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IRIS
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of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of Financial Times a.o. v. UK

Eight years ago the British courts decided in favour of a disclosure order in the case of Interbrew SA v. Financial Times and others. The case concerned an order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Bush InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009, the European Court of Human Rights (Fourth Section) came to the conclusion that this disclosure order constituted a violation of the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources, as protected by Article 10 of the European Convention of Human Rights.

On the basis of a leaked report by a person X and further investigations by journalists, the British media in November and December 2001 reported that Interbrew (now: Anheuser Bush InBev NV) had been plotting a bid for SAB. The media coverage had a clear impact on the market on shares of Interbrew and SAB, with Interbrew's share price decreasing, while both the share price and the volume of SAB's shares traded obviously increased. At the request of Interbrew, the High Court on 19 December 2001 ordered delivery up of the documents under the so-called Norwich Pharmacal principle. This principle implies that if a person through no fault of his own becomes involved in the wrongdoing of others so as to facilitate that wrongdoing, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer. The four newspapers and the news agency were ordered not to alter, deface, dispose or otherwise deal with the documents received by person X and to deliver up the documents to Interbrew's solicitor within 24 hours. The newspapers and Reuters appealed, but the disclosure order was confirmed by the Court of Appeal. In the London Court's judgment it was emphasised that what mattered critically in this case was the source's purpose: "It was on any way a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both." The public interest in protecting the source of such a leak was considered not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source. It was also underlined that there is "no public interest in the dissemination of falsehood", as the judge had found that the document, leaked by person X to the media, was partially forged. The Court of Appeal said: "While newspapers cannot be asked to guarantee the veracity of everything they report, they in turn have to accept that the public interest in protecting the identity of the source of what they have been told is disinformation may not be great." Accordingly, the Court of Appeal dismissed the appeals. On 9 July 2002, the House of Lords refused the newspapers leave to appeal, following which Interbrew required that the newspapers and Reuters comply with the court order for delivery up of the documents. The newspapers and Reuters however continued to refuse to comply and applied to the European Court of Human Rights, arguing that their rights under Article 10 of the Convention had been violated.

The European Court of Human Rights came to the conclusion that the British judicial authorities in the Interbrew case did indeed neglect the interests related to the protection of journalistic sources, by overemphasising the interests and arguments in favour of source disclosure. The Court accepted that the disclosure order in the Interbrew case was prescribed by law (Norwich Pharmacal and Section 10 of the Contempt of Court Act 1981) and was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however did not consider the disclosure order to be necessary in a democratic society. First, the Court in general terms reiterated that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important: "protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected" (§59). Disclosure orders in relation to journalistic sources have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. The Court accepted that it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage when overridden in circumstances where it is clear that a source was acting in bad faith with a harmful purpose and disclosed intentionally falsified information. The Court made clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasised most importantly that "the conduct of the source can

never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 §2" (§63).

Applying these principles to the Interbrew case. the European Court of Human Rights came to the conclusion that the British Courts had given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide*. While the Court considered that there may be circumstances in which the source's harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the four newspapers and Reuters did not allow X's purpose to be ascertained with the necessary degree of certainty. The Court therefore did not place significant weight on X's alleged purpose in the present case, but did clearly emphasise the public interest in the protection of journalistic sources. The Court accordingly found that Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources. The judicial order to deliver up the report at issue was considered to constitute a violation of Article 10 of the Convention. The European Court was unanimous in its judgment, although it took the Court seven years to come to its conclusion.

• Judgment by the European Court of Human Rights (Fourth Section), case of Financial Times v. The United Kingdom, Application no. 821/03 of 15 December 2009
http://merlin.obs.coe.int/redirect.php?id=12221 EN

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EUROPEAN UNION

European Commission: Ratification of the WCT and WPPT

On the 14 December 2009, the European Union ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The two treaties, also known as the WIPO "Internet" Treaties, were adopted in 1996 with the intention of bringing the international protection of copyright and related rights up to speed with modern advances in information technology. Sixteen EU Member States (namely the Republic of Malta, the Republic of Austria, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Republic of Italy, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland) also concurrently ratified the Treaties. The remaining Member States had already proceeded with ratification at an earlier stage.

The negotiations of the Diplomatic Conference that led to the conclusion of the Treaties marked the first time that the European Union was granted full Contracting Party status alongside Member States in the field of copyright, as opposed to the observer status is had enjoyed up to that point. Immediately after the Diplomatic Conference, work begun on the European level to adapt European copyright law to the new Treaties. The resulting Directive on the harmonisation of certain aspects of copyright and related rights in the information society was adopted in 2001 and has since been transposed into the national law of all EU Member States. In March 2000, the Council of the European Union decided formally that ratification of the Treaties would be done both on the level of the individual Member States and by the European Community.

Nevertheless, harmonisation, at least as concerns the rights of producers of phonograms, has not thus been fully effected. As the notification of the ratification of the WPPT notes, five of the ratifying states (Denmark, Finland, France, Germany and Sweden) have availed themselves of the possibility afforded by the Treaty of declaring that they will not apply either the criterion of publication (the phonogram was first published in another Contracting State) or alternatively of fixation (the first fixation of the sound was made in another Contracting State) or will apply the criterion of fixation alone and the criterion of fixation instead of the criterion of nationality (the producer of the phonogram is a national of another Contracting State) as concerns the recognition of the right to national treatment in relation to certain rights for producers of phonograms, in accordance with Articles 5 and 17of the Rome Convention, to which the WPPT refers in Article 3.

The two Treaties will enter into force with respect to the European Union and the aforementioned Member States on 14 March 2010.

• "WPPT Notification No. 78, WIPO Performances and Phonograms Treaty, Accessions or Ratifications by the European Union and some of its Member States", 10 December 2009
http://merlin.obs.coe.int/redirect.php?id=15385 DE EN FR
• "WCT Notification No. 76, WIPO Copyright Treaty, Accessions or Ratifications by the European Union and some of its Member States", 10 December 2009
http://merlin.obs.coe.int/redirect.php?id=15387 DE EN FR
• "European Commission Welcomes Ratification of the WIPO Copyright Treaties", IP/09/1916, Brussels, 14 December 2009
http://merlin.obs.coe.int/redirect.php?id=15388 DE EN FR

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European Commission: OPTA Tariffs Approved

The European Commission has approved the tariffs suggested by the Dutch Telecom Regulator *Onafhankelijke Post en Telecommunicatie Autoriteit* (Independent Post and Telecommunications Authority - OPTA). Two Dutch cable operators, UPC and Ziggo, are now obliged to charge other providers a fixed price, set by OPTA, for their products. These alternative providers can then resell the acquired analogue radio and TV signals to their customers.

On 19 August 2008, OPTA held a national consultation on its plans for opening up cable networks in the Netherlands. OPTA intended to encourage lower price levels and higher quality networks by stimulating competition. OPTA hoped to attain this by, among other measures, obliging cable operators to sell their products to alternative providers who would then be able to resell them. This would give these alternative providers the opportunity to sell packages (internet, telephony and television) to their customers. In the Netherlands it is estimated that around 80% of households receive their radio and television services from cable operators. Alternative platforms, among others DSL, fibre, digital terrestrial and satellite, have not managed to establish themselves in the Dutch market. 10% of the market share is captured by digital terrestrial TV and satellite TV, while a mere 1% is taken by IPTV. With this regulatory measure, OPTA hopes alternative platforms will be able to improve their digital offers and provide analogue transmission over the cable platform as well. The cable operators were fairly critical about the enforced obligations, but to no avail: the European Commission gave the green light to the project on 9 February 2009 (see IRIS 2009-4: 4).

The four largest cable operators were labelled as having significant market power by OPTA. However, OPTA imposed a 'Wholesale Line Rental - Cable' obligation on only two of these: Ziggo and UPC. The current decision of the European Commission focuses on OPTA's draft decision, which examines how UPC and Ziggo should calculate the tariffs other providers, which intend to resell their analogue radio and TV signals to their customers, ought to pay. The prices are set at EUR 8.84 for services purchased from UPC and at EUR 8.46 for services purchased from Ziggo per month per subscriber (before tax), while only the inflation rate could be taken into account when deciding upon price increases.

The relevant consultation and transparency procedures are provided for under Article 7 of the Framework Directive. The Commission registered a notification from OPTA about these tariff regulations on 25 November 2009. The Commission asked OPTA for information on 4 December 2009. OPTA delivered the requested material on 8 December 2009 and sent in extra data on 11 December 2009. On 22 December 2009, the Commission stated that it had no comments in accordance with Article 7(3) of the Framework Directive.

- C(2009)985, Brussels 9 February 2009
http://merlin.obs.coe.int/redirect.php?id=12189 EN
- Press release, "Telecoms: European Commission clears tariffs for reselling analogue cable TV in the Netherlands", NL/2009/1015, 22 December 2009
http://merlin.obs.coe.int/redirect.php?id=13164 DE EN FR
- C(2009)10734, Brussels, 22 December 2009
http://merlin.obs.coe.int/redirect.php?id=13165 EN
- Press release, "Commission clears Dutch regulator OPTA's proposal to enhance competition in the broadcasting markets", IP/09/245, Brussels, 11 February 2009
http://merlin.obs.coe.int/redirect.php?id=12192 DE EN FR NL

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NATIONAL

AT-Austria

Data Retention Bill

The Austrian *Bundesministerium für Verkehr, Innovation und Technologie* (Federal Ministry for Traffic, Innovation and Technology) has published a bill transposing the Data Retention Directive 2006/24/EC into national law. The public had until 15 January 2010 to submit opinions on the bill as part of the consultation procedure.

The bill amending the *Telekommunikationsgesetz* (Telecommunications Act), drafted on the ministry's behalf by the *Ludwig Boltzmann Institut für Menschenrechte* (Ludwig Boltzmann Institute for Human Rights - BIM) sticks very closely to the provisions of the Directive. The data retention period of six months required under the bill is the minimum allowed under the Directive.

In contrast to the situation in Germany, for example, the bill only authorises access to retained data for the purposes of the prosecution of "serious criminal offences"; such offences are to be defined in a decree by the Austrian *Bundesjustizministerium* (Federal Ministry of Justice). The German *Telekommunikationsgesetz* goes beyond the Directive's main regulatory objective by also allowing data to be used for the prevention of danger and for secret service purposes.

According to the Austrian draft, a decree must also be issued guaranteeing that the telecommunications

companies concerned will be reimbursed not only for the cost of providing individual pieces of information to the relevant authorities, but also for the cost of the necessary surveillance infrastructure. The rules on the reimbursement of investment costs are designed to take into account a 2003 ruling of the *Verfassungsgerichtshof* (Constitutional Court), which declared that a legal requirement to make such equipment available without compensation was unconstitutional.

The bill also stipulates that micro and small enterprises, as defined in Commission Recommendation 2003/361/EC, can apply for exemption from the data retention obligation. It also includes provisions on secure data storage and the separation of this data from other data.

