OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2010-1

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

INTERNATIONAL

NATIONAL

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

Editorial Informations

Publisher:
European Audiovisual Observatory
76, allée de la Robertsau F-67000 STRASBOURG
Tel.: +33 (0) 3 90 21 60 00 Fax: +33 (0) 3 90 21 60 19 E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Wolfgang Closs
 ISSN 1023-8573

IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of Pasko v. Russia

The European Court of Human Rights found no violation of Article 10 of the Convention in the highly controversial case of Pasko v. Russia. The case concerns Grigoriy Pasko, a Russian national who at the time of the events was a naval officer and worked as a military journalist on the Russian Pacific Fleet's Newspaper "Boyevaya Vakhta". Mr Pasko had been reporting on problems of environmental pollution, accidents with nuclear submarines, transport of military nuclear waste and other issues related to the activities of the Russian Pacific Fleet. Mr Pasko had also been in contact on a free-lance basis with a Japanese TV station and a newspaper and had supplied them with openly available information and video footage. These contacts with Japanese journalists and a Japanese TV station and newspaper were pursued by Mr Pasko of his own volition and were not reported to his superiors.

In November 1997, Mr Pasko was searched at the Vladivostok airport before flying to Japan. A number of his papers were confiscated with the explanation that they contained classified information. He was arrested upon his return from Japan and charged with treason through espionage for having collected secret information with the intention of transferring it to a foreign national. Mr Pasko was sentenced in December 2001 to four years' imprisonment by the Pacific Military Fleet Court, as he was found guilty of treason through espionage for having collected secret and classified information containing actual names of highly critical and secure military formations and units, with the intention of transferring this information to a foreign national. He was released on parole in January 2003.

Relying on Articles 7 (no punishment without law) and 10 of the European Convention of Human Rights, Mr Pasko complained that the Russian authorities had applied criminal legislation retrospectively and had subjected him to an overly broad and politically motivated criminal persecution as a reprisal for his critical publications. The Court considered that the essence of the case was the alleged violation of Article 10, since Mr Pasko's complaints under Article 7 concerned the same facts as those related to Article 10. The Court therefore decided to examine the complaints under Article 10 only.

After having accepted that the Russian authorities acted on a proper legal basis, the Court observed that, as a serving military officer, the applicant had been bound by an obligation of discretion in relation to anything concerned with the performance of his duties. The domestic courts had carefully scrutinised each of his arguments. The courts had found that he had collected and kept, with the intention of transferring to a foreign national, information of a military nature that had been classified as a State secret and which had been capable of causing considerable damage to national security. Finally, the applicant had been convicted of treason through espionage as a serving military officer and not as a journalist. According to the European Court, there was nothing in the materials of the case to support the applicant's allegations that his conviction had been overly broad or politically motivated or that he had been sanctioned for any of his publications. The Court found that the domestic courts had struck the right balance of proportionality between the aim of protecting national security and the means used to achieve that purpose, namely the sentencing of the applicant to a "lenient sentence", much less severe than the minimum stipulated in law. Accordingly, the Court held by six votes to one that there had not been a violation of Article 10.

• Judgment by the European Court of Human Rights (First Section), case of Pasko v. Russia, Application. no. 69519/01 of 22 October 2009
http://merlin.obs.coe.int/redirect.php?id=12167 EN

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

European Court of Human Rights: Case of Ürper a.o. v. Turkey

The Court's judgment in the case of Ürper a.o. v. Turkey firmly condemns the bans on the future publication of four newspapers. At the material time the applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers published in Turkey: Ülkede Özgür Gündem, Gündem, Güncel and Gerçek Demokrasi. The publication of all four newspapers was suspended, pursuant to section 6(5) of the Prevention of Terrorism Act (Law no. 3713) by various Chambers of the Istanbul Assize Court, between 16 November 2006 and 25 October 2007, for periods ranging from 15 days to a month in response to various news reports and articles. The impugned publications were deemed to publish propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL, as well as to express approval of crimes committed by that organisation and its members.

The applicants alleged, under Article 10 of the Convention, that the suspension of the publication and

distribution of their newspapers constituted an unjustified interference with their freedom of expression. The European Court reiterates that Article 10 of the Convention does not, in its terms, prohibit the imposition of prior restraints on publication. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially true as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period of time, may well deprive it of all its value and interest. As freedom of the press was at stake in the present case, the national authorities had only a limited margin of appreciation to decide whether there was a "pressing social need" to take the measures in question. The Court was of the opinion that, as opposed to earlier cases that have been brought before it, the restraints under scrutiny were not imposed on particular types of news reports or articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court's decisions. In the Court's view, both the content of section 6(5) of Law no. 3713 and the judges' decisions in the instant case stem from the hypothesis that the applicants, whose "guilt" was established without trial in proceedings from which they were excluded, would re-commit the same kind of offences in the future. The Court found, therefore, that the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future and to hinder their professional activities. The Court considered that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles. The Court concluded that by suspending the publication and distribution of the four newspapers involved, albeit for short periods, the domestic courts largely overstepped the narrow margin of appreciation afforded to them and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. The practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of a "necessary" restraint in a democratic society and, instead, amounted to censorship. There has accordingly been a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Second Section), case of Ürper a.o. v. Turkey, Application nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07 of 20 October 2009
http://merlin.obs.coe.int/redirect.php?id=12168 EN

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

EUROPEAN UNION

European Commission: Communication on Copyright

On 19 October 2009, the European Commission adopted a Communication on Copyright in the Knowledge Economy. The document was prompted by the results of the public consultation on the Green Paper on Copyright and the Knowledge Economy (see IRIS 2008-8: 4).

The Communication aims at offering an overview of these results on the one hand, and at paving the way for future follow-up actions on the other. As regards the former, the Communication identifies the two antithetical positions that emerged from the public consultation: unsurprisingly, libraries, archives and universities support a flexible copyright system, whereas publishers, collecting societies and rightsholders favour a stronger regime. Roughly speaking, the first group supports a shift towards a more permissive copyright system and the second advocates the maintenance of the status quo.

These two divergent interests are apparent in the specific issues dealt with by both the Green Paper and the Communication, which include: the digital preservation and dissemination of scholarly, cultural and educational works; orphan works; copyright exceptions for persons with disabilities; and user created content. Hence, the main challenge ahead is the conciliation of these views.

The Communication sets forth a number of steps to be followed. In relation to the digital preservation and dissemination of works in general, it clarifies that the strategy to pursue will include an analysis of the legal implications of mass-scale digitisation and the suggestion of options to tackle the costs of rights' clearance. In this arena, the Commission is bound to examine all possible solutions and to verify whether further initiatives - e.g., the establishment of an exception for this kind of digitisation - are needed.

Specifically as concerns research and learning materials, the Communication underlines that the Commission is already active in the area of granting open access to publicly-funded research results. Moreover, it is recognised that universities face a cumbersome task when licensing copyright works. Thus, this issue will be on the Commission's agenda, as it will be the object of a consultation on best practices. Finally, the Commission will continue monitoring activities in the field of distance learning.

In regard to orphan works, the Communication remarks on the need to establish common standards for

rights clearance and to find a solution for the infringement of rights in orphan works. The Commission will be working on an impact assessment, but possible solutions might include a legally binding instrument, an exception to Directive 2001/29/CE or guidance on mutual recognition of orphan works.

Furthermore, it is acknowledged that more works should take into account the needs of persons with disabilities. The Commission will organise a stakeholder forum on that issue, with a particular focus on visually impaired persons, cross-border trade in works in accessible formats and access to online content.

Lastly, the Communication determines that the Commission will carry out consultations on options for rights clearance for user created content.

It is therefore recognised that copyright policy has to be prepared to face the current knowledge economy. And, it is noted, the selected strategy will be to coordinate the different interests at stake.

• Communication from the Commission on Copyright in the Knowledge Economy, Brussels, 19 October 2009, COM(2009) 532 final
http://merlin.obs.coe.int/redirect.php?id=15378 DE EN FR

Ana Ramalho
Institute for Information Law (IViR), University of Amsterdam

European Commission: Consultation on Digital Cinema

On 16 October 2009, the European Commission launched a public consultation of all stakeholders from the European Union's audiovisual industry on the opportunities and challenges for European cinema in the digital era. The feedback from the professionals from the sector will contribute to setting out the Commission's policy on digital cinema.

The use of digital technologies by filmmakers has increased in recent years. First sound was digitised, then post-production turned digital, while now production is also increasingly using digital technologies. Digital technologies create a lot of possibilities for both the production and the distribution phase. For example, in the production phase, digital technologies make it possible to create special effects and 3D films. With digitisation, the distribution stage becomes both easier and cheaper. Digital distribution can be ten times cheaper than distribution using traditional prints. This makes the flexibility and diversity of programming easier and enables more European films to travel across borders.

However, in Europe the digital revolution has been slower than foreseen. The cost for digital screening equipment is high. The transition to digital cinema raises two major issues. Firstly, the investment in digital equipment has to be borne by exhibitors, while the savings are made by distributors. Exhibitors do not directly benefit from their investments. Secondly, the investment in digital equipment is financially supportable for large cinema chains, but mostly not for smaller independent (art house) cinemas. These cinemas could be threatened with closure because of the high cost of digital equipment. The closure of these kinds of cinemas could potentially threaten cultural diversity in the European audiovisual sector.

In order to solve the first issue, the United States film industry came up with the Virtual Print Fee (VPF) model. The model is based on involving a third party, who collects part of the distributors' savings and uses it in contributions towards the digital equipment of participating screens. The consultation could help establish whether a similar model could be effective in Europe.

Member States share the concern that not all cinemas can afford to make the digital transition. A wide range of exhibitors must be maintained to ensure the diversity of European cinema. Therefore, several national governments are considering subsidising the transition to digital cinema. For example, Italy has already notified a State aid scheme for which a public consultation was launched on 22 July 2009 (see IRIS 2009-9: 6). Public support schemes by Member States must be assessed in the context of European Union State aid rules. Therefore, they must be compatible with Article 87 of the EC Treaty.

The purpose of the public consultation is to gather information from stakeholders on digital cinema and the aforementioned opportunities and challenges it brings with it. The consultation is open to all stakeholders in digital cinema, such as exhibitors, distributors and producers agents. The information gathered from the consultation will enable the Commission to finalise a Communication in 2010 on "Opportunities and challenges for European Cinema in the digital era". The public consultation is open until 16 December 2009.

• European Commission seeks views on the opportunities and challenges for digital cinema, Brussels, 16 October 2009, IP/09/1534
http://merlin.obs.coe.int/redirect.php?id=12109 DE EN FR BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

• Public Consultation on Opportunities and Challenges for European Cinema in the Digital Era
http://merlin.obs.coe.int/redirect.php?id=15381 EN FR

Kim de Beer
Institute for Information Law (IViR), University of Amsterdam

European Commission: Free-Trade Agreement EU-South Korea

On 15 October 2009, the European Union and South Korea signed a free-trade agreement (FTA) which is considered to be the most important FTA ever negotiated between the EU and a third country. In the Global Europe trade policy strategy of 2006, South Korea was designated a priority FTA partner. In May 2007, negotiations were launched for an FTA and, after eight rounds of talks, agreement on the text was reached. The agreement will remove virtually all tariffs and many non-tariff barriers between the two economies. The agreement is estimated to be worth EUR 19 billion in new trade for EU exporters.

The agreement contains a Protocol on Cultural Cooperation, which underlines the specific characteristics of this sector. The Protocol sets up the framework for facilitating exchanges regarding cultural activities, including those in the audiovisual sector. There are several provisions in the Protocol which are specifically relevant to the audiovisual sector.

According to Article 4 of the Protocol, the parties shall endeavour to facilitate the entry into their territory and temporary stay of artists, actors, technicians and other cultural professionals from the other party who are involved in the shooting of cinematographic films or television programmes. The Protocol makes it easier for professionals from the audiovisual sector to enter and temporarily stay in the territory of the other party.

The Protocol contains a specific section with provisions relating to audiovisual works. Article 5 concerns audiovisual co-productions produced by producers of both Korea and the EU in which those producers have invested. The negotiations of co-production agreements between Member States of the European Union and Korea shall be encouraged. The Article states that under certain conditions co-produced audiovisual works are entitled to benefit from the schemes of both parties on the promotion of local or regional cultural content. Any problem which arises under the Protocol, including the co-production provisions, can be referred to the Committee on Cultural Cooperation. The Committee will be established according to Article 3 of the Protocol.

Article 6 of the Protocol contains several provisions on audiovisual cooperation. For example, the parties will strive to promote audiovisual works of the other party through the organisation of festivals and similar initiatives. The parties also agree to cooperate in the area of broadcasting with the aim of promoting cultural exchange by, for example, exchanging audiovisual works and information on broadcasting policy. The other provisions concern interoperability, the rental of material necessary for the production of audiovisual works and the digitisation of audiovisual archives.

The last Article in the subsection on audiovisual works contains provisions on shooting audiovisual works in the territory of the other party. Both parties agree to promote their territory as a location for the purpose of shooting audiovisual works. They shall also allow the temporary importation of the material and equipment necessary to shoot audiovisual works.

In early 2010, the European Commission will present the agreement to the EU Member States. Then it has to be presented for approval to the European Parliament. The entry into force of the agreement is expected in the second half of 2010.

- EU-Korea Free Trade Agreement, Protocol 3 on Cultural Co-operation, signed on 15 October 2009
http://merlin.obs.coe.int/redirect.php?id=12111 EN

Kim de Beer
Institute for Information Law (IViR), University of Amsterdam

European Commission: Consultation on Creative Content Online

On 22 October 2009, the European Commission launched a public consultation calling for input on ways to achieve a more vibrant market for the online distribution of goods and services protected by intellectual property rights. The launch of the consultation is accompanied by the publication of a reflection paper by Commissioners Reding and McCreevy of the Directorates-General for the Information Society and the Media and the Internal Market and Services entitled "Creative Content in a European Digital Single Market: Challenges for the Future".

The reflection document opens by stating that "copyright is the basis for creativity". It goes on to note the vitality of Europe's cultural and creative sectors and the growing importance of the Internet and of digitisation technologies for the distribution of creative content. On this basis, the paper concludes that what it terms the "dematerialisation" of content presents a great opportunity for Europe. In order to fully realise this potential, legislative action aimed at achieving a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online is necessary. In particular, three objectives are identified:

- the creation of a favourable environment in the digital world for creators and rightsholders, through ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;

- the encouragement of the provision of attractive and legal offers for consumers to access a wide range of content through digital networks anywhere and at any time, with transparent pricing and terms of use;

- the promotion of a level playing field for new business models and innovative solutions for the distribution of creative content across the EU.

Three groups of stakeholders are identified for the consultation: rightsholders, consumers and commercial users. The deadline for submissions is 5 January 2010.

The first consultation in the area was launched in 2006 (see IRIS 2006-8: 5) and led to the adoption of a Communication on Creative Content Online in the Single Market, which in turn launched a second consultation in 2008 (see IRIS 2008-2: 5). In addition, the Commission also set up a stakeholder discussion group, the Content Online Platform. The Platform published its final report in May 2009 (see IRIS 2009-6: 4).

The consultation and reflection paper form part of the ongoing discussion on the priorities of a European Digital Agenda, as called for by President José Manuel Barroso in his Policy Guidelines presented to the European Parliament in September 2009.

• European Commission launches reflection on a Digital Single Market for Creative Content Online, Brussels, 22 October 2009, IP/09/1563
http://merlin.obs.coe.int/redirect.php?id=12112 CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO DE EN FR BG SK SL SV

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

European Parliament: Telecoms Reform Adopted

On 24 November 2009, the European Parliament, at its plenary session in Strasbourg, formally approved the EU's Telecoms Reform Package, after two years of discussions (see IRIS 2008-10: 4, IRIS 2009-1: 5and IRIS 2009-6: 5).

After the first reading of the legislative proposals failed to lead to adoption, intense negotiations during last spring resulted in an informal political agreement between the Commission, the Parliament and the Council on all three parts of the package: the electronic communications framework directive, the citizen's rights directive and the establishment of a new Body of European Regulators for Electronic Communications (BEREC). Subsequently, in May 2009, the EP approved the new package in its entirety, save for one contentious modification: it reinstated Amendment 138 of the Trautmann report, one of the Parliament's most controversial first-reading amendments, according to which "no restriction may be imposed on the fundamental rights and freedoms of end users, without a prior ruling by the judicial authorities (...) save when public security is threatened".

Upon rejection of the amendment by the EU Telecommunications Ministers on 6 October, the Article 251 co-decision procedure entered the conciliation stage. Formal conciliation proceedings were opened on 4 November 2009. Political agreement between negotiators from the Parliament, the Council and the Commission was reached in the Conciliation Committee in the early hours of 5 November 2009.

