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EUROPEAN AUDIOVISUAL OBSERVATORY
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of TASZ v. Hungary

In April 2009, the European Court of Human Rights delivered an important judgment in which it recognised the right of access to official documents. The Court made it clear that, when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention. The case concerns a request by the *Társaság a Szabadságjogokért* (Hungarian Civil Liberties Union – TASZ) to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation concerning drug-related offences. The Constitutional Court refused to release the information. As the Court found that the applicant was involved in the legitimate gathering of information on a matter of public importance and that the Constitutional Court's monopoly of information amounted to a form of censorship, it concluded that the interference with the applicant's rights was a violation of Article 10 of the Convention.

The European Court's judgment refers to the "censorial power of an information monopoly", when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. The Court refers to its consistent case law, in which it has recognised that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, including measures which merely make access to information more cumbersome. It is also underlined that the law cannot allow arbitrary restrictions, which may become a

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form of indirect censorship should the authorities create obstacles to the gathering of information, this by itself being an essential preparatory step in journalism and inherently a protected part of press freedom. The Court emphasised once more that the function of the press, including the creation of forums of public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognises the important contribution of civil society to the discussion of public affairs and categorised the applicant association, which is involved in human rights litigation, as a social "watchdog". The Court is of the opinion that, in these circumstances, the applicant's activities warrant similar Convention protection to that afforded to the press. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

It should be emphasised that the European Court's judgment is obviously a further step in the direction of the recognition by the Court of a right of access to public documents under Article 10 of the Convention, although the Court is still reluctant to affirm this explicitly. The Court recalls that "Article 10 does not (..) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" and that "it is difficult to derive from the Convention a general right of access to administrative data and documents". But the judgment also states that "the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (..) and thereby towards the recognition of a right of access to information", referring to its decision in the case of Sdruženi Jihočeské Matky v. Czech Republic (ECHR 10 July 2006, Appl. No. 19101/03). The Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him". In this case, the information sought by the applicant was ready and available and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant. ■

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

• Judgment by the European Court of Human Rights (Second Section), case of Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05 of 14 April 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=9237
EN

EUROPEAN UNION

European Commission: Assessing the Barriers to Online Retailing in Europe

The European Commission, DG Competition, recently published a report of the deliberations of the Online Commerce Roundtable on the business opportunities created by the Internet and the existing barriers to increased online retailing in Europe. The Roundtable was convened twice in the fall of 2008 and comprised senior consumer and industry representatives among whom were EMI, Apple Inc., SACEM and Sir Mick Jagger. The discussions touched on several issues relating to the online retailing of music and goods. With respect to the retailing of music, the issue of the online licensing of rights by collective rights management organisations and other stakeholders was identified as one area of major importance.

All participants recognised the need for EEA-wide licensing in the online environment. This was felt to be a good starting point to allow EEA-wide licensing of both performance and mechanical rights for a wider repertoire and in competition between several rights managers. If effectively implemented, this could lead to online licensing practices that would benefit all stakeholders. It is in the interests of rightsholders, publishers and collecting societies that online rights are effectively licensed and that as much music as possible is sold. It is to the advantage of the consumers who will have a wider choice, as they can access online music services from anywhere in the EEA.

In the report, the European Commission stresses that the conclusions of the Group on the issue of online music licensing will have an effect on the market if implemented not only by the participants, but also by other market players, in particular by other publishers and collecting societies. In fact, it is the responsibility of the industry involved to develop workable licensing solutions that would allow easy access to the global repertoire in a competitive environment. The success of a rights manager should not depend on its size, but on its efficiency and the quality of services it is able to offer. These are the criteria on which rights managers should compete. A licensing model likely to satisfy the needs of commercial users would consists in having several rights managers offering a licence that covers a repertoire that comes close to the global repertoire. Nevertheless, a limited number of rights managers which offer an important, even though not global, repertoire could still be a workable solution, if a common data-

base could provide transparency on who offers what at which price.

This report is one of the many recent attempts from the European Commission to clarify the situation surrounding the issue of the multi-territory licensing of online music rights. ■

Lucie Guibault
Institute for Information Law (IViR), University of Amsterdam

• **European Commission, Online Commerce Roundtable Report on Opportunities and barriers to online retailing, Brussels, June 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11769**

EN

NATIONAL

BE – Transposition of the AVMS Directive

The decree of 5 February 2009 of the French-speaking Community amending the decree on broadcasting of 27 February 2003, the founding text for the audiovisual scene in the French-speaking Community – renamed the "decree on audiovisual media services" for the occasion – was published in the *Moniteur Belge* on 18 March 2009. This is of course the main text transposing the AVMS Directive for the French-speaking Community – it was transposed for the Flemish Community by a decree of 18 March 2009 (see IRIS 2009-5: 8). It should, however, be pointed out that the legislator for the French-speaking Community had already anticipated this transposition for various aspects of commercial audiovisual communication (still called "advertising" at the time), by introducing beforehand the distinction between linear services and non-linear services in the RTBF management contract concluded in 2006, and in legalising virtual advertising by an earlier amending decree adopted on 19 July 2007, almost five months before the Directive was adopted.

The decree transposes the main elements of the new Directive into the domestic law of the French-speaking Community of Belgium – new definitions and new rules for commercial communication (product placement is to be allowed in certain programmes), distinction between the schemes applicable to linear services and to non-linear services (more particularly with regard to the methods for promotion, of and by, available European works), making precise the criterion for editorial responsibility, and a minor change in the mechanisms for co-regulation by means of slight reinforcement of the role of the opinion panel of the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA).

The text also contains a number of specific features that go beyond the Directive. It is, for example, applicable to sound broadcasting services, and it abolishes the system of prior authorisation and introduces a simple declaration scheme for audiovisual media services and for sound services broadcast other than terrestrially. Thus the scheme for linear services is brought into line with the scheme for non-linear services, except for radio stations requiring a radio relay frequency, for which – because of the shortage of frequencies – a selection and authorisation procedure remains in force. Lastly, the new decree establishes a distinction between open distribution platforms (which any editor may access freely) and closed platforms (accessible only once the distributor's agreement has been obtained), with stricter legal obligations for audiovisual media services distributed on closed platforms. ■

François Jongen
Catholic University of Louvain

• **Decree on audiovisual media services, available at: http://merlin.obs.coe.int/redirect.php?id=11764**

FR

BE – Ethical Directive on the Way the Media Should Deal with User Generated Content

On 12 March 2009, The *Vlaamse Raad voor de Journalistiek* (Flemish Council for Journalism Ethics) issued a directive on the way the media (audiovisual, as well as print media and the internet) should deal with User Generated Content (UGC). This Council is an independent self-regulating institution that supervises journalistic work in all Flemish media upon the filing of a complaint by a member of the public, thereby ensuring that journalistic ethics are upheld. It can also issue ethical directives and recommendations on its own initiative. Up until now, the Flemish Council has not been in the habit of controlling the online news media. This directive can be seen as a step towards filling this lacuna.

By means of digital media and the internet, users can now more easily send information and comments to newsrooms. The Flemish Council recalls in this directive some deontological principles on the use of this type of content. The directive makes a distinction between how to handle news material on the one hand and how to handle opinions/comments on the other, when either is supplied by media users. The term "news material" would include clues, photos, video images, etc. On this topic, the directive is relevant to all media, including audiovisual media. As to opinions/comments, the directive is of particular relevance to print and online news media.

News material should be treated and sources should be checked by the editorial staff according to traditional journalistic standards. Hence, the newsroom is also responsible for published news material.

As to opinions/comments on discussion forums, however, the authors bear the prime responsibility. Yet, the medium that publishes the contributions is also deontologically co-responsible for governing the forum properly. As concerns digital discussion forums, the media can approach that responsibility in three ways: checking the comments' admissibility before publication (the so-called pre-monitoring), reading the comments and selecting them for publication (the so-called active moderation) or supplying the necessary techniques in order to rapidly and adequately remove inappropriate content (the so-called post-monitoring). In order to prevent or rapidly remove inappropriate content, the following techniques are conceivable: prior user registration, clearly mentioning conditions for use and recommendations on the website, using electronic filtering mechanisms, installing the possibility of an alert as to inappropriate comments and prior moderating and continuously checking discussions on delicate subject matters.

Anonymous contributions should only be published in exceptional circumstances. In any case, the newsroom should have access to the identity of the supplier. ■

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

• ***Richtlijn over de omgang van de pers met gebruikersinhoud*** **(Directive on the way the media should deal with user generated content), available at: http://merlin.obs.coe.int/redirect.php?id=11755**

NL

BG – State Digital Multiplex

On 19 May 2009 the Law on Public Radio Broadcasting ("LPRB") was published in the State Gazette (issue No. 37). Despite some severe opposition from the media sector to the adoption of such an important legislative act in a non-transparent manner, the President has not vetoed the LPRB.

