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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

2009 - 6

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IRIS LEGAL OBSERVATIONS
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of Faccio v. Italy

The European Court of Human Rights has declared inadmissible the application in a case concerning the sealing by the authorities of a television set because a person had not paid his licence fee.

In 1999, the applicant, Mr. Faccio, filed a request with the *Radiotelevisione italiana* (RAI) subscriptions bureau to terminate his subscription to the public television service. On 29 August 2003, the tax police sealed his television set in a nylon bag so that it could no longer be used. Relying on Article 10 (freedom of expression) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Mr. Faccio complained before the Court of a violation of his right to receive information and of his right to respect for his private and family life. He alleged that the act of making his television set unusable was a disproportionate measure, as it also prevented him from watching private channels. He further relied on Article 1 of Protocol No. 1 (protection of property) to the Convention.

The European Court of Human Rights noted that it was not in dispute that the sealing of the television set had constituted interference with the applicant's right to receive information and with his right to respect for his property and for his private life. It further found that the measure, taken under the provisions of Italian law, had pursued a legitimate aim: to dissuade individuals from failing to pay a tax or, in other words, to dissuade them from terminating their subscriptions to the public television service. The licence fee represents a tax that is used for the financing of the public broadcasting service. In the Court's view, regardless of

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whether or not Mr. Faccio wished to watch programmes on public channels, the mere possession of a television set obliged him to pay the tax in question. Moreover, a system whereby viewers would be able to watch only private channels without paying the licence fee, assuming that this were technically feasible, would amount to depriving the tax of its very nature, since it is a contribution to a community service and not the price paid by an individual in return for receiving a particular channel.

In view of the foregoing considerations and the reasonable amount of the tax (which, by way of example, amounts to EUR 107.50 for 2009), the Court concluded that the measure consisting of sealing the applicant's television set in a bag was proportionate to the aim pursued by the Italian authorities. It thus declared the application manifestly ill-founded. ■

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

● Decision by the European Court of Human Rights (Second Section), case of Bruno Antonio Faccio v. Italy, Application no. 33/04 of 31 March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=9237

FR

European Court of Human Rights: Case of A. v. Norway

The European Court in a recent judgment clarified the relation of the freedom of the press (Art. 10) vis à vis the right of privacy (Art. 8) and the presumption of innocence (Art. 6 para. 2) in a case of crime-reporting in the media. The applicant, A, is a Norwegian national with a criminal past. The case concerns A's complaint about the unfavourable outcome of a defamation suit he brought against the Fœdrelandsvennen newspaper, following its publication of two articles concerning the preliminary investigation into a murder case which implicated him. A had been questioned as a possible witness about the murder of two young women, but was released after 10 hours. The police's interest in A attracted considerable media attention. Fœdrelandsvennen disclosed details of A's criminal convictions and stated that he had allegedly been seen by witnesses in the very same area and at the same time as the girls were killed. A television station, TV2, also reported in a news broadcast on the case and presented A as a murderer.

A brought defamation proceedings against the Fœdrelandsvennen newspaper and TV2, as further investigation and proceedings made it clear that he had nothing to do with the murder case. The Norwegian courts found in his favour and awarded him compensation as regards the TV2 report. In respect of the newspaper articles, however, the domestic courts agreed that the publications had been defamatory, in as much as they were capable of giving the ordinary reader the impression that the applicant was regarded as the most probable perpetrator of the murders, yet concluded that, on balance, the newspaper had been right to publish the articles, as it had acted in the interest of the general public, which had the right to be informed of the developments in the investigation and the pursuit of the perpetrators. Relying on Article 6§2 (presumption of innocence) and Article 8 (right to respect for private and family life), A complained in Strasbourg that the domestic courts' findings – to the extent that the Fœdrelandsvennen newspaper was found to have a right to publish defamatory material about him – had negatively affected his right to be presumed innocent until proven otherwise, as well as his private life.

The Court dismissed A's allegations under Article 6 para. 2, as it found that Article not applicable to the matters at hand, given in particular that no public authority had charged A with a criminal offence and that the disputed newspaper publications did not amount to an affirmation that he was guilty of the crimes in question. The Court, however, was of the opinion that the articles had been defamatory in nature, as they had given the impression that the applicant had been a prime suspect in the murder case of the two girls. While it is undisputed that the press have the right to deliver information to the public and the public have the right to receive such information, these considerations did not justify the defamatory allegations against A and the consequent harm done to him. Indeed, the applicant had been persecuted by journalists seeking to obtain pictures and interviews from him, this being during a period in his life when he had been undergoing rehabilitation and reintegration into society. As a result of the journalistic reports, he found himself unable to continue his work, had to leave his home and was driven to social exclusion. In the Court's view there was no reasonable relationship of proportionality between the interests relied on by the domestic courts in safeguarding Fædrelandsvennen' freedom of expression and those of the applicant in having his honour, reputation and privacy protected. The Court was therefore not satisfied that the national courts struck a fair balance between the newspaper's freedom of expression under Article 10 and the applicant's right to respect for his private life under Article 8, notwithstanding the wide margin of appreciation available to the national authorities. The Court concluded that the publications in question had gravely damaged A's reputation and honour and had been especially harmful to his moral and psychological integrity and to his private life, in violation of Article 8. ■

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● Judgment by the European Court of Human Rights (First Section), case of A. v. Norway, Application no. 28070/06 of 9 April 2009, available at: http://merlin.obs.coe.int/redirect.php?id=9237

EN

EUROPEAN UNION

European Commission: Further Consultation on a Revised Draft Broadcasting Communication

The European Commission has launched a second consultation to seek feedback on a revised draft for a new Broadcasting Communication, which entails its revisions of the applicable rules that govern the state funding of public service broadcasting. The Commission invited Member States, citizens and stakeholders alike to submit their comments and reviews by 8 May 2009, as later this year the Commission is to adopt a modernized Broadcasting Communication. The remarks provided for in this public consultation allow interested parties the ability to share their input, as well as to include any current information that is relevant, such as the effects (if any) of the economic crisis upon the media.

Catie Austin
Institute for Information Law (IViR), University of Amsterdam

Like the previous draft, this second draft Communication is based upon the fundamentals of EU law in the area of finance and public service broadcasting, as well as elaborations thereon as provided for in the Amsterdam Protocol on Member States' systems of public broadcasting (see IRIS 2009-1: 6).

This new draft incorporates a number of revisions, which are aimed at clarifying the previous text. The changes are to elaborate on the principles of technology neutrality and editorial independence. Also included is a key focus on enhanced flexibility for implementation within Member States and refinement on holding public service reserves.

The initial consultation on the first draft Communication took place between November 2008 and January 2009, whereas the first consultation on the general principles of review occurred between January and March 2008. ■

● Draft Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting, available at:
http://merlin.obs.coe.int/redirect.php?id=11740
BG-CS-DA-DE-EL-EN-ES-ET-FI-FR-HU-IT-LT-LV-MT-NL-PL-PT-RO-SK-SL-SV

European Commission: Final Report on the Content Online Platform

To support the cross-border delivery of online content, the European Commission launched the "Creative Content Online in the Single Market" initiative (see IRIS 2008-2: 5). This initiative is aimed at enhancing the availability of online content and ensuring that all players in the value chain receive adequate revenues. In the short term, these goals may be realised through pragmatic solutions, but the Commission is examining whether, in the medium term, regulatory intervention is needed.

To help identify the main challenges and set future priorities, the Commission set up the Content Online Platform, i.e., a stakeholders' discussion and cooperation platform, in which 77 high-level experts participated. They looked at key issues such as new business models, licensing of copyright, the fight against piracy, protection of minors and cultural diversity. In May 2009, they presented their final report.

The report offers valuable insights into the position of the different players in the value chain and the practices that they adopted. It shows, for example, that, while creative content is generally a high-risk investment sector, business models mostly vary according to the production budget of the various types of creative content (e.g., free or premium content). It appears that consumers are increasingly willing to pay for legal online offerings, provided they are priced accurately. Moreover, consumers expect content to be easily accessible and cross-platform available.

Stef van Gompel
Institute for Information Law (IViR), University of Amsterdam

As regards management of copyright, cross-border rights clearance continues to be a problematic issue. While in the music sector there is a need to reassess cross-border licensing, in other sectors there is more of a need for a European database for creative content, to help identify rightsholders and deliver all necessary information for licensing and rights management. Furthermore, to the extent that DRMs are used, they should allow interoperability (i.e., portability of content from one device to another), while consumers must duly be informed of any copy restrictions they contain.

The European Commission is preparing a Second Commission Communication on Creative Content that it plans to adopt in September/October 2009. In this communication, the findings and results of the Creative Content Online initiative will be summarised and analysed. Moreover, it shall define a set of principles for action by stakeholders and public authorities and offer a continuing framework for discussions with stakeholders. Also, the Commission has mandated a study on multi-territory licensing of audiovisual content, the results of which are expected in early 2010. ■

● Final Report on the Content Online Platform, May 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11739
EN

European Parliament: Proposal on Copyright Term Extension Endorsed

Catie Austin
Institute for Information Law (IViR), University of Amsterdam

In the first reading of the co-decision procedure on 23 April 2009, the European Parliament (EP) adopted a proposal for a directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights. The European Commission welcomed the Parliament's vote, although the extension of the term of protection for phonograms has been strongly opposed by some academics, consumer organisations, political groups and by some Member States (see IRIS 2008-8: 4). The final vote was 377 in favour, 178 against and 37 abstentions.

