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Advocate General: Opinion in the Dispute Between Private Television Channels and the Swedish Collecting Society STIM

In February 2007, *Marknadsdomstolen* (the Market Court) requested a preliminary ruling from the European Court of Justice in a dispute between, on the one hand, the private television channels Kanal 5 Ltd (Kanal 5) and TV 4 AB (TV 4) and, on the other hand, the collecting society *Föreningen Svenska Tonsättares Internationella Musik Byrå* (Swedish Performing Rights Society) (STIM).

The procedure concerns the compensation that STIM requires from television channels so as to allow them access to copyright-protected music works from the repertoire administered by the organization.

The private TV channels have challenged STIM's demands and put forward that it should be required to refrain from applying certain compensation models for calculation of the remuneration to be paid by users, due to breach of competition law, since STIM in this manner abuses its dominant position.

STIM applies different models for the calculation of the remuneration. From Kanal 5 and TV 4, STIM receives a share of the revenue from advertising sales or advertising sales and subscription sales. The annual use of copyright-protected music is established at the end of each year. SVT – a public service TV channel – is mainly financed by government fees and the remuneration is instead calculated according to a model of hypothetical advertising sales. Thus, from SVT, STIM receives a share of the hypothetical income of the annual use of copyright-protected music in advertisements. The annual use is estimated, however, in advance and the actual proportion of use is not taken into consideration.

Marknadsdomstolen (Market Court) established that the relevant product market and the relevant geographic market is the provision of copyright-protected musical works in television within Sweden.

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

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

• **Executive Director:** Wolfgang Closs

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

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

• **Documentation:** Alison Hindhaugh

• **Translations:** Michelle Ganter (co-ordination) – Brigitte Auel – Véronique Campillo – Michael Finn – Bernard Ludewig – Marco Polo Sàrl – Manuella Martins – Katherine Parsons – Stefan Pooth – Erwin Rohwer – Sonja Schmidt – Nathalie-Anne Sturlèse

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Géraldine Pilard-Murray, post graduate diploma in *Droit du Multimédia et des Systèmes d'Information*, University R. Schuman, Strasbourg (France) – Christina Angelopoulos, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Anne Yliniva-Hoffmann, Institute of European Media Law (EMR), Saarbrücken (Germany) – Dorothée Seifert- Willer, Hamburg (Germany) – Sharon McLaughlin, Faculty of Law, National University of Ireland, Galway (Ireland) – Amélie Lépinard, Master - International and European Affairs, Université de Pau (France)

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Marknadsdomstolen also found that STIM holds a de facto monopoly and therefore has a dominant position in this market. Given that STIM's actions could affect community trade, Article 82 EC applies.

In light of these circumstances, the Market Court referred four questions for a preliminary ruling to the European Court of Justice, all relating to whether the models used to calculate the amounts of remuneration constitute an abuse of a dominant position within the meaning of Article 82 EC.

The Advocate General has now handed down her opinion in a ruling on 11 September 2008 in case C-52/07, stating inter alia the following:

The use of different remuneration models for a public service television channel, on the one hand, and private television channels, on the other hand, constitutes an abuse of a dominant position if certain conditions are fulfilled. If application of the compensation model implies that the public service channel will pay a lower compensation than the private television channels for a similar transaction and there is an element of competition between the public service television channel and one of the private TV channels, then the application constitutes an abuse. Furthermore, the Advocate General held that attention should be paid to the actual proportion of the use of copyright-protected material when calculating remuneration. ■

Michael Plogell et Erik Ullberg
Wistrand Advokatbyrå, Gothenburg

● ***Förslag till avgörande av Generaladvokat Verica Trstenjak i Mål C-52/07 Kanal 5 Ltd, TV4 AB mot Föreningen Svenska Tonsättares Internationella Musikbyrå* (Opinion of Advocate General Verica Trstenjak in Case C-52/07 Kanal 5 Ltd, TV4 AB versus Swedish Performing Rights Society), available at:**
http://merlin.obs.coe.int/redirect.php?id=11445

DE-ES-FR-IT-LV-NL-PT-SL-FI-SV

European Commission: Consultation on the Transition to Web 3.0

On 29 September 2008 the European Commission published a communication addressing future networks and the Internet.

According to the report, broadband and Internet services have been adopted en masse by Europeans, thereby impacting European society and economy significantly. Internet use continues to grow and change in Europe and is speculated to continue to flourish, its changes predicted to result in new opportunities for European businesses and citizens.

The pervasiveness of broadband in Europe has shifted the way in which users engage with the Internet. The Internet is increasingly participative and its data traffic is rising. The increase in the use of broadband and the increasingly nomadic use of the web is expected to usher Europeans into an age of the "Internet of things" whereby machines, vehicles, appliances and sensors will interact via the web. This new Internet – Web 3.0 – is described as "anytime, anywhere business, entertainment and social networking over fast reliable and secure networks".

In its communication, the Commission speculates that Web 3.0 will offer Europe many opportunities, such as an increase in the productivity of businesses, societal innovation, new jobs and new and expanding markets in the next decade, all of which would improve Europeans' quality of life. Given Europe's already important use of broadband, the Commission is confident that "Europe has the know-how and the network capacity to lead this transformation".

The Commission argues that the Internet is vital to development strategies in many sectors of the global economy and its social and economic potential is playing out as part of the post-Lisbon agenda. While stressing its great potential, the communication addresses the challenges of Web 3.0, namely keeping the Internet economy open in order to innovate business models, equipping networks for the Internet of the future and tackling security and privacy challenges. The Commission recommends that the EU stimulate investment in the next generation broadband access and promote "Broadband for All". The Commission further recommends keeping the Internet open to competition by reinforcing end users' interests and preventing and removing anti-competitive conduct. The Commission urges the EU to confront a changing Internet to meet the "rising demand of scalability, mobility, flexibility, security, trust and robustness". Finally, the communication addresses the challenge of privacy and security by noting a forthcoming Commission Recommendation on "RFID, data protection, privacy and security", and promising a new strategy on privacy and trust in the ubiquitous information society.

A public consultation was launched along with the communication which will allow the Commission to assess policy and private sector responses to the future of the web. A "Broadband Performance Index" is also proposed in the communication. This index compares member states' performance in broadband speed, price, competition and coverage. The Commission notes that a broader debate will be required to address policy responses to Web 3.0 and its role in modernising Europe's economy and society. ■

Hilary Johnson
Institute for Information Law (IViR), University of Amsterdam

● **"Commission consults on how to put Europe into the lead of the transition to Web 3.0", Brussels, 29 September 2008, IP/08/1422, available at:**
http://merlin.obs.coe.int/redirect.php?id=11449

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

● **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on future networks and the internet, COM(2008) 594 final, Brussels, 29 September 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11452

EN-FR-DE

IRIS LEGAL OBSERVATIONS
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European Parliament: First Reading of New Telecoms Package

Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam

On 24 September 2008, the European Parliament approved, in the first reading, with amendments, the proposals initially tabled by the European Commission on 13 November 2007 with a view to reforming the existing EU telecoms rules, in place since 2003. The new Telecoms Package aims to create a Single EU Telecoms Market, encompassing the internet and telecoms sectors, with emphasis on more rights and better choice for consumers, as well as stronger competition. As the President of the European Commission José Manuel Barroso explained, "Telecoms is a field where our single market can bring about very concrete results for every citizen […] At the same time, a single market with 500 million consumers opens new opportunities for telecoms operators […] A more European regulatory approach is particularly justified in telecoms. After all airwaves know no borders. And the internet protocol has no nationality."

The Telecoms Reform Package introduced three main legislative proposals. The first of these would encompass amendments to the current Framework Directive, Access Directive and the Authorisation Directive. The second would entail amendments to the Universal Service Directive and the Privacy and Electronic Communications Directive. The third involves the introduction of a regulation establishing a European Electronic Communications Market Authority (EECMA).

The main features of these proposals involved the following: more transparency and better information for consumers; the introduction of functional separation so as to boost competition; number portability with regard to both fixed and mobile service providers; better access for users with disabilities; better protection of users' private data; a review of radio spectrum management, so as to achieve "Broadband for All" within Europe (see IRIS 2008-10: 3) and the establishment of an EU Telecoms regulator.

The European Parliament did introduce a number of amendments to the Commission's original text. Key amendments included: (a) Amendment 138 of the Trautmann report and amendment 166 of the Harbour report. These state that users' rights to access content, services and applications may not be restricted in any way that infringes their fundamental rights. Restrictions must be proportionate and require a prior ruling by a judicial authority; (b) The replacement of the strong EECMA with a co-regulatory and smaller Body of European Regulators in Telecoms (BERT).

In particular, amendment 138 has caused debate, due to its incompatibility with the *riposte graduée* approach to the protection of copyrighted works online introduced by the French Bill "Création et Internet" (see IRIS 2008-10: 10). French President Nicholas Sarkozy sent a letter to President Barroso, asking that the amendment be rejected by the Commission. The Commission, in turn, noted its respect for the democratic decision of the MEPs and the deliberately balanced language of the amendment and invited the French government to discuss its views in the next Telecoms Council.