Under the final deal, fundamental rights regarding internet access are dealt with in Article 1(3a) of the second directive of the package on citizen's rights. According to this, national measures liable to restrict end-users' access to or use of services and applications through electronic communications networks must be "appropriate, proportionate and necessary in a democratic society" and can only be implemented with "adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process". A "prior fair and impartial procedure" is also guaranteed, as is the "right to an effective and timely judicial review".

Questions still remain open as to the correct interpretation of the expression "prior fair and impartial procedure" and the extent to which so-called three strikes legislation in force in France and under consideration elsewhere is affected by it. It is likely however that the issue will have to be brought before the ECJ before absolute clarity can be achieved.

The reformed Package entered into force with its publication in the Official Journal of the EU on 18 December 2009. The 27 Member States now have 18 months, till July 2011, to transpose the new rules into their national telecoms laws. BEREC was established in January 2010.

• European Commission welcomes European Parliament approval of sweeping reforms to strengthen competition and consumer rights on Europe's telecoms markets, Brussels, 24 November 2009, IP/09/1812
http://merlin.obs.coe.int/redirect.php?id=12113 DE EN FR BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

• Relevant press pack, including all official documents of the new EU Telecom Package
http://merlin.obs.coe.int/redirect.php?id=12114 EN

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

European Commission: Communication Proposing a Coordinated Approach towards the Digital Dividend

On 28 October 2009 the European Commission adopted a Communication concerning several policy proposals for a coordinated approach towards the digital dividend in Europe. Two proposals urging for immediate action by the Member States are further elaborated upon in a Recommendation by the European Commission that was adopted in conjunction with this Communication (see IRIS 2010-1: 0/121). The other proposals in the Communication focus on strategic and longer-term issues and call for political decision-making.

In the light of the economic crisis and the undergoing switchover from analogue to digital terrestrial broadcasting, the Commission proposes the development of a common EU Roadmap in order to fully benefit from the socio-economic and cultural potential of the digital dividend spectrum. A study conducted by the Commission on the positive socio-economic impact of the digital dividend's potential has played a key role in this respect.

The two 'key actions' urge (1) Member States to complete the switchover from analogue to digital terrestrial broadcasting by 1 January 2012; and (2) the adoption of harmonised technical conditions of use of the 790-862 Mhz sub-band for electronic communication services. According to the Communication, these two proposals for action are necessary to address the immediate policy objectives of the "EU's economic recovery efforts, and to maximise consumer benefits" (page 6). Furthermore, by providing harmonised technical standards for the use of this spectrum, these proposals also seek to prevent a fragmented situation amongst the Member States and loss of economies of scale. See also the aforementioned Recommendation by the Commission (see IRIS 2010-1: 0/121).

Besides these two key measures, the Commission proposes three strategic measures that will require input by the Council and the European Parliament. First, it proposes a common EU position to effectively coordinate the use of the digital dividend with non-EU third countries. Cross-border interference as well as the potential 'knock-on' effect of the surrounding states' use of the spectrum are given as reasons for a common EU position. Particularly within the light of the forthcoming World Radio Conference in 2012, the Commission stresses the importance of a common EU position with regard to the digital dividend policy at an international level, in order to improve the EU's negotiating power. Second, in addition to the proposed urgent technical measure regarding the 790-862 Mhz sub-band, the Commission proposes that Member States should cease using this sub-band for high-power broadcasting transmitters and open it up to electronic communication services. Third, it proposes the adoption of common minimum requirements in order to incentivise the most efficient use of the (scarce) digital dividend spectrum.

The Commission also refers to a list of the "most promising" (page 9) forward-looking initiatives, as identified in the Commission study, which could have a positive long term impact on the future of the digital dividend.

After the Commission has received the input of the European Parliament and the Council, it intends to submit a spectrum action programme in 2010 to both institutions. It also intends to submit the proposed urgent technical measure regarding the 790-862 Mhz sub-band to the Radio Spectrum Committee for their regulatory opinion.

The Communication ends with an invitation to the Member States to report to the Commission, by mid 2010, on the status of their switch-off of analogue broadcasting.

- Communication from the Commission, "Transforming the digital dividend into social benefits and economic growth", 28 October 2009, COM(2009) 586
http://merlin.obs.coe.int/redirect.php?id=12577 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV
- Recommendation from the Commission, "Facilitating the release of the digital dividend in the European Union", 28 October 2009, 2009/848/EC, OJ L 308, 24 November 2009
http://merlin.obs.coe.int/redirect.php?id=12580 DE EN FR
- Commission study (conducted by Analysys Mason, DotEcon and Hogan&Hartson): "A European approach to the digital dividend", September 2009
http://merlin.obs.coe.int/redirect.php?id=12557 EN

David Korteweg
Institute for Information Law (IViR), University of Amsterdam

European Commission: Recommendation on the Release of the Digital Dividend in the EU

In a recent Recommendation the European Commission encourages the Member States to urgently undertake two actions, in order to guarantee that the switch-over from analogue to digital broadcasting takes place in a coherent manner and ensure a co-ordinated approach towards the digital dividend.

The Recommendation was adopted in conjunction with a Communication by the Commission on 28 October 2010 (see IRIS 2010-1: 0/120).

First, it recommends that Member States fully switch over from analogue to digital transmission technology by 1 January 2012. Secondly, Member States are encouraged to support a harmonised regulatory approach towards the use of the 790-862 Mhz sub-band

for electronic communications services. Therefore, the Commission recommends that Member States refrain from any actions that could hinder the use of communications services in that particular sub-band.

The Commission stresses the importance of the urgency of the digital switchover as a stimulus for the European economy through the provision of available spectrum for the development of new wireless and broadband services. It also stresses the importance of a coordinated approach towards the digital dividend to secure the development of a single market for these new services and to fully reap the socio-economic benefits.

In response to the Opinion of 18 September 2009 by the Radio Spectrum Policy Group, the Commission plans to adopt a Decision that will set the technical requirements for the future use of the 790-862 Mhz sub-band for low and medium-power electronic communications networks. The Commission also recognises that different national contexts and legacy situations require a gradual and flexible approach towards the digital switchover and the allocation of the spectrum. Therefore, the Member States are only obliged to apply the proposed harmonised technical requirements if they decide to open the sub-band for services other than broadcasting.

• Recommendation from the Commission, "Facilitating the release of the digital dividend in the European Union", 28 October 2009, 2009/848/EC, OJ L 308, 24 November 2009
http://merlin.obs.coe.int/redirect.php?id=12580 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

• "Radio Spectrum Policy Group Opinion on the Digital Dividend", 18 September 2009, RSPG09-291
http://merlin.obs.coe.int/redirect.php?id=12559 EN

David Korteweg
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AT-Austria

TV Reporting Consent Considered Given Unless Opposition Expressed

In a previously unpublished decision taken in summer 2009, the *Oberlandesgericht Wien* (Vienna Appeal Court - *OLG Wien*) set out the conditions under which a person can be considered to have consented to television reporting about him/herself. An Austrian television company had produced a documentary on the work of the motorway police. The plaintiff was filmed by a camera crew employed by the broadcaster while a police officer carried out his official duties in a service station car park. The footage was broadcast several times in early 2009. It showed defects in the plaintiff's car and the conversation between him and the police officer concerning the state of the vehicle. The plaintiff disputed the existence and visibility of some of the defects. He was clearly recognisable because his face had not been obscured.

The plaintiff claimed that the programme breached his rights in his own image and requested an injunction against further broadcasts of the programme, as well as a temporary order banning the broadcast. He argued that he had been made a laughing stock and been denounced as an alleged serious traffic offender. He had not given his consent for his image to be broadcast in such a disparaging report.

The *Handelsgericht Wien* (Vienna Commercial Court) rejected the application for a temporary order and the *OLG Wien* upheld its decision. The courts held that the plaintiff's rights to his own image had not been infringed because they considered that he had consented to comprehensive use of his image. Such consent was considered given if the conduct of the person concerned left no doubt that he had agreed to the public use of his image. However, protection of these rights was only waived to the extent covered by the person's consent. It was therefore necessary to take into account for what purpose and in what context this consent had been given. In this particular case, the plaintiff had not only played a part in the police officer's official duties, but had "turned directly to the camera and responded to the accusations made against him, as if in an interview. Not only was the filming obvious to him, but he had even contributed to and supported it. [04046] In this situation, he should have objected to the filming expressly or through clear gestures, or refused to allow his image to be shown in a recognisable form." From this, the *OLG Wien* concluded that consent had been given for the use of the images. Since the police officer's actions had been accurately portrayed, the plaintiff's consent had covered the full use of the images. The courts did not examine whether the report had been disparaging.

The *OLG Wien's* decision is final. The main injunction proceedings are still pending.

• *Oberlandesgericht Wien 27. Mai 2009, 15 R 89/09g* (Vienna Appeal Court, 27 May 2009, 15 R 89/09g) DE
• *Handelsgericht Wien 11. März 2009, 17 Cg 10/09s* (Vienna Commercial Court, 11 March 2009, 17 Cg 10/09s) DE

Robert Rittler
Gassauer-Fleissner Attorneys at Law, Vienna

BE-Belgium

Advertising to Promote Children's Programmes on the Public Broadcaster not Discriminatory

On 14 October 2009, the Belgian *Jury voor Ethische Praktijken inzake Reclame* (Jury for Ethical Practices Concerning Advertising) issued a decision on a complaint, lodged by a member of the public, against the Flemish public broadcasting corporation VRT. The Jury for Ethical Practices Concerning Advertising is the self-disciplinary authority of the advertising and marketing sector in Belgium. It examines the compliance of advertisements with self-disciplinary advertising codes, such as the International Chamber of Commerce's International Code of Advertising Practice, either after a complaint by members of the public or, before an advertisement has actually been made public, at the demand of an advertiser. In addition, the Jury also supervises the compliance of advertisements with legal norms and, although it seldom refers explicitly to the prevailing legislation on audiovisual commercial communications, a large number of its decisions are based on these. The Jury is not authorised to impose sanctions and can only take three types of measures: first, it can decide not to formulate any remarks. Second, the Jury can order a modification or withdrawal of the advertisement. If the advertiser does not react, the media themselves will be advised to stop publishing or broadcasting the advertisement in question. And third, it can advise dealing cautiously with the publication or transmission of an advertisement. In such circumstances, the advertisement is not deemed illegal or unethical as such, yet is found by the Jury to be probing the boundaries of acceptable commercial speech. The advertiser, the advertising agency and the media then decide themselves whether or not to publish or broadcast the advertisement in question.

The complaint concerned the transmission of six commercial radio advertising spots that promote the programme service 'Ketnet', which broadcasts children's programmes on the public broadcaster. The six radio spots in the instant case feature the voices of children trying to convince their parents to stop working earlier, so the children can be seated in front of their televisions in time to watch their favourite programme. According to the complaint, the advertisement exploits the feelings of guilt of women who want to work outside the home (and in many circumstances have to) and who therefore cannot look after their children during working hours. Hence, in order to be good mothers, women are "obliged" to stay at home. Moreover, these spots are discriminatory against women, as they are not directed towards men. The Jury in a very short decision first noted that there are actually three spots in which a child addresses itself to its father and three spots in which a child addresses itself to its mother; hence a good equilibrium between women and men is preserved. This advertising campaign can therefore in no way be perceived as discriminatory. Second, the Jury observed that the spots feature the voices of children who are attempting to convince their parents to stop working earlier in funny ways. Because of this humorous tone, the jury judged that the spots were neither likely to provoke feelings of guilt in the parents nor reinforce gender stereotypes among the public. As the Jury could find no violation of legal or self-disciplinary norms, it decided not to formulate any remarks.

• Jury voor Ethische Praktijken inzake Reclame, *14 October 2009* (Jury for Ethical Practices concerning publicity, complaint against VRT, 14 October 2009)
http://merlin.obs.coe.int/redirect.php?id=12115 NL

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

BG-Bulgaria

Progress on the Implementation of the AVMS Directive

The new Bulgarian government undertook some urgent measures in order to implement Directive 2007/65/425C in Bulgarian law. The Council of Ministers has approached all key stakeholders to offer their opinions on the draft legislative acts that need to be prepared for the transposition of the Directive.

Within the time limit set by the Ministry of Culture the following key stakeholders have put forward their opinions: the Council for Electronic Media, the Bulgarian National Television, the Bulgarian National Radio, the Television Producers Association, the Bulgarian Radio and Television Operators Association, the Advertising Agencies Association, the National Self-Regulation Council, the Bulgarian PR Agencies Association, the Bulgarian Advertisers Agency, Film Author and the Bulgarian Donation Forum.

On 14 October 2009, the Ministry of Culture held a public hearing on the opinions received. After the completion of the public consultation process the opinions were published on the web page of the Ministry of Culture.

During October 2009 a working group was set up by the Prime Minister which prepared the acts required for the implementation of the Directive. The working group delivered its Draft on the amendment of the Radio and Television Act on 10 November 2009 aimed at implementing the provisions of Directive 2007/65/425C into Bulgarian law.

IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Rayna Nikolova
Council for Electronic Media, Sofia

CZ-Czech Republic

Film Industry Support Programme

The government of the Czech Republic has adopted a support programme for the film industry.

Under this programme, film producers who invest a certain sum in the production of a film in the Czech Republic can claim back 20% of that sum in the form of a tax bonus. The producer must have its headquarters and pay taxes in the Czech Republic. Co-productions may also receive support. The programme lays down the conditions under which support is available, although there is no legal right to it.

The Ministry of Culture decides on the granting of support, which is only possible on the basis of a written application submitted together with relevant documentation. If an application fails to include information or documents relevant to the decision on whether support should be granted, the applicant is granted a 10-day extension. If the required information is not submitted before this deadline, the Ministry rejects the application.

The Programme Council, comprising experts appointed by the Minister of Culture, assesses the applications. On the basis of this assessment, the Minister of Culture decides whether support should be granted.

Support is available for the production of cinema and television films of at least 70 minutes' duration and episodes of television series of at least 40 minutes' duration.

The Ministry can also, on the basis of application documents, grant a promise of support that is valid for a limited time. If the conditions of the promise of support are not demonstrably met or if the conditions under which it was granted are not, or are no longer, in place when the deadline expires, the promise is automatically withdrawn.

The support consists of partial reimbursement of the costs linked to the production of a film in the Czech Republic. The programme is valid for the year 2010.

• Usneseni Vlady Ceske Republiky ze dne 19. října 2009 č. 1304 k návrhu Programu podpory filmového průmyslu (Decision no. 1304 of the government of the Czech Republic of 19 October 2009 on the proposal of a support programme for the film industry)
http://merlin.obs.coe.int/redirect.php?id=12116 CS

Jan Fučík
Ministry of Culture, Prague

DE-Germany

ECJ Asked for Preliminary Ruling on Responsibility for Internet Publications

In a decision of 10 November 2009 (case no. VI ZR 217/08), the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) suspended a pending procedure in order to ask the European Court of Justice (ECJ) for a preliminary ruling under Art. 234 of the EC Treaty.

The question that needs clarification concerns the international responsibility of courts to rule on injunction suits against Internet publications by companies that are based in another EU Member State. The ECJ has also been asked to determine whether the claim under the country of origin principle enshrined in Directive 2000/31/EC should be assessed - in the present case - in accordance with Austrian law or whether German law applies.

The case on which the proceedings are based concerns an action brought by a man who was found guilty of murder in Germany and who has since been released from prison on parole. The plaintiff is demanding that an Austrian-based media company cease publishing reports on the crime he committed, in which his full name is mentioned.

Up to June 2007, the company had made available on its Internet site an article written in 1999 concerning a complaint made by the plaintiff and his brother, who was also found guilty, about an infringement of the Constitution. The first names and surnames of the plaintiff and his brother appeared in full in that article.

The plaintiff is demanding that the report containing his full name should be withdrawn. He claims that the company's activities significantly impede the social rehabilitation of criminals who have served their sentence and infringe his personality rights. The lower instance courts had ruled in the plaintiff's favour.

• *Pressemitteilung des BGH Nr. 227/09 vom 10. November 2009* (Press release of the Federal Supreme Court No. 227/09 of 10 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12117 DE

Max Taraschewski
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Liability of Website Operator for Users' Infringements

In a ruling on 12 November 2009, the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) decided that the operator of an Internet site is liable for the illegal uploading of photographs by users of the site.

The plaintiff operates an Internet site from which recipes, some including photographs, can be downloaded free of charge. Private users uploaded several of these photos together with recipes onto the website of the defendant, who also operates a free recipe collection on the Internet. The plaintiff did not give consent for the photos to be used in this way.

