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European Court of Human Rights: case of Leroy v. France

In 2002, the French cartoonist Denis Leroy (pseudonym Guezmer) was convicted for complicity in condoning terrorism because of a cartoon published in a Basque weekly newspaper Ekaitza. On 11 September 2001, the cartoonist submitted to the magazine's editorial team a drawing representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it" (Cfr. "Sony did it"). The drawing was published in the magazine on 13 September 2001. In its next issue, the magazine published extracts from letters and emails received in reaction to the drawing. It also published a reaction of the cartoonist himself, in which he explained that when he made the cartoon he was not taking into account the human suffering ("*la douleur humaine*") caused by the attacks on WTC. He emphasized that his aim was to illustrate the decline of the US-symbols and he also underlined that cartoonists illustrating actual events do not have much time for distanced reflection: "*Quant un dessinateur réagit sur l'actualité, il n'a pas toujours le bénéfice du recul*". He also explained that his real intention was governed by political and activist expression, namely that of communicating his anti-Americanism through a satirical image and illustrating the decline of American imperialism.

The public prosecutor, on request of the regional governor, brought proceedings against the cartoonist and the newspaper's publishing director in application of Article 24, section 6 of the French Press Act of 1881, which penalizes, apart from incitement

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• **Publisher**:
European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 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) – Véronique Campillo – Paul Green – Bernard Ludewig – Marco Polo Sàrl – Manuella Martins – Katherine Parsons – Stefan Pooth – Nathalie-Anne Sturlèse

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Caroline Bletterer, post graduate diploma in Intellectual Property, *Centre d'Etudes Internationales de la Propriété Intellectuelle*, 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) – Candelaria van Strien-Reney, Faculty of Law, National University of Ireland, Galway (Ireland) – Amélie Lépinard, Master - International and European Affairs, Université de Pau (France)

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to terrorism, also condoning (glorifying) terrorism: "*l'apologie du terrorisme*". The publishing director was convicted for condoning terrorism, while Mr. Leroy was convicted for complicity in condoning terrorism. Both were ordered to pay a fine of EUR 1,500 each, to publish the judgment at their own expense in Ekaitza and in two other newspapers and to pay the costs of the proceedings. The Pau Court of Appeal held that "by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ("We") with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act."

The cartoonist lodged an application with the European Court of Human Rights, relying on Article 10 of the Convention guaranteeing freedom of expression. Mr. Leroy complained that the French courts had denied his real intention, which was governed by political and activist expression, namely that of communicating his anti-Americanism through a satirical image. Such an expression of an opinion, he argued, should be protected under Article 10 of the Convention. The Court considered that Mr. Leroy's conviction amounted indeed to an interference with the exercise of his right to freedom of expression. It refused to apply Article 17 of the Convention (prohibition of abuse of rights) in this case, although the French government invoked this article arguing that the cartoon, by glorifying terrorism, should be considered as an act aimed at the destruction of the rights and freedoms guaranteed by the European Convention for the protection of Human Rights and that, therefore, the cartoonist could not rely at all on the freedom of expression guaranteed by the Convention. The Court underlined that the message of the cartoon – the destruction of US imperialism – did not amount to a denial of the fundamental values of the Convention, in contrast e.g. with incitement to racism, anti-Semitism, Holocaust negationism and Islamophobia. Hence, in principle the cartoon was entitled to Article 10 protection. As the conviction of Mr. Leroy was prescribed by French law and pursued several legitimate aims, having regard to the sensitive nature of the fight against terrorism, namely the maintenance of public safely and the prevention of disorder and crime, it especially remained to be determined whether the interference by the French authorities was "necessary in a democratic society", according to Article 10 § 2 of the Convention.

The Court noted at the outset that the tragic events of 11 September 2001, which were at the origin of the impugned expression, had given rise to global chaos, and that the issues raised on that occasion were subject to discussion as a matter of public interest. The Court however considered that the drawing was not limited to criticism of American imperialism, but supported and glorified the latter's violent destruction. It based its finding on the caption which accompanied the drawing and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims, as he submitted his drawing on the day of the attacks and it was published on 13 September, with no precautions on his part as to the language used. In the Court's opinion, this factor – the date of publication – was such as to increase the cartoonist's responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also the impact of such a message in a politically sensitive region, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region. All in all, the Court considered that the grounds put forward by the domestic courts in convicting Mr. Leroy had been "relevant and sufficient". Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist was not disproportionate to the legitimate aim pursued. Accordingly, there has not been a violation of Article 10 of the Convention. ■

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

● Judgment by the European Court of Human Rights (Fifth Section), case of Leroy v. France, Application no. 36109/03 of 2 October 2008, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

Committee of Ministers: European Convention on Access to Official Documents

At the 1024bis Meeting of 27 November 2008, the Committee of Ministers adopted the Council of Europe Convention on Access to Official Documents. Existing instruments are Council Recommendation (2002) 2 on access to official documents and Recommendation No. R (81) 19 on access to information held by public authorities. The idea behind these instruments is that public access to government information is essential for the exercise of

fundamental rights, that it enhances the transparency and accountability of the public sector and the informed participation by citizens in the democratic process.

The Parliamentary Assembly has voiced a number of substantial criticisms of the Draft convention, inter alia, that it provided for too many exceptions, applied to too few public bodies and did not establish a robust enough procedure. It advised that the draft be sent back to the Steering Committee for Human Rights (CDDH) for further consideration (Opinion No. 270 (2008)). The Council however pushed forward. The Convention will take effect three months after ten States have consented to be bound by it.

The Convention starts from the premise that all official documents are in principle public and should only be withheld in order to protect other rights and legitimate interests. The right of access pertains primarily to documents of public authorities with administrative functions: these include local, regional and national administration, but also the legislature, judicature and legal persons, at least as far as their administrative tasks are concerned. Contracting States are free to regard documents relating to all public activities of legislative bodies and judicial authorities as subject to the right of access and also to include natural or legal persons, insofar as they have public functions or are funded with public money.

Public bodies should make official documents available at their own initiative, as long at least as this is in the interests of transparency and the stimulation of efficiency in the public sector, or to encourage citizens' participation (Art. 10). Many national Freedom of Information Acts also require public bodies to be pro-active. Access on request is regulated in more detail (Arts. 4-8). The request procedure has the following characteristics: anybody can make a request, and the applicant shall not be obliged to give reasons for the request. The public authority should make reasonable effort to help the applicant identify which document(s) to which he or she seeks access. If necessary, the applicant is to be referred to the public authority which holds the official document. Requests must be dealt with "promptly", but the Convention does not prescribe a time limit. A refusal must be reasoned. If the rights and interests that justify refusal apply, but are relevant to part of the document only, then the remainder must be released. If access is granted, the applicant is in principle entitled to decide the form of access (inspection, receiving a copy in a certain format, etc.). Any charges for copies may not exceed the costs of reproduction and delivery.

The Convention recognizes four types of refusals. First, access may be refused because the request remains too vague to determine to which document it relates (Art. 5(5)i). Second, a request may be refused because it is manifestly unreasonable (i.e., huge or repetitive bulk requests; Art. 5(5)ii). Third, partial access to a document may be refused, if it requires an unreasonable effort to produce a "clean" document or if the document becomes misleading or meaningless due to the omissions. Fourth and final, a request may be refused because one or more of the countervailing rights and interests of Art. 3(3) is at stake.

The Convention lists twelve broad classes of such rights and interests, ranging from national security to privacy, from commercial or other economic interests (whether public or private) to public safety. These categories are not the same as those found in, for example, Art. 10 ECHR, and some are optional. But the types of limitation to access must meet similar criteria as the infringement of fundamental rights under the ECHR: they must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim pursued. The test for disclosure is a two-pronged one (Art. 3(3)): if a listed right or interest is at stake, access may be refused if 1) the making public of the information would harm or is likely to harm said interest, and 2) there is no overriding public interest in disclosure.

Citizens must always be able to appeal (implicit) decisions on requests before a court or other independent and impartial body established by law. A fast and inexpensive review procedure must also be available, although it need not necessarily be before an independent or impartial body: reconsideration by the refusing public authority suffices. ■

Mireille van Eechoud
Institute for Information Law (IViR), University of Amsterdam

● Council of Europe Convention on Access to Official Documents (Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies), available at:
http://merlin.obs.coe.int/redirect.php?id=11573
EN

Media & Information Society Division: Reports on Anti-terrorism Legislation and Freedom of Expression and Information

In November 2008, the Media & Information Society Division of the Council of Europe, the Dutch Ministry of Education, Culture and Science and the Institute for Information Law (IViR) of the University of Amsterdam organised a conference on anti-terrorism legislation in Europe since 2001 and its impact on freedom of expression and information. The conference opened with the launch of a report

on the topic and concluded with the presentation of a general report on the conference proceedings.

The former report "Speaking of terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe", was written by David Banisar. It contains a number of key substantive focuses: effects of international bodies on Council of Europe Member States; limits on access to and gathering information (including access to information laws; State secrets legislation; limits on photography); limits on freedom of expression; protection of journalists' sources and materials; and wiretapping and surveillance of journalists. Each section provides an overview of the Council of Europe standards most relevant to the topic under discussion and then surveys recent developments in Member States of the Council of Europe. As such, it provides a panorama of the current state of affairs across the Council of Europe.

