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Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com
• Layout: www.acom-europe.com and www.logidee.com

ISSN 2078-6158

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Renaud v. France*

The European Court of Human Rights recently delivered a judgment regarding defamation and insult on the Internet. The Court was of the opinion that the sharp and polemical criticism of the public figure in question was part of an ongoing emotional political debate and that the criminal conviction for defamation and insult amounted to a violation of the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

The applicant in the case was Patrice Renaud. He is the founder of a local association (*Comité de défense du quartier sud de Sens*) opposing a big construction project planned in the city of Sens. To this end he also initiated a website, sharply criticising the mayor of Sens, who supported and promoted the building project. In 2005, and on appeal in 2006, Renaud was convicted in criminal proceedings for defamation and for publicly insulting a citizen discharging a public mandate, on account of remarks concerning the mayor of Sens. On the website he had inter alia compared the urban policy of the mayor to the policy of the former Romanian dictator Ceaucescu. Renaud was convicted for defamation because of the specific allegation that the mayor was stimulating and encouraging delinquency in the city centre in order to legitimise her policy of security and public safety. Also the insinuation that the mayor was illegally putting public money in her own pockets was considered defamatory, while the article on the association's website in which Renaud had written that the mayor was cynical, schizophrenic and a liar was considered to be a public insult. Renaud was ordered to pay a fine of EUR 500 and civil damages to the mayor of EUR 1,000.

Relying on Article 10 (freedom of expression), Renaud complained of his conviction before the European Court of Human Rights.

The European Court recognised that the applicant, being the chairman of the local association of residents opposing the construction project and the webmaster of the Internet site of the association, was participating in a public debate when criticising public officials and politicians. The Court admitted that some of the phraseology used by Renaud was very polemic and virulent, but stated that on the other hand a mayor must tolerate such kind of criticism as part of public debate which is essential in a democracy. The Court was of the opinion that when a debate relates to an

emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism and that they have to accept "*les débordements verbaux ou écrits*" (free translation: "oral or written outbursts"). The Court considered the allegations of Renaud to be value judgments with a sufficient factual basis and came to the conclusion that the French judicial authorities had neglected the interests and importance of freedom of expression in the matter at issue. The conviction of Renaud was thus an interference with his right to freedom of expression which did not meet any pressing social need, while at the same time such a conviction risks engendering a chilling effect on participation in public debates of this kind. Therefore, the European Court found a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (cinquième chambre), affaire Renaud c France, requête n°13290/07 du 25 février 2010* (Judgment by the European Court of Human Rights (Fifth Section), case of Renaud v. France No. 13290/07 of 25 February 2010)
<http://merlin.obs.coe.int/redirect.php?id=12444>

FR

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EUROPEAN UNION

Council of the EU: The Granada Ministerial Declaration on the European Digital Agenda

On 19 April 2010 the Ministers responsible for the Telecommunications and Information Society of the EU member states and the European Economic Area adopted, under the Spanish Presidency, the Granada Declaration on the Digital Agenda.

The Declaration notes that the EU2020 Strategy calls for the EU to find a fast and effective road to recovery following the recent economic downturn. Given that the ICT sector is a crucial driver of growth and jobs in the EU economy, Europe could put itself back on the fast track to growth by raising its global competitiveness in the digital economy. To this end, the Declaration suggested the following eight actions for consideration:

1. The creation of the necessary infrastructures, such as 100% coverage of basic broadband to all citizens, the roll out of competitive next generation high speed networks or the development of innovative digital wireless services. The importance of the adoption of the future EU radio spectrum policy programme and of efficient radio spectrum use is also underlined.

2. The promotion of the advanced use of the open internet, security and trust. This can be attained,

inter alia, through the implementation of the new EU electronic communications rules on network provision, through the support of e-authentication systems for consumers and businesses or through raising public awareness and empowering citizens in the digital environment.

3. The reinforcement and promotion of the rights of users of electronic communications and online services, as well as, in certain key fields, of social networking services. The Declaration suggests the drafting of a "Code of Digital Rights of e-Communications and Online Services".

4. The fostering of a single European digital market. Regulatory obstacles should be eliminated, European digital content markets should be promoted and access to digital content enabled and European cultural heritage should be digitised and disseminated. The Declaration also supports the solution of multi-territorial licensing to overcome the fragmentation of content markets along borders.

5. The development of effective and efficient public digital services. The Declaration specifically mentions the importance of the ability to reuse public sector information and the introduction of e-IDs and e-signatures and digital administrative services. The goal should be the reinforcement of an open and transparent government and active citizen participation.

6. Strengthening the competitiveness of Europe's ICT sector. This can be achieved through better support for Europe's ECT R&D and Innovation efforts, as well as of high-tech SMEs and other European ICT firms, particularly in areas where Europe has a lead market potential.

7. The promotion of Europe's positions on issues relevant to the Digital Agenda in international fora.

8. Benchmarking the Information Society. Policy implementation should be tracked on a regular basis and key targets set.

The Declaration also emphasises the importance of a truly inclusive digital society. Particular attention should be paid to the needs of citizens with disabilities.

Appropriately, the meeting of the Ministers in Andalucía was made possible thanks to ISDN videoconferencing, as a number of delegations were unable to attend in person due to the air traffic disruptions caused by the volcanic eruption in Iceland.

• Granada Ministerial Declaration on the European Digital Agenda
<http://merlin.obs.coe.int/redirect.php?id=12450>

EN

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European Commission: Consultation on Future of Cultural and Creative Industries

On 27 April 2010, the European Commission launched an online public consultation aimed at unlocking the full potential of Europe's cultural and creative industries. The consultation is linked to a Green Paper, which sets out the untapped potential of the cultural and creative industries to create growth and jobs.

'Cultural industries' are defined in the Green Paper as industries "producing and distributing goods or services which at the time they are developed are considered to have a specific attribute, use or purpose which embodies or conveys cultural expressions, irrespective of the commercial value they may have". This definition covers traditional arts sectors (performing arts, visual arts and cultural heritage), film, video, television, radio, video games, new media, music, books and press. 'Creative industries' are defined as "industries which use culture as an input and have a cultural dimension, although their outputs are mainly functional". They include architecture and design, as well as subsectors such as graphic design, fashion design and advertising. Together, the cultural and creative industries provide quality jobs for 5 million people in the European Union and they represent highly innovative companies with great economic potential.

The public consultation focuses around three issues. First, the public consultation asks stakeholders and others the question of how the EU should encourage cultural and creative industries to experiment, innovate and to act as entrepreneurs. Second, the consultation deals with the question of how to help European cultural and creative industries to achieve worldwide presence. Finally, the consultation goes into the spill-over effects of cultural and creative industries on other industries and society.

With regard to Information and Communication Technologies, the Commission notes that the cultural and creative industries are faced with a rapidly changing context characterised by the speed of the development and global deployment of these new technologies. The Commission specifically mentions the recorded content industry that is being hurt by piracy and losses in sales. These changes affect traditional production and consumption models and they challenge the industries to draw value from their content. The industries need to develop new and innovative business models. However, keeping a business running successfully while investing and testing new business models can be a challenging task for many creative enterprises.

The public consultation will run until 30 July 2010. The results of this consultation will be analysed and summarised in a report that will be published on the Commission's website in approximately September 2010.

- “Commission Launches Public Consultation on Future of Cultural and Creative Industries”, Brussels, 26 April 2010, IP/10/466

<http://merlin.obs.coe.int/redirect.php?id=12448>

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

- “Green Paper - Unlocking the Potential of Cultural and Creative Industries”

<http://merlin.obs.coe.int/redirect.php?id=12449>

BG	CS	DA	EL	ES	ET	FI	HU	IT	LT	LV
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European Commission: Update on the Current Negotiations on the ACTA

In October 2007, non-public negotiations started for a new international trade agreement on counterfeiting, the Anti-Counterfeiting Trade Agreement (ACTA), between the trading partners EU (represented by the European Commission), the United States, Australia, Canada, Japan, South Korea, New Zealand, Mexico, Morocco, Singapore and Switzerland.

ACTA aims at becoming a new plurilateral treaty, improving global standards for the enforcement of intellectual property rights, for a more effective combat against trade in counterfeited and pirated goods.

Until recently, the negotiations on ACTA were secret. No official documents had been released, except for brief summaries of conclusions after each negotiation round. This lack of transparency made ACTA controversial among data protection authorities, NGOs, copyright scholars and other public interest groups. Since the negotiations began, chapters of the Agreement were continuously leaked to the public. This led to widespread discussion and concern about how ACTA would influence and change domestic laws. The definition of piracy according to the leaked documents makes it possible to force Internet Service Providers (ISPs) to adopt ‘three strikes’ Internet disconnection policies for copyright infringers. ‘Three strikes’ policies have implications for privacy (see IRIS 2010-4: 1/5)

On 10 March 2010, the European Parliament adopted a resolution on the transparency and the state of play of the ACTA negotiations. The European Parliament referred to Articles 207 and 218 of the Treaty on the Functioning of the European Union (TFEU). According to the European Parliament, the European Commission has a legal obligation to inform the Parliament immediately and fully at all stages of international negotiations. The Parliament called for the disclosure of the ACTA preparatory drafts to the Parliament and the public.

Further, the Parliament stressed that the proposed Agreement may not provide for an introduction of ‘three strikes’ procedures. This is in order to avoid violating fundamental human rights, such as the right of freedom of expression and privacy and the principle of subsidiarity. Further, the Parliament threatened to take suitable action, including bringing a case before the European Court of Justice, if it was not informed immediately and fully on the negotiations.

On 16 April 2010, the ACTA trading partners released a Joint Statement on ACTA after concluding the 8th round of negotiations in New Zealand from 12-16 April 2010.

According to the trading partners, the negotiations have advanced to a point at which making a draft available to the public will support the process of reaching a final agreement. ACTA will respect fundamental human rights and governments will not be forced to adopt a ‘three strikes’ approach to copyright infringement on the Internet.

The draft text of ACTA has now been released and is accessible via the website of the European Commission as of 21 April 2010.

Currently there is a discussion on the draft text among copyright scholars, public interest groups, data protection authorities and NGOs.

The next negotiating round on ACTA will be held in Switzerland in 2010. A date has not yet been published. The ACTA trading partners will strive to conclude ACTA within 2010.

- European Commission Trade Joint Fact Sheet on ACTA

<http://merlin.obs.coe.int/redirect.php?id=12458>

EN

- European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations

<http://merlin.obs.coe.int/redirect.php?id=12459>

FI HU IT

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

- Joint Statement on Anti-Counterfeiting Trade Agreement (ACTA), press release 16 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12460>

EN

- Anti-Counterfeiting Trade Agreement, European Commission welcomes release of negotiation documents, press release 21 April 2010

<http://merlin.obs.coe.int/redirect.php?id=12461>

EN

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European Commission: New Reflection Group on the Digital Dissemination of European Cultural Heritage

The European Commission has recently established a Reflection Group entrusted with the task of finding innovative solutions to make European cultural heritage

publicly available on the Internet. The Group will build on the previous work of the High Level Expert Group on Digital Libraries (see IRIS 2007-6: 5/6, IRIS 2008-7: 5/6). The setting up of the Reflection Group is part of a broader strategy, with which the Commission aims to address the current digitisation challenges for the cultural section and, on a more general level, to establish a favourable environment for creative industries in the digital environment.

The Reflection Group will address issues relating to the digitisation, online accessibility and preservation of European cultural heritage. It has been invited to make recommendations about the funding of digitisation projects, including public-private partnerships. Moreover, it will examine copyright issues, such as licensing practices to facilitate the digitisation and making available of copyright protected material, in particular, of out-of-print works and orphan works (i.e., works the copyright owners of which are untraceable).

The Reflection Group will consist of Maurice Lévy (Chief Executive Officer of the French advertising and communications company Publicis), Elisabeth Niggemann (Director-General of the German National Library) and Jacques De Decker (Belgian writer and journalist). The Group has been asked to submit its conclusions to the Commission before the end of 2010.

• “Boosting cultural heritage online: the European Commission sets up a Reflection Group on digitisation”, IP/10/456, 21 April 2010
<http://merlin.obs.coe.int/redirect.php?id=12457>

DE EN FR

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NATIONAL

AL-Albania

Public Consultation on the Strategy for Digital Broadcasting

The transition to digital broadcasting in Albania is expected to face a series of challenges, according to the latest public discussion among stakeholders.

On 27 April 2010 the *Këshilli Kombëtar i Radios dhe Televizionit* (National Council of Radio and Television), the regulatory authority for broadcasting, and the Organisation for Security and Cooperation in Europe (OSCE) representation in Albania jointly organised a conference on “Digital Television: Near and Far”. This conference marked the conclusion of a two-year long awareness and discussion campaign on the strategy

for the transition to digital broadcasting. Participants included representatives of the regulatory authority, national and local media outlets, civil society representatives, etc.

One of the main concerns of the discussions during the conference was the role of the public broadcaster in the digital switchover and in the allotment of national frequencies. According to the current strategy *Radio Televizioni Shqiptar* (Albanian Radio Television, RTSH) has the right to two national frequencies out of a maximum of eight frequencies. Many participants claimed that RTSH has not shown any evidence of being able to create and administer two multiplexes and that therefore one of them should be reserved for operators that can invest in such an effort. However, concerns about the provision of content of public interest arise in such scenarios.

Another main concern was the fate of numerous local radio and television stations against the backdrop of the digital switchover. The strategy discusses several options of ownership and administration of network operators, giving preference to ownership of networks by consortia of existing TV stations. However, representatives from these TV stations said that this would be difficult to implement due to high investment costs and inability to reach agreement among competing TV stations. As a result the pluralism of information and media outlets would be endangered.

