/03 of 4 December 2007, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

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Court of Justice of the European Communities: Promusicae v. Telefónica

On 29 January 2008, the Grand Chamber of the Court of Justice issued its judgment in case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU (Telefónica). Promusicae is a non-profit-making organisation of producers and publishers of musical and audiovisual recordings. It asked the Spanish *Juzgado de lo Mercantil No. 5 de Madrid* (Commercial Court No 5, Madrid) for Telefónica to be ordered to disclose the identities and physical addresses of certain persons whom it provided with Internet access services. According to Promusicae, those persons used the peer-to-peer file sharing application KaZaA and provided access via shared files of personal computers to phonograms in which the members of Promusicae held the exploitation rights.

The national court decided to stay the proceedings and referred a question to the Court of Justice for a preliminary ruling. The reference for a preliminary ruling concerned the interpretation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic commerce Directive), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive), Directive 2004/48/EC on the enforcement of intellectual property rights, and Articles 17(2) and 47 of the Charter of Fundamental Rights of the European Union. The national court essentially asked whether Community law, in particular these Directives, must be interpreted as requiring Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.

Aside from the directives mentioned above, the Court of Justice considers Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), of use for deciding the case. The Court of Justice finds that this Directive does not preclude the possibility for the Member States to lay down an obligation to disclose personal data in the context of civil proceedings. As to the directives mentioned by the national court, the Court of Justice notes that the purpose of these directives is that the Member States should ensure, especially in the information society, effective protection of intellectual property, in particular copyright. However, it follows from Article 1(5)(b) of Directive 2000/31/EC, Article 9 of Directive 2001/29/EC and Article 8(3)(e) of Directive 2004/48/EC that such protection cannot affect the requirements of the protection of personal data.

The national court also referred to the right to property, which includes intellectual property rights such as copyright, and the right to an effective remedy as laid down in Articles 17 and 47 of the Charter of Fundamental Rights of the European Union. The Court of Justice adds another fundamental right, namely the right that guarantees protection of personal data and hence of private life as laid down in Article 7 of the Charter and Article 8 of the European Convention on Human Rights. According to recital 2 in the preamble to the Directive on privacy and electronic communications, the directive seeks to respect, *inter alia*, this fundamental right.

The Court of Justice concludes that all mentioned directives do not require the Member States to lay down, in a situation such as that in this case, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of these which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation, which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. ■

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● Judgment of the Court (Grand Chamber) of 29 January 2008, Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU (Telefónica), available at:
http://merlin.obs.coe.int/redirect.php?id=11150
BG-CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LV-LT-MT-NL-PL-PT-RO-SK-SL-SV

Court of Justice of the European Communities: Case of Centro Europa 7

On 28 July 1999, Centro Europa 7 was granted rights by the competent Italian authorities for terrestrial television broadcasting at the national level, authorising the installation and use of a television network using analogue technology. The national allocation plan for radio frequencies adopted on 30 October 1998 would see to the allocation of frequencies for such broadcasting activities. However, the plan was never adopted. Instead a series of national laws succeeded each other, which prevented Centro Europa 7 from effectively making use of its rights to the benefit of incumbent operators. Centro Europa 7 sought justice before domestic courts and the highest Italian administrative court, the *Consiglio di Stato* (Council of State), which while reviewing the case

referred ten questions to the European Court of Justice. The *Consiglio di Stato* asked the Court to rule on the interpretation of the provisions of the EC Treaty on freedom to provide services and competition, Directive 2002/21/EC (Framework Directive), Directive 2002/20/EC (Authorisation Directive), Commission Directive 2002/77/EC ('the Competition Directive'), and Article 10 of the ECHR, in so far as Article 6 EU refers thereto.

The European Court of Justice declared two questions as being inadmissible as the Court had not been presented with the necessary information to enable it to adequately rule on the matter. The Court summed up the situation as one in which incumbent operators have been allowed to carry on their broadcasting activities through several legislative interventions to the detriment of new entrants having secured rights for terrestrial television broadcasting. These legislative interventions consisted of a series of laws providing for transitional arrangements in favour of the incumbent networks, which had the effect of preventing operators without radio frequencies, such as Centro Europa 7, from accessing the market it sought to operate in and for which it had successfully secured rights in 1999. The Court deemed these transitional arrangements to have been constructed in a manner contrary to the NCRF, which implements provisions of the Treaty, in particular those on freedom to provide services, in the area of electronic communications networks and services. Several provisions of the NCRF do indeed call for objective, transparent, non-discriminatory and proportionate criteria to be observed in the process of allocating and assigning radio frequencies. These criteria are not present in the Italian system of legal transitional arrangements, which left untouched the status of incumbent networks as the radio frequencies de facto continued to be theirs to use and prevented Centro Europa 7 from exercising its rights as it was not given the practical means to do so through the subsequent allocation of radio frequencies.

The Court concluded: "Article 49 EC and, from the date on which they became applicable, Article 9(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), and Article 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services must be interpreted as precluding, in television broadcasting matters, national legislation, the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria." ■

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● **Judgment of the Court (Fourth Chamber), 31 January 2008, Case C-380/05, Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, available at:**
http://merlin.obs.coe.int/redirect.php?id=11153

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

European Commission: Greek Law Liberalising Broadcasting Services Prompts Commission to Close Infringement Procedure

In September 2007 Greece formally notified the European Commission regarding the new Greek "Law on Media Concentration" prompting the Commission to close an ongoing infringement procedure. This new law has been described by the Competition Commissioner as the legislative step with which Greece "has finally completed its national regulatory framework for broadcasting transmission services". After it was referred to the European Court of Justice for failure to implement Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, the Hellenic Republic was faced with the Court's judgment of 14 April 2005 confirming it had not complied with its obligation to notify national implementation measures by the prescribed deadline of 24 July 2003. The 2002/77/EC Directive aims to guarantee competitive market conditions throughout the European Union extending the principle of full market liberalisation to all electronic communications services, including broadcasting services. Almost exactly a year after the Court's ruling, the Commission sent Greece a "letter of formal notice" inquiring about the progress made with regard to the implementation obligations. Greece responded, explaining that a new media law was in the making, which would deal with broadcasting transmission services as prescribed by the Directive. A reasoned opinion was then sent by the Commission requesting compliance with the Court's ruling by the end of 2006. Greece was able to avert a second round before the European Court of Justice when it notified the EC, in September 2007, that a new bill on media concentration had been adopted by the Greek parliament. The resulting new law liberalises analogue and digital broadcasting services, allowing these services to be provided on the basis of a declaration made according to the procedure set out in the Greek electronic Communications Law 3431/2006. ■

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● **"Competition: Commission welcomes implementation of EU framework for broadcasting services in Greece", press release of 1 February 2008, IP/08/169, available at:**
http://merlin.obs.coe.int/redirect.php?id=11159

DE-EL-EN-FR

European Commission: Preliminary Conclusion with regard to Financing of ORF

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On the basis of a series of complaints received since 2004, the European Commission has been looking into the degree of transparency and control surrounding the public mission and financing of the Austrian public service broadcaster ORF. Aside from claims alleging insufficiency of transparency and control of ORF's public mission and financing, the scope and public financing of the broadcaster's online activities and sports broadcasts have also been challenged. After reviewing the information presented by both the complainants and the Austrian authorities, The Commission has come to the preliminary conclusion that the definition of the public service remit of the ORF is not precise enough - especially where online activities and sports programmes are concerned - and the fulfillment of the public service tasks is not subject to adequate supervision. In addition to these findings, the Commission observes that no adequate mechanisms seem to be in place to prevent overcompensation and to ensure that ORF carries out its commercial activities in line with market principles.