The *BGH* ruled that the defendant had adopted the photos uploaded by users as its own and was therefore liable for them as if they were its own content. It did not matter that the photos had previously been generally available on the plaintiff's website. The defendant had clearly accepted responsibility for the recipes and illustrations published on its website, particularly by marking the recipes with its logo. In the absence of adequate verification of the rights to the images, the stipulation in the defendant's general terms of business that uploading copyrighted content onto its platform was prohibited, was not sufficient.

Therefore, by making the photos available for download from its Internet site, the defendant had infringed the plaintiff's exclusive right to make content available under Art. 15 para. 2 no. 2 and Art. 19a of the *Urheberrechtsgesetz* (Copyright Act - *UrhG*).

• *Urteil des BGH vom 12. November 2009 (Az. I ZR 166/07)* (Ruling of the Federal Supreme Court, 12 November 2009 (case no. I ZR 166/07))
http://merlin.obs.coe.int/redirect.php?id=8723 DE

Christian M. Bron
Institute of European Media Law (EMR), Saarbrücken/ Brussels

New Cinemas' Eligibility for Support

On 28 October 2009, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) decided that financial aid for the construction of new cinemas should not be granted if there is a danger of existing cinemas being forced to close as a result.

In the underlying case, the plaintiff, a cinema firm, had applied to the *Filmförderungsanstalt* (Film Support Office - FFA) for financial assistance with the construction of two new multiplex cinemas in different locations in accordance with Art. 56 para. 1 no. 1 of the *Filmförderungsgesetz* (Film Support Act - FFG). Support may be granted on condition that the planned building project would produce a structural improvement in the location concerned. Such a structural improvement might be possible, for example, if there was a shortage of cinemas in the area concerned.

However, the BVerwG shared the view of the courts of lower instance that this condition was not met. In this case, there was no discernible shortage of cinemas. Moreover, it was possible that the new cinemas might have a detrimental impact on ticket sales in existing cinemas in the area, which might be forced out of business as a result. It ruled that the FFA's decision to reject the application for support was legitimate.

• *Pressemitteilung des BVerwG zu den Urteilen vom 28. Oktober 2009 (Az: 6 C 31.08 und 6 C 32.08)* (Press release of the Federal Administrative Court on the rulings of 28 October 2009 (case nos. 6 C 31.08 and 6 C 32.08))
http://merlin.obs.coe.int/redirect.php?id=12118 DE

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

Appeal Court Rules on Dispute between *RTL* and *Sat.1* over Use of Film Material

In the legal dispute between RTL Television GmbH and Sat.1 Satellitenfernsehen GmbH, the *Oberlandesgericht Köln* (Cologne Appeal Court - OLG) issued a ruling on 30 October 2009, rejecting RTL's complaint and overturning the decision of the court of lower instance.

The underlying case concerns film material from the episode of an RTL talent show broadcast on 23 January 2008. The episode included an appearance by a candidate who broke down after one of the judges gave a devastating appraisal of his performance. On the following two days, the broadcaster Sat.1 reported on this incident, using several excerpts from the recording in its own programmes. RTL argued that this infringed its exclusive right of exploitation, enshrined in Art. 15 of the *Urheberrechtsgesetz* (Copyright Act - UrhG), and demanded compensation.

The OLG Köln rejected this claim. The intrusion into RTL's copyright by Sat.1 had been admissible in this case. The talent show concerned was very popular with the viewing public. The very harsh assessments of this particular judge were regularly the subject of public debate. In this context, the candidate's breakdown was a significant public event, which could be and - through its use in the Sat.1 programmes - had been the subject of topical news reporting (Art. 50 UrhG). Sat.1's use of the film material had been limited to the extent necessary for the purpose of the

reporting. Furthermore, the film excerpts used for reference had been covered by the right to quote (Art. 51 UrhG).

The ruling of the OLG Köln is final.

• *Pressemitteilung des OLG Köln zum Urteil vom 30. Oktober 2009 (Az. 6 U 100/09)* (Press release of the Cologne Appeal Court on its ruling of 30 October 2009 (case no. 6 U 100/09))
http://merlin.obs.coe.int/redirect.php?id=12119 DE

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

Minister-Presidents Sign 13th Inter-State Broadcasting Agreement

On 30 October 2009, the Minister-Presidents of the *Länder* signed the *13. Rundfunkänderungsstaatsvertrag* (13th amendment to the Inter-State Broadcasting Agreement - *RÄStV*).

The primary reason for adopting the 13th *RÄStV* is to transpose the Audiovisual Media Services Directive 2007/65/EC into German law. In particular, product placement is allowed in certain cases for the first time (see IRIS 2009-6:9).

Public service broadcasters are permitted to use product placement "during cinema films, television films and series, sports broadcasts and light entertainment programmes, which were not commissioned by the broadcaster itself". As long as no payment is made in return, the same applies to programmes other than news bulletins or similar programmes. Product placement remains prohibited in children's programmes under Art. 15 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*).

Private broadcasters are also allowed to use product placement in their own programmes (Art. 44 *RStV*).

Art. 58 para. 3 also now explains which provisions of the *RStV* should, in future, also apply to telemedia similar to television (on-demand audiovisual media services). These particularly include the provisions on the scope of the *RStV* , on advertising and teleshopping content, and on sponsorship.

The provisions on the transmission of major events, short reporting, European productions, the inclusion of advertising and teleshopping and the duration of advertising also apply to services comprising programmes that are made available in return for a one-off payment.

• *Dreizehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Dreizehnter Rundfunkänderungsstaatsvertrag - 13. RÄStV)* (13th amendment to the Inter-State Broadcasting Agreement - 13. RÄStV)
http://merlin.obs.coe.int/redirect.php?id=12120 DE

Christian Mohrmann
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Cinema Industry Rejects Full Digitisation Proposal

Representatives of the cinema industry have rejected the offer made by the *Filmförderungsanstalt* (Film Support Office - *FFA*) on the initiative of the Federal Commissioner for Culture and Media concerning support for the full digitisation of cinemas in Germany (see IRIS 2009-8:10).

Under the proposal, the *FFA* would provide start-up funds of up to EUR 40 million for digitisation. In return, the *FFA* demanded that the cinema industry drop its complaints about the obligation to pay film contributions on the grounds that it infringed the principle of fair contributions, and that it pay the contributions unconditionally (see IRIS 2009-4:7).

However, cinema industry representatives have refused to withdraw their complaints and reservations. As a result, the *FFA* considers that there is no longer a basis for the proposed agreement.

In order to counter the pending procedure on the constitutionality of the film contributions, the *FFA* and the Federal Commissioner for Culture and Media have promised to amend the *Filmförderungsgesetz* (Film Support Act - *FFG*).

• *Pressemitteilung der FFA vom 17. November 2009* (FFA press release of 17 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12121 DE

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

ES-Spain

Law on the Funding of RTVE Corporation Adopted

The draft law reforming the funding of the national public service broadcaster, the RTVE Corporation, presented to the Parliament in May 2009, was passed in

August, after amendments were debated and considered during the summer (see IRIS 2009-8: 11). Law 8/2009 on the funding of the Spanish Radio and Television Corporation eliminates advertising as a source of income, instead proposing a new financial equilibrium to be achieved mainly through State subsidy and three different types of taxes. It also imposes additional public service obligations on RTVE.

The corporation will continue to derive revenue from an existing tax on the use of spectrum frequencies (up to a maximum of EUR 330 million per year), however in addition two new taxes are also to be imposed on national telecommunications operators offering audiovisual services, as well as national commercial television companies operating pay or free-to-air services via cable, satellite or terrestrial networks.

The tax to be paid annually by national commercial broadcasters is to amount to 3% of their gross operating income, corresponding to their yearly turnover, and that to be faced by pay-TV operators and telecommunications companies is to be 1.5% and 0.9%, respectively. Nevertheless, it has been specified that the latter will not contribute more than 25% of the Corporation's total income and that, in turn, free-to-air and pay-TV operators will not add more than 15% and 20% of the same.

Direct support from the State is guaranteed so as to enable financial equilibrium in case other resources are reduced, as long as the national public service broadcaster's expenditure is in line with a pre-approved budget. Nevertheless, RTVE's total budget will be limited to EUR 1,200 million for the period from 2010 to 2011 and will not be allowed to grow more than 1% annually during the period from 2012 to 2014. Additionally, the Corporation will have to create a reserve fund from the income that is surplus to the cost of providing its public service activities.

As regards additional public service broadcasting obligations, the following can be outlined. RTVE will be required to:

- Dedicate at least twelve hours per week, through any of the Corporation's radio and television stations, to the support of programmes and interactive services where political parties, unions and social groups are represented.

- Increase programmes designed to educate and entertain the youngest section of the audience. From Monday to Friday between 5pm and 9pm 30% of the offerings on the children's channel should be directed at children from 4 to 12 years of age. During weekends and holidays, such programming should be offered from 9am to 8pm. Once the switch-off of analogue television has taken place, content will have to be broadcast in Spanish, co-official languages and/or English, making use of the multilingual system.

- Commit to making programming as accessible as possible to all audiences, including those with any kind of disability. Before 1 January 2013, TVE will have to deliver subtitles in at least 90% of its offerings - aiming to reach 100% where practicable - and offer at least 10 hours a week of programmes that include audio description and 10 hours a week of programmes that include sign language.

- Broadcast European audiovisual works in at least 60% of its main channels' prime time slots, increase by 20% the legal obligation to fund European audiovisual productions, and diversify the independent suppliers of commissioned productions.

- Have the possibility of buying sports rights limited to 10% of its total annual budget from a general interest sporting events list designed by the *Consejo Estatal de Medios Audiovisuales* (Audiovisual Media Council) yet to be created.

- Provide information regularly about debates in Parliament and broadcast live those sessions of special interest to citizens.

• Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española (Act 8/2009 of 28 August 2009 on the funding of RTVE Corporation)
http://merlin.obs.coe.int/redirect.php?id=12122 ES

Trinidad García Leiva
Universidad Carlos III, Madrid

Audiovisual Draft Law

The proposal for a Spanish Audiovisual Act was approved on 16 October 2009 by the Spanish government. If signed into law, the bill will revoke fourteen standards and regulations related to the radio, television and telecommunications industries. Among others, these include the acts that have regulated private commercial channels and the local television channels of the Spanish autonomous communities from 1988 and 1983 respectively.

Composed of sixty articles, the most important aspects of this bill are the following:

- The new law tries to provide added protection for minors. It forbids the broadcasting on free-to-air television of programmes that include pornographic scenes or gratuitous violence. Such programmes may only be broadcast in encrypted form between 10 pm and 6 am. The broadcasting of other programmes that may be harmful to children will have to be signaled by means of a characteristic sound and a visual sign. Programmes dedicated to games of chance and bets (in free-to-air broadcasting or in an encoded way) may only be shown between 1am and 5am.

- Televisions and telecom operators shall assign 5% (6% in the case of Televisión Española) of their gross

revenue to finance Spanish and European cinema. 40% of that amount can be assigned to TV series.

- Advertising will be limited to a maximum of 12 minutes per hour. An additional 12 minutes per hour may be dedicated to telepromotions and 5 minutes per hour to self-promotion. Movies and news programmes may be interrupted every 30 minutes.

- Holders of licenses to broadcast television will be able to allocate 50% of their channels to pay-TV and the duration of such licenses will be increased to 15 years (10 years under current legislation).

- Telecom operators will be obliged to broadcast on free-to-air television certain events of general interest.

- And finally, the *Consejo Estatal de Medios Audiovisuales* (National Council of Audiovisual Media) will be created. The National Council of Audiovisual Media will be a public organisation with legal personality and full capacity to act and, as an independent authority, its purpose will be to ensure and guarantee compliance with the law. It will be created in conjunction with the Ministry of the Presidency and will consist of nine members, elected by 3/5 of the Congress.

Infringements of the new Audiovisual draft law will result in fines of up to EUR 1 million.

• Proyecto de Ley General de la Comunicación Audiovisual (General Law of Audiovisual Communication - Draft)
http://merlin.obs.coe.int/redirect.php?id=12123 ES

Laura Marcos and Enric Enrich
Enrich Advocats - Copyr@it, Barcelona

FR-France

Revision of the "Tasca" Decrees to Be Completed Soon

At the end of 2007, with a view to adapting the regulations to recent developments in the audiovisual sector, the Ministry of Culture and Communication gave Mr Kessler and Mr Richard the task of consulting the sector's professionals on amending the 2001 "Tasca" Decrees. The Decrees lay down the scheme for contributions from the editors of television services to the development of the production of European and French-language audiovisual works (see IRIS 2007-10: 13and 2008-2: 12). The proposals that came out of their work made it possible to conclude agreements in November 2008 between the editors of national television services broadcast terrestrially in analog mode (Canal+, France Télévisions, M6 and TF1) and the representatives of audiovisual creations. Decree 2009-1271 of 21 October 2009 on the contribution of analog channels, the first of the three Decrees that are to redefine the framework of the relations between the editors of television services and the audiovisual producers, incorporates more specifically the consequences of the 2008 agreements. It amends the Decrees of 09 July 2001 and 28 December 2001, which applied respectively to the unencrypted channels and to the channels that are partly financed by payments from users. The text lays down the minimum proportion of turnover that a services editor must devote to audiovisual production, which varies according to the level of investment in heritage works. The proportion is fixed at 15% (compared with 16% previously), of which at least 10.5% must be in heritage works, or at 12% where it relates to these works exclusively. Under Article 27 of the 1986 Act as amended by the Act of 05 March 2009, and in the light of the agreements negotiated some months earlier, the legislator wanted the contribution to audiovisual production to involve a "significant proportion" for heritage works, i.e., works falling within one of the following genres: fiction, animation, creative documentary, video music, and the recording or recreation of live shows. At the same time, the obligation to broadcast works not previously shown at prime time is lessened, since the annual volume of 120 hours may include up to 25% of repeats. Lastly, part of the audiovisual contribution (a minimum of 9% of the service editor's turnover) must be earmarked for "independent production", according to criteria for independence that are an updated version of those laid down in the previous arrangements.

Two inter-professional agreements have also been concluded, in July and October 2009, between the producers and a group of cable and satellite channels on the one hand and a number of digital land-broadcast television channels on the other. Both these agreements take account of the new means of on-line consumption of programmes (VoD, catch-up TV), and redefine independent production and the concentration on the obligation to produce heritage works. They should be extended in the near future by means of regulations, as there are two Decrees (on "cable and satellite" and "digital TV") on the verge of being adopted. The Directorate for Media Development recently embarked on a public consultation "on the scheme for contribution to the development of the production of cinematographic and audiovisual works by television services broadcasting terrestrially". The reform is therefore aimed principally at taking into account the agreements concluded on 22 October 2009 between the digital channels and the professional organisations of authors and audiovisual producers on the scheme for the contribution of these channels to audiovisual production. However, in order to take account of the upcoming extinction of analog terrestrial broadcasting, the reform decrees a single scheme applicable to all the terrestrially-broadcast channels. The draft Decree submitted for consultation is therefore the result of the incorporation of the arrangements applicable to the analog terrestrially-broadcast channels, both unencrypted (TF1, France Télévisions, M6) and encrypted (Canal+) and the arrangements

applicable to the digital channels, both encrypted and unencrypted. It would therefore have the effect of repealing the Decrees of 09 July and 28 December 2001.

• *Décret n°2009-1271 du 21 octobre 2009 relatif à la contribution à la production audiovisuelle des éditeurs de services de télévision diffusés par voie hertzienne terrestre en mode analogique, JO du 22 octobre 2009* (Decree 2009-1271 of 21 October 2009 on the contribution to audiovisual production by the editors of television services broadcast terrestrially in analog mode; published in the *Journal Officiel* of 22 October 2009)
http://merlin.obs.coe.int/redirect.php?id=12124 FR

• *Consultation publique relative au régime de contribution au développement de la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre* (Public consultation on the scheme for the contribution to the development of the production of cinematographic and audiovisual works by television services broadcast terrestrially)
http://merlin.obs.coe.int/redirect.php?id=12125 FR

Amélie Blocman
Légipresse

New Cinema Code Amended Already

Article 72 of the Act of 05 March 2009 on audiovisual communication authorises the Government to organise by decree a certain number of the provisions of the new legislation on the economic regulation of the cinema industry. Thus the Decree of 05 November 2009 has amended (or in some cases created) certain provisions of the new *Code du Cinéma et de l'Image Animée* (Code for the Cinema and Animated Image - CCIA) (see IRIS 2009-9: 11).