Finally, the issue of existing digital broadcasting platforms in the country is a major one. Terrestrial and satellite digital broadcasting was started in Albania in July 2004 by the Digitalb company (see IRIS 2007-8: 5), later followed by the Tring company and Shijak TV. Although the exact number of subscribers is not known, a significant number of households already has had access to the packages offered by these platforms.

The licensing of the existing and new companies will be a new test for the authority and fairness of the regulator. The Albanian Parliament has already passed the Law on Digital Broadcasting in 2007 (see IRIS 2007-8: 5), which will be implemented after the strategy is approved by an ad hoc commission established for this purpose.

• Strategjia (Strategy for the transition to digital broadcasting)
<http://merlin.obs.coe.int/redirect.php?id=12430>

SQ

• Analysis of the strategy by the OSCE
<http://merlin.obs.coe.int/redirect.php?id=12431>

EN

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NCRT Report Approved in the Parliament

On 1 April 2010 the Parliamentary Commission on Education, Public Media and Information Means issued

a resolution that approved the Annual Report on the Activities of the *Këshilli Kombëtar i Radios dhe Televizionit* (National Council of Radio and Television - NCRT) for 2009 (see IRIS 2005-4: 6).

The Report provides information on the main activities of the regulator in 2009, especially with regard to the licensing of new television and radio stations, the fight against piracy, the problems with frequency spectrum coverage, etc. Specific attention is paid to the preparations for the strategy for the transition to digital broadcasting.

The resolution approved by the Parliamentary Commission praised the work of the regulator, stating that it has increased efficiency in its work and has contributed to improving the quality of broadcasting services and protection of consumer and operators' interests.

However, the Parliament demands as quickly as possible the implementation of the digital switchover strategy, a greater efficiency against piracy in broadcasting as well as tougher implementation of ethical norms in broadcasting programmes.

The Parliamentary Commission reviewed the annual report and approved the resolution only with the participation of members from the ruling majority. The members of the opposition have refused to participate in most parliamentary activities, claiming the need for more transparency regarding the process and results that led to the composition of the current Parliament.

• Komisioni parlamentar për Edukimin dhe mjetet e informimit publik miraton projektrezolutën për Raportin e Këshillit Kombëtar të Radio Televizioneve për vitin 2009 (Parliamentary Commission on Education, Public Media and Information Means Approves the Draft Resolution on the Report of the National Council of Radio and Television for year 2009)

<http://merlin.obs.coe.int/redirect.php?id=12432>

SQ

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AT-Austria

Administrative Court Decides on Obligation to Pay ORF Licence Fee

The Austrian *Verwaltungsgerichtshof* (Administrative Court - VwGH) ruled on 10 May 2010 (Case 2009/17/0177) that the ORF licence fee only has to be paid if it is technically possible to receive all the television programmes covered by the ORF's television remit.

The legal dispute was preceded by an Administrative Court decision in 2008 (Case 2008/17/0163) in which

the present plaintiff successfully brought an action against the levying of the ORF licence fee. The ORF had previously informed the plaintiff that a change in the encryption system meant that programmes could in future only be received at the plaintiff's location by means of DVB-T reception modules. The plaintiff did not have the necessary equipment and could no longer receive the television programmes ORF 1 and ORF 2 with his satellite receiver and smartcard, whereupon he stopped paying the ORF licence fee. The defendant, Info Service GmbH (GIS), continued to demand that the plaintiff pay the licence fee as he had at least one operational radio or television set in his household.

By section 31(1) and (3) of the *ORF-Gesetz* (ORF Act), anyone in Austria is entitled to receive the ORF's radio and television programmes against payment of an ongoing licence fee, and this obligation exists irrespective of the frequency and quality of the programmes or their reception. The beginning and end of the obligation are governed by the *Rundfunkgebührengesetz* (Broadcasting Licence Fees Act), sections 2(1) and 1(1) of which provide that anyone who operates broadcasting reception equipment in a building must pay the licence fee. Such equipment comprises technical devices that render presentations or performances visible or audible within the meaning of section 1(1) of the *Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks* (Federal Constitutional Law on Safeguarding the Independence of Broadcasting). The Administrative Court concluded from this in 2008 that there was a mutual relationship between the reception of the ORF's programmes and the licence fee payable. It pointed out that a distinction had to be drawn between the obligation to pay the licence fee and the mode of payment, which was governed by the Broadcasting Licence Fees Act. The reference to that legislation in the ORF Act showed that for the purposes of the licence fee the requirement concerning the possession of operational broadcasting reception equipment was only met when the equipment was capable of actually receiving the ORF's programmes, which was not the case. GIS nonetheless demanded that the licence fee continue to be paid as the plaintiff could receive the speciality channels ORF 2 Europe and ORF Sport Plus without a new smartcard.

The Administrative Court has now ruled that the ORF licence fee only has to be paid when all the television programmes covered by the ORF's remit can be received using existing operational reception equipment. The statutory remit, it stated, required the provision, inter alia, of two television programmes that could be received nationwide. If this was not guaranteed, then no licence fee was payable.

- *Erkenntnis des VwGH vom 10. Mai 2010, Geschäftszahl 2009/17/0177* (Administrative Court's judgment of 10 May 2010, 2009/17/0177)

<http://merlin.obs.coe.int/redirect.php?id=12474>

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VRT Coverage of 65th Anniversary of Liberation Auschwitz Found Not Discriminatory

On 29 March 2010, the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) of the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) considered a complaint regarding a teletext message on the public broadcaster VRT that covered the 65th anniversary of the liberation of the Nazi concentration camp Auschwitz-Birkenau. The message amongst others contained the phrase "*In Auschwitz zijn zeker 1,1 miljoen mensen omgekomen*" (freely translated, "In Auschwitz, at least 1,1 million human beings deceased"). According to the plaintiff, VRT had consciously failed to mention that most of the victims were Jews. Moreover, the use of the word '*omgekomen*' (deceased) seems to refer to some sort of accident, while in reality all the victims had been liquidated ('*omgebracht*'). For these reasons, the plaintiff held that false, consciously incomplete information had been spread and that VRT had displayed a lack of impartiality in its coverage on that teletext page. According to him, VRT therefore had violated Article 39 of the Flemish Media Decree, which stipulates that any form of discrimination must be avoided in all programmes and that news coverage must be presented in a spirit of political and ideological impartiality (The Decree explicitly adds that this Article also applies to teletext). VRT argued that most teletext messages are first extensively published on its website (www.deredactie.be) and afterwards summarised to fit the exigencies of the medium teletext. Because of the very nature of this medium, some aspects of the covered item must be described in a concise way. Furthermore, VRT held that the word '*omgekomen*' (deceased) was replaced by '*omgebracht*' (liquidated) immediately after the editorial staff received an email from the plaintiff. Finally, the public broadcaster stated that it had deliberately chosen not to distinguish between the different groups of Nazi victims. The Regulator considered that the initial use of the word '*omgekomen*' (deceased) should be seen as a consequence of the way in which messages on the website are transformed into a teletext message. The Regulator observed that the coverage on the website did make mention of the fact that prisoners were

gassed and cremated. In addition, the Regulator decided that the lack of mention of the fact that most victims were Jewish, an aspect that however was elaborated extensively upon on the website, could be ascribed to the need for brevity on teletext. As a result, the Regulator judged that VRT had not violated its obligation of impartiality and non-discrimination, as worded in Article 39 of the Media Decree.

- *ZAAK RUDI ROTH t. NV VLAAMSE RADIO- EN TELEVISIEOMROEP (dossier nr. 2010/0506) BESLISSING nr. 2010/022 29 maart 2010* (Rudi Roth v. NV VRT, 29 March 2010 (No 2010/022))

<http://merlin.obs.coe.int/redirect.php?id=12440>

NL

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Commercial Broadcaster SBS Belgium Fails to Comply with Advertising Regulation

On 22 March 2010, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) twice rapped the commercial broadcasting organisation SBS Belgium over the knuckles for breaches of various rules on advertising.

In the first decision, the *Algemene Kamer* (General Chamber) considered an allegation made by its research group according to which SBS Belgium had infringed the rule that the share of television advertisements and teleshopping advertisements may not exceed twenty percent of or 12 minutes per each clock hour (Article 81, §2 of the Media Decree). The total share of two advertising slots broadcasted within one hour amounted to 12 minutes and 17 seconds. SBS Belgium submitted that one of the advertisements, which concerned 'Médecins du Monde - Dokters van de Wereld' (freely translated, 'Doctors of the World') and lasted 25 seconds, should not be seen as advertising, but rather as a public service announcement (PSA). The Regulator accepted this defence, arguing that the advertisement in question emanated from a humanitarian association and therefore corresponded with the definition of PSA, as formulated in Article 2, 3(b) of the Flemish Media Decree. In other words, the allowable share of advertisements had not been exceeded. However, Article 46 of the Decree stipulates that PSAs should be clearly identified and differentiated from regular programming. With regard to television programmes, this means that PSAs must be preceded and followed by a suitable announcement (2nd clause). SBS Belgium had failed to do this, and therefore, taking into account the broadcaster's willingness to take the necessary measures in order to avoid repetition, the Regulator decided to caution SBS Belgium because of this infringement.

The second decision concerned the illegitimate transmission of a television advertisement. On the broadcasting programme VT4, a 'single spot' was shown

that featured the presenters holding a New Year's Eve party, while one of them entered the room with a bottle of Martini. At the end, a voice-over stated, "VT4 en Martini Brut wensen je bruisende feesten" (freely translated, "VT4 and Martini Brut wish you delightful holidays"). According to SBS Belgium, this spot was to be viewed as self-promotion, sponsored by Martini. The General Chamber, however, judged this spot to be an advertisement in favour of Martini. The message via voice-over and the clear display of the bottles and logo of Martini Brut gave this spot the character of advertising. Article 79, §1 of the Media Decree stipulates that television advertising, excluding self-promotion, should be clearly identifiable and easy to differentiate from editorial content. In this regard, it should be kept quite distinct from other parts of the programme by visual, and/or acoustic, and/or spatial means (1st clause). As SBS Belgium had failed to meet this obligation, the Regulator decided to impose a fine amounting to EUR 5,000.

• ZAAK VAN VRM t. NV SBS BELGIUM (dossier nr. 2010/0507) BESLISSING nr. 2010/018 22 maart 2010 (VRM v. NV SBS Belgium, 22 March 2010 (No. 2010/018), available at:)

<http://merlin.obs.coe.int/redirect.php?id=12442>

NL

• ZAAK VAN VRM t. NV SBS BELGIUM (dossier nr. 2010/0508) BESLISSING nr. 2010/019 22 maart 2010 (VRM v. NV SBS Belgium, 22 March 2010 (No. 2010/019))

<http://merlin.obs.coe.int/redirect.php?id=12443>

NL

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Electronic Communications Act Amended

The Electronic Communications Act was amended (published in the State Gazette, issue No. 27 of 2010, effective as of 9 April 2010, see IRIS 2010-3: 1 and IRIS 2009-5: 9) in relation to the personnel of the Communications Regulation Commission, which was reduced by four members.

Pursuant to Article 22 of the Electronic Communications Act the Communications Regulation Commission is a collective body comprised of five members including a chairman and a vice-chairman.

Pursuant to §6 of the conclusive provisions of the Act on the Amendment and Supplementation of the Electronic Communications Act the National Assembly shall remove three elected members of the Commission from the Parliament's quota and the President shall remove one of the two appointed by him as a member of the Commission within 15 days commencing from the effective date of the Act.

On 22 April 2010 the National Assembly removed three of its parliamentary representatives to the Communications Regulation Commission.

After the amendments of the Electronic Communications Act the mandate of the Commission is shortened by one year as well.

On 23 April 2010 the President removed one representative to the Commission from his quota.

• ЗАКОН ЗА ЕЛЕКТРОННИТЕ СЪОБЩЕНИЯ (Electronic Communications Act)

<http://merlin.obs.coe.int/redirect.php?id=12435>

BG

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Licence for Digital Broadcasting of Public Television

On 24 March 2010 the Council for Electronic Media (CEM) issued to the Bulgarian National Television (BNT) a licence for the operation of television activities: the creation of a programme offer for terrestrial digital broadcasting by means of electronic communications networks of companies, to which the Communications Regulation Commission has issued a permit for the use of individually-defined scarce resources (radio frequency spectrum for carrying out electronic communications through terrestrial digital radio broadcasting, see IRIS 2009-5/12).

The licence is issued for a programme called BNT 1, the programme profile of which is general (polythematic) with a national broadcasting coverage and a term of 15 years. The BNT shall fulfil its activity acting as the national public operator.

The reasoning of the CEM for issuing the licence is as follows:

- According to §35 of the temporary and concluding provisions of the Act on the Amendment and Supplementation of the Radio and Television Act the programme of BNT shall be transmitted through a public electronic communications network for digital terrestrial television and radio broadcasting with a national coverage, constructed in accordance with the First Transitional Stage of the Plan for the Introduction of Digital Terrestrial Television Radio Broadcasting (DVB-T) in the Republic of Bulgaria, as approved by the Council of Ministers (see IRIS 2008-4/13).

- According to Article 44 para. 2 of the Radio and Television Act the State shall take all necessary measures to guarantee the broadcasting of programmes of the Bulgarian National Radio (BNR) and BNT on the whole territory of the country for the implementation of policy in the field of electronic communications.

- Furthermore, the State shall implement its obligation under the said provision through the CEM which shall issue licences to the BNR and BNT for the transmission of their programmes through electronic communications networks for digital terrestrial radio broadcasting.

- Article 105 para. 3 of the Radio and Television Act introduces an easier regime for issuing licenses for television activities to the BNT in its capacity as the national public operator, since the Act envisages licences shall be issued without a tender or a competition.