The Commission has suggested measures that would help bring Austria's state funding of the public service broadcaster into line with EC state aid rules. The Austrian authorities now have the opportunity to propose measures of their own, which may satisfy the Commission's criteria and demands, eventually resulting in the closure of the investigation. Until the Austrian funding scheme has been clarified, the case remains open in much the same way as the cases concerning the Belgian, Irish and Dutch state financing of public service broadcasters. ■

● **"State Aid: Commission requests Austria to clarify financing of public service broadcaster ORF", press release of 31 January 2008, IP/08/130, available at: http://merlin.obs.coe.int/redirect.php?id=11163**

DE-EN-FR

European Commission: Infringement Procedure Concerning Gambling Legislation

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The European Commission has officially requested Germany to submit information on national legislation restricting the supply of gambling services, the first step in an infringement procedure under Article 226 of the EC Treaty. The European Commission wishes to investigate the possible infringement of Articles 43, 49 and 56 of the Treaty.

The Commission's inquiry focuses on a number of provisions of the new *Glücksspiel-Staatsvertrag* (Inter-State Gambling Agreement), which entered into force on 1 January 2008 having been agreed by the Minister-Presidents of the *Bundesländer* in December 2006. Under the new rules, private gambling services are subject to numerous restrictions. These include a ban on public games of chance on the Internet. Advertising for games of chance on TV, the Internet and via telephone is prohibited and is also restricted in terms of content. Private lotteries, sports betting and casinos are largely forbidden.

The Commission wishes to verify whether the measures in question are compatible with the internal market rules set out in the EC Treaty. It is particularly concerned about the total ban on games of chance on the Internet. The Commission had submitted detailed opinions to Germany concerning sports betting in March and May 2007. It had criticised the ban on public games of chance on the Internet, describing them as inappropriate and disproportionate for the achievement of the relevant objectives. In its recent request for information, the Commission refers, in particular, to case law of the European Court of Justice that states that any restrictions on gambling that seek to protect general interest objectives, such as consumer protection, and must be "consistent and systematic" in how they seek to limit activities (see Placanica, C-338/04, C-359/04 and C-360/04). The Commission adds that a member state cannot invoke the need to restrict its citizens' access to gambling services if at the same time it encourages them to participate in State games of chance. The Commission notes, for example, that horse race betting on the Internet is allowed in Germany, as is the advertising of games of chance by mail, in the press and on the radio.

Germany now has two months in which to respond. ■

● **European Commission press release of 31 January 2008 (IP/08/119), available at: http://merlin.obs.coe.int/redirect.php?id=11128**

EN-FR-DE

NATIONAL

AT – Public Council Objects to Rise in ORF License Fee

As reported recently (see IRIS 2008-2: 8), the Foundation Board of the *Österreichische Rundfunk* (Austrian public broadcasting company – ORF) decided by a small majority on 13 December 2007 to increase the license fee by 9.4%.

On 28 January 2008, the Public Council voted by a clear majority in objection to this increase. The main reason for the objection was what it considered

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to be the inappropriate timing of the measure. It thought that such a decision should not have been taken until after the structural and cost measures announced by the management had been implemented and the results of the audit office investigation and the 2007 accounts had been published. The Public Council is an organ of the ORF, responsible for protecting the interests of viewers and listeners.

However the ORF Foundation Board exercised its right of veto under Art. 31 para.2 of the *ORF-Gesetz* (ORF Act) on 2 February, and as a result the increase will take effect as originally decided in June 2008. ■

● Press release of the Public Council at its plenary meeting of 28 January 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11131

● Press release of the Foundation Board of 2 February 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11132

DE

BG – Postponement of Tenders for Analogue Television Deemed Null and Void

In a judgement of 11 January 2008 the Supreme Administrative Court confirmed that the Council of Electronic Media (CEM) is not empowered to issue declarations, and therefore was not able to effectively postpone tender decisions by declaration.

In 2006, the CEM published eight tenders for analogue television frequencies with local coverage for the cities of Sofia (3), Plovdiv (2) and Varna (3). After a special expert commission evaluated the tender documentation prepared by the applicants in the first half of 2007, a session of the CEM was scheduled for 2 July 2007 with the only purpose being to evaluate the applications and announce the successful bidders. However, at its meeting the Council did not announce the successful bidders and adopted a declaration stating that it will take its final decision after the Council of Ministers adopted the National Digital Frequency Plan.

One of the participants in the tender, TV Sedem EAD, appealed the declaration of the CEM before a three member jury of the Supreme Administrative Court (court of first instance). On 28 September 2007, the Supreme Administrative Court issued decision No. 8898 announcing that the declaration of the Council postponing the completion of the published tenders for analogous television for the cities of Sofia, Plovdiv and Varna was null and void.

The three member jury of the Supreme Administrative Court reached its decision on the basis of the following reasons: "Although the decision of the Council was issued in the form of a declaration, the latter has direct legal effect on the completion of the procedures for the allocation of the eight free frequencies in the cities of Sofia, Plovdiv and Varna. [...] In its capacity as a collective administrative body with special competence, the Council shall adopt its decisions in accordance with the provisions of Article 34 - 36 of the Radio and Television Act. Those decisions constitute administrative acts subject to appeal before the Supreme Administrative Court. [...] The specialised state bodies can issue administrative acts, which are termed "decisions" by the legislature and that have a form and content prescribed by the law. In this case, the appealed declaration has been issued outside the competence granted to the Council by the law. The Council is not permitted to issue declarations, but only reasoned decisions (compare Article 32 para. 2 and Article 116 of the Radio and Television Act). According to the established court practice, an administrative act issued outside the competence of the issuing authority shall be deemed null and void and cannot have legal effect. [...] Based on the above, the court holds that the declaration of the Council has been issued in breach of Article 32 para 4 of the Radio and Television Act and therefore the declaration should be considered null and void".

The CEM appealed the decision of the court of first instance before a five member jury of the Supreme Administrative Court. On 11 January 2008, the court of second instance issued its decision No. 425 rejecting the Council's claim and upholding the previous decision.

On 22 January 2008, the CEM scheduled its final decision for 5 February 2008 regarding the announcement of the successful bidders in the eight tenders for analogue television. The participants in the tenders warned that they would bring the issue before the European institutions, if the Council fails again to announce the winners in the eight tender procedures.

On 5 February 2008 the CEM failed to form the necessary legal quorum and its session was cancelled. Two days later, on 7 February 2008, the Media Commission at the Parliament issued a statement that the eight tenders for analogue television should be finalised as soon as possible. ■

Rayna Nikolova
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● Supreme Administrative Court, judgement of 11 January 2008

BG

CH – Advertising within Sponsor References Unlawful

In a ruling of 4 October 2007, the Swiss *Bundesverwaltungsgericht* (Federal Administrative Court - BVG) decided that the words "*Depuis 1775*" constituted advertising and therefore, as part of a trademark, should not appear in a reference to a sponsor (case no. A-563/2007).

In autumn 2006, Publisuisse SA (a subsidiary of the Schweizerische Radio- und Fernsehgesellschaft –

SRG) refused to allow the company Montres Breguet SA to continue to appear as a sponsor of its programmes using its logo and the words "*Montres Breguet – Depuis 1775*". The opinion that the reference to the company's year of foundation constituted advertising was subsequently confirmed by the *Bundesamt für Kommunikation* (Federal Communication Office – BAKOM). *Montres Breguet SA* lost its appeal on this decision to the BVG.

Art. 2 lit. o of the *Radio- und Fernsehgesetz* (Radio and Television Act – RTVG), which entered into force on 1 April 2007, defines sponsorship as the "participation of a natural or legal person in the direct or indirect financing of a programme with the purpose of promoting its own name, brand or image". Under Art. 12 para. 3 RTVG, sponsored programmes may neither "promote the conclusion of legal transactions concerning the goods or services of sponsors or third parties nor contain references of an advertising nature concerning goods and services". The court considered the words "*Depuis 1775*" to be product-related because they formed part of the official logo used by the sponsor to characterise its own products and services and to distinguish them from those of its competitors. It also thought that these words emphasised not only the company's age, but also the quality of its products on account of its wealth of tradition and experience. The court also explained that the sponsor reference would also be unlawful if the advertising element concerned only the company. It stated that sponsorship, like advertising, was subject, above and beyond the wording of Art. 12 para. 3 RTVG, to the basic principle of the separation of advertising and programme material, and therefore to the need for advertising to be recognisable. It should therefore not be used for direct or indirect advertising purposes. Art. 12 para. 3 RTVG prohibited not only advertising for a company's products and services, but also all forms of advertising in relation to sponsorship.