Despite the controversy, MEPs voted to extend the term of copyright protection for phonograms and the performances fixed thereon from 50 to 70 years. The 20-year term extension may be seen as a compromise to temper the disapproval of some Member States, as the initial proposal of the Commission called for the extension of the term to up to 95 years. Political groups in Parliament, such as ALDE, GREENS/EFA, NGL, IND/DEM, opposed the extension of the term for performer's rights.

The text of the proposal includes other measures worthy of review. For example, a dedicated fund for session musicians is included, whereby session players gain financial benefits. Producers or record companies are called upon to make annual contributions to a fund, setting aside at least 20% of the revenues resulting from the extension of terms. Also, a "use it or lose it" provision enables performers to recover or regain their rights, should the producer fail to make the recording available to the public within one year of the expiry of a fifty-year term. Finally, the text contains a so-called "clean slate" measure aimed at benefiting performers and at preventing producers from using previous contract terms to make deductions in royalties.

The Commission has been called upon to perform an impact assessment by January 2010 on the possible need for a similar extension of terms in the audiovisual sector.

The proposal now awaits the first reading by the Council of Ministers. ■

● **European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights (COM(2008)0464 – C6-0281/2008 – 2008/0157(COD)), Brussels, 23 April 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11733**

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

European Parliament: Approves the New Telecoms Package in the Second Reading

On 6 May 2009, the European Parliament voted on the informal political agreement reached with the Commission and the Council in the discussions following last autumn's first reading of the Telecoms Package. The package involves a revision of the EU's electronic communications regulatory framework, appertaining to five existing Directives and as encapsulated in three separate legislative proposals and corresponding Parliament reports (see IRIS 2008-10: 4). The EP approved the new package in its entirety, save for one modification: it reinstated amendment 138 of the Trautmann report, a controversial article which states that the fundamental rights and freedoms of end users may not be restricted without prior ruling by a competent judicial authority, unless public security is threatened. The amendment had been introduced by Parliament in the first reading, but was later rejected by Council (see IRIS 2009-1: 5).

The move is considered significant, as amendment 138 is widely held to constitute a political signal against the so-called "three strikes and you're out" approach being implemented in national legislation. It is particularly seen as incompatible with France's *Création et Internet* legislative bill, which was recently voted through by the French National Assembly.

On the other hand, the likewise heavily debated amendment 166 of the Harbour report remains outside the endorsed package, with the re-written text, as negotiated with Council, taking its place. Amendment 166 in its initial form required that any measures restricting users' access rights take heed of the principles of proportionality, effectiveness and dissuasiveness. The new text explicitly explains that it "neither mandates not prohibits" conditions imposed by providers limiting users' access to and/or use of services or applications. Instead, these are safeguarded by means of an obligation to inform customers of existing restrictions. A "universal service" obligation in relation to functional internet access is also imposed. In any case, MEP Malcolm Harbour has indicated his view that lines have been blurred in the discussions surrounding Telecoms reform: "This directive package has never been about copyright enforcement. The Parliament cannot impose on a country conditions about how it organises its judicial system. That is a basic element of subsidiarity".

Other issues affected by the proposed reforms would include clearer contracts for the provision of electronic communication services, mobile phone number portability, functional separation to overcome competition problems, a hotline for missing children, better recognition of the rights of people with disabilities, better privacy protection and action against illegal activity on the internet, network security against personal data breaches and spam, better management of radio spectrum and investment in next-generation networks and infrastructure. Finally, if the reforms pass, what has now been termed the Body of European Regulators for Elec-

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tronic Communications (BEREC) will be instituted as an independent expert advisory body, helping to ensure fair competition and more consistency of regulation in telecoms markets.

The new texts must now be accepted by Council by a qualified majority if agreement on the package is to be found. Discussions on the question are likely to take place at the Telecoms Council on 12 June 2009. If rejected, the whole package of reforms will have to enter the conciliation process in Parliament's next legislative term, following the upcoming European elections. ■

● No Agreement on Reform of Telecom Legislation, EP press release, 6 May 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11736
BG-CS-DA-DE-ET-EL-EN-ES-FR-IT-LV-LT-HU-MT-NL-PL-PT-RO-SK-SL-FI-SV

NATIONAL

BA – RAK Report on Violations of its Rules and Regulations

Dusan Babic
Media Researcher and Analyst, Sarajevo

The Communications Regulatory Agency (RAK) has presented its annual report for 2008, in the form of an overview on the violations of its rules and regulations. In total 39 decisions have been issued. Of these, 35 relate to broadcasting and 4 to the telecommunications sector.

During the reported period, the RAK examined 169 cases of possible breaches of its rules and regulations. Of these, 129 cases related to programme content requirements. It is worth noting that as many as 92 of these cases were initiated by citizens who lodged complaints. About 30 cases dealt with technical aspects of broadcasting and 7 with the cable distribution of RTV programmes.

Concerning the respective items, in 9 cases the Broadcasting Code of Practice for Radio and TV Programmes had been violated; one case related to the Advertising and Sponsorship Code; 15 cases to licensing terms and 10 cases to pre-election campaigns. Out of the total number of broadcasters operating in the country (203), 31 radio and television stations were sanctioned (15.3 %).

It should be noted that the entire amount of the fines collected goes to the State budget, as prescribed by the Law on Communications under Article 44, para. 1 (Official Gazette, No. 31/03 and 75/06).

Compared with previous years, it is noticeable that both public and commercial broadcasters adhere more and more to the RAK's rules and regulations, which implies that they are improving their professional media standards. ■

● RAK Annual Report for 2008, available at:
http://merlin.obs.coe.int/redirect.php?id=10734
BS

BE – *Vlaams Belang* not Discriminated against by Public Broadcaster

In a decision of 24 February 2009, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media – monitoring and enforcement of media regulation) considered a complaint filed by the *Vlaams Belang* (Flemish Interest – a political party with an extreme right signature in the Flemish Community) against the VRT (Flemish public broadcaster). According to the *Vlaams Belang*, the latter violated its obligation of impartiality and non-discrimination by not inviting a representative of the *Vlaams Belang* to an information programme ("Panorama"). In this programme, twelve so-called "wise men", from a broad range of political backgrounds, discussed the future of Belgium, a question with which this particular political party concerns itself in a very prominent manner.

The obligation of impartiality and non-discrimination is described in Article 111bis of the Flemish Media Decree (Article 39 of the new decree, see IRIS 2009-5: 8), which reads as follows: "§ 1. Every form of discrimination should be avoided in the programmes. The programmes will be structured in such a way that they cannot give rise to discrimination between different ideological or philosophical ideas. § 2. Information programmes, communications and programmes of a general information nature, as well as all information programme parts must be presented in a spirit of political and ideological impartiality". In its jurisprudence, the Flemish Regulator has established a guiding principle: programme producers enjoy wide professional freedom in selecting guests. Yet this freedom is not unlimited, in view of the above-mentioned obligation. If the broadcaster manages to justify the absence of a politician or a political party from an information programme in an objective and reasonable way (with an eye on subject matter and programme format), no partiality or discrimination, and hence no violation of Article 111bis of the Flemish Decree, occurs.

In the present case, the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) found the justification given by the VRT to be reasonable and objective. The purpose of the debate was to approach the theme from various points of view, rather than from a purely political one. With this objective in mind, the guests were selected not as representatives of a political party, but rather on the ground of their alleged professional familiarity with

Hannes Cannie
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the subject. Given the subject's specificity, the invitation of, amongst others, active politicians does not give rise to objections in the view of the Regulator: during the debate, these politicians did not necessarily proclaim the political points of view of their respective parties, but rather pronounced their personal visions. Hence, the VRT did not violate its legal obligation of impartiality and non-discrimination. ■

● **B. Valkeniers & Vlaams Belang vs. VRT, 24 February 2009 (No. 2009/025), available at:**
http://merlin.obs.coe.int/redirect.php?id=11726
NL

BG – Controversial Bill on Public Broadcasting

Rayna Nikolova
Council for Electronic Media, Sofia

On 2 April 2009 the Council of Ministers (CoM) adopted the Bill on Public Broadcasting ("Bill"). This happened without holding public discussions or consultations with the stakeholders: namely the Council for Electronic Media, the Communications Regulation Commission, the Bulgarian National Television (BNT) and the Bulgarian National Radio (BNR). The Law on Normative Acts and the Internal Rules of Procedures of the CoM explicitly provide that before adopting an act a consultation process should take place with the relevant interested parties. The Bill was submitted to the National Assembly on 6 April 2009 and was made available to the public for the first time on 8 April 2009 on the internet site of the National Assembly.