Austria should have already fully transposed Directive 2006/24/EC by 15 March 2009 at the latest. The European Commission has therefore already brought an action before the Court of Justice of the European Union for an infringement of the EC Treaty (C-189/09).

• *Gesetzentwurf des Bundesministeriums für Verkehr, Innovation und Technologie* (Bill of the Federal Ministry for Traffic, Innovation and Technology) DE

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Flemish Regulator Accepts Logo for Product Placement

The new Flemish Media Decree of 27 March 2009, which entered into force on 1 September 2009, allows product placement in the programmes and under the conditions stipulated in the Audiovisual Media Services Directive (Articles 98-101). Unlike the Directive, the Flemish Decree stipulates that only in programmes produced or commissioned by the media service provider itself or a company affiliated to it must viewers be clearly informed about product placement (Article 100 §1, 4). With this goal in mind, all Flemish broadcasting organisations have been using the same logo with regard to the appearance of product placement in their programmes since 1 September 2009. However, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) considered this initial logo to be insufficiently clear and was of the opinion that it was not displayed for long enough. During an informative meeting on 5 October 2009, the Regulator provided the broadcasting organisations with some recommendations as to the use and application of a more obvious logo. Meanwhile, a new, adjusted logo has been created with which the Regulator has explicitly agreed. This new logo must be displayed at the beginning and at the end of programmes containing product placement, as well as after every break. Starting from 1 January 2010, the Flemish Regulator will effectively supervise whether the appearance of product placement in programmes is appropriately communicated to the viewers through the proper use of this logo.

• *Website van de Vlaamse Regulator voor de Media* (Website of the Flemish Regulator for the Media)
http://merlin.obs.coe.int/redirect.php?id=12183 NL

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Draft Amendments to the Radio and Television Act

On 18 December 2009 the National Assembly adopted at its first reading the Law on amendment and supplementation of the Radio and Television Act (Draft Law). The main aim of which is to implement the provisions of Directive 2007/65/EC. The following is a summary of the main changes introduced by the Draft Law.

1. The Draft Law replaces the current regulations on radio and TV activities by a new framework for the provision of audiovisual media and radio services, and also extends the regulation to audiovisual media services on demand. The latter are subject to the notification regime. The providers of audiovisual media services on demand shall file application forms with the Council for Electronic Media (CEM) within one month following the effective date of the Draft Law.

2. The current rules on the protection of minors, as well as human dignity, which up to now have been applicable only to traditional TV broadcasting, will apply in future to all audiovisual media services and commercial communications.

3. The Draft Law provides a new balance between exclusive TV broadcasting rights to events of major interest to the public and the promotion of plurality through a variety of production and structuring programme schemes for news in the entire EU. Those who exercise exclusive rights to events of major interest are obliged to grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms. The terms should be communicated in a timely manner before the event takes place to give sufficient time to exercise such a right. The

short extracts can be used for broadcasting within the whole EU and should not exceed 90 seconds. The right of access to short extracts should apply on a transfrontier basis only where necessary. Thus, a TV broadcaster is obliged first to seek access from a broadcaster established in the same Member State having exclusive rights to the event of major interest.

4. The country-of-origin principle is laid down in the effective Radio and Television Act with regard to TV activities in the area of traditional (linear) TV broadcasting. The Draft Law provides that the CEM will monitor also the activities of audiovisual media service providers on demand (non-linear), which fall within the jurisdiction of the Republic of Bulgaria.

5. The Draft Law provides that, where it is practically possible, on-demand audiovisual media services provided by media service providers under its jurisdiction shall promote the production of and access to European works. The implementation of this provision and the effective consumption of European works shall be the subject matter of the regular reports of CEM to the EU Commission.

6. The Draft Law introduces a new, liberal regulatory regime for commercial communication regarding traditional TV broadcasting and also a basic package of rules governing the on-demand and radio services. The Draft Law does not increase the maximum amount of admissible advertising, but gives TV broadcasters flexibility in advertising insertion. The limitation on the daily quantity of advertising has been abolished. The hourly advertising limitation of twelve minutes is more important and will apply to TV advertising and teleshopping spots. Surreptitious audiovisual commercial communication continues to be forbidden. However, this prohibition shall not cover legitimate product placement. The Draft Law carefully distinguishes between product placement and surreptitious positioning of audiovisual commercial communication.

7. The Draft Law introduces the co-regulation method as an alternative regulatory mechanism. Media service providers shall adopt codes of conduct for the advertising of certain foods in children's programmes. The Draft Law also provides for a new mechanism of co-regulation between the CEM and the media service providers regarding the protection of minors from editorial content that may be harmful to them.

• Закон за изменение и допълнение на Закона за радиото и телевизията (Law on amendment and supplementation of the Radio and Television Act (Draft))
http://merlin.obs.coe.int/redirect.php?id=12171 BG

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CY-Cyprus

Auction Process, Adopted Standard and Strategy for Digital Terrestrial Television Networks

The process of the introduction of DTT officially started on 4 December 2009 with a public invitation to tender for the granting of licences. This will include the authorisation to use radio frequencies and create and operate DTT and electronic communications networks. The invitation was published on behalf of the Commissioner for Electronic Communications and Postal Regulation (CECPR), the authority competent for electronic communications networks, and of the Ministry of Communications and Works, responsible for the radio frequencies spectrum and radio communications in general. Two licences will be issued to one applicant, a licence for radio communications (use of frequencies for DTT) and a licence for electronic communications (creation and operation of digital networks for both terrestrial TV and electronic communications).

The procedure that will be followed is an "ascending multiple round auction". It provides for the submission of applications by interested parties and at a first stage the selection of those who fulfill the terms and conditions set down in the invitation. The deadline for applications was 29 January 2010 and following the first round of selection, which is expected to be completed in April 2010, a second round of offers will start. Licences will be issued to the highest bidder for a duration of 15 years. The winner will be given 12 months to reach the required territorial coverage of 75% of the areas under the effective control of the Government of the Republic of Cyprus. Among its obligations are the following:

To provide networks for DTT of a hybrid type (free-to-air, with encoded signal, subscription services, local channels) and information society services; to carry the signal of all licensed analogue TV channels, to provide information on programmes (EPG) and to comply with the rules and laws related to technical specifications of the equipment, town planning, public health and other matters. The reserve price for the auction is EUR 850,000. This auction procedure is for the licensing of a platform of DTT and communications for private TV channels. A second platform will be leased to the public service broadcaster CYBC on the basis of negotiations with the government.

The standard for digital TV receivers in Cyprus will be MPEG-4. The CECPR announced this decision in November 2009 and an order was published in the Official Gazette in the form of a Normative Administrative Act (KDP 397/2009, Official Gazette on 27 November 2009).

Cyprus will shift fully to digital TV on 1 July 2011 with two digital networks, one for the public service broadcaster and one for the private operators. On that date, all licences for analogue transmission will expire and radio frequencies will be returned to the Ministry of Communications and Works. The main provisions of the strategic plan are as follows:

Two licences will be granted for the operation of two digital terrestrial radio networks for a duration of 15 years. One licence will be granted to the public broadcaster and one to a private operator for commercial TV services. The first network will be offered on the basis of negotiations between the government and the public broadcaster while the second will be auctioned.

The public broadcaster will carry audiovisual services only, must avoid competition with private operators and will not be allowed to develop other electronic communications services except very specific public utility ones. It must offer TV services for all with universal coverage. The private network will have the obligation to carry the signal of all licensed TV (and radio) channels, on special contracts and terms set in a framework decided by the CECPR. Only the operator of the commercial network will be allowed and obliged to offer services of both electronic communications and information society ones.

The transition period from analogue to digital TV shall be the shortest possible. The Government has decided to subsidise the purchase of digital decoders and to lead an information campaign both on the advantages and benefits of digital technology and the technical requirements for access to DTT.

In the framework of the digital switch-over the role of the Radio and Television Authority will change to focus more on content regulation. Its new role and functions will be set down in the amending law on Radio and TV Stations which will be changed to the law on Audiovisual Media Services. The draft is expected to be sent to the House of Representatives in the next few weeks in order to harmonise Cypriot legislation with the EU Directive on Audiovisual Media Services 2007/65/EC.

- Invitation of the OCECPR to tenders for granting licences to use radio frequencies spectrum, and establish and operate networks of digital terrestrial television and provide electronic communications services
http://merlin.obs.coe.int/redirect.php?id=12172 EN
- KDP 397/2009, Official Gazette 27 November 2009
http://merlin.obs.coe.int/redirect.php?id=12173 EN
- Policy and Regulation Framework for Licensing Networks of Digital Terrestrial Television
http://merlin.obs.coe.int/redirect.php?id=12174 EN

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CZ-Czech Republic

MoU between Regulatory Bodies

A Memorandum of Understanding on mutual co-operation and exchange of information between the Czech Council for Radio and TV Broadcasting, the Hungarian National Radio and TV Commission, the Polish National Broadcasting Council, the Romanian National Audiovisual Council, the Serbian Republic Broadcasting Agency and the Slovak Council for Broadcasting and Retransmission was signed on 10 December 2009 in Prague.

Each signatory shall prepare a brief summary of the relevant legislation in the respective country for the regulation of the content of and advertising in TV and radio broadcasts. The purpose of these summaries is inter alia to identify material differences between the applicable rules in the countries participating in the MoU. If requested by one of the signatories, these differences may be discussed with a view to improving the mutual understanding in the spirit of Recital 66 of the Preamble and Article 23b of the AVMSD.

The agreed co-operation also concerns the handling of complaints against TV or radio programmes with cross-border relevance. If, for instance, a signatory receives a complaint against a TV programme broadcast by a company licensed by another signatory, it may forward the complaint to the signatory from the country having the jurisdiction for consideration. The signatory of the country in charge will then deal with the complaint in accordance with its procedures. In addition, a signatory may forward the result of its monitoring report on the contents of foreign broadcasts to the signatory of the responsible country for consideration. The signatories will send complaints they receive against programme services to the signatory of the responsible country as soon as possible. The signatory of the country having jurisdiction should send a copy of the response to such a complaint in English to the other signatory concerned.

Each signatory shall designate relevant experts in order to facilitate the exchange of information and the consultation process in the spirit of the AVMSD.

The signatories shall give advice to each other about the legislation relevant to the regulation of TV programme services under their jurisdiction. This advice shall include how such laws and regulations are interpreted in the respective countries in the light of their culture, heritage and local distinctions.

The signatories agree to organise at least one annual meeting to discuss the most important issues arising from this agreement. They shall inform each other about major conferences and forums to be held

in their countries concerning the audiovisual field. This co-operation may be extended to regulators from other countries that express their interest.