Referring to the plaintiff's claim, the BVG noted, in particular, that on account of the unambiguous provision of the RTVG, it was irrelevant whether, and to what extent, Swiss company law permitted advertising in trademarks. ■

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- **Ruling of the *BVG*, 4 October 2007 (case no. A-563/2007), available at: http://merlin.obs.coe.int/redirect.php?id=11140**

DE

CH – Capacity of an Exclusive Licence Holder to Instigate Legal Proceedings

The capacity of an exclusive licence holder to instigate legal proceedings in the case of the violation of copyright by a third party has been a controversial issue for some time. Capacity to instigate proceedings in this case means the ability of a licence holder, in their own name, to claim a ban and the ceasing of the infringement of copyright.

The matter has finally been clarified by the Federal Court in a decision delivered on 29 August 2007. The judges in Switzerland's supreme court have upheld that, in its current version, the federal legislation on copyright and neighbouring rights of 9 October 1992 (Copyright Act – "LDA") does not confer on a licence holder the capacity to instigate legal proceedings in the event of a third party infringing the rules on copyright. The Federal Court, nevertheless, admitted that the right to instigate legal proceedings may be transferred to the licence holder, who would then have the capacity to instigate legal proceedings against a third party, if this were to be explicitly or implicitly authorised by the copyright holder. It is not, however, necessary for the party granting the licence to include such authorisation in the actual licence contract; authorisation may also be given separately or subsequently, even with a view to dealing with a specific case.

In the case brought before the Federal Court, the judges had to consider the capacity of the Swiss national broadcasting company Société Suisse de Radiodiffusion et Télévision (SSR) to instigate legal proceedings in the context of the case involving the French company Métropole Télévision, which operates the M6 television channel. Since January 2002, Métropole Télévision has been broadcasting a second signal (separate from the one used for broadcasting to France) including advertising directed specifically at viewers in the French-speaking part of Switzerland. The Federal Court allowed SSR to instigate proceedings (in its capacity as an exclusive licence holder) on the basis of the authorisations granted by the holders of copyright for the films and series broadcast by both SSR and M6.

It should be noted that, on 22 June 2007, the Federal Parliament adopted an amendment to the federal Act on patents allowing the holder of an exclusive licence the capacity to instigate legal proceedings. On this occasion the Federal Parliament had also revised the Copyright Act in order to harmonise all intellectual property legislation with regard to the capacity to instigate legal proceedings. Thus, the new Articles 62, paragraph 3, and 65, paragraph 5, LDA provide that a person holding an exclusive licence may him-/herself instigate legal proceedings on the grounds of violation of copyright on condition that the licence contract does not explicitly exclude this. The new Article 81a LDA, nevertheless, states that the rules on the capacity of licence holders to instigate legal proceedings only applies to licence contracts concluded or confirmed after the entry into force of the new legal provisions, which will probably be sometime in 2008. ■

Patrice Aubry
Télévision Suisse Romande (Geneva)

- **Decision 4A_55/2007 delivered by the Federal Court on 29 August 2007**
- **Federal Act on copyright, amended on 22 June 2007**

DE-FR-IT

CH – Extension of Compulsory Collective Management on Behalf of Distributors

In the context of the revision of the Federal Act on copyright and neighbouring rights of 9 October 1992 (LDA), the Federal Parliament approved, in October 2007, an extension of the scope of compulsory collective management on behalf of distribution bodies. These provisions should enter into force on 1 July 2008.

The new Article 22a LDA settles the use of archive productions belonging to distributors. According to this provision, the right to distribute such productions, or to make them available on demand, can only be exercised by the approved management companies. An "archive production" is a work in the form of a phonogram or videogram that has been produced by the distribution body or commissioned by it from a third party. The first circulation of the work must have occurred at least ten years previously. Article 22a LDA also applies to archive productions that contain other works or parts of works, on condition that these do not substantially determine the nature of the production; this exception applies more particularly to recordings of concerts, which are thus excluded from compulsory collective management. Lastly, the application of Article 22a LDA is also excluded if a contract concluded before the first screening of the archive production, or within the following ten years, governs these rights of use and remuneration for their use; in this case, only the contractual provisions apply, in order to avoid double remuneration.

Article 22b LDA governs the use made of "orphan" works. These arrangements concern archives that the public may access, or that are held by distributors but whose rightsholders are unknown or cannot be traced. Article 22b LDA introduces compulsory collective management when at least ten years have passed since the production or reproduction of the phonograms or videograms containing the orphan works in question.

In addition, the new Article 22c LDA also makes collective management compulsory for the right to availability held by the producers and the performing artists on commercial phonograms used in radio and television productions. This provision applies when the broadcast is produced largely by the distributors themselves, or at their request, and the music is used as background music for the broadcast. Article 22c LDA includes the right to make broadcasts available as video on demand, either with or without downloading, either free of charge or for payment.

Lastly, the new Article 24b LDA clarifies the distributor's right to use phonograms or videograms available on the market for the requirements of the broadcasts it produces. Thus, the legal provision acknowledges the existence of a right of reproduction for the purpose of distribution in favour of producers and performing artists, but makes this right subject to compulsory collective management by incorporating it in the rates for the distributors' activities. ■

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● **Federal Act on Copyright, amended on 5 October 2007**
DE-FR-IT

DE – Right of Reply to Ambiguous Remarks

In a decision on general principle, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) ruled that the right of reply to ambiguous remarks should not be granted if the breach of personality rights is the result of only one possible and reasonable interpretation of a text. If a text has a hidden message, the right of reply must be limited to content whose meaning is irrefutable for the reader.

In 2004, the plaintiff published a magazine article about a private individual who was ordered to pay back millions received in compensation. The person concerned was granted the right to publish a reply by the civil courts. The courts argued that, although the article did not necessarily create the impressions that the applicant claimed in their complaint, any possible interpretation could suffice to justify the granting of the right of reply where ambiguous remarks were concerned, as long as this was not too far-fetched. The BVerfG overturned the decisions appealed by the plaintiff on the grounds that they infringed the freedom of the press protected in Art. 5 para. 1.2 of the *Grundgesetz* (Basic Law).

In its reasoning, the Court explained that in cases in which – as was the case here – it was unclear whether a hidden meaning lay beneath the obvious one, decisions should be based on the principles for dealing with ambiguous remarks. It was necessary to decide whether an injunction should be granted or whether damages, compensation or the right of correction should be awarded. In the latter case, the freedom of opinion was violated if a court based its decision on one interpretation without first excluding other interpretations, which did not justify such a sanction. If a writer had to fear punishment for making remarks even though the wording and context of those remarks could be interpreted in a way that would not result in such a punishment, this could lead to the suppression of an admissible comment and a form of intimidation that contradicted the basic freedom of communication. However, an injunction could be granted if the remarks concerned could be interpreted in such a way as to breach an individual's personality rights.