As mentioned in its preamble, the Bill is aimed at regulating the activities of the so-called "public multiplex operators". However, the majority of the media experts in Bulgaria view the Bill as a tool for increasing the political influence over the management of the BNT and the BNR. The media sector also considers that some of the mechanisms provided in the Bill for public-private partnership in the process of programme creation are not compliant with current EU policies (e.g., the European Commission's Broadcasting Communication on State Aid for Public Broadcasting). It is also worth mentioning that the Bill provides for the possibility for the general directors of the BNT and the BNR to appoint unilaterally the individuals or legal entities with whom the public-private partnership will be carried out. No specific criteria for such appointments are laid down in the Bill.

The Bill provides for the establishment of a new State enterprise called National Company Public Digital Broadcasting. The managing bodies of the National Company Public Digital Broadcasting shall comprise the Minister of Finance, a Management Board and an Executive Director. The members of the Management Board (five persons) shall be appointed by the President of Bulgaria upon an initiative of the Prime Minister. According to some media experts, by introducing these legislative changes the current political majority is attempting to maintain its control over the digitalisation process and the media in the wake of the upcoming parliamentary and EU elections.

It is worth noting that the Bill went from first to second reading (30 April 2009) in just two weeks (which is quite unusual in Bulgarian parliamentary practice). The interested parties were given only 72 hours to submit their proposals. During the second reading of the Bill the Parliament decided unexpectedly to increase the number of members of the Communications Regulation Commission from five to eleven. ■

CY – Media Publicity, a Reason for the Dismissal of Charges of Ill-treatment

The way in which media covered a case of ill-treatment of two students by the police was one of the reasons that led the Assize Court of Nicosia to dismiss charges against the suspects as this interfered with the course of justice in many ways. Negative publicity, abuse of the suspects, violations of their rights and of the principle of a fair trial by the media were some of the findings mentioned in the verdict. The decision caused a public outcry and criticism of the courts, as well as a clash between the Attorney General and the Court.

The case is based on an incident between two students and a dozen policemen, members of the special forces and anti-drugs squad on the night of 20 December 2005. It was initially reported that the two students refused and resisted routine identity control by the police. They were also charged by policemen with assault and causing injuries. The case took a different dimension in March 2006, when scenes from an amateur video went public on a newspaper's website and were subsequently screened on TV channels. The ten-minute video showed several servicemen savagely beating and ill-treating the young men while they were handcuffed, which caused indignation and an outcry against the police force. The author of the video had handed it to the Attorney General on condition that his identity would not be disclosed. All the above led to 11 servicemen being brought before the Assize Court to face several charges, including assault and ill-treatment. Among the main reasons for the dismissal of the case mentioned by the Court were the procedure followed by the police force to identify the servicemen involved in or present at the incident and the procedure followed that led to the recognition of the suspects by the two students.

In its decision, the three-judge Court found the accused not guilty for several reasons, including the following:

- The testimony based on an amateur video providing the crucial evidence of the incident was not accepted because the non-disclosure of the identity of its author deprived the culprits of the right to ask questions about its content and other issues. This right was considered a basic requirement for a fair trial.
- The negative publicity in the media caused a number of further problems that interfered with the prerequisites for a fair trial. More specifically, the treatment of the suspects, repeatedly branded as 'aggressors' and 'sadists', described in such a negative way, violated the principle of the presumption of innocence. These descriptions, along with statements by officials, politicians and others, and the apology expressed to the students' parents by the Chief of the Police Force, along with the disclosure of the suspects' names in the (published) report of the ombudsman, all created the conviction that they were guilty.

Christophoros Christophorou
Political analyst, Expert on Media and Elections

According to the Court, public opinion was in this way shaped in a definite and irreversible way, creating the strong belief that the suspects had committed the tort of ill-treatment; this verdict was reached in the absence of the competent State bodies. The course and the result of the trial were determined in advance, resulting in defiance of the rules of law and contempt of court, the three justices noted.

All the above, concluded the Assize Court, were additional reasons for the dismissal of this case. It 'constituted a serious interference with the work of justice' that cancelled the requirements for a fair trial, while it also constituted an appropriation of the judicial power

The decision is subject to appeal before the Supreme Court. ■

● Assize Court, Case 17179/06, Republic of Cyprus v. A. Efstathiou & others, decision of 19. March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11720

EL

CZ – Administrative Court Bans Advertising of Dietary Supplement

The Supreme Administrative Court of the Czech Republic banned advertising of a dietary supplement in a ruling of 29 January 2009.

The Czech Advertising Regulations Act prohibits advertising that claims that dietary supplements are able to cure or prevent human illnesses. Liability for advertising lies with the contractor. The Broadcasting Council is responsible for regulating television advertising.

The company Mediarex Communications and Consulting s.r.o. had commissioned television advertising of the dietary supplement Preventan akut. In the advertising, the product was described as having medicinal properties such as the ability to cure influenza, for example. A pharmacist was shown in the advertising spot, saying: "Preventan akut rapidly gets the body's defences working and fights viruses and bacteria."

Jan Fučík
Culture Ministry, Prague

On 29 August 2007, the Broadcasting Council fined Mediarex after this spot had been broadcast several times. Mediarex appealed, claiming that the product had not been described as a medicine. It argued that the advertisement concerned a dietary supplement and did not contain any reference to healing or preventing illness.

Prague Municipal Court rejected the appeal on 16 April 2008 on the grounds that the advertising spot had portrayed the product primarily as a medicine. Mediarex appealed again.

This appeal was dismissed by the Supreme Administrative Court on the grounds that the product had been presented as being capable of curing or preventing human illnesses. It should be remembered that the decisive factor is not whether the product actually has healing or preventive properties, but whether it is characterised as a medicine.

The ruling of the Supreme Administrative Court is final. ■

***● Rozsudek Nejvyššího správního soudu č.j. 9 As 52/2008 ze dne 29.1.2009* (ruling of the Supreme Administrative Court, No. 9 As/2008, 29 January 2009)**

CS

DE – Cameraman Entitled to Information from Film Exploiters

In a ruling of 7 May 2009, the *Landgericht München I* (Munich District Court I - LG) decided that, under copyright law, a cameraman had the right to certain information from film exploiters. The case concerned revenue generated by the film "*Das Boot*" (made in 1981) since 2002 (case no. 7 O 17694/08).

The plaintiff was a cameraman who had helped to make the film and had been paid for doing so. The film became a global success and was exploited repeatedly over a period of years. The plaintiff did not receive a share of the proceeds of this exploitation.

In the proceedings, he asked the producer, the broadcaster that financed the film and a video company for information about how the film had been exploited and how much revenue had thus been generated. In a second stage of the proceedings, he intended to use the information disclosed by the defendants to assert a claim for payment of additional remuneration in accordance with Art. 32a of the *Urhebergesetz* (Copyright Act - UrhG).

The LG granted him the right to such information on the grounds that the unusually long and extensive exploitation of the film gave reason to assume that

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the income generated would be noticeably disproportionate to the remuneration received by the plaintiff.

The plaintiff's right to information covers revenue generated since 2002 because the provision of Art. 32a UrhG was only introduced as part of the 2001 copyright reforms. ■

● Press release of Munich District Court I of 7 May 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11718

DE

DE – DSF Cleared of Surreptitious Advertising

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In a ruling of 5 March 2009, the *Bayerische Verwaltungsgericht München* (Bavarian Administrative Court, Munich – VG, case no. M 17 K 07.5805) decided that DSF Deutsches Sportfernsehen GmbH did not breach the ban on surreptitious advertising in its broadcast of the programme PartyPoker-Football & Poker Legends Cup on 22 November 2006.

The programme featured a poker tournament. On the poker table, the words "PartyPoker.com Football & Poker Legends Cup" were printed in large letters. They were visible for a total of 16 of the 44 minutes of transmission time, which the *Bayerische Landeszentrale für Neue Medien* (Bavarian New Media Office - BLM) considered to be a form of surreptitious advertising. Such advertising is banned in Germany under Art. 7(6) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), which states that surreptitious advertising occurs when goods, services, etc. are deliberately mentioned or portrayed for advertising purposes of which the general public may be unaware (see Art. 2(2)(6) RStV).

The VG did not deem the screening of these words to be surreptitious advertising. It thought that it could not be proven that DSF had intended to advertise. In individual cases, such an intention should be positively established as an element of the facts, generally through circumstantial evidence, which was not produced in this case. An essential reason for drawing this conclusion was the fact that no payment had been made and that there was no proof that reduced licence fees had been paid. Another reason for concluding that there was no intention to advertise was the fact that, under the licence agreement with the programme producer, DSF was not authorised to adapt the programme in order to make the advertisement unrecognisable.