• РЕШЕНИЕ № 142 24 март 2010 г. Съветът за електронни медии на свое заседание, проведено на 24 март 2010 г., 400460467463473465464460 заявление с вх. № 18-00-6/02.03.2010 г. (Decision of the CEM, 24 March 2010)
<http://merlin.obs.coe.int/redirect.php?id=12433>

BG

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Completion of the Transaction for the Sale of the First Private TV in Bulgaria

On 20 April 2010, the transaction for the acquisition of the bTV media group by Central European Media Enterprises Ltd. (CME) was completed (see IRIS 2010-4: 1/10). It involves the leader in the television market in Bulgaria bTV, the cable channels bTV Cinema and bTV Comedy, as well as a few radio stations. The cost of the transaction amounts to USD 400 million plus the payment of USD 13 million working capital.

By its Decision No. 385 of 8 April 2010 the Commission on the Protection of Competition permitted the acquisition of direct unilateral control on the part of CME Media Enterprises B.V. over the Balkan News Corporation (BNC). The Commission has imposed an immediate implementation of the decision.

The Commission on the Protection of Competition believes the transaction will not considerably change the market situation of BNC. According to the official statement of the Commission the dominant position of the group in the market for television broadcasting had been established for a long time before the transaction, whereas after its closing the market share of the group will grow by a little more than 1%.

As regards the radio services market the investigation has revealed that the combined market share of the participants in the concentration is below 10% which is a sufficient basis on which to presume that competition will not be jeopardised as a result of the transaction.

Neither the choice nor the quality of services will lessen due to the transaction, and the future digitisation constitutes an exceptionally powerful factor for

stimulating competition in as far as the transition to digital television broadcasting is a certain and irreversible process.

The television channels of CME are located on the territories of Bulgaria (bTV, bTV Cinema, bTV Comedy, PRO.BG и RING.BG), Croatia (Nova TV), the Czech Republic (TV Nova, Nova Cinema, Nova Sport и MTV Czech), Romania (PRO TV, PRO TV International, Acasa, PRO Cinema, Sport.ro и MTV Romania), Slovakia (TV Markíza, Doma) and Slovenia (POP TV, Kanal A и TV Pika).

• Решение № АКТ -385-08.04.2010 (Decision No. 385 of 8 April 2010 of the Commission on the Protection of Competition)
<http://merlin.obs.coe.int/redirect.php?id=12436>

BG

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CH-Switzerland

Reception Charges also Apply to Households with ADSL Connection or Clock Radio

In a decision delivered on 21 December 2009, the *Tribunal Administratif Fédéral* (federal administrative court - TAF) looked into the question of whether the charge for receiving radio and television programmes still had to be paid when a person with an ADSL connection or a clock radio stated that these were not used for listening to the radio. Article 68 (1) of the Federal Radio and Television Act (LRTV) provides that anyone installing or operating a device intended for receiving radio and television programmes (a receiver) must pay a reception charge. Reception charges are payable per household, not per appliance. Families, couples or people living together pay the charge once only.

The TAF recalled firstly that the reception charge was due even if some programmes, either Swiss or foreign, could not be received or were of poor quality. It was therefore payable by anyone with a radio or television on which programmes could be received, regardless of whether the person with the radio or television used it, and if so, how and how much. The obligation to pay the charge began on the first day of the month following the installation of the receiver or the start of operation and ended on the last day of the month in which the receiver ceased to be used or ceased to be in place, but not before the end of the month in which this was announced to the body receiving the charge.

According to the TAF, the text of Article 68 (1) of the LRTV expresses clearly the idea that the State does not wish to, and cannot, check whether anyone

who has the necessary means of receiving radio programmes does in fact listen to them or not. As a result, even if the members of a household state that they do not listen to the radio in their home, the mere fact of installing receivers incurred liability to pay the charge, even if they were intended for purposes other than listening to the radio. As a result, it did not matter whether a person who owned an appliance allowing reception of radio programmes used it or not.

Thus the TAF judged that households with an ADSL connection and specific software making it possible to receive radio or television programmes were liable to pay the charge. Similarly, the presence of a clock radio in the living room, regardless of whether the device was in fact only used for telling the time, also justified payment of the reception charge.

• Arrêt n°A-2182/2009 du Tribunal administratif fédéral du 21 décembre 2009 (Decision No. A-2182/2009 of the Federal Administrative Court on 21 December 2009)

FR

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CY-Cyprus

Law Barring CYTA from Digital Platform Contest Returned to the Parliament

The President of the Republic exercised his right of return and sent back to the House of Representatives for reconsideration a law on telecommunications that excluded CYTA (the public telecommunications organisation) from the contest for the second digital television platform. Two digital television platforms will be created; one has already been assigned to Ραδιοφωνικό ίδρυμα Κύπρου (Cyprus Broadcasting Corporation, RIK), the public service broadcaster; the second platform will be issued to a private organization by a tender process.

The law voted on 15 April 2010 prohibited CYTA's eligibility for the contest on the grounds that if it was the winner of the tender, the two digital television platforms to be created would both be in the hands of State-controlled organisations; these are RIK and CYTA which has not been privatised yet and is maintaining a largely dominant position in the market.

Earlier, in late March 2010, the House of Representatives froze parts of CYTA's budget for advertising, payment of football television rights and investments in Greece reducing its competitive advantages, according to its governing body. Some attributed these moves to pressure by private broadcasters on members of the Parliament.

According to an official announcement dated 26 April 2010, the reasons for the decision to return the law to the Parliament were: The law interferes with specific administrative procedures with the sole goal being to exclude CYTA from the tender process for the digital platform; in addition, this law constitutes an interference of the legislative power with the rules of competition.

According to Article 51 of the Constitution, the House of Representatives "shall pronounce on the matter so returned within fifteen days of such return" and if it persists in its decision the President shall promulgate the law by publication in the Official Gazette within 15 days of the transmission of the relevant documents to his office.

Article 52 stipulates that the President has the right of return to the House for reconsideration; he has also the right of reference to the Supreme Court if the law or any of its provisions is "repugnant to or inconsistent with any provision of the Constitution" (Article 140); in case of "conflict or contest of power or competence arising between the House of Representatives" and any organs or authorities, the President has the right of recourse to the Supreme Court (Article 139).

The House of Representatives persisted in its decision (23 votes to 16) on 6 May 2010 and it is expected that the President of the Republic will file a recourse or refer the subject to the Supreme Court for final decision. In the meantime, CYTA will face no problem in its bid for the digital network platform. The first phase of the tender's selection procedure for assignment of the second digital platform was underway in April 2010 and CYTA was one of the contestants.

• Ανακοπή Νόμου από τον Πρόεδρο της Δημοκρατίας 26/04/2010 (Information on the official announcement)
<http://merlin.obs.coe.int/redirect.php?id=12437>

EL

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CZ-Czech Republic

New Legislation Concerning Audiovisual Media Services

The Czech Parliament recently adopted a law regulating audiovisual media services. This implementation of the European Directive on Audiovisual Media Services in the Czech Republic took place by means of a new Law on Audiovisual Media Services on Demand and substantial amendments to the Law on Radio and Television Broadcasting.

The general objective of the regulation of audiovisual media services on demand is primarily to establish

non-discriminatory access to all providers of audiovisual media services (i.e., broadcasters and providers of audiovisual media services on demand) and the protection of consumers and minors. For this purpose, in addition to the regulation of broadcast content, the new legislation also regulates the content of audiovisual on demand services (audiovisual commercial communication; protection of certain groups of persons; promotion of European works).

The responsible regulatory body for audiovisual on demand services is the Council for Radio and Television Broadcasting. Providers of on demand services are obliged to register at the RRTV within 30 days of the coming into force of the law. Given that audiovisual media services are largely provided in a wide range of countries, the law regulates cross-border co-operation of the RRTV with the EU institutions and the regulatory authorities of the member states of the EU and States that participate in the European Convention on Trans-frontier Television.

The Law includes provisions which oblige providers of audiovisual on demand services to take measures to prevent minors from accessing services for adults: there is a general prohibition on distribution of content intended for adults in a way that would make it - in normal circumstances - possible for minors to have access to it.

The law imposes an obligation on RRTV to co-operate with self-regulatory bodies, e.g., to take into account the opinion of the self-regulatory bodies when determining the amount of administrative fines. RRTV has to report the results of its co-operation with self-regulatory bodies in an annual report submitted to the Parliamentary Chamber of Deputies.

The new legislation removes the prohibition on overlapping ownership of electronic communications networks and broadcasting licenses and of overlapping ownership of several electronic communications networks.

Part of the new regulation is also an amendment of the Law on Radio and Television Fees. These fees are no longer collected for mobile phones.

• Zákon č./2010 Sb. o audiovizuálních mediálních službách na vyžádání a o změně některých zákonů (Law Nr. č./2010 Coll. Of 13 April 2010 on the audiovisual media services on demand and amending other laws published in the Official Gazette No. 132/2010 Sb.)
<http://merlin.obs.coe.int/redirect.php?id=12438>

CS

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DE-Germany

BGH Rules on Cable Retransmission Right

In a decision of 12 November 2009, which has only recently been published, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled on the scope and conditions of the cable retransmission right enshrined in Art. 87(1)(1), case 1, and Art. 20 of the *Urheberrechtsgesetz* (Copyright Act - UrhG).

In 2003, the plaintiff, *Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen* (copyright and performance rights collecting society for media companies - VG Media), signed a contract with cable network operator *ish NRW* for compensation for cable network operators' use, via broadband cables, of the terrestrial and satellite channels of radio and television companies (*Regio-Vertrag*). Section 2 of the contract entitles the cable network operator to use the rights held by the plaintiff in cable networks, to feed in and retransmit the channels of the broadcasting companies and to transfer the rights to third parties, provided it "supplies the broadcasting companies' channels to other level 4 cable network operators and that a contract concerning the signal supply is in place or concluded between the cable network operators and the other operators involved."

The defendant, a hotelier, had concluded a cable contract with level 4 cable network operator *Tele Columbus*, under which he received channels of private broadcasters. *Tele Columbus*, for its part, took over the relevant programme signals from the operator *ish NRW* at the boundary of the defendant's property and fed them, via an internal distributor, to the individual guest rooms. There was a corresponding signal supply contract between *Tele Columbus* and *ish NRW*. Under Art. 97(1) UrhG, VG Media asked the hotelier to stop feeding the television channels, whose rights it owned, to the hotel rooms. It argued that the defendant was not entitled to act in this way under the *Regio-Vertrag* and was infringing its cable retransmission right.

Unlike the lower instance court, the BGH rejected the injunction request which had been submitted on copyright grounds. The reception of the programme signals at the property boundary and the transmission of those signals to the hotel rooms constituted retransmission under Art. 87(1)(1), case 1 UrhG because the content of the programmes was being transmitted simultaneously to a new audience (hotel guests) by independent technical means.

The broadcaster in this context was "only the party who decides which broadcast programmes are fed into the cable and transmitted to the public, rather

than the party which merely provides and operates the technical devices required for this purpose." This decision only concerned *Tele Columbus*. The defendant had not had any influence on the network operator, but had only placed the necessary reception devices in the rooms.

Tele Columbus had been entitled to carry out the disputed actions because the operator *ish NRW* had, through the signal supply contract - based on the *Regio-Vertrag* - effectively transferred the necessary rights.

• *Urteil des BGH vom 12. November 2009 (Az. I ZR 160/07, veröffentlicht am 3. Mai 2010)* (BGH ruling of 12 November 2009 (case no. I ZR 160/07, published on 3 May 2010))
<http://merlin.obs.coe.int/redirect.php?id=12467>

DE

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BGH Rules that Google Image Search Engine Does not Breach Copyright

In a ruling of 29 April 2010, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that Google's image search engine does not infringe copyright law.

Google's image search engine enables users to search for images posted online by third parties by typing in a search item. In the subsequent search result list, the images are shown in thumbnail form.

In the case at hand, the plaintiff, an artist who runs her own website containing images of her works of art, had asked the court to prevent Google from showing such images of her work in thumbnail form.

The BGH rejected her request. It recognised that the works were protected by copyright and that the plaintiff had not authorised Google either expressly or tacitly to use them. However, unlike the appeal court, which had decided that the plaintiff's copyright had been illegally infringed but rejected her request for an injunction as an abuse of process in the sense of Art. 242 of the *Bürgerliches Gesetzbuch* (Civil Code - BGB), the BGH found that no illegal breach of copyright had taken place.

The thumbnail images had made the plaintiff's work accessible to the public in the sense of Art. 19a of the *Urheberrechtsgesetz* (Copyright Act - UrhG) and had therefore intruded on her copyright. However, the plaintiff herself had not taken any suitable measures, which were technically possible, to prevent people accessing the images of her work via the image search engine. The defendant had therefore been entitled to conclude that the plaintiff did not object to her works being shown in thumbnail form. Consequently, the

defendant's intrusion on the artist's copyright had not been illegal.

• *Pressemitteilung des BGH zum Urteil vom 29. April 2010 (Az. I ZR 69/08)* (BGH press release on the ruling of 29 April 2010 (case no. I ZR 69/08))

<http://merlin.obs.coe.int/redirect.php?id=12466>

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Urgent Application Against Frequency Auction Rejected

In a decision of 8 April 2010, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) rejected an urgent application by a network operator against the auction of 2.6 GHz frequencies.

The applicant (broadband provider *Airdata*) used some of the frequencies concerned under a fixed-term licence. Since that licence had now expired, it requested an extension, which would block the auction.

The BVerwG rejected the urgent application after weighing up the various interests. As a result of its decision, the auction of frequencies (360 MHz in total) could begin, as planned, on 12 April 2010. Bids of over EUR 2.6 billion had been made by 3 May 2010.