The latter report, drafted by Sandra Braman, the conference's General Rapporteur, sets out and links the various themes discussed during the conference. It concerns itself with the texts and implementation of anti-terrorism laws and the effects of both on the protection of the right to freedom of expression. In the context of identified trends and concerns, it highlights a number of crucial issues, such as: the expansion of governmental powers; legal uncertainty surrounding key terms; vague or insufficient procedural detail governing legislative interpretation; the scope of reservations to and restrictions on rights, especially the right to freedom of expression.

A number of existing Council of Europe texts were of background importance for the above-mentioned reports and the conference discussions, including the Committee of Ministers' Guidelines on: human rights and the fight against terrorism (2002); the protection of victims of terrorist acts (2005); and protecting freedom of expression and information in times of crisis (2007 - see IRIS 2007-10: 2). Also worthy of mention in this connection is the Committee of Ministers' Declaration on freedom of expression and information in the media in the context of the fight against terrorism (2005 - see IRIS 2005-3: 3). ■

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

● Conference on anti-terrorism legislation in Europe since 2001 and its impact on freedom of expression and information, Council of Europe Media & Information Society Division/Dutch Ministry of Education, Culture and Science/IViR, University of Amsterdam, Amsterdam, 17-18 November 2008; all documents available at: http://merlin.obs.coe.int/redirect.php?id=11572

EN

EUROPEAN UNION

Court of First Instance: Judgment in the State Aid Case against Danish Public Service Broadcaster TV2

Following a complaint from commercial Danish broadcasting operators, the EC Commission in 2003 decided to launch a State aid probe into the possible overcompensation of the Danish Public Service Broadcaster TV2 by the Danish State (see IRIS 2003-2: 3).

In 2004, the Commission decided that part of the aid granted by Denmark to TV2 between 1995 and 2002 in the form of license fee resources and other measures, namely DKK 628.2 million (approx. EUR 84 million), constituted overcompensation of TV2's net costs for public service activities (re: Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Denmark). The Commission ordered Denmark to recover that sum from TV2, with interest. The rest of the State aid granted to TV2 in the aforementioned period the Commission found to be compatible with the common market.

TV2 and Denmark brought actions before the Court of First Instance requesting the annulment of the Commission's decision. Also, the two commercial broadcasters SBS and Viasat brought actions before the Court of First Instance for the annulment of the part of the decision that found the aid granted to be compatible with the common market.

In its judgment of 22 October 2008, the Court of First Instance ruled in favour of TV2 and Denmark, thus annulling the Commission's decision of 2004.

The Court found that the Commission's decision of 2004 was based on an inadequate statement of reasons, amounting to an infringement of essential procedural requirements. According to the Court, the failure to provide an adequate statement of reasons was attributable to the Commission's complete failure to examine seriously, during the formal investigation procedure, the actual conditions that governed the setting of the amount of license fee income payable to TV2. Moreover, the Court found that the Commission's assertion that the Danish authorities did not regularly check the level of the accumulated reserves was an unsubstantiated claim which was expressly disputed by Denmark during the formal investigation procedure.

As it appears, the judgment was based on formal grounds. However, the judgment also contains interesting points with regard to some of the material aspects of the case. First, the Court noted that Member States enjoy a broad discretion for defining what they regard as services of general economic

interest and can legitimately extend the definition of such services so as to cover broadcasting of full-spectrum programming. Second, the Court noted that license fees, though paid by the users, should be considered State funds, as the obligation to pay the license fee does not arise from a contractual relationship between TV2 and the person liable to pay, but simply from the ownership of a television or radio receiver in accordance with statutory law.

Søren Sandfeld Jakobsen
Copenhagen Business School

The judgment of the Court of First Instance does not put the case to rest. The Commission has chosen not to appeal the judgment to the ECJ, but, since the decision was annulled on formal grounds, the Commission can re-examine the case from the beginning and make a new decision. Further, the judgment may be appealed by SBS and Viasat. In addition, two other cases are pending before the Court of First Instance concerning the Commission's approval in 2004 of Denmark's recapitalization of TV2, following the Commission's decision regarding State aid and TV2's repayment thereof. ■

● **Judgment of the Court of First Instance in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, 22 October 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11553**

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

Council of the European Union: Framework Decision on Racism Adopted

In November 2008, the Council of the European Union adopted a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. The aim of the Framework Decision is to "approximate criminal law provisions and to combat racist and xenophobic offences more effectively by promoting full and effective judicial cooperation between Member States".

Article 1 of the Framework Decision requires Member States to take the measures necessary to ensure that the following types of intentional conduct are punishable:

- "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin";
- the commission of any of the above acts "by public dissemination or distribution of tracts, pictures or other material";
- "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes" (as defined by the Statute of the International Criminal Court or the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945).

In respect of the foregoing, Member States may opt, inter alia, "to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting" (Article 1(2)).

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

Member States are also required to make instigating, aiding and abetting the commission of the acts specified above punishable (Article 2). Member States must take the necessary measures to ensure that the types of conduct set out in Articles 1 and 2 are punishable "by effective, proportionate and dissuasive criminal penalties" (Article 3(1)). They are obliged to make the acts specified in Article 1 punishable by "criminal penalties of a period of at least between 1 and 3 years of imprisonment" (Article 3(2)).

Article 4 provides: "For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties". Article 5 envisages liability for legal persons in relevant circumstances and Article 6, in turn, envisages penalties for legal persons.

Also noteworthy is the fact that the Council of the European Union has invited the European Commission to examine and report to it on "whether an additional instrument is needed to cover publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions".

The history of the Framework Decision has been protracted, with the European Commission having presented its original proposal in 2001. The stalled progress can largely be explained by the concerns of certain Member States about the likely impact of the Framework Decision on the protection of the right to freedom of expression. On this specific point, Article 7 makes it clear that the Framework Decision shall not have a negative effect on, inter alia, the rights to freedom of expression (including of the media) and association, as vouchsafed by Article 6 of the Treaty on European Union or the constitutional traditions or rules of Member States. ■

● **Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Council of the European Union, Interinstitutional File 2001/0270(CNS), Doc. No. 16351/1/08 REV 1, 26 November 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11575**

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

● **Press Release 2908th meeting of the Council – Justice and Home Affairs, Council of the European Union, Doc. No. 16325/08, 27 & 28 November 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11578**

EN

European Commission: Commission Issues Guidelines on Mobile TV Networks and Services

On 10 December 2008, the European Commission issued a communication providing guidance on the appropriate regulatory approach towards the authorisation of the deployment of mobile TV services within EU Member States. After the 2007 Communication on "Strengthening the Internal Market for Mobile TV" (see IRIS 2007-8: 2), the addition of the Digital Video Broadcasting Handheld standard (DVB-H) to the EU list of standards (see IRIS 2008-5: 3) and a stakeholders' consultation in February 2008, the communication represents an additional step in the Commission's strategy for mobile TV in the European Union.

To date, legislation accommodating the emergence of mobile TV services has been adopted in only a few Member States. On this limited basis, the Commission was able to identify the gradual establishment of three main regulatory models: a) the extension of existing Digital Terrestrial Television (DTT) rules to the new services, currently in operation in the UK and Italy; b) the "plain wholesale model" favoured by Finland and centring around the wholesale operator; and c) "the integrated approach", initiated by Austria, whereby all players in the value chain have to reach a consensus before authorisation is granted. Noting that consistency of regulatory approaches across the EU is integral to the creation of a regulatory environment conducive to investment and innovation, the Commission throws its weight behind the last these models.

The Commission's further best practice guidelines are separated into four categories, in accordance with the elements of the regulatory regime involved: a) with regard to the general framework adopted, the Commission urges progress towards clear, transparent and non-discriminatory procedures for awarding licences, the operation of public consultation mechanisms before the adoption of regulations and regular reporting by public authorities on market developments; b) with regard to authorisation regimes, the relationship between e-communications, spectrum and content rules should be clearly defined so as to promote a clear and transparent authorisation regime, while the adoption of a "one-stop-shop" approach is exhorted; c) as far as award procedures are concerned, clear schedules should be announced no later than the start of commercial trials for mobile TV, and objective and transparent and non-discriminatory award criteria should be applied, including guarantees of the quality of the service in the form of such elements as indoor coverage and optimal use of spectrum. The possibility of withdrawing frequencies awarded if not used within a reasonable period of time should not be dismissed; and d) finally, as to any specific aspects that might arise, the introduction of must-carry obligations should be contemplated, network infrastructure sharing should be enabled and interoperability and roaming issues given due consideration.