After their initial suggestion by the European Commission last November, the Council of Telecoms Ministers expressed its view on the proposals for reform over the summer and the European Parliament debated the question, first at Committee level and then during its plenary session on 2 September 2008. Both bodies have to agree on the final text on identical terms, in accordance with the rules of the Article 251 co-decision procedure. Next in line is the up-coming meeting of the Telecoms Council, planned for the end of November. ■

● European Parliament legislative resolution of 24 September 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services (COM(2007)0697 – C6-0427/2007 – 2007/0247(COD)), Brussels, 24 September 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11464

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

● European Parliament legislative resolution of 24 September 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users" rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation (COM(2007)0698 – C6-0420/2007 – 2007/0248(COD)), Brussels, 24 September 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11467

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

● European Parliament legislative resolution of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (COM(2007)0699 – C6-0428/2007 – 2007/0249(COD)), Brussels, 24 September 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11470

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

NATIONAL

AT – Supreme Court Relaxes its Practice regarding the Interpretation of Political Statements

A remarkable decision has been taken by the *Oberster Gerichtshof* (Supreme Court – OGH) on the question of the principles that apply to the interpretation of political statements when an assessment has to be made of whether the person making the statement is to be punished for the resulting injury to the honour of the politician criticised.

The origin of the case was a caricature in a publication for politically interested readers that appeared in the year 2000. It showed Mr K, a politician of the *Freiheitliche Partei Österreichs* (Austrian Freedom Party – FPÖ), surrounded by women and children and wearing a uniform reminiscent of the National Socialist *Sturmabteilung* (SA). In the picture, he was wearing an abdominal belt and a tie

with a conspicuous capital F on a white background. Next to the photo, below the initials FPÖ, was a sentence in Gothic script reading "Our offer: honour and loyalty ("Unser Angebot: Ehre & Treue").

The criminal courts ruled, both at first instance and on appeal, that this constituted the offence of defamation *(üble Nachrede)* and ordered the publication's owner to pay compensation. The reader, the courts said, could only understand the caricature to mean that the person depicted held National Socialist views.

The Supreme Court set the judgments aside and expressly departed from its previous case law, according to which the most unfavourable meaning for a person who has made an ambiguous political statement must always be assumed to be the correct interpretation: "When assessing a piece of text and a pictorial representation, … the meaning … must be established from the overall context of the statements with which they are connected, that is to say the situational context into which the statement must be placed. … However, when several interpretations cannot be ruled out when assessing the meaning of a statement, the *in dubio pro reo* principle that applies in criminal proceedings must be applied and the alternative that is most favourable for the accused assumed to be the correct one … The contrary judicial doctrine that a person who has made a statement must accept the application of what is for him or her the least favourable meaning in the case of several possible interpretations …, can accordingly not be upheld for judgments in criminal cases." Here, the court endeavoured to meet the criteria of the European Court of Human Rights (ECHR) on the protection of freedom of expression.

In the case in issue, the criminal courts had also failed to take sufficient account of the fact that the caricature had to be understood as a reaction at that time to statements recently made by FPÖ officials: the Supreme Court noted that in June 2000 an FPÖ official had used the slogan "Our honour is loyalty" ("Unsere Ehre heisst Treue"), which is derived from the *Schutzstaffel* (SS) motto, at an event to honour long-standing party members, while another official had referred to "honour and loyalty" as being among the prime virtues. Similarly, no account had been taken of the fact that the picture had been based on an election poster of the time depicting Mr K as the FPÖ's top candidate in Vienna with the advertising slogan "Our offer: free nursery schools" ("Unser Angebot: Kindergarten kostenlos").

These aspects, the Supreme Court said, were crucially important as they had made it possible to establish the meaning of the publication, which was that, in the light of the broad discussion that took place in the year 2000 (especially with reference to the words "honour" and "loyalty" as an offer made by the FPÖ), the statements made at that time and the attitude of the FPÖ leadership at that time were subjected to critical scrutiny as part of a reasonable comment on a matter of public interest. On this basis, it would have been possible to answer in the publication owner's favour the question of whether in this particular case a value judgment concerning top political party officials and based on the relevant facts was not punishable under the criminal law and was not excessive. ■

Robert Rittler
Gassauer-Fleissner Lawyers, Vienna

● Supreme Court decision of 8 May 2008 (15 Os 6/08h, 15 Os 7/08f), available at: http://merlin.obs.coe.int/redirect.php?id=11473

DE

AT – First Federal Communications Court Decision on the Monitoring of Advertising in ORF Programmes

In a decision dated 1 September 2008, the *Bundeskommunikationssenat* (Federal Communications Court – BKS) gave a ruling on an alleged offence reported by the *Kommunikationsbehörde Austria* (Austrian broadcasting regulator – KommAustria) concerning programmes broadcast by ORF.

The decision relates to a programme broadcast by ORF2 on 1 April 2005 in which, according to the Court, there was a breach of the ban on teleshopping contained in section 13(2) of the *Bundesgesetz über den Österreichischen Rundfunk* (Austrian Broad-casting Corporation Act – ORF-G). In the context of these proceedings, the BKS made an application to the European Court of Justice (ECJ) for a preliminary ruling under Article 234 of the EC Treaty.

The programme in issue was a call-in quiz broadcast in the late-night programme, during which there was a total of seven rounds in different categories with one question in each and a cash prize to be won for the correct answer. The presenter's main task was to urge viewers to call in on the permanently displayed premium rate number. Trailers on other ORF programmes were occasionally inserted on screen.

The main aspect of the dispute was whether the programme, which could be received across the national borders, constituted teleshopping within the meaning of section 13(2) of the Austrian Broadcasting Corporation Act, which transposes Article 1(f) of the Television without Frontiers Directive, and consequently constituted a service within the meaning of Article 50 of the EC Treaty. ORF wanted this to be categorised as "self-promotion". In response to the request for a decision, the ECJ ruled that whether the game show constituted teleshopping depended on whether this was an actual offer of a service and not just an interactive element within a simple entertainment programme. On the basis of the criteria submitted by the ECJ, the BKS decided that the programme concerned was an offer of a service against payment within the meaning of section 13(2) of the Austrian Broadcasting Corporation Act and was therefore teleshopping. Qualitatively and quantitatively, the key aspect of the programme was the organisation of a game show in which viewers were encouraged to participate by dialling a premium rate

number. The call charges collected constituted the payment and were also economically substantial, while the incorporated editorial elements were merely of secondary importance. With regard to the time criterion too, the game was the dominant element of the programme. Furthermore, the questions were designed in such a way as to promote the provision of the "game show" service.

However, as ORF is prohibited from broadcasting teleshopping by section 13(2) of the Austrian Broadcasting Corporation Act, it has now been obliged to publish the BKS decision within four weeks by reading it out on one working day in ORF1's late-night programme.

An appeal against this decision can be lodged within six weeks. ■

Anne Yliniva-Hoffmann
Institute for European Media Law (EMR), Saarbrücken/Brussels

• BKS decision of 1 September 2008 (Case 611.009/0042-BKS/2007), available at: http://merlin.obs.coe.int/redirect.php?id=11422

DE

AT – Second Federal Communications Court Decision on the Monitoring of Advertising in the Case of ORF Programmes

On 1 September 2008, the *Bundeskommunikationssenat* (Federal Communications Court – BKS) reached a further decision (Case 611.009/0013-BKS/2008) on alleged offences reported by the *Kommunikationsbehörde Austria* (Austrian broadcasting regulator – KommAustria) concerning programmes broadcast by ORF.

In this second decision, the BKS dismissed KommAustria's allegation that in three programmes broadcast by ORF1 on 9 November 2004 there had been a breach of section 14(5) of the *Bundesgesetz über den Österreichischen Rundfunk* (Austrian Broadcasting Corporation Act – ORF-G) relating to product placement.

In the case of two of the programmes, KommAustria's allegations concerned viewer game shows that took place either during the programme or after the closing credits and in the course of which items and manufacturers' brands were displayed on screen for a few seconds. The third allegation concerned a programme in the course of which two fitness apparatus items and game consoles were used as part of participant competitions and therefore shown on screen. The manufacturers' names could not be recognised. With regard to the first two programmes, the BKS ruled that they constituted product placement within the meaning of section 14(5) of the Austrian Broadcasting Corporation Act but dismissed the allegation owing to the triviality of the offence, stating that an objective standard should be employed to examine whether the nature of the presentation was such that it was, according to prevailing opinion, normally made against payment and whether the usual payment exceeded the limit of EUR 1000. The key parameters for the calculation were the spatial extent as well as the programme's duration and geographical coverage. The calculation made on the basis of these criteria by the BKS did not result in a breach of the *de minimis* threshold. With regard to the third programme, the BKS refused to describe it as product placement as there were insufficient details to identify the products.

An appeal against this decision can be lodged within six weeks. ■

Anne Yliniva-Hoffmann
Institute for European Media Law (EMR), Saarbrücken/Brussels

• BKS decision of 1 September 2008 (Case 611.009/0013-BKS/2008), available at: http://merlin.obs.coe.int/redirect.php?id=11423

DE

AT – Telecommunications Providers' Monitoring Costs to Be Partly Reimbursed

The Austrian operators of public telephone services are to receive EUR 17 million for costs incurred as a result of implementing the *Überwachungsverordnung* (Monitoring Ordinance – ÜVO). This has been determined by the *Investitionskostenverordnung* (Investment Costs Ordinance – IKVO) recently issued by the Austrian Federal Ministry of Justice.