It is likely that the four major mobile phone providers, which are also the only bidders to date, will be awarded the frequencies. The bidders' behaviour will determine the length of the process.

• *Beschluss des BVerwG vom 8. April 2010 (Az. 6 VR 2.10)* (Decision of the BVerwG, 8 April 2010 (case no. 6 VR 2.10))

<http://merlin.obs.coe.int/redirect.php?id=12469>

DE

• *Auflistung der Gebote* (List of bids)

<http://merlin.obs.coe.int/redirect.php?id=12470>

DE

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Draft Law Strengthening Freedom of the Press

On 4 April 2010, the *Bundesministerium der Justiz* (Federal Ministry of Justice - BMJ) presented a draft law strengthening the freedom of the press.

The bill aims to improve the protection of journalists and their sources in order to ensure that they can fulfil their oversight function vis-à-vis State activities.

This is to be achieved by amending Art. 353b of the *Strafgesetzbuch* (Criminal Code - StGB), which provides for imprisonment of up to five years for breaches of official secrecy and special obligations of secrecy by public officials. An additional paragraph will be added to the article, expressly excluding "aiding and abetting breaches of official secrecy". This will mean that journalists who merely publish material that has been leaked to them will not be punishable.

The need for regulation in this area arose following comments by the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) in its "Cicero ruling" of 27 February 2007 (see IRIS 2007-4:8). In this case, the magazine Cicero had cited confidential documents of the *Bundeskriminalamt* (Federal Criminal Police Office). The responsible public prosecutor's office subsequently launched an investigation into the aiding and abetting of a breach of official secrecy, during which the magazine's editorial offices were searched and documents confiscated. The magazine complained to the Constitutional Court about these measures.

The BVerfG ruled that "the mere publication of an official secret in the press by a journalist is not sufficient to justify the suspicion that the said journalist has aided and abetted a breach of official secrecy, together with the related search and confiscation of material." Specific factual evidence was required to show that the offence of aiding and abetting had been committed. Investigations into journalists' activities should not be carried out solely, or mainly, in order to discover the identity of a source.

• *Pressemitteilung des BMJ* (BMJ press release)
<http://merlin.obs.coe.int/redirect.php?id=12468>

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Land Prime Ministers Agree on Household Based Licence Fee

At their conference on 9 June 2010, the prime ministers of the Länder agreed in a position paper that the broadcasting licence fee will in future not be charged per device but per household (home) or place of business.

The main objectives of this change to a device-independent broadcasting licence fee model are to solve the problem of media convergence, create a simpler system for levying licence fees and achieve an expected a reduction in administrative costs.

It is intended to keep the licence fee at its current level of EUR 17.98, and there will no longer be a distinction between a standing charge and a charge for television reception.

The basis for charging the broadcasting licence fee is to be either a household or place of business, with only one fee to be levied in future for all the individuals living in a dwelling. The amount payable per place of business will vary according to the number of people regularly employed there and be based on a ten-step sliding scale. For example, the first step is for businesses with up to four employees and enables one-third of the licence fee to be charged, the fourth step covers the range 50 to 249 employees and requires the payment of four times the licence fee, while the tenth step applies to businesses with 20,000 employees or more and requires payment of 150 times the licence fee.

The exemptions for private dwellings will in principle remain unchanged; in the case of non-private areas, they can be dropped for establishments exempted up to now since the payment will already have been reduced following the introduction of the sliding scale.

The revenue shifts within the ARD caused by the change to the new model are to be compensated for internally by employing specific mechanisms that take account of Germany's federal structure while retaining the flat rate charge. To this end, the ARD is to submit a joint financial and structural equalisation proposal. For the current licence fee period, the ARD has found an interim solution to the question of financial and structural equalisation.

In connection with the planned levy of a household-based licence fee from 1 January 2013, advertising and sponsorship in public service broadcasting are to be treated in the same way from that date, which means there may be no sponsorship on Sundays and public holidays and after 8pm Monday to Saturday, with the exception of major sporting events.

The prime ministers believe that the position they have taken up in their paper has been confirmed by Professor Kirchhof's report on the funding of public service broadcasting published on 6 May 2010 (see IRIS 2010-6: 1/22). In that report, the author sets out under what conditions the funding of public service broadcasting by means of a household/place of business based licence fee is permissible under German constitutional law.

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Kirchhof Report on Household Tax Published

In his report on the financing of public service broadcasting, published on 6 May 2010, Prof. Dr Kirchhof, former Federal Constitutional Judge, recommends

that the licence fee obligation should no longer be dependent on whether the fee payer owns a broadcasting reception device, but should apply to each household.

ARD, ZDF and Deutschlandradio had commissioned Kirchhof to write the report. He believes that linking the licence fee to reception devices is inappropriate, raising doubts over the legality of the current licence system. One reason for this is media convergence. Whereas in the early days of television a single device tended to be used in each household or business premises, these days increasing numbers of people carry a broadcasting and television device around with them in the form of a mobile telephone or PC. The current rules no longer reflect reality, are inappropriate and are therefore unfair.

The current monthly licence fee comprises a basic charge of EUR 5.76 and an additional TV fee of EUR 12.22 payable by owners of devices capable of receiving television programmes, except where legal exemptions apply.

The household tax proposed by Kirchhof would apply to each private household, regardless of whether or not the householder owns a reception device. The distinction between the basic and overall fee would be abolished, and replaced by a single charge for all households. Businesses would pay a business premises tax, depending on the number of employees. Low-income households would either remain exempt or would receive a State allowance to the value of the licence fee, payable with their housing benefit.

The cost of the broadcasting tax would continue to depend on the broadcasters' needs. The current system, under which the financial needs of public service broadcasters are established by the KEF, would be maintained.

The *Rundfunkkommission* (Broadcasting Commission) of the *Länder* hopes to agree how the licence fee will be collected in future at the Conference of Minister-Presidents on 9 June 2010. An unofficially published draft *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on broadcasting fees), dated 31 March 2010, contains most of the recommendations of the Kirchhof report.

• *Gutachten über die Finanzierung des öffentlich-rechtlichen Rundfunks vom April 2010* (Report on the funding of public service broadcasting, April 2010)

<http://merlin.obs.coe.int/redirect.php?id=12472>

DE

• *Staatsvertragsentwurf* (Draft Inter-State Agreement)

<http://merlin.obs.coe.int/redirect.php?id=12473>

DE

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ES-Spain

Hidden Camera Case Decision by the Supreme Court

The rights to honour, privacy and self-image are established in the Spanish Constitution (Arts. 18 para. 1, 20 para. 4). They are considered to be fundamental rights and a limit to freedom of speech or expression, which is also protected as a fundamental right according to the Spanish Constitution. Honour, privacy and image rights are regulated in detail by the Spanish Act on Civil Protection of Right to Honour, Privacy and Self-Image.

Notwithstanding the aforementioned, these rights cannot be considered to be absolutely unlimited, as was stated by the Supreme Court in a recent decision on this matter.

The facts underlying this decision were the following: in 2004, a lawsuit was filed by a Spanish football players' representative against three different Spanish Television Broadcasters, because they had broadcast a report filmed with a hidden camera and entitled "The Business of Football", in which the reporters made this person believe that they were interested in supposed negotiations for the signing of a player. These images and conversations were finally broadcast on different information media.

The lawsuit was based on the infringement of the rights to honour, privacy and image and the plaintiff claimed the amount of EUR 300,000 in damages. The Court of First Instance of Barcelona decided that there was an effective infringement of the three abovementioned rights, but it sentenced the defendants to pay jointly and severally the much lower amount of EUR 6,000 in damages.

The decision was appealed by both parties before the Provincial Court of Barcelona. The judge stated that there was an infringement of the rights to honour and self-image and sentenced the defendants to pay jointly and severally the amount of EUR 75,000 in damages.

Finally, the case arrived before to the Spanish Supreme Court, which analysed separately the two rights allegedly infringed (the right of honour and the right of image) in relation to the rights of freedom of speech and information, which were the rights that the defendants called upon in their defence, as they considered the programme to be a report of investigative journalism.

Regarding the right to honour, the Supreme Court stated that there was no infringement, as the information published was true, it was not offensive and

it was socially relevant. As a result, this plea was rejected.

And in relation to the image right, the Supreme Court stated that there was indeed an infringement of such a right, both at the time of the recording and at the time of the broadcasting of the programme, as the plaintiff was not allowed to decide, consent to or impede the reproduction of his physical image; the Supreme Court considered also that the reproduction of the physical image of the plaintiff could have been avoided, as the objective of the programme was the condemnation of abusive practices in contracting football players. Also relevant was the fact that nowadays it is very easy to use digital techniques in order to blur someone's face or voice.

In addition to the aforementioned, the Supreme Court referred to a previous decision it had issued on 6 July 2009, which stated that the self-image of the plaintiff was not an essential element for information purposes, as it did not contribute at all to the report, which could have been broadcast perfectly well without it. And it cannot be alleged that the image was information in itself, because its publication did not add any informative value.

Finally, the Supreme Court sentenced the defendants to pay jointly and severally the amount of EUR 3,000 to the plaintiff.

To conclude, it is worth highlighting that:

a) There is a really fine line between the two fundamental rights (right to honour, privacy and self-image and the right to freedom of speech and information) and problems start at the moment of determining which of these two fundamental rights must prevail over the other if there is a conflict between them, as there are no specific rules to use as a guide in solving the problem and judges are obliged to analyse on a case by case basis;

b) Even when an infringement is found by Spanish Courts, the penalties are far from significant in an economic sense, as normally penalties for damages are very poor. As a result it will usually be better to find an out-of-court solution, as court costs when not compensated for by damages can be very high.

• Sentencia del Tribunal Supremo número 201/2010 de 25 de Marzo, de la Sala de lo Civil, Sección 1ª (Supreme Court Decision number 201/2010 of 25 March, Civil Division, Section 1)

ES

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Analogue Terrestrial TV Switch-Off Complete

Digital switchover was achieved as planned in Spain in April 2010. The migration, which took place in three

phases beginning in 2008, was progressively implemented throughout the 73 technical areas into which the country was "divided" by the National Technical Plan on DTTV (see IRIS 2008-9: 9/11). On 30 March, 84 of the 90 technical projects of the implementation plan were definitively switched off, while the whole process was completed before the official deadline of 3 April.

As of March 2010 and according to Impulsa TDT - the association created by broadcasters to promote the adoption of DTT - the following were the main statistics of the service: national public service channels reached 98.36% of the population, whereas commercial services accounted for 98.79%; penetration stood at 89.3% of TV households and, although there were still analogue receivers to be converted, it was estimated that the total figure for DTT receivers stood at over 31 million.

In an official presentation on 30 March 2010, the Ministry of Industry, Tourism and Trade welcomed DTT. Minister Miguel Sebastián outlined the positive outcome of the coordination between stakeholders, as well as the fact that Spain switched off two years ahead of the 2012 deadline suggested by the European Union. The migration process is said to have created 40,000 jobs, boosted the activity of more than 10,000 companies and mobilised approximately EUR 12,000 million. The Ministry distributed free of charge more than 130,000 set-top boxes available to vulnerable groups.

• Monthly Report Extract by Impulsa TDT. April, 2010
<http://merlin.obs.coe.int/redirect.php?id=12445>

EN

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Royal Decree Regulates Future DTTV Allocation

On 26 March 2010, in line with Royal Decree 944/2005 and international radio communication regulations (ITU-R WRC 2007), the Spanish Government approved Royal Decree 365/2010. The Decree organises the allocation of digital terrestrial TV (DTTV) multiplexes after the switch-off of analogue terrestrial television. Two phases have been established in order to free the frequency band 790-862 MHz from DTTV services by 1 January 2015.

According to Royal Decree 944/2005, each national commercial broadcaster will be allocated a multiplex after switch-off. The public service corporation, CRTVE, will be assigned two multiplexes (see IRIS 2005-9: 9/15). Since analogue transmissions have ceased as planned (see IRIS 2010-6: 1/24), such capacity will be transitory, allocated for six months

within the 470-862 MHz band, currently reserved for broadcasting (channels 21 to 69).

Nevertheless, this first phase will have to be replaced before January 2015 by Phase 2, which will consist of allocating television services to band 470-790 MHz (channels 21 to 60), freeing up sub-band 790-862 MHz (channels 61 to 69).

The Decree emphasises the fact that frequency planning will pursue spectrum saving and efficiency and will occasion as little disruption for consumers as possible. It is expected that the frequencies to be released, best known as the digital dividend, will be allocated for the provision of mobile broadband services.

• Real Decreto 365/2010, de 26 de marzo, por el que se regula la asignación de los múltiples de la Televisión Digital Terrestre tras el cese de las emisiones de televisión terrestre con tecnología analógica. *BOE nº 81, 3 de abril de 2010, pp. 30750-30764* (Royal Decree 365/2010 on the allocation of digital terrestrial television multiplexes after analogue switch-off - *BOE nº 81, 3 April 2010, pp. 30750-30764*)
<http://merlin.obs.coe.int/redirect.php?id=12447>

ES

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FI-Finland

Implementing the AVMSD Resulted in Amending the Finnish Copyright Act

The adoption of the AVMS Directive 2007/65/EC (codified version 2010/13/EU) in Finland brought about some changes to the Finnish Copyright Act (404/1961). These changes came into force on 1 May 2010. They relate to amendments of sections 25b and 48 of the Copyright Act due to Article 3k of the AVMSD (2010/13/EU Art. 15), which provides for a 'short reporting right': Member states have an obligation to ensure that any broadcaster established in the EU has access to events of high interest to the public which are transmitted on an exclusive basis. This access is to be ensured for the purpose of transmitting short news reports and can be guaranteed by allowing certain uses of a broadcaster's signal or by creating an equivalent system.

In Finland the short reporting right was established by amending Section 48 of the Copyright Act, which provides for the rights of broadcasting organisations (or the protection of broadcasting signals). The right is provided without prejudice to the rights of broadcasters in a new Paragraph 5. The Paragraph defines the scope and conditions of short reporting in accordance with the specific requirements of Article 3k and within the discretion left to Member States. Access to events of high interest to the public is ensured on a fair, reasonable and non-discriminatory basis: Other

broadcasters may freely choose short extracts from the transmitting broadcaster's signal. However, the extracts are to be used solely for general news programmes, including, for example, such programmes as newscasts on sports channels. The extracts may be used in on-demand services only if the same programme is offered on a deferred basis by the same service provider. The maximum length of the extracts is 90 seconds. Identification of the source is required, whereas compensation is not. The short extracts can be used only after the event and they are not to be used after their newsworthiness is lost or in order to develop new business models.

Furthermore, a reference to section 48(5) was added in section 25b of the Finnish Copyright Act. In the latter it is stated that in presenting a current event in, for example, a TV transmission, a work audible or visible as part of the event may be included in the transmission to the extent required for informational purposes. According to a new second paragraph, works included in television transmissions may be incorporated in short extracts. In addition, section 25b is referred to in several provisions on related rights (i.e., sections 45, 46, 46a, 47, 49, and 49a of the Copyright Act).

• Hallituksen esitys Eduskunnalle laeiksi televisio- ja radiotoiminnasta annetun lain muuttamisesta ja väliaikaisesta muuttamisesta sekä tekijänoikeuslain 25 b ja 48 §:n muuttamisesta (HE 87/2009 vp) (Government bill on amendments and temporary amendments to the Finnish Act on Television and Radio Operations as well as amendments to sections 25 b and 48 of the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=12486>

FI

• Suomen säädöskokoelma 50/2010 (N:o 306 ja 307) (Statute Book of Finland 50/2010 (no. 306 and 307))

<http://merlin.obs.coe.int/redirect.php?id=12487>

FI

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FR-France

Effect of the Sale of Advertising Space on the Qualification of Video Sharing Sites

In two decisions handed down on 9 and 14 April 2010, the Paris Court of Appeal has confirmed the qualification of Google Vidéo and Dailymotion as hosts for sites storing audiovisual content in cases brought by the rightsholders of a film ("Le Monde selon Bush") and of sketches (by the comedians Omar and Fred) who complained that their works had been put on line without their authorisation. These decisions have been awaited with interest, since they come after the Tiscali decision handed down by the Court of Cassation

on 14 January 2010 (see IRIS 2010-2: 1/16), which attracted much comment. The Court had found that the company at issue could not claim the benefit of the “light” scheme of liability for providers of technical services provided for in the Act of 21 June 2004, and should therefore be prosecuted as a content editor under common law, on the grounds that it proposed setting up advertising space for advertisers directly on the personal pages it offered, in return for payment. In the judgment in the case of *Omar and Fred v. Dailymotion*, the comedians argued that the platform was wrong in claiming the status of a provider of technical services, because it made commercial use of the content by selling advertising space, the yield of which was directly correlated to the site’s audience figures. However, the Court found a number of arguments to support its view that “the operation of the site by the commercialisation of advertising space, as long as it did not result in the service being able to take any action in respect of the content put on line, did not justify qualification as the editor of the service at issue”. In its decision, the Court noted more specifically that the legislation on confidence in the digital economy made specific provision that the hosting service could be offered “even if no charge was made”, in which case it was necessarily financed by income from advertising. It was not proven in the case at issue that there was any relationship between the method of remuneration by advertising and determination of the content put on line, particularly as Dailymotion is not able to target any advertising in connection with the content put on line in such a way as to gain advantage or to carry out a selection of content that would be guided by commercial imperatives. Similarly, the judgment concerning Google Vidéo did not note any correlation between the funding of the site by advertising and the putting on line of content operated by Internet users, over which neither the advertisers nor the company Google had any influence. Having confirmed that the sites were hosts, the Court of Appeal went on to examine whether, in that capacity, they had fulfilled their obligation to withdraw content notified by rightsholders with the speed required by law. This was not the case in regard to Google Vidéo, as it had taken more than two weeks to do so. The company’s liability as a host was therefore invoked; and it was ordered to pay EUR 265 ,000 in monetary prejudice caused to the rightsholders and to the professional associations of producers involved in the case. As proof of failure to comply with the obligation of prompt withdrawal of illegal content once notified was also brought in the Dailymotion case, it was ordered to pay EUR 50 ,000 in damages in respect of the moral and pecuniary prejudice suffered by the rightsholders. Thus with these two decisions the Paris Court of Appeal confirms the position already adopted in previous cases (in respect of “Joyeux Noël” on 6 May 2009 and “Lafesse v. Dailymotion” on 16 September 2009).

• *Cour d’appel de Paris (pôle 5, chambre 2), 9 avril 2010, Flach Film et Editions Montparnasse c. Goggle* (Paris Court of Appeal (section 5, chamber 2), 9 April 2010, Flach Film and Editions Montparnasse v. Google)

FR

• *Cour d’appel de Paris (pôle 5, chambre 1), 14 avril 2010, Omar Sy et Fred Testot c. Dailymotion* (Paris Court of Appeal (section 5, chamber 1), 14 April 2010, Omar Sy and Fred Testot v. Dailymotion)

FR

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Decree Laying Down the Audiovisual and Cinematographic Contribution of Cable and Satellite Channels

The result of an agreement reached between producers, authors and ACCES (*Association des Chaînes Conventionnées Editrices de Services* - association of channels under convention that edit services) on 23 July 2009, and signed in the presence of Frédéric Mitterrand, Minister of Culture and Communication, the Decree laying down the framework of regulations applicable to the production obligations of cable, satellite and ADSL channels was gazetted on 29 April 2010. The text imposes a minimum creative contribution from the channels, but leaves them choice in distributing their investments among the various programme genres. It guarantees an 8.5% investment in heritage production. Special levels of obligations may be laid down to take account of the nature of the programming of certain channels. The text introduces a minimum contribution of the channels to heritage production, while offering them greater flexibility in splitting their investments among the various programme genres. It is also important to break down the boundary between audiovisual works other than stock programmes and flow programmes, which are included in the arrangements for the first time. It also extends the protection of independent production to every area of production.

• *Décret n°2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel* (Decree No. 2010-416 of 27 April 2010 on the cinematographic and audiovisual contribution of editors of television services and editors of radio services distributed by networks not using frequencies assigned by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA))

<http://merlin.obs.coe.int/redirect.php?id=12488>

FR

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France and South Africa Sign Cinematographic Co-production Agreement

On 16 May 2010, Frédéric Mitterrand, Minister of Culture and Communication, met his South African counterpart Lulama Xingwana in Cannes, and the two Min-

isters signed the first ever agreement on cinematographic co-production that will offer films co-produced by France and the Republic of South Africa the possibility of access to the support schemes in operation in both countries. This means that such films will be eligible for the European quotas for broadcasting in television channels, thereby increasing the channels' interest in the films and possibility of funding them. A new cooperation programme in the field of the arts and culture was also signed, covering the period 2010-2012. The aim of this is to allow a reinforcement of exchanges and skill in the fields of the visual arts, the plastic arts, heritage, the cultural industries, and digitisation. The agreements bear witness to the desire of both Ministers, who had already met last January, to move forward into a new stage in the development of cultural relations between France and the Republic of South Africa. These agreements are all the more important in that South Africa wants to become more involved in African cinema, supported by France.

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CSA Clarifies Regulation of On-demand Audiovisual Media Services

On 20 April 2010 the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) published the summary of the consultation it had embarked on in June 2009 concerning the regulation of on-demand audiovisual media services. The text lays down general guidelines, with details of interactive applications and the associated data for television and radio services, the procedures for authorising the new services, and interactive advertising. One of the topics concerns catch-up TV and the way it is made available to the public. To promote its development, the CSA has decided to authorise the showing of programmes before they are shown on TV. It also feels that the economic aspects of the offer of catch-up TV (whether a charge is made or not) could be different from those of the channel to which it is attached. The other audiovisual communication services, such as video on demand via downloading or the "electronic programme guide" (EPG) - an interactive menu accessible on the television screen permitting consultation of the list of programmes being broadcast at any time on the various channels, could not be authorised on DTV until after a procedure of calling for applicants, on a radio-electric resource identified by the CSA. The CSA recommends that the economic stakeholders draft a white paper on the EPG by the end of the year, to constitute the first stage in launching a call for applicants.

The summary presented also broaches the subject of the associated data intended to supplement or enrich

DTV television services. This data could be broadcast on the radio-electric resource attributed to the channel, but the conventions of these would have to be amended. The CSA is in favour of carrying out prior experiments in order to identify requirements and use in terms of resources. It also notes that since the on-demand audiovisual media services raise specific issues concerning the protection of children and programme ethics, it will shortly adopt a deliberation on the subject. On interactive advertising, the CSA believes it is necessary to maintain the separation between advertising and editorial content. Lastly, it would like to see legislation providing for accessibility to these services for people with impaired sight or hearing, and for its competence in settling disputes to be extended to on-demand audiovisual media services; the opinion of the independent agency in charge of regulating telecommunications in France (ARCEP) may well be requested.

• *Synthèse de la consultation relative au déploiement des services relevant de l'article 30-5 de la loi du 30 septembre 1986, aux données associées aux services de la TNT et de la RNT ainsi qu'à la régulation des SMAD* (Summary of consultation on deployment of services covered by Article 30-5 of the Act of 30 September 1986 to data associated with digital radio and television services, and the regulation of on-demand audiovisual media services)
<http://merlin.obs.coe.int/redirect.php?id=12464>

FR

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GB-United Kingdom

Court Rejects Scottish National Party Challenge to Election Debate Broadcast

Before the UK general election of 6 May 2010, a series of three television debates was held featuring the leaders of the three major UK parties. The Scottish National Party (SNP) was not included and its challenge to the BBC's broadcast was rejected by a Scottish court.

The BBC is required by its Charter and Agreement to do all it can to ensure that controversial subjects are treated with due accuracy and impartiality; this is reinforced by its editorial guidelines and by special rules applying during election periods; for example, requiring that "due weight is given to hearing the views and examining the policies of all parties" and that parties are covered proportionately over a period, normally a week. Coverage is to reflect past and/or current electoral support for political parties.

In December 2009 it was agreed that three debates involving the leaders of the three major UK parties should be broadcast successively by ITV, Sky and the BBC before the election. The SNP, which has the

largest number of seats in the Scottish Parliament and forms the minority Scottish Government, considered that broadcasting such a debate in Scotland would not satisfy the requirements of due accuracy and impartiality. The BBC rejected this view, noting that the SNP held only seven seats in the UK Parliament and were standing candidates in only one tenth of UK constituencies. It was considered by the SNP that the first two debates had a major impact, particularly for the coverage and fortunes of the third UK party, the Liberal Democrats, and the party sought an order from a Scottish court to prevent the final debate from going ahead, unless it featured an SNP representative on equal terms with the three UK leaders. Technical difficulties meant that it would not be possible to exclude Scotland from coverage of the debate, so the debate would not be able to go ahead in England and Wales if the SNP obtained the order.

The Court of Session in Edinburgh rejected the application on the day before the debate was due to be broadcast. It considered that the SNP's argument was not likely to succeed at a full trial in the future, as the BBC had planned coverage of the SNP campaign which was of substance and not lacking in impartiality. Impartiality was not seen as a matter of giving every party equal coverage or examining coverage at one point in time during the election period. The Court also considered that the SNP had delayed unduly in seeking the order and that the order sought lacked precision as to what was necessary to comply with it.

• Petition of the Scottish National Party and Others [2010] CSOH 56
<http://merlin.obs.coe.int/redirect.php?id=12456> EN

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Another Copyright Infringement Action Decision

Previous issues of IRIS have reported on several copyright infringement cases decided in the English Courts, (see, IRIS 2010-3: 1/26, IRIS 2010-3: 1/27, IRIS 2010-4: 1/26).

Another case has been decided recently in an action brought by a number of film studios, Twentieth Century Fox, Universal, Warner Bros., Paramount, Disney, Columbia Pictures, against Newzbin Ltd., a Usenet indexer. That company was found liable for copyright infringement. Company accounts for 2009 indicate that Newzbin Ltd was a sizeable operation, with around 700,000 members, a turnover in excess of GBP 1 million, a profit of more than GBP 360,000 and dividends on ordinary shares of GBP 415,000.

The judge in the High Court hearing, Mr Justice Kitchin, said that Newzbin "encouraged its editors (members)

to report and has assisted its users to gain access" to copies of infringing films. The Judge took into consideration Newzbin's structure - its categorisation of content and the fact that its "editors" were encouraged to report films. Accordingly, he had no doubt that Newzbin knew that "the vast majority of films in the Movies category of Newzbin are commercial and so very likely to be protected by copyright, and that members of Newzbin who use its NZB facility to download those materials, including the claimants' films, are infringing that copyright."

However, Mr Justice Kitchin said that the remedy sought by the film studios (an injunction preventing Newzbin from including any infringing material in their index) was too broad and that he would only be prepared to issue a narrower injunction, which would prevent Newzbin infringing the copyrights of the films to which the plaintiffs own the copyright.

• Twentieth Century Fox Film Corporation & Anor v. Newzbin Ltd [2010] EWHC 608 (Ch) (29 March 2010)
<http://merlin.obs.coe.int/redirect.php?id=12453> EN

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The Digital Economy Bill Becomes Law

The Digital Economy Bill became law, passed in the final days of the last UK Parliament. The Bill was preceded by a White Paper, entitled 'Digital Britain', published by the Government in June 2009.

The law covers a wide range of matters. The Act makes provisions about: the functions of the Office of Communications; online infringement of copyright and penalties for infringement of copyright and performers' rights; internet domain registries; the functions of the Channel Four Television Corporation; the regulation of television and radio services; the regulation of the use of the electromagnetic spectrum; the Video Recordings Act 1984; and the public lending right in relation to electronic publications.

• Digital Economy Act 2010
<http://merlin.obs.coe.int/redirect.php?id=12451> EN

• Digital Britain, final report
<http://merlin.obs.coe.int/redirect.php?id=12452> EN

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IE-Ireland

Three Strike Copyright Rule Approved

The Irish High Court on 16 April 2010 approved a settlement agreed in earlier litigation (January 2009) between a number of record companies (EMI, Sony, Universal and Warner) and Eircom, an Internet service provider which has about 40% of the market share. The settlement provided for a three strike approach to dealing with copyright infringement. On first detection a notice from Eircom would inform the subscribers that they had been detected infringing copyright; on a second infringement, they would receive a warning that unless they desisted they would be disconnected from the service; and finally, on a third infringement, the service would be discontinued, apart from telephone or television internet access. As part of the settlement the parties agreed to negotiate a protocol governing their respective sides of the bargain. The main points of the protocol were: to provide an education and awareness campaign; to phase in implementation of the settlement with a three-month pilot programme; and to include exceptions to the ultimate sanction.

One of the parties consulted the Data Protection Commissioner about the terms of the settlement and he raised three issues under the Data Protection Acts 1988-2003. The first question was whether data comprising IP addresses constituted "personal data" for the purposes of the Data Protection Acts. The judge decided that the data involved did not constitute "personal data" under the Acts as the settlement did not involve the identification of any infringer and its entire purpose was to uphold the law.

The second question concerned the final step in the settlement, namely the termination of the subscribers' access to the service, and whether it prejudiced their fundamental rights and freedoms. This issue involved consideration both of the Acts and the Irish Constitution, as copyright is recognised as a fundamental right under the Constitution. The judge found that there was nothing disproportionate in the settlement and that there were adequate procedural safeguards, as well as conformity with Article 1(b) of Directive 2009/140/EC, although the Directive has not yet been transposed into Irish law. The final step of the settlement, therefore, did not prejudice the fundamental rights and freedoms of subscribers.

The third question posed by the Data Protection Commissioner consisted of two parts: whether the graduated response process set out in the settlement could be implemented, firstly because it would involve the processing of sensitive personal data for the purposes of the Act, in that the data related to the commission of a criminal offence; and secondly, because ac-

cess to the service would be cut off on the basis that the subscriber had committed an offence but without any investigation or determination of the offence by a court following a fair and impartial hearing. The judge found, however, that there was nothing in the settlement or protocol to suggest that anyone was being accused of a criminal offence and there was no issue beyond civil copyright infringement. The graduated response process was therefore lawful and could be implemented.

Given the competitive disadvantage of the settlement to Eircom, the record companies agreed to take similar court proceedings against other internet service providers. The proceedings are scheduled for hearing in the Commercial Court on 10 June 2010. It may also be noted that access to the Pirate Bay site through Eircom had already been closed down by court order in 2009.

• EMI & others v. Eircom [2010] IEHC 108
<http://merlin.obs.coe.int/redirect.php?id=12454>

EN

• Closure of Pirate Bay case: EMI v. Eircom [2009] IEHC 411, 24 July 2009

<http://merlin.obs.coe.int/redirect.php?id=12455>

EN

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IT-Italy

The Italian Google Verdict

The Court of Milan has made public the decision in the criminal trial against four Google executives, charged of defamation and illegal personal data handling in relation to the publication on the video-sharing platform Google Video of a video containing an act of bullying against a person suffering from Down's syndrome. The Court acquitted all the defendants on the charge of defamation, but found two managers and a former executive of Google Inc. liable for the illegal personal data handling.

The case concerned a teenage boy with autism who was bullied by some classmates at a school in Turin in 2006. The incident was filmed by the perpetrators and uploaded to Google Video, where it was seen by thousands of viewers over a period of nearly two months. The video was removed after Vivi Down, an Italian association representing people with Down's syndrome whose name was mentioned in the video, complained to the police. Google removed the video once it was notified.

The prosecution argued that the accused had failed to handle correctly the processing of the personal and sensitive data of the boy affected by Down's syndrome by allowing the upload of the video file and

for failing to remove it subsequently from the site video.google.it, in order to pursue profit. Google Italy, in fact, a subsidiary of Google Inc., enables uploading and using home videos without complying with the rules relating to the concrete protection of personal data. This behavior, where for-profit, according to the prosecution, results in an intentional disregard of company policies relating to issues of personal data.

Prosecutors said that recording data entered into the Google Video system necessarily involves their processing by the company. This would suggest that Google Italy should be understood as being not a mere intermediary subject (host provider), but a content provider that manages material and is responsible for this activity.

The defendants deny these allegations by noting that Google Video is a hosting provider and therefore not responsible for uploaded content: there is no obligation to control the information that the site transmits and stores. The obligation to check the data contained in the video is placed on those who uploaded it. The provider is required to indicate in the terms of contract the requirements imposed on the user, including those relating to privacy law, although compliance with these is the sole responsibility of the user. Consequently, Google argued that it is the person who uploaded the video without obtaining the consent of the boy who was filmed who is solely responsible for the unlawful use of data.

Moreover, Google defended itself by alleging a complete absence of profit: the company does not draw profit from the Google Video service, which is free.

The issue that the Italian court had to assess was complex: first the Italian judge needed to check if there was a violation of privacy law; then the court had to determine whether such violation is attributable to Google and if there is a profit purpose.

The court answered the first question in the affirmative: the video constitutes personal and sensitive data, within the meaning of Article 167 of the Italian Privacy Code (Italian Privacy Law No. 196 of 2003) and in this case there was no consent to the disclosure of the video in question.

The court stated that there is no doubt that the obligation to ask for the boy's consent was incumbent on the person who uploaded the video onto the Google Video website. However, the judge also considered whether this requirement was attributable to the person who has managed and distributed the video via the Internet as well. In other words, the court questioned: is there an obligation for the owner or operator of a website to check the data previously entered onto the site or else to correctly inform users about the site's privacy policy?

According to the court, the ISP that provides users with a simple interconnection service and properly informs them of their legal obligations relating to privacy cannot be considered punishable if it does not

monitor users' prior compliance with these obligations. The court relied on the principle of *ad impossibilia nemo tenetur*; it would be impossible to expect an ISP to verify that all the thousands of videos uploaded to the website comply with the privacy rights of all the individuals represented. It is incumbent on the ISP, however, to provide users with all the necessary information for them to respect privacy rules. Accordingly, there is no requirement for prior review of data entered into the system, but for correct and timely provision of information to third parties who deliver the information.

Therefore, according to the Italian judge, on the one hand there is no requirement for ISPs to control information, on the other, however, the Internet is not an "unlimited prairie where everything is permitted and nothing can be prohibited." In fact, there are laws that impose conduct obligations which, if not met, lead to criminal liability.

From this perspective, therefore, Google Inc. was held responsible because, during user account activation, files loading the information about privacy obligation were either lacking or hidden in the general conditions of contract and therefore likely to be ineffective.

It is not sufficient to hide the information on the obligations arising from compliance with privacy laws within the "general conditions of service." The content of these seems incomprehensible. The only reference to obligations relating to privacy was contained in section 9 of Google's general conditions of contract. This asks the user to ensure that the content being uploaded does not violate the rights or obligations of any person, including those related to privacy. The court, however, considered that these warnings are too generic and abstract, as well as hidden and anonymous. This behaviour, said the judge, shows little willingness to communicate and would therefore warrant a negative assessment of Google's conduct.

According to the Italian court, Google, moreover, through the Google Video service, clearly pursues the purpose of profit, which is related to advertising. Google Italy has, in fact, the ability of connecting advertising to Google Video.

Ultimately, Google, according to the court, knowingly accepted the risk of introducing and disseminating sensitive data that should have been given special protection. The acceptance of this risk is linked to the pursuit of economic interest.

• Tribunale di Milano, sezione penale, 2 aprile 2010 numero 1972 (Court of Milan, Criminal Section, 2 April 2010, number 1972)
<http://merlin.obs.coe.int/redirect.php?id=12462>

KG-Kyrgyzstan

PBC Statute Adopted

On 30 April 2010 the Provisional Government of the Kyrgyz Republic adopted a Decree on establishing the Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic, which entered into force immediately. The Provisional Government by its own decree No. 1 of 7 April 2010 took upon itself the power of the parliament and the president of the republic, thus its decrees can be considered as national statute law.

The Decree of 30 April ordered the transformation of the State-run National TV and Radio Corporation into the "Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic" (PBC). The decree stipulates that the first Supervisory Board of 15 members be appointed for a period of 3 years by the Provisional Government from among the candidates presented by NGOs. The Director-General of the PBC is to be appointed by the Supervisory Board for 5 years.

The Decree approved the Statute of the Public TV and Radio Broadcasting Corporation which in itself presents a detailed piece of legislation. The Statute is an almost verbatim replica of the Statute of the Kyrgyz Republic "On the National Radio and Television Broadcasting Corporation", which was adopted by the Zhogorku Kenesh (parliament) on 8 June 2006 and signed into law on 2 April 2007 (see IRIS 2007-6: 14/21). This Statute was then annulled by the introduction on 2 June 2008 of the Statute "On television and radio broadcasting" adopted by the parliament on 24 April 2008 (see IRIS 2008-9: 16/25). The difference lies only in the new name of the Corporation.

The new Act determines the main provisions concerning the legal status of the Corporation, the financial aspects of its activity, programming, and questions of advertising and sponsorship. The PBC has the legal status of a State agency: its rights and freedoms are guaranteed by the State. At the same time the Government may not interfere in the operation of the PBC.

Among the goals of the Corporation are the maintenance of national interests, national culture and traditions, the formation of a common information and broadcasting space, the creation of a positive world image of the Kyrgyz Republic as a democratic country, as well as the production of high quality programmes on socially important issues. At the same time the Statute demands that news and current affairs programmes be produced objectively in the spirit of the best journalistic culture. It stipulates protection of journalistic sources and the need for the code of practice with some of its provisions already included in the text of the Statute.

The management and control of the Corporation shall be the responsibility of the Supervisory Board and the Director-General. The Supervisory Board is the supreme body of the PBC; it consists of 15 members elected for five years by the parliament, five from among the ten candidates proposed by the president, five from among the ten candidates proposed by the parliament itself, and five from the ten candidates from civil society, that is "academic institutions, public associations, the mass media, etc." (Art. 13). As here the Statute contravenes the Decree, the Decree shall be in force but only in relation to the first call of the Supervisory Board.

The Director-General is the executive manager of the PBC and is elected by the Supervisory Board in an open contest.

The activity of the Corporation is based on the principles of transparency. Its annual report shall be delivered to the president and parliament and be published in the press.

According to Article 20 of the Statute the main source of financing of the Corporation comes from the national budget (this budgetary finance shall be protected from appropriation for other purposes), as well as income from its commercial activity, the sale of intellectual property, advertising and sponsorship.

Article 9 contains provisions on advertising. It imposes limits of ten per cent of both the daily and hourly broadcasting time used for advertising. Advertising of tobacco and alcohol products shall be forbidden. Many provisions of the rules of advertising and sponsorship, as well as the right of reply are not dissimilar to those in the European Convention on Trans-frontier Television.

Article 7 allows the Corporation to offer for tender up to 30 per cent of the broadcasting time for independent producers. Only 40 per cent of all programmes broadcast can be supplied by foreign producers. Moreover a minimum of 50 per cent of all programmes shall be in Kyrgyz.

• Декрет Временного Правительства Кыргызской Республики о создании Общественного телерадиовещания в Кыргызской Республике (Decree on establishing the Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic of 30 April 2010) RU

• Положение Кыргызской Республики "Об Общественной телерадиовещательной корпорации Кыргызской Республики" (Statute of the Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic) RU

• Legal review of the Decree on Establishment of Public Television and Radio Broadcasting in the Kyrgyz Republic
<http://merlin.obs.coe.int/redirect.php?id=12429> EN

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Amendment to the Press Law

The Standing Committee of the Council of Ministers is currently considering the draft of 27 January 2010 amending the Act of 26 January 1984 on Press Law (with subsequent amendments). It has already passed public and intergovernmental consultations. For a long time the need to establish a new Press Law regime has been pointed out. The existing provisions are out of date in many respects, inter alia they refer to institutions that no longer exist.

The proposed changes are quite broad. The Draft includes inter alia changes in the definitions of “press”, “journalist”, “redaction”, amendments referring to the authorisation of statements quoted by journalists, amendments on journalists’ professional secrecy, new provisions on the registration of a journal or periodical and amended provisions on the right to correction.

The Draft defines “press” as periodical publications which do not form a closed and homogeneous whole, appearing at least once a year, having a regular title or name, current number and date and, in particular: dailies and periodicals, agency news, bulletins, radio and TV programme services. “Press” also includes each and any mass medium that exists or may be created in the course of technological progress, provided that they disseminate periodical information through printing, vision, sound transmission or other technique, including forms of electronic documents.

The new definition of “press” is not very different from the existing one; it rather aims at clarification of doubts that might arise under the existing definition (e.g., clarification that electronic editions of dailies or periodicals are covered as well). It was further clarified that materials not being the subject of redactional editing such as e.g., blogs, electronic mail, websites used for the exchange of user-generated content, private websites and internet forums are not covered by the notion “press”.

The proposed definition of “journalist” formally bonds its activity with the requirement of working for and on behalf of an editor and being employed by the editor either on the basis of Labour Law or under a Civil Law contract. Currently a journalist should either be employed by the editor or should work for and on behalf of it. Hence, the proposal defines “journalist” more narrowly. That has a limiting impact on the scope of persons who can enjoy journalists’ rights.

The Draft provides a new proposal of organising press activity. Today publishing of a daily or periodical requires registration in the District Court.

The judiciary explained that this obligation also concerns daily or periodical on-line productions (provided they fulfil the general requirements of the definition “daily”/“periodical”). The Draft proposes to keep the general registration obligation for printed dailies and periodicals and - for those published in an electronic form - it introduces a voluntary registration procedure. The justification in the Draft explains that in consequence of the voluntary registration of an electronic daily or periodical, the rules of the Press Law would apply to these. It would depend on the editor to decide whether the electronic daily or periodical is to register and therefore enjoy the benefits provided by the Press Law (e.g., right to journalists’ secrecy), or not (and in consequence organise its activity outside the Press Law regime).

Still, it can be noted that such interpretation may be challenged as the registration procedure of an electronic daily or periodical should not influence the general rights and obligations of journalists and the press as such. Fulfilling the registration procedure is not a prerequisite for qualification as press and being covered by the Press Law. As presented, the concept of voluntary registration of an electronic daily/periodical and its actual meaning raised some doubts. The Supreme Court in its decision of 2007 (IV KK 174/07) separated the understanding of “press” from the registration procedure, stating that the purpose of registration of dailies and periodicals is the protection of consumers - ensuring that the press title they receive is in fact a title that they want to acquire or to get to know and, secondly, the protection against unfair competition (protection of the existing press title).

The Draft specifies that the provisions on registration of press do not concern radio and television broadcasting, as these are subject to different legal provisions (Broadcasting Act). The current provisions of the Press Law are not precise in this respect, although in practice, being the subject of clarification by academic commentaries, they do not raise doubts. The other Press Law provisions apply to broadcasting organisations’ activities unless otherwise stated in the Broadcasting Act.

The Draft proposes to abandon the concept of the right to reply and to keep the right to correction. Currently the Press Law envisages both a right to reply and a separate one to correction, although the distinction between them is not always clear-cut. It is understood that correction (defined as “to the point and factual correction of untruthful or imprecise news”) can refer only to facts. Currently the notion “reply” is defined as “a factual reply to a statement endangering personal goods”. Generally, the reply can be understood as a statement being a reaction to a statement endangering personal interests, such as human dignity; the reply can provide critical commentary, opinion, polemic and - as explained by the judiciary - it can refer both to opinions and facts described in the press material. The Draft proposes to keep only the concept of the right to correction. It defines “correc-

tion" as a formal denial or introduction of a reservation regarding untruthful or imprecise news appearing in the press. Upon application by an interested natural person, legal person or other organisational unit, the editor-in-chief of a relevant daily paper or a periodical is obliged to publish, free of charge, to the point and factual correction.

The Draft proposes also new rules on the right to authorisation; the amendments to the current regime are a response to journalists' opinions expressed during the public debate; the deadlines to provide authorisation are shorter and the understanding of the notion of "authorisation" is narrower.

• Projekt ustawy o zmianie ustawy - Prawo prasowe (z dnia 27 stycznia 2010 r., skierowany pod obrady Komitetu Stałego Rady Ministrów) (Draft of 27 January 2010 amending the Act of 26 January 1984 on Press Law)

<http://merlin.obs.coe.int/redirect.php?id=12439>

PL

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RO-Romania

Dispute about Frequencies Reaches the Court of Justice of the EU

The Romanian Government was sued by several mobile telecommunications providers, such as Vodafone, Orange and RCS&RDS. They complained about the way the Government had granted a national licence for the 410-415 and 420-425 MHz frequency bands use for providing data and mobile electronic communications services networks.

The providers claimed before the Court of Appeal that they had been excluded from the selection procedure by a Government Decision which, in their opinion, was arbitrary, because one of the articles stipulated that „providers which hold at least one national licence for using radio frequencies in order to provide networks and electronic communications services [...] are not allowed to take part in the selection procedure“. The licence was granted to Romtelecom (the national telecommunications services operator, owned mainly by the Greek OTE) which paid approximately EUR 35 million for the access to the above mentioned frequency bands. Vodafone claimed the price was 20 times less than the price paid previously by other providers (EUR 0.2 million per MHz paid by Romtelecom, in comparison to about EUR 4.7 million paid by other providers previously).

The plaintiffs considered that the Government had contravened European regulations that stipulate a transparent and non-discriminatory procedure. Romania has adopted the general regulatory framework on

electronic communications by several *Ordonanțe de Ugență* (Emergency Decrees).

Vodafone, Orange and RCS&RDS accused the Government of having changed the rules in order to grant a licence directly to a company lacking relevant experience. The Romanian Ministry of Communications and Information Society argued during the trial that it had tried to boost competition in this field.

In this context the Court of Justice of the EU was addressed. The Court has judged similar cases giving sentences favourable to the plaintiffs, which then received compensation.

• Războiul frecvențelor ajunge la Curtea Europeană de Justiție (Press release)

<http://merlin.obs.coe.int/redirect.php?id=12440>

RO

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Radio Romania International

"NO to Discrimination" Campaign Continues

The *Consiliul Național al Audiovizualului* (national council for electronic media - CNA) will continue its partnership with the *Consiliul Național pentru Combaterea Discriminării* (national council for the fight against discrimination - CNCD) and the *Biroul de Informare al Consiliului Europei la București* (Council of Europe office in Bucharest - BICE) for the period from 31 March to 31 July 2010. The aim of the partnership is to increase awareness of the Council of Europe's "Say NO to discrimination" campaign in Romania (see IRIS 2009-8:17).

The *Ministerul Administrației și Internelor* (Ministry for administration and home affairs - MAI) and the *Ministerul Educației, Cercetării, Tineretului și Sportului* (Ministry for education, research, youth and sport - MECS) are also involved in the campaign.

The purpose of this Europe-wide campaign, which is also being conducted in all the other 46 Council of Europe member states, is to combat discrimination and promote cultural diversity.

In view of the important role that the media can play in promoting intercultural dialogue, informing the general public and shaping public opinion, all journalists are invited to participate in the campaign in order to spread a culture of tolerance and better mutual understanding, particularly in the light of the press's responsibility in the fight against discrimination, xenophobia, racism, extremism and violations of fundamental rights.

The Council of Europe is supporting the campaign in Romania by providing Romanian-language materials such as TV commercials, posters and postcards with the message "Say NO to discrimination".

The CNA has urged all national and local broadcasters to broadcast the TV commercials. The CNCD has set up a 24-hour hotline which the general public can use to lodge complaints about discrimination and find information on the subject.

• "Spuneți NU discriminării" (CNA press release of 29 March 2010, "Say NO to discrimination")

<http://merlin.obs.coe.int/redirect.php?id=12471>

RO

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Supreme Court on Media Law

On 15 June 2010 the plenary meeting of the Supreme Court of the Russian Federation adopted a Resolution *О практике применения судами Закона Российской Федерации «О средствах массовой информации»* (On Judicial Practice Related to the Statute of the Russian Federation "On the Mass Media") (hereinafter - the Resolution). Such resolutions routinely explain the statutory norms to the courts that have general jurisdiction over particular topical issues of legal practice in Russia (see IRIS 2005-4:18/32). According to the Constitution of the Russian Federation (Art. 126) "The Supreme Court of the Russian Federation shall be the supreme judicial body for civil, criminal, administrative and other cases under the jurisdiction of common courts, shall carry out judicial supervision over their activities according to procedural forms envisaged by federal law and provide explanations on the issues of court practice."

This is the first ever resolution of the national Supreme Court that directly interprets the media law. The Resolution reiterates the basic principles of Article 29 of the Constitution of the Russian Federation and Article 10 of the European Convention on Human Rights, on freedom of expression and freedom of the media. It also refers the Russian courts to the relevant provisions of the International Covenant on Civil and Political Rights and the Final Act of the Conference on Security and Cooperation in Europe (CSCE), as well as of the CIS Convention on Human Rights and Fundamental Freedoms (see IRIS 1995-6: Extra). It recalls that according to para. 3 of Art. 55 of the Russian Constitution "The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring the defence of the country and security of the State." In particular the Supreme Court directs the courts of law to find out if liability of persons engaged in the mass media

sector is indeed provided by the federal statutes (as opposed to other sources of law).

The Resolution clarifies that since the obligatory state registration of the mass media outlets is dependent on the dissemination of the produce of the mass media, and since no such produce exists in dissemination of mass information via Internet, registration of Internet web sites as mass media outlets is not obligatory. As a result persons who disseminate mass information via Internet are not liable for production or dissemination of unregistered mass media. Those who violate the law by disseminating mass information via Internet sites that are not registered as mass media can be liable for the violations but without the peculiarities of liability envisioned by the statute "On the mass media". At the same time the governmental registration authority may not deny an application of a web site to be registered as a mass media outlet.

As Art. 31 of the statute "On the mass media" requires licensing of terrestrial, wired or cable broadcasting, and as no such technical means are used in the dissemination of mass information via the Internet, no licence is required for persons who disseminate [audiovisual] mass information via Internet sites. Advertising regulations of broadcasting stipulated by the Federal Statute "On Advertising" (see IRIS 2006-4:19/34) are only applicable to the Internet sites that have voluntarily registered as mass media outlets, while general rules established by this statute can be enforced to the extent applicable to Internet sites (point 6 of the Resolution).

The Resolution allows the presentation in the courtroom of any notary certifications of civil law violations on the Internet if it is considered that the evidence might be destroyed or tampered with before the court proceedings begin. The judge (or court) may also review the evidence in real time in preparation for the hearings with the full respect of the Civil Procedure Code (point 7 of the Resolution).

The Resolution indicates that the title of a media outlet is not a statement as such, since "its function is essentially to identify the given media outlet for its actual and prospective audience". Therefore the title may not be evaluated in the court as to whether it does or does not reflect the "real state of affairs". Thus a denial of the registration of a media outlet because of the requirement that its title reflect the "real state of affairs" is illegal (point 10 of the Resolution). This clarification thereby closely follows the Judgment of the European Court of Human Rights in the case of *Dzhavadov v. Russia* (Application no. 30160/04, Strasbourg, 27 September 2007).

The Resolution explains that any "closed door session" of the court of law on grounds that are not directly stipulated by the federal statutes contradicts the constitutional provisions that examination of cases in all courts shall be open, and also presents a possible violation of the right to a fair and public hearing as stipulated by point 1 of Art. 6 of the European

Convention on Human Rights and also point 1 of Art. 14 of the International Covenant on Civil and Political Rights (point 17 of the Resolution).

The Resolution explained that the so-called "obligatory information" (Art. 35 of the statute "On the mass media") must include election campaigning statements of the candidates that the state-owned, municipal-owned, and/or private media outlets are obliged to disseminate, as well as information to be disseminated in accordance with the Federal Statute "On Guarantees of Equality of Parliamentary Parties as to the Coverage of their Activities by the State-Run General TV and Radio Channels" (see IRIS 2009-7:19/32). Thus these types of material fall under journalistic privileges as provided in Art. 57 of the statute "On the mass media" and make media outlets immune from liability in relation to their content (point 22 of the Resolution).

The Resolution further states that interviews with public officials, leaders of political parties, and their press officers, represent a form of reply to an editorial request for information and thus also make the mass media outlets immune from liability as stipulated in Art. 57 of the statute "On the mass media".

Statements of the readers/viewers made on the fora and chat pages of an Internet site registered as a mass media outlet (where this section of the web site is not pre-moderated) shall make such an outlet liable only if it has received a complaint from a governmental watchdog that the communication is illegal in its content, and fails to correct (or delete) the communication, and the communication subsequently is determined by a court to be illegal. Here the Resolution draws a parallel between such fora and live broadcasts that do not make broadcasters liable in accordance with the aforementioned Art. 57 (point 23 of the Resolution).

The Resolution discusses at length the norms of the Russian statute "On the mass media" and the recently introduced Art. 1521 of the Civil Code that provides for a possibility to disseminate information about the private life of a person and his/her pictures in cases where "it is necessary to protect public interests". The notion of necessity to protect such interests has not been widely used in courts and has never been explained in Russian law. The Supreme Court held that the courts should consider that a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who does not exercise official functions. While in the former case the press exercises its public duty by imparting information on matters of public interest, it does not do so in the latter case. Here the Supreme Court again closely followed the arguments of the European Court of Human Rights (see *Observer and Guardian v. U.K.*, and *von Hannover v. Germany*) (point 25 of the Resolution).

The Supreme Court noted that part 2 of Art. 41 of the statute "On the mass media" demands that the editorial office protects the confidentiality of sources except in the case where a corresponding demand comes from the court of law in relation to a case that it is dealing with. The Resolution says that this type of information presents "a secret specifically protected by a federal statute". A court of law may demand such a disclosure only when all other means of obtaining the necessary information have been exhausted and "there is an overriding public interest in the disclosure of the confidential source" (point 26 of the Resolution).

Point 28 of the Resolution deals with an interpretation of Art. 4 ("Inadmissibility of abuse of the freedom of mass information") of the statute "On the mass media" which (together with Art. 16) make way for a forced closure of media outlets under certain circumstances. The Supreme Court explains here that while determining whether an offence was indeed an abuse of the freedom of mass information, the court of law should take into account the context such as "aim, genre and style of a publication, a programme or part thereof". In particular, the Resolution here directly quotes point 5 of the Declaration on freedom of political debate in the media of the Council of Europe's Committee of Ministers (2004): "The humorous and satirical genre, as protected by Article 10 of the [European] Convention [on Human Rights], allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts".

The Supreme Court stipulates that a suspension of a media outlet or a ban on the coverage of certain events or persons represent extreme measures to support a claim, which should only be used by courts in cases when they hear a complaint on violation of Art. 4 ("Inadmissibility of abuse of the freedom of mass information") of the statute "On the mass media" (point 30 of the Resolution).

A case on the closure of a media outlet should be dealt with only by the top court of law of the particular subject (region) of the Russian Federation where the dominant dissemination of the media outlet takes place (that is, the second instance court) (point 31 of the Resolution).

The Resolution was signed by the Chief Justice Vyacheslav Lebedev, with Vyacheslav Gorshkov serving as Judge-Rapporteur.

• Постановление Пленума Верховного суда Российской Федерации «О практике применения судами Закона Российской Федерации «О средствах массовой информации»» No. 16. (Resolution of the Plenary of the Supreme Court of the Russian Federation "On Judicial Practice Related to the Statute of the Russian Federation 'On the Mass Media' No. 16.)
<http://merlin.obs.coe.int/redirect.php?id=12489>

RU

• Statute of the Russian Federation "On Mass Media" No. 2124-1 of 27 December 1991 as of 8 December 2003
<http://merlin.obs.coe.int/redirect.php?id=12475>

EN

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SE-Sweden

An Expansion of the Extended Collective Licences Suggested for the Swedish Copyright Law

A fact-finding copyright Committee, appointed by the Swedish Government, recently introduced a report on the Swedish Copyright Act. The main tasks of the Committee have been to review the provisions on the transfer of copyright and to look over certain issues concerning extended collective licences and related matters.

Two years ago, the Swedish government entrusted this expert Committee with conducting a review of the provisions of the Swedish Copyright Act. On 8 April 2010, the Committee published an interim report (SOU 2010:24) proposing that the Copyright Act provide for clearer and more modern provisions with respect to transfer of copyright. In addition, the Committee proposed enlarged and simplified rules governing extended collective licences.

In the interim report, this Committee proposes the implementation of a number of general provisions applicable to all different types of copyright contracts. For instance:

- It has been proposed that a provision on the interpretation of copyright contracts be incorporated into the Copyright Act. The current special provisions concerning publishing contracts will be replaced with new general contractual rules on the interpretation of agreements. Furthermore, the Committee suggests that a special provision inserted in Section 36 of the Swedish Contracts Act, which enables modification of unreasonable contractual terms relating to non-material rights, be referred to in the Copyright Act.

- With respect to rights acquired on an exclusive basis, the Committee proposes an obligation to use such rights within a reasonable timeframe or at least within five years. However, the proposed provision is optional; hence, the parties will likely be able to agree on another timeframe pursuant to the provision.

- The Committee suggests clarifying the current presumptive rule concerning film contracts. Under the Committee's proposal, an author contributing a work to a film cannot object to copies being made of the film or to the film being made available to the public, provided with subtitles or being translated into another language.

- The Committee has introduced a presumption, stating that an author is entitled to reasonable remuneration for transfers by assignment or licence of right to

exploit the work, to someone who intends to use this right in the framework of commercial activities.

One particular issue that has been the subject of a great deal of discussion among various interested parties concerns the question of rights in the event of employment relationships. The Committee proposes a codification of the so-called 'rule of thumb' developed in case-law and doctrine. Thus, if the Committee's proposal is accepted in the legislation process, the amended Copyright Act will provide for a rule stating that employers may use works created by the employee as a result of employment duties toward the employer.

As far as the extended collective licences are concerned, the Committee proposes:

- Broadening the extended collective licence concerning radio and television broadcasts. Under the proposal, the extended collective licence provision will cover all communications to the public instead of only broadcasts. In addition, the Committee suggests that the provision cover such making of copies as is necessary to enable the communication to take place. In practice, this new provision is likely to facilitate, in particular, the use of music in television programmes on the Internet.

- Incorporation of a supplementary rule to the general provision on extended collective licences enabling parties to enter into agreements in areas other than those specified in the Copyright Act. This supplementary extended collective licence may, for instance, be used for Internet services for which the clearance is otherwise complicated due to the existence of many owners.

- It is also being clarified that only one organisation in each field is competent to enter into extended collective licence agreements.

- The current extended collective licence clauses concerning the making of copies at places of work, is being expanded to include digital copying as well.

- Finally, the broadening of the contractual licence provisions for libraries and archives for the purpose of facilitating these institutions in making the works contained in their collections available on their own premises has also been suggested.

• Avtalad upphovsrätt SOU 2010:24 ("Contractual Copyright" Swedish Government Official Reports 2010:24)
<http://merlin.obs.coe.int/redirect.php?id=12463>

SV

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UA-Ukraine

Decree on Digital Television

Just before the termination of his powers, President Viktor Yushchenko issued a Decree on the development of digital television. On 18 February 2010 the relevant Decree of the President of Ukraine No. 189/2010 was signed. Its full title is "On the Decision of the National Security and Defense Council of Ukraine" of 11 September 2009 "On the concept of creation of public service broadcasting system and the implementation of digital television". In this document the President of Ukraine states that the situation with the implementation of digital broadcasting in Ukraine is "threatening for national security". The activity of the Cabinet of Ministers of Ukraine on the implementation of digital broadcasting was found insufficient for the purposes of protecting the national interests of Ukraine in the informational sphere. The decree says that the government "endangers the ensuring of the constitutional right of citizens to access information as well as the fulfillment of the international obligations of Ukraine in the aforementioned sphere".

This document also established an Interdepartmental commission on the issues of the coordination of implementation of digital broadcasting as a working body of the National Security and Defense Council of Ukraine. The Cabinet of Ministers of Ukraine was given six months to make amendments to the State programme of digital broadcasting implementation, approved by the Decree of the Cabinet of Ministers of Ukraine of 26 November 2008 No. 1085. The aforementioned changes shall concern the specification of technical conditions of the transition from analogue to digital broadcasting; solution of the procedure of supplying citizens with the set-top boxes for the reception of digital signals; solutions on the set of activities necessary to complete the transition to digital terrestrial broadcasting in the border regions and the Crimea.

Together with the National Television and Radio Broadcasting Council the Cabinet of Ministers of Ukraine is due to develop and introduce for consideration by the Supreme Rada of Ukraine (the parliament) a draft law on amendments to certain legislative acts of Ukraine on licensing broadcasting based on digital technologies. The Cabinet of Ministers of Ukraine together with the Security Service of Ukraine should work out and ensure the practical solution of the issues related to the release of radio-frequency resources for the needs of digital broadcasting.

• УКАЗ ПРЕЗИДЕНТА УКРАЇНИ № 189/2010 Про рішення Ради національної безпеки і оборони України від 11 вересня 2009 року « Про концепцію створення системи Суспільного телебачення і радіомовлення України та хід упровадження цифрового телерадіомовлення » (Decree of the President of Ukraine No. 189/2010 "On the Decision of the National Security and Defense Council of Ukraine" of the 11th of September 2009 "On the concept of creation of public service broadcasting system and the implementation of digital television")

<http://merlin.obs.coe.int/redirect.php?id=12428>

UK

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US-United States

Court Invalidates FCC Internet Jurisdiction

In *Comcast Corporation v. Federal Communications Commission* (D.C. Cir., 6 April 2010), the District of Columbia Circuit Court found that the FCC did not have the legal authority to regulate an Internet service provider's (ISP's) network management practices. Many observers view the decision as a setback for "net neutrality," the principle that users should have open access to Internet content without carrier interference. Others view it as the demise of the National Broadband Plan, which the Federal Communications Commission (FCC) had issued on 16 March 2010. Despite the politically-charged nature of the issue, the court's decision was narrowly based on the absence of adequate statutory basis for FCC jurisdiction over the Internet.

The underlying dispute arose when subscribers to Comcast Corporation's (Comcast's) high speed Internet service discovered that Comcast was slowing particular service providers' peer-to-peer networking traffic and filed a complaint with the FCC. The subscribers argued that Comcast violated the Commission's policy that "consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice." Comcast defended its action as necessary to manage network capacity, as peer-to-peer networking consumed a significant amount of bandwidth.

The FCC agreed that Comcast's action ran afoul of its policy, noting that Comcast had other options to manage network traffic. Since Comcast already had agreed to adopt alternative methods for managing its network, the FCC ordered Comcast ("Order") to disclose implementation of its new approach, but advised that it was prepared to issue an injunction if Comcast failed to keep its promises.

In challenging the Order, Comcast argued that the FCC had: (i) failed to justify exercising jurisdiction over its network management practices, (ii) circumvented

the rule-making requirements of the Administrative Procedure Act (Act) as well as violated the Due Process Clause, and (iii) acted in an arbitrary and capricious manner in its reasoning for the Order. The first point was decisive in favor of Comcast's position.

Acknowledging that it had no express authority to regulate such activity, the FCC asserted that its authority derived from Title I of the Act, which provides, in section 154(i), that "the [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, that are not inconsistent with the Act, as may be necessary in the execution of its functions". This invoked the Commission's "reasonably ancillary authority" to regulate, as articulated in the United States Supreme Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)—all decided in the context of recognizing FCC jurisdiction over the then new cable television medium.

Citing its own decision in *Am. Library Ass'n v. FCC.*, 406 F.3d 689 (D.C. Cir. 2005) wherein the court summarized the holdings of these cases, the court stated that the FCC could exercise ancillary authority provided: (1) the FCC's general jurisdictional grant under Title I of the Act covers the regulated subject, and (2) the regulations are reasonably ancillary to the FCC's effective performance of its statutorily mandated responsibility.

But the court concluded that the FCC had failed to satisfy the second part of the test. Analyzing a line of cases considering "ancillary authority" the court found that such authority must have a statutory basis in the Communications Act—such as the Commission's jurisdiction over broadcasting in *Southwestern*. Here the court found, however, that the Commission had relied only on Congressional policy. Policy statements may "illuminate" the authority of administrative agencies, but the authority must ultimately derive from the statute. Without reference to substantive regulatory provisions of the Communications Act, the FCC's ancillary jurisdiction could be unbounded.

The FCC also argued that several other provisions of the Act, including parts of Title II, gave the FCC ancillary jurisdiction over Comcast, but the court disagreed with the FCC's analysis of these provisions.

The court concluded that "while Congress gave the FCC broad and adaptable jurisdiction to keep pace with rapidly evolving communications technology - the Internet being just such a technology - arguably the most important innovation in communications in a generation - the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities of which the statute fails to confer FCC authority."

The FCC may look for other existing statutory bases—such as its longstanding jurisdiction over common carriers under Title II of the Act—or encourage the

Obama Administration to introduce legislation giving the Commission Internet jurisdiction. Given the state of affairs in Washington today, however, enacting such legislation will likely prove to be a long and perhaps uphill battle.

• *Comcast Corporation v. Federal Communications Commission* (D.C. Cir., 6 April 2010)
<http://merlin.obs.coe.int/redirect.php?id=12427>

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Copyright in Latvia

The protection of copyright is fundamentally guaranteed by the Constitution of the Republic of Latvia (*Satversme*), Art. 113: The state recognises the freedom of scientific, artistic and other creation, as well as protects the copyright and patent rights.

The current framework of copyright protection in Latvia is governed by the 2000 Copyright Law (*Autoritīšu likums*). This law replaced the previous 1993 Law on Copyright and Neighbouring Rights. The 2000 Copyright Law governs all the main issues of the protection of copyright, neighbouring rights, as well as the sui generis right of database protection. Since its adoption, the law has been amended four times, mainly to clarify some of the covered issues, as well as to implement the newest regulatory enactment of the European Union (see IRIS 2004-5/307). As Latvia is a member of the Berne Convention for the Protection of Literary and Artistic Works since 1995, the Copyright Law follows the main principles of the copyright protection stemming from this convention, as well as other related international agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (binding to Latvia as of 1999).

The copyright protection as provided by the Copyright Law warrants authors rights to their works without a need of any special registration or assertion. The Copyright Law distinguishes between economic and moral rights of the author, and the moral rights may not be alienated. The Copyright Law implements the copyright directives of the European Union.

On the basis of the Copyright Law three secondary legislative acts have been issued, inter alia:

- Regulations of the Cabinet of Ministers No. 565 "The order how the compensation for public lending shall be calculated, paid and distributed" of 21 August 2007;



- Regulations of the Cabinet of Ministers No. 321 "Regulations on the amount of levies for blank material carriers and equipment fit for reproduction, and on the order of its collecting, paying, distribution and disbursement" of 10 May 2005.

It may be expected that in near future new amendments to the Copyright Law may be adopted. On 12 May 2010 the Cabinet of Ministers approved draft amendments to the Copyright Law and on 27 May 2010 the draft was transferred for review to one of the commissions at the Saeima (Parliament). The draft amendments propose to improve the regulation of the collective rights management societies, especially, to provide a fairer regime for the collection of copyright levies for collectively managed rights. As of now, the draft has not been reviewed by the Saeima yet.

• *Autortiesību likums 06/04/2000*, Latvijas Vēstnesis 148/150, 27/04/2000 (Copyright Law, adopted on 6 April 2000, Official Journal No. 148/150, on 27 April 2000, in force since 11 May 2000)

<http://merlin.obs.coe.int/redirect.php?id=12935>

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• *Grozījumi Autortiesību likumā* (Draft amendments to the Copyright Law, submitted to Saeima)

<http://merlin.obs.coe.int/redirect.php?id=12936>

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Agenda

De la directive SMA à la communication Cinéma : vers une approche globale et cohérente du cinéma européen

4-6 July 2010

Organiser: Belgian Presidency of the Council of the
European Union

Venue: Mons

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