The Commission will continue to promote the exchange of best practice information and experience through the existing committees of Member States' experts, the public availability and regular update of all relevant information on the Commission's website and the submission of relevant reports to the European Parliament, as well as to the Council's working parties. ■

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

● Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Legal Framework for Mobile TV Networks and Services: Best Practice for Authorisation – The EU Model, COM(2008) 845 final, Brussels, 10 December 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=11557
BG-ES-CS-DA-DE-ET-EL-EN-FR-GA-IT-LV-LT-HU-MT-NL-PL-PT-RO-SK-SL-FI-SV

European Commission: MEDIA Mundus Programme

On 9 January 2009, the European Commission adopted a proposal for the establishment of the new MEDIA Mundus programme, an international audiovisual programme intended to promote global cooperation with the European film industry. The proposal was submitted to the Council and the European Parliament and, pending their agreement, will provide EUR 15 million in funding for projects submitted jointly by audiovisual professionals from Europe and third countries. The project is intended to run from 2011 to 2013.

The programme's specific objectives, as stated in the proposed Article 5, shall be:

(a) to increase information exchange and, in particular through training activities and scholarships, facilitate transnational networking between professionals, in order to improve access to third country markets and build trust, as well as long-term commercial relationships;
(b) to improve the competitiveness and transnational distribution of audiovisual works worldwide;
(c) to improve the circulation and exposure of audiovisual works worldwide and increase public (in particular among young members of the public) demand for culturally diverse audiovisual content.

The MEDIA Mundus programme will act in parallel to the existing MEDIA 2007 programme (see IRIS 2004-9: 5), which provides EUR 755 million to Europe's audiovisual industry from 2007 to 2013, as well as the complementary MEDIA International Preparatory Action, under which EUR 2 million is channeled towards 18 projects involving interna-

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

tional partners, selected after a call for proposals and an evaluation procedure. It is in fact precisely the success of the latter initiative that reveals the strong international demand for collaboration with the European film industry. MEDIA Mundus is expected to benefit both consumers through the enablement of additional consumer choice and audiovisual professionals through the creation of new business opportunities. ■

● Proposal for a Decision of the European Parliament and of the Council establishing an audiovisual cooperation programme with professionals from third countries MEDIA Mundus COM(2008) 892 final 2008/0258 (COD) Brussels, 9 January 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11569
BG-ES-CS-DA-DE-ET-EL-EN-FR-GA-IT-LV-LT-HU-MT-NL-PL-PT-RO-SK-SL-FI-SV

NATIONAL

AT – Computer Games to be Labelled following Youth Protection Act Amendments

Meike Ridinger
Institute of European Media Law (EMR), Saarbrücken/Brussels

The *Landtag* (State parliament) in Vienna has unanimously adopted an amendment to the *Wiener Jugendschutzgesetz* (Vienna Youth Protection Act) concerning computer and video games, which entered into force on 1 December 2008 and includes an obligation for computer games to be properly labelled. Packaging must now display the standard PEGI (Pan-European Game Information) symbols which have been developed at European level by the Interactive Software Federation of Europe (ISFE). As well as an age rating, the symbols provide information about problematic content such as violence, sex and racism.

Until now, the age group for which games are suitable under youth protection rules has not always been clearly marked. Providing information about game content has not been obligatory. Since computer games are distributed in the same way throughout Austria, games with the PEGI symbols are also sold in the other *Bundesländer* which, it is assumed, will soon follow Vienna's example.

During the transitional period to the end of 2009, computer games labelled using the USK (*Unterhaltungssoftware Selbstkontrolle* – German entertainment software voluntary monitoring organisation) rating system will still be available for sale. However, most games already carry the PEGI symbols. The *Bundesstelle für die Positivprädikatisierung von Computer- und Konsolenspielen* (Federal Office for the positive rating of computer and console games - BuPP) may also be asked for advice on whether a game is too complicated for children. ■

● *Gesetz zum Schutz der Jugend - Wiener Jugendschutzgesetz 2002* (Vienna Youth Protection Act 2002 - WrJSchG 2002), available at:
http://merlin.obs.coe.int/redirect.php?id=11542
DE

BE – New Draft Media Decree

On 5 December 2008, the Flemish Government approved a draft of a new Media Decree, which aims to implement the Audiovisual Media Services Directive 2007/65/EC. The draft has been introduced in the Flemish Parliament, which is strongly expected to grant its approval to the final text of the new Decree before the regional elections in June 2009.

The draft contains a set of modifications and modernizes the broadcasting law in the Flemish Community. Some of its most striking characteristics are highlighted below.

The draft differentiates between "broadcasting activities" and "broadcasting services". The latter are to be compared with the audiovisual media services covered by the Directive and are part of the broader category of "broadcasting activities", which also implies activities that are primarily non-economic (e.g., private websites). Only "broadcasting services" are submitted to the procedural and content-related requirements of the Decree (compare with para. 16 of the Preamble to the Directive), while "broadcasting activities" that are not "broadcasting services" are only prohibited from inciting hatred (Arts. 38-39).

A basic tier of coordinated rules applies to all audiovisual media services (linear and on-demand; compare with para. 7 of the Preamble to the Directive). In addition, more stringent rules apply to linear services, because of their greater impact and the fewer possibilities for control by users.

All "commercial communications" (a notion extracted from the Directive) are treated in the same chapter. The draft follows the Directive very closely as to the relaxation of advertising regulation (Arts. 11 and 18 of the Directive, clarified by paras. 55, 57 and 59 of the Preamble). Children's programmes may still not be interrupted for advertisements or teleshopping (Art. 76).

The draft introduces clear regulation of product placement, which is possible in the programmes and under the conditions stipulated in the Directive (Arts. 95-97). Nonetheless, the provision of goods or services on a free of charge basis is prohibited in the children's programmes of the public broadcasting corporation (VRT). The Flemish Government can expand this prohibition to all children's programmes (Art. 95, 2).

The draft responds to the aspiration of the Directive to introduce rules to protect minors, as well as human dignity in all audiovisual media services, including audiovisual commercial communications (para. 44 of the Preamble). With this view in mind, the

draft integrates the code concerning publicity and sponsorship on radio and television (20 September 1995) into the Decree. This code contains a new Chapter VII, entitled "Publicity directed towards children and young people" (Decision of the Flemish Government, 7 September 2007, ratified by Decree of 29 February 2008). As a result, the draft contains quantitative and qualitative advertising restrictions, which offer at least the protection level required by the Directive (Arts. 67-73). As to promoting the rights of persons with disabilities, the Flemish Government should take all necessary measures to ensure that television services are made accessible to people with a visual or hearing disability (Article 147; compare with Article 3c of the Directive).

No references to co- and self-regulation can be found in the draft, although the Directive encourages their consideration (para. 36 of the Preamble). The *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) is, as before, charged with the monitoring and enforcement of media regulation (chapter VII).

Furthermore, future developments may require a specific regulation of "service distributors", such as intermediaries between content providers and network operators (chapter IV).

Finally, as to short news reports, the draft did not really take notice of the provisions in the Directive, which, amongst others, stress the fair, reasonable and non-discriminatory conditions under which this right should be exercised. The draft simply adopts the provisions of the present decree, the only exception being the explicit restriction of the right to linear broadcasting corporations only (Arts. 114-122). ■

Hannes Cannie
Researcher Department of Communication Sciences / Center for Journalism Studies, Ghent University

● ***Ontwerp van decreet betreffende de radio-omroep en televisie*** **(Draft of a new Flemish Decree on Radio-broadcasting and Television, approved by the Flemish Government on 5 December 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11556**

NL

BG – Law on Prevention and Disclosure of Conflict of Interests

On 31 October 2008 a new Law on the Prevention and Disclosure of Conflict of Interests (Law) was promulgated in the State Gazette, issue No. 94. The new Act lays down the rules for the prevention and disclosure of conflict of interests of persons occupying public positions (see IRIS 2008-8: 6).

According to Art. 2, para. 1 of this Law a conflict of interests arises when a person occupying a public position has any personal interest that may influence the impartial and objective performance of his powers and official obligations.

Among the persons who will be affected by the Law are the members of the Council for Electronic Media and the members of the management boards of the public operators – the Bulgarian National Television and the Bulgarian National Radio.

The Law provides for various restrictions in cases of performance of public duties and also regulates the procedure for declaring incompatibility and disclosure of personal interests.

In the event of a conflict of interests the legal consequences are as follows:

1. If the Law has been violated and a situation of conflict of interests has been confirmed by a valid and final decision the person should be dismissed from his position.
2. The remuneration received during the period in which the conflict of interests was not disclosed shall be deducted by the State. In cases where the person who has occupied a public position or a person connected with him has derived some material benefit resulting from the conflict of interests, the State shall appropriate the money or the other benefits received during the non-disclosure period.
3. The names of the persons who were found to be in a conflict of interests situation shall be published on the Internet page of the respective institution.