• Memorandum of Understanding on mutual co-operation and exchange of information between the Czech Council for Radio and TV Broadcasting, the Hungarian National Radio and TV Commission, the Polish National Broadcasting Council, the Romanian National Audiovisual Council, the Serbian Republic Broadcasting Agency and the Slovak Council for Broadcasting and Retransmission, signed on 10 December 2009
http://merlin.obs.coe.int/redirect.php?id=12175 EN

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Federal Supreme Court on Admissibility of Retention of Certain Information in Online Archives

In a ruling of 15 December 2009, the *Bundesgerichtshof* (Federal Supreme Court - BGH) rejected the plaintiffs' demand that certain old reports should be removed from the online archive of a radio broadcaster.

Both plaintiffs were sentenced to life imprisonment in 1993 for the murder of a well-known German actor and have since been released on parole. Until 2007, the defendant made available, in its publicly accessible online archive, an article from the year 2000, in which - on the occasion of the 10th anniversary of the actor's murder - the crime was reported, revealing the full identities of the murderers. The plaintiffs claimed that this infringed their general personality rights, particularly their right to social rehabilitation, and applied for an injunction against publication of the report about them in connection with the crime, which revealed their full identities. These claims had been upheld by the lower instance courts.

The BGH overturned the lower instance decisions and rejected the claims. It did not consider the intrusion into the plaintiffs' general personality rights to be unlawful. The defendant had been acting to protect the public's right to information and freedom of expression, which was particularly relevant in light of the details of the case, i.e., the victim's popularity, the considerable public attention generated at the time of the event, and the plaintiffs' persistent denial of the crime over many years. Incidentally, the information contained in the report was true and the archive entry itself, which could only be found via a deliberate search, did not have a particularly widespread impact.

According to this weighing up of interests, the plaintiffs' personality rights in this case were judged to be less important than the need to protect the rights of freedom of expression and of the media.

In another pending procedure brought before it by the same plaintiffs against the Internet publications of an Austrian-based company, the BGH has suspended proceedings and asked the ECJ for a preliminary ruling on the international responsibility of courts (see IRIS 2010-1:1/12).

• *Pressemitteilung des BGH zum Urteil vom 15. Dezember 2009 (Az. VI ZR 227/08 und VI ZR 228/08)* (BGH press release on the ruling of 15 December 2009 (case no. VI ZR 227/08 and VI ZR 228/08))
http://merlin.obs.coe.int/redirect.php?id=12202 DE

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Federal Supreme Court Rules on Official Status of Public Broadcaster Editors

On 27 November 2009, the *Bundesgerichtshof* (Federal Supreme Court - BGH) upheld a decision of the *Landgericht Frankfurt am Main* (Frankfurt am Main District Court - LG) of 2 October 2008 (case no. 2 StR 104/09), imposing a prison sentence against a former television presenter and editor of Hessischer Rundfunk (HR) for corruption and embezzlement.

According to the BGH's ruling, editors working for the public broadcasting companies affiliated to the ARD, ZDF and Deutschlandradio qualify as office-holders within the meaning of criminal law and can therefore be punished for accepting bribes.

In the grounds for its decision, the court explained that providing the public with information from all sectors of society was one of the most important tasks of public service broadcasters. Public broadcasters could only fulfil their remit if they were careful to protect their economic independence. This was why all viewers had to pay licence fees. The fact that the convicted party was deemed to be an office-holder meant that a much heavier sentence should apply.

In the court's opinion, between 2001 and 2004, the convicted party, as HR's chief sports editor, had siphoned off more than EUR 500,000 from his employer for personal gain via a front company. According to the court, he had cost the broadcaster at least EUR 285,000.

• *Urteil des BGH vom 27. November 2009 (Az. 2 StR 104/09)* (BGH ruling of 27 November 2009 (case no. 2 StR 104/09))
http://merlin.obs.coe.int/redirect.php?id=12203 DE

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Administrative Court Rules on Applicability of IFG NRW to WDR

In a ruling on 20 November 2009, the *Verwaltungsgericht Köln* (Cologne Administrative Court - VG) decided that *Westdeutscher Rundfunk* (WDR) is not obliged to provide information to citizens under the North Rhine-Westphalia *Informationsfreiheitsgesetz* (Freedom of Information Act - IFG NRW).

The proceedings followed a complaint lodged on the basis of the IFG NRW by a freelance journalist against the broadcaster's refusal to disclose information. The plaintiff had wanted to know which companies WDR cooperated with and how much money was involved. The journalist had requested this information because he suspected that the broadcaster, which is funded by the licence fee, commissioned work from companies which employed members of its own *Rundfunkrat* (Broadcasting Council).

WDR itself had not disputed the applicability of the IFG NRW, but refused to disclose the information on the grounds that, regardless of freedom of information, it was not entitled to reveal trade secrets and internal company information.

The *VG Köln* ruled that the IFG NRW did, in principle, apply to WDR as a public body under the legal supervision of the *Land*. However, this did not give the plaintiff the right to obtain information from the defendant because his request did not concern a State administrative activity rooted in public law. Such activities would include any State activity, regardless of its legal form. The only condition was that the activity should be attributable to the State. However, the defendant only carried out such activities in the areas in which it operated with sovereign authority, i.e., the collection of the licence fee and the granting of broadcast time to third parties. The financial activity referred to by the plaintiff did not fall into this category and therefore did not represent an "administrative activity" in the sense of the IFG NRW.

• *Urteil des VG Köln vom 20. November 2009 (Az. 6 K 2032/08)* (Ruling of the Cologne Administrative Court of 20 November 2009 (case no. 6 K 2032/08))
http://merlin.obs.coe.int/redirect.php?id=12204 DE

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Fees Due for Use of Broadcasters' Programme Information

In December 2009, two court rulings were issued in relation to whether programme providers can charge a licence fee for the use of their programme information in electronic programme guides (EPGs).

According to reports, the *Oberlandesgericht Dresden* (Dresden Appeal Court - OLG) ruled that this was the case on 15 December 2009 in an appeal procedure between the collecting society *Verwertungsgesellschaft Media* (*VG Media*) and the online programme magazine *tvtv.de*. It therefore upheld a first instance decision taken by the *Landgericht Leipzig* (Leipzig District Court - LG) in May 2009. The LG had decided that the operator of the EPG, which is only available via the Internet, was obliged to pay a licence fee of EUR 0.0002 per downloaded page for the use of content descriptions and images produced by the 36 broadcasters represented by *VG Media* (see IRIS 2009-7: 8). The LG had based its decision on the notion that the programme information was protected under copyright law because it was artistically created. The web service did not constitute reporting on events of the day and was therefore not entitled to use the additional programme information free of charge under Art. 50 of the *Urheberrechtsgesetz* (Copyright Act). The decision of the *OLG Dresden* is final.

On 23 December 2009, the *Landgericht Köln* (Cologne District Court) responded differently to the action brought by the *Verband Deutscher Zeitschriftenverleger* (association of German magazine publishers - VDZ) for a negative declaratory judgment against *VG Media*. The VDZ had demanded on the publishers' behalf that they be allowed to continue using programme information without restriction.

According to the VDZ, the court upheld its action because *VG Media* was not entitled to exercise the rights of the broadcasters it represented. The merger had only been authorised under the EC Merger Regulation in relation to the cable retransmission market, but not for the purpose of exercising rights related to the use of programme information in EPGs. The existing agreements with the broadcasters were therefore inoperative, pending the approval of the European Commission. However, regarding the fundamental question of whether programme information that extends beyond basic details can be protected under copyright, the court's decision matched that of the *OLG Dresden*. It was reasonable to expect publishers to obtain the rights to use the information from the rightsholders in advance.

• *Urteil des OLG Dresden vom 15. Dezember 2009, Az. 14 U 818/09* (Ruling of the Dresden Appeal Court of 15 December 2009, case no. 14 U 818/09) DE
• *Urteil des LG Köln vom 23. Dezember 2009, Az. 28 O 479/08* (Ruling of the Cologne District Court of 23 December 2009, case no. 28 O 479/08) DE

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Amendments to the State Media Act and WDR Act Adopted

On 3 December 2009, the *Landtag* (State parliament) of North Rhine-Westphalia adopted the new *Landesmediengesetz* (State Media Act - LMG) and an amendment to the *WDR-Gesetz* (WDR Act). As well as bringing these instruments into line with the provisions of the amended *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement), the main changes are designed to amend media concentration rules, tighten youth protection in the media and facilitate radio digitisation.

Firstly, the amendment of Art. 33 para. 3 LMG allows newspaper publishers to own up to a 100% share in a broadcasting company. In order to prevent the creation of a dominant influence over the expression of opinion, and to guarantee diversity, publishers who do so are subject to certain conditions. For example, either a fixed amount of broadcast time must be made available to independent third parties or a programme advisory body must be set up to prevent bias. Media companies can also make individual commitments, which are subject to verification and evaluation by the *Landesanstalt für Medien* (State Media Office).

Secondly, in the field of youth protection, following the abolition of the delaying effect of legal remedies, the instruments designed to combat Internet content that is harmful to young people have been tightened. This means that, if a provider appeals against an injunction, such content cannot remain freely accessible on the Internet until the court has taken a definitive decision.

In addition, the new version of the LMG creates a legal framework for the development of digital radio. The objective is to provide digital radio coverage for the whole population.

The revised LMG also attaches greater importance to the promotion of media literacy: the LMG and the amended *WDR-Gesetz* contain far-reaching transparency and anti-corruption rules for *Westdeutscher Rundfunk* (WDR) and the *Landesanstalt für Medien* .

- *Gesetz über den „Westdeutschen Rundfunk Köln" (WDR - Gesetz), Bekanntmachung der Neufassung* (Revised Act on the WDR)
http://merlin.obs.coe.int/redirect.php?id=12219 DE
- *Landesmediengesetz Nordrhein-Westfalen (LMG NRW)* (North Rhine-Westphalia State Media Act (LMG NRW))
http://merlin.obs.coe.int/redirect.php?id=12220 DE

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ARD and Producers' Alliance Agree Cooperation Guidelines

In December 2009, the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten Deutschlands* (association of German public service broadcasters - ARD) and the *Allianz Deutscher Produzenten Film & Fernsehen e. V.* (alliance of German film and television producers) agreed a set of guidelines for cooperation in relation to commissioned television productions.

One of the provisions of the agreement is that, as well as the standard model whereby commissioned productions are fully financed by the broadcaster, the model of co-financing by producers should be strengthened. Under the co-financing model, the broadcaster only receives a limited proportion of the rights, depending on its share of the costs and contractual conditions, which are negotiated on a case-by-case basis.

In addition, the guidelines stipulate that producers should receive a 50% share of all the net proceeds from foreign exploitation of productions, as well as domestic pay-TV, cinema, DVD and on-demand services.

If the broadcasters do not use their rights to a production within a five-year period, the producer is entitled to exploit those rights, but must give half the proceeds from such "self-exploitation" to the commissioning broadcaster, who retains non-exclusive broadcasting rights.

With regard to light entertainment programmes, the economic rights to a particular programme format are held by the party that bears the related development costs. Here also, it will be possible to share the proceeds, depending on the proportion of the costs borne by each party.