The BLM had argued that the programme could have been adapted afterwards because the tournament was not broadcast live. It fundamentally criticised the DSF's arguments, claiming that they were ultimately based on the fact that the tournament had taken place abroad and that a local broadcaster and sponsor had deliberately edited the television coverage in such a way that the advertising was clearly visible for long periods. It argued that, in such cases, the broadcaster should not be allowed to lay the blame on foreign producers, but should assume responsibility itself. The court disagreed. ■

● Ruling of the *Bayerische Verwaltungsgericht München* (Bavarian Administrative Court, Munich -VG), 5 March 2009 (case no. M 17 K 07.5805)

DE

DE – Draft 13th Inter-State Broadcasting Agreement Published

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The State chancellery of Rhineland-Palatinate, which currently chairs the Broadcasting Commission of the *Länder*, has published a draft 13th *Rundfunkänderungsstaatsvertrag* (amendment to the Inter-State Broadcasting Agreement - RÄStV).

One of the issues covered by the amendment is product placement, which is to be defined in Art. 2(2)(11) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV). The ban on surreptitious advertising, product and thematic placement and related practices will be incorporated in the newly added Art. 7(7)(1) RStV (instead of Art. 7(6)(1), where it is at present). However, under Art. 7(7)(2) RStV, exemptions to the ban on product placement are allowed on condition that editorial independence is observed, there are no direct invitations to buy goods or services and the product is not given undue prominence. Viewers must be informed at the beginning and the end, as well as after any breaks in the programme, that it contains product placement.

For public service broadcasters, product placement will be allowed during cinema and television films, series, sports broadcasts and light entertainment programmes, provided they are not aimed at children and as long as no payment is made in return (Art. 15 RStV). Product placement is also prohibited in children's programmes on private channels (Art. 44 RStV). Product placement does not count towards the permitted duration of advertising (Art. 16(1)(2), 45(1)(2) RStV).

Furthermore, in future, television and cinema films, as well as news programmes will only be allowed to contain one advertising or teleshopping break per 30 minutes of programme time (Art. 7a(3) RStV) (see also IRIS 2009-6: 10). ■

● Working draft on the transposition of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (as at 17 April 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11715

● Position of the public service broadcasters concerning the draft, available at: http://merlin.obs.coe.int/redirect.php?id=11716

DE

DE – Amendment of Telemedia Act and the Provisional Tobacco Act

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At the beginning of May, a draft Act on the further development of the legal framework for new services was presented, proposing amendments to the *Telemediengesetz* (Telemedia Act - TMG) and the *Vorläufiges Tabakgesetz* (Provisional Tobacco Act).

The Act is meant to transpose Directive 2007/65/EC (Audiovisual Media Services Directive – AVMSD) with regard to its provisions concerning on-demand audiovisual media services.

The main areas in which the AVMSD requires amendments to the TMG are the definitions of service providers and on-demand audiovisual media services (Art. 2(1)(1) and (6) of the draft), provisions on country of establishment in terms of its impact on the application of the country of origin principle (Art. 2a(3) of the draft) and particular requirements concerning audiovisual commercial communication in relation to sponsorship (Art. 6(1)(5) of the draft).

The amendments to the Provisional Tobacco Act required under the AVMSD mainly concern the ban on sponsorship and product placement (Art. 21b of the draft). ■

• Draft Act on the further development of the legal framework for new services, 30 April 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11717

DE

ES – Reform of the Public Television Broadcaster

In the context of economic difficulties for the media industry in Spain (partially due to the general economic crisis, but also to specific factors in the sector), the Spanish cabinet has undertaken a drastic reform: the suppression of advertising on the public television broadcaster, *Televisión Española* (TVE).

Since television started in Spain in 1957, it has always operated following a free-to-air model, with a public sector funded partially by the Government, but essentially through advertising. The introduction of commercial television in Spain in 1989 did not result in a change in this model, but the dual funding of the TVE has been subject to bitter criticism from its commercial rivals (who have termed it "unfair competition") and also to formal notice from the European Commission.

This situation is now being brought to an end. On 8 April 2009, the Cabinet approved a draft bill substantially reforming the funding of the TVE. As of 1 January 2010, advertising will disappear from the content aired on the TVE. According to this draft, the TVE will now be funded by:

- A Government subsidy, aiming at around 45% of its budget.
- The amount of an already existing tax, paid to the Government by businesses using the radio spectrum (broadcasters and telecommunications).
- A new tax, to be paid by commercial television broadcasters, amounting to 3% of their gross financial income (this tax is estimated to be neutral, on the basis that advertising investment will move from the TVE to the commercial broadcasters).
- An additional new tax, imposed upon telecommunications operators and fixed at 0.9% of their operational (not financial) income.

The distribution of funding obligations among these sources, taking the 2009 budget (which has been fixed at EUR 1.2 billion) as a starting point, would work out approximately as follows: the Government subsidy would amount to nearly EUR 500 million; The spectrum tax would amount to nearly EUR 300 million. The new taxes would yield something close to EUR 120 million (from the commercial broadcasters) and EUR 300 million (from the telecommunications operators).

This reform has been negotiated between the Cabinet and the commercial broadcasters, which may explain some additional restrictions imposed upon TVE: it will reinforce its public service nature, giving more room to information and current affairs programmes and more presence to political parties and various types of social organisations and restricting its access to "competitive" content. Thus, it will only be allowed to broadcast 80 "first window" films every year and invest only 10% of its budget in purchasing sports programs – not including the Olympic Games, the broadcasting of which is taken to be a "public service of national interest".

However, consensus has yet to be reached. On one hand, the TVE Board members, appointed less than two years ago under a law that reformed the TVE in 2006 (see IRIS 2006-6: 11), have not been consulted nor did they take part in the negotiations. On the other hand, the telecoms operators are still not convinced that they should invest in the financing of another business (despite the fact that their industry is one of the least affected by the economic crisis).

Some other difficulties are foreseeable. First, the Cabinet does not have a majority in Parliament and tends to rely on minor left-wing parties in order to pass legislation; however, it is difficult to imagine these parties giving support to a reform perceived as a gift to commercial broadcasters and a serious blow to the public service broadcaster.

Secondly, the Cabinet would like to see regional

governments introduce similar reforms in their regional broadcasters (all of which are still part of the public sector). These represent in total around 17% of television audiences in Spain, although they lack the financial means to compensate for the loss of advertising income and do not have the possibility of introducing new financially significant taxes.

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Shortly before the analogue "switch-off", scheduled for April 2010, and in the context of serious economic difficulties for all television broadcasters (who are experiencing a serious reduction in advertising investment), the Spanish Cabinet is introducing reforms intended to reinforce the whole sector. The recent authorisation of cross-ownership between operators and the possible subsequent mergers (see IRIS 2009-4: 8), as well as the steps taken towards a new Broadcasting Law (transposing the recent Audiovisual Services Directive) form other parts of this effort. Results will be visible in the very next months. ■

● ***Informe sobre el Anteproyecto de Ley de Financiación de la Corporación de Radio y Televisión Española*** **(Report on the Draft Law on Financing of the Corporation for Spanish Radio and Television), available at:**
http://merlin.obs.coe.int/redirect.php?id=11728
ES

ES – Support for Pay DTT Services

In April the Spanish Ministry of Industry, Tourism and Commerce issued a press release announcing the possibility for those national commercial broadcasters interested in offering pay-DTT services to simply apply for a change in their licensing conditions entitling them to do so from that point onwards. Nevertheless, the document goes on to explain that final authorisation will depend on the Cabinet of Ministers approving a previous report of its advisory council, the *Consejo de Estado*.

The announcement has been quite controversial, since the Government is supposed to be working on the presentation of a General Audiovisual Law to the Parliament. In any case, the Ministry issued a reminder that every stakeholder affected by the introduction and implementation of these new services will have to comply with the conditional access provisions established by Royal Decree 2296/2004, a regulation that elaborates on the Telecommunications Bill that in 2003 implemented into Spanish Law the new EC Electronic Communications Framework (see IRIS 2003-6: 12), and Law 21/1997 relating to the broadcasting of sports and other events of national interest (see IRIS 1997-8: 12).

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The press release also suggests that pay-DTT services will benefit citizens, as well as private television operators and consumer equipment manufacturers. While citizens will have access to better content, and broadcasters to additional revenue resources besides advertising, the electronic industry will be able to take advantage of the need for new conversion equipment. Finally, the press release mentions that by this decision Spain joins those countries that have already authorised pay DTT, amongst which France, the United Kingdom, Italy, Portugal, Netherlands, Sweden and Finland are listed. ■

● ***A partir de hoy los operadores privados de televisión podrán solicitar la autorización para prestar el servicio de TDT de pago. Nota de prensa, 08/04/2009*** **(As of Today Private Television Operators will be Able to Ask for Authorisation to Operate Pay-DTT Services), press release of 8 April 2009, Ministry of Industry, Tourism and Commerce, available at:**
http://merlin.obs.coe.int/redirect.php?id=11727
ES

FR – Decision of the Paris Court of Appeal on the Liability of Video-sharing Platforms

On 6 May 2009 the court of appeal in Paris delivered a notable decision on the first dispute to be submitted to the French courts on the liability of video-sharing platforms. The director and the producer of the film "Joyeux Noël" claimed that the company Dailymotion allowed the film to be viewed using streaming technology despite having been sent formal notice to withdraw the film. The regional court of Paris had found in favour of the rightsholders on 13 July 2007 and held the company Dailymotion, categorised as a host service provider, guilty of infringement of copyright in respect of the film (see IRIS 2007-8: 10). The company appealed, claiming that – as a technical service provider – it had properly complied with its obligations under the Act of 21 June 2004 on confidence in the digital economy (LCEN) and that it had not been able to actually view the disputed content before the case was brought. The court of appeal of Paris, in a closely argued judgment, upheld the categorisation of the site as a host, but overturned the issue of its liability.