According to the Monitoring Ordinance, public telephone service operators are obliged to make the necessary technical facilities available for the monitoring of telecommunications in connection with criminal investigations carried out under sections 134 ff. (formerly sections 149a ff.) of the Criminal Code. Sections 4(1) and 2(1) of the Investment Costs Ordinance now state that the operator must be reimbursed for 90 percent of the staff and material costs incurred in setting up these facilities. The reimbursement covers the costs of procuring and installing the necessary devices and programmes, adapting them to the network and obtaining the required licences. However the amount available for the reimbursement of costs is limited to EUR 17 million. If the total costs that qualify for reimbursement exceed this sum, the individual operators' claims will be reduced in accordance with section 4(2) of the Investment Costs Ordinance. The operators must claim their costs by the end of the year, which means that subsequent costs incurred, for example to replace faulty devices, will not be reimbursed under the Ordinance.

According to section 2(3) of the Investment Costs Ordinance, the latter also does not cover the costs of co-operating on the implementation of individual court-ordered monitoring measures. These costs are reimbursed under the *Überwachungskostenverordnung* (Monitoring Costs Ordinance – ÜKVO), according to which costs may be claimed on the basis of specified flat rates. ■

Sebastian Schweda
Institute for European Media Law (EMR), Saarbrücken/Brussels

• Ordinance of the Federal Minister of Justice concerning the reimbursement of operators' investment costs in connection with the provision of all facilities necessary for making data available and monitoring the content of a telecommunication (*Investitionskostenverordnung* – IKVO), available at: http://merlin.obs.coe.int/redirect.php?id=11420

• Ordinance of the Federal Minister of Transport, Innovation and Technology concerning the monitoring of telecommunications traffic (*Überwachungsverordnung* – ÜVO), available at: http://merlin.obs.coe.int/redirect.php?id=11421

DE

BA – Licensing Process Improved

A comprehensive framework for the broadcasting sector in Bosnia and Herzegovina was introduced in October 2002 with the Law on Communications of Bosnia and Herzegovina (Official Gazette of BiH, No. 31/03) which established principles based on a convergent approach, including telecommunications, radio, broadcasting (including cable television) and associated services and facilities (see IRIS 2002-10: 13). This Law gives the Communications Regulator Agency (RAK) wide responsibilities in the sectors of the converged market, broadcasting, telecommunications and the frequency spectrum management.

In May 2005, the Parliament of Bosnia and Herzegovina ratified the European Convention on Transfrontier Television, which integrated the general legal framework for the communications sector. Since then Bosnia and Herzegovina is trying to harmonize its communications legislation with European standards. Recently another important step in that direction has been made.

At its regular session held on 10 September 2008, the Council of the Communications Regulatory Agency, which guides the Agency with respect to strategic issues, has adopted, *inter alia*, the Rule on Methods of Licensing and Conditions of the Licence for distribution of radio and TV programs, which defines general conditions, actions and licensing and maintenance fees.

The purpose of this Rule is to provide access to the communication services for all users at a transparent, objective and non-discriminatory level, to protect the interests of all service users and to ensure a quality level within the provision of services closer to the EU standards. The Rule enters into force on 1 January 2009.

This instrument, officially titled Rule 36/2008, is replacing the existing Rule 17/2003 (Official Gazette of BiH, No. 08/03). By this rule the basic legal principles concerning the licensing process in the country have been substantially improved. ■

Dusan Babic
Media researcher and analyst, Sarajevo

● **Rule 36/2008 on Methods of Licensing and Conditions of the Licence for distribution of radio and TV programs, available at: http://merlin.obs.coe.int/redirect.php?id=10734**

BS

BG – Media Law Changes

On 17 September 2008 the Parliamentary Commission on Media and Civil Society discussed the Draft Bill amending the Radio and Television Act as proposed by the Council of Ministers. The Draft Bill concerns amendments and supplementation to the Radio and Television Act, which will enable the process of digitalization in Bulgaria.

The Draft Bill limits certain powers of the Council for Electronic Media regarding the licensing of television operators and clearly determines the Communications Regulation Commission as the leading supervisory authority in the digitalization process. According to the Draft Bill the price offered by the multiplex operators would be the main criterion in the selection process and not the programme content.

On 16 September 2008 the Council for Electronic Media adopted a special declaration on the Draft Bill. The members of the Council for Electronic Media are of the opinion that the Draft Bill does not protect the public interest as the program content criterion is substituted mainly by technical and commercial terms.

1. the operator has been granted a programme licence for television activity with national coverage;
2. the operator transmits its programme via electronic communications networks for analogue transmission; and
3. the electronic communications networks shall cover at least 50 % of the population of the country. ■

Rayna Nikolova
Council for Electronic Media, Sofia

● **Draft Bill amending the Radio and Television Act**

BG

CY – Plans for Digital Television Disclosed

The government of the Republic of Cyprus publicised initial decisions on the introduction of terrestrial digital television on the island. According to informations released on 3 October 2008 by the Ministers of Interior and of Communications and Works, plans are on the way in order to meet the European Union deadline of complete digitalisation by 2012. Thus, all analogue broadcasts will cease in the course of 2011. Analogue and digital programmes will co-exist for a couple of years.

Two terrestrial digital platforms are to be created; one will be leased to the public broadcaster Cyprus Broadcasting Corporation (CyBC) and one to the private sector. The terms and conditions of the lease, the company that will run the platform for private broadcasters and issues related to the costs, both of the passage to and the use of the digital platform are not decided yet. They are the object of consultation and discussion between competent authorities, which will also work on the draft of the relevant law. However, the government has decided to support low income families in covering the costs for new televi-

sion sets or decoders.

In the framework of the digital shift, the role and competencies of the Cyprus Radio Television Authority, the broadcasting regulator, will be broadened and its name will be changed to the Audio-visual Media Services Authority. Further to its actual jurisdiction on broadcasters, the new entity's powers will be extended to cover audio-visual services in general, both with pay and free access.

Cyprus lags behind both the introduction of digital technology and of a legal framework regulating digital and television services (subscription). Today, only LTV and Alpha which are pay-television broadcasters offer access to terrestrial digital television, while NOVA Cyprus, offers digital television services by satellite, using DTH (Direct to Home) technology. ■

Christophoros Christophorou
Media and elections analyst

- **Press and Information Office, Press release of 3 October 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11430**

EL

DE – Court decisions on the Right to Information under Section 101(9) of the Copyright Act

The Cologne *Landgericht* (Regional Court – LG), in a decision of 2 September 2008, and the Düsseldorf LG, in a decision of 12 September 2008, are the first German courts to reach decisions on the new right to copyright information enshrined in section 101(9) of the *Urheberrechtsgesetz* (Copyright Act, – UrhG). This right has existed since 1 September 2008 and implements Directive 2004/48/EC on the enforcement of intellectual property rights.

The applicant for an injunction in both cases was a company that possesses rights in sound recordings. Some of these recordings were illegally distributed over the internet and the applicant had identified the IP addresses of those involved. This company requested the courts to order the access provider to let it have information on the identifiers and traffic data of the clients behind the IP addresses. The applications were granted.

The Cologne Regional Court considered that the preconditions set out in section 101(9) of the Copyright Act were met and ruled that the illegal distribution of the sound recordings constituted a breach of the applicant's rights within the meaning of section 19a of the Copyright Act. This breach had also been committed on a commercial scale, as could be seen from the seriousness of the legal infringement since a large file was made publicly accessible after the publi-cation of the sound carrier in Germany. The court denied that the provision of information would be disproportionate within the meaning of section 101(4). It fixed the value of the subject-matter at issue at EUR 200 per IP address. The Düsseldorf Regional Court's reasons for its own decision to grant the application for an injunction have not yet been published.

While the applicant welcomed the decisions, other lawyers criticised the courts' assumption regarding the commercial extent, stating that the threshold had been set too low and a flood of applications for information was consequently to be feared in the future. ■

Anne Yliniva-Hoffmann
Institute for European Media Law (EMR), Saarbrücken/Brussels

- **Decision of the Cologne Regional Court of 2 September 2008 (Case 28 AR 4/08), available at: http://merlin.obs.coe.int/redirect.php?id=11426**
- **Decision of the Düsseldorf Regional Court of 12 September 2008 (Case 12 O 425/08), available at: http://merlin.obs.coe.int/redirect.php?id=11427**

DE

DE – Separation of Games of Chance and Confectionery

Lottery tickets and sweets do not have to be kept separate after all.

Reports had stated that lottery tickets and sweets had to be kept separate from one another in future according to a decision by the Berlin *Landgericht* (Regional Court – LG) in connection with an application for an injunction against the lottery organiser *Deutsche Klassenlotterie Berlin* (DKLB). However, this decision was set aside in its entirety following the latter's appeal lodged on 7 October 2008.

The original decision of 7 August 2008 (Case 103 O 134/08) stated that the lottery ticket counter should not be together with, or had to be kept separate from, the sales of sweets. The applicant was the Dutch gaming company Lotto-Team, which evidently claimed that competition had been distorted.

The decision was probably based on assessments of the *Glücksspielstaatsvertrag* (Inter-State Gambling Agreement – GlüStV), which came into force in January 2008 and prohibits the advertising of public games of chance that directly calls on or encourages people to take part in such games. Advertising may also not be directed at minors or similarly endangered target groups (section 5 GlüStV). The particular aim of the Inter-State Agreement is to work against the development of compulsive gambling and betting (section 1(1) GlüStV) and ensure the protection of young people (section 1(3) GlüStV), and the organisation and procurement of games of chance must not run counter to this (sections 4(2) and (3) GlüStV).