Firstly, the text redefines and improves the scheme for programming commitments the operators are required to observe. This is in order to adapt the original regulations to recent developments in the sector, the better to take into account the competition situation at the local level in order to determine the commitments to which each individual operator must subscribe. The Decree also extends the competence of the cinema mediator (Articles L. 213-1 to L. 213-5 of the CCIA) to include all the operating conditions, including the economic aspects, that apply to cinematographic works shown in cinemas. The mediator is also responsible for promoting the resolution of disputes between operators and distributors arising out of their disregard for their mutual contractual commitments. Lastly, the mediator may have jurisdiction over determining the time after which works may be exploited physically as videos, as provided for in the "HADOPI" Act of 12 June 2009 (see IRIS 2009-7: 13). The Decree also changes the arrangements concerning ticket schemes where buying one multiple ticket - called an "unlimited card" - gives access to an unspecified number of viewings (Articles L. 212-22 to L. 212-25). Their implementation is subject to the prior approval of the Chairman of the CNC. As the unlimited cards scheme means that it is no longer possible to calculate the remuneration payable to rightsholders according to the number of tickets bought by the audience, the regulations define a reference price to be used as the basis for this. Implementing the recommendations of the council on competition (*Conseil de la Concurrence*), the Decree provides that this reference price will be determined and assessed on the basis of measurable economic data (evolution of the average price of tickets sold singly by the operator, the market situation of the operator, and the noted and expected effects of the access scheme, etc.).

The Decree also introduces new rules on the conditions for concession of the representation rights for cinematographic works shown in cinemas. The text requires the concession contract concluded by the distributor and the operator to be in writing and contain a certain number of compulsory indications (Article L. 213-14 of the CCIA). The Decree also introduces the rule of minimum levels of remuneration for distributors representing the rightsholders who concede the operating rights for the works to the operators. The present system of proportional remuneration for all the economic players in the chain is based on shared risk, but it does not make it possible to guarantee sufficient remuneration to the distributors (and, consequently, to all the rightsholders) where the operator, who has complete freedom in determining his prices, adopts particularly low prices, whether occasionally or over a long period.

Lastly, the Decree has an additional chapter on the remuneration for the exploitation of cinematographic works by on-demand audiovisual media services. Article L. 223-1 of the CCIA lays down the principle of remuneration for beneficiaries for each dematerialised access to a work on an on-demand service. It then provides for the possibility for the public authorities to introduce a minimum level of remuneration, which should reconcile the objectives of access for the greatest number of users with maintaining a diversified cinematographic offer and the full effect of the provisions applicable to the chronology of exploiting cinematographic works. These arrangements are intended to ensure firstly the development and maintenance of the diversity of the cinematographic offer on the on-demand services, and secondly the full application of the new media chronology. A Decree will lay down the method for applying these two new schemes for minimum remuneration and will state more specifically the economic data to be used as the basis for its determination.

• *Ordonnance n°2009-1358 du 5 novembre 2009 modifiant le code du cinéma et de l'image animée, JO du 5 novembre 2009* (Decree No. 2009-1358 of 05 November 2009 amending the Code for the Cinema and Animated Image, published in the *Journal Officiel* of 05 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12126 FR

Amélie Blocman
Légipresse

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

International Tax Credit Comes into Force

Instituted by the 2009 budget (Art. 131, codified in Art. 220 quaterdecies of the General Tax Code), this form of international tax credit is aimed at facilitating the filming and manufacture in France of cinematographic and audiovisual works initiated by a foreign producer and including elements that connect them to France's culture, heritage or territory. The tax credit is granted to companies carrying out executive production of such works in France, subject to the work being approved by the national cinematographic centre (*Centre National de la Cinématographie* - CNC). It represents 20% of the work's eligible expenditure in France, with a ceiling of EUR 4 million per work (see IRIS 2009-2: 13).

The two Decrees for application of these arrangements were published in the *Journal Officiel* on 1 December 2009. The texts lay down the extent of the expenditure taken into account in the arrangements, determine the works eligible "in the fiction and animation genres", and the conditions for allocating the tax credit. The decisions are made by the Chairman of the CNC after the works have been selected by a committee of experts. The decree also states the various conditions for provisional authorisation, and those for final authorisation, which can only be stated once the final work carried out in France by the executive production company has been completed. An appendix to the text gives a scale of points applicable to eligible works.

The first authorisations could be issued to executive producers before the end of the year. A standard application file is available on the CNC's Internet site. Exceptionally, for works produced in 2009, the expenditure since 1 January 2009 may be taken into account in the amount used for calculating the tax credit. The corresponding files must be submitted to the CNC within a 3-month period starting 1 December 2009. According to the CNC, this could concern between five and ten works from 2009.

• *Décret du ministère de l'Economie de l'Industrie et de l'Emploi n°2009-1464 du 30 novembre 2009 pris pour l'application de l'article 220 quaterdecies du code général des impôts relatif au crédit d'impôt pour dépenses de production exécutive d'œuvres cinématographiques et audiovisuelles, JO du 1er décembre 2009* (Decree no. 2009-1464 of 30 November 2009 by the Ministry for the Economy, Industry and Employment, adopted in order to implement Article 220 quaterdecies of the General Tax Code on tax credit for executive production expenditure for cinematographic and audiovisual works, published in the *Journal Officiel* of 01 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12127 FR

• *Décret du ministère de la Culture et de la Communication n°2009-1465 du 30 novembre 2009 pris pour l'application des articles 220 quaterdecies et 220 Z bis du code général des impôts et relatif à l'agrément des œuvres cinématographiques et audiovisuelles ouvrant droit au crédit d'impôt pour dépenses de production exécutive en France d'œuvres cinématographiques ou audiovisuelles étrangères, JO du 1er décembre 2009* (Decree 2009-1465 of 30 November 2009 by the Ministry for Culture and Communication, adopted in order to implement Articles 220 quaterdecies and 220 Z bis of the General Tax Code on the approval of cinematographic and audiovisual works giving entitlement to tax credit on expenditure on executive production in France of foreign cinematographic or audiovisual works, published in the *Journal Officiel* of 01 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12128 FR

Amélie Blocman
Légipresse

The "HADOPI 2" Act Comes into Force

On 10 June 2009, the Constitutional Council found that the power to suspend access to the Internet as punishment for the illegal downloading of works, as voted in the context of the "HADOPI" Act, could not be conferred on an independent administrative authority, in this case the high authority for the circulation of works and the protection of rights on the Internet (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* - Hadopi) (see IRIS 2008-10: 10and IRIS 2009-7: 12). The powers of the Hadopi, according to the original legislation, would lead to a restriction to a person's exercise of his/her right to self-expression and freedom of communication. The penalty of cutting off access to the Internet could only be imposed by a judge, according to the "Wise Men", thereby obliging the Government to supplement the text with a new provision on repression. The text (referred to as "Hadopi 1"), without its section on penalties, was promulgated on 13 June 2009.

A new bill on the penal protection of literary and artistic property on the Internet was therefore discussed and voted on in September, and submitted to the Constitutional Council by the opposition for examination. On 22 October 2009, the Council validated the essential part of the arrangements. The texts create a criminal sentence of suspending access to the Internet for unlawful downloading, that the courts may impose for a maximum period of one year on anyone guilty of infringing copyright and for one month for the person with access to the Internet. The sentence also carries a ban on subscribing another Internet access contract; a subscriber failing to observe the ban would be further penalised (two years' imprisonment and a fine of EUR 30,000). The subscriber would also be required to continue paying his/her subscription, despite access being cut off. This suspension penalty may be in addition to or replace the main penalty of three years' imprisonment and a fine of EUR 300,000 incurred in the event of infringement of copyright (Article L. 335-2 and L. 335-3 of the CPI). The new Act also makes the

judgment of copyright infringement offences committed on the Internet subject to specific rules of criminal procedure. Thus the public prosecutor may choose to use the simplified procedures of the criminal ruling, which enables a single judge to deliver a judgment without a hearing in the presence of the parties. Although the Constitutional Council has validated this procedure, it declared Article 6.II of the Act unconstitutional; this enabled the victim, in the case of the simplified procedure being applied, to claim damages and to appeal against any criminal ruling. All the other contested articles, concerning the powers of the Hadopi's agents, the specific criminal procedure, and the introduction of an additional penalty suspending access to the Internet, have therefore been validated. The regulatory authorities will nevertheless have to define the elements that constitute the offence punished by the additional penalty of suspending access to the Internet. Although this brings the Hadopi saga to an end, Patrick Zelnik, who has been given responsibility by the Minister for Culture to consider the legal offer of music and films on line, has already intimated that the recommendations of his working party, expected by 15 December 2009, could give rise to a new bill.

• *Loi n°2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique, JO du 29 octobre 2009* (Act No. 2009-1311 of 28 October 2009 on the penal protection of literary and artistic property, published in the *Journal Officiel* of 29 October 2009)
http://merlin.obs.coe.int/redirect.php?id=12166 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Audiovisual Media Services Regulations

On 19 December 2009, the Audiovisual Media Services Regulations 2009 came into force. This was actually the date by which EU Member States must transpose into national law the Audiovisual Media Services Directive (AVMS Directive). The Regulations are made under the European Communities Act, 1972, Section 2(2).

The Regulations deal with those matters in the Directive whose transposition requires legislation, with the exception of "product placement".

There are four main topics in the Regulations:

1) The regulation of video-on-demand services. This involves a new legal definition of "on-demand programme services" and the setting up of a legal framework for a regulatory system for such services, including one or more industry led co-regulatory bodies;

2) Television broadcasting services provided over the Internet. The definition of a television licensable content service is amended, removing the exclusion of services provided over the Internet and ensuring that all television broadcasting services are regulated and Ofcom licensable;

3) Country of origin "co-operation procedure". Ofcom will lead in dealing with any request from another Member State regarding compliance with its stricter national rules by a broadcaster within UK jurisdiction; and

4) The regulation of non-EU satellite services which are uplinked from the UK. Ofcom is given powers to issue directions to UK uplink providers in respect of any non-EU satellite channels which they uplink to a satellite.

• The Audiovisual Media Services Regulations 2009
http://merlin.obs.coe.int/redirect.php?id=12129 EN
• Explanatory Memorandum to the Audiovisual Media Services Regulations 2009, No. 2979
http://merlin.obs.coe.int/redirect.php?id=12130 EN

David Goldberg
deeJgee Research/ Consultancy

Government Consults on Product Placement

The UK Department for Culture, Media and Sport is consulting on a change to advertising rules to permit product placement on television; it has stated that it "is currently minded to permit product placement on UK television, subject to safeguards". It is however concerned about potential health issues related to the promotion of particular types of product.

The current position is that product placement is prohibited by the requirements in the Ofcom Broadcasting Code that "no undue prominence may be given in any programme to a product or service" (rule 10.4) and that "product placement is prohibited" (rule 10.5). In consultation on the implementation of the AVMS Directive widely varying estimates had been made of the value of product placement for UK commercial broadcasters and the Government had concluded that no decisive evidence had been put forward that the economic benefit of product placement would outweigh the detrimental effects on the quality and standards of British television and viewers' trust in it. However, the point was also made that UK viewers already accept product placement in films shown on television and in non-UK programming, especially American programming. It was also argued that the "no undue prominence" rule could be retained to prevent the more overt and intrusive forms of product placement.

The Government is now seeking views on additional safeguards that might be needed beyond those in

the AVMS Directive on the commercial advantages of permitting product placement, on the types of programmes in which product placement might be permitted and whether these should be defined more specifically than in the Directive. For example, should there be a specific prohibition of product placement in religious programmes, news programmes and consumer programmes? Should the prohibition cover not only children's programmes, but all programmes with a disproportionately high child audience? Other concerns include whether placement of alcohol, high fat foods and gambling should be prohibited and how the existence of product placement should be signaled to viewers.

The Department is seeking responses to the consultation by 8 January 2010.

• Department for Culture, Media and Sport, 'Consultation on Product Placement on Television', November 2009
http://merlin.obs.coe.int/redirect.php?id=12131 EN

Tony Prosser
School of Law, University of Bristol

Retention of Amended List of Protected Free-to-Air Events Recommended

The UK has had since 1956 a list of events that are felt to have special national resonance and so are available, so far as is possible, to be broadcast on free-to-air television. The list, which is drawn up by the Secretary of State, has been regularly amended and has now been examined by an Independent Review Panel.

The Panel found that 82% of respondents believed that they had an entitlement to watch certain events free-to-air, as they had already paid their BBC licence fee, and that there is compelling evidence of a public expectation that the BBC should give a high priority to such events. On this basis it concluded that in current circumstances it supported the principle of protecting some major sporting events for the widest possible television audience, if necessary by means of listing them. However, the current criteria should be simplified to require that the event must have a special national resonance and not merely be of interest to followers of the sport concerned; it must be a pre-eminent national or international event with the involvement of a national team and be likely to command a large television audience. There should also be a single list of live events rather than the current two lists, one with full protection and the second with protection of highlights only.

The Panel accepted that sports governing bodies (who were opposed to listing) should be best placed to know what is in the interest of their sport now and for the future. However, the Panel had to look beyond the singular interests of any one sport to assess events "of major importance to society". Those who opposed listing had to accept that their view means that there are circumstances in which a significant proportion of the population could be denied the chance to view major national and international events, including senior citizens who qualify for free television licences. Despite radical changes in the media landscape, for the foreseeable future most people's first choice of how to view the biggest sporting events will be by means of a television set.

On this basis the Panel recommended that the Summer Olympic Games, the World Cup Finals and the UEFA European Football Championship Finals should continue to be listed, as should a number of domestic sporting events. The whole of the Wimbledon Lawn Tennis Championships should be listed (not just the finals as at present), while the Open Golf Championship and Cricket's Home Ashes Test Matches against Australia and the entirety of the Rugby Union World Cup should also be added to the current list. Some events such as the Winter Olympic Games should be de-listed.

It is now for the Secretary of State to decide to what extent the recommendations will be accepted.

• Department for Culture, Media and Sport, 'David Davies Publishes His Review of Free-to-air Listed Events', 13 November 2009
http://merlin.obs.coe.int/redirect.php?id=12132 EN

Tony Prosser
School of Law, University of Bristol

GR-Greece

The Transition Process to Digital Terrestrial Television in Motion in Greece

The first digital terrestrial transmission in Greece of private television channels of national reach through the digital network provider Digea took place on 24 September 2009 in an area of the North Peloponnese, while current planning envisages the immediate launch of transmissions in big, urban centres as well. Greece has thus officially entered the period of digital transition envisaged in the ministerial decision, published in August 2008, which determined the frequencies on which the existing television stations can digitally transmit their analogue programme. On the institutional level, these stations have already received the necessary license from the Εθνικό Συμβούλιο Ραδιοτηλεόρασης (National Council for Radio and Television - 325343341) for the digital simulcasting of their analogue programming in January 2009, while 42 stations of regional reach have also been issued

the same license. Across the country, two digital frequency bands of the public service broadcaster Ελληνική Ραδιοφωνία Τηλεόραση (Greek Radio and Television - 325341344) have already been in operation since 2006, on which the existing four analogue channels are rebroadcast and three digital channels broadcast. However, the technical method for the encoding of the signal of the private channels of national reach is MPEG-4, while public service television has chosen the MPEG-2 system, a fact that inhibits the dissemination of the new method of transmission among consumers.

On the legislative level, a delay has occurred in relation to the publication of the Presidential Decree with which, according to the recent Law 3592/2007, the process for the issuance of licenses for digital terrestrial television (DTT) will be decided, while the frequencies that will be used for this purpose have not yet been determined. The progress of DTT is meeting with obstacles in the face of the absence of central planning and of a strict timeframe, while the general coordination of the frequencies is also hindered by the fact that not all television stations have a permit. The new political leadership of the Ministries of Internal Affairs and of Transport and Communications, who took office after the recent parliamentary elections in Greece on 4 October 2009, are now called upon to provide immediate answers to these problems.

• Απόφαση 321301371370μ. 604/20.11.2008 του Εθνικού Συμβουλίου Ραδιοτηλεόρασης (Decision No. 604/20.11.2008 of the National Council for Radio and Television)
http://merlin.obs.coe.int/redirect.php?id=12107 EL

Alexandros Economou
National Council for Radio and Television, Athens

HU-Hungary

DTT/DAB Service Provider Fined

In a decision of 15 October 2009 *Nemzeti Hírközlési Hatóság* (Hungarian National Communications Authority - NHH) imposed a fine of HUF 40 million (approx. EUR 150,000) on the provider of national DTT and DAB services Antenna Hungária Zrt, AH. The decision was made on the basis of the assessment of AH's compliance with the terms of its DTT/DAB licence agreements.

AH concluded the licence agreements on providing DTT and DAB services with the NHH at the end of 2008 (see IRIS 2008-9: 14). By these agreements AH undertook a number of obligations beyond paying licence fees. Such obligations are for example:

- to reach pre-defined percentages of DTT and DAB network coverage in accordance with a schedule fixed by the relevant licence agreement;

- to play an active role in consumer information campaigns;

- to be actively involved in the distribution of set-top boxes;

- to introduce two new national free-to-air television channels as a part of the DTT offer.

