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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of Yalçin Küçük (nr. 3) v. Turkey

On 22 April 2008, the European Court of Human Rights found a breach of freedom of expression in the case of Yalçin Küçük (nr. 3) v. Turkey. Küçük, a university professor and a writer, who was prosecuted on account of various speeches he gave and articles he wrote concerning the Kurdish question. In 1999, the Ankara State Security Court found him guilty of inciting hatred and hostility, of emitting separatist propaganda and of belonging to an armed group (art. 312 § 2 and art. 168 § 2 of the Criminal Code and art. 8 of the Antiterrorism Act nr. 3713). He was also convicted of assisting an armed group (art. 169 Criminal Code) on the basis of an interview for Med-TV in which Küçük had welcomed the PKK-leader Abdullah Öcalan as "Mister President" and had invited him to make a statement about the Kurdish question.

Küçük had to undergo a prison sentence of six years and six months and was ordered to pay a fine of EUR 1,300. Relying on Article 6 § 1 and Article 10 of the European Convention on Human Rights, he complained that the proceedings had been unfair and that his right to freedom of expression had been breached.

The European Court in its judgment of 22 April 2008 considered that the grounds adopted by the Turkish courts could not be regarded in themselves as sufficient to justify interference with Külçük's right to freedom of expression. While certain comments in the offending articles and speeches sought to justify separatism, which thus made them hostile in tone, taken as a whole they did not, however, advocate the use of violence, armed resistance or an uprising and did not constitute hate speech, which, in the Court's view, was the essential factor to be taken into consideration. One speech by Külçük, however, contained a sentence considered as incitement to violence and therefore could not invoke the protection guaranteed by Article 10 of the Convention.

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

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The European Court, referring to the nature and the severity of the sanctions, found that Külçük's conviction as a whole had been disproportionate to the aims pursued and, accordingly, was not "necessary in a democratic society". The Court in particular referred to the severity of the sentence of imprisonment for six years and six months. The Court held, unanimously, that there had been a violation of Article 10 and that it did not need to examine the complaints submitted under Article 6 of the Convention. It awarded Küçük EUR 3,000 in respect of non-pecuniary damage. ■

● Judgment by the European Court of Human Rights (fourth section), case of Yalçin Küçük (n° 3) v. Turkey, Application no. 71353/01 of 22 April 2008, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

Committee of Ministers: White Paper on Intercultural dialogue

In this 'Year of European Intercultural dialogue', the Ministers of Foreign Affairs of the Council of Europe have adopted the 'White Paper on intercultural dialogue'. The White Paper has been presented as a pan-European contribution to the increasingly international discussion on cultural diversity. The paper establishes that an intercultural approach is necessary to manage cultural diversity. For this approach, the paper seeks to provide a conceptual framework and a guide for policy-makers and practitioners. In addition, the media should play a role in this intercultural approach.

In order to advance the intercultural approach, it is necessary for the Contracting States to concentrate on five policy areas. First, the democratic governance of cultural diversity should be adapted. This means that the common values of democracy, human rights and fundamental freedoms, the rule of law, pluralism, tolerance, non-discrimination and mutual respect must be guaranteed by the government. Second, the democratic citizenship and participation should be strengthened. It must be easier for migrants to participate in local and regional elections, something which contributes to their prosperity and enhances integration. Third, the competences necessary for intercultural dialogue should be taught and learned. The three key competences to be taught in this respect are democratic citizenship, languages and history. The development of these competences should not be limited to primary and secondary education. On the contrary, learning outside of schools also plays a prominent role. Fourth, spaces for intercultural dialogue should be created and widened. An urban space has to be organised in open-minded ways and has to embrace busy parks, lively streets and markets. It is important that migrant populations do not find themselves isolated from city life, which is often the case. Virtual spaces created by the media can also contribute to a more open-society. Finally, intercultural dialogue should be taken to the international level. This will help to overcome sterile juxtapositions and stereotypes that may flow from the general view that the world exists of mutually exclusive civilisations, vying for relative economic and political advantages at each other's cost. International dialogue emphasises that cultural identities are increasingly complex, they overlap and contain elements from many different sources. This will eventually contribute to conflict prevention and conflict solution and support reconciliation and the rebuilding of social trust.

Subsequently, the Council of Europe continues to formulate policy directions for its future action. Included in these directions will be plans involving the media. The Council of Europe will launch a campaign against discrimination together with media professionals and journalism training institutions. Furthermore, training in intercultural competences will be offered to journalists to promote teaching outside school by the media. Moreover, media organisations are invited to promote the participation of minorities in all levels of production and management, while still paying due regard to their professional competences. The Council of Europe sees this as an important realisation of freedom of expression, for which not only public broadcasters are responsible.

Additionally, the media are encouraged to develop arrangements for sharing and co-producing material, which has proven its value in mobilising public opinion against intolerance and improving community relations. To conclude, the Council of Europe intends to institute an annual media award for media, which have made an outstanding contribution to conflict prevention or resolution, understanding and dialogue. ■

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● White Paper on Intercultural Dialogue 'Living Together as Equals in Dignity', 2 May 2008, CM (2008) 30, available at: http://merlin.obs.coe.int/redirect.php?id=11294

EN-FR

Parliamentary Assembly: Resolution on European Muslim Communities Confronted with Extremism

On 15 April 2008, the Parliamentary Assembly of the Council of Europe (PACE) unanimously adopted Resolution 1605 (2008) entitled "European Muslim Communities Confronted with Extremism". In view of the recent spate of attacks in Europe and elsewhere performed by terrorists invoking Islamic fundamentalism as justification, PACE called upon the Member States of the Council of Europe, as well as European

Muslim organisations and leaders to take relevant action.

In particular, PACE called upon European governments to, *inter alia*, condemn Islamophobia, act resolutely against hate speech, ensure respect for human rights when enforcing anti-terrorist measures and promote social cohesion and interegration of immigrants and citizens with an immigrant background. On the basis of a report by João Bosco Mota Amaral, the Political Affairs Committee rapporteur, the Assembly warned against the confusion of Islam as a faith with Islamic fundamentalism as an ideology (para. 2), the latter of which Mr. Mota Amaral characterised as "an ideology with a political agenda [that] promotes a model of society which is not compatible with the values of human rights and democracy on which European states are built". The Assembly also emphasised the importance of tackling the root causes of extremism, such as poverty, discrimination and social exclusion (para. 5). It laid particularly heavy emphasis on the rights of women, e.g. the elimination of discrimination and violence against women and the cultural relativism that justifies discriminatory practices and human rights violations at their expense (para. 9.4 – 9.7).

In addition, PACE called upon Muslim organisations, leaders and opinion-makers to clearly condemn extremism and terrorism. In this context, the role of the media is of importance: Muslim leaders should see to the promotion of a fair coverage of Mulism reality and views in the media and ensure that the voice of moderate Muslims is also reported (para. 11.8). They must also, in co-operation with appropriate media organisations, work at the elaboration of ethical guidelines for the media in the fight against Islamophobia and in favour of cultural tolerance and understanding (para. 11.9).

In the relevant Recommendation to the Council of Ministers (Recommendation 1831 (2008)), PACE asked for the activities in the field of intercultural dialogue to be considered a priority (para. 4.1), that appropriate resources for the integration of migrants and persons with migrant background be allocated (para. 4.2), and that co-operation in the field of inter-cultural and inter-religious dialogue with the UN, EU, OSCE and the Organisation of the Islamic Conference be increased (para. 4.4). The Assembly also asked that specific research on the situation of Muslim communities in Europe be conducted by ECRI and the Council of Europe Commissioner for Human Rights (para. 4.5). Finally, it greeted the recent letter of intent on co-operation between the Council of Europe and the Alliance of Civilisations and encouraged the conclusion of a Memorandum of Understanding between the two organisations (para. 2. and 4.3). ■

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- **European Muslim communities confronted with extremism, Resolution 1605 (2008) (Provisional edition), Parliamentary Assembly of the Council of Europe, 15 April 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11253**
- **European Muslim communities confronted with extremism, Recommendation 1831 (2008) (Provisional edition), Parliamentary Assembly of the Council of Europe, 15 April 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11255**

EN-FR

EUROPEAN UNION

Council of the European Union: Conclusions on Media Literacy in the Digital Environment

During its 2868th meeting concerning Youth, Culture and Education, the Council of the European Union has established Conclusions on a European approach to media literacy in the digital environment. Media literacy implies the ability of people to critically analyse what they find in the media and to make more informed choices when using the media. The Council has noted that this ability becomes essential for active citizenship and democracy. The Council is not the first institution to deal with this concept. The UNESCO and the Council of Europe have already highlighted the importance of media literacy in several documents. Also, the Audiovisual Media Services Directive has called for the development of this concept and has set out a reporting obligation for the Commission to measure the levels of media literacy in all the Member States. Finally, the Commission adopted a Communication on media literacy in December 2007 (see IRIS 2008-2: 6). The Council's Conclusions are consequently adopted in the light of the above mentioned instruments.