In its appeal against the injunction, an argument put forward by the DKLB was the lack of a causal link between the offer of confectionery and compulsive gambling, and the Berlin Regional Court ultimately concurred with this view. The reasons for the decision have not yet been published. ■

Nicola Lamprecht-Weißenborn
Cologne Media Law Research Centre

DE – Agreement on 12th Inter-State Broadcasting Agreement Prepared

According to press reports, the head of the State Chancellery of Rhineland-Palatinate, the *Land* in overall charge of the discussions, has announced that at their mid-September 2008 meeting the heads of the State and Senate chancelleries agreed on solutions to the outstanding issues concerning the implementation of the compromise with the European Commission. These solutions are to be incorporated into the *12. Rundfunkänderungsstaatsvertrag* (12th Inter-State Broadcasting Agreement – RÄStV).

In talks with Commission representatives on 16 September 2008, these outline proposals were then clarified and the European authority said it had no reservations. This, the reports say, will enable the *Land* Prime Ministers to reach agreement on 22 and 23 October 2008. The *Land* parliaments and the European Commission will then be informed. It can accordingly be assumed that the ratification process in the *Land* parliaments will be completed in time, and this will in turn enable the Agreement to enter into force by May 2009, the deadline agreed in the "state aid compromise".

It emerges from the current draft that the three additional digital television programmes of ARD and ZDF will not have to undergo a three-stage test but, rather, will be commissioned by the *Länder*.

In the case of telemedia services, the three-stage test will always have to be carried out. Entertainment offerings are also considered permissible, both with regard to telemedia that relate to a specific programme and those that do not. However, in all cases the 7-day time-limit will apply, after which it will be possible to exploit the offerings commercially but not make them available free of charge. In addition to "bought-in feature films and series", sports broadcasts are also excluded from these provisions. Furthermore, if these broadcasts constitute events specified in the list contained in section 4 of the RStV they may only be offered for retrieval for a period of 24 hours.

The three-stage test thus has to be carried out for all telemedia services that are provided by the public-law institutions (including multimedia libraries) and are available on 30 April 2009. This test, which must be completed no later than 31 December 2010, will be carried out on the basis of the institution's own telemedia concepts and rules on the procedure for conducting it.

There is also provision for specific quorums to be met by the institutions' internal bodies when the test is applied so that its validity can be recognised by the authority responsible for legal supervision.

In a minuted note, the subject of the relationship that public-law institutions, as commissioners of productions, have with manufacturers, scriptwriters and directors is mentioned, and it is pointed out that the issue involved here is the establishment of fair rules when drawing up provisions concerning rights to the (digital) exploitation of works. ■

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

FR – Development Plan for the Digital Economy

On 20 October 2008 the Government presented the 154 measures that make up its "2012 Digital France" plan, which aims at reducing the gap between France and its international competitors in this specific area. Noting that the digital economy is a vector for growth that has a lot of potential, the plan is based on three major democratic objectives, namely ensuring that everyone in France has access to broadband Internet, ensuring that France switches over to all-digital in the audiovisual sector before 30 November 2011 in keeping with the Giazzi Report submitted in September, and reducing the digital divide. To develop the digital economy, the "2012 Digital France" plan therefore aims not only at equipping as many homes in France as possible with computers and broadband but also supplying them with digital content, thereby encouraging the development of production and offering better availability as well as protecting works and programmes. In the audiovisual field, the plan envisages the creation of a national directory of protected digital works, and of a public observatory of content marking technologies, a shortening of the amount of time before audiovisual content is made available, a charter for the web 2.0 players to undertake to respect copyright, interoperable standards, and a reform of the private copy commission to make the issue more transparent.

The changeover to all-digital will provide an opportunity to take on new audiovisual services – including high-definition television and personal mobile television – and to release a number of frequencies. In this way a number of frequencies re-sulting from the end of analog television will be allocated to covering the territory with new-generation networks of fixed and mobile super-broadband. Since the prime objective of the plan as far as the audiovisual sector is concerned is to enable everyone in France to receive terrestrially-broadcast digital television and personal mobile television, one of the actions envisaged is aimed at releasing resources for the new television services. The incumbent television channels are keen to switch over to digital as soon as possible in order to make savings (because of the expense of broadcasting in both analog and digital modes). The changeover to all-digital in France will take place gradually, region by region, with completion scheduled for 2011.

The plan does not omit digital radio, for which a band of frequencies resulting from the digital dividend has been earmarked. The all-digital system will also work in favour of the creation of a French-language "gateway" to act as a content aggregator. ■

Aurélie Courtinat
Légipresse

● Digital France 2012 – Plan for the development of the digital economy, October 2008; available at:
http://merlin.obs.coe.int/redirect.php?id=11479

● Report on "The media and the digital system" by D. Giazzi, September 2008; available at:
http://merlin.obs.coe.int/redirect.php?id=11475

FR

FR – Graduated Response according to the Bill on "Creation and the Internet"

The French Government has presented a bill entitled "Creation and the Internet" as a solution to the threat to creation posed by unlawful downloading. Proposing the setting up of a system of "graduated response" which is intended to be dissuasive rather than repressive, the bill has given rise to considerable debate both in France and in Europe. Amendment 138 adopted by the European Parliament catalysed the fears expressed by the bill's detractors (see IRIS 2008-10: 4).

"Graduated response" refers to the method for warning and sanction that the new High Authority for the Broadcasting of Works and the Protection of Rights on the Internet (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* - HADOPI) would apply to holders of Internet subscriptions used for unlawful downloading (see IRIS 2008-7: 10). The holder, identified by a sworn HADOPI agent, would be sent in the first instance an ordinary letter, and possibly a second letter by registered post with request for acknowledgement of receipt, before being sanctioned by the HADOPI if he/she failed to mend his/her ways or those of the users for which he/she was responsible. The authori-ty may then propose a transaction or suspend the Internet subscription, which would not release him/her from the obligation of paying the subscription. Those opposed to the bill object that it would be counter to freedom and would not provide any solution to the loss of earnings suffered by content originators. Those in favour of the bill feel, on the contrary, that this system gives Internet users an opportunity to change their behaviour once they become aware that what they are doing is illegal, thereby preserving the freedom of all parties concerned. The Creation and Internet bill highlights the fundamental opposition between two concepts of the Internet. The European Parliament's adoption of Amendment 138 during the discussions on the Telecoms Package in the autumn has highlighted the contentions and given MEPs an opportunity to express their disagreement with the French solution. The Amendment provides for application of "the principle that no restriction may be imposed on the rights and freedoms of end-users, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, without a prior ruling by the judicial authorities, save when public security is threatened". The text, presented as a flat refusal of the French bill, has so far only been adopted by the Parliament – it still has to go through the Council and the Commission and, if it is successful, may be transposed into national law within two years. Nicolas Sarkozy, the French President, sent a letter to José Manuel Barroso requesting his "personal undertaking to have the Amendment set aside". By way of reply, the Commission merely recalled that the European procedure for adopting texts made no allowance for the discretionary withdrawal of an Amendment adopted by the European Parliament. Whatever happens, the date for the Senate examining the bill remains the 29 and 30 October 2008. ■

Aurélie Courtinat
Légipresse

● **Bill in favour of the circulation and protection of creation on the Internet; available at:**
http://merlin.obs.coe.int/redirect.php?id=11480
FR

FR – Reform of the "Tasca Decrees"

The "Tasca Decrees" are regulations aimed at developing and maintaining a fabric of 'independent producers' for television channels in order to preserve the diversity of French production. They ensure for producers a set of inalienable rights in order to ensure not only their survival but also their development. They are based on restrictions not only on the rights that the channels may acquire but also on the new work they may commission, and make it possible to preserve a degree of independence in the financing and content of French production. Disparaged by some yet considered as being almost a public utility by others, the Decrees are now being subjected to the overall reform of the audiovisual sector and their content is being reworked as a result of fierce negotiations between the syndicates of producers and the television channels which have given rise to undertakings for each separate channel. Announced at the beginning of September, these negotiations have already been completed for a number of broadcasters. Canal+, for example, was the first to commit itself to this new collaboration with producers, providing for a "modulation of the rights sold according to programme genre and the percentage of the production financed by the group" – 'à la carte' financing that also takes account – for the first time ever – of VoD broadcasting and catch-up TV, for which the rights will now be associated with broadcasting rights and not with non-linear rights (VoD). Canal+ is reserving the rights for twelve months starting from the first television airing, but is offering to concentrate its investments in "patrimonial"

works and independent audiovisual production. As the method of calculation now refers to the group and not the channel, the investments of the encrypted channel should in the end amount to 3.4% of its turnover, compared with 4.5% for audiovisual works and 12% for cinematographic works out of its total net resources from the previous year under its last agreement.

France Télévisions has also just signed an agreement with the producers, which refers to a percentage of its turnover, as before, and not to a specific amount; this would have posed a threat for the holding company whose income has already been reduced as a result of the announcement of the abolition of advertising and whose future is still uncertain. The group has therefore undertaken to invest an increasing proportion of its turnover over the next four years, starting from 18.5% in 2009 and working up to 20% in 2012. It should be recalled that some of France Télévisions' channels currently exceed the minimum threshold for investment imposed on them, already reaching 20%, on the basis of turnover that is much higher than the figure anticipated for 2012. In return for these undertakings, the holding company is reserving an exclusive 18-month broadcasting window for one-off fiction works and an exclusive broadcasting window of 36 to 48 months for series. The agreement also includes catch-up TV, for which the usual scheme of rights covers 7 days.

TF1 is currently negotiating a relaxation of its undertakings, and M6 is ensuring that, in the negotiations on its agreement, its obligations take account of its magazine programmes. ■

Aurélie Courtinat
Légipresse

FR – Cinema on French Television

On 29 September 2008 the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority - CSA) published its report on the place occupied by the cinema in the best television viewing figures.