The LPRB governs State participation in the broadcasting of Bulgarian National Television ("BNT") and Bulgarian National Radio ("BNR"). The LPRB differen-tiates between two types of networks for the digital transmission of electronic communication: via radio network for the transmission of the signal and via a backbone network for the transmission of signals. According to the LPRB the State guarantees the broadcasting of the programmes of BNT and BNR through a terrestrial digital electronic communications system. To that end the State will incorporate a State-owned enterprise under Article 62, para. 3 of the Commercial Act, called Public Digital Radio Broadcasting National Company ("PDRBNC"). It is responsible for constructing and operating the electronic communications network for terrestrial digital radio broadcasting. One month after the PDRBNC is registered, the Communications Regulation Commission shall grant the company permission for the use of an individually assigned scarce resource – radio frequency spectrum for electronic communications through the network for terrestrial digital radio broadcasting. The management bodies of the PDRBNC are the Minister of Finance, the management board (four members) and the executive director, all of whom are elected by the President upon the proposal of the Prime Minister. The activities are financed by:

1. The State budget;
2. Income from fees paid by operators whose programmes are broadcast through the electronic communications network for terrestrial digital radio broadcasting;
3. Income from commercial activities.

BNT and BNR shall pay a fee to PDRBNC for the broadcasting of their programmes. The fee comprises the remuneration for covering the maintenance expenses of the electronic communications network for terrestrial digital radio broadcasting and the profit within the meaning of the Corporate Income Tax Act. The fees collected by the PDRBNC shall be used for:

1. The use of the individual scarce resource – radio frequency spectrum;
2. Construction, maintenance and development of the network;
3. The transmission of radio and TV programmes;
4. Covering the maintenance costs of the PDRBNC.

The Minister of Finance shall supervise how the money is spent. The LPRB sets out that the PDRBNC shall/can not:

1. Be a radio or TV operator;
2. Participate in commercial companies that create programmes to be broadcast through electronic communications networks; and
3. Construct and use electronic networks for broadcasting radio and TV programmes. ■

Rayna Nikolova
Council for Electronic Media, Sofia

• **Law on Public Radio Broadcasting, published in the State Gazette (issue No. 37) on 19 May 2009**

CY – Regulations for the Provision of Networks for Digital TV Services

In accordance with Article 10 of the Telecommunications Law 112(I)/2004, requiring the Telecommunications Commissioner to ensure maximum benefit to end-users, new regulations set the terms and conditions under which providers give access to their network and services for terrestrial digital TV. The Regulations are provided in a decree issued by the Commissioner for Telecommunications and Postal Services, enacted as Normative Administrative Act KDP.200/2009. This also harmonizes Cypriot law with European Community Directives 2002/19/EC, 2000/20/EC and 2000/21/EC and the relevant documents of the European Commission.

The Regulations define the rights and obligations of the providers of network and services of terrestrial digital TV, in respect of access to those networks. The scope of the Regulations is to set the principles and conditions under which providers will give broadcasters the access that enables them to disseminate their programmes through digital networks.

Access should be offered in accordance with the following principles: transparency, non-discrimination, separate book-keeping and controlled pricing. In order to ensure respect for these principles, negotiations with interested parties should be based on open tenders, where the terms and conditions are to be made fully available. Providers should conduct negotiations with broadcasters in good faith. A template annexed to the Regulations lists the various sections and the specific points on which information must be provided. The sections include the general terms, pricing, network technical description and technical specifications of connection services; procedures on handling applications and information exchange; information on co-installation services and procedures on sanctions/damages should also be provided in the documents. ■

Christophoros Christophorou
Media and elections analyst

● ***Ο περί Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών και Ταχυδρομικών Υπηρεσιών Νόμος του 2004, ΚΔΠ 200/2009, Επίσημη Εφημερίδα, 15/05/2009*** **(Law on Electronic Communications and Postal Services of 2004, Normative Administrative Act KDP.200/2009, Official Gazette, 15 May 2009)**

EL

CY – Regulations on Fairness Amended to Cover EU Parliament Elections

Following an amendment to the legal framework the elections for the members of the EU Parliament were included on the list of contests that should receive fair coverage by the media. The Normative Administrative Act KDP.207/2009 amended certain provisions of the Regulations on Fair Treatment of Parties and Candidates (KDP.193/2006) so that contestants in EU Parliament elections are treated fairly as in the case of Presidential, Parliamentary and Local Authorities elections.

The Regulations on Fair Treatment of Parties and Candidates were issued in conformity with the Law on Radio and Television Stations (N.7(I)1998), which was amended earlier in the same manner. They define fairness and set the terms and conditions under which it is achieved. Fairness in the coverage of elections by broadcasters is based on proportionality, a party's presence in parliament and overall organisation. The main provisions of the Regulations are as follows:

- The coverage should promote pluralism and impartiality and ensure both freedom of expression and editorial independence.
- Fairness should apply with respect to the number and kind of party activities covered. The criteria used are the duration of on-screen presence and coverage of overall activity, as well as of reports on the activities of parties and candidates; access and coverage offered to supporters is also taken into account.
- Activities of holders of public office are credited to parties or candidates when they are considered as electioneering, i.e., offering support or promoting a candidate or a party or giving an account of accomplishments.
- Media policies of addressing invitations and offering access to programmes should also respect fairness and be done without discrimination. The same principles must also apply in the case of men and women invitees and candidates contesting seats in the same constituency.
- In fulfillment of these obligations broadcasters are obliged to draft a code of conduct and draw up their schedule of programmes 30 days before the electoral period, which is set at 40 days from the polling day. The drafting work is to be done in co-operation with political parties or candidates, without prejudice to editorial independence.

In the absence of any statutory definition of a "political party", the Regulations define a party in the same way as the amending law 212/1987 to the Cyprus Broadcasting Corporation, the public service broadcaster; thus, "party" means a party represented in the House of Representatives or an association or group of persons, which in the understanding of the average sensible citizen having knowledge of the internal political reality in the Republic and considering its organisation, structure, institutional setting, its goals and appeal, is considered as a party. ■

Christophoros Christophorou
Media and elections analyst

● ***Ο περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμος του 1998, ΚΔΠ 207/2009, Επίσημη Εφημερίδα, 15/05/2009*** **(Law on Radio and Television Stations of 1998, Normative Administrative Act KDP.207/2009, Official Gazette, 15 May 2009)**

EL

CZ – Election Campaign of Nationalist Parties

Nationalist parties in the Czech Republic committed a number of infringements during the recent European Parliament election campaign. Candidates included members of the nationalist Workers' Party (*Dělnická strana*) and the National Party (*Národní strana*). Both parties submitted election spots to be transmitted on Czech Television and Czech Radio, the content of which provoked fierce reactions from the government, Czech Television and Czech Radio. One of the TV spots showed images of Roma families with the words "Stop Black Racism", "We don't want black racists among us" and "Stop Favouring Gypsies". The expression "a finalsolution to the Gipsy problem" was also used.

The broadcasters refused to air these spots. The spot was broadcast once on Czech Television and then withdrawn. Czech Radio refused to transmit two of the three spots that were submitted by the National Party because they were unlawful.

Political parties and unions are entitled to a reasonable period of airtime on public service channels during the European Parliament election campaign if at least one of their candidates has been authorised to stand. This rule is an exception to the general ban on advertising of political parties or candidates. The public service broadcasters are obliged to broadcast election spots, which they are not allowed to produce themselves. Channels that broadcast such third-party programmes are made directly responsible for their content by the parties that submit that content. If their content is unlawful, claims can be made directly against the parties that produced it and that are responsible for it. Broadcasters can nonetheless still be liable and therefore they too must check the content. However, an election spot can only be rejected if it seriously and obviously infringes generally applicable legislation.

Punishable offences include attacks on human dignity such as incitement to hatred, violence and arbitrary acts, insults, wilful contempt or slander. The broadcasters thought this criterion was fully met. Czech Television and Czech Radio have therefore reported this offence to the official authorities. ■

Jan Fučík
Ministry of Culture, Prague

DE – Internet-Based Video Recorders Infringe Copyright

In a ruling of 22 April 2009, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that Internet-based video recorders regularly infringe copyright.

On its website, the defendant company offers an "Internet-based personal video recorder", which records television programmes, including those of the plaintiff (the broadcaster RTL), on the customer's instructions. The recorded programmes are stored in an area allocated to the individual customer on a server owned by the defendant, to be downloaded by the customer at a time of his choice.

The BGH began by considering the recording process itself and ruled that copyright would be infringed if programmes were stored on so-called "personal video recorders" on the customer's instructions. This would breach the broadcaster's right of reproduction. Since a fee was charged for the service, it did not constitute lawful reproduction for the customer's private use. However, if the recording process was automated to the extent that the customer could be considered responsible for making the recording, the BGH ruled that this would constitute lawful reproduction for private use. However, it thought that the broadcaster's copyright would be infringed by the retransmission of the programmes received from the service provider to the "personal video recorders" of more than one customer, since this would infringe the broadcaster's right to make its programmes accessible to the public.