In the contested decisions, the courts concerned had wrongly assumed that the principles that applied to injunctions were applicable. However, according to

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the BVerfG, in contrast to an injunction, there was a danger that a reply could have intimidating effects, particularly that the publication of a reply could cause almost irreparable damage to the image of the publishing company concerned. A reply could lead readers to doubt and distrust any truthful reporting in a way that would later be virtually irreversible. Therefore, the Court ruled that the principles applicable to damages, compensation and correction should apply to the right of reply. It was therefore compatible with the Constitution to only grant the right of reply if the hidden remarks that were the basis of the complaint were understood by the reader as the irrefutable message of the text. ■

● Ruling of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 19 December 2007 (1 BvR 967/05), available at:
http://merlin.obs.coe.int/redirect.php?id=11133
DE

DE – Liability for Internet Connections and Content

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In a decision of 20 December 2007 (case no. 11 W 58/07), the *Oberlandesgericht* (Appeal Court - OLG) of Frankfurt a.M. ruled that the owner of an Internet connection was not necessarily responsible for copyright infringements committed by a family member – in this case, so-called file-sharing infringements. Connection owners should only be held liable if they were under an obligation to monitor the Internet use of family members. Such an obligation only applied if the connection owner had actual grounds for suspecting that the connection might be used to break the law. Such grounds only existed if similar infringements had been committed in the past or if there were other reasons to suspect an intention to commit such infringements. Liability could not be based solely on the fact that copyright infringements were common on the Internet and widely reported in the media.

In another case, the OLG Frankfurt a.M. ruled on 22 January 2008 (case no. 6 W 10/08) that an access provider was not responsible for illegal websites that could be accessed using its Internet service (see IRIS 2008-2: 10). A provider of pornographic content argued that an access provider should be obliged to block its customers' access to certain search engines because they could be used to find pornographic content which, in its view, infringed provisions on the protection of minors. The court ruled that the role of Internet access providers was content-neutral.

There was therefore no obligation to block access. ■

● Ruling of the OLG (Appeal Court) of Frankfurt a.M. of 20 December 2007 (case no. 11 W 58/07), available at:
http://merlin.obs.coe.int/redirect.php?id=11134

● Ruling of the OLG (Appeal Court) of Frankfurt a.M. of 22 January 2008 (case no. 6 W 10/08), available at:
http://merlin.obs.coe.int/redirect.php?id=11135
DE

FR – Copyright Protection for the Title of a Television Programme

Can a television programme be protected by copyright? This was the relatively conventional question raised at the regional court in Paris. In the case at issue, the applicant had submitted to a production company a project for broadcast in short format for a series using characters aged between 25 and 30 talking on the telephone, called "Allo? T'es où?" ('Hello? Where are you?'). On discovering that the company, without following up the submitted project, was scheduling a series of 50 episodes entitled "Allo T où", to be broadcast on TF1, the party concerned accused the company of infringement of copyright, claiming that there were flagrant similarities and resemblances between the original text that he had submitted and the series that was broadcast. The party concerned based their claim more particularly on the title, the concept of the characters talking exclusively on the telephone, and the format of the broadcast. The court found that the discussions and the documents showed that the format of the broadcast was the result of the order placed by the manager of the defendant company, so the applicant party could not claim protection. Nor could the concept of the characters talking exclusively on the telephone be protected, by virtue of the principle of the freedom of movement of ideas. The court nevertheless noted that the titles ("Allo T où" and "Allo? T'es où?") were virtually identical – they were pronounced in the same way and they had the same meaning; only the spelling was slightly different. Furthermore, it transpired from the documents produced that the idea for using recurring characters that only spoke by telephone was the idea of the applicant party and in consequence the title of the programme was probably also his creation. No document mentioned that the manager of the defendant company had in any way taken part in putting together the concept, and hence the title. Moreover, the title appears in the first and second versions of the original text drawn up by the applicant party and hence divulged under his name, thereby creating a presumption of ownership that was not cancelled out by any of the documents. The court held that there could be no doubt as to the originality of the title; it was new, and although the expression was used frequently, particularly since the appearance of mobile phones, it was still origi-

nal as a title for a television programme. Recalling that Article L 112-4 of the Intellectual Property Code provides that "the title of a work, if it is of an original nature, is protected in the same way as the work itself", the court ordered the production company to pay the applicant party the sum of EUR 30,000 in damages as compensation for the prejudice suffered. It also ordered the company to add the name of the applicant party to the credits of the disputed programme or, failing that, to change the title of the programme. ■

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● Regional Court of Paris (3rd chamber, 3rd section), 16 January 2008, Mr Delasnerie v. Sàrl Télé Images

FR

FR – Bill on Combating Internet Piracy Looking more Definite

The Minister for Culture, Christine Albanel, seems to be determined to implement the agreement resulting from the "Olivennes Mission" signed on 23 November 2007 on the cultural offer and combating piracy on the Internet (see IRIS 2008-1: 12). Ms Albanel referred to the new details of the bill using the "graduated response" in her inaugural speech at MIDEM 2008 (the trade fair for music professionals held in Cannes at the end of January). Confirming that the fight against mass piracy was going to undergo changes in its logic, she recalled that this would henceforth include a preventive stage and would not necessarily pass through the courts. The legal procedure and the penalties incurred (up to 3 years in prison and a fine of EUR 300,000) were not suited to ordinary piracy. In accordance with the Olivennes Agreement, the *Autorité de Régulation des Mesures Techniques* (authority for regulating technical measures – ARMT), instituted by the DADVSI Act of 1 August 2006, will be responsible for preventing and sanctioning piracy. In real terms, creators whose works have been pirated could refer the matter to the ARMT (which the Minister, to take account of its new sphere of competence, proposes renaming the "high authority for the broadcasting of works and the protection of rights on the Internet"). The authority would start by sending personalised warning messages to those committing piracy. If they were to commit a subsequent offence within six months there would be a second warning and the authority would impose an appropriate sanction – the suspension of the person's Internet access for one month. If the person committed yet another offence within six months, the subscription would be terminated and the person would not be allowed to take out a subscription with another IAP for a specified period of time. The Internet user could appeal to the authority against these two sanctions (the one-month suspension and the one-year termination) using the ordinary inter partes procedure, and then before a court still to be decided upon. Furthermore, the Minister promised that the preventive dimension would be reinforced further by the commitment on the part of the Internet access providers to experiment with filtering and content recognition arrangements. Referring to a "wrong track" that she did not wish to take, Ms Albanel did however set aside the plan for a "global licence" (imposing on the IAPs a contribution that would be used as fair remuneration for beneficiaries) proposed by Jacques Attali in his report entitled "The liberalisation of growth", which was submitted to Nicolas Sarkozy on 28 January 2008. The Minister also gave details of the schedule for the bill, which should be submitted to the Council of Ministers in early April and then to the Senate. If all goes well, it should therefore be adopted by the summer. ■

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● Christine Albanel's plan for the future of the music industry, MIDEM 2008, 26 and 27 January 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11158

FR

FR – CSA Examines Sports News

In an opinion published on 8 February 2008, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) announced that it was toughening its position on the visibility of cigarette brand names during television broadcasts of motor sport competitions. As an exception to the general principle banning advertising of tobacco products set out in Article L. 3511-3 of the Public Health Code, "television channels may broadcast motor sport competitions that take place in countries where advertising for tobacco is permitted" (Art. L. 3511-5 of the Code). Previously it had been considered in the case law that the notion of "broadcasting" provided for in Article L. 3511-5 was not limited to the competition itself, but also included everything surrounding the event that provided information to viewers. On 24 September 2007, the court of appeal in Paris, to which the matter had been referred by the *Comité National contre la Tabagisme* (national committee against the abuse of tobacco), adopted a much more restrictive definition of the notion of "broadcasting motor sport competitions". Since current technology makes it possible, when broadcasting after the event, to delete all references to brands of cigarettes, the court felt that the exception provided for in Article L. 3511-5 should only refer to the live broadcast-