In its report, the CSA compared the audience figures for full-length feature films broadcast on television from 1994 to 2007 and reached the alarming conclusion that the presence of the cinema on French television channels is in decline. It noted that the number of cinematographic works in the category of the 100 best viewing figures had been divided by three in the space of 14 years, falling within the category just 11 times in 2007. The CSA noted that the French cinema represents 40% of these films, as required of the channels by law, whereas the French cinema is more successful in cinema theatres, where it has a 47.8% market share, and that the vast majority of the other films broadcast are of American and non-European origin. Nevertheless, although the decline of the cinema on television was flagrant, the CSA noted that their average audience was stable, as long as they did not suffer from similar programming on competitor channels. The CSA put forward a number of explanations for the declining presence of the cinema on television, including competition from other programme genres, among which fiction has had the most important effect on the programming of cinematographic works. One-off or serial fiction is formatted for broadcasting on television and is sometimes so successful as to completely overturn the previous equilibrium, as in the case of "C.S.I.", which recorded the best fiction audience figures for the year. Fiction is subject to fewer legal constraints than cinema films, which are subject to weekly or annual broadcasting restrictions and have to fit into a media chronology that is now perhaps showing its limits. Among the possible causes for the decline of the cinema on television, the CSA also puts forward the small number of works not previously shown on tele-vision that are programmed, which was not the case for audiovisual works, a much less abundant offer on the part of the channels with the disappearance of slots that used to be reserved for the cinema, and the increasing segmentation of the offer of producers who target the various types of audience in cinema theatres with increasing precision, whereas television broadcasting aims to be convergent rather than divergent. Lastly, the CSA advances the hypothesis of the constraint imposed by the single advertising break authorised during the broadcasting of cinematographic works (which does not exist on the public-sector channels), which places a burden on the cost of broadcasting, a point that the current audiovisual reform has promised to broach. The bottom line of the report is that the cinema has been running out of steam on television for the past 14 years, to the detriment of the French and European cinema and currently to the advantage of American series and major events in sport and politics. Terrestrially-broadcast digital television perhaps constitutes a life-raft for the broadcasting of cinema films on television. ■

Aurélie Courtinat
Légipresse

● CSA, 29 September 2008; report on the place occupied by the cinema among the best television viewing figures, available at: http://merlin.obs.coe.int/redirect.php?id=11474

FR

GB – Competition Appeal Tribunal Rejects BSkyB Appeal Against Requirement to Sell Shares in ITV, but Grants Rival Appeal on Plurality

Tony Prosser
School of Law, University of Bristol

The UK Competition Commission found earlier this year that BSkyB's 17.9% holding in ITV plc constituted a merger situation and had resulted in a substantial lessening of competition within the UK market for all television services, though it was not unlawful for reducing media plurality. As a result, the Secretary of State for Business and Enterprise ordered the shareholding to be reduced to a level below 7.5% (see IRIS 2008-3: 13). BSkyB appealed to the Competition Appeal Tribunal, the UK competition court, which has now rejected its appeal, but upheld an appeal from a rival bidder on plurality grounds.

BSkyB had argued that key findings of the Competition Commission were irrational, perverse or based upon inadequate evidence; it had also not applied the correct standard of proof in reaching its decision. It should be noted that merger appeals to the Tribunal have to be decided not "on the merits" by assessing whether the decision was right or wrong, but on principles similar to those used in judicial review, which permit only a more limited assessment of the illegality or irrationality of the decision. On the key finding by the Commission that the holding permitted BSkyB to block a special resolution proposed by ITV management, the Tribunal concluded that this was a conclusion which the Commission was perfectly entitled to reach and which was not irrational or perverse. In none of the findings under challenge had BSkyB succeeded in establishing that they were perverse, irrational, unsupported by evidence or influenced by irrelevant considerations.

The Tribunal also heard an appeal by Virgin Media, whose merger with ITV had been blocked by the BSkyB shareholding. Virgin argued that the Commission and the Secretary of State had misunderstood the relevant statutory provisions relating to plurality of media ownership in determining that the BSkyB holding would not affect media plurality, but only reduce competition in the marketplace. They had taken into account not just the number of persons with control of the media, but also "internal plurality"; the range of information and views made available by enterprises under common control. The Virgin argument was upheld by the Tribunal, which considered that the relevant legal provisions required that each enterprise had to be treated as wholly controlled by a single person and that "internal plurality" was not relevant. Thus the Commission had taken into account irrelevant considerations in reaching its decision; as a result, the decision was held to be partly invalid. A further hearing will be held to determine the appropriate remedy. ■

• Competition Appeal Tribunal, British Sky Broadcasting plc v The Competition Commission, [2008] CAT 25, available at: http://merlin.obs.coe.int/redirect.php?id=11440

EN

GB – Regulator Publishes Options for Future of Public Service Broadcasting

The Office of Communications (Ofcom), which regulates most UK broadcasting, is required by the Communications Act 2003 to review public service broadcasting at least every five years. It has just published the second stage of its current review, based on detailed evidence from broadcasters and from stakeholders and the public.

The review found that audiences value the BBC very highly, but do not favour it becoming the only provider of public service broadcasting. However, provision of such broadcasting by commercial broadcasters will not survive transition to an all-digital world (from 2012) without new means of support; the value of commercial licences will fall below the cost of current public service obligations before 2012, so broadcasters will have an incentive to surrender the licences unless further funding is provided. Although the marketplace will make a growing contribution, multichannel broadcasters provide very little programming in the genres under threat; current affairs, national and regions programming, challenging UK drama, UK scripted comedy, and UK drama and factual programming for children. Online business models remain highly uncertain, especially in these areas.

The review sets out three possible modes for the post-switchover world. In the first, the "enhanced Evolution model", the main commercial public service broadcasters retain some obligations. ITV1 will have them for UK origination and news, including that for the devolved nations; Channel 4 for innovation and distinctive public service across platforms (with additional funding), and Five for UK origination, in particular children's programming. The second model is the "refined BBC/Channel 4 model". These two channels would be the main recipients of public funding and regulatory assets, whilst the other channels would lose their public service obligations. The third model, the "refined competitive funding model", would be the most appropriate, if audiences turn rapidly to new platforms and forms of content. The BBC would remain the cornerstone of public ser-vice broadcasting provision, but additional funding would be made available to a wide pool of providers through competitive bidding. Channel 4 would retain its public service status, but would be required to bid for any additional funds.

Any future model will require replacement funding for the provision of news and information for the

devolved nations of Scotland, Wales and Northern Ireland. To continue the same mix of public and private content which exists today, funding of between GBP 330-420 million will be required, in addition to the licence fee. This could be found from part of the licence fee settlement ring-fenced to pay for costs of digital switchover, from partnerships between the BBC and commercial broadcasters or the transfer of BBC Worldwide to Channel 4 or from industry levy schemes. In the meantime, the cost of some obligations would be reduced substantially by reducing ITV1's minimum requirements for news and non-news programmes for the nations and regions and reducing its quotas for out-of-London productions; Ofcom is consulting on these proposals.

It is important to note that all the possible models are highly controversial and at this stage remain proposals; the debate will continue for some time. ■

Tony Prosser
School of Law, University of Bristol

● Ofcom, 'Ofcom's Second Public Service Broadcasting Review – Phase 2: Preparing for the Digital Future', Ofcom, 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11441

EN

HR – EU MEDIA 2007 Programme

By signing the Memorandum of Understanding between the European Union and the Republic of Croatia on the participation of Croatia in the European Union MEDIA 2007 program (2007- 2013) on 13 March 2008 and its ratification by the Croatian Parliament on 25 April 2008 Croatia became a full member of this program. The mentioned Memorandum and its ratification now provide a legal basis for Croatian directors, producers, writers and other physical or legal entities to participate in the audiovisual activities of the MEDIA 2007 program and the tenders for financial means which are granted by the European Union to support the production, promotion and distribution of European audio-visual works.

The MEDIA 2007 program's objectives are: to strive for a stronger European audiovisual sector, reflecting and respecting Europe's cultural identity and heritage; to increase the circulation of European audiovisual works inside and outside the European Union; to strengthen the competitiveness of the European audiovisual sector by facilitating access to financing and promoting the use of digital technologies. ■

Nives Zvonaric
Agencija za elektroničke medije, Novo Cice

● Act on ratification of the Memorandum of Understanding between European Union and Republic of Croatia in Union Media 2007 program (2007 – 2013) - International agreement number 03/08 is available at: http://merlin.obs.coe.int/redirect.php?id=9658

HR

IT – Italian Courts Ban Pirate Bay, but then Lift the Block

Over the past two months the attention of the media and of Peer-to-Peer users has been focused on two recent rulings with which two Italian courts first imposed and subsequently lifted a ban on the popular Swedish BitTorrent tracker website Pirate Bay.

By its decree of 1 August 2008, the *Giudice Per le Indagini Preliminari* (Court for Preliminary Investigations) of Bergamo placed the said website under preventive seizure (*Sequestro preventivo*) on the basis of Article 321 of the Italian Code of Criminal Procedure. This interim measure was adopted in the context of criminal investigations against the owners of the Swedish website, who were charged with aiding and abetting, on a profit-making basis, the illegal sharing of copyrighted material, in violation of Law no. 633, of 22 April 1941 concerning copyright and related rights.