The case was referred back to the appeal court, the *Oberlandesgericht Dresden* (Dresden Court of Appeal - OLG), which must now assess the legally relevant processes in this specific case, taking the BGH's ruling into account. ■

Julia Maus
Institute of European Media Law (EMR), Saarbrücken/Brussels

• **BGH press release on its ruling of 22 April 2009, available at:**
http://merlin.obs.coe.int/redirect.php?id=11745
DE

DE – Film about "Cannibal of Rotenburg" Can Be Screened

In a ruling issued on 26 May 2009 (case no. VI ZR 191/08), the *Bundesgerichtshof* (Federal Supreme Court - BGH), overruling the two previous decisions of the *Landgericht Kassel* (Kassel District Court - LG) and the *Oberlandesgericht Frankfurt* (Frankfurt Appeal Court - OLG), decided that the cinema film about the so-called "Cannibal of Rotenburg" could be shown.

The film portrays the life story of the plaintiff, known as the "Cannibal of Rotenburg", who was sentenced to life imprisonment for murder and disturbing the peace of the dead after killing a man in March 2001, removing the bones from his body, cutting it up, freezing it and then eating parts of it over a period of time. The main character in the film displays some of the personality traits of the plaintiff and the events shown in the film are virtually identical to the plaintiff's life and actions. The plaintiff, who had already signed an exclusive agreement with a production company for the use of his life story, applied for an injunction against the screening and exploitation of the film, referring to his general personality rights (see IRIS 2006-4: 10).

Although the BGH accepted that the screening of the film could cause considerable psychological strain on the plaintiff and that his innermost privacy would be affected, when weighing these factors against the defendant's artistic freedom and freedom to film in accordance with Art. 5 of the Basic Law (GG), the plaintiff's personality rights under Art. 2(1) in connection with Art. 1 GG were of lesser importance. This conclusion was based on the public's right to information and the fact that the film did not contain any distancing or distorting effects, nor did it violate the plaintiff's right to respect as a human being. ■

Julia Maus
Institute of European Media Law (EMR), Saarbrücken/Brussels

• **Pressemitteilung des BGH zum Urteil vom 26. Mai 2009, abrufbar unter:**
http://merlin.obs.coe.int/redirect.php?id=11746
DE

DE – Internet Transmission of Sexual Acts via Webcam Constitutes Abuse

The *Bundesgerichtshof* (Federal Supreme Court - BGH) has dismissed as unfounded the defendant's appeal against the ruling of the *Landgericht München I* (Munich District Court I - LG) of 15 December 2008 (case no. 12 Kls 468 Js 310758/07) concerning five concurrent cases of sexual abuse of children and the distribution of pornographic material via teleservices.

The defendant, who had several previous convictions for sexual offences, had made contact with five children from Belgium via the Internet. During their conversations, live images of the defendant and the children had been transmitted using a webcam. When the defendant told the children that he wanted to "fuck" them, one of the girls turned the webcam away and told him that she was only 12 years old. The defendant then wrote back: "It doesn't matter how old you are, do you want to take your clothes off?" At that point, the defendant turned his webcam towards his exposed penis and started masturbating in order to arouse himself sexually, in the knowledge that the children would be able to see what he was doing on the screen.

According to the BGH's decision, its re-examination of the original ruling did not show that any legal error had been made to the defendant's disadvantage. Even though the defendant and the five children had not been physically next to each other, the victims, who were interacting with the defendant, could directly see his exposed penis and mastur- bation because of the simultaneous transmission of images to their computer screen using the webcam and the Internet. It did not matter whether the offender and victim were physically next to each other. The offence described in Art. 176(4)(1) of the *Strafgesetzbuch* (Criminal Code - StGB) could also be committed if the physical distance between the perpetrator and his actual victim was overcome by the transmission of live images, which enabled the victim to watch the perpetrator's sexual acts in real time on the screen. The criminal court had therefore been right to find the defendant guilty, since there was no doubt that the law was designed to give children complete protection from such images in order to prevent harm to their overall development.

Under Art. 176(4)(1) StGB, children under 14 should be protected from harm to their overall development caused by exposure to exhibitionist acts performed in front of them. ■

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

• **Decision of the BGH of 21 April 2009 (1 StR 105/09), available at: http://merlin.obs.coe.int/redirect.php?id=11747**

DE

DE – Kurdish TV Broadcaster's Urgent Applications against Home Affairs Ministry Ban Granted

The *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) has reinstated the delaying effect of two legal challenges in an accelerated procedure (case nos. 6 VR 3.08 and 6 VR 4.08).

The challenges were lodged by two public limited companies under Danish law, which operate the Kurdish-language television station Roj TV under a Danish licence. The channel can be received all over Europe via satellite. The *Bundesministerium des Inneren* (Federal Ministry of Home Affairs - BMI) had assumed that the television channel was a propagandist mouthpiece of the Kurdish Workers' Party (PKK), which is banned in Germany, and therefore imposed an immediate ban on its activities in Germany under the provisions of the German *Vereinsgesetz* (law of association) (see IRIS 2008-8: 10).

The BVerwG was of the opinion that both challenges had a chance of succeeding. It attached particular importance to the fact that the German legal principles raised by the BMI did not apply to cross-border broadcasting activities, since the provisions of German criminal law, which the broadcaster was alleged to have broken, only covered activities carried out in Germany. Although the "Television Without Frontiers" Directive may have been breached, this was a matter for the "broadcasting State" rather than the "receiving State" to deal with. Furthermore, the immediate effect of the ban was unnecessary, since closing down the channel's broadcasting operations after more than four years of broadcasting activity was not particularly urgent. The Court added that the detailed examination of the facts presented by the BMI should remain a matter for the main hearing. ■

Christian Mohrmann
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• **BVerwG press release concerning the decisions of 14 May 2009 (BVerwG 6 VR 3.08 and 6 VR 4.08), available at: http://merlin.obs.coe.int/redirect.php?id=11748**

DE

DE – Court Bans EPGs from Using Programme Information

In May, in the dispute over the use of programme information in electronic programme guides (EPGs) on the Internet, the *Landgericht Leipzig* (Leipzig District Court - LG) ruled in favour of the plaintiff, the collecting society VG Media (case no. 5 O 2742/08). According to this decision, the information may only be used if a licence fee has been paid to the relevant rightsholders (see IRIS 2008-4: 12).

The defendant company, tvtv, operates a website under the domain name tvtv.de, which contains information about television programmes. It uses additional information, such as content descriptions and images that are produced by the broadcasters. VG

Media, which claims to represent 36 TV broadcasters, requested a licence fee of EUR 0.0002 per downloaded page of this additional programme information.

The *LG Leipzig* ruled in favour of the plaintiff. It considered the programme information to be artistically created, which meant it was protected under copyright law. The web service did not represent reporting on events of the day and therefore was not entitled to use the additional programme information free of charge under Art. 50 of the *Urheberrechtsgesetz* (Copyright Act - UrhG).

The *Verband Deutscher Zeitschriftenverleger* (association of German magazine publishers - VDZ), whose members often provide Internet services containing programme information, had already submitted to the *Landgericht Köln* (Cologne District Court - LG) an action for a negative declaratory judgment against VG Media's demand. A ruling on this action is yet to be issued.

Following the *LG Leipzig's* decision, tvtv removed the additional programme information from its service. However, it also announced that it intends to appeal the ruling. ■

Sebastian Schweda
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• **Decision of the *Landgericht Leipzig* (Leipzig District Court - LG) (Az: 5 O 2742/08)**

DE

DE – Court Confirms Licence Fee Obligation for Work PCs with Internet Access

In a ruling of 12 March 2009 (case no. 7 A 10959/08.OVG), the *Oberverwaltungsgericht Rheinland-Pfalz* (Higher Administrative Court of Rhineland-Palatinate - OVG) dismissed the complaint of a lawyer, who had appealed against decisions taken by Südwestrundfunk (SWR) that he should pay a licence fee for a PC with Internet access that he used for his work.

In the previous instance, the *Verwaltungsgericht Koblenz* (Koblenz Administrative Court - VG) had ruled in favour of the lawyer on 15 July 2008 and overturned SWR's decisions to impose the monthly licence fees on the grounds that the abstract notion of being technically able to receive broadcasts did not necessarily mean that the person concerned should be considered a recipient of broadcast services.

However, the OVG upheld SWR's appeal, explaining that a PC with Internet access was a new kind of broadcast-receiving device and that, under the *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on broadcast licence fees), the applicability of licence fees did not depend on actual use, but only on possession of a reception device. The OVG added that, since the device could receive broadcasts, it met the necessary objective purpose, which could be assumed to be the case even for devices used in non-private situations if, as in the current case, there was no other traditional monofunctional device for receiving broadcasts at the address concerned. It also rejected reservations linked to constitutional law and found that the current legal format of the licence fee rules for PCs with Internet access was sufficiently clear as well as a suitable, reasonable means of preventing people from evading the licence fee and safeguarding the finan-cing of public service broadcasting. It therefore considered the licence fee obligation for such PCs to be a reasonable impediment to access to "sources of information available free of charge on the Internet", which did not infringe the freedom of information protected by the Constitution.