The penalties in cases of violation of the Law vary between BGN 2,000 and BGN 15,000 (about EUR 1,000 – 7,500). ■

Rayna Nikolova
Council for Electronic Media, Sofia

● ***Закон за предотвратяване и разкриване на конфликт на интереси*** **(Conflict of Interest Prevention and Disclosure Act), Promulgated, SG No. 94/31.10.2008, effective 01.01.2009**

EN-BG

CH – Amendment to the MEDIA Agreement with the European Union

On 26 November 2008, the Swiss Federal Council referred to the Parliament the additional message on Switzerland's participation in the European Union's MEDIA Programme. The Swiss Confederation and the EU had signed an agreement on 11 October 2007 enabling Switzerland to continue to participate in the MEDIA Programme. In exchange for this agreement, however, the EU had demanded that Switzerland fully incorporate into its national legislation the country of origin principle arising from the Community's "Audiovisual Media Services" Directive (AVMSD). This requirement would mean that it would no longer be possible to impose Switzerland's more restrictive advertising provisions on foreign advertisements. More particularly, it would cease to be possible to require foreign television channels broadcasting advertisements directed at Switzerland to abide by the rules for advertising alcohol and political and religious advertising in force in Switzerland. The implementation of these amendments would, however, require a revision of Switzerland's Radio and Television Act (LRTV) and would therefore need to be approved by the Federal Parliament (see IRIS 2008-1: 9).

In December 2007, however, the Parliament rejected the Federal Council's bill and invited it to submit a proposal that took greater account of Swiss interests in respect of foreign advertising spots. The Federal Council then embarked on new negotiations with the EU which resulted in a satisfactory solution that involved adapting Annex I of the MEDIA Agreement. These adaptations allow Switzerland to continue to apply stricter rules on advertising to foreign advertising spots, on condition that these rules are proportionate, non-discriminatory, and motivated by public interest. If these conditions are met, Switzerland would be able to renounce application of the country of origin principle.

Switzerland could then maintain its bans on religious and political advertising, and on advertising for spirits and mixed drinks ("alcopops"). On the other hand, advertising for beer and wine would henceforth be allowed. In order that Swiss broadcasters would not be at a disadvantage compared with foreign competitors in this respect, the Federal Council has proposed that the adoption and financing of the MEDIA Agreement should be accompanied by a revision of the LRTV which would authorise advertising for wine and beer during any programmes broadcast in Switzerland, whether broadcast by private channels or by the Swiss national broadcasting company (SRG SSR idée suisse). Lastly, if any foreign advertising were to infringe Switzerland's rules on advertising, Switzerland would be able to instigate a conciliation procedure with the broadcasting State and the European Commission. ■

Patrice Aubry
Télévision Suisse Romande (Geneva)

• Message in addition to the message of 21 September 2007 approving the agreement on Switzerland's participation in the European Community's MEDIA Programme for the years 2007-2013 and on a Federal Decree on the financing of such participation; amendment of 26 November 2008 of the national Radio and Television Act (LRTV) of 24 March 2006. Available at:
http://merlin.obs.coe.int/redirect.php?id=11586 (FR)
http://merlin.obs.coe.int/redirect.php?id=11587 (DE)

FR-DE-IT

DE – Ruling on Surreptitious Advertising Breach

In a ruling of 11 December 2008 (case no. VG 27 A 132.08), the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) upheld a complaint lodged by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority - mabb) against the private broadcaster ProSieben for a breach of the ban on surreptitious advertising enshrined in Art. 7 para. 6 sentence 1 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV).

The complaint concerned episodes of the programme "TV total Wok-WM" broadcast in 2006 and 2007, particularly various visual and verbal references to brand names and logos (see IRIS 2008-7: 9).

The VG decided that, although another production company had been involved in making the programme, the broadcaster still had some influence and the right to participate in decision-making under the terms of the licensing agreement. This was sufficient to draw the necessary conclusion that the broadcaster had intended to advertise. Contrary to the broadcaster's argument, Wok-WM was not comparable to other sports events at which perimeter advertising and team sponsorship was normal, partly because this took place regardless of the television broadcast. This was not, therefore, a case of so-called "intrusive advertising", which was permitted by law. ■

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

• Press release of the *VG Berlin* (Berlin Administrative Court), available at:
http://merlin.obs.coe.int/redirect.php?id=11549

DE

DE – Ruling on Surreptitious Advertising in Easter Show Upheld

The *Oberverwaltungsgericht* (Higher Administrative Court - OVG) of Rhineland-Palatinate has upheld the decision of the *Verwaltungsgericht Neustadt* (Neustadt Administrative Court), confirming the ruling of the *Landeszentrale für Medien und Kommunikation* (State Media and Communications Agency - LMK), according to which the live programme "*Jetzt geht's um die Eier. Die große Promi-Oster-Show*" broadcast by private broadcaster Sat.1 had violated the ban on surreptitious advertising set out in Art. 1 para. 2 of the *Landesmediengesetz* (*Land* media act) in connection with Art. 7 para. 6 sentence 1 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement) (see IRIS 2008-5: 5).

According to an LMK press release, the OVG rejected the argument put forward by Sat.1 that the blatant advertising contained in the programme did not constitute surreptitious advertising and ruled that the involvement of other production companies could not release the broadcaster from its responsibility for separating programme and advertising content. ■

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

• LMK press release, available at:
http://merlin.obs.coe.int/redirect.php?id=11588

DE

DE – Düsseldorf Regional Appeal Court Confirms Ban on Merger between ProSiebenSat.1 and Springer

On 3 December 2008, the *Oberlandesgericht Düsseldorf* (Düsseldorf Regional Appeal Court - OLG) confirmed the ban on the takeover of broadcasting group ProSiebenSat.1 by the Axel Springer publishing house, imposed by the *Bundeskartellamt* (Federal Cartel Office) on 19 January 2006 due to concerns about competition. Although Springer abandoned its plans

following the decision, it took an appeal in order to obtain legal certainty for possible future mergers (see IRIS 2007-10: 9).

In its reasoning for the decision, the OLG explained that the merger would have opened new possibilities for cross marketing of services. Even a slight strengthening of the dominant market position would have been sufficient to justify the ban, since ProSiebenSat.1 and RTL already held a duopoly in the German private television market, with a 90% market share in advertising revenue. Springer is considering another appeal. ■

Meike Ridinger
Institute of European Media Law (EMR), Saarbrücken/Brussels

DE – 12th Broadcasting Agreement Signed

After lengthy negotiations (see IRIS 2008-10: 9), the Minister-Presidents of the *Länder* officially signed the 12th *Rundfunkänderungsstaatsvertrag* (Agreement amending the Inter-State Broadcasting Agreement - RÄStV) on 18 December 2008.

The deadline for implementation of the three-stage test for existing telemedia services was brought forward by five months to 31 August 2010. This step was criticised by the public service broadcasters, along with the fact that some parts of the agreement go further than the requirements of the European Commission, such as the stipulation that sports broadcasts can only be made available in media libraries for 24 hours after the original broadcast.

The 12th RÄStV, which should enter into force on 1 June 2009, requires the approval of the *Landtage* (State parliaments). ■

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

● **Commission press release is available at:**
http://merlin.obs.coe.int/redirect.php?id=11589
EN-FR-DE

DE – Legal Affairs Committee Approves Compensation for Data Retention

On 3 December 2008, the *Rechtsausschuss* (Legal Affairs Committee) of the *Bundestag* (lower house of parliament) approved the draft *Gesetz zur Neuordnung der Entschädigung von Telekommunikationsunternehmen* (*TK-Unternehmen*) *für die Heranziehung im Rahmen der Strafverfolgung* (Act on the reform of compensation for telecommunications companies providing assistance with criminal prosecutions - TKEntschNeuOG). Under the Act, companies will in future be entitled to flat rate compensation payments for costs they incur when carrying out surveillance orders and disclosing call or location data. The Act does not make provision for any reimbursement of the investment needed to acquire the relevant technology.

The reasons given for the Act explain that it has become necessary because of the significant increase in the number of data requests and surveillance orders addressed to telecommunications companies in recent years. In particular, the draft amends Art. 23 of the *Justizvergütungs- und Entschädigungsgesetz* (Court Payment and Reimbursement Act - JVEG), under which compensation for loss of earnings of telecommunications company staff was previously, like that of witnesses, limited to a maximum of EUR 17 per hour. The new rates are meant to take into account the unusual nature of the services provided by the telecommunications sector, which include a 24-hour stand-by service as well as measures that often involve more than simple data communication. The reimbursement of the resulting higher costs will therefore be improved.

In parallel with this, the Bundestag is also reported to be working on a rule for the reimbursement of investment costs relating to the acquisition of surveillance technology. Such a provision had already been called for by most of the experts who were involved in drafting the TKEntschNeuOG. However, several experts think that this expenditure should be reimbursed not under the JVEG, but independently of actual investigations, since it cannot be included in procedural costs, which are awarded against convicted parties under the rules of criminal procedure. ■

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

● **Draft Act, BT-Drs. 16/7103 of 13 November 2007, available at:**
http://merlin.obs.coe.int/redirect.php?id=11543
DE

FR – TF1 Newscaster Sued for Libel

The presenter of TF1's 1 o'clock news has been sued for public libel by the French society for the defence of tradition, family and property (TFP). When presenting a news item on the annual report of the inter-ministerial mission for vigilance and combating sects (Miviludes), the newscaster described as fraud the commercial practices of an association acknowledged in the report as being a sect, the name of which was revealed in the report that followed. The court in Paris had no difficulty in recognising that this constituted libel, which is defined in Article 29 of the Freedom of the Press Act of 29 January 1881 as "any allegation or imputation of a fact that infringes the honour or reputation of the person or body to which the fact is imputed". The only valid defence arguments are to provide proof of the veracity of the allegations or the good faith of the person committing the libel.