A clearing house composed of two representatives of each party will be established to settle disputes concerning the agreed guidelines.

The agreement is based on the statement of the *Länder* concerning Art. 6 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement), which was included in the *12. Rundfunkänderungsstaatsvertrag* (12th amendment to the Inter-State Broadcasting Agreement). In this statement, the *Länder* urge public service broadcasters to see that clear commitments are made to ensure "balanced contractual conditions and the fair distribution of exploitation rights" in the field of film and television productions.

"Self-exploitation" rights apply to all productions made after 1 March 2008. The remaining guidelines concern productions made after 1 January 2010. The guidelines will initially apply until 31 December 2013.

• *Eckpunkte für ausgewogene Vertragsbedingungen bei Produktionen von Mitgliedern der Allianz Deutscher Produzenten - Film & Fernsehen im Auftrag der ARD-Landesrundfunkanstalten in der Schlussfassung vom 8. Dezember 2009* (Guidelines on balanced contractual conditions for productions by members of the *Allianz Deutscher Produzenten Film & Fernsehen e. V.* (alliance of German film and television producers) commissioned by ARD members, final version, 8 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12201 DE

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ES-Spain

Supreme Court Declares Law Obliging TV Stations to Earmark Revenue for Cinema Industry Unconstitutional

The Spanish Supreme Court has delivered an opinion of unconstitutionality against the law that obliges Spanish television broadcasters to earmark part of their gross revenue for the financing of Spanish and European cinematographic productions.

The *Unión de Televisiones Comerciales Asociadas* (Associated Commercial Televisions Union - UTECA), an entity formed by the six private Spanish television broadcasters, has been claiming the unconstitutionality of this regulation, which, however, has been obeyed by its members for the past ten years. The regulation was introduced in Spain in 1999 and was also included in the proposal for a new Spanish General Audiovisual Law which is currently being discussed in the Senate (see IRIS 2010-1:1/19)

The Supreme Court has now recognised that obliging television broadcasters to dedicate part of their gross revenue (5%) to the financing of Spanish and European cinema is against the right of economic freedom that is guaranteed by Article 38 of the Spanish Constitution - particularly since revenue thus collected is to be invested in the cinema and not the television industry.

The Supreme Court stated that "unless it is on the basis of reasons that involve the general public interest, the legislator cannot impose an obligation to make certain economic investments." The Supreme Court states that this regulation, that was introduced ten years ago under the Government of the Popular Party, is not a consequence or an implementation of any EU Directive, but is simply a provision of national origin that is not compliant with the general provisions that regulate television in Spain.

In addition to the above, this obligation is not the same for every broadcaster. The law in force only affects TV stations that broadcast movies produced less than seven years ago. The new Spanish General Audiovisual Law introduces several changes, including an obligation that Televisión Española (Spanish nationwide public broadcaster) earmark 6% of its gross revenue for the financing of Spanish and European cinematographic works, while private broadcasters have to assign only a lesser part of their gross revenue (5%) and are able to devote part of these resources to TV series, documentaries and animation productions.

Nevertheless, the Supreme Court did not reject the possibility of encouraging television broadcasters to contribute to cinematographic productions (e.g., through fiscal incentives), although it did hold that there is no reason to impose an obligation or "sacrifice" on the television sector, thus reducing its economic freedom for the benefit of other parties (cinematographic production companies).

• Auto del Tribunal Supremo. Cuestión de inconstitucionalidad. Posibilidad de obligar a las Televisiones a invertir en el sector cinematográfico. Jurisdicción Contencioso-Administrativo, Sala 3ª, Sección 3ª, 09/12/2009, Número de Recurso: 104/2004 (Supreme Court Resolution. Question of unconstitutionality. Possible obligation on Spanish Television Broadcasters to assign part of their gross revenue to the cinematographic production sector, Contentious Administrative Division, Room 3, Section 3, 09/12/09, Appeal number: 104/2004) ES

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FR-France

Host or Editor? Decision from the Court of Cassation at last

The Court of Cassation has just delivered an eagerly awaited and noteworthy decision, pronouncing for the first time on the matter of the qualification - and hence the corresponding scheme of liability - of a service "hosting" personal websites on the Internet.

The dispute was one of infringement of copyright, initiated by two famous strip cartoon editors against the company Tiscali (Telecom Italia), when they discovered that the entire adventures of Lucky Luke and Blake & Mortimer were being reproduced on personal websites operated by the IAP in question. Since the case originated before Directive 2000/31/EC on Electronic Commerce was transposed into French law by the Act of 21 June 2004 in favour of confidence in the digital economy, the applicable legislation here was the provisions of Article 43-8 of the Act of 30 September 1986 as amended by the Act of 01 August 2000. Overturning the judgment delivered by the regional court, which had qualified Tiscali as a host, the court of appeal in Paris had held, in 2006, that the company's intervention "could not be limited to a mere

technical service since it offered Internet users the possibility of creating their own websites by using its site at www.chez.tiscali.fr". As justification for holding that its liability was invoked because of the content on the site that infringed copyright, the court of appeal had held that "the company Tiscali should be regarded as also having the quality of editor since it is established that it operates the site at issue commercially, as it offers paying advertising space to advertisers directly on the personal websites, such as the disputed sites". Tiscali could therefore not claim the less onerous liability of a host, defined in Article 43-8 of the amended 1986 Act as "natural or legal persons who, whether or not a charge is made, provide direct and permanent storage for making available to the general public [content] of any kind that may be accessed by these services". According to this text, the latter's criminal or civil liability can only be invoked "if, the matter having been brought to their notice by a legal authority, they did not take prompt action to render access to the content impossible". Tiscali therefore applied to the Court of Cassation, claiming that it was exercising the technical function of a host supplier and not the editorial function of the author of the disputed personal websites, which it had not designed and over the content of which it had no control.

In a decision delivered on 14 January 2010, the Court of Cassation upheld the decision of the court of appeal, on the grounds that the mere acknowledgement that the company was offering Internet users "the possibility of creating their own websites on its site and offered advertisers paying advertising space directly on these sites, which it managed" showed that the services provided went beyond the mere technical and storage functions referred to in Article 43-8 of the amended Act of 30 September 1986. Tiscali could not therefore claim the benefit of this text and its quality as host supplier, which was denied by the Court of Cassation, in order to elude liability.

This solution is somewhat baffling, as very many of the decisions reached by judges in previous cases have been based on the consideration that "the selling of advertising space justifies the categorisation of a company [providing web services] as a content editor since there was nothing in the text of the Act to prevent a host taking advantage of its site by selling advertising space" (see IRIS 2009-6: 11). It is doubtful that the terms of the current 2004 Act in favour of confidence in the digital economy, which defines hosts as "natural or legal persons who provide, even free of charge, storage [for content] belonging to a service receiver so that it may be made available to the general public on-line using communication services", will change the Court of Cassation's interpretation. This decision represents a very restrictive position for hosts.

• *Cour de cassation (1re ch. Civ.), 14 janvier 2010,* Telecom Italia (ex Tiscali Media) c. Stés Dargaud Lombard et Lucky Comics (Court of Cassation (1 st section, civil), 14 January 2010, Telecom Italia (formerly Tiscali Media) v the companies Dargaud Lombard and Lucky Comics) FR

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Conseil d'Etat Upholds Change of Name for one Radio Station and one Television Channel

The Conseil d'Etat has issued a pronouncement on the legality of the decision by the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) in July 2007 to approve the application for a change of name submitted by the Lagardère Group, further to concluding a licence agreement with the holder of the Virgin brand name, to re-name its Europe 2 radio station Virgin Radio and its Europe 2 TV DDT television channel Virgin 17 (see IRIS 2007-8: extra). The radio station's competitors called for the cancellation of both the authorisations for the services issued by the CSA on the grounds that it had exceeded its powers, and the conventions attached further to these changes of name, on the grounds that they would cause an "upheaval of the audiovisual scene" and alter the financial conditions for the functioning of the services which would challenge their contribution to musical diversity.

The Conseil d'Etat noted that it transpired from the documents in the file that the approval that had been granted was dependent on an undertaking on the part of the companies holding the authorisations to maintain the format of their programmes and their editorial independence in respect of the holder of the brand name to be used for their new names. This did not in itself have any effect on the methods of financing the companies or on observance of the imperative of musical diversity for the radio service. Furthermore, the Conseil d'Etat held that the name "Virgin" was not inappropriate to the content of the programmes offered, or was such as to affect its format. Nor did it have the effect of altering either the conditions for sharing advertising resources or the prospects for operating rival radio and television services. The Conseil d'Etat noted that it transpired from the licence agreement that companies holding authorisations did not receive any remuneration from the disputed brand. Use of the brand name, aimed at providing the services concerned with a higher profile and musical identification, did not, in view of the purpose sought by the editors of the services, constitute surreptitious advertising, which was prohibited by the Decrees of 06 April 1987 and 27 March 1992, for the other products and services marketed under the same brand name. The Conseil d'Etat also noted that, by means of codicils to the agreements concluded with the companies hold-

ing the authorisations, the CSA had imposed the identification of the channels concerned by logos which did not create confusion with those of other products and services distributed under the brand name and did not allow the services to broadcast advertising for such products and services or to conclude partnership agreements with them.

The purpose of all these rules is to prevent the subversion of the new name for advertising purposes in favour of other products or services distributed by the brand in question under conditions that would constitute a violation of the same Decrees. The Conseil d'Etat therefore concluded that the applicant companies had no reason to call for the cancellation of the CSA's decision authorising the contested name changes.

• *Conseil d'Etat (5e et 4e sous-sect.), 6 novembre 2009 - Stés NRJ Group et Vortex* (Conseil d'Etat (5 th and 4 th sub-sections), 6 November 2009 - the companies NRJ Group and Vortex) FR

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CSA Orders Canal Sat to Change the Numbering of two Digital TV Channels Included in its Offer

The issue of the numbering of channels in the programmes offered by service distributors is keeping the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) on its toes. It will be remembered that the CSA received fourteen applications from new digital terrestrial television (DTT) channels in 2006 for the settlement of differences concerning their numbering on cable and satellite distribution networks. In the light of these disputes, the CSA had adopted on 24 July 2007 a deliberation defining the general rules on the matter (see IRIS 2007-7: 13), which was incorporated in Article 34-4 of the Act of 30 September 1986 when the Act of 05 March 2009 reforming the audiovisual sector was adopted. According to this, "the distributors of services whose programme offer includes all the national television services broadcast unencrypted terrestrially in digital mode, if they do not abide by the logical numbering defined by the CSA for DTT, must observe the order of the numbering in taking up these services. In this case, numbering should start with a whole number immediately after a multiple of a hundred, without prejudice to including the services in the theme group to which they belong". The aim of this provision is to oblige distributors to reserve a block of their offer for carrying the DTT channels in the order in which they are broadcast.