The OVG agreed that the decision could be appealed before the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) because of its fundamental importance. ■

Julia Maus
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• **Ruling of the *Oberverwaltungsgericht Rheinland-Pfalz* (Higher Administrative Court of Rhineland-Palatinate - OVG) of 12 March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11749**

DE

DE – Premiere Loses Case against Kathrein

In a ruling of 28 May 2009 (case no. 7 O 17548/08), the *Landgericht München I* (Munich District Court I - LG) rejected the claim by German pay-TV provider Premiere Fernsehen GmbH & Co. KG against aerial manufacturer Kathrein-Werke KG for payment of a penalty for breach of contract of more than EUR 26 million.

Between 2003 and 2007, Kathrein had made decoders for the reception of Premiere's television service. Agreeing to pay a penalty of EUR 50,000 for any breach of its contract with Premiere, Kathrein had promised not to manufacture, either itself or via third parties, devices which could be used to receive the service illicitly without the payment of a Premiere subscription.

The plaintiff claimed that the defendant should pay the penalty for breach of contract in 527 separate cases. It argued that Kathrein had links with the Zehnder company, which had imported from China and sold almost 220,000 such devices between 2006 and 2008. It claimed that Kathrein must have been aware of this fact.

The LG disagreed, since the defendant had neither sold the devices itself nor used the third company as a middleman. Moreover, Premiere had been unable to prove that Kathrein had known about the business arrangements in question. The plain-tiff had not even been able to prove its claim that the directors of the Zehnder company knew all about these transactions. The LG was therefore convinced that Premiere had no rightful claim to payment of the agreed penalty for breach of contract. ■

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• **Press release of the *Landgericht München I* (Munich District Court I - LG) of 28 May 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11750**

DE

ES – Competition Authority Imposes Fine for Monopoly in Audiovisual Signal Distribution

On 19 May 2009, the Spanish *Comisión Nacional de la Competencia* (National Commission for Competition – CNC) imposed a fine on Abertis, the main operator for signal distribution in the Spanish audiovisual sector, of EUR 22.6 million for "well-esta-blished anticompetitive practices in the sector of DTT signal distribution, due to its notorious dominant position in the industry".

A comprehensive analysis of this situation ought to begin in 1988, when the end of the State mono-poly in Spanish television led to the creation of three new commercial television operators and the privatisation of the infrastructures for signal distribution. The exploitation of those infrastructures was assigned to a new firm, called Retevision, which was focused more on telecommunications than on the audiovisual sector.

Retevision's ownership changed several times over the next decade. It finally joined the international telephone group Orange, while its audiovisual signal transport business was taken over by a new society, called Abertis, which was linked to one of the main financial brands in Spain, La Caixa.

Abertis has occupied an important position as the leading force for La Caixa activities in manufacturing and, more particularly, services. As such, Abertis manages a number of heterogeneous services, from toll highways in Italy to airports and telecommunication services in Latin America, as well audiovisual services in Spain, an area in which it enjoys a position of virtual monopoly. These services include traditional analogue services, DTT and satellite television (with Abertis being the key stakeholder of both Hispasat and EutelSat).

This monopoly, however, was challenged with the arrival of DTT. Until then, the national television ope-rators had used Abertis services without discussion. However, the Spanish strategy of promoting DTT through regional and, mostly, local services, created a puzzle of "mini-markets", too small to attract Abertis, but promising enough to attract new entrants into the market.

One of these new entrants, Axion, the regional operator of broadband services in Andalusia, complained to the CNC that the contents of the agreements between Abertis and the main commercial networks prevented effective competition. There were two main elements taken into account by the CNC: the excessive time-length of the agreements imposed by Abertis (which offered an important discount to those television operators who would accept periods of between 5 and 10 years) and the very severe financial penalties that those agreements established for television operators who would end their contract before the scheduled date. The CNC has recognised that these two features "prevented the possible action of new competitors" and that this is especially serious in a recently liberalised market, where all steps have to be taken in order to ensure an appropriate level of competition.

Abertis has announced its intention to appeal this resolution before the European Court of Justice. Ironically, it has also brought a case before the Luxembourg Court against the European Commission, which supported the intervention of the Italian government against the merger of Abertis and Atlantia. ■

Joan Botella
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- **Decision of the *Comisión Nacional de la Competencia* (National Commission for Competition – CNC), partially censored, available at: http://merlin.obs.coe.int/redirect.php?id=11760**

ES

ES – Increase of Economic Aids to Spanish Cinema, despite the Crisis

Despite the current economic situation, economic aids to Spanish cinema will increase. Specifically, Ignasi Guardians, who recently assumed the management of the *Instituto de la Cinematografia y de las Artes Audiovisuales* (Spanish Film Institute – ICAA) has decided to increase economic aids to Spanish cinema by EUR 8.6 million.

It is striking that, only six months after the initial fixation of these subsidies, they are increased in such a manner, particularly given the worldwide economic crisis, which has caused a strain on the general budget.

It is worth highlighting that the *Fondo de Protección de la Cinematografía* (Cinematographic Protection Fund) had already been granted EUR 88 million for the year 2009, i.e., EUR 3 million more than last year, when the crisis was not yet in evidence. To this amount, the EUR 8.6 million granted by the ICAA will now be added. Moreover, in addition to the Spanish State funds, EUR 11.5 million is available as aids and subsidies extended by the various Autonomous Communities.

As was initially decided last December, the subsidies have been earmarked for feature film scripts, for the production of short films, for the direction of feature films by new directors or experimental works with an artistic or cultural content, for documentaries and pilots of animation/entertainment series and, finally, for the distribution of European Union films.

Nevertheless, according to Ignasi Guardians, the

scheme is not exactly an increase in economic aid, but a "relocation" of the same. That is to say, in each financial year, a set amount is established which is designated for animation series and R&D. When, due to a variety of reasons, these subsidies are not used, they are "relocated" as economic aids on behalf of the ICAA for feature films, short films, scripts and distribution. The last two categories are not limited solely to the cinematographic market, but extend to the audiovisual market in general. ■

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● **Resolutions of 13 May 2009 by the ICAA, published in the Spanish Official Gazette nº 127, of 26 May 2009, available at:**
http://merlin.obs.coe.int/redirect.php?id=11756
http://merlin.obs.coe.int/redirect.php?id=11757
http://merlin.obs.coe.int/redirect.php?id=11758
http://merlin.obs.coe.int/redirect.php?id=11759

ES

FR – Court of Cassation Classifies Participation in Reality Television Broadcast as Employment Contract

In line with the industrial tribunal and the court of appeal of Paris (see IRIS 2008-4: 13), the social section of the court of cassation delivered a noteworthy decision on 3 June 2009 upholding the claim brought by three participants in the reality television programme "l'Ile de la Tentation" for the "participant regulations" they had signed to be reclassified as an employment contract. The programme consists of "filming the day-to-day lives of couples on an island paradise in order to test the strength of their love". The programme's production company referred to the clauses in the documents signed by the participants (with each stating specifically that they were "taking part in the programme for personal and not professional ends"). It held that none of the elements constituting an employment contract was present – work carried out, or subordination, or remuneration. The court of cassation recalled however that "the existence of an employment relationship does not depend on either the intention expressed by the parties nor the name given to their agreement, but on the de facto conditions in which the workers' activities are carried out". Analysing the actual situation and the conditions for shooting the programme, the social section of the court noted that participants had an obligation to take part in the various activities and meetings; they had to abide by the programme's rules as defined unilaterally by the producer, and were guided in the analysis of their behaviour. Moreover, some scenes were rehearsed in order to enhance important moments, and waking and sleeping times were laid down by the production team. Lastly, the rules required permanent availability on the part of the participants, who were not allowed to leave the site or communicate with anyone outside, and stipulated that any infringement of these contractual obligations could be sanctioned by being sent away. The court inferred from this that there was a degree of subordination. In response to the production company's argument refuting the claim that work was being carried out, the court also stressed the fact that this consisted of the participants taking part in imposed activities and expressing anticipated reactions for a period of time and in a place unrelated to their usual personal lives. This activity was therefore not the same as merely recording their everyday lives.

Lastly, the court of cassation found that the sum of EUR 1525 that had been paid to each participant was indeed for the work carried out, confirming that the participants were bound to the production company by an employment contract. On the other hand, the court of cassation censured the court of appeal for its statement of the existence of concealed employment, as it had given no valid justification for the intentional nature of such concealment. The producers and broadcasters were united in deploring the fact that this important decision challenged the economics of many television programmes. ■

Amélie Blocman
Légipresse

● **Court of cassation (social section), 3 June 2009, Société Glem v. A. Brocheton et al.**

FR

FR – Court Judgment against Television Channel for Infringement of a Competitor Channel's Brand Name

The M6 television channel, which for the past 22 years has been showing a daily news report entitled "6 minutes", available in various local versions and downloadable on-line on the channel's Internet site, owns various "6 minutes" brand names to designate the broadcast. M6 noted that the channel France 3 had lodged a "7 Minutes" brand name in 2006, used for a news programme of that name, and had its competitor summoned to appear in court on a charge of infringement of a brand name.