As the journalist was not able to provide perfect and complete proof of the allegations, he was not able to benefit from the exception on grounds of veracity. As he had no proof that he had asked for evidence from the association in question before broadcasting the report, the journalist – who had displayed neither prudence nor moderation in his speech – was not able to benefit from the exception on grounds of good faith.

The journalist, his team and the director of the channel were therefore found guilty of being perpetrators or accomplices and ordered to pay a EUR 500 fine and EUR 1 in damages. Libel – like various categories of insult and contempt – constitutes an offence under the legislation on the press, currently the subject of plans for reform, announced by President Sarkozy, aimed at decriminalising the 1881 Act. Although the purpose of the reform is to simplify a procedure whose complexity is often damaging to the victims, some people nevertheless feel that there is a risk that the proposed new legislation will be less effective in terms of guaranteeing the rights of the defence and in terms of dissuasion. The civil procedure that would be applied to such behaviour would no longer allow journalists the possibility of claiming good faith or veracity as grounds for their defence, there would no longer be the advantage of an oral hearing, and it would merely make provision for the payment of damages according to the alleged prejudice suffered. Lastly, it would leave the victim alone in search of the identitiy of abusive Internet users. ■

Aurélie Courtinat
Légipresse

● Regional court of Paris (17th chamber), 28 November 2008, State Counsel v Le Lay, Bosom, Pernault et al.

FR

FR – "Marius" and "Cosette" Declared Lawful Sequels to Victor Hugo's "Les Misérables"

In France, authors enjoy the right to respect for their name, their status and their work. This right is perpetual, inalienable and not subject to limitation. It is transmitted to his successors on the death of the author (Art. L. 121-1 of the Intellectual Property Code). It is on the basis of infringement of the moral right of his predecessor that Victor Hugo's heir lost his appeal against the author and editor of two sequels to *Les Misérables*. He claimed that these novels spoiled the famous writer's work – the social context in which their action takes place is substantially different from that of the original work and a number of narrative elements, which in any case were not on a par with the quality of Hugo's writing, were destabilising because of their incongruity in relation to the original story. An example of this is the return of Inspector Javert in Ceresa's sequels – the character appears to commit suicide in the original book, but is brought back to life in these sequels.

In the end the court of appeal, to which the heir, together with the association "Société des Gens de Lettres", had applied, found in favour of the writer. It studied the disputed elements at length in order to determine whether they were contrary to the "spirit" of Hugo's work, and in the end decided that they were not – Ceresa was therefore not guilty of infringing the moral right attached to *Les Misérables*. The court held that Victor Hugo had not made any statement precluding a possible sequel to *Les Misérables*, that as the action in the sequels took place at a period of time after that of *Les Misérables* their social context was necessarily different, and lastly that since Javert was not the central character of the work his fate – while it was certainly surprising – was not sufficiently important to spoil Victor Hugo's work. ■

Aurélie Courtinat
Légipresse

● Court of appeal of Paris, (4th chamber, section B), 19 December 2008, Association SGDL and P. Hugo v Editions Plon and F. Ceresa

FR

FR – Sentence for an Insult on the Basis of Disability Proffered During a Television Programme

Grégory Lemarchal was a singer who became famous both for winning a reality TV programme and for the disease that killed him - despite the doubts expressed for a long time as to its nature – cystic fibrosis. During one of his sketches, a humorous commentator on a television programme who habitually renames celebrities by referring to them by a word that is supposed to sum them up chose "cystic fibrosis" to refer to Gregory Lemarchal, using the name of the disease in place of the name of the person each time it came up in a phrase.

The commentator was prosecuted on the basis of a totally new infringement – insult on the basis of disability. This special qualification was introduced into French press criminal law in 2005 (Art. 33 (3) of the Act of 29 July 1881), and this was the first time it had been raised. The judge in the initial proceedings had no difficulty in concluding that an offence had been committed. In the appeal brought by the humorist, the court came to the same conclusion – referring to a person by just the name of his/her incapacitating and fatal disease constitutes a term of disdain by reducing the identity and human nature of that person to his/her disability and nothing else. The humorist was fined EUR 3,000 plus EUR 2,000 in damages. ■

Aurélie Courtinat
Légipresse

● Court of appeal of Lyon, (7th chamber, section A), 8 October 2008, State Counsel v F. Martin

FR

FR – New Tax Breaks for Foreign Filming in France

The 2009 Finance Act has created a new tax incentive aimed at attracting foreign productions and co-productions to France. Directed at both cinema and audiovisual works, the arrangement will be to the advantage of executive producers liable for French company tax for their fictional and animated works meeting three cumulative conditions: they must be ineligible for financial support for production, their dramatic content must include elements relating to French culture, heritage or territory, and they must have eligible expenditure of at least EUR one million euro; for fictional works there is the additional condition of at least five days' filming in France. The tax credit is equal to 20% of the total amount of expenditure corresponding to operations or services carried out in France. The aim of this arrangement, which has been eagerly awaited, is to attract international co-productions, which are increasing in number because of their advantageous economic model, and also to put an end to a nonsensical situation in the regulations which, because they were previously almost exclusively based on the origin of the capital involved, excluded *de facto* Franco-foreign works filmed in France, in the French language and with French actors, from taking advantage of the many types of aid available in France. ■

Aurélie Courtinat
Légipresse

● **Article 220 *quaterdecies* of the General Tax Code, introduced by the 2009 Finance Act, no. 2008-1425 of 27 December 2008**

FR

FR – Reform of the Public-sector Audiovisual Scene Applied before Parliament Vote

The bills for reforming the public-sector audiovisual scene have provoked stormy discussions in the National Assembly. Being fewer in number, the opposition MPs firmly opposed to the bill as prepared and drafted by the parliamentary majority had no choice but to table hundreds of amendments in order to delay voting, hoping thereby to cause the reform to fail. In view of the delay caused by examination of the bill in the National Assembly, the Government made the surprising decision not to wait for Parliament's vote before applying the key measure in the reform – the abolition of advertising. The Chairman of France Télévisions, Patrick de Carolis, was asked to have his board of directors vote to adopt the ban on advertising between 8 pm and 6 am. As the company had prepared its new programme schedules several months earlier and advertisers had already resigned themselves to the fact that they would not be able to advertise on France Télévisions during this time slot, the board of directors had to ratify the French President's decision rather than endanger the economic basis of the public-sector channels. Since 5 January 2009, France Télévisions no longer receives any resources for advertising after 8 pm.

Although the method came as a shock, it has not as yet given rise to an appeal before the Conseil d'Etat. It has, on the other hand, motivated the members of the Senate to use the same methods as the opposition MPs in December. By tabling a large number of amendments, the opposition is this time joined by several members of the majority and by centrist MPs who are negotiating a number of amendments to the text, which has been under examination since 7 January by the upper house, concerning more specifically the licence fee and the method of dismissing the chairmen of the public-sector channels. The text resulting from this examination by the Senate will then be sent to the Joint Mixed Committee for validation. Appeals before the Conseil d'Etat and the Constitutional Court are likely, particularly regarding the legality of the letter sent by the Minister for Culture to the chairman of France Télévisions asking him to ensure that the board of directors vote in favour of abolishing advertising, since the method of financing public-sector television is supposed to be determined by legislation, the new conditions for dismissing the chairmen of the public-sector television channels are supposed to be adopted by the Senate if they are approved by the Joint Mixed Committee, which has the final say on the text, etc. The Act, involving more particularly reform of the method of financing the public-sector audiovisual scene, will therefore be promulgated several weeks after the actual disappearance of prime-time advertising on France Télévisions, leaving the public service in a somewhat uncomfortable legal situation during this period.

The 2009 Finance Act in fact applies the State's compensation for the partial abolition of advertising. But the Freedom of Communication Act, which is still in force even though it is currently undergoing reform, still obliges the public-sector channels to operate mixed financing, with no time restrictions. ■

Aurélie Courtinat
Légipresse

● **Texts of bills and amendments, available at:**
http://merlin.obs.coe.int/redirect.php?id=11592

FR

GB – BBC Plans for Local Video Rejected

The BBC Trust, which acts as the regulator of BBC services, has rejected the Corporation's plans for providing local video services on the grounds that they will not improve services for the public enough to justify either the investment of licence fee funds or their potential negative impact on commercial media.

The BBC currently offers regional news on television, local radio and local websites. In May 2008, the BBC management submitted proposals to the trust to introduce an additional local video service covering news, sports and weather on enhanced BBC Local websites in 60 areas across the UK, with an additional five Welsh language services. The proposed service would have around 400 staff and a total budget of GBP 68 million covering an initial four-year period.

The BBC Charter requires that significant changes to public services are subject to a public value test, conducted by the Trust, and a market impact assessment conducted by Ofcom, the communications regulator. The Trust concluded that a broadband-only local video proposal would not extend the BBC's reach to those audiences it is not serving well. Some people with low incomes or in remote areas would not have access to broadband, whilst younger audiences wanted a wider range of commercial concerns, such as cinema listings, which the BBC does not provide. Older audiences would have less time for searching the web and would turn to TV, radio and newspapers instead. Thus, the service would not create significant new reach or impact in return for the investment of licence fee funds.