The Council's Conclusions invite the Commission to monitor developments in this area closely and keep under review the need for a further policy response at the European level. Furthermore, the Commission is encouraged to make use of the Contact Committee, established under the Audiovisual Media Services Directive, as a forum for the exchange of information and best practices on media literacy and the provision of input to the development of the policy agenda in this area. This Committee needs the contribution of experts from the private sector and other stakeholders.

Accordingly, the Council invites Member States to encourage different actors in the field to promote media literacy. This includes promoting the implementation of codes of conduct and other co-regulatory and self-regulatory initiatives. Stakeholders within the media and ICT are encouraged to carry out their own regular research into, and observation of, the dif-

ferent aspects and dimensions of media literacy. In addition, initiatives aimed at raising awareness are promoted, including those focusing specifically on the use of ICTs directed towards young people and their parents. Finally, Member States have to include media literacy in their learning strategies and have to encourage peer learning and the exchange of good practices between teaching professionals.

The Conclusions also underlined the relevance of programmes contributing to media literacy, such as the MEDIA 2007 Programme, the Lifelong Learning Programme 2007-2013 and the Safer Internet Plus Programme. These programmes particularly encourage young people to use the media safely.

During the same meeting the Council reached a general approach on a draft Decision of the European Parliament and the Council designating 2009 as the "European Year of creativity and innovation." If the Conclusions are successfully followed through by the Commission and the Member States next year, there will be an added reason to designate this title in 2009. ■

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• Council conclusions of 22 May 2008 on a European approach to media literacy in the digital environment (2008/C140/08), available at:
http://merlin.obs.coe.int/redirect.php?id=11301
BG-CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-RO-SK-SL-SV

European Commission: Additional Three Year Extension to the 2001 Cinema Communication

On 22 May 2008, European Commissioners Neelie Kroes and Viviane Reding issued a joint declaration on the future regime for cinema support. The declaration follows the publication of the final report of the study on the economic and cultural impact of territorial conditions in film support schemes. On the basis of the study's findings, the Commissioners intend to propose a three year extension to the current regime for state aid for film support.

The study was launched after the adoption of the Commission's Cinema Communication of 2004 and was conducted by a consortium led by Cambridge Economics. As the Commissioners noted, the final report, published on 21 May 2008, does not draw any definite conclusions as to the economic and cultural impact of territorial conditions in film support schemes, highlighting instead the need for further reflection. This would also allow for an examination of emerging trends in the sector, such as support for other activities aside from film production (including digital technology and film distribution), or competition among various Member States in order to attract investment from large-scale, primarily US-based, film production companies.

The Commissioners have suggested that further thought is necessary before a modification of the existing territorialisation criterion of the Cinema Communication is proposed. They also believe that more time is necessary in order to allow all interested stakeholders to voice an opinion. It is also necessary at this point to exercise caution, as the existing regime is widely accepted within the film sector, a fact which allows the Commission to control schemes, which may have distorting effects on competition or on trade between various Member States.

The ultimate aim of the cinema support regime is expressed in the joint declaration as one of "ensuring that Europe's national and regional cultures and creative potential are expressed in the audiovisual media of film and television. At the same time, though, it should also aim to lead to a sustainable European film sector."

The 2001 Cinema Communication has already been extended twice, once in 2004 and then again in 2007. According to Commissioners Kroes and Reding, the current aim is that the Commission be in a position to consult Member States on a new draft Communication by Autumn 2008. ■

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Institute for Information Law (IViR), University of Amsterdam

• "State aid: future regime for cinema support", Brussels 22 May 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11293
EN

European Commission: Memorandum of Understanding on Orphan Works and Other Developments in the European Digital Libraries Framework

On 4 June 2008, the High Level Expert Group on Digital Libraries (HLEG) held its 5th Meeting in Brussels. At this meeting, the HLEG presented the achievements so far with regard to a number of matters that were identified as urgent and of high priority in order to make the "i2010: European Digital Libraries" initiative a success.

First, with regard to the issue of orphan works (i.e. works whose rightsholders cannot be identified or located), the HLEG welcomed a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, which was signed by representatives of libraries, (audiovisual) archives and rightsholders. The due diligence guidelines were established by four sector specific working groups (text, audiovisual, visual/photography and music/sound), in which stakeholders voluntarily collaborated. They contain a definition of orphan works, recommendations regarding the procedure and methodology to be

applied, and a list of appropriate and generic information resources available for research. This should provide a practical tool to assist cultural institutions in identifying and locating rightsholders. The guidelines are not prescriptive, but should as far as possible be observed when searching for rightsholders. The stakeholders have also agreed to refine the guidelines if necessary and, in general, to encourage and support measures to facilitate the lawful use of orphan works and to prevent works from becoming orphaned. The implementation of the guidelines shall be reviewed after an appropriate period of time (e.g. a year).

In addition, the HLEG adopted a Final Report on Digital Preservation, Orphan Works and Out-of-Print Works. This report partly consolidates the recommendations made in previous reports (see IRIS 2007-6: 5). What is new here is the recommendation for Member States to provide for web-harvesting (i.e. the technique for collecting material from the Internet for preservation purposes) under national legal deposit legislation. As regards orphan works, the report lists a number of measures, including voluntary and regulatory measures to be taken at Member State level, which are to be mutually recognised at the inter-state level. Moreover, the HLEG endorsed two model licenses for making works that are out-of-print or out-of-distribution accessible for all: the first for authorised users in secure networks, the other for online access over open networks. Finally, the report describes certain key principles for the development of rights clearance centres and databases of orphan works and out-of-print works.

Lastly, the HLEG adopted a Final Report on Public Private Partnerships (PPP). On the basis of case studies, this report offers practical guidelines and includes a set of recommendations for partnerships between public institutions, such as libraries, archives and museums and private organisations. While currently PPPs are not widespread within the cultural sectors in Europe, the report concludes that these partnerships are essential to provide funding, technology, software and expertise for large-scale digitisation projects. It is recommended, therefore, that public institutions actively engage with private institutions when developing and implementing mass digitisation strategies. This will bring significant additional benefits to all parties involved, including the partners, citizens, rightsholders and users. ■

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- **Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, available at:**
http://merlin.obs.coe.int/redirect.php?id=11297
- **Sector-Specific Guidelines on Diligence Search Criteria for Orphan Works - Joint Report, available at:**
http://merlin.obs.coe.int/redirect.php?id=11298
- **Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, available at:**
http://merlin.obs.coe.int/redirect.php?id=11299
- **Final Report on Public Private Partnerships for the Digitisation and Online Accessibility of Europe's Cultural Heritage, available at:**
http://merlin.obs.coe.int/redirect.php?id=11300

EN

European Commission: Case against Sweden Withdrawn after Licensing System Abolition

On 5 June 2008, the European Commission withdrew the case launched before the European Court of Justice against Sweden in October 2006 for the breach of Directive 2002/77/EC on competition in the markets for electronic communications networks and services (the "Competition Directive").

According to the Directive's stipulations, Member States were obliged to abolish, before July 2003, all monopoly rights for broadcasting transmission services, including the encryption of broadcasting programmes. In contravention of this Directive, Swedish legislation maintained a system whereby Boxer, a partially state-owned company, held exclusive rights over certain digital terrestrial broadcasting services.

According to this regime, Swedish broadcasters were limited from freely operating digital terrestrial broadcasting networks. Instead, a single encryption system for the entire network was controlled by Boxer, who was also responsible for the handling and distribution of the common access card. Other broadcasters wishing to use digital terrestrial broadcasting and transmission technology were obliged to refer to Boxer in order to acquire access control services, whether these be the encryption and decryption of TV-signals or the provision of decoders, set-top boxes, smart cards and other devices. In effect, this provided Boxer with an illegal monopoly not only over encryption, but also over all digital terrestrial broadcasting programming and services.

Following the referral of the case to the ECJ on the part of the Commission, Sweden decided to amend its TV and Radio Act. As a result, competitive market conditions, as envisioned in the Competition Directive, have now been established, at least on the legislative level. The only thing remaining is for the Swedish authorities to ensure that correct implementation allows for effective competition to take place in practice as well, allowing consumers a wider range of choice of service providers. ■

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- **"Competition: Commission ends Court proceedings after Sweden abolishes Boxer's exclusive right in digital terrestrial broadcasting services", Brussels, 5 June 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11289

EN-DE-FR-SV

NATIONAL

BA – RAK Adopted Rule on Local Loop Unbundling

Dusan Babic
Media researcher and analyst, Sarajevo

At its regular session, held on 27 May 2008, the Council of the Communications Regulatory Agency (RAK) adopted the Rule on Local Loop Unbundling (LLU).

The LLU regulates the procedures to allow multiple telecommunication operators the use of connections from the telephone exchange's hub to the customers' premises. The LLU also enables communication providers to offer the full range of voice and broadband services, as well as to foster high speed Internet access, direct to the customers.

This rule is expected to increase the competition on the local network access market. To achieve this it enables the development of broadband services, in particular Internet access services. A faster and less costly access to the Internet enables a broad use of e-commerce and similar services of the information society. The access to the Unbundled Local Loop provides new operators with the possibility to offer different and competitive services, using the existing infrastructure of incumbent operators.