Then last spring the channels NRJ 12 and BFM TV applied to the CSA to obtain different numbering in the services plan in Canal Sat's satellite bundle offer. The two channels had asked to be placed at the number they have been given for terrestrial broadcasting, i.e., the number 12 for NRJ 12 and the number 15 for BFM TV, whereas they were placed respectively as no. 36 and no. 55 in the bundle. In addition, BFM TV wanted to be placed immediately after the channels LCI and I>Télé in the "news" theme section of Canal Sat's offer, and not after the channels Euronews and LCP. In a decision delivered on 17 December 2009, made public on 11 January 2010, the CSA allowed the channels' requests, on the grounds that in Canal Sat's services plan only the seven "historic" channels (TF1, France 2, France 3, Canal +, France 5, M6, and Arte) have the numbers allocated to them by the CSA for digital broadcasting (from 1 to 7). The CSA found that this constituted discrimination against NRJ 12 and BFM TV, and was contrary to the new provisions of Article 34-4 of the Act of 30 September 1986. The CSA therefore called on the company Canal+ Distribution to draw up a services plan for Canal Sat's offer placing NRJ 12 and BFM TV in the slots numbered 12 and 15, unless it could justify a numbering criterion in compliance with the provisions of the Act that would allow for different positioning. Nor should the plan include any discrimination, for numbers 1 to 18, between the national channels broadcast on digital terrestrial television depending on whether or not they were broadcast previously in analog mode.

The new services plan must be communicated to the CSA within two months, with a view to implementation within no more than four months. At the same time, the CSA rejected the other application brought by BFM TV, on the grounds that the similarity of the programming of LCI with that of both I>Télé and Euronews was such as to justify the current placing in the "news" theme block and that the evolution of the programming of the channel BFM TV, which was currently more focused on permanent monitoring of general news, was not such as to challenge the choice made by Canal+ Distribution. The Canal+ Group has appealed to the Conseil d'Etat against this decision by the CSA. To be continued, then!

• *Décision du 17 décembre 2009 relative à un différend opposant les sociétés BFM TV et Canal+ Distribution* (Decision of 17 December 2009 on a dispute between the companies BFM TV and Canal+ Distribution)
http://merlin.obs.coe.int/redirect.php?id=12198 FR

• *Décision du 17 décembre 2009 relative à un différend opposant les sociétés NRJ 12 et Canal+ Distribution* (Decision of 17 December 2009 on a dispute between the companies NRJ 12 and Canal+ Distribution)
http://merlin.obs.coe.int/redirect.php?id=12199 FR

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Zelnik Mission Reports on "Creation and the Internet"

The "Creation and the Internet" mission, chaired by Mr Zelnik, COE of the 'Naïve' music label, aimed at improving the legal offer on-line, reported back to the Minister for Culture (see IRIS 2010-1: 1/23) on 6 January 2010. The purpose of this cooperation with the professionals in the sector is to respond to the demand for financing the cultural industries, reaching beyond the educational and repressive aspects of the 'HADOPI' legislation. After hearing from about a hundred professionals in the sector, the report's signatories say they are convinced that the method adopted until now by the Government, which offers a graduated response in preventing and penalising unlawful use of the Internet, is necessary, but far from enough. The report is a real plan of action for facilitating access to creation on the Internet, setting out a list of 22 proposals aimed at supporting the cultural industries in the digital environment, which include not only music but also the cinema, audiovisual products and the printed book.

The very next day, in his New Year address to the world of culture, the French President Mr Sarkozy referred to some of these measures. Firstly, the start of work in the coming months on an expert's report to be carried out by the Ministry of Finance on "apprehending from the taxation point of view the activities of the major portals and international search engines present in France", which currently escape national regulation. As proposed by the mission, the Government should also request the opinion of the national competition authority on the possibly dominant position achieved by Google in the market for on-line advertising. The President said he was also in favour of setting up, by the summer, a "young person's music card", of a value yet to be determined, with a 50% subsidy from the State, in order to promote legal downloading. Producers should also be given a period of one year to negotiate rights and release their musical files on all the platforms, whereas currently each record company negotiates the conditions for making its music catalogue available with each streaming and downloading site separately. If they failed to do so, the negotiation of rights would be covered by the legislation on compulsory collective management. He also advocated the referencing by French beneficiaries of their entire catalogues of videos on demand on all the platforms and on a single portal which would reference all of the available offer, under the supervision of the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA). The report also proposes relaxing the media chronology laid down in the agreement reached on 6 July 2009 (see IRIS 2009-8: 13) in order to bring forward the exploitation windows for films as video on demand by subscription (which could be accessible as early as the 22nd month after their first showing, or even as early as the 10th month, rather than after 36 months as is the case at present) and VOD free of charge. Still with regard to the audiovisual scene, it is suggested that the exploitation of films that have fallen into the public domain - which is by nature unrestricted and free of charge - should be taxed, in order to top up a fund for digitising heritage films. Lastly, the Zelnik mission's report includes a section on action at Community level, including:

- the desire to take action for application of the reduced rate of VAT for all cultural on-line services;

- defence of the specific nature of copyright and neighbouring rights before Community bodies;

- the definition and implementation of a European digitalisation strategy in relation to culture, and also the setting up in Brussels of a European platform for creation on the Internet.

• *Création et Internet, rapport au ministre de la Culture et de la Communication, janvier 2010* ("Creation and the Internet" - report to the Minister for Culture and Communication, January 2010)
http://merlin.obs.coe.int/redirect.php?id=12210 FR

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Criminal Defamation Abolished

On 12 November 2009, the Coroners and Justice Bill became law. Section 73 provides for the "Abolition of common law libel offences etc."

Specifically, it states that "The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—

(a) the offences of sedition and seditious libel;

(b) the offence of defamatory libel;

(c) the offence of obscene libel."

It should be noted that this provision only applies to England, Wales and Northern Ireland.

• Coroners and Justice Act 2009, Section 73
http://merlin.obs.coe.int/redirect.php?id=12180 EN

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Regulator Announces Arrangements for the Regulation of Video on Demand Services

Ofcom, the UK communications regulator, has announced after consultation the arrangements to be made for regulating video on demand services under the Audiovisual Media Services Directive and implementing the requirements of the UK Audiovisual Media Services Regulations 2009 (see IRIS 2010-1: 1/24).

In earlier consultation the UK Government had made it clear that it intended to limit the scope of UK regulation to the narrow range of services falling within the scope of the AVMS Directive and only to include services which include programmes similar to those available on television broadcast services. Ofcom will now finalise guidance on the scope of regulation to provide clarity for the public and service providers as to who will be subject to regulation; the guidance includes an illustrative list of services likely to be within the scope of regulation.

The regulations provide for the designation of co-regulatory bodies to secure compliance with the regulatory requirements. In relation to editorial content, the Association for Television on Demand (ATVOD) put forward a proposal for its designation as the new body and undertook a range of activities in preparation for designation, including recruitment of new independent members. Ofcom intends to designate ATVOD and give it broad functions to enforce standards requirements, to encourage service providers to ensure that services are gradually made accessible to people with sight or hearing disabilities and to ensure that providers promote the production of and access to European works. Ofcom retains these powers in parallel with the co-regulator and will exercise powers to determine decisions on the scope of regulation and on some statutory sanctions.

The Advertising Standards Authority (ASA), already the co-regulator for broadcast advertising, put itself forward for designation for regulation of video on demand advertising. Ofcom is satisfied that it complies with the requirements for designation and is now determining the detailed terms on which this will be made.

• Explanatory Memorandum to the Audiovisual Media Services Regulations 2009, 2009 No.2979
http://merlin.obs.coe.int/redirect.php?id=12182 EN

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BBC Trust Approves Project for On-Demand and Internet Services to be Made Available on TV Sets

The BBC Trust, which approves new BBC ventures, has conditionally approved Project Canvas. This is an open joint venture between the BBC and five other partners, including the other UK public service broadcasters, to develop a common standard permitting a viewer with a broadband connection to watch on-demand services, such as BBC iPlayer, the ITV Player and other internet content, on a television set. The content will be accessed through a set-top box attached to the internet; no subscription will be payable except for the broadband connection.

The Trust conducted a public value assessment of the proposal, concluding that it will add a new dimension to digital terrestrial television through an increase in the range of content and services available; that there will be low barriers to access for new producers and providers of content who wish to join the platform; and that it will help to deliver a common technical standard and to drive broadband take-up. The Trust also conducted a market impact assessment which found that there is a growing demand for on-demand content on television, that the project would offer internet service providers the opportunity to develop stronger triple play offerings and that it will offer new entrants providing content an accessible and affordable platform to reach the public. It might, however, slow future growth in subscriptions to some pay-TV services, contribute to the long-term shrinkage of DVD rental markets and negatively affect smaller hybrid DTT/IPTV platforms.

The conditions attached to the approval were that the core technical specification must be published well in advance of the launch to allow all manufacturers to adapt to the new standard; that access to the platform for content providers must be on a fair, reasonable and non-discriminatory basis; and there should be a review on the effects of the project on incentives for syndication of content to other platforms. In relation to the BBC's involvement, it must always be possible to access the Canvas platform without a subscription; the BBC must report to the Trust on accessibility features and parental controls and the Trust must approve major cost overruns.

• Press Release, "BBC Trust Gives Provisional Approval to Project Canvas", 22 December 2009
http://merlin.obs.coe.int/redirect.php?id=16005 EN

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IT-Italy

Court of Cassation Endorses Ban on The Pirate Bay

On 29 September 2009, the Third Criminal Chamber of the Italian Court of Cassation entered a judgment against the owners of the Swedish BitTorrent website The Pirate Bay, holding that the website could be placed under 'preventive seizure' (*sequestro preventivo*) and Italian Internet Service Providers (ISPs) could be enjoined to block access by their users to the website.

The decision of the Court of Cassation is but the latest development in Italy in the criminal investigations brought against the owners of the Swedish website, charged with aiding and abetting, on a profit-making basis, the illegal sharing of copyrighted material, contrary to Law no. 633, of 22 April 1941. In its decision of 1 August 2008, the Court for Preliminary Investigations of Bergamo placed the website under preventive seizure, but, on appeal by The Pirate Bay, the ban was subsequently lifted by the Court of Bergamo (see IRIS 2008-10: 13)

In reaching that decision, the Court of Bergamo had at the time observed that preventive seizures are court orders of an objective nature, which according to the Italian Code of Criminal Procedure can be imposed where the public availability of a given commodity pertaining to the crime may exacerbate the latter's consequences or enable the perpetration of further offences. By contrast, by requiring Italian ISPs to block access to The Pirate Bay website, the Court for Preliminary Investigations of Bergamo had in fact adopted a personal measure addressed at private parties uninvolved in the crime, thus acting beyond its powers under the Code of Criminal Procedure.

On appeal by the District Attorney of Bergamo, however, the Court of Cassation reversed the decision of the Court of Bergamo and remanded the case to the latter. The Court of Cassation first dealt with the likelihood of the charges (*fumus commissi delicti*) brought against the defendants. With regard to this question, the court held that, even though The Pirate Bay did not host any copyrighted work, by indexing and publishing BitTorrent files it contributed appreciably to illegal file-sharing.

