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of the European Audiovisual Observatory

IRIS 2010-8

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European Court of Human Rights: Akdaş v. Turkey

The applicant in this case, Rahmi Akdaş is a publisher, residing in Bandirma, Turkey. In 1999 he published the Turkish translation of the erotic novel "Les onze mille verges" by the French writer Guillaume Apollinaire ("The Eleven Thousand Rods", "On Bir Bin Kırbaç" in Turkish). The novel contains graphic descriptions of scenes of sexual intercourse, including various practices such as sadomasochism, vampirism and paedophilia. Akdaş was convicted under the Criminal Code for publishing obscene or immoral material liable to arouse and exploit sexual desire among the population. The publisher argued that the book was a work of fiction, using literary techniques such as exaggeration or metaphor and that the post face to the edition in question was written by specialists in literary analysis. He added that the book did not contain any violent overtones and that the humorous and exaggerated nature of the text was more likely to extinguish sexual desire.

The criminal court of Istanbul ((Istanbul Asliye Ceza Mahkemesi) ordered the seizure and destruction of all copies of the book and Akdaş was given a "severe" fine of EUR 1,100, a fine that may be converted into days of imprisonment. In a final judgment of 11 March 2004, the Court of Cassation quashed the part of the judgment concerning the order to destroy copies of the book in view of a 2003 legislative amendment. It upheld the remainder of the judgment. Akdaş paid the fine in full in November 2004.

Relying on Article 10, Akdaş complained about this conviction and about the seizure of the book. Before the European Court it was not disputed that there had been an interference with Akdaş' freedom of expression, that the interference had been prescribed by law and that it had pursued a legitimate aim, namely the protection of morals. The Court however found the interference not necessary in a democratic society. The Court reiterated that those who promoted artistic works also had "duties and responsibilities", the scope of which depended on the situation and the means used. As the requirements of morals vary from time to time and from place to place, even within the same State, the national authorities are supposed to be in a better position than the international judge to give an opinion on the exact content of those requirements, as well as on the "necessity" of a "restriction" intended to satisfy them.

Nevertheless, the Court had regard in the present case to the fact that more then a century had elapsed since the book had first been published in France (in 1907), to its publication in various languages in a large number of countries and to the recognition it had gained through publication in the prestigious "La Pléiade" series. Acknowledgment of the cultural, historical and religious particularities of the Council of Europe's member states could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage. Accordingly, the application of the legislation in force at the time of the events had not been intended to satisfy a pressing social need. In addition, the heavy fine imposed and the seizure of copies of the book had not been proportionate to the legitimate aim pursued and had thus not been necessary in a democratic society, within the meaning of Article 10. For that reason, the Court found a violation of Akdaş' right to freedom of expression.

• *Arrêt de la Cour européenne des droits de l'homme (deuxième section), affaire Akdaş c. Turquie, n° 41056/04 du 16 février 2010* (Judgment by the European Court of Human Rights (Second Section), case of Akdaş v. Turkey, No. 41056/04 of 16 February 2010)
http://merlin.obs.coe.int/redirect.php?id=12605 FR

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European Court of Human Rights: Fatullayev v. Azerbaijan

Having been convicted of defamation and threat of terrorism and while serving a prison sentence, the founder and chief editor of the newspapers Günd231lik Az231rbaycan and Realny Azerbaijan, Mr. Fatullayev, applied successfully before the European Court of Human Rights against a violation of his freedom of expression and right to a fair trial. The European Court ordered the Azerbaijani authorities to release Fatullayev immediately.

In 2007 two sets of criminal proceedings were brought against Fatullayev in connection with two articles published by him in Realny Azerbaijan. The first set of criminal proceedings related to an article and to separate Internet postings. The statements made in the article and the postings differed from the commonly accepted version of the events that took place at the town of Khojaly during the war in Nagorno-Karabakh, according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces with the reported assistance of the Russian army. Four Khojaly survivors and two former soldiers involved in the Khojaly battle brought a criminal complaint against Fatullayev for defamation and for

falsely accusing Azerbaijani soldiers of having committed an especially grave crime. The courts upheld the claims, convicted Fatullayev of defamation and sentenced him to imprisonment for a term of two years and six months. Fatullayev was arrested in the courtroom and taken to a detention centre. In addition, in civil proceedings brought against Fatullayev before the above-mentioned first set of criminal proceedings, he was ordered to publish a retraction of his statements, an apology to the refugees from Khojaly and the newspaper's readers and to pay approximately EUR 8,500 personally, as well as another EUR 8,500 on behalf of his newspaper, in respect of non-pecuniary damages.

The second set of criminal proceedings related to an article entitled "The Aliyevs Go to War". In it Fatullayev expressed the view that, in order for President Ilham Aliyev to remain in power in Azerbaijan, the Azerbaijani government had sought the support of the United States in exchange for Azerbaijan's support for US "aggression" against Iran. He speculated about a possible US-Iranian war in which Azerbaijan could also become involved and provided a long and detailed list of strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. He concluded that the Azerbaijani government should have maintained neutrality in its relations with both the US and Iran and that it had not realised all the dangerous consequences of the geopolitical game it was playing, like for example the possible deaths of Azeris in both Azerbaijan and Iran. Before Fatullayev was formally charged with the offence of threat of terrorism, the Prosecutor General made a statement to the press, noting that Fatullayev's article constituted a threat of terrorism. A short time later, Fatullayev was indeed found guilty as charged and convicted of threat of terrorism. The total sentence imposed on him was imprisonment for eight years and six months. In his defence speech at the trial and in his appeals to the higher courts, Fatullayev complained that his presumption of innocence was breached as a result of the Prosecutor General's statement to the press and that his right to freedom of expression as a journalist was violated. His complaints were summarily rejected.

Apart from finding breaches of Art. 6 § 1 (right to a fair trial, no impartial tribunal) and Art. 6 § 2 (breach of presumption of innocence) of the European Convention of Human Rights, the Court found that the conviction of Fatullayev in both criminal cases amounted to a manifest violation of Article 10 of the Convention.

With regard to the first criminal conviction, the Court acknowledged the very sensitive nature of the issues discussed in Fatullayev's article and that the consequences of the events in Khojaly were a source of deep national grief. Thus, it was understandable that the statements made by Fatullayev may have been considered shocking or disturbing by the public. However, the Court recalled that freedom of information applies not only to information or ideas that were favourably received, but also to those that offend, shock or disturb. In addition, it is an integral part of freedom of expression to seek historical truth. Various matters related to the Khojaly events still appear to be open to ongoing debate among historians and as such should have been a matter of general interest in modern Azerbaijani society. It is essential in a democratic society that a debate on the causes of acts of particular gravity which might amount to war crimes or crimes against humanity should be able to take place freely. Further, the press plays the vital role of a "public watchdog" in a democratic society. Although it ought not to overstep certain bounds, in particular in respect of the reputation and rights of others, the duty of the press is to impart information and ideas on political issues and on other matters of general interest. The Court considered that the article had been written in a generally descriptive style with the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. The public was entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. Fatullayev had attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides in the conflict and the article had not contained any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians.

As regards the Internet postings, the Court accepted that, by making those statements without relying on any relevant factual basis, the applicant might have failed to comply with the journalistic duty to provide accurate and reliable information. Nevertheless, taking note of the fact that he had been convicted of defamation, the Court found that those postings had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees. It therefore held that the domestic courts had not given "relevant and sufficient" reasons for Fatullayev's conviction of defamation. In addition, the Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence. As this had not been the case, there had been no justification for the imposition of a prison sentence on Fatullayev. There had accordingly been a violation of Article 10 of the Convention in respect of his first criminal conviction.

With regard to the second criminal conviction, the Court reached a similar conclusion. The article "The Aliyevs Go to War" had focused on Azerbaijan's specific role in the dynamics of international politics relating to US-Iranian relations. As such, the publication had been part of a political debate on a matter of general and public concern. The applicant had criticised the Azerbaijani Government's foreign and domestic political moves. At the same time, a number of other media sources had also suggested during

that period that, in the event of a war, Azerbaijan was likely to be involved and speculated about possible specific Azerbaijani targets for Iranian attacks. The fact that the applicant had published a list of specific possible targets in itself had neither increased nor decreased the chances of a hypothetical Iranian attack. The applicant, as a journalist and a private individual, had not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Neither had Fatullayev voiced any approval of any such possible attacks or argued in favour of them. It had been his task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government. Thus, the domestic courts' finding that Fatullayev had threatened the State with terrorist acts had been arbitrary. The Court considered that Fatullayev's second criminal conviction and the severity of the penalty imposed on him had constituted a grossly disproportionate restriction of his freedom of expression. Further, the circumstances of the case had not justified the imposition of a prison sentence on him. There had accordingly been a violation of Article 10 in respect of Fatullayev's second criminal conviction as well.

In application of Article 46 of the Convention (execution of the judgment), the Court noted that Fatullayev was currently serving the sentence for the press offences in respect of which it had found Azerbaijan in violation of the Convention. Having considered it unacceptable that the applicant still remained imprisoned and the urgent need to put an end to the violations of Article 10, the Court held, by six votes to one, that Azerbaijan had to release the applicant immediately. Under Article 41 (just satisfaction) of the Convention, the Court held that Azerbaijan is to pay Fatullayev EUR 25,000 in respect of non-pecuniary damages and EUR 2,822 in respect of costs and expenses.

• Judgment by the European Court of Human Rights (First Section), case of Fatullayev v. Azerbaijan, No. 40984/07 of 22 April 2010
http://merlin.obs.coe.int/redirect.php?id=12606 EN

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Committee of Ministers: Recommendation Combating Discrimination on Grounds of Sexual Orientation or Gender Identity

A new Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Council of Europe's Committee of Ministers' (CM) on 31 March 2010, contains a number of provisions concerning freedom of expression, "hate speech" and the media.

Recommendation CM/Rec(2010)5 is addressed to all member states of the Council of Europe. It comprises a substantive part with five recommendations and an appendix that sets out a range of relevant "principles and measures". The recommendations concern both direct and indirect discrimination based on sexual orientation or gender identity. They highlight the need for relevant existing legal and other measures to be kept under review. They also call for the adoption and effective implementation of legal and other measures to combat such discrimination and to "ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them". Another main focus of the recommendations is the need to ensure that relevant legal (and other) measures include effective legal remedies, as well as awareness of and access to such remedies, and provision for appropriate sanctions and reparations.

The principles and measures contained in the Appendix are intended as a source of guidance for member states "in their legislation, policies and practice". In respect of "hate speech", the Appendix recommends that "Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons". Those measures should be in accordance with Article 10 of the European Convention on Human Rights and relevant case-law of the European Court of Human Rights. Public authorities and institutions "at all levels" are reminded of their responsibility to refrain from engaging in such types of expression and indeed to promote tolerance towards lesbian, gay, bisexual and transgender persons. The Appendix also calls on member states to ensure the non-discriminatory and effective enjoyment of the right to freedom of expression, "including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity".

More generally, the range of "principles and measures" set out in the Appendix to the Recommendation is broad, as illustrated by the range of categories into which they are grouped: right to life, security and protection from violence ("Hate crimes" and other hate-motivated incidents; "Hate speech"); freedom of association; freedom of expression and peaceful assembly; right to respect for private and family life; employment; education; health; housing; sports; right to seek asylum; national human rights structures, and discrimination on multiple grounds.

Finally, it is worth noting that the CM's engagement with "hate speech" concerning sexual orientation and gender identity in this Recommendation and Appendix represents a broadening of the Council of Europe's traditional approach to combating "hate speech", which has generally tended to centre on

racism, xenophobia, anti-Semitism and related forms of intolerance. Curiously, two very important reference points for that traditional approach - the twin CM Recommendations No. R (97)20 on "hate speech" and No. R (97)21 on the media and the promotion of a culture of tolerance (see IRIS 1997-10: 4/4) - are not expressly mentioned in the present Recommendation.

• Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010
http://merlin.obs.coe.int/redirect.php?id=12646 EN FR

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EUROPEAN UNION

European Commission: Laggard Member States Urged to Implement AVMS Directive

On 24 June 2010, the European Commission issued a set of reasoned opinions to 12 member states (Austria, Cyprus, Estonia, Greece, Finland, Hungary, Lithuania, Luxemburg, Latvia, Poland, Portugal, and Slovenia) requesting that they proceed with updating their national broadcasting legislation in order to bring it into compliance with the Audiovisual Media Service (AVMS) Directive. The Directive, which replaced the Television without Frontiers Directive of 1989 (as amended), was adopted in December 1997 with the intention of bringing the EU's broadcasting rules up to speed with the digital age.

The deadline for the transposition of the Directive into the domestic legislation of the member states expired in December 2009. However, of the EU 27, only 3 countries had notified the Commission of full implementation by that date. The Commission reacted by sending requests for information in the form of letters of formal notice to 23 member states. In the meantime, 12 countries (Bulgaria, the Czech Republic, Denmark, France, Germany, Ireland, Italy, Malta, The Netherlands, Spain, Sweden and the United Kingdom) have responded, notifying the Commission of their moves to transpose the Directive into national law.

If the member states whose compliance is being sought fail to inform the Commission of measures to implement the Directive within a period of two months following the reasoned opinions, the Commission may decide to refer them to the European Court of Justice.

• "Audiovisual Media Services Directive: Commission requests 12 Member States to implement in full", IP/10/803, Brussels, 24 June 2010
http://merlin.obs.coe.int/redirect.php?id=12608 DE EN EL

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European Commission: Legislation Guaranteeing the Independence of Slovak Telecoms Regulator

On 26 February 2010 Act No. 56/2010 Coll. amending Act No. 610/2003 Coll. on Electronic Communications ("ECA") was published in the Collection of Laws of the Slovak Republic. The particular Amendment of the ECA ("Amendment") was approved by the National Council on 3 February 2010 and came into effect on 1 April 2010.

As well as guaranteeing the independence of the *Telekomunikačný úrad Slovenskej Republiky* (Telecommunications Regulatory Authority of the Slovak Republic - TÚSR), the Amendment also lays down the legal means for guaranteeing an efficient granting of subventions by the Ministry of Transport, Posts and Telecommunication and introduces technical legislative changes resulting from Regulation (EC) No. 544/2009 amending Regulation (EC) No. 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

The subject matter of the ECA, which came into force on 3 December 2003, mainly concerns the governing of the conditions for the provision of electronic communications networks and services, for using radio facilities, the State regulation of electronic communications, rights and obligations of undertakings and users of electronic communications networks and services, and protection of these networks and services, whereas the purpose of this Act is to create the conditions for the development of competition in the field of electronic communications in the Slovak Republic. TÚSR - being the national regulatory and pricing authority in this sector - was vested with the task of undertaking regulation and all its activities, as well as publishing its decisions in line with the principles of efficiency, objectivity, transparency, non-discrimination, adequacy and legitimacy.

On 4 December 2008 the National Council dismissed the chairman of TÚSR upon a proposal of the Slovak Government. According to the Government, the regulator had failed to fulfill its tasks in accordance with the national legal framework and with the goals and principles of the national policy for electronic communications during a call for tender for digital ter-

restrial frequencies. The European Commission emphasised that such a measure by the national government and the rules that allow it are not in line with EU rules. The particular rules require national laws to ensure the independence of the regulator from interference that could have an effect on the impartiality of its decisions. As a result the Commission expressed concerns about Slovakia not adequately protecting the independence of TÚSR, on 14 May 2009. In order to guarantee the neutrality, sovereignty and independence of national regulators the governments and parliaments are according to EU telecoms rules only allowed to remove the chairman/vice-chairman in limited circumstances when serious conditions for such a decision are met. Since the ECA did not comply with the respective EU regulations, the Commission sent a letter of formal notice to Slovakia, i.e., the first stage of an infringement proceeding.