By adopting this rule the Communications Regulatory Agency has completed its regulatory-legislative framework, which is necessary to conduct the liberalisation process in Bosnia and Herzegovina in accordance with its legal obligations.

This conforms to regulatory frameworks already developed and introduced in the EU Member States. Although Bosnia and Herzegovina is not yet even a candidate for EU membership, it has already harmonised its media and telecommunications legislation and regulation with the EU standards. ■

BG – Bill for Amendments to the Radio and Television Act Driven by Future Digitalisation

Rayna Nikolova
Council for Electronic Media, Sofia

According to paragraph 4, item 1 of the Final and Transitional Provisions of the Electronic Communications Act (ECA) the relevant provisions of the Radio and Television Act (RTA) regarding digital licensing should have been amended in compliance with the rules of the new ECA not later than six months after the entry into force of the ECA. The ECA became effective on 25 May 2007 and therefore the legislative term for the amendments to the RTA has not been adhered to.

At the beginning of 2008, the Ministry of Culture commenced the procedure for preparing a bill for amendments to the RTA (the "Bill"). The Ministry of Culture held public consultations with all concerned parties – the Council for Electronic Media, the State Information Technology and Communications Agency, the Communications Regulation Commission, the public operators (Bulgarian National Television and Bulgarian National Radio), the Bulgarian Radio and Television Operators Association and the Television Operators Association.

Most of the recommendations and proposals made by the parties concerned were adopted in the Bill. The statement of Working Group 18, Sub-group "Audio Vision", to the Ministry of Culture includes the following: "By adopting the present Bill the legislative requirement for bringing the RTA into compliance with the ECA shall be considered fulfilled. The Bill provides for a licensing and registration procedure of programmes for terrestrial digital transmission."

Pursuant to the Bill the following important amendments have to be made to the RTA:

- The Council for Electronic Media will be competent to issue licenses for radio and television programmes for broadcasting through the electronic communications network for terrestrial digital transmission;
- The public interest for transmission of the programmes of the public operators (Bulgarian National Television and Bulgarian National Radio) is guaranteed;
- The public register kept by the Council for Electronic Media shall also include the above-mentioned licenses issued by the Council for Electronic Media;
- The terminology used in the RTA will be harmonised with the concepts used in the ECA.

The Bill was adopted by the Ministry of Culture at the beginning of April 2008. Now it has to be approved by the Council of Ministers in order to be submitted to the National Assembly. ■

CZ – Copyright Amendment Act

The Czech Parliament has passed an amendment to the Czech Republic's Copyright Act. It concerns the free movement of services and the treatment under copyright law of broadcasts received in hotels, an issue that has been debated in the Czech Republic for many years. The European Court of Justice has already considered the subject of broadcasts in hotel complexes (Case C-306/05 SGAE v. Rafael Hoteles, see IRIS 2007-2: 3) and ruled that this constitutes a "communication to the public".

The Czech government concluded from this decision that it had to adapt the Czech Copyright Act. In March 2007, the Czech Republic received a letter of formal notice from the European Commission in connection with breach of contract proceedings under Articles 43 and 49 of the EC Treaty. The Com-

mission stated that the Czech Copyright Act was not compatible with these articles. According to one of the provisions of that Act, only a legal entity based in the Czech Republic was able to exercise its copyright and other, similar, rights in that country, thus preventing a legal entity based in another member state from providing its services there, in breach of the rules on free movement of services. This provision also had to be changed in order to avoid legal proceedings and the payment of a fine.

Under the amended Act, broadcasts in accommodation facilities are now no longer exempt from the obligation to obtain a licence and pay the relevant fees. For all authorised persons, the amount of the fees should not exceed 50 per cent of the amount of the broadcasting licence charged for the use of the television or radio set and remitted to the public broadcasters. The words "based in the Czech Republic" have been deleted from section 97(2), which lays down the conditions for the exercise of copyright and associated rights. The amendment entered into force on 19 May 2008. ■

Jan Fučík
Broadcasting Council, Prague

● ***Zákon č. 168/2008 Sb. ze dne 22. dubna 2008, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů*** **(Amendment to the Copyright Act), available at:**
http://merlin.obs.coe.int/redirect.php?id=11304

CS

DE – Extent of the Obligation to Identify a Provider

The courts are being repeatedly called upon to deal with issues relating to the identification of Internet providers. The reason for this lies in the requirements of section 5 of the *Telemediengesetz* (Telemedia Act – TMG), according to which service providers must keep certain easily recognisable information directly accessible and constantly available to commercial telemedia, which customers are normally offered against payment. According to section 5(1)(2) of the Telemedia Act, which transposes Article 5(1)(c) of Directive 2000/31/EC ("Directive on Electronic Commerce") into German law, this concerns details, including the e-mail addresses, that enable the service provider to be contacted rapidly and communicated with in a direct manner. In a judgment of 21 April 2008 (Case 3 W 64/07), the *Hanseatisches Oberlandesgericht* (Hamburg Court of Appeal – OLG) ruled that the scope of the TMG – and therefore the obligation to properly identify the provider – is not limited to Internet services for which a charge is imposed. In the court's opinion, all commercial telemedia services are subject to the requirements of the TMG and are accordingly obliged to provide the details of the provider. Only Internet offerings of private individuals or non-profit associations, that is to say services that are clearly non-commercial, should not fall within the scope of the TMG. A breach of the provisions on identifying the provider constitutes a violation of competition law. However, in the court's opinion, the failure to name the supervisory authority and the number on the register of commercial firms does not have "more than an insubstantial impact on competition" within the meaning of section 3 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG).

In a judgment dated 21 April 2008 (Case 44 O 79/07), the *Landgericht Essen* (Essen Regional Court – LG) ruled that the requirements are not met when a commercial provider's website only contains a contact form without an e-mail address.

So far the question as to whether a telephone number must be given in connection with identifying a provider has not been definitively addressed.

While the *Oberlandesgericht Köln* (Cologne Court of Appeal – OLG) ruled in its judgment of 13 February 2004 (Case 6 U 109/03) that it was necessary to provide a telephone number, the *Oberlandesgericht Hamm* (Hamm Court of Appeal) ruled in its decision of 17 April 2004 (Case 20 U 222/03) that this was not required. An appeal on points of law against the Hamm Court of Appeal judgment is pending.

In proceedings to provide a preliminary ruling, the *Bundesgerichtshof* (Federal Court of Justice – BGH) referred the case to the European Court of Justice. In his final submission of 15 May 2008, Advocate General Colomer also came to the conclusion that there was no obligation to provide a telephone number in connection with the identification of a provider when a German company's website only contained an e-mail address and a form for questions to be answered by e-mail. The telephone, he said, was not the only means of ensuring direct and effective communication. The word "direct" Article 5(1)(c) of Directive 2000/31/EC only pointed out that the contact took place without an intermediary, which could be done both by telephone and e-mail. Moreover, the concept of consumer protection does not give rise to a different conclusion since there was no contractual relationship between the parties at the time relevant to this case. The BGH also requested an answer to the question as to whether a service provider is obliged, not only to give an e-mail address but also, to ensure that there is another channel for receiving enquiries from users when e-mail is an appropriate and sufficient means of quickly establishing contacts. In the Advocate General's opinion, a service provider is not obliged to make a second channel available for receiving enquiries from users when e-mail is an appropriate and sufficient means of establishing contacts quickly, and of initiating direct and effective communication. ■

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● **Advocate General Colomer's final submission of 15 May 2008 is available at:**
http://merlin.obs.coe.int/redirect.php?id=11312

DE

DE – Possibilities for Exploiting Sports Events

In a judgment dated 8 May 2008, the Stuttgart Regional Court (*Landgericht*) ruled that a video portal must not show film footage of amateur football games that fall within the responsibility of the Württemberg Football Association.

The court stated that the association held all exploitation rights as a co-organiser of the games, justifying this view by referring to the financial risk borne by the organiser and to the latter's responsibility for all the organisational aspects of a particular event. The fact that, *inter alia*, the Association organised the games, drew up the fixture lists, trained referees and provided a system of sports tribunals, justified its being attributed the status of a co-organiser. The judges held that making available the footage of amateur football games via the operator of the video portal, constituted the direct adoption of the plaintiff's product by the defendant, within the meaning of section 4(9) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG). Moreover, the Football Association's efforts to market the games that it organised were impeded within the meaning of section 4(10) of the UWG. Furthermore, the fact that the work carried out by the Association only constituted so-called "advance work" (*Vorleistungen*) was no obstacle to the assumption that the Association was a co-organiser and that its work was, accordingly, subject to additional legal protection. The court assumed that the necessary competitive relationship existed because the plaintiff, the football association, also intended to exploit amateur football games in the future, including on the Internet. It also established that the operation of the defendant's Internet portal was not the result of any effort on the part of the defendant as regards content.