In its lengthy list of reasons, the Bergamo Court for Preliminary Investigations noted that, albeit no copyrighted files were being hosted on Pirate Bay, that website provided its users with alphanumerical codes, known as "torrents", which allowed them to retrieve and download specified files from their respective computers. Since many of the users exchanging copyrighted works were Italian nationals, the Italian Court deemed that it had jurisdiction over the case.

The Court further observed that the site's willingness to facilitate illegal file sharing was apparent *inter alia* from the name of the website (www.thepiratebay.org), which constitutes an express reference to online piracy. That activity, moreover, was found to be conducted on a profit-making basis, as the inclusion on the website of advertising banners generated a revenue estimated at "million of dollars".

The Bergamo Court, therefore, held that the said website constituted either the corpus delicti or "a commodity pertaining to" the violation of copyright laws insofar as it made illegal file sharing possible. Since the operation of the website could, under the terms of Article 321 of the Italian Code of Criminal Procedure, "worsen or extend in time the consequences" of the said criminal offence, the Court placed it under preventive seizure, thereby enjoining Internet Service Providers (ISPs) established in the Italian territory from granting their users access to www.thepiratebay.org, its aliases and its respective static IP address.

The Pirate Bay's lawyers Giovanni Battista Gallus and Francesco Micozzi promptly challenged the seizure decree. By its order of 24 September the Court of Bergamo, sitting as an appeal instance, quashed the decree by the Court for Preliminary Investigations, thus lifting the ban on Italian ISPs.

The grounds of the decision, however, make it apparent that the earlier decision was not reversed because of a lack of jurisdiction on the part of the Italian courts or due to insufficient evidence linking the website to the alleged illegal file sharing. The reasoning of the decision lifting the ban, instead, focused on the legal notion of "preventive seizure", under Article 321 of the Italian Code of Criminal Procedure, as a measure which is real in nature and has erga omnes effects, insofar as the commodity concerned becomes unavailable to everybody.

The decree adopted by the Court for Preliminary Investigations, conversely, constituted a sui generis personal injunction, as it required specific addressees having no responsibility in the offence (i.e. the ISPs) to prevent their users from accessing the website. Article 321 therefore, could not serve as a legal basis for the contested decision. Since, in the context of a criminal procedure, interim measures have to be expressly laid out in legislation, the impugned decree was invalid.

Finally, it is worth mentioning that, for reasons yet to be clarified, the users who attempted to access the Pirate Bay whilst the ban was in force were redirected by their respective ISPs, instead of to a warning webpage by the Italian authorities, to a website run by FIMI, an association of Italian record labels. This caused considerable dismay among those users, who feared that the Italian majors might have logged their IP addresses for the purpose of prospective legal action. Relying on the outcome of the recent Peppermint case, whereby such a conduct on the part of record labels was clearly outlawed, the consumers' association Altroconsumo filed a complaint with the Italian Authority for the Protection of Personal Data. ■

Amedeo Arena
University of Naples School of Law

- ***Tribunale di Bergamo, Sezione del Giudice per le Indagini Preliminari e della Udienza preliminare, Decreto 1 agosto 2008*** **(Court of Bergamo, Court for Preliminary Investigations and Pretrial Hearing, Decree of 1 August 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11435**
- ***Tribunale di Bergamo, Sezione penale del dibattimento in funzione di giudice del riesame, Ordinanza 24 Settembre 2008*** **(Court of Bergamo, Criminal division acting as an appeal instance against interim measures, Order of 24 September 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11436**

IT

IT – Government Approves the Final Transition to Digital Terrestrial Broadcasting

The Italian Parliament converted the *decreto-legge* (draft law) n. 59/2008 into Act 101/2008, embodying urgent provisions for the fulfillment of European Community obligations.

Recently, on 10 September 2008, the Italian Ministry of Economic Development, according to the provisions of article 8 novies, paragraph V of the mentioned draft law n. 59/2008, signed a Ministerial Act, which contains the timetable for analogue switch-off. In fact, the measure – in order to pursue complete digitisation by 31 December 2012, as required by Italian Law n. 222/2007 – sets a plan for a gradual transition to digital broadcasting. The *Autorità per la Garanzia nelle Comunicazioni* (Italian communications authority - AGCOM) also approved the project unanimously.

The process will take place across 16 regions between 2009 and 2012. Sixteen technical areas have been identified following a thorough technical analysis conducted by the *Comitato Nazionale Italia Digitale* (National Italian Digital Committee). In order to ensure an efficient use of the frequency resources and the continuity of receiving programs, the technical areas do not always coincide with administrative regions.

The provision establishes a gradual and progressive transition to DTT starting from the second half of 2009 until the second semester of 2012. Nevertheless, the switchover pilots which are currently underway in Sardinia and the Aoste Valley will be completed in early 2009, as originally planned. Four regions will switch-off analogue services in 2009 including Lazio, Campania, Trentino Alto-Adige and Piemonte. The process will end in the regions of Sicily and Calabria. It is expected that by 2010 70% of the population will have completed digital switchover.

Finally, the Italian ministry has stressed that the process has social repercussions and has therefore suggested providing contributions to aid disadvantaged people. ■

Valentina Moscon
PhD candidate Department of Legal Sciences University of Trento

- ***Decreto Ministeriale 10 settembre 2008, contentente il calendario della transizione definitiva alla trasmissione digitale terrestre*** **(Ministerial Decree of 10 September 2008) available at: http://merlin.obs.coe.int/redirect.php?id=11446**
- ***Legge 22 Novembre 2007, numero 222: Conversione in legge, con modificazioni, del decreto-legge 1° ottobre 2007, n. 159, recante interventi urgenti in materia economico-finanziaria, per lo sviluppo e l'equita' sociale"*** **(Act of 22 November 2007 number 222 article 1, paragraph 325 - 343), available at: http://merlin.obs.coe.int/redirect.php?id=11447**
- ***Comunicato Stampa del Ministero dello Sviluppo Economico pubblicato il 10 Settembre 2008: "TV digitale - Romani: per il 70% italiani switch off anticipato al 2010"*** **(Press Release of Ministry of Economic Developement of 10 September 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11448**

IT

LV – Supreme Court Senate Discusses the Definition of Relevant Market for Films

On 10 April 2008 *Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departaments* (the Administrative Department of the Supreme Court Senate of Latvia) adopted an interesting judgment regarding the definition of relevant market for films. The judgment may contribute to careful application of competition law to the audio-visual sector.

The judgment was adopted in a dispute between a film distributor SIA Rimaida and the Competition Council of Latvia. The Competition Council had recognised in its decision that Rimaida holds a dominant position with respect to the retail market of renting and selling VHS and DVD format records of the film *Terminator 3: Rise of the Machines*. Moreover, the Competition Council found that Rimaida had abused its dominant position by applying unfair selling prices. Rimaida appealed the said decision, and, although the first instance court rejected the appeal, the second instance court upheld the claim and revoked the decision of the Competition Council. The judgment of the second instance was appealed, too, thus the case was reviewed by the Supreme Court Senate as the third and final instance.

The second instance court held that the Competition Council had defined the relevant market too narrowly, i.e., the court disagreed that a single film might constitute a separate relevant market. The court indicated that a film of certain genre may be substituted by other films of the same genre. Also, the specific film *Terminator 3* could have been available for viewing also in cinema, not only by renting or purchasing a DVD or VHS record. Thus, the second instance court considered that the relevant market in the case should be the market of audio-visual products in total. In such a broadly defined market the market share of Rimaida was no more than 10 %, so it could not be considered as being in a dominant position.

The Supreme Court Senate rejected the findings of the second instance court and revoked its judgment. The Senate agreed with the Competition Council that a single film may constitute a relevant market for the purposes of the competition law. In particular, the Senate indicated that a new film, especially a new blockbuster, cannot be substituted with other films of the same genre. The Senate mentioned the example of Harry Potter films: when a new Harry Potter movie sequel comes out, the audience wants to see exactly this movie, not some other film of the same genre, such as any of the previous Harry Potter movies. The Senate also referred to the case law of the European Court of Justice, which in its judgment in case 298/83 Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities had recognised that abuse of dominant position is possible with respect to individual films.

In addition, the Senate also rejected the opinion of the second instance court that the film *Terminator 3* could have been available for viewing in cinema and thus the market should be broader. The Senate pointed out that the distribution of films in cinema or in any other way (rental, pay television, free to air television, etc.) constitute separate relevant markets. These types of distribution are not substitutable either from the demand side (different experience) or the supply side (different economic value of goods). By reaching this conclusion the Senate referred to the decision of the European Commission of 13 October 2000 declaring a concentration to be compatible with the common market (Case No IV/M.2050 - 3* VIVENDI / CANAL+ / SEAGRAM).

The case will have to be reviewed once again in the second instance court, for which the findings of the Senate will be binding. The case reflects a positive development in the Latvian courts, namely, that the courts try to adopt a broader view when applying laws, which are largely influenced by the European Community law, the competition law being a prime example. In this case, the Senate tried to adopt an interpretation, which would be consistent with the approach of the European Court of Justice and the European Commission. It remains to be seen if and how far the lower instance courts will follow this trend. ■

Ieva Bērziņa-Andersone
Sorainen Law Office, Riga

● **Decision of *Latvijas Republikas Augst k s tiesas Sen ta Administrat vo lietu departaments* (the Administrative Department of the Supreme Court Senate of Latvia), 10 April 2008, published on the official newspaper *Latvijas Vēstnesis*, appendix *Jurista Vārds* of 2 September 2008.**

LV

LV – Regulations on the Introduction of Digital Television in Latvia Finally Adopted

On 2 September 2008 the Cabinet of Ministers of Latvia finally adopted the long awaited regulations on the introduction of digital broadcasting in Latvia. The authorisation to the Cabinet of Ministers to adopt such regulations was provided in 2002 by respective amendments to the Radio and Television Law (31 October 2002). However, it took almost six years and several changes of government to agree on the respective regulations.