The court began by analysing the nature of the service offered by Dailymotion, as the rightsholders of the film held that the company's activity in fact constituted content editing and that in consequence its liability was fully and automatically incurred. However, the court held that neither Dailymotion's re-encoding of videos to make them compatible with their viewing interface, nor the setting up of presentation frames and tools for classifying content, nor even the operation of the site by selling advertising space justified its categorisation as an

editor of an on-line public communication service within the meaning of the LCEN. The company was therefore right in claiming the status of a technical intermediary within the meaning of Article 6-I-2 of the LCEN, which gives rise to limited liability. According to this text, the civil liability of technical service providers cannot be invoked if they "did not have actual knowledge of the unlawful nature of the content or if, once they did have such knowledge, they took prompt action to withdraw the data or render access to it impossible". The judgment was therefore upheld on this point. The court went on to examine the matter of the liability incurred by Dailymotion, recalling the terms of Article 6-I-5 of the LCEN, which lists the elements that must be notified to technical service providers for them to be presumed to have knowledge of the disputed facts. In the present case, the rightsholders had sent the company formal notice for the immediate withdrawal of the film available on the platform in disregard of their copyright entitlement, which Dailymotion had said it had done, although it was not able to guarantee the total deletion of the content since it had not been informed of the URL address of the Internet page in question; the company invited the rightsholders to use the speedy procedure available on the site using the "This video may cause offence" link. The court found that the information contained in the formal notice did not fully meet the demands of Article 6-I-5 of the LCEN in terms of the obligation to describe and locate the disputed facts held against the other party. The rightsholders had in fact omitted to attach the process-server's reports that they had had drawn up and which would have provided the operator with all the elements necessary for identifying the disputed content. Nor had they used the description procedure that Dailymotion had proposed. The court found that the company had not truly had knowledge of the disputed content until the summons was served and that thereafter it was not established that the film had been hosted on the site. Therefore its civil liability could not be invoked, and in consequence the applications on the grounds of infringement of copyright and unfair competition were dismissed. The judgment was therefore overturned on this point and the rightsholders' application rejected. They have announced their intention to apply to the court of cassation, whose position on all these matters is keenly awaited. ■

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● **Court of appeal of Paris (4th chamber, section A), 6 May 2009, Dailymotion vs. C. Carion, the company Nord-Ouest Production et al.**

FR

FR – Access to the Channel Orange Sports May Be Tied to Subscription to Orange Broadband

The court of appeal of Paris has overturned the very recent judgment by the commercial court which found Orange guilty of tied sale practices and unfair competition in its dispute with its competitors Free and SFR (see IRIS 2009-4: 9). The latter complained that the operator, which had spent EUR 203 million on buying exclusive broadcasting rights for premier league football matches between 2008 and 2011, was making subscription to its channel Orange Sports which was broadcasting the matches dependent on taking out a subscription to Orange's broadband Internet access. Having been ordered in the first instance to stop commercialising its channel, the operator referred before the court of appeal to a very recent decision by the ECJ, delivered on 23 April 2009 (C-261/07 and C-299/07), according to which the Directive of 11 May 2005 on unfair commercial practices of companies in relation to consumers should be interpreted as meaning the application of national regulations which, save for exceptions and without taking into account the specific circumstances of the case at issue, prohibited any joint offer made by a vendor to a consumer. In the light of this jurisprudence, the parties called on the court of appeal to interpret the national legislation, and more specifically Article L. 122-1 of the Consumer Code which prohibits tied sales, in such a way as to comply with Community law. Applying the principle of compliant interpretation, the court found that the decision of 23 April 2009 could be applied without any real doubt to the present dispute. In doing so, it noted that Article L. 122-1 of the Consumer Code came up against the scheme instituted by the Directive in that it prohibits tied offers generally and preventively, regardless of any check on their unfair nature with regard to Articles 5-9 of the Directive. The court therefore applied this appreciation, recalling that the Directive states that a commercial practice is unfair more specifically if it is misleading, within the meaning of Articles 6 and 7, or aggressive, within the meaning of Articles 8 and 9, in that it involves harassment or constraint. The court, contrary to the claims made by SFR and Free, held that the mere fact of the consumer having to take out a subscription to Orange broadband in order to have access to the Orange Sports channel did not meet the definition of constraint. The court observed, in fact, that in the context of the competition among them, all the IAPs tried to enrich the content of their offers to make them more attractive by setting up innovative services or acquiring exclusive rights for audiovisual, cinematographic or sports content. Listing various exclusive agreements concluded more specifically by Free and SFR, the plaintiffs in the proceedings, the court observed that it was the necessary result of this configuration of the market that the

average consumer considering subscribing to broadband Internet access did so quite specifically by considering the services associated with the subscription. Consequently, it could not be considered that the fact that access to the Orange Sports channel was exclusively associated with Orange's offer of broadband Internet access significantly altered the consumer's freedom of choice among the various broadband offers – indeed, the contrary was true. What was essential, within the meaning of the Directive, was that the subscriber was free to not take up the subscription, which was not contested in the present case. Since France Telecom/Orange could not be held to have infringed Article L. 122-1 of the Consumer Code, as interpreted in the light of the 2005 Directive, the judgment was overturned. On the following day, Orange resumed commercialising its channel Orange Sports; its competitors, for their part, announced their intention to appeal to the court of cassation. ■

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● Court of appeal of Paris (centre 5, chamber 5), 14 May 2009, France Telecom and Orange vs. Free, Neuf Cegetel-SFR and LFP

FR

FR – CSA Lays Down Conditions for Second Commercial Break in Programmes

The national rules applicable to television advertising, sponsorship on television, and teleshopping have been relaxed with the transposition of the "Audiovisual Media Services" Directive of 11 December 2007 into French law. Thus, although the Act of 5 March 2009 (see IRIS 2009-4: 10) put an end to the broadcasting of advertising on the France Télévisions channels, it nevertheless authorised the private channels, other than cinema channels, to include an extra commercial break in audiovisual and cinematographic works (Article 73). This second break, which previously the CSA had allowed only during works lasting longer than 2-and-a-half hours, is the result of the transposition of Article 11 of the AVMS Directive. The extra break is dependent on the nature and duration of the work. Thus cinematographic works, one-off audiovisual fiction works, transmissions of live shows and programmes for children and young people must last at least 30 minutes in order to be interrupted once, and at least 60 minutes to be interrupted a second time. Serials, soap operas and documentaries written for television can be interrupted twice, regardless of their duration.

On 21 April, the CSA gave its verdict on the relationship between the new Article 73 of the Act and Article 15 of the Decree of 27 March 1992 that lays down the framework for the inclusion of advertising in programmes. In compliance with Article 15(I) of the Decree, the CSA stated that there must be a period of at least 20 minutes between two successive breaks in works, regardless of which category they fall into. Furthermore, no commercial break in a cinematographic work may exceed 6 minutes. The periods of 30 or 60 minutes necessary for determining the number of breaks authorised during a programme means "programmed" periods as defined by ECJ jurisprudence. This means that the duration of the advertisements must be included in the calculation period, i.e., a 52-minute television film could be interrupted twice if the broadcaster decided to insert at least 8 minutes of advertising. ■

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● Decision announced by the CSA on 21 April 2009; available at the following address:
http://merlin.obs.coe.int/redirect.php?id=11743

FR

HR – The Draft Law on Electronic Media

In 2008 the Ministry of Culture of the Republic of Croatia established a Working Group for the Transposition of the Audiovisual Media Services Directive into Croatian Media Legislation. The Working Group has concluded a series of meetings and their proposal for a draft law is now in public discussion. The proposed Draft Law on Electronic Media of 29 April 2009 regulates in particular:

- the specific terms used in the Law,
- the general principles of the activities and the provision of audio and audiovisual media services,
- the promotion and protection of the interests of the Republic of Croatia,
- the general issues regarding all audio and audiovisual media services,
- the conditions for the activities and the provision of on-demand audio and audiovisual media services,
- TV and/or radio media services,
- the protection of media pluralism and diversity,
- the position and scope of work of the Agency for Electronic Media and of the Council for Electronic Media,
- the procedure for granting concessions for the provision of TV and radio media services,
- the procedure for granting authorisations for programme transmission via satellite, Internet and cable networks,
- electronic publications,
- the restriction and termination of media service provider activities,
- the provisions on offences and
- the interim and final provisions.

The proposed Draft Law lays down the necessary

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framework for the provision of TV audiovisual media services (linear audiovisual media services) and on-demand audiovisual media services (non-linear audiovisual media services), as well as for the satellite, Internet and cable transmission of programmes.