The right to exploit football games is an issue that has occupied the courts in the past. In the year 2000, the Bundesliga clubs Hamburger SV and FC St. Pauli and their marketing organisation DFL demanded a fee for the first time for live and other reporting from the stadium, referring to their exploitation rights. The *Bundesgerichtshof* (Federal Court of Justice – BGH) ruled on 8 November 2005 that Bundesliga clubs may demand fees for live reporting by radio broadcasters, thus dismissing an action for a declaration brought by a radio broadcaster that objected to paying this fee. In its reasoning, the court noted that a radio broadcaster made greater use of the access it was granted to a stadium and to the game organised there than a normal spectator, or even a representative of the press. After losing the case in 2005, the broadcaster filed a constitutional complaint with the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG), the decision of which is still pending. ■

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• Judgment of the Stuttgart Regional Court of 8 May 2008 (Case 41 O 3/08 KfH), available at: http://merlin.obs.coe.int/redirect.php?id=11307

DE

DE – Copyright also Applies in the Online World

In a judgment of 21 April 2008, the *Landgericht Köln* (Cologne Regional Court) ruled that copyright protected works can also be created in the context of the "Second Life" online platform.

The case concerned a virtual model of Cologne Cathedral. The court stated that a work available on an online platform could also be protected by copyright if it could be classified as one of the types of works mentioned in section 2 of the *Urhebergesetz* (Copyright Act). As long as this classification was possible, there was, the court said, no need under this section to have recourse to the notion of a potentially original "multimedia work". The court held that the use of electronic media when producing the work was not enough to make it necessary to have recourse to the indeterminate concept of a "multimedia work".

The emphasis should be on the message conveyed by means of language, pictures and sound and not on the nature of the medium in which the work was produced.

However, in this case the court refused to grant the virtual "constructor" of the landmark copyright protection: it did not consider the quality of the personal creation to be high enough and was of the opinion that the plaintiff's image manipulations were more "technical" in nature, so that the virtual cathedral could not be regarded as a work of art within the meaning of section 2(1)(4) of the Copyright Act. Nor was it possible to consider granting protection as a photograph under section 72 or as a collective work under section 4(1). ■

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• Cologne Regional Court judgment of 21 April 2008 (Case 28 O 124/08), available at: http://merlin.obs.coe.int/redirect.php?id=11305

DE

DE – Breaches of the Ban on Surreptitious Advertising

The media authorities of the *Länder* (States) have recently noted several cases of surreptitious advertising on television and have initiated proceedings against the broadcasters concerned. Surreptitious advertising is defined in section 2(2)(6) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement) and is prohibited under the first sentence of section 7(6).

After conducting a thorough investigation, in particular concerning the contractual relationships between the television station, the producer and the programme organiser, the Media Council of the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority – *mabb*) considered that the integration of various visual and verbal references to brand names and logos into the "TV total Wok-WM" television programmes broadcast by ProSieben in 2006 and 2007 constituted surreptitious advertising and issued a complaint regarding these on 25 April 2008.

At its meeting on 16 May 2008, the Media Commission of the *Landesanstalt für Medien Nordrhein-Westfalen* (North Rhine-Westphalia Media Authority – LfM) also described the broadcast of a "Spiegel TV" programme by Vox as containing surreptitious advertising and criticised this accordingly: in a piece on German spinach products, a well-known domestic brand could be seen several times on the screen in close-up, and this emphasis was not justified on the grounds of either content or dramatic necessity. ■

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• LfM press release of 16 May 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11306

DE

ES – Supreme Court Rules on P2P

A recent decision of the *Tribunal Supremo, sala de lo penal* (Spanish Supreme Court - TS), through its criminal division, on a child pornography issue (Judgement STS 19327/2008, dated 9 May of this year), created considerable debate as regards the implications for P2P use and the potential conflict with both privacy protection and telecoms secrecy and inviolability.

Essentially, the TS concluded that upon connection to a P2P network, in this case Emule, an implicit consent is provided by the user, known and accepted by said user, which overrides the secrecy of communications, meaning that data provided by the user becomes publicly accessible and privacy cannot be invoked.

In this case, the Guardia Civil, one of the security forces that operates throughout Spain, traced P2P users online in order to identify potential child pornography P2P networks. This investigation, conducted without previous judicial authorisation, necessitated a follow-up procedure, in which the ISPs were required to identify the traced IP numbers and corresponding user IDs. As a result of this investigation, a Spanish citizen was accused and prosecuted.

The *Audiencia Provincial de Tarragona* (Tarragona Provincial Appeal Court), in the first instance, came to a verdict of not guilty, due to the violation of article 18.3 of the Spanish Constitution on telecoms inviolability, and the prosecutor then took the case to the TS.

The TS resolution considered that the legal framework affected corresponds rather to Art. 18.1 of the Spanish Constitution, Law 15/1999 on personal data (LOPD) and the relevant Regulation 1720/2007, as well as telecom laws and regulations and even, incidentally, the recent law 25/2007 on the conservation of data regarding electronic communications for security forces.

In conclusion, the TS considers data flowing on the Internet through P2P applications as public data for Internet users and thus, out of the scope of privacy and telecom inviolability protection. This implies that police forces may investigate and access such data without previous judicial approval. As a final comment, this resolution forms an important precedent and it would seem that the TS may consider acceptable in specific cases, such as those involving child abuse networks, that telecoms secrecy and even data privacy may be overridden by a higher interest. Undoubtedly, Internet user associations shall have something to say about this decision. ■

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• *Tribunal Supremo. Sala de lo Penal, sección 1, Sentencia 1932/2008, de fecha 9 de mayo de 2008, Apelación Procedimiento Abreviado* (Supreme Court, criminal court, section 1, resolution 1932/2008, of 9 of may, 2008, Appeals Brief procedure) http://merlin.obs.coe.int/redirect.php?id=11296

ES

FR – Draft Legislation on Creation and the Internet Finally Revealed

Following the criticism and amendments expressed by the *Conseil d'Etat* during its examination provision of an opinion, the draft legislation on "promoting the diffusion and protection of creation on the Internet", called the Creation and the Internet Act (see IRIS 2008-3: 12), was presented at the meeting of the Council of Ministers on 18 June 2008 by Christine Albanel, Minister for Culture. The purpose of the text, the product of the agreements resulting from the Olivennes mission (see IRIS 2008-1: 12), is to prevent and combat piracy while guaranteeing the ownership rights and moral rights of creators on the one hand, and guaranteeing the privacy of Internet users on the other. The mechanism of "graduated penalties" that is intended as a passage from the present arrangement, which is strongly repressive, to a more education-oriented

logic, has now been established. Under the DADVSI Act of 1 August 2006, unlawful downloading is now considered to be an infringement of copyright and carries a penal sanction. Anyone downloading in an illegal way currently faces a fine of up to EUR 300,000 and three years of imprisonment. This draft legislation proposes a more educational approach, via warnings issued by the newly created High Authority for the Circulation of Works and the Protection of Rights on the Internet (HADOPI), before any penalties are inflicted. The first warning will take the form of an e-mail, and the second a letter sent by registered mail. Should the infringement be repeated, the penalties that Internet users face – suspension of their access subscription for between three months and one year – would therefore be less repressive than at present. Internet pirates punished in this way would be able to negotiate a transaction to reduce the duration of the suspension of their subscription by one to three months. In the case of a company being penalised for the activities of one of its employees, the HADOPI could propose an alternative penalty in the form of an injunction compelling them to take steps to prevent their employees from downloading in an illegal way from the Internet. The Minister also stated that the HADOPI would not carry out any generalised supervision of digital networks, and neither would the IAPs. The data necessary for implementing the preventive mechanism is that already gathered by creators and cultural companies for the purposes of undertaking legal proceedings, using methods authorised by the CNIL. The judge will no longer be the only possible recipient of this information; the HADOPI will also be competent to deal with these matters. It will act exclusively when approached by economic beneficiaries, whose works have been pirated, or professional protection bodies, or the companies that collect and redistribute royalties. The penalties may be appealed in the courts. Lastly, the draft legislation improves the present procedure, which enables the regional courts, on application from the rightsholders, to order measures for the suspension, withdrawal or filtering of on-line content that infringes creators' rights. These new methods, which include an urgent procedure, replace the procedure based on the seizure of counterfeit goods set up by the Act of 21 June 2004.

In response to the substantial criticism that the text has received, the Minister concluded her presentation by emphasising that it was obviously not a matter of policing or criminalisation, nor of curtailing fundamental freedoms, "unless anyone thinks that theft is a fundamental freedom". Despite her initial preference, the text will not go before the Senate before the autumn, but she hopes it will come into force "in the first few days" of 2009. ■

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● **Draft legislation in favour of the circulation and protection of creation on the Internet, available at:**
http://merlin.obs.coe.int/redirect.php?id=11309

FR

FR – CSA Launches Public Consultation on the Right to Information in the Field of Sport

The *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body - CSA) announced on 10 June the opening of a public consultation on the right to information in the field of sport, continuing on from the consideration of the subject since last February. There are currently two methods for public audiovisual access to sports events. The first is the broadcasting of the event, usually live and generally in its entirety, which involves the channel acquiring rights that are often exclusive. The second takes the form of summarised reports that are normally offered free of charge by the radio and television service editors under the guarantee of the public's right to information and the freedom of expression. Nevertheless, a number of changes that have taken place recently in the sector make it necessary to assess these legal arrangements.