Following the launch of DTT and DAB services the NHH first assessed the compliance of AH with the conditions defined in the licence agreements in April this year. The assessment led to the conclusion that AH was behind schedule in fulfilling many of its commitments listed above. However, at that time NHH only warned AH to comply with the licence agreements and did not impose any other sanction.

In autumn NHH conducted a new round of assessment. This revealed, inter alia, that

- AH has not introduced the expected two new national free-to-air television channels yet;

- AH has not introduced a proper scheme to make available set-top boxes for consumers on easy terms;

- the website launched by AH providing consumer information related to the digital switchover does not comply fully with the criteria described in the licence agreement.

Given that the revealed shortcomings are related to the key success factors of digital switchover (namely to attractive content on digital platforms and awareness among consumers) the Board of the NHH decided to impose a fine on the DTT service provider for breaching its material obligations as defined in the licence agreements.

• *HB/4066-48/2009. sz. határozat* (Decision of the NHH no. HB/4066-48/2009)
http://merlin.obs.coe.int/redirect.php?id=15399 HU

Mark Lengyel
Attorney at Law, Hungary

IE-Ireland

Rules on Broadcast Advertising Limits

In September 2009, shortly before its demise and the setting up of the new Broadcasting Authority of Ireland (BAI), the Broadcasting Commission of Ireland (BCI) published rules on advertising and teleshopping daily and hourly limits. Such rules had been in operation for many years and were enforced via BCI's contracts with its licensed broadcasters. BCI was required to draft such rules under s.19(3) of the Broadcasting

Act 2001. In publishing the rules in September 2009, BCI, according to its Chairman, was simply formalising long standing practice and bringing to a conclusion BCI's responsibility to develop Codes and Rules under the 2001 Act (see IRIS 2001-4: 9). Henceforth the responsibility will lie with the BAI under the Broadcasting Act 2009 (see IRIS 2009-10: 13).

The draft rules, which reflected existing practice, were published on 7 September 2009. A short public consultation period followed and the rules were then published on 30 September 2009. They apply to all commercial and community broadcasters licensed by BCI. They do not apply to the public service broadcasters RTÉ and TG4. It is the Minister for Communications who determines the amount of broadcasting in relation to public service broadcasters. In the case of commercial broadcasters, total daily times for advertisements must not exceed 15% of the total daily broadcasting time and must not exceed ten minutes per clock hour. Community broadcasters are limited to a maximum of six minutes per clock hour, while institutional and special event broadcasters may not carry advertising. Teleshopping segments on channels not exclusively devoted to teleshopping must be of a minimum duration of fifteen minutes and the maximum number of segments per day is eight, up to a maximum daily time of three hours.

In light of the requirement to transpose the Audiovisual Media Services Directive into national law by 19 December 2009, BAI, which came into existence on 1 October 2009, published draft rules and began a public consultation on them on 16 November. BAI is required by s.43(1) of the Broadcasting Act 2009 to prepare and from time to time revise rules on such matters as advertising limits. The draft rules it has published are in fact the rules published by BCI in September and which reflect existing practice. However, as the Broadcasting Act 2009 offers greater flexibility regarding limits on advertising and teleshopping, BAI is seeking preliminary responses inter alia on the desirability or otherwise of increasing the hourly and daily limits permitted on commercial television services and community radio and television services. Further consultation will follow.

- BCI Press Release, 30 September 2009
http://merlin.obs.coe.int/redirect.php?id=12135 EN
- BCI Rules
http://merlin.obs.coe.int/redirect.php?id=12136 EN
- BAI Consultation Document
http://merlin.obs.coe.int/redirect.php?id=12137 EN

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

Developments Regarding BCI General and Children's Advertising Codes

The Broadcasting Commission of Ireland (BCI) was required by the Broadcasting Act 2001 to draft and review every three years a Children's Advertising Code. The resulting code came into operation in January 2005 and was reviewed in 2008. In July 2009, BCI published a "Statement of Outcomes", which documents the process used in undertaking the statutory review and details the BCI's decisions regarding those parts of the Code that will not be revised and those parts that may be subject to revision following further consultation in 2009 and 2010. The rules contained in the 2005 Code were set out under twelve headings, covering such issues as social values, inexperience and credulity, undue pressure, general safety, diet and nutrition, and programme characters. The review included a national attitudinal survey, a review of policies, practices and legislation and a stakeholder consultation, which involved various children's, health and advertising organisations and various discussion groups with children. Some issues that arose will be dealt with by means of Guidance Notes to assist broadcasters, the public, advertisers and other stakeholders. Other matters of a substantive nature will be subject to further consultation. Such matters include diet and nutrition, the use of programme characters and prohibitions on specific products and services. Revision of the Diet and Nutrition rules is currently underway.

Meanwhile, the new Broadcasting Authority of Ireland, in light of the obligation to transpose the Audiovisual Media Services Directive by 19 December, issued a draft revised Children's Code on Audiovisual Commercial Communications and a consultation document on 2 November 2009. The current BAI consultation, therefore, is confined to changes to the Code arising from the AVMS Directive. The revised code has amendments to definitions, introducing the concept of audiovisual commercial communications, and all necessary broadening of the rules to apply not just to advertising, but to various forms of commercial communications. In addition to a revised children's code, BAI published a revised General Code on Audiovisual Commercial Communications. Some of the revisions to the Children's Code are linked to the General Code so as to ensure greater consistency between the two. However, in some respects the children's code is stricter, for example in envisaging a wider range of prohibitions than the General Code. This phase of the consultation closed on 20 November 2009.

- BCI Children's Advertising Code, Statement of Outcomes
http://merlin.obs.coe.int/redirect.php?id=12138 EN
- BAI Press Release, 2 November 2009
http://merlin.obs.coe.int/redirect.php?id=12139 EN
- BAI Draft Codes and Consultation Document
http://merlin.obs.coe.int/redirect.php?id=12140 EN

Marie McGonagle
Cyprus

LV-Latvia

Supreme Court Adjudicates on the Duties of the NBC

On 1 October 2009 the Department of Administrative Cases of the Supreme Court Senate issued a judgment in a dispute between a private person and the National Broadcasting Council (NBC).

The underlying facts concern a private person, R., who requested from the private TV broadcaster LNT a copy of a broadcast that allegedly contained defamatory information on R. LNT offered a copy for a certain fee, which R. considered too high. Consequently, R. complained to the NBC, asking it inter alia to penalise LNT. The NBC denied the request and R. appealed this denial in the administrative court. The court of first instance satisfied the claim in part on 3 October 2007 stating that the NBC had failed to provide a reasoned answer to R.'s complaint. The court requested that the NBC should issue a substantiated decision (see IRIS 2007-10: 17).

The judgment of the court of first instance was appealed by both parties. The appellate court rejected the claim in full on 3 December 2008. It agreed with the court of first instance that the answer of the NBC was not reasoned sufficiently; however, it indicated that the answer was essentially correct. The court explained that according to the Radio and Television Law (RTVL) a person has a right to request a copy of a broadcast from a broadcaster only if he/she wants to exercise the right of reply, but not in cases concerning other civil claims (e.g., a defamation claim). In such cases the evidence needs to be requested in accordance with the Civil Procedure Law.

The applicant further appealed the judgment to the Senate and considered that the appellate court had restricted the scope of the relevant provision of the RTVL. R. argued that a person has the right to request such a copy irrespective of what legal remedy he/she plans to pursue. R. explained that the object of his application was that the NBC should penalise LNT and ensure that LNT issue a copy of the broadcast to R.

The Senate established that R. requested the issuing of an administrative act: i.e., R. expected that the NBC should impose a penalty on LNT and requested LNT to issue a copy of the broadcast to R. for a fee acceptable to R. The Senate indicated that the RTVL provides a private person with the right to submit a complaint to the NBC, but it does not provide a right to request that the NBC should penalise a particular broadcaster. The Senate referred to its earlier jurisprudence that a person's interest in penalising some official could not be recognised as a subjective legal interest. As a consequence, the Senate concluded that in this case R. wanted to use the NBC to solve a private dispute with LNT over the amount of the fee for the copy of the broadcast. In the Senate's opinion this dispute had to be solved by civil litigation.

The Senate decided that R. did not have subjective rights to submit this application to the administrative court and consequently the Senate cancelled the appellate court judgment and terminated the proceedings in the case. The judgment cannot be appealed.

• *NORAKSTS Lieta Nr.A42382506SKA – 293/2009 SPRIEDUMS Rīgā 2009.gada 1.oktobrī* (Supreme Court Senate, Department of Administrative Cases, judgment of 1 October 2009)
http://merlin.obs.coe.int/redirect.php?id=12141 LV

Ieva Bērziņa-Andersone
Sorainen, Riga

NL-Netherlands

Amsterdam District Court Orders The Pirate Bay to Remove Torrents

On 22 October 2009, the Amsterdam District Court ordered The Pirate Bay to remove a list of torrents that link to copyright-protected works in the Netherlands and to make these torrents on its websites inaccessible for Internet users in the Netherlands, on penalty of EUR 5,000 per day, the maximum possible fine being EUR 3,000,000.

The court annulled the default judgment it had issued on 30 July 2009 in the summary proceedings brought against The Pirate Bay by the *Bescherming Rechten Entertainment Industrie Nederland* (Protection Rights Entertainment Industry Netherlands - BREIN), the Dutch rightsholders' representative. In that case, the court had ruled that The Pirate Bay had to block access to all Dutch users, because The Pirate Bay infringed the intellectual property rights of the Dutch rightsholders, represented by BREIN (see IRIS 2009-9: 14). The Pirate Bay decided to appeal this judgment.

The court opined that it could not be determined that The Pirate Bay infringed the intellectual property rights of the Dutch rightsholders. The fact that The Pirate Bay enabled third parties to infringe intellectual property rights did not mean that The Pirate Bay made copyright-protected works available to the public in the sense of the 'Agreed statement' on Article 8 of the WIPO Copyright Treaty, that states: "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention." According to the court, BREIN had not demonstrated that The Pirate Bay played any role in the exchange of files in

a torrent, after a torrent had been downloaded, either by offering tracker facilities - in order to establish the connection between the computer of the uploader and the computer of the downloader - or by showing other activities that could be considered to be 'making available to the public'.

The court concluded that The Pirate Bay did act in an unlawful manner towards BREIN in the sense of Article 6:162 Dutch Civil Code. It relied on the findings of the Utrecht District Court in a previous case of BREIN against Mininova B.V. of 26 August 2009 (see IRIS 2009-9: 15) and concluded that, by offering torrents that enable the exchange of copyright-protected works, The Pirate Bay facilitates the structural linking to copyright-protected works, encourages infringements of intellectual property rights and exploits the popularity of the website and those infringements through advertisements and commercial activities on its website. According to the court, the activities of The Pirate Bay constitute more than mere 'caching' services of an Internet Service Provider in the sense of Article 6:196c of the Dutch Civil Code.

The court rejected the defense of The Pirate Bay according to which the website is owned by the Seychelles-based company Reservella. The court found that the defendants could neither name the current owners nor provide evidence that the website had been sold and held the defendants responsible for the website.

The court equally rejected the defense of The Pirate Bay that its activities were covered by Article 10 ECHR, which protects freedom of expression. According to the court, the prohibition on enabling the structural and continuous infringement of intellectual property rights on a large scale was a proportionate measure, despite interference with Article 10. The Pirate Bay was ordered to pay the costs.

• *LJN: BK1067, Rechtbank Amsterdam, 436360 / KG ZA 09-1809* (Summary judgment of Decision of the Amsterdam District Court, 22 October 2009, LJN: BK1067, 436360 / KG ZA 09-1809)
http://merlin.obs.coe.int/redirect.php?id=12142 NL

• *LJN: BJ4298, Rechtbank Amsterdam, 428212 / KG ZA 09-1092* (Summary judgment of Decision of the Amsterdam District Court, 30 July 2009, LJN BJ4298, 428212 / KG ZA 09-1092)
http://merlin.obs.coe.int/redirect.php?id=12143 NL

• *LJN: BJ6008, Rechtbank Utrecht, 250077 / HA ZA 08-1124* (Decision of the Utrecht District Court, 26 August 2009, LJN BJ6008, 250077 / HA ZA 08-1124)
http://merlin.obs.coe.int/redirect.php?id=12144 NL

Esther Janssen
Institute for Information Law (IViR), University of Amsterdam

NO-Norway

Unsuccessful Attempt to Block the Pirate Bay

On 6 November 2009, a District Court in Norway ruled that there were no grounds for ordering Telenor, a major Norwegian Internet Service Provider, to block Internet access to the peer-to-peer search engine The Pirate Bay. The court ruled that Telenor cannot be held liable for copyright violations that arise from illegal downloads.

The Pirate Bay, a BitTorrent search engine, enables the download of data from multiple sources on a peer-to-peer file-sharing system. This rather popular service has been a frequent target for the entertainment industry, with lawsuits filed in several countries across Europe (see IRIS 2008-6: 7, IRIS 2008-10: 13, IRIS 2009-6: 17, IRIS 2009-8: 19, IRIS 2009-9: 14and IRIS 2009-9: 18).

This summer Telenor refused to block access to the site after having received a petition for a temporary injunction from a group of copyright holders, including IFPI (the International Federation of the Phonographic Industry). The Court (the District Court of Asker and Baerum) ruled in favor of Telenor and concluded that the Internet Service Provider did not unlawfully contribute to copyright infringements. Accordingly, the court held that there was no legal basis for blocking Internet access.

The court held that Telenor and other Internet providers, being private companies, are not under an obligation to monitor or assess whether or not to block a relevant website or service. This task normally belongs to public authorities and the court found that in the present situation it is unnatural to assign such responsibility to private companies.

The court decision is not yet final and may be appealed.

• 6.11.09 i Asker og Baerum tingrett, Sak nr.: 09-096202 (6.11.09 Asker & Baerum tingrett, Case No: 09-096202)
http://merlin.obs.coe.int/redirect.php?id=12164 NO

Lars Winsvold
Attorney at Law, Fredrikstad

PL-Poland

Constitutional Tribunal Judgment on the Act on Licence Fees

On 4 November 2009 the Constitutional Tribunal assessed a motion of the Polish President to examine the conformity of certain provisions of the Act of 13 June 2008 amending the Act of 21 April 2005 on Licence Fees with the Constitution.

The motion relates to provisions enlarging significantly the group of persons being exempt from the duty to pay licence fees. Concerns have been expressed that this might infringe the principle of legal security and the rule of law.

Previously the following persons were exempted from the payment of licence fees:

1) persons who have been adjudged to:

a) be classified as invalids of group I,

b) be totally incapacitated for work and unaided existence pursuant to the Act of 17 December 1998 on Old Age and Disability Pensions from the Social Insurance Fund,

c) have a serious degree of disability pursuant to the Act of 27 August 1997 on Occupational and Social Rehabilitation and on Employment of Disabled Persons,

d) be permanently or temporarily totally incapacitated for work on a farm pursuant to the Act of 20 December 1990 on Social Insurance of Farmers and who are entitled to a nursing allowance;

2) senior citizens over 75 years;

3) persons who receive a nursing benefit from a competent authority that performs tasks related to family benefits, mandated as tasks falling within the scope of government administration, or a social pension from the Social Insurance Board or any other authority in charge of old-age and disability pensions;

4) deaf persons with ascertained anacusis or ambilateral hearing loss;

5) the blind whose visual acuity does not exceed 15%.

The Act in question exempted in addition inter alia all pensioners over 60 years, whose pensions do not exceed 50% of the average remuneration, persons sent to internment camps during the state of war, unemployed persons, and beneficiaries of social care.

It has been observed that extending the group of persons exempted from the licence fee payment obligation will result in a serious loss in the revenues of public radio and TV broadcasters, which might endanger the proper functioning of public media.

According to the Tribunal the legislator had the right to enlarge the group of persons exempted from the licence fee obligation as such an act is within its discretion. The lawmaker's discretion comprises not only the issue of exemption from the licence fee obligation, but also other issues connected with the functioning of public radio and TV, including the rules of financing and the amount of public funds allocated to the fulfillment of the public remit.

The Tribunal found that the fulfillment of the public remit is impossible without ensuring adequate financial outlay coming from public means. Still, it is up to the legislator to establish the tasks of public media and the way financing them.