The Draft Law should be adopted by the end of 2009. ■

● **Public Discussion on the Draft Law on Electronic Media, available at: http://merlin.obs.coe.int/redirect.php?id=11721**

HR

HU – Report of the Competition Authority on the Media Market

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In April the *Gazdasági Versenyhivatal* (Hungarian Competition Authority, GVH) finalised and published its report examining competition on the Hungarian media markets. The basis of the report was a general sector inquiry launched by the authority on 24 July 2007. Its subject was TV broadcasting in Hungary as a whole. The GVH named three factors as reasons for initiating such a review:

- the obvious disproportionality between the audience share of the two national commercial TV channels RTL-Klub and TV2 (together approx. 60 %) and their share on the TV advertising market (together approx. 90 %) at the expense of thematic channels;
- the gate-keeper role of cable TV providers in case of new TV channels' entry into the market (cable is the most important platform of programme distribution in Hungary, cable penetration is more than 60 % of TV households in the country);
- the strong presence of vertically integrated market players in most of the segments of the TV value chain and the lack of independent TV programme package providers.

The inquiry was conducted from the perspective of broadcasters. It comprised three major groups of markets:

- the market of premium (film, sports and other) content rights;
- the markets of broadcast distribution (both upstream and downstream);
- the market of TV advertising.

Concluding its review the GVH said that it has not found any reason to open any formal individual inquiry. According to the GVH's assessment the TV programme distribution market is heading towards higher levels of competition as a consequence of recent technical and market developments (such as the growing importance of the satellite programme distribution platform). The authority also noted in its report the high potential of the recent introduction of digital terrestrial television and the launch of IPTV services from the perspective of competition.

However, the authority also formulated a number of proposals for the regulator. Such recommendations are:

- to remove the legal obstacles to launching additional thematic channels by national commercial broadcasters;
- to boost the efforts for the success of the DTT platform;
- to create a transparent structure for audience measurement based on tendering the provision of this service. ■

● **Report of the GVH no. ÁV-2/2007, available at: http://merlin.obs.coe.int/redirect.php?id=11722**

HU

IT – Tax Credits Clear Last Hurdle

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The new Italian tax credit and tax shelter (See IRIS 2008-9: 15 and IRIS 2009-3: 14) have now become available, after clearing the final government hurdle. On 11 May 2009 the signing of the decrees implementing the financial measures was announced, in accordance with Italian Law no. 133 of 6 August 2008. With these measures the two cinema tax incentives have now become operational.

The incentives are expected to pump as much as USD 350 million into the local industry annually and lure foreign productions back to Rome's Cinecitta Studios, where business has been dwindling.

The incentives for foreign productions are payable through an Italian executive producer.

They are effective until 2010, when, according to the provisions of the new legislation, another round of approval from the Italian parliament will be necessary. ■

● ***Comunicato Stampa del Ministero per i Beni e le Attività culturali pubblicato il 22 maggio 2009: "Decreti ministeriali tax credit e tax shelter ex L 244/07 per i produttori)"* (Press Release of the Ministry of Culture of 22 May 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11742**

IT

IT – Regulation on the SIAE Sticker

The Italian Copyright Statute Law No 633 of 22 April 1941 (Article 181bis) lays down the mandatory requirement of affixing a distinctive sign bearing the initials of the Italian collecting society *Società Italiana degli Autori ed Editori* (Society of Authors and Publishers – SIAE) to any medium containing protected works. This operates as an authentication tool and a safeguard enabling legitimate products to be distinguished from pirated goods. In most relevant Italian court rulings (delivered prior to the Schwibbert ruling, see IRIS 2009-1: 15), the absence of the SIAE sign on a given medium has

always been held by criminal courts to be strong evidence of its unauthorised duplication.

Article 181bis of the Copyright Statute does not distinguish between works in the SIAE register and those not included in it: the SIAE sticker must to be affixed to any medium containing works listed in Article 181bis, regardless of whether or not the author used the intermediation services of SIAE. In other words, Article 181bis requires that a SIAE sticker be affixed to every medium containing programmes, multimedia, sounds, voices or moving pictures for it to be put it onto the market or distributed for profit (including indirect profit). Accordingly, the main three elements of the Article are the following:

1) the medium (any material object in which a work can be permanently incorporated);
2) the object (content protected by copyright) embedded in the medium;
3) distribution of the medium to the public for profit.

In the last few months a broad debate has been opened over the interpretation of the judgment delivered by the European Court of Justice in case C-20/05 Schwibbert, which dealt with the obligation to affix the SIAE marking to CDs for the purpose of marketing them within the Italian territory. The ECJ established that such a requirement constitutes a "technical regulation", which, if not notified to the Commission pursuant to Directive 83/189/ECC as replaced by Directive 98/34/EC, cannot be invoked against an individual (see IRIS 2008-1: 15).

Therefore, on 6 April 2009, the Italian Government, implementing Article 181bis of the Copyright Statute, published in the *Gazzetta ufficiale* (Official Gazette) a new regulation (Regulation No. 31 of 23 February 2009), which reaffirms the requirement of affixing the SIAE sticker. The new regulation came into force on 21 April 2009 and the Italian authorities have communicated it to the European Commission.

The new regulation would close the hoary question of the SIAE stickers opened by the ECJ. In effect, in the Italian copyright system, the mandatory requirement of affixing a distinctive sign bearing the initials of the SIAE to any medium containing protected works is reintroduced. Moreover, the Government regulation seems to be retroactive: Article 1 paragraph 2 states that only CDs and DVDs with the SIAE stickers are lawful, even if put into circulation after the ECJ ruling and before the recent law.

In Articles 2 and 3, the recent regulation describes the features of the stickers that have to be appended to the CDs and DVDs containing sounds, voices, moving pictures or software. Article 4 regulates the procedure for the issuance of stickers and Articles 5 et seq. specify in detail the exceptions to the requirement. ■

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● ***Decreto del Presidente del Consiglio dei Ministri 23 febbraio 2009, numero 31: "Regolamento di disciplina del contrassegno da apporre sui supporti, ai sensi dell'art. 181bis della legge 22 aprile 1941, n. 633"*** **(Italian Government Act 23 February 2009, number 31), available at:**
http://merlin.obs.coe.int/redirect.php?id=11732

IT

LT – Order of Identification of Political Advertising Approved

The Law on Funding of Political Parties and Political Campaigns, and the Control of Funding (see IRIS 2008-8: 15) envisages that political advertising and its sources of funding shall be identified and adequately separated from the rest of the disseminated information. Following the provisions of the Law, the Central Election Commission (CEC) and the Radio and TV Commission of Lithuania approved the Order of Identification of Political Advertising in Radio and TV Programmes in March 2009.

The Order seeks to determine the necessary requirements for the identification of political advertising in Radio and TV programmes that apply to all broadcasters and are valid irrespective of whether the political campaign is announced or not. According to the Order each announcement or part of a programme dedicated to political advertising shall be indicated by acoustic means in radio programmes and a visual symbol in TV programmes and also the sources of funding shall be revealed. In cases where programmes dedicated to political advertising are interrupted by other kinds of advertising, news, musical breaks, etc., there has to be additional information that a political advertisement was being broadcast beforehand and the sources of funding shall be indicated again.

It has to be noted that in TV programmes during an election (referendum) campaign, which usually lasts for 30 days before the elections, all announcements and parts of programmes dedicated to the political campaign, shall be identified by a notice "election/referendum campaign"; in radio programmes this shall be announced by acoustic means. In addition, during the announcements or programmes a notice of no less than 2 seconds shall be shown/aired, indicating that the campaign is being paid for either out of a special account of an independent political campaign member or out of the State budget.

The CEC monitors whether broadcasters adhere to these requirements. Liability for infringements is laid down in the Code of Administrative Offences. The amount of the fines ranges from EUR 286 to 2,857. The cases can be investigated in court on the basis of documentation provided by the CEC. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

● ***Politinės reklamos žym jimo radijo, televizijos programose tvarka*** **(Order of Identification of Political Advertising in Radio and TV Programmes), available at:**
http://merlin.obs.coe.int/redirect.php?id=11723

LT

MT – Broadcasting Authority Directive Concerning EU Parliamentary Elections

On 15 April 2009, the Chief Executive of the Broadcasting Authority issued Circular No. 8 of 2009 to all broadcasting stations informing them of the approval by the Authority of the "Directive on Programmes and Advertisements Broadcast During the Period 4 May to 6 June 2009". This Directive has been issued in conjunction with the elections for the European Union Parliament to be held in Malta on 6 June 2009. Five MEPs are expected to be elected to represent Malta in the EU Parliament.

In the circular it is stated that the Authority has decided that, in the case of a breach of this Directive, no warning will be given, but that an administrative penalty, which can amount up to a maximum of EUR 34,940 depending on the gravity of the offence, will be imposed. Naturally other harsher sanctions, such as closing down a station, the suspension of a licence or revocation of a licence, may be imposed in the case of non-compliance with the Directive.