Ofcom found that the overall market impact would be likely to be negative, with particularly strong effects on local newspaper publishers, in particular in relation to future online innovation in relation to the provision of online local news, sports and weather services. Modifications to the proposed services would only have a very limited effect in reducing their negative impact.

The BBC Trust thus instructed that the funds for the proposed service be returned to the Corporation's general funds, with expenditure subject to Trust approval. ■

Tony Prosser
School of Law, University of Bristol

- **BBC Trust, "BBC Trust Rejects Local Video Proposals", Press Release 21 November 2008, available at:**
http://merlin.obs.coe.int/redirect.php?id=11560
- **Ofcom, "Market Impact Assessment of the BBC's Local Video Service", available at:**
http://merlin.obs.coe.int/redirect.php?id=11561

EN

GR – Telecommunication Companies Enter the Pay-TV Service Market

Greek companies traditionally active in the telecommunications sector have lately shown an increasing interest in pay-TV services. In accordance with Greek and EU regulation, the Greek authorities are called upon to approve and authorize any new pay-TV activities.

In particular, the takeover of "NetMed NV" (that provides the Greek pay-TV service platform "Nova") by "Forthnet SA" (a Greek alternative telephony and Internet service provider) was formally completed through the publication of a recent decision of the relevant regulatory authority, the *Ethiniki Epitropi Tilepikoinonion kai Taxidromion* (National Committee for Telecommunication and Postal Services – E.E.T.T.). The national regulatory authority did not find the existence of a market that might be influenced, and considered that "Forthnet SA" could lawfully provide radio-television services via its broadband network, as well as via the purchased company or it can use the satellite network of "Syned SA" (a NetMed BV subsidiary active in the pay-TV sector), which has leased capacity in Greek satellite HELLAS SAT 2 without any overlapping of its activities. Since all the required formal conditions (notifications to the Competition authority, publications in the financial press) were fulfilled as well, the authority approved the takeover.

In another case, the *Ethiniko Symvoulio Radiotileorasis* (National Council for Radio and Television – ESR), in a decision published on 29 July 2008, granted authorization for operation to the company Hellas Sat (the owner and operator of the Greek HELLAS SAT satellite, controlled directly by OTE A.E., the Greek telecom provider) for the provision of pay-TV services via satellite. This five-year term of authorization refers to the 96-hour broadcast of foreign television channels that are already transmitted in high resolution. ■

Athina Fragkouli
Office of the European Data Protection Supervisor

- ***Απόφαση υπ' αριθμόν 491/028/2008, φύλλο Εφημερίδας Κυβερνήσεως (ΦΕΚ)* B 1645/2008 (Decision No. 491/028/2008, Official Journal No. B 1645/2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11563
- ***Απόφαση υπ' αριθμόν 424/2008 Του Εθνικού Συμβουλίου Ραδιοτηλεόρασης "Άδεια Συνδρομητικής Τηλεόρασης"* (Decision no. 424/2008 of the National Council for Radio and Television, "Authorization of Pay-TV"), available at:**
http://merlin.obs.coe.int/redirect.php?id=11564

EL

GR – Regulation of Devolution of a Part of Right of Use of Individual Radiofrequencies or Areas of Radiofrequencies

On 8 December 2008, a Regulation entitled "Devolution or Leasing of a Part of Right of Use of Individual Radiofrequencies or Areas of Radiofrequencies" was published according to the Decision of the Minister of Transport and Communications, after a proposal of the *Ethiniki Epitropi Tilepikoinonion kai Taxidromion* (National Committee for Telecommunication and Post-Services – E.E.T.T.). The regulation was based on Article 26(5) of Law 3431/2006, the Greek legislative act that implemented the European directives 2002/19/EC (Access Directive), 2002/20/EC (Authorization Directive), 2002/21/EC

(Framework Directive), 2002/22/EC (Universal Services Directive) and 2002/77/EC (E-Commerce Directive) into national law.

This decision determines the terms, conditions, criteria and processes for the devolution or leasing of part of a right of use of individual radio frequencies or areas of radio frequencies.

The decision consists of 9 Articles and 2 Annexes. The body of the decision can be divided into 4 parts:

- The first part (Arts. 1-3) describes the aim and the scope of the regulation. Furthermore, it provides some definitions (i.e., what is meant by the term "part of a right"), as well as the general principles that apply in the devolution and leasing of the above-mentioned radio frequencies.
- The second part (Arts. 4-5) refers to substantive issues: on which preconditions the right can be devolved or leased, what is actually devolved or leased, the obligations of each part, etc.
- The third part (Arts. 6-8) sets up the administrative procedure that must be followed in cases of devolution or leasing of the above-mentioned right. Moreover, it lays down the possible sanctions in cases of infringement of the regulation.
- The forth part (Art 9) determines the date of entry into force of the regulation.

Finally, as far as the Annexes are concerned, the first Annex determines the areas of frequencies and services for which the devolution and the leasing of the rights are, according to the regulation, allowed, while the second Annex specifies the required documents for the transfer of a part of the right. ■

Athina Fragkouli
Office of the European Data Protection Supervisor

● ***Απόφαση υπ' αριθμόν 39957/1650, "Μεταβίβαση ή Εκμίσθωση Τμήματος Δικαιώματος Χρήσης Μεμονωμένων Ραδιοσυχνοτήτων ή Ζωνών Ραδιοσυχνοτήτων", φύλλο Εημερίδας Κυβερνήσεως (ΦΕΚ) Β 1836/2008*** **(Decision No. 39957/1650, "Devolution or Leasing of a Part of Right of Use of Individual Radiofrequencies or Areas of Radiofrequencies", Official Journal No. B 1836/2008), available at:**
http://merlin.obs.coe.int/redirect.php?id=11565

EL

HU – Decision of the Competition Council on the Conditions of the Distribution of TV2

In December 2008 the Hungarian Competition Council delivered a decision on the pricing policy of MTM-SBS. This company, which since 2007 has been a subsidiary of the ProSiebenSat1 Media AG, broadcasts TV2, one of Hungary's two national commercial terrestrial television channels. TV2 has one of the largest audience shares in the country. Although broadcast primarily on analogue terrestrial frequencies, the channel is also available on various analogue and digital programme distribution networks.

Until 2006 MTM-SBS granted the right to distribute TV2 for free to platform operators. However, in that year it decided to change this policy and the company began to charge fees for the distribution of the channel.

The motives behind this change of policy can be traced back to changes in the programme distribution segment of the Hungarian media market. In 2006 a number of new digital platforms appeared (most notably DigiTV, a digital satellite DTH service and some new IPTV services). As a consequence the analogue terrestrial mode of reception rapidly began to lose its significance. This also led to a more or less parallel decline in TV2's audience share. The introduction of the programme distribution fee was a reaction of MTM-SBS to these market developments.

This change in the pricing policy by MTM-SBS affected first of all the new entrants to the broadcast distribution market. In an enquiry launched in January 2007 the competition authority analysed whether the practice of MTM-SBS as described above is discriminatory towards these new entrants. In its decision completing this enquiry the Competition Council came to the following conclusions:

- MTM-SBS is not a vertically integrated actor of the Hungarian media market. As a consequence it is not in the company's interests to limit the competition in the programme distribution segment;
- the fee requested by MTM-SBS is approximately 2 % of the total revenue of the programme distributors affected. This portion, in itself, is not significant enough to create distortion on the market;
- during the period of the enquiry the programme distribution segment developed significantly. New entrants appeared and they were able to reach significant increases in subscriber numbers within a relatively short period of time. No sign of a significant obstacle to entry into the programme distribution market could be observed.

As a consequence the Competition Council concluded that there is no evidence for any market distortion related to the conduct of MTM-SBS. ■

Mark Lengyel
Körmendy-Ékes & Lengyel Consulting

● **Decision of the Competition Council Vj-7/2007/42, available at:**
http://merlin.obs.coe.int/redirect.php?id=11545

HU

IT – Italian Communication Authority Issues Interpretative Communication on Television Advertising Rules

In its Deliberation of 24 September 2008, the Italian *Autorità per la Garanzia nelle Comunicazioni* (Communications Authority – AGCOM), issued an Interpretative communication concerning several aspects of television advertising rules aimed at clarifying the criteria it follows in the application of certain rules concerning television advertising, in the context of its monitoring and enforcement powers. From the preamble to the Deliberation, it becomes apparent that it is intended, inter alia, to align the

rules with the European Commission's interpretation of some provisions of the Television Without Frontiers Directive, as set out in the latter's interpretative communication of 2004, as well as in its letters of formal notice of 12 December 2007 and 16 March 2007 (see IRIS 2007-7: 14 and IRIS 2008-5: 14).

Article 1 of the *Comunicazione interpretativa* deals with the notion of self-promotion, defined so as to encompass two types of announcements: those concerning programmes and those referring to ancillary products directly derived from those programmes. Whilst these announcements must, in both cases, fall within the editorial responsibility of their broadcaster or content provider, the channel on which they are broadcast is irrelevant. This proviso has a certain importance in the Italian market, where the two main television broadcasters each have editorial responsibility for more than one channel.