In a judgment delivered on 29 April 2009, the regional court of Paris held that the disputed signs were different (6 minutes/7 minutes), and that it was in the light of Article L. 713-3 of the Intellectual Property Code that the claim of infringement needed to be considered. This text provides that "without the owner's authorisation, if there is a risk of confusion in the minds of members of the general public, it is not allowed …b) to imitate a brand name or use an imitation of a brand name for products or services identical or similar to those designated in the registration". In terms of product, the court held that they were identical – both were television programmes. In terms of signs, the second sign used the

first sign, merely replacing the figure 6 with a figure 7 and deleting the definite article. The two signs thus used the same construction – the association of a number with the word "minutes". The judge added that while it was frequent for a television programme to take as its title its duration expressed in minutes, the fact remained that the substitution of the figure 6 by the figure 7 did not make any substantial difference to the viewer, since the period of time was perceived as being short in both cases.

The television company had used the brand name "6 minutes" for more than twenty years as the title of a short news programme. As a result, the choice of the "7 minutes" sign to designate a news programme in an almost identical format was such as to create the risk of confusion for the viewer, who would be inclined to think that it was a variation of the "6 minutes" brand name. The court therefore held that there was infringement of the "6 minutes" brand names.

In view of public awareness of the infringed brand names and the duration of the infringement (the "7 minutes" broadcast had been operating for eighteen months), the court held that the prejudice would be fairly compensated by payment of EUR 10,000. It also banned France 3 from continuing these unlawful acts, on pain of a penalty of EUR 2,000 for each infringement. ■

Amélie Blocman
Légipresse

• Regional court of Paris (3rd chamber, 3rd section), 29 April 2009, Métropole Télévision M6 v. France 3
FR

FR – HADOPI's Power of Sanction Censured by the Constitutional Council

After months of controversy, the Act "promoting the circulation and protection of creation on the Internet" (the HADOPI Act), adopted on 13 May 2009 after long and laborious parliamentary debate, has finally been censured by the Constitutional Council, to which it had been referred by opposition MPs opposed to the text. The Act was designed basically to set up a "gra-duated response" to the illegal downloading of works on the Internet, and introduced a "High Authority for the circulation of works and the protection of rights on the Internet" (HADOPI), a nine-member independent administrative authority with power to warn and, initially intended to, sanction, to which application is made by sworn agents attached to the societies for gathering and redistributing royalties and by the national cinematographic centre (*Centre National de la Cinématographie* – CNC). The Act introduces an obligation of vigilance (new Article L. 336-3 of the Intellectual Property Code - CPI), the keystone of the new system, as a result of which all Internet subscribers must ensure that "such access is not used to exploit [a work, a recording or a programme] without the authorisation of the rightsholders where this is required". Under the Act, failure to comply with this obligation would incur the possibility of the HADOPI sending a "recommendation" by e-mail to the Internet subscriber via its IAP reminding him/her of the obligation of vigi-lance and the corresponding sanctions. In the event of a second infringement within six months of this e-mail being sent, the HADOPI could send a letter in similar vein to the subscriber by registered mail. Lastly, if the subscriber continued to disregard the obligation of vigilance within a year of this letter being sent, the Act provides for the possibility of the HADOPI "suspending access to the Internet for a period of between two months and one year, combined with the impossibility for the subscriber to subscribe" to a contract with another operator. On 10 June the Constitutional Council found this power of sanction (stopping access) on the part of the HADOPI unconstitutional, on the grounds that freedom of communication and expression implied "nowadays, in the light of the generalised development of the Internet and its importance for participation in democratic life and the expression of ideas and opinions, freedom of access to these on-line communication services". Thus the HADOPI's powers as provided for in the legislation could lead to restricting an individual's exercise of the right to express him/herself and communicate freely. The Constitutional Council decided that access to the Internet could only be cut off by the courts. The Act also provided that its sanctions could only be imposed on the holder of the Internet subscription contract, unless that person provided proof of fraud on the part of a third party. The Constitutional Council found this provision contrary to the principle of the presumption of innocence. Withdrawing all power of sanction from the HADOPI Act deals a serious blow to the Government's logic of "decriminalisation". The text, minus its sanction provisions, was promulgated on 13 June 2009. The Minister for Culture explained that the Act would need to be supplemented in order to "give the courts the power to impose appropriate sanctions and more specifically to decide on the temporary suspension of access to the Internet, the principle of which has been validated by the constitutional judge". A new text should therefore be tabled for the Parliament's extraordinary session in July. The Minister said that the HADOPI, now responsible exclusively for the "preventive and educational aspect" of combating on-line piracy (the sending of warning messages), would be set up "within the scheduled timescale", i.e., in September 2009. ■

Amélie Blocman
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• Act No. 2009-669 of 12 June 2009 promoting the circulation and protection of creation on the Internet, available at:
http://merlin.obs.coe.int/redirect.php?id=11765

• Constitutional Council, Decision No. 2009-580 DC of 10 June 2009, available at:
http://merlin.obs.coe.int/redirect.php?id=11766
FR

FR – HADOPI Looks at Media Chronology and the Rights of On-line Editors

Apart from the high-profile "graduated response" it contains, the Act of 12 June 2009 "promoting the circulation and protection of creation on the Internet" also institutes the status of the on-line press editor, reforms journalists' copyright protection, and makes changes to media chronology. Article 27 of the Act supplements Article 1 of the Act of 1 August 1986 reforming the legal scheme applicable to the press, creating the status of the on-line press editor and details this person's responsibility.

"On-line press service" refers to any on-line service of communication to the public edited profes-sio-nally by a natural or legal person with editorial control over its original content of general interest, which is renewed regularly and comprises information connected with current affairs treated in a journalistic fashion and does not constitute a promotion tool or accessory for an industrial or commercial activity.

A decree would lay down the conditions under which an on-line press service could have access to the tax scheme applicable to printed press companies (business tax, provision for investment). The new Act also institutes a scheme of attenuated responsibility for the director of the publication of these services, whose criminal responsibility may not be invoked if an illegal message is published in a space for personal participation calling for contributions from Internet users, as long as he/she did not have knowledge of the disputed message before it went on-line or if, having had knowledge of it, it took prompt action to withdraw it. This waived Article 93-3 of the Act of 29 July 1982.

The new Act also introduces a new section in the Intellectual Property Code (CPI) entitled "Right to make use of journalists' work", which is intended to replace a right in respect of a medium by a right in respect of a period of time for using a work. Until now, and under Articles L. 121-8 of the CPI and L. 7713-2 of the Employment Code, employment contracts between journalists and the press companies involving the transfer of copyright in respect of first publication and any further use of an article in a medium other than the original medium (and more particularly on the Internet) had to be explicitly authorised by the journalist, who was entitled to claim additional remuneration.

The HADOPI Act lays down the principle of an automatic and exclusive transfer to the editor of the rights to exploit the journalist's work carried out in the context of a "press title" for all the media utilised by the title. The only recompense for this is the journalist's salary, for the period of time laid down in the company agreement. Beyond this period, exploitation of the journalist's work in the press title will be remunerated in the form of royalties or salary, subject to the conditions set out in the collectively negotiated agreement. Lastly, any exploitation other than by the press title or its "coherent press family" would need to be specifically agreed by the journa-list in advance, subject to remuneration to be negotiated between the editor and the journalist.

Lastly, the HADOPI Act includes a section designed to promote development of the offer of on-line programmes. As the professionals in the audiovisual sector did not manage to conclude the agreements defining the rules applicable to media chronology (period of time to be observed between a film being shown in a cinema for the first time and its exploitation using various media), before the Act was voted on, the legislator included the principle of professional agreements defining the periods of time applicable to each mode of exploitation, and more particularly television broadcasting and VoD (Article 17 of the Act amending Articles 30-34 et seq. of the Cinematographic Industry Code). The Act cuts from six to four months the period of exploitation of video works intended for sale or rental. This could even be further reduced by means of a waiver granted by the CNC in the light of the film's operating results, although it could not be for less than one month. The four-month period would be extended to pay-per-view VoD if no professional agreement has been reached by 12 July 2009. Similarly, as there was no agreement, a decree would lay down the conditions for making other types of VoD services available (subscriptions and free offers financed by advertising). ■

Amélie Blocman
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• **Act No. 2009-669 of 12 June 2009 promoting the circulation and protection of creation on the Internet, available at:**
http://merlin.obs.coe.int/redirect.php?id=11765
FR

GB – Regulator Announces Changes to Rules on Advertising and Teleshopping

Ofcom, the UK communications regulator, has announced further changes to its advertising rules, as part of its continuing review of advertising regulation (for earlier changes see IRIS 2008-5: 11 and IRIS 2008-9: 12).

Ofcom has decided to maintain the number of advertising breaks permitted on public service broadcasting (PSB) channels at current levels for programmes with a scheduled duration of 90 minutes or less, but to increase the number of permitted breaks in longer programmes to the same level as permitted on non-PSB channels. This does not affect the rules applying to particular types of programme, such as

films, news and children's programmes. The aim is to avoid deterring PSBs from airing longer programmes, especially during peak times. Ofcom has also decided not to change the rules on the overall amount of advertising permitted, which currently are more restrictive for PSBs than for other broadcasters. Nevertheless, it considers that there is a strong case for harmonising the rules through a further review, by removing the special restrictions applying to PSBs. Ofcom will also remove the "peak time" designation for the period from 7am to 9am on PSB channels and will regulate this period in accordance with the rules applying to non-peak periods.