The Directive enjoins all broadcasting stations, be they radio or television, to forward to the Authority a detailed schedule of programmes and advertising to be broadcast between 4 May and 6 June 2009, for its approval. Although the Broadcasting Act does empower the Authority to request all radio and television stations to provide it with a copy of their programme schedules, in practice it is only in the case of the public service broadcaster that the Authority will approve programme schedules prior to broadcasting. However, an exception to this rule applies where the Authority will generally provide approval prior to broadcasting not only to the programme schedules of the public service broadcaster, but also of commercial stations (whether radio or television). This happens when elections are held, usually during the four to five weeks preceding the date of polling. Once the programme and advertising schedules for this short period are approved by the Authority, it is in only very exceptional circumstances that further changes can be approved.

As happened in June 2004, EU Parliament elections will be held on the same day as local council elections in a third of Malta. The Directive thus applies also to broadcasts relating to the local council elections campaign.

In the Directive, the Authority regulates the exposure which candidates in the elections can receive in the broadcasting media to ensure a level playing field for all. In this respect, the Directive contains a provision to the effect that a person who has announced his or her candidature for both these elections (EU Parliament and local council) cannot participate in a regular manner in the same programme during the same election period. A candidate is considered to have participated regularly in a programme when s/he participates in more than two editions of the same programme in the same period. This does not include coverage in news bulletins, but includes fabricated news items where interviews with candidates are broadcast on matters that have no bearing on the news item being covered and which are intended to give that candidate undue exposure over other candidates.

In addition, it is not possible during this four-week period for an election candidate to present a programme on a broadcasting station, unless s/he happens to be a regular employee of the station broadcasting such a programme.

The Directive also deals with advertisements of a political nature. These are permitted within a scheme of political broadcasts organised by the Authority itself with the participation of all political parties and independent candidates contesting in the 6 June 2009 elections. Once again, the Directive makes it clear that in the case of advertisements commissioned by public and other entities, persons who have announced their candidature for these elections are not allowed to appear in advertisements, even when the advertisement is not considered to be a political advertisement in terms of law. ■

Kevin Aquilina
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● ***Direttiva tal-Awtorità tax-Xandir dwar rogrammi u Reklami Mxandra Matul il-Perijodu 4 ta' Mejju sas-6 ta' Ġunju 2009*** **(Broadcasting Authority Directive on Programmes and Advertisements Broadcast during the Period 4th May to 6th June 2009), available at:**
http://merlin.obs.coe.int/redirect.php?id=11729

EN-ML

PL – Need for Development of TV Puls

On 27 February 2009 the National Broadcasting Council (NBC) announced the opening the application procedure for the first Polish digital multiplex. It is anticipated that there will be bandwidth for seven channels; three of them shall be public: TVP1, TVP2 and TVP3 and the others commercial: TVN, Polsat, TV4, and TV Puls (currently transmitted in analogue terrestrial mode). The commercial broadcasters must apply no later than 14 April 2009.

TV Puls had been owned by The Order of Franciscans (60 %) with a minority share (35 %) held by News Corporation. News Corp. bought 25 % of TV Puls in June 2006 and increased its stake to 35 % in April 2007. According to the NCB's resolution it has been broadcasting a programme including religious, family and social affairs. In 2008 TV Puls broadened its audience share after having received the NBC's approval for more terrestrial frequencies.

Due to the recent economic downturn TV Puls' situation has seemed unstable, thus News Corp. decided to withdraw its stake in TV Puls in November 2008. Currently 51 % of TV Puls shares are held by the Franciscans and 49 % by a private investor. Presently TV Puls has been looking for a new investor and is even considering the sale of its controlling interest.

Participation in the multiplex platform may encourage the (required) potential investors for TV Puls. ■

Katarzyna Maslowska
National Broadcasting Council, Warsaw

RO – Audiovisual Rules for European Parliament Elections

In Decision no. 391 of 26 March 2009 on the rules governing the audiovisual campaign (8 May to 6 June 2009) for the election of members of the European Parliament, the *Consiliul Naţional al Audiovizualului* (national council for electronic media – CNA) laid down a code of conduct for Romanian broadcasters.

All political parties, political alliances, electoral pacts, organisations representing ethnic minorities and independent candidates involved in the election are categorised in the Decision as *competitori electorali* (election participants). According to Art. 2, they must be given access to certain broadcast programmes described in the Decision: *emisiuni de promovare electoral* (programmes in which candidates or representatives of election participants can present their manifestos, activities and candidates - Art. 7(a)), *emisiuni de dezbatere* (broadcast debates - Art. 7 (b)) and *spoturi electorale* (electoral advertising spots - Art. 7 (c)).

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Journalist, Bucharest

All private radio and television providers intending to broadcast election programmes were obliged under Art. 4 to notify this to the public and the CNA by 21 April 2009. The programme schedule and airtime tariffs also had to be fixed in accordance with Art. 5(2).

All programme material and advertising spots linked to the European election campaign had to meet the following conditions, set out in Art. 13: they must not incite hatred on the grounds of race, religion, nationality or gender; they must not violate human dignity, image rights or common decency; and they must not contain claims directed at other election participants for which no sufficient proof is given, or risk possible criminal or moral sanctions.

Broadcasters must also keep recordings for the CNA of all programmes relating to the election throughout the campaign and for a further 30 days after the official announcement of the election results (Art. 20).

Possible sanctions for infringements are provided for in *Legea audiovizualului nr. 504/2002* (Audiovisual Act) and *Legea nr. 33/2007 privind organizarea şi desfăşurarea alegerilor pentru Parlamentul European* (European Parliament Elections Act). ■

● ***Decizia nr. 391 din 26 martie 2009 privind regulile de desfăşurarea în audiovizual a campaniei electorale pentru alegerea membrilor din România ai Parlamentului European*** **(Decision no. 391 of 26 March 2009 on the rules governing the audiovisual election campaign), available at:**
http://merlin.obs.coe.int/redirect.php?id=11719

RO

SE – The Pirate Bay Case

On 17 April 2009, *Stockholms tingsrätt* (the District Court of Stockholm) delivered its judgment regarding four people behind the well-known file-sharing site "The Pirate Bay", hereinafter jointly referred to as the accused.

The case concerns the question of criminal liability for acting as an accessory to and for the preparation of a crime against the Copyright Act.

The Pirate Bay uses so-called BitTorrent technology, which makes it possible for people to share data files with each other. Through The Pirate Bay it is possible for internet users to upload and store so-called torrent files on The Pirate Bay website, as well as to search for such files. The torrent files can refer to specific data files, for example a music album. By means of a so-called tracker, a user may find a person with that music album. The actual file-sharing, however, occurs between users within the framework of a so-called swarm (a group of users in the course of sharing files).

The court found that file-sharing of music, films and computer games had occurred by means of the use of the Pirate Bay's services. This file-sharing constituted an unlawful transmission to the public of copyright-protected material. Therefore, objectively speaking, file-sharers who were engaged in such activities using The Pirate Bay's services had infringed the copyright of the rightsholders in question. This issue was of crucial importance, since the existence of a principal crime is essential in order to establish the liability of accomplices. In this context, the court stated that it is not mandatory to identify or to hold the actual perpetrator liable, but it is enough that a principal crime was objectively committed.

During the proceedings it was alleged that some infringements had occurred outside Sweden by file-sharers who were established abroad. Therefore, Swedish courts should be found to lack jurisdiction. Nevertheless, the court held that, since the material was made available and had effects in Sweden, strong arguments suggested that an infringement should be deemed to have occurred within the country. The court continued, arguing that the Pirate Bay is available in Swedish and that its servers had previously been situated in Sweden. Accordingly, the court established that infringements had occurred in Sweden.

Copyright infringement may be a crime under the Copyright Act, if it is committed with negligence or intent.

By providing a website with sophisticated search functions, easy upload and storage functionalities, as well as the website-linked tracker, the accused had promoted the crimes that file-sharers committed in an objective sense, the court stated. The fact that torrents may have been available on other websites, as well before or at the same time as they were made

available on The Pirate Bay did not change the court's view.

Furthermore, according to the court, the accused had cooperated with each other and had been acting as a "team" for the operation and development of The Pirate Bay. Thus, the court did not make any differentiation as regards individual liability between the four accused, although they had arguably taken part in the Pirate Bay in different ways. The accused had also been aware of the fact that copyright materials had been shared by use of the Pirate Bay. Hence, the accused had intentionally promoted copyright infringement. As a result, they were accessories to criminal activity in breach of the Copyright Act.

However, the court did not find the accused guilty of preparation of criminal activity in breach of the Copyright Act, given that this crime was concurrent with the above-mentioned one.

Given that the accused had acted with intent, they could not be released from liability under the "safe harbour" provisions applicable to the providers of services in the information society.

The court sentenced each of the accused to serve one year in prison. The sentence was determined on the basis of the fact that their actions resulted in a large amount of copyright-protected material being made available to the public. Moreover, the court considered that the activities were carried out commercially and in an organised manner.