Article 2 defines the notions of "programmes consisting of autonomous parts" and of "autonomous part" for the purpose of the application of the rules on the insertion of advertising breaks. The latter is defined as a programme portion with "congruous duration", whose contents can be appreciated by the viewer even if he or she has not watched the other programme parts. With a view to facilitating the perception by the viewer of the gap existing between autonomous parts, broadcasters are requested to insert appropriate visual or audio elements such as jingles.

Article 3 is designed to cope with the controversial issue of the number of advertising breaks allowed during the broadcast of audiovisual works such as feature films and films made for television. Indeed, the application of the rule according to which those works may be interrupted once every 45 minutes has proven difficult in Italy, as certain commercial broadcasters transmit films in two independent parts, so that the advertising inserted between them does not count as one advertising break under the said 45-minute rule. In its letter of formal notice of 12 December 2007, the Commission held that such a practice does not come within the mischief of advertising rules, insofar as the two parts of the work are also regarded as independent for the purposes of the calculation of the programme's duration. Following these guidelines, the *Comunicazione interpretativa* provides that films can be broadcast in two or more parts – so that advertising between those parts does not count as one interruption within the meaning of the 45-minute rule – provided that the duration of each part cannot be joined to that of the other parts with a view to reaching the 45-minute threshold.

Article 4 covers the insertion of short advertising breaks, the so-called "minispots", in the course of sports programmes. This provision stipulates that advertising can only be inserted in game breaks which, according to the official rules of the sport, either require the referee to make an allowance for time lost or, if this is left to the referee's discretion, which are likely to result in such an allowance. As to the former, the *Comunicazione interpretativa* lists three events: player substitutions, the occurrence of an injury and the transportation of injured players off the playing field. As to the latter, in turn, a reference is made to the guidelines issued by the Italian Referee Association.

Finally, Article 5 addresses the innovative advertising technique known as "animated overlay" or "in-logo", consisting of the superimposition onto the main broadcast of graphic elements. In view of the similarities between this type of advertising and that known as "split-screen", which is dealt with in the Commission's Interpretative communication of 2004, the Italian Communications Authority resolved to subject the former to the rules applying to the latter. Therefore, animated overlays are allowed, but are required to comply with the rules concerning the recognisability of advertising, hourly and daily time limits and the time-gap from other advertising instances. Under Italian law in particular, such a gap should be "as a rule" at least 20 minutes long, but the *Comunicazione interpretativa* expressly states that, with reference to animated overlays, this rule is to be applied with a certain degree of flexibility and on the basis of a case-by-case assessment. ■

Amedeo Arena
Studio Legale Mastroianni & University of Naples School of Law

● ***Delibera n. 211/08/CSP - Comunicazione interpretativa relativa a taluni aspetti della disciplina della pubblicità televisiva*** **(Deliberation no. 211/08/CSP - Interpretative communication concerning several aspects of television advertising rules), available at:**
http://merlin.obs.coe.int/redirect.php?id=11562

IT

LT – Regulation of the Activities of the Inspector of Journalists' Ethics Revised

In October 2008 a working group consisting of members of the Lithuanian Parliament (*Seimas*) prepared amendments to the Law on the Provision of Information to the Public. The amendments are mainly linked to the regulation of the activities of the Inspector of Journalists' Ethics. The aim of the draft law is to specify the functions of the Inspector of Journalists' Ethics, the procedure for the examination of complaints and the rules for the adoption and publication of the Inspector's decisions more precisely.

According to the provisions of the current Law on the Provision of Information to the Public, the Inspector, in compliance with the conclusions of experts, categorises press publications, audiovisual works, radio and television programmes or broadcasts as well as the Information Society media and other media and/or their content, as being of erotic, pornographic and/or violent character. It should be noted that the draft law envisages a new provision according to which any content consisting of no less

than 1/3 of erotic, pornographic and/or violent information could be ascribed to the relevant category.

The amendments establish that the Inspector has the right to begin an investigation on his own initiative, once he obtains information about violations of the legal acts governing the provision of information to the public, despite the fact that no complaints have been received. The amendments guarantee the Inspector's right to film, photograph, make sound or video recordings, use any other technical means for the purpose of his investigation as well as to receive the information necessary for discharging the functions of his office from both the State and municipal institutions and agencies and the producers of public information. Moreover, the draft provisions provide a clear procedure for the examination of the complaints and indicate the grounds for possible rejection. The draft law also defines the types of the Inspector's decisions.

According to the current Law on the Provision of Information to the Public, each decision of the Inspector has to be published in the supplement *Informaciniai Pranešimai* (Information Bulletin) to the official gazette *Valstybės žinios* as well as on the website of the Inspector's office. The draft amendments establish a new order, which stipulates that the Inspector's decisions should not be published if the publication could violate human rights and/or legitimate interests. The current Law does not provide for such an exception.

Furthermore, in order to ensure the implementation of the Inspector's decisions, the *Seimas* working group proposed to amend the Code of Administrative Infringements also. This draft amendment is closely related to the amendments mentioned above, whereas the amended provision of the Code of Administrative Infringements addresses the issues of liability for the failure to provide the Inspector with the information necessary to discharge his functions, the violation of his decisions as well as other interference in the implementation of the legal rights of the Inspector. The draft provision envisages fines from EUR 145 to EUR 580 for these violations. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

● ***Visuomenės informavimo įstatymo 49 ir 50 straipsnių pakeitimo ir papildymo įstatymo projektas*** **(Draft Law on Amendments to the Law on the Provision of Information to the Public), available at:**
http://merlin.obs.coe.int/redirect.php?id=11546

● ***Administracinių teisės pažeidimų kodekso papildymo 187[13] straipsniu, 224, 259[1] ir 262 straipsnių papildymo įstatymo projektas*** **(Draft Law on Amendments to the Code of Administrative Infringements), available at:**
http://merlin.obs.coe.int/redirect.php?id=11547

LT

MT – Prohibition of Broadcasting Information Concerning Adoptions

The Broadcasting Authority had, in 2007, amended its Requirements as to Standards and Practice Applicable to Participation in Media Programmes of Vulnerable Persons so as to prohibit, inter alia, programmes aimed at establishing the identity of the natural parents of children, including adopted ones. Moreover, programmes or parts thereof relating to adoption have to be aired after the 9 p.m. watershed. The same applies to programme promotions concerning adoptions. Since then, the legislator has taken action to tighten the provisions of the Civil Code on adoption. Article 128A of the Civil Code was added to the Code very recently by means of amendments made to the Civil Code by Article 41 of Act No. IV of 2008, entitled the Adoption Administration Act 2008 (now Chapter 495 of the Laws of Malta). The text of Article 128A of the Civil Code, which concerns broadcasting, provides that no person shall, without the approval in writing of an accredited agency, publish or cause to be published by means of broadcasting, any advertisement, news item or other material indicating, in relation to any particular child, born or unborn, whether or not that child may be adopted; a person intends to adopt the child; or a person intends or is willing to make arrangements with a view to the adoption of the child.

Unless authorised by the court, no person shall broadcast anything relating to an application for the adoption of a child or to adoption proceedings including: the name of the applicant or applicants; the name of the person who is or will be adopted; the name of the father, mother, guardian or tutor of the child who is or will be adopted; or any matter likely to enable any of the persons mentioned above to be identified.

Any person who contravenes the provisions of this Article shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term of not less than three months, but not exceeding six months or to a fine (*multa*) of no less than EUR 1,164.69, but not more than EUR 2,329.37, or to both. ■

Kevin Aquilina
Senior Lecturer, Department of Public Law, Faculty of Laws, University of Malta

● **Article 128A of the Civil Code, Chapter 16 of the Laws of Malta, available at:**
http://merlin.obs.coe.int/redirect.php?id=11551

EN-ML

RO – Emergency Decree Amends Audiovisual Act

Through the *Ordonanţa de Urgenţă Nr. 181/2008 pentru modificarea şi completarea Legii audiovizualului Nr. 504/2002* (Emergency Government Decree amending and completing Audiovisual Act no. 504/2002), which entered into force on 3 December 2008, Romania became the first EU Member State to transpose the provisions of EC Directive 2007/65/EC on audiovisual media services into its domestic law.

As a result, TV advertising rules have been relaxed, since new advertising techniques such as product placement (*plasarea de produse)*, split-screen advertising (*publicitatea pe ecran partajat)* and virtual advertising (*publicitatea virtuală*) are now allowed under certain conditions. The previous requirement of at least a 20-minutes gap between advertising breaks in broadcast programmes has been dropped. Commercial breaks in television films are now permitted every 30 minutes (instead of 45). However, the total duration of advertising still must not exceed 12 minutes per hour. The approval of product placement means that television films, entertainment programmes and sports broadcasts may in future show commercial products; however, reference to such products must be built into the action of the programme, the products must not be given undue prominence, and acoustic and visual warnings must be broadcast, indicating that the programme concerned contains product placement. According to Art. II of Government Order no. 181/2008, these new regulations, which are contained in Article 31 paras. 2-5 of the amended and completed Audiovisual Act no. 504/2002, are only applicable to television programmes produced after 19 December 2009. In split-screen advertising, the programme continues on one part of the screen while the advertisement is broadcast on another; the coherence and identity of the programme must not be affected by the advertising. Such advertising may be shown during a break in play in a football broadcast, for example. Virtual advertising will enable TV broadcasters to replace stadium perimeter advertising with their own advertisements during a sports broadcast, provided the event organisers agree.