• Komunikat prasowy po rozprawie dotyczącej abonamentu radiowo - telewizyjnego and Dodatkowy Komunikat prasowy (Press releases on case no.: Kp 1/08 of 19 November 2009)
http://merlin.obs.coe.int/redirect.php?id=10177 PL

Małgorzata Pęk
National Broadcasting Commission, Warsaw

PT-Portugal

Only Sports Qualify as 'General Interest' Events

On 28 October 2009, the Portuguese Minister responsible for Parliamentary Affairs and for the Media Sector, Jorge Lacão Costa, signed a decree (Despacho nº 23951-A/2009) containing the list of events which must be broadcast by national terrestrial open access television channels. The decree has been published in the Official Journal of the Portuguese Republic.

According to Article 32 of the *Lei n.º 27/2007 de 30 de Julho* (Portuguese Television Law), the government should publish annually a list of general interest events that cannot be exclusively broadcast by restricted access channels. The list comprises general interest events whose relevance justifies their broadcast on terrestrial national free-to-air channels.

The official document of *despacho nº 23951-A/2009* includes only sports events, particularly football. Amongst the list's eleven items, seven are dedicated to professional football and four relate to other popular first league sports, such as cycling, athletics, hockey, handball and basketball.

Before the publication of the annual list of general interest events, the government is legally obliged to

consult with the *Entidade Reguladora para a Comunicação Social*, the Portuguese Media Authority.

• Despacho publicado no "Diário da República" - 2.ª Série, n.º 211, Suplemento, de 30 de Outubro de 2009, página 44404-(2) (Entry no.º 23951-A/2009 of the Presidency of the Council of Ministers, Office of the Minister for Parliamentary Affairs) PT

Helena Sousa
Communication and Society Research Centre, University of Minho

RO-Romania

Audiovisual Law Enters into Force

On 10 November 2009, Act no. 333/2009, amending Audiovisual Act no. 504/2002, was promulgated by the President. This enacts the *Ordonanţa de Urgenţă nr. 181/2008* (Emergency Government Decree no. 181/2008, OUG 181/2008) which modified the *Legea Audiovizualului nr. 504/2002* (Audiovisual Law 504/2002) (see IRIS 2009-3: 18). The amendments aim at implementing Directive 2007/65/EC into Romanian law (see IRIS 2009-2: 17and IRIS 2009-3: 18) and set up the general framework inter alia for introducing digital radio and TV services for the public.

On the one hand the amended Act relaxes the rules on advertisement, by introducing new advertising techniques (such as product placement, split-screen advertising, virtual advertising) and altering the advertising limits: it maintains the advertising limit of 8 minutes per hour for public TV and 12 minutes per hour for commercial TV but the rules concerning the frequency of commercial breaks have been altered: TV films may be interrupted every 30 minutes instead of 45 minutes (see IRIS 2009-2: 17). On the other hand the Government is obliged to launch a strategy for the transition from analogue to digital TV, in accordance with European legislation. The amended Act assures the continuity of the programmes provided to the public, allowing all the holders of analogue licenses to keep these licenses after the switch off to digital transmission. Romania has to switch completely from analogue to digital TV by 1 January 2012 (see IRIS 2009-9: 17).

In addition to the other amendments to the Audiovisual Law, the fines that can be imposed by the National Council for Electronic Media due to, for example, surreptitious advertising, the rejection of the right of reply, broadcasting outside the geographical area specified in the license, the use of subliminal techniques for commercial communication etc., have been increased.

• *Lege Nr. 504 din 11 iulie 2002 Legea audiovizualului - Text actualizat prin produsul informatic legislativ LEX EXPERT în baza actelor normative modificatoare, publicate în Monitorul Oficial al României, Partea I, până la 19 noiembrie 2009* (Act no. 333/2009 amending Audiovisual Act no. 504/2002, published on 19 November 2009 (Official Journal no. 790))
http://merlin.obs.coe.int/redirect.php?id=11601 RO

• (Government strategy for the transition from analogue to digital TV, adopted by Government Decision no. 1213 on 7 October 2009, published in the Official Journal no. 721 on 26 October 2009) RO

Eugen Cojocariu
Radio Romania International

Decrease in Support for the Film Industry

The *Romanian Fondul Cinematografiei* (Cinematography Fund) could be cut by approximately 40% in 2010. This would be the effect of the decrease in financial contributions from TV advertising and gambling. The *Ordonanţa de Urgenţă nr. 77/2009* (Emergency Government Decree no. 77/2009, OUG 77/2009) has cancelled the 4% financial contribution from the profits of the gambling sector which constitutes about 20% of the Cinematography Fund's budget.

In addition, it is assumed that the Fund will diminish even more (10-20%), because of the decrease in advertising revenues of TV broadcasters due to the financial crisis. The Fund receives 4% of the advertising income of public and commercial TV broadcasters. According to the NCC this accounts for about 53% of the Cinematography Fund.

• *Guvernul României - Ordonanţă de urgenţă nr. 77 din 24/06/2009 - Publicat in Monitorul Oficial, Partea I nr. 439 din 26/06/2009 privind organizarea şi exploatarea jocurilor de noroc* (OUG 77/2009, published on 26 June 2009 (the regulations entered into force partly on the same day and partly 90 days after their publication) in Official Journal no. 439/2009)
http://merlin.obs.coe.int/redirect.php?id=12147 RO

• *HOTĂRÂRE pentru aprobarea Normelor metodologice de aplicare a Ordonanței de urgență a Guvernuluinr. 77/2009 privind organizarea și exploatarea jocurilor de noroc* (Methodological provisions for the application of the OUG 77/2009, approved by Government Decision no. 870 (Official Journal no. 528 on 30 July 2009))
http://merlin.obs.coe.int/redirect.php?id=12148 RO

Eugen Cojocariu
Radio Romania International

Sanctions for Exceeding TV Advertising Times

At its meeting on 5 November 2009, on the basis of a monitoring report drafted by its own experts concerning compliance with legal advertising time restrictions, the *Consiliul Naţional al Audiovizualului* (national council for electronic media - CNA) sanctioned

three private broadcasters for exceeding the legal advertising limit during the observation period (15-22 October 2009, between 7 p.m. and 11 p.m.).

CNA decision no. 927 imposed a fine of RON 20,000 (EUR 1 = RON 4.3) on TV broadcaster ANTENA 1 for non-compliance with the hourly upper limit for advertising. According to Art. 35 para. 1 of the *Legea audiovizualului Nr. 504/2002* (Audiovisual Act no. 504/2002), TV advertising spots, including teleshopping, may not constitute more than 20% of hourly transmission time (12 minutes). ANTENA 1 exceeded this limit by margins varying from 20 to 328 seconds.

CNA decision no. 928 imposed a fine of RON 30,000 on broadcaster *PRIMA TV* for exceeding the advertising time limit by margins varying from 11 to 441 seconds. This fine was so high because the broadcaster's owner, S.C. SBS BROADCASTING MEDIA S.R.L, had already been fined twice (a total of RON 25,000) for breaching the same legislative provisions.

CNA decision no. 929 imposed a fine of RON 10,000 on *KANAL D* for exceeding the hourly advertising limit by margins of between 24 and 236 seconds.

In addition, the broadcasters were obliged to inform their viewers of the wording of the CNA sanction at least three times between 6 p.m. and 10 p.m. within 24 hours of the sanctions being announced by visual and acoustic means. They were required to broadcast it at least once during their main news programme, but not during advertising breaks. The obligation to inform viewers was contained in CNA decision no. 52/2003.

- \- (CNA press release of 5 November 2009) RO
- Decizia nr. 927 din 05.11.2009 (CNA decision no. 927 of 5 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12150 RO
- Decizia nr. 928 din 05.11.2009 (CNA decision no. 928 of 5 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12151 RO
- Decizia nr. 929 din 05.11.2009 (CNA decision no. 929 of 5 November 2009)
http://merlin.obs.coe.int/redirect.php?id=12152 RO

Mariana Stoican
Journalist, Bucharest

SI-Slovenia

Measure against a Reality Show

The international TV enterprise Pro Plus produced a Slovenian reality show featuring some public figures. The "Celebrity Farm" (*Kmetija slavnih*) started broadcasting on 28 September 2009 on the commercial broadcaster POP TV every day except Sunday in the early evening. As it contains explicit sexual scenes, scenes of violence, bad language, pornographic material, unnecessary violence against animals, rough hierarchical patterns among participants, promotion of alcohol and tobacco consumption, there are many complaints against it. On 16 November 2009 the *Agencija za pošto in elektronske komunikacije Republike Slovenije* (Agency for Post and Electronic Communications - APEK) issued a measure against POP TV due to the violation of the Media Act (*Zakon o medijih, ZMed-1*).

Because the broadcasting time is after the main daily news at 8 p.m. five times a week and once a week at 8.55 p.m., many parents and other viewers have been complaining about the programme's potentially harmful content from the perspective of the protection of minors. In addition, the public radio and TV (RTV Slovenija) requested the Ministry of Culture (which is affiliated to the Culture and Media Inspectorate) and APEK to take measures against POP TV because of the time schedule of the reality show in question. The Culture and Media Inspector did not agree, putting forward the argument that the expert interpretation of the show's content is a matter for APEK. As the ethical guidelines (codices) for broadcasters which were articulated by APEK are a non-obligatory normative document and the codex of POP TV is exclusively self-regulatory, the ZMed-1 is the only referential and legally relevant document for the expert interpretation and taking of measures regarding "Celebrity Farm".

APEK's experts analysed some episodes of the show broadcast from 28 September to 6 November 2009 and stated that there were many scenes that might affect children's understanding of cultural norms and give them a misleading understanding of certain areas of human behaviour (sexuality, violence etc.) especially as "famous" characters are involved and their manners are supposed to be socially "winning". According to data provided in the text of the measure issued, in the period between 29 September and 6 November 2009 the show was seen by 14,158 children between the ages of 4 and 9 years, and 16,150 children between the ages of 10 and 14 years.

The Agency's measure stipulates that the broadcaster shall use acoustic and visual warnings according to Article 84 paragraph 3 ZMed-1 on the protection of minors. Regarding the period of implementing the measure (Article 109 paragraph 3 ZMed-1) the Agency decided to use the shortest possible option, which is one month. After the expert opinion was published and the measure issued by the Agency, the Inspector for Media and Culture announced that it would fine POP TV in accordance with to the law. The defined range of the fine is from 1,000 to 80,000 EUR.

• Zakon o medijih, ZMed-1 (Media Act)
http://merlin.obs.coe.int/redirect.php?id=12075 SL

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

SK-Slovakia

Contracts between the State and Public Broadcasters

The Slovak Government approved the proposal of a contract on content, aims and provision of public television broadcasting services for the period of 2010-2014 ("State Contract") and the proposal of Amendment No.1 to the State Contract for the year 2010 ("Amendment"). The parties involved are Slovak TV ("STV") and the Ministry of Culture ("Ministry").

The State Contract was proposed by the Ministry on the basis of Government Resolution No. 741 of 15 October 2008 concerning the proposal of a concept of contracts between public broadcasters and the State about contents, aims and provision of public radio and television broadcasting services. Pursuant to this Resolution the Ministry was obliged to submit the proposal to be discussed in Government proceedings.

While the State Contract with STV has been approved, the contract with Slovak Radio ("SRo") is still under discussion, as there are several reservations on the part of Sro, inter alia towards suggestions the Ministry wants to include in the State Contract and the Amendment.

The aim of the State Contract is to form a medium-term strategy for the creation, production and broadcasting of programmes by STV. The contractual obligation of the State (which represents the public in this relationship) is to provide financial resources as a State budget contribution according to the Act on State Budget, granted pursuant to the State Contract and intended to support the production of public interest programmes, i.e., programmes aimed at satisfying the informational and cultural needs of the audience in the territory covered by the broadcaster. STV binds itself to using these financial resources for the creation, production and broadcasting of such programmes, i.e., mainly dramatic, documentary and animated works that promote the cultural identity of the Slovak Republic according to Section 3 lit. h) of Act No. 308/2000 Coll. on broadcasting and retransmission and Act No. 195/2000 Coll. on Telecommunications, examples of which include inter alia the following:

- educational and informational programmes for minors;

- programmes providing legal information, supporting a healthy life-style, protection of nature, environment, life, property and road safety;

- programmes which present cultural issues, with emphasis on Slovak culture and the culture of national minorities and ethnic groups;

- programmes which present religious activities.

STV can use the financial resources provided for the creation of the above-mentioned programmes in its own capacities or in co-operation with other providers of audiovisual works. In addition, the State Contract will have a positive impact on the STV budget. According to the Amendment the income of STV will increase by EUR 12,500,000 in 2010 and in the period of 2010-2014 by at least EUR 10,000,000 for each year. The State budget expenditure will increase accordingly.

Jana Markechová
Markechova Law Office, Bratislava

US-United States

FCC Proposes Network Neutrality Rules

On 22 October 2009, the Federal Communications Commission ("FCC") released a Notice of Proposed Rulemaking ("NPRM") (a document that solicits comments on a proposed federal rule) seeking public input on draft rules to preserve an open Internet.

Response by interested parties was immediate. Many severely criticize the effort, claiming it to be overbearing, unnecessary, and likely to result in unintended negative consequences for investment, innovation, and entrepreneurship. Proponents give two major supporting arguments. First, they aver that the rules are necessary to prevent Internet access service providers ("ISPs") from reducing or even eliminating innovation by Internet content and telecom service companies. Second, sans rules, ISPs can suppress free speech and civic discourse on the Internet. The FCC also has created a vessel to stir up public debate by launching openinternet.gov, a blog-like website where the public can easily post their own ideas as well as vote or comment on others. As of 1 December 2009, 1,744 people have contributed 159 posts, 1,040 comments, and 14,506 votes.

If promulgated, all ISPs, including wireless and satellite providers, will be required to abide by the rules. Broken down, the rules would restrict ISPs from preventing or discouraging users from sending, receiving,

running and using lawful content, applications, and devices connected to the Web, or from favoring one type of content, application or device over another. They would also require disclosure of network management and other practices employed to prevent the transfer of illegal content.

This NPRM is based on the FCC's 2005 Policy Statement regarding Internet and broadband. The four principles contained there entitled consumers to (i) access lawful Internet content, (ii) run applications and use services, subject to the needs of law enforcement, (iii) connect their choice of legal devices that do not harm the network, and (iv) compete among network providers, application and service providers, and content providers. The NPRM expands on the Policy Statement in two important ways. First, the language has been reformatted in order to make the rules legally binding. Second, the FCC proposes an exceptionally broad non-discrimination principle that delineates unqualified prohibitions on ISPs. This is significantly stronger than the general prohibition on "unjust or unreasonable discrimination" required by common carriers.

Opponents state that the broadband industry is still in its infancy and should be left to self-regulation by the marketplace. In essence, government should not try to fix what is not broken. FCC Commissioner Robert M. McDowell cautioned that he "does not agree with the majority's view that the Internet is showing breaks and cracks and that the government . . . needs to fix it." USTelecom believes that "it would be a mistake to replace today's open and dynamic environment with a government-managed 'mother may I' approach to innovation." Verizon states that "the Commission should not adopt rules that would effectively dictate the structure of what is still a new and developing area by treating [Internet content and telecom service companies] and [ISPs] as separate parts of the broadband Internet ecosystem." Many postings on openinternet.gov subscribe to this free market line of thought.

Another point of contention is centered on the definition of "reasonable network management." ISPs are against any regulation that limits their ability to attenuate congestion and fear that an attempt to define reasonable practices will have a negative effect across the country. AT&T has stated that the imposition of "a non-discrimination standard that does not contain some form of reasonableness limitation would be more restrictive than the prohibition against 'unreasonable discrimination' adopted for monopoly-era telephone companies in the Communications Act of 1934."

Proponents are most concerned with the stifling of innovation and civic participation. They are united on one overarching point — government inaction will essentially grant network providers the right to block, degrade, or slow down any content on the Internet for any reason. They bolster their arguments by pointing to specific examples, provided in the NPRM, where carriers have discriminated against applications, services, and even particular users. Some think the proposed rules are not strong enough and require clarity to ensure that they will be effective and enforceable.

Recently, an alliance of Internet content and telecom service companies including Google and Facebook wrote to the Commission pressing for a strong anti-discrimination policy because ISPs currently have the legal right to block their products from the marketplace. This complements Lawrence Lessig's argument (quoted in the NPRM) that "If the principle of end-to-end is abandoned . . . innovators must now include in their calculation of risk the threat that the [ISP] might either block or tax a particular application. That increased risk will reduce application investment."

The debate continues with both sides cooperating by providing comments that the FCC will turn to regulations to both protect the openness of the Internet as well as promote innovation.