ing of sports events. If the brand names of cigarettes were visible during programmes scheduled for broadcasting several hours or even several days after the competition actually takes place, the television service would be violating Article L. 3511-3 of the Public Health Code. The court of appeal in Paris, therefore, held that news reports, interviews, broadcasts, credits and trailers did not fall within the scope of the exception provided for in Article L. 3511-5. The CSA therefore took note of this new case law. Henceforth, it will not accept the appearance of brands of cigarettes except in the context of the live broadcasting of a motor sport competition. Moreover, the CSA announced, on 11 February 2008 that it was launching a "concerted study" in order to envisage the most suitable solutions for guaranteeing the proper application of the right to quote and, more generally, the right to information in the context of sport. Since the introduction of the Act of 13 July 1992, which laid down the relevant principle, the offer of audiovisual programmes devoted to sport has changed considerably. The launch of continuous news television channels, the creation of new generalist channels, the appearance of non-linear sport content available on the Internet and on mobile phones are all factors that make it necessary to consider all the legal arrangements in force and their relevance in the light of the new audiovisual landscape. More particularly, the CSA says that it has been approached in recent months by a number of service editors, who wish to know the CSA position on a possible updating of the rules defining broadcasters' access to images of sports events. One of these editors was, for example, France Télévisions, who had lost its magazine devoted to premier league football when the professional football league put out tenders, and was claiming entitlement to five to ten minutes of images for each day of League 1 football, whereas the 1992 Act authorised no more than one and a half minutes per weekend of the championship. Furthermore, the new AMS Directive of 11 December 2007, which ought to be transposed into French law sometime in 2008, gives television services a right of access to short extracts of broadcasts of events of major interest to the public. It is also with this in mind that the CSA is launching its consideration of the issue, with a view to respecting the legitimate interests of the public, the service editors, and everyone involved in the world of sport. ■

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- **Plenary assembly held on 15 January 2008: Advertising for tobacco brands and products during sports broadcasts – new case law. Available at: http://merlin.obs.coe.int/redirect.php?id=11156**
- **CSA press release: The right to information on sport – the CSA undertakes concerted study; 11 February 2008; available at: http://merlin.obs.coe.int/redirect.php?id=11157**

FR

GB – Virgin Media Broadband Radio Advertisement Cleared by the Advertising Standards Authority

An adjudication by the UK Advertising Standards Authority Council (Broadcast) has decided that a radio advertisement for Virgin Media Broadband did not infringe the British Code of Advertising Practice Radio Advertising Code, Section 3, concerning "Misleadingness". A parallel adjudication by the Advertising Standards Authority Council (Non-broadcast) also cleared Virgin in respect of a national press advertisement headed "Truth, Lies and Broadband".

In total, 10 claims were the subject of the adjudication. However, most of the objections, made by both the general public and competitors (British Sky Broadcasting Ltd and Talk Talk Telecom Ltd), complained about the advertisement's claim that Virgin did not "use copper wire". Objectors argued that some of the co-axial cable used between people's homes and the network is made from copper.

However, the ASA found that, whilst this was the case, the main point of Virgin's claim focused on the technical performance of its cable rather, than its component materials per se. ■

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- **ASA Adjudications - Virgin Media Ltd, 6 February 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11146**
- **The Broadcast Committee of Advertising Practice Radio Advertising Standards Code, available at: http://merlin.obs.coe.int/redirect.php?id=11147**

EN

GB – Minister Orders BSkyB to Divest Most of Shareholding in ITV Plc

The UK's major competition authority, the Competition Commission, decided in December that BSkyB's 17.9% holding in ITV Plc, the UK's major commercial broadcaster, amounted to a merger situation and had resulted in a substantial lessening of competition within the UK market for all television services. As a result the Secretary of State for Business and Enterprise has ordered the shareholding to be reduced to a level below 7.5%.

In November 2006, BSkyB announced that it had acquired a 17.9% shareholding in ITV Plc, which at the time was facing a possible takeover by Virgin Media. The minister referred the matter to the competition authority (the Office of Fair Trading) and to the communications regulator, Ofcom, to consider issues of the public interest. The OFT decided that there had been a merger situation, which might be

expected to result in a substantial lessening of competition; the minister considered that the issue of media plurality was also relevant. The issue was then referred to the Competition Commission, whose provisional report (see IRIS 2007-10: 14) and its final report, published in December 2007, both found that the transaction had resulted in a substantial lessening of competition. However, the Commission rejected the argument based on media plurality as it considered that the strong culture of editorial independence within ITV made it unlikely that the views and interests of BSkyB would influence issues of editorial policy. News was provided by a separate enterprise with its own board, and was subject to regulatory mechanisms in order to maintain standards. Thus there was insufficient evidence to suggest that the shareholding would give BSkyB the ability or incentive to exert editorial influence over ITV's news output. The minister agreed with this finding.

Thus the minister's decision was based only on the substantial lessening of competition as a result of the shareholding. The Competition Commission had considered either full divestment or partial divestment as potential remedies, favouring the latter as more proportionate. BSkyB's proposed action of placing the shares in an independent voting trust would require continued monitoring of the trust's independence and would not address the competition issue as future transactions could still be affected by a threat to sell the shares. The minister decided to impose the remedies recommended by the Competition Commission of partial divestment to reduce the shareholding below 7.5% and to require behavioural undertakings from BSkyB, which included not disposing of the shares to an associated person, not seeking or accepting representation on the ITV board and not reacquiring shares in ITV. BSkyB now has the right to appeal the decision before the Competition Appeal Tribunal. ■

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- **Department for Business, Enterprise and Regulatory Reform, "Final Decision on BSKYB's Stake in ITV", Press Release 29 January 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11144**
- **"Final Decision by the Secretary of State for Business, Enterprise and Regulatory Reform on British Sky Broadcasting Group's Acquisition of a 17.9% Shareholding in ITV plc Dated 29 January 2008", available at: http://merlin.obs.coe.int/redirect.php?id=11145**

EN

HR – Rulebook on Special Conditions for Performance of Radio and Television Activities

In October 2007, according to the provisions of the *Izmjene i dopune Zakona o elektroničkim medijima* (Law on amendments of the Law on Electronic Media, see IRIS 2007-6: 13 and IRIS 2007-9: 15), the Council for Electronic Media adopted a "Rulebook on special technical, spatial, financial and personnel conditions for performance of radio and television activities".

The Rulebook stipulates a number of minimum requirements for television and radio broadcasters operating at state, regional, county, city, municipality or other concession levels set by special regulations, in particular as regards their premises and financial basis.

For the performance of television activities a television broadcaster has to insure minimal spatial conditions. He has to provide: a separate room for each member of the management and/or the editor in chief, the editing, studios, the journalists and the marketing as well as auxiliary space. A separate room for book-keeping is also required, if the broadcaster performs carries out its own book-keeping. On the level of municipality and city broadcasters the total premises shall have at least 50 m². On the level of county broadcasting licensees and in the City of Zagreb the premises space shall have a minimum of 80 m², on the regional level at least 90 m², and on the state level at least 100 m². For broadcasting on other levels the Council for Electronic Media will decide on the minimum room to be provided by the broadcaster.

As regards financial minimum standards, a television broadcaster has to ensure basic financial resources of an amount sufficient for the broadcaster's expenses for three months - the sum is dependent upon the concession level and other conditions - according to the broadcasters business plan. The fulfilment of the financial conditions will be evaluated on the basis of the television broadcaster's business plan, which is to be certified with original documents outlining available or secured financial resources, as well as on creditworthiness and solvency.

The rules further provide for a number of personnel requirements. Thus, a television broadcaster has to have an editor in chief and a director/president of administration/head-master; the same person can fill both roles. Furthermore, the broadcaster should have permanently employed journalists. According to the concession level the personnel requirements are as follows:

a) State, regional, county and city level: an editor in chief, a news programme editor, at least two journalists, at least two cameramen/editors/technicians;
b) County level: an editor in chief, a news programme editor, at least one journalist, at least one cameraman/editor/technician;
c) City level: an editor in chief, a news programme editor/journalist, at least one journalist, one cameraman/editor/technician;
d) Municipality and other levels to be determined by

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a special regulation: one journalist, one cameraman/editor/technician.