Subsequently Slovakia committed itself to modifying its national legislation. According to s. 7(9) of the Amendment the National Council shall remove the Chairman and the Government shall remove the Vice-Chairman, if they hold any position in a political party or movement, or hold any position in any other State office or on a body of a legal entity established by law as a public institution; if they are employees, associates or agents of a legal entity, members of its statutory body, controlling body, supervisory body, or employees of a natural person; if they either have a share interest in the registered capital or possess voting rights in these entities, provided these persons are network operators, service providers or both; or if they undertake other gainful employment. The Vice-/Chairman shall also be removed if he/she were found guilty of an intentional crime, if the accused person has agreed on a settlement or the criminal proceedings on the intentional crime have been conditionally terminated; if he/she were found guilty of non-intentional crime and sentenced to unconditional imprisonment; if he/she were deprived of the capacity to perform legal acts or if his/her capacity was limited or if he/she had not performed his/her function for a period of at least six consecutive months. The Vice-/Chairman may also be removed if the TÚSR does not fulfill its tasks in line with the ECA, s. 7(10).

Consequently, the Commission decided to close the infringement proceeding against Slovakia as the Slovak legislation is now respecting the independence of the national telecoms regulators as required by European law.

• Press release of the European Commission, IP/10/806 of 24 June 2010
http://merlin.obs.coe.int/redirect.php?id=12600 DE EN FR SK

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European Commission: Article 29 Working Party - Opinion on Behavioural Advertising

The EU's Article 29 Data Protection Working Party has adopted an Opinion on data protection law as applied to behavioural advertising. In its Opinion, it gives legal guidance on legal issues related to the tracking of internet users when they surf the net. Amongst other issues, it addresses the permissibility of the use of cookies and it clarifies the legal responsibility of online content and advertising network providers under European data protection laws.

Behavioural advertising involves the tracking of internet users' online behaviour in view of the targeting of advertising to internet users based on their habits and interests. The Opinion focuses in particular on network behavioural targeting, in which users are being tracked across a large network of online content providers through the use of cookies or similar tracking techniques. The Opinion notes that network behavioural advertising typically entails the processing of personal data and the profiling of internet users, activities to which European data protection laws apply.

The obligations related to tracking cookies in the recently amended Article 5 (3) of the e-Privacy Directive are discussed in detail, as well as recent changes to this provision at the European level. The Opinion concludes that consent must be given by the internet user before the cookie is placed on the user's equipment (prior consent) and after having provided information to the user about the sending and purposes of the cookie (prior information). The Working Party notes that browser settings, which are mentioned in Recital 66 of the amending Directive, can only be considered a valid means of acquiring consent if a number of strict conditions are satisfied that guarantee valid prior informed consent.

The Opinion also discusses the responsibility under European data protection law of content providers that rent out space on their websites for advertising networks. The Opinion notes that publishers are involved in tracking internet users "by setting up their web sites in such a way that when a user visits a publisher's web site, his/her browser is automatically redirected to the webpage of the ad network provider. In doing so, the user's browser will transmit his/her IP address to the ad network provider which will proceed to send the cookie and tailored advertising." As a result, the Working Party concludes, publishers will carry responsibility as data controllers for these actions, although this responsibility cannot require compliance with the bulk of data protection obligations. In particular, according to the Opinion, online publishers that participate in behavioural advertising will have to comply with the obligation to inform the visitors to

their sites about the processing of personal data that is a result of behavioural targeting on their website.

The Opinion should probably be seen as a first step by European data authorities towards addressing behavioural advertising. The Working Party explicitly invites the industry to enter into a dialogue on the ways in which it can guarantee compliance with the legal framework as set out in the Opinion, in particular through the development of technological tools or other means.

• Article 29 Data Protection Working Party, 'Opinion 2/2010 on online behavioural advertising', 00909/10/EN171, 22 June 2010
http://merlin.obs.coe.int/redirect.php?id=12647 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

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NATIONAL

AL-Albania

Parliament Elects New NCRT Members - NCRT Imposes Fines

The Albanian Parliament elected three new members of the *Këshilli Kombëtar i Radios dhe Televizionit* (National Council of Radio and Television - NCRT) on 22 July 2010. Two of them were re-elected for a second term, while the third one is the newest member of the Council. The election of these members came after a long period during which the seats were vacant, due to the boycott of parliamentary sessions by the opposition.

Following the law amended in 2006 and the political agreement that followed, the NCRT's membership is chosen from among the proposals of four potential members for each vacant seat from both parliamentary groups and professional associations. From these candidates the Media Commission shortlists no more than two candidates for each seat and proposes them to Parliament for the final vote (see IRIS 2006-3: 9/13). However, given the political stalemate during the last year and the opposition's absence from the Parliament for most of the time, it became impossible to elect the new NCRT members until recently. The absence of new members led to a failure of NCRT meetings to reach a quorum and hence, council decisions on media regulation, licenses and other issues were postponed for a significant period.

Shortly after the election of the new members, on 28 July 2010 the NCRT decided to impose a fine of ALL 1 million (about EUR 7,250.00) on, and limit to five years the license of, Tring TV, a digital terrestrial and satellite platform. This decision was made after noticing that the platform had broadcast programmes the rights to which it did not possess.

NCRT has also fined several local cable TV stations: Tv Jug and TV AVN on piracy claims, after a monitoring carried out in December last year. Six other local TV stations have been warned on this matter. Other stations have been penalised because they have applied for a license that covers a larger area and have extended their broadcasting to this larger area, without waiting for the NCRT approval.

These fines are part of the NCRT's continuous struggle against piracy and violation of licensing terms by TV stations in the country.

• Vendime të KKRT-së për dhënie, rinovim dhe heqje licence, si dhe vendosje sanksionesh të tjera (NCRT decisions for granting, renewing, and withdrawing license, as well as imposition of other sanctions)
http://merlin.obs.coe.int/redirect.php?id=12587 SQ

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AM-Armenia

New Amendments to Broadcast Law

On 17 June 2010 President Serzh Sargsian of Armenia signed into law the statute "On Introducing Amendments and Supplements to the RA Law 'On Television and Radio'". The document was adopted by the National Assembly (parliament) in the final second reading on 10 June 2010. The draft law was elaborated on by the Ministry of Economy and was justified by the need to switch from analog to digital broadcasting. This is the latest set of amendments to the broadcasting statute of Armenia (see IRIS 2010-5: 1/6 and IRIS 2008-1: 7/6).

The amendments introduce a new text into the whole broadcasting statute, though very close in structure and meaning to the norms of the previous one.

Article 8 of the amended statute provides that the volume of the "broadcasts of domestically produced programmes by television-radio companies on one television (radio) channel may not be less than 55 per cent of the overall monthly airtime".

While the notion of "sponsorship" is now defined in the Armenian broadcasting statute exactly as in the European Convention on Transfrontier Television and

many provisions follow the Convention, some important provisions of the Convention are not included: for example the broadcasting statute does not provide that sponsored programmes shall not encourage the sale, purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services in such programmes (as in the Convention, para. 3 of Art. 17) (Armenia is not a party to the Convention).

There are no clear distinctions in the broadcasting statute between regulating satellite, mobile, Internet-provided broadcasting and non-linear audiovisual media services. There are no specifics in relation to the number or thematic direction of radio programmes on national and capital (Yerevan) multiplexes. The system of financing Public Television and Radio and that of the National Commission on Television and Radio (national regulator) does not provide for an automatic guarantee of their financial independence from the State.

No legal grounds were laid for the establishment of non-State operators of digital broadcasting. For example, para. 13 of Article 62 of the statute now provides that “in order to create a private network of digital broadcasting by legal persons starting from 1 January 2015, the procedure and terms for multiplex licencing will be established by law”. When these important terms will be established by law or why their adoption was delayed is not specified in the draft or in the “Substantiating Memo” to it.

Since the release in early May the document has been criticized by journalistic and international organizations. The observers noted that the draft does not solve the crucial issues of broadcast sphere regulation and recommended that it should introduce some essential changes to it. For example, in the statement of 15 June 2010 Dunja Mijatovic, OSCE Representative on Freedom of the Media, considered the amendments as not promoting broadcast pluralism in the digital era.

• Armenian broadcasting law fails to guarantee media pluralism, says OSCE media freedom representative / Press release and accompanying legal reviews
http://merlin.obs.coe.int/redirect.php?id=12601 EN

• Law of the Republic of Armenia “On Making Amendments and Supplements to the Law of the Republic of Armenia on Television and Radio” of 17 June 2010 HY

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AT-Austria

Withdrawal of Invitation to Discussion Breached Objectivity Rule

In June 2010, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS) ruled that the withdrawal of an invitation to a political party to participate in a television programme constituted a breach of the objectivity rule.

On 24 December 2009, ORF broadcast the programme "*Licht ins Dunkel*", in which viewers were encouraged to donate money to charitable causes. The programme included a discussion involving the presidents of the parties represented in the *Nationalrat* (national assembly). ORF had sent similar invitations to all party presidents. The plaintiff is a political party represented in the *Nationalrat* and the Vienna *Landtag* (State parliament). Its president could not accept the invitation. Instead, her deputy was nominated, a proposal that ORF initially accepted. The day before the programme, which was to be broadcast live, ORF informed the party that the invitation to its representative was no longer valid because she was also a leading candidate in the forthcoming 2010 *Landtag* election in Vienna. The party declined to send another representative, whereupon the programme "*Licht ins Dunkel*" was broadcast without a representative of that party. The party pointed out that another invited guest was expected to stand as a candidate in the Vienna *Landtag* election and therefore should also have been excluded from the programme.

The BKS upheld the complaint. It began by explaining that it intended to adhere to previous case-law concerning invitations to participate in certain programmes. ORF had broad discretion to select discussion participants. In principle, no individual, group or political party had the right to appear in a particular programme.

The unusual feature of this case is that, although ORF invited the party to appear in the programme, it did not allow a particular person - the party’s deputy leader - to take part. In principle, a political party should be allowed to choose its own representative.

There was no reason why ORF should not include the discussion of non-political themes in a Christmas Eve broadcast. The fact that the discussion was of a non-political nature could even justify its refusal to accept a nominated representative of an invited party official - but not if that representative herself held a senior position in the party. This was the case here: on the basis of her party’s statutes, the invited representative was authorised to deputise for the party president if the latter was unable to fulfil an engagement. ORF should therefore have accepted her nom-

ination. The possibility of the Christmas Eve broadcast being abused for election purposes could have been prevented, for example, by a general invitation to people other than the presidents of the parties represented in the *Nationalrat*. It was unlawful to exclude one party's top candidate for the Vienna *Landtag* election from the discussion, but to allow another party's leading candidate to take part. By not inviting the deputy leader of the party, ORF had therefore broken the rule on objectivity.

• *Entscheidung des BKS vom 2. Juni 2010 (611.940/0007-BKS/2010)*
(BKS decision of 2 June 2010 (611.940/0007-BKS/2010))
http://merlin.obs.coe.int/redirect.php?id=12614 DE

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Operator of Illegal Download Server Sentenced

According to media reports, on 22 June 2010, the Austrian *Landesgericht für Strafsachen Wien* (Vienna district criminal court) imposed a suspended three-month prison sentence on the German operator of a subscription-based download server.

Subscribers could download pirate copies of current music, films and TV series via the operator's FTP server. He advertised his service in relevant forums and offered the choice of two download tariffs. A limited download service was available for EUR 15, whereas unlimited access cost EUR 20.

The Austrian *Verein für Anti-Piraterie der Film- und Videobranche e. V.* (film and video anti-piracy association - VAP) became aware of the service after seeing an advertisement. It appointed private investigators to gather evidence and, with the help of the German *Gesellschaft zur Verfolgung von Urheberrechtsverletzungen* (federation against copyright theft - GVU), they were able to identify the operator from his bank account details.

The defendant did not respond to a caution, but withdrew the service. Although he continued to deny all the allegations at the first oral hearing, he failed to appear at the second hearing and was sentenced *in absentia*. The sentence was suspended.

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Comprehensive Media Rights Reforms Adopted

On 17 June 2010, the Austrian *Nationalrat* (national assembly) adopted amendments to the *Bundes-Verfassungsgesetz* (Federal Constitutional Act), *KommAustria-Gesetz* (KommAustria Act - KommAustria-G), *Telekommunikationsgesetz* (Telecommunications Act), *Verwertungsgesellschaftengesetz* (Collecting Societies Act), *ORF-Gesetz* (ORF Act - ORF-G), *Privatfernsehgesetz* (Private Television Act) (now known as the *Audiovisuelles Mediendienste-Gesetz* - Audiovisual Media Services Act - AMD-G), *Privatradiogesetz* (Private Radio Act) and *Fernseh-Exklusivrechtegesetz* (Exclusive Television Rights Act - FERG). The decision is essentially in line with the 2009 ministerial draft of the *Bundeskanzleramt* (Federal Chancellery) (see IRIS 2010-3:1/5).

Under Articles 1, 2 and 13 KommAustria-G (in connection with Articles 35 and 36 ORF-G), KommAustria, which is not subject to directives, is responsible for the legal supervision of ORF and other audiovisual media services, and for fulfilling tasks listed in the FERG. Article 3 states that the five KommAustria members are appointed by the government and confirmed by the parliamentary steering committee. The *Bundeskommunikationssenat* (Federal Communications Senate) controls the administrative activities of KommAustria and remains responsible for hearing appeals against its decisions (Article 36 KommAustria-G).

The *Aufsichtsbehörde für Verwertungsgesellschaften* (supervisory authority for collecting societies), newly created under the auspices of the *Bundesministerium für Justiz* (Federal Ministry of Justice), is now responsible for supervising collecting societies (Article 28 *Verwertungsgesellschaftengesetz*).

ORF remains partly funded through licence fees, which will be fixed on a five-yearly basis and whose usage will also be monitored by KommAustria (Article 31 paragraphs 1, 14 and 15 ORF-G). The ORF Director-General will provide KommAustria with a structural concept with measures to cut broadcasters' costs, including an income and expenditure plan (Article 31 paragraph 13 ORF-G). An evaluation committee set up within KommAustria will submit its opinion on this concept to the ORF *Stiftungsrat* (Foundation Board), which will take the final decision. According to Article 4 paragraph 8 ORF-G, the ORF Director-General will be required to submit a code of conduct for journalistic activities. This must be approved by the *Publikumsrat* (Viewers' Council) and *Stiftungsrat* and published on the ORF website.

In order to guarantee ORF's (core) public service remit, Article 4a ORF-G provides for an internal quality assurance system involving the ORF Director-General,

Stiftungsrat and *Publikumsrat*. Under Article 4a paragraph 2 ORF-G, an external council of experts will evaluate the overall performance of the quality assurance system and decide whether the quality criteria are being met in key areas. KommAustria will ensure compliance with the provisions of the quality assurance system (Article 4a paragraph 8 ORF-G). ORF's public service remit must be clarified with regard to online services (Articles 4e and 4f ORF-G) and special interest channels (Articles 4b, 4c and 4d ORF-G). To this end, ORF must draw up "service concepts", which should provide more concrete definitions (Article 5a ORF-G). KommAustria is also required to evaluate new ORF services in advance (Articles 6 ff. ORF-G), particularly by determining whether they meet the social, democratic and cultural needs of the Austrian population and help ORF to fulfil its core public service remit effectively.