• FCC Notice of Proposed Rulemaking In the Matter of Preserving the Open Internet Broadband Industry Practices
http://merlin.obs.coe.int/redirect.php?id=12154 EN
• FCC Policy Statement of 5 August 2005
http://merlin.obs.coe.int/redirect.php?id=12155 EN

Jonathan Adler
Media Center, New York Law School

IE-Ireland

Digital Cinema

According to the Arts Council, Ireland has the largest per capita cinema-going population in the EU. However, the choice of film in Ireland has been largely confined to mainstream commercial cinema. In 2007 there were only 15 digital screens in Ireland. In April 2008 a report entitled "Digital Cinema in Ireland - A Review of Current Possibilities" was published. It was commissioned by the Cultural Cinema Consortium, which is a joint initiative of the Arts Council of Ireland and the Irish Film Board. Since then, the Consortium has embarked on a project to roll out digital cinema equipment in arthouse cinemas.

The term 'digital cinema' in the Report refers to projection systems which can be used to screen new releases and specialised films to public audiences at a standard comparable to or better than that achievable with conventional 35mm film. The Report sets out the technical and financial advantages of digital cinema and considers the options for Ireland. It states that, even if the private company Digital Cinema Ltd (Ireland) achieve their target of equipping 500 screens in Ireland with DCI standard digital projection systems,

there will remain a group of cinemas, including cultural cinemas, arts centres and smaller, probably geographically remote venues, which will not suit the DCL business model. The Consortium, therefore, the Report said, might consider developing methods of ensuring that these cinemas are not "digitally abandoned" and potentially denied access to a range of films, especially specialist titles distributed by independent film distributors.

At the time of the publication of the Report it was not clear whether all the cinemas in Ireland were willing or able to participate in the scheme. Additionally, there were concerns from distributors and exhibitors about a single company dominating the entire Irish cinema sector. The Report considered it appropriate therefore to investigate the opportunities for partnerships with other suppliers. The Consortium might consider developing a support programme which would encourage key providers of cultural cinema to keep apace with developments in this area. Also, to assist the digital distribution of Irish films, it might consider requiring producers and distributors who receive public funding to deliver an appropriately formatted digital master as an integral part of the funding contract.

Digital Cinema Ltd (Ireland) aimed to convert most cinemas in Ireland during 2008. In common with its counterparts in the UK, Europe and the USA, it adopted a 'virtual print fee' model to fund the digital roll-out. These fees are paid to the equipment suppliers or integrators by film distributors each time a digitally equipped cinema screens a digital film. Over several years, these fees will recoup the capital costs of providing digital projection equipment.

The Film Board's Strategy Goals for 2008 to 2009 included references to the roll-out of digital cinema and also to exploring with the Irish Film Institute the digitising of the Film Board catalogue in the archive.

The recipients of the Cultural Cinema Consortium's Cinema Digitisation Scheme grants, which totalled EUR 750,000, were announced in January 2009. The grants were for the purchase and installation of digital projection equipment to cinemas that offer a cultural cinema programme on a year-round basis. Since then a number of cinemas have been refurbished to become digital or all-digital multi-screen and the first custom designed digital cinema in Ireland opened in Dublin in December 2009. The roll-out is not complete yet but it is progressing and an evaluation will be carried out shortly.

Other interesting developments with regard to film include the Virtual Cinema scheme for high-quality short films that are suited to new forms of digital video consumption and the intended launch of an Irish Film Television channel provided for in the Broadcasting Act 2009 (IRIS 2009-10: 13/18).

• Report: "Digital Cinema in Ireland - A Review of Current Possibilities"
http://merlin.obs.coe.int/redirect.php?id=12284 EN

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

SK-Slovakia

Public Aid for the Digitalisation of Cinemas

As of 2010 there are approximately 200 cinemas in Slovakia but only 11 have been digitised, mostly from private sources. Only 7 % of the cinemas are run by private companies, the rest is under the management of cities.

In line with the Slovak Act No. 516/2008 Coll. a new fund has been created to gather finances which shall contribute to the purchase of projecting equipment. According to section 2 of the Act, among other tasks the new Audiovisual Fund ("Fund") shall:

- create material conditions for the development of audiovisual culture and industry by granting financial resources for the renovation and development of the technological basis used for production and distribution of audiovisual works and for the realisation of public performances in the area of audiovisual culture;

- govern the administration of specific types of contributions.

On 15 December 2009 the Fund published a statement regarding the "Public Consultation on Opportunities and Challenges for European Cinema in the Digital Era" of the European Commission. The Fund declares that it is aware of the fact that certain types of cinemas in Slovakia are endangered due to the costs for the transition to the digital format. It acknowledges the right to granting aid for the digitalisation of cinemas from public sources within the framework of the existing rules for State aid and the Commission's announcement. The Fund sees one of its tasks in creating basic conditions in accordance with the Commission's announcement. At this time public consultations are taking place in Slovakia. They concern a.o. a survey on the present state of Slovak cinemas, the potential effects and the actual options for their digitalisation according to the criteria agreed by the Fund.

The programme No. 4 of the Fund's Support Structure for the year 2010 concerns the support of technological development projects. The deadline for applications in this programme is presumed to be 1 September 2010. The primary aim of the programme is the modernisation of cinemas and the digitalisation is an implicit part of this modernisation. A precondition for the realisation of such projects is the participation of

the local self-government authorities because cinemas are part of the local culture.

• Stanovisko Audiovizuálneho fondu k verejnej konzultácii otvorenej Európskou komisiou „Konzultácia o príležitostiach a výzvach pre európske kiná v digitálnej ére" (Statement of Audiovisual Fund from December 15, 2009 regarding the Public Consultation Opened by the European Commission "Public Consultation on Opportunities and Challenges for European Cinema in the Digital Era" approved by a decree of the Audiovisual Fund)
http://merlin.obs.coe.int/redirect.php?id=12275 SK

Jana Markechová
Markechova Law Office, Bratislava

FI-Finland

Proposed Changes to the Finnish Copyright Act due to the Implementation of the AVMS Directive

The deadline for the transposition of Directive 2007/65/EC (Audiovisual Media Services Directive - AVMSD) into the national laws of the EU Member States was the 19 December 2009. In Finland, the final adoption of the Directive was scheduled for the beginning of 2010. At the moment, legislative proposals are before the Parliament and the Government bill (HE 87/2009 vp) suggests not only several changes to the Finnish Act on Television and Radio Operations (744/1998), but also some changes to the Finnish Copyright Act (404/1961). The latter have to do with amending Sections 25 b and 48 of the Copyright Act in order to bring them into line with Article 3k of the AVMS Directive on the short reporting right.

Article 3k of the AVMS Directive contains an obligation for Member States to ensure that any broadcaster established in the European Union have access to events of high interest to the public which are transmitted on an exclusive basis. This access is to be ensured for the purpose of transmitting short news reports. Article 3k(3) states that such access can be guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal, while the possibility of creating an equivalent system which achieves access through other means is mentioned in Article 3k(4). In Finland the suggestion is that the right be introduced through an amendment of Section 48 of the Copyright Act, which provides for the rights of broadcasting organisations (or the protection of broadcasting signals). The proposed paragraph 5 of the Section would provide for the short reporting right without prejudice to the above-mentioned rights of broadcasters, but it would also define the scope and conditions of short reporting both in accordance with the specific requirements of Article 3k and within the discretion left to Member States to define the modalities and conditions regarding the provision of short extracts (e.g. compensation arrangements, maximum length and time limits). Thus, access is proposed to be ensured on a fair, reasonable and non-discriminatory basis and the extracts should be used solely for general news programmes (including e.g. newscasts on sports channels). The maximum length of short extracts is suggested to be set at 90 seconds and the identification of their source would be required. No form of compensation or remuneration is suggested.

In addition, the proposal suggests a second paragraph to be added to Section 25 b of the Copyright Act. It is stated in Section 25 b(1) that in presenting a current event, for example, in a TV transmission, a work which is audibly or visibly part of the event may be included in the transmission to the extent required for the informational purpose. With the new paragraph, a similar restriction concerning works included in television transmissions would apply to short extracts. The amendment would even apply in relation to those provisions on related rights that contain reference to Section 25b (i.e. Sections 45, 46, 46 a, 47, 49 and 49 a).

• Hallituksen esitys Eduskunnalle laeiksi televisio- ja radiotoiminnasta annetun lain muuttamisesta ja väliaikaisesta muuttamisesta sekä tekijänoikeuslain 25 b ja 48 §:n muuttamisesta (HE 87/2009 vp) (Government bill (HE 87/2009 vp) on amendments and temporary amendments to the Finnish Act on Television and Radio Operations (744/1998), as well as amendments to Sections 25 b and 48 of the Copyright Act (404/1961))
http://merlin.obs.coe.int/redirect.php?id=12486 FI

Anette Alén
Institute of International Economic Law (KATTI), University of Helsinki

Proposal concerning an Employer's Right to Use Works of Employees

Currently, the legal status of the employer's right to use the works of his/her employees in Finland is unclear, as there are no written provisions in the relevant legislation. However, there is currently one exception: according to the Finnish Copyright Act, copyright in a computer programme is transferred to the employer if the programme was created while fulfilling work tasks.

The Finnish Ministry of Education drafted a proposal for an Act concerning the employer's right to use works created as a result of an employment relationship. The introduction of an assumption was proposed according to which an employer would have the right to use such works unless something else was agreed between the parties. The right would work in parallel to the employee's own right to use works. According to this proposal, the employer would also be granted a right to modify this kind of works and also the right to assign the right to the use of such works. The report

was completed on 4 November 2009. It was fiercely supported by the Confederation of Finnish Industries EK and media firms. However, it was strongly opposed by several interest groups. Indeed, the proposal initiated a heated debate on artists' and employers' rights or lack thereof and become headline news in Finnish media.

Stefan Wallin, the Minister of Culture and Sport, decided on 17 December 2009 against bringing the proposal before Parliament due to the strong opposition and highly contrasting opinions expressed. According to Wallin, it was not possible to attain a reasonable compromise. Wallin also said that it was not viable to propose changes to the Finnish Copyright Act which weaken the rights of those working in the creative industries.

• *Luonnos hallituksen esitykseksi laiksi tekijänoikeuslain muuttamisesta* (Draft proposal for an amendment for the Finnish Copyright Act)
http://merlin.obs.coe.int/redirect.php?id=12560 FI

Taina Pihlajarinne
Institute of International Economic Law (KATTI), University of Helsinki

MT-Malta

The Maltese Copyright Act

The Copyright Act, Chapter 415 of the Laws of Malta, was enacted on 14 August 2000 to make new provisions in respect of copyright, neighbouring rights and certain sui generis intellectual property rights. It also repealed the previously standing enactment on the same subject, the Copyright Act 1967. Chapter 415 of the Laws of Malta was not however the first Act in Malta to regulate copyright. Under British colonial rule, Malta applied the English law on the subject, the Copyright Act of 1911. Following independence in 1964, Malta enacted its first copyright Act, Act No. VI of 1967, in 1967. The 1967 enactment was at the time necessary because the 1911 Act did not cater for such matters as radio and television broadcasting. A new copyright act was introduced in the new millennium to take on a board variety of EU Directives on the subject. The enactment was amended in 2001 (Act No. VI of 2001), 2003 (Act No. IX of 2003) and 2009 (Act No IX of 2009). Thus, when Malta joined the European Union in 2004 the Copyright Act was in compliance with EU law.

The Copyright Act deals with various types of works which are eligible for copyright: artistic works, audiovisual works, databases, literary works and musical works. Such works have to have an original character and have to be written down, recorded, fixed or otherwise reduced to material form. Not eligible for copyright are ideas, procedures, methods of operation and mathematical concepts. The Act accepts cases of joint authorship.

Copyright expires seventy years after the end of the year in which the author died in the case of literary, musical or artistic works and databases, whilst in the case of audiovisual works copyright ceases seventy years after the end of the year in which the last of the following people died: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the audiovisual work. In the case of copyright works owned by the Government and international bodies, the seventy year prescriptive period comes to an automatic end at the end of the year in which the work was first published.

Copyright allows the author of the works mentioned above to enjoy the exclusive right to authorise or prohibit any or all of the following actions with regard to a work that is subject to copyright: reproduction by any means and in any form, whether directly or indirectly, temporarily or permanently, in whole or in part; rental and lending; distribution; translation into other languages, including different computer languages; adaptation, arrangement and any other alteration and reproduction, distribution, communication, display or performance to the public of the results thereof; broadcasting, rebroadcasting, communication to the public or cable retransmission; and display or performance to the public.

The Copyright Act also establishes copyright in works of architecture. In addition, it regulates those cases where restrictions with regard to certain rights are permissible, as well as the issue of the first ownership of copyright. Moral rights of authors, neighbouring rights, moral rights of performers, transfer of copyright and neighbouring rights, sui generis rights in respect of databases and semiconductor product topographies are also regulated by the enactment.

Infringements of the provisions of the Copyright Act relating to copyright, neighbouring rights and sui generis rights give rise to a civil action before the Civil Court, First Hall and, on appeal, before the Court of Appeal. Moral rights, when violated, are also subject to a civil lawsuit before the said courts. Finally, the Act establishes a Copyright Board, which mainly deals with setting the remuneration to be paid to the copyright holder by any person requiring copyright permission and grants the parties a right of appeal for all decisions of the Board.

• *Att dwar id-Drittijiet ta' l-Awtur* (Maltese Copyright Act, Chapter 415, Laws of Malta)
http://merlin.obs.coe.int/redirect.php?id=12561 EN MT

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

NL-Netherlands

The Dutch Copyright Act

The Dutch Copyright Act ('Auteurswet') is the guardian of the cultural heritage in the Netherlands. The Act grants protection to the creators of literary, scientific, artistic and many more types of work.

In 1803, under the so-called 'Book Act' ('Boekenwet'), publishers were protected against the reproduction of their books and music by other publishers. During the period when the Netherlands formed part of the French empire (1810-1813), the subject of protection changed in accordance with French law and copyright became a right of the author. The first Dutch Copyright Act dates back to 1817. Under the 'Auteurswet 1817' it was still the publisher who benefited the most from copyright, as authors assigned their rights to the publisher. In 1881, with the new 'Auteurswet 1881', copyright took shape as a right in favour of the author himself. The 'Auteurswet 1912' (after several amendments) is the Copyright Act in force in the Netherlands today. Upon an amendment on the 13 of March 2008, the title was changed to 'Auteurswet', so as to avoid giving the impression that the Act is not up-to-date. In fact, the Copyright Act has changed along with technological developments and currently uses technology-independent language.

Copyright or 'auteursrecht' is the exclusive right of the author, the "maker" of the work, to reproduce his work and to communicate it to the public. This right comes into existence at the moment of the mere creation of the work, without any formal requirements being necessary, and runs until 70 years after the author's death. Initially the Act was used for books, but at the present time it is applicable to all sorts of creative expressions such as software, art, architecture and even under certain conditions an ordinary conversation. An idea as such is not however protected under Dutch copyright law, but only the expression of the idea in a material form. According to Dutch case law, a copyright-protected work needs to "reflect an original expression and the personal imprint of the author."

The copyright of the author consists of a property right and of moral rights. The property right can be assigned by a written deed. Because the author has a personal bond with his work, the moral rights stay with the original author despite the assignment of the copyright. The moral rights allow the author, inter alia, to oppose a distortion of the work he created. This could be an entire demolition of a building or a change in the height of the pedestal of a public statue.

So as to encourage the free flow of information, certain limitations are placed on copyright. For example, under certain conditions it is permissible to use a work for educational purposes, for strictly private purposes or in a parody or caricature. Other important limitations are the right to copy news items and the right to quote from a copyright-protected work. The copying of a computer programme in the private sphere however is not allowed. In the chapter of the Copyright Act on limitations, portrait rights are also established. This is the right of the portrayed person to use or oppose to the use of his portrait, even if he/she is not the author of the portrait.

If copyright is violated, the holder of the copyright is provided with several remedies. Among others, the applicant can claim full damages; the surrender of the profits made from the infringement; and the destruction of the products used for the infringement. Some violations, like piracy, are criminal offences under the Copyright Act. Besides these remedies set out in the Copyright Act, a copyright owner can avail of the general remedies that all intellectual property holders have. In urgent cases, so as to avoid irreparable damage, the applicant may ask for summary proceedings. In this way, the judge can condemn the infringer without his/her presence in court being required.

- Wet van 23 september 1912, Auteurswet (Copyright Act, 23 September 1912)
http://merlin.obs.coe.int/redirect.php?id=12562 NL
- *Wet van 13 maart 2008, Stb. 2008, 85. Reparatiewet III Justitie* (Repair Act, 13 March 2008)
http://merlin.obs.coe.int/redirect.php?id=12563 NL

Aad Bos
Institute for Information Law (IViR), University of Amsterdam

NO-Norway

Public Value Test Required for New Services in NRK

The Norwegian Broadcasting Act has been amended with a regulation requiring pre-consent for new services which Norsk rikskringkasting AS (the Norwegian public service broadcaster - NRK) wants to launch. The procedure requires an application of what is often called a public value test prior to a decision to add any significant new service to the NRK's public service remit. The amendment was enacted by Parliament on 19 June 2009 along with several other changes (see below), all with effect from 1 January of this year.