For the performance of non-profit television activities special minimal conditions are applied; they are similar to those for the municipality concession level, except where this activity is performed on a higher concession level or another level determined by special regulation. ■

● ***Pravilnika o posebnim tehničkim, prostornim, financijskim i kadrovskim uvjetima za obavljanje djelatnosti radija i televizije*** **(Rulebook on special technical, spatial, financial and personnel conditions for performance of radio and television activities),** ***Narodne novine*** **(Official Gazette) number 111/07, available at: http://merlin.obs.coe.int/redirect.php?id=9658**

HR

LT – Regulation on Misleading and Comparative Advertising Revised

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Radio and Television Commission of Lithuania

With the aim of implementing the Unfair Commercial Practices Directive (Directive 2005/29/EC) the Lithuanian *Seimas* (Parliament) amended the *Lietuvos Respublikos reklamos įstatymas* (Law on Advertising). The new law came into force on 1 February 2008.

Principally, it was the provisions regarding misleading and comparative advertising that were amended. As the provisions of the Law on Advertising are applicable also to advertising in broadcasting, these amendments and additions are also relevant for the field of broadcasting.

According to the new Law, advertising shall be considered as misleading if its content is incomplete and if essential information is not revealed, concealed, inaccurate, ambiguous or presented not in due time and thus, might cause or is likely to cause an average consumer to form and take a decision on a transaction, which he (she) would not have otherwise taken.

The amendments also specify the requirements on comparative advertising. The Law allows comparative advertising if it does not cause confusion with regard to commercial undertakings, i.e. of the advertiser and its rival, or of their trademarks, names, or other tags with distinguishable features, goods or services.

Aside from the amendments related to the implementation of the Unfair Commercial Practices Directive, the Law on Advertising also defined the liability for a violation of the stipulated requirements. According to the amended Law, the fine for the use of misleading and forbidden advertising that can be imposed on the operators of advertising activity (makers and distributors of advertising, including broadcasters) may reach from LTL 1,000 (around EUR 290) to LTL 30,000 (EUR 8,695). In cases of aggravating circumstances, the fine may reach LTL 120,000 (EUR 34,782). According to the amended Law, the amount of the fine shall depend on the type, the duration and the degree of the violation as well as on any possible extenuating or aggravating circumstances.

Fines for misleading and illicit comparative advertising shall be imposed by the Competition Council on the operators of advertising activity. The National Consumer Protection Council is designated to impose fines for infringements of the provisions on forbidden advertising and for breaches of the requirements on advertising use. ■

● ***Lietuvos Respublikos reklamos įstatymas*** **(Law on Advertising of the Republic of Lithuania), available at: http://merlin.obs.coe.int/redirect.php?id=11143**

LT

LU – New Law Grants 80% Tax Exemption on Income from Intellectual Property

Article 50*bis* of the Income Tax Code, which came into force on 1 January 2008, makes Luxembourg one of the most attractive jurisdictions worldwide for holding certain types of Intellectual Property.

The new law introduces an 80% tax exemption on the net income derived by a Luxembourg taxpayer from a software copyright, patent, trademark or service mark, design or model. According to the Parliamentary Commission's report, Internet domain names are also eligible. The concept of "net income" is defined in the legislation as the gross royalties received, minus the expenses directly linked to this income. This includes annual depreciations and potential write-downs.

In order for the new scheme to be applicable, a number of conditions must be met. The most important of these are: to be eligible under the new regime, the Intellectual Property must have been acquired (or created) after 31 December 2007; the Intellectual Property must not have been acquired from an "affiliated company". For the purposes of this exclusion rule, a company is considered "affiliated":

- if the buying company directly holds 10% or more of the share capital of the selling company;
- if the selling company directly holds 10% or more of the share capital of the buying company or
- if a third company holds 10% or more of the share capital of both the selling and the buying company.

Both individual taxpayers and companies are eligible.

Capital gains realised when selling Intellectual Property rights are also eligible, in principle, for the 80% tax exemption. However, taxable gains may be adjusted by the tax authorities under certain conditions.

Article 50*bis*, §2 allows taxpayers who have developed their own patent for in-house use and do not derive any income from it, to claim a notional

deduction of 80% of the possible income from granting the right to use it to third parties. However, only registered patents are eligible for this deduction.

Marc Thewes
Thewes and Reuter, Luxembourg

The Law accepts that if no market value is available, the market value of the IP can be determined by any well-accepted method for the valuation of Intellectual Property. ■

MT – Directive on Programmes and Advertisements Broadcast During the Electoral Period

Following the issue of the Presidential writ that general elections will be held on 8 March 2008, together with local council elections for 23 localities in Malta and Gozo, the Broadcasting Authority issued a Directive governing programmes and advertisements broadcast between 11 February and 8 March 2008. This Directive, which came into force on 11 February 2008, requires all radio and television stations to submit their programme schedules for approval to the Broadcasting Authority so that the latter would be in a position to ensure that during the electoral campaign periods all political parties are given an opportunity to air their views and that all programmes containing political content ensure a level playing field between all the political parties concerned, in the interest of fair and democratic elections.

Care has to be taken during this period to ensure that all programmes and all advertisements are free of material that could be interpreted as favouring or giving undue exposure to any political party or candidate, or which might be reasonably considered as being directed towards a political end. In particular it is not permissible in the case of advertisements commissioned by public or other entities: to allow persons who have submitted their candidature for these elections to appear in such advertisements; that a programme is presented by a person who has submitted his or her candidature for these elections when such person is not a regular employee of the station broadcasting such programme; that the person who has submitted his or her candidature for these elections participates in a regular manner in a programme during the said period. A candidate is not considered to have participated regularly when s/he participates in less than two editions of the same programme in the above-mentioned period.

During the day preceding the elections and on the actual day of polling (hereinafter referred to as "the silence period"), all forms of broadcasting that might influence voters are prohibited. Broadcasting stations have to avoid a situation where during the silence period they broadcast programmes, which could be reasonably interpreted as broadcasting with a view to influence voters. All forms of presentation in the broadcasting media of political parties, candidates and other movements and organisations involved in the elections must cease. Broadcasting stations cannot broadcast information, statements, press and media releases issued by the government, the opposition, candidates, politicians, political parties and other movements and organisations involved in the elections, and other forms of broadcasting that are, openly or in a covert manner, of a political nature, have political content, or which may influence the decisions of the voters. Nor may informative advertisements commissioned by public entities, including public service announcements, be broadcast unless these are of public interest and of an urgent nature.

The following is also prohibited during the two-day silence period: agitation, information related to an electoral campaign, and announcements designed for presentation of programmes, logos, mottos and symbols of a political party and a candidate. All forms of media presentations concerning the electoral campaign (such as free presentations, political propaganda, discussion programmes, interviews, etc.) are also prohibited. ■

Kevin Aquilina
Broadcasting Authority

● Broadcasting Authority Directive of 6 February 2008 on Programmes and Advertisements Broadcast during the Period 11 February to 8 March 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11149

MT-EN

PL – Working Document on the Transition to Digital Broadcasting

On 4 May 2005 the Polish government adopted "the transition from analogue to digital broadcasting strategy", a long-term act guiding national policy in the area of the digital media (see IRIS 2005-7: 17). According to the strategy, on 8 August 2007, the Ministry of Transport (MT) in cooperation with the Office of Electronic Communications (OEC) and the National Broadcasting Council (NBC) prepared a working document entitled: "Plan for implementing terrestrial digital television in the DVB-T standard". In the context of a wide consultation procedure some ministries, broadcasters and interested governmental and non-governmental institutions have presented a number of detailed remarks to this document concerning technical, economic and legal issues. Some of these are included in a new version of the Plan of 14 January 2008.