Ofcom has also decided to allow PSB channels to schedule up to 6 hours of teleshopping between midnight and 6am and to remove the restrictions on the amount of teleshopping that non-PSB channels may schedule, the previous time limit being three hours per day. The aim is to allow PSBs to generate additional revenues from teleshopping, whilst limiting this to the night hours to maintain the view that teleshopping content does not contribute to the public service remit. Ofcom has also decided that all transactional gambling on television that invites viewers to pay money to take part in gaming or to place bets will be treated as teleshopping. ■

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- **Ofcom, "No changes to the rules on the amount of advertising on TV", Press Release of 26 May 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11761**
- **Ofcom Code on Scheduling of TV Advertising, Annex 1, available at: http://merlin.obs.coe.int/redirect.php?id=11762**

EN

GR – The TV and Radio Exposure of Political Parties in the Pre-Election Period under Judicial Scrutiny

The 4th Chamber of *Συμβουλίο της Επικρατείας* (the Administrative Court of Justice – StE) found the ministerial decision by which only a five-minute period is granted for the presentation of their views by means of a television or radio programme of their own production to political parties participating for the first time in the European elections to be legal. The Court decided that these parties operate in different circumstances than their more well-established counterparts and, therefore, the dedication of additional time to the latter, through the free transmission of advertisements (on television stations with nationwide reach), three ten-minute-long broadcasts of the parties' own production, interviews with their leaders and four topical discussion panels with their representatives, was considered to be reasonable. In their dissenting opinion, two of the judges (out of a total of seven) emphasised the blatant violation of constitutional provisions and of principles of EC law by the current system governing the exposure of political parties on television during election campaigns.

The issue is not settled however, since, due to its importance, the final ruling will not be handed down by the Court until the plenary session next September. In addition, the Court's committee in charge of suspensions has rejected (with one dissenting judge, out of a total of three) the request for a suspension of the contested ministerial decisions, by recalling the pu-blic interest and according to the reasoning that a suspension of the current "single, complete and cohe-rent system" of pre-election exposure would interfere with the smooth conduct of the election campaign.

As the law now stands, the audiovisual transmission of the election campaign is based on the principle of proportional equality, the deciding criteria being a party's representation in parliament, as well as the overall presence of both the party and the persons representing it on the national political scene. Even though ministerial decisions, which are published four weeks at the earliest before the polling date, upon the submission of a proposal by the Trans-Partisan Election Committee, include analytical provisions as concerns the obligations of television and radio channels (in particular public services broadcasters), it remains questionable to what extent they are applied in practice, given that the competent independent authority does not publish a report. ■

Alexandros Economou
National Council for Radio and Television

- ***Συμβούλιο της Επικρατείας, Απόφαση Αριθμ. 1784/2009 (Δ΄ Τμήμα, 7μ.) 26 Μαΐου 2009* (Administrative Court of Justice, Decision No. 1784/2009 (Section D, 7 members) 29 May 2009), available at: http://merlin.obs.coe.int/redirect.php?id=11773**

EL

GR – ESR Terminates the Transmission of Reality Show

The *Εθνικό Συμβούλιο Ραδιοτηλεόρασης* (National Council for Radio and Television – ESR) imposed the strictest sanction at its disposal in relation to television programmes on the television channel ANT1 in a decision issued on 2 June 2009, by ordering the termination of transmission of the reality show "The Moment of Truth". The show involved players answering questions relating to their personal life in the pre-sence of members of their immediate family. The show was divided into three different rounds; The questions during the first round were generally harmless, while those of the second and third round were respectively indiscreet and very indiscreet and mainly referred to the sexual life of the player. The format of the show is owned by Shine Reveille; It has been sold to 24 countries and is currently in production in Spain and France.

According to the ESR, which recorded three episodes of the show, participants were goaded "to the revelation of intimate and unconfessed thoughts or actions in return for a fee, the result being the exploitation and the degradation of the players and the people close to them, who were also present in return for a fee (...). The above-mentioned episodes do not have the quality required by the Constitution and the law and imposed by the societal mission of television and the cultural development of the country".

It is worth mentioning that the same show (and according to the same reasoning) had already been fined twice: EUR 200,000 (in a decision of 25 November 2008) and EUR 75,000 (in a decision of 10 March 2009), while the present decision of the ESR was published only after the transmission of all the episodes of the show was complete. In an announcement published by the Union of Private Television Stations of Nationwide Reach, the decision was described as being "of borderline legality" and "irrational", because it is based on "the mere hypothesis that, perhaps, in the future, in episodes of the same series, the same violations of legislation might continue to occur". ANT1's lawyers' have confirmed that they are considering taking the case to the European Court of Human Rights in Strasbourg. ■

Alexandros Economou
National Council for Radio and Television

● ***Εθνικό Συμβούλιο Ραδιοτηλεόρασης, Απόφαση Αριθμ. 268/2.6.2009*** **(National Council for Radio and Television, Decision No. 268/2.6.2009), available at: http://merlin.obs.coe.int/redirect.php?id=11564**

EL

IE – DTT and Digital Dividend

In November 2008, the Department of Communications, Energy and Natural Resources published a report on the digital terrestrial television trials conducted in 2006. One of the key decisions from the trials was to use MPEG 4, the technology chosen in most countries.

Under the Broadcasting (Amendment) Act 2007 (see IRIS 2007-4: 16), RTÉ, the public service broadcaster, is required to provide a digital television service offering access to the Irish national channels (RTÉ, TG4 and TV3) on a free-to-air basis. RTÉ received its licence in 2008 and is expected to launch its service on a phased basis from autumn 2009. RTÉ Networks Limited (RTÉNL), a subsidiary of RTÉ, is responsible for building RTÉ's DTT national network and has been operating a test service using MPEG 4. The 2007 Act placed the onus of identifying and licensing commercial DTT service providers on the Broadcasting Commission of Ireland (BCI). In 2008, the BCI awarded a licence to operate the three commercial DTT multiplexes to Boxer DTT Limited, but the latter handed back the licence in April 2009, citing prevailing and anticipated economic circumstances. The licence was then awarded (May 2009) to the OneVision consortium comprising Eircom, TV3, Setanta Sports and Arqiva, subject to the successful outcome of contract negotiations.

One of the results of DTT is that it frees up spectrum for use by other communications services. Accordingly, the Commission of Communications Regulation, ComReg, launched a consultation in March 2009 on a new approach to spectrum use. This followed a number of publications, including a Department of Communications paper on the development of a national policy framework for identifying spectrum for the Digital Dividend. A new statutory instrument, S.I. 192 of 2009, also provided for new regulations regarding the licensing of wireless telegraphy for amateur stations and ComReg has published guidelines for applicants. The regulations came into force on 1 June 2009. ■

Marie McGonagle
School of Law, National University of Ireland, Galway

● **Department of Communications, Energy and Natural Resources, "A report on the Digital Terrestrial Television Trial, Ireland, August 2006 – August 2008", November 2008, available at: http://merlin.obs.coe.int/redirect.php?id=11774**

● **ComReg, "Digital Dividend in Ireland/ A new approach to spectrum use in the UHF Band", publication number 09/15, available at: http://merlin.obs.coe.int/redirect.php?id=11775**

● **Department of Communications, Energy and Natural Resources, "Development of a National Policy Framework for identifying spectrum for the Digital Dividend", March 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11776**

● **S.I 92 of 2009, Wireless Telegraphy (Amateur Station Licence) Regulations 2009, 25 May 2009, available at: www.comreg.ie/publications or, as Annex 1 to ComReg, Amateur Station Licence Guidelines, publication 09/45, 28 May 2009, available at: http://merlin.obs.coe.int/redirect.php?id=11775**

EN

LT – Draft Amendment Law on the Protection of Minors against Detrimental Effect of Public Information

On 2 June 2009 the Lithuanian *Seimas* (Parliament) approved the Draft Amendment Law on the Protection of Minors against the Detrimental Effect of Public Information in the first reading. The Draft Law seeks to enhance the protection of minors against the negative effect of public information by expanding the list of criteria on the restricted published information as well as by establishing a system of visual means (indexes) used for categorising TV programmes.

The Draft Law provides that public information which encourages gambling and participating in

lotteries and other games, where the impression of easy winning is created; which sneers at people; which creates the impression of paranormal phenomena as real, is included in the category of public information, the publishing of which is restricted. In a case where the content of the programme corresponds to one or more criteria of the restricted information, it shall be broadcast using technical means that shall ensure the possibility of limiting the communication of such information to minors, for example, encoding, or categorising such programmes by using appropriate signalling and watershed hours as indicated by the Law. Programmes containing public information that is likely to cause detrimental effect to the development of minors shall be indicated by the signal related to the age of the viewers. Category „S", which is appropriate only for adults, shall be broadcast from 11 p.m. to 6 a.m.; programmes indexed "N-14" shall be broadcast from 9 p.m. to 6 a.m. and index "N-7" shall mean programmes that could cause a negative effect on minors under 7 years old.