The ORF-G contains new rules for ORF's commercial activities (Articles 8a ff.) and commercial communication (Articles 13 ff.). The latter must be easily recognisable, while surreptitious advertising and commercial communications beneath the perception threshold are prohibited during programmes. Product placement is forbidden in principle, although Article 16 ORF-G mentions some exceptions, which are subject to additional conditions.

The AMD-G regulates private terrestrial, mobile terrestrial, satellite and cable television, multiplex platforms and audiovisual media services (Articles 29 ff. AMD-G). Articles 39 ff. AMD-G, particularly, include provisions on the protection of minors and product placement for private audiovisual media services.

The FERG contains provisions on the exercise of exclusive television broadcasting rights for events of considerable importance to society (Article 3 FERG) and short reporting rights for events of general public interest (Article 5 FERG). For example, the maximum length of short reports for the latter category is 90 seconds, unless otherwise agreed, whereas there is no limit for the former category.

• *50. Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das KommAustria-Gesetz, das Telekommunikationsgesetz 2003, das Verwertungsgesellschaftengesetz 2006, das ORF-Gesetz, das Privatfernsehgesetz, das Privatradiogesetz und das Fernseh-Exklusivrechtegesetz geändert werden* (50th Federal Act Amending the Federal Constitutional Act, KommAustria Act, 2003 Telecommunications Act, 2006Collecting Societies Act, ORF Act, Private Television Act, Private Radio Act and Exclusive Television Rights Act)
http://merlin.obs.coe.int/redirect.php?id=12619 DE

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Revision of Legislation on Copyright

On 13 July 2010 the Parliamentary Assembly adopted the Act on Copyright and Related Rights and the Act on the Collective Management of Copyright and Related Rights. The subject-matter of the current Act on Copyright and Related Rights of 2002 has been thus revised and divided into two separate laws.

The purpose of the revision is to harmonise this field with the relevant EU legislation and international conventions and treaties, as well as to adequately respond to technological developments and new forms of copyright exploitation in the information society. The new Act on Copyright and Related Rights regulates more closely the right of making available to the public works in digital form through the Internet. Another significant addition concerns the provisions aiming to raise the level of legal protection against the circumvention of technological measures. The Act also introduces limitations to the reproduction rights to allow certain acts of temporary reproduction which are integral to a technological process. Under the Act of 2002, related rights governed solely the rights of performers, phonogram producers and broadcasting organisations. The new Law extends these rights to include rights of film producers, publishers and database producers.

The collective management of copyright and related rights was not sufficiently regulated under the 2002 Law, allowing for quite a few grey areas, mostly with respect to the mandate of collecting societies, which the new Act on Collective Management of Copyright and Related Rights seeks to rectify.

This Law sets forth specific and detailed provisions with regard to authorisation procedures, tariffs and tariff agreements on the amounts of remuneration, as well as the supervision of collecting societies. It also stipulates that there may be only one collecting society per type of protected work. This is one of the most important provisions having in mind that the former system allowed for the existence of collecting societies with parallel competencies, which has proved to be inefficient in practice, creating legal uncertainty for the users of copyright works, especially broadcasters.

Another important amendment concerns the establishment of the Copyright Board. It is envisaged as an expert, independent and impartial authority in charge of settling tariff disputes between collecting societies and users. Finally, the Law also introduces the possibility of mediation in negotiating collective agreements for cable retransmission of broadcasts.

Both Acts were published in the Official Gazette on 3 August 2010 and entered into force 8 days after their publication.

• Prijedlog zakona o autorskom i srodnim pravima (Act on Copyright and Related Rights, Official Gazette number 63/2010, dated 3 August 2010)
http://merlin.obs.coe.int/redirect.php?id=12588 BS

• Prijedlog zakona o kolektivnom ostvarivanju autorskih i srodnih prava (Act on Collective Management of Copyright and Related Rights, Official Gazette number 63/2010, dated 3 August 2010)
http://merlin.obs.coe.int/redirect.php?id=12588 BS

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RTBF Guilty of Product Placement

The new rules for product placement are without doubt creating problems for public-sector broadcasters in Belgium. Following on from the two cases involving VRT (see IRIS 2010-5: 1/9 and IRIS 2010-7: 1/7), it is now the turn of RTBF to be ordered by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) to pay a fine of EUR 10,000 and to broadcast a communiqué for having failed to observe the statutory provisions concerning product placement.

In February 2010, to mark the Chinese New Year, RTBF broadcast a daily micro-programme devoted to Eastern cookery entitled "A table on riz" over a period of two weeks on its main television service ("La Une").

RTBF had notified the CSA that the programme was the first to include product placement and had accompanied its broadcast with adequate identification measures; indeed the CSA acknowledges in its decision of 1 July 2010 that a micro-programme of this kind constitutes an entertainment programme for which product placement is permitted, since this form of advertising is in fact authorised for programmes produced after 19 December 2009 (Art. 21), subject to certain conditions, by the coordinated Decree on audiovisual media services.

However, the CSA noted that a number of elements pointed to excessive influence on the part of the advertiser (Uncle Ben's) at each stage of the production and in the exploitation of the micro-programme at issue, and concluded that RTBF's editorial independence had been infringed, in contravention of the provisions of the Decree. These elements included the fact that the content of the programme appeared to be tailor-made to serve the advertiser's interests, the facts that the presenter selected, although a member of RTBF's staff, was selected and recruited by the advertiser, that the production techniques used were more closely related to advertising than to a conventional programme, and that the recipes could only be consulted on the advertiser's Internet site and not on RTBF's site.

It should be said that apparently RTBF has decided not to apply for the cancellation of the CSA's decision, and has even asked its advertising agency (RMB) to pay the administrative fine of EUR 10,000.

• *Décision du CSA du 1er juillet 2010* (CSA decision of 1 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12613 FR

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Flemish Broadcasters Keep Violating New Regulation on Product Placement

Once again, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media - monitoring and enforcement of media regulation) has rendered decisions relating to forbidden product placement. Although the two cases both present similar facts, only the first decision, against the commercial broadcaster VMMa, is explicitly grounded in the regulation on product placement. The second, against the public broadcasting corporation VRT, concerns a radio programme, hence the new regulation on product placement is not applicable in this case (see Article 98 of the new Flemish Media Decree).

On 26 April 2010, the Flemish Regulator considered a report that was broadcast as part of the programme 'Spotlight' on VMMa. The report exclusively focused on the opening of a new fashion store, called 'Sissy-Boy', and continually mentioned and depicted this new commercial establishment. The Regulator held that the location was obviously chosen by and placed at the disposal of the broadcasting organisation in order to obtain a favourable and complimentary report on the new store. Therefore, there is no doubt that this cooperation was a form of production aid (Article 99, §2 of the Media Decree), a type of product placement that is allowable only within certain limits. According to the Regulator, the representation exclusively portrayed 'Sissy-Boy' in an attractive way. Moreover, the comments accompanying the report were without exception full of praise. The presenter showed the store's complete range of products (clothing, beauty products, etc.) and exclusively expressed herself in superlatives ('shop sensation', 'fantastic', 'unique', 'lovely', etc.). For these reasons, the Regulator decided that VMMa had violated the limits of acceptable attention that can be directed at a product in an audiovisual media service. As a consequence, the product had benefited from undue prominence, in breach of Article 100, §1, 3°of the Flemish

Media Decree. Moreover, the Regulator held that such purely promotional presentation of the fashion store amounted to a direct encouragement to visit the new establishment, in breach of Article 100, §1, 2°of the Media Decree. It eventually imposed a fine of EUR 5,000 (see IRIS 2010-7: 1/7 for a very similar case).

On 17 May 2010, the Regulator's attention was directed to a radio programme on MNM, a radio station that is part of the public broadcasting corporation VRT, which was transmitted live from a new 'Starbucks' establishment. The programme again focused on the opening of a new commercial establishment, continually mentioning the particular brand of the product sold. Once again, the Regulator considered that the location was obviously chosen by and placed at the disposal of the broadcasting organisation in order to bring the opening of this new store to the listeners' attention and, at the same time, promote a positive attitude towards the brand, amplifying the commercial nature of this programme. In return, the VRT was given access to all facilities in the establishment, which can be viewed as compensation in the form of production aid. Hence the Regulator decided that the programme contained commercial communication, as the sounds transmitted by the station were designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity (Article 2, 5°of the Flemish Media Decree). By integrating these sounds as a form of commercial communication in the editorial content of a programme itself, the VRT disrespected the obligation that commercial communication must be easy to identify as such (Article 53 of the Media Decree). As a consequence, the Regulator imposed a fine of EUR 7,500.

• *ZAAK VAN VRM t. NV VLAAMSE MEDIA MAATSCHAPPIJ (dossier nr. 2009/0498) BESLISSING nr. 2010/027 26 april 2010* (VRM v NV VMMa, 26 April 2010 (No 2010/027))
http://merlin.obs.coe.int/redirect.php?id=12625 NL

• *ZAAK VAN VRM t. NV VLAAMSE RADIO- EN TELEVISIEOMROEPORGANISATIE (dossier nr. 2010/0513) BESLISSING nr. 2010/028 17 mei 2010* (VRM v NV VRT, 17 May 2010 (No 2010/028))
http://merlin.obs.coe.int/redirect.php?id=12626 NL

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New Development to the Amendments to the Copyright Act

On 16 July 2010 the draft amendments to the Закон за авторското право и сродните му права (Copyright and Related Rights Act) were filed in Parliament by the Government. In general the draft was approved by a decision of the Council of Ministers on 16 May and had to be filed earlier, but some doubts arose regarding the provisions regulating the obligations concerning the payment of compensation for personal use (levies) and the draft was revised.

According to the provisions of May 2010 the Government took the view that additional rules for the collection of levies were necessary in order that the mechanism provided by the Law from 1993 (see IRIS 2010-7: 1/9) should start working effectively. Later, the Government changed its opinion due to the opinion of Advocate General Trstenjak on ECJ Case no 467/08 (SGAE, of 11 May 2010). According to this opinion the levy for private copies imposed on digital equipment, devices and media should be limited to cases where it may be presumed that they are to be used for private copying. A national system that indiscriminately provides for such a levy on all equipment, devices and media, infringes Article 5(2)(b) of Directive 2001/29/EC, insofar as there is insufficient correlation between the fair compensation and the limitation on the private copying right justifying it, because it cannot be assumed that such equipment, devices and media will be used for private copying.

Having this in mind and also the fact that for more than ten years the levy rule in Bulgaria was not followed, the Council of Ministers decided to revoke the system for the payment of levies for all equipment, devices and media, not just digital ones. In the recent bill it is proposed that Article 26 of the Copyright Act regulating the levy shall be deleted. This means that the use of protected works for personal use will be subject to the same rules as the use for commercial purpose. The user is obliged to obtain the consent of the rightsholder and to pay remuneration for every kind of use and for every time the work is used.

The amendments concerning the introduction of administrative control on the activities of the collecting societies and some temporary measures against copyright infringements are kept. The hope is that these rules will ensure a fair balance between the rightsholders affected by the private copying, to whom the compensation is owed under the general rule, on the one hand and the persons liable to pay the compensation on the other.

• ЗАКОН за изменение и допълнение на Закона за авторското право и сродните му права (Draft amendments to the Copyright and Related Rights Act)
http://merlin.obs.coe.int/redirect.php?id=12589 BG

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

Tension in the Competition for a Public Multiplex

The executive director of Mobiltel declared before journalists on 14 July 2010 that there was a risk that all platforms for digital radio broadcasting in Bulgaria may be seized by unofficially associated companies and the market may be monopolised. This statement was made after on the previous day unofficial information leaked out that the Communications Regulation Commission (CRC) had rejected the Mobiltel offer and that of Vivacom for receiving a license for the multiplex that will broadcast the programmes of the public media, the Bulgarian National Television (BNT) and the Bulgarian National Radio (BNR).

The CRC adopted a decision in May 2010 to organise a non-attendant competition for a permit for terrestrial digital broadcasting with national range which will broadcast the programmes of the public operators BNT 1, BNT Sat, Horizont, Hristo Botev, Radio Bulgaria plus the possible new programmes that the public television will create. For the public multiplex offers were made by Mobiltel, Vivacom (which recently closed a deal for the sale of one-half of the National Unit Radio and TV Systems (NURTS), now broadcasting the programmes of BNT and BNR, with the offshore company Mancelord Ltd., represented by the owner of the Corporate Commercial Bank), Hannu Pro Bulgaria (which is a part of the Latvian media systems group and had already been awarded a license to develop three of the multiplexes for the private radio and television) and "DVB-T" (a group of seven companies led by Insat Electronics that support the networks of television Pro.bg and radio Express, Darik and FM+).

The future constructor and operator of the public multiplex will possess a permit for 15 years and will serve twelve towns in the country: Blagoevgrad, Burgas, Varna, Vidin, Kardzhali, Pleven, Plovdiv, Ruse, Smolyan, Sofia, Stara Zagora and Shumen.

The competition for the public multiplex was set up and the most important criterion when evaluating the offers was previous experience in the construction of such facilities, which is beneficial to Vivacom as an owner of NURTS. That is why the operator attracted as a partner a Hungarian company which had already realised such projects.

On 14 July 2010 the Communications Regulation Commission declared Hannu Pro Bulgaria the winner.

• Решение № *749* от *14* юли *2010* г *)* (Decision of the Communications Regulation Commission of 14 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12591 BG

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Media Legislation and Child Protection

On 14 May 2010, a bill for the amendment of the Radio and Television Act (RTA) was introduced in the National Assembly. The amendments were provoked by programmes on the private national terrestrial television "Nova", in the format "Big Brother Family", in which children of some of the families were admitted into the house. The participation of juveniles in those programmes was the subject of harsh criticism by the National Assembly Commission for Education, Science and the Issues of Children, Youth and Sports.

A proposal for the introduction of a new clause into the RTA has been made: "Article 17a. Media service providers are obliged to prevent the participation of children in programmes that are adverse to their physical, psychological, moral, intellectual and social development". The violation of that clause shall lead to a severe sanction: the provider shall be penalised by a fine of an amount ranging from BGN 15,000 (EUR 7,500) to BGN 30,000 (EUR 15,000); in case of repeated violation the fine is of BGN 40,000 (EUR 20,000) to BGN 60,000 (EUR 30,000).

The motives of the initiators of the amendments are: "[...] the necessity for a swift and adequate response to the negative social reactions caused by the participation of children in programmes that raise the question whether the rights and interests of children are protected and how that participation influences their normal physical, psychological and mental development. It is precisely the participation of children in TV programmes, in particular in the so-called reality programmes, which motivated the UN Committee on the Rights of the Child in their report of 2008 to emphasise explicitly that the involvement of children in such programmes may be regarded as an illegal interference in their personal lives. In relation to this a recommendation has been addressed to the States, parties to the Convention on the Rights of the Child, to regulate the participation of children in reality programmes in order to eliminate that risk and guard their rights. From that point of view, it is compulsory to create a specific clause according to which media service providers are obliged to prevent the participation of children in such programmes. This is the aim of the bill, to preclude any arbitrary or illegal interference into children's personal lives and create conditions for the protection of their rights, interests and proper development in the utmost degree." On 2 June 2010, the Commission for Culture, Civil Society and Media approved the bill on its first reading.

On 8 June 2010, the chairman of the Commission for Education, Science and the Issues of Children, Youth and Sports introduced a bill for the amendment of the Radio and Television Act by which the Council for Electronic Media (CEM) acquires a new competence: the authority to order the immediate termination of the

broadcast of a programme that damages or exposes to the danger of being damaged the physical, psychological, moral, intellectual or social development of children, following a motivated proposal of the Chairman of the State Agency for Child Protection. The appeal against this kind of decision does not suspend its enforcement. The CEM and the National Agency for Child Protection shall develop criteria for evaluating content that damages or exposes to the danger of being damaged the physical, psychological, moral, intellectual or social development of children, which are to be adopted within 6 months of the coming into effect of the law.

On 16 June 2010, the Parliamentary Commissions for Education, Science and the Issues of Children, Youth and Sports and for Culture, Civil Society and Media approved the text.

• Законопроект за изменение и допълнение на Закона за радиото и телевизията (Bill amending the Law on Radio and Television)
http://merlin.obs.coe.int/redirect.php?id=12640 BG

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Reduction in the Number of Members of the Media Regulator

The President of Bulgaria imposed a veto on the latest Act for the Amendment of the Radio and Television Act adopted by the National Assembly. Among the motives for the imposition of the veto was that by introducing a limitation on the members of the Council for Electronic Media on serving more than two consecutive mandates, a new specific limitation is created beyond those listed in Article 26 of the Radio and Television Act, as it is used as legal grounds for a pre-term termination of the mandate of council members apart from those listed in Article 30.

The National Assembly overrode the presidential veto and voted on 19 May 2010 and 16 June 2010 the amendments to the normative Act, which was promulgated in the State Gazette (issue No 47 dated 22 June 2010). By virtue of the act, the number of members of the Council for Electronic Media has been reduced from 9 members to 5, as two representatives from the Parliament and two representatives from the President were released from their duties.

A commission from the Administration of the President held on 22 June 2010 a procedure for determining, by lot, a member of the Council for Electronic Media from the presidential quota whose mandate should be terminated. The lot was organised on the grounds of § 5 of the Act for the Amendment of the Radio and Television Act.

• Act for the Amendment of the Radio and Television Act, State Gazette (issue No 47 dated 22 June 2010) BG

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CY-Cyprus

Digital Platform Auction Suspended

On 2 July 2010, the bidding process for the selection of the company that would run the second digital platform (the first digital television platform was assigned to the public service broadcaster Cyprus Broadcasting Corporation) was suspended after one of the bidders contested it, following allegations about double-bidding by two contestants. After 13 rounds of an "ascending multiple round auction", and with two contestants remaining, the bid amounted to EUR 9,000,000 - more than ten times the reserve price set at EUR 850,000.

Following an initial selection of eligible contestants, officially named on 14 May 2010, the bidding process started on 28 June with the participation of three companies, the Cyprus Telecommunication Authority CYTA (a semi-governmental public law body), LRG Enterprises Ltd and Velister Ltd, a company set up by Cyprus private broadcasters. CYTA withdrew from the competition after the seventh round when the bid amounted to EUR 4,000,000, while LRG and Velister continued to reach EUR 9,000,000. Amid allegations by a member of CYTA's board of directors that the organisation's chairman had secret dealings with LRG officials, Velister contested the validity of the process on claims of double-bidding. The Department of Electronic Communications and the Office of the Commissioner for Electronic Communications and Postal Regulation (CECPR) suspended the contest in order to examine the issue.

In the meantime, without submitting an official complaint, LRG claimed also that CYTA and Velister were involved in double-bidding and that the contest should be cancelled. Some analysts say that the amount of the last bid was too high for the market of Cyprus, which could ultimately lead to the cancellation of the contest.

In another development, in May the President of the Republic referred to the Supreme Court a law passed by the House of representatives to ban CYTA from taking part in the contest for the digital platform. The President had as a first step exercised his right of return of the law to the House for reconsideration, on the grounds that it interferes with specific administrative procedures with the sole goal of excluding CYTA

from the auction for the digital platform, and that it constitutes an interference by the legislative power with the rules of competition (see IRIS 2010-6: 1/15). The House insisted on its vote, but with the Supreme Court's decision pending CYTA eventually could take part in the auction.

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Information Action Plan on Digital Television

The creation of a website on digital television and of a 'digital television theatre' are two of the main actions for informing the public about the benefits of digital television and the digital switch-over. These are part of an information action plan announced by the Office of the Commissioner for Electronic Communications and Postal Regulation (CECPR), which is coordinating the campaign.

The campaign targets all of the groups involved in the plan, such as professionals who import, distribute or install digital television equipment, consumer associations, local authorities and the public. Actions include meetings and consultations, the publication of articles and information material and an advertising campaign on radio and television.

Through the website on digital television (www.dtv.org.cy) users can access information about the regulatory bodies and their functions and competence; they can also find details about the plans for the digital switch-over due in July 2011, technical specifications of digital equipment, transmissions and other information, and actions users need to undertake in order to meet the requirements for digital reception.

The 'digital television theatre', which will be set up at the offices of the Commissioner, will be a specially arranged space where the visitor can have free access to the various digital platforms and services provided in Cyprus, both free to air and paid ones. Visitors will get acquainted with the services available, they will be provided with information on connectivity and other technical issues and will have the opportunity to better assess the advantages of digital television.

• Η ΕΨΤ και ο τερματισμός των αναλογικών μεταδόσεων - Παρουσίαση ΓΕΡΗΕΤ (Information action plan on Digital Television)
http://merlin.obs.coe.int/redirect.php?id=12641 EL

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Sky Youth Protection Adequate?

In early July, the *LandgerichtDuisburg* (Duisburg district court - LG) reinstated a temporary injunction, under which the erotic broadcaster Beate-Uhse.tv was provisionally prohibited from transmitting its programmes via the pay-TV broadcaster Sky before 11 p.m. According to media reports, however, the *OberlandesgerichtDüsseldorf* (Düsseldorf court of appeal - OLG) lifted this injunction on 21 July 2010. The programmes may now again be shown from 8 p.m. onwards.

The case follows a complaint from a company that itself operates an encrypted online pornography service and believed that the Sky service, whose encryption it considered to be insecure, infringed its rights under competition law.

Before the temporary injunction was granted, the channel was broadcast from 8 p.m. and viewers had to enter a special code ("youth protection code"). For some decoders, this code can be calculated from the decoder's serial number by following instructions available on the Internet. The plaintiff therefore thought that, in contrast to its own service, the youth protection measures associated with the Sky service were not secure or adequate. Sky, however, argued that, since it explicitly instructed its client to change the code regularly, the youth protection measures were sufficient.

The OLG Düsseldorf agreed. Sky's appeal would, in all probability, be successful because the broadcaster's interest in the temporary injunction being lifted outweighed that of the plaintiff to have it maintained.

The plaintiff has announced that, despite the OLG's decision, it will continue to take action against the youth protection mechanism used by Sky.

• *Beschluss des LG Duisburg vom 4. Mai 2010 (Az.: 21 O 51/10)* (Decision of the Duisburg district court, 4 May 2010 (case no. 21 O 51/10))
http://merlin.obs.coe.int/redirect.php?id=12618 DE

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FFG Amendment Passed

On 11 June 2010, the *Bundestag* (lower house of parliament) adopted an amendment to the *Film-*

förderungsgesetz (Film Support Act - FFG). The *Bundesrat* (upper house of parliament) had already decided not to raise any objections on 26 March 2010 and adopted it on 18 June 2010.

Under the revised FFG, whose entry into force was backdated to 1 January 2010, the television industry is now legally obliged to pay a fixed level of contributions to the *Filmförderungsanstalt* (Film Support Office - FFA).

Previously, television companies were free to negotiate the level of their contributions with the FFA (Art. 67 of the old version of the FFG), while cinema operators and video companies had to pay a fixed amount based on their turnover (Art. 66 f. of the old version of the FFG). Several cinema operators had filed complaints about this unequal treatment of the different sectors required to pay the contributions. They had subsequently made their contributions to the FFA subject to certain conditions or stopped paying them altogether. During the proceedings, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG), as the appeal body, expressed doubts over the compatibility of the contributions regime with the equality principle enshrined in Article 3 of the *Grundgesetz* (Basic Law - GG). It held that the failure to lay down in law a fixed amount for television companies violated the principle of fair contributions. The BVerwG suspended the proceedings and referred them to the *Bundesverfassungsgericht* (Federal Constitutional Court) (see IRIS 2010-3:1/18 and IRIS 2009-4:7/8).

Aiming to dispel the concerns of the BVerwG and create a secure legal basis for the financing of the FFA, the current legislative amendment establishes a legal obligation for television companies to pay the FFA contributions. Article 67 of the revised FFG specifies the level of contributions and payment method required. It concerns public and private broadcasters of free-to-air television channels, pay-TV providers and programme marketing companies.

Under paragraph 1 of Article 67, public service television companies are obliged to pay 2.5% of the amount they spent on the broadcast of cinematographic films (e.g., licence and administrative costs) during the previous year. Under paragraph 2, the contributions to be paid by private television companies are graded in accordance with the ratio of cinematographic films to total airtime and net turnover for the previous year. Paragraph 3 states that pay-TV providers must pay a contribution of 0.25% of their net income from subscriptions (excluding the provision of technical services) for the previous year. The rule does not apply to channels on which cinematographic films account for less than 2% of total airtime (paragraph 4). Television companies are allowed to pay up to 50% of their contributions in the form of media services. The details of these services must be set out in an agreement with the FFA (paragraph 5).

Since the amendments have been backdated, they apply to the period from 2004 onwards.

- *Filmförderungsgesetz in der Fassung der Bekanntmachung vom 24. August 2004 (BGBl. I S. 2277), das zuletzt durch das Gesetz vom 31. Juli 2010 (BGBl. I S. 1048) geändert worden ist* (Film Support Act, published on 24 August 2004 (Federal Gazette I p. 2277), most recently amended by the Act of 31 July 2010 (Federal Gazette I p. 1048))
http://merlin.obs.coe.int/redirect.php?id=12615 DE
- *Entscheidung des Bundesrats vom 26. März 2010* (Decision of the *Bundesrat* (lower house of parliament), 26 March 2010)
http://merlin.obs.coe.int/redirect.php?id=12616 DE

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KJM and ASTRA Agree Regulatory Framework for Free-to-Air Erotic Content

On 19 July 2010, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Young People in the Media - KJM) and satellite provider ASTRA announced the conclusion of an agreement, under which ASTRA promised, on a voluntary basis, not to sign any more contracts with foreign providers of free-to-air erotic content for an indefinite period, and to phase out all existing contracts by the end of 2011. Aware of its responsibility as a service provider to protect young people, ASTRA also declared its willingness to refer proactively in line with its cooperation with the KJM at various events.

This KJM initiative to improve youth protection was triggered by numerous complaints about so-called "erotic freeze frame channels", on which foreign providers, which are not subject to German laws, broadcast erotic or pornographic content and services via satellite, usually in connection with a telephone hotline that viewers pay to use in order to make contact.

The agreement, which covers a total of almost 40 channels that pose problems from a youth protection point of view, is the result of a longstanding dialogue between the KJM and the satellite operator and should, in future, prevent foreign providers from circumventing German youth protection laws.

- *Pressemitteilung der KJM vom 19. Juli 2010* (KJM press release, 19 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12634 DE

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DK-Denmark

Danish Supreme Court Upholds Injunction to Block the Pirate Bay

The Swedish website The Pirate Bay offers a service with which users can find and download so-called 'torrent files'. When using appropriate file-sharing software, these files can be used to download music, films, software, etc., from other users of the same file-sharing software (the so-called 'peer-to-peer (P2P) file sharing').

In April 2009, the four persons behind the operation of The Pirate Bay website were found guilty by a Swedish court of contributory copyright infringement and were sentenced to one year in prison, as well as ordered to pay damages of SEK 30 million. The website has also given rise to injunction cases against internet service providers (ISPs) in several European countries, including all of the Scandinavian countries (see IRIS Merlin database for a collection of previous articles on such cases).

In this Danish case, the Supreme Court by its decision of 27 May 2010 upheld an injunction against a Danish ISP to block access to The Pirate Bay. The injunction was first issued by the bailiff's court in 2008 and upheld by the high court later the same year.

The case started in 2007 when a number of rightsholders filed for an injunction ordering the Danish ISP Sonofon (at that time called DMT2) to block its subscribers' access to The Pirate Bay through its network. IFPI argued that The Pirate Bay infringed the rightsholders' copyright and that Sonofon contributed to the infringement by providing its subscribers with access to The Pirate Bay (see IRIS 2008-6: 7/10)

The decision in the case in all court instances very closely followed the reasoning in the leading case, a Supreme Court case from 2006, where another ISP was effectively ordered to terminate an internet connection that was used to distribute a large amount of copyright-protected music. It was taken into account that Sonofon, being a mere conduit service provider, was free from liability under Section 14 of the Danish E-Commerce Act, implementing Article 12 of the E-Commerce Directive (2000/31/EC). It was also taken into account that the liability exemption does not preclude member states, in accordance with their legal system, from applying interlocutory remedies such as injunction orders against the intermediaries (cf. Article 12(3) of the E-Commerce Directive and Article 8(3) of the InfoSoc Directive).

Thus, the pivotal issue in the case was whether the conditions under Danish law for issuing an injunction were fulfilled. Under the Danish Administration of Justice Act, it is, inter alia, a condition for imposing injunctive relief that the defendant has infringed or intends to infringe the plaintiff's rights. This notion of infringement is based on an objective standard, i.e., it is not a requirement that the defendant has acted with intent or negligence. It is also a condition that the injunction is proportionate, i.e., does not harm the defendant in a way which is obviously disproportionate to the plaintiff's interest in the injunction.

The Supreme Court concurred with the high court that the Pirate Bay contributed to serious copyright infringement and that Sonofon contributed to this infringement by providing its subscribers with access to the Pirate Bay. Through this chain of contributory liability Sonofon was held objectively to have infringed the plaintiff's copyright.

The Supreme Court also concurred that the injunction was proportionate, considering the relatively low costs and slight disadvantages for the ISP in blocking access to the website, compared to the very large number of copyright infringements being conducted via the Pirate Bay.

Before the Supreme Court the ISP also argued that the requested injunctive relief was too imprecise, because it did not specify how the blocking should be established. This argument was rejected by the Supreme Court.

With two Supreme Court decisions there is a now clear precedent under Danish law for imposing injunctions against ISPs performing mere conduit in cases of extensive copyright infringements via the internet. However, the decisions have raised some uncertainty with regard to, inter alia, the precise scope of the rules on contributory liability in injunction proceedings against ISPs and other intermediaries on the internet and the interpretation of the balancing of interest rule in relation to broader interests, including the right to freedom of expression. These issues were not tried before the Supreme Court.

• Højesterets kendelse, afsagt torsdag den 27. maj 2010, Sag 153/2009, Telenor (tidligere DMT2 A/S og Sonofon A/S) mod IFPI Danmark (Supreme Court's decision of 27 May 2010 in case 153/2009 (Telenor v IFPI Denmark))
http://merlin.obs.coe.int/redirect.php?id=12604 DA

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The Media Agreement for 2011-2014

On 26 May 2010, an agreement focused on quality and diversity in radio and television was reached between the Danish Government and the political parties Dansk Folkeparti (Danish popular party) and

Liberal Alliance on the media policy for the coming four years. The radio and TV legislation shall be amended correspondingly during the parliamentary session 2010/2011. The agreement shall come into force for the period from 1 January 2011 to 31 December 2014. The main features of the agreement are as follows:

- The agreement intends to expose the public service radio channel DR (Danmarks Radio) to more competition in order to augment the quality of its programmes and to give more choice in programmes to viewers;

- To this end, a tender concerning the establishment of a new private radio channel with public service obligations, FM 4, shall be organised. The new channel shall comply with a range of requirements for achieving a qualified level;

- The outsourcing of the production of programmes to commercial producers shall be intensified;

- A test of new services offered by the DR channel shall be introduced in order to evaluate their importance for the public and to observe the influence of the services on the market;

- The number of permitted broadcasting hours for the regional broadcasters shall be increased. The national TV 2 broadcaster however shall not receive more time for its regional broadcasting programmes. The intention is to strengthen the position for the regional broadcasters in relation to TV 2;

- The obligations for viewers to adhere to a communal aerial system shall be reduced, in order to enable viewers' access to a wider variety of broadcast programmes;

- Product placement in programmes shall be permitted, in order to place Danish broadcasters on an equal footing with foreign broadcasters.

The possibility of granting particular resources to the DR for improving news and music programmes and for producing film dramas on the history of Denmark is also currently being considered.

• *Pressemeddelelse: Medieaftale 2010* (Press release of 26 May 2010 on the Media Agreement 2010)
http://merlin.obs.coe.int/redirect.php?id=12602 DA

• Fokus på kvalitet og mangfoldighed, Mediepolitisk aftale for 2011-2014 ('Focus on Quality and Diversity'. Media Political Agreement for 2010-2014)
http://merlin.obs.coe.int/redirect.php?id=12603 DA

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FR-France

Court of Cassation Upholds Exclusive Commercialisation of Orange Sports Channel

The Court of Cassation has found in favour of Orange (a subsidiary of France Télécom) in its dispute with its competitors SFR and Free, which claimed it was making access to its sport channel Orange Sports dependent on subscription to its triple-play offer (television, Internet and telephone) (see IRIS 2009-6: 12/19). The applicants claimed that the two-fold exclusivity for distributing and broadcasting exclusive audiovisual programmes constituted joint selling, which is prohibited by Article L 122-1 of the French Consumer Code, and hence was an act of unfair competition on the part of Orange. The Court of Cassation rejected the appeal against the decision of the Paris court of appeal delivered on 14 May 2009, and confirmed that Orange's strategy did not constitute unfair competition. The Court of Cassation found that the court of appeal had analysed the situation correctly, in accordance with the criteria set out in the Directive of 11 May 2005 on unfair commercial practices, without proceeding with the direct application of the Directive by substitution, or violating the principle of the presence of all the parties concerned, as SFR and Free claimed. The Court held that the appeal judgment noted rightly that it was not proven that the offer made by France Télécom's company (Orange) was misleading or contrary to professional diligence and was right in holding that the offer left consumers free to choose their ADSL operator because of the configuration of the market and more particularly because of the structure of the offer. As a result consumers were able to choose their operator according to the associated services and hence operators had the capacity to differentiate themselves from their competitors. Having noted that, in the context of the competition between them, all Internet access providers make every effort to enrich the content of their offers to make them more attractive by setting up innovative services or acquiring exclusive rights for audiovisual, cinematographic or sports events content, the appeal judgment observed that the average consumer about to take out a subscription for the supply of Internet access reaches a decision precisely on the basis of the associated services and hence on the basis of the capacity for differentiation among the various competing offers. The Court of Cassation found that the court of appeal had been right in deducing from these observations, which reflected in general the usual behaviour of the average consumer in deciding between offers of Internet access and also in possibly deciding to change to a different operator, that the exclusive access to the Orange Sports channel included in the ADSL offer of the company Orange did not substantially compromise the consumer's ability to make a

reasoned decision.

This judgment comes just as the French competition authority (Autorité de la Concurrence) is beginning its investigation, further to an application from SFR and Canal+, into the same exclusive features on the grounds of tied selling. France Télécom also announced early in July that it was looking for partners, particularly in terms of capital, for its Orange Sports and Orange Cinéma channels, as it did not wish to pay on its own the annual charge of EUR 203 million for acquiring exclusive rights for League football matches. It would appear then that the time has come for Orange's exclusivity strategy to end, even though it has been definitively validated by the Court of Cassation's judgment.

• *Cour de cassation (ch. com.), 13 juillet 2010, SFR et Free c. France Télécom* (Court of Cassation (commercial section), 13 July 2010, SFR and Free v France Télécom) FR

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Conseil d'Etat Deliberates on Digital TV Channel Numbering in a Satellite Package Offer

On 17 December 2009 the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body - CSA) called on Canal+ Distribution to change the numbering of the terrestrially broadcast television channels NRJ 12 and BFM TV in the offer of its Canal Sat package, in response to the channels' desire to be given the place numbering they have for digital broadcasting, i.e. 12 for NRJ 12 and 15 for BFM TV, whereas they were numbered 36 and 55 respectively in the package. Canal Sat then appealed to the Conseil d'Etat for the decision to be cancelled (see IRIS 2010-2: 1/18). In a decision delivered on 9 July 2010, the Conseil d'Etat (the highest administrative court in France) overturned the CSA's decision, on the grounds that the CSA had committed a "mistake of law" in its interpretation of paragraph 2 of Article 34-4 of the Act of 30 September 1986 (as amended). The Conseil d'Etat noted that Canal Sat's offer, which included all the national digital TV services broadcast unencrypted, included a "digital TV section" in which these channels were each allocated their logical number plus three digits. Nevertheless, the Conseil d'Etat stated quite clearly that the fact that the "historic" channels were also included in the same service plan in the places corresponding to their logical numbers did not of itself require the distributor to allocate their logical numbers to the channels NRJ 12 and BFM TV. Similarly, the distributor was free to choose its own thematic organisation of the service plan, as long as it observed the criteria of fairness, transparency, uniformity and non-discrimination, meaning that the services must be grouped homogenously according to their programming. Thus, contrary to what the CSA had decided, the fact that only some digital TV channels in the package were allocated the same number as their logical number did not necessarily constitute discrimination.

Aside from the issue of channel numbering, BFM TV wanted to be placed immediately after the channels LCI and i-Télé in the "information" category in Canal Sat's offer, and not after the channels Euronews and LCP. Canal Sat justified the order it had applied by its choice to group together, at the start of the sequence of numbers in the same theme, those channels with programming that offered the least specialised content. The Conseil d'Etat found however that the nature of the information actually broadcast by the channel was not sufficiently different from that of i-Télé and LCI to justify, objectively, in the light of the single criterion applied, the placing it had been given. Canal+ Distribution was therefore enjoined to allocate to BFM TV a placing justified "by objective criteria" within three months. However, the Conseil d'Etat rejected the application brought by NRJ 12 which, having been placed in the "series and entertainment" category, wanted to be included in the "Canal+ channels and major general channels" category instead. The Conseil d'Etat found that the channel's programming had a preponderance of series and entertainment programmes.

• *Conseil d'Etat, 9 juillet 2010, Société Canal+ Distribution* (Conseil d'Etat, 9 July 2010, the company Canal+ Distribution) FR

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CSA Sanction Procedure and Prior Questioning of Constitutionality

Since 1 March 2010, anyone under the jurisdiction of a court may claim in proceedings before a court, either administrative or judicial, "that a legislative provision infringes the rights and freedoms guaranteed by the Constitution" - this is the prior questioning of constitutionality.

Thus Canal+, in support of its application to the Conseil d'Etat for the cancellation of a decision by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) in March 2010 ordering it to broadcast a communiqué (see IRIS 2010-4: 1/22), called for a referral to the Constitutional Council on the question of the constitutionality of Article 42-4 of the Act of 30 September 1986 (as amended). According to this provision, "in all cases of failure to perform the obligations incumbent on editors of audiovisual communication services, the CSA may order the inclusion in programmes of a communiqué, laying down the terms and conditions for broadcasting it. The CSA

shall call on the party concerned to submit its observations to the CSA within two clear days starting from the date of receipt of the request. The decision shall then be pronounced without implementing the procedure provided for in Article 42-7. (This procedure provides for the CSA to notify the grievances to the 'contravening' editor of the audiovisual services, which has the possibility of consulting its dossier, presenting its observations in writing, being heard before the CSA with the possibility of being represented) (04046)". Canal+ claimed that the procedure instituted under Article 42-4 would be contrary to the principle of respect for rights of defence.

In a decision issued on 18 June 2010 the Conseil d'Etat stated that, on the basis of Article 23-5 of the Order of 7 November 1958 instituting the Constitutional Council that "matters involving prior questioning of constitutionality shall be referred to the Constitutional Council on the three-fold condition that the contested clause is applicable to the dispute or procedure, that it has not already been declared in compliance with the Constitution in the grounds and operative part of a decision issued by the Constitutional Council, unless there has been a change in the circumstances, and that it is new or is of a serious nature". It goes on to recall that, as the Constitutional Council set out in its Decision No. 88-248 DC of 17 January 1989, the disputed provisions have neither the purpose nor the effect of dispensing the CSA from proceeding with the noting of failure on the part of an editor of audiovisual services to observe rights of defence. This implies, even if the sanction procedure provided for in Article 42-7 has not been implemented (i.e., at the time of implementing the contested Article 42-4), that the editor has been put in the position of being able to access its dossier and present its observations on the complaints made against it, and been given a sufficient period of time in relation to the nature of the grievances. Thus the period of two clear days provided for in the contended arrangement only concerns the observations that the party concerned may submit on the content and the conditions for broadcasting the draft communiqué sent to it by the CSA. The Conseil d'Etat therefore holds that the prior questioning of constitutionality raised by Canal+ is not new and is not of a serious nature, and therefore the matter does not need to be referred to the Constitutional Council. It seems likely that the question of the constitutionality of other provisions of audiovisual legislation will be submitted to the Conseil d'Etat, and even perhaps to the Constitutional Council, in the near future.

• *Conseil d'Etat (n°338344), 18 juin 2010* (Conseil d'Etat (no. 338344), 18 June 2010) FR

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Catch-up TV and Deep Hyperlinks

The group M6 operates the free catch-up TV services M6 Replay and W9 Replay, which can be accessed on dedicated Internet sites. The services allow on-demand viewing of certain programmes after they have been shown on the two channels without the possibility of recording them. Having noted that a company edited two sites that listed and made available to the public all the audiovisual programmes available as catch-up TV, including those of M6 and W9, using deep hyperlinks, the group had the company summoned on the grounds of violation of the general conditions for using the M6 Replay and W9 Replay services, infringement of their exploitation rights, infringement of the rights of the producer of a database, unfair competition and parasitic activities. M6's complaint included the fact that the sites at issue directed Internet users not to the home page of these catch-up TV sites but to a window for viewing the programme selected, which meant that the viewing request was sent by the Internet user not to the rightsholder but to the company editing the two disputed sites.

In a judgment delivered on 18 June 2010, the regional court of Paris noted that, according to Article L. 122-2 of the Intellectual Property Code, representation consists of the communication of the work to the public by any means. By making the programmes of the two catch-up TV services available to the public, the defendant party was in no way communicating the works itself, but was merely assisting the viewer by indicating a link for viewing the works directly on the television channels' Internet sites - it was the sites themselves that carried out the act of representation within the meaning of the text. M6's application on the grounds of infringement of copyright was therefore rejected. The group also claimed infringement of its rights in its capacity as producer of a database. The court acknowledged that catch-up television services did indeed constitute databases, but stated that although the M6 group had demonstrated that it had incurred expense in developing and maintaining the two sites, this did not justify allowing substantial investments for constituting, checking or presenting the databases. The applications on this point were therefore rejected. Lastly, the television group claimed that the defendant party had committed acts of unfair competition as well as parasitic activities. M6 and W9 were indeed suffering from the diversion of Internet users who were no longer visiting M6 Web's home page to watch the programmes, whereas they were alone in bearing the investment and other costs necessary for such showing. In dismissing the application, the court held that, in order to achieve entitlement to compensation, proceedings on the grounds of unfair competition or parasitic activity needed to be based on facts other than those invoked in respect of infringement of intellectual copyright, which was

not the case here. All M6's applications were therefore rejected. The defendant company had in fact entered a cross-claim in order to obtain compensation for the prejudice it had suffered in terms of defamation. It claimed that M6 Web had sent a letter to media agencies, which were its main clients, in which it was stated that the defendant company was making television programmes available without the agreement of the channels broadcasting them. The court held that circulating such correspondence was wrongful as it discredited the company by casting doubt on the legality of its activity. M6 was therefore ordered to pay 30,000 EUR in compensation for the prejudice suffered.

• *Tgi de Paris (3e ch. 2e sect.), 18 juin 2010, M6 Web et a. c. SBDS* (Regional court of Paris (3rd chamber, 2nd section), 18 June 2010, M6 Web et al. v SBDS) FR

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GB-United Kingdom

Broadcast's Failure to Comply with Generally Accepted Standards not a Disproportionate Interference with Freedom of Expression

The High Court has upheld a finding of the communications regulator, Ofcom, that the offensive language and manner of a radio talkshow presenter failed to comply with generally accepted standards; the finding was not a disproportionate interference with freedom of expression. Under the Broadcasting Act 1990 broadcasters must comply with the requirement that nothing in their programmes "offends against good taste or decency or is 04046 offensive to public feeling" and this is implemented by Ofcom's Broadcasting Code covering television and radio. The Code requires that generally accepted standards must be applied to provide adequate protection for the public from harmful and/or offensive material.

Jon Gaunt, a controversial radio presenter for Talksport, interviewed a local authority member on a proposal not to place foster children with families who smoked. The presenter, who had himself spent his childhood in local authority care, referred to the councillor as a "Nazi", then as a "health Nazi'" The interview deteriorated into a shouting match, with the presenter calling the interviewee "you ignorant pig", a "health fascist" and an "ignorant idiot". The presenter was immediately suspended by the broadcaster and his contract was ended shortly afterwards.

Ofcom received 53 complaints from listeners. It expressed concern that Talksport's compliance procedures did not appear robust enough to deal with problematic material being broadcast live. It considered that the offensive and "what would be considered to be a persistently bullying and hectoring approach" by the presenter exceeded the expectation of the audience even in the context of a robust level of debate. It thus found a breach of the Broadcasting Code, but did not impose any penalty on the presenter or broadcaster. The finding was then challenged by the presenter as a disproportionate interference with his right to freedom of expression under Art. 10 of the European Convention on Human Rights.

The High Court accepted that it was for the Court itself to assess whether there was such interference. No attempt had been made to challenge the provisions of the Act itself or of the Code and it was accepted that the decision was prescribed by law and was capable of meeting a pressing social need. As the subject of the interview was one of political controversy and involved questions of value, freedom of expression should be accorded a high degree of protection and could extend to offensive expression. However, it did not extend to gratuitous offensive insult or abuse or to repeated abusive shouting. On this basis the reference to the councillor as a "Nazi", whilst capable of being highly insulting, had some contextual content and justification. However the tone of the interview then degenerated; the term "ignorant pig" had no contextual justification and constituted gratuitous offensive abuse and the latter part of the interview became abusive shouting with no real content at all. On this basis the Ofcom finding was justified and constituted no material interference with freedom of expression, as "an inhibition from broadcasting shouted abuse which expresses no content does not inhibit, and should not deter, heated and even offensive dialogue which retains a degree of relevant content". Ofcom's decision to impose no penalty also affected the proportionality of its decision.

• Gaunt v Ofcom [2010] EWHC 1756 (QBD), 13 July 2010
http://merlin.obs.coe.int/redirect.php?id=12610 EN

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BBC Authorised to Add Copy Protection to High Definition Freeview Broadcasts

Ofcom, the UK communications regulatory, has authorised the BBC to add copy protection in the form of content management technology or digital rights management (DRM) to its high definition Freeview digital terrestrial platform. Other Freeview services will not be affected.

The BBC proposed that its licence be varied to allow it to restrict access to broadcast Electronic Programme Guide data to only those high definition receivers that include content management technology. This would

enable broadcasters to control the multiple unauthorised copying of broadcast high definition content and its retransmission over the internet. The BBC argued that without the use of this technology the ability of broadcasters on this platform to secure content from third party rightsholders on similar terms to those on other platforms would be reduced.

The application was opposed on the grounds that 'open source' software developers would be unable to develop receivers that access such data if they had to take a licence from the BBC in order to access it. It was also argued by individual consumers that their ability to copy high definition content would be unduly restricted.

Ofcom concluded that the BBC proposal would widen the range of high definition content available on the digital terrestrial platform, in particular high value film and drama content, and that this would bring positive benefits to citizens and consumers and help to ensure that the platform is able to compete on similar terms with other digital TV platforms for high definition content rights. It also concluded that the licence amendment would not impact negatively on the market for high definition receivers in terms of market distortion and price, as the BBC is proposing to licence free of charge the intellectual property rights required to gain access to the data. Open source software development manufactures could also opt for an open source licence compatible with the BBC arrangements. The BBC had recognised consumer concerns and set out a number of commitments towards protecting consumers' fair dealing rights, including the implementation of a good practice framework, a user guide and a grievance mechanism.

On this basis, Ofcom granted the licence amendment on condition that a licence for data access is provided on a charge-free basis and that restriction of broadcast programme data is only used for the purposes of securing an effective content management framework on the high definition Freeview platform.

• Ofcom, 'Statement on the HD Freeview Platform', 14 June 2010
http://merlin.obs.coe.int/redirect.php?id=12609 EN

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Advertisement Regulation on VOD Services

The Advertising Standards Authority has been designated by the UK regulator Ofcom as the co-regulator for advertisements appearing on VOD services which are subject to statutory regulation, namely, the Communications Act, 2003, section 368A. Such advertisements are subject to the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code) and, in particular, the Appendix, which allows the ASA to take legal action against the VOD service provider in the event of Code infringements. A revised CAP Code (as well as the Code of Broadcast Advertising, the BCAP Code) comes into effect on 1 September 2010.

Recently, the ASA has delivered two adjudications on VOD service advertisements.

In Red Bull Company Ltd., a complaint was made that the advertisement was irresponsible and offensive, because it showed a young child in a sexual situation, engaging CAP Clauses 2.2 (Responsible advertising), 5.1 (Decency) and 47.2 (Children). The ASA did not find Red Bull in breach.

Interestingly, in coming to this conclusion, the ASA accepted information, supplied by Demand Five, that the audience profiles for the programmes in question ('Neighbours', 'Home and Away' and 'The Mentalist') on linear TV during 2010 showed that the child index was low. Other criteria could have been the time that the programme was originally broadcast or the "family-friendly" content of the programme. "We [the ASA] considered that children were therefore unlikely to watch those same programmes on VOD and it was therefore unlikely that they would have seen the ad."

An earlier adjudication, involving Paramount Pictures UK, involved a video-on-demand (VOD) trailer for the 15-rated film "Carriers", which was seen by the complainant before and during the X Factor final on the ITV Player. The complainant objected that the ad was frightening and inappropriate for display during a family programme, because it had distressed his young children. The ASA noted that "if a VOD programme contained adult themes, ITV had safeguards in place to ensure that it could only be accessed if the viewer was over 18 and, in those cases, an on-screen notice warning of the adult content also appeared prior to the start of the programme." However, "the X Factor itself on the ITV Player was not protected by a restricted content warning, nor was there any warning about the scenes in the trailer."

The ASA concluded that the ad breached CAP Code clauses 2.2 (Responsible advertising) and 9.1 (Fear and distress) and that it must not appear again in its current form.

• "Video-on-demand (VOD) advertising", ASA website
http://merlin.obs.coe.int/redirect.php?id=12627 EN
• ASA Adjudication on Red Bull Company Ltd.
http://merlin.obs.coe.int/redirect.php?id=12628 EN
• ASA Adjudication on Paramount Pictures UK
http://merlin.obs.coe.int/redirect.php?id=12629 EN

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Ofcom Consultation on Product Placement Rules

Up to now, the Ofcom Broadcast Code has prohibited product placement. However, owing to changes in EU and national law, "the placing of references to products, services or trade marks in television programmes in return for payment" is now to be permitted.

Ofcom, consequently, intends to amend the Code, removing the prohibition and incorporating enabling rules. It has initiated a Consultation on the matter.

Such rules would impact on other rules permitting other types of commercial references (e.g., sponsorship) and the Consultation includes proposals for revising those rules.

• Broadcasting Code Review: Commercial references in television programming: Proposals on revising the Broadcasting Code
http://merlin.obs.coe.int/redirect.php?id=12630 EN

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HU-Hungary

A Wave of Media Legislation

Following the general elections in spring the newly formed Hungarian Parliament has begun to reshape the legislative framework for the media.

As its first step the Constitution was amended in early July. The amendment defines the role of public service media (which is to contribute "to preserving the national and European identity, to preserving and enriching Hungarian and minority languages, to strengthening national cohesion and to fulfilling the needs of national, ethnic, religious communities and of the family"). Beyond this broad remit a new provision of the Constitution also defines the basic institutions designed to govern and supervise the activities of the public service media. Another new provision declares the right of the citizen to be informed about public affairs as a fundamental one.

As the second element of the ongoing reform of media regulation Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications was promulgated in the *Magyar Közlöny* (Official Journal) on 10 August 2010. This establishes a new "converged" regulatory authority and reshapes the institutions governing and supervising the activities of the public service broadcasters and of the public service news agency.

The new communications authority, the *Nemzeti Média- és Hírközlési Hatóság* (National Media and Communications Authority) is defined by the Act as an autonomous institution. It is the successor of the former telecom regulator, the *Nemzeti Hírközlési Hatóság* (National Communications Authority - NHH). The role of the former Council of the NHH will be taken over by the chairperson of the new authority, appointed by the prime minister for a renewable term of 9 years. The chairperson plays a central role in the new system of institutions: she/he appoints inter alia the director general of the office of the authority, the deputy chairpersons of the authority, the deputy directors general of the office and the director general of the Broadcast Support and Property Management Fund.

The Media Council is to be established in order to regulate the media. This is defined by the Act as a separate autonomous institution attached to the National Media and Communications Authority. Its chairperson and members are to be elected by the Parliament (also for a renewable term of 9 years). The chairperson of the authority becomes *ipso iure* the nominee for the chairpersonship of the Media Council. In preparing and executing its decisions the Media Council will be assisted by the office of the National Media and Communications Authority. The council is the successor of the former *Országos Rádió és Televízió Testület* (National Radio and Television Commission - ORTT) with more or less the same powers and duties.

In the previous system of institutions the *Műsorszolgáltatási Alap* (Broadcasting Fund) managed the State resources dedicated to funding public service broadcasting and supporting content production and technical development in the media sector. On the basis of the newly adopted Act this role will be taken over by the *Műsorszolgáltatás Támogató és Vagyonkezelő Alap* (Broadcast Support and Property Management Fund). However, the portfolio of this fund is substantially larger than that of its predecessor: according to the Act a definitive proportion of the properties of the public service broadcasters are to be transferred to and managed by this fund.

The Act also introduces a new system of governance for public service broadcasters. The previously separate governing bodies (the public foundations) of the public service broadcasters are to be merged into a single organ. However, in the new structure the three Hungarian public service broadcasters (Magyar Televízió, MTV; Duna Televízió; Magyar Rádió, MR) and the national news agency (Magyar Távirati Iroda, MTI) will also be liable (to various extents) to several institutions:

- The chairperson of the National Media and Communications Authority is entitled to nominate candidates for the position of CEO of the public service institutions.

- Electing the CEOs of the public service media companies is a task for the *Közszolgálati Közalapítvány* (Public Foundation for Public Service Media). The majority of the board of trustees of this public foundation is to be elected by the Parliament. The board of trustees also acts as general assembly of the public service companies.

- The Media Council of the National Media and Communications Authority adopts the *Közszolgálati Kódex* (Public Service Code) defining the tasks of the public service companies in detail.

- The Public Service Council - to be composed of nominees of non-governmental organisations defined in the appendix to the Act - safeguards the provisions of the Public Service Code as a representative of the Hungarian civil society. It may also propose amendments to the code, however, such amendment is subject to acceptance by the board of trustees of the Public Foundation for Public Service Media.

- The Broadcast Support and Property Management Fund will become the manager of the main body of the properties of the public service media companies.

- The economic activities of the public service companies will be supervised by a single board of supervision to be elected by the board of trustees of the Public Foundation for Public Service Media.

By the entry into force of the Act on the system of media institutions almost all the decision makers of the former regulatory and supervisory bodies will be relieved of their positions by virtue of the Act. Their successors on the new bodies are to be newly elected. (It has to be noted that due to resignations and cessations of memberships and the lack of new appointments both the NHH and the ORTT have lost their operability in the previous months.) These changes to the institutions do not affect the system of financing of public service broadcasters. Currently this is calculated year by year on the basis of a hypothetical licence fee and paid from the central budget via the Broadcasting Fund.

The third element of the ongoing media legislation still awaits acceptance by the Parliament. The bill, which is dubbed "Media Constitution" by its introducers, is aimed at regulating questions relating to the right to information, journalistic freedoms, right of reply and similar issues concerning media content. The Parliament is expected to make a decision on this bill in the autumn.

• *Az Alkotmány 2010. július 6-i módosítása - a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról* (Amendment of the Constitiution, 6 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12651 HU

• *2010. évi LXXXII. törvény A médiát és a hírközlést szabályozó egyes törvények módosításáról* (Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications, *Magyar Közlöny* (Official Journal), 10 August 2010.)
http://merlin.obs.coe.int/redirect.php?id=12652 HU

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New Requirements for Political Advertising Adopted

On 18 May 2010 Seimas adopted a new wording of the Act on the Funding of Political Parties and Political Campaigns and the Control of the Funding. The new wording of the Act will come into force on 15 September 2010.

The provisions of the adopted Act are particularly important to broadcasters as they allow broadcasting advertising clips of political parties in radio and television programmes again. This was not allowed by the previous law (see IRIS 2008-8: 15/26). According to the amended Act such political video and audio advertisements shall not be shorter than 90 seconds duration.

However, the costs of such a spot shall not exceed 50% of the highest allowed amount of political campaign costs set for a participant in the campaign. The maximum amount of costs allowed for the political campaign is calculated according to the size of the electorate.

Furthermore, the amended Act provides for a new definition of political advertising: as information disseminated publicly on behalf and/or in the interest of a State official, political party, its member or political campaign participant, in any form and through any means for payment or for free. Such information is intended for influencing electors when voting at elections or referenda, or the dissemination of which is intended for propagating a political party, its member or a candidate as well as their ideas, intentions and the programme.

The amended provisions state that political advertising shall be marked in accordance with the procedure laid down by Law by indicating the source of funding and shall visibly be separated from other disseminated information during the period of the political campaign only, whereas the previous act required political advertising to be marked every time it was broadcast, not relating it to the period of the political campaign. The rules for marking political advertising in radio and television programmes are established by the Central Election Commission.

For the first time the amended Act provides for the definition of surreptitious political advertising: It states that unmarked political advertising as well as inadequately marked advertisements are to be considered as surreptitious political advertising and are therefore forbidden. Pursuant to the Code of Administrative Offences a fine ranging from EUR 290 to EUR 2,900 could be imposed on the director of the broadcasting company for disseminating surreptitious political advertising.

In comparison to the former act the amended one liberalises the requirements for the dissemination of free-of-charge political advertising. The amended Act allows the dissemination of political advertising free of charge at any time, except during the political campaign period. However, one exception is allowed, according to which political advertising could be disseminated for free in the debate programmes. The former act completely prohibited the dissemination of political advertising for free.

• Politinių partijų ir politinių kampanijų finansavimo bei finansavimo kontrolės įstatymas (Amendment to the Act on the Funding of Political Parties and Political Campaigns and the Control of the Funding)
http://merlin.obs.coe.int/redirect.php?id=12642 LT

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LV-Latvia

The New Electronic Media Law in Latvia Finally in Force

In recent times Latvia has been undergoing a legislative procedure to adopt a new Electronic Media Law that is intended to transpose the AVMSD and to replace the 1995 Radio and Television Law (see IRIS 2010-7: 1/28). Now, after a period of long and challenging discussions and actions by various stakeholders and officials the new law is finally adopted and has come into force.

The previous reports on the review of the draft Electronic Media Law have already reflected the complicated and slow movement of the draft through the Saeima (Parliament). Saeima adopted the draft Electronic Media Law at the final, third reading on 17 June 2010. However, the law was not published as the President used his constitutional right to return the law to the Saeima for a second review. According to the *Satversme* (Latvian Constitution) the President has the right to request the Saeima to conduct a second review of an adopted law within ten days of its adoption, by indicating the motivation for such an additional review. Saeima is not obliged to follow the suggestions of the President, however, normally such requests have a high authority and Saeima tries to improve the law, if possible.

In his request of 22 June 2010 the President indicated several deficiencies of the adopted Law and also mentioned that he had received complaints from non-governmental associations such as the Latvian Broadcasters' Association and Latvian Electronic Communications Association as well as from some broadcasting companies. The President pointed out the following controversial issues of the law:

- Firstly, the law provided that broadcasting companies broadcasting nationwide must ensure that 40% of the European audiovisual works included in their programmes within the period from 19:00 to 22:00 h are made in the Latvian language. The President indicated that it is unfair to limit this requirement only to nationwide broadcasters, and also that it is necessary to include news broadcasts within this quota and to extend the period until 23:00 h. Saeima obeyed this request and extended the requirement to regional TV broadcasters also and removed the time window completely (so that the quota might be reached within the whole day).

- Secondly, the President pointed out to the unsuccessful wording of the advertising limitations applicable to public broadcasters, i.e., that the advertising period may not exceed 10% of their programmes, but did not specify that it should not exceed 10% within one broadcasting hour. Saeima fully rectified this deficiency.

- Thirdly, the President noted that the law does not ensure the rights of commercial broadcasters to create programmes for the public remit and thus receive financing from the State budget for this purpose. The law only mentioned that the regulatory authority (National Electronic Media Council) may transfer part of the public remit to commercial broadcasters, but is not obliged to do so. The President suggested that more specific rights of the commercial broadcasters should be provided. However, Saeima did not follow this suggestion and left this provision as it stood in the previous reading.

- Finally, the President highlighted various drafting inconsistencies, which should be remedied. Most of them were taken into account by the Saeima in the second review. Saeima carried out the second review of the Electronic Media Law on 12 July 2010. The law was published on 28 July 2010 and came into force on 11 August 2010.

• *12.07.2010. likums "Elektronisko plašsaziņas līdzekļu likums" ("LV", 118 (4310), 28.07.2010.) [stājas spēkā 11.08.2010.]* (Electronic Media Law, published on the Official Journal on 28 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12595 LV

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

NL-Netherlands

Summary Judgment in Pirate Bay Case Confirmed

On 16 June 2010, the Amsterdam District Court ordered the three operators of The Pirate Bay to stop all their activities in the Netherlands and make their websites inaccessible for users in the country, under penalty of EUR 50,000 per day, the maximum possible fine being EUR 500,000.

The Amsterdam District Court hereby confirms in the proceedings on the merits its earlier decision in summary proceedings that the Bescherming Rechten Entertainment Industrie Nederland (Entertainment Industry Rights Protection Netherlands - BREIN), the Dutch rightsholders representative, had initiated against the three operators of The Pirate Bay. On 30 July 2009, the Court had sentenced the three operators to make their websites inaccessible for Internet users in the Netherlands, because The Pirate Bay was found to have infringed the intellectual property rights of the Dutch rightsholders, represented by BREIN (see IRIS 2009-9:14/22).

The three operators appealed this decision. On 22 October 2009, the Court ruled that The Pirate Bay itself was not necessarily guilty of copyright infringement, but that it did act unlawfully towards BREIN, because it assisted in copyright infringement by allowing and encouraging its users to share torrents. It sentenced the operators to remove a list of torrents that link to copyright-protected works in the Netherlands and to make these torrents inaccessible on The Pirate Bay's websites for Internet users in the Netherlands, under penalty of EUR 5,000 per day with a maximum of EUR 3,000,000 (see IRIS 2010-1: 1/32).

In both the summary proceedings and the case on the merits, the defendants did not appear in Court, nor did they defend themselves, and were sentenced by default. On appeal, they were represented by a lawyer who argued that it was not the defendants who were the owners of the site, but a Seychelles-based company named Reservella. The Court rejected this defense and concluded that the three defendants were responsible for the site.

BREIN has subsequently initiated summary proceedings against Ziggo, a Dutch ISP, in which it demanded that Ziggo block access to The Pirate Bay website for all its users. In its decision of 19 July 2010, the District Court of The Hague denied this request.

• Uitspraak vonnis Rechtbank Amsterdam (eerste aanleg), LJN: BN1626, 448310 / HA ZA 10-158 (Decision of the Amsterdam District Court, 16 June 2010, LJN: BN1626, 448310 / HA ZA 10-158)
http://merlin.obs.coe.int/redirect.php?id=12611 NL

• Uitspraak vonnis Rechtbank 's-Gravenhage (kort geding), LJN: BN1445, 365643 / KG ZA 10-573 (Summary judgment of Decision of the District Court of The Hague, 19 July 2010, LJN: BN1445, 365643 / KG ZA 10-573)
http://merlin.obs.coe.int/redirect.php?id=12612 NL

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Dutch Cable Companies not Obliged to Resell their Products

On 31 May 2010 the Court of The Hague decided that two cable television companies, Ziggo and UPC, cannot be obliged to resell their products to alternative providers, as this might breach their contractual obligations. The Dutch Telecom Regulator (OPTA) wanted to stimulate market competition by allowing alternative providers to offer packages (internet, telephony and television) by way of reselling television signals offered by Ziggo and UPC. These plans are now thwarted.

Last year, OPTA imposed a 'wholesale line rental - cable' obligation on Ziggo and UPC. OPTA wanted to oblige the two companies to sell their products to alternative providers at a fixed (low) rate. On 22 December 2009, the European Commission approved the tariffs suggested by OPTA (see IRIS 2010-2: 1/3) and on 30 March 2010 OPTA published its final rules and tariffs for UPC and Ziggo (see IRIS 2010-5: 1/31).

In its decision OPTA did not however regulate questions regarding copyright obligations. The reselling of television signals could lead to copyright infringement, since UPC and Ziggo have signed contracts with all television channels enabling them to broadcast their programmes legitimately, while the reselling parties (Tele2 and Online) would not have cleared such rights, rendering their broadcasts of such material of questionable legality, while also resulting in significantly lighter administrative burdens for themselves in comparison to those imposed on Ziggo and UPC. One of the largest TV providers (CLT) has prohibited UPC and Ziggo from distributing wholesale TV signals to other providers. OPTA did not opine on this problem, but held that the matter was better suited to judicial review.

This resulted in a complaint, submitted by newcomers Tele2 Nederland B.V. and Online Breedband B.V. against UPC and Ziggo. The complaint regarded the obligation of 'third party billing' by UPC and Ziggo, both of whom were hesitant to execute the obligations set out by OPTA. The Court of The Hague found that UPC and Ziggo are not obliged to execute the obligation imposed by OPTA, if this would breach their contractual obligations. Tele2 and Online are now obliged

to sign contracts with each individual TV provider before broadcasting their programmes. The two companies have announced that they are considering an appeal, while one has indicated that it has already started negotiations with the TV providers.

• Tele2&Online v. UPC&Ziggo. Kort geding, 31 mei 2010, sector civiel recht, Rechtbank 's-Gravenhage. Zaaknummer/rolnummer: 364673/KG ZA 10-531 (Tele2&Online v. UPC&Ziggo. Interim Injunction, 31 May 2010, sector civil law, Court of The Hague. Casenumber/listnumber: 364673/KG ZA 10-531)
http://merlin.obs.coe.int/redirect.php?id=13162 NL

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ISP Ordered to Reveal Identity of Copyright Infringer

The Supreme Court has decided that an Internet Service Provider (ISP) may be obliged to reveal the identity (name and home address) of an Internet subscriber engaging in illegal file-sharing to the rightsholder intending to pursue relief. In a landmark ruling delivered on 18 June 2010, the Supreme Court found that a statutory duty of confidentiality may be repealed when there is a copyright infringement of a certain gravity.

A customer of the Internet Service Provider Altibox had engaged in illegal file-sharing by uploading different Norwegian blockbusters, such as Max Manus and Kautokeino-opprøret, on a peer-to-peer file-sharing system called Lysehubben. The exclusive rightsholders Sandrew Metronome AS (theatrical distributor) and Filmkameratene AS (production company) identified the IP address from which the movies were uploaded and demanded that Altibox reveal the customer's name and home address. The Norwegian Post and Telecommunications Authority decided to exempt Altibox from its statutory duty of confidentiality under the Electronic Communications Act section 2-9, but Altibox refused to identify its customer. The rightsholders therefore filed a petition to court for the securing of evidence outside a lawsuit. Both the District Court and the Court of Appeals found that Altibox had to reveal its customer's identity and the Supreme Court has now confirmed this interpretation.

Section 22-3 of the Dispute Act prohibits the presentation of evidence that is under a statutory duty of confidentiality. The Court may, however, consent to such presentation after giving due consideration to the duty of confidentiality on the one hand and to the need for clarification of the case on the other. In a unanimous decision the Supreme Court first concluded that the rules were applicable also in procedural cases dealing only with the securing of evidence outside a lawsuit. The Court also rejected a claim from the defendant that the rules on the securing of evidence outside a lawsuit had to be interpreted narrowly when applied to private individuals who intend to pursue their rights and make civil claims as a result of copyright infringement. Secondly, the Court confirmed the balancing of interests that the Court of Appeals had undertaken and found that there were grounds for accepting such presentation of evidence in the case. The Court emphasised that the case involved actions which were both illegal and entitled the rightsholders to compensation, that the police did not give priority to such cases and that the copyright infringer could not legitimately expect protection for his illegal actions. The Court also concluded that securing access to evidence in this case would not be in violation of Article 8 of the European Convention on Human Rights on the right to privacy. Given that several films had been uploaded, the copyright infringement had to be considered to be of a certain gravity and the Court also emphasised that the information sought was of a less sensitive character.

The decision has been characterised as a major victory for the industry in the battle against piracy on the Internet and a disappointment to all those claiming that piracy must be fought only through police investigations. The Ministry of Cultural Affairs is currently in the process of revising the Copyright Act. Advocates for the industry have argued that the Supreme Court decision has highlighted the need for statutory provisions securing efficient procedural handling of rightsholders' claims of access to identity information.

• *Høyesteretts kjennelse, 18.06.2010, HR-2010-01060-A* (Supreme Court decision of 18 June 2010, No. HR-2010-01060-A)
http://merlin.obs.coe.int/redirect.php?id=12621 NO
• Unofficial English translation of The Dispute Act
http://merlin.obs.coe.int/redirect.php?id=12623 EN

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Amendment to Broadcasting Act

On 6 August 2010 the Parliament adopted the Act Amending the Broadcasting Act and Licence Fees Act. The Act was sent to the President for signing on 9 August 2010. The Act refers to public broadcasters' Supervisory Boards' and Management Boards' composition and the procedure for appointment (stressing the importance of contest procedures), as well as improv-

ing the mechanism of control over the realisation of the public service remit.

The Act provides that the Supervisory Boards of the companies Polish Television and Polish Radio shall consist of seven members: five chosen by a contest organised by the National Broadcasting Council (NBC) among candidates having competences in law, finances, culture and media, being proposed by the collegial bodies of higher education institutions; one member appointed by the Minister of State Treasury and one member appointed by the Minister of Culture and National Heritage.

The Supervisory Boards of regional radio companies shall consist of five members, among whom four should be chosen by a contest (organised by the NBC) among candidates having competences in law, finances, culture and media, being proposed by the collegial bodies of higher education institutions functioning in the given region, and one by the Minister of State Treasury, acting in agreement with the Minister of Culture and National Heritage.

A member of the Supervisory Board can be dismissed during his/her term in three special cases precisely described by the Act. The organ entitled to dismiss the member of the Supervisory Board is the same as that which appointed him/her: in relation to members chosen by a contest procedure - the NBC, while in relation to a member appointed by a Minister - the relevant Minister.

Management Boards of public radio and television broadcasting organisations (operating in the form of the sole-proprietor joint stock company of the State Treasury) shall consist of one to three members (fewer than currently). Members of the Management Board, including the President, would be appointed, on the motion of the Supervisory Board, by the NBC. Members of the Management Board have to be appointed from among candidates having the necessary competencies in management and radio and television, selected by a contest organised by the Supervisory Board. A member of the Management Board can be dismissed during his/her term only if one of three special cases precisely described by the Act would happen. In such a situation the member of the Management Board can be dismissed, based on a motion of the Supervisory Board or General Meeting of Shareholders, by the NBC.

It is also envisaged that public radio and television should prepare each year, in agreement with the NBC, financial and programming plans in respect to the tasks connected with the fulfilment of the public service remit, requiring public financing. It would be up to the NBC to establish, by regulation, deadlines to present these plans and their scope, having regard to achieving the fulfillment of the public service remit by public radio and television.

• Ustawa z dnia 6 sierpnia 2010 r. o zmianie ustawy o radiofonii i telewizji oraz ustawy o opłatach abonamentowych (Act Amending the Broadcasting Act and Licence Fees Act)
http://merlin.obs.coe.int/redirect.php?id=12596 PL

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Implementation of the Audiovisual Media Services Directive

On 13 July 2010 the Polish Government adopted the Guidelines for the Draft Act Amending the Broadcasting Act (in relation to the implementation of Directive 2007/65/EC). On the basis of these detailed Guidelines the Draft Act was prepared and sent on 30 July 2010 for intergovernmental consultations that have been already concluded. The AVMSD will be transposed into national legislation mostly by amending the Broadcasting Act. The responsible regulatory authority will be the National Broadcasting Council (NBC), which nowadays has responsibility only in respect of traditional radio and television broadcasting. The scope of tasks of NBC will be significantly broadened.

The Draft Act refers inter alia to authorisation procedures: broadcasting of radio and television programme services either by means of terrestrial, satellite or cable would still require a broadcasting licence. Such licensing obligation will not apply to programme services transmitted solely on computer networks; webcasting of television programme services would require only registration (it would be compulsory to declare such service to the register no later than a month before offering it to the public), while Internet radio will not require any authorisation procedure. The on-demand audiovisual media services would be subject to registration (declaring it on the index of such services no later than at the moment of offering it to the public). A fee will be charged for such registration. The aforementioned register and the index will be kept by the Chairman of the NBC.

The Draft Act envisages that product placement (PP) will be allowed, under certain conditions, in some respects stricter than the AVMSD provisions. These stricter rules include a broader list of services and products that cannot be the subject of PP. The Draft Act provides that the list of banned products and services for PP would be the same as the current list of banned products and services for advertising. Safeguards to protect consumers are envisaged, including the obligation to clearly inform viewers of the existence of PP in the programme, a ban on theme placing, a limitation on the inclusion of PP only to certain kinds of programmes, etc. The NBC shall determine, by regulation the way of informing viewers on PP, specific conditions of determining the significant value

and the way of providing the evidence of programmes in which PP was used, as well as the scope of data being covered by this evidence. The Draft Act provides for broadcasters the obligation to collect such evidence and make it accessible to the NBC. The provisions on PP will be used solely to programmes produced after entering into force of this Act.

As regards the promotion of European works in on-demand services it is proposed to adopt a flexible form of implementing this obligation, based on alternative solutions embracing catalogue quotas and an exposition obligation, or alternatively investment quota. The promotion of European works by on-demand AVMS providers may take one of two alternative forms:

- reserving 15 % of the catalogue content for European works, 10% for works originally produced in Polish, 5% for European works produced by independent producers plus appropriate exposition of these works in the catalogue, or

- reserving the amount equal to at least 10 % of spending on producing or acquiring of audiovisual works in the proceeding year - for the purpose of production or acquiring rights to European works, with the aim to make them available on the on-demand service.

This goal (catalogue quota or financial contribution limit) should be achieved progressively by 2013.

The implementation of the AVMSD envisages a certain role to be played by self- and co-regulation. NBC would be given the competence to take action encouraging media service providers to engage in self- or co-regulation.

It is also envisaged to make television programme services more accessible to people with visual or hearing disabilities. Television broadcasters will be obliged to provide at least 10 % of the quarterly transmission time of their programme services (excluding advertising and teleshopping) to programmes with appropriate facilities, notably sign language, subtitling, audio-description. This obligation is meant to be achieved progressively by 2012.

It is expected that the Draft Act will be sent to Parliament in autumn 2010. The proposed *vacatio legis* of the proposed Act is 30 days from publication in the Official Journal.

• Ustawa o zmianie ustawy o radiofonii i telewizji oraz o zmianie niektórych innych ustaw (Draft Act Amending the Broadcasting Act some other Acts)
http://merlin.obs.coe.int/redirect.php?id=12643 PL

• Projekt założeń do projektu ustawy o zmianie ustawy o radiofonii i telewizji, w związku z implementacją Dyrektywy o audiowizualnych usługach medialnych (Guidelines for the Draft Act Amending the Broadcasting Act (in relation to the implementation of Directive 2007/65/EC))
http://merlin.obs.coe.int/redirect.php?id=12644 PL

Małgorzata Pęk
National Broadcasting Council of Poland

RO-Romania

Electronic Media - Sanctions and Processes

On 27 July 2010 the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) imposed sanctions on 10 TV stations and one radio station broadcasting in Romania for having broken the Audiovisual Code rules when covering the death of a Romanian star, the singer Mădălina Manole, who committed suicide on 14 July 2010.

The CNA considered the broadcasters had broken the *Codul de reglementare a conţinutului audiovivzual* (Regulatory Code for Audiovisual Content) rules with regard to the protection of children, human dignity and of the right to one's own image, in news programmes and talk shows about the death of the artist (see inter alia IRIS 2010-7: 1/33, IRIS 2009-10: 17/24 and IRIS 2009-6: 17/28).

A fine of RON 10,000 (about EUR 2,350 was imposed on the commercial TV station Antena; fines of RON 7,500 (EUR 1,765) each on the commercial stations Antena 3 and Realitatea TV and fines of RON 5,000 (EUR 1,175) were each imposed on the public channel TVR 1 and the commercial Kanal D. Public warnings were imposed on the commercial TV channels B1 TV, Naţional TV, OTV, Prima TV and Pro TV and the commercial radio station Realitatea FM.

The CNA imposed a total of 240 sanctions on broadcasters for breaches of the audiovisual law between 1 January and 30 July 2010 (83 fines totaling RON 1,033,000 (EUR 243,000), 156 public warnings and a decision of 10 minutes' prime time broadcast interruption of a commercial TV station).

Most breaches were related to the protection of children, human dignity and the right to one's own image, correct information and pluralism of opinions, sponsoring, advertisement and teleshopping regulations, broadcasting programmes not included in the approved schedule and not broadcasting the must-carry programmes.

Further, the CNA stated on 5 July 2010 that it had won 191 (94%) of the 203 proceedings in which it was sued for sanctions it imposed between January 2005 and June 2010. 13 proceedings won by the Council are now before the Supreme Court for the final proceedings.

• Cazul „Mădălina Manole" Comunicat de presă (The „Mădălina Manole" Case press release dated 27 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12597 RO

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Communications Networks and Services Authorisation Underway

As stated by the *Autoritatea Naţională pentru Reglementare şi Administrare în Comunicaţii* (National Authority for Administration and Regulation in Communications - ANCOM) on 2 August 2010, 228 providers have been authorised according to a new Decision on the General Authorisation Regime for the Provision of Electronic Communications Networks and Services (Decision no. 338/2010).

In order to remain active on the market, providers need to complete again the general authorisation procedure, by no later than 31 December 2010. Otherwise, they will automatically lose their capacity as providers.

The Decision no. 338/2010 (published in the Official Journal of Romania no. 347/26.05.2010) came into force recently. The document had to be issued in order to update, consolidate and/or revise the general authorisation regime due to legal, technical and technological evolutions in this field after the adoption of the Emergency Government Decree no. 79/2002 (revised), which contains the Regulatory Framework for Communications.

Decision no. 338/2010 includes provisions with regard to:

- the rules concerning foreign persons (which are only allowed to provide temporary communications services in Romania without founding a local branch, according to EU regulations),

- the regime for authorised individuals, family and individual enterprises,

- the suspension, termination or withdrawal of the right to provide electronic communications networks and services,

- the general, technical and compatibility conditions imposed on the electronic communications networks for re-broadcasting the audiovisual programmes services and for data transmission and Internet access services,

- the use of radio frequencies,

- the protection of the ANCOM's monitoring stations sites,

- the changes of the notification form the providers have to fill in and send to ANCOM and of

- the networks and services description sheet, regarding the protection of consumer's rights.

• Decizia nr. 338/2010 privind regimul de autorizare generală pentru furnizarea reţelelor şi a serviciilor de comunicaţii electronice - publicată în Monitorul Oficial al României nr. 347/26.05.2010 (Decision no. 338/2010 on the General Authorisation Regime for Providing Electronic Communications Networks and Services)
http://merlin.obs.coe.int/redirect.php?id=12645 RO

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RS-Serbia

Most of the 2009 Amendments to Law on Public Information Quashed

On 22 July 2010 the Constitutional Court of Serbia decided that most of the articles of the 2009 Law on Amendments and Additions to the Law on Public Information (hereinafter referred to as the "Law") were unconstitutional due to violation of media freedom and freedom of expression.

The Law consists of amendments made to the Law on Public Information, which were adopted by Parliament on 31 August 2009 (see IRIS 2009-8: 17/26 and IRIS 2009-9: 17/27). A month after its adoption, based on several initiatives, the country's Ombudsman filed a motion before the Constitutional Court for an evaluation of the constitutionality of the Law. After almost a year, the Constitutional Court has established that most of the provisions of the Law are not in compliance with the Constitution of the Republic of Serbia and several international treaties that Serbia has ratified. The most significant of these are:

- The provisions that limit the founder of a public medium to being only a domestic legal entity are found not to be in compliance with the provisions of Article 50 of the Constitution which provides the freedom for anyone to establish newspapers and other forms of public information without prior permission and Articles 10 and 14 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights;

- The provisions on draconian monetary fines for the media were ruled as unconstitutional because they violated media freedom and freedom of expression. In the judge's words: "The threat of heavy fines could bring into question the survival of the media, and even more dangerously, they could lead to self-censorship, because neither the founders nor those employed in the media will be free from wondering whether they will be threatened with a fine for something that ought to be said freely." Having in mind that the question of economic offences in the Serbian legal system is entirely regulated by the Law on Economic Offences, proscribing procedural rules that are different from the relevant law and drastically higher

fines for media offences than the maxima set out by the law violates the principle of legal system unity as well as the principle of prohibition on discrimination as provided by Article 21 of the Constitution;

- The obligation to register the establishment and all changes of ownership, etc., in the Public Media Register is found to be neither in violation of the Constitution Articles 21, 50 and 83 nor Article 14 of the ECHR, but it is found that certain provisions that connect registration on the Register with a ban on publishing are unconstitutional.

Further, the Court has now initiated proceedings for the evaluation of the constitutionality of certain other provisions of the same Law. Although long awaited, this decision of the Constitutional Court is considered as a positive impetus and a cornerstone for further reform and improvement of Serbian media law and the media in general.

• *Ustavni sud je na 31. Redovnoj sednici odlučio o 71 predmetu, a u predmetima IU-227/06, IUl-29/09, Už- 838/09, Už- 487/09, Už-1185/10 i Už- 2330/10 je odložio razmatranje i odlučivanje.* (2009 Law on Amendments and Additions to the Law on Public Information is available in the Official Gazette of the Republic of Serbia no. 71/2009)
http://merlin.obs.coe.int/redirect.php?id=12599 SR

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SE-Sweden

The New Swedish Authority for Radio and TV

On 15 June 2010 the Swedish parliament passed the bill for a new Radio and Television Act (*Radio- och TV-lagen* - SFS 2010:696) (see IRIS 2010-5: 1/36). The bill includes, amongst other things, the merger of the *Granskningsnämnden för Radio och TV* (Swedish Broadcasting Commission) and the *Radio- och TV-verket* (Swedish Radio and TV Authority) into a newly formed authority named the *Myndigheten för Radio och TV* (Authority for Radio and TV).

The Swedish Broadcasting Commission and the Swedish Radio and TV Authority both act within the same media field. Due to the rapid development within this field a more efficient and competent administrative handling is required. The main reason for the merger of the two authorities is to create a more coherent administration, which will result in increased efficiency. Hence, the new authority will hereafter perform both the Swedish Broadcasting Commission's and the Swedish Radio and TV Authority's tasks in accordance with the new legislation. The increased efficiency will hopefully release funding, which can be used in the authority's core activities, such as the supervision which up to now was performed by the Swedish Broadcasting Commission.

Currently, the Swedish Broadcasting Commission, amongst its other tasks, supervises compliance of radio and TV broadcasts with the Radio and Television Act and authorises companies' (*programbolagen*) transmission licenses. Within the framework of this task the Swedish Broadcasting Commission executes inspections after reports from the public or on its own initiative. These inspections need to be carried out by an independent agency, since the agency will carry out tasks similar to those of a court. Therefore, even after the merger between the two authorities, there will remain an independent agency within the new authority charged with carrying out such inspections. Furthermore, this agency will, due to the new Radio and Television Act, supervise on-demand TV (*beställ-tv*) and teletext.

Moreover, the new authority will, as did the old Swedish Radio and TV Authority, decide on questions relating to fees, transmission licenses and registrations required for broadcasting. The authority will also be responsible for observing the media development and issuing its findings to the public.

Consequently, there are no material changes in practice to be expected as a result of the merger.

The new Radio and Television Act enters into force on 1 August 2010.

• Radio- och tv-lagen (SFS 2010:696) (Swedish Radio and Television Act (SFS 2010:696))
http://merlin.obs.coe.int/redirect.php?id=12650 SV

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US-United States

Viacom v. YouTube

On 23 June 2010 the Federal district court for the Southern District of New York handed down its long-awaited decision in Viacom International Inc. v. YouTube Inc. (Case No. 07 Civ. 2103) ("Viacom"), handing content providers such as Viacom a major defeat – and service providers such as YouTube, and its parent company Google, Inc. a clear victory – regarding the extent to which service providers are liable for infringement by their users. The court determined that the §512(c) "safe harbor" provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §512(c) shield service providers, like YouTube, against all direct and secondary infringement claims, as well as contributory liability claims for the acts of their users.

The Court observed that the principles of §512(c) are clear and practical: "[I]f a service provider knows (from notice from the owner, or a "red flag") of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is 'ubiquitous' does not imply a duty on the service provider to monitor or search its service for infringements." This common-sense reasoning is rooted in the belief that limiting the liability of service providers incentivizes them to continue to provide their services.

From a service provider's perspective, there are three necessary elements that must be present if it wants to avail itself of the statutory protection of §512(c):

(1) it must have designated an agent for service of notices of violation with the U.S. Copyright Office;

(2) it must have received "notice" as specified by the DMCA; and

(3) it must promptly remove the infringing material once notified.

The DMCA provides that the limitations on liability only apply if the service provider has designated an agent to receive notifications of claimed infringement. At a minimum, the service provider must make available through its service, including on its website in a location accessible to the public – as well as provide the Copyright Office with – the name, address, phone number, and electronic mail address of the agent (§512(c)(2)).

The court held that the DMCA notification procedure places the burden of policing copyright infringement squarely on the owners of the copyright, and declined to shift this substantial burden to the service providers by requiring them to police their sites. Therefore, a general description of infringing content is not sufficient notice to trigger a take-down requirement. To be effective, a notice must provide "information reasonably sufficient to permit the service provider to locate the material" (§512(c)(3)(A)(iii)). An example of such sufficient information would be a copy or description of the allegedly infringing material and the "uniform resource locator" (the URL, or website address) that allegedly contains the infringing material (Viacom at pg. 29, citing UMG Recordings, Inc. v. Veoh Networks, Inc., 655 F. Supp. 2d 1099, 1109-10 (C.D. Cal. 2009)).

Similarly, the definition of "red flags" that would put a service provider on notice is extremely narrow. While the legislative history provides that if a service provider, in the performance of his regular business, turns a blind eye to "red flags" such as "pirate" or "bootleg" directories he would lose the protections of §512(c), this seems almost theoretical. If any degree of discretion or further investigation is necessary to determine whether content is infringing, then no "red flag" is raised "[A]wareness of pervasive copyright, however flagrant and blatant, does not impose liability on the service provider. It furnishes at most a statistical estimate of the chance any particular posting is infringing – and that is not a 'red flag' marking any particular work."

The court found that YouTube clearly complied with its requirement to act promptly once put on notice by removing over 100,000 infringing videos the very next business day after receiving notice from Viacom. The court further held that YouTube was under no obligation to police its site for other infringing works based on Viacom's argument that the list was "representative" of other infringing works. The court reasoned that the list was merely a "generic description" if it did not give the works' location on the site, because it puts the onus on service providers to engage in a factual search in contravention of §512(m) of the DMCA.

In the wake of Viacom, it is clear that the DMCA provides a powerful shield to service providers. Unless a service provider is on "actual notice" from the content provider sufficiently identifying specific infringing works – or in the alternative it confronts clear "red flags" as to the nature of the infringing content on its servers – it is under no duty to act. Once it has been put on notice, the service provider's only duty is to promptly remove that content which has been specifically identified, but no further duty to locate other infringing work arises.

A version of this article first appeared in Metropolitan Corporate Counsel.

• Viacom International Inc. v. YouTube Inc. (Case No. 07 Civ. 2103)
http://merlin.obs.coe.int/redirect.php?id=12655 EN

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AT-Austria

Copyright Act

The legal basis of the current copyright law in Austria is the *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte* (Urheberrechtsgesetz) (Federal law on copyright in literary works, works of art and related rights - the "Copyright Act").

The task of the Copyright Act is to protect works in the fields of literature, sound and music, art and cinematography and to enable the pecuniary and non-pecuniary interests of the copyright holders and holders of neighbouring rights to be asserted. Copyright comes about when a creator produces a work (section 10(1) of the Copyright Act). No formal act, such as

registration, is required to obtain copyright protection for a work. By section 1(1) of the Copyright Act, works are "unique intellectual creations in the fields of literature, sound and music, art and cinematography". The work enjoys copyright protection both in its entirety and with regard to its individual parts. Rights can be granted either against payment or free of charge. The term of copyright under the Act differs according to the item protected. Copyright in works ends 70 years after the creator's death (or the death of the last living co-creator). The term for music recordings (neighbouring rights of producers and performers) is 50 years from the date of publication. The term for films ends 70 years after the death of the last survivor from the circle of the principal director and the author of the script, the dialogues and the music created especially for the film. The term for neighbouring rights of film actors is 50 years from the end of the year in which the performance has taken place or 50 years from the date of publication when the performance was recorded on an image or sound carrier before the expiry of this time-limit. For the first publishers of posthumous works, the term is 25 years and for database producers 15 years. After the term has expired, the work or performance is available for any use desired.

The Copyright Act, which had been in force since 1936, underwent its most significant change when it was amended by the National Council, the Austrian lower house, in 1996 (see IRIS 1996-10/19). That amendment mainly took account of the new ways of using copyrighted works. The key changes were the creation of a reprographic fee to be paid for copies for a person's own use, an improvement in the legal position of film copyright holders (sections 38 ff. of the Copyright Act), improvements to facilitate access to copyrighted works for teaching purposes (section 56c of the Copyright Act), the introduction of a statutory licence for the exhibition of films by means of standard video cassettes in hotels, etc (section 56d of the Copyright Act), the extension of copyright terms for films (section 62 of the Copyright Act) and adapting the law to conform to Directive 93/83/EEC.

The 1997 amendment to the Copyright Act (see IRIS 1997-6/15 and IRIS 1997-10/19) led to the transposition of Directive 96/9/EC on the legal protection of databases (sections 40f ff., 76c ff. of the Copyright Act). Special rules were introduced for database works, especially provisions on reproduction rights, on the free use of works and on trademark rights. When a work is described as a database work, it must be a "unique intellectual creation".

The Copyright Act 2003 led to the transposition of Directive 2001/29/EG into Austrian law (see IRIS 2002-10/25). The rules of the Copyright Act were adapted, especially in the light of new technical means of exploitation (e.g. digitisation and the internet), with the introduction of the right to interactive public performance, with a minor change to the list of free uses of works (e.g. sections 40h, 41, 41a, 42, 42a, 42b, 42c of the Copyright Act) and with an improvement in legal protection against the circumvention of technical measures (e.g. sections 90b, 90c, 90d of the Copyright Act). The digitisation of protected works constitutes copying, the right to which is held by the creator. Examples of cases involving digital reproduction include scanning photographs, copying a CD or DVD onto a PC hard disk or downloading music and films from the internet.

The amendment to the Copyright Act 2005 transposed Directive 2001/84/EC into domestic law and extended the film creator's right granted by the 1996 amendment to a share in a cable fee.

The purpose of the 2006 amendment to the Copyright Act was to adapt the Act to Directive 2004/48/EC, which resulted in particular in the adaptation of sections 81, 87b, 87c of the Copyright Act.

• *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (in der Fassung vom 27. Juli 2010)* (Federal law on copyright in literary works, works of art and related rights (version of 27 July 2010))
http://merlin.obs.coe.int/redirect.php?id=12940 DE

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Agenda

The Russian Film and the VoD Market

21 September 2010
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http://www.kinoexpo.ru/eng/index.htm

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