Additionally, the court established that the four persons are jointly liable to jointly pay damages to those record and film companies which were plaintiffs in the case and whose rights had been illegally exploited. The claims of the companies were based on both reasonable compensation for unlawful use of copyright-protected material, as well as compensation for certain loss of sales and market damage. The plaintiffs were awarded damages amounting to approximately MSEK 30 altogether.

The judgment has already been appealed.

In the aftermath of the court's decision, the head judge has been accused of a conflict of interest in relation to the accused. The ground for this accusation is the fact that the judge, who specialises in intellectual property matters, is a member of *Svenska Föreningen för Upphovsrätt* (the Swedish Association for Copyright) and a board member of *Svenska Föreningen för Industriellt Rättsskydd* (the Swedish Association for the Protection of Industrial Property). Counsel for the plaintiffs are also members of these organisations. These associations are not open to the industry, but only to legal professionals. The chairman has rejected the charges of conflict of interest, claiming that his membership makes it possible for him to keep up to date in the field. The issue has caused much debate as to whether, on the one hand, it is proper for a judge to be a member of such organisations and, on the other hand, whether this constitutes a conflict of interest in the legal sense. A formal complaint has been lodged. The issue will now be decided by the court of appeals. If that court should find a conflict of interest, a retrial may have to be ordered. ■

Michael Plogell and Erik Ullberg
Wistrand Advokatbyrå, Gothenburg

***Stockholms tingsrätts avgörande den 17 april 2009 i mål nr B 13301-06* (Judgment of the District Court of Stockholm of 17 April 2009 in case No. B 13301-06)**

SV

SI – Self-Regulatory Document of Mobile Telephone Operators

On 31 March 2009 the Slovenian mobile telephone operators signed *Samoregulacijski kodeks ravnanja operaterjev mobilnih elektronskih komunikacijskih storitev o varnejši rabi mobilnih telefonov s strani otrok in mladoletnih do 18. leta* (self-regulatory ethical rules for handling the mobile electronic communication services in regard to the safer use by minors below the age of 18).

The self-regulatory document was articulated with reference to the "European Framework for Safer Mobile Use by Younger Teenagers and Children" (the self-regulatory guidelines of the GSM Europe, an interest group of the GSM Association), which was signed by European mobile and content providers in Brussels on 6 February 2007. The Slovenian code was adopted by representatives of the Slovenian operators Debitel, Mobitel, Si.mobil d.d., Tušmobil, T-2 and IZI mobil. This self-regulatory framework was assisted by the *Gospodarska zbornica Slovenije – Združenje za informatiko in telekomunikacije* (Slovenian Chamber of Commerce and Industry, the Branch Association for Informatics and Telecommunication).

The proposed classification is addressed to minors below the age of 18 as the category of social group to which harmful contents are inappropriate. Harmful content is described as violent, hazardous, erotic and/or sexual content. The document says that content aimed at adults has to be segmented as prescribed in the continuation to the self-regulatory procedure, i.e., in the forthcoming part of the document entitled *Priročnik s smernicami za razvrščanje vsebin za odrasle* (Guidelines for the classification of adult content). Thus, mobile content which is aimed at adults should be obtained only after written correspondence with the operator's customers. As regards the protection of minors the code stipulates that mobile operators should divide content into those types that could be accessed generally without any harm and those appropriate only for adults. The harmful content should be clearly identified and "accessed appropriately". It is stated that control mechanisms could vary according to the available technical equipment of each operator but nevertheless the code should be respected by all.

Help for parents is promised in surveying and

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technically or likewise protecting their children as the operators are obliged to provide a safe environment as regards products and services of information communication technologies. The final topic of the self-regulatory document is the stipulation on awareness raising, information and consultancy services aimed at parents.

Each operator has to publish adequate information relating to the protection of minors on its homepage. ■

- **Further information is available at: http://merlin.obs.coe.int/redirect.php?id=11724**
- **European Framework for Safer Mobile Use by Younger Teenagers and Children, available at: http://merlin.obs.coe.int/redirect.php?id=11725**

SL

SK – Proposal for Banning the Advertising of Alcohol

Jana Markechova
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On 14 January 2009 a proposal for amendments to the Act No. 147/2001 Coll. on Advertisements and on the Amendments to Certain Acts (which entered into force on 1 May 2001) concerning the ban of alcohol advertising was made by members of the Slovakian Parliament. The amendment which is at the moment in the second reading is expected to come into effect on 1 June 2009.

The reason for this proposal is the fact that alcoholism is becoming a serious and acute problem in society nowadays, particularly in the case of children and minors. Its explanatory report refers to the fact that the age of people who consume alcohol is becoming increasingly lower. According to various researches children and minors are those who are most influenced by advertising. Consequently, schoolchildren who are exposed to alcohol advertising drink about 50 % more than those who are not.

The aim of the proposal is to forbid the advertising of all alcoholic beverages in places children and youths most often frequent, that is, in particular on the streets and in cinemas. Therefore a ban on advertising all alcoholic beverages, except beer, on billboards, posters, in public transport vehicles, on all types of information carriers located in public, excluding the points of sale for alcohol (hereinafter referred to as "products sale"), in cinemas before eight p.m., the distribution of samples of alcoholic beverages to the public (excluding those samples of alcoholic beverages that are distributed at the place of products sale), on advertising articles that are not related to drinking alcoholic beverages and that are distributed to the public, the sponsorship of alcoholic beverages, as well as the introduction of a trade mark, emblem or other specific name for alcoholic drinks is proposed.

According to the proposal, identifying operating areas and means of transportation, that are directly related to the production and sale of alcoholic beverages, information and advertising materials designed exclusively for producers and sellers of alcoholic beverages, distribution of samples of alcoholic beverages at meetings related to the production and sale of alcoholic beverages, as well as information regarding their sale on concrete products placed in a store, are not considered to be advertising of alcoholic drinks.

None of the bans mentioned applies to advertising of beer. This exception stems from the fact that beer is produced with various levels of alcohol content, including even alcohol-free brews and moreover it is considered to be "a national drink".

However, the proposal has met with much criticism up to now, inter alia the argument that the proposal would not help to lower alcohol consumption among underage drinkers. Furthermore, the fact that the proposal forbids advertising of alcohol with the exception of beer has been criticised, as some kinds of beer have a higher content of alcohol than some light wines. In addition, it has been pointed out that the culture of alcohol consumption, for instance wine, exists in many countries and has nothing to do with excessive drinking. ■

US – Supreme Court Upholds FCC's Changes in Broadcast Indecency Policy on Administrative Law Basis

The US Supreme Court recently upheld the FCC's modified broadcast indecency policy, which prohibits the on-air use of indecent "fleeting expletives'—that is, sudden, usually surprised outbursts of one or two indecent words. The Commission's policy went back to FCC v. Pacifica Foundation, 438 U.S. 726 (1978), which emphasized the harm of the "repetitive occurrence" of indecent language – in that case, George Carlin's famous 12-minute "Seven Dirty Words" monologue. The changes also were challenged under the free speech clause of the Constitution, but the Court refused to consider these arguments (the rules do not apply to cable or other multichannel media, and obscenity is completed banned from the airwaves).

The new policy came in the context of two Fox broadcasts. One involved the singer Cher saying "fuck them" to critics, the other Paris Hilton exclaiming: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple".

The Commission based its fines again Fox and its policy changes on three considerations: (1) a new conclusion that indecency was a "harmful first blow" for children; (2) its perception that indecent fleeting expletives were more dangerous than other offensive statements; and (3) a new finding that "bleeping" of

content had become easy and inexpensive for radio stations.

On appeal, the Court of Appeals for the Second Circuit found the FCC's reasoning to be "arbitrary" and "capricious" under the Administrative Procedure Act, 5 U.S.C. § 706. The Circuit Court reasoned that the Commission never had been concerned about "first blows" in the past: it was impossible to differentiate indecency from other offensive language; and "bleeping" equipment still was very expensive.

The Supreme Court held that the Circuit Court had erred as to all three issues, in requiring the FCC to supply "a more substantial" explanation of its actions. It stated that requirements to change an existing rule were not necessarily higher than to adopt a new one. As to the "first blow" issue, the Commission's conclusion was found to be intuitive and did not demand "empirical evidence." Similarly, the FCC's prohibition of only indecent fleeting expletives was within its discretion. Finally, despite the lack of any record evidence, the Court supported the Commission's conclusion that "bleeping" was feasible and affordable.

The Supreme Court remanded the case to the Second Circuit "for further proceedings consistent with this opinion"—but with the cryptic comment that the constitutional issue might be resolved "perhaps in this very case." The Supreme Court seems to expect the Second Circuit to decide the free speech question, resulting in a second appeal to the Supreme Court. But this raises an interesting possibility. If the Second Circuit declines to decide the point, there would be no substantive issue to appeal to the Supreme Court. The result would be to leave the question unresolved, after yet more years of litigation. ■

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● **Federal Communications Commission v. Fox Television Stations, Inc., (No. 07-582) 489 F. 3d 444, reversed and remanded. Available at: http://merlin.obs.coe.int/redirect.php?id=11741**

EN

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