The Plan represents the first stage of implementing digital television in Poland up until the moment of the switch-off of terrestrial analogue transmissions. Thus a new autonomous legal act implementing and regulating this convergent environment is envisaged; it should be a *lex specialis* to both Telecommunication Law and the Broadcasting Act. The project of the Act should be prepared by 31 July 2008 and should focus

on issues related to creating a nation-wide primary multiplex. It should ensure, in particular, the continuity of access to television broadcasting for all citizens during the transition period and determine the transitory period between the first general accessible digital transmissions and the term of analogue switch-off. Then, taking into consideration technical (e.g. the means for future management of the "digital dividend"), social and other factors, the comprehensive system for making use of free frequencies will be established. In particular, the social demand for particular TV channels, which should be transmitted via terrestrial means and which have not been included in primary multiplexes should be determined.

According to the schedule of activities, which form a major part of the Plan, the following issues should be noted:

1) Digital television broadcasting should start after 1 January 2009. The precise date will be determined on the basis of detailed schedules of nation-wide primary multiplexes prepared by the OEC. These schedules should include technical conditions (based on ETSI standards). After 31 December 2012, which is the term of analogue switch-off, at most 8 nation-wide terrestrial digital networks will be in use; the exact number will depend on the future management of free frequencies after the completion of the switchover procedure. The term of analogue switch-off can be rescheduled, to a date up until 17 June 2015, by the Council of Ministers.
2) The transition to digital transmission should be achieved gradually in the territory of the whole country. The simulcast of analogue and digital transmission will continue for at least one year after digital broadcasting has been introduced in a particular area; the analogue switch-off in a given region will then be acceptable, taking into consideration indicators such as accessibility of digital transmission for the public.
   Terrestrial broadcasters, such as public television channels, TVN, Polsat, TV4, TV Puls will have an authorisation to be placed within the scope of multiplex services. Technical capabilities required to meet the broadcasters' needs and possible ways of assisting them in the digital switchover should be prepared.
3) Prevention of social exclusion is one of the major but also difficult problems to be solved. It seems to be difficult to "achieve" a social acceptance of the costs of transition to digital switch-over; the high costs are a crucial obstacle to this process. There is no doubt that some kind of support policy is necessary in Poland if digital transmission is to replace analogue. First of all, it is necessary to ensure broad availability of set-top-boxes (digital receivers). Support for different undertakings willing to subsidise the costs of transition is important, as well as support for (also local) producers and suppliers of advanced digital TV receivers for interactive platforms. It is expected that an adequate programme concerning the support for individual viewers will be prepared, mainly by the Minister of Labour and Social Policy, by 30 June 2008.

Last but not least, a friendly environment for the provision of digital broadcasting shall be created. The widespread popularisation of digital broadcasting shall be a basic element of a governmental information campaign, which is to be prepared by the Ministry of Culture, the OCE and the NBC by 30 June 2008. ■

Katarzyna B. Maslowska
Institute of Human Science, National Defence Academy, Warsaw

RO – CNA Decision Imposes New Obligation on Cable Providers

Following a decision taken by the *Consiliul Naţional al Audiovizualului* (national council for electronic media in Romania - CNA) at its meeting on 22 January 2008 (*Decizia CNA privind obligaţia distribuitorilor de servicii de programe de a aduce la cunoştinţa publicului sancţiunile aplicate de Consiliul Naţional al Audiovizualului*), cable network operators and all "providers of broadcast programmes" in the audiovisual sector (*"distribuitorii de servicii de programe"*) sanctioned by the *CNA* are obliged to inform the public of the subject matter and reasons for the sanction using the wording set out by the CNA (Art. 1 para. 1). Under Art. 1 para. 2, providers of audiovisual services are obliged to broadcast the wording of the CNA sanction on seven consecutive days following the announcement of the sanction. The provider must broadcast the sanction on the channel on which the programme concerned was shown (Art. 1 para. 3). If a service provider also acts as the broadcaster (*radiodifuzor*), it is subject to the same obligation according to para. 4.

Art. 2 of the CNA decision states that failure to respect the decision will be sanctioned in accordance with Art. 91 of Audiovisual Act No. 504/2002 (including the subsequent amendments and additions). Therefore, the CNA will punish breaches with a caution under the terms of Art. 91 para. 2 of the Audiovisual Act, stating the conditions and deadlines for rectifying the situation. If the service provider or broadcaster fails to meet the conditions laid down in the caution, it will be fined between RON 2,500 and RON 25,000 (approx. EUR 670 and EUR 6,700) in accordance with Art. 91 para. 3. ■

Mariana Stoican
Journalist, Bucharest

● ***Decizia CNA Nr. 36 din 22 ianuarie 2008 privind obligaţia distribuitorilor de servicii de programe de a aduce la cunoştinţa publicului sancţiunile aplicate de Consiliul Naţional al Audiovizualului*** **(CNA decision no. 36 of 22 January 2008 concerning the obligation for broadcasting companies to publish sanctions imposed by the CNA), available at:**
http://merlin.obs.coe.int/redirect.php?id=11141

RO

SE – Improper Favouring of a Commercial Interest in Sponsoring Message

On 3 December 2007 *Kammarrätten i Stockholm* (The Stockholm Administrative Court of Appeals) judged in a case regarding improper favouring of a commercial interest in a sponsoring message. The case concerned the application of provisions in the *Radio- och TV-lagen* (The Radio and TV Act – RTL). The RTL transposes into Swedish law the "Television without Frontiers" Directive 89/552/EEC, amended by Directive 97/36/EC.

The programmes in question were two episodes of a Swedish TV-series broadcast by the Swedish nationwide television channel TV 4 on 2 October 2007 and 9 October 2007 respectively. During each episode there were two breaks for advertising, in connection with the breaks and before and after the programmes, sponsoring messages were broadcast.

In short, the sponsoring messages were constituted as follows. The messages broadcast on 2 October and the second break of the 9 October messages carried a voice-over saying: "The movie is presented by Eniro – search help via telephone". In connection with the voice-over a sign with a mobile phone displaying the number 118 118 was shown. Thereafter Eniro's logotype was shown. During the first break of the message broadcast on 9 October a voice-off informed: "The movie is presented by Eniro – search help via the Internet". In connection with the voice-over a sign with a computer bearing the text "eniro.se" on its screen was shown. Thereafter Eniro's logotype was shown. Eniro is a company providing services allowing users to find telephone numbers, addresses and directions to Swedish individuals and companies.

The RTL, section 6:4, states that programmes, which are not commercials, may not improperly favour commercial interests. RTL, section 7:8, stipulates that if a programme, which is not a commercial, has been paid for by someone other than the one responsible for carrying out the broadcast, then it shall be specified as to who the sponsor is. This information shall be provided at the beginning and the end of the programme respectively or at least at either the beginning or the end of the programme. *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission – GRN) filed a suit against TV 4 claiming that a special fee should be imposed on TV 4 for the improper favouring of commercial interests. The GRN claimed that the improper favouring was constituted by showing the telephone number and the URL related to Eniro's services. *Länsrätten i Stockholms län* (The Stockholm County Administrative Court) granted GRN's request and imposed a special fine amounting to SEK 100,000 (approximately EUR 10,600) on TV 4.

The Stockholm Administrative Court of Appeals overturned the judgment of the Stockholm County Administrative Court. The Administrative Court of Appeals firstly states that by showing, in addition to the sponsor's name, the telephone number and the URL, which are substantial parts of the sponsor's products, the sponsoring messages went beyond what is required for information purposes according to section 7:8 of the RTL. However, the Administrative Court of Appeals observes that the GRN based its claim on section 6:4 of the RTL, i.e. the provision regarding improper favouring.

As mentioned above, section 6:4 of the RTL concerns programmes that are not commercials. Therefore, according to the Administrative Court of Appeals, the question is whether the sponsoring messages in question can be considered as being "programmes". The main regulation of sponsoring messages is found in chapter 7 of the RTL. According to section 7:8 of the RTL the information concerning who the sponsor of a programme is shall not be included in the advertising time prescribed in section 7:5 of the RTL. The Administrative Court of Appeals states that the wording of the RTL supports the view that sponsoring messages are to be considered as messages of an advertising nature although the provisions on commercials are not fully applicable to such messages. Furthermore, it is stated that sponsoring messages should "surround" a programme. The formulation and the placing of the provision does not support the notion that a sponsoring message to be regarded as a "programme".