The court then turned to the preventive seizure order. As a preliminary matter, the court ruled that the fact that the website's servers are located in another Member State does not in itself place the case outside of the jurisdiction of the Italian criminal courts. Indeed, in the case of illegal file-sharing, the moment at which the crime is perpetrated is when the copyrighted work becomes available to downloaders, many of whom access peer-to-peer networks from locations within Italian territory.

On the merits, the Court of Cassation held that the preventive seizure order has in fact a twofold nature, both objective and personal. Relying on the preparatory work of the Code of Criminal Procedure, the Court of Cassation determined that the legislative intent was to prevent certain criminal behaviours from being accomplished with the aid of the object placed under seizure: while objective in nature, therefore, the preventive seizure order has inherently personal implications.

The court further noted that, with specific regard to internet file-sharing, the personal scope of preventive seizure orders is even broader, as the provisions of the Code of Criminal Procedure must be read in conjunction with Legislative Decree of 9 April 2003, no. 70 implementing Directive 2000/31/EC on electronic commerce. Section 17(3) of the said decree, indeed, expressly empowers courts to request that ISPs disable access to illegal content.

The Court of Cassation therefore concluded that the Court for Preliminary Investigations of Bergamo could legitimately enter a preventive seizure order against a website contributing to illegal sharing of copyrighted works and, by the same token, enjoin ISPs from granting access to that website so as to prevent further distribution of the said works.

• Corte di Cassazione, Sezione Terza Penale, Sentenza 29 settembre 2009 n. 49437 (Court of Cassation, Third Criminal Chamber, Judgment of 29 September 2009, no. 49437)
http://merlin.obs.coe.int/redirect.php?id=12217 IT

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Anti-Piracy Measures Outweigh Private Copying

The *Tribunale di Milano* (Court of Milan) issued a decision concerning the conflict between the private copying exception and technical protection measures (TPM).

The case involved a user who wanted to make a copy of a DVD, but was not able to do so because of technological protection measures. This is the first case decided by an Italian court on the relationship between TPM and the private copying exception under EU Directive 2001/29 (the Copyright Directive). The issue, much debated in the doctrine, is the following: "can copyright limitations be overridden by contractual agreements and relative TPM under European law?" In other words, should the private copying exception be preserved, as this exception is often 'put out of order' by technical measures?

The Italian Copyright Statute, Law No 633 of 22 April 1941, (Article 71 sexies, paragraph 4), in implementation of the European Copyright Directive, lays down the requirement that the rightsholder permit, despite the application of TPM, the user who has lawfully acquired possession of a work to make a private copy of that work. According to the so-called 'three-step test' (Article 5.5 EU Copyright Directive and Article 71 sexies, paragraph 4 Italian Copyright Statute) however, a certain number of restrictive criteria apply. The limitation must not conflict with the normal exploitation of the work and not constitute an unreasonable prejudice to the legitimate interests of the rightsholder. The exact scope of this legal instrument still remains, on the whole, very uncertain. The first step, according to which the use should not conflict with the normal exploitation of the work, is problematic. The concept of 'normal exploitation' is very imprecise. Neither the Directive nor the national legislators, who have transposed the test into national law, provide a definition. The test is addressed to the judge, who seems be required to examine whether the application of a limitation to a specific case respects the conditions it imposes. As a result, the private copying exception faces possible nullification by judges.

In the present case, the plaintiff (user) had lawfully purchased a DVD (Pink Floyd Live at Pompei) produced in 2004 by Universal Pictures Italia s.r.l. He could not create a private copy due to the presence of TPM measures. He thus took Universal Pictures Italia s.r.l. to court, claiming violation of the Copyright Statute (Article 71 sexies, paragraph 4). Universal Pictures defended themselves saying that the rightsholder has a right to affix TPM to works placed in the market (Article 102 quater Italian Copyright Statute). The right to private copying, on the contrary, is only an exception, while in 2004 (when the work was distributed) TPM that enabled users to make a single copy for private purposes did not exist.

The court ruled in favour of the defendant, reasoning that private copying is "only" an exception to the exclusive right of reproduction, which is one of the most significant and economically important manifestations of the economic rights over protected works. Accordingly, the reproduction right and the right to private copying are not on par with each other. In the instant case, the court found no prevailing assumptions and conditions for the exercise of the concrete right to private copying. Universal had shown that, at the time the DVD was purchased, there were no protective systems in existence which technically could allow for private copying. This meant that the only options available were either the total suppression of copying or the opposite solution of not applying any security measures at all and allowing the production of an infinite number of identical copies. Essentially, the court stated that, given the state of the technology, application of TPMs that prevented copying (even for personal use) did not infringe the 'right' of private copying. In the court's opinion, the conditions laid down in Article 71 sexies, paragraph 4, reproduce the content of Article 5 of Directive 2001/29/EC, i.e., the 'three step test', which is intended to verify eligibility for a copyright exception. On the basis of the above, the court found that the possibility of copying the work should be examined in contrast to "the normal exploitation of the work" and that, in the present case, it would have constituted an unreasonable prejudice to the legitimate interests of the rightsholders.

The 1 July 2009 decision of the Milan court applied Article 5.5 of the Directive (transposed into the Italian Copyright Statute) in order to overcome the application of an exception in favour of a technical protection measure, arguing abstractly and generally that the private copying of a DVD conflicts with the normal exploitation of the work, without providing a definition of this term at any time. The same solution was adopted in 2008 by the French Court of Cassation (see IRIS 2008-9: 9, IRIS 2007-5: 8and IRIS 2006-4: 12).

• Tribunale di Milano 1 luglio 2009 numero 8787/09 (Court of Milan No. 8787/09 1 July 2009)
http://merlin.obs.coe.int/redirect.php?id=12216 IT

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Draft Decree Implementing the Audiovisual Media Services Directive

On 17 December 2009, the Italian Government issued a draft legislative decree for the implementation of Directive 2007/65/EC on Audiovisual Media Services (AVMSD). The legal basis for the decree is contained in the *Legge comunitaria 2008*, the annual statute enacted by the Italian Parliament to bring national law into line with EU law. The legislature afforded the Italian Government wide latitude in transposing the AVMSD, as the Parliament restrained itself to opting in favour of product placement. The Government, in turn, has taken advantage of the leeway granted by the Italian legislature, as well as of the right set out in Article 3(1) AVMSD to enact stricter provisions for national audiovisual media service providers.

The draft decree for the most part transposes the AVMSD verbatim by amending Legislative Decree no. 177 of 2005, now renamed "Code for Audiovisual Media Services". Below only the provisions of the draft decree that differ from the default framework laid down by the AVMSD will be examined.

The first divergence is to be found in the definitions set out in the draft decree. While Recital no. 59 AVMSD defines a 'television advertising spot' as "television advertising ...having a duration of not more than twelve minutes", the draft decree contains no reference to such a temporal criterion.

As far as the advertising of tobacco products is concerned, the draft decree lays down a stricter framework than the one set out in Article 3e(1)(d) AVMSD, insofar as the Italian prohibition covers not only direct advertising, but also indirect forms of advertising using brand names, symbols or other distinctive features of tobacco products or undertakings whose known or main activities is the production or sale of such products. The language of that provision echoes, albeit with some differences, that of Recital no. 28 of Directive 89/552/EEC.

Unlike the AVMSD, which abolished the daily advertising limits set out in the previous directive, the Italian draft decree still provides for a daily 15% airtime limit for free-to-air broadcasters, that can be increased to 20% if the broadcasters also broadcast advertisement forms other than advertising spots. The draft decree also preserves the stricter advertising limits applicable to the public service broadcaster.

As to hourly limits for advertising and teleshopping spots, instead of the 20% ceiling set out in the AVMSD, the draft decree provides for an 18% limit. Although the AVMSD contains no reference to that effect, the Government deemed it appropriate to introduce a 16% special hourly advertising limit for pay-tv operators; this limit will be reduced to 14% in 2011 and to 12% in 2012.

The provisions on sponsored programmes are also interesting to examine. While the Directive allows references to the sponsor's products, services or distinctive signs, the draft decree stipulates that only the former's name and logo can be displayed. By the same token, while under the AVMSD such references can occur at the beginning, during and/or at the end of the sponsored programmes, according to the draft decree no reference can be made to sponsors during the course of the programme. As to the types of programmes that cannot be sponsored, the Italian Government took advantage of the option set out in Article 3f(4) AVMSD, whereby "Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes."

As regards product placement, while some provisions of the draft decree appear to be stricter than those set out in the AVMSD, others lay down a more lenient regime. As to the first category, while the AVMSD states that Member States can allow product placement i) in certain types of programmes listed in the Directive, "or" ii) where the goods or services to be included in the programme are provided free of charge, the draft decree allows product placement only in the types of programmes mentioned in the AVMSD, but clarifies that remuneration can be both monetary or consist of the free provision of goods or services.

To the contrary, the rules concerning the obligation to inform the viewers of the existence of product placement can be considered to be more lenient. According to the AVMSD, Member States can waive this obligation only "by way of exception", provided that the programme in question has neither been produced nor commissioned by the media service provider. This exception becomes the rule in the Italian draft decree, which states that viewers must be informed of the presence of product placement "only" in the case of programmes produced or commissioned by media service providers.

Possibly the most relevant difference between the AVMSD and the draft decree is the notion of "schedule" (*palinsesto*), defined in the draft implementation measure as follows: "the set, defined by a television or radio broadcaster, be it analogue or digital, of a series of programmes characterised by the same trademark and intended for reception by the public, not including i) the time-shifted broadcast of the same set of programmes, ii) merely repetitive transmissions, iii) the provision, for a fee, of individual programmes or sets of linear audiovisual programmes which can be purchased by the user immediately before the start of the individual programme or, in the case of sets of programmes, of the first programme." As a consequence, certain programmes (pay-tv, time-shifted programmes, etc.) are exempted from the rules on advertising limits, the protection of minors, etc. This definition does not appear to be in line with the AVMSD, whose references to programme "schedules" do not contain any such exclusions.

The draft decree is currently undergoing examination in both the Houses of Parliament. The Seventh Committee of the House of Representatives (Transport, Postal Services, and Telecommunications), as well as the Eighth Committee of the Senate (Public Works and Communications), have launched broad consultations with stakeholders. Once the relevant Parliamentary Committees have delivered their non-binding opinions, which should occur in early February, the draft decree will be passed by the Council of Ministers and promulgated by the President of the Republic.

• Schema di Decreto legislativo 17 dicembre 2009 "Attuazione della Direttiva 2007/65/CE del Parlamento europeo e del Consiglio dell'11 dicembre 2007, che modifica la direttiva 89/552/CEE del Consiglio relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive (Draft legislative decree of 17 December 2009, "Implementation of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities")
http://merlin.obs.coe.int/redirect.php?id=12218 IT

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LT-Lithuania

Law on the Protection of Minors Revised

On 22 December 2009 the Seimas adopted the Law on Amendments to the Law on the Protection of Minors against the Detrimental Effect of Public Information (Law) on the grounds of proposals put forward by the President. The aim of the amendments is to widen the field of application of the Law to all public information.