The CSA refers more particularly to the changes in the pay television sector in France, the tension surrounding the coverage of major sports events, the appearance of extensive concepts of the ownership rights in respect of international events, and difficulties in applying the existing rules to disciplines wishing to raise their media profiles. The first stage in the consultation, carried out between February and April 2008 and involving all the players concerned, pointed to a desire to refrain from challenging the fundamental principles of the right to information in the field of sport as defined in the legislation.

The CSA, nevertheless, observed that their implementation was causing some problems, making it necessary to promote a revised framework. This, the CSA proposes, could take the form of an inter-professional agreement, including a code of good practices, setting out clearly the practical methods currently in use for exercising the right to information in the field of sport in order to meet the current and emerging challenges of the French audiovisual scene. The CSA was therefore keen to continue its consultation, in order to obtain the opinions of all the people and organisations concerned, covering more particularly an analysis of the present right to citation in the audiovisual and sport scene, the determination of new practical methods for exercising the right to citation, an examination of the legal arrangements for protecting the access of reporters

to sports venues, and a ban on freezing of rights. Contributions are to be sent to the CSA by 1 August 2008.

In addition, on the matter of information in the field of sport, the Court of Cassation turned down the appeal brought against the decision of the Court of Appeal of Paris of 24 September 2007 (see IRIS 2008-3: 12), thereby upholding the judgment against the channels France 2 and France 3 for unlawful advertising of tobacco during the broadcasting of parts of the 2005 Paris-Dakar rally. In doing so, the Court of Cassation confirmed the restrictive nature of the exception to the general principle of the ban on advertising of tobacco products prescribed in Article L. 3511-5 of the Public Health Code, according to which "the broadcasting of motor sports competitions held in countries where advertising for tobacco is allowed may be assured by the television channels". The Court held that this provision should be interpreted as if it were "limited to the possibility of broadcasting these competitions, to satisfy information requirements, in real time or in situations close to this, without extending to include the broadcasting of images several hours or even days after the event". In the present case, the French committee against tobacco abuse (*Comité National contre le Tabagisme* - CNCT) claimed that the channels in question were causing nothing short of media hype in favour of the Gauloises brand-name during the broadcasting of reporting or news reports on automobile racing, interviews with participants in the event, credits and trailers. It should be recalled that, further to the appeal judgment, the CSA announced on 8 February 2008 that it would no longer authorise the appearance of cigarette brand names during the television coverage of a motor sport event unless it was a live broadcast. ■

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● **Public consultation organised by the CSA on the right to information in the field of sport, available at:**
http://merlin.obs.coe.int/redirect.php?id=11310

FR

FR – Commission for the New Public Service Television Finalises its Report

On Wednesday, 18 June 2008, the Member of Parliament Jean-François Copé, after a final meeting of the Commission for the New Public Service Television of which he is chairman, revealed the recommendations that will be made to the French President on 25 June. In the end, the 26 members of the Commission have opted for a single financing scenario instead of the three proposed at the end of May (see IRIS 2008-5: 9). This will involve taxes and indexing of the licence fee with a view to providing compensation for the judgment on advertising on public service television.

The Commission, therefore, recommends a tax of 0.5% on the turnover of Internet and mobile phone operators (generating EUR 210 million), a tax on radio frequencies (EUR 100 million), and a tax on the additional advertising revenue of private television channels (EUR 80 million). This EUR 80 million would be paid to the French audiovisual institute (*Institut National de l'Audiovisuel* - INA) in place of the licence fee it receives currently, which will henceforth be paid to the France Télévisions group. Similarly, the licence fee received by Radio France International (EUR 60 million) would be paid to the France Télévisions group, and the radio station should become part of the external audiovisual holding (along with France 24 and TV5 Monde), with its budget therefore dependant on the State. These amounts add up to EUR 450 million, corresponding to the estimated loss of earnings during the transition period. This loss is due to the fact that advertising would be abolished after 8 p.m. from September 2009 until January 2012, before being subsequently totally abolished. As for the licence fee, which currently stands at EUR 116, the Commission recommends indexing it to inflation and making it payable by the owners of a computer or mobile phone that can be used to watch television. The Commission is also maintaining its proposal to reorganise the France 3 channel on the basis of seven regional centres instead of the present thirteen. Lastly, on the matter of governance, it recommends abandoning the right of veto held by the State's representative on the board of directors of France Télévisions. Draft legislation covering all these recommendations should be put to Parliament in the autumn, for implementation in 2009. ■

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FR – CSA Proposals on the Editorial Line Adopted by Channels Belonging to the France Télévisions Group

In parallel with the work carried out by the Copé Commission (see IRIS 2008-7: 12), the CSA has been considering the content being offered by public service television against a backdrop of the discussions on an economic model. Its consideration has covered the articulation of the texts applicable to the programmes of the France Télévisions group and the evolution of the editorial lines of the public service channels. The CSA's thinking, which has been examined a number of times in plenary session, has led it

to reaffirm a number of principles that it considers inherent in public service programmes, in a document adopted on 10 June : the aim of attracting a wide audience and determining its level of satisfaction; the need for the public service to propose programmes of all types; the choice of a clear definition of the missions of the public service channels rather than overly quantified obligations. While the CSA considers that, on the whole, the public service group offers a wealth of diversified programmes that marks its specific nature, it nevertheless notes that this offer does not allow a sufficient identification of each channel and sometimes remains underused. On the basis of mainly foreign examples and the example of Radio France, and attaching particular importance to an analysis of the content of the France 2, France 3, France 4 and France 5 channels, the CSA has therefore drawn up recommendations that should make it possible to reinforce the identity of the public service. Nevertheless, in the context of competition that is marked by an evolution that has accelerated and amplified with the launch of new channels on terrestrially-broadcast digital TV, the CSA wishes to draw attention to what it feels are the issues that particularly face the channels in the France Télévisions group – the ageing of their audiences, insufficient perception by viewers of the specific features of each channel, and an outdated framework of legislation and regulations, etc.

In order to provide the public audiovisual sector in France with a boost, the CSA is therefore recommending, firstly, an updating of the framework of its obligations with a view to giving the group more room for manoeuvre. This would be achieved by replacing the contract of objectives and means by a "contract of term of office", concluded for the duration of the term of office of the Group's President, and by updating the terms of reference for its missions and duties. The CSA also recommends clarifying editorial positioning, increasing synergies within the France Télévisions group, and revising the system for contributing to production. The CSA is also recommending the improvement of the circulation of programmes within the France Télévisions group and promoting the influence of the public service broadcasters; this would be achieved through use of the new technologies, which should make a substantial contribution to the ambitious objectives assigned to the public service channels. ■

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• Observations and proposals made by the CSA on the editorial line of the channels of France Télévisions, available at:
http://merlin.obs.coe.int/redirect.php?id=11311

FR

GB – Record Fine on Broadcaster

Over the last year, the conduct of competitions using premium rate telephone services has been a source of major scandals in British broadcasting (see IRIS 2007-8: 11, IRIS 2007-10: 15 and IRIS 2008-2: 13). Now the communications regulator, Ofcom, has fined ITV (Channel 3, the major commercial broadcaster) GBP 5,675,000 for breaches of the Ofcom Programme Code in connection with such services. Relevant provisions of the Code include those requiring that factual programmes must not mislead the viewer, that competitions should be conducted fairly and that the broadcaster must retain control of premium rate service arrangements. This is almost three times the previous highest fine imposed by the regulator. The broadcaster has also promised to pay an additional GBP 7,800,000 for viewer compensation and to charity.

GBP 3 million of the fine was imposed for breaches in the programme "Ant and Dec's Saturday Night Takeaway" between January 2003 and October 2006. These included selecting competition finalists before telephone lines were announced as closed, selecting finalists on the basis of their suitability to be on television and of where they lived although the broadcaster's terms and conditions stated that they would be chosen at random, and on one occasion placing an individual already known to the production team on the shortlist of potential winners, who then went on to 'win' the competition. GBP 1.2 million of the fine related to "Ant and Dec's Gameshow Marathon", where on six occasions competition winners were chosen on the basis of their suitability to be on screen, whilst terms and conditions had stated that selection would be random; additionally the broadcaster was unable to account for almost half of the competition entries. A further GBP 1.2 million was accounted for by "Soapstar Superstar", where the programme makers had on one occasion ignored the viewers' vote and finalised results before the lines actually closed, and on a number of occasions had overridden the song choices voted for by viewers. GBP 275,000 of the fine related to over thirty occasions when programmes had been repeated without informing viewers that interactive competitions had concluded, so entrants had no chance of winning, but were still charged. Ofcom noted that the programme makers had completely ignored their own published terms and conditions and Ofcom codes; the compliance system in place was completely inadequate. The broadcaster was unable to supply Ofcom with sufficient data relating to the use of premium rate services in regional programmes. Further investigations are still continuing.