The restrictions that are applied to the dissemination of public information that could cause detrimental effect to the development of minors are also applied to advertising, announcements, trademarks of goods and computer games. In addition, the Draft Law provides a provision that envisages that advertising of goods and services aimed at viewers from 18, 14 and 7 years old, shall not be broadcast in programmes dedicated to viewers younger than the mentioned age.

The Draft Law also envisages a new provision regarding Internet service providers, who from now on shall have to ensure the establishment and functioning of a filtering means for content that could cause detrimental effect on the development of minors. This Law should be adopted by the Lithuanian *Seimas* (Parliament) in its second reading in June 2009. Within six months from then the Government of the Republic of Lithuania shall adopt the Rules for Usage of Obligatory Filtering Means for Internet Access. ■

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

• ***Nepilnamečių apsaugos nuo neigiamo viešosios infromacijos poveikio įstatymo pakeitimo įstatymo projektas*** **(Draft Amendment Law on the Protection of Minors against Detrimental Effect of Public Information), available at:**
http://merlin.obs.coe.int/redirect.php?id=11754

LT

LV – The Legality of Broadcasting License Fees Unclear

In May 2009 Latvian commercial broadcasters pointed out that the legality of the annual broadcasting license fees may be challenged. The broadcasters claim that there is no valid legal basis for the specific amount of the fees, as the relevant legal acts have lost their force for several years already.

The Radio and TV Law provides that commercial broadcasters must pay an annual broadcasting license fee in the amount specified by the regulations of the Cabinet of Ministers (CoM). Thus, the Law obliges the broadcasters to make the payment for the license, but delegates to the CoM the duty to decide on the amount of this payment.

However, currently there are no valid regulations of the CoM defining the amount of the fee. Previous-ly, the amount of the fee was established by the Regulations of the CoM No. 48 of 16 February 1999 "Regulations on the State Fee for the Granting of the Special Permit (License) to Specific Types of Commercial Activities". According to these Regulations, the amount of the annual broadcasting license fee was established in the range of LVL 100 (ca. EUR 143) for small local radio broadcasters up to LVL 20.000 (ca. EUR 28.760) for national and crossborder TV broadcasters. These regulations have lost their legal force since 19 May 2006 as a consequence of the revocation of the "Law on Business Activities" on the basis of which they were issued. From then on the amounts of the specific license fees, if applicable, were regulated by specific regulations of the CoM. However, the CoM did not adopt any specific regulations on the broadcasting license fees after 19 May 2006. The National Broadcasting Council (NBC), the Latvian regulatory authority in the broadcasting field, continued to collect the broadcasting license fees in accordance with the amounts specified in the no longer valid regulations.

Now, the commercial broadcasters have pointed to this legally unclear situation and claim that any license fees collected after 19 May 2006 have been illegal, and the NBC should repay them. The broadcasters have announced that they are considering approaching the court with a claim for the repayment. The NBC, in turn, is of the opinion that it was not its legal duty to adopt or initiate the decision on the amount of the license fees, as this is the prero-gative of the CoM. Currently the NBC has prepared a draft regulation on the amount of license fees and plans to submit it to the CoM for discussion. ■

Ieva Bērziņa-Andersone
Sorainen

• **Radio and TV Law, available at:**
http://merlin.obs.coe.int/redirect.php?id=11770

• **Regulations of CoM No. 48 of 16 February 1999, available at:**
http://merlin.obs.coe.int/redirect.php?id=11772

LV

MT – Consultation Document on the Proper Use of the Maltese Language in the Broadcasting Media

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On 28 April 2009, the Malta Broadcasting Authority issued a Consultation Document on the Proper Use of the Maltese Language in the Broadcasting Media. In 2002, the Authority had published a subsidiary law in the form of a Code on the Proper Use of the Maltese Language in the Broadcasting Media. This Code provides guidelines to broadcasters on their responsibility insofar as the correct use of the Maltese language in the broadcasting media is concerned, lists particular responsibilities applying to broadcasting stations and lays down the Broadcasting Authority's functions in this respect.

Subsequent experience has shown that, even though the Code provided for the implementation of these and other measures favouring the Maltese language, the situation as regards the use of the Maltese language in the broadcasting media has not demonstrated any substantial improvement. As a result, the Broadcasting Authority and the National Council on the Maltese Language decided to appoint a conjoint advisory committee to review the present Code and to draw up proposals for changes to the existing legislation. A Committee of Experts was appointed in August 2008, which concluded its work and presented its report in January 2009. The report contained a draft subsidiary law proposing the making of a new Code on the Proper Use of the Maltese Language in the Broadcasting Media, to replace the existing one.

The recommendations contained in the report are various. The report proposes that each broadcasting station employ a Maltese language consultant, that guidelines of a general nature be approved to assist broadcasters in the execution of their duty to ensure the proper use of the Maltese language, that broadcasters be obliged by law to follow the rules and directives of the National Council on the Maltese Language, that each station produce at least one programme in its programme schedule intended to promote the Maltese language and that the Broadcasting Authority adopt a proactive attitude towards assisting broadcasters in reaching these aims.

The Advisory Committee's report and the revised new Code, which is being proposed for adoption by the Broadcasting Authority, was the subject of a consultation process that came to an end on 22 May 2009. ■

• ***Proċess ta' Konsultazzjoni Mniedi mill-Awtorità tax-Xandir – L-Użu Tajjeb tal-Ilsien Malti fil-Mezzi tax-Xandir*** **(Process Consultation Launched by the Broadcasting Authority – The Correct Use of Maltese Language in the Media), available at: http://merlin.obs.coe.int/redirect.php?id=11778**

MT

PL – New Law on Public Duties in Audiovisual Media Services

In September 2008 the Polish Ministry of Culture presented initial proposals for a new media law, concerning in particular public duties in audiovisual media services. On 18 March 2009 the project was introduced in the Parliament and in accordance with procedure the *Sejm* (lower chamber) passed the new Law on Public Duties in Media Services on 21 May 2009. On 25 May 2009 the Law was sent to the Senate (upper chamber).

The Law amends provisions of the Broadcasting Act, which currently governs the audiovisual sector in Poland. It determines public duties of media services, rules and conditions organising their budget (including a management of their State financing) and proper regulatory bodies (Article 1). There is a wide definition of public duties in the audiovisual media services sector, strictly connected with public remittance. It includes different goals which are generally focused on supporting the development of a democratic, civic society and all its values (Article 3). According to Article 4 the National Broadcasting Council (NBC), acting through its programme advisory council, may entrust the carrying out of public duties on the basis of a programme license to a public broadcaster in the case of a programme, or to a media service provider in the case of a programme service. This is a very important change due to the introduction of a new "double system" of criteria. For the first time in the Polish legal system not only a public but also a commercial broadcaster is authorised to receive State money for its service.

The public radio and television broadcasting organisations are granted licenses on the basis of application (Article 12). The license shall be awarded for up to 4 years (Article 14) and be free (Article 15). A media service provider may be granted a license on the basis of winning a competition (Article 13); the winner is called a beneficiary of a programme license. The license means an authorisation to receive State money (Article 2 para. 6). The programme's license determines the particular public duties to be entrusted to the public broadcaster or the media service provider and the anticipated amount of money from the Public Duties Fund (Article 11.1), according to the conditions of the NBC's resolution in the particular case and the particular agreement between the NBC and the media service provider (Article 18). The carrying out of the entrusted duties is controlled by the NBC; if those requirements are not fulfilled a beneficiary is obliged to repay the public money with appropriate interest (Article 27). The financing of public duties seems to be a crucial difference between the current and future systems. The Law abolishes the receivers' licence fee system from 2010 and replaces it with a State funding (Public Duties Fund), approved by the Parliament at a level approximately equal to the current amount.

But in order to give State aid to a public broadcaster/media service provider, the Law will be subject to a notification's procedure to the EC. It requires proper regulation of the NBC, and in particular it must include a programme licensing scheme (Article 11.11); these documents have not currently been prepared.

There are almost no doubts among experts in the audiovisual media sector in Poland, including the official opinion of the Office of the Committee for European Integration (OCEI) of 19 May 2009, that a new State aid system of financing public tasks in media services which replaces the current financing model, requires an authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty.

According to the above-mentioned opinion the new Law does not violate Articles 86 para. 2 and 87 paras. 1 and 3 of the Treaty. Nevertheless the EC is authorised to decide if the Law is consistent with the common rules on competition. For this reason it is doubtful if the procedure will be finished before the end of the year, when a new law replaces the current receivers' licence fee system. Therefore, as many experts underline, from the beginning of 2010 Polish public broadcasters may be deprived of any revenues.