The EFTA Surveillance Authority has long expressed its dissatisfaction with how the Norwegian government has handled its ownership of NRK with respect to the EEA agreement's state aid regulation. The Government has responded to this by amending the NRK

statutes with a clarification of the public service remit, among others by providing a more detailed list of the activities which are considered to be a part of the remit. The amendment to the Act requiring pre-consent for the new activities which NRK wants to take on must be understood in connection to this. Only services which fulfill the democratic, social and cultural needs of society will be accepted. It is presupposed in the preparatory works that only significant and principal issues should be subject to the procedure. So, for example, NRK should be able to make minor changes to its existing services or move a service to another platform without having to ask for consent. The new Section 6-1a in the Act gives the King in Counsel (the Government) the final say as to whether a service should be acknowledged, but commands Medietilsynet (the Norwegian Media Authority) to carry out the public value test and to give its advisory opinion. The provision explicitly states that more detailed rules on the assessment criteria and procedural arrangements will be included in the Broadcasting Regulation. The Government circulated for public consultation a proposal on a new regulation in July 2009, which is expected to be adopted very soon. In addition, the Media Authority is currently carrying out an examination of NRK's current activities to assess whether they qualify as a public service.

The Parliament also amended the Broadcasting Act with a provision granting the Media Authority full independence from the Government when carrying out its task of making an annual report on how public service broadcasters in Norway comply with their remits. Section 2-13 of the Act now states that neither the King nor the Ministry can instruct the Authority in its assessments. Although this must be seen only as a codification of practice, since the Government has never used its right to instruct in these cases, the new provision is in principal very important, not least for the Norwegian Media Authority, which is not independent from the state. The same independence is granted in Section 6-1a to the Authority when carrying out the public value test.

A few other minor changes to the act were also made. These involve among other things a new prohibition against advertisements on NRK's teletext services (provision 6-4) and a new provision giving NRK a right to get information from distributors customer registries in order to make the collection of licence fees more efficient (provision 8-5).

The Broadcasting Act will be revised again this year as a result of the implementation of the AVMS Directive. The Government plans to send a proposal for the amendments to the Parliament before summer.

• Lov 4. desember 1992 nr. 127 om kringkasting (Broadcasting Act)
http://merlin.obs.coe.int/redirect.php?id=12564 NO
• Ot. prp. nr. 81 (2008-2009) (Proposition Nr. 81 to the Odelsting)
http://merlin.obs.coe.int/redirect.php?id=12565 NO
• Innst. O. nr. 77 (2008-2009) (Recommendation O. Nr. 77)
http://merlin.obs.coe.int/redirect.php?id=12566 NO

Ingvil Conradi Andersen
Norwegian Media Authority

PT-Portugal

Copyright Code

The Portuguese Act Nº 16/2008 of 1 April 2008 is a transposition of the European Directive 2004/48/CE of the Parliament and Council of 29 April 2004 regarding intellectual property. In terms of Portuguese law, it corresponds to the third change introduced to the Industrial Property Code, the seventh alteration of the Code of Authors Rights and Related Rights and the second change to Law-Decree Nº 332/97 of 27 November.

Being a transposition of an EU Directive, Act Nº 16/2008 establishes and updates the necessary measures and procedures to guarantee full respect for intellectual property rights. In Article 201, the Act establishes that stolen copies or counterfeit intellectual works will always be seized, whatever the nature of the work. The apprehension comprehends other material, machinery, instruments or documents that are suspected of being used in these offensive acts.

In Article 211, Act Nº 16/2008 states in detail the compensation mechanisms for those whose intellectual property rights have been breached. It says clearly that any person who intentionally or recklessly breaches the copyright or related rights of others is obliged to compensate for damages resulting from the breach. In determining the amount of compensation, the court must consider material and immaterial loses, the profit made by the infringer and consequential damages suffered by the offended party. In special circumstances, when it might be difficult for the court to assess the compensation, it may calculate, at the very least, the remuneration that would be received if the infringer had requested authorisation to use those rights and the costs involved in the investigative and administrative procedures to stop the unlawful conduct.

• Lei n.º 16/2008 de 1 de Abril Transpõe para a ordem jurídica interna a Directiva n.º 2004/48/CE, do Parlamento Europeu e do Conselho, de 29 de Abril, relativa ao respeito dos direitos de propriedade intelectual, procedendo à terceira alteração ao Código da Propriedade Industrial, à sétima alteração ao Código do Direito de Autor e dos Direitos Conexos e à segunda alteração ao Decreto -Lei n.º332/97, de 27 de Novembro (Portuguese Copyright Act - Act Nº 12/2008 of 1 April which transposes the European Directive 2004/48/CE of the European Parliament and Council of 29 April 2004 regarding the respect of intellectual property, corresponding to the third change to the Industrial Property Code, the seventh alteration of the Code of Authors Rights and Related Rights and the second change in the Law-Decree Nº 332/97 of 27 November)
http://merlin.obs.coe.int/redirect.php?id=12567 PT

Helena Sousa
Communication and Society Research Centre, University of Minho

SE-Sweden

Copyright Act

Swedish copyright regulation dates back to 1752 and the "Royal Act Regulating Book Printers". The current Swedish Act on Copyright in Literary and Artistic Works (1960:729), as subsequently amended, entered into force in 1960.

The Copyright Act provides legal protection for literary and artistic works, which are the result of original creativity in any form or shape (see e.g. Article 1 of the Copyright Act). Furthermore, the Copyright Act protects neighbouring rights, such as those over databases or those of the producers of recordings of sound and of images (Articles 45-49).

Generally, copyright in Sweden lasts for 70 years after the author's death (Article 43).

From Article 2 of the Copyright Act it follows that the author has the exclusive right to make copies of a work and to make a work available to the public. These are the so-called economic rights (Article 2).

Moreover, the Copyright Act protects authors' moral rights, meaning that the author has the right to be named in connection with the work, as well as the right to refuse any changes to the work which are prejudicial to the author's literary or artistic reputation or to his individuality (Article 3).

The economic rights in a work may be transferred entirely or partially (Article 27). However, an author may only waive his/her moral rights in relation to uses which are limited as to their character and scope (Article 3).

The Copyright Act has been modified quite extensively in the past few years due to, inter alia, the implementation of two EC Directives: Directive 2001/29/EC, otherwise known as the 'Infosoc Directive', and Directive 2004/48/EC, otherwise known as the 'Enforcement Directive'.

The implementation of the Infosoc Directive included in particular the imposition of restrictions in relation to individuals' ability to make copies for private purposes. Additionally, protection for technological measures was introduced, while it was also made illegal to circumvent measures which prevent copying or acts of making a work available to the public (see e.g. Article 52 d).

The implementation of the Enforcement Directive strengthened the position of rightsholders (see also IRIS 2009-5: 19/32). For instance, if there is probable cause for an infringement, then rightsholders may apply for an order to provide information regarding the origin or distribution channels of the questioned goods. Such an order may be directed against anyone who has committed or contributed to the infringement, e.g. an Internet Service Provider, which, as a consequence, may be ordered to disclose the name of a person hiding behind a certain IP number.

• Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works)
http://merlin.obs.coe.int/redirect.php?id=12583 EN SV

Michael Plogell and Erik Ullberg
Wistrand Advokatbyrå, Gothenburg

ES-Spain

Copyright Act

The current Spanish Intellectual Property Law is the Royal Legislative Decree 1/1996 of 12 April (as amended) approving the Consolidated Act on Intellectual Property, which regularises, clarifies and harmonises the applicable statutory provisions.

This Legislative Decree is a consolidation of all previous regulations on copyright which were standing at the time of its adoption and aims at their regularisation, clarification and harmonisation. The Legislative Decree was adopted on the basis of the Second Final Provision of Act 27/1995 of 11 October on the incorporation in Spanish legislation of Council Directive 93/98/EEC of 29 October 1993 on the term of protection of copyright and certain related rights. This Second Final Provision authorised the Government to approve a final text consolidating all the applicable regulations on intellectual property before 30 June 1996.

The Royal Legislative Decree incorporated the revised Spanish Intellectual Property Act of 1987, as well as four other Acts, which were approved at that time for

the implementation of four corresponding European Directives:

- Act 22/1987 of 11 November, of which several articles were amended by Act 20/1992 of 7 July;

- four regulations incorporating Directives 91/250/EEC, 28/100/CEE, 93/98/EEC and 93/83/EEC into the Spanish legal system: Act 16/1993 of 23 December, Act 43/1994 of 30 November, Act 27/1995 of 11 October and Act 28/1995, of 11 October.

The content of the Royal Legislative Decree is basically the same as that of the previous Spanish Intellectual Property Act, which addressed the problems arising from the extension of the types of protected works (computer programmes were introduced), from economic rights and the recognition of new copyrights for the first time. In accordance with the Berne Convention, this Act also regulated moral rights and dispensed with the registration requirement for works at the Intellectual Property Registry in order to ensure the effectiveness of the rights and their protection. It also abolished the legal monopoly of the General Society of Authors and Publishers (Sociedad General de Autores y Editores - SGAE) and introduced an open system for the different collecting societies.

After its adoption, the Royal Legislative Decree was amended several times. Firstly, it was modified by Act 5/1998 of 6 March, by means of which Council Directive 96/9/EEC was implemented, and by the new Civil Procedure Code (Act 1/2000, 7 January), which revoked and modified several articles of the Royal Legislative Decree. It was also modified by Act 19/2006 of 5 June, with which intellectual and industrial property means of protection were extended. And finally, it was modified by Act 23/2006 of July 7 that amended the Consolidated Text of the Act on Intellectual Property. This last modification, the most important to date, implemented into Spanish legislation Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, with which the European Union, in turn, sought to comply with the two World Intellectual Property Organization (WIPO) Treaties of 1996 on copyright and performances and phonograms.

• Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (Royal Legislative Decree 1/1996 of 12 April approving the Consolidated Act on Intellectual Property, which regularises, clarifies and harmonises the applicable statutory provisions)
http://merlin.obs.coe.int/redirect.php?id=12569 ES

Laura Marcos and Enric Enrich
Enrich Advocats, Barcelona

BE-Belgium

Copyright in Belgium after 2005

The Copyright and Related Rights Act of 30 June 1994 (published in the Belgian Gazette on 27 July 1994) has been amended on several occasions.

One of the most significant amendments was the transposition into Belgian law of European Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society by the Act of 22 May 2005 (published in the Belgian Gazette on 27 May 2005). Following the transposition of Directive 2001/29/EC, the 2005 version of the Belgian law on copyright contains new provisions concerning:

- the rights of reproduction, communication and making available to the public, and distribution (Article 1);

- exceptions to the pecuniary rights of authors (Articles 21 to 23*bis*) and holders of related rights (Articles 46 to 47*bis*);

- private copying and related remuneration (Articles 55 to 58);

- reprography and related remuneration (Articles 59 to 61);

- remuneration for the reproduction and/or communication of works and other subject-matter for the purpose of illustration for teaching or scientific research (Articles 61*bis* to 61*quater*);

- public lending (Articles 62 to 64);

- the legal protection of technological measures and rights-management information (Articles 79*bis* to 79*ter*);

- actions relating to the application of technological protection measures (Article 87*bis*). Royal decrees, particularly concerning the new remuneration schemes for reprography and private copying, with the exception of digital copying for educational purposes, are yet to be adopted, which is making it difficult to apply the new law on copyright.

On 16 November 2006, the Parliament adopted an Act transposing into Belgian law Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (Act of 4 December 2006, published in the Belgian Gazette on 23 January 2007). The resale right is an unassignable and inalienable right, enjoyed by the author of a work of graphic or plastic art, to an economic interest in successive sales of the work concerned. The royal

decree of 2 August 2007 (published in the Belgian Gazette on 10 September 2007) executing the Act of 4 December 2006 particularly lays down the minimum threshold for the sale price of a work for which a resale right may be claimed. This threshold was raised from EUR 1,250 to EUR 2,000. The royal decree also names SABAM and SOFAM as collecting societies to which parties that owe resale rights may notify sales and pay the relevant fees.

As regards protection against the counterfeiting of works, three Acts amended the Act of 30 June 1994:

- the Act of 9 May 2007 concerning the civil aspects of the protection of intellectual property rights (published in the Belgian Gazette on 10 May 2007 - erratum published in the Belgian Gazette on 15 May 2007);

- the Act of 10 May 2007 concerning the procedural aspects of the protection of intellectual property rights (published in the Belgian Gazette on 10 May 2007 - erratum published in the Belgian Gazette on 14 May 2007).

- the Act of 15 May 2007 concerning the prevention of the counterfeiting and piracy of intellectual property rights (published in the Belgian Gazette on 18 July 2007).

• *Version coordonnée de la Loi relative au droit d'auteur et aux droits voisins* (Consolidated version of the Copyright and Related Rights Act)
http://merlin.obs.coe.int/redirect.php?id=12570 FR

Katrien Van der Perre
Department of Communication Sciences / Center for Journalism Studies, Ghent University

Decree of the Media Council of the German-speaking Community of Belgium

The tasks of the *Medienrat der deutschsprachigen Gemeinschaft* (Media Council of the German-speaking Community), which is responsible for regulating the audiovisual media in Belgium's smallest linguistic community, are laid down *inter alia* in a decree of 27 June 2005. This decree was last amended on 3 December 2009 and is entitled *Dekret über die audiovisuellen Mediendienste und die Kinovorstellungen* (Decree on Audiovisual Media Services and Cinema Exhibitions).

It governs not only the provision of audiovisual media services and of the transmission networks, services and facilities that fall within the remit of the German-speaking Community but also the organisation of cinema exhibitions in the area of that Community (Article 1).

With the amendments of December 2009, the decree was extensively revised and adapted to the provisions of the European Audiovisual Media Services Directive.

For example, it now covers all audiovisual media services instead of only the traditional area of television and radio (Article 3).

Furthermore, provisions have been adapted and simplified with regard to audiovisual commercial communication, and product placement is permitted in certain cases (Articles 6 et seq.).

• *Dekret über [die audiovisuellen Mediendienste] und die Kinovorstellungen vom 27. Juni 2005* (Decree on [Audiovisual Media Services] and Cinema Exhibitions)
http://merlin.obs.coe.int/redirect.php?id=12943 DE

Christian Mohrmann
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Agenda

The impact of digital technology on film screening, particularly independent screening
5 - 6 March 2010
Organiser: Spanish Presidency of the European Union
Venue: Barcelone
Information & Registration:
http://www.eu2010.es/en/agenda/seminarioscongresosyconf/eventos3.html

Book List

Lardinois, J-Ch.
Les contrats commentés de l'industrie de la musique 2.0
BE, Louvain
2009, Larcier
ISBN 978-2-8044-3517-2
http://editions.larcier.com/titres?id=32338_1_0

Mouffe, B.
Le Droit de la publicité
2009, Bruylant
ISBN 978-2802727392
http://www.bruylant.be/st/fr/fiche.php?id=12928

Fosbrook, D., Laing, A. C.
The Media & Business Contracts Handbook, 4th edition
GB, London
2009, Sweet & Maxwell
ISBN 9781847039088
http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=3872&productid=23344

Beat Graber, Ch.
Governance of Digital Game Environments: Transdisciplinary Perspectives
GB, Cheltenham
2010, Edward Elgar Publishing Ltd
ISBN 978 1 84844 683 0
http://www.e-elgar.co.uk/Bookentry_Main.lasso?id=13659

Cupa, J.
The Media Freedom to Inform v. Celebrities' Personality Rights: A comparative study of the U.S. and German approach
2010, VDM Verlag Dr. Muller Aktiengesellschaft & Co. KG
ISBN 978-3639183344
http://www.amazon.co.uk/Freedom-Inform-Celebrities-Personality-Rights/dp/3639183347/ref=sr_1_-66?ie=UTF8&s=books&qid=1264440678&sr=1-66

Glaesner, Dr. H.-J.
Europarecht
DE, Baden Baden
2010, Nomos Verlag
ISBN 978-3-8329-5269-3
http://www.nomos-shop.de/productview.aspx?product=12147&toc=219

Ring, W-D.
Positionen zum Jugendmedienschutz in Deutschland: Eine Textsammlung
2010, Vistas Verlag
ISBN 978-3891585085
http://www.vistas.de/Vistas/446/Positionen_zum__-Jugendmedienschutz_in_Deutschland/446/detail.html