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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2010-9

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Editorial Informations

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European Audiovisual Observatory
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Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Andreescu v. Romania

The applicant, Gabriel Andreescu, is a well-known human rights activist in Romania. He was among those who campaigned for the introduction of Law No. 187, which gives all Romanian citizens the right to inspect the personal files held on them by the Securitate (the former Romanian intelligence service and secret police). The law also allows access to information of public interest relating to persons in public office who may have been Securitate agents or collaborators. A public agency, the *Consiliul Naţional pentru Studierea Arhivelor Securităţii* (National Council for the Study of the Archives of the Securitate - CNSAS) is responsible for the application of Law No. 187. In 2000, Andreescu submitted two requests to the CNSAS: one to be allowed access to the intelligence file on him personally and the other seeking to ascertain whether or not the members of the Synod of the Romanian Orthodox Church had collaborated with the Securitate. He received no reply and organised a press conference at which he criticised A.P., a member of the CNSAS, making reference to some of A.P.'s past activities. Andreescu's remarks on A.P.'s past received widespread media coverage.

A.P. made a criminal complaint against Andreescu accusing him of insult and defamation. After being acquitted in first instance, Andreescu was ordered by the Bucharest County Court to pay a criminal fine together with a high amount in compensation for non-pecuniary damage. The appeal Court ruled that he had not succeeded in demonstrating the truth of his assertion that A.P. had collaborated with the Securitate. Furthermore, a certificate issued by the CNSAS had meanwhile stated that A.P. had not collaborated.

Relying on the European Convention of Human Rights and Fundamental Freedoms, Andreescu lodged an application with the European Court of Human Rights concerning his conviction for defamation. Although the interference by the Romanian authorities with Andreescu's freedom of expression had been prescribed by law and had pursued the legitimate aim of protecting A.P.'s reputation, the European Court considered that the sanction was a violation of Article 10 of the Convention. The Court held that Andreescu's speech had been made in the specific context of a nationwide debate on a particularly sensitive topic of general interest, namely the application of the law concerning citizens' access to the personal files kept on them by the Securitate, enacted with the aim of unmasking that organisation's nature as a political police force, and on the subject of the ineffectiveness of the CNSAS's activities. In that context, it had been legitimate to discuss whether the members of that organisation satisfied the criteria required by law for holding such a position. Andreescu's remarks had been a mix of value judgments and factual elements and he had especially alerted public opinion to the fact that he was voicing suspicions rather than certainties. The Court noted that those suspicions had been supported by references to A.P.'s conduct and to undisputed facts, such as his membership with the transcendental meditation movement and the modus operandi of Securitate agents. According to the Court, Andreescu had acted in good faith in an attempt to inform the public. As his remarks had been made orally at a press conference, he had no opportunity of rephrasing, refining or withdrawing them. The European Court was also of the opinion that the Romanian court, by convicting Andreescu, had paid no attention to the context in which the remarks at the press conference had been made. It had certainly not given "relevant and sufficient" reasons for convicting Andreescu. The Court noted furthermore that the high level of damages - representing more than 15 times the average salary in Romania at the relevant time - could be considered as a measure apt to deter the media and opinion leaders from fulfilling their role of informing the public on matters of general interest. As the interference with Andreescu's freedom of expression had not been justified by relevant and sufficient reasons, the Court held that there had been a violation of Article 10. It also found a breach of Article 6 § 1 of the Convention (right to fair trial) due to Andreescu's conviction without evidence being taken from him in person, especially after he had been acquitted at first instance. The Court held that Romania was to pay Andreescu EUR 3,500 in respect of pecuniary damage, EUR 5,000 for non-pecuniary damage and EUR 1,180 for costs and expenses.

• *Arrêt de la Cour européenne des droits de l'homme (troisième chambre), affaire* Andreescu c. Roumanie*, requête n°19452/02 du 8 juin 2010* (Judgment by the European Court of Human Rights (Third Section), case of Andreescu v. Romania, No. no. 19452/02 of 8 June 2010)
http://merlin.obs.coe.int/redirect.php?id=12677 FR

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European Commission against Racism and Intolerance: Growing Emphasis on Internet Racism in New Country Reports

On 15 June 2010, the European Commission against Racism and Intolerance (ECRI) released its latest reports on France, Georgia, Poland and "the former Yugoslav Republic of Macedonia" (fYROM), adopted in

the fourth round of its monitoring of the laws, policies and practices to combat racism in the Member States of the Council of Europe (for commentary on earlier reports, see IRIS 2010-4: 1/3, IRIS 2009-10: 0/109, IRIS 2009-8: 5/4, IRIS 2009-5: 4/4, IRIS 2008-4: 6/5, IRIS 2006-6: 4/4 and IRIS 2005-7: 3/2).

The main recommendations dealing with the (audiovisual) media and/or the Internet in these reports can be grouped into three rough categories. The first category concerns the harmful effects of stereotypes propagated by the media (Reports on the fYROM (para. 73 and 74) and Georgia (para. 56)). The overall tenor of ECRI's various recommendations flowing from this focus is that States authorities should encourage and actively support measures aimed at promoting possible roles for the media in fostering "interethnic cohesion" (Report on fYROM, para. 74) or, generally, "reconciliation", "mutual trust", "mutual understanding", "tolerance" and "peaceful co-existence" among different groups in society (Report on Georgia, para. 56).

The second main category of recommendations focuses on racism disseminated via the Internet. Thus, in its Report on Poland, ECRI calls for "an increase in law-enforcement resources for the fight against racism on the Internet" (para. 103). Similarly, in its Report on France, ECRI "strongly recommends" that the French authorities "pursue and reinforce their efforts to combat forms of racist expression propagated via the Internet", including by publicising "the ban on the use of statements inciting to racial hatred" which are disseminated online and the possibility of reporting violations of the ban (para. 83). In respect of the fYROM, ECRI recommends increased vigilance by the authorities in tackling the problem and the establishment of a "surveillance system, in co-operation with access providers and without interfering in the latter's independence" to monitor the situation (para. 76). The Report on France also focuses on the need to raise media awareness of the need for them to prevent the content of discussion boards hosted on their Internet sites from creating "an atmosphere of hostility towards and rejection of members of minority groups" (para. 79).

The third category of recommendations has a catch-all character. It comprises a number of now-familiar calls by ECRI on States authorities, e.g. to denounce racist expressions by public figures and to initiate legal proceedings against offenders, as appropriate (Report on fYROM, para. 72) and to raise awareness among media professionals about the need to report relevantly and sensitively on (potential) ethnic dimensions to criminal cases and other stories (Report on Poland, para. 105). A final - more specific - recommendation falling in this category, is that the National Broadcasting Council of Poland should "show increased vigilance concerning racism within its field of competence", including by raising public awareness about the existence of the relevant complaints mechanism (ibid., para. 97).

• ECRI Reports on Georgia, Poland and "the former Yugoslav Republic of Macedonia" (fourth monitoring cycle), all adopted on 28 April 2010 and ECRI Report on France (fourth monitoring cycle), adopted on 29 April 2010; all published on 15 June 2010
http://merlin.obs.coe.int/redirect.php?id=11705 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Télévision française 1 SA (TF1) v Commission

The European Court of Justice has handed down another decision in a long list rejecting of claims by Télévision française 1 (TF1) against the European Commission in relation to French state aid to the public service broadcaster France-Télévisions (see for example most recently IRIS 2010-7: 1/3, IRIS 2009-5: 5/5 and IRIS 2009-1: 0/104). On 13 September 2010, the General Court dismissed TF1's action requesting that Commission Decision C(2006) 832 final of 22 March 2006 be annulled.

The decision approved new financial support measures granted through the Centre national de la cinématographie (National cinematographic centre - CNC) for cinematographic and audiovisual production in France as compatible with the common market, taking the view that the investment obligations did not involve State resources and therefore did not constitute State aid within the meaning of Article 87 EC (see 2006-5: 7/8).

The Court noted that, under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. However, an undertaking cannot rely solely on its status as a competitor of the undertaking which benefits from the measure in question; it must also demonstrate the magnitude of the prejudice to its market position. The General Court found that TF1 had not specifically and precisely demonstrated that it was individually concerned by the Commission's decision; it had not shown that its competitive position is substantially affected vis-à-vis its competitors, other television service providers or large audiovisual communications groups in regard to the disputed support measures of the CNC, as claimed, while it is not the task of the General Court to speculate as to the reasoning and precise observations, both in fact and law, which might lie behind the claims in the application. The Court thus rejected TF1's action as inadmissible

and did not proceed to rule on the merits of the question of whether the measures are to be considered State aid.

• Case T-193/06, Télévision française 1 SA (TF1) v Commission, 13 September 2010
http://merlin.obs.coe.int/redirect.php?id=12682 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

• Commission Decision C(2006) 832 final of 22 March 2006 relating to support measures for the cinema and audiovisual industry in France
http://merlin.obs.coe.int/redirect.php?id=12683 FR

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European Commission: Report on the Challenges for European Film Heritage

On 6 June 2010 the European Commission's Information Society and Media Directorate General published a study on the challenges for European film heritage from the analogue and the digital era. The study constitutes the second implementation report of the 2005 Recommendation on Film Heritage, which calls for EU Member States to improve conditions of the conservation, restoration and exploitation of film heritage and remove obstacles to the development and full competitiveness of the European film industry. Member States are encouraged to inform the Commission every two years of action taken in response to the Recommendation. The first implementation report was released in August 2008.

The current report is based on a questionnaire circulated by the European Commission and covering all aspects of the Film Heritage Recommendation, as well as two additional questions: the challenges and opportunities for European film heritage which arise from the transition from the analogue to the digital era and the link between film funding policies and film heritage. These issues therefore also form the subject matter of the report and are organised into three chapters: I. Analysis of the situation of film heritage in Europe in those areas covered by the Film Heritage Recommendation; II. Challenges and opportunities of the digital era for film heritage institutions; III. Access to European film heritage. The report suggests that Europe's film heritage institutions should take a new approach to the way they safeguard and provide access to Europe's film heritage. The traditional model of conserving fragile film materials in vaults cannot guarantee preservation for posterity nor accessibility. A move should be made from the old "sealed box" approach to a new "full access" model. The report further suggests that amendments to the existing legal framework might be necessary so as to permit such access, particularly the efficient cultural and educational use of the films and related film material. Finally, best practices collected from among the Member States for dealing with the challenges of analogue and digital film heritage are highlighted.

The report is only a first evaluation of the situation in this area. Further action is foreseen: this summer the Commission launched an invitation to tender for an independent study which will look in detail into the question of the challenges of the digital era for film heritage institutions. On the basis of the study the Commission intends to consider whether a new Communication or a revision of the existing Film Heritage Recommendation will be necessary to bolster efforts in the field. Meanwhile, the next application report by the Member States is due by November 2011.

• Commission Staff Working Document on the challenges for European film heritage from the analogue and the digital era, Brussels, 2 June 2010, SEC(2010) 853 final
http://merlin.obs.coe.int/redirect.php?id=12685 EN

• Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, [2005] OJ L 323/57
http://merlin.obs.coe.int/redirect.php?id=15051 CS DA EL
ES ET FI HU IT LT LV MT NL PL PT
SK SL SV DE EN FR

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European Parliament: Written Declaration 12/2010

Earlier this year four MEPs submitted a Written Declaration on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA), also called Written Declaration 12. The declaration urges the Commission to make the documents relating to the negotiation of that Agreement publicly available. Importantly, though, it also draws attention to a number of substantive provisions that might be objectionable: namely, those relating to criminal sanctions, liability of service providers and border measures. Moreover, it stresses that ACTA should not impose indirect harmonisation of intellectual property laws at the European level and that the principle of subsidiarity ought to be respected.