Despite its major public service orientation, the BBC has also experienced problems with similar

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services. After investigations of BBC Editorial Controls and Compliance and of Premium Rate Services, it was found that GBP 106,000, which should have been paid to charity was wrongly retained by Audiocall (a trading division of BBC Worldwide); this was the result of a policy of retaining the proceeds where viewers mistakenly made calls when lines were closed. The sums have now been paid to charity with interest. ■

- **Ofcom, 'Ofcom Fines ITV plc for Misconduct in Viewer Competitions and Voting', 8 May 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11285**
- **BBC Trust, 'Reports by Pricewaterhouse Coopers and Ronald Neil: BBC Statement', 9 May 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11286**

EN

GB – British Board of Film Classification Launches BBFC Online

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On 21 May 2008, The British Board of Film Classification (BBFC) launched a new service, "BBFC.online". It aims to provide consumer information, thus enhancing consumer trust and confidence when choosing new media content.

The scheme applies, on a voluntary basis, the BBFC's existing eight-fold classification system to content distributed online, including "video on demand, streaming video, download-to-own and portable media devices." It is "'Platform Neutral' – it is designed to cover all forms of digital content delivery (e.g. web, set top boxes, hand-held devices and mobile phones)."

The BBFC had sought legal opinion that concluded that "works supplied by 'non-physical' means (e.g. by streaming or download) are not covered by the Video Recordings Act 1984." This implied that such works were largely unregulated.

The scheme is subscription-based, and main membership costs GBP 900 per year. Walt Disney Studios, Warner Bros, 20th Century Fox and Home Entertainment Europe have already joined the scheme. However, classification includes the "R18" category (explicit sex works). Thus, it is envisaged that adult entertainment companies will join the scheme and, in fact, Strictly Broadband has already done so.

The scheme was developed over eighteen months, in collaboration with the British Video Association, on the basis of research done by TNS World Panel (published as the "Downloading Classification Study" February 2007).

The research found (4244 respondents) that "63% of adults (74% of parents) are concerned about downloading video material which does not come with independent content advice and labelling. 84% of adults (91% of parents) want to see BBFC film and DVD classification on downloadable/streaming films and other digital audiovisual content."

The scheme includes a compliance process and, in general, it "anticipates key requirements for non-linear content under the EU's Audiovisual and Media Services Directive (AVMS)." ■

- **BBFC.online, available at: http://merlin.obs.coe.int/redirect.php?id=11287**
- **Downloading Classification Study, available at: http://merlin.obs.coe.int/redirect.php?id=11288**

EN

HR – Rulebook on Television Broadcasting Acts for the Protection of Minors

On 21 April 2008, the Council of Electronic Media passed a rulebook on television broadcasting regarding the legal protection of minors. This was carried out on the basis of Article 15, paragraph 5, of the Law on Electronic Media.

This rulebook contains regulations that television broadcasters have to obey when broadcasting programmes, the contents of which could pose a threat to the physical, mental and moral upbringing of minors and which are broadcast in un-encoded form. This implies *inter alia* all types of programmes containing extreme violence, sex scenes, vulgar expressions, and those showing the abuse of hard liquor. It does not include such sequences in educational and scientific programmes, wherein they are explained in an appropriate manner and adjusted to suit the needs of minors. The broadcaster has to provide visual warnings for the audience during the entire broadcast if a programme includes contents unsuitable for minors.

Visual effects have to be integrated into the programme depending upon the category of its content in the following way:

- Category 18: Such programmes must not be broadcast before 23:00h (11 p.m.) The broadcaster is obliged to provide before the programme, for a time interval of at least 10 seconds, the written warning: "The following programme contains scenes which could possibly threaten the physical, mental or moral upbringing of persons younger than 18 years." The broadcaster is furthermore obliged to ensure that during the entire broadcast of the relevant content there remains on screen a red circle with the written transparent number "18" opposite to the usual broadcaster's logo.
- Category 15: This programme content must not be broadcast before 22:00h (10 p.m.). The broadcaster is obliged to provide before the programme, for a time interval of at least 10 seconds, the written warning: "The following programme contains scenes which could possibly threaten the physical,

mental or moral upbringing of persons younger than 15 years." The broadcaster is also obliged to ensure that during the entire broadcast of the relevant content there remains on screen an orange circle with the written transparent number "15" opposite to the usual broadcaster's logo.
- Category 12: This programme content must not be broadcast before 21:00 h (9 p.m.). The broadcaster is obliged to provide before the programme, for a time interval of at least 10 seconds, the written warning: "The following programme content contains scenes which could possibly threaten the physical, mental or moral upbringing of persons younger than 12 years." The broadcaster is obliged to ensure that during the entire broadcast of the relevant content there remains on screen a green circle with the written transparent number "12" opposite to the usual broadcaster's logo.

The broadcasters have to brand programme contents, which are published in electronic and printed media together with the title of the programme and the appropriate age categorisation. Trailers, i.e. programme announcements of content with such categories may not contain inappropriate parts of programme content. ■

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● ***Pravilnik o načinu postupanju nakladnika televizijske djelatnosti radi zaštite maloljetnika*** **(Rulebook on television broadcasting acting for protection of minors), Official Gazette, issue No. 47/08, available at: http://merlin.obs.coe.int/redirect.php?id=11273**

HR

HU – Court Decision on the Qualification of a Hungarian Satellite Broadcaster as "National"

In April 2007 the *Országos Rádió és Televízió Testület* (National Radio and Television Commission - ORTT) made a series of decisions establishing that several satellite television broadcasters shall be qualified as broadcasters with a national area of reception. Previously these broadcasters were considered as "regional" broadcasters given their encoded mode of transmission and taking into account their actual presence on the Hungarian cable networks.

As a result the broadcasters affected by the decisions faced a set of new obligations. These included additional limitations on ownership, an increased rate of broadcasting fee, increased rates of royalty fees to be paid to collecting societies and the obligation to produce and broadcast daily news programmes (the ORTT later declared in a decision that it sets aside the latter obligation with regard to the thematic nature of the relevant channels). The majority of the broadcasters concerned decided to submit their appeals to the *Fővárosi Bíróság* (Metropolitan Court of Budapest) asking the court to annul the respective decisions of the media authority.

On 5 May 2008 the court issued a decision on one of these cases. According to the judgement, the ORTT was not entitled to declare that the applicant, the broadcaster Viasat3, should comply with the stricter rules governing the operation of national broadcasters and was also not entitled to increase the amount of the broadcasting fee to be paid by the broadcaster.

The regulatory authority submitted an appeal against the judgement. In this the authority emphasised that in other cases the court had explicitly stated that it had the right to examine the area of reception of the television broadcasters concerned. Consequently, the matter is expected to be decided by the *Fővárosi Ítélőtábla* (Budapest Court of Appeal). ■

Mark Lengyel
Körmendy-Ékes & Lengyel Consulting

● **Decision of *Fővárosi Bíróság* (Metropolitan Court of Budapest) of 5 May 2008**

HU

HU – Application of Article 2a of the TVWF Directive

The European Commission has closed its procedure in accordance with Article 2a of the TVWF Directive involving the Romanian and the Hungarian media authorities and a television broadcaster called Cool Tv.

Cool Tv is a television channel operating under Romanian jurisdiction but broadcasting in the Hungarian language for primarily Hungarian audiences. In recent years the *Országos Rádió és Televízió Testület* (Hungarian National Radio and Television Commission - ORTT) has received several complaints from viewers regarding one particular programme of the broadcaster entitled "Cool Sex". The programme, which contained explicit scenes was broadcast in the early afternoon hours.

The ORTT established that the content of the episodes of "Cool Sex" was harmful to minors, thus, according to the corresponding rules of Act I of 1996 on Radio and Television Broadcasting (Broadcasting Act), and it should only have been broadcast after 10.00 pm. The ORTT also established that the conduct of Cool Tv constituted an infringement of Article 22 of the TVWF Directive, and informed the *Consiliul Naţional al Audiovizualului* (Romanian National Broadcasting Council – CNA) accordingly.

Article 52/A. § of the Hungarian Broadcasting Act, consistent with Article 2a of the TVWF Directive, provides the possibility for the ORTT to restrict the retransmission (i.e. to prohibit the cable distribution) of a television broadcast coming from another EU Member State if it manifestly, seriously and gravely infringes, *inter alia*, Article 22 of the TVWF Directive. The ORTT launched the corresponding procedure in August 2007 by informing its Romanian counterpart and the European Commission of its intention to derogate from the principle of freedom of reception and retransmission as enshrined in Article 2 of the TVWF Directive.

During the procedure, the CNA also examined the

programming of Cool Tv. The CNA's inquiry found that Cool Tv had ceased to broadcast its programme "Cool Sex" but continued to broadcast other programmes of a similar nature in the early afternoon hours. As a consequence the CNA publicly warned the broadcaster to change its conduct and to broadcast the programmes concerned after 10.00 and 11.00 pm.