The Law liquidates regional branches of the Telewizja Polska (TVP) company. The regional public TV shall be formed by 16 companies founded to produce and transmit regional programmes and other media services, as is the case for the Polish public radio. The PSB´s companies may transmit a programme on the basis of a programme license as well as thematic programmes if a broadcasting license has been awarded for the transmission of such. ■

Katarzyna B. Masłowska
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RO – Protocol on Co-operation between CNA and ANPDC

On 14 May 2009, the *Consiliul Naţional al Audiovizualului* (national council for electronic media – CNA) and the *Autoritatea Naţională pentru Protecţia Drepturilor Copilului* (national authority for the protection of children's rights – ANPDC) signed a protocol on active co-operation to protect and promote children's rights through the exchange of relevant data and information and the effective handling of all infringements in this field (chapter 1 para. 1).

Improvements will also be made to the monitoring of how children's rights are protected in broadcasting. In particular, the public image of children and the protection of their privacy must be respected (chapter 1 para. 2). Protection from scenes of violence in audiovisual programmes should be improved (chapter 1 para. 3). Joint efforts should also be made to enhance provisions on the protection and promotion of children's rights (chapter 1 para. 4).

The CNA has undertaken to analyse at a public meeting any case referred by the ANPDC involving a possible breach of children's rights in broadcasting and to give its opinion in accordance with its powers (chapter 2 para. 1). Decisions taken by the CNA at such public meetings must be communicated to the ANPDC within 15 days of the case being referred (chapter 2 para. 2). The ANPDC, for its part, using the powers assigned to it under the Child Protection Act, will analyse every breach of children's rights notified to it by the CNA and inform the CNA of its opinion within 15 days (chapter 2 para. 4).

The ANPDC and CNA have each appointed one person to monitor compliance with the obligations set out in the protocol (chapter 2 para. 5); both parties also wish to consult each other on every future draft normative act relating to respect for children's rights in audiovisual programmes (chapter 2 para. 6).

The protocol entered into force on 14 May 2009 and is valid for one year initially. It will be automatically renewed annually unless one of the parties applies for it to be annulled no later than 30 days before the renewal date (chapter 3 paras. 1 and 2). ■

Mariana Stoican
Journalist, Bucharest

- **Protocol on co-operation between the CNA and ANPDC, available at: http://merlin.obs.coe.int/redirect.php?id=11751**
- **Act no. 272/2004 on the protection and promotion of children's rights, available at: http://merlin.obs.coe.int/redirect.php?id=11752**

RO

RS – Broadcasting Act Amended

The National Assembly of the Republic of Serbia adopted amendments to the 2002 Broadcasting Act at a session held on 29 May 2009. The amendments were published in the Official Gazette No. 41/2009-218 dated 2 June 2009 and came into force on 10 June 2009.

The adoption of the amendments followed the dispute regarding the election procedure for the new Serbian Broadcasting Authority (SBA) Council members that took place in February 2009, where the competent parliamentary Committee decided to repeat the procedure for electing new members and thus delayed the procedure.

The Broadcasting Act has now been changed so that all but one of the authorised nominators may nominate only two, and not at least two, candidates (the parliamentary Committee still nominates six, of whom three are to be elected). In case the authorised nominators cannot agree on a list with two names, the amendments contain a provision empowering the

parliamentary Committee for Culture and Information to decide on the two candidates itself. This replaced the provision stating that in case there are several candidate lists issued by NGOs and citizens' alliances, the one signed by most organisations, i.e., alliances that had previously conducted more actions, initiatives and publications in the area they primarily deal with, should be put to vote.

Most associations and NGOs involved with media freedoms have warned that these amendments allow more State influence in the election process of SBA Council members. ■

Miloš Živkovi
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Živković Samardžić Law offices

● **Amendments to the 2002 Broadcasting Act, published in the Official Gazette No. 41/2009-218 dated 2 June 2009**

SR

RU – Equal Rights Law Passed

On 12 May 2009 President Dmitry Medvedev of Russia signed into law the Federal Statute *О гарантиях равенства парламентских партий при освещении их деятельности государственными общедоступными телеканалами и радиоканалами* ("On Guarantees of Equality of Parliamentary Parties as to the Coverage of their Activities by the State-Run General TV and Radio Channels").

The Statute deals with the coverage of the political parties represented as factions in the State Duma (the national parliament) by State-run broadcasters other than special sports, culture, music and children's channels. The Statute shall not be in force during the period of election campaigning in the mass media (or the period of 28 days prior to the ballot day) when the Federal Statute "On basic guarantees of electoral rights and the right to participate in a referendum of the citizens of the Russian Federation" takes precedence (see IRIS 2002-8: 10).

The Statute deals with the activities of the party administrative bodies, factions and the deputies at all levels of State and municipal authorities. If party members are not explicitly stated as such (e.g., the prime minister or cabinet ministers) in a broadcast, the time allotted to them shall not be counted.

Information about the parliamentary parties shall be equal on a month-by-month basis (para. 1 Article 3) on national TV, national radio channels, regional TV, as well as on regional radio channels (para. 3 Article 5). The authority to oversee that the Statute is observed shall be the Central Election Commission (CEC). If equal time is not allotted the CEC makes a decision to compensate for the shortage of the cove-rage within the following 30 days. The CEC publishes an annual report in an official daily as to observance of the Statute. ■

Andrei Richter
Moscow Media Law and Policy Centre

● **Federal Statute *О гарантиях равенства парламентских партий при освещении их деятельности государственными общедоступными телеканалами и радиоканалами, №* 95-ФЗ (No.95-FZ "On Guarantees of Equality of Parliamentary Parties as to the Coverage of their Activities by the State-Run General TV and Radio Channels"), published in the *Российская газета* (Official daily) on 15 May 2009. Available at: http://merlin.obs.coe.int/redirect.php?id=11753**

RU

TR – Actors are Getting Together under the Umbrella of a Collecting Society

In recent years the number of movies and TV series produced in Turkey has shown a notable increase. Due to the deep public interest, most national TV channels prefer to broadcast series at prime time, rather than other kinds of programmes. Likewise, the cinema industry has shown a trend towards growth as a result of the remarkable success of Turkish directors as well as increasing audience attendance.

In spite of these developments, the rightsholders have been struggling to pursue their rights through the collecting societies. Currently there are eight collecting societies established by producers and joint authors of cinematographic works (namely directors, composers, scriptwriters and dialogue writers). As to actors, even though they form one of the most important groups in the field, there is no collecting society to represent them. However, a group of actors, under the leadership of famous cinema and TV stars, is trying to establish a collecting society named *Birleşik Oyuncular Meslek Grubu*, "The United Actors Collecting Society" (BIROY). The main purposes for the establishment of BIROY were the protection and pursuit of the rights of actors and to make the Turkish cinema sector reach international standards. This initiative arose from the efforts of other collecting societies in the cinematographic field and related non-governmental organisations. According to the BIROY representatives, all those institutions were aware that it would not be possible to represent the sector completely without a collecting society established by actors. Although, in line with international standards, the actors are stated to be "related rightsholders" in the Turkish Copyright Law (LIA), they experience serious difficulties with regard to claiming their rights, as a result of the general structure of the industry. As the LIA allows the full, unrestricted transfer of rights, once a cinematographic work has been created, the producers or broadcasters demand that they obtain all economic rights as well as the authority to exercise the moral rights to financially exploit the works. Such agreements to which the authors or rightsholders usually agree form a major obstacle that keeps them from pursuing their rights effectively. The founders of BIROY believe that all these problems shall be overcome by acting collectively under the umbrella of a

collecting society. Furthermore, it is expected that on the establishment of BIROY the *Türkiye Cumhuriyeti (T. C.) Kültür ve Turizm Bakanlığı* (Ministry of Culture) shall distribute the private copy levies which have been collected and deposited in a special account since 2001. In recent years the collecting societies were striving to get the collected amount in order to distribute it to their members but the Ministry was putting forward reasons for delaying distribution, and the lack of representation of all sides of the film industry was one of them. In Turkey it is possible to found more than one collecting society in the same area. Performers are one of the areas listed in Article 7 of the Regulation on Intellectual and Artistic Works Authors and Related Rightsholders. The actors are among the subgroup of performers. To found another collecting society in the same field, a minimum of one-third of the total number of members of the collecting society with the largest number of members set up for that field have to apply (LIA Article 42). Currently, the founders of BIROY are trying to comply with this rule. The collecting society shall begin to operate when the Ministry approves the application and grants permission. ■

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Preview of next month's issue:

IRIS *plus* 2009-8

The Satellite and Cable Directive

by Bernt Hugenholtz
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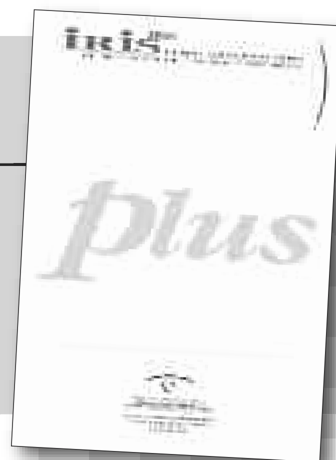

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AGENDA

Digital Content Distribution: Legal, Regulatory and Commercial Developments in New Media
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