While a Written Declaration has no binding force, it can be an accurate indicator of the European Parliament's stance on a given issue. It is a tool that may be used by up to five MEPs to suggest holding a debate on a certain subject, according to Rule 123 of the Rules of Procedure of the European Parliament. However, if the declaration is signed by a majority of the MEPs, it is forwarded to the President and is included in the agenda of the plenary session, i.e., ultimately the declaration may be adopted by the Parliament. It is also forwarded to all relevant institutions.

In the case of the Written Declaration 12, 387 MEPs signed it before the lapse date (9 September 2010). Accordingly, its adoption by the European Parliament is a necessary consequence, as it is its forwarding to the European Commission. As it stands, Written Declaration 12 represents a clear admonition to the Commission. It hints that the European Parliament will take a strong position on this matter and that it is attentive to possible discrepancies on the part of the Commission. Above all, it is a significant political yellow card.

• Written Declaration 12/2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content
http://merlin.obs.coe.int/redirect.php?id=12679 DE EN FR

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OSCE

OSCE: Representative on Freedom of the Media - Regular Report to the OSCE Permanent Council

On 29 July 2010, Dunja Mijatovic, the OSCE Representative on Freedom of the Media, presented the regular report to the OSCE Permanent Council, the organisation's main decision-making body. The report consists of overviews of issues raised in the participating countries, activities of the Representative in the last period and planned activities for the next reporting period. A large part of the report consists of the analysis of issues raised in 26 of the OSCE participating states. In the last period the Representative had to deal with several issues concerning media freedom, such as media pluralism, editorial independence, the physical safety of journalists and investigative journalism. In several countries issues of media freedom with regard to audiovisual content arose, including the following:

- The Representative addressed the Albanian authorities about a defamation case in which a broadcasting company was ordered to pay EUR 400,000 in damages to a former minister. The Representative reminded the authorities that a true democratic society encourages investigative journalism; consequently, awarded damages should be proportionate, as otherwise a chilling effect on reporting could ensue;

- The Representative voiced her concern about an instruction issued by the Prime Minister of the Republika Srpska of Bosnia and Herzegovina, in which he called upon public institutions to stop their cooperation with the public service broadcaster after airing an allegedly inaccurate portrayal of the entity's governmental actions. The Representative emphasised that public service broadcasters must not be exposed to any political pressure;

- In France the President nominated a new head of the public service broadcaster, France Télévisions. The Representative restated that the presidential nomination of the head of a country's public service broadcaster is an obstacle to its independence and contradicts OSCE commitments;

- In June the Representative requested that the Hungarian authorities halt the drafting of media legislation, as the proposed legislation could breach OSCE standards guaranteeing freedom of expression and freedom of the media. Despite the request parts of the draft media legislation were adopted by the Hungarian Parliament (see IRIS 2010-8: 1/34). Recently the Representative presented the Hungarian Government with an expert legal analysis of the adopted laws and draft media legislation. She asked that the Government reconsider and amend the media package;

- The Representative asked Turkish authorities to restore access to YouTube and other services offered by Google and bring the so-called Internet Law in line with international standards on freedom of expression. She also stressed that in the last two years more than 5.000 websites were blocked in Turkey, which considerably limits freedom of expression and severely restricts citizens' right to access of information.

The Representative also informed the Permanent Council about several legal reviews, such as the analysis of the Decree on the establishment of the public television and radio broadcasting in the Kyrgyz Republic. Finally, it was mentioned that the Representative participated in several expert events relating to freedom of expression and the Internet. She stated that the Office is currently working on a document on Internet legislation which will include an overview of legal provisions related to freedom of media, the free flow of information and media pluralism on the Internet in the OSCE region.

• Regular Report to the Permanent Council by the OSCE Representative on Freedom of the Media, 29 July 2010
http://merlin.obs.coe.int/redirect.php?id=12680 EN
• Analysis and Assessment of a Package of Hungarian Legislation and Draft Legislation on Media and Telecommunications, prepared by Dr Karol Jakubowicz, commissioned by the Office of the OSCE Representative on Freedom of the Media
http://merlin.obs.coe.int/redirect.php?id=12681 EN

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REGIONAL AREAS

Commonwealth of Independent States: Model Statute to Fight Extremism

The Commonwealth of Independent States (CIS) Interparliamentary Assembly which is currently comprised of delegations of the parliaments of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan and Ukraine enacted on 14 May 2009 the Model Statute О противодействии экстремизму (On Countering Extremism).

The Model Statute develops the ideas of the national statutes with the same or similar titles that were adopted in 2002 in Russia (see: IRIS 2007-9:19/27), in 2003 in Moldova and Tajikistan, in 2005 in Kazakhstan and Kyrgyzstan (see: IRIS 2005-8:17/26), and in 2007 in Belarus (see: IRIS 2007-3:11/14).

The Model Statute defines extremism as "an attempt at the foundations of the constitutional order and state security, as well as violation of the rights, freedoms and lawful interests of a man and citizen, that takes place as a result of denial of legal and (or) any other accepted standards and rules of social behaviour" (Art. 1).

A list of what is defined as "extremist activity" includes an activity of a mass media outlet to plan, prepare or execute actions that range from hate speech to portrayal of Nazi symbols, from threats of violence against public officials and their relatives to the "provision of informational services" for extremist actions.

The materials become extremist once the court's decision on it enters into force. The decision is to be taken on the proposal of the procurator concerned or as part of a resolution of an administrative, civil or criminal case where such demand was made (Art. 11 and 12).

Article 13 of the Model Statute sets out a detailed procedure for closing down an extremist media outlet. It begins with the registering authority (or the control body with the executive in the mass media sphere) or public prosecutor issuing to the founder and/or editorial office (editor-in-chief) a written warning with details of the offences. If the offences can be remedied, a deadline is given. A warning can be contested in court. If a warning is not contested or if its legality is upheld, if no remedial action is taken by the given deadline, or if within a certain time period (set by national law) of being warned a media outlet is again engaging in extremism or spreading extremist content, then the media outlet is to be shut down in a procedure set by the national law.

Article 14 of the Model Statute stipulates that if the extremist materials are disseminated on-line, relevant (to the above-described) measures are applied to the communication networks taking into account the specificity of the Web.

• О противодействии экстремизму , Информационный бюллетень , *2009, No. 44* (Model Statute On Countering Extremism, 32nd plenary meeting of the CIS Interparliamentary Assembly (Resolution No. 32-9 of 14 May 2009), Информационный бюллетень , 2009, No. 44)
http://merlin.obs.coe.int/redirect.php?id=12703 RU

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Commonwealth of Independent States: Model Statute to Fight Terrorism

The Commonwealth of Independent States (CIS) Interparliamentary Assembly which currently comprises delegations from the parliaments of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan and Ukraine enacted on 3 December 2009 the Model Statute О противодействии терроризму (On Countering Terrorism).

In a way this Model Statute recommends the CIS member-states to adopt new anti-terrorism national statutes as most of these countries' legislation on terrorism is currently based on the Model Statute "On the fight against terrorism" of 8 December 1998 (see IRIS 2005-1: 0/103). In its turn the new Model Statute develops the ideas of the recent Russian Federation's Statute "On Counteraction to Terrorism" of 6 March 2006 (see IRIS 2006-5: 19/33).

The Statute provides for the principles of counteraction against terrorism, organizational and legal measures aiming at prevention and fighting against terrorism, and minimization or elimination of the aftermath of terrorist activities. It also stipulates legal rules of conduct of antiterrorist operations including the formation and competence of operational matters, admissible limitations of the rights and freedoms inside the territory of zone of counterterrorist operation, rules of use of the Armed Forces.

The new law expands the boundaries of the notion of "terrorist activities": it shall inter alia include propaganda of ideas of terrorism, dissemination of information calling for performance of terrorist activities as well as proving or justifying the necessity of such performance, including such actions with the use of Internet (Art. 3).

The Statute includes a few provisions that affect the mass media. Article 9 of the Model Statute stipulates obligations of the mass media to assist counteraction to terrorism. Those include considering the priority of the life and security of population over the freedom of access to information and freedom to disseminate information when covering terrorist attacks and

counter-terrorist activity. They also include an obligation to immediately tip the law-enforcement agencies on preparations of a terrorist act if such information was obtained by the journalists in the course of their professional activity, including an obligation to pass all materials related to the information. Finally this Article puts responsibility of the editors to restrain their staff from disseminating materials thatcall for, justify, or provoke terrorism and extremism, and to refrain from using hate speech in their media. Article 10 suggests introducing criminal liability of journalists and editors as well as closure of the mass media outlets for failing to act as stipulated in Article 9.

Within a counterterrorist operation zone certain limitations of information rights may by introduced, among them control over any forms of conveyance of information including communication via telecommunication networks; temporary suspension of provision of telecommunication services, e.g. mobile telephone communications. The head of operational matters or a person appointed by him defines the rules of conduct of journalists in the counter-terrorist operation zone (Art. 20).

• О противодействии терроризму , Информационный бюллетень , *2010, No. 46.* (Model Statute On Countering Terrorism, 33rd plenary meeting of the CIS Interparliamentary Assembly (Resolution No. 33-18 of 3 December 2009), Информационный бюллетень , 2010, No. 46)
http://merlin.obs.coe.int/redirect.php?id=12704 RU

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Commonwealth of Independent States: Model Statute to Protect Children

The Commonwealth of Independent States (CIS) Interparliamentary Assembly which is currently comprised of delegations from the parliaments of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan and Ukraine enacted on 3 December 2009 the Model Statute О защите детей от информации , причиняющей вред их здоровью и развитию (On the Protection of Minors against Information Detrimental to their Health and Development).

The Model Statute develops the ideas of the recent Russian Federation's bill of the same name which was adopted on 24 June 2009 by the State Duma (Russian parliament) in its first reading (see IRIS 2009-8: 18/29). On 11 June 2010 the bill was adopted in second reading and awaits the third and final reading during the current session of the parliament.

The preamble to the Model Statute speaks of the necessity to take into account international instruments in particular the UN Convention on the Rights of the Child.

The Model Statute regulates products of the mass media, printed materials, movies, TV and video films, phonograms, electronic and computer games, computer software, other audiovisual products on any material object, including those disseminated in public performances and on the information telecommunication networks of general access (including Internet and mobile telephony) (Art. 3).

The Model Statute defines several categories of information banned for dissemination among minors (persons below 18 years of age). They range from pornography (also defined in the Model Statute) to "discrediting the social institution of the family" (Art. 6).

The ratings of the "informational products" related to the age of their consumers are recommended to be as follows: universal (all ages), below 6 (years old), 6+, 12+, 16+ and 18+ (Art. 7). The Model Statute introduces mandatory specific labelling of the products including TV programmes in accordance with their age rating (Art. 14 and 15). Airing of products labelled 16+ shall be allowed on TV only from 9 p.m. to 7 a.m., and those labelled 18+ from 11 p.m. to 6 a.m. (Art. 16).

Facilities, such as Internet cafes, providing Internet access to customers shall be obliged to use technical and programming means to protect minors from detrimental information (Art. 17).

Producers and distributors shall be responsible for marking their products in accordance with the directives of the new law. In particular it encourages them to solicit an expert opinion (that is an opinion of experts as to what category the product belongs), specific rules and legal consequences of which are also regulated in the Model Statute.