Hence the GRN has based its request on a provision, which is not applicable, and therefore TV 4's appeal shall be granted and the judgment of the Stockholm County Administrative Court overturned. ■

Michael Plogell & Henrik Svensson
Wistrand Advokatbyrå, Gothenburg

● **Judgment of the *Kammarrätten i Stockholm* (The Stockholm Administrative Court of Appeals), 3 December 2007**

SV

SI – Survey of Complaints in the Slovenian Audiovisual Sector in the Year 2007

This survey is based on the reports and the available data of the four regulatory and/or inspecting bodies for the period of one year. It includes all complaints related to contents, which might (seriously) impair the physical, mental and moral development of minors directly via the Internet or via mobile phones, via broadcasting and advertising in the audiovisual sector, as well as via advertising for Internet content in print.

The report of the Inspectorate for Culture and Media includes a complaint that questioned gratuitous violence content in a broadcast, and another complaint against the allegedly illegal broadcasting of pornography. Article 84 of the *Zakon o medijih* (Media Act) on the protection of children and minors stipulates that pornography is, depending on the genre, either prohibited or should be inaccessible to minors; minors should be protected by the watershed, by acoustic and visual warnings or technical devices. The Inspector for Culture and Media decided that the cable operator Telemach UPC, who violated the law,

should use a technical device for the broadcasts in question. The reason for the low number of complaints related to Article 84 of the Media Act seems to be that the Minister of Culture has not stipulated the promotion plan for pictograms indicating harmful contents, and has not yet determined the modes of their application (defined in regulation guidelines for TV programme scheduling), which is his duty according to Article 84 para. 6 of the Media Act.

The Market Inspectorate received a few complaints regarding allegedly illegitimate advertisements for "erotic" or "porno chic" contents on the Internet, accessed via mobile phones, and aimed at children. The exact number of such advertisements is not known because there is no official evidence. The advertisements were published in weeklies, radio and television programme publications, and broadcast by one of the commercial broadcasters. As it is stipulated by Article 15 of the *Zakon o varstvu potrošnikov* (Consumer Protection Act) advertising should not contain any element that could impair the physical and mental condition of children or could harm them in some other way, or exploit either their trust or lack of experience. The complaint about a television advertisement, which promoted the "erotic" pictures of teenage girls was dealt with by a Market Inspector and the offence provision was applied. The complaints concerning providers of "sexy" contents on mobile web portals, which were advertised in printed media, were not dealt with. The Chief Market Inspector did not consult the Slovenian Advertising Chamber, which is determined by law as the respective expert body (Article 13 of the Consumer Protection Act). The Advertising Arbitration Court, a part of the Slovenian Advertising Chamber that offers expert statements on request, did not receive any complaint regarding supposedly illegal or illegitimate advertising of so called erotic or porno chic Internet contents accessed via mobile phones aimed at children in the year 2007.

The Ministry for Internal Affairs reported 36 complaints related to Article 187 of the *Kazenski zakonik republike Slovenije* (Criminal Code of the Republic of Slovenia). The provision penalises: selling, exhibiting or in other ways exposing minors under fourteen years of age in pornography or porno shows (para. 1); exploitation of minors in pornographic productions or in porno shows (para. 2); production, distribution, selling, import-export or in other ways disseminating child pornography, or the possession of child pornography with the aim of producing, distributing, selling, importing-exporting or in other ways disseminating child pornography (para. 3). Regarding the illegal dissemination of child pornography via the Internet all complaint cases were regarded as being suspicious. Nine complaints were processed as indictments by the District Prosecutor Office, eight complaints were reported to the District Prosecutor Office as lacking in evidence, and 19 are still in the process of police investigation. ■

Renata Šribar
Faculty for Social Sciences at the University of Ljubljana and Centre for Media Politics of the Peace Institute, Ljubljana

UA – Constitutional Court Obliges to Dub all Films in Ukrainian

The Constitutional Court of the Ukraine issued, on 20 December 2007, a judgment about obligatory dubbing, voice-over or subtitling in the Ukrainian language of all films before their distribution. The Court accepted this decision after considering a constitutional inquiry of 60 members of the Supreme *Rada* (parliament) of Ukraine on an official interpretation of the Statute of Ukraine "On Cinematography" (See IRIS 1998-4: 9 and IRIS 1998-10: 11). A question put before the Court was: "Shall the following phrase "foreign films before their distribution in Ukraine must undergo dubbing, or post-synchronisation, or subtitling into the official language" be understood in such a way that cinematographic enterprises may not distribute foreign films, if such films are not dubbed or have not undergone post-synchronisation or subtitling into Ukrainian language".

After analysing a number of legislative acts, the Court came to the conclusion, that it was necessary to interpret that Statute exactly as suggested. Moreover, the Court specified, that any exhibition was a next step after distribution, accordingly it means that exhibition of a film both in a cinema and on television before it is at least subtitled into Ukrainian is also not possible in Ukraine. It is very explicitly indicated in the decision, that "the central body of the executive branch of government in the field of cinematography has no authority to give to the cinematography industry the right of distribution and exhibition of such films and may not provide them with the necessary state certificates".

In assessing whether this position is in line with the 1992 European Charter for Regional or Minority Languages, the Court considered that the Ukraine did not violate this document, as the Statute "On inematography" specifies, that films "can also be dubbed or undergo post-synchronisation or subtitling in languages of national minorities". This implies that the Court did not forbid the showing of the films in other languages, but created the obligation to create copies of the film in the official language.

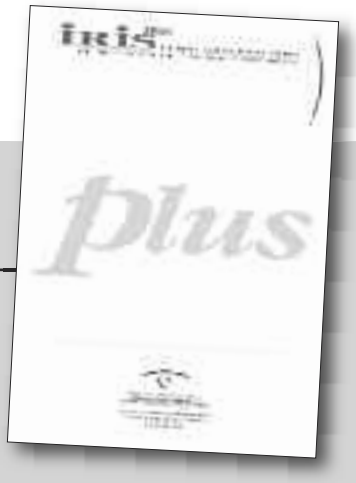
It is worth mentioning that this was the not first attempt to impose an obligatory dubbing of films. As early as 2005 a decree of the Government set quotas on the minimum amount of copies of a film in the Ukrainian language. However, this decision was later abolished by judicial order, and the government in office at the time of the decision had another approach to that question and did not make an effort to appeal. ■

Taras Shevchenko
Media Law Institute, Kiev

● ***Рішення Конституційного Суду України у справі за конституційним поданням 60 народних депутатів України про офіційне тлумачення положень частини другої статті 14 Закону України "Про кінематографію"*** **(Decision of the Constitutional Court of Ukraine on a case concerning a constitutional appeal of 60 members of parliament of Ukraine about official interpretation of paragraph 2 article 14 of the Law of Ukraine "On Cinematography". 20 December 2007, # 13-*рп*. Available at: http://merlin.obs.coe.int/redirect.php?id=11142**

UK

Preview of next month's issue:



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Media Windows In Flux

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PUBLICATIONS

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Pahlow, L., Eisfeld, J.,
Grundlagen und Grundfragen des Geistigen Eigentums
DE: Tübingen
2008, Mohr Siebeck
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Damm/Rehbock
Widerruf, Unterlassung und Schadensersatz in den Medien
Deutschland, München
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Robertson, G., Nicol, A. Q.C.
Media Law
GB, London
2008, Penguin
ISBN 978-0141030210

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Media and Entertainment Law
2008, Delmar Pub
ISBN 978-1418039127

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Propriété littéraire et artistique
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Politique du peer-to-peer : Le commun, les réseaux pair à pair et la démocratie à venir
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