According to a press release of the *Consiliul Naţional al Audiovizualului din România* (national council for electronic media – CNA), the Emergency Government Decree was drafted by the CNA in consultation with the Romanian Ministry for Culture and Education. Discussions began in February 2008 with representatives of the major broadcasting companies and the general public. The Decree will now be examined by the newly-elected parliament and, once it has been approved along with any improvements added by the legislative assembly, it will be published as the new Audiovisual Act. ■

Mariana Stoican
Journalist, Bucharest

- ***Ordonanţa de urgenţă Nr,. 181/2008 pentru modificarea şi completarea Legii audiovizualului Nr. 504/2002 Monitorul Oficial al României, Partea I Nr. 809 din 03/12/2008*** **(Emergency Government Decree no. 181/2008, published in the Romanian official gazette, part 1, no. 809 of 3 December 2008), available at: http://merlin.obs.coe.int/redirect.php?id=11550**
- **CNA press release of 25 November 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11544**

RO

SI – New Penal Code Introduces Amended Provisions on Pornography and Child Pornography

The Parliament of the Republic of Slovenia passed into law the new Penal Code (*Kazenski zakonik* KZ-1) on 20 May 2008, which came into force on 1 November 2008. The new provision on pornography, child pornography, and sexual exploitation of children in commercial sex performances (Article no. 176) changes substantially the previous legislative concepts in this field.

The most outstanding amendment of the provision refers to the juridical treatment of the possession of child pornography. Possession is now punishable without being conditional on the intention of the possessor to produce and/or disseminate the illegal material (as was stipulated in the previous Penal Code which came into force in 2004 (*Kazenski zakonik*, KZ-UPB1, Article no. 187)). Another change relates to the age of the children exposed to pornography in the criminal act. It is stipulated that anyone who exposes a child under fifteen to pornography or other sexual content or a sex show is to be fined or sentenced to prison (Article no. 176, para. 1). In comparison to the previous provision, the age of a child has been raised from fourteen to fifteen years. There is also a new departure in regard to pornographic images in child pornography. They have proliferated in the past few years, therefore in addition to actual images of children, simulated but realistic-looking images of them are also considered as criminal materials. Furthermore it is stipulated that anyone who reveals the identity of a child shown in child pornography is to be punished (Article no. 176, para. 3).

The sanctions are as followings:

- exposing a child under fifteen to pornography or other sexual material, or a pornographic show: fine or imprisonment of up to two years (Article no. 176, para. 1);
- exploiting a minor under eighteen for the production of pornography or other sexual content, or in the production of a sex show, or being knowingly present at a sex show, involving a minor: imprisonment from six months up to five years (Article no. 176, para. 2);
- production, dissemination, import or export of pornography or other sexual material, which involve minors or the aforementioned realistic-looking images, the possession of such material, or the revelation of the identity of a minor, exploited in the production of such material: prison from six month up to five years (Article no. 176, para. 3);
- if a criminal act, as defined in paras. 2 and 3 occurs within a criminal association: imprisonment from one year up to eight years (Article no. 176, paras 4). ■

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

- ***Kazenski zakonik*** **KZ-1 (Penal Code (2008)), available at: http://merlin.obs.coe.int/redirect.php?id=11548**

SL

SK – Broadcaster Fined for Paraphrasing Interior Minister

Jana Markechova
Markechova Law Office, Bratislava

On 7 October 2004, Radio Viva, formerly known as Radio Twist, broadcast a report from the official press conference held by the then Interior Minister Vladimír Palko. The news-presenter paraphrased a part of Palko's report on a police investigation where he announced that the police had accused a Slovak judge of a crime (fraud). Furthermore it was announced that the Slovak judge was prosecuted unapprehended for this crime. However, the judge was not identified by his full name. The sentence of Palko's report was abbreviated by the news-presenter and it was read without mentioning that it was „according to Palko's words".

In October 2008 the Bratislava Regional Court ordered the Slovak broadcaster Radio Viva to apologize and to pay EUR 30,000 libel damages to the Slovak judge, Mr. Jozef Soročin, in association with the report on the fraud charges brought against him.

In the interests of precision it should be noted that the Bratislava Regional Court found the statement made by the news-presenter during the objective report to be an "incorrect and truth-distorting infringement on the civic honor and dignity of Mr. Jozef Soročin".

The only domestic option now available to Radio Viva is an appeal to the Constitutional Court. If it fails in this, Radio Viva has indicated its intention to take the case to the European Court of Human Rights. ■

TR – Music Collecting Societies Sign Agreement with Radio and Television Broadcasters

Gül Okutan Nilsson
Intellectual Property Research Center, Istanbul Bilgi University

The four major music collecting societies in Turkey, representing authors (MESAM & MSG), phonogram producers (MU-YAP) and performers (MUYORBIR) joined forces to sign a copyright agreement with the Television Broadcasters Association representing 55 leading TV channels in Turkey, constituting approximately 90 % of the television broadcasting sector.

This historic agreement, which was signed in October 2008 in the presence of the Turkish Minister of Culture, ends a decade-long legal struggle that had existed between the music collecting societies and the broadcasters, ever since the music collecting societies actively started to make efforts to collect copyright fees for broadcast music in Turkey. According to the agreement, the TV channels will pay approximately TRY 20 million (roughly EUR 10 million) for one year into the common account of the collecting societies, to be distributed to their members. The tariffs for the copyright fees are determined according to how many hours of music are used by each channel per day, whether it is a national, regional or local channel and the type of broadcast (terrestrial, satellite, cable or digital).

A similar agreement was signed with the Turkish Radio and Television Broadcasters Collecting Society, which represents 704 regional and local radio and television channels. The radio and television channels that are parties to this agreement will receive access to the digital music archive of the four collecting societies containing approximately 100,000 pieces of music.

These agreements follow a framework agreement that was signed in March 2008 by the same collecting societies with the Federation of Turkish Hotel Enterprises, a legal body which brings together several hotel associations under the same umbrella group. In this agreement, the Federation promised to make sure that a minimum number of hotels with at least 150,000 beds in total would agree to pay the tariff negotiated by the Federation to the common account of the music collecting societies. The tariff for hotels is determined according to the number of rooms, size of other common areas and number of stars awarded to the hotel.

With these agreements, the music collecting societies seem to have arrived at a satisfactory solution to the problem of collecting copyright fees from hotels and broadcasters. ■

TR – Radio and Television Corporation Launches Kurdish Language Channel

Eda Çataklar
Intellectual Property Law Research Center, Istanbul Bilgi University

The Turkish Radio and Television Corporation (TRT) recently completed the necessary preparations and launched a Kurdish language channel named TRT 6. This is the next step in and the execution of the plans announced to dedicate a channel that broadcasts in different languages and dialects as well as the last amendment to Law no. 2954, which was made on 11 June 2008 and which gave TRT the opportunity to provide full-time broadcasting in foreign languages (see IRIS 2008-8: 19).

After broadcasting for a test-period of one week, TRT 6 started full broadcasting officially on 1 January 2009 at 07:00 p.m. Several ministers and members of parliament attended the launch ceremony and the congratulations of the Turkish President and Prime Minister were broadcast in the first programme of TRT 6. In offering their congratulations they drew attention to the importance of this channel in the context of cultural diversity and social integrity as well as its aim to strengthen Turkish unity and democracy. The Prime Minister also mentioned that TRT 6 would start broadcasting in the Kurmanji dialect and that other Kurdish dialects would be included gradually as the channel develops.

The Director General of TRT declared that TRT 6 was only the first of the multilingual channels and TRT would continue its activities to launch new channels to broadcast in Arabic, Farsi and English in 2009. ■

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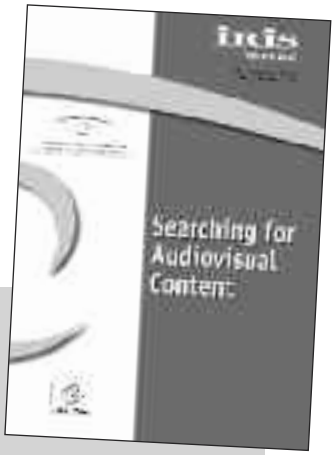

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- How can the free flow of information be weighed against the protection of privacy?
- What does the exclusive position of search engines mean for freedom of expression?
- How is the EC regulatory framework (Framework Directive for Electronic Communications Networks and Services, Universal Service Directive, E-Commerce Directive, Audiovisual Media Services Directive) relevant to search engines?
- What examples are there of self- and co-regulation being used instead of State regulation?
- What kind of regulation is necessary?

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Fax: +43 1 408 11 40 20
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