Márk Lengyel
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Following the decision of the CNA the European Commission suggested that the ORTT should cease the procedure aimed at derogating from the principle of freedom of retransmission in the case of Cool Tv. Considering the decision of the CNA as an effective remedy, the ORTT agreed with the proposal that led to the closure of the procedure. ■

- **Press Release of the ORTT, available at: http://merlin.obs.coe.int/redirect.php?id=11274**

HU

- **Decision of the CNA nr. 84 of 7 February 2008, available in Romanian at: http://merlin.obs.coe.int/redirect.php?id=11275**

RO

IT – Case of Centro Europa 7

On 28 July 1999, the competent Italian authorities granted Centro Europa 7 the terrestrial television broadcasting rights on the national level, authorising the installation and the use of a television network utilising analogue technology, according to the provisions of act 249/1997. The administrative measure did not allocate Centro Europa 7 the specific radio frequencies. In fact, in order to be allocated frequencies for such broadcasting activities, Centro Europa 7 had to await the national allocation plan for radio frequencies. In the event, however, the national allocation plan for radio frequencies for such broadcasting activities was never adopted. In the meantime, some broadcasting stations, without authorisation and under a provisional regime, made *de facto* use of the frequencies. In fact, a series of national laws succeeded one another consolidating the provisional regime, which prevented Centro Europa 7 from effectively making use of its entitlements, to the benefit of incumbent operators. Centro Europa 7 sought justice before the Italian courts and the highest administrative court, the *Consiglio di Stato* (Council of State), who then, while reviewing the case, asked the European Court of Justice 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), Directive Commission Directive 2002/77/EC ('the Competition Directive') and Article 10 of the ECHR, in so far as Article 6 EU, refers thereto. On 31 January 2008, the Court issued a sentence (see IRIS 2008-3: 5) deeming these transitional arrangements to have been constructed in a manner contrary to the NCRF, which implements provisions of the Treaty, in particular those on the freedom to provide services in the area of electronic communication networks and services. Several provisions of the NCRF do 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.

Valentina Moscon
Department of Legal Sciences, University of Trento

After the Court of Justice judgement, on 31 May 2008, the *Consiglio di Stato* passed its ruling on the Centro Europa 7 case. The Italian court decided that the *Consiglio di Stato* cannot replace the Government in the assignment of frequencies and neither can it force the Government to allocate them. The Court ordered the Government to rule on the Centro Europa 7 frequencies request, respecting the criteria that were imposed by the European Court of Justice. The *Consiglio di Stato* deferred the definitive decision on the compensation for damages for the Centro Europa 7 until 16 December 2008. In order to determine the compensation for damages, the Italian court considered it necessary to wait for the government regulation. In fact, the compensation will differ depending on whether or not the frequencies will be assigned to Centro Europa 7. In the first case, the damages will be limited to the loss for the period in which the Centro Europa 7 would have made use of the frequencies. In the second case, the damage will correspond to the value of the company (about EUR 3,5 billion).

Moreover, the *Consiglio di Stato* requested that both parties conform to the following demands before 16 December 2008. The court asked the Italian Ministry to: 1) make clear which frequencies were available after the public competition in 1999 and why these frequencies were not assigned to Centro Europa 7; 2) explain the issue on the alleged expiry in 2005 of the Centro Europa 7 grant (on this question there is another judgement pending). Centro Europa 7 will have to: 1) describe its business from 1999 to 2008; 2) explain the reason why it did not take part in the public competition for the frequencies assignment in 2007. The *Consiglio di Stato* asked the *Autorità Garante per le Comunicazioni* (Italian communications authority) to explain the reasons why the plan for radio frequencies for such broadcasting activities was never adopted. Finally, the *Consiglio di Stato* denied the Centro Europa 7 request to interrupt the Rete 4 transitory permission to make use of the frequencies. Therefore, the Centro Europa 7 case is still in a stalemate, at least for the time being. ■

- ***Consiglio di Stato, sez VI, 31 maggio 2008 n. 200802622, 200802623, 200802624, 200802625, 200802626* (Decisions of Consiglio di Stato of 31 May 2008 n. 200802622, 200802623, 200802624, 200802625, 200802626, available at: http://merlin.obs.coe.int/redirect.php?id=11281**

IT

- **Case C-380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni (ECJ 31 January 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11282**

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

IT – Monitoring the Activities of P2P Users Runs Foul of Privacy Legislation

In its decision of 28 February 2008, the *Garante per la Protezione dei Dati Personali* (the Italian Data Protection Authority) outlawed the use by private companies of a software designed to monitor, for the purpose of identifying and suing them, the activities of peer-to-peer (P2P) users that share copyrighted files on the Internet.

The decision of the *Garante* was adopted in the broader context of the controversial "Peppermint case". The genesis of the case dates back to 2007, when the German record label Peppermint Jam Records GmbH (Peppermint) and the Polish videogame developer Techland sp. z o.o. (Techland) entrusted Logistep, a company based in Switzerland, with the task of monitoring P2P networks where their copyrighted works were allegedly being shared. To this end, Logistep used its own proprietary software, known as "File Sharing Monitor" (FSM), to monitor the availability of specified electronic contents on several file exchange networks, notably eDonkey and GNUtella. The IP addresses of users who downloaded or made such contents available to others were logged in a database.

Peppermint and Techland hence brought several actions before the Rome Civil Court of First Instance seeking an order that the relevant Italian Internet Service Providers (ISPs) be enjoined to disclose the identities of the users behind the IP addresses included in the Logistep database. The earliest cases were decided in favour of Peppermint and Techland, which promptly contacted the users concerned requesting *inter alia* that they pay EUR 330 or face the consequences of criminal proceedings. In subsequent judgments, however, following the intervention in the proceedings of the consumer association Adiconsum and of the *Garante* itself, the Rome Court reversed its earlier case-law and dismissed the applicants' claims.

Amedeo Arena
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In parallel with the said court proceedings – which dealt with the possible uses of Logistep's database – the *Garante* initiated its own investigation to determine whether the gathering of such data was lawful in the first place. The procedure, which was carried out in cooperation with the Polish, Swiss and German Data Protection Authorities, led to the conclusion that the monitoring and data collection effected by Logistep was at variance with EU and Italian privacy legislation on several grounds.

At the outset, the *Garante* took the view that the data collection effected by Logistep constituted an instance of "interception or surveillance of communications", which is not permitted to private parties pursuant to Article 5 of Directive 2002/58/EC on privacy and electronic communications and Article 122 of the Italian Data Protection Code.

In accordance with the decision of the *Préposé fédéral à la protection des données et à la transparence* (the Swiss Data Protection Authority) in the same case, the *Garante* further established a breach of the purpose limitation principle laid down in Article 6(b) of Directive 95/46/EC (the Data Protection Directive), as well as in Article 5(b) of the Strasbourg Convention No. 108/1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data. P2P networks, indeed, are meant to exchange data and files between users for personal purposes. The use of users' data for other purposes, such as those pursued by Logistep and the other companies, thus contravenes the law.

Moreover, the *Garante* established an infringement of the principle of transparency, as P2P users received no prior notification that their data was being processed. Drawing on the case law of the Rome Court, as well as on the Working document on data protection issues related to intellectual property rights (issued on 18 January 2005 by the Article 29 Data Protection Working Party), the *Garante* determined that the data in question (i.e. IP addresses, downloaded and shared files, etc.) constituted "personal data", and should thus have been processed accordingly.

In view of the foregoing, the *Garante* adopted a decision under Article 143(1)(c) and 154(1)(d) of the Italian Data Protection Code whereby Peppermint, Techland and Logistep were barred from further processing the said data and were enjoined to erase it by 31 March 2008. Pursuant to Article 170 of the Code, failure to comply with such a decision may result in imprisonment for up to 2 years for the natural persons involved. ■

- ***Garante per la protezione dei dati personali, provvedimento 28 febbraio 2008, n. 1495246*** **(Data Protection Authority, Decision of 28 February 2008, no. 1495246), available at:**
http://merlin.obs.coe.int/redirect.php?id=11278

- ***Decreto legislativo 30 giugno 2003, n. 196 "Codice in materia di protezione dei dati personali", versione consolidata*** **(Legislative Decree 30 June 2003, no. 196 'Personal Data Protection Code', consolidated version), available at:**
http://merlin.obs.coe.int/redirect.php?id=11279

IT

- **Article 29 Data Protection Working Party, Working document on data protection issues related to intellectual property rights, 18 January 2005, available at:**
http://merlin.obs.coe.int/redirect.php?id=11280

EN

LT – New Requirements for Alcohol Advertising

On 26 April 2008 new amendments to the Law on Alcohol Control came into force. The amended Law abolishes the unconditional prohibition to advertise alcoholic beverages in TV programmes.

According to the former amendments of the Law on Alcohol Control (see IRIS 2007-8: 15), which came into force on 1 January 2008, alcohol advertising was prohibited from 6 a.m. to 11 p.m. in broadcast programmes of broadcasters under Lithuania's jurisdiction.

When the prohibition to broadcast alcohol advertising came into force, the broadcasters of Lithuania suspended the live broadcast of all sports and began to broadcast them from 11 p.m. using the recordings.