The new regulations refer only to the digital terrestrial broadcasting of television programmes, and do not regulate radio broadcasting or digital broadcasting in formats other than terrestrial. Also the regulations are relevant only to the transmission part of broadcasting, and do not provide any rules on content provision or programme packaging. The regulations specify the technical parameters of digital broadcasting (DVB-T and DVB-H technologies to be used, as well as MPEG-2, MPEG-4 or other compression technologies) and provide rules on how the providers of digital broadcasting will be selected.

The provider of digital broadcasting will have to be an electronic communications merchant (as defined by the Electronic Communications Law of Latvia) selected in a tender organised by the Ministry of Transport, running until 15 November 2008. The regulations do not specify the type of tender (open

or closed tender, a negotiations procedure, etc.), thus it should be chosen by the Ministry of Transport. The regulations only note that the tenderers must be assessed, taking into account their previous experience, offered terms for the implementation of digital television, plans of geographical availability, number of users, and measures for providing information to the public. The selected provider of digital broadcasting will have to implement digital television and carry out a complete transfer to digital broadcasting by 1 December 2011. The provider has to ensure that public and commercial broadcasters have an opportunity to broadcast their programmes in digital formats in accordance with their broadcasting permits and pursuant to mutual agreements with the provider.

The National Radio and Television Council will have to name certain television programmes, which must be provided in digital format free of charge. The broadcasting permits for digital broadcasting will be issued by the National Radio and Television Council, as it has been done so far. It may be decided that the existing broadcasting permits will remain in force, the regulations provide that the National Radio and Television Council must re-register the permits and amend, if necessary.

It is clear that it will be crucial to select an appropriate provider of digital broadcasting in order to ensure successful transfer. The regulations provide, however, that during the transition period terrestrial broadcasting will be continued in analogue format. The regulations came into force on 27 September 2008. ■

Ieva Bērziņa-Andersone
Sorainen Law Office, Riga

● ***Kārtība, kādā tiek ieviesta elektronisko sabiedrības saziņas līdzekļu veidoto programmu apraide ciparformātā*** **(Regulations No.714 of the Cabinet of Ministers as of 2 September 2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11431

LV

MT – Broadcasting Authority's Interpretation of the 20-Minute per Clock Hour of Advertising Rule: The Position of Short Programmes

The Authority has clarified that paragraph 13 of the Third Schedule to the Broadcasting Act applies to programmes and not to broadcasts aired during a given clock hour. Paragraph 13 provides that a period of 20 minutes has to elapse between each successive advertising break within a programme which is interrupted by advertising and teleshopping spots. The Authority has held that in the case of programmes which are of less than 20 minutes in duration ("short programmes"), it is permissible to have adverts at the beginning and/or at the end of the short programmes, even if 20 minutes have not elapsed between one advertising break and another. However, in such short programmes, it is not permissible to have adverts within the short programmes. In other words, such short programmes cannot be interrupted by adverts. ■

Kevin Aquilina
Broadcasting Authority, Malta

● **Circular 38/08, "Broadcasting Authority's Interpretation of the 20-Minute per Clock Hour of Advertising Rule: The Position of Short Programmes", 19 September 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11438

EN

MT – Broadcasting Authority Interpretation of the Surreptitious Advertising and Separation Rules

Following a consultation exercise carried out in summer 2008, the Broadcasting Authority has clarified the rules on surreptitious advertising and separation contained respectively in paragraphs 4 and 9 of the Third Schedule of the Broadcasting Act. These rules read as follows: "4. Advertising and teleshopping shall be readily distinguishable as such and kept quite separate from the other parts of the programme service by optical or acoustic means…" and "9. Surreptitious advertising shall be prohibited."

The clarifications state that when a person is invited during an informative slot on a radio or television programme, that person cannot be associated with the entity which sponsors that same programme or a slot within that programme or which advertises in that programme. Moreover, a programme presenter may not participate in an advertisement which promotes a product or service of the same genre discussed during the informative part of the programme. Furthermore, the programme's set used during the information slot cannot be the same set used during the advertisement. In addition, the product or service which is advertised immediately following the conclusion of an information slot and within the first batch of adverts cannot be the same product or service referred to in the information slot.

In its interpretation, the Authority is of the view that during the advertisements it is prohibited to refer to the products or services mentioned during the information slot. Finally, it is not permissible in the information slot to mention products or services referred to in the adverts which follow that slot. ■

Kevin Aquilina
Broadcasting Authority, Malta

● ***Interpretazzjoni ta' l-Artikli 4 u 9 tat-Tielet Skeda ta' l-Att dwar ix-Xandir dwar: Nuqqas ta' Separazzjoni u Reklamar b'Ħabi*** **(Interpretation of Articles 4 and 9 of the Third Schedule to the Broadcasting Act: Lack of Separation and Surreptitious Advertising), available at:**
http://merlin.obs.coe.int/redirect.php?id=11439

MT

RO – The Election Campaign in the Electronic Media

Mariana Stoican
Journalist, Bucharest

On 30 November 2008, elections to the Chamber of Deputies and the Senate will be taking place in Romania. In view of this, the *Consiliul Naţional al Audiovizualului din România* (Romanian National Audiovisual Council – CNA) adopted on 30 September 2008 Decision No. 792, which in addition to the existing legal rules (Electoral Law No. 35) and CNA regulations, lays down a number of "new principles and rules for the conduct of the election campaign by means of audiovisual programmes".

For the first time, the *"candidaţi"* (candidates) and the *"competitori electorali"* (election campaign participants) will have to pay for taking part in the private broadcasters' programmes during the election campaign. The rates laid down by the private broadcasters apply to all candidates in equal measure (section 38 of Electoral Law No. 35). The rules provide for the candidates and election campaign participants to participate in the Romanian public service broadcasters' programmes free of charge.

Private stations wishing to broadcast election announcements and programmes during the campaign must notify the CNA of this in writing by 10 October 2008 at the latest (paragraph 5). Those involved in the election can then apply to the broadcasters for broadcasting time in the same proportion as that to which they are entitled under the Electoral Law with regard to the public service broadcasters' programmes (section 6). On the basis of the applications, the broadcasters will then adapt their programme schedule for the duration of the campaign and inform the CNA of the changes made (section 7). CNA Decision No. 792 only provides for two types of programme: *emisiuni electorale de promovare* (election campaign broadcasts for advertising purposes, paragraph 8a) and *emisiuni electorale de dezbatere* (broadcasts of election debates). Journalists, political commentators and other guests can take part in these programmes in addition to the candidates and campaign participants. Paragraph 9(2) prohibits the use of national symbols for advertising purposes in parts of programmes associated with the election campaign. Candidates and campaign participants are also banned from working as broadcast producers, programme makers or presenters during the campaign (paragraph 9(3)). Candidates holding public office may appear in other programmes in addition to the broadcasts described in paragraph 8 but only if their appearances are strictly linked to their present office (paragraph 10).

Inter alia, broadcasters must ensure that human dignity is respected during election programmes, that there is no incitement to discrimination on the grounds of race, religion, nationality, gender or sexual orientation and that no unproven criminal allegations are made against other candidates (paragraph 12). The programme makers and presenters are, for their part, required to be impartial (paragraph 13). If the candidates and election participants believe that their rights and legitimate interests have been violated in the television and radio programmes, paragraph 17 of the CNA Decision refers to the rules relating to the right of reply contained in the Audiovisual Code (Articles 52(1) and 60(1)).

According to paragraph 19 of CNA Decision No. 792, broadcasters are obliged to record all programme contributions associated with the election campaign and make them available to the CNA on request for up to 30 days after the announcement of the election results. A breach of this provision will be punished under Audiovisual Law No. 504/2002 and sections 50 and 51 of Electoral Law No. 35/2008. ■

● ***Decizia Nr. 792 din 30 septembrie 2008 privind principii şi reguli de desfăşurare a campaniei electorale pentru alegerea Camerei Deputaţilor şi a Senatului, prin intermediul serviciilor de programe audiovizuale*** **(CNA regulations: a number of "new principles and rules for the conduct of the election campaign by means of audiovisual programmes"), available at:**
http://merlin.obs.coe.int/redirect.php?id=11428

● ***Legea Nr. 35 din 13 martie 2008 cu modificările şi completările ulterioare*** **(Electoral Law No. 35 of 13 March 2008), published in *Monitorul Oficial, Partea I Nr. 196 din 13/03/2008*, available at:**
http://merlin.obs.coe.int/redirect.php?id=11429

RO

RS – Changes in Media Legislation Announced

Following the parliamentary elections in May 2008 and the forming of a new Government in July 2008, consisting of the broad pro-Europe coalition and the coalition gathered around the Socialist Party, political changes are slowly starting to reflect on media regulation in Serbia. The new Government, as a starting point, focused on issues that were heavily criticised in the preceding period – the privatisation of local media owned by local authorities, the concentration of ownership of media and the position of independent regulators and public service broadcasters.

Judging from the recent announcements of the Ministry of Culture, the laws which undermined the process of the privatisation of media outlets, thus leaving some of the media under direct ownership control of the local authorities, shall be amended and the process of privatisation shall be back on track.