The Law was supplemented with a new criterion according to which particular public information can be determined as harmful to minors if it promotes behaviour that is humiliating to human dignity, or sexual violence of minors and their exploitation, as well as sexual relations with minors. This concerns purposeful information by which minors are encouraged to undertake particular actions or change habits or views.

In addition, the Law was supplemented with a provision which obligates broadcasters to inform viewers about the potentially harmful content of broadcast information before the respective programme or a part of it is actually broadcast. However, the envisaged exemptions of the amended law justify the broadcasting of harmful information in cases where such information is needed in public interest, educational or training purposes.

The amended law expands the functions of the Inspector of Journalists' Ethics who is obligated to prepare and publish:

a) Guidelines on the application of the criteria to classify public information as harmful to minors and on the requirements of the dissemination of such information, e.g., the use of watershed hours or the indication of programmes;

b) Summaries on the activities and judicial practices of various institutions responsible for the implementation of the Law, i.e., the Radio and Television Commission, the Radio and Television Council, the Ethics Commission of Lithuanian Journalists and Publishers, the Children's Rights Ombudsman Institution and the Ministry of Culture.

In addition, the Inspector shall provide recommendations to producers of public information for the evaluation of the information they intend to broadcast.

The amendments will come into force on 1 March 2010.

- Nepilnamečių apsaugos nuo neigiamo viešosios informacijos poveikio įstatymo 1, 2, 3, 4, 5, 7, 9 straipsnių pakeitimo ir papildymo įstatymas (Law on Amendments to the Law on the Protection of Minors against the Detrimental Effect of Public Information)
http://merlin.obs.coe.int/redirect.php?id=12213 LT

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Radio and Television Commission of Lithuania

LV-Latvia

Launching Digital Terrestrial Television

The launch of digital terrestrial television shall be implemented finally during the year 2010, but not all issues of the implementation are clear yet.

At the end of 2008 the Ministry of Transport organised a tender during which it had to select a provider of digital broadcasting in accordance with the Regulations of the Cabinet of Ministers (see IRIS 2008-10: 15). The rules of the tender provided that the winner will have to carry out a complete transfer to digital terrestrial broadcasting by 1 December 2011. The provider has to ensure that public and commercial broadcasters have the opportunity to broadcast their programmes, as well as to make sure that certain channels nominated by the National Broadcasting Council (NBC) are available to viewers on free-TV.

As a result of this tender the Ministry of Transport selected SIA Lattelecom, the incumbent fixed telephony operator of Latvia, to carry out the transfer to digital broadcasting. The Cabinet of Ministers approved Lattelecom's role in the introduction of digital terrestrial television on 27 January 2009. Lattelecom now has technically enabled the transfer and is negotiating with the broadcasters on the inclusion of channels in the digital packages on offer.

Regarding the inclusion of channels, the NBC decided according to the Regulations of the Cabinet of Ministers that the channels broadcast by public broadcasters (LTV1, LTV2) have to be included in the free-to-air package. Also, the commercial broadcaster LNT has agreed with Lattelecom that its channel will be included in the free-to-air package. These programmes should be available only in digital mode as of 1 April 2010 in the surroundings of Riga and as of 1 June 2010 in other parts of Latvia. The analogue broadcasting of these channels will then be switched off.

The other major commercial broadcaster TV3 (MTG Group) has failed to agree with Lattelecom on the inclusion of its channel in the free-to-air package for want of consent on the price for the inclusion. Therefore, TV3 announced that at least in 2010 it will continue to broadcast analogue, using the services of

the State-owned Latvian Radio and Television Centre. The latter, however, indicated that it would be unprofitable to broadcast only one channel in the analogue mode. Therefore, the companies may still reach a deal, particularly as TV3 and Lattelecom in the beginning of January 2010 have agreed on the retransmission of TV3 channel within Lattelecom's IPTV offer.

Another problematic issue is that the Regulations of the Cabinet of Ministers do not provide any compensation to households who have to purchase new technical equipment due to the switch-off of analogue retransmission. Taking into account the difficult economic situation of Latvia, the costs for the equipment may be significant for many households. Moreover, according to recent research, terrestrial television is used as the single mode of transmission only by 27% of households, the majority of which constitutes elderly, rural people and people with low incomes. Economically more powerful households have already switched to other reception modes such as cable, satellite and IPTV. For these, the transfer to digital terrestrial TV is relatively insignificant.

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MT-Malta

Draft Law to Transpose the AVMS Directive

The year 2009 has been a fruitful year for legislation in the broadcasting scene in Malta. Earlier on in the year, Parliament enacted a law to empower the Maltese Broadcasting Authority to license radio and television satellite services. Currently, the House of Representatives is discussing a Bill to amend the Broadcasting Act to transpose the Audiovisual Media Services Directive (AVMS), whilst another Bill has been drawn up - though it has not yet been published - intended, inter alia, to regulate general interest objectives in Maltese Broadcasting Law.

The Audiovisual Media Services Directive will be transposed into Maltese Law through an amendment to the Broadcasting Act and through the introduction of a number of subsidiary laws. In fact, a bill to amend the Broadcasting Act was published on 24 November 2009 in The Malta Government Gazette. The debate in the House of Representatives began in the first week of December 2009. The Bill was still at Second Reading before the House adjourned for the Christmas recess.

No effective date of entry into force is mentioned in the Bill, although Malta had until 19 December 2009 to bring it into force and to make the necessary subsidiary laws. The Bill does not however transpose all the provisions of the AVMS Directive. As a result, other legal notices will have to be made for the remaining provisions not contained in the Bill through which the Directive will be implemented.

The Broadcasting (Amendment) Act 2010, will transpose, when enacted, the Directive's definitions of 'audiovisual commercial communication', 'audiovisual media service', 'broadcaster', 'broadcasting', 'editorial responsibility', 'media service provider', 'on-demand audiovisual media service', 'product placement', 'programme', 'sponsorship', and 'surreptitious audiovisual commercial communication'. It will also transpose into the Broadcasting Act Articles 2, 2a, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h and 3i of the AVMS Directive. The remaining provisions will have to be transposed by subsidiary legislation amending the Code for Advertisements, Teleshopping and Sponsorship; the Broadcasting (Jurisdiction and European Co-Operation) Regulations; the Broadcasting (Short News Reporting) Regulations; the Broadcasting Code for the Protection of Minors; the Broadcasting Authority (Enforcement Powers) Regulations; and the Fifth Schedule of the Broadcasting Act dealing with Offences which are Cognizable by the Broadcasting Authority.

• Abbozz Ta' Liġi imsejja147 att biex ikompli jemenda l-Att dwar ix-Xandir, Kap. 350 (A Bill entitled an Act to further amend the Broadcasting Act, Cap. 350)
http://merlin.obs.coe.int/redirect.php?id=12184 MT

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PL-Poland

New Regulation on the Limitation of the Loudness of Advertising

On 15 December 2009 the National Broadcasting Council adopted an amendment to its Regulation of 3 June 2004 concerning principles of advertising and teleshopping in radio and television programme services.

The amendment aims to limit the practice of excessively increasing the volume, as well as the violent, abrupt change of sound levels during radio and television advertising and teleshopping spots in comparison to the programmes preceding the advertising break. Such occurrences infringe the comfort of the reception of programme services by the public and are the reason for many complaints by television viewers and radio listeners.

It has been noticed in the past that the most frequently used methods of measurement of the level of

phonic electric signals during sound production for the purpose of radio and television broadcasting did not reflect the subjective reception of the sound volume by the public. The attempts to encourage the development of a co-regulation mechanism did not work. Therefore, it became necessary to establish the new regulatory obligation in this respect.

According to the amended Regulation the loudness level of the broadcast advertising and teleshopping may not exceed the loudness level of the programmes preceding the advertising break. In order to ensure that this obligation will be properly exercised the broadcaster is obliged to conduct comparisons of the loudness level of the programmes broadcast within the period of 20 seconds before the beginning of the transmission of advertising or teleshopping to the loudness level of each transmitted advertising and teleshopping spot. The annex to the Regulation provides detailed technical requirements on the aforementioned loudness measurement. The Regulation provides that the measurement has to be conducted using sound parameters in such technical conditions that fulfill the conditions of the reception of programmes by the final recipient, i.e., the public.

The technical rules of volume measurement level have been elaborated based on ITU recommendations: ITU-R BS.1770-Algorithms to measure audio programme loudness and true-peak audio level and ITU-R BS.1771-Requirements for loudness and true-peak indicating meters.

The amended Regulation enters into force 5 months after its promulgation in the Official Journal.

• Rozporządzenie Krajowej Rady Radiofonii i Telewizji z dnia 15 grudnia 2009 r. zmieniające rozporządzenie w sprawie prowadzenia działalności reklamowej i telesprzedaży w programach radiowych i telewizyjnych (Amendment to the National Broadcasting Council Regulation of 3 June 2004 concerning principles of advertising and teleshopping in radio and television programme services, 15 December 2009)
http://merlin.obs.coe.int/redirect.php?id=12214 PL

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RO-Romania

Rules for Film Project Subsidies

The contest for film project subsidies organised by the *Centrul Naţional al Cinematografiei* (National Cinematography Centre - CNC) in 2010 will be run under almost the same Regulation as in 2009, despite the criticism of Romanian filmmakers with regard to the conditions of the contest.

The Regulation has been slightly modified only to be in line with the amended *Legea cinematografiei nr. 303/2008* (Cinematography Law no. 303/2008; see IRIS 2009-1: Extra). The Ministry of Culture changed five articles of the Regulation through an Order published in the Official Journal on 30 December 2009.

The only amendment with regard to the organisation of the contest was to split the projects in competition into three sections instead of two: full-length fiction and short reel films, documentaries, cartoons. Until now documentaries and cartoons were in the same section. The new jury for cartoons will be composed of 3 members and will join the two existing juries for fiction (5 members) and for documentaries (3 members).

The filmmakers have criticised the way the members of the juries mark the projects without being obliged to argue their decisions and along the discretionary way of calculating the budgets of the projects with direct effects on the results of the contest. The first session of film project subsidisy will probably be launched at the end of February 2010.

In addition, the CNC announced the results of the subsidisy session for other kinds of cinematography projects organised from 1 January to 30 June 2010 (i.a., organising or attending domestic/international Film festivals, support for cultural or cinematograhic education programmes, publishing of cinematographic specialised works). The CNC granted subsidies for 19 projects and rejected 12 projects. The total amount of subsidies is RON 2,956,982 (about EUR 704,000). The biggest subsidy amounts to RON 690,000 (about EUR 164,000) for the organisation of the well-known *Festivalul Internaţional de Film Transilvania* (International Film Festival Transylvania).