The above decisions of the broadcasters were due to the fines imposed by the State Consumer Rights Protection Authority, which is responsible for the control of alcohol advertising in the media. The State Consumer Rights Protection Authority imposed the fines on the broadcasters because during the live broadcast of the basketball competition, the logos of alcoholic beverages were visible on the screen. The logos of alcoholic products were visible on screen only in the background of the game, therefore the broadcaster could not technically avoid them (see IRIS 2008-4: 17).

It is natural that broadcasting of sport programmes such as basketball, which is tremendously popular in Lithuania in particular, from the recordings after 11 p.m. led to a wave of resentment from the side of fans and viewers.

It should be noted that these circumstances necessitated a new amendment of the Law on Alcohol Control regarding advertising of alcohol.

According to the newly amended Law, which came into force on 26 April 2008, alcohol advertising is prohibited on broadcast and re-broadcast programmes from 6 a.m. to 11 p.m., except for live and uninterrupted international broadcasts or re-broadcasts of art, culture or sports events.

Furthermore, the Law expanded the list of information which is not treated as being advertisement of alcoholic beverages, i.e. the registered names or trademarks of undertakings producing or selling alcoholic beverages, when such names or trademarks appear during broadcasts and re-broadcasts on an irregular or unexpected basis and when such names or trademark images are ancillary with regard to the main programmes broadcast or re-broadcast.

It is important to note, that the newly amended Law foresees the complete prohibition of alcohol advertising in all media in Lithuania as of 1 January 2012. The aim of such a prohibition is to reduce the spread of alcohol use in society, particularly among young people. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

● ***Alkoholio kontrolės įstatymas*** **(Law on Alcohol Control) is available at:**
http://merlin.obs.coe.int/redirect.php?id=11276

LT

MT – Consultation Document Proposing Guidelines on Quality Programmes

In March 2006, Ernst & Young Limited submitted a report to the Media Desk within the EU Affairs Directorate of the then Ministry for Tourism and Culture, which consisted of an analysis of focus group discussions on quality programming. The report lists a number of themes, which participants mentioned as being essential for good quality programming. The comments of participants are summarised under each theme.

Based on this report, the Broadcasting Authority drew up a set of draft Guidelines for good quality programming and issued this draft for public consultation purposes in April 2008.

Essentially the Consultation Document Proposing Guidelines on Quality Programming identifies the following characteristics of a quality programme: a quality programme must have interesting topics and be informative and educational; it must be fair and balanced, as well as original; a quality programme is realistic and can also be humorous and witty; it has sound values, a good script, a good presenter, good camera work, light and sound; a good quality programme should not have any advertisements and should not be "stretched out"; it should respect people and, finally; it should have an informed panel.

These characteristics are, in turn, elaborated upon in the consultation document. The consultation period came to an end on 30 May 2008. ■

Kevin Aquilina
Broadcasting Authority, Malta

● **Circular 15/08, Circular to All Broadcasting Stations Consultation, Document Proposing Guidelines on Quality Programming, available at:**
http://merlin.obs.coe.int/redirect.php?id=11277

EN

PT – Bullfighting Excluded from Daytime TV

On the 30 May 2008, the *12º Vara Cível de Lisboa*, a Portuguese Court, prohibited the exhibition of the programme "44.ª Corrida TV" (44th TV bullfighting), scheduled by the Public Service Broadcaster, Rádiotelevisão Portuguesa (RTP), for Sunday afternoon (8 June) at 17h00. The Court decided that bullfighting could not be broadcast before 22h30 and without an identifying symbol advising viewers of the violent nature of the programme's content.

In a country with a long tradition of bullfighting, this landmark decision was taken following a complaint of the animal rights association *Animal, Associação Nortenha de Intervenção no Mundo Animal*. The judicial deliberation has concurred with the Association's view that bullfighting is a "violent" demonstration and "might negatively influence the development of the personalities of children and young adults".

The court argued that watching bullfighting on television might lead children and young adults to accept violence against animals as natural and entertaining. Furthermore, making bullfighting available to children on daytime TV goes against the state's educational objectives. The court stated that the

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Communication & Society Research Centre, University of Minho

protection of animals is a structural value in modern societies and pointed out that the Portuguese state's compulsory children textbooks defend the protection of animals and, in some case, include the Universal Declaration of Animal Rights.

Following the court's decision, the RTP programme "44th TV bullfighting" was removed from the programming schedule. ■

***12ª Vara Cível de Lisboa, 1ª Secção. Acta da Audiência Final, 2ª sessão. Processo nº 1.520/08.4TVLSB – Providência Cautelar 12º Vara Cível – 1ª Secção. 30 May 2008* (Court injunction, Process nº 1.520/08.4TVLSB, 12º Vara Cível - 1st section. 30 May 2008)**

PT

RO – Protocol on Co-operation Between CNA and AJR

Mariana Stoican
Journalist, Bucharest

On 6 March 2008, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) and the *Asociaţia Jurnaliştilor din România* (Romanian Association of Journalists – AJR) signed a protocol on co-operation with regard to the application of ethical standards in the audiovisual sector, that is to say international standards on which the professional ethics of broadcast journalists are based. These standards include the European Convention on Human Rights, the Council of Europe Parliamentary Assembly Resolution 1003 (1993), the principles on guaranteeing the independence of journalists drawn up by the OSCE in 2001, the declaration on freedom of expression and the right to information adopted by the EC Council of Ministers in 1982, the UN and UNESCO recommendations on freedom of speech, and the rules on freedom of speech and freedom of the press contained in the Romanian constitution and the *Legea Audiovizualului* (Audiovisual Media Act).

According to the agreement reached, the CNA and the AJR intend to consult with one another on drawing up all standards and regulations relating to audiovisual programme content (section 1). The CNA will notify the AJR if professional ethics are breached, while the AJR undertakes to draw the CNA's attention to all cases that might involve breaches of the Audiovisual Media Act or the *Codul de reglementare a conţinutului* (Regulatory Code for Audiovisual Content) drawn up by the CNA (section 2).

On the basis of this protocol, the CNA and the AJR will work together on all matters that the management boards of the two signatory bodies consider to be of common interest (section 3), and any conclusions drawn are to be communicated to the general public as and when necessary by means of joint press releases (section 4). The protocol does not rule out co-operation by the two sides in other areas of common interest (section 5). ■

***Protocol CNA-AJR pentru implementarea normelor deontologice în activitatea audiovizuală* (CNN-AJR Protocol for the implementation of ethical standards in the audiovisual sector), available at: http://merlin.obs.coe.int/redirect.php?id=11308**

RO

SE – Administrative Court of Appeals Rules on Obligation to Pay Fee for Unlawful Broadcast of Advertising

Michael Plogell and Henrik Svensson
Wistrand Advokatbyrå, Gothenburg, Sweden

On 26 May 2008, the *Kammarrätten i Stockholm* (the Stockholm Administrative Court of Appeals) issued a judgment on a case involving the unlawful broadcasting of advertisements. The case concerned the application of provisions included in *Radio-och TV-lagen* (The Radio and TV Act – RTL). The RTL is based on the TWF Directive 89/552/ECC, as amended by Directive 97/36/EC.

On 25 April 2006, the Swedish nationwide television channel TV4 broadcast an interview with the very famous, at least in Sweden, artist Carola Häggkvist. In the middle of the interview, a commercial break was inserted. The break was inserted after a fairly long question from the interviewer, but before the response from the interviewee. The interview also changed direction at the time of the commercial break; the question preceding the break was the first question on a new subject matter within the interview.

In the RTL there are provisions regulating the circumstances under which advertising may be broadcast. These provisions, *inter alia*, state that advertising should be broadcast between programmes. Advertising may however interrupt a programme if, with regard to natural pauses and the programme's length and character, neither the programme's integrity or value, nor the rights of rights holders are violated. If these provisions are breached, the court may impose a special fee.

The court stated that a commercial break may be inserted where it does not cause an interruption to the programme's continuity. The court then argued that the insertion of the commercial break between the interviewer's question and the interviewee's response placed it in the middle of the programme's course of events and not where a natural break would have occurred, if a commercial break had not been inserted.

Therefore the court found that the integrity and value of the programme was violated and a special fee was imposed on TV4 amounting to SEK 25,000 (approximately EUR 2,675). ■

***Kammarrätten i Stockholm, 2008-05-26, mål nr 271-08, överklagat avgörande: länsrättens i Stockholms län dom 2007-12-03 i mål 26405-06* (The Stockholm Administrative Court of Appeals, 2008-05-26, case nr 271-08, appealed judgement: Stockholm County Administrative Court's judgment 2007-12-03 in case nr 26405-06)**

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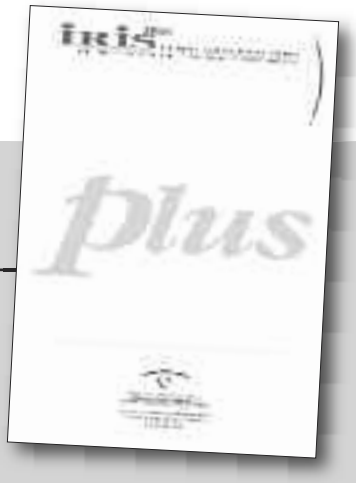

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Audiovisual Media Services and the Unfair Commercial Practices Directive

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