A draft law which shall deal with the issue of the concentration of media ownership, introducing effective limitations thereto, shall be presented rather soon, and the alterations to the 2002 Broadcasting Act made in 2007, through which most of the safeguards of the independence of the Serbian Broadcasting Agency (SBA) were removed, shall be reversed so as to reinstate the SBA as an independent authority.

As for the public service broadcaster RTS, the Ministry of Culture explained that, due to the requirements of improvement of broadcasting technology,

the transmitting department shall be removed from the RTS into a separate legal entity which should enable all licensed content broadcasters to, without discrimination, use its technical facilities to air their programs. This change is also necessary because the reconstruction of the transmitting equipment, almost totally destroyed during the air strikes in 1999, puts a heavy financial burden on the public service broadcaster, which is financed mostly by licence fee. The state is limited in its possibilities to provide direct financial aid to the RTS because of concerns about its editorial independence. Such concerns would not exist if the RTS transmitting department would be spin-off into a separate company under direct state ownership.

Most of the announced changes shall happen, according to the Ministry of Culture, by the end of this year. ■

Miloš Živković,
Belgrade University School of Law & Živković & Samardžić Law offices

SE – Court of First Instance Holds Collecting Society Responsible for Anti-Competitive Behaviour

ALIS, a Swedish collecting society, filed two lawsuits against the *Mediearkivet* (Media Archive) alleging that it was in breach of the Act on Copyright in Literary and Artistic Works when using articles not paid for. The Media Archive administrates an internet-based information database, where it sells subscriptions which enable the user to search among and use the articles available. The Media Archive responded by claiming that ALIS's agreements with the rightsholders were a restraint of trade, according to Section 7 of the Swedish Competition Act, as well as of Article 81§3 of the EC Treaty. On the 26 of August 2008, the Stockholm District Court announced its judgment, holding ALIS responsible for anti-competitive behaviour.

The court initially stated that Article 81§3 of the EC treaty is applicable in parallel with the Competition Act, because the co-trading effect criterion is met. The Court considered that collecting societies do not per se breach the probation against anti-competitive agreements. The Court however stated that collecting societies are not immune, in the sense that there is a risk that they enter into agreements that are considered to be a restraint of trade, according to Article 81§1 of the EC Treaty and Section 6 of the Competition Act. Nor are they protected by some kind of legal exception.

The court found that the burden of proof for a restraint of trade rested on the Media Archive. After a detailed review of the EC legislation, the Court nevertheless declared that it was unreasonable for the Media Archive to have to present an extensive market analysis for their claim to be successful. The court chose to apply a step-by-step analysis, where the demand of proof was adjusted to the disputed question of restraint of trade.

The existence of a larger negotiating party on the vendor's side could generally reduce the transaction costs. However, since ALIS does not in an explicit way declare whom they represent and this is only made available upon request, the efficiency gained from the agreements becomes negligible. ALIS's activities are built on a business model whereby negotiations are held with every single commercial buyer, concerning each piece of work. They do not offer licences where the conditions are transparent and clear. Nor do they provide their customers with a package deal in the shape of an extended collective licence. Furthermore, as ALIS enjoys exclusive rights to the rights administered, the organisation holds a monopoly on these rights. There was also evidence pointing towards monopoly pricing.

In conclusion, the Court rejected ALIS's claim for compensation in the two cases. It cited that the organization lacked standing, as the rights-holders' association agreements with ALIS were invalid because of illegality, according to Section 6 of the Competition Act and Article 81§1 of the EC treaty. The Court referred to another case pending before it, where a more detailed decision is expected on what parts of ALIS's business are in breach of Competition law.

The Stockholm District Court's decision was appealed on 16 September 2008 by ALIS to the Svea Court of Appeals. ■

Helene H. Miksche
Bird & Bird Stockholm

● Stockholm District Court decision, 26 August 2008, in cases no. FT 27829-06 and FT 2875-06

SV

SK – Bill on Audiovisual Fund

The Slovak Ministry of Culture has submitted a draft of the new Act on Audiovisual Fund to the National Council of the Slovak Republic in August 2008. The draft passed the first reading in September 2008.

It refers to and is fully compatible with the Act No. 343/2007 Coll. – Audiovisual Act that became effective on 1 January 2008 and, among other things, it defines Slovak audiovisual works, introduces new obligations (e.g. record keeping) in the audiovisual sector and redefines the activities of the Slovak Film Institute.

The draft is also compatible with other Slovak Acts concerned (Act No. 308/2000 Coll. on Broadcasting and Retransmission and the Act. No. 618/2003 Coll. Copyright Act). At the same time it also reacts to an appeal of the European Council Fund, Eurimages, of which the Slovak Republic has been member since 1996, to the EU member states, to secure and improve their supporting systems for audiovisual productions.

On the basis of this Act, the Audiovisual Fund shall be created with the status of a public institution and start its activities in 2009. The Act counts two independent institutions – the Audiovisual Fund and the Slovak Film Institute as an organization within the founder's competence of the Ministry of Culture that keeps the archive of the Slovak audiovisual works.

The main reason for this Act is the long term absence of a quantitative stable financial resource assigned exclusively for the support and the development of the Slovak audiovisual culture. Currently, the audiovisual culture does not have any state guaranteed and supported institutions orientated only on production and distribution of the Slovak audiovisual works as well as any sufficient primary recourses from the state budget.

The state support of audiovisual production is provided by a grant system of the Ministry of Culture called AudioVízia and covers at present ca. 15 % of the required expenses.

Jana Markechová
Markechova Law Office, Bratislava

The conception of the Act is based on the following principles:
- the creation of the Audiovisual Fund as a main financial recourse aimed exclusively at supporting the Slovak audiovisual culture and industry;
- securing the independence and professionalism of decision-making in the form of public institutions;
- defining stable financial resources based on a fund of contributions of those who perform their business activities also by using contents of audiovisual works;
- determining goals of supporting activities and transparent rules for using its recourses
- determining mechanisms of control.

The scope of activities of the fund includes besides supporting, strategic and planning activities in the audiovisual culture and industry in the Slovak Republic also granting the co-production statute according to the European Convention on cinematographic co-production.

The Slovak Audiovisual Fund enables three different forms of film support - grants, loans, awards or loan guarantees. The successful applicants should receive the money under predetermined and agreed conditions and for a time period longer than one year. The applications shall be considered by several independent professional commissions.

According to the introduced draft of the Act on Audiovisual Fund, the Audiovisual Fund should be financed from the state budget and contributions of users of the audiovisual works. However, the several concerned Slovak institutions (Institute for Media, Literary Fund and the Slovak Film and Television Academy) expressed their objections to financing the Audiovisual Fund this way. ■

● ***Vládny návrh zákona o Audiovizuálnom fonde a o zmene a doplnení niektorých zákonov*** **(Bill on Audiovisual Fund), available at:**
http://merlin.obs.coe.int/redirect.php?id=11478

SK

TR – Changes Planned in Foreign Participationin Turkish Radio and Television Corporations

Turkish private radio and television organisations are regulated by the Law on the Establishment of Radio and Television Enterprises and Their Broadcasts (Law No. 3984 of 20 April 1994). According to this Law, radio and television broadcast permits and licences shall only be granted to corporations which are established in Turkey according to the Turkish Commercial Code, for the purpose of radio and television broadcasting, communication, education and culture. Such a corporation's shares must be registe-red and no preferred shares may be issued. A single corporation may establish only one radio and television enterprise.

Foreign investors may acquire shares in Turkish radio and television corporations, provided that the share of foreign capital in one private radio or television corporation does not exceed 25 % of the paid in capital. A real or legal person of foreign nationa-lity holding shares in a certain radio or television corporation may not become a shareholder in another private radio or television corporation.

The restrictions regarding foreign investments in Turkish radio and television corporations have been criticised in recent years. Recently, a plan to relax these restrictions has been announced in Turkey's Draft National Program expected to be issued in 2008. The National Program is a document which spells out Turkey's plans on how national law shall be harmonised with EC law.

According to a draft law which has not yet been sent to the Parliament, the cap of 25 % on foreign investments will be increased to 50 %. As a result, foreign participation in a Turkish radio and television corporation shall be possible up to 50 % of the paid in capital. Furthermore, foreign shareholders shall be allowed to participate in a maximum of two

private radio and television corporations. However, the share of the same foreign person may not exceed 25 % of the paid in capital in the second private radio and television corporation. Foreign persons will not be allowed to participate in radio and television enterprises conducting local or regional broadcasting.

The situation of indirect ownership of shares has been a contentious issue under the current law. The draft law provides no clear restrictions on the percentage of foreign investment which may be acquired in companies holding shares of Turkish radio and television corporations. However, in case of foreign indirect ownership, it shall be required that the president, vice president and the majority of members of the board of directors and the general manager of the Turkish broadcasting corporation will be Turkish citizens and that the majority of votes to be used at the shareholders meeting will be held by Turkish national or legal persons.

The draft law also provides that restrictions on foreign investment shall not be applicable to EU citizens and companies established in the EU upon Turkey's full membership.

Once the draft law is sent to the Parliament, it shall be discussed by the Parliament's Justice Commission and, therefore, further changes may be expected before it is finalised. ■

Gül Okutan Nilsson
Istanbul Bilgi University Intellectual Property Research Center

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AGENDA

Finanzen und Finanzierung in der Filmwirschaft
25 November 2008
Organiser: Media Business Academy
Venue: Munich
Information & Reservation:
Tel.: +49 (0)89 451 14 202
Fax.: +49(0)89 451 14 416
E-Mail: a.fink@e-media.de
http://www.m-mba.de/