• - (Order no. 2520 of 17 December 2009 of the Minister of Culture which modifies and amends the Regulation of the selection contest of film projects is published in the Official Journal no. 923, Part I on 30 December 2009; the Press release of the CNC with regard to the subsidies to projects for events organised from 1 January to 30 June 2010) RO

• - (Press release of the CNC with regard to the subsidies to projects for events organised from 1 January to 30 June 2010)
http://merlin.obs.coe.int/redirect.php?id=12178 RO

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Radio Romania International

RS-Serbia

New Legal Framework for Cable Distribution of TV Discussed

In November 2009 the Serbian Broadcasting Agency (SBA) announced plans to pass a "general mandatory

instruction" (type of regulation or by-law under the 2002 Broadcasting Act) to regulate cable distribution of TV programmes in Serbia. The issue gave rise to public debate as it involves the fragile regional relations in the Western Balkans (or former Yugoslavia) and is also very complex from the legal point of view.

Cable distribution of TV has significantly advanced in Serbia in the last five years; most of urban Serbia receives TV programmes through cable distribution. Cable distribution companies offer domestic and foreign programmes, including ones from Montenegro, Bosnia and Herzegovina and Croatia, in all of which the language is practically the same as in Serbia. Given the fact that some of those regional programmes broadcast events for which exclusive broadcasting rights for the territory of Serbia have been purchased by Serbian broadcasters (e.g., F1 racing or Football Champions League), a few years back the practice was established for the cable companies to "blacken" the screen of the foreign broadcasters during such events, upon request of a local rightsholder.

Lately there have been complaints from Serbian broadcasters who purchased rights to copyrighted content other than live events (e.g., TV series, movies), that foreign broadcasters through cable distribution severely reduced their ratings, although they had not purchased the rights for such programmes to be broadcast in the territory of Serbia. This problem is especially emphasised in relation to regional broadcasters, given the fact that a language barrier does not exist, and that most Serbian broadcasters are prevented from entering cable distribution in the other countries of the region.

The SBA therefore announced its intention to pass a regulation by which the rights of cable distribution companies to include foreign TV programmes will be limited or even excluded, by a system of licensing all foreign programmes that may be found in the cable distribution in Serbia. This was publicly interpreted as an intention to remove all programmes coming from the region from cable distribution in Serbia and caused strong reactions from regional ethnic minorities and freedom of expression organisations. SBA explained that the eventual ban of certain programmes shall, by no means, pertain to own programming of regional broadcasters available in cable distribution in Serbia, but rather to the segments of such broadcasters' programmes that are not purchased for the territory of Serbia. Such explanation was questioned following the behaviour of cable distribution companies during the four days of mourning proclaimed after the death of the Patriarch of Serbian Orthodox Church in November, when all regional programmes were removed from cable distribution, which was allegedly based upon SBA instructions.

The discussion is still going on among the SBA and interested parties and has slowed down the passing of the planned SBA regulation. Some of the associations involved in the discussion have proposed that the issue should be dealt with by independent regulators in all countries involved, so that balanced and non-discriminatory rules providing the same conditions for cable distribution in all countries of the region could be adopted at regional level.

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RU-Russian Federation

Statute on Cinematography Amended to Attract Foreign Investments

On 27 December 2009 President Dmitry Medvedev signed the Federal Statute of the Russian Federation "On Amending Federal Statute on State Support for Cinematography of the Russian Federation" ("О внесении изменений в Федеральный закон « О государственной поддержке кинематографии Российской Федерации »") adopted by the State Duma on 23 December 2009. It enters into force on 1 May 2010.

The Act makes important changes to the Federal Statute of 22 August 1996 (No. 126-FZ) (see IRIS 1999-2: 11).

It introduces an obligatory system of collection of data regarding film exhibition in Russia by establishing a uniform cinema ticket and a "united federal automated information system" whereby every commercial exhibitor of films shall provide the following data on each ticket sold: name of the cinema, date, time of the showing, title of the film, number of the exhibition permit, number or name of the cinema hall, row and seat number, price of the ticket and discounts if any (new Art. 6-1 of the Federal Statute "On State Support for Cinematography of the Russian Federation").

According to Article 149 (point 21 of para. 2) of the Tax Code of the Russian Federation (2000), works (services) on production of films for cinema provided by cinematography organizations, sale of rights (including rights to exhibitions) on products - that have the certificate of a national film - are among the operations that are exempt from taxation.

In order to qualify for the tax-free status, a film has to obtain a certificate recognising its status as a national film in accordance with the 1996 Federal Statute "On State Support for Cinematography in the Russian Federation".

The amendments stipulate that such a certificate is issued by the Ministry of Culture to films produced by Russian citizens or companies and produced with less than 50% (earlier - 30%) of foreign investment and with no more than 50% (previously - 30%) of the crew

made up of foreigners. Most of the authors of such a film shall be Russians (previously - all its authors). Now also national films may be not only in Russian or in the language of a minority of the Federation but also in a foreign language if this is required by the artistic plot. As before at least half of the budget must be spent in Russia (Art. 4 of the Federal Statute "On State Support for Cinematography of the Russian Federation").

• „436 внесении изменений в Федеральный закон « О государственной поддержке кинематографии Российской Федерации »" (Federal Statute of the Russian Federation of 27 December 2009 No. 375-FZ "On Amending Federal Statute on State Support for Cinematography of the Russian Federation")
http://merlin.obs.coe.int/redirect.php?id=12169 RU

• Налоговый кодекс Российской Федерации (Second part of the Tax Code of the Russian Federation)
http://merlin.obs.coe.int/redirect.php?id=12170 RU

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SI-Slovenia

Draft Public Broadcaster Amendment Act Published

In November 2009 a draft amendment to the *Zakon o Radioteleviziji Slovenija* (Radio and Television Act of Slovenia) was put to public discussion.

In the public and expert debates focus has been put on the renewed structure of the Programme Council and its expanded competencies. Numerous professionals and experts, public opinion and the parliamentary opposition are against the proposed modifications, thus, the draft is expected to meet changes.

The existing Programme Council of the public broadcaster Radio and Television Slovenia (RTV Slovenija) consists of 29 members; the criteria for their appointment are stipulated in the Television and Radio Act of 2005 (Article 17 para. 6): two members are appointed by two national minorities, one by the Slovenian Academy of Science and Art, two by the President of the State in accordance with the proposal of the registered religious communities, three are elected directly from among the RTV Slovenija employees, five are proposed by political parties and then appointed by the Parliament and 16 are likewise appointed by the Parliament from the quota of candidates of the audience, universities and non-governmental organisations which are active in the fields of culture and art, science and journalism.

The Programme Council is involved in setting and surveying programming standards in co-operation with the general manager; it appoints and dismisses the general manager and has some other tasks related to audience, finances and programme schemes (Article 16 para. 6).

The proposed Draft of the Slovenian Radio and Television Amendment Act suggests there should be eleven members in the renamed Council (the word "programme" would be omitted). Their appointment is supposed to follow the amended criteria: three members are appointed by the President, six members are appointed by the Parliament after the Parliamentary body's proposal is submitted (half of the votes of the body are granted to the opposition), one member is appointed by the Slovenian Academy of Science and Arts and one member is appointed by the Slovenian National Council of Culture (Article 16 draft new version).

The proposed modification reduces the possibilities of civil-society actors to be appointed, since the election from among them is to be performed by the Parliamentary body and according to the political orientation. Along with that the competencies of the Council are planned to be prolonged, e.g., the Council might appoint and dismiss members of the administration board, declare a vote of no-confidence and dismiss the executive editors and appoint and dismiss those members of the Supervising Council who are under its competence (Article 19 draft new version).

• Predlog osnuka Zakona o spremembah in dopolnitvah Zakona o Radioteleviziji Slovenija (Draft of the Slovenian Radio and Television Amendment Act)
http://merlin.obs.coe.int/redirect.php?id=12179 SL

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US-United States

Minority Ownership on the Federal Communications Commission's Agenda

After decades of declining minority ownership, the US government is once again interested in promoting it. On 15 January 2009 the Federal Communication Commission's ("FCC" or "Commission") Media Bureau announced a "Minority Media Ownership Workshop" to be held on 27 January 2010, as part of the Commission's 2010 quadrennial review process. The Workshop will include two panels: "Constitutional Issues in Advancing Minority Ownership Through the FCC's Media Ownership Rules" and "How the FCC's Media Ownership Rules Affect Minority and Female Ownership" by examining some of the following: (1) the interaction of the FCC's media ownership rules and minor-

ity or female ownership (including the potential impact of any rule changes on such ownership); (2) marketplace or other factors that encourage diverse entrants; and (3) the constitutionality of targeted "race-based" measures for promoting diverse ownership.

The Commission's basic statutory authorization to promote such diversity derives from the Communications Act of 1934, as amended by the Telecom Act of 1996 ("Telecom Act") which provides for two mechanisms of promoting minority ownership using the FCC's license granting authority: §309(i) ("Random Selection") and §309(j) ("Competitive Bidding").

§309(i)(3)(A) provides that the FCC shall establish rules and procedures to ensure that (1) a "significant preference" is given to applicants or groups of applicants who will increase the diversification of ownership of the media of mass communications; and (2) to diversify further the ownership of the media, an additional "significant preference" is given to any applicant controlled by a member or members of "minority group" (defined to include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders").

§309(j)(3)(B) gives the FCC the authority to design a system of competitive bidding' which will include safeguards to protect the public interest in the use of the spectrum and seek to promote, among other purposes, economic opportunity and competition by avoiding excessive concentration of licenses by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

In its 1990 Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 decision the US Supreme Court used the "intermediate" review standard to find such "pluses", when used in favor of women and minorities, to be Constitutional. However, in 1995 the Court, in Adarand Constructors, Inc. v. Penna, 515 U.S. 200 rejected such two-tiered systems, and directed agencies to first look to "race-neutral" alternatives before giving racial preferences, in effect overturning Metro Broadcasting. The workshop will examine the impact of subsequent decisions on the "Adarand" standard.

It remains to be seen if any further effort will be undertaken by the Commission to increase the proportion of minority or woman owners, and whether such efforts will be successful in the face of further media consolidation. The Workshop at least appears to signal that minority ownership issues are once again on the Commission's radar.

• Communications Act of 1934, as amended by the Telecom Act of 1996 ("Telecom Act")
http://merlin.obs.coe.int/redirect.php?id=12196 EN

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Stern & Kilcullen

Agenda

Egta's New Media Conference

24 - 25 March 2010
Organiser: Egta
Venue: Brussels
Information & Registration:
Tel: +32 2 290 31 34
Fax: +32 2 290 31 39
E-Mail: annelaure.dreyfus@egta.com
http://www.egta.com/

European Forum on Cultural Industries

29 - 30 March 2010
Organiser: Spanish Presidency of the European Union
Venue: Barcelone
Information & Registration:
http://www.eu2010feic.org/

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