• О защите детей от информации , причиняющей вред их здоровью и развитию , Информационный бюллетень , *2010, No. 46* (Model Statute On the Protection of Minors against Information Detrimental to their Health and Development, 33rd plenary meeting of the CIS Interparliamentary Assembly (Resolution No. 33-15 of 3 December 2009), Информационный бюллетень , 2010, No. 46)
http://merlin.obs.coe.int/redirect.php?id=12705 RU

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Commonwealth of Independent States: Model Code on Intellectual Property

The Commonwealth of Independent States (CIS) Interparliamentary Assembly which currently is comprised of delegations from the parliaments of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan and Ukraine enacted on 7 April 2010 Модельный Кодекс интеллектуальной собственности для государств - участников СНГ (Model

Code on Intellectual Property for CIS Member-States). It consists of 13 chapters with total 107 articles.

In a way the new Model Code develops the notions and ideas of Part 4 of the Russian Federation's Civil Code of 18 December 2006 (see IRIS-Plus 2008-2). Although the Model Code does not explicitly say so it apparently replaces the Model Statute "On copyright and neighbouring rights" adopted by the Interparliamentary Assembly of CIS Member States on 18 November 2005 (see IRIS 2006-1: 0/102).

Art. 24 specifies some of the objects (subject matters) that shall be protected under authors' rights and neighbouring rights law. They are: works of science, literature and art; computer programmes, performances, audiovisual works, databases, photography works, text of translations (including subtitles and texts for dubbing in different languages of audiovisual works), composite works, illustrations, maps, other works. The legal protection extends only to the form of the works and therefore does not extend to ideas, concepts, principles, methods, processes, systems, means, discoveries, even if they are expressed, described, explained, illustrated in a work. In order to establish and materialise authors' rights no registration or other formalities are required.

Objects that shall not be considered as objects of author's rights are the following: official documents of state bodies, including state technical standards as well as official translations of such documents; state symbols and signs; bank notes and coins; works of folklore; reports on facts of the day; telephone directories, public transportation, television schedules and similar data banks that do not respond to the principle of originality (Art. 25).

While only natural persons are recognized as "primary" subjects of the copyright, other natural persons, as well as legal entities may become such subjects by law, contract of testament (Art. 26).

• Модельный Кодекс интеллектуальной собственности для государств - участников СНГ ,Информационный бюллетень *, 2010, No. 47* (Model Code on Intellectual Property for CIS Member-States, 34th plenary meeting of the CIS Interparliamentary Assembly (Resolution No. 34-6 of 7 April 2010), Информационный бюллетень , 2010, No. 47)
http://merlin.obs.coe.int/redirect.php?id=12706 RU

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NATIONAL

AT-Austria

Telecommunications Act Draft Amendment on Data Retention

On 26 July 2010, the Austrian Ministry of Transport, Innovation and Technology tabled a new draft amendment to the 2003 *Telekommunikationsgesetz* (Telecommunications Act - TKG), under which the data retention obligations set out in Data Retention Directive 2006/24/EC would be transposed into Austrian law.

The 16-page document takes into account almost 190 comments received by the ministry after the bill was published in autumn 2009 (see IRIS 2010-2: 1/4). The most significant changes are a provision on data protection for persons required to keep professional secrets and the extension of access for security services for the purposes of warding off danger.

The newly added Article 93(5) is designed to ensure that press secrets, protected under Article 31 of the *Mediengesetz* (Media Act), remain protected, and that other secrecy obligations, such as those of lawyers or doctors, which justify the refusal to give evidence in criminal proceedings under Article 157 of the *Strafprozessordnung* (Code of Criminal Procedure - StPO), cannot be circumvented by means of data retrieval. The bill authorises the creation of an independent body which, using an automated system, can render such information anonymous. The provision prohibits access to the data of persons required to keep professional information confidential secret, unless they themselves are the subject of the investigations.

In the new draft, the possibilities for accessing data have been extended in two respects. Firstly, criminal prosecution authorities will be able to access data relating to an Internet connection - for a maximum of three months after the communication concerned - for the purposes of investigating and prosecuting non-serious crimes. As a result, such data could particularly be used in a legal action against copyright infringements on the Internet. Secondly, the access granted to security services will no longer, as originally planned, remain limited to cases in which it is required to avert a concrete danger to life and limb. Rather, such services will now be allowed to access traffic, master and location data without a court order when there is a concrete danger to freedom and in order to ward off danger caused by a dangerous attack in accordance with Article 16 of the *Sicherheitspolizeigesetz* (Police Act - SPG). This represents a sig-

nificant increase in access compared to the current rules.

In several places, it is noticeable that the draft closely follows parallel developments in Germany. At various points, footnotes refer to the decision of the German *Bundesverfassungsgericht* (Federal Constitutional Court), such as in relation to the practical implications of the provisions on guaranteeing data security (see IRIS 2010-4: 1/12).

Even after the publication of this new draft, the transposition process in Austria remains in its early stages: for some provisions, a two-thirds majority is required, since they would require the Constitution to be amended. Amendments to the StPO and SPG are also necessary, partly in order to define what constitutes a "serious criminal offence" in the sense of the amended TKG. In addition, the provisions cannot enter into force until nine months after they are adopted, in order to allow enough time for operators to make technical adjustments and for amended decrees on the reimbursement of costs to be adopted.

During the Austrian legislature's efforts to bring the data retention obligations into line with the Directive at the second attempt - after the 2007 draft had hit obstacles - the EU member state was found guilty by the ECJ after the Commission brought an action for an infringement of the Treaty. The Court ruled that the deadline for transposing the Directive had been missed. Even so, the Minister for Transport, Innovation and Technology does not want to present the bill to Parliament until 15 September 2010, the day on which the Commission has announced that it will publish its report on the evaluation of the Directive.

- *Entwurf zur Änderung des TKG* (Bill amending the TKG)
http://merlin.obs.coe.int/redirect.php?id=12688 DE
- ECJ judgment (C-189/09) of 29 July 2010 DE FR

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BA-Bosnia And Herzegovina

Recent Developments in PBS Transition to Digital Broadcasting

On 14 July 2010 *Vijeće ministara Bosne i Hercegovine* (the Council of Ministers of Bosnia and Herzegovina) adopted a Decision endorsing the Project of the digitalisation of public broadcasting service microwave links. The Project is aimed at building a new, modern system for digital transmission of radio and TV programmes and increasing network capacity for a bilateral and multilateral exchange of programmes among the three public broadcasting services in Bosnia and Herzegovina (BiH), as well as programmes from the neighbouring countries.

In April 2010 *Regulatorna agencija za komunikacije* (the Communications Regulatory Agency) established terms and conditions for the utilisation of Multiplex A (MUX A) by public broadcasting services for terrestrial digital television broadcasting during the transition period. Public broadcasting services in BiH are thus enabled to launch the process of transition to digital terrestrial broadcasting through shared building and usage of synchronous assignments in the digital allotments.

The process of transition of public broadcasting services in BiH to digital broadcasting is however not expected to be without difficulties. There are concerns over the funding of the above mentioned Project threatening to delay the entire digitalisation process.

Issues that remain to be addressed also concern the unfinished reform of the public service broadcasting system. *Zakon o javnom radiotelevizija kom sistemu* (Law on the Public Broadcasting System) namely stipulates the creation of a Corporation of Public Broadcasting Services as an umbrella organisation over all three public broadcasting services in the country. Once established, the Corporation would be in charge of, among other things, the joint operation of the transmission network and the introduction of new technologies including digital terrestrial broadcasting (see IRIS 2009-9: 7/8).

The national Strategy on the Digital Switchover in BiH sees public broadcasting services as leading stakeholders in the process of transition to digital broadcasting due to their traditionally central position in the BiH broadcasting market but also to their important role in providing universally available services which can help bridge the digital divide.

- *Donesena Odluka o usvajanju Projekta digitalizacije* (Press release on the Decision on the Endorsement of the Digitalisation Project)
http://merlin.obs.coe.int/redirect.php?id=12666 BS
- Decision on the manners of utilisation of Multiplex A (MUX A) by public broadcasting services for terrestrial digital television broadcasting in transition period, BiH Official Gazette No. 38/10 of 10 May 2010 BS
- Strategy on the digital switch-over within the frequency bands of 174-230MHz and 470-862MHz in Bosnia and Herzegovina
http://merlin.obs.coe.int/redirect.php?id=12668 EN

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BG-Bulgaria

Preparation of a New Bill for the Electronic Media

By order of the Bulgarian Prime Minister a Working Group has been established in the Ministry for Culture with the purpose of preparing a bill for the electronic media by 30 November 2010.

The Working Group includes media experts, representatives of the Council of Ministers, of the Council for Electronic Media and the Communications Regulation Commission, of the Bulgarian National Radio and the Bulgarian National Television, of the Ministry for Culture and the Ministry for Finance and the Independent Producers Association.

The Council of Ministers held a discussion about the future of the media regulation in Bulgaria, which took place on 29 and 30 July 2010.

The first day of the deliberations was devoted to the debate on the following issues: basic principles; the scope of the act; co-regulation; commercial messages; regulatory body; licensing and registration and media pluralism. The ideas about a possible merge of the two regulators in the media market at present - the Council for Electronic Media and the Communications Regulation Commission; the process of licensing and registration of media providers and how to secure the pluralism in the sector, were also under discussion.

On the second day of the deliberations on the amendments to the media law several further issues were - partly of an emotional nature - debated: The question whether the Bulgarian National Television and the Bulgarian National Radio should merge; whether there is a necessity for a more accurate definition of "social media" and of more clear rules on its functioning; the statutes, structures and governance of the Bulgarian National Television and the Bulgarian National Radio and how the State media will be financed. The ideas of a merge were opposed by both the representatives of the National Radio and of the National Television.

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Proofs for Granted Copyrights and Related Rights

On 24 August 2010 the six months term expired, before which, according to Article 125 of the Закон за радиото и телевизията (Radio and Television Act - Z440442), all enterprises that transmit radio or TV programmes in their electronic webs have to submit to the Council for Electronic Media a list of all radio and TV programmes that have been transmitted and the documents proving the granting of all copyrights and related rights on each programme and on all elements of the programme.

This obligation is in force since 2001 but in 2009 for the first time the Bulgarian legislator established some sanctions for those who do not fulfil it according to Article 126a, paragraph 5 Z440442. The sanctions are financial and vary from EUR 1,500 to 3,500 for not submitting any information within the set term or for presenting incorrect or insufficient information. In case of illegal transmission of radio or TV programmes without the consent of the holders of copyrights or related rights on the programme, on the cinematographic or audiovisual works or on the music, which are used in the programme, the sanctions are between EUR 3,500 and 15,000.

In February 2010 when the previous 6 months term finished, the examination of the submitted documents in the Council for Electronic Media showed that less than half of all 526 enterprises, that have declared to the Committee for the Regulation of Communications that they would transmit programmes in their webs, have presented any information under Article 125v Z440442. The Council punished few of those that did not submit any information. The enterprises appealed and now most of the cases are pending before the court. On most of the cases the Council decided that those are of minor importance and only reminded the enterprises of their obligations to settle copyrights and related rights with the rightholders and to submit the required documents under Article 125 Z440442. The councillors hoped that this policy is strong enough to make the enterprises follow the law.

The documents submitted up to 24 August 2010 are still not checked. However, some of the Bulgarian collective management societies state that they have already received many requests from enterprises that transmit radio or TV programmes for signing contracts to grant copyrights and related rights.

• СЪОБЩЕНИЕ - ОТНОСНО ПРИЛАГАНЕ НА ЧЛЕН 4 И ЧЛЕН 5476402 Директива *89/522/*425430436, изменена с Директива *97/36/*425436 иДиректива *2007/65/*425436 на ЕП и на Съвета – Директива за аудиовизуални медийни услуги
(Press Release of the Council for Electronic Media, 6 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12707 BG

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Council for Electronic Media & Sofia University "St. Kliment Ohridsky"

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BY-Belarus

Regulation of the National Segment of Internet Enforced

In the period from February to July 2010 the President and the Council of Ministers (the government) of the Republic of Belarus adopted a set of acts that put in place a sophisticated system of regulation of the national segment of Internet. All of these entered into force in July 2010.

In particular they have introduced the necessity for all public authorities, State-owned and state-run entities to have official websites with regularly-renewed information about their activities.

They establish a unified system of voluntary State registration of Internet resources in the national segment of Belarus (.by) as stipulated in the statute of the Republic of Belarus "On Information, Informatisation and Protection of Information" (see IRIS 2009-1: 9/12). State registration is obligatory for all websites if they are used for commercial purposes (for example, Internet shops).

"In the interests of the security of citizens and the state" Belarusian Internet-providers are to identify all end-users of their services, keep and store for the period of 1 year records of such users and services provided to them. That rule involves identification of clients of Internet cafes and clubs. The records include files with all IP-addresses and domain names of the resources that were connected with in a particular session. They are to be provided to the law-enforcement agencies, as well as tax authorities and the governmental Committee of State Control. In effect these provisions ban the possibility to access Internet with the help of pre-paid cards and/or without a state-registered password (including free Wi-Fi services).

The providers are not liable for the contents of the information in Internet. On demand of a user of the Internet-services the provider must block access of this particular user to Internet-resources that contain pornography, propaganda of violence and cruelty and other illegal actions. Illegal information will be automatically blocked for the users located in State-run facilities (including schools and colleges) and cultural establishments (e.g., libraries and information centres). In the latter case the decisions on what information is deemed to be illegal are made by the prosecutor's office, Analytical Centre at the President of Belarus, the Committee of State Control or any other national governmental agency.

• О мерах по совершенствованию использования национального сегмента сети Интернет (Decree of the President of the Republic of Belarus No. 60 of 1 February 2010 "On measures to improve the use the national segment of Internet")
http://merlin.obs.coe.int/redirect.php?id=12657 RU

• О461 утверждении Положения о порядке взаимодействия операторов электросвязи с органами, осуществляющими оперативно - розыскную деятельность (Decree of the President of the Republic of Belarus No. 129 of 3 March 2010 "On approval of the Procedures for interoperation between telecommunications operators and investigation agencies")
http://merlin.obs.coe.int/redirect.php?id=12658 RU

• О некоторых вопросах совершенствования использования национального сегмента глобальной компьютерной сети Интернет » (Ordnance of the Council of Ministers of the Republic of Belarus No. 644 of 29 April 2010 "On certain issues to improve the use of the national segment of the global computer network Internet")
http://merlin.obs.coe.int/redirect.php?id=12659 RU

• О некоторых вопросах интернет - сайтов государственных органов и организаций и признании утратившим силу постановления Совета Министров Республики Беларусь от 11 февраля 2006 г. № 192 (Ordnance of the Council of Ministers of the Republic of Belarus No. 645 of 29 April 2010 "On certain issues of the Internet-sites of the state bodies and organizations and on declaring void Ordnance of the Council of Ministers of the Republic of Belarus No. 192 of 11 February 2006")
http://merlin.obs.coe.int/redirect.php?id=12659 RU

• О внесении изменений и дополнений в Правила оказания услуг электросвязи (Ordnance of the Council of Ministers of the Republic of Belarus No. 646 of 29 April 2010 "On amendments and addenda to the Rules of providing telecommunication services")
http://merlin.obs.coe.int/redirect.php?id=12659 RU

• О регистрации интернет - магазинов в Торговом реестре Республики Беларусь, механизме контроля за их функционированием и внесении дополнений и изменений в некоторые постановления Совета Министров Республики Беларусь (Ordnance of the Council of Ministers of the Republic of Belarus No. 649 of 29 April 2010 "On registration of Internet-shops in the Trade Register of the Republic of Belarus, control mechanisms over their activity and on amendments and addenda to certain ordnances of the Council of Ministers of the Republic of Belarus")
http://merlin.obs.coe.int/redirect.php?id=12659 RU

• Об утверждении положения о порядке ограничения доступа пользователей интернет - услуг к информации, запрещенной к распространению в соответствии с законодательными актами (Ordnance of the Analytical Centre at the President of the Republic of Belarus and of the Ministry of Communications and Informatics of the Republic of Belarus No. 4/11 of 29 June 2010 "On approval of the Procedures for restrictions of access of the users of Internet-services to information banned for dissemination in accordance with law")
http://merlin.obs.coe.int/redirect.php?id=12660 RU

• Об утверждении перечня административных процедур, осуществляемых Министерством связи и информатизации и подчиненными ему государственными организациями в отношении юридических лиц и индивидуальных предпринимателей, внесении изменения и дополнений в отдельные постановления Совета Министров Республики Беларусь и признании утратившими силу некоторых постановлений и отдельных положений постановлений Правительства Республики Беларусь (Ordnance of the Council of Ministers of the Republic of Belarus No. 1001 of 2 July 2010 "On approval of the list of administrative procedures performed by the Ministry of Communications and Informatics and affiliated state organizations in relation to legal entities and private entrepreneurs, on amendments and addenda to certain ordnances of the Council of Ministers of the Republic of Belarus and on declaring void certain ordnances and provisions of ordnances of the Council of Ministers of the Republic of Belarus")
http://merlin.obs.coe.int/redirect.php?id=12702 RU

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CY-Cyprus

Commercial Digital Platform Awarded

Velister Ltd, a consortium of broadcasters and television services companies, won the competition for the commercial digital platform that will provide the infrastructure for digital television in the Republic of Cyprus (two platforms will be created, with the first awarded to the public service broadcaster Cyprus Broadcasting Corporation, Ραδιοφωνικό Ίδρυμα 332΄305300301377305, RIK). The bidding process for the selection was completed in 17 rounds, on 23 August 2010, with Velister Ltd's bid amounting to EUR 10,000,000; next highest bid by LRG Ltd was EUR 9,000,000 and the third, by CYTA, the public (service) telecommunications company, EUR 4,100,000.

According to an official announcement dated 26 August 2010 Velister Ltd, which fulfilled the criteria for participating in the selection process, was named provisional winner of the auction because it made the highest bid. For the company to be declared final winner it must submit within 30 days from the end of the auction the documents and warrants required and deposit the sum of the bid according to the rules of the competition.

Velister Ltd is a consortium of the six commercial broadcasters (Antenna, Sigma, Mega, Plus TV and subscription channels LTV and Alpha) and two television services and Internet providers, Primetel and Cablenet.

It is noticeable that the reserve price for the auction was set at EUR 850,000, which means that the final bid is almost twelve times higher. Some observers consider the sum of EUR 10,000,000, that the winner has to pay, as too high for the market of Cyprus and expressed some concerns as to the smooth operation of the digital television project.

The course to the award of the digital platform was not without problems. Initially, the House of Representatives attempted to disallow by law participation of CYTA in the auction. The President sent back to the House the law for reconsideration and on the insistence of the House on their vote it referred the law to the Supreme Court for decision (see IRIS 2010-6: 1/15).

On another development, the auction process was suspended after the thirteenth round on 2 July 2010, following allegations for double-bidding by contestants. The process resumed in late August after the competent authorities rejected the objections raised by the contestants.

• Πλειστηριασμός για τη Χορήγηση Εξουσιοδότησης Δικτύου Επίγειας Ψηφιακής Τηλεόρασης - Προσωρινός Νικητής , *26/08/2010* (Auction for the Issue of Authorisation of a DTT Network - Temporary Winner)
http://merlin.obs.coe.int/redirect.php?id=12670 EL

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DE-Germany

Temporary Injunction against Save.TV Technical Service Company

According to a press release issued by the online video recording service Save.TV, on 28 July 2010 the *Landgericht München* (Munich District Court - LG), at the request of television broadcaster RTL, granted a temporary injunction against one of its service companies, obliging it to cease providing technical support so that the RTL channel could no longer be recorded. The reasons for the court's decision were not reported.

The unnamed technical service company is reported to have announced immediately that it would take legal action against the temporary injunction.

The injunction clearly represents a further step in the broadcaster's lengthy efforts to prevent Save.TV and similar providers from making recordings of copyright-protected content available to the public (see IRIS 2009-7: 7/9 on the dispute between RTL and Shift TV). The action against Save.TV's service company is closely related to a legal dispute between Save.TV itself and RTL, which is currently pending before the *Oberlandesgericht Dresden* (Dresden Appeal Court - OLG) after the *Bundesgerichtshof* (Federal Supreme Court) quashed the OLG's appeal ruling in April 2009 (case no. I ZR 175/07) and referred the case back to it for review.

The OLG Dresden had upheld the broadcaster's complaint and ruled that its copyright-related right as enshrined in Article 87(1) of the *Urheberrechtsgesetz* (Copyright Act - UrhG) had been infringed due to unauthorised reproduction. The OLG Dresden had rejected the defendant's argument that the recordings were made for private use in accordance with Article 53(1) UrhG.

• *Mitteilung von Save.TV* (Save.TV press release)
http://merlin.obs.coe.int/redirect.php?id=12690 DE

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Court Refuses to Open Main Proceedings on "Black Surfing"

In a decision of 3 August 2010, the *Amtsgericht Wuppertal* (Wuppertal District Court - AG) refused to open the main proceedings in a case concerning the unauthorised use of an unencrypted wireless network on the grounds of insufficient suspicion.

On two days in August 2008, the defendant had logged onto a third-party (unencrypted) wireless network without permission and without paying a fee.

In the AG's opinion, this did not constitute either the offence of unauthorised tapping under Article 89(1)(1) of the *Telekommunikationsgesetz* (Telecommunications Act - TKG) or unauthorised retrieval or acquisition of personal data under Articles 44 and 43(2)(3) of the *Bundesdatenschutzgesetz* (Federal Data Protection Act - BDSG). The AG therefore revised the opinion it had expressed in 2007 and, at the same time, opposed the view of the *AG Zeven* (Zeven District Court), which considered the unauthorised use of a WLAN to constitute unauthorised tapping under Articles 148 and 89 TKG (see IRIS 2010-3: 1/16).

The AG did not consider this to be a criminal act under Article 89(1)(1) TKG because the defendant's conduct did not represent "tapping" in the sense of the provision. Tapping should be understood as directly listening to something or making it audible for other people, as well as switching on a recording device. In any case, this required there to be some form of communication between other people, to which the perpetrator listened in as a third party. There must be a deliberate, purposeful receipt of third-party messages, which are deliberately and purposefully listened to by the culprit, in order for tapping to have taken place. In this case, the defendant did not deliberately and purposefully receive messages. By logging on to the unencrypted network, he had been able to share the use of the Internet connection. The necessary receipt of the IP address did not constitute tapping. The confidentiality of third-party communication was not affected by this act. Also, the defendant had also not listened in on a third-party exchange of data, since the IP address had been allocated to the defendant as the sole user of the Internet connection.

A punishable offence under Articles 44(1) and 43(2)(3) BDSG was ruled out because the defendant had not accessed or obtained any personal data. Personal data was any information on personal and factual conditions that was assigned to a natural person and not accessible to the public. However, IP data was not personal data in the sense of Article 3(1) BDSG, since the IP address was freely allocated to whichever computer was using the network. When it was received by the defendant, this data was therefore intended for him as the user.

Nor had a criminal offence been committed under Article 202b of the *Strafgesetzbuch* (Criminal Code) (interception of data) because the IP data received had been intended for the defendant as the user of the network.

• *Beschluss des AG Wuppertal (Az. 26 Ds-10 Js 1977/08-282/08)* (Decision of the Wuppertal District Court (case no. 26 Ds-10 Js 1977/08-282/08))
http://merlin.obs.coe.int/redirect.php?id=12691 DE

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GEMA (Provisionally) Loses Legal Dispute with YouTube

In a decision of 27 August 2010 (case no. 310 O 197/10), the *Landgericht Hamburg* (Hamburg District Court - LG) rejected an application by the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (society for musical performing and mechanical reproduction rights - GEMA) and other collecting societies for a temporary injunction against YouTube.

The legal dispute concerned videos uploaded by users onto the YouTube portal, containing pieces of music to which the applicants held the rights but for the use of which YouTube paid no compensation. A licensing agreement between the GEMA and YouTube had expired on 31 March 2009 and had not been renewed due to a failure to agree on compensation obligations and methods. As a result, the GEMA, together with other European collecting societies, ended up taking legal action. The applicants requested an injunction preventing YouTube from making the disputed titles available to the public.

The LG Hamburg disputed the urgency of the application and therefore rejected it, suggesting that the applicants open principal proceedings if necessary or reach an out of court agreement. It ruled that the applicants had known for a long time "that music compositions were used on the YouTube service". This fact, together with the long period of time they had spent preparing the injunction application itself, contradicted the notion that the applicants had only become aware a few weeks earlier that their rights were being infringed. The argument regarding the necessary urgency was not therefore sufficiently plausible.

The LG Hamburg therefore did not consider the actual question of whether the applicants were entitled to an injunction against the video portal under copyright law. However, if principal proceedings were to be opened, there was good reason to believe that such a claim would be granted. In particular with regard to

preventive measures that would stop further uploading of blocked content, it seemed "that the respondent had failed to fulfil reasonable examination duties or take measures to prevent further rights infringements".

• *Pressemitteilung des LG Hamburg vom 27. August 2010* (LG Hamburg press release of 27 August 2010)
http://merlin.obs.coe.int/redirect.php?id=12696 DE

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OLG München Upholds Cameraman's Claim

According to media reports, the *Oberlandesgericht München* (Munich Appeals Court - OLG) has upheld the claim of a cameraman who worked on the film "*Das Boot*" to a reasonable additional share in the revenue generated through exploitation of the film, thereby confirming the ruling of the *Landgericht München I* (Munich District Court I).

Agreeing with the lower instance court (see IRIS 2009-6: 8/12), the OLG found a "noticeable disproportion" in the sense of Article 32a of the *Urheberrechtsgesetz* (Copyright Act) between the remuneration paid to the cameraman when the film was produced in 1981 and the amount of revenue generated since that time, during which the film had become a global success. The cameraman had asserted a claim against the producer, the broadcaster that financed the film and a video company.

According to the reports, the defendants have appealed to the *Bundesgerichtshof* (Federal Supreme Court) against this OLG ruling.

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New Developments in Cinema Digitisation

At the end of August 2010, the *Filmförderung Hamburg Schleswig-Holstein* (Hamburg Schleswig-Holstein film support office - FFHSH) launched a special programme for the promotion of cinema digitisation.

Help is available for commercial art cinemas in Hamburg with a maximum of six screens and a high-quality film programme, which can apply for support for the refitting of up to three screens per calendar year. The funds can be used to purchase and install the necessary equipment and projection technology and take the form of an investment subsidy of up to 25% of the costs, with an upper limit of EUR 18,000 per screen. The funds are provided as a *de minimis* amount and may be granted in addition to other forms of public aid, such as subsidies from the *Filmförderungsanstalt* (Film Support Office). This support programme will run until 2014.

Also at the end of August 2010, the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government Commissioner for Culture and Media - BKM) and the *Verband der Filmverleiher* (Association of Film Distributors - VdF) reached an agreement on the involvement of the film distribution industry in the financing of cinema digitisation. Under this agreement, film distributors will also support so-called *Kriterienkinos* (criteria cinemas) with their technical refitting, such as through direct financial subsidies for the purchase of the necessary technical equipment.

• *Sonderprogramm Digitalisierung der FFHSH* (FFHSH special digitisation programme)
http://merlin.obs.coe.int/redirect.php?id=12694 DE
• *Mitteilung des BKM vom 25. August 2010* (BKM press release of 25 August 2010)
http://merlin.obs.coe.int/redirect.php?id=12695 DE

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Government Adopts Bill Strengthening Press Freedom

On 25 August 2010, the Federal Government adopted the bill strengthening the freedom of the press in criminal law and criminal procedure law (PrStG). The bill is based on a draft tabled by the *Bundesministerium der Justiz* (Federal Ministry of Justice - BMJ) on 4 April 2010 (see IRIS 2010-6: 1/20).

The bill will strengthen the freedom of the press by offering better protection to journalists and their sources, in order to ensure that the media can fulfil their oversight function vis-à-vis State activities. In the sense of the provisions, journalists are "people who, in a professional capacity, participate or have participated in the preparation, production or distribution of printed publications, radio programmes, film reports or information and communication services used for educational or opinion-forming purposes" (Art. 53(1)(5) of the *Strafprozessordnung* - Code of Criminal Procedure - StPO).

In accordance with the BMJ's proposal, a new paragraph has been added to Article 353b of the *Strafgesetzbuch* (Criminal Code - StGB; breaches of official secrecy and special obligations of secrecy), under which journalists cannot be punished for aiding and

abetting breaches of official secrecy if they merely receive, analyse or publish the secret or the information that is supposed to be kept secret.

In addition, an amendment to Article 97(5)(2) StPO (concerning items that cannot be confiscated) stipulates that journalists in the sense of Article 53(1)(1)(5) StPO may only have their property confiscated if they are seriously suspected of involvement in the offence. Previously, any degree of suspicion was sufficient.

The need for reform in this area arose following the so-called "Cicero ruling" of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 27 February 2007 (see IRIS 2007-4: 8/11). In that case, the magazine "Cicero" had cited confidential documents of the *Bundeskriminalamt* (Federal Criminal Police Office), following which the responsible public prosecutor's office had launched an investigation, searched the magazine's editorial offices and confiscated documents.

• *Gesetzentwurf der Bundesregierung - Gesetz zur Stärkung der Pressefreiheit im Straf- und Strafprozessrecht (PrStG)* (Federal Government Bill - Act strengthening the freedom of the press in criminal law and criminal procedure law (PrStG).)
http://merlin.obs.coe.int/redirect.php?id=12693 DE

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Federal Network Agency Wants to Delegate Cable Regulation to Cartel Authority

The *Bundesnetzagentur* (Federal Network Agency - BNetzA) announced on 3 September 2010 that it had sent a draft market definition, market analysis and regulatory measures concerning the wholesale market for broadcasting transmission services to the European Commission for comment. In the proposal, the Agency, which is responsible, *inter alia*, for regulating national telecommunications markets in Germany, suggests that the signal delivery and input markets for cable networks should be removed from sector-specific regulation and placed under the general competition supervision carried out by the *Bundeskartellamt* (Federal Cartel Office). The latter has already agreed to the proposal. The Commission now has one month to give its opinion on the proposals.

The "wholesale market for the provision of broadcasting transmission services to deliver broadcast content to end users", which is still identified as market no. 18 in the 2003 Commission Recommendation on markets (see IRIS 2003-3: 7/9), was omitted from the revised recommendation of 2007. The Commission did not consider that this market still needed specific regulation and therefore recommended to the member states that it should no longer be susceptible to *ex ante* regulation. National regulatory authorities can still maintain sector-specific regulation in this field, but must provide reasons for doing so. The recommendation lays down three criteria (contained in Article 10(2)(1) of the German Telecommunications Act), which must be fulfilled cumulatively in order to justify continued *ex ante* regulation: firstly, there must be "high and non-transitory barriers to entry"; secondly, the market must not tend towards effective competition within the relevant time horizon; and thirdly, competition law alone should not adequately address the market failure concerned.

Before the BNetzA proposals were submitted to the Commission, a consultation paper was published, on which interested parties were given until 21 May 2010 to comment. In this document, the Agency had firstly identified three market segments: as well as the two markets for the input of broadcast signals into the broadband cable network and for the delivery of signals by large cable network operators to home network operators, the investigation had included the market for the provision of terrestrial broadcasting facilities for the transmission of analogue VHF radio signals. In regard to the cable markets, the BNetzA concluded that the first two of the three aforementioned criteria for *ex ante* regulation were met. However, it thought that general competition law was sufficient to effectively address the existing market failure. On the other hand, it decided that continued *ex ante* regulation was justified in the market for the transmission of analogue VHF radio signals. Due to its virtual monopoly of this market, Media Broadcast, as the owner of more or less all terrestrial VHF transmission facilities, would otherwise be unable to achieve competitive prices.

• *Konsultationspapier der BNetzA vom 21. April 2010 und die Ergebnisse des Anhörungsverfahrens* (BNetzA consultation paper of 21 April 2010 and results of the hearing)
http://merlin.obs.coe.int/redirect.php?id=12692 DE

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FR-France

HADOPI gets moving!

Slowly but surely, with the publication of the implementing decrees for the "HADOPI I" and "HADOPI II" Acts (see IRIS 2010-1:1/23 and IRIS 2009-7:12/20), the High Authority ("HADOPI") is getting into working order, despite the efforts of its detractors. The "HADOPI II" Act of 28 October 2009 gave the criminal courts the task of ordering the suspension of Internet access for an Internet user who fails to comply with the obligation to ensure that access was not used for

the illegal circulation of protected works. This is in addition to the offence of "specific negligence", which attracts a penalty in the 5th category, the principle of which is laid down by Article L. 335-7 of the Intellectual Property Code resulting from the HADOPI Act, the definition of which was nevertheless left to the regulatory authority. The Decree of 25 June 2010 has now defined the offence, which is constituted when an Internet access holder has not set up a security system to prevent unlawful downloading. The negligence is also deemed specific if it has failed to implement the system. According to the text, however, the offence can only be constituted if the access holder has received a recommendation from the HADOPI enjoining him/her to secure his/her Internet access and if, within a period of one year following this recommendation, his/her Internet access is used again to unlawfully download or circulate protected works.

At the same time, Decree No. 2010-872 of 26 July 2010 has laid down the rules applicable to the procedure and the investigation of cases before the HADOPI's panel and commission for the protection of rights. Cases may be referred to the HADOPI by the regularly constituted professional defence bodies, the societies for receiving and redistributing royalties, and the CNC. After hearing the Internet subscriber who is being prosecuted for having downloaded protected works without authorisation, the commission decides, by a vote taken with a majority of at least two, that the facts of the case are likely to constitute specific negligence or counterfeiting, and sends its deliberation on to the office of the Public Prosecutor at the appropriate regional court. It informs the commission of its follow-up to the referral. If a penalty is imposed, the commission informs the access provider that the subscriber is to be suspended, and in turn the access provider informs the commission of the date on which it has suspended access.

The access provider FDN applied to the Conseil d'Etat under the urgent procedure for implementation of the Decree of 26 July to be suspended, but the Conseil d'Etat turned down the application on 14 September 2010, on the grounds that none of the arguments put forward were such as to cast serious doubt on the legality of the Decree at the present stage. The HADOPI is thus well and truly in working order, even though an application has been made to the Conseil d'Etat for another decree, adopted on 5 March 2010 (on the processing of personal data necessary for implementing the recommendation procedure), to be cancelled. Theoretically, it should therefore be possible to start sending out the first warning e-mails 04046

• *Décret n°2010-695 du 25 juin 2010 instituant une contravention de négligence caractérisée protégeant la propriété littéraire et artistique sur Internet, JO du 26 juin 2010* (Decree No. 2010-695 of 25 June 2010 instituting the offence of specific negligence in the protection of literary and artistic property on the Internet, gazetted (published in the Journal Officiel) on 26 June 2010)
http://merlin.obs.coe.int/redirect.php?id=12709 FR

• *Décret n°2010-872 du 26 juillet 2010 relatif à la procédure devant la commission de protection des droits de la Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet, JO du 27 juillet 2010* (Decree No. 2010-872 of 26 July 2010 on the proceedings before the commission for the protection of rights of the High Authority for the Broadcasting of Works and the Protection of Rights on the Internet ('HADOPI'), gazetted (published in the Journal Officiel) on 27 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12710 FR

• *Conseil d'Etat (ord. réf.), 14 septembre 2010, Société French Data Network* (Conseil d'Etat (urgent procedure), 14 September 2010, the company French Data Network) FR

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Abolition of Advertising on Public-sector Channels Suspended

By imposing a total ban on advertising on public-sector channels, the Act of 5 March 2009 constituted nothing short of a revolution on the French audiovisual scene. Originally, the ban was supposed to be implemented in two stages - applying to the period between 8 p.m. and 6 a.m. starting on 5 January 2009, then a total ban starting on 30 November 2011, the date of the total switch from analog to digital television. As compensation, a new tax was introduced on advertising broadcast by the private-sector channels, and another new tax on electronic communication operators. Nevertheless, sponsored broadcasts remained possible on public-sector channels.

An interim report is scheduled for May 2011 on the possibility of abolishing advertising during the day, between 6 a.m. and 8 p.m. The Government seems not to want to wait that long, however, or to wait for the conclusions of the report being prepared on the subject by the National Assembly's cultural affairs committee. After considering a number of hypotheses, the committee finally reached a decision and announced on 17 September 2010, through Frédéric Mitterrand, Minister for Culture, the introduction of a two-year moratorium, until January 2014, for the abolition of day-time advertising on public-service television. Total abolition will therefore not take place at the end of 2011 as provided for in the Act, for purely budgetary reasons - it will take between 300 and EUR 400 million to compensate for the total abolition of advertising.

The private-sector channels, headed by TF1 and M6, were quick to react to the news; they are up in arms about what they consider to be an overturning of their economic balance. Calling for fair competition, the heads of these channels have therefore called for compensation, more particularly in the form of a reduction in their tax burden since the abolition of advertising on the public-sector group's channels. TF1 and M6 are also calling for a stop to sponsoring, which provides France Télévisions with EUR 72 million per

year, after 8 p.m., and for the duration of advertising spots immediately before 8 p.m. to be limited to 6 minutes per hour, compared with 8 minutes at present.

At the same time, on 21 September, the National Assembly's cultural affairs committee presented the conclusions of the working party "on advertising and the commercial activities of public-sector television". The report draws up an initial assessment of the application of the reform and draws conclusions for the future. In this respect, the parliamentarians recommend maintaining advertising before 8 p.m. The abolition of day-time advertising does not raise the same editorial issues as advertising during peak-time viewing. The cost to the State's budget would also appear to be higher than previously forecast. Lastly, there was the risk that the total abolition of advertising on France Télévisions would result in an overall loss of advertising income for the audiovisual industries as a whole.

Abolishing advertising during evening viewing had in fact shown that the majority of the advertising offer cannot be substituted because of the specific nature of the audience for the public-service channels. The working party therefore recommends abolishing the legislative provision corresponding to the second stage provided for in the Act of 5 March 2009. At the very least, if the moratorium solution were to be adopted, it should logically correspond to the term of office of the new chairman of France Télévisions and to the duration of the contract of ways and means he wishes to conclude with the State, i.e., five years. The committee's recommendations include maintaining the exemptions to abolishing advertising after 8 p.m., although the parliamentarians will take care that amendments do not distort the spirit of the reform. The level of the tax imposed on the private-sector channels is 0.5%.

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CSA Study on the Circulation of Audiovisual Works

The Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) has carried out a new study with a view to improving the circulation of audiovisual works originally in the French language. This is an issue it looked at in 2006, but competition has increased since then with the arrival of the DTV channels. The legal framework has also changed, as the "Tasca" Decrees were revised in 2008 and 2009 in order to raise the production obligations incumbent on most of the players in the market, especially new arrivals.

After an initial summing up in April 2010, a number of proposals for measures designed to make the circulation of works easier were submitted to the sector's professionals (television service editors, professional organisations in the sectors of the production, broadcasting and distribution of audiovisual programmes). The CSA used the observations made to supplement its analysis and to formulate definitive proposals.

The study highlights three fundamental points. Firstly, there was no evidence of rights being frozen. Secondly, however, works circulate mainly between channels in the same group. Thirdly, those channels not backed by a "historic" analog broadcaster may encounter problems with access to works, in the form of extremely limited access to financing arrangements, and with the effects of contractual clauses ("first and last refusal" clauses, retrocession clauses). The CSA points out in its report that this clause deals with the priority given to a first channel broadcasting a work to acquire exclusive broadcasting rights at the end of the period constituting the first "window" of rights (right of first refusal), and the obligation incumbent on the producer, before transferring rights to a third party definitively, to offer these rights to the channel on the same conditions as those negotiated by the third party ("last refusal" clause).

The CSA's recommendations outline three objectives. Firstly, the rights granted to the broadcaster should be in proportion to its investment in the production of the work, more particularly by reserving the clause of first and last refusal for the best-financed works. Then, it is necessary to facilitate access to broadcasting rights, particularly for the "independent" channels, during the initial "window" of exclusive broadcasting rights, more particularly by allowing those "independent" channels that have committed themselves to investing in the production of new works made initially in French or another European language to have access to the financing schemes for works initiated by the "historic" analog channels. The France Télévisions group could play a particular role in this process. At the end of the first window of exclusivity, access to broadcasting rights could be made easier by organising the release of broadcasting rights at the end of the last airing under contract, without waiting for the end of the negotiated period of exclusivity and by limiting the period for using the clause of first and last refusal. The final objective consists of ensuring the transparency of the contract for acquiring the works, more particularly by instituting a mediator for audiovisual creation responsible for overseeing the circulation of the works and for the resolution of disputes, along the lines of the cinema mediator.

• *Contribution à la réflexion sur la circulation des œuvres audiovisuelles, CSA, juillet 2010* (Contribution to consideration of the circulation of audiovisual works, CSA, July 2010)
http://merlin.obs.coe.int/redirect.php?id=12687 FR

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GB-United Kingdom

List of Protected Free-to-Air Events to be Retained Unamended

The UK has issued a list of events that are felt to have special national resonance and so are available, so far as possible, for broadcast on free-to-air television. In late 2009 an Independent Review Panel reported on the list (see IRIS 2010-1: 1/26). The Panel recommended that the list be retained but amended so that it should contain pre-eminent national or international events with the involvement of a national team and likely to command a large television audience. The Summer Olympic Games, the World Cup Finals and the UEFA European Football Championship Finals should continue to be listed, as should a number of domestic sporting events. The whole of the Wimbledon Lawn Tennis Championships should be listed (not just the finals as at present) and the list should be expanded to include the Open Golf Championships and cricket's Home Ashes Test Matches against Australia, as well as the whole of the Rugby Union World Cup. Some events should be removed from the list, such as the Winter Olympic Games. There should also be a single list of events rather than the current two lists, one with full protection and one with protection for highlights only.

The proposals met with strong opposition from the sports governing bodies and the Government has now announced that the list will remain unchanged until the conclusion of digital switchover in 2012. This would permit the consideration of the effects of availability of a significantly increased number of free-to-air digital channels and the completion of the BBC's strategy review and the Ofcom Pay TV review. According to the Government, the current economic climate also points against making a decision which could adversely impact sport at the grassroots. There will thus be a further review in 2013.

The listed events will consequently continue to include protection of full live coverage of the Olympic Games, the World Cup Football Finals, the European Football Finals, the Wimbledon Tennis Finals, the Rugby World Cup Final and a number of major domestic events, such as the Derby horse race. Protection of secondary coverage will include the Open Golf Championship and the Ryder Cup, the World Athletics Championship, the Commonwealth Games and cricket Test Matches played in England.

• Department for Culture, Media and Sport, "Decision on Free-to-Air Listed Events Deferred Until 2013", Press Release 080/10, 21 July 2010
http://merlin.obs.coe.int/redirect.php?id=12678 EN

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Regulator Reviews Programmes Sponsored by the Scottish Government

Ofcom, the UK communications regulator, has examined 57 programmes broadcast on STV (Scottish commercial television) sponsored by the Scottish Government after press allegations that the Government had influenced the content of programming. The allegations made reference to three programmes (the "Homecoming programmes") sponsored by a Scottish newspaper and Homecoming Scotland. The latter was an initiative of the Scottish Government to get Scots at home and abroad to reconnect with Scotland and consisted of events, festivals and celebrations. The press reports had quoted letters from SCV's Chief Executive referring to the need to "incorporate our innovative thinking around television exposure for the benefit of the Government" and to "forge a closer partnership with the Government". Ofcom expanded its investigation to cover all programmes sponsored by the Scottish Government, including 12 homecoming programmes and 45 others, mainly one-minute public information films.

The Communications Act 2003 does not prohibit sponsorship of programmes by a government body. However, the Broadcasting Code requires that a sponsor must not influence the content of a programme so as to undermine the broadcaster's independence; there must be no promotional reference to the sponsor; sponsorship must be clearly identified; and the relationship between sponsor and programme must be transparent.

Ofcom found that 39 of the programmes did not breach the Code; these included all of the Homecoming programmes. However, 18 of the short programmes were in breach of the Code, mainly through editorial content being too closely linked to the sponsor and, in one series, due to a lack of transparency in relation to the sponsorship arrangements. For example, programmes promoting attendance at adult education courses promoted the services of the sponsor, Learn Direct Scotland. A programme on care for the elderly was considered by Ofcom to reassure viewers that the Scottish Government's National Care Standards work in favour of elderly citizens and so was akin to an advertisement for the sponsor. The programme "The Great Scottish Meal" identified "Specially Selected Pork" as the sponsor whilst not making it clear that the overall sponsor was Quality Meat Scotland, a government agency.

• Ofcom, "Scottish Government Sponsorship of Programmes", Ofcom Broadcast Bulletin 163, 2 August 2010, 31-55
http://merlin.obs.coe.int/redirect.php?id=12676 EN

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GR-Greece

• Νόμος 345300'321301371370. *3878,* ΦΕΚ 321' *161, 20* Σεπτεμβρίου *2010* (Law No. 3878, Official Gazette A-161, 20 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12708 EL

Greek Public Service Broadcaster in Crisis

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The Greek public service broadcaster, Ελληνική Ραδιοφωνία Τηλεόραση 321. 325. (National Television and Radio, Inc. - ERT), has been facing a serious crisis over the past few months. The PSB's three television stations (ET1, NET and ET3) and the five radio stations of national coverage, as well as a number of regional radio stations which also transmit via ERT's systems, have not gathered the popularity enjoyed by corresponding European organisations, while criticism of its inordinately big number of employees has been intensifying, particularly during recent months, when ways of saving money in the public sector have been sought.

A new law adopted in September 2010 aims at regulating certain questions concerning the administration of the company. Most particularly, the division of the positions of the President of the Administrative Council and of the Managing Director are foreseen, so as to ensure administrative flexibility, while the responsibilities of the Board of Directors are also due to be clarified. Nevertheless, how to best fill the position of the Managing Director of ERT, Inc. remains an important open issue, as at the end of July, six months after his initial appointment, the director appointed by the new government, handed in his resignation. A public tender for the position, a process that usually lasts more than two months, has already been published.

During the most recent administrative period the findings of the Body of Inspectors of Public Administration, a service for the internal inspection of the administration, were submitted to the Minister of Culture and Tourism, reporting serious occurrences of inefficient administration, lack of transparency, illegal assignments and improvident spending of public money during the last three years. The findings have been forwarded to the Public Attorney of the Court of Appeals for the investigation of possible criminal liability, as indicated by the findings and the conclusions drawn therein. During the same administrative period, it was announced that the Public Attorney of the Court of First Instance began criminal proceedings against seven of ERT's members of staff for the perpetration of two felonies and four misdemeanours in the agreement of contracts harmful to the State.

These problems will soon be placed in the hands of Mr. Telemaxos Xitiris, deputy Minister of Culture and Tourism, to whom, as was announced during the recent Cabinet reshuffle, all audiovisual matters will be assigned.

HR-Croatia

New Media Rules

The Electronic Media Law ("Law") came into effect on 29 December 2009 whereby, pursuant to Article 88, Paragraph 2, the Council for Electronic Media had been required to adopt new secondary legislation. Accordingly, the following Rules have been adopted:

- Pursuant to Article 37, para. 6 of the Law the Rules on Detailed Criteria for Determining which Audiovisual and/or Radio Programmes are to be Considered as Own Production, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 40, para. 3 of the Law the Rules on Croatian Audiovisual Works, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 42, para. 2 of the Law the Rules on the Criteria and Manner of Increasing the Share of European Works, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 44, para. 2 of the Law the Rules on the Criteria and Manner of Increasing the Share of European Audiovisual Works by Independent Producers, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 64, para. 6 of the Law the Rules for the Methods and Procedures of the Public Tender for Co-financing Audiovisual and Radio Programmes from the Resources of the Fund for the Promotion of Pluralism and Diversity of Electronic Media, as well as for the Criteria for the Allocation of those Resources and the Method of Supervising their Utilisation and the Production of the Relevant Programmes ("Rules on the Fund"), in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 75, para. 6 of the Law the Rules on the Register of Media Service Providers, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 41, para. 3 of the Law the Rules for Exercising the Right to Correction in Programmes of Audio and Audiovisual Media Service Providers, in effect since 17 April 2010 (Official Gazette No. 43/10);

- Pursuant to Article 73, para. 3 of the Law the Rules for the Content and Procedure of the Public Tender for Granting Concessions for Providing Television and Radio Services, in effect since 24 April 2010 (Official Gazette No. 46/10);

- Pursuant to Article 75, para. 5 of the Law the Rules on Obligations to Pay Fees, Relevant Amounts and the Methods of Paying, in effect since 24 April 2010 (Official Gazette No. 46/10);

- Pursuant to Article 12 of the Rules on the Fund the Decision on the Method of Evaluation of Tender Bids for the Allocation of the Resources of the Fund for the Promotion of Pluralism and Diversity of Electronic Media, in effect since 7 June 2010 (Official Gazette No. 53/10);

- Pursuant to Article 26, para. 4 of the Law the Rules on the Protection of Minors, in effect since 21 May 2010 (Official Gazette No. 60/10);

- Pursuant to Article 22, para, 3 and Article 3 of the Law the Rules on the Minimum Conditions for Providing Audio and Audiovisual Media Services as well as on Keeping Broadcasting Logs, in effect since 5 June 2010 (Official Gazette No. 66/10).

• *Narodne novine d.d.* (All Rules are available at:)
http://merlin.obs.coe.int/redirect.php?id=9658 HR

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IS-Iceland

Resolution on the Protection of Freedom of Expression and Information

On 16 June 2010 the Icelandic Parliament adopted a resolution on the protection of freedom of expression and information. In the resolution the government is invited to find ways to strengthen freedom of expression, the protection of sources of information and whistleblowers. To this end the government shall, inter alia, review the legislative framework and prepare amendments to it, study the laws of other countries in order to use best practice to bring Iceland to the forefront in this respect, map the State's preparations, in particular from a security point of view, because of the operations of international data centres in the country. The Minister of Education and Culture shall inform the Parliament every three months about progress with implementing the resolution.

When the proposal for a resolution was introduced in Parliament by members of all parties last winter it raised considerable interest at the international level. The explanatory report spoke about changing the country so that it would provide a progressive environment for the registration and operations of international media and publishers, start-ups, human rights organisations and data centers. This would strenghten democracy, encourage necessary reform in the country and increase transparency. This might also increase the nation's standing at the international level and stimulate the economy.

A report issued by the relevant Parliamentary Committee which dealt with the proposal strikes a more careful note. It remarks that the extent to which Iceland can take a leading role in increasing freedom of expression ensuring that the laws of other countries do not apply to computing in data centers in Iceland has to be studied more closely. One might rather think, according to the report, that Iceland needs to regain trust from neighbouring countries following the economic collapse in 2008. Iceland needs to pay attention to other states and to international conventions which are binding upon it. One lesson from the economic collapse was, according to the report, that wanting to excel too quickly is sometimes dangerous. The government needs to be well prepared before further steps are taken. There is for example no Computer Emergency Response Team in the country. Cable connections with Europe are also sometimes unstable. Iceland does not have the powers to get involved with libel legislation in other countries. Furthermore, there is no intention to create a safe haven where international law is not applicable.

• Þingsályktun um að Ísland skapi sér afgerandi lagalega sérstöðu varðandi vernd tjáningar- og upplýsingafrelsis (Parliamentary Resolution on Iceland establishing a unique legal framework as regards the protection of freedom of expression and information)
http://merlin.obs.coe.int/redirect.php?id=12684 IS

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MD-Moldova

Freedom of Expression Act Enters into Force

On 9 October 2010 the Statute of the Republic of Moldova on Freedom of Expression, adopted by the Parliament on 23 April 2010, enters into force. The act aims inter alia to implement the case law of the European Court of Human Rights on Article 10 into the statuary law of the country, especially in relation to the balance between freedom of expression and the right to honour and dignity, and the right to privacy. The Statute introduces into the Moldovan law such terms as "fact", "opinion", "opinion that has no adequate factual basis", "public interest", "public figure", "person who conducts public functions", "journalistic

investigation", "apologies", "hate speech", etc. It also expands some of the existing notions such as "censorship", which now includes "ungrounded distortion of a journalist's material by the leadership of the mass media outlet" (Art. 2).

Article 3 para. 2 states that freedom of expression protects information "that offends,shocks or disturbs". Para. 3 is a verbatim translation of Article 10 para 2 of the European Convention on Human Rights. Para. 5 stipulates that freedom of expression does not protect hate speech.

Article 4 para. 3 adds to the guarantees of the freedom of expression in the mass media the right "to exaggeration or even provocation, as long as the essence of the facts is not distorted".

Most provisions of the new statute introduce norms related to defamation and privacy law, including procedural norms. The basic provisions here are as follows. "Protection of honour, dignity and business reputation shall not prevail the right of the public to obtain information of public interest" (Art. 6 para. 2). As to the protection of privacy the Statute stipulates (Art. 10 para 3): "No one shall be prosecuted for disclosure of information on private or family life of a person if the public interest in its dissemination overweighs the interest of the particular person in its nondisclosure." The Statute establishes a limitation period of 30 days for a defamation lawsuit (Art. 17). Moral damages can be awarded to a public figure only in a case of malicious defamation (Art. 29 para 2).

The Statute also deals with such issues as protection of sources of information and journalistic privileges.

• ЗАКОН о свободе выражения мнения № *64* от *23.04.2010*
(Statute "On Freedom of Expression" Official Journal of 9 July 2010)
http://merlin.obs.coe.int/redirect.php?id=12656 MO

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ME-Montenegro

New Laws on Electronic Communications and Media Adopted

The Montenegrin Parliament adopted the new Law on Electronic Media, along with the necessary changes to the accompanying Law on Electronic Communications, intended to stipulate the competences of the regulatory bodies in the area of electronic media.

According to the new legislation, the Montenegrin Broadcasting Agency (renamed Agency for Electronic Media) shall continue to work as the Agency responsible for electronic media and the allocation of broadcasting frequencies by public procedures shall again be under its authority.

This solution will clarify the confusion created by previous legal provisions from 2008, which deprived the Broadcasting Agency of several important competencies and did not provide any specific alternative. The same legislation prescribed the foundation of a new regulatory body, the Agency for Electronic Communications and Postal Affairs, but the competencies of the two Agencies were not clearly distinguished and were explained only by drafting the new Law on Electronic Media that has now been adopted (see IRIS 2009-10: 0/106 and IRIS 2010-3: 1/31).

These changes in legislation were preceded by a significant amount of criticism from the European Commission's Delegation in Montenegro regarding the uncertainty connected to the procedure for the assignment of broadcasting frequencies, which was believed not to be in line with European standards. The Government claims that the new Law is completely in line with international standards and that it clearly provides political, institutional and financial independence of the Agency for Electronic Media. According to the new Law, the founder of the Agency is the State of Montenegro and the Council of the Agency, as its governing body, shall be elected by the Parliament. Universities, non-governmental organisations, Pen centre and associations of commercial broadcasters shall delegate the candidates.

However, the discussion in the Parliament unveiled a dilemma as to whether this solution was a compromise made by the Government in order to keep the control over the other regulatory body, the Agency for Electronic Communications and Postal Affairs. The Law on Electronic Communications kept the existing solution due to which the Government will appoint the Council members of this Agency, which controls primarily the area of telecommunications with an annual turnover of over EUR 300 millions.

Another general remark made by the political opposition in the parliamentary plenary discussion held at the end of July 2010 was that the new legislation preserved the existence of two Agencies that will regulate the areas of electronic and telecommunications, which is contrary to the national strategy on electronic communications.

• *ZAKON O ELEKTRONSKIM MEDIJIMA* (Law on Electronic Media)
http://merlin.obs.coe.int/redirect.php?id=12711 SR
• *ZAKON O IZMJENAMA I DOPUNAMA ZAKONA O ELEKTRONSKIM KOMUNIKACIJAMA* (Law on Changes to the Law on Electronic Communications)
http://merlin.obs.coe.int/redirect.php?id=12712 SR

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Public Consultation to Modify the Audiovisual Code

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) launched on 17 August 2010 a public consultation regarding the proposed changes of *Decizia nr. 187/2006 privind Codul de reglementare a conţinutului audiovizual* (Decision no. 187/2006 concerning the Regulatory Code for Audiovisual Content, Audiovisual Code). The project was placed for one month on the Council's website (see IRIS 2006-4: 19/33, IRIS 2007-1:16/29, IRIS 2007-4: 19/30, IRIS 2008-1: 17/25 and IRIS 2008-2: 17/26).

The Audiovisual Code has to be modified to be in line with the *Legea Audiovizualului* (Audiovisual Law) and the European Union Directive on Audiovisual Media Services. The Audiovisual Law offers the general framework for the Council's and the broadcasters' activities. The Audiovisual Code details the obligations of the channels with regard to editorial content, advertising, minors' and human dignity protection, correct information etc.

The most important changes proposed by the CNA target the regime concerning advertising, the protection of minors and human dignity and the principles concerning correct information. The Council's propositions are aimed inter alia at:

- the advertising regime: the conditions to use product placement, virtual advertising, sponsoring, advertising within split screens;

- the broadcasting rules concerning sports matches;

- to loosen restrictions with regard to liberal professions advertisement;

- to tighten the non-commercial communication rules;

- to tighten the child protection rules and to renew the programme classification rules;

- to adapt rules with regard to human dignity, the protection of the right in one's own image and the rules regarding the right to reply;

- to tighten the rules to assure correct information and pluralism;

- to tighten the rules with regard to games and contests.

The CNA will discuss with broadcasters the changes proposed within the public consultation and it intends to adopt a new Audiovisual Code during Fall 2010.

• Proiect - Propuneri de modificare a deciziei nr. 187/2006 privind Codul de reglementare a conţinutului audiovizual (Draft proposals to modify Decision no. 187/2006 concerning the Regulatory Code for Audiovisual Content, Audiovisual Code)
http://merlin.obs.coe.int/redirect.php?id=12673 RO

• *CNA a pus in dezbatere publica propunerile de schimbare a Codului audiovizual. Principalele modificari vizeaza regimul publicitatii, protectia copilului si a demnitatii umane* (Information on the public consultation launched by the CNA)
http://merlin.obs.coe.int/redirect.php?id=12674 RO

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Digital Switchover Postponed

The Romanian Government decided on 11 August 2010 to postpone the switchover from analogue to digital television until 1 January 2015. The previous deadline foreseen for the switchover was 1 January 2012.

The new Decree repealed Government Decree no. 464/2010 on the granting of licenses to use radio frequencies in the digital television system and the modified Strategy of transition from analogue terrestrial to digital television and the introduction of digital multimedia services at national level, approved by Government Decree no. 1213/2009 (Official Journal of Romania no. 357 of 31 May 2010). The Strategy was first published in the Official Journal of Romania no. 721 of 26 October 2009 and modified afterwards (see IRIS 2009-9: 17/26, IRIS 2010-1: 1/36, IRIS 2010-3: 1/34 and IRIS 2010-7: 1/32).

The postponement of the switchover put an end to the ongoing tender for the granting of the first two national digital television multiplexes. Seven companies had bought the Terms of References (tender specifications) for the first two Romanian national DVB-T digital multiplexes, which should have been granted by way of distinct comparison-based selections organised by the *Autoritatea Naţională pentru Reglementare şi Administrare în Comunicaţii* (National Authority for Administration and Regulation in Communications, ANCOM). The tenderers will be reimbursed by ANCOM the Terms of References costs.

The analogue television UHF band frequencies services will be terminated by 1 January 2015, but can coexist with digital services until then. The Government will adopt another Decree to establish the new calendar to implement the above mentioned Strategy.

The postponement decision, which surprised the broadcasting market, was officially explained by the will of the Government to release Romanian citizens of buying new TV devices during the economic crisis and to assure the operators a reasonable amount of time to comply with the new technical demands. Allegedly, the decision was taken in order to find a solution to

offer one of the licenses to RADIOCOM, the Romanian State-owned public radio and television programmes provider, without breaching EU legislation.

• Hotărârea Guvernului României nr. 833/2010 din 11 august 2010 pentru modificarea Strategiei privind tranziția de la televiziunea analogică terestră la cea digitală terestră și implementarea serviciilor multimedia digitale la nivel național, aprobată prin Hotărârea Guvernului nr. 1213/2009, publicată în Monitorul Oficial al României nr. 609 din 27 August 2010 (Government Decree no. 833/2010 of 11 August 2010 on the modification of the Strategy of transition from analogue terrestrial to digital television and the introduction of digital multimedia services at national level, approved by Government Decree no. 1213/2009, published in the Official Journal of Romania no. 609 of 27 August 2010) RO

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Plans of the New Government in the Area of Media

On 11 August 2010 the National Assembly of the Slovak Republic approved the new Government Programme Declaration ("Declaration"). The main objectives in the area of culture are the protection and restoration of the cultural heritage, a complete reform of the public media and an efficient administration of public finances. The Deputy Minister of Culture announced that one of the priorities is also the elaboration of a document on the direction of culture for the next years, for the purpose of transforming the culture to a sector suitable for investment.

One major issue susceptible to change is the payment system for public media. According to the Declaration "the Government will repeal the concessionary fees and create a new legislative framework for the financing, organising and functioning of the public media with an aim to increase their efficiency and strengthen their public character". Firstly, the Minister of Culture wants to bring forward the concept of public media to discuss it with specialists. A part of this concept is also the repeal of "concessionary fees" planned to be concluded by 1 January 2012. The Minister of Culture has pointed out that five statutes will have to be amended before this reform can be effectuated and a long legislative process will therefore be necessary.

Although the Minister speaks of "concessionary fees", this term is not precise. The concessionary fees, which were paid only by natural persons who owned a television/radio receiver and legal persons who held a record of a television/radio receiver in their accounting, have been replaced by "payments for public services in the area of television and radio broadcasting" established by Act No. 68/2008 Coll., which are paid by all natural persons who purchase electricity and by employers who employ at least three persons. Nevertheless, besides expanding the number of people who are obliged to pay the respective fees, the system of gathering finances from the public in the form of a compulsory contribution remained unchanged.

Although the new "payments for public services" were expected to increase the amount of payments from the public, the Slovak Television, the Slovak Radio and the Radio and Television Company ("RTC"), the body entrusted with the collection of fees, have informed about a decrease in revenues, which they connect with the newly issued information about a total repeal of the payment system. The Ministry of Culture denies such argumentation due to the fact that the decrease is visible since the second half of the year 2009.

Another important intention of the Ministry of Culture concerns Act No. 270/1995 Coll. Language Act ("LA"). The Ministry wants to abolish the sanctions for breaches of the LA, which were introduced by the Amendment No. 318/2009. According to s. 9a if the Ministry of Culture discovers a breach of the specific provisions of the LA and the illegal consequences are not eliminated within the period given by a written warning the Ministry may impose a fine from EUR 100 up to EUR 5,000.

Finally, the granting of subsidies from the Audiovisual Fund ("Fund") should become more transparent. There was a longstanding critique of the authority members to allocate finances for their own projects. According to the new system, members of the board, the control commission and the expert commission cannot file an application for subsidy. The same will apply to persons close to these members.

It will not be possible for applicants to be a part of the decision-making process. In case of a member of the expert commission if there is a possibility of conflict of interest the respective member shall not participate in the whole proceeding and has to be represented by a substitute. The members of the board and the control commission are absolutely barred from deciding on the subsidy. Should the member of the board or the control commission have an employment or copyright-based relation with the applicant, he has to disclose this in advance and cannot take part in the deliberation process of the bodies of the Fund regarding this matter.

• OBCIANSKA ZODPOVEDNOST A SPOLUPRÁCA PROGRAMOVÉ VYHLÁSENIE VLÁDY SLOVENSKEJ REPUBLIKY NA OBDOBIE ROKOV 2010 - 2014 (Government Programme Declaration, August 2010)
http://merlin.obs.coe.int/redirect.php?id=12675 SK

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Cinematographic Works Collecting Societies Have Joined Forces

The collecting societies in the field of cinematographic works have joined forces under a union named "Union of Forces of Cinematographic Work Owners' and Related Rightsholders' Collecting Societies".

It should be noted that more than one collecting society in the same area may be founded in Turkey. The areas are listed in Article 7 of the Regulation Regarding Intellectual and Artistic Works Owners and Related Right Holders, according to which, in the field of cinematographic works, authors, performers, radio and TV organisations and film producers may set up one or more separate collecting societies (see IRIS 2009-7: 19/33).

The Union does not constitute a federation, but it provides a constructive co-operation among the eight collecting societies, which consist of the BIROY - Society of Movie Actors, BSB - Association of Documentary Film Makers, FİYAB - Society of Film Producers, SİNEBİR - Cinematographic Work Owners' Society, SEYAP - Movie Producers Professional Association, SETEM - Cinema and Television Works Owners' Society, TESİYAP - Society of Television and Cinematographic Work Producers, SESAM - Cinematographic Work Owners' Society of Turkey.

According to the founding agreement the main objectives of the Union are the collection of the royalty payments and the communication with private and public institutions in the name of all cinematographic societies. Furthermore, the Union aims to fight against piracy, to determine joint tariffs, to provide the recording and registration made by collecting societies, to obtain a share from the private copy levies collected by the Ministry of Culture and Tourism (see IRIS Special, Creativity Comes at a Price The Role of Collecting Societies, 2009), to establish a media monitoring system and to lobby regarding the Law on Intellectual and Artistic Works and other related regulations.

The executive committee of the Union consists of the chairmen of the constituent collecting societies and decides unanimously. According to the founding agreement each collecting society is obliged to make the Union's decisions their own decision by approval of their own executive committees.

As a first activity, in August, the collecting societies have moved to joint headquarters, which have been provided by the Ministry of Culture upon the Union's request.

Up to the present, in spite of their effort to get together and solve the problems they face, none of the attempts of the collecting societies in the field of cinematographic works had achieved success. Therefore they were rather passive, while the collecting societies in the field of music have made remarkable progress (see IRIS 2009-2: 19/32).

However, the establishment of the mentioned Union promises hope for a better situation in respect of the rights of cinematographic works' owners.

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Ofcom Decisions on the Regulation of the Pay-TV Market

It was already becoming apparent before the completion of the pay-TV review that the British regulator Ofcom's task of regulating the pay-TV markets would not end with the review's publication on 31 March 2010.

Ofcom has now put its thinking in more concrete terms in two decisions: it has referred an investigation into possible distortions of competition in BSkyB's marketing of Hollywood films to the Competition Commission (CC) for further examination and taken action itself on the conditions for the distribution of the channels Sky Sports 1 and 2, prohibiting Sky, according to reports, from limiting the use of set-top boxes in its wholesale contract with Top Up TV.

The decision of 4 August 2010 on the marketing of films concerns two specific markets of particular importance for pay-TV in the United Kingdom: the market for first-run films from the major Hollywood studios on pay-TV and the wholesale market for pay-TV packages containing film channels based on these rights. Ofcom assumes that a combination of several market features has adverse effects on competition, leading in turn to reduced choice, less innovation and higher prices. The market situation, it says, gives Sky in particular an incentive to impede competition. It notes that a previous consultation revealed that no change in the marketing structures could be expected without regulation. However, as its own sectoral powers are unlikely to solve the problems relating to competition it decided to refer the matter to the CC, which now has two years to investigate the situation and take any necessary measures.

In the meantime Ofcom has prohibited Sky from using a clause in its wholesale contract with the digital television group Top Up TV that would limit the models of set-top box that can be used for the distribution

of Sky Sports. In the context of the pay-TV review, Top Up TV, as one of the four companies that initiated the investigation, was ordered to begin negotiations with Sky on the distribution of the two premium channels Sky Sports 1 and 2. In the course of these negotiations, Sky opposed Top Up TV's plans to introduce a new digital receiver capable of receiving not only the two sports channels but also other digital terrestrial channels, including the Freeview offering and the linear Top Up TV channels, but not additional premium content.

Ofcom has now ordered the removal of the clause from the contract as it would restrict the market for Top Up TV to existing customers and customers willing to purchase a more expensive set-top box with a hard-disk recorder. Sky has already announced its intention to appeal against the decision, arguing that the mere reselling of Sky Sports 1 and 2 was not intended by Ofcom itself in the original obligation to supply since the aim of this obligation was to promote innovation.

In the pay-TV review, Ofcom states that BSkyB must offer its premium sports channels Sky Sports 1 and 2 to all competing platforms at a price set by Ofcom (see IRIS 2010-5/26 and IRIS 2009-8/21).

The terrestrial pay-TV service offered by Sky and Arqiva under the name Picnic has been approved subject to an agreement actually being reached on the provision of sports channels to wholesale customers. If Picnic offers feature films, the relevant channels must also be made available to other terrestrial television providers.

On the other hand, Ofcom held that it did not have the power to regulate video-on-demand film rights, initiating a further consultation on the subject and then referring the matter to the Competition Commission.

- Ofcom decision of 4 August 2010
http://merlin.obs.coe.int/redirect.php?id=16245 EN
- Ofcom decision on the pay-TV market of 31 March 2010
http://merlin.obs.coe.int/redirect.php?id=16246 EN

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Agenda

Performers' Right in Today's European Environment: How to adapt existing Rights to News Uses of performances
18 - 19 November 2010
Organiser: AEPO-ARTIS
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