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## INTERNATIONAL

### COUNCIL OF EUROPE

#### European Court of Human Rights: Case of Wojtas-Kaletka v. Poland

In one of its recent judgments the European Court of Human Rights found that the freedom of expression of a journalist employed by the Polish public television broadcaster (Telewizja Polska Spółka Akcyjna, TVP) had been unduly restricted. The journalist, Helena Wojtas-Kaletka, received a disciplinary sanction after criticising in public the direction the TVP had taken. This sanction, and its confirmation by the Polish courts, was found to constitute a violation of Article 10 of the European Convention for Human Rights.

In 1999 the national newspaper *Gazeta Wyborcza* published an article reporting that two classical music programmes had been taken off the air by TVP. The article quoted an opinion expressed by Ms Wojtas-Kaletka in her capacity as the President of the Polish Public Television Journalists' Union, in which

she criticised this decision of the director of TVP. In addition, Ms Wojtas-Kaletka signed an open letter in protest at the above measure. The letter was addressed to the Board of TVP and stated among other things that, while classical music is the heritage of the nation, its continuous dissemination was seriously jeopardised by reducing its time on the air and by instead polluting air time with violence and pseudo-musical kitsch. Ms Wojtas-Kaletka was reprimanded in writing by her employer for failing to observe the company's regulations, which required her to protect her employer's good name. Following an unsuccessful objection to the reprimand, she brought a claim against TVP before the district court, requesting the withdrawal of the reprimand. However, first the district court and subsequently the court of appeal dismissed her claim and found that Ms Wojtas-Kaletka had behaved in an unlawful manner and that this was a necessary and sufficient prerequisite for the disciplinary measure imposed on

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her. The courts found that she had acted to the detriment of her employer by breaching her obligation of loyalty and, consequently, the employer had been entitled to impose the reprimand.

Ms Wojtas-Kaletka complained in Strasbourg that the Polish judicial authorities had violated her freedom of expression by taking into account merely her obligations as an employee, while disregarding her right as a journalist to comment on matters of public interest. The Court considered that, where a State has decided to create a public broadcasting system, the domestic law and practice have to guarantee that the system provides a pluralistic audiovisual service. The Polish public television company had been entrusted with a special mission including, among other things, assisting the development of culture, with emphasis on the national intellectual and artistic achievements. In her comments and open letter Ms Wojtas-Kaletka had essentially referred to widely-shared concerns of public interest about the declining quality of music programmes on public television, while her statements had relied on a sufficient factual basis and, at the same time, amounted to value judgments which were not susceptible to proof. The Court further noted that Ms Wojtas-Kaletka had to enjoy freedom of expression

in all her capacities: as an employee of a public television company, as a journalist or as a trade union leader. The Court observed that the Polish courts took no note of her argument that she had been acting in the public interest. They limited their analysis to a finding that her comments amounted to acting to the employer's detriment. As a result, they did not examine whether or how the subject matter of Ms Wojtas-Kaletka's comments and the context in which they had been made could have affected the permissible scope of her freedom of expression. Such an approach is not compatible with Convention standards. The Court noted that the tone of the impugned statements was measured and that she did not make any personal accusations against named members of the management. Finally, the journalist's good faith had never been challenged either by her employer or by the domestic authorities involved in the proceedings. Being mindful of the importance of the right to freedom of expression on matters of general interest, Ms Wojtas-Kaletka's professional obligations and responsibilities as a journalist, and of the duties and responsibilities of employees towards their employers, as well as having weighed up the other different interests involved in the present case, the Court came to the conclusion that the interference with her right to freedom of expression was not "necessary in a democratic society". Accordingly, the Court held that there had been a violation of Article 10. ■

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● **Judgment by the European Court of Human Rights (Fourth Section), case of Wojtas-Kaletka v. Poland, Application no. 20436/02 of 16 July 2009, available at: <http://merlin.obs.coe.int/redirect.php?id=9237>**

**EN**

## **Committee of Ministers: Legal Instrument Calls for Comprehensive Film Policies Covering the Entire Value Chain**

On 23 September The Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2009)7 of the Committee of Ministers to member states on national film policies and the diversity of cultural expressions. This recommendation, which is a non-binding international legal instrument, encourages film policy bodies in the 47 member states of the Council of Europe to adapt their schemes to the technological and cultural changes and optimise the use of resources in order to increase circulation and improve access of film to audiences. The European film industry is fragile. Globalisation and digital technologies may be an opportunity or a threat, depending on whether public authorities are able to act swiftly and help to develop new business models for European film. Such business models should enable the film sector to realise its potential as a vector of diverse cultural expressions by stimulating creativity and by increasing its market reach.

The Recommendation asserts that national and regional policy makers and film bodies are responsible for putting in place policies that cover not only production but all aspects of the film value chain (development, production, distribution and marketing, screening, media literacy and training, access to audiences and film heritage) and that they encompass not only financial support but also regulation, research and data collection.

The Recommendation focuses on six areas of concern: developing a comprehensive approach to film policies; addressing film development and production; improving the regulatory frameworks for co-production and co-distribution; encouraging the distribution and circulation of European films; European cinema and young people; realising the full potential of digital technologies; and transparency and accountability.

The Recommendation is the result of a wide-reaching consultation with professionals involved at all stages of the film value chain. The ThinkTank on Film and Film Policy, national film agencies, the European Audiovisual Observatory, Eurimages and the Council of Europe Steering Committee for Culture (CDCULT) have provided essential expertise and support throughout the process. The Polish Film Institute has been the main political champion and financial supporter of the initiative. ■

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● **Recommendation CM/Rec(2009)7 of the Committee of Ministers to member states on national film policies and the diversity of cultural expressions (Adopted by the Committee of Ministers on 23 September 2009 at the 1066<sup>th</sup> meeting of the Ministers' Deputies), available at: <http://merlin.obs.coe.int/redirect.php?id=11894>**

**EN-FR**

## Committee of Ministers: Measures to Protect Children against Harmful Content

On 8 July 2009, the Committee of Ministers of the Council of Europe adopted Recommendation 5 (2009) on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment.

In the Recommendation, the Committee first states that the protection of freedom of expression in the information and communications environment by ensuring a coherent level of protection for minors against harmful content is a priority for the Council of Europe. Content like online pornography, the glorification of violence, discriminatory or racist expressions could have a negative effect on the well-being of children. The Committee emphasises that it is necessary to provide children with the knowledge and skills to participate actively in social and public life, to act responsibly and to respect the rights of others. The Committee also recognises the need to encourage trust and promote confidence on the Internet. Therefore, the Committee recommends to the Member States three categories of strategies to protect children against content and behaviour carrying a risk of harm. The categories are as follows: providing safe and secure spaces for children on the Internet, encouraging the development of a pan-European trustmark and labelling systems and promoting Internet skills and literacy for children, parents and educators.

The Committee acknowledges the difference between protection from content in the offline world

compared to the online world. The latter is the more difficult, especially considering that the restriction of access to content could be in conflict with the right to freedom of expression and information. The Committee states that parental responsibility and media education play an important role in protecting children. However, there are tools and methods that can assist parents and educators in protecting children from harmful content. Therefore, the Committee encourages Member States to develop safe and secure spaces on the Internet for children. An example of this would be the creation of safe and secure websites for children, by developing age-appropriate online portals.

The second strategy is the development of a pan-European trustmark and labelling systems. The labelling of content contributes to the development of safe and secure spaces for children on the Internet. The Committee drew up a list of criteria which a pan-European trustmark should meet. For example, the trustmark should be compatible with human rights principles and standards, labelling systems should be provided and used on a voluntary basis and any form of censorship of content should be inadmissible.

The Committee acknowledges that, even by creating secure spaces on the Internet and with the labelling of online content, it is not possible to completely exclude the possibility of children being exposed to harmful content. Therefore, the Committee recommends the promotion of media literacy for children, parents and educators, so that they can be prepared for possible encounters with harmful content. Member States are encouraged to raise awareness about the benefits and risks for children freely using the Internet. Children, parents and educators should also be informed about safe and secure spaces on the Internet and trustworthy labels for online content. ■

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● **Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, 8 July 2009, available at:**  
<http://merlin.obs.coe.int/redirect.php?id=11861>

**EN-FR**

## EUROPEAN UNION

### European Commission: Commission Investigates State Aid for France Télévisions

The European Commission has opened an investigation into the long term State aid mechanisms proposed by the French authorities for the funding of France Télévisions, the largest French broadcasting group. France initially gave notice to the Commission of its intention to pay a subsidy for that year in January 2009, while in May the French authorities sig-

nalled their plan to introduce the multi-annual funding mechanism. The mechanism consists of funding from the public service broadcasting contribution and an annual subsidy, and forms part of the far-reaching reforms of the public service broadcasting sector announced by France in 2008, with a view to consolidating the specific nature of PSB and improving its quality. The reform is set to eliminate advertising on public channels and to introduce two taxes, one on advertisements and the other on electronic communications, as well as a new set of specifica-

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tions unique to France Télévisions emphasising the group's general-interest mission.

The Commission approved the immediate payment of a State subsidy amounting to EUR 450 million, which had already been projected in the French Budget Act of December 2008, as compliant with State aid rules (case no. N 34a/2009). By contrast,

● **Decision of the European Commission, State aid C 27/2009 (ex N 34/A/2009 & N 34/B/2009) – France – Subvention budgétaire pour France Télévisions, available at:**

<http://merlin.obs.coe.int/redirect.php?id=11897>

FR

● **“State aid: Commission approves immediate payment of subsidy to France Télévisions and opens in-depth investigation into long-term funding mechanism”, Brussels, 1 September 2009, available at:**

<http://merlin.obs.coe.int/redirect.php?id=11864>

DE-EN-FR

## European Commission: State Aid and Italian Cinema

On 22 July 2009, the European Commission approved under State aid rules a EUR 82 million Italian tax incentive scheme for film investment and distribution. In the same decision, the Commission also decided to open a formal investigation into a proposal for tax incentives for digital projection in Italian cinemas. The tax incentives aim to support and promote the production and distribution of Italian cultural films.

The approved tax incentives complement the Italian film production tax incentives already approved by the Commission in December 2008 (see IRIS 2008-9: 15, IRIS 2009-3: 14 and IRIS 2009-6: 14). For years the Italian film industry has had a difficult time because of the strong presence of US commercial films. As a result of this, film producers in Italy largely depend on major production companies and television networks, which usually demand a more commercial type of films. This kind of distortion in the Italian film market threatens the cultural identity of Italian cinema. The incentives aim to attract investments from within and outside the film sector. This could lead to more independence for film producers, which would allow them to focus on the quality and cultural nature of the films.

The Commission determined that the incentives for production are compatible with the criteria set out in the 2001 Cinema Communication. The Communication provides specific rules for assessing aid for film and audiovisual production under Article

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● **European Commission, “Film investment & distribution tax incentives: State aid approval Digital cinema tax credit: Opening of formal investigation”, Brussels, July 2009, available at:**

<http://merlin.obs.coe.int/redirect.php?id=11867>

EN

however, the Commission decided to open a formal investigation into several aspects of the long-term funding scheme. The Commission is concerned as to the use to which the taxes introduced by the reforms will be put, as well as about the possibility of over-compensation for public service costs. The investigation will give France the opportunity to comment on the projected changes, while stakeholders will also be offered the chance to put forward their views. The final objective is the attainment of increased legal certainty.

The decision was published in the Official Journal of the European Communities and on the website of DG Competition, under case no. C 27/2009 (ex N 34b/2009). ■

87(3)(d) of the EC Treaty. Examples of these criteria are the demand that the aid must be directed towards a cultural product and that the maximum level of aid be 50%.

The incentives for the distribution of films also comply with the EC Treaty State aid rules. The Commission agrees with the Italian authorities that State aid is necessary to support the distribution of Italian cultural films. According to the Italian authorities, the incentives will encourage distributors to release Italian cultural films, rather than more commercial alternatives. In conclusion, the Commission finds the incentives necessary and proportionate to the objective pursued and thus compatible with the EC Treaty.

The incentive concerning the tax credit for installing digital projection equipment in Italian cinemas has not yet been approved. The objective of the measure is to extend the use of digital projection to increase the circulation of cultural films, both Italian and European. The Commission fears that the incentive will mostly benefit the large multiplexes which need less support than the small art house cinemas. The Commission is concerned that small cinemas probably do not have sufficient tax liabilities to profit from the 30% tax credit. And even if they do, the incentive can only provide 30% of the financing for the digital projection equipment. The Commission wonders whether small cinemas can finance the remaining 70%, especially if they are already struggling financially. The large multiplexes, which can possibly afford to finance the remaining 70%, will probably not show a lot of Italian cultural films, especially not during prime time.

Because the Commission is unsure whether the incentive is compatible with the EC Treaty State aid rules, it has opened a formal investigation into this question. ■



## NATIONAL

### AT – Even Non-Commercial Advertising is Advertising

The *Oberste Gerichtshof* (Supreme Court - OGH) has ruled that non-commercial advertising broadcast in return for payment is subject to the limits on advertising time laid down in broadcasting legislation.

The plaintiff in this case was a private broadcasting company, while the defendant was *Österreichische Rundfunk* (Austrian public service broadcaster - ORF). The parties disputed whether ORF had exceeded the limit of six minutes of advertising on a particular day on a regional radio station. The courts ruled that this was the case if an appeal for donations to support the training of priests in the Third World, which had been broadcast in return for payment, counted as “radio advertising” and was therefore subject to the advertising time limit.

The OGH explained that the appeal did not represent commercial advertising in the sense of Art. 13 (1) of the *ORF-Gesetz* (ORF Act - ORF-G) because it did not aim “to promote sales of goods or the provision of services [...] in return for payment.” However, the ORF-G did count non-commercial advertising as advertising in the broader sense of the term. The OGH stressed that the legal principles and consequences enshrined in the ORF-G applied to ORF’s radio as well as its television advertising. This was

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● Ruling of the OGH (case no. 4 Ob 223/08k), 24 February 2009, wbl 2009, 365/162 (July issue), available at:  
<http://merlin.obs.coe.int/redirect.php?id=11856>

DE

### AT – OGH Rejects Collecting Society’s Claim Against Internet Provider for Customer Data

In a ruling issued on 14 July 2009 (case no. 40b41/09x), the *Oberste Gerichtshof* (Supreme Court - OGH) explained that an Internet access provider cannot be forced to disclose the personal data of customers who download protected works using file-sharing systems.

In the case concerned, the collecting society LSG GmbH had demanded that access provider Tele2 should disclose the personal data linked to IP addresses of customers who had downloaded files illegally. Tele2 had refused to comply. LSG had based its claim on Art. 87b (3) of the Copyright Act, which obliges providers, as intermediaries, to disclose this information in accordance with Art. 81 (1a) of the Act.

The OGH ruled in Tele2’s favour and quashed the decisions of the courts of lower instance. During the

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● Ruling of the OGH (case no. 40b41/09x) of 14 July 2009, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11857>

DE

the case even though the rules on television advertising had been issued in accordance with the Television Without Frontiers Directive (89/552/EEC – TWF Directive) and the European Convention on Transfrontier Television, and the legislative body could have adopted different rules for radio advertising. The opinion that non-commercial advertising was subject to the advertising time limit could not be challenged under European law, since Art. 3 of the TWF Directive permitted Member States to adopt stricter rules and therefore to include non-commercial advertising. This was necessary in order to comply with the provisions of the European Convention on Transfrontier Television. The Convention’s definition of advertising in Art. 2 (f) included any public announcement in return for payment or for self-promotional purposes intended “to advance a cause or idea, or to bring about some other effect desired by the advertiser or the broadcaster itself”. Even charity appeals were intended to advance a “cause”. The advertising restrictions enshrined in the Convention were based on this broad definition and were therefore stricter than those contained in Community law. The concept of advertising in the ORF-G must therefore include non-commercial advertising.

Finally, the Supreme Court ruled that the appeal did not constitute a “contribution in the general interest”, which would have been exempt from the advertising time limit, because it had been broadcast in return for payment. The spot should therefore have counted towards the daily limit. ■

proceedings, the OGH had submitted to the European Court of Justice (ECJ) questions on the interpretation of Information Directive 2001/29/EC (C-557/07), including its definition of the term “intermediary”. The OGH explained its decision with reference to the *Telekommunikationsgesetz* (Telecommunications Act - TKG). LSG had requested information about master data in the sense of Art. 92 (3) (3) of the 2003 TKG. However, this information could only be provided if Tele2 processed the relevant traffic data (internally). This was nevertheless contradicted by Art. 99 (1) of the 2003 TKG, under which “traffic data relating to participants and users [...] must be] erased or made anonymous as soon as they are no longer required for the transmission of information”. This rule was intended to prevent unlawful use of such data. Traffic data that was lawfully stored for a legitimate purpose could only be used for that specific purpose.

However, since Tele2 could not be forced to act illegally, the complaint had to be dismissed. Only the legislature could establish an obligation to disclose information. ■

## **BA – Public Broadcasting System – Need for a Corporation**

As reported already, the BiH broadcasting sector comprises four laws: the Law on the Public Broadcasting System of BiH, the Law on the Public Broadcasting Service of BiH, the Law on the Public Broadcasting Service of the Republika Srpska and the Law on the Public Broadcasting Service of the Federation of BiH (see: IRIS 2008-9: 4).

In June 2009 the new members of the RTV FBiH Board of Governors were appointed by the Federal Parliament. This was formally the only precondition left for the creation of the Corporation of PBS.

The Corporation as a fourth legal subject (besides the three public broadcasters of BiH) within the Public Broadcasting System should mainly provide technical and logistical support to all three public broadcasters. Up to now, there was a lack of co-operation between the public broadcasters. The consequences were high operational costs and a lack of competitiveness in relation to commercial networks that almost dominate the broadcasting sector.

The absence of a Corporation affected in particular BHRT, a countrywide public broadcaster, which in this legal vacuum was acting as a “para-corporation” with a multitude of obligations: e.g., pro-

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gramming and production, maintenance of equipment and related tasks. It was a burden on BHRT that hindered a more intensive development of this broadcaster, which was projected in particular to play an important role for social cohesion in a fragile and ethnically divided society.

The next step is the adoption of the statute of the Corporation necessary to register this fourth legal subject. In this context there is allegedly a need for harmonisation of the above-mentioned laws; e.g., concerning different programme content requirements — for instance Article 40 of the Law on RTV FBiH explicitly bans the denial of the Srebrenica genocide in the programmes of the RTV FBiH, while such bans do not exist in the laws of the other public broadcasters.

The members of the newly-appointed Governing Board of the PBS (composed of the members of the Governing Boards of all three public broadcasters), charged with adopting a statute, differ strikingly in their opinions as to the role and mandate of the Corporation and the scheme of distribution of revenues, which should, according to the Law on PBS, follow that for the subscription fees (50 % to BHRT, and 25 % each to the other public broadcasters). Representatives of the RTV FBiH are in particular opposed to it and want to change the law, since this public broadcaster is the most watched. ■

## **BG – Competition Commission Decides on MTG and Diema Vision EAD**

The Bulgarian Commission for the Protection of Competition (CPC) received a request from MTG Broadcasting AB concerning the clearance of the intended acquisition of Diema Vision EAD by MTG.

In its considerations on the request the CPC included its decision No. 879 dated 9 October 2008 permitting the acquisition of 100 % of the shares of Nova Television – First Private Channel EAD, 100 % of the shares of Nova Television Plus EOOD and 80 % of the shares of EVA Agency OOD by MTG Broadcasting EAD, Sweden. As part of internal restructuring measures, MTG has transferred its shareholding in Nova Television Plus and EVA Agency to Nova Television – First Private Channel.

MTG’s presence on the Bulgarian market is as follows: Nova Television – First Private Channel EAD has been granted licences by the Council for Electronic Media and the Communications Regulation Commission to provide television programmes through terrestrial analogue network with national coverage; Nova Television Plus EOOD is currently not providing any services as the term of validity of its licence has expired; EVA Agency OOD publishes a monthly women’s magazine called EVA – Women’s

Magazine. Through its affiliated company Viasat World Limited, UK, MTG broadcasts in Bulgaria the following pay-per-view channels: TV100, Viasat Explorer and Viasat History. MTG jointly with Apace Media Plc exercises control over the programmes of Diema Vision EAD: Diema, Diema 2, Diema Family and the musical channel MM.

According to the data presented to the CPC the turnover of the companies participating in the concentration does not meet the requirements and criteria set out in Article 1 of Council Regulation No. 139/2004 (Merger Regulation). In view of this, the contemplated transaction is subject to a notification to the Bulgarian competition authority in accordance with the provisions of the Protection of Competition Act (published in State Gazette, issue 102 dated 28 November 2008).

By virtue of decision No. 769 dated 23 July 2009, the CPC permitted the concentration through the acquisition of indirect sole control over Diema Vision EAD by MTG Broadcasting AB, Sweden, through its subsidiary Nova Television – First Private Channel EAD. MTG Broadcasting exercises control over Diema Vision through the Balkan Media Group Limited. The CPC concluded that the concentration will not significantly affect the market as the positions of MTG will not be changed after the

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acquisition of sole control over Diema Vision. In 2008 the market share of MTG did not exceed 25 % and would not be increased as a result of the deal.

Another argument for the clearance of CPC is that no negative opinions have been expressed by any of the interested parties. ■

## CH – Qualification as a “Swiss Film” for the Purpose of the Cinema Act

The *Tribunal administratif fédéral* (Federal Administrative Tribunal - TAF) has defined the notion of what constitutes a “Swiss film” for the purposes of the *Loi fédérale sur la culture et la production cinématographiques* (Cinema Law - LCin). Recognition of an audiovisual work as a “Swiss film” means that it has access to the Federal aid provided for in the Cinema Act. According to Article 2 (2) of the Act, the term “Swiss film” is deemed to mean a film (a) that has been produced in the main by an author who has Swiss nationality or is domiciled in Switzerland, (b) that has been produced by a natural person domiciled in Switzerland or a company that has its registered office in Switzerland and the majority of both its own and its investors’ capital and management are in the hands of persons domiciled in Switzerland, and (c) that has been made as far as possible by actors and technicians of Swiss nationality or domiciled in Switzerland and by technical industries established in Switzerland. These conditions are cumulative.

In determining whether the third of these conditions is met, the *Office Fédéral de la Culture* (Ministry of Culture - OFC) used to apply by analogy Article 8 (2) of the *Ordonnance sur l’Encouragement du Cinéma* (order on encouragement for the cinema - OECin), in the version in force since 1 July 2006. According to this provision, a film was recognised as Swiss if, in the absence of an international co-production agreement, the Swiss part amounted to at least 50%. The OFC therefore considered the condition contained in Article 2 (2)(c) of the LCin as being

met only if the majority of the artistic and technical participants were of Swiss nationality or domiciled in Switzerland.

In its decision published recently, the TAF nevertheless considered that Article 8 (2) of the OECin was not applicable where a film, produced exclusively by Swiss producers, involved the participation of foreign actors or technicians. According to the TAF, the very open, vague wording of Article 2 (2)(c) of the LCin did not make it possible to lay down a strict quota for a minimum of 50% participation, nor in consequence to apply by analogy Article 8 (2) of the OECin to films that were not co-produced with foreign interests. Indeed Article 2 (2)(c) of the LCin required an appreciation, taking into consideration the specific features of each individual case, of whether the film involved the sufficient participation of elements connected with Switzerland. The term “as far as possible” should consequently be understood as a criterion of what may reasonably be demanded, as the authority has considerable latitude in its appreciation of the issue. The TAF therefore judged the OFC’s practice as being contrary to the law.

It should be noted that the OECin was amended on 28 October 2008. The new Article 8a of the OECin provides that, for Swiss films, the number of artistic and technical collaborators of Swiss nationality or domiciled in Switzerland and the proportion of the Swiss technical industries referred to in Article 2 (2)(c) of the LCin should reach a minimum of 50%. The OFC may nevertheless authorise exceptions, particularly in the case of documentary films which, because of their theme, need to be produced mainly in another country, or when it has not been possible to find a qualified person or industry in Switzerland.

- The authors referred to in Article 2(2)(a) of the LCin and the producers referred to in Article 2(2)(b) of the LCin are not taken into account in determining Swiss participation. ■

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● Decision of the Federal Administrative Tribunal no. C-5736/2007 of 8 August 2008, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11796>

DE

## CH – Agreement between SSR and Swiss Audiovisual Industry

The Swiss radio and television broadcasting company (*Société Suisse de Radiodiffusion et Télévision - SSR*) and the main Swiss associations in the audiovisual industry have concluded a new collaboration agreement, that was signed in Locarno on 7 August 2009. The agreement is based on Article 17 of the concession granted to SSR, which requires SSR to regulate by contract the main features of its collab-

oration with the independent audiovisual industry. Under Article 2 of the concession, SSR is also required, in providing its services, to guarantee that an appropriate part of the market is granted to the independent audiovisual industry.

The collaboration that this new agreement institutes covers firstly the technical services of Swiss professionals in the cinema and audiovisual fields, and the production of television broadcasts and programmes. The partners have agreed to support the Swiss audiovisual industry by the concerted out-



sourcing of certain technical services and “turnkey” commissions. The key broadcasts in SSR’s scheduling (daily and weekly news and sports broadcasts) will nevertheless continue to be produced in SSR’s production centres. Broadcasts that are technically complex will also be produced within SSR or managed by its production centres.

The agreement also aims to organise in a transparent fashion SSR’s collaboration with the independent audiovisual industry. Ideally, the agreement will allow more effective coordination of the market for demand and the offer of technical services. A further aim of the agreement is to avoid competition as a result of duplicated competencies, particularly with regard to the production of advertising and industrial films, and the rental of technical equipment.

SSR intends to encourage transparency in the attribution of mandates and to promote greater foreseeability in the scheduling of its production activi-

ties. It therefore undertakes to manage in a transparent fashion the procedures for calls for tenders, assessment of proposals, and the awarding of orders for services. SSR’s requirements are mainly for the hire of cameras, studio equipment and lighting, static and mobile recording studios, editing, special effects, computer graphics, subtitling, film laboratories, and staging. For programmes, SSR will be able to entrust to independent producers the production of television broadcasts, particularly entertainment and commissioned films, as well as subjects included in regular broadcasts (information, sport, etc).

In accordance with this agreement, which came into force on 1 August 2009 and will remain valid until 31 December 2011, the partners confirm their intention to improve the quality and diversity of the independent audiovisual industry and to encourage competition in the production of television broadcasts. Thus the agreement supplements the Audiovisual Pact, renewed in 2008 for three years, which supports the production of fiction, documentary and animated films for cinema and television (see IRIS 2008-8: 7). ■

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● Collaboration agreement between *Société Suisse de Radiodiffusion et Télévision* and the associations representing the Swiss audiovisual industry

DE

## DE – Springer AG’s Appeal on ProSiebenSAT.1 Takeover Rejected

In a decision of 7 July 2009, the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) rejected the appeal of Axel Springer AG concerning its takeover of the broadcasting group ProSiebenSAT.1 (see IRIS 2009-2: 10).

The *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office - BLM) had refused to approve Axel Springer AG’s plan to acquire all the shares in ProSiebenSAT.1 and to submit a public takeover bid for the free-floating preference shares without voting rights attached. It explained that the planned change of ownership might give Axel

Springer AG a dominant influence over the expression of opinion.

In its appeal, Axel Springer AG asked for this decision to be declared unlawful. The BayVGH accepted that there was an interest to seek a declaratory judgement but rejected the appeal against an adopted administrative act as unfounded, since the BLM’s decision could not be questioned. However, it dismissed the appeal on the grounds that it lacked legitimate interest. It could not be upheld either from the perspective of possible repetition or the prejudicing of a renewed takeover plan by the appellant, nor in preparation for an administrative liability procedure, to vindicate the appellant or in view of a serious breach of fundamental rights.

The BayVGH authorised an appeal to the *Bundesverwaltungsgericht* (Federal Administrative Court) to clarify the requirements for an appeal against an adopted administrative act. ■

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● Decision of the BayVGH (case no. 7 BV 08.254) of 7 July 2009, available at: <http://merlin.obs.coe.int/redirect.php?id=11858>

DE

## DE – BayVGH Rejects Competition Rules Injunction Request

On 11 August 2009, the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) (case no. 7 NE 09.1378) rejected an application by the game show broadcaster 9Live for an injunction against the competition rules adopted by the *Landesmedienanstalten* (state media authorities - LMA).

The broadcaster 9Live, which broadcasts phone-in

quiz programmes, had asked the BayVGH to conduct a judicial review of the LMA’s competition rules. In addition, 9Live had submitted an urgent application for all, or in the alternative, some of the rules to be withdrawn pending the outcome of the judicial review. Based on Art. 8a of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), the rules contain provisions on youth protection, a ban on manipulation and broadcasters’ information obligations. Infringements can be punished with

finances of up to EUR 500,000. 9Live based its application on the fact that participant numbers had fallen sharply since the competition rules had been introduced. The broadcaster had lost millions and was expecting to have to pay substantial sums in fines. The rules therefore jeopardised the whole business model of 9Live.

Since the BayVGH thought the chances of the judicial review application succeeding were unclear due to difficult legal questions which had not yet been resolved at appeal court level, the decision on the granting of the temporary injunction was based on the so-called "*Differenzhypothese*", under which only the weighing up of each side's interests is decisive. The legislature had asked the LMA to adopt the rules in order to clarify legal provisions on competitions. This official request to the LMA would remain unfulfilled indefinitely if the disputed rules were suspended under a temporary injunction. The fact that individual companies suffered financial harm

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● Decision of the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) of 11 August 2009 (case no. 7 NE 09.1378), available at: <http://merlin.obs.coe.int/redirect.php?id=11859>

DE

## FR – Qualification of Video Games as Complex Works

On 25 June 2009 the Court of Cassation delivered an important judgment on the much debated issue, in terms of both doctrine and case law, of the legal qualification of video games. A video game incorporates both software and audiovisual elements, alongside other elements (music, text, etc) that are covered by copyright under common law. This raises the question of its qualification, as a unit or in terms of distribution, as each of these elements has been subject to a different scheme. The only legal definition under French law is given in relation to tax, and opts for qualification as software (Article 220 terdies of the General Tax Code). Case law has often qualified video games as software works, or even multimedia works, on the basis of copyright under common law.

In the present case, SESAM, which exercises and manages the rights to the mechanical reproduction of musical works in the SACEM/SDRM catalogue for multimedia works, declared among the liabilities of a

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● Court of cassation (1<sup>st</sup> chamber, civil section), 25 June 2009, *Mr J. X. v. SESAM*

FR

## FR – Conditions for Copyright Protection of a 'Bible' for a Television Broadcast

Since the issue of the protection of projects for television broadcasts is highly casuist, each case

could not justify the withdrawal of legal rules. Such a move would run counter to the purpose of the competition rules. Otherwise, the legislature would be prevented in many cases from immediately taking certain situations into account simply because they had financial implications.

The BayVGH thought that, in view of the importance of the protected interests and the large number of potentially concerned competition participants, in cases of doubt the specific protection of participants and minors, which the competition rules were meant to guarantee, should take precedence over the broadcaster's economic interest in having the rules withdrawn, unless the continued application of the rules until the main procedure was decided was highly likely to have particularly serious and irreversible consequences for the broadcasting operations of the company concerned. In this case, there were not sufficient grounds to suggest that the potentially unlawful competition rules would have an impending economic disadvantage for the broadcaster.

The competition rules remain in force pending the outcome of the main procedure. ■

company's court-ordered liquidation debts resulting from the unauthorised reproduction of works in its catalogue in the video games produced, edited and marketed by the company in question. If video games were to be considered as software works, it would be possible to apply a lump-sum remuneration, but if not it would be possible to consider a proportional remuneration based on the right to mechanical reproduction managed by SESAM. The court of appeal held that the games were complex works and their qualification could not be reduced to that of software, sale of which was subject to a lump-sum payment. The Court of Cassation rejected the appeal against the decision, but came up with a new solution by stating that video games were complex works which could not be reduced merely to their software dimension, however important that might be, such that each of their component parts was subject to the scheme applicable to it by virtue of its nature – which means that each work incorporated in a game is covered by its own scheme. This judgment therefore breaks down any qualification of the video game as a unit. Time will tell if this solution will be easy to implement. ■

where it is raised is worthy of interest. Recently, the regional court in Paris was required to pronounce on the originality of the 'bible' for a television broadcast entitled *Le Supermarché* (the supermarket), devised by a couple of star presenters, which had as

its theme inviting a celebrity to fill a supermarket trolley with items reflecting his or her character. The rights for using the programme were sold to a company which refused to pay in respect of the production and broadcast of a further twelve broadcasts, on the grounds that the presenter had not been able to present the new broadcasts. Thereupon the couple of presenters had the company brought to court, accusing it of infringing their rights as the authors of the disputed 'bible' for the television broadcast, which they qualified as an original work. The court recalled the principle that an idea or con-

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● Regional court of Paris (3<sup>rd</sup> chamber, 1<sup>st</sup> section), 19 May 2009, *S. Davant and P. Sled v. Les Baladeurs d'Images Särl et al.*

FR

## FR – New Code for the Cinema and Animated Images

Article 71 of the Act of 5 March 2009 on audiovisual communication and new public service television has allowed the government to adopt a decree modernising legislation for the cinema and other arts and industries for animated images and to gather together in the form of a Code all the legislative texts, whether part of a code or not, concerning these fields. A decree of 24 July 2009 promulgated the legislative part of a new Cinema Code.

The aim of the decree is to simplify and modernise cinema law, which has been based on the dozen articles of the "Code of the Cinematographic Industry" and on a few scattered texts adopted over the years since 1956. This earlier code, which in the main gathered together earlier texts, has never been brought up to date as a whole and many of its provisions have become obsolete. One of the main points of the present overhaul was the intention to consolidate and modernise the organisation and functioning of the national cinematographic centre (*Centre National de la Cinématographie - CNC*), which is the means for implementing State policy on the cinema and audiovisual creation, in the form

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● Decree No. 2009-901 of 24 July 2009 on the legislative part of the Code on the Cinema and the Animated Image, gazetted (published in the *Journal Officiel*) on 25 July 2009

FR

## GB – BSkyB Broadcasts "Misleading" Advertisements

British Sky Broadcasting Ltd t/a Sky broadcast two advertisements advertising its High Definition service.

cept cannot be protected by copyright and must be allowed free rein. It therefore held that, for a 'bible' for a television broadcast to be considered as an intellectual work that may be protected, it must constitute a work that provides for titles and credits, a décor, a detailed presentation of the characters, scene, and provides for a progression to conclusion, and it must be justified by the mark of the authors' personalities on the work – the feature that makes it original. In the case at issue, as the 'bible' for the broadcast had not been communicated and the parties referred only to a "concept" in their documents and in the contract between them, the presenters could not be qualified as its authors and their application to the court was therefore rejected. ■

of the "national centre for cinematography and the animated image" (*Centre National de la Cinématographie et de l'Image Animée*) (but retains its former acronym of CNC). This title reflects the extension of its field of action beyond the cinema alone, mainly towards audiovisual production, video and multimedia, including video games. Apart from the determination of the missions, the organisation, and the means of action of the CNC, the first section of the Code sets out in detail the method for depositing title and registering works in the cinema and audiovisual registers.

The second section, devoted to professions and activities, lists more specifically the conditions for obtaining authorisation to show a cinematographic work, and the organisation of the cinematographic exploitation sector and its relations with distributors. Four chapters set out the provisions introduced by Article 17 of the HADOPI Act of 12 June 2009 on media chronology (see IRIS 2009-7: 13). The third section of the Code covers financing and fiscal matters concerning the cinema and the other arts and industries of the animated image, with general provisions on the awarding of financial aid granted by the CNC. The fourth section is devoted to the "checks and sanctions", both administrative and penal, that may be applied in these sectors of activity. Thus the adoption of this new Code simplifies and updates the law with regard to professionals in the cinema industry. ■

To persuade people to sign up for it, the ads promoted as part of the service sports coverage generally and, in particular, the British and Irish Lions' summer tour of South Africa and the Ashes series of cricket matches between England and Australia, for which BSkyB had bought the rights.

A number of viewers (seven) objected. Their point was that the ads were “misleading” because, having registered for the HD service, they were then informed that there was a twelve-week waiting period before the HD installation could be completed. By then, they would have missed most coverage of the two sporting events.

The specific section of the BCAP Television Advertising Code engaged by this dispute is Section 5. The rules “in this Section are...designed (amongst other things) to ensure that advertising does not misrepresent the nature, benefits and limitations of advertised offers.”

The specific sub-rules said to apply to the ads were 5.1.1 (“No advertisement may directly or by

implication mislead about any material fact or characteristic of a product or service.”); 5.1.3 (“Advertising must not [...] provide in an [...] untimely manner material information if that [...] presentation is likely to affect consumers’ decisions about whether and how to buy the advertised product [...]”); and 5.2.3 (“All important limitations and qualifications must be made clear. Note: Important limitations and qualifications include those on availability”).

The TV ads stated “See every moment of this summer’s Ashes in High Definition ...” and “See every moment of the Lions tour in High Definition ...”. However, because of the time it took from pre-registration for the service till installation, in fact this “was unlikely to be the case for all existing Sky customers who signed up for the service”.

The adjudication concluded that “the ads were likely to mislead” and ordered that the ads “must not appear again in their current form.” ■

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● **ASA Adjudication, 2 September 2009, available at:**  
<http://merlin.obs.coe.int/redirect.php?id=11868>

● **BCAP TV Advertising Code, available at:**  
<http://merlin.obs.coe.int/redirect.php?id=11869>

EN

## HR – Law Amending the Electronic Media Law

A new law amending the Electronic Media Law came into force in Croatia in July 2009.

The Electronic Media Law regulates inter alia the granting of concessions for radio and TV broadcasting activities. Additionally, the granting of concessions in general is regulated by the Law on Concessions.

Several provisions of the Law on Concessions apply to radio and TV broadcasting activities, namely the provisions of Chapters I and II of the law regulating general issues and preparations necessary for the granting of a concession (an evaluation of the concession, a feasibility study, the

preparation of public tender documentation, etc.), and of Chapter VIII prescribing a concessions policy which includes concession granting plans and keeping a Register of Concessions.

Due to the alignment of the Law on Concessions with the Community acquis regarding Chapter V, Public Procurement, in October 2008, a certain discrepancy in regulation had emerged.

It was therefore necessary to align the Electronic Media Law with the relevant provisions of the Law on Concessions as well as with the new Electronic Communications Law which came into force at the end of 2008.

The present Law Amending the Electronic Media Law thus regulates the fundamental issue of the alignment of the wording of the Electronic Media Law with the terms used in the Law on Concessions and in the Electronic Communications Law. ■

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● **Law Amending the Electronic Media Law, Official Gazette, issue No. 65/09, available at:**  
<http://merlin.obs.coe.int/redirect.php?id=9658>

HR

## HU – Regulatory Authority Considers Telephone Games as Teleshopping

On 2 September 2009 *Országos Rádió és Televízió Testület* (the National Radio and Television Commission, ORTT) decided to qualify TV programmes consisting of games (for prizes) where viewers can take part via telephone as teleshopping.

The basis of the decision was judgment C-195/06 of the European Court of Justice. In this judgment (see IRIS 2008-1: 4) the Court inter alia expressed that “a broadcast or part of a broadcast during which a TV broadcaster offers viewers the opportu-

nity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment, is covered by the definition [...] of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms a part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked.”

Following the examination of a number of such



games broadcast in the programmes of Hungarian broadcasters the ORTT concluded that the Court's interpretation is also valid in relation to them. As a consequence these games are also to be qualified as teleshopping on the basis of Act I of 1996 on Radio and Television Broadcasting.

This qualification leads to a number of consequences for broadcasters in the future:

- they have to mark such programmes clearly as teleshopping;
- they have to apply to such programmes the time-

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● Press release of the ORTT on its decision 1712/2009. (IX. 2.), available at:  
<http://merlin.obs.coe.int/redirect.php?id=11881>

HU

## IT – IP Address Is Not Proof in Itself of the Author of Illegal File Sharing

On 3 April 2009, the Judge for Preliminary Investigation of the Court of Rome upheld the motion by the public prosecutor to drop charges of illegal file sharing on a peer-to-peer website against the owner of the IP address used to commit the alleged crime.

Both the public prosecutor and the Court clarified in their statements of reasons that there is no proof that the person who has entered into a con-

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● *Procura della Repubblica presso il Tribunale di Roma, Richiesta di archiviazione, 3-12-2008 (Public Prosecutor for the Court of Rome, Motion for Dismissal of Charges, 3 December 2008)*

● *Giudice per le Indagini Preliminari presso il Tribunale di Roma, Decreto di Archiviazione, 3-4-2009 (Judge for preliminary investigations for the Court of Rome, Order for dismissal), 3 April 2009*

IT

## LT – Must-Carry Rules Revised

In September 2009 the Ministry of Culture prepared a Draft Edition of the Law on Provision of Information to the Public (Draft). Its main aim is the implementation of the AVMSD into national law. Besides this, there is a new provision essentially changing the currently valid must-carry rules. It envisages that network operators shall transmit all uncoded terrestrial public TV programmes.

The present law obliges all network operators to transmit one terrestrial public TV programme and all uncoded Lithuanian national scope terrestrial TV programmes. According to this a broadcaster is considered as having a national scope if its programme broadcast by a terrestrial TV network is received within a territory inhabited by more than 60 % of the population. Consequently, this obliges all operators in Lithuania to transmit all national scope TV

limits defined for teleshopping and teleshopping windows;

- the content of these games has to comply with the content rules defined for teleshopping;
- they have to treat incomes from such games as advertising incomes and therefore they have to dedicate 6 % of those to the production of programmes originally made in the Hungarian language.

As emphasised in the decision, broadcasters have to ensure the compliance of their telephone games with the rules of teleshopping by 30 September 2009 at the latest. ■

tract with an ISP for the provision of access to the Internet is the one who engaged in illegal file sharing using that IP address. As the prosecutor duly noted in his motion, indeed it cannot be ruled out that the acts of copyright infringement were perpetrated by another user, possibly one accessing the Internet connection concerned on an occasional basis.

The ruling of the Court of Rome is of key significance at the national and possibly at the EU level in the light of the recent controversy over the so-called Peppermint case (see IRIS 2008-7: 17), where a record label used proprietary software to log the IP addresses among which its copyrighted works were shared over P2P networks and subsequently requested that the owners of those addresses pay a given amount of money or face criminal proceedings. ■

programmes regardless of whether they are digital or analogue. The wider the penetration of digital TV achieved, the more TV programmes must be carried. According to the present provision operators are obliged to transmit 12 TV programmes in total. In future, due to technological developments the number of such programmes will increase as the provision does not specify must-carry regulation independent of the broadcasting technology used.

The modification will oblige operators to transmit only two public TV programmes. According to research by the Monitoring Department of the Radio and TV Commission few operators were implementing the stipulation presently in force. The main reasons for this are the lack of free channels and of resources. Every new must-carry programme requires additional equipment and infrastructure. Operators note that there is no compensation paid for those expenses.

The new rules seem to favourably influence operators, as they could avoid an increasing number of obligatory programmes. But operators fear that national scope commercial broadcasters will demand fees for including their programmes in the operators' packages. Currently operators do not pay broadcasters for the transmission of their programmes. With the change operators will have to start paying broadcasters, which will have a negative impact on the cable TV subscription fee. The broadcasters' motivation in demanding a change lies in the costs of the creation of original programmes they invest in and which the operators then get free and offer to subscribers at a fee. The broadcasters think that this is unfair and that operators should pay for the programmes. But in their opinion this issue should be left for the market and

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● Draft Law on Provision of Information to the Public, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11882>

LT

## NL – Court Orders The Pirate Bay to Make its Website Inaccessible to Dutch Internet Users

On 30 July 2009, the Amsterdam District Court sentenced The Pirate Bay by means of a default judgment to make its websites inaccessible to Internet users in the Netherlands, because The Pirate Bay was found to infringe the intellectual property rights of Dutch rightsholders, represented by the *Bescherming Rechten Entertainment Industrie Nederland* ((Protection Rights Entertainment Industry Netherlands – BREIN).

The Pirate Bay is a website registered in Sweden on which BitTorrents are provided. These torrents enable the exchange of files between computers that are connected to the Internet and which are in direct contact with each other (the peer-to-peer protocol). According to the BREIN, The Pirate Bay enables users to download copyright-protected materials from the computers of other users and, as such, makes copyright-protected material available to the public within the meaning of Art. 1 para. j 12 of the Dutch Copyright Act and Article 2.1 para. d-j, Art. 6.1 para. c and Art. 7a.1 para. c of the Dutch Neighbouring Rights Act. The Pirate Bay thus offers services in the capacity of an intermediary within the meaning of Article 26d of the Dutch Copyright Act and Article 15e of the Dutch Neighbouring Rights Act. By doing so, The Pirate Bay infringes the intellectual property rights of the rightsholders represented by BREIN.

As The Pirate Bay is not a legal entity, but a

group practice of the three defendants who live in Sweden, BREIN served a summons to all three of them in person. The defendants did not appear before the Dutch judge. Subsequently, they notified the judge in writing that they were not informed about the meeting and submitted a written plea. Although it was not firmly established that the services of the website meet the requirements of Article 7 of Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, the judge entered a judgment of default liability against the defendants, because BREIN had sufficiently guaranteed that the summons would reach its destination, which left the defendants sufficient time to prepare their defence. BREIN sent the summons by email to the defendants, by registered post to the lawyers who had represented the defendants in prior proceedings and to the address where the defendants lived, according to the Swedish register of birth. In addition, BREIN sent a link to the publication of the summons on the Internet via both Twitter and Facebook. This publication was visited by an Internet user with an IP address that is hosted by "Piratebyran". Finally, BREIN issued an international press release. The judge held the proposition of The Pirate Bay to be unlikely and thus did not take it into consideration. The judge considered the demands of BREIN to be neither unlawful nor unfounded, sustained them and ordered The Pirate Bay to pay the costs. The judge ordered The Pirate Bay to desist and refrain

from infringement in the Netherlands of the copyrights and neighbouring rights of the rightsholders represented by BREIN, including from the offering of services in the capacity of an intermediary within the meaning of Article 26d of the Dutch Copyright Act and Article 15e of the Dutch Neighbouring Rights Act, by making their websites and corresponding trackerservers and databases inaccessible for Internet users in the Netherlands, under a penalty of EUR 30,000 per day up to a maximum of EUR 3,000,000.

The Amsterdam District Court joined the case with another one involving BREIN against the

Global Gaming Factory X AB (GGF), which did appear before the judge. GGF is an enterprise that had announced on 30 June 2009 its plan to buy out The Pirate Bay in August 2009 and turn it into a legal website. According to BREIN there is a chance that GGF will continue the infringements made by The Pirate Bay, because GGF has not entered into negotiations with BREIN on the question of how the website can be legalised. The claims of BREIN against GGF are identical to its claims against The Pirate Bay. According to GGF, BREIN has no interest in its claims, because GGF does not yet either own or operate the website and intends to legalise it. The judge rejected GGF's defence and accepted the claims of BREIN, but only starting from the moment at which GGF will have taken over The Pirate Bay. Each party was ordered to pay its own costs. ■

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● Summary judgment of Decision of the Amsterdam District Court, 30 July 2009, LJN BJ4298, 428212 / KG ZA 09-1092, available at: <http://merlin.obs.coe.int/redirect.php?id=11870>

● Summary judgment of Decision of the Amsterdam District Court, 30 July 2009, LJN BJ4466, 432071 / KG ZA 09-1411, available at: <http://merlin.obs.coe.int/redirect.php?id=11871>

NL

## NL – Torrent Website Has to Remove All Torrents for Copyright Protected Works

The Dutch District Court of Utrecht has ruled against the popular torrent website Mininova, in a case brought by anti-piracy organisation BREIN. The court concluded that Mininova had acted unlawfully by structurally providing the means for, encouraging and profiting from infringements of copyright and related rights and, moreover, that it is not protected under the hosting safe harbour of the E-Commerce Directive. Mininova was not held liable for direct copyright infringement. The website has been ordered to remove all torrents for protected works within 3 months and is considering an appeal.

The court held Mininova accountable for the actions of the (volunteer, but appointed) moderators of the website. These moderators, who, together with Mininova's administrators, police the website for torrents to pornographic material, viruses or fake files, were shown to have knowledge of the infringing nature of the target files in certain instances, without taking appropriate action. The court attached significant weight to the fact that Mininova did police its offering with regard to certain types of material, but failed to do so for copyright-protected works. It relied on a report commissioned by the plaintiff and conducted by TNO, according to which the website's offering in categories such as movies or TV shows, predominantly contained references to protected material. The court also found relevant the facilitative character of the directory of categories, with subcategories

featuring names such as "Disney" or those of recent TV shows which everyone knows or should know cannot be distributed without permission.

The court did not grant Mininova's appeal for protection under the hosting safe harbour of Article 14 of the E-Commerce Directive and its implementation into Dutch law. Mininova was found to be too actively involved with the material on its website to be considered a host under Dutch law. In the court's eyes, the restriction of the safe harbour to mere passive technical intermediary activities in Dutch law is in line with the Directive, in particular because of recital 42, which refers to the "mere technical, automatic and passive nature" of the services that are exempted from liability in Articles 12-14. Notably, recital 42 on the one hand refers to mere conduit and caching activities only ("transmitted or temporarily stored"), but on the other hand to all the safe harbours in the Directive ("The exemptions from liability established in this Directive cover only cases where [...]"). The court's emphasis on passiveness seems to create an incentive for intermediaries to do as little as possible to actively police their services for harmful or illegal material. The ruling does not discuss the status of information location tools under the Directive (Article 21.2 shows they are not included in the safe harbour provisions). As torrent websites like Mininova are functionally equivalent to information location tools, a discussion of Article 14 seems without merit.

Because Mininova could not claim protection under Article 14, it could not claim protection under Article 15 of the Directive either. The court

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finally elaborated on the implications of Mininova's preventive duty of care regarding the distribution

● *Rb. Utrecht 26 August 2009, BREIN v. Mininova, LJN BJ6008, 250077 / HA ZA 08-1124* (District Court of Utrecht, 26 August 2009, BREIN v. Mininova, LJN BJ6008, 250077 / HA ZA 08-1124), available at: <http://merlin.obs.coe.int/redirect.php?id=11872>

NL

## NO - Co-Production Convention Signed

On 9 July the Norwegian Permanent Representative to the Council of Europe signed the European Convention on Cinematographic Co-Production (ETS 147) on behalf of the Kingdom of Norway. Norway thus becomes the 40<sup>th</sup> signatory to the Convention. The signature follows a Royal Decree of 26 June 2009 establishing the legal basis for the signing and the approval of the Convention.

Norway is the last of the Scandinavian countries to sign the Convention. The decision to accede comes after a protracted process, involving film industry lobbying for accession, administrative

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● *Stortingmelding nr. 22 (2006-2007) "Veiviseren For det norske filmløftet" (Parliamentary Report no. 22 (2006-2007) "The Pathfinder - For the Norwegian film initiative")*, available at: <http://merlin.obs.coe.int/redirect.php?id=11873>

● *Official communication on government decisions 26.07.09*, available at: <http://merlin.obs.coe.int/redirect.php?id=11874>

● *Ministry for Culture, press release*, available at: <http://merlin.obs.coe.int/redirect.php?id=11875>

NO

● *Council of Europe, "Notification of Signature and Approval"*, available at: <http://merlin.obs.coe.int/redirect.php?id=11876>

EN-FR

## NO - Cinemas Go Digital with Levy Funds

Following pre-notification contacts between the European Surveillance Authority, the EFTA watchdog body, and the Norwegian exhibitors' organisation Film & Kino, full digital roll-out to all 440 cinema screens in 220 locations across Norway will commence this autumn, to be completed by 2011. Implementation of the ambitious scheme follows the publication by the ESA in May of a preliminary assessment, in which it declared itself satisfied that no State aid is involved in the funding of the digitalisation programme.

Norway's exhibition structure is dominated by municipally owned and operated cinemas, which hold 72.6 per cent of the market (calculated on the basis of admissions). Publicly and privately owned cinemas, however, have co-operated closely in developing the exhibition sector since the early 1970s, using the so-called "Cinema Fund" to bankroll

of lawful material. It considered the duty of care proportional and not an infringement of the right to freedom of expression. In the court's view, Mininova could mitigate most of the negative implications for the lawful distribution of material by implementing put-back procedures for undeservedly removed files. ■

review of the compatibility of current regulations on film support with the stipulations of the Convention and the 2007 government White Paper on film policy. The latter document observed that "Norwegian accession may contribute to enlarging the traditional Nordic co-operation [in film production] and opening up to impulses from the wider European cultural community. Accession will furthermore contribute to vitalising and enhancing creative and commercial alliances already established through, inter alia, the MEDIA programmes and Eurimages".

Norway has maintained a reservation under Article 20 of the Convention allowing Norwegian authorities to define maximum participation levels in financial co-productions different from those stipulated in Article 9.

The Norwegian government has designated the Norwegian Film Institute as the competent national authority in co-production matters.

Norway's accession to the Convention will take effect on 1 January 2010, concurrently with the coming into force of new Regulations on Support for Audiovisual Production. ■

projects of common interest and benefit. Since the late 1980s, video retailers have also participated. The fund, originally a voluntary mutual fund, was enshrined in the 1987 Act relating to Films and Videograms, which made obligatory the Cinema Fund levy on all cinema ticket sales (2.5 per cent) and video/DVD sale and rental transactions (NOK 3.50 per transaction). Regulations delivered under the 1987 Act provide general aims for the use of the Fund's resources, while also establishing a legal base for Film & Kino to determine concrete operations and lines of action, under the supervision of the Ministry for Culture. The levy currently brings some EUR 7.5 - 8 million per year into the Fund.

Total costs of digital roll-out in Norway are estimated at NOK 400 million (EUR 45 million). Film & Kino has negotiated the roll-out directly with Hollywood studios and agreed on the Digital Cinema Initiative (DCI) specifications as the applicable technical standard, with a minimum 2K projection. Funding



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will be split between distributors, who will pay a 40 per cent Virtual Print Fee (VPF) over a period of

● *Lov om film og videogram av 15. mai 1987 nr. 21 (Act relating to Films and Videograms of 15 May 1987 no. 21)*, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11877>

NO

● *Unofficial translation into English of Act relating to Films and Videograms*, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11878>

EN

● *Forskrift om film og videogram av 20. desember 1999 (Regulations relating to Films and Videograms of 19 December 1999)*, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11879>

● *For a more comprehensive description of the Norwegian digital roll-out*, see European Audiovisual Observatory, "Digital Roll-Out in Norwegian Cinemas", available at:  
<http://merlin.obs.coe.int/redirect.php?id=11880>

EN

## RO – Digital Strategy

The Romanian Government recently adopted a strategy for the switchover from analogue to digital terrestrial television and the introduction of digital multimedia services at national level.

Under the strategy, in accordance with Community law provisions, the introduction of digital terrestrial TV at national level and the withdrawal of analogue TV services using UHF frequency bands should be achievable by 1 January 2012. The transition to digital technology should lead to modernisation and harmonisation with other EU Member States. New regulations will also be gradually introduced in order to provide more effective control of the radio spectrum in accordance with the ITU recommendations contained in the final acts of the 2006 Regional Radiocommunication Conference (RRC).

The optimal use of the frequency spectrum using technologies that make DVB-T, DVB-T2 and DVB-H standards as well as the MPEG2 and MPEG4 methods possible, should open up new development opportunities. Regarding the proposed switch-off of analogue signals, all public and private broadcasters of

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● *Hotărâre pentru aprobarea Strategiei privind tranziția de la televiziunea analogică terestră la cea digitală terestră și implementarea serviciilor multimedia digitale la nivel național (Government decision)*, available at:  
<http://merlin.obs.coe.int/redirect.php?id=11860>

RO

## RS – Amendments to Law on Public Information Adopted

At its session held on 31 August 2009 the National Assembly adopted the Amendments to the 2003 Law on Public Information of Serbia. The Act

up to six years, while cinemas can choose between paying by cash or in instalments and taking out a six-year loan. To bankroll the programme, Film & Kino will use NOK 100 million from the Cinema Fund to leverage a NOK 400 million (EUR 45 million) financial package and will launch a tender to financial institutions in the European Economic Area (which includes the EU, as well as Iceland, Liechtenstein and Norway) to manage the package.

Technical implementation will be handled by "system integrators". To avoid monopolisation, Film & Kino has divided the country into ten zones; potential suppliers of technical services may place bids to service one or more zone(s) for a minimum period of ten years. Tenders will be issued to potential system integrators in the EEA area. ■

national TV channels, as well as local TV providers, will be obliged to adapt their transmission equipment to the new format. In parallel, new reception devices will need to be produced and sold.

The Government has authorised the *Ministerul Comunicațiilor și Societății Informaționale* (Ministry for Communication and Information Society – MCSI) to issue licences by the end of 2009, with the aim of ensuring that 80% of the country can receive digital terrestrial television.

According to the Government's decision, 7,025,000 households (of a total of 7.5 million) currently receive TV channels primarily via cable and satellite. In Romania, 260 TV and 662 radio broadcasters are currently operating, which represents the second largest market for local broadcasters in central and eastern Europe. The strategy mentions the idea of State support to help poorer members of the population in disadvantaged regions to afford the equipment needed to receive digital television.

In terms of implementing the strategy, the decision allocates individual tasks to the MCSI, the *Ministerul Culturii, Cultelor și Patrimoniului Național* (Ministry of Culture), the *Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (National Regulatory Authority for Communication – ANCOM) and the *Consiliul Național al Audiovizualului* (National Council for Electronic Media – CNA). ■

was promulgated by the President on the same day and came into force on 8 September 2009. Compared to the Government proposal of July 2009 the adopted amendments were altered during the parliamentary debate so that a tight majority in favour of the amendments has been achieved (125 out of

249 MPs voted for the amendments).

The 2003 Law on Public Information has been altered in three points: the Registry of Media Outlets abandoned in 2003 has been re-introduced; a ban on the transfer of founders' rights over media outlets has been introduced and sanctions (fines) for potential breaches of the law have been increased.

As for the Registry of Media Outlets the competent Minister shall pass a detailed rulebook within 30 days from the day the amendments came into force. Being registered shall be a precondition for operating a media outlet. In the case where a media outlet is publicised without proper registration the fines are severe and go up to RSD 20 million (about EUR 20,000) with the possibility of an interim measure which consists in a ban from operating media outlets for the company fined. Special attention has been given to the duty to respect the presumption

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## SE – Internet Service Provider Ordered to Cease Providing Internet Capacity to The Pirate Bay

The Pirate Bay saga continues. On 21 August 2009, *Stockholms tingsrätt* (the District Court of Stockholm) issued an order, subject to a conditional fine, enjoining an Internet Service Provider, Black Internet AB, from contributing to the making-available of certain films and music albums to the public by means of supplying Internet capacity to the file-sharing site The Pirate Bay.

The court held that Black Internet AB was well aware that users of The Pirate Bay are considered to be engaging in illegal file sharing and that the people behind The Pirate Bay have been found guilty of complicity in activities in breach of the Swedish Copyright Act.

Furthermore, the court stated that Black Internet AB, as a supplier of Internet capacity to The Pirate Bay, objectively could be deemed to be an accomplice to the infringements performed by the users of The Pirate Bay.

**Michael Plogell**  
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Wistrand Advokatbyrå,  
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● *Stockholms tingsrätts beslut den 21 augusti 2009 i mål nr T 7540-09 och T 11712-09 (Decision of the District Court of Stockholm of 21 August 2009 in cases No. T 7540-09 and No. T 11712-09)*

SV

## SK – New Audiovisual Media Services to Be Regulated

An amendment to Act No. 308/2000 Coll. on Broadcasting and Retransmission and to Act

of innocence because severe fines are prescribed in a case where a media outlet breaches that presumption: fines of up to 100 % of the overall daily value of sold copies and marketing space may be imposed in that case.

The amendments show a clear intention to tackle various forms of fraudulent behaviour by companies who are founders of media outlets, which resulted in practical impunity for damages made by breaches of the journalists' due diligence in reporting. But journalists' associations and many local experts pointed out that the same goals could have been achieved by means that would have been less restrictive on freedom of expression than the current amendments. The opponents have announced they are prepared to challenge the Law before the Serbian Constitutional Court and, if need be, before the ECHR, in order to force the Government to revoke it. ■

Black Internet AB argued that it was not the sole supplier of Internet capacity to The Pirate Bay. Therefore, an injunction against Black Internet AB would not suspend public access to The Pirate Bay.

Nonetheless, the court held that, for complicity in activities in breach of the Copyright Act to be found, it was not necessary to establish that Black Internet AB's supply of Internet capacity was an absolute condition for infringement. Consequently, it was irrelevant that other companies also supplied Internet capacity to The Pirate Bay.

The court concluded that the interest of the rightsholders outweighed that of Black Internet AB. Therefore, it was proportionate to enjoin Black Internet AB from complicity in making the films and music albums in question available to the public by means of supplying Internet capacity to the file-sharing site The Pirate Bay, subject to a conditional fine of SEK 500,000.

In practice this meant that Black Internet AB has had to cut off Internet access to The Pirate Bay.

Given that Black Internet AB only had the option of hitting the "off button", meaning that lawful material will also be affected, critics have claimed that the proportionality of the decision in relation to its effects can be brought into question.

At the time of writing it was not known whether the decision would be appealed. ■

No. 195/2000 Coll. on Telecommunications from 14 September 2000 ("Amendment") was proposed by the Ministry of Culture on 29 May 2009. The Amendment was required following Slovakia's commitment to implementing Directive 2007/65/EC (AVMSD).

Slovakia as a Member State shall bring into line laws, regulations and administrative provisions necessary to comply with the AVMSD by 19 December 2009 at the latest. The amended Act No. 308/2000 Coll. shall also apply to Internet broadcasting and providing on-demand audiovisual media services which differ from TV broadcasting with regard to the choice and control the user can exercise and with regard to the impact they have on society. This justifies imposing more lenient regulation on on-demand audio-visual media services which should comply only with the basic rules provided for in the Directive.

Hence the Amendment on the one hand concerns such Internet services which are considered to constitute broadcasting of TV programme service, i.e., broadcasting with a fixed time schedule of programmes, available to the general public and aimed at providing information, entertainment or education. The Amendment relates *inter alia* to the broadcasting of TV advertisements and sponsorship. The abolition of the daily limit on broadcasting of TV advertising and the maintaining of the hourly limit only could be seen as the most significant change. Furthermore, product placement can only be permitted after having fulfilled all the requirements defined by law aimed mainly to protect viewers from undesirable advertising effects. Product placement is

prohibited in programmes which are intended for minors of less than 12 years of age. On the other hand, the Amendment strengthens the protection of minors as the current legal regulation shall also apply to providing on-demand audiovisual media services: the providers of such services are obliged to take appropriate measures to ensure that minors will not have access to such on-demand audiovisual media services the contents of which might seriously impair their physical, mental or moral development.

Generally, the Amendment, if approved, will be less strict on providers of Internet programmes than traditional broadcasters. For instance, it will neither oblige them to ensure the objectivity, impartiality and plurality of news programmes and political and current affairs programmes, nor to use the State language, languages of national minorities and foreign languages in line with special regulations.

Immediately after being approved by the Government on 15 July 2009 the Amendment was criticised. The Ministry received 241 comments on the Amendment among which it was also demanded that the regulations should only apply to providers of Internet programmes whose audiences account for more than 30 percent of the Slovak population. Despite these objections the Amendment is expected to be approved by the Parliament and is in the first reading at the moment. ■

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## TR – Expected Amendments to Turkish Copyright Law

The Turkish Law on Intellectual and Artistic Works No. 5846 (LIA) is going to be amended. A draft is being prepared by a committee set up by the Copyright and Cinema Directorate of the Republic of Turkey, Ministry of Culture and Tourism (Ministry). According to information obtained from the Ministry the draft shall bring substantial amendments to copyright law.

The main goal of the amendment is to provide harmonisation with EU copyright law. The Ministry has run a twinning project with the European Public Law Organisation (EPLA), as a result of which certain amendments to the law were proposed. The current draft aims at enacting these proposals.

The second goal of the draft is to address certain problems that are observed in practice, especially with regard to collecting societies and collective management of rights. Currently there are 24 collecting societies in the fields of literary and artistic works, cinematographic work, music and fine arts. The view has been expressed that the existence of such a large number of collecting societies weakens

the power of these organisations and will pose problems especially with regard to the distribution of private copy levies, the introduction of which is another proposal contained in the draft. Currently income from the private copy levies is not being distributed to the collecting societies but being retained by the Ministry to promote the protection of intellectual property. Taking this view into account, the Ministry proposes to merge the collecting societies into one society per sector in the four fields mentioned above.

According to the draft around twenty articles of LIA shall be revised. Some of the other changes concern the protection of audiovisual works and the improvement of the protection of digital copyrights. With regard to the first issue the present description of the LIA of “cinematographic works” shall be replaced with “audiovisual works”, as a result of which other original audiovisual works such as TV programmes shall also come under the protection of the law. With regard to the latter issue, certain improvements shall be introduced to the present system of “notice and takedown”, such as a simplified notification procedure.

The draft is expected to be submitted to public opinion